IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 3

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
v.	)	Case No. 201400195
Edward T. ATULU, Electrician's Mate Second Class (E-5) U.S. Navy Appellant	)	Tried at Regional Legal Service Office Mid-Atlantic, Norfolk, Virginia, on November 21, 2013, and February 26, 2014, by general court-martial convened by Commander, Navy Region Mid-Atlantic

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Assignment of Error

IF AN ACCUSED RAISES MATTERS INCONSISTENT WITH A GUILTY PLEA AT ANY TIME DURING THE PROCEEDING, THE MILITARY JUDGE MUST RESOLVE THE INCONSISTENCY OR REJECT THE PLEA. HERE, THE MILITARY JUDGE DID NOTHING TO RESOLVE APPELLANT'S STATEMENT THAT HE ATTEMPTED SUICIDE. WAS APPELLANT'S PLEA IMPROVIDENT?

Statement of Statutory Jurisdiction

Appellant's approved sentence includes a dishonorable discharge and one year or more of confinement. Accordingly, this Court has jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012).

Statement of the Case

A military judge sitting as a general court-martial

convicted Appellant, pursuant to his plea, of one specification of wrongful sexual contact in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2012). The Military Judge sentenced Appellant to eighteen months confinement and a dishonorable discharge. The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed. In accordance with the pretrial agreement, the Convening Authority suspended all confinement in excess of twelve months.

Statement of Facts

A. Background.

On November 24, 2012, Appellant and a number of his shipmates met at the home of Electrician's Mate Second Class Petty Officer (EM2) J.L. (Prosecution Ex. 1 at 1.) Others present were EM2 R.K. and EM2 J.D. (R. 42; Pros. Ex. 1 at 1.) The group consumed alcohol at EM2 J.L's home, then continued at a bar in downtown Norfolk, Virginia. (R. 43-44; Pros. Ex. 1 at 1.) The group returned to EM2 J.L's residence and continued drinking and playing beer pong. (R. 44; Pros. Ex. 1 at 1.) Appellant, EM2 R.K., and EM2 J.D. went back into town to an after-hours club. (R. 45.) The group eventually returned back to EM2 J.L.'s residence. (R. 46.)

EM2 J.L. and EM2 J.D. eventually retired to the master

bedroom while EM2 R.K. and Appellant slept on either end of a sectional sofa located in the living room. (R. 46; Pros. Ex. 1 at 2.) Appellant pulled down EM2 R.K.'s pants and underwear exposing his penis as he slept. (R. 46; Pros. Ex. 1 at 2.) Appellant fondled and played with EM2 R.K.'s penis with his hand. (R. 47, 49; Pros. Ex. 1 at 2.) Appellant was aware that EM2 R.K. was sleeping. (R. 46, 49; Pros. Ex. 1 at 2.) EM2 R.K. woke up and pushed Appellant away, yelled at him, and struck him in the face with his fists. (R. 50, 51; Pros. Ex. 1 at 2.) Appellant admitted that he intentionally touched EM2 R.K.'s penis with the intent to arose and gratify his own sexual desires. (R. 53, 54, 56; Pros. Ex. 1 at 2.)

B. Presentencing.

During his unsworn statement, Appellant provided history as to his family, his childhood, and the health complications of his mother. Appellant retraced his military career. Appellant then stated, that "[t]his case has weighed, like heavily on me. Like I feel a lot of burden. I have attempted suicide, and kinds of stuff. But I felt like today has a purpose." (R. 130.) Appellant concluded by apologizing for his actions to the military and his victim.

Argument

THE MILITARY JUDGE DID NOT ABUSE HER DISCRETION AS THE LACK OF MENTAL RESPONSIBILITY DEFENSE DID NOT EXIST AND NO FACTS EXISTED TO QUESTION ACCEPTING APPELLANT'S PLEA OF GUILT.

A. Standard of Review.

This Court reviews a military judge's decision to accept an accused's guilty plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). A guilty plea is only set aside only where "the record as a whole shows a substantial basis in law or fact for questioning the plea." *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008) (internal quotations omitted).

B. The existence of a complete defense is inconsistent with a guilty plea.

A substantial basis for questioning a guilty plea exists where an accused "sets up matter inconsistent with the plea." 10 U.S.C. § 845(a) (2012). Where an inconsistency is raised, the military judge must inquire further to either resolve the inconsistency or reject the plea. *E.g.*, *United States v. Shaw*, 64 M.J. 460, 462 (C.A.A.F. 2007). A complete defense is inconsistent with a guilty plea. *Id.* However, the "mere possibility" of an applicable defense does not warrant overturning an accepted guilty plea. *United States v. Ferguson*, 68 M.J. 431, 434 (C.A.A.F. 2010) (citations and internal

quotations omitted); *see also United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991).

C. Appellant's passing reference to suicide in his unsworn statement provided no substantial basis to question acceptance of the plea because it neither set up a matter inconsistent with the plea nor did it introduce facts that he is incompetent to stand trial.

Appellant fails to indicate with specificity how his passing reference to suicide in his unsworn statement renders his guilty plea improvident forcing the United States to speculate as to what his exact allegation is. Appellant could be alleging his reference to suicide set up a matter inconsistent with his plea of guilty in the form of the defense of lack of mental responsibility. *See* R.C.M. 916(b)(2). Alternatively, Appellant could be alleging that he lacked the capacity to stand trial. *See* R.C.M. 706(a). Each will be addressed in turn.

1. The single unsupported passing reference to a suicide attempt did not raise the defense of lack of mental responsibility at the time of the offense.

Lack of mental responsibility is an affirmative defense that an accused must establish by clear and convincing evidence. 10 U.S.C. § 850(a) (2012); R.C.M 916(b)(2). The question is whether an accused suffered from "a severe mental disease or defect *at the time of the offense*." *United States v. Harris*, 61 M.J. 391, 398 (C.A.A.F. 2005) (emphasis added). Once raised, a

military judge must inquire into mental health issues as part of a providence inquiry. *Id*.

a. The defense of lack of mental responsibility was not raised.

In *Shaw*, the appellant mentioned during his unsworn statement in presentencing that he had been diagnosed with bipolar disorder. *Shaw*, 64 M.J. at 461. The appellant offered no other evidence to support his statement and the military judge did not inquire into the claim. *Id*. The court held there was no basis to question the plea because the reference to a diagnosed mental health condition raised only the "mere possibility" of a defense. *Id.* at 464.

Recently, in *United States v. Zaruba*, No. 201000382, 2011 CCA LEXIS 27 (N-M. Ct. Crim. App. Feb. 28, 2011), this Court found that the military judge abused his discretion in accepting a guilty plea where there was affirmative evidence of a mental health disorder. At sentencing the appellant presented medical records indicating a diagnosis of post-traumatic stress disorder ("PTSD") and a form of bipolar disorder. *Zaruba*, 2011 CCA LEXIS 27 at *3. Additionally, witness testimony suggested appellant suffered from bipolar disorder and written statements from family and friends corroborated that the appellant was suffering symptoms related to PTSD. *Id.* at *2-4. The military judge, prior to announcing the sentence, acknowledged that *Zaruba*

suffered from PTSD, but made no inquiry into whether the appellant knew that a mental defect could be an affirmative defense to the charges. *Id.* at *4-5.

Here, just as in *Shaw*, where there was no substantial basis to question the plea, Appellant made a single passing reference to an incident bearing on mental health. *Shaw*, 64 M.J. at 461. Also, just as in *Shaw*, Appellant offered no evidence in support of his vague unsworn reference. *Shaw*, 64 M.J. at 461. Unlike *Zaruba*, where there was a substantial basis to question the plea, Appellant offered neither documentary evidence of a mental health condition, nor testimony of persons that had observed him demonstrating the symptoms of any mental health condition. *Zaruba*, 2011 CCA LEXIS 27 at *2-4. Accordingly, just as in *Shaw*, and unlike *Zaruba*, Appellant offered only the mere possibility of a defense and there is therefore no substantial basis to question acceptance of the plea.

Further, Appellant offered absolutely nothing to indicate what undiagnosed mental health condition he might have had, or that it affected him at the time of the charged offense as required to establish the defense. *Harris*, 61 M.J. 398 (noting lack of mental responsibility focuses on moment offense occurred). His sole passing reference indicates he felt pressure as a result of the case against him. Not the offense

he committed, but the case against him. That indicates, if this unsubstantiated suicide attempt ever even actually occurred, it occurred long after the time of the offense, during the pendency of the charges against him. Accordingly, there is no basis on which to find he lacked mental responsibility at the time of the offense as required. *See Harris*, 61 M.J. 398. There is no substantial basis on which to question the acceptance of Appellant's guilty plea.

b. Appellant's reliance on *United States v. Caldwell*, 72 M.J. 137 (C.A.A.F. 2013) is misplaced.

Appellant cites *United States v. Caldwell* for the proposition that a "bona fide suicide attempt created [a] substantial basis to question appellant's guilty plea." (Appellant's Br. July 16, 2014 at 5.) Appellant's reliance on *Caldwell* is erroneous because it is completely inapplicable here. The *Caldwell* opinion did not address whether a suicide attempt creates a substantial basis to question a guilty plea. *Caldwell* turned on the failure to elicit a factual predicate for the terminal element during the plea colloquy. *Caldwell*, 72 M.J. at 142. The facts provided by the accused in the plea colloquy did not establish "a reasonably direct and palpable injury to good order and discipline." *Caldwell*, 72 M.J. at 141. *Caldwell* also admit no actions on his part that would bring

discredit upon the service. *Caldwell*, 72 M.J. at 141. The utter failure to provide a factual basis for the terminal element created the substantial basis to question the plea. *Caldwell*, 72 M.J. at 142 (explaining limited nature of opinion in that "we need not determine whether, as a general matter, a bona fide suicide attempt alone may be service discrediting, or is more properly considered a noncriminal matter requiring treatment not prosecution.") The holding from *Caldwell* is completely inapplicable to Appellant's claim on appeal.

The specific facts of *Caldwell* are further distinguishable from those of Appellant's case. There, the appellant was charged with the offense of self-injury which was the result of an actual attempt to commit suicide. *Caldwell*, 72 M.J. at 139-40. As the suicide attempt formed the basis of the charged offense, the question of mental disease or defect at the time of the offense was squarely before the military judge. *Caldwell*, 72 M.J. at 138. Here, completely unlike *Caldwell*, any purported mental disease or defect occurred significantly after the charged offense as opposed to contemporaneous to it. From the context in which Appellant made the passing reference to suicide if it happened at all, it did not happen until after charges were preferred against him. The charged offense however, occurred much earlier. Accordingly, unlike *Caldwell*, the

potential issue of mental health is not tied to the time of the offense by anything. In the absence of specific information to the contrary, of which there is none here, Appellant is presumed competent at the time of the offense. *Shaw*, 64 M.J. at 463; *see also* R.C.M. 916(k)(3)(A) (explaining accused presumed mentally responsible at time of alleged offense).

2. Nothing in the Record indicates Appellant was not competent to stand trial.

In the absence of "contrary circumstances" a military judge presumes an accused is mentally competent. *United States v. Shaw*, 64 M.J. 460, 463 (C.A.A.F. 2007) (citing *United States v. Cronic*, 466 U.S. 648, 658 (1984)); *see also* R.C.M. 916(k)(3)(A) (explaining accused presumed mentally responsible at time of alleged offense). "Should the accused's statements or material in the record indicate a history of mental disease or defect on the part of the accused, the military judge must determine whether that information raises a conflict with the plea and thus the possibility of a defense or only the mere possibility of conflict." *United States v. Riddle*, 67 M.J. 335, 338 (C.A.A.F. 2009) (internal quotations omitted). "However, the military judge is not required to embark on a mindless fishing expedition to ferret out or negate all possible defenses or inconsistencies." *United States v. Bowling*, No. 200300001, 2003 CCA LEXIS 207 (N-M. Ct. Crim. App. Aug. 29, 2003). To warrant

overturning a guilty plea, a purported conflict in the evidence must be substantial. *United States v. Watson*, 71 M.J. 54, 58 (C.A.A.F. 2012).

Here, nothing in the Record overcomes the presumption of mental competency. All evidence within the Record of Trial including the Stipulation of Fact signed by Appellant, Appellant's statements made under oath during the providence inquiry, and the unsworn statements of Appellant during presentencing demonstrate that Appellant's unsupported post-trial assertion is without merit. Moreover, the entire trial, the exchanges between the Military Judge and Appellant, and the documents presented to the court is evidence the Military Judge had before her to consider, and buttressed her decision that Appellant was competent and did not have a mental disease or defect at the time of offense or trial.

Appellant highlights three of the four sentences of his eight paragraph unsworn statement to suggest Appellant may have had a mental disease or defect. The fourth sentence, which Appellant omitted from his brief, demonstrates the inverse. Appellant said, "[t]his case has weighed, like heavily on me. Like I feel a lot of burden. I have attempted suicide, and kinds of stuff. But I felt like today has a purpose." (R. 130.) The omitted last sentence is evidence of his competency;

his understanding of his criminal conduct and the damage it caused the victim, and understanding that the trial and punishment he must endure will lead to a better future.

Additionally, the answers provided by Appellant clearly provided the Military Judge with evidence of his lucidity and thus supported her decision to forgo additional questioning. When the Military Judge asked Appellant why he thought touching the victim's penis was wrongful, he replied that "I know I should not violate anybody's private space or try and humiliate somebody." (R. 55.) When the Military Judge indicated that he earlier said he did not do it to humiliate the victim, but rather to gratify his sexual desires, Appellant provided clarification. He said "[r]ight, but at the end of the day, it's humiliating to somebody, so I did not want that to be the outcome even though I know why I did it. I just did not want that to be an outcome for someone else." (R. 55.) The Military Judge responded saying, "I see, so you have thought about it, and you've realized how embarrassing that must have been for him?" (R. 55.) Appellant said, "[y]es, Your Honor. I don't -- I know better not [to] violate anybody's space whether it's assault or sexual assault." (R. 55.) This exchange demonstrates Appellant's ability to empathize and distinguish between his subjective intent for committing the offense and its

probable impact on another human being. Clearly the thought process of a competent individual.

During general questioning by the Military Judge Appellant indicated that he had enough time with his counsel to discuss the case, that he believed his counsel's advice was in his best interests, and that he was pleading guilty freely and voluntarily. (R. 30.) These responses are other indicia of Appellant's competency. Appellant acknowledged that everything in the stipulation of fact was true and then he supplied answers to the Military Judge's questions that corroborated his statement regarding the veracity of the stipulation. (R. 35.)

Finally, when the Military Judge asked him if the Pre-Trial Agreement contained all the agreements in this case, Appellant responded by asking, "I'm sorry, can you repeat the question?" (R. 78.) The knowledge that he did not understand and the ability to ask for clarification constitute additional evidence of his sanity on that day and provided the Military Judge with ample evidence to forgo additional questioning when Appellant provided the sole vague and passing reference to suicide during his unsworn statement.

Moreover, as asserted earlier, the military judge may presume, in the absence of contrary circumstances that the accused is sane and that counsel is competent and would have

raised this defense if it existed. *Shaw*, 64 M.J. at 463.

The Record as a whole demonstrates Appellant's competency at trial. As such, the Military Judge did not abuse her discretion in accepting Appellant's plea without further inquiry into a mere possibility that a mental health disorder or defense existed at the time of trial. There is no substantial basis, in law or fact, to question acceptance of Appellant's guilty plea.

Conclusion

WHEREFORE, the United States respectfully requests that this Court affirm the findings and sentence as adjudged and approved below.

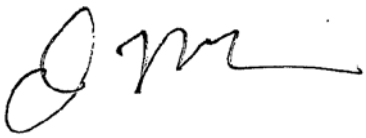
JAMES E. CARSTEN
Commander, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard DC 20374
james.carsten@navy.mil

IAN D. MACLEAN
LT, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity

Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7686, fax (202) 685-7687

Certificate of Filing and Service

I certify the foregoing was delivered to the Court and a copy was served upon opposing counsel and electronically filed with the Court pursuant to N-M. Ct. Crim. App. Rule 5.2(b)(1) on August 14, 2014.



IAN D. MACLEAN
LT, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7686, fax (202) 685-7687

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 3

UNITED STATES, Appellee v. Edward T. ATULU Electrician's Mate Second Class (E-5) U.S. Navy, Appellant	**BRIEF AND ASSIGNMENTS OF ERROR** Case No. 201400195 Tried at Regional Legal Service Office MIDLANT, Norfolk, Virginia, by a General Court-Martial convened by Commander, Navy Region MIDLANT, on 21 Nov 13 and 26 Feb 14.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

MICHAEL D. BERRY
Major, USMCR
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Bldg. 58, Ste. 100
Washington Navy Yard, DC 20374
(202) 685-7296
Fax (202) 685-7426

Issue Presented

IF AN ACCUSED RAISES MATTERS INCONSISTENT WITH A GUILTY PLEA AT ANY TIME DURING THE PROCEEDING, THE MILITARY JUDGE MUST RESOLVE THE INCONSISTENCY OR REJECT THE PLEA. HERE, THE MILITARY JUDGE DID NOTHING TO RESOLVE APPELLANT'S STATEMENT THAT HE ATTEMPTED SUICIDE. WAS APPELLANT'S PLEA IMPROVIDENT?

Statement of Statutory Jurisdiction

Appellant's approved court-martial sentence included a punitive discharge. Accordingly, his case falls within this Court's jurisdiction under Article 66(b)(1), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(1) (2006).

Statement of the Case

A military judge sitting as a general court-martial convicted Appellant, consistent with his plea, of one specification of wrongful sexual contact in violation of Article 120, UCMJ.[1] The military judge sentence Appellant to confinement for eighteen months, and a dishonorable discharge.[2] In accordance with a pre-trial agreement, the convening authority suspended all confinement in excess of twelve months, and approved the remainder of the adjudged sentence.[3]

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[1] 10 U.S.C. §920.
[2] Record of Trial (R.) at 140.
[3] Convening Authority's Action, Special Court-Martial Order No. 10-14 of 15 May 2014.

Statement of Facts

Appellant pleaded guilty to committing wrongful sexual contact.[4] At the sentencing phase of his court-martial, Appellant offered an unsworn statement, during which he uttered:

> "This case has weighed, like heavily on me. . . . I have attempted suicide, and kinds of stuff."[5]

This is the only time Appellant mentioned his suicide attempt, and it does not appear elsewhere in the record of trial. Neither the military judge nor the trial counsel did anything in response to Appellant's admission.

Summary of Argument

Appellant raised a matter inconsistent with his plea. The military judge should have re-opened the providence inquiry to resolve the inconsistency. But she did not. And her failure to do so resulted in her abusing her discretion by accepting an improvident plea.

Argument

IF AN ACCUSED RAISES MATTERS INCONSISTENT WITH A GUILTY PLEA AT ANY TIME DURING THE PROCEEDING, THE MILITARY JUDGE MUST RESOLVE THE INCONSISTENCY OR REJECT THE PLEA. HERE, THE MILITARY JUDGE DID NOTHING TO RESOLVE APPELLANT'S STATEMENT THAT HE ATTEMPTED SUICIDE. THE MILITARY JUDGE ABUSED HER DISCRETION IN ACCEPTING APPELLANT'S IMPROVIDENT PLEA.

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[4] Record of Trial (R.) at 18.
[5] R. at 130.

Standard of Review

A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion.[6] A military judge's legal conclusion that a plea is provident is reviewed *de novo*.[7]

Principles of Law

If an accused raises a matter inconsistent with his plea at any time during the proceeding, the military judge must either resolve the apparent inconsistency or reject the plea.[8]

The apparent inconsistency must raise more than a "mere possibility" of a defense.[9]

Discussion

By most measures, Appellant's court-martial was unremarkable. Pursuant to his negotiated pre-trial agreement, Appellant pleaded guilty to one specification of wrongful sexual contact. The military judge accepted Appellant's guilty plea,[10] and during sentencing, Appellant offered an unsworn statement.[11]

Appellant expressed remorse, regret, and sorrow for his act and its consequences. He also spoke about how his court-martial experience affected him:

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[6] *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996)(citing *United States v. Gallegos*, 41 M.J. 446 (C.A.A.F. 1995)); *United States v. Phillippe*, 63 M.J. 307, 309 (C.A.A.F. 2006).

[7] *United States v. Harris*, 61 M.J. 391, 398 (C.A.A.F. 2005).

[8] Article 45(a), UCMJ, 10 U.S.C. § 845(a); *Phillippe*, 63 M.J. at 309.

[9] *See United States v. Riddle*, 67 M.J. 335 (C.A.A.F. 2009)(more than a "mere possibility of a conflict is required).

[10] R. at 81.

[11] R. at 129.

> "This case has weighed, like heavily on me. . . . I have attempted suicide, and kinds of stuff."[12]

Appellant's suicide attempt admission must be taken at face value because there is no evidence in the record contradicting it. And a suicide attempt raises far more than the mere possibility of a conflict.[13]

Thus, the moment the military judge heard Appellant admit that he attempted suicide, she became aware of a potential conflict or inconsistency, and she had an obligation to: (1) resolve it; or (2) reject Appellant's plea. But she did nothing. In fact, only a few moments later, she sentenced Appellant and adjourned the court-martial.

Conclusion

Appellant respectfully requests this Court set aside the findings and sentence, and remand this case to allow Appellant to plead anew with adequate opportunity for an inquiry into his competency.

MICHAEL D. BERRY
Major, USMCR
Appellate Defense Counsel

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[12] R. at 130.

[13] *See United States v. Caldwell*, 72 M.J. 137, 140 (C.A.A.F. 2013)(*bona fide* suicide attempt created substantial basis to question appellant's guilty plea).

Certificate of Filing and Service

I certify that a copy of the foregoing was delivered to the Court and to Director, Appellate Government Division, and filed on 16 July 2014.

MICHAEL D. BERRY
Major, USMCR
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Bldg. 58, Ste. 100
Washington Navy Yard, DC 20374
(202) 685-7296
Fax (202) 685-7426

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 3

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
	)	Case No. 201300471
v.	)	
John C. AVERELL, Chief Hospital Corpsman (E-7) U.S. Navy Appellant	)	Tried at Fleet Activities Yokosuka, Japan, on April 16, July 3, July 22-27, and July 29, 2013 by a general court-martial convened by the Commander, U.S. Naval Forces Japan.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Errors Assigned

MATTHEW M. HARRIS
Captain, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7430, fax (202) 685-7687

ANN E. DINGLE
Lieutenant, JAGC, USN
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374

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Errors Assigned

I.

DID CAPTAIN FALLER HAVE THE AUTHORITY TO CONVENE A GENERAL COURT-MARTIAL AND REFER CHARGES AGAINST HMC AVERELL?

II.

THE GOVERNMENT HAD TO PROVE HMC AVERELL'S ACTION CREATED A "REASONABLE FEAR" IN THE VICTIM TO SUSTAIN A CONVICTION FOR CHARGE II, SEXUAL ASSAULT. HERE, THE ALLEGED VICTIM TESTIFIED THAT HER FEAR WAS NOT REASONABLE. IS THE EVIDENCE LEGALLY AND FACTUALLY SUFFICIENT TO SUSTAIN A CONVICTION FOR CHARGE II?

III.

AN ACCUSED IS ENTITLED TO CONFRONT THE WITNESSES AGAINST HIM WITH EVIDENCE OF A MOTIVE TO FABRICATE. DID THE MILITARY JUDGE ERR BY EXCLUDING EVIDENCE THAT THE ALLEGED VICTIM WAS MOTIVATED TO FABRICATE HER ALLEGATIONS TO PROTECT A ROMANTIC RELATIONSHIP WITH A MAN WHO WAS NOT HER BOYFRIEND?

IV.

THE MILITARY JUDGE FAILED TO SUMMARIZE AN IMPORTANT SESSION PURSUANT TO R.C.M. 802 FOR THE RECORD. IS THE RECORD VERBATIM AND COMPLETE AS REQUIRED BY R.C.M. 1102 AND ARTICLE 54, UCMJ?

V.

DID THE MILITARY JUDGE ABUSE HIS DISCRETION BY EXCLUDING EVIDENCE THAT HMC AVERELL PREVIOUSLY TREATED QMSN IA FOR AN STD?[1]

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[1] Raised as a Summary Assignment of Error pursuant to Rule 15.1(c) of this Court's Rules of Practice and Procedure.

VI.

DID THE MILITARY JUDGE ABUSE HIS DISCRETION BY EXCLUDING EVIDENCE THAT SHORTLY BEFORE THE ALLEGED SEXUAL ASSAULT QMSN IA WAS INTERESTED IN HAVING A SEXUAL ENCOUNTER WITH A YET UNDETERMINED PERSON?[2]

VII.

NO PERSON SUBJECT TO THE UCMJ MAY INFLUENCE A COURT-MARTIAL MEMBER. THE NAVY'S MOST SENIOR LEADERS PUBLICIZED THEIR PREFERRED OUTCOMES FOR SEXUAL ASSAULT CASES. DID THE MILITARY JUDGE'S RULING REMOVE THE APPEARANCE OF UNLAWFUL COMMAND INFLUENCE?[3]

Statement of Statutory Jurisdiction

Appellant's approved sentence includes a bad-conduct discharge. Accordingly, this Court has jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012).

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, pursuant to his pleas, of violating a lawful general order and adultery, in violation of Articles 92, and 134, UCMJ, 10 U.S.C. §§ 892, 934 (2012). Appellant was convicted, contrary to his pleas, of sexual assault in violation of Article 120, UCMJ, 20 U.S.C. § 920 (2012). The members sentenced Appellant to ninety days of

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[2] Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[3] Raised pursuant to *Grostefon*, 12 M.J. 431.

confinement, reduction to pay grade E-1, and a bad-conduct discharge. The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

Statement of Facts

A. Appellant forced a junior sailor to have sex with him by threatening her with the abuse of his official position.

1. Appellant sexually assaulted QMSN IA.

QMSN IA checked in aboard the USS Germantown, her first duty assignment, in December 2011. (R. 782-83.) She encountered Appellant, a Chief Petty Officer, on her first day aboard the ship. (R. 783.) Appellant told QMSN IA that she was pretty and that she should keep her legs closed, which made her uncomfortable. (R. 783.) Eventually, Appellant invited QMSN IA to be his mentee. (R. 784.) Appellant began as a very professional mentor, but gradually began questioning QMSN IA about her sexual habits. (R. 787.) Appellant also began explaining to her the sexual frustration he felt in his marriage. (R. 788.)

One day, in June or July or 2012, Appellant came to the barge where QMSN IA was standing watch and demanded a tour of the barge. (R. 791-93.) Appellant took QMSN IA to the Chiefs' berthing area on the barge and asked her to take her clothes off. (R. 795.) When QMSN IA refused, Appellant called her "chicken

shit." (R. 796.) QMSN IA was hesitant to report the incident, but told Appellant that he was like her father and she could not be involved with him. (R. 799.)

On October 20, 2012, QMSN IA attended a birthday party for a fellow sailor. (R. 805.) QMSN IA became very intoxicated. (R. 808.) She returned to the barge via taxi, but did not remember returning there. (R. 809.) At some point, IA left her berthing aboard the barge to smoke. (R. 811.) On her way to the smoke deck she fell down a ladder back. (R. 811.) The ship's medical officer saw her and took her to the medical office to evaluate her. (R. 813.) QMSN IA was still inebriated and refused to allow the Medical Officer to touch her. (R. 813.) She demanded to see Appellant instead, believing she would be "in trouble" for being intoxicated. (R. 813.)

At some point, QMSN IA left the medical bay and fell down a second ladderback. (R. 813-14.) The medical officer retrieved her and returned her to the examination table, where he examined her arm. (R. 815.) During this examination, Appellant arrived and said QMSN IA was fine, and left with her and another sailor. (R. 815-16.)

After an altercation with another sailor at QMSN IA's berthing, Appellant took QMSN IA to the Chiefs' mess aboard the barge. (R. 821, 1005.) She felt uncomfortable there, and while Appellant was in the Chiefs' berthing area, she sent her ex-

boyfriend a text message telling him where she was. (R. 824; Pros. Ex. 1.) QMSN IA's ex-boyfriend told her to leave and go to bed. (Pros. Ex. 1.)

QMSN IA did leave, and started walking to her berthing. (R. 826.) Appellant followed her, telling her that she was going to be in trouble. (R. 826.) Appellant then found a key to the dental office and guided QMSN IA inside, shutting the door behind them. (R. 830.) Appellant again told QMSN IA that she was in trouble. (R. 830.) Appellant spoke to her very aggressively, unlike his previous interaction with her, which made her nervous, and made her believe that he was serious about his threat. (R. 830.) Appellant then told QMSN IA that she knew what she needed to do, which she understood to mean he expected sex. (R. 831.) Then Appellant, holding a condom, told QMSN IA to pull her pants down. (R. 831.)

At the time, QMSN IA believed that Appellant's threat that she would be in trouble because he had previously been the one who stood up for her. (R. 832.) QMSN IA was a "troubled sailor" and did not think anyone would believe her if Appellant retaliated when she refused to have sex with him. (R. 832.) Accordingly, when Appellant told QMSN IA to pull her pants down, she did. (R. 832.) Appellant then made her turn around and bend over a table, where he penetrated her vagina with his penis.

(R. 833.) Appellant's DNA was later found in QMSN IA's underwear and in rectal swabs taken from QMSN IA. (R. 1186.)

When he had finished with QMSN IA, Appellant told her to leave the room. (R. 835.) They encountered an Ensign in the passageway, and Appellant told QMSN IA to return the next morning so he could examine her arm. (R. 836.)

After returning to her berthing, QMSN called her ex-boyfriend, FC2 Lopez. (R. 836.) Crying, she told her ex-boyfriend what had occurred, and he told her to leave the barge. (R. 836.) Following his advice, QMSN IA left the barge and went down to the pier. (R. 837.) She was followed by a PS3 Leslie and by Appellant. (R. 836.) Crying hysterically, QMSN IA told PS3 Leslie that Appellant had raped her and handed her the phone she was still using to talk to her ex-boyfriend. (R. 837.) Appellant heard QMSN IA say she was raped and returned to the barge. (R. 837.) QMSN IA passed out on the pier due to hyperventilation and was carried aboard the USS GERMANTOWN. (R. 841, 943-45.)

2. Appellant pled guilty to orders violations and adultery.

Appellant, a Chief Petty Officer, pled guilty to having sex with QMSN IA in the dental office of a Navy barge. (R. 147-51, 1383.) Appellant was married at the time. (R. 163-64.) He understood that he was forbidden by general orders from

fraternizing with junior enlisted personnel and from having sex aboard the barge. (R. 153.) Appellant denied ejaculating during the sex with QMSN IA, but DNA taken from Appellant indicated that he had ejaculated. (R. 1198, 1389.)

B. Appellant's court-martial was convened by the Captain Faller commanding in the Convening Authority's absence.

The court-martial that heard Appellant's trial was originally convened by Rear Admiral Cloyd, Commander, U.S. Naval Forces Japan. (General Court-Martial Convening Order (GCMCO) 1-13, Mar. 12, 2013.) Appellant's charges were referred by Captain T.C. Faller, Rear Admiral Cloyd's Chief of Staff, while the Admiral was away on temporary orders and Captain Faller was Acting Commander, U.S. Naval Forces. (R. 206; LCDR Maryann Stampfli Aff., Aug. 5, 2014.)[4] Captain Faller also amended the GCMCO on July 19, 2013 while the Admiral was on leave. (General Court-Martial Amending Order 1B-13; Stampfli Aff.) Rear Admiral Kraft, Commander, U.S. Naval Forces Japan acted on Appellant's court-martial. (Convening Authority's Action (CAA), Nov. 20, 2013.)

C. Appellant claimed his court-martial was tainted by Unlawful Command Influence.

Appellant claimed that public statements by senior leaders about sexual constituted unlawful command influence in his

[4] LCDR Stampfli's Affidavit is the subject of a Motion to Attach filed concurrently with this Answer.

court-martial. (R. 17; Appellate Ex. I; Appellate Ex. IX.) He requested dismissal, or, in the alternative, ten peremptory challenges and elimination of a punitive discharge as a potential sentence. (R. 52-54; Appellate Ex. I; Appellate Ex. IX.)

The Military Judge concluded that there was an appearance of Unlawful Command Influence caused by remarks made by senior civilian leaders and by the Chairman of the Joint Chiefs of Staff. (R. 53.) To remedy that perceived appearance, the Military Judge allowed Appellant five peremptory challenges. (R. 55.) However, after hearing the Members' responses in voir dire, the Military Judge determined that only one additional peremptory challenge was needed. (R. 650.)

The Members all agreed that Appellant had a right to a fair trial. (R. 258.) The Members all affirmed that they could remain impartial throughout the trial and could consider the entire range of possible punishments if Appellant was found guilty. (R. 235-40.) The Military Judge also instructed the Members to disregard the Navy's administrative training about sexual assault and any comments from the chain of command or "the outside world." (R. 245.) The Members agreed that they should only be concerned with determining whether a sexual assault actually took place. (R. 245.)

D. The Military Judge excluded evidence regarding QMSN IA's sexual relationship with her ex-boyfriend and the fact that his semen was also found during the SAFE exam.

Appellant brought a motion pursuant to R.C.M. 412 to introduce evidence of QMSN IA's ongoing relationship with her ex-boyfriend, FC2 Lopez, and of his D.N.A. being found in QMSN IA's vagina during the SAFE exam. (R. 66; Appellate Ex II.) Trial Defense Counsel asserted that this evidence indicated a motive to fabricate the allegations against Appellant and that it demonstrated an alternate source of semen. (R. 66, 81; Appellate Ex. II.) QMSN IA testified in a 39(a) session that she had continued a sexual relationship with FC2 Lopez that she concealed from her current boyfriend. (R. 663.) She had been dating her boyfriend for approximately two months, but had not decided whether she wanted to be with either of them exclusively. (R. 669.) The Military Judge then asked Trial Defense Counsel to clarify exactly what the Defense wanted the Court to admit and why. (R. 678-79.) Trial Defense Counsel explained that the only piece of evidence they were "really concerned" with having admitted was the third source of DNA found during the SAFE exam, which, Trial Defense Counsel argued, indicated QMSN IA had been deceitful to her boyfriend. (R. 678-683.) Trial Defense Counsel theorized that "if we lie about small things, we lie about big things." (R. 682.) Finally, Trial Defense Counsel

explained, “I really don’t care about who she had sex with and why. What I care about her ability to be truthful.” (R. 681.) Responding to this explanation, the Military Judge found that QMSN IA had not lied about her relationships, but had merely carried out two romantic relationships at once without disclosing that to her current boyfriend. (R. 684.) The Military Judge decided that this was propensity evidence barred by Mil. R. Evid. 412 and excluded it unless the Defense could demonstrate that QMSN IA had lied to FC2 Lopez about her boyfriend or had lied to her boyfriend about FC2 Lopez. (R. 684.) The Military Judge then allowed Trial Defense Counsel a second opportunity to explain a theory by which the evidence could be admitted under Mil. R. Evid. 412. (R. 685.) Trial Defense Counsel responded that it was Mil. R. Evid. 608 evidence of “character, conduct, and bias of a witness.” (R. 685.) The Military Judge then excluded evidence that she had not told her boyfriend about her ongoing relationship with FC2 Lopez. (R. 695, 704.) The Military Judge further excluded evidence that there was a third source of DNA found during the SAFE exam, unless it became relevant. (R. 704.)

E. The Military Judge excluded mention of QMSN IA’s affliction with a Sexually Transmitted Disease.

Appellant sought to admit evidence that he had treated QMSN IA for a sexually transmitted disease (STD). (R. 1406-1408.)

The Military Judge expressed concern that the evidence related to a charge that Appellant sexually harassed QMSN IA by asking her inappropriate sexual questions. (R. 1408-09.) Accordingly, without objection, the Military Judge struck the charge under R.C.M. 917. (R. 1410.) The Military Judge then forbade mention of any STD, but allowed Appellant to explain that he had performed pelvic exams on QMSN IA as part of the ship's preventative medicine program, and provided guidance about proper care in "private life." (R. 1521, 1523.)

F. The Military Judge discussed the exclusion of testimony regarding QMSN IA's sexually transmitted disease in an R.C.M. 802 Conference.

When Appellant was asked about discussing matters of a sexual nature with QMSN IA, Trial Counsel requested an R.C.M. 39(a) session to discuss the testimony. (R. 1408.) In the 39(a) session, Trial Counsel objected to mention of any STD. (R. 1408.) The Military Judge noted his concern that the testimony might provide a defense to the sexual harassment charge and ordered counsel into his chambers for an R.C.M. 802 session. (R. 1408.) Following the R.C.M. 802 session, the Military Judge summarized their discussion, reiterating that the testimony would likely provide a defense to the charge and that the Trial Counsel should have known that. (R. 1409.) Trial Defense Counsel agreed that this was an accurate summary of the R.C.M. 802 session. (R. 1409.) Trial Counsel then explained that he

had spoken with the Staff Judge Advocate and would strike the language "asking her inappropriate sexual question [*sic*]" from specification 1 of Charge I. (R. 1409.) The Military Judge struck that specification pursuant to R.C.M. 917. (R. 1410.) After additional discussion, the Military Judge mention of the STD. (R. 1521.)

G. The Military Judge excluded testimony that QMSN IA was interested in having sex with SN Haney.

Appellant sought to admit evidence that QMSN IA had acted as though she wanted to have sex on the evening when Appellant sexually assaulted her. (R. 190-91; Appellate Ex. LVI.) He sought to have SN Haney testify that QMSN IA appeared interested in having sex with SN Haney on the evening when QMSN IA was assaulted. (R. 744.) The Military Judge excluded that testimony, but allowed SN Haney to testify regarding QMSN IA's drunken, flirtatious behavior at the party as impeachment material. (R. 772-75.) He allowed SN Haney to explain that QMSN IA had "flashed" her breasts to people at a barbeque on the night she was assaulted. (R. 1536.)

Argument

I.

CAPTAIN FALLER APPROPRIATELY ACTED AS CONVENING AUTHORITY DURING THE COMMANDING OFFICER'S OFFICIAL ABSENCE.

A. Standard of Review.

Whether a court-martial was properly convened is a question of law reviewed *de novo*. *United States v. Harmon*, 63 M.J. 98, 101 (C.A.A.F. 2006).

B. Appellant's court-martial was convened and acted upon by the Chief of Staff after command devolved to him in the Convening Authority's absence.

To ensure "full and effective control" and "efficient operation" of any command, undivided attention and considered judgment to the functions of the command are required. *United States v. Kugima*, 16 C.M.A. 183, 186 (C.M.A. 1966). Where the commander cannot provide his undivided attention, there is a basis for succession of command. *Id*. In the absence of a commanding officer, command may devolve to his chief of staff. Navy Regulations at ¶ 1073 (Sep. 14, 1990).

The authority to convene a court-martial may not be delegated and vests in the office, not in the person of the acting authority. *United States v. Vargas*, 47 M.J. 552, 554 (N-M. Ct. Crim. App. 1997) (citation omitted). Further, the Secretary of the Navy, pursuant to his authority under Article 22(a)(8), UCMJ, has authorized "[a]ll flag and general officers,

or their immediate temporary successors, in command of units or activities of the Navy or Marine Corps[]" to convene general courts-martial and otherwise act as Convening Authority. *United States v. Foley*, 2013 CCA LEXIS 991 at *3 (N-M. Ct. Crim. App., Nov. 26, 2013) (quoting Manual of the Judge Advocate General, Judge Advocate General Instruction 5800.7F § 0120(a)(1)(26 Jun 2012)); *Kugima*, 16 C.M.A. at 183.

Here, the Convening Authority's Chief of Staff appropriately succeeded him while he was absent from command. (R. 206; Stampfli Aff.) CAPT Faller properly modified the GCMCO while commanding U.S. Naval Forces Japan. (GCMCO 1B-13; Stampfli Aff.) Likewise, CAPT Faller referred charges while commanding as the Commanding Officer's successor. (Stampfli Aff.) LCDR Stampfli's Affidavit answers the questions raised in Appellant's first Assignment of Error and should satisfy this Court that Appellant's Court-Martial was convened and acted on only by those with authority to do so. No further factfinding is necessary.

II.

THE EVIDENCE IS FACTUALLY AND LEGALLY SUFFICIENT TO SUPPORT APPELLANT'S CONVICTION OF SEXUAL ASSAULT. QMSN IA'S TESTIMONY, CORROBORRATED BY DNA EVIDENCE, SHOULD INDEPENDENTLY CONVINCE THIS COURT OF APPELLANT'S GUILT.

A. Standard of Review.

This Court has an independent obligation to review each case *de novo* for factual and legal sufficiency. Art. 66, UCMJ, 10 U.S.C. § 866. *See United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

B. Appellant's conviction is legally sufficient.

The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements beyond a reasonable doubt." *United States v. Humphreys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987)). In resolving questions of legal sufficiency, the Court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). The Court's assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

The elements of sexual assault under Article 120, UCMJ, are, in pertinent part, as follows:

> (1) That the accused committed a sexual act on QMSN IA;
> (2) That he did so by placing her in fear;

Manual for Courts-Martial, United States (2012 ed.), IV-68, ¶ 45(b). "Placing a person in fear" means a communication that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the wrongful action included in the communication. Manual for Courts-Martial, United States (2012 ed.), IV-69, ¶ 45(g)(7). Here, Appellant challenges only whether the evidence is sufficient to show that he reasonably placed QMSN IA in fear. (Appellant's Br. at 20.)

"Reasonable" fear is judged by an objective standard. *See, e.g.*, *United States v. Gutierrez*, 73 M.J. 172, 176 (C.A.A.F. 2014) (noting that reasonable fear caused by stalking behavior contains an objective component); *United States v. DiPaola*, 67 M.J. 98, 102 (C.A.A.F. 2008) (explaining that the reasonableness of a mistake of fact is judged by an objective standard); and *United States v. Dobson*, 63 M.J. 1, 11 (C.A.A.F. 2006) (explaining that apprehension of death or bodily injury supporting a defense to homicide includes an objective component).

Here, QMSN IA believed that Appellant would abuse his position to get her in trouble if she refused to have sex with

him. (R. 831.) He told her that she was “in trouble” and that she knew what she had to do. (R. 831.) QMSN IA’s record as a sailor was not unblemished, and it had always been Appellant who had protected her whenever she had disciplinary issues. (R. 832.) Appellant was also her mentor and a Chief Petty Officer. (R. 832.) QMSN IA believed that if Appellant took action to get her in trouble if she refused to have sex with him, nobody would believe her claims otherwise. (R. 832.) She yielded to his commands out of fear that he would make good on his threat. (R. 832.) When viewed in the light most favorable to the United States, this evidence clearly demonstrates that Appellant communicated a threat to that QMSN IA that she reasonably believed required her to comply with his demands.

C. Appellant’s conviction is factually sufficient.

The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having personally observed the witnesses, this Court is convinced of an appellant’s guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. Article 66, UCMJ, requires this Court to not only evaluate the sufficiency of the evidence, but also its weight. Moreover, this *de novo* power of review permits this Court to substitute its judgment for that of the court members. *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990).

Under Article 66, UCMJ, this Court "must assess the evidence in the entire record without regard to the findings reached by the trial court, and it must make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399. When exercising its Article 66, UCMJ, powers of review, this Court may be convinced beyond a reasonable doubt of an appellant's guilt even though conflicts in the evidence may exist, and may also accord a witness's credibility greater weight on some topics than on others. *United States v. Lepresti*, 52 M.J. 644, 648 (N-M. Ct. Crim. App. 1999).

In testing for factual sufficiency, this Court is required to "recogniz[e] that the trial court saw and heard the witnesses." *Id.* This is not a *pro forma* legal requirement. Rather, it takes into account that the trier of fact is best situated to assess a witness's credibility while testifying. *See United States v. Madey*, 14 M.J. 651, 653 (A.C.M.R. 1982), *rev. denied*, 15 M.J. 183 (C.M.A. 1983); *see also United States v. Ferguson*, 35 F.3d 327, 333 (7th Cir. 1994), *cert. denied*, 514 U.S. 1100 (1995)(trial court's evaluation of witness credibility "will not be disturbed unless it is completely without foundation."). It also takes into account that, where the court members are properly instructed to consider a witness's credibility, this Court should presume that the members followed

the Military Judge's instructions. *See United States v. Collier*, 67 M.J. 347 (C.A.A.F. 2009).

Appellant urges this Court, (Appellant's Br. at 33), to adopt the factors indicating reasonableness adopted by the Court of Appeals for the Armed Forces in *United States v. Simpson*, in analyzing constructive force in the commission of rape. 58 M.J. 368 (C.A.A.F. 2003). The *Simpson* Court noted the following indicators that those victims' fear of death or grievous bodily harm was reasonable:

> (1) the appellant's physically imposing size; (2) his reputation for being tough and mean; (3) his position as a noncommissioned officer; (4) his actual and apparent authority over each of the victims in matters other than sexual contact; (5) the location and timing of the assaults, including his use of his official office and other areas within the barracks in which the trainees were required to live; (6) his refusal to accept verbal and physical indications that his victims were not willing participants; and (7) the relatively diminutive size and youth of his victims, and their lack of military experience.

Id. at 377. The Court further noted that the "[a]ppellant used his authority over the victims to issue orders that placed them in the isolated locations where the charged rapes occurred." *Id*. (citation omitted). Some of these factors might be useful in analyzing QMSN IA's fear, but those relied on by Appellant are irrelevant as they relate to generating fear of death or bodily harm required for rape by constructive force, and are specific to the facts in *Simpson*. Physical intimidation and a

reputation for meanness are not required to threaten the abuse of an official position. However, other *Simpson* factors are present here and indicate QMSN IA's fear was reasonable. Appellant told QMSN IA that she was in trouble and then indicated, verbally and through his actions of producing a condom, that she must submit to having sexual intercourse with him. (R. 831.) He was a chief petty officer and her mentor. (R. 832.) He enjoyed a reputation for honesty aboard the USS GERMANTOWN. (R. 1358, 1548.) By contrast, QMSN IA was a "troubled sailor." (R. 832.) She had several disciplinary problems and her advancement had been delayed. (R. 895, 1083, 1089.) Moreover, Appellant had always been QMSN IA's protector——he spoke on her behalf when she performed poorly or had disciplinary problems. (R. 832.) Appellant utilized medical spaces aboard the ship in the early hours of the morning to conduct his assault. (R. 830.) He disregarded QMSN IA's previous expressions of unwillingness. (R. 796, 800.) Based on her prior problems along with her knowledge of Appellant's good reputation and standing about the ship, QMSN IA reasonably feared that nobody would believe her if Appellant used his position to retaliate against her if she refused to have sexual intercourse with him. (R. 832, 892.)

Further, Appellant's assault of QMSN IA followed two other instances when he had tried to isolate her for sex. (R. 796,

800.) On one of those occasions, Appellant told QMSN IA to take her clothes off and called her “chicken shit” when she refused. (R. 796.) Yet on the night when Appellant assaulted QMSN IA, he elevated his aggression in a way QMSN IA had never seen before. (R. 830.) It was clear to her that this time he was serious. (R. 830.)

Under these circumstances, it was entirely reasonable for QMSN IA, an E-3, to believe Appellant’s threat of reprisal if she refused him. Had Appellant brought accusations against QMSN IA, he would have been believed. QMSN IA’s protest would seem incredible, given her history. Likewise, Appellant’s history of attempting to isolate QMSN IA and his unusual aggression reasonably impressed on QMSN IA that Appellant would make good on his threat if she failed to give him what he wanted.

D. QMSN IA’s intoxication did not make her fear unreasonable.

QMSN IA was intoxicated at the time Appellant assaulted her. (R. 808.) Although QMSN IA did say that the alcohol affected her judgment, she explained that had she not been intoxicated, she would not have gone to the dental office with Appellant in the first place and Appellant would never have told her she was in trouble. (R. 892.) Appellant recognized QMSN IA’s fear of being in trouble and her drunken state, and took advantage of the opportunity to force her into the sex he had

previously failed to convince her to have with him. (R. 892.) While it may have been unreasonable, in hindsight, to believe she would be in trouble for her actions that night, (R. 891), it was not at all unreasonable to fear that Appellant could and would make sure she was in trouble if she refused sex.

E. The Military Judge did not commit plain error by declining to provide, *sua sponte,* additional instruction on the objective nature of reasonable fear.

"Absent plain error, failure to object to instructions as given or to request additional instructions forfeits the issue on appeal." *United States v. Guthrie*, 53 M.J. 103, 106 (C.A.A.F. 2000). Even where counsel requests specific instructions, the military judge has substantial discretion in deciding which instructions to give. *United States v. Miller*, 58 M.J. 266, 270 (C.A.A.F. 2003) (citation omitted). Judged as a whole, instructions must provide meaningful legal principles for the court-martial's consideration. *See United States v. Dearing*, 63 M.J. 478, 483 (C.A.A.F. 2006) (citation omitted).

Here, Appellant forfeited an additional instruction by failing to request it at trial. *Guthrie*, 53 M.J. at 106. When asked if he objected to any of the Military Judge's instructions, Trial Defense Counsel said he did not. (R. 1614.) Moreover, he had no cause to do so as there was no need for an additional instruction on the offense. The Military Judge

instructed the Members that QMSN IA's fear of reprisal must be reasonable. (R. 1734.) This is a commonly understood term. The Members required no further instruction to understand that if they found QMSN IA's fear to be unreasonable, they could not convict Appellant.

III.

THE MILITARY JUDGE DID NOT ERR IN EXCLUDING EVIDENCE OF QMSN IA'S SEXUAL RELATIONSHIP WITH FC2 LOPEZ.

A. Standard of Review.

This Court reviews a military judge's ruling on whether to exclude evidence pursuant to Mil. R. Evid. 412 for an abuse of discretion. *United States v. Ellerbrock*, 70 M.J. 314, 317 (C.A.A.F. 2011) (citing *United States v. Roberts*, 69 M.J. 23, 26 (C.A.A.F. 2010)). Findings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed de novo. *Id*.

B. Mil. R. Evid. 412 excludes evidence of a victim's sexual behavior and sexual predispositions.

Mil. R. Evid. 412 states that evidence offered by an accused to prove an alleged victim's sexual predispositions, or that the alleged victim engaged in other sexual behavior, is inadmissible except in limited contexts. *Ellerbrock*, 70 M.J. at 317-18 (citing Mil. R. Evid. 412(a)-(b)). The rule is intended to shield victims of sexual assaults from embarrassing and

degrading cross-examination. *Id*. (citation omitted). One limited exception to Mil. R. Evid. 412 permits the admission of evidence when its exclusion would violate the constitutional rights of the accused. *Id*.; M.R.E 412(b)(1)(C). This includes the right to confront and cross-examine witnesses pursuant to the Sixth Amendment. *Id*. The right to cross-examine includes the right to impeach or discredit the witness. *Id*. (citing *Olden v. Kentucky*, 488 U.S. 227, 231 (1988)). However, trial judges retain wide latitude to limit cross examination to prevent, among other things, harassment, prejudice, and confusion. *Id*. (citing *Michigan v. Lucas*, 500 U.S. 145, 149 (1991)). To be admitted under Mil. R. Evid. 412(c)(3), evidence must be relevant, material, and must be more probative than prejudicial. *Id*.

C. <u>The evidence of QMSN IA's relationship with FC2 Lopez was neither relevant nor material</u>.

Here, Appellant mischaracterizes the evidence Trial Defense Counsel attempted to elicit at trial. (Appellant's Br. at 38, 42). QMSN IA did not lie to her boyfriend about her relationship with FC2 Lopez——she simply remained silent about it. (R. 693.) QMSN IA was also entirely forthright about the nature of the two relationships. (R. 693.)

Trial Defense Counsel reduced Appellant's position relative to this evidence to a single argument——that QMSN IA's

relationship with FC2 Lopez, the third source of semen, indicated a propensity to lie. (R. 682.) The evidence, proffered under that theory, was not relevant and did not fall under any of the exceptions to Mil. R. Evid. 412. Nor was Appellant's theory factually accurate, since QMSN IA had not lied to her boyfriend or to the Court. Appellant included an alternate theory in his written motion, (Appellate Ex. II), and adopted in his Brief, (Appellant's Br. at 43-44), that QMSN IA lied to protect her relationship with FC2 Lopez, not with her current boyfriend. But this assertion is belied by Trial Defense Counsel's arguments in support of admission, (R. 679, 682), and by Appellant's failure to elicit any facts relevant to that theory from the victim during her 39(a) testimony on the subject. (R. 661-76.) This was clearly an attempt to paint QMSN IA as a promiscuous woman, which is exactly the aim Mil. R. Evid. 412 stands against. Accordingly, the Military Judge did not err by refusing to admit evidence of QMSN IA's relationship with FC2 Lopez.

D. Even if the excluded evidence was Constitutionally required, its exclusion was harmless beyond a reasonable doubt.

When constitutionally required evidence is excluded, this Court must test for harmlessness beyond a reasonable doubt, asking whether there is a reasonable possibility that the evidence contributed to the conviction. *Ellerbrock*, 70 M.J. at

320 (citing *United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007)). When making this determination, the Court applies the *Van Arsdall* test, analyzing five factors: (1) the importance of the witness' testimony in the prosecution's case, (2) whether the testimony was cumulative, (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, (4) the extent of cross-examination otherwise permitted, and (5) the overall strength of the prosecution's case. *Id*. (citing *United States v. Van Arsdall*, 475 U.S. 673, 684 (1986).

Here, the first *Van Arsdall* factor favors Appellant. However, the other facts all indicate harmlessness. Certainly, QMSN IA was the most important witness in the United States' case. Yet the testimony Appellant sought was cumulative with other testimony undermining her credibility, not the least of which was evidence of her reputation for dishonesty. (R. 1554.) Trial Defense Counsel was permitted to cross-examine QMSN IA extensively, including about exposing her breasts at the party. (R. 856). Finally, the United States' case was very strong, given that QMSN IA immediately reported being attacked, (R. 869), and her testimony was corroborated by DNA evidence that contradicted Appellant's version of events. (R. 1184.)

Further, it is implausible that QMSN IA would report a consensual sexual encounter as rape in order to protect another

relationship. Indeed, if QMSN IA had successfully carried out two sexual relationships by keeping those relationships discrete, she likely would have simply kept her interactions with Appellant secret as well. Certainly, Appellant could have argued that QMSN IA was attempting to protect the relationship that was on the Record——the relationship with her boyfriend. Yet Trial Defense Counsel did not even bother to make that argument to the Members, preferring to argue QMSN IA's motive was to leave the ship. (R. 1690, 1698.) Accordingly, Appellant was not prejudiced by his inability to present evidence of QMSN IA's relationship with FC2 Lopez.

IV.

APPELLANT WAIVED THIS CHALLENGE BY FAILING TO RAISE IT AT TRIAL. FURTHER, THE RECORD OF TRIAL IS COMPLETE. THE MILITARY JUDGE SUMMARIZED MATTERS DISCUSSED IN THE R.C.M. 802 SESSION AND HIS RULINGS CAN BE UNDERSTOOD FROM THE RECORD.

A. Standard of Review.

This Court reviews the completeness and verbatim nature of a record *de novo*. *United States v. Gaskins*, 72 M.J. 225, 229 (C.A.A.F. 2013).

B. The Military Judge summarized the R.C.M. 802 session for the Record and no component of the Record is absent.

Article 54, UCMJ, requires a complete record of trial whenever a discharge is adjudged. However, R.C.M. 802(b)

expressly states that conferences under R.C.M. 802 need not be included in the Record, but the "matters agreed upon at a conference shall be included in the record orally or in writing." R.C.M. 802(b). Failure to object to non-compliance with this Rule waives the recording requirement. *Id.*; *see also United States v. Cordell*, 37 M.J. 592 (A.F. Ct. Crim. App. 1993) (finding that the appellant waived his objection by failing to raise it and that a brief summary of an R.C.M. 802 session was sufficient to produce a complete record).

Here, the Military Judge noted his concern that testimony objected to under Mil. R. Evid. 412 might provide a defense to the sexual harassment charge and ordered counsel into his chambers for an R.C.M. 802 session. (R. 1408.) Following the R.C.M. 802 session in question, the Military Judge summarized their discussion, reiterating that the testimony would likely provide a defense to the charge and that the Trial Counsel should have known that. (R. 1409.) Trial Defense Counsel agreed that this was an accurate summary of the R.C.M. 802 session. (R. 1409.)

Trial Counsel then explained that he had spoken with the Staff Judge Advocate and would strike the language "asking her inappropriate sexual question" from specification 1 of Charge I. (R. 1409.) The Military Judge struck that specification pursuant to R.C.M. 917. (R. 1410.)

Nothing is missing from the Record. It is clear from the Record that the parties discussed whether the United States would pursue specification 1 of Charge I. The Military Judge's ruling excluding mention of QMSN IA's STD was made on the Record. (R. 1521.) The ruling is found over 100 pages later in the Record than the R.C.M. 802 session. These pages include substantial discussion of the issue as well as voir dire of Appellant to determine the limits of his testimony. (R. 1517.) While the Military Judge may not have made extensive findings of fact and conclusions of law on the Record, nothing indicates that any agreement or other important aspect of the Record is missing.

Moreover, by failing to demand additional summary, Appellant waived this challenge. Likewise, Appellant cannot claim prejudice from the Military Judge's exclusion of the term "STD" when he specifically consented to the Military Judge's solution to the Mil. R. Evid. 412 problem——permitting Appellant to explain the medical nature of his communication with QMSN IA without specifically mentioning an STD.

V.

THE MILITARY JUDGE DID NOT ERR IN EXCLUDING EVIDENCE OF QMSN IA'S TREATMENT FOR A SEXUALLY-TRANSMITTED DISEASE. APPELLANT WAS ABLE TO PRESENT HIS DEFENSE BY EXPLAINING

THAT HIS CONDUCT RELATED TO MEDICAL TREATMENT.[5]

A. Standard of Review.

This Court reviews a military judge's ruling on whether to exclude evidence pursuant to Mil. R. Evid. 412 for an abuse of discretion. *Ellerbrock*, 70 M.J. at 317. Findings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed de novo. *Id*.

B. Mil. R. Evid. 412 excludes evidence of a victim's sexual behavior and sexual predispositions.

Mil. R. Evid. 412 is a rule of exclusion. *United States v. Banker*, 60 M.J. 216, 223 (C.A.A.F. 2004). This Rule states that evidence offered by the accused to prove the alleged victim's sexual predispositions, or that she engaged in other sexual behavior, is inadmissible except in limited contexts. *Ellerbrock*, 70 M.J. at 317-18 (citing Mil. R. Evid. 412(a)-(b)). Mil. R. Evid. is intended to shield victims of sexual assaults from embarrassing and degrading cross-examination. *Id*. (citation omitted). To be admitted under Mil. R. Evid. 412(c)(3), evidence must be relevant, material, and must be more probative than prejudicial. *Id*. The burden of admissibility at trial lies on the proponent of the evidence to demonstrate why the evidence is admissible. *Banker*, 60 M.J. at 223.

[5] Raised as a Summary Assignment of Error pursuant to Rule 15.1(c) of this Court's Rules of Practice and Procedure.

One limited exception to Mil. R. Evid. 412 permits the admission of evidence when its exclusion would violate the constitutional rights of the accused. *Id*.; M.R.E 412(b)(1)(C). This includes the right to confront and cross-examine witnesses pursuant to the Sixth Amendment. *Id*. The right to cross-examine includes the right to impeach or discredit the witness. *Id*. (citing *Olden v. Kentucky*, 488 U.S. 227, 231 (1988)). However, trial judges retain wide latitude to limit cross examination to prevent, among other things, harassment, prejudice, and confusion. *Id*. (citing *Michigan v. Lucas*, 500 U.S. 145, 149 (1991)).

C. The evidence of Appellant's treatment of QMSN IA's STD was not material.

Here, the Military Judge excluded only the mention of QMSN IA's STD. He did not exclude evidence that Appellant had treated her and had admonished her to take care in "private life". (R. 1521-23.) The fact that QMSN IA had an STD was not vital to Appellant's defense. *See Banker*, 60 M.J. at 222-23 (Only evidence that is vital to the accused's defense will overcome Mil. R. Evid. 412 balancing against the danger of unfair prejudice).

This case is analogous to *United States v. Smith*, 68 M.J. 445 (C.A.A.F. 2010). There, in deciding that evidence of a victim's sexual past was not material, the higher Court noted

that the appellant was able to present a “precise and plausible theory” that the victim was biased to preserve a secret that could have a negative impact on her career. *Id*. at 448. The Court determined that under those circumstances, the “lurid nuances of her sexual past” would not add much to the theory of fabrication. *Id*. Similarly, the fact that Appellant had an STD would add little to Appellant’s explanation that he discussed sexual issues with QMSN IA as part of his job. Appellant was able to explain to the Members that he performed gynecological exams on QMSN IA as part of the preventative medicine program and that his discussions with her were for medical reasons. (R. 1524.) Indeed, Appellant could have cross-examined QMSN IA about the nature of Appellant’s sexual comments and their medical relevance——he simply chose not to do so. Accordingly, the Military Judge did not err in excluding evidence that QMSN IA had an STD.

Further, given that Appellant had the opportunity to explain his conversations with QMSN IA, he was not prejudiced by being unable to specifically mention her STD. Indeed, Trial Defense Counsel specifically consented to this course of action. (R. 1521.) He cannot claim now to have been deprived by the Military Judge’s ruling.

VI.

THE MILITARY JUDGE DID NOT ERR IN EXCLUDING EVIDENCE THAT QMSN IA EXPRESSED INTEREST IN SN HANEY. THE EVIDENCE ONLY INDICATED QMSN IA'S SEXUAL PREDISPOSITION AND IS NOT CONSTITUTIONALLY REQUIRED.[6]

The legal principles applicable to this Assignment of Error are addressed in sections III and V above. Mil. R. Evid. 412(b)(1)(B) permits evidence of specific sexual behavior by the victim to prove consent only when that behavior is directed to the person of the accused. Here, QMSN IA came in contact with SN Haney, who speculated that IA desired to have sex with her. (R. 744-45.) QMSN IA's actions toward SN Haney do not indicate consent to Appellant's assault, but instead indicate IA's sexual predisposition, as prohibited by Mil. R. Evid. 412. Indeed, Appellant goes so far as to argue that the evidence in question "shows QMSN IA's state of mind [and] makes it more probable that she made a sexual advance on [Appellant]." Clearly, this evidence is offered to show that QMSN IA was promiscuous, not to demonstrate that she consented to Appellant's assault. The Military Judge appropriately allowed SN Haney to testify about QMSN IA's other behavior at the party to impeach IA's denials that she had acted that way. (R. 1536.) Nothing more was constitutionally required.

VII.

[6] Raised pursuant to *Grostefon*, 12 M.J. 431.

APPELLANT'S COURT-MARTIAL WAS NOT TAINTED BY UNLAWFUL COMMAND INFLUENCE. EXTENSIVE VOIR-DIRE AND AN ADDITIONAL DEFENSE PEREMPTORY CHALLENGE FULLY AMELIORATED ANY APPEARANCE OF UNLAWFUL COMMAND INFLUENCE.[7]

A. Standard of Review.

This Court reviews allegations of unlawful command influence *de novo*. *United States v. Harvey*, 64 M.J. 13, 19 (C.A.A.F. 2006). If any findings of fact are made at trial in conjunction with a ruling on a motion alleging unlawful command influence, the findings are reviewed for clear error. *Id*. A military judge's remedy for unlawful command influence is reviewed for an abuse of discretion. *United States v. Douglas*, 68 M.J. 349, 354 (C.A.A.F. 2010).

B. Unlawful command influence is influence that "corrupts the truth-seeking function of the trial process."

Statute and regulation prohibit unlawful influence on a court-martial. Art. 37, UCMJ; R.C.M. 104. Unlawful command influence involves command influence that "corrupt[s] the truth-seeking function of the trial process." *United States v. Thomas*, 22 M.J. 388, 393-94 (C.M.A. 1986). The "appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial." *United States v. Simpson*, 58 M.J. 368, 374 (C.A.A.F. 2003) (quotation and citation omitted).

[7] Raised pursuant to *Grostefon*, 12 M.J. 431.

The defense has the initial burden to raise unlawful command influence by showing "some evidence" that it exists. *Harvey*, 64 M.J. at 14. To raise the issue at trial, the defense may meet its burden by showing "facts which, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings." *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999) (citing *United States v. Stombaugh*, 40 M.J. 208, 213 (C.M.A. 1994)).

Once the defense sufficiently raises unlawful command influence, the burden shifts to the United States at trial to demonstrate beyond a reasonable doubt either that there is no unlawful command influence or that the proceedings will be untainted. *United States v. Lewis*, 63 M.J. 405, 413 (C.A.A.F. 2006) (citing *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002)). The United States may meet this burden by: (1) disproving the predicate facts on which the allegation of unlawful command influence is based; (2) showing that the facts do not constitute unlawful command influence; (3) if at trial, by producing evidence proving that the unlawful command influence will not affect the proceedings; or (4) if on appeal, by persuading the appellate court that the unlawful command

influence had no prejudicial impact on the court-martial. *Biagase*, 50 M.J. at 151.

"In the course of addressing these issues, military judges and appellate courts must consider apparent as well as actual unlawful command influence." *United States v. Reed,* 65 M.J. 487, 488 (C.A.A.F. 2008). "[T]he appearance of unlawful command influence will exist where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *Lewis*, 63 M.J. at 415. "To find that the appearance of command influence has been ameliorated and made harmless beyond a reasonable doubt, the United States must convince [the court] that the disinterested public would now believe [the appellant] received a trial free from the effects of unlawful command influence." *Id.*

C. Appellant's court-martial was not affected by unlawful command influence.

On appeal, the appellant bears the initial burden of showing: (1) facts that, if true, constitute unlawful command influence; (2) that the proceedings were unfair; and (3) that the unlawful command influence was the cause of the unfairness. *United States v. Richter*, 51 M.J. 213, 224 (C.A.A.F. 1999).

Here, Appellant fails to make any such showing. Instead, he assserts only that various Navy leaders, most of them civilians,

made remarks expressing concern about sexual assault in the Navy or Department of Defense. (Appellant's Br. at 58.) Indeed, the only uniformed officer whose comments Appellant cites is the Chief of Naval Operations, who merely stated that "we have got to do something about this." (Appellant's Br. at 58.) Appellant acknowledges that because they are not subject to the Code, these civilian leaders cannot actually commit unlawful command influence under Article 37, U.C.M.J. (Appellant's Br. at 61.) He claims instead that their comments created an appearance of unlawful command influence and that the Military Judge's remedy was inadequate to remedy that appearance. (Appellant's Br. at 61.) It is clear, therefore, that there was no actual interference in Appellant's Court Martial.

D. Any appearance of unlawful command influence was fully ameliorated by thorough voir dire and by an additional peremptory challenge.

The comments Appellant cites do not create an appearance of unlawful command influence. The mere fact that several senior leaders made statements, which were entirely unconnected to Appellant's court-martial, would not cause a fully–informed, disinterested observer to question the integrity of the trial. Moreover, any appearance that did exist was fully ameliorated by thorough voir dire and by the additional peremptory challenge granted by the Military Judge.

The Members all agreed that Appellant had a right to a fair trial. (R. 258.) The Members all affirmed that they could remain impartial throughout the trial and could consider the entire range of possible punishments if Appellant was found guilty. (R. 235-40.) The Military Judge excused four Members *sua sponte*. (R. 312-654.) He then allowed the Defense an extra peremptory challenge to ensure that the Panel was untainted. (R. 654.) Most importantly, all three of the Members challenged by the defense, CDR Getschman, LCDR Reeves, an LCDR Marino, were ultimately dismissed. (R. 654.) The fact that Appellant offered no challenges to any of the Members who were ultimately empanelled would certainly satisfy a disinterested observer that the Members were not tainted by unlawful command influence. The Military Judge therefore did not abuse his discretion when declining to provide any additional remedy.

Conclusion

WHEREFORE, the Government respectfully requests that this Court affirm the findings and sentence as adjudged and approved below.

MATTHEW M. HARRIS
Captain, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7430

ANN E. DINGLE
Lieutenant, JAGC, USN
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7433, fax (202) 685-7687

Appendix

1. *United States v. Foley*, 2013 CCA LEXIS 991 (N-M. Ct. Crim. App., Nov. 26, 2013).

Certificate of Filing and Service

I certify that the United States filed this brief with the Court, served a copy on Appellate Defense Counsel and electronically filed the brief in CMTIS with the Court pursuant to N-M. Ct. Crim. App. Rule 5.2(b)(1), on August 21, 2014.

MATTHEW M. HARRIS
Captain, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7430, fax (202) 685-7687

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 3

UNITED STATES, Appellee v. John C. AVERELL Chief Hospital Corpsman (E-7) U.S. Navy, Appellant	**APPELLANT'S BRIEF AND ASSIGNMENTS OF ERROR** Case No. 201300471 Tried at Commander, Fleet Activities Yokosuka, Japan on 16 Apr 2013, 3 Jul 2013, 22-27 Jul 2013, and 29 Jul 2013 by general court-martial convened by Commander, U.S. Naval Forces Japan.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

JENNIFER L. MYERS
Lieutenant, JAGC, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
Bldg. 58, Ste. 100
Washington, D.C. 20374
Phone (202) 685-7713
Fax (202) 685-7426
jennifer.l.myers@navy.mil

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Issues Presented

I.

DID CAPTAIN FALLER HAVE THE AUTHORITY TO CONVENE A GENERAL COURT-MARTIAL AND REFER CHARGES AGAINST HMC AVERELL?

II.

THE GOVERNMENT HAD TO PROVE HMC AVERELL'S ACTION CREATED A "REASONABLE FEAR" IN THE VICTIM TO SUSTAIN A CONVICTION FOR CHARGE II, SEXUAL ASSAULT. HERE, THE ALLEGED VICTIM TESTIFIED THAT HER FEAR WAS NOT REASONABLE. IS THE EVIDENCE LEGALLY AND FACTUALLY SUFFICIENT TO SUSTAIN A CONVICTION FOR CHARGE II?

III.

AN ACCUSED IS ENTITLED TO CONFRONT THE WITNESSES AGAINST HIM WITH EVIDENCE OF A MOTIVE TO FABRICATE. DID THE MILITARY JUDGE ERR BY EXCLUDING EVIDENCE THAT THE ALLEGED VICTIM WAS MOTIVATED TO FABRICATE HER ALLEGATIONS TO PROTECT A ROMANTIC RELATIONSHIP WITH A MAN WHO WAS NOT HER BOYFRIEND?

IV.

THE MILITARY JUDGE FAILED TO SUMMARIZE AN IMPORTANT SESSION PURSUANT TO R.C.M. 802 FOR THE RECORD. IS THE RECORD VERBATIM AND COMPLETE AS REQUIRED BY R.C.M. 1102 AND ARTICLE 54, UCMJ?

V.

DID THE MILITARY JUDGE ABUSE HIS DISCRETION BY EXCLUDING EVIDENCE THAT HMC AVERELL PREVIOUSLY TREATED QMSN IA FOR AN STD?

VI.

DID THE MILITARY JUDGE ABUSE HIS DISCRETION BY EXCLUDING EVIDENCE THAT SHORTLY BEFORE THE ALLEGED SEXUAL ASSAULT QMSN IA WAS

INTERESTED IN HAVING A SEXUAL ENCOUNTER WITH A YET UNDETERMINED PERSON?[1]

VII.

NO PERSON SUBJECT TO THE UCMJ MAY INFLUENCE A COURT-MARTIAL MEMBER. THE NAVY'S MOST SENIOR LEADERS PUBLICIZED THEIR PREFERRED OUTCOMES FOR SEXUAL ASSAULT CASES. DID THE MILITARY JUDGE'S RULING REMOVE THE APPEARANCE OF UNLAWFUL COMMAND INFLUENCE?[2]

Statement of Statutory Jurisdiction

Appellant's approved general court-martial sentence includes a bad-conduct discharge. (General Court-Martial Order (GCMO) No. 13-13, at 2, Nov. 20, 2013.) Accordingly, this Court has jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012).

Statement of the Case

A military judge convicted the appellant, Chief Hospital Corpsman (HMC) John C. Averell, U.S. Navy, consistent with this pleas of one specification of violating a lawful general order, and one specification of adultery in violation of Articles 92, and 134, UCMJ, 10 U.S.C. §§ 892, 934 (2012). (GCMO No. 13-13, at 1-2, Nov. 20, 2013.) Then, a panel of members with enlisted representation, sitting as a general court-martial convicted HMC Averell, contrary to his pleas, of one specification of sexual assault accomplished by placing the victim "in fear of abuse of

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[1] This assignment of error is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[2] This assignment of error is raised pursuant to *Grostefon*, 12 M.J. 431.

his military position" in violation of Article 120, UCMJ. (*Id*.) The convening authority approved the adjudged sentence of reduction in rank to pay-grade E-1, confinement for ninety days, total forfeitures, and a bad-conduct discharge. (GCMO No. 13-13, at 2.) Except for the bad-conduct discharge, the convening authority then ordered the sentence executed. (*Id.* at 2.)

Statement of Facts

On the evening of 20 October 2012, HMC Averell was a section leader on duty on board a barge attached to the USS GERMANTOWN. (R. at 1395.) With the approval of his command, he left the barge to attend a birthday party for his command master chief's granddaughter. (R. at 1397.) While at the party, HMC Averell received two calls from the barge. The first call was from Lieutenant Whitlow, the medical officer. LT Whitlow informed HMC Averell that Quartermaster Seaman IA, the alleged victim, fell down two ladderbacks and that she wanted HMC Averell to return to the ship and conduct her medical exam. (R. at 999, 1397.) HMC Averell was QMSN IA's mentor and tried to help her where he could. (R. at 672, 786.)

Before HMC Averell could return to the ship, he received a second phone call from a duty master-at-arms who informed him that there was a conflict related to a female restrictee who claimed that QMSN IA messed up her rack. (R. at 1398.) After

receiving the second call, HMC Averell left the party and returned to the barge. (*Id*.)

Upon arriving at the ship HMC Averell met Information Systems Technician Chief (ITC) Karp at the smoke pit. (R. at 1054, 1399.) ITC Karp informed HMC Averell that QMSN IA, who had a reputation for being very loud and disrespectful, had made a fool of herself by cursing and yelling on the quarterdeck in front of the lieutenant commander command duty officer. (R. at 1460.) HMC Averell went to the medical office where he found QMSN IA, the medical officer, and Personnel Specialist Third Class, (PS3) Leslie, a friend of QMSN IA. (R. at 814, 1402.)

PS3 Leslie and LT Whitlow told HMC Averell that QMSN IA had had a few drinks earlier in the night. (R. at 1462.) But, LT Whitlow testified that he could not say that QMSN IA was drunk to a reasonable degree of medical certainty nor could he give a lay opinion that she was drunk. (R. at 1013, 1026, 1463.) LT Whitlow could tell that she was upset and thought it could be attributed to her recent falls. (R. at 1013.)

HMC Averell examined QMSN IA’s arm and shoulder and found no injuries. (R. at 1403.) QMSN IA was very concerned that she would be in trouble but, throughout the night, when various people asked her why she would be in trouble; QMSN IA was unable to answer. (R. at 925-26, 999, 1003, 1011-12, 1018, 1249, 1272,

1274, 1318, 1404.) HMC Averell assured her at least twice that she would not be in trouble. (R. at 820, 1019, 1350, 1389.)

Since QMSN IA had fallen down two ladderbacks, HMC Averell and the medical officer thought she should be under observation for a short time and then get some rest. (R. at 1004-05.) QMSN IA told the group that she wanted to go to the pier to smoke a cigarette. (R. at 927, 1004-05.) PS3 Leslie refused to take her to the pier and the medical officer was leaving for the night. (R. at 1003-04, 1422; *but see* R. at 965 (PS3 Leslie claimed she never said she would not take QMSN IA to the pier).) HMC Averell decided to keep an eye on QMSN IA himself and took her to the chief's mess. (R. at 1005, 1422.) He suspected that QMSN IA had messed up the restrictee's rack in berthing, as reported to him earlier, and he believed that QMSN IA would open up to him if he could speak with her alone. (R. at 1056, 1427.) QMSN IA was a troubled sailor who had a few disciplinary issues. (R. at 1089, 1117.)

Upon arriving in the chief's mess, HMC Averell heard ITC Karp in berthing and briefly left to speak with him. (R. at 1056-57.) HMC Averell told ITC Karp that he intended to speak with QMSN IA to try to get her to open up to him and that he thought she would be more forthcoming if they could speak alone. (R. at 1056.) When HMC Averell returned to the chief's mess QMSN IA was gone. (R. at 1430.)

HMC Averell decided to investigate the rack complaint in female berthing. On the way to berthing, he met BM1 Hill, another master-at-arms on duty, and the two of them went to the female berthing. (R. at 1430.) Upon arriving, the rack did not appear messed up. In fact, HMC Averell made a comment to the effect of "you've got to be kidding me," when he saw the rack. (R. at 1390.) However, the complainant accused QMSN IA of messing up her rack and QMSN IA yelled at her, calling her a liar. (R. at 1393.) At trial many witnesses testified that QMSN IA messed up the rack but then seemed to have no memory of it. (R. at 751, 819, 933.) Those witnesses testified, prior to HMC Averell and BM1 Hill's arrival in berthing, they informed QMSN IA that she did in fact mess up the rack. Yet, when confronted with this in front of HMC Averell and BM1 Hill, QMSN IA continued to call the restrictee a liar. (R. at 935.) Because QMSN IA was being loud, HMC Averell and BM1 Hill told QMSN IA to stand in the hallway. (R. at 818.) Later, HMC Averell told QMSN IA that she would not be in trouble for this "dumb shit." (R. at 819-20, 1390.)

After leaving berthing HMC Averell decided to finish some work that he had begun earlier in the day on the dental offices' computer. (R. at 1507.) On his way back to the dental office he encountered QMSN IA in Officer's Country. (R. at 1490.) Even though HMC Averell had told her at least twice that she

would not be in trouble, QMSN IA continued to worry. (R. at 819, 820, 1390.) QMSN IA followed HMC Averell into the dental office. (R. at 1374.)

HMC Averell testified that QMSN IA approached him and kissed him on the mouth. (R. at 1374.) He was shocked by her behavior and turned away to collect himself for a moment. (R. at 1374.) By the time he turned around again she was completely nude. (R. at 1376.) They kissed some more, then he sat in a chair and lowered his pants. (R. at 1379.) HMC Averell retrieved a purple condom from the preventative medicine supply and put it on. (R. at 151, 831, 1379.) QMSN IA turned away from him and sat in his lap, causing his penis to penetrate her vagina. (R. at 1382.) After a few seconds of intercourse, HMC Averell felt very guilty for cheating on his wife and told QMSN IA to stop. (R. at 1384.) The two redressed and left the dental office. (R. at 1384.)

According to QMSN IA, she was blacking in and out most of the evening so her memories are incomplete, but her story is different. (R. at 809 (she did not remember the taxi ride back to back or coming across the brow but she did remember the quarterdeck), 822 (she did not remember text messaging FC2 Lopez from the chief’s mess).) She claims that in the dental office when she expressed concern about being in trouble, HMC Averell said something to the effect of “you know what you need to do.”

(R. at 831.) At the time, QMSN IA took this as a threat that if she did not have sex with HMC Averell she would be in trouble. (R. at 832.) QMSN IA claims there was no kissing, but she reported kissing to the forensic examiner who conducted her "rape kit." (R. at 870, 1158.) QMSN IA further testified that he then told her to turn around and pull down her pants. (R. at 831-32.) QMSN IA testified that she pulled down her pants, bent over a table, and HMC Averell then put on a purple condom and penetrated her vagina from behind. (R. at 832.) She does not remember most of the sexual act but claimed that he stopped before ejaculating when he heard a noise in passageway. (R. at 835.) After putting on their clothes, he checked the passageway and they both left the office. (R. at 834.)

QMSN IA claims that she complied with HMC Averell's request only because she was drunk, and that had she been sober, she would not have felt threatened. (R. at 832.) In fact, after the incident she told friends that she was "stupid" and that she never should have believed HMC Averell's alleged threat. (R. at 970, 974.) QMSN IA also testified that her fear was not reasonable. (R. at 891.)

Summary of Arguments

I.

Commander, U.S. Naval Forces Japan convened HMC Averell's court-martial. But another individual revised the convening order and preferred charges against HMC Averell. Because the record is silent on the reasons the Commander could not act, and because the record is silent on his replacement's authority to convene a general court-martial, this Court should order a *Dubay* hearing to determine if the court-martial had jurisdiction.

II.

Sexual assault accomplished by placing the victim in fear requires that the fear be objectively reasonable. A reasonable person in QMSN IA's position would not have been afraid of "being in trouble" even assuming HMC Averell made the statements alleged by QMSN IA because QMSN IA was not previously threatened by HMC Averell's behavior and her intoxication is irrelevant to the analysis. The evidence is factually and legally insufficient to sustain a conviction for Charge II. This Court should set aside the conviction with prejudice.

III.

The military judge erred by excluding evidence that the alleged victim was romantically and sexually involved with not just her boyfriend, but also a second man, Fire Controlman Second Class Lopez, at the time of the assault. The evidence

was constitutionally required to show QMSN IA's motive to fabricate to protect her relationship with FC2 Lopez and to show that she previously lied to her boyfriend to protect their relationship. This Court should set aside the sexual assault conviction with prejudice.

IV.

The record is not *verbatim* and not "complete" as required by Rule for Courts-Martial (R.C.M.) 1102 and Article 54, UCMJ, because the military judge failed to record the discussions held in an important R.C.M. 802 conference. Those discussions resulted in the exclusion of evidence that HMC Averell treated QMSN IA for an STD pursuant to M.R.E. 412. Further, the military judge erred by holding a motions session in his chambers. This Court cannot accomplish its appellate function because the record of trial is insufficient. This Court should order the convening authority to attempt to correct the record.

V.

The military judge abused his discretion by excluding evidence that HMC Averell treated QMSN IA for a sexually transmitted disease because the evidence was constitutionally required to impeach QMSN IA's credibility.

VI.

The military judge excluded the testimony of Seaman (SN) Haney, who saw QMSN IA at the barbeque and who believed she was

interested in having sex. SN Haney would have testified that she not only flashed her breasts at several people but that she made a sexual advance towards SN Haney and other people as well. That evidence is relevant and necessary because it makes it more likely that QMSN IA consented to sexual activity with HMC Averell and acted as he testified she did only a couple of hours later.

VII.

Senior leaders of the Navy, both civilian and military, have widely publicized their preferred outcomes for sexual assault cases. These statements created the appearance of unlawful command influence. The military judge's attempt to remedy the unlawful command influence present in HMC Averell's case was insufficient. This Court should dismiss the charges with prejudice.

Argument

I.

HMC AVERELL'S COURT-MARTIAL WAS IMPROPERLY CONVENED AND THE CHARGES WERE IMPROPERLY REFERRED BECAUSE CAPTAIN FALLER DID NOT HAVE THE AUTHORITY TO CONVENE A GENERAL COURT-MARTIAL.

Rear Admiral J.D. Cloyd, Commander, U.S. Naval Forces Japan, convened a general court-martial with GCMO 1-13 on 12 March 2013. Captain (CAPT) T.C. Faller referred charges against HMC Averell on 4 April 2013, signing as "Acting" Commander.

(Charge Sheet.) Then CAPT Faller, again signing as "Acting" Commander, amended the convening order on 19 July 2013 with General Court-Martial Amending Order 1B-13. After trial, Rear Admiral T.B. Kraft, signing as Commander, U.S. Naval Forces Japan, acted on HMC Averell's convictions and sentence. (GCMO No. 13-13, at 3.)

The trial counsel acknowledged CAPT Faller as the acting convening authority on the record when stating the jurisdictional data for the court-martial. (R. at 275.) The military judge also suggested that CAPT Faller was the chief of staff. (R. at 206.) However, the trial counsel did not offer any additional information on CAPT Faller's authority to convene a court-martial or on the absence of the actual Commander.

Standard of Review

Whether a court-martial had jurisdiction and was properly convened are "a question of law to be reviewed *de novo*" by this Court. *United States v. Harmon*, 63 M.J. 98, 101 (C.A.A.F. 2006).

Principles of Law

"A court-martial is the creature of statute, and as a body or tribunal, it must be convened and constituted in entire conformity with the provisions of the statute, or else it is without jurisdiction." *United States v. Kugima*, 36 C.M.R. 339, 341 (C.M.A. 1966) (citing *McClaughry v. Deming*, 186 U.S. 49, 62

(1902)). According to Article 22(a)(6), UCMJ, 10 U.S.C. § 822 (2012) a general court-marital may be convened by ". . . the commanding officer of a naval station or larger shore activity of the Navy beyond the United States." Under Article 22(a)(8), the Secretary of the Navy has also authorized "All flag or general officers, or their immediate temporary successors, in command of units or activities of the Navy or Marine Corps" to convene general courts-martial. Office of the Judge Advocate General, Manual of the Judge Advocate General, JAGINST 5800.7F, para. 0120(a)(1) (June 26, 2012).

A convening authority may not delegate the authority to convene a general court-martial. R.C.M. 201(b)(1) (It is a requisite that a court-martial must be convened by an official empowered to convene it.); R.C.M. 504(a)(4); *United States v. Bunting*, 15 C.M.R. 84, 87 (C.M.A. 1954) (citing *Runkle v. United States*, 122 U.S. 543 (1987)). But, successors to command may act as a convening authority. *United States v. Brown*, 39 M.J. 114, 117 (C.M.A. 1994); *Bunting*, 4 C.M.A. at 87; . The Navy Regulations discuss successors to command and their authority:

> 1. An officer who succeeds to command due to incapacity, death, departure on leave, detachment without relief or absence due to orders from competent authority of the officer detailed to command, has the same authority and responsibility as the officer who he or she succeeds.
>
> . . .

3. When an officer temporarily succeeding to command signs official correspondence, the word “Acting” shall appear below his or her signature.

U.S. Navy Regulations, Art. 1026 (1990); *see also* R.C.M. 103(6) (stating “convening authority” includes a commissioned officer in command for the time being and successors in command).

When a commander is temporarily absent from his command and another officer *properly* succeeds him, the latter officer may act as convening authority. *Kugima*, 16 C.M.A. at 183 (finding a successor to command may act with regard to military justice and administrative matters while the original convening authority retains operational command); *see also United States v. Jette*, 25 M.J. 16 (C.M.A. 1987) (finding violations of individual service regulations regarding succession to command not a jurisdictional issue). The Manual for Courts-Martial (MCM) empowers the individual services to provide for devolution of command in ways other than by order of a competent authority. R.C.M. 504(b)(1), discussion. In the Navy successors to command are determined in accordance with Chapter 10 of the U.S. Navy Regulations, (1991) by virtue of position and relative rank of the subordinate officers.

Discussion

The record in this case is void of any evidence that CAPT Faller properly succeeded to command. Since this is a jurisdictional question that cannot be answered within the four

corners of the record, this Court should order a *Dubay* hearing to determine 1) whether the commander was absent from command; and 2) whether CAPT Faller properly succeeded to command. *United States v. DuBay*, 17 C.M.A. 147 (C.M.A. 1976).

Article 22(a), UCMJ, and JAGINST 5800.7F, para. 0120(a)(1) clearly provide Commander, U.S. Forces Japan, with the authority to convene a general court-martial. What is not clear is whether RADM Cloyd was "absent from command" when CAPT Faller amended the convening authority and referred charges in this case. The Court of Military Appeals (CMA) and the Court of Appeals for the Armed Forces (CAAF) have considered the meaning of the concept "absent from command" many times.

In *United States v. Bunting*, the CMA found a convening authority was "absent from his command" when he attended armistice negotiations in Korea as the senior U.S. delegate and the Spokesman for the United Nations delegation. *Bunting*, 4 C.M.A. at 84. The CMA reasoned that even though he was Commander Naval Forces Far East at the time and Korea was within his command's geographic area of responsibility, being physically located outside of the area of command was not required. *Id.* at 88. The Court reasoned:

> The efficient operation of a military unit, especially in combat, requires that the commanding officer be in full and effective control of his organization. If his circumstances are such that he is unable to give his undivided attention and considered judgment to the

> functions of the command, there is certainly some basis for a succession of command.

Id. at 88. "The real issue is who actually functioned and was recognized as commander at the time of the relevant events." *Jette*, 25 M.J. at 19, (Everett, C.J., concurring (citing *United States v. Kalscheuer*, 11 M.J. 373 (C.M.A. 1981)). Here, the record is silent regarding the reasons the actual commander could not refer charges and amend the convening order in HMC Averell's case.

The record also fails to establish if CAPT Faller in fact "properly" succeeded to command. CAPT Faller signed the amended convening order and the charge sheet as "Acting" Commander.[3] But this single word under a signature is not dispositive. And signature authority is widely misunderstood.

It is also unclear what position CAPT Faller held prior to taking these actions. Further, his date of rank relative to other officers in the command is not established in the record, so it is impossible to apply Chapter 10 of the U.S. Navy Regulations to determine these issues. This Court cannot

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[3] The Naval Correspondence Manual states:

> In the absence of the commander/commanding officer/officer in charge, and where specifically authorized by law or regulation, an officer who temporarily succeeds to command shall sign official correspondence with the term "Acting" typed below their name.

SECNAV Manual M-5216.5, § 2-4, para. (5)(c) (Mar. 2010)

determine whether the charges were properly referred and the court-martial was properly convened based on a record that fails to explore the factual circumstances that prevented a convening authority from exercising his authority in this court-martial. But it is appropriate to remand such a case for further fact-finding. *See, e.g.*, *United States v. Duvall*, 7 M.J. 832 (N.C.M.R. 1977).

Conclusion

This Court should order a *Dubay* hearing to determine (1) whether RADM Cloyd was "absent" from command, and (2) whether CAPT Faller properly succeeded to command.

II.
THE GOVERNMENT HAD TO PROVE HMC AVERELL CREATED A "REASONABLE FEAR" IN THE VICTIM TO SUSTAIN A CONVICTION FOR CHARGE II, SEXUAL ASSAULT. HERE, THE FEAR WAS NOT OBJECTIVELY REASONABLE, AS ATTESTED BY THE ALLEGED VICTIM, SO THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUSTAIN A CONVICTION FOR CHARGE II.

QMSN IA testified, "My fear was not reasonable at all." (R. at 891.) "[I] complied [with the sexual act] due to lack of good judgment." (R. at 883.) "I believed him at the time--now I know I wouldn't have been in trouble." (R. at 832; Appellate Ex. LXIX, at 5.) She told other people that she felt stupid because she never should have believed HMC Averell's alleged threats. (R. at 974.)

The Government alleged that HMC Averell committed a sexual act on QMSN IA by placing her in fear of his military position in violation of Article 120(b)(3), UCMJ. (Charge Sheet.) In an Article 39(a), UCMJ, session Special Agent Godette testified that he believed the victim in this case was taken advantage of because she was drunk, not because she was threatened. (R. at 1319-20.) The military judge then gave his interpretation of the evidence, stating that there was a conflict about whether or not the victim was drunk (R. at 1324) but that, absent alcohol, the special agent believed she would have declined to have sex with HMC Averell and "escaped." (R. at 1327). The military judge then correctly stated that under the Government's legal theory of the case, the fear had to be such that "it wouldn't have mattered if she was drunk or sober." (R. at 1330.)

In response, the Government presented its theory of the case:

> [Due to her slight intoxication] less positional tyranny was required to get her to submit. She was not drunk enough, based on her testimony, based on the questions posed to her by NCIS or anybody else that constitutes substantial incapacitation. But she was drunk enough to lower the threshold of authority needed to get to be coercive, to be able to assert his position over her and that's the government's theory.

(R. at 1331.) In response, the military judge stated "ok" and called the members back to the courtroom. (R. at 1332.)

The military judge erred by failing to dismiss Charge II *sua sponte* because there is no lowered threshold under the constructive force doctrine and the victim's intoxication is irrelevant to a "reasonable fear." "Reasonable fear" is an objective standard under the plain meaning of the statute, case law, and when considering it in context of the U.S. code. The Government acknowledged that the evidence of fear was only established by proving QMSN IA's intoxication and was therefore not objectively reasonable. The evidence is factually and legally insufficient to sustain a conviction.

Standard of Review

This Court reviews questions of factual and legal sufficiency *de novo* as a matter of law. Art. 66(c), UCMJ, 10 U.S.C. § 866.

Principles of Law

The test for legal sufficiency is "whether considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all of the essential elements beyond a reasonable doubt." *United States v. Turner,* 25 M.J. 324, 325 (C.M.A. 1987). The test for factual sufficiency is "whether, after viewing the evidence in the record of trial and making allowances for not having personally observed the witnesses . . . this Court is convinced of the appellant's guilt beyond a reasonable doubt." *Id*.

Article 120(b), UCMJ (2012) states: “Any person subject to this chapter who- (1) commits a sexual act upon another person by- (A) threatening or placing that other person in fear. . . is guilty of sexual assault and shall be punished as a court-martial may direct.” Article 120(g)(7), UCMJ (2012) defines “Threatening or placing that other person in fear” as: “. . . a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another person being subjected to the wrongful action contemplated by the communication or action.” (emphasis added). Article 120 does not contain a definition of reasonable fear and there is surprisingly little case law dealing with this crime since its inception in the 2008 revisions to the code.

Discussion

QMSN IA’s fear was not reasonable and HMC Averell’s alleged threat that QMSN IA would be in trouble was not a “sufficient consequence” to inspire a reasonable fear because QMSN IA was frequently in trouble in the past. (R. at 1633-34, 1652.)

a. Prior to 2008 constructive force was not codified.

Prior to 2008, rape, under Article 120, UCMJ, required proof of two elements: 1) that the accused engaged in a sexual act; and 2) that the act was accomplished by force and without consent. Art. 120(a), UCMJ, 10 U.S.C. § 920 (2005). The force element could be accomplished by either physical force or by

constructive force. M.C.M., Pt. VI, para 45.c.1.b (2005); *see also*, *United States v. Leak*, 61 M.J. 234, 246 (C.A.A.F. 2005). Constructive force "consist[s] of expressed or implied threats of bodily harm." *See, e.g.*, *United States v. Hicks*, 24 M.J. 3, 6 (C.M.A. 1987); *United States v. Palmer*, 33 M.J. 7, 9 (C.M.A. 1991) ("Physical contact, however, is not the only way force can be established. Where intimidation or threats of death or physical injury make resistance futile, it is said that 'constructive force' has been applied, satisfying this element.").

These earlier versions of the MCM required victims to manifest lack of consent, unless,

> resistance would have been futile, where resistance is overcome by threats of death or great bodily harm, or where the victim is unable to resist because of the lack of mental or physical faculties. In such a case there is no consent and the force involved in penetration will suffice. All the surrounding circumstances are to be considered in determining whether a victim gave consent, or whether he or she failed or ceased to resist only because of a <u>reasonable fear</u> of death or grievous bodily harm.

MCM pt. IV, para. 45.c.1.b (2005) (emphasis added); *see also* Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook [hereinafter Benchbook], para. 3-45-1 n.6 "Constructive force--abuse of military power" (Sept. 30, 1996) (unchanged in 15 September 2002 edition). "Constructive force may be shown by proof of a coercive atmosphere that includes,

for example, threats to injure others or statements that resistance would be futile." *United States v. Simpson*, 58 M.J. 368, 377-79 (C.M.A. 2003).

The CMA "extended the application of the constructive-force doctrine to rape cases involving military relationships, but only when the accused sufficiently exploited the military relationship itself to exert a psychologically intimidating presence that could imply a threat of death or bodily harm." *United States v. Clark*, 35 M.J. 432, 438 (C.M.A. 1992) (Gierke, J., Dissenting) (describing the victim, a trainee on active duty for four months met the appellant, and sergeant first class on the day of the assault. He made personal remarks then ordered her to accompany him to an isolated storage shed that was pitch black. The accused was significantly larger than the victim. He locked the closed the door and had intercourse with her. She did not resist at first.) "Military relationships . . . create[] a unique situation of dominance and control where explicit threats and display of force by the military superior [are] not necessary" for rape. *United States v. Bradley*, 28 M.J. 197, 200 (C.M.A. 1989). But, disparity in rank alone was never enough to support a conviction under the theory of constructive force. *Id*.

Prior to the 2008 MCM, constructive force required a showing of fear of death or grievous bodily injury. M.C.M. Pt.

IV, para. 45.c.1.b (2005). Sexual intercourse induced by fear less than that of death of bodily injury could only have been charged as maltreatment of a subordinate or as sexual harassment. *See, e.g.*, *United States v. Osuna*, 56 M.J. 620 (C.G. Ct. Crim. App. 2001) (affirming a conviction for maltreatment charged in the alternative to rape for an implied threat to a trainee to hold her back from graduation from training if she did not submit to sexual activity.)

b. Prior to 2008 military courts required a victim's fear under a constructive force theory to be objectively reasonable.

Military courts required a victim's fear to be objectively reasonable when interpreting pre-2008 statutes. In *United States v. Leak*, a trainee at the Army's non-commissioned officers course, had sexual intercourse with her instructor three times in his office. 58 M.J. 869, 870-72 (A.C.C.A. 2003). The victim claimed that she feared he would get her kicked out of the school if she refused. *Id*. at 872. The ACCA found the victim "did not have a reasonable fear of death of grievous bodily injury, nor did she have a reasonable basis for her conclusion that resistance would be futile." *Id*. at 876. In a footnote the ACCA explained:

> Specialist M emphasized that the primary reason she did not resist sexual intercourse with appellant was her belief that he would cause her to be dismissed from PLDC. <u>This belief was not objectively reasonable</u> because: (1) appellant never threatened to dismiss SPC

> M from PLDC; (2) appellant was not in SPC M's rating or supervisory chain; (3) such authority was reserved to the PLDC Commandant; (4) SPC M had sufficient military and personal experience to be well aware of the limitations of appellant's military authority; and, (5) there was no evidence that action was initiated to dismiss SPC M's roommate from PLDC in response to SPC M's request that appellant take action against her roommate. In any event, SPC M's belief that appellant might cause her dismissal from PLDC does not equate to a reasonable fear of death or grievous bodily injury.

Leak, 58 M.J. at 876 n.11 (emphasis added). The CAAF reviewed this opinion, and, while overturning another portion of the opinion, took no issue with the objective standard applied by the ACCA. *United States v. Leak*, 61 M.J. 234 (C.A.A.F. 2005).

Other cases have similarly rejected a constructive force theory finding a victim’s fear to be objectively unreasonable. In *United States v. Bright*, the CAAF found a reasonable fact finder could not find lack of consent under a theory of constructive force where a trainee repeatedly met her drill instructor at a hotel and engaged in sexual intercourse with him. 66 M.J. 359, 360 (C.A.A.F. 2008). The court reasoned that the recruit agreed to meet him at the various hotels over the phone and outside of his physical presence so she could not have had a reasonable fear of physical violence if she refused. *Id.* at 364 (rejecting constructive force theory but affirming theory of physical force).

This Court still considers the totality of the

circumstances to determine if a victim's fear is objectively reasonable. "[W]hen the accused's actions and words or conduct, coupled with the surrounding circumstances, create a reasonable belief in the victim's mind that death or physical injury would be inflicted on her and that further resistance would be futile, the act of sexual intercourse has been accomplished by force." *Simpson*, 58 M.J. at 379.

c. The 2008 and 2012 revisions to the code did not alter the requirement of an objectively reasonable fear.

The 2008 and 2012 revisions to Article 120 of the code expanded the offense of rape to codify the concept of "constructive force" separately from physical force, under the theory of "by threat or by causing fear." Art. 120(t)(6-7), UCMJ, 10 U.S.C. § 920(t)(6-7) (2008); Art. 120(g)(7), 10 U.S.C. § 920(g)(7) (2012).[4] These revisions also expanded the concept of constructive force by including threats of harm less than death or grievous bodily injury, thereby including harm to a career. Art. 120(c)(1)(A) (2008); Art. 120(b)(1)(A) (2012). These lesser threats are now charged under a theory of "sexual assault" rather than "rape." *Id*. Both still require a "reasonable fear." *Id*.

Neither the code nor the MCM provide a definition of "reasonable fear." But the term is not ambiguous. "Reasonable

[4] Article 120 changed in many other ways. For example, it no longer requires a victim to resist.

fear" is an objective standard which considers whether a reasonable person in the same position as QMSN IA would have been in fear of reprisal from HMC Averell on 20 October. *See, e.g.*, *State v. Wooten*, 206 N.C. App. 494, 501-502 (N.C. Ct. App. 2010) (requiring the judge to instruct the jury that reasonable fear is an objective standard); *State v. Talley*, 122 Wn.2d 192, 213 (Wash. 1993) (finding "reasonable fear" in a harassment statute to be an objective standard) *superceded by statute, see State v. Haberman*, 105 Wn. App. 926, 931 (Wash. Ct. App. 2001) (statutes explicitly states "reasonable fear" is an objective standard); *Parker v. Commonwealth*, 24 Va. App. 681, 688 (Va. Ct. App. 1997) (noting in state stalking statute "reasonable fear" is an objective standard); *State v. Ricci*, 507 A.2d 587, 588 (Me. 1986) (finding state rape statute set forth a subjective-objective standard for constructive force-- "the victim must in fact fear . . . and that fear must be reasonable under the circumstances."); *Smith v. Martens*, 279 Kan. 242, 251 (Kan. 2005) (interpreting "reasonable fear" in state stalking statute as an objective standard); *United States v. Smith*, 685 A.2d 380, 386 (D.C. 1996) (noting "reasonable" fear in stalking statute is an objective statute). This Court need not consider other sources of law because "reasonable fear" is clearly an objective standard. *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1186

(11th Cir. 1997) (where a statute is not ambiguous there is no need to consider the cannons of construction to derive meaning).

Even if this Court finds the term ambiguous and considers the cannons of construction, an objective standard is still required. This Court would first consider the context of the words and look to other provisions of the code to derive meaning. The reasonable fear concept is used in federal asylum law in Chapter 8 of the code. *See* 8 U.S.C. § 1158 (2012); *Rodriguez-Rivera v. U.S. Dep't of Immigration and Naturalization*, 848 F.2d 998, 1002 (9th Cir. 1988). To establish eligibility for asylum based on a well-founded fear of persecution, asylum applicants must show both a genuine subjective fear of persecution and an objectively reasonable fear. *Id.*; *see also Ramsameachire v. Ashcroft*, 357 F.3d 169, 178 (2d Cir. 2004). Regarding the objective standard, "[a]n applicant has established a well-founded fear if a reasonable person in the same circumstances would have such a fear." *Abankwah v. INS*, 185 F.3d 18, 22 (2d Cir. 1999).

Reasonable fear is also used in the Federal Interstate Stalking statute, 18 U.S.C. § 2261A (2012) and the stalking statute under the UCMJ, Article 120a, UCMJ (2012). In 2000, the Supreme Court denied a petition for *certiorari* in a Fourth Circuit case which analyzed the federal stalking statute and applied an objective "reasonable fear" standard. *See Young v.*

United States, 529 U.S. 1081 (2000); *see also United States v. Saunders*, 59 M.J. 1, 8 (C.A.A.F. 2003) (considering the reasonable person standard applied in the federal statute when considering an Article 134 offense for stalking).

Further, the CAAF's application of an objective standard for constructive force in *United States v. Leak* prior to the 2008 amendments as discussed above, is still good law. 61 M.J. 234. Here, witnesses disagreed about whether or not the alleged victim was intoxicated, and the Government conceded that she was not so intoxicated as to be incapacitated. (R. at 194, 1331.) But the victim's intoxication is irrelevant. It is well established that the "reasonable person standard" does not contemplate a reasonable, intoxicated person. When considering a mistake of fact defense, the Military Judge's Benchbook instructs members,

> On the question of whether the accused's belief was reasonable, you may not consider the accused's intoxication, if any, because a reasonable belief is one that an ordinary prudent sober adult would have under the circumstances of this case. Voluntary intoxication does not permit what would be an unreasonable belief in the mind of a sober person to be considered reasonable because the person is intoxicated.

Dep't of Army, Pam. 27-9, *Military Judge's Benchbook*, P5-11-2 "Voluntary Intoxication" (15 Sep 2002). The same standard must be applied to the belief of an alleged victim. The issue is whether a reasonable and sober person would have been afraid of

HMC Averell in QMSN IA's position. To find otherwise (i.e., requiring only a subjective fear) would be to create a strict liability crime where Congress has not so legislated.

d. A reasonable sober person, considering the totality of the circumstances, would not have been afraid of HMC Averell in QMSN IA's position.

Even assuming all of QMSN IA's testimony was true, QMSN IA's fear was not reasonable. For purposes of this section only, we will assume the truth of QMSN IA's testimony, notwithstanding the fact that the members called IA's credibility into question by acquitting HMC Averell of sexual harassment.[5] According to QMSN IA these are the totality of the circumstances:

QMSN IA considered HMC Averell a trusted mentor who regularly stood up for her with other chiefs. (R. at 671, 786.) QMSN IA was a "troubled sailor" who went to the disciplinary review board (DRB) two or three times and had her advancement withheld. (R. at 895, 1083, 1089.) She was loud, had issues with military bearing, received several written counselings, and

[5] QMSN IA's testimony regarding the timing of the events of 20 October 2012 is also different from everyone else's. After leaving medical, QMSN IA testified that she went to the chief's mess with HMC Averell. (R. at 815-20.) QMSN IA testified she then went directly from the chief's mess to the dental office with HMC Averell because he followed her. (R. at 826.) In fact, from the chief's mess she went to berthing alone where HMC Averell, BM1 Hill, and PS3 Leslie all saw her. (R. at 932-33.)

struggled to correctly execute her duties with regards to colors on the barge. (R. at 1052, 1064, 1078, 1083, 1365-66, 1498.)

HMC Averell had a great reputation among the ship's crew. (R. at 1098, 1115, 1463.) He was known as approachable and a very good mentor. (R. at 786.) According to QMSN IA, HMC Averell made her uncomfortable in the past by making sexual comments to her (R. at 850), sharing parts of his own sex life with her, and making other personal inquiries of QMSN IA about her sex life (R. at 788).[6] QMSN IA testified that HMC Averell attempted to get her alone in secluded areas of the ship or barge, like the chief's mess. (R. at 794, 800.) On one occasion, QMSN IA claimed he told her to take off her clothes while in chief's berthing and when she refused, he called her "chicken shit" and she left unscathed. (R. at 795-96.) After each one of these uncomfortable experiences, QMSN IA testified that HMC Averell treated her normally, never seemed upset or angry with her, and never held her sexual rebuffs against her personally or professionally. (R. at 797-98.)

Even after all of these uncomfortable experiences allegedly took place, QMSN IA still considered HMC Averell a trusted mentor. (R. at 926, 999, 1010.) Furthermore, when she was in

[6] It is unclear to what extent these comments may have been related to HMC Averell's treatment of QMSN IA for a sexually transmitted disease. As discussed in AOEs IV and V, HMC Averell was prohibited from exploring this issue at trial.

need of medical attention on 20 October 2012, QMSN IA trusted only HMC Averell to conduct the physical exam and refused to let even the medical officer touch her. (R. at 813, 926, 999, 1010.) According to QMSN IA, later on the night of 20 October 2012, HMC Averell took her to the chief's mess and touched her knee. (R. at 821, 864.) Then, when left alone in the chief's mess, QMSN IA sent a text message to one of her boyfriends who told her to leave. (R. at 822; Pros. Ex. 1.) While QMSN IA first testified that she did not remember sending the text message, she later testified that she sent the message because she was scared. (R. at 824.) Nevertheless, QMSN IA felt free to leave and was not so intimidated that she was unable to do so. (R. at 825.)

Prior to their visit to the dental office, HMC Averell specifically told QMSN IA at least twice she would not get in trouble. (R. at 820 (QMSN IA testified he said she would not get in trouble for this "this dumb shit" after leaving berthing); 1018 (LT Whitlow also heard HMC Averell tell QMSN IA she shouldn't get in trouble while at medical).)

QMSN IA claimed that HMC Averell took her into the dental spaces while they were talking about her potentially being in trouble. (R. at 826.) QMSN IA claimed, HMC Averell said something to the effect of "you know what you need to do," which she took to mean sex. (R. at 831.) HMC Averell in no way

blocked the door, physically restrained QMSN IA, or physically intimidated QMSN IA. (R. at 878.) He did not yell at her and she neither tried to leave, nor told HMC Averell that she wanted to leave. (R. at 867.) QMSN IA stated that HMC Averell asked her to pull her pants down and turn around--to which QMSN IA complied with no indication to HMC Averell that she did not want to participate in the sexual activity. (R. at 887-88.)

At the time of the alleged assault, QMSN IA did not have a direct senior-subordinate relationship with HMC Averell because she did not work for him and had recently transferred out of his duty section. (R. at 1252.) After the assault, QMSN IA repeatedly said to different people that she felt stupid because she should have known that she would not have been in trouble. (R. at 970-74.) QMSN IA also testified that had she been sober she would not have been afraid. (R. at 866 (regarding a previous occasion on which HMC Averell told her to pull down her pants and she refused, "I was sober.").)

"Under some circumstances, constructive force can be based on the intimidation inherent in the domineering relationship of a senior noncommissioned officer to a lower ranking victim." *United States v. Cauley*, No. 9300175, 1995 CCA LEXIS 441, *14 (N-M. Ct. Crim. App. Apr. 7, 1995) (in *dicta* this Court rejected a theory of constructive force by virtue of rank alone where the noncommissioned officer in charge of a recruit depot had sexual

intercourse with a Marine awaiting training but affirmed convictions on a theory of physical force) (citing *Clark*, 35 M.J. at 432). But, "rank disparity alone is not sufficient to constitute constructive force." *Simpson,* 58 M.J. at 376.

In *Simpson* the CAAF adopted seven factors identified by the ACCA that created an implied threat in that case. All of the factors indicate a requirement of objective reasonableness:

> (1) the appellant's physically imposing size; (2) his reputation for being tough and mean; (3) his position as a noncommissioned officer; (4) his actual and apparent authority over each of the victims in matters other than sexual contact; (5) the location and timing of the assaults, including his use of his official office and other areas within the barracks in which the trainees were required to live; (6) his refusal to accept verbal and physical indications that his victims were not willing participants; and (7) the relatively diminutive size and youth of his victims, and their lack of military experience.

58 M.J. at 377 (citing *United State v. Simpson*, 55 M.J. 674, 707 (A.C.C.A. 2001)). In this case, there was no evidence that HMC Averell was physically imposing or intimidating to QMSN IA. To the contrary, she was comfortable with him as her mentor and as her medical provider--so much so that she met with him alone regularly as a mentee and he conducted two pelvic exams on her. (R. at 1518.) QMSN IA testified that she never told him to stop discussing sexual topics with her or that he made her

uncomfortable in any way. (R. at 799.)[7] The Government offered only evidence of QMSN IA's subjective fear and HMC Averell's rank and position to support the conviction. As in *Simpson*, those facts alone are not enough to constitute constructive force.

A reasonable person in QMSN IA's position would not be afraid of professional reprisal considering the totality of the circumstances in this case. In fact, when QMSN IA returned to a reasonable state of mind she admitted her previous fear was unreasonable and that she never would have been afraid if she were sober. QMSN IA testified, (R. at 891 ("My fear was not reasonable at all."), 883 ("[I] complied [with the sexual act] due to lack of good judgment."), 813 ("I was being ridiculous."), 832 ("I believed him at the time--now I know I wouldn't have been in trouble."), 974 (calling herself stupid because she never should have believed HMC Averell.); Appellate Ex. LXIX, at 5.)

Further, QMSN IA was not a stranger to "trouble." Such a vague threat was not substantial enough to create a reasonable fear in these circumstances. Art. 120(g)(7). The evidence is

[7] As discussed in AOEs IV and V much of QMSN IA's discomfort could be related to HMC Averell's treatment of her STD and the embarrassment that likely accompanied the conversations related to the treatment.

factually and legally insufficient to sustain a conviction for Charge II, sexual assault.

e. The military judge failed to instruct the members on this requirement of objectivity, which prejudiced HMC Averell.

QMSN IA testified that her fear that she would get in trouble unless she had sex with HMC Averell was unreasonable. “My fear was not reasonable at all.” (R. at 891.) “[I] complied [with the sexual act] due to lack of good judgment.” (R. at 883.) “I was being ridiculous.” (R. at 813.) “I believed him at the time- now I know I wouldn’t have been in trouble.” (R. at 832.) She testified that on a previous occasion when HMC Averell told her to pull her pants down she did not do it because “I was sober.” (R. at 866.) The record is also rife with other evidence of QMSN IA’s irrationality on 20 October. (R. at 922, 1049 (yelling and cussing on the quarterdeck), 925-26 (refusing to let the medical officer examine her for injuries), 929 and 1001 (running from the medical officer to smoke a cigarette only to fall down a second ladderback), 1244 (karate kicking a rack in berthing to mess it up).) But, nevertheless, QMSN IA testified that at the time, in her drunken state she was subjectively afraid. (R. at 888.)

The military judge should have instructed the members to convict HMC Averell of sexual assault under a theory of constructive force only if they found QMSN IA’s fear was

objectively reasonable. (R. at 1734-35.) Based on the evidence presented and the lack of an instruction, the members convicted HMC Averell based on QMSN IA's unreasonable and subjective fear, because the evidence did not support an objectively reasonable fear.

Conclusion

Because QMSN IA's fear was not objectively reasonable this Court cannot sustain a conviction for Charge II, sexual assault. The Government could have pursued other charges under the UCMJ based on QMSN IA's statements such as cruelty or maltreatment of a subordinate under Article 93, UCMJ, 10 U.S.C. § 893 (2012),, dereliction of duty, or an additional specification of sexual harassment under a *quid pro quo* theory. Dep't of the Navy Policy on Sexual Harassment, SECNAV Instruction 5300.26D, Encl. 1, at 2 (Jan. 3, 2006) (Appellate Ex. LVII.)

This Court should set aside the conviction for Charge II with prejudice. The evidence is factually and legally insufficient to sustain the conviction.

III.

AN ACCUSED IS ENTITLED TO CONFRONT THE WITNESSES AGAINST HIM WITH EVIDENCE OF A MOTIVE TO FABRICATE. HERE, THE ALLEGED VICTIM WAS MOTIVATED TO FABRICATE THE ALLEGED ASSAULT TO PROTECT AN ILLICIT RELATIONSHIP SHE HAD AT THE TIME WITH A MAN OTHER THAN HER BOYFRIEND. THE MILITARY JUDGE ERRED BY EXCLUDING THIS IMPORTANT EVIDENCE.

QMSN IA dated FC2 Lopez. (R. at 792.) When they broke up she began to date Engineman Third Class (EN3) Walwick. (R. at 982.) But, QMSN IA continued to have a romantic and sexual relationship with FC2 Lopez but did not inform EN3 Walwick of this ongoing relationship. (R. at 76, 663.) FC2 Lopez was a large part of her life. He did not testify at trial. However, QMSN IA testified about him. She said HMC Averell caught FC2 Lopez sitting with her on the quarterdeck when she was supposed to be on watch. (R. at 792, 1415.) She told the members that she went to DRB for kissing FC2 Lopez in front of the Commodore. (R. at 895.) And, as discussed below, he was very involved in the events of 20 October.

On 18 June 2013, the defense filed a motion pursuant to Military Rule of Evidence (M.R.E.) 412, notifying the Government that it intended to offer evidence of QMSN IA's relationship with Fire Controlman Second Class (FC2) Lopez, an ex-boyfriend with whom she was cheating on her current boyfriend, EN3 Warwick. (Appellate Ex. II.) Specifically, the defense wished to offer evidence that 1) the DNA of FC2 Lopez was present in QMSN IA's vagina after the alleged assault, 2) evidence of QMSN IA's sexual and romantic relationship with FC2 Lopez, and 3) evidence that IA previously lied to her boyfriend about FC2

Lopez to protect their relationship. (Appellate Ex. II.)[8] The Government opposed this motion. (Appellate Ex. XI.)

The military judge first reserved ruling on the motion naming it a "close call" but later excluded all evidence of the romantic and sexual relationship with FC2 Lopez. (R. at 90, 198-99, 695.) He found the fact that QMSN IA lied to her boyfriend about FC2 Lopez to protect her relationship with EN3 Walwick had no bearing on the current proceedings, calling the evidence "utterly irrelevant." (R. at 695.) He did not address the defense's argument that QMSN IA had a motive to lie about a consensual sexual relationship with HMC Averell to protect her relationships with EN3 Warwick and FC2 Lopez. (*See* Appellate Ex. II, at 4-5.)

The military judge's ruling denied HMC Averell's Sixth Amendment right to Confrontation by limiting his right to fully and adequately cross-examine the key witness against him. HMC Averell was unable to elicit the importance of the relationship with FC2 Lopez to QMSN IA on cross-examination. Further, HMC Averell was not permitted to elicit QMSN IA's prior dishonesty

[8] The Defense filed a supplemental motion pursuant to M.R.E. 412 that is not relevant to this assignment of error. (Appellate Ex. LVI.)

related to a consensual sexual relationship that was designed to protect her relationship with EN3 Warwick.[9]

Standard of Review

This Court reviews a military judge's decision to admit evidence for an abuse of discretion. *United States v. Banker*, 60 M.J. 216, 223 (C.A.A.F. 2004).

Principles of Law

a. The Sixth Amendment right to Confrontation.

The accused's Sixth Amendment right "to be confronted with the witnesses against him" necessarily implies "the right to conduct reasonable cross-examination." *Olden v. Kentucky*, 488 U.S. 227, 231 (1988) (citing *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974)). When a military judge excludes evidence of bias, the exclusion raises issues regarding an accused's Sixth Amendment right to confrontation and if the military judge precludes the accused from exploring an entire relevant area of cross-examination there is a Sixth Amendment violation. *United States v. Moss*, 63 M.J. 233 (C.A.A.F. 2006). The exposure of a witness's motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. *United States v. Carruthers*, 64 M.J. 340, 341 (C.A.A.F. 2007).

[9] HMC Averell does not contest the military judge's ruling with regard to the DNA evidence.

However, the Confrontation Clause of the Sixth Amendment does not prevent a trial judge from imposing limits on a defense counsel's inquiry into the potential bias of a prosecution witness. *Id*. Trial judges retain wide latitude insofar as the Confrontation Clause is concerned, to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or only marginally relevant. *Id*.; *see also United States v. Sullivan*, 70 M.J. 110 (C.A.A.F. 2011). The military judge may restrict cross-examination when the probative value of the evidence sought would be substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members. M.R.E. 403; *Carruthers*, 64 M.J. at 341; *see, e.g.*, *United States v. Smith*, 68 M.J. 445 (C.A.A.F. 2010) (even assuming that evidence that the victim was previously involved in consensual sexual relations with an enlisted member, knowledge of the exact nature of her indiscretion in relation to the other issues in the case was not important where the military judge allowed appellant to present a fairly precise and plausible theory of bias, i.e., that the victim lied to preserve a secret which if revealed could have an adverse impact on her military career, including possibly disciplinary action under the UCMJ). But, a military judge's discretionary authority to limit cross-

examination arises only after sufficient cross-examination has been permitted as a matter of right. *Id*. at 344.

An accused's right to confrontation is violated when a reasonable jury might have received a significantly different impression of the witness's credibility had defense counsel been permitted to pursue his proposed line of cross-examination. *United States v. Jasper*, 72 M.J. 276 (C.A.A.F. 2013) (considering evidence gleaned amidst pastor-parishioner privilege). Whether sufficient cross-examination has been permitted depends on whether the witness's motivation for testifying has already been exposed and further inquiry would be marginally relevant at best and potentially misleading. *Id*.

b. M.R.E. 412

M.R.E. 412 renders inadmissible in any proceeding for an alleged sexual offense, "evidence offered to prove that any alleged victim engaged in other sexual behavior," or "evidence offered to prove any alleged victim's sexual predisposition." M.R.E. 412(a)(1-2). There are three exceptions but only one is relevant in this case: "when exclusion would violate the constitutional rights of the accused." M.R.E. 412(b)(1)(C).[10]

[10] The other exceptions are: evidence of specific instances of sexual behavior by the victim offered to prove that someone other than the accused was the source of the semen, injury, or other physical evidence, M.R.E. 412(b)(1)(A); and "specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the

M.R.E. 412 is intended to shield alleged victims of sexual assaults "from the often embarrassing and degrading cross-examination and evidence presentations common to sexual offense prosecutions." *United States v. Gaddis*, 70 M.J. 248, 252-53 (C.A.A.F. 2011) (citing MCM, Analysis of the Military Rules of Evidence app. 22, at A22-35 (2008 ed.)). But, where evidence is relevant, material, and favorable to the defense, such evidence is "constitutionally required to be admitted." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982).

Discussion

HMC Averell should have been permitted to elicit from QMSN IA that she had an ongoing romantic and sexual relationship with FC2 Lopez that was important to her, and that could have been damaged by engaging in consensual sex with HMC Averell. HMC Averell further should have been permitted to impeach QMSN IA's truthfulness with her history of lying about consensual sexual activity to protect her relationship with EN3 Walwick.

a. QMSN IA valued her relationship with FC2 Lopez and feared losing it after she had consensual sexual intercourse with HMC Averell.

FC2 Lopez knew QMSN IA spent a great deal of time with HMC Averell and that he acted as her mentor and protector. (R. at 792, 798, 1087.) QMSN IA needed to assuage the suspicions of

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accused to prove consent or by the prosecution," M.R.E. 412(b)(1)(B).

FC2 Lopez, her lover. She told FC2 Lopez that HMC Averell's behavior made her uncomfortable but told him not to tell anyone. (R. at 798, 850.) In fact, QMSN IA did not even tell her best friend, PS3 Leslie, that HMC Averell was making her uncomfortable. (R. at 950.)

Then on 20 October 2012 QMSN IA was in trouble once again and she made a big production of having HMC Averell called back to the ship to give her a medical exam. (R. at 999.) It was likely that FC2 Lopez, a member of the crew, would hear that QMSN IA was again spending more time with HMC Averell. To assuage his suspicions she periodically contacted FC2 Lopez throughout the night. (R. at 822, 827, 937, 987.) LT Whitlow testified that during his medical examination of QMSN IA, she handed him the phone and that FC2 Lopez was on the phone. (R. at 927, 1014.) PS3 Leslie also testified that she saw the name "Peter" on QMSN IA's phone earlier in the night but did not know at the time that it was FC2 Lopez. (R. at 963.) Then, QMSN IA texted FC2 Lopez from the chief's mess. QMSN IA first claimed she did not remember sending the text message, but then testified that she sent it because she was scared (R. at 824). It said "In chief's mast. Help me." (Pros. Ex. 1.) FC2 Lopez responded, "get out of there now." (Pros. Ex. 1.)

Then, after having consensual sexual intercourse with HMC Averell in the dental office, she realized her choices could

cost her the relationship with FC2 Lopez if he found out. QMSN IA called him in remorse and reported the event as a sexual assault--this was her first report of sexual assault. (R. at 837.) Out of concern of losing their relationship, and because she was in an irrational state of mind, QMSN IA hyperventilated. (R. at 841.) Cross-examination on this motive to fabricate was very relevant. Importantly, QMSN IA did not seem to be in contact with MM3 Walwick, her boyfriend, at all on 20 October. The military judge denied HMC Averell the right to confront his accuser by excluding this evidence.

Denying such evidence in similar cases was error. For example, in *Olden*, the accused dropped the alleged victim off at her boyfriend's house after a sexual encounter. 488 U.S. at 229-30. Her boyfriend saw the victim with the accused and the victim immediately claimed the accused raped her. *Id*. at 229. Both the victim and her boyfriend were married to other people at the time of the incident. *Id*. To support his defense of consent, *Olden* sought to admit evidence of the victim's relationship with her boyfriend to establish her motive to fabricate to protect her illicit relationship with her boyfriend, rather than her husband. *Id*. at 229-30. The Supreme Court found denial of "cross-examination designed to show a prototypical form of bias on the part" of a witness violated the Confrontation Clause of the Sixth Amendment. *Id*. at 231; *United*

States v. Hall, 58 M.J. 90 (C.A.A.F. 2003) (the right to cross-examination is at the core of the Confrontation Clause). The Court based its analysis on several factors:

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Olden, 488 U.S. at 233 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)).

The record here "discloses noncumulative, uncontradicted, impeachment evidence which was relevant not only to a material issue in this case but the dispositive issue in this case - - the victim's credibility." *United States v. Williams*, 37 M.J. 352, 357 (C.M.A. 1993) (citations omitted); *see generally United States v. Thomas*, 11 M.J. 135, 139 n.1 (1981) (Everett, C.J., concurring in part and dissenting in part) (citing earlier federal cases). QMSN IA's credibility was central to the Government's case. She first reported this incident to FC2 Lopez, a man with whom she was in an illicit relationship and on whom she relied heavily for advice and support. Before the report, FC2 Lopez was aware QMSN IA spent a lot of time with HMC Averell on 20 October. No other evidence presented at trial brought the nature of her relationship

with FC2 Lopez to light. This evidence was crucial to impeach the credibility of the Government's star witness.

b. Evidence that QMSN IA previously lied to EN3 Walwick about a consensual sexual relationship with FC2 Lopez to protect those relationships was constitutionally required to impeach her credibility and to establish her motive to fabricate.

Here, evidence that QMSN IA was previously untruthful about a sexual relationship with FC2 Lopez in order to protect her relationship with MM3 Walwick, is relevant. HMC Averell's theory of the case was consent. The fact that QMSN IA previously lied to MM3 Walwick about a consensual relationship with FC2 Lopez makes it far more likely that she lied about a consensual relationship with HMC Averell to again protect her relationships with FC2 Lopez and MM3 Walwick. This evidence was constitutionally required to be admitted because it tests her veracity and exposes a motive to fabricate.

c. The evidence is relevant, material, and favorable to the defense.

As in *Olden* and *Williams*, the evidence of QMSN IA's illicit relationship with FC2 Lopez here was relevant to provide a reason for her giving false testimony -- she fabricated the charge to protect her relationships with FC2 Lopez and EN3 Walwick. *Williams*, 37 M.J. at 360; *Olden*, 488 U.S. at 232. "It is well settled that 'the exposure of a witness'[s] motivation in testifying is a proper and important function of the

constitutionally protected right of cross-examination.'" *Collier*, 67 M.J. at 352 (quoting *Davis v. Alaska*, 415 U.S. at 316-17).

This evidence was also material and would affect the judgment of the trier of fact because QMSN IA was central to the Government's case. *C.f. Williams*, 37 M.J. at 360; *Olden*, 488 U.S. at 233; *United States v. Colon-Angueira*, 16 M.J. 20, 26-27 (C.M.A. 1983). The Government's case was entirely dependent on QMSN IA's credibility because only she and HMC Averell were present in the dental office on 20 October.

Finally, the evidence was favorable to the defense because the case against HMC Averell was far from overwhelming and the excluded evidence could very well have shifted the outcome in HMC Averell's favor. *Williams*, 37 M.J. at 360; *Olden*, 488 U.S. at 233; *Colon-Angueira*, 16 M.J. at 27. The members heard repeated references to FC2 Lopez throughout the trial. If the members had also heard that QMSN IA has an ongoing romantic relationship with FC2 Lopez and was motived to protect an ongoing relationship with the person to whom she first reported, it could very well have changed the outcome of this case.

d. The evidence is far more probative than prejudicial.

Notwithstanding M.R.E. 412(c)(3), this Court must consider whether the probative value of the evidence outweighs "the ordinary countervailing interests reviewed in making a determination as to whether evidence is constitutionally required." *Gaddis*, 70 M.J. at 254 (finding that the alleged victim's privacy interests are only one consideration for the military judge even if M.R.E. 412(c)(3) seems to suggest otherwise); *United States v. Ellerbrock*, 70 M.J. 314, 318 (C.A.A.F. 2011).

Here, QMSN IA's romantic and sexual relationship with FC2 Lopez was very probative of QMSN IA's credibility and her motive to fabricate. QMSN IA repeatedly turned to FC2 Lopez for emotional support and advice so she clearly regarded the relationship highly. There was no evidence that she similarly relied on MM3 Walwick. Evidence of cheating on a boyfriend would not have been distracting to the members. As the military judge understood, these are young people who do not quite have their relationships figured out yet. (R. at 679-80. ("She just said in front of God and everyone, hi, I was playing two guys against each other. I'm a young lady. I have haven't determined what I wanted to do by way of dating either of them. Last time I looked that was a young lady's prerogative. For

heaven's sake, she's 21 and 20 at the time.") It would be far from distracting to the members. Further, this evidence would have explained the multiple references to FC2 Lopez throughout the record. The evidence is far more probative than prejudicial. This evidence was constitutionally required to be admitted.

Having concluded that this evidence is constitutionally required, this Court must assess the five *Van Arsdall* factors to determine whether the military judge's error was harmless: 1) the importance of the testimony; 2) whether the testimony was cumulative; 3) the presence or absence of corroborating or contradictory evidence on material points; 4) the extent of cross-examination otherwise permitted; and 5) the overall strength of the prosecution's case. *Ellerbrock*, 70 M.J. at 320 (citing *Van Arsdall*, 475 U.S. at 684); *United States v. Savala*, 70 M.J. 70 (C.A.A.F. 2011).

The Government's case was based entirely on the credibility of QMSN IA. The excluded evidence was not cumulative as no other evidence brought these biases to light. The Government also opened the door by eliciting admitting text messages to Lopez and testimony from victim that she told FC2 Lopez about her issues with HMC Averell. (R. at 822, 824.) The error of

the military judge was not harmless beyond a reasonable doubt because this evidence very well could have changed the outcome of this trial.

Conclusion

This Court should set aside HMC Averell's conviction of Charge II, sexual assault with prejudice.

IV.
THE RECORD IN THIS CASE IS NOT VERBATIM OR COMPLETE BECAUSE THE MILITARY JUDGE FAILED TO SUMMARIZE AN IMPORTANT SESSION PURSUANT TO R.C.M. 802 FOR THE RECORD.

The Government charged HMC Averell with sexually harassing QMSN IA by discussing sexual topics with her and telling her to remove her clothing when they were alone. (Charge Sheet.) Related to the conversations about sex, QMSN IA claimed that HMC Averell repeatedly asked her about whether she was sexually active, about her birth control, and what sexual positions she liked. (R. at 787, 789, 850.)

At trial HMC Averell testified on his own behalf. When asked about the sexual comments, HMC Averell was in a tough position. He expressed that he was bound by privilege not to discuss his medical treatment of QMSN IA. (R. at 1406.) The Government requested an Article 39(a) session to discuss the testimony before it was presented to the members. (R. at 1408.) During the Article 39(a) session the military judge ordered the counsel into his chambers for an R.C.M. 802 session. (R. at

1408.) The contents of the session were not adequately summarized for the record. (R. at 1409.) However, after the session, the Government withdrew the portion of Charge I that accused HMC Averell of talking to QMSN IA about sex. (R. at 1409.) The military judge prohibited HMC Averell from testifying about STDs (R. at 1521) and instead only permitted HMC Averell to say that he discussed her private life with her (R. at 1524).

From the instructions given on the record, the gist of the excluded evidence seems to be that HMC Averell performed two pelvic exams on QMSN IA when she first arrived on the ship presumably because she had an STD. (*See* R. at 1518.) Seemingly, as a result of this treatment HMC Averell discussed safe sex and the use of condoms with QMSN IA.

As a direct result of that R.C.M. 802 session, the military judge excluded the use of the word “STD” and any evidence pertaining to that subject. (R. at 1521.) But, the basis for this ruling and content of the excluded evidence is unclear from the record. Because the military judge failed to adequately summarize this session, the record is incomplete and not *verbatim* and this Court cannot review this record as required by Article 66, UCMJ.

Standard of Review

Whether a record is complete under Article 54 or *verbatim* under R.C.M. 1103 are questions of law which this Court reviews *de novo*. *United States v. Gaskins*, 72 M.J. 225, 229 (C.A.A.F. 2013) (citing *United States v. St. Blanc*, 70 M.J. 424, 427 (C.A.A.F. 2012)).

Principles of Law

R.C.M. 1103 requires the Government to produce a *verbatim* record of trial for general courts-martial in which the accused receives a punitive discharge. R.C.M. 1103(b)(2)(B). Art. 54, UCMJ, 10 U.S.C. § 854 (2012) requires the preparation of a "complete record" of the proceedings in a general court-martial where "the sentence adjudged includes death, a dismissal, a discharge, or (if the sentence adjudged does not include a discharge) any other punishment which exceeds that which may otherwise be adjudged by a special court-martial." Art. 54(c)(1)(A), UCMJ.

"*Verbatim*" and "complete" are distinct concepts. *Gaskins*, 72 M.J. at 229-30 (citing *United States v. McCullah*, 11 M.J. 234, 236 (C.A.A.F. 1981) ("A 'complete record' is not necessarily a '*verbatim* record.'" (quoting *United States v. Whitman*, 11 C.M.R. 179, 181 (1953))). Sessions under R.C.M. 802 "need not be recorded, but matters agreed upon at such conferences must be included in the record." R.C.M.

1103(b)(2)(B)(ii), discussion; R.C.M. 802(b). But, while "not every sidebar conference must be recorded *verbatim*, [] one involving a ruling by the judge affecting the rights of the accused at trial must be fully recorded if the transcript is to be *verbatim*." *United States v. Sturdivant*, 1 M.J. 256, 257 (C.M.A. 1976) (citing *United States v. Richardson*, 45 C.M.R. 157 (C.M.A. 1972)).

In *Sturdivant*, the contents of an unrecorded session, which apparently dealt with a causal challenge of a member, could reasonably be ascertained from the record. 1 M.J. at 257. But, its absence from the recording nevertheless created a non-*verbatim* record. *Id*. The court remanded the record of trial and instructed the convening authority to either conduct a sentence rehearing or disapprove the punitive discharge pursuant to R.C.M. 1103(f)(1). *Id*.

According to R.C.M. 1103 and Article 54(c)(1), UCMJ, the Government is required to compile a "complete" and *verbatim* record of trial in this case because HMC Averell received a punitive discharge. "Proceedings in revision" may be directed to correct an apparent error, omission, or improper or inconsistent action by the court-martial, which can be rectified by reopening the proceedings without material prejudice to the accused. R.C.M. 1102 (b). But because the action is corrective, a proceeding in revision may not be conducted for

the purpose of presenting additional evidence. R.C.M. 1102(b), discussion (emphasis added).

Nothing in the MCM, "including Article 54, UCMJ, and R.C.M. 1103 . . . limit[s] the court of criminal appeals' (CCA's) discretion to remedy an error in compiling a complete record." *Gaskins*, 72 M.J. at 230-31 (citations omitted).

Conclusion

Because this record is incomplete and not *verbatim* this Court cannot fulfill its function under Article 66, UMCJ. In fact, this information is paramount to HMC Averell's next assignment of error, alleging the military judge erred by excluding the evidence under M.R.E. 412.

This Court should direct the convening authority to attempt to correct the record of trial. If the record of trial cannot be corrected, this Court should order a rehearing.

V.

THE MILITARY JUDGE ABUSED HIS DISCRETION BY EXCLUDING EVIDENCE THAT HMC AVERELL PREVIOUSLY TREATED QMSN IA FOR AN STD. THE EVIDENCE WAS CONSTITUTIONALLY REQUIRED TO IMPEACH QMSN IA'S TESTIMONY THAT HMC AVERELL DISCUSSED SEXUAL TOPICS WITH HER THAT MADE HER UNCOMFORTABLE.[11]

Presumably, HMC Averell treated QMSN IA for an STD and discussed safe sex practices with her. (R. at 1515-18.) But as

[11] This assignment of error is raised pursuant Rule 15.1(c) of this Court's Rules of Practice and Procedure, as a summary assignment of error.

discussed above the record is incomplete. Other facts relevant to this assignment of error are discussed in assignment of error IV.

Principles of Law

The law relevant to this assignment of error, is the same as that discussed in AOE III, M.R.E. 412.

Discussion

The military judge erred by excluding evidence of QMSN IA's STD because the absence of this evidence misled the members and was relevant to QMSN IA's candor to the court-martial and the investigators. While the Government withdrew part of Charge I related to discussions about sex that made QMSN IA uncomfortable, evidence about the STD incident was still relevant to QMSN IA's credibility and Charge II, the alleged sexual assault. Her statements to the court-martial and her complaints to FC2 Lopez that HMC Averell made her uncomfortable are viewed in an entirely new light when considering this evidence.

It is human nature to expect some kind of flirtation or expression of interest prior to a sexual encounter. In fact, one of the members asked HMC Averell about prior flirtations during his testimony. (R. at 1493.) QMSN IA testified that HMC Averell previously discussed sexual topics with her. (R. at 787-89.) She also told SA Godette that she engaged in play

flirting with HMC Averell that may have inadvertently led him to believe she was sexually interested in him. (R. at 1316.) But, HMC Averell testified that there was no flirting between QMSN IA and himself prior to 20 October (R. at 1459).[12] This evidence regarding HMC Averell's treatment of QMSN IA's STD, and subsequent discussions about sex could have highlighted a misunderstanding between HMC Averell and QMSN IA in this case.

Conclusion

The military judge abused his discretion in precluding it because the evidence was constitutionally required to be admitted.

VI.
THE MILITARY JUDGE ABUSED HIS DISCRETION BY EXCLUDING EVIDENCE THAT SHORTLY BEFORE THE ALLEGED SEXUAL ASSAULT QMSN IA WAS INTERESTED IN HAVING A SEXUAL ENCOUNTER WITH A YET UNDETERMINED PERSON.[13]

The defense gave notice pursuant to M.R.E. 412 of its intent to offer the testimony of Seaman (SN) Haney, a female who attended the same barbeque with QMSN IA on 20 October. SN Haney would have testified that QMSN IA not only flashed her breasts at various people at the party but that she seemed interested in

[12] HMC Averell is unable to further elaborate on this assignment of error because of the dearth of information in the record.

[13] This assignment of error is raised pursuant to *Grostefon*, 12 M.J. 431.

having sex that evening. (R. at 742-46.)[14] SN Haney would have testified, at one point it seemed QMSN IA was interested in having sex with SN Haney. (R. at 744.) The military judge abused his discretion for excluding this evidence because it is relevant and necessary to the defense theory of consent. It shows QMSN IA's state of mind at the time of the sexual encounter and makes it more probable that she made a sexual advance on HMC Averell that night, as he testified.

VII.

NO PERSON SUBJECT TO THE UCMJ MAY INFLUENCE A COURT-MARTIAL MEMBER. THE NAVY'S MOST SENIOR LEADERS PUBLICIZED THEIR PREFERRED OUTCOMES FOR SEXUAL ASSAULT CASES. THE MILITARY JUDGE'S RULING DID NOT CURE THE APPARENT UNLAWFUL COMMAND INFLUENCE IN THIS CASE.[15]

The Commander in Chief of the U.S. military, President Barack Obama, stated the following about sexual assault in the military:

> The bottom line is: I have no tolerance for this. I expect consequences. So I don't just want more speeches or awareness programs or training, but ultimately folks look the other way. If we find out somebody's engaging in this, they've got to be held accountable – prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged. Period.

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[14] The military judge permitted SN Haney to testify that QMSN IA flashed her breasts to various people at the barbeque including SN Haney. (R. at 1536.)

[15] This assignment of error is raised pursuant to *Grostefon*, 12 M.J. 431.

(Appellate Ex. I, Encl. 13, at 1.) More of the most senior leaders of the military and the U.S. Navy have made similar statements which are widely publicized. Admiral Jonathan Greenert, the Chief of Naval Operations, stated "we have got to do something about this." (*Id*. at Encl. 1, at 2.) Then Secretary of the Department of Defense, Leon Panetta stated that sexual misconduct and asexual assault would not be tolerated in the military. (*Id*. at Encl. 4, at 1, 2.) Current Secretary of Defense Chuck Hagel wrote to Senator Barbara Boxer, "I am committed to doing everything I can to stop sexual assault in our armed forces." (*Id*. at Encl. 3, at 1.) The Secretary of the Navy, Ray Mabus, stated "There is no place –none- in the Navy and Marine Corps for sexual assaults or for those who do them." (*Id*. at Encl. 7, at 2.)

The trial defense counsel moved to dismiss all charges due to unlawful command influence that emanated from these statements by the Navy's most senior leaders. (Appellate Ex. I.) The military judge found the appearance of UCI existed due to these statements and awarded the defense five peremptory challenges. (R. at 55.) But during *voir dire*, the military judge reconsidered his ruling and reduced that number to two. (R. at 650.) This remedy was insufficient to cure the appearance of UCI in this case.

Standard of Review

This Court reviews allegations of unlawful command influence *de novo*. *United States v. Hutchins*, 72 M.J. 294, 312 (C.A.A.F. 2013) (Baker, C.J., dissenting) (citing *United States v. Harvey*, 64 M.J. 13, 19 (C.A.A.F. 2006)).

Principles of Law

Unlawful command influence is "the mortal enemy of military justice." *United States v. Gore*, 60 M.J. 178, 178 (C.A.A.F. 2004). "No person subject to [the UCMJ] may attempt to coerce or, by any unauthorized means, influence the action of a court-martial . . . or any member thereof . . . ." Art. 37, UCMJ, 10 U.S.C. § 837 (2012). An appearance of unlawful command influence is just as problematic as actual command influence. It creates "a question whether the influence of command placed an 'intolerable strain on public perception of the military justice system.'" *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006) (citation and internal quotation marks omitted).

The defense has the initial burden of raising the issue of actual unlawful command influence even on appeal. *United States v. Stombaugh,* 40 M.J. 208, 213 (C.M.A. 1994). The defense must show "(1) facts which, if true, constitute unlawful command influence; (2) that the proceedings were unfair; and (3) that unlawful command influence was the cause of the unfairness." *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999)

(internal citations omitted). If the defense produces some evidence of proximate causation between the acts constituting unlawful command influence and the outcome of the court-martial, *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002), there is a rebuttable presumption of prejudice. *Biagase*, 50 M.J. at 150-51.

To rebut the presumption of prejudice the Government must prove beyond a reasonable doubt:

> (1) the predicate facts do not exist; or
> (2) the facts do not constitute unlawful command influence; or
> (3) the unlawful command influence . . . did not affect the findings and sentence.

Id. at 151.

Even if there is not actual unlawful command influence, the mere appearance of it may be "as devastating to the military justice system as the actual manipulation of any given trial." *United States v. Ayers*, 54 M.J. 85, 94-95 (C.A.A.F. 2000) (citation and quotation marks omitted). The appearance of unlawful command influence exists when "an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *Id*.

To review for apparent unlawful command influence, this Court considers, "the perception of fairness in the military justice system as viewed through the eyes of a reasonable member

of the public." *Lewis*, 63 M.J. at 415. The test for apparent unlawful command influence is whether the Government has proven beyond a reasonable doubt that "the disinterested public would now believe that [Appellant] received a trial free from the effects of unlawful command influence." *Lewis,* 63 M.J. at 415. An appearance of unlawful command influence arises "where an objective, disinterested observer, fully informed of all the facts and circumstances would harbor a significant doubt about the fairness of the proceeding." *Id*.

Discussion

Here, some of the statements at issue were made by civilian officials, not subject to the UCMJ as required under Article 37, UCMJ. But the CAAF has recently recognized that the rubric of apparent unlawful command influence may apply to civilian leaders. *See Hutchins*, 72 M.J. 294 (Ryan, J., concurring) (Baker, C.J., dissenting); *see also Simpson*, 58 M.J. at 374-75; *United States v. Hagen*, 25 M.J. 78, 88 (C.M.A. 1987) (Sullivan, J., concurring); *United States v. Fowle*, 22 C.M.R. 139, 141-42 (C.M.A. 1956). Therefore, this Court should undertake the standard inquiry here to evaluate these comments.

Conclusion

The military judge erred because his remedy did not cure the appearance of UCI in this case. This Court should dismiss Charge II with prejudice.

JENNIFER L. MYERS
Lieutenant, JAGC, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE
Bldg. 58, Ste. 100
Washington, D.C. 20374
Phone (202) 685-7713
Fax (202) 685-7426
jennifer.l.myers@navy.mil

Appendix

United States v. Cauley, No. 9300175, 1995 CCA LEXIS 441, *14 (N-M. Ct. Crim. App. Apr. 7, 1995)

Certificate of Filing and Service

I certify that a copy of the foregoing was delivered to the Court and to Director, Appellate Government Division, and electronically filed on 13 May 2014.

JENNIFER L. MYERS
Lieutenant, JAGC, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
Bldg. 58, Ste. 100
Washington, D.C. 20374
Phone (202) 685-7713
Fax (202) 685-7426
jennifer.l.myers@navy.mil

UNITED STATES NAVY
WESTERN PACIFIC JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES **v.** **KYLE P. BARSALOU** **SA/E-2** **U.S. Navy**	**DEFENSE BENCH BRIEF: PROHBITING CONTACT BETWEEN COMPLAINING WITNESS AND HER COUNSEL** **Date: 22 Sep 14**

1. **Nature of Brief:** This bench brief is submitted in support of the defense request that the military judge enter an order prohibiting Mrs. Hofer, the complaining witness, from discussing her testimony with her counsel during any recess in the case.

2. **List of Authority:**

Perry v. Leeke, 488 U.S. 272 (1989);

Geders v. United States, 425 U.S. 80 (1976)

3. **Brief:** Military Rule of Evidence 611 states in relevant part that "the military judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth[.]" The defense respectfully requests a ruling from the military judge that prohibits the complaining witness from discussing any part of her testimony with either the trial counsel or her "Victim's Legal Counsel."

Witness sequestration is put in place to lessen the danger that their testimony may be influenced by hearing what other witnesses have to say. *See Perry v. Leeke*, 488 U.s. 272, 282

(1989). The dangers inherent in witness coaching become even more prevalent when an attorney is involved in the process. As the Supreme Court stated, "In other words, the truth-seeking function of the trial can be impeded in ways other than unethical "coaching." Cross-examination often depends for its effectiveness on the ability of counsel to punch holes in a witness' testimony at just the right time, in just the right way. Permitting a witness, including a criminal defendant, to consult with counsel after direct examination but before cross-examination grants the witness an opportunity to regroup and regain a poise and sense of strategy that the unaided witness would not possess." *Id.*

In *Leeke*, the Supreme Court faced a situation where the trial court had told the accused that he was not to speak with anyone during a 15 minute break following his own direct examination. The defense claimed that this violated the Court's holding in *Geders v. United States*, 425 U.S. 80 (1976) which overturned a conviction based on a trial court's sequestration order. In *Geders* the Supreme Court held that an overnight sequestration order violated the accused's 6th Amendment right to the assistance of counsel. However, the *Leeke* Court distinguished the cases holding that the recess in *Geders*, 17 hours, was fundamentally different because of the many other areas that an accused and counsel must confront during an overnight recess.

In this case the extra caution that was present in *Geders* is not even necessary for the court to enter an appropriate sequestration order, as the complaining witness does not have a sixth amendment right to the effective assistance of counsel. As the *Leeke* Court held, allowing a witness to have the opportunity to regroup following direct would accord her with an unfair advantage – one that has not even been permitted for criminal defendants. The complaining witness would have nothing to speak with her counsel about in this case other than her

testimony, as opposed to an accused who may have other strategic issues to discuss with counsel. "The judge must also have the power to maintain the status quo during a brief recess in which there is a virtual certainty that any conversation between the witness and the lawyer would relate to the ongoing testimony." *Leeke*, 488 U.S. at 283.

In order to preserve the integrity of the court-martial, the defense respectfully requests the military judge impose a sequestration order and prohibit the complaining witness from discussing any part of her testimony with counsel once it has begun until the completion of the trial.

/s/
B.H. SARGENT
LT, JAGC, USN
Detailed Defense Counsel

****

CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief was served electronically on Trial Counsel on 22 Sept 14.

/s/
B.H. SARGENT
LT, JAGC, USN
Detailed Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
GENERAL COURT-MARTIAL
UNITED STATES NAVY
WESTERN PACIFIC JUDICIAL CIRCUIT

UNITED STATES **v.** **KYLE BARSALOU** **SA/E-2/USN**	**DEFENSE MOTION TO DISMISS THE ADDITIONAL CHARGE AS UNCONSTITUTIONALLY VAGUE** **Date: 22 Sep 14**

1. <u>Nature of Motion</u>

This is a Motion to Dismiss the Additional Charge and Sole Specification thereunder alleging violation of Article 120 of the Uniform Code of Military Justice because the term "incapable of consenting due to impairment" is unconstitutionally vague.

2. <u>Statement of Facts</u>

Under the sole specification of the Additional Charge, SA Barsalou is charged with sexual assault under Article 120, UCMJ. This charge is based upon the theory that the complaining witness was "incapable of consenting to the sexual act due to impairment by an intoxicant, and that condition was known or reasonably should have been known by Seaman Apprentice Kyle Barsalou, U.S. Navy."

The Additional Charge stems from accusations made by Ms. [redacted], a civilian dependant. Mrs. [redacted] claims that, on the night of 3 November 2013, after a night of drinking alcohol she engaged in sexual intercourse with SA Barsalou. Mrs. [redacted] claims that she

experienced periods of memory loss, but has specific recollections of portions of the sexual encounter.

3. <u>Discussion.</u>

This case involves allegations of sexual assault in which alcohol consumption and intoxication are principal factors. The latest iteration of Article 120 of the Uniform Code of Military Justice seeks to proscribe certain forms of sexual conduct, including situations where one participant has consumed alcohol or other intoxicants to the level that they are, statutorily, incapable of consenting to the sexual activity. The statute describes this state as "incapable of consenting due to impairment", but provides no amplifying information or definition as to what this means. For the reasons that follow, this language is unconstitutionally vague, and Charge I should be dismissed with prejudice.

A. Statutory Background.

Since the 1950s Congress has defined military sexual crimes in Article 120 of the Uniform Code of Military Justice (UCMJ). 10 U.S.C.S. § 920 et.seq. In 1992, Congress began to implement amendments to Article 120 that ultimately revamped and expanded the scope of Article 120. The most notable changes to Article 120 came in the 2007 and 2011 Congressional amendments respectively. Specifically, Congress made key modifications to the definition of sexual assault in their 2007 and 2011 amendments to Article 120.

As stated above, in many military sexual assault cases the accusing witness alleges that he or she is impaired by the ingestion of alcohol or drugs. The degree of impairment is a frequent area of dispute during trial. In 2007, Congress completely overhauled the scope of Article 120 making a "sexual act" illegal if the victim was "substantially incapacitated" or "substantially incapable" of appraising the nature of the sexual act, declining participation in the

sexual act, or communicating unwillingness to engage in the sexual act. Subsequent case law demonstrated that "substantially incapacitated" was difficult to define with any clarity. *United States v. Moore*, 58 M.J. 466, 469 (C.A.A.F. 2003).

In 2011, Congress drafted amendments to the 2007 Article 120, which took effect on 28 June 2012. In the 2012 Article 120, Congress attempted to shift the focus to what the accused "knew or reasonably should have known." The 2012 Article 120 also omits the term "substantially incapacitated", and asks whether the complaining witness was "incapable of consent due to impairment."

Unfortunately, the 2012 Article 120 repeats the failure of Congress to clearly define the parameters of sexual assault because it fails to provide the definition of impairment, and when an individual is so impaired that they are incapable of providing consent. Congress essentially omitted one vague term - "substantially incapacitated" - and replaced it with another. The result is that the statute is too vague to provide the accused with notice of the definitions of the law's key elements. Specifically, the law fails to define the requisite level of knowledge necessary for the accused to determine that the complaining witness is incapable of consenting to a sexual act due to impairment. Effectively, the 2012 Article 120 repeats the same problem of the 2007 Article 120 – focusing on the mental state of the complaining witness, and not providing notice to the accused.

B. Article 120 is so vague that SA Barsalou could not possibly have been expected to conform his conduct to the law.

The Sole Specification under the Additional Charge alleges a violation of Article 120(b)(3), which reads in pertinent part (as related to the offenses alleged in this case):

Any person subject to this chapter who-

(3) commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to-

(A) impairment by any drug , intoxicant, or other similar substance, and that condition is known or reasonable should be known by the person.

Based upon the foregoing language, the Government must prove in this case, beyond a reasonable doubt, that:

1. SA Barsalou committed a sexual act upon the complaining witness;

2. The complaining witness was incapable of consenting due to impairment; and

3. SA Barsalou knew, or should have known, the complaining witness was incapable of consenting due to impairment.

The first prong is clear, as the statute provides a clear definition of what constitutes a sexual act. Article 120(g)(1), UCMJ. The statute also defines consent, and provides some specific instances in which a person cannot consent, such as " a sleeping, unconscious, or incompetent person" or a person "under threat or fear." Article 120(g)(8)(B), UCMJ. The section defining consent conspicuously omits "impairment" in the delineation of specific conditions in which, as a matter of law, a person cannot consent. This means that under some circumstances, a person is capable of consent when impaired. The question then, is when does a person reach a level of impairment such that they are no longer capable of consent and any person who commits a sexual act upon them would be criminally liable under Article 120(b)(3)? Unfortunately, there is no definition provided in the text of the statute as to what "incapable of consenting" and/or "impairment" specifically means. Furthermore, the Analysis of Punitive Articles in the Manual for Courts-Martial, a review of Legislative History, and the Military Judge's Benchbook are all silent, and of no utility in helping explain what these critical terms

actually mean. These key terms, "incapable of consenting" and "due to impairment", are the very crux of the proscribed conduct, and are impermissibly and unconstitutionally vague such that SA Barsalou could not have read the law's key elements and understood what "incapable of consenting due to impairment" means. This vagueness left SA Barsalou with insufficient notice that his conduct may or may not have been proscribed. *See United States v. Moore*, 58 M.J. 466, 469 (C.A.A.F. 2003).

C. Article 120(b)(3) is unconstitutionally vague because it violates SA Barsalou's right to Due Process of law.

Courts have on a number of occasions examined the question of whether a statute is impermissibly vague. A law will be deemed facially void if it is so unclear that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). A law failing to clearly define the conduct it proscribes "may trap the innocent by not providing fair warning," inevitably leading to impermissible delegation of "basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. Rockford*, 408 U.S. 104, 108-109 (1972). The D.C. Court of Appeals in *United States v. Capital Traction Co.*, 34 App. D.C. 592 (1910), analyzed a statute prohibiting municipal street railway companies from running an insufficient number of cars to accommodate passengers "without crowding." *Id.* The opinion's language, cited approvingly by the U.S. Supreme Court in *Connally*, is pertinent to this case and helpful to reproduce at length:

> *What shall be the guide to the court or jury in ascertaining what constitutes a crowded car? What may be regarded as a crowded car by one jury may not be so considered by another. What shall constitute a sufficient number of cars in the opinion of one judge may be regarded as insufficient by another*. . . . There is a

> total absence of any definition of what shall constitute a crowded car. This important element cannot be left to conjecture, or be supplied by either the court or the jury. It is of the very essence of the law itself, and without it the statute is too indefinite and uncertain to support an information or indictment…*The dividing line between what is lawful and unlawful cannot be left to conjecture.* The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, *must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue*. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another. *Id.* at 596, 598 (Emphasis added).

Capital Traction and *Connally* provide basic background on the doctrine of void-for-vagueness. The modern seminal case on the question is *Parker v. Levy*.[1] In *Parker*, the Court states, "void-for-vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." *Id.* at 757.[2] This standard is expanded upon in a series of military cases. In *United States v. Saunders*, C.A.A.F. framed the issue of whether an individual was on sufficient notice as an objective inquiry. 59 M.J. 1, 29 (2003). Later, *United States v. Pope* lists examples of "fair notice" sources to include federal law, state law, military case law, military custom and usage, and military regulations. 63 M.J. 68 (C.A.A.F. 2006). Training, pamphlets, and other materials may also serve as sources of notice by giving context to regulations and articulating differences between permissible and impermissible behavior. *See United States v. Brown*, 55 M.J. 375, 384 (C.A.A.F. 2001).

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[1] 417 US 733 (1974), citing *U.S. v. Harris*, 347 US 612, 617 (1954).

[2] While *Parker* upheld the statute, the Court explained that the military is subject to a less stringent analysis than our civilian counterparts. But this reasoning stems from the unique military nature of the laws at issue, Articles 133 and 134. The rationale used to justify an unclear statute in Parker cannot be used to compensate for Art. 120's failings. Arts. 133 and 134 are particularly inherent to our military structure and unknown in the civilian world. Not so with laws prohibiting sex crimes. The Government would be hard pressed to articulate a legitimate reason why a servicemember should receive less protection from the dangers of an unconstitutionally vague law than a civilian accused of the same conduct.

Here, SA Barsalou had no notice that the complaining witness allegedly reached the undefined level of impairment such that her consent was invalidated by alcohol consumption. The statute unrealistically expected him to gauge whether the complaining witness was "incapable of consenting due to impairment." Does "incapable of consenting due to impairment" mean that a person is *extremely impaired*? *Mostly* impaired? *Totally* impaired? Above the legal blood alcohol content ("BAC") limit for operating a motor vehicle? When does the switch between capable of consenting and incapable of consenting occur? As an impaired individual's BAC inevitably drops, when does the person revert back to "capable" once again? Who is culpable in a situation where both parties have reached a level of impairment such that neither party was capable of consenting?

Determining whether someone is "incapable of consenting due to impairment" requires either medical training or the ability to make accurate, immediate determinations based on usually incomplete information (such as a potential sexual partner's height, weight, tolerance for alcohol, knowledge of how much alcohol was consumed, and knowledge of when alcohol consumption ceased). Consider the intoxicated complaining witness during a period of "black-out": externally appears capable of consenting, externally appears to actually consent, and it is not determined until later (usually by experts, analyzing facts that were not necessarily known to the accused) that she was "incapable" of consenting at the time. Indeed, an Article 120(b)(3) referral all but assures the government and accused will be provided forensic alcohol experts to help a panel of members understand the extent to which a person was intoxicated and the effect on their capability to consent. SA Barsalou, or any other lay person, could not have been expected to employ such a detailed level of analysis on the night in question.

Article 120 is not "so clearly expressed" that SA Barsalou could "intelligently choose, in advance, what course it is lawful for him to pursue". *Capital Traction Co.*, 34 App. D.C. at 598. As a result, SA Barsalou could not have reasonably known whether the complaining witness had reached a level of impairment such that she was incapable of providing consent, and Article 120(b)(3) must be struck down as unconstitutionally vague.

4. <u>Relief Requested</u>

Defense respectfully requests that the Additional Charge and Sole Specification thereunder be dismissed, with prejudice, as Art 120(b)(3) is unconstitutionally vague.

5. <u>Evidence and Burden of Proof</u>.

The burden is upon the defense. No evidence other than that previously submitted with other motions will be relied upon.

6. **<u>Argument</u>**. The Defense desires oral argument.

/s/
M. A. REARDON
LT, JAGC, U.S. Navy
Assistant Detailed Defense Counsel

****

Certificate of Service

I hereby attest that a copy of the foregoing Motion to Dismiss was served on the Court and opposing counsel by email on 22 September 14.

/s/
M. A. REARDON
LT, JAGC, U.S. Navy
Assistant Detailed Defense Counsel

UNITED STATES NAVY
WESTERN PACIFIC JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES **v.** **KYLE BARSALOU** **SA/E-2** **USN**	**GOVERNMENT RESPONSE TO MOTION TO DISMISS THE ADDITIONAL CHARGE AS UNCONSTITUTIONALLY VAGUE** **Date: 26 Sep 2014**

1. <u>Nature of Motion</u>.

The Government respectfully submits this response to the Defense motion to dismiss the additional charge as unconstitutionally vague.

2. <u>Summary of Facts</u>. As a pre-trial motion to dismiss based on unconstitutional vagueness, no facts are relevant to the resolution of this motion.

3. <u>Discussion</u>.

Article 120(b)(3) of the Uniform Code of Military Justice, prohibits the commission of a sexual act on a person when the Accused knew or reasonably should have known that the other person was incapable of consenting to the sexual act due to impairment by any drug, intoxicant, or other similar substance. This statute provides comprehensible guidelines on the proscribed conduct and is not unconstitutionally vague.

A. The prohibition on committing a sexual act on a person incapable of consenting due to impairment by an intoxicant is not unconstitutionally vague.

The United States Supreme Court has established two theories under which a criminal statute may be invalidated due to vagueness: First, a statute may be so vague and broad that it vests so much discretion in police and prosecutors that it encourages arbitrary and discriminatory

enforcement. Second, a statute may be so vague as to fail to place the Accused on notice that his conduct is prohibited. See Parker v. Levy, 417 U.S. 733, 752 (1974). Neither of these rationales applies to the statute under which the Accused was convicted, so the Defense motion to dismiss must be denied.

i) Article 120 does not vest unconstitutional enforcement discretion in law enforcement agents or prosecutors.

In Kolender v. Lawson, 461 U.S. 352 (1983), the Supreme Court stated that the most important aspect of vagueness doctrine is its role in governing law enforcement and preventing arbitrary and discriminatory enforcement of vague laws. Id. at 357-58. In Kolender, the Court invalidated a California statute requiring any individual stopped by the police to produce a reliable and credible identification. Similarly, in City of Chicago v. Morales, 527 U.S. 41 (1999), the Court struck down a Chicago ordinance authorizing police to arrest a group of two or more people in a public place "with no apparent purpose" if they failed to disperse when ordered to do so. Id. at 47. In both cases, the statutes in question gave the police broad authority to arrest individuals whom they encountered on the streets with virtually no limits on their discretion.

Article 120 vests no such unfettered discretion in military law enforcement. Unlike police enforcing a requirement to carry identification or an anti-loitering ordinance, law enforcement agents investigating an allegation of sexual assault do so only in response to a report of the commission of a crime. Whether this report comes from a victim of such a crime or a witness, law enforcement agents are limited in their ability to enforce Article 120 by the information provided to them. Thus, unlike the laws at issue in Kolender and Morales, Article

120 cannot be held to be so vague as to vest unconstitutional enforcement discretion in law enforcement agents.

ii) SA Barsalou was on notice that his conduct was prohibited.

Potentially more applicable to this case is the second aspect of vagueness doctrine: that the statute under which SA Barsalou has been charged is so vague that he was not placed on notice that his conduct was illegal. However, this avenue of attack must fail as well. The plain language of Article 120 is sufficiently clear to place any reasonable person on notice of what conduct is proscribed by the prohibition on committing a sexual on a person incapable of consenting to it due to impairment by an intoxicant.

Courts assess vagueness in relation to the charged conduct and determine whether the statute sufficiently warned the specific Accused that his conduct was prohibited. Parker, 417 U.S. at 757; United States v. Nat'l Dairy Prods. Corp., 372 U.S. 29, 33 (1963); United States v. Pope, 63 M.J. 68, 79 (C.A.A.F. 2006) (Erdmann, J., dissenting). Unless the statute implicates expressive activity protected by the First Amendment, facial challenges are not entertained. Nat'l Dairy Prods. Corp., 372 U.S. at 36. Because Article 120(b) does not implicate any First Amendment concerns, the Court must consider this an as-applied challenge. Because no evidence has been presented regarding SA Barsalou's misconduct, this issue is not ripe for adjudication. Consequently, the Court should deny the defense motion until evidence has been presented to enable the Court to assess the validity of the statute as applied to SA Barsalou.

If the Court determines that the issue is ripe for resolution, it should rule that the statute is not unconstitutionally vague as applied to SA Barsalou. In assessing whether a statute is unconstitutionally vague, courts apply varying levels of deference to Congress depending on the subject matter and applicability of the statute in question. Judicial deference is at its zenith when

considering vagueness in statutes that affect First Amendment activity. See Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989). In contrast, courts grant much greater leeway to congressional imprecision in regulatory statutes governing business activities. Papachristou v. Jacksonville, 405 U.S. 156, 162 (1972). Likewise, the Supreme Court has stated that judicial deference is at its apogee when reviewing congressional action to govern the armed forces. Rostker v. Goldberg, 453 U.S. 57, 70 (1981). "For the reasons which differentiate military society from civilian society, we think Congress is permitted to legislate both with greater breadth and greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter." Parker, 417 U.S. at 756. Thus, the Court mandates that courts apply the less stringent vagueness standard applicable to economic regulations when assessing whether a statute governing the armed forces is so vague as to fail to place an Accused on notice. Id. Applying this deferential standard, the "incapable of consenting due to impairment" clause of Article 120 is not so vague that SA Barsalou had no notice of the illegality of his conduct.

The Defense premises much of its argument on the lack of a statutory definition of "incapable of consenting." However, in the absence of a statutory definition or ambiguity, it is well-settled that the plain language of the statutory text adopted by Congress must prevail. United States v. Kearns, 73 M.J. 177, 181 (2014). Here, each of the words in the operative clause is a common word the meaning of which an ordinary individual would understand. Congress is under no mandate to explicitly define every word used in criminal statutes. In fact, the Supreme Court has repeatedly upheld statutes against vagueness challenges when the words used in the statutes were commonly understood. See, e.g., Hill v. Colorado, 530 U.S. 703, 732 (2000) (holding that a statute using the terms "oral protest," "education," and "counseling" was

not unconstitutionally vague because "[t]he likelihood that anyone would not understand any of those common words seems quite remote"); Boos v. Barry, 485 U.S. 312, 332 (1988) ("The statute communicates its reach in words of common understanding, and it accordingly withstands petitioners' vagueness challenge."); Cameron v. Johnson, 390 U.S. 611, 616 (1968) (upholding a statute using the terms "obstruct" and "reasonably interfere" because it "delineates its reach in words of common understanding").

When considering a challenge based on vagueness, in addition to considering the plain language of the statute, courts also look to the "[Manual for Courts-Martial . . . military case law, military custom and usage, and military regulations." United States v. Vaughan, 58 M.J. 29, 31 (C.A.A.F. 2003). Here, the military has a long history of prohibiting sexual activity with an individual who cannot consent to that activity due to intoxication. See United States v. Grier, 53 M.J. 30 (C.A.A.F. 2000) (affirming conviction after military judge instructed members on lack of consent due to intoxication); United States v. Mathai, 34 M.J. 33, 36 (C.M.A. 1992) (affirming rape conviction base on intoxication of victim).

In addition, Article 120(b)(3) does not prohibit all sexual acts with a person who is incapable of consenting due to intoxication; it only prohibits such actions when "that condition is known or reasonably should be known" by the Accused. Article 120(b)(3)(A). "Even a regulation that is facially vague or overly-broad may be constitutionally sound when a mens rea requirement is read into it." United States v. Caporale, 73 M.J. 501, 505 (A.F.C.C.A 2013). Thus, contrary to the Defense argument, the focus of this crime is not the mental state of the victim, but the Accused's knowledge of the victim's condition.

The Defense motion also conflates the issue of formal legal notice under the statute with evidence of the Accused's knowledge of the victim's level of intoxication. See, e.g., Def.

Motion at 7 ("Here, SA Barsalou had no notice that the complaining witness allegedly reached the undefined level of impairment such that her consent was invalidated by alcohol consumption."). If, in fact, the evidence shows that the Accused did not know that the victim was incapable of consenting to sexual activity, the members would acquit him due to the Government's failure to prove an essential element of the offense. But this is an issue of proof, not a constitutional infirmity of the statute.

The Navy-Marine Corps Court of Criminal Appeals addressed this precise issue in its unpublished decision in United States v. Torres, NMCCA 201300396, 2014 CCA LEXIS 641 (N.M.C.C.A. Aug. 28, 2014). In that case the court expressly rejected the appellant's argument that "incapable of consenting to the sexual act due to impairment by alcohol is unconstitutionally vague because this definition cannot be understood by the common man." Id. at *23 (internal quotation marks omitted). Relying on the language of the statute and the U.C.M.J.'s long history of prohibiting such sexual activity, the court states, "[w]e find nothing vague about the statute, and the requirement to prove actual or constructive knowledge on the part of the appellant further serves to negate [the appellant's] claim of vagueness." Id. at *25. "Based on the plain text of Article 120(b)(3) , UCMJ, and military jurisprudence that has traditionally interpreted virtually identical conduct, we find that service members of ordinary intelligence have 'fair notice of what is prohibited.'" Id. (quoting United States v. Williams, 553 U.S. 285, 304 (2008)); see also United States v. Ellerbee, NMCCA 201300109, 2014 CCA LEXIS 533 (N.M.C.C.A. Jul. 31, 2014) (rejecting appellant's argument that prior version of Article 120 prohibiting sexual activity with an individual who was "substantially incapacitated" was unconstitutionally vague).

Because the plain language of Article 120(b)(3) – especially when read in light of the U.C.M.J.'s longstanding prohibition on sexual activity with excessively intoxicated individuals – is not unconstitutionally vague. The Defense motion should be denied in keeping with N.M.C.C.A.'s prior resolution of this same issue.

4. <u>Relief Requested</u>.

The Government respectfully requests that the Court deny the Defense's motion to dismiss.

5. <u>Oral Argument</u>.

The Government requests oral argument.

6. <u>Evidence</u>.

None

_____
Erin Janofski
LT, JAGC, USN
Trial Counsel

<u>CERTIFICATE OF SERVICE</u>

I certify a copy of this Response was served on the Court and detailed Defense Counsel on 26 September 2014.

_____
Erin Janofski
LT, JAGC, USN
Trial Counsel

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 3

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
	)	Case No. 201300311
v.	)	Tried at Region Legal Service Office Mid-Atlantic, Naval Station Norfolk, Norfolk, Virginia on August 7, November 5, November 19, 2012 and March 4-8, 2013, by a general court—martial convened by Commander Navy Region Mid-Atlantic, Norfolk, Virginia.
Pedro M. BESS, Hospitalman Second Class (E-5) U.S. Navy Appellant	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

IAN D. MACLEAN
LT, JAGC, U.S. Navy
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7389, fax (202) 685-7687

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Errors Assigned

I.

AT THE START OF DELIBERATIONS, THE MEMBERS REQUESTED MORNING REPORTS PURPORTING TO SHOW THE APPELLANT'S WHEREABOUTS. THE MILITARY JUDGE, RATHER THAN THE MEMBERS, DETERMINED THE ACCURACY OF THE MORNING REPORTS. ALTHOUGH THE DOCUMENTS WERE NOT ACCURATE OR TRUSTWORTHY, THE MILITARY JUDGE ADMITTED THEM WITHOUT EXPLANATION TO THE MEMBERS. THE MEMBERS THEN RETURNED A FINDING OF GUILT ONLY THIRTY-THREE MINUTES LATER. DID THE MILITARY JUDGE ERR?

II.

TWO YOUNG BLACK PETTY OFFICERS WERE RADIOLOGICAL TECHNICIANS AT THE TIME AND PLACE OF THE ALLEGED OFFENSES. THE EVIDENCE SHOWED SOME QUESTION AS TO THE IDENTITY OF THE OFFENDER. THE GOVERNMENT FAILED TO CONDUCT A PHOTOGRAPHIC LINEUP OR IDENTIFICATION OF ANY KIND, OTHER THAN IN-COURT IDENTIFICATIONS BY THE ALLEGED VICTIMS ONE YEAR AFTER THE ALLEGED OFFENSES. DID THE MILITARY JUDGE ERR BY DENYING THE DEFENSE EXPERT CONSULTANT IN EYEWITNESS IDENTIFICATION AND MEMORY?

III.

IS THE EVIDENCE LEGALLY AND FACTUALLY SUFFICIENT TO SUSTAIN CONVICTIONS FOR INDECENT ACTS BY OBSERVING AND ATTEMPTING TO OBSERVE THE NUDE BODIES OF THE ALLEGED VICTIMS?

Statement of Statutory Jurisdiction

Appellant's approved sentence includes a dishonorable discharge and one year or more of confinement. Accordingly, this Court has jurisdiction pursuant to Article 66(b)(1),

Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012).

Statement of the Case

A panel of members with enlisted representation, sitting as a general court-martial, convicted Appellant, contrary to his pleas, of two specifications of attempting to commit an indecent act, and four specifications of indecent acts, in violation of Articles 80 and 120, UCMJ, 10 U.S.C. §§ 880 and 920 (2012). The Members sentenced Appellant to two years confinement and a dishonorable discharge. The Convening Authority approved the sentence as adjudged, and except for the punitive discharge, ordered the sentence executed.

Statement of Facts

A. While performing his duties as a radiology technician, Appellant required several patients to unnecessarily strip naked to take x-rays.

Appellant was a radiology technician at the Oceana medical clinic. (R. 578-79.) While working as an x-ray technician Appellant had several female patients strip completely naked for x-rays and positioned them while naked during the process of taking multiple x-rays and tried to convince other female patients they had to strip naked for their x-rays. (R. 407, 525-26, 551, 701, 764, 816.)

HM1 Green, recognized as an expert in the field of radiology, explained there is no x-ray that requires a patient

to be nude. (R. 324.) HM1 Green testified that at a minimum a patient should always wear a gown and that gowns do not interfere with any x-rays done at Oceana. (R. 322, 390.) Appellant's Lead Petty Officer, HM1 Brewer, testified that a patient in the x-ray department should never be completely naked. (R. 603-04.) HM1 Brewer also testified there is no such thing as a consent form for nudity in the x-ray department at Oceana. (R. 607.) The former lead petty officer of the Oceana radiology department, Ms. Oliver, also testified there was no consent form to be completely naked during x-rays. (R. 1080.) CDR Rader, the Head of the Radiology Department at Naval Hospital Portsmouth, testified that no x-ray requires a patient to be naked. (R. 947.) Similarly, Dr. Bozman, who has been a practicing Radiologist for 25 years, testified there was no reason for any of patients in the charged offenses to be naked for their x-rays. (R. 1014.)

While Appellant was stationed at Oceana, were a total of five x-ray technicians at the time. (R. 579.) Appellant was the only second class petty officer. (R. 579.) Two of the five technicians were African-American males, Appellant and HM3 Philogene. (R. 579.) HM3 Philogene has a "thick Haitian accent" while Appellant does not speak with an accent. (R. 579.)

1. Patient LS3 DB (Charge I, Specification 1).

LS2 DB was a third class Petty Officer at the time of incident on March 10, 2011. (R. 518.) After complaining of hip pain her doctor ordered x-rays. (R. 519.) She checked into the Ocean clinic at approximately 1600. (R. 521.) She described her x-ray tech as "African American, about six foot, second class, kind of stocky." (R. 522.) She saw his rank and noted he was a second class petty officer. (R. 522, 545.) She indicated her x-ray tech did not speak with any discernible accent. (R. 522.) Appellant brought her back to the x-ray room, gave her a gown, and stepped out of the room. (R. 522.)

He returned to the room with a consent form stating she needed to be naked for the x-rays. (R. 523, 525.) Appellant told her based on the type of x-ray ordered she had to be completely naked. (R. 525.) LS2 DB challenged the assertion that she needed to be completely naked for the x-rays because she did not have to be naked the previous time she came to have her x-rays taken. (R. 525-26.) Appellant stated he would try and get the type of x-ray changed. (R. 526.)

When he returned to the room he stated the type of x-ray was changed and she did not need to be nude. (R. 526.) The x-rays were then taken. (R. 526.) LS2 DB identified Appellant in court as her x-ray technician. (R. 522.) LS2 DB's medical records indicate her x-ray was performed at 1647 by Appellant.

(Pros. Ex. 6 at 2.) Three x-ray technicians are scheduled at the Oceana clinic per day. However after 1600 at Oceana only one x-ray technician is scheduled to be present. (R. 687.) The late shift at Oceana ran from 1100 to 1900. (R. 581.)

2. Patient LCpl AA (Charge I, Specification 2).

LCpl AA had x-rays at the Dam Neck branch clinic due to a snowboarding injury. (R. 694.) She described her x-ray technician as an African-American male with a strong accent. (R. 695.) She reported no incident with the x-rays at Dam Neck. LCpl AA's doctor sent her to Oceana to pick up her x-rays that were taken at Dam Neck and bring them to him due to a technical problem at Dam Neck. (R. 696.)

Upon arriving at Oceana an x-ray technician offered to help her. LCpl AA identified the tech that approached her at Ocean as Appellant. (R. 699.) Appellant brought her back into an x-ray room and told her she needed additional x-rays. (R. 701.) Appellant told her to get completely undressed. (R. 701, 703.) LCpl AA challenged the assertion that she needed to be completely naked. (R. 702.) Appellant relented and informed her he would print her x-rays. (R. 706.) After this encounter LCpl AA made special note of Appellant's name tape and rank on his uniform, noting it was HM2 Bess. (R. 708-09.)

LCpl AA complained to the LPO of the radiology department about the incident. (R. 709-10.) Appellant admitted to his LPO

on the day of the incident that he was the tech that he saw and helped LCpl AA at Oceana. (R. 1203.) Appellant admitted on the witness stand that he interacted with LCpl AA. (R. 1203.) Upon returning to her command, LCpl AA began an EO complaint for sexual harassment and eventually requested mast with her Commanding Officer to bring the incident to his attention. (R. 711.)

3. Patient PG (Charge II, Specification 1).

PG's doctor ordered x-rays because she was having back and neck pain from an automobile accident. (R. 760.) PG was twenty-one years old at the time and had never had x-rays before. (R. 769; Pros. Ex. 12 at 2.) PG was brought back to an x-ray room where two x-ray technicians were present for chest x-rays. (R. 761.) PG described one of the technicians as an older white gentleman and identified Appellant as the other. (R. 761.) The older white technician told her to remove jacket and bra but leave her t-shirt on for the x-ray. (R. 762-63.) She then took three x-rays with just her t-shirt on. (R. 763.) The older white technician then told her she could put her bra and jacket back on. (R. 764.) After changing in the attached bathroom she returned to the empty exam room and because she was not told she could leave. (R. 764.) The older white technician was no longer in the exam room. (R. 764.) Appellant told PG additional x-rays were needed and she would have to be completely undressed.

(R. 764.) Appellant told her to get undressed and he would be back for the x-rays. (R. 765.) PG got undressed and sat naked on the exam table. (R. 765.)

Appellant came back into the room and took what PG believed was a series of x-rays. (R. 766.) Before each purported x-ray, Appellant positioned her naked body on the examination table. (R. 767.) The purported x-rays were of her upper torso and of her pelvic area. (R. 767-78.) PG's medical records show no pelvic x-rays. (Pros. Ex. 12 and 13.) The former leading petty officer of the Oceana radiology department, Ms. Oliver, testified it is possible to operate the x-ray machine in a manner which causes the machine to make sounds as though it is taking an x-ray but actually does "shoot" an x-ray. (R. 1084.) Ms. Oliver also explained that the x-ray system is electronic now and the tech chooses which x-ray digital image to send to radiology to be interpreted by the doctors. (R. 1088.) Ms. Oliver also explained that digital images not sent to the doctors are automatically purged from the system at the end of the month. (R. 1088.)

4. Patient AL (Charge II, Specification 2).

AL was a twenty-two year old third class petty officer when she received x-rays at Oceana, and subsequently left the Navy. (R. 399-401.) AL's flight surgeon ordered x-rays in order to refer her to a chiropractor. (R. 401.) AL had two x-rays taken

by a female tech. (R. 402.) AL was laying down on a table and wearing her underwear and a gown. (R. 402.) Upon returning to work she was contacted by the hospital and asked to return because the x-rays needed to be done standing as opposed to laying down. (R. 403.) AL identified Appellant as the technician who checked her in. (R. 405.) AL had no recollection of her x-ray technician having an accent. (R. 429.) AL's medical records indicate Appellant took x-rays of her at 1801. (Pros. Ex. 2 at 4.)

Appellant took her to an exam room, gave her a gown, and told her take off everything except for the gown. (R. 405.) Appellant then returned and told her the doctor requested she be completely naked for the x-rays and that he would return with the consent form for that. (R. 407.) AL took off the gown and was completely naked when Appellant returned to the exam room with the form. (R. 408.) Appellant stood right next to her while she reviewed and signed the form, all the while completely naked. (R. 408.) Appellant then took a series of x-rays. (R. 410.) Between each x-ray he instructed AL on where and how to stand, all the while she was completely naked. (R. 410.) During this process Appellant told her to remove her hands from attempting to cover her vaginal area. (R. 433-34.)

5. Patient LCpl JE (Charge II, Specification 3).

Lance Corporal (LCpl) JE had a set of x-rays for pain in her hip at the Dam Neck clinic. (R. 813.) The x-ray technician was a tall African-American male with a "Jamaican type accent." (R. 813.) She wore paper shorts and a t-shirt during the x-rays. (R. 814.) She received a call the next day to return to the Dam Neck clinic for additional x-rays. (R. 814.) A different African American male with no discernible accent was the technician the second day. (R. 815.) LCpl JE identified Appellant as the technician from the second day. (R. 816.) LCpl JE was nineteen years old at the time. (R. 830.)

There was nobody else in the radiology department when she arrived. (R. 828.) Only one x-ray technician is ever scheduled to be present at the Dam Neck branch clinic. (R. 580, 582, 690.) Appellant brought her into the exam room and told her she would have to be nude for these x-rays and that he would return with the consent form. (R. 816.) She signed the form and undressed. (R. 819.)

As she lay completely naked on the exam table Appellant told her how to position herself. (R. 820.) Appellant touched her to move her into position while she was completely naked and took the x-rays. (R. 820.) Appellant then repositioned her and took more x-rays. (R. 821.)

Appellant then showed LCpl JE the x-rays and told her she may need surgery to correct the problem he could see on the x-rays. (R. 822.) He then suggested one more series of x-rays to determine if she would need surgery. (R. 823.) Appellant gave her the option of laying on her back with her legs spread or being positioned "doggy style" on the table for the additional series of x-rays. (R. 824; Pros. Ex. 20.) Appellant was repeatedly interrupted by phone calls in the exam room and ultimately told LCpl JE she did not need the final series of x-rays. (R. 829.)

6. Patient BS (Charge II, Specification 4).

BS was enlisted in the Navy at the time of her x-rays. (R. 549.) She was cross rating to air crew and was completing a medical checklist which included a chest x-ray. (R. 549.) She was a twenty-three year old E-3 at the time. (R. 549.) Her x-ray technician was an African American male with no notable foreign accent. (R. 550.) Her technician told her she needed to be topless for the chest x-ray. (R. 550-51.) She took three views naked from the waist up. (R. 554.) Appellant told her how to stand for each x-ray. (R. 554.) BS's medical records show Appellant was her x-ray tech. (Pros. Ex. 8 at 2.)

B. Denial of expert assistance in the fields of eyewitness memory and identification.

Appellant filed a motion seeking an expert consultant in the fields of "[e]yewitness [m]emory [and] [i]dentification." (Appellate Ex. XI.) The United States opposed the motion. (Appellate Ex. XVII.) Defense Counsel presented no testimony in support of the motion, relying on enclosures to their motion and argument of counsel. (R. 36-47, 52-55.)

During argument Defense Counsel conceded that the Defense team can "self-educate and to a certain degree, become competent to do its job——during cross examination." (R. 45.) After hearing the thorough arguments from the parties the Military Judge took the matter under advisement indicating he would allow the defense to submit proposed findings of fact and conclusions of law prior to rendering his ruling. (R. 56.)

The Military Judge denied the Defense motion orally on the Record and subsequently supplemented that oral ruling with a written ruling. (R. 140; Appellate Ex. CVI.) The Military Judge found Appellant failed to meet his burden to establish the necessity of expert assistance because he did not show why "defense counsel is unable to gather and present the evidence the expert assistant would be able to develop." (Appellate Ex. CVI.)

C. Admission of muster reports in response to Member question during deliberations on merits.

Members returned during deliberations with a question asking for additional evidence. (R. 1413; Appellate Ex. CI.) The Members specifically requested statements collected during NCIS investigations, muster reports, and counseling chits. (R. 1413.) Civilian Defense Counsel objected to any additional evidence, including muster reports. (R. 1416.) Civilian Defense Counsel articulated the basis of his objection to the muster reports as hearsay. (R. 1417.) Trial Counsel had no objection to admitting the muster reports. (R. 1418.)

An Article 39(a) session was held on the admissibility of the muster reports. (R. 1438.) The muster reports in question were limited to those referred to during the trial, specifically during the cross examination of the accused.[1] (R. 1469-70.) Trial Counsel called Ms. Deloris Wilson to authenticate the reports. (R. 1438.) Ms. Wilson served as an administrative assistant at Branch Medical Clinic Oceana. (R. 1439.) Her

[1] The five muster reports offered were:
(1) Prosecution Exhibit 26, regarding February 24, 2011, the day of the charged incident with PMG;
(2) Prosecution Exhibit 27, regarding March 10, 2011, the day of the charged incident with DSB;
(3) Prosecution Exhibit 28, regarding March 17, 2011, the day of the charged incident with OLS;
(4) Prosecution Exhibit 29, regarding April 13, 2011, the day of the charged incident with JVE; and
(5) Prosecution Exhibit 30, regarding May 4, 2011, the day of the charged incident with BAS.

responsibilities included personnel and pay matters. (R. 1439.) As a part of her personnel and pay responsibility she tracked staffing levels at the clinics through a daily muster report. (R. 1441, 1444.) Ms. Wilson created the muster reports at 0800 every morning. (R. 1444.) Ms. Wilson maintained each day's muster report in a separate Excel spreadsheet file on her work computer. (R. 1440.) Ms. Wilson maintained the spreadsheet files herself. (R. 1441.)

Upon request from the Trial Counsel she printed off muster reports for five specific dates and brought them to the courtroom. (R. 1442-43, 1469-70; Prosecution Ex. 26-30.) The file names demonstrate the date the report corresponds to but the content of the file does not show the date. (R. 1440.) Ms. Wilson handwrote the date each printout corresponded to on the top left corner after printing them out. (R. 1443; Pros. Ex. 26-30.) The date in the upper right corner is the date the document was printed. (R. 1443; Pros. Ex. 26-30.)

In addition to cross examining the authenticating witness, Civilian Defense Counsel called a witness of his own, Hospitalman First Class (HM1) Odom. (R. 1451.) HM1 Odom submitted some of the data that was used to create two of the muster reports, Prosecution Exhibits 26 and 30. (R. 1452.) Those two muster reports contained missing data fields pertaining to the whereabouts of some clinic employees. (R.

1454; Pros. Ex. 26 and 30.) Both muster reports have entries for Appellant. (R. 1457; Pros. Ex. 26 and 30.) HM1 Odom indicated if a person is not present and he has not heard from them as to why they are not present he marked them as "UA." (R. 1464.) However, if a person had contacted him and explained they were running late he would mark them as "late stay" on the muster report. (R. 1464.) A person working a late shift would also be marked as "late stay." (R. 1465.)

Civilian Defense Counsel challenged that the muster reports were not generated or maintained in the regular course of business and that they were unreliable. (R. 1467-68.) The Military Judge admitted the muster reports over the objection. (R. 1470.) In response to those specifically articulate objections, the Military Judge found, based on Ms. Wilson's explanation of how she generates the reports, that they were generated in the regular course of business. (R. 1468.) The Military Judge also noted muster reports are mentioned in the text of the rule as an example of what can qualify as a business record. (R. 1469.) The Military Judge found the mere hypothetical possibility of someone lying in a muster report or leaving the workspace after the muster was completed insufficient to vitiate the reliability of the reports. (R. 1469.)

Once the documents were admitted into evidence the Members were brought back inform their deliberations. (R. 1473.) The Military Judge provided the new exhibits to the Members and returned them to their deliberations. (R. 1473.)

Argument

I.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN ADMITTING MUSTER REPORTS INTO EVIDENCE IN RESPONSE TO A SPECIFIC REQUEST FROM THE MEMBERS FOR THE REPORTS.

The daily muster reports from the medical clinic were properly admitted against both the stated and preserved hearsay objection and against the unstated confrontation clause objection.

A. The muster reports were properly admitted as business record exceptions to the prohibition on hearsay.

Evidentiary rulings admitting evidence over defense objection are reviewed for an abuse of discretion. *E.g.*, *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion." *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010) (internal quotations omitted). A military judge abuses his discretion where he relies on clearly erroneous facts, where he relies on an erroneous view of the law, or his ultimate conclusion is "arbitrary, fanciful, clearly unreasonable or clearly erroneous." *United States v. White,* 69

M.J. 236, 239 (C.A.A.F. 2010); *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987) (internal quotations omitted); *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008).

For evidence to qualify under the business records exception the proponent must establish that the record was: (1) made at or near the time of the event; (2) made by or from information transmitted by a person with knowledge; and (3) the records are made and kept in the course of the regular practice of the business entity. Mil. R. Evid. 803(6); *see also United States v. Casey*, 45 M.J. 623, 626 (N-M. Ct. Crim. App. 1996); *Military Justice Department Evidence Division: Study Guide for Lawyers,* p. 173 (Rev. 3/06). The Military Judge need only have been convinced by a preponderance of the evidence that the business records exception was satisfied. *United States v. Harris*, 53 M.J. 514, 521 (N-M. Ct. Crim. App. 2000). Here, the three predicates for the business record exception to the prohibition on hearsay were met.

Trial Counsel called Deloris Wilson to authenticate the five muster reports as she was the custodian of the records. (R. 1439; Pros. Ex. 26-30.) Ms. Wilson served as an administrative assistant at Branch Medical Clinic Oceana. (R. 1439.) Ms. Wilson's responsibilities included personnel and pay matters. (R. 1439.) As a part of her personnel and pay responsibility she tracked staffing levels at the clinics. (R.

1444.) To do this she kept a daily muster report. (R. 1441; Pros. Ex. 26.) Accordingly the muster reports are documents that were kept in the regular course of business of the clinic to account for personnel. *See* Mil. R. Evid. 803(6) (noting "morning reports and other personnel accountability documents" within business records exception to the prohibition on hearsay.)

Each day's muster report was its own electronic Excel spreadsheet file. (R. 1440.) As they were created each day at 0800, they were created at or near the time of the event. (R. 1444.) Ms. Wilson maintained the files in her own electronic filing system on her work computer. (R. 1441.) That the document was printed on the day of trial does not vitiate the fact that it was created as an electronic spreadsheet file on the morning of the particular day the report addressed. *See United States v. Loiacono*, No. 201200451, 2014 CCA LEXIS 194, *53-54 (N-M. Ct. Crm. App. Mar. 25, 2014) (finding subsequent printout of data generated and stored at the time of creation satisfied business record exception).

The muster reports were made by a person with knowledge. Ms. Wilson created her muster reports from submissions made by each individual clinic. *See United States v. Harris*, 55 M.J. 433, 437 (C.A.A.F. 2001) (holding employee generally familiar with logbook process satisfied business records exception

despite not personally making the entries in question). That she did not directly collect the data herself does not vitiate the fact that they are business records. *Loiacono*, 2014 CCA LEXIS 194 at *56 (N-M. Ct. Crim. App. Mar. 25, 2014) (finding phone records of internal calls merely maintained by hotel manager admissible under business record exception). Because Ms. Wilson created and stored the muster reports herself, these records were authenticated by a person with knowledge. *See United States v. Esposito*, No. 200700348, 2008 CCA LEXIS 90, *6-7 (N-M. Ct. Crim. App. 2008) (explaining witness need only be generally familiar with the records and how they are kept).

All of the requirements of the business records exception were satisfied by the uncontroverted testimony of the custodian of the records. Therefore, viewing that evidence in the light most favorable to the prevailing party as this Court must, the Military Judge did not abuse his discretion in finding the business records exception to hearsay satisfied. *E.g.*, *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996) (explaining evidence considered in the light most favorable to the prevailing party in reviewing evidentiary ruling); *see also United States v. Foerster*, 65 M.J. 120, 125 (C.A.A.F. 2007) (explaining the business records exception should be “construed generously in favor of admissibility.”).

Appellant's argument that the muster reports lack indicia of trustworthiness because a data field was left blank lacks merit. (Appellant's Br. at 23.) Appellant challenges only two of the six muster reports, Prosecution Exhibits 26 and 30, as having "facial irregularities." (Appellant's Br. at 23.) Neither of those two muster reports leave relevant data fields blank; rather, both show specific entries for Appellant's status at muster. (R. 1456; Pros. Ex. 26 and 30.) However, even assuming *arguendo* a particular data field had been left blank, "[n]on-compliance with strict procedural requirements in preparing business records will not render them untrustworthy." *United States v. Casey*, 45 M.J. 623, 626 (N-M. Ct. Crim. App. 1996) (quoting *United States v. Wetherbee*, 10 M.J. 304, 306 (C.M.A. 1981).) Merely disagreeing with the Military Judge's conclusion, as Appellant does, does not render that conclusion an abuse of discretion. *See United States v. Mott*, 72 M.J. 319, 329 (C.A.A.F. 2013) (recognizing within abuse of discretion review trial judges have "a range of choices and will not be reversed so long as the decision remains within that range."); *see also White*, 69 M.J. at 239 (explaining mere difference of opinion does not render a ruling an abuse of discretion); *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (same).

B. Assuming *arguendo* the muster reports did not satisfy the business records exception, Appellant suffered no prejudice from their admission because they were inconsequential.

Erroneous admission of evidence only warrants relief where it resulted in material prejudice to a substantial right. 10 U.S.C. § 859(a); *United States v. Goodin*, 67 M.J. 158, 160 (C.A.A.F. 2009). This Court evaluates "prejudice from an erroneous evidentiary ruling by weighing (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999) (citation omitted). Here, the overwhelming strength of the evidence of Appellant's guilt combined with the inconsequential nature of the muster reports establishes that there was no prejudice.

1. Strength of the case against Appellant and of the defense case.

The strength of the case against Appellant was strong. The muster reports complained of on appeal go only to establishing Appellant was physically present in the clinic and therefore could have conducted the x-ray examinations in question. Only five muster reports were admitted pertaining to five of the seven charged incidents. (Pros. Ex. 26-30.) Appellant was acquitted of one of the incidents, leaving four convictions. (R. 1476.) Three of the Victims identified Appellant in court as

their x-ray technician. (R. 522, 761, 815.) The fourth Victim provided a physical description of her x-ray technician that matched Appellant. (R. 550.)

Appellant's case, as to the four incidents he was convicted of that muster reports were admitted for was weak. *See United States v. Hall*, 66 M.J. 53, 55-56 (C.A.A.F. 2008) (finding defense case that consisted of relatively unsupported alternative theories weak). Appellant's arguments that it was not him or that the charged conduct simply did not occur were weak. The in court identifications of him as the x-ray technician were backed by the electronic medical records showing Appellant was the x-ray technician.

2. <u>The materiality and quality of the evidence in question</u>.

The muster reports are immaterial and poor quality evidence. If any of the charged misconduct had occurred at 0800, when the muster reports were taken, or immediately thereafter they could have provided some evidence Appellant was physically present in the appropriate timeframe and therefore had the opportunity to commit the offenses. However, the muster reports were inconsequential to any of the convictions here for three reasons.

First, the muster reports were not important to the prosecution's case, as evidenced by the fact that Trial Counsel never sought to introduce them into evidence during the case in

chief and never even mentioned them during closing argument spanning fifty-three transcribed pages. (R. 1296-1349); *see United States v. Durbin*, 68 M.J. 271, 276 (C.A.A.F. 2010) (finding brief references in closing and rebuttal arguments demonstrate limited materiality of the evidence in question.)

Second, muster reports provide *de minimis* value to show that Appellant was physically present when the incidents with the various Victims occurred. The Members, all being military personnel themselves, understood that even when perfectly accurate, a muster report only indicates the person was physically present when the muster was taken. Here, the muster reports were generated prior to 0800. (R. 1444.) All that a muster report shows is that Appellant was physically present at some time prior to 0800 on the days they were made.

Finally, the muster reports are cumulative for any relevant purpose for which they could have been considered by the Members. All of Appellant's Victims either identified Appellant as the person who examined them nude, or provided sufficient circumstantial evidence to support the conclusion that Appellant and no one else violated them.

a. Prosecution Exhibit 26.

Prosecution Exhibit 26 pertained to February 24, 2011. (Pros. Ex. 26.) The muster report showed Appellant as "Late Stay/Special Detail." (Pros. Ex. 26.) This is the entry used

for afternoon and evening shift workers that would not be present at the morning muster because their work day does not start for several hours yet. (R. 1465.)

The charged conduct on February 24, 2011, pertained to patient PMG. (Charge sheet, charge II, specification 1.) PMG was checked in to the clinic at 1709 in the evening, over nine hours after the muster was taken. At that hour of the evening only one x-ray technician was still on duty on the evening shift. PMG could not remember her x-ray technician's entire name but she specifically remembered the name tape on his uniform started with a "B." (R. 761-62, 795.) PMG also identified Appellant in court as her x-ray technician. (R. 761.) The muster report was completely inconsequential to Appellant's conviction of this specification in light of the much stronger evidence of his opportunity to commit the charged offense. *See United States v. Hall*, 66 M.J. 53, 56 (C.A.A.F. 2008) (noting challenged evidence not qualitatively significant where duplicative of other stronger evidence).

b. Prosecution Exhibit 27.

Prosecution Exhibit 27 pertained to March 10, 2011. (Pros. Ex. 27.) Appellant was marked as "Late Stay/Special Detail." (Pros. Ex. 27.) The charged conduct on March 10, 2011, pertained to patient DSB. (Charge sheet, charge I, specification 1.) Patient DSB did not check in to the clinic

until 1647, during the afternoon/evening shift. Whoever the morning muster report showed was or was not present at 0800 that day had no real bearing on the charged conduct from that day that occurred nearly nine hours later. The muster report for this day was inconsequential to the conviction of this specification.

DSB provided a physical description of her x-ray technician that matched Appellant. (R. 522.) DSB, who was a second class petty officer herself, specifically noted her x-ray technician was a second class petty officer. (R. 522, 545.) DSB then identified Appellant in court as her x-ray technician on March 10, 2011. (R. 522.) In light of the fact that the Members convicted Appellant, they must have found DSB a credible witness. In light of the much stronger evidence that Appellant was her x-ray technician, including her in court identification of him, the muster report was inconsequential to Appellant's conviction. *See Hall*, 66 M.J. at 56.

c. Prosecution Exhibit 28.

Prosecution Exhibit 28 pertains to March 17, 2011. (Pros. Ex. 28.) Prosecution Exhibit 28 does show Appellant was present on the morning of March 17, 2011, when muster was taken. (Pros. Ex. 28.) However, the Members acquitted him of the charged offense on that date. (R. 1476.) Despite the muster report providing some evidence Appellant may have been physically

present at the scene, the Members acquitted, indicating they placed little weight on the muster reports.

d. Prosecution Exhibit 29.

Prosecution Exhibit 29 pertained to April 13, 2011. (Pros. Ex. 29.) Appellant was marked as "present." (Pros. Ex. 29.) The charged conduct on April 13, 2011, pertained to patient JVE. (Charge sheet, charge II, specification 3.) The muster report was merely duplicative of other stronger evidence of Appellant's guilt. *See Hall*, 66 M.J. at 56 (noting challenged evidence not qualitatively significant where duplicative of other stronger evidence).

Patient JVE's x-rays were taken at Dam Neck, where only one x-ray technician worked at a time. (R. 813.) Patient JVE's electronic medical record shows she was entered into the system as "arrived" under Appellant's user name and password. JVE's x-rays show Appellant's personalized x-ray marker device indicating he took the x-ray. Finally, patient JVE clearly identified Appellant as her x-ray technician. (R. 815.) The muster report indicating Appellant was present at Dam Neck that day was inconsequential in Appellant's conviction of this specification.

e. Prosecution Exhibit 30.

Prosecution Exhibit 30 pertained to May 4, 2011. (Pros. Ex. 30.) Appellant was marked as "present." (Pros. Ex. 30.) The charged conduct on May 4, 2011, pertained to patient BAS.

(Charge sheet, charge II, specification 4.) BAS' description of her x-ray technician matched Appellant. (R. 550.) BAS' electronic medical records indicate Appellant was her x-ray technician and Appellant's personalized technician markers in the x-ray indicate he took the image himself. That the muster report indicates he was present that day was inconsequential to his conviction of the offense.

C. Admission of the muster reports did not violate the Confrontation Clause because the documents themselves are not testimonial hearsay and the declarant of the handwritten entries on the documents was subjected to cross examination.

Whether proffered evidence constitutes testimonial hearsay is a question of law reviewed *de novo*. *E.g.*, *United States v. Clayton*, 67 M.J. 283, 286 (C.A.A.F. 2009).

1. The test to determine whether a statement is testimonial in nature has significantly evolved since *Crawford v. Washington*.

The Confrontation Clause prohibits testimonial hearsay without an opportunity for cross examination. *United States v. Crawford*, 541 U.S. 36, 53-54 (2004); *United States v. Blazier (Blazier II)*, 69 M.J. 218, 222 (C.A.A.F. 2010). This holding turns on the phrase "testimonial statements." *Davis v. Washington*, 547 U.S. 813, 821 (2006). "The language used by the Supreme Court to describe whether and why a statement is testimonial is far from fixed." *United States v. Tearman*, 72 M.J. 54, 58 (C.A.A.F. 2013); *see also United States v. Squire*,

72 M.J. 285, 288 (C.A.A.F. 2013) (noting "[t]he Supreme Court has not articulated a comprehensive definition of testimonial statements.") (internal quotations omitted).

The Court has noted testimony is "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford*, 541 U.S. at 51 (internal citations omitted). While the Court declined to provide a comprehensive definition of "testimonial" they did identify examples of core testimonial statements: "Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* at 68.

In the companion cases *Davis v. Washington* and *Hammon v. Indiana*, 547 U.S. 813 (2006), the Court introduced the "primary purpose" test in analyzing statements for whether they qualify as testimonial. In *Davis*, a victim made statements to a 911 operator "under circumstances objectively indicating that the primary purpose of the interrogation [was] to enable police assistance to meet an ongoing emergency"; thus the statement was nontestimonial. *Id.* at 822. By contrast, the victim's statements to police in *Hammon* were testimonial because "[o]bjectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime ...." *Id*. at 830.

In both cases, the Court looked to the primary purpose as informed by its relative formality. In *Davis*, the Court compared the statements with *Crawford's* statements and found that "the difference in the level of formality between the two interviews is striking," which "objectively indicate[d]," that the statement's primary purpose was not evidentiary. *Id.* at 827-28. The *Hammon* statements did not rise to the level of formality seen in *Crawford* but remained sufficiently formal to indicate an evidentiary purpose. *Id*. at 830.

Justice Thomas wrote separately——concurring in the judgment in *Davis* but dissenting in *Hammon*——to explain his belief that the "plain terms of the 'testimonial' definition we endorsed [in *Crawford*] require some degree of solemnity before a statement can be deemed 'testimonial.'" *Id.* at 835 (Thomas, J., dissenting in part, concurring in part). "Affidavits, depositions, and prior testimony are, by their very nature, taken through a formalized process" and, he explained, "confessions when extracted by police in a formal manner carry sufficient indicia of solemnity to constitute formalized statements," which makes these statements testimonial. *Id.* at 836-37. But Justice Thomas declined to extend the reach of the Confrontation Clause beyond these "formalized testimonial materials." *Id.*

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the

Court first applied *Crawford* to scientific reports. The majority held that a lab analyst's certificate fell within the "core class of testimonial statements" as an affidavit because it was a sworn and notarized certificate that attested to the results of testing. *Id.* at 310. Justice Thomas concurred noting the statement fell within the limited reach of the Confrontation Clause due to its level of formality. *Id*. at 329 (Thomas, J., concurring).

In *Michigan v. Bryant*, 131 S. Ct. 1143, 1150 (2011), the Supreme Court applied the "primary purpose" test and held that the victim's statements to police "to enable police assistance to meet an ongoing emergency" were nontestimonial. "The informality suggests that the interrogators' primary purpose" was to address an emergency, and the "circumstances lacked any formality that would have alerted [the declarant] to or focused him on the possible future prosecutorial use of his statements." *Id.* at 1166. Justice Thomas again concurred in the judgment, explaining the "questioning by police lacked sufficient formality and solemnity for his statements to be considered 'testimonial.'" *Id*. at 1167 (Thomas, J., concurring).

The Court returned to scientific testing in *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011). The majority held that, like *Melendez-Diaz*, the forensic lab's "certificate of analysis" fell within the core class of testimonial statements. *Id.* at

2716-17. Indicating disagreement, however, only four Justices (Ginsburg, Scalia, Sotomayor, and Kagan) joined the "primary purpose" test. *Id.* at 2714 n.6. Moreover, Justice Sotomayor and Justice Kagan did not join Part IV. *See also United States v. Sweeney*, 70 M.J. 296, 306 (C.A.A.F. 2011) (Baker, J., dissenting) (discussing Justice Sotomayor's limiting concurring opinion). Nonetheless, five Justices joined Part III and found that though the certificate was not notarized, the certificate was sufficiently "formalized." *Bullcoming*, 131 S. Ct. at 2717.

The Court addressed the Confrontation Clause again in *Williams v. Illinois*, 132 S. Ct. 2221 (2012) (plurality). Four justices held that a DNA lab report that the expert witness relied on was not testimonial hearsay because it was not offered into evidence for the truth of the matter. *Id.* at 2228. The Court noted that even if the report had been offered for the truth of the matter asserted it was not testimonial in light of its primary purpose and level of formality. *Id*. at 2242.

Justice Thomas joined in the judgment, producing the majority. *Williams, 132 S. Ct.* at 2255 (Thomas, J. concurring). But his rationale was more narrow: the report did not violate the Confrontation Clause "solely because" the statements lacked the "requisite 'formality and solemnity' to be considered 'testimonial' for purposes of the Confrontation Clause." *Id.* (citation omitted).

2. Justice Thomas' concurrence in *Williams v. Illinois* controls as the test for whether a statement qualifies as testimonial hearsay.

As demonstrated above, the Court's definition of "testimonial" has continued to evolve since *Crawford*. However, Justice Thomas's concurrence in *Williams v. Illinois* best articulates the current state of law, as it was the narrowest rationale on which five Justices agreed. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (explaining when a "fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds.") (internal quotation and citation omitted); *but see United States v. Tearman*, 72 M.J. 54, 59 n.6 (C.A.A.F. 2013) (indicating *Williams* did not "alter" Confrontation Clause jurisprudence).

In *Williams*, while four Justices found that the report was not testimonial because it was not offered for the truth of the matter or, alternatively, because it lacked an evidentiary purpose and requisite formality, Justice Thomas's concurrence hinged solely on the lack of the requisite formality and solemnity. That concurrence provided the narrowest grounds for the holding; therefore, it serves as the controlling rationale.

To qualify as testimonial, Justice Thomas requires that a statement have both an evidentiary purpose and sufficient

formality and solemnity. *Williams*, 132 S.Ct. at 2261 (Thomas, J., concurring). This analytic framework captures "depositions, affidavits, and prior testimony, or statements resulting from 'formalized dialogue,' such as custodial interrogation." *Id.* at 2260 (citation omitted); *see United States v. Tearman*, 72 M.J. 54, 65 (C.A.A.F. 2013) (Baker, J., concurring in result) (explaining *Williams* limits prior Confrontation Clause jurisprudence).

3. The muster reports themselves are not testimonial hearsay because they were not generated in response to a law enforcement request, contain only routine facts, and were not made with an eye toward a future trial.

The question of whether a statement qualifies as testimonial hearsay is a fact specific inquiry. *United States v. Squire*, 72 M.J. 285, 288 (C.A.A.F. 2013). A reviewing court objectively considers the totality of the circumstances surrounding the statement to determine it is testimonial. *Squire*, 72 M.J. at 288. There are three factors for consideration as part of the review of the totality of the circumstances: "(1) the statement was elicited or made in response to law enforcement or prosecutorial inquiry; (2) the statement involved more than a routine and objective cataloging of unambiguous factual matters; and (3) the primary purpose for making, or eliciting, the statement was the production of evidence with an eye towards trial." *Squire*, 72 M.J. at 288,

289; *see also United States v. Tearman*, 72 M.J. 54, 58 (C.A.A.F. 2013) (noting both the purpose of the statement and the formality of the statement as factors for consideration of whether it is testimonial). Here, an objective consideration of the circumstances surrounding the muster reports themselves show not even one of the three factors are satisfied and therefore they are not testimonial hearsay.

a. The muster reports were not made in response to a law enforcement or prosecutorial inquiry.

The muster reports are generated daily. (R. 1441.) The muster reports are part of the ordinary course of business of the Oceana medical clinic for pay and for accountability purposes. (R. 1444.) The muster reports in question here were created in February, March, April, and May of 2011. (Pros. Ex. 26-30.) The muster reports were generated long before this investigation was initiated. Accordingly, they were not created in response to a law enforcement or prosecutorial inquiry. *See United States v. Rankin*, 64 M.J. 348, 352 (C.A.A.F. 2007) (finding even documents generated in response to a specific unauthorized absence not testimonial hearsay); *see also Squire*, 72 M.J. at 289 (finding statements made by medical provider to law enforcement pursuant to a statutory reporting requirement non-testimonial).

b. The muster reports contain only routine non-ambiguous facts.

"[U]nambiguous factual matters" encompasses more than machine generated laboratory data. *Squire*, 72 M.J. at 289. The muster reports here record unambiguous facts. The muster report merely captures whether an individual is present at the time of muster or not. There is no ambiguity in that fact. The collection of these unambiguous facts is routine because it is done every workday at the same time. Accordingly, these statements are not testimonial hearsay.

c. The primary purpose for creating the muster reports was administrative as opposed to evidentiary with an eye towards trial.

Evaluating the primary purpose of a statement "requires a combined inquiry that accounts for both the declarant and the interrogator." *Squire*, 72 M.J. at 290 (internal quotations omitted). Here, there is no interrogator asking questions. The muster reports were part of the Oceana clinic's standard operating procedure.

Knowledge that a statement could potentially be used in a criminal trial does not render it a testimonial statement. *Squire*, 72 M.J. at 290. In *Davis*, a woman made a call to a 911 emergency operator. Her ensuing statements were made to law enforcement personnel. *Davis*, 126 S.Ct. at 2271. However her primary purpose was to receive emergency assistance rather than

generate evidence for a possible future trial. *Davis*, 126 S.Ct. at 2274, 2277. Accordingly, despite the statements being made to law enforcement personnel and declarant knowing they may be used in a future trial, they were not testimonial because the primary purpose was to acquire emergency assistance rather than produce evidence. *Davis*, 126 S.Ct. at 2277.

Here, as in *Davis*, the primary purpose of the muster reports was not to produce evidence. No evidence was adduced at trial that Ms. Wilson was even aware the muster reports even could have an evidentiary purpose when she created them. Even if she had been aware of the possibility, her primary purpose was administrative. One of her responsibilities was to account for staffing and manage pay issues. (R. 1439.) As these muster reports were not created with an evidentiary purpose and an eye towards a trial they are not testimonial hearsay.

4. <u>The handwritten annotations on the muster reports did not violate the Confrontation Clause because they are not testimonial and the declarant was subjected to cross examination</u>.

The handwritten dates in the upper left hand corner of the muster reports are not testimonial hearsay. (Pros. Ex. 26-30.) The custodian of records handwrote the date each muster report corresponds to on the report because that information is not contained in the content of the electronic file. (R. 1443.) The date the report corresponds to is in the name of the saved

file, which does not print when she prints the file. (R. 1440.) Accordingly, handwriting the date on the printout did not add anything to the content of the report. For the same reasons discussed *supra*, the handwritten notes are not testimonial as they are part of the muster report.

If the handwritten notes were deemed separate statements for purposes of Confrontation Clause analysis, their admission did not violate the Confrontation Clause. The Confrontation Clause prohibits testimonial hearsay without an opportunity for cross examination. *Crawford*, 541 U.S. at 53-54. Here, Ms. Wilson is the declarant as she handwrote the dates on the reports. (R. 1443.) Ms. Wilson was subjected to cross examination, accordingly, no Confrontation Clause violation occurred.

D. Assuming *arguendo* admission of the muster reports did violate the Confrontation Clause, their admission was harmless beyond a reasonable doubt because it was cumulative of eyewitness identifications and medical records.

1. Determination of whether a constitutional error was harmless beyond a reasonable doubt is measured through application of the *Van Arsdall* factors.

The Court considers whether a constitutional error is harmless beyond a reasonable doubt *de novo*. *United States v. Kreutzer*, 61 M.J. 293, 299 (C.A.A.F. 2005). Confrontation Clause errors only warrant relief where they were not harmless

beyond a reasonable doubt based on the entire record. *United States v. Tearman*, 72 M.J. 54, 55-56 (C.A.A.F. 2013); *Blazier II*, 69 M.J. at 227. There are several factors measured to determine whether an error was harmless beyond a reasonable doubt including the importance of the unconfronted testimony in the prosecution's case, whether that testimony was cumulative, the existence of corroborating evidence, the extent of confrontation permitted, and the strength of the Government's case. *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986); *Sweeney*, 70 M.J. at 306. The "question is whether there is a reasonable probability that the evidence complained of might have contributed to the conviction." *Chapman v. California*, 386 U.S. 18, 23 (1967)(citation omitted).

2. Applying the *Van Arsdall* factors, there is no reasonable probability that the muster reports contributed to Appellant's convictions.

Here, as in *Tearman*, under the first *Van Arsdall* factor, the muster reports were insignificant to the prosecution. *Tearman*, 70 M.J. at 644. The muster reports were so insignificant the prosecution did not offer them into evidence during its case in chief. Further, the Trial Counsel did not reference them during his closing argument spanning fifty-three transcribed pages. (R. 1296-1349.) As discussed *supra*, at 22-26, the prosecution hinged on the testimony of the Victims themselves. Their testimony was supported by their electronic

medical records showing Appellant was their x-ray technician, as well as Appellant's personalized x-ray technician markers in their x-rays demonstrating he took the images.

Any testimonial hearsay in the muster reports was merely cumulative of the powerful in-person testimony identifying Appellant supported by the individual Victims' medical records. *See generally United States v. Bryne*, 70 M.J. 611, 620 (C.G. Ct. Crim. App. 2011) (finding supporting documentary evidence insignificant in light of compelling in court testimony).

Appellant had and exercised a full opportunity for vigorous cross examination of the custodian of records who generated the muster reports satisfying the third *Van Arsdall* factor. *Van Arsdall*, 475 U.S. at 684. Ms. Wilson was subjected to rigorous cross examination on all aspects of the muster reports. Appellant conducted a thorough cross-examination of the muster reports through Ms. Wilson. As to the final *Van Arsdall* factor, the prosecution's case against Appellant was overwhelming.

Applying the *Van Arsdall* factors, there is no reasonable probability that the evidence complained of might have contributed to Appellee's conviction. The muster reports were relatively inconsequential and where they had any value they were cumulative of stronger evidence. Further, Appellant had a full and fair opportunity to cross examine the declarant, Ms. Williams regarding the muster reports. Therefore, any possible

error was harmless beyond a reasonable doubt.

II.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING APPELLANT EXPERT ASSISTANCE IN THE FIELDS OF EYEWTINESS MEMORY AND IDENTIFICATION BECAUSE THE DEFENSE ATTORENY WAS CAPABLE OF GATHERING THE EVIDENCE HIMSELF.

A. Abuse of discretion requires more than merely disagreeing with the decision reached by a military judge.

A military judge's ruling on a request for expert assistance is reviewed for an abuse of discretion. *E.g.*, *United States v. Gunkle*, 55 M.J. 26, 32 (C.A.A.F. 2001). "A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *Miller*, 66 M.J. at 307. "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion." *Lloyd*, 69 M.J. at 99 (internal quotations omitted). The ultimate ruling constitutes an abuse of discretion where it is "arbitrary, fanciful, clearly unreasonable or clearly erroneous." *United States v. Baker*, 70 M.J. 283, 287 (C.A.A.F. 2011) (internal quotations omitted); *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987) (internal quotations omitted).

B. The Military Judge's factual findings are not clearly erroneous because they are supported in the Record.

A military judge abuses his discretion when his ruling is predicated upon findings of fact that are clearly erroneous. *Miller*, 66 M.J. at 307. Findings of fact are clearly erroneous when they are unsupported by the record. *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004); *see also United States v. Hughes*, 640 F.3d 428, 437 n.4 (1st Cir. 2011) (determining factual finding unsupported by the record clearly erroneous); *United States v. Rizzo*, 349 F.3d 94, 98-100 (2d Cir. 2003) (same); *United States v. Phelps*, 17 F.3d 1334, 1337 (10th Cir. 1994) (same); *Chaney v. Galveston*, 368 F.2d 774, 776 (5th Cir. 1966) (same). Where there is some support for a factual finding in the record it is only clearly erroneous where "the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985); *United States v. Martin*, 56 M.J. 97, 106 (C.A.A.F. 2001); *United States v. Blair*, 524 F.3d 740, 747 (6th Cir. 2008).

Here, Appellant never identifies a specific factual finding made by the Military Judge in his written ruling as clearly erroneous. (Appellant's Br. at 37-46.) Accordingly this Court should adopt the Military Judge's factual findings contained in his written ruling for purposes of appellate review. *E.g.*,

United States v. Leedy, 65 M.J. 208, 213 n.4 (C.A.A.F. 2007) (explaining findings of fact accepted for appellate review where there is merely "some evidence" in the Record to support them).

C. The Military Judge did not rely on an erroneous view of the law by referencing the fact that civilian defense attorney's thirty years of experience in reaching his conclusion.

A military judge abuses his discretion where his conclusion is based upon an erroneous view of the law. *E.g., United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008). An erroneous view of what law is applicable, an erroneous application of the applicable law, or omission from consideration of binding law, constitute reliance on an erroneous view of the law. *See United States v. Seay*, 60 M.J. 73, 77 (C.A.A.F. 2004); *see also United States v. Zarbatany*, 70 M.J. 169, 170 (C.A.A.F. 2011) (finding failure to consider alternative remedies laid out in case law an application of erroneous view of law). Here, Appellant alleges the Military Judge "relied upon an erroneous understanding of the law," but cites no case the Military Judge erroneously cited and relied upon, no case omitted from his analysis, nor any case applied by the Military Judge that was inapplicable. (Appellant's Br. at at 45.) Appellant's failure to specify how the Military Judge relied on an erroneous view of the law forces the United States to speculate as to Appellant's argument in

order to respond. Contrary to this argument, the Military Judge applied the correct law in denying the Defense Motion.

1. The Military Judge cited and applied the correct legal principles from binding case law.

An accused is entitled to production of expert assistance where it is "relevant and necessary." *E.g.*, *United States v. Ford*, 51 M.J. 445, 455 (C.A.A.F. 1999) (quoting R.C.M. 703(d)). The Military Judge correctly identified this principle in citing to *United States v. Garries*, 22 M.J. 288, 290 (C.M.A. 1986) and *United States v. Gunkle*, 55 M.J. 26, 31-32 (C.A.A.F. 2001). (Appellate Ex. CVI at 8.) As the Military Judge noted, the accused bears the burden of demonstrating both relevance and necessity of the requested expert. *United States v. Gunkle*, 55 M.J. 26, 31-32 (C.A.A.F. 2001). The Military Judge also correctly identified the three prong test an accused must satisfy to establish necessity of expert assistance: "(1) why the expert is needed, (2) what the expert would accomplish for the accused, and (3) why the defense counsel is unable to gather and present the evidence the expert assistant would be able to develop." *Gunkle*, 55 M.J. at 31-32; (Appellate Ex. CVI at 8.)

The cases cited and applied by the Military Judge are still valid law as none of them have been abrogated or completely overturned. The Military Judge omitted express reference to the point that the accused must also establish denial of such

assistance would result in a fundamentally unfair trial. *Gunkle*, 55 M.J. at 31. However this Court can be confident that the Military Judge was aware of the principle as he cited *Gunkle* for a major rule and the same page of the opinion from which this statement springs. (Appellate Ex. CVI at 8.) Further, omission of this additional burden on Appellant to justfy expert assistance actually inures to Appellant's benefit. Accordingly the Military Judge did not rely on an erroneous view of what law applied to Appellant's detriment.

2. The Military Judge did not omit binding case law from his analysis.

Appellant cited no binding authority that the Military omitted from his analysis. Of the six cases in his argument, only three are from the military justice system. (Appellant's Br. at 37, 38, and 41.) Two of the cases, *United States v. Lloyd*, 69 M.J. 95 (C.A.A.F. 2010) and *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005), are cited for applicable appellate standards of review. (Appellant's Br. at 37.) At trial the Military Judge would have no reason to cite applicable standards of appellate review, therefore omission of *Bresnahan* or *Lloyd* for those propositions was not reliance on an erroneous view of the law.

Appellant cited both *Lloyd* and *United States v. Warner*, 62 M.J. 114, 118 (C.A.A.F. 2005) for the applicable test for

showing reasonable probability of assistance from the requested expert. (Appellant's Br. at 37, 38.) The Military Judge did not rely on an erroneous view of the law by omitting either case from his analysis.

As Appellant notes, *Warner* relies on *United States v. Gunkle*, 55 M.J. 26, 31 (C.A.A.F. 2001). (Appellant's Br. at 37 n.130.) As the Military Judge did cite and rely on *Gunkle* himself, his omission of *Warner* is insignificant. (Appellate Ex. CVI at 8.) Omission of *Lloyd* is similarly inconsequential. The Military Judge cited *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994), for the reasonable probability of assistance test. (Appellate Ex. CVI at 8.) The *Lloyd* opinion, on which Appellant's argument relies, derives its holding from *Gonzalez*, the case the Military Judge relied upon. *Lloyd*, 69 M.J. at 99. Consequently, the Military Judge's citation to *Gonzalez* over *Lloyd* was not reliance on an erroneous view of the law. (Appellate Ex. CVI.)

The three other cases cited by Appellant cannot form the basis of an abuse of discretion. (Appellant's Br. at 41.) Two of the cases are from state courts and the third is from a federal circuit court. (Appellant's Br. at 41.) None of those cases are binding on military courts, and consequently their omission from the Military Judge's analysis does not constitute an abuse of discretion. *Cf. Seay*, 60 M.J. at 77 (explaining

omission from consideration of binding case law constitutes abuse of discretion).

3. The Military Judge did not misapply case law in his analysis.

Appellant appears to allege the Military Judge weighed considerations not found in case law in reaching his conclusion, thereby abusing his discretion. (Appellant's Br. at 41.) This argument here is fatally flawed because it both misapprehends the applicable legal test and mischaracterizes the ruling of the Military Judge. The third prong of the necessity test that Appellant must demonstrate is "why is the *defense counsel* unable to gather and present the evidence that the expert assistant would be able to develop." *Gunkle*, 55 M.J. at 31-32 (emphasis added). This language expressly instructs the Military Judge to consider the defense attorney in making his determination. Consideration of the defense attorney himself is appropriate in determining necessity of expert assistance. *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994).

The Military Judge found Appellant failed to meet his burden to show his defense counsel was unable to gather the evidence himself. (Appellate Ex. CVI at 9.) The Military Judge did not rely solely on the experience of Civilian Defense Counsel to reach his conclusion as Appellant suggests. (Appellant's Br. at 41.) The Military Judge explained five

separate factual findings that led him to that conclusion. (Appellate Ex. CVI at 9.) One of those findings was that the civilian Defense Counsel has over thirty years of experience. (Appellate Ex. CVI. at 9.) Even the defense attorney himself conceded that he was able to gather the evidence himself when he stated the defense team could "self-educate and to a certain degree, become competent to its job—-during cross examination." (R. 45.)

In *Gonzalez*, the military judge considered the defense attorney's proficiency in speaking Spanish in determining whether the defense attorney would be able to gather the evidence himself. *Gonzalez*, 39 M.J. at 461. Here, as in *Gonzalez*, the Military Judge properly considered the particular defense counsel in determining whether he was able to gather the evidence he claimed he needed an expert to gather. (Appellate Ex. CVI at 9.)

Consequently, the Military Judge's correct application of the necessity test did not constitute an abuse of discretion, and Appellant merits no relief on this assignment of error.

III.

APPELLANT'S CONVICTIONS WERE LEGALLY AND FACTUALLY SUFFICIENT BECAUSE THE VICTIM'S TESTIMONY ESTABLISHED ALL ELEMENTS OF THE OFFENSES AND WAS CORROBORATED BY OTHER WITNESSES INCLUDING APPELLANT'S OWN ADMISSIONS.

This Court reviews claims of legal and factual insufficiency *de novo*. 10 U.S.C. § 866(c); *United States v. Beatty*, 64 M.J. 456, 459 (C.A.A.F. 2007). The test for legal sufficiency is whether, considering the evidence admitted at trial in a light most favorable to the prosecution, a reasonable fact-finder could have found all the elements beyond a reasonable doubt. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Testing for factual sufficiency, this Court asks whether, after weighing the evidence in the record of trial, it is independently convinced of Appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). In testing for factual sufficiency, this Court is required to "recogniz[e] that the trial court saw and heard the witnesses." *Id*. This is not a *pro forma* legal requirement. Rather, it takes into account the legal rule that the trier of fact is best situated to assess a witness' credibility while testifying. *See, e.g., United States v. Madey*, 14 M.J. 651, 653 (A.C.M.R.

1982), *rev. denied*, 15 M.J. 183 (C.M.A. 1983); *United States v. Ferguson*, 35 F.3d 327, 333 (7th Cir. 1994), *cert. denied*, 514 U.S. 1100 (1995) (trial court's evaluation of witness credibility "will not be disturbed unless it is completely without foundation."). It also takes into account that, where the court members are properly instructed to consider a witness' credibility, this Court should presume that the members followed the Military Judge's instructions to do so here. *See United States v. Collier*, 67 M.J. 347 (C.A.A.F. 2009). (*See* R. 1286.)

A. Appellant's two convictions for attempted indecent conduct were legally and factually sufficient.

There are four elements to attempted indecent act: "(1) [t]hat the accused did a certain overt act; (2) [t]hat the act was done with specific intent to commit a certain offense under the code; (3) [t]hat the act amounted to more than mere preparation; and (4) [t]hat the act apparently tended to effect the commission of the intended offense. Manual for Courts-Martial, pt. IV, para. 4(b) (2012 ed.). Appellant challenges both convictions of attempted indecent conduct. (Appellant's Br. at 46.)

1. Patient LS3 DB (Charge I, Specification 1).

Appellant's challenge to both the legal and factual sufficiency of this conviction are limited to the first element, specifically, the identification of Appellant as the

perpetrator. (Appellant's Br. at 47-48.) Appellant argues LS2 DB's in court identification of Appellant as her x-ray technician cannot be trusted and that the marker in her x-ray was "DM8" as opposed to Appellant's personalized marker. (Appellant's Br. at 50.)

This conviction is legally sufficient on the basis of the in court identification alone. When the in court identification is considered in the light most favorable to the prosecution, as this Court must, a reasonable fact finder could have found the first element satisfied. *See Reed*, 54 M.J. at 41.

There are many more facts which when combined with the in court identification demonstrate the factual sufficiency of this conviction as well. LS2 DB was a third class petty officer at the time of the x-rays. (R. 518.) LS2 did not merely testify that she noticed her x-ray technician was a second class petty officer. (R. 522.) On re-direct examination she explained that she specifically made note of his rank. (R. 545.) A third class petty officer was having what she described as an "uncomfortable" encounter with someone that outranks her telling her she has to be completely naked when she does not believe that is correct. (R. 526.) That she took specific note of the rank of the person making her so uncomfortable that she was refusing to comply with his instructions is not at all surprising. (R. 526.) Appellant was the only second class

petty officer working as an x-ray technician at the Oceana clinic. (R. 578-79.)

Further, the physical description LS2 DB provided of her x-ray technician, “African American, about six foot, second class, kind of stocky” matched Appellant. (R. 522.) LS2 DB also testified that her x-ray technician lacked any discernible foreign accent. R. 522.) Appellant’s lead petty officer testified that Appellant does not speak with any accent. (R. 579.) Meaning she was not confusing Appellant with the other African American x-ray technician, HM3 Philogene, who was born and raised in Haiti and spoke with an accent. (R. 743.) Finally, LS2 DB confidently identified Appellant as her x-ray technician. (R. 522.)

Only one technician works in the radiology department at Oceana clinic after 1600. (R. 687.) The electronic medical records program used in the radiology department, CHCS, requires a Common Access Card (CAC) as well as a username and password to access. (R. 755.) LS3 DB’s electronic medical records indicate she was checked in at 1647 and that Appellant performed her x-rays. (Pros. Ex. 6 at 2.)

2. Patient LCpl AA (Charge I, Specification 2).

Appellant’s challenge to both the legal and factual sufficiency of this conviction is somewhat unclear but can best be stated as two fold. First, Appellant alleges the allegations

"do not amount to an attempt. . . ." (Appellant's Br. at 52.) That challenge is best understood as arguing the allegations amount only to mere preparation, therefore challenging the sufficiency of the evidence on the third element of the offense. Next Appellant alleges there was insufficient evidence to establish Appellant had the specific intent to observe LCpl AA's genitalia, buttocks, and nipples. (Appellant's Br. at 55.) That challenges the second element of the offense.

a. Appellant's actions were a substantial step towards viewing LCpl AA's genitalia, buttocks, and nipples.

The third element of an attempt offense is "[t]hat the act amounted to more than mere preparation." Manual for Courts-Martial, pt. IV, para. 4(b) (2012 ed.). This element requires the accused take a "substantial step" towards completing the crime. *E.g.*, *United States v. Payne*, 73 M.J. 19, 24 (C.A.A.F. 2014.) To be a substantial step an act must "unequivocally demonstrate that the crime will take place unless interrupted by independent circumstances." *United States v. Winkelmann*, 70 M.J. 403, 2011 CAAF LEXIS 1061, at *11 (C.A.A.F. 2011) (internal quotations omitted). Speech alone can constitute a substantial step. *Id*. at *13 (noting grooming speech alone can constitute substantial step).

Here, Appellant engaged in considerably more than grooming speech. LCpl AA came to the Oceana clinic to pick up hard

copies of x-rays that had already been completed at Dam Neck. Her doctor instructed her to go get hard copies from Oceana due to a technical problem at Dam Neck. Appellant falsely told her she needed additional x-rays and escorted her back to the exam room behind closed doors. Once there he told her the first was the same x-ray that she had taken at Dam Neck for which she could wear her shirt and disposable shorts. (R. 700.) He then told her she needed additional x-rays that she would have to be completely naked for. (R. 700.) LCpl AA's medical records do not show any order for a re-do of the Dam Neck x-ray or any additional x-rays ordered. (Pros. Ex. 10 and 11.)

LCpl AA removed her bra, pants, and boots and put on the disposable shorts as instructed for the re-do of the Dam Neck x-ray. (R. 701.) Appellant entered the room and told her the re-do x-ray was not needed. (R. 701.) Appellant told her that they would proceed to the new x-rays that she needed to get completely naked for and left the room for her to do so. (R. 701.)

LCpl AA followed Appellant from the exam room into the hallway and asked for clarification as to why she needed to be completely naked. (R. 702.) Instead of answering her question, Appellant ushered her back into the exam room behind closed doors before broaching the subject of nudity. (R. 702-03.) Once safely behind closed doors such that they would not be

overheard discussing it, Appellant then attempted to give his lie credence with medical sounding terminology saying she needed a “deep tissue x-ray” to justify his demand that she be naked. (R. 703.) Dr. Bozman, a radiologist for over twenty-five years testified “there really is no such thing as a deep tissue x-ray.” (R. 1013.) When LCpl AA maintained her resistance, Appellant accepted she would not be a good victim for him, and he left the room under the false pretense of verifying if the x-rays were really needed. (R. 705.) He then returned and relented that the x-rays requiring nudity, that never existed in the first place, were not needed and she could leave. (R. 706).

Appellant engaged in much more than speech. He relocated and isolated his Victim. When she tried to engage in conversation in the hallway, a more public forum, he again relocated her back to isolation in the exam room. He abused the inherent trust and authority of a medical care provider to further his scheme. Finally, he lied using false medical sounding jargon of “deep tissue x-ray” to bolster his authority for why she needed to be naked. Appellant took a substantial step towards completion of the crime of viewing the genitals, buttocks, and nipples of LCpl AA.

b. Appellant's intent to view LCpl AA's genitalia, buttocks, and nipples.

The second element of an attempt offense is "[t]hat the act was done with the specific intent to commit the crime under the code." Manual for Courts-Martial, pt. IV, para. 4(b) (2012 ed.). Here, the crime under the code is the viewing of LCpl AA's genitalia, buttocks, and nipples. Intent is inferred from the totality of the circumstances. *E.g.*, *United States v. Webb*, 38 M.J. 62, 69 (C.M.A. 1993) (inferring intent from "nature, time, and place" of incident as well as actions of accused "before and during" the events alleged).

Here the totality of the circumstances demonstrate Appellant's intent. Appellant relocated LCpl AA to an x-ray examination room when there was no cause to do so. He told her she had to get naked for a set of x-rays that were never ordered. When she challenged that in a public hallway he spirited her back into the isolation of the examination room where they would not be overheard and again insisted she get naked. When she continued to resist, he escalated his lie, using medical jargon to justify his demand that she get naked. Finally, the intent seen in one incident can be carried over into another incident. *See United States v. Whitner*, 51 M.J. 457, 459 (C.A.A.F. 1999). Appellant's intent to observe LCpl AA's naked body was well established.

B. Appellant's four convictions for indecent acts were legally and factually sufficient.

The two elements of an indecent act are: "(1) [t]hat the accused engaged in certain conduct; and (2) [t]hat the conduct was indecent conduct." Manual for Courts-Martial, Appx. 28, para. 45(b)(11) (2012 ed.). Appellant challenges all four convictions of indecent acts. (Appellant's Br. at 46.)

1. Patient PG (Charge II, Specification 1).

Appellant failed to specifically challenge an element of the offense, instead broadly challenging the Victim as not a credible witness arguing her "testimony is totally incredible." (Appellant's Br. at 55.) Appellant's argument that PG was not a credible witness lacks merit. But even if PG's credibility was damaged on cross examination, her testimony identifying Appellant and descriptions of him telling her to get naked and assume various provocative positions was uncontroverted. This credible testimony alone is sufficient to support the convictions. (R. 761, 764, 769-71.)

2. Patient AL (Charge II, Specification 2).

Rather than challenge what happened during the x-ray examination itself, Appellant focuses his challenge on the credibility of AL and her identification of Appellant as her x-ray technician. (Appellant's Br. at 47-48.) This argument lacks merit.

This conviction is legally sufficient on the basis of the in court identification alone. (R. 405.) When the in court identification is considered in the light most favorable to the prosecution, as this Court must, a reasonable fact finder could have found the first element satisfied. *See Reed*, 54 M.J. at 41.

There are many more facts which when combined with the in court identification demonstrate tis reliability and thereby establish the factual sufficiency of this conviction as well. AL's x-rays were ordered by her flight surgeon so that he could refer her to a chiropractor for the back pain she was experiencing. (R. 401.) At the time of her x-rays AL was a twenty-two year old E-4 in the Navy. (R. 400.) She was well familiar with ranks and rates in the Naval service. She explained that it was an HM2 that checked her into radiology at the Oceana clinic and that he took her back into the examination room. (R. 404.) She physically described the technician as a tall black male and specifically noted his rank on his Navy Working Uniform. (R. 405.) According to the lead petty officer of the radiology department at Oceana clinic, there was only one second class petty offer x-ray tech, Appellant. (R. 578-79.) Those additional supporting facts bolster AL's in court identification of Appellant as her x-ray tech.

AL’s identification of Appellant as her tech is very credible. After taking her into an exam room, and giving her a gown, he told her take off everything except for the gown. (R. 405.) Appellant then returned and told her the doctor requested she be completely naked for the x-rays and that he would return with the consent form for that. (R. 407.) AL took off the gown and was completely naked when Appellant returned to the exam room with the form. (R. 408.) Appellant stood right next to her while she reviewed and signed the form, all the while completely naked. (R. 408.)

Appellant then took a series of x-rays. (R. 410.) Between each x-ray he instructed AL on where and how to stand, all the while she was completely naked. (R. 410.) During this process Appellant told her to remove her hands from attempting to cover her vaginal area. (R. 433-34.)

Appellant forced her into an extended incredibly uncomfortable and awkward situation. It is not at all surprising that a third class petty officer would take specific note of the rank of the individual that put in her in this situation. She would remember not only the rank but also the face of the man that told her to remove her hands from trying to cover her vaginal area while she stood there before him completely naked. AL’s recollection of the event and her in court identification of Appellant are credible.

3. Patient LCpl JE (Charge II, Specification 3).

Appellant erroneously focuses the majority of his argument on the facts pertaining to an attempt charge that Appellant was acquitted of. (Appellant's Br. at 57-58.) Appellant was acquitted of the charge because he did not complete a substantial step towards its completion because the phone in the exam room kept ringing and interrupting him.

When focusing on the specification at issue here, observing her genitalia and buttocks by wrongfully and without necessity having her remove all of her clothing, the evidence is legally and factually sufficient. Appellant merely challenges the credibility of the Victim, LCpl JE. (Appellant's Br. at 61.)

Appellant's suggestion that LCpl JE's testimony lacked credibility because Appellant was acquitted of one of the offenses is incorrect. Appellant implies causation where none exists. Appellant was acquitted of attempted wrongful sexual contact because he was unable to accomplish the substantial step due to the interruptions from the phone calls. The acquittal had nothing to do with any credibility issues with the Victim.

4. Patient BS (Charge II, Specification 4).

Appellant alleged the evidence was insufficient to establish the first element of the offense, that indecent conduct occurred. (Appellant's Br. at 50.) The indecent conduct in question is "observing the nipples" of BS by

“wrongfully and without necessity having her remove her shirt and brassiere in order to receive an X-ray examination.” (Charge sheet, Charge II, Specification 4.) Appellant challenged the identification of Appellant as the x-ray technician and that no evidence established the technician “clearly observed her nude body during the exam.” (Appellant’s Br. at 51.)

Appellant’s allegation that that there was no evidence he ever observed her nude body lacks merit. After BS complied with Appellant’s instruction that she remove her shirt and sports bra she covered her breasts with her arm and t-shirt until it was time to take the actual x-rays. (R. 553.) When the actual x-rays were taken she was instructed to place her hands above her head thereby exposing her bare breasts. (R.553.) After each x-ray Appellant would come out from behind the partition and explain to her how to position herself for the next x-ray. (R. 553.) There were three x-rays taken, one from each side and one straight on. (R. 554.) For the front facing x-ray, BS was directly facing Appellant, with her bare breasts exposed. (R. 554.)

Patient BS provided a physical description of her x-ray technician as a lighter skin African American male of her approximate height. (R. 550.) There were only two African American x-ray techs, HM2 Bess and HM3 Philogene. She noted no

discernible foreign accent in her x-ray technician. (R. 550.) HM3 Philogene was born and raised in Haiti and spoke with a thick accent. HM2 Bess spoke with no discernible accent. Finally, the CHCS electronic medical records system indicates Appellant was her x-ray technician. (Pros. Ex. 8 at 2.) The evidence that Appellant was BS' x-ray technician is factually sufficient.

Conclusion

WHEREFORE, the United States respectfully requests that this Court affirm the findings and sentence adjudged and approved below.

IAN D. MACLEAN
LT, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7686, fax (202) 685-7687

Certificate of Filing and Service

I certify the foregoing Answer in the case of United States v. Pedro M. BESS, No. 201300311, was delivered to the Court and a copy was served upon opposing counsel, Maj John Stephens, USMC, and electronically filed with the Court pursuant to N-M. Ct. Crim. App. Rule 5.2(b)(1) on June 10, 2014.

IAN D. MACLEAN
LT, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard DC 20374
(202) 685-7686, fax (202) 685-7687

IN THE UNITED STATES COURT OF APPEALS FOR
THE ARMED FORCES

UNITED STATES, Appellee v. Joseph C. BOYD Lance Corporal (E-3) U.S. Marine Corps, Appellant	SUPPLEMENT TO PETITION FOR GRANT OF REVIEW Crim.App. Dkt. No. 201300302 USCA Dkt. No. _____/MC

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

Statement of Statutory Jurisdiction

Lance Corporal (LCpl) Joseph C. Boyd's approved court-martial sentence included a dishonorable discharge and more than one year of confinement. Accordingly, his case fell within the lower court's Article 66 jurisdiction. Article 66(b)(1), Uniform Code of Military Justice (UCMJ); 10 U.S.C. § 866(b)(1) (2012). LCpl Boyd filed a petition for grant of review properly bringing his case within this Court's Article 67(a)(3) jurisdiction. 10 U.S.C. § 867(a)(3).

Statement of the Case

Consistent with his pleas, a military judge sitting as a general court-martial convicted LCpl Boyd of two specifications of indecent conduct in violation of Article 120, UCMJ, 10 U.S.C. §§ 920. (General Court-Martial Order (GCMO) No. 08-2013 of 26 Jul 2013, at 1.) Contrary to his pleas, the court-martial

convicted LCpl Boyd of one specification of taking indecent liberties in the presence of a female under sixteen years old, AN. (Id.) LCpl Boyd actually pleaded guilty to committing an indecent act for the incident involving AN, but pleaded not guilty to taking indecent liberties in the presence of a child under 16 years of age for the same incident. (R. at 72.) The Government sought a conviction for the greater offense and after convicting LCpl Boyd of Additional Charge I, the military judge dismissed the lesser charge. (R. at 199.)

The military judge sentenced LCpl Boyd to reduction to pay grade E-1, total forfeitures, to be confined for three years, and to a dishonorable discharge. (Id., at 2.) The convening authority approved the adjudged sentence and, pursuant to a pretrial agreement, suspended execution of any confinement in excess of eighteen months. (Id.) The convening authority ordered the remaining sentence executed except for the punitive discharge. (Id.) The lower court affirmed the findings of guilty and the sentence. *United States v. Boyd*, No. 201300302, 2014 CCA LEXIS 170, (N-M. Ct. Crim. App. March 13, 2014).

Submission of the Case Without Specific Assignments of Error

The undersigned states that she has been designated by the Judge Advocate General of the Navy as appellate defense counsel in the above captioned case pursuant to Appellant's request, that she has carefully examined the record of trial in this

case, that she does not admit that the findings and sentence are correct in law and fact, and that she submits the case on its merits to this Honorable Court without specific assignment of error or brief.

JENNIFER L. MYERS
Lieutenant, JAGC, U.S. Navy
Appellate Defense Counsel
1254 Charles Morris Street, SE
Bldg. 58, Ste. 100
Washington Navy Yard, DC 20374
(202) 685-7713
Jennifer.l.myers@navy.mil
CAAF Bar No. 35954

Appendix

1. *United States v. Boyd*, No. 201300302, 2014 CCA LEXIS 170, (N-M. Ct. Crim. App. March 13, 2014).

2. Issue raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Certificate of Filing and Service

I certify that the foregoing was electronically delivered to this Court, the Appellate Government Division, and to the Administrative Support Division, Navy-Marine Corps Appellate Review Activity on May 12, 2014.

JENNIFER L. MYERS
Lieutenant, JAGC, U.S. Navy
Appellate Defense Counsel
1254 Charles Morris Street, SE
Bldg. 58, Ste. 100
Washington Navy Yard, DC 20374
(202) 685-7713
Jennifer.l.myers@navy.mil
Bar No. 3595

Appendix 1

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS WASHINGTON, D.C.

Before
F.D. MITCHELL, J.A. FISCHER, M.K. JAMISON
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JOSEPH C. BOYD
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 201300302
GENERAL COURT-MARTIAL

Sentence Adjudged: 11 April 2013.
Military Judge: LtCol Leon J. Francis, USMC.
Convening Authority: Commanding General, 1st Marine Division (Rein), Camp Pendleton, CA.
Staff Judge Advocate's Recommendation: Col S.D. Marchioro, USMC.
For Appellant: LT Jennifer L. Myers, JAGC, USN.
For Appellee: Mr. Brian K. Keller, Esq.

13 March 2014

OPINION OF THE COURT

After careful consideration of the record, submitted without assignment of error, we affirm the findings and sentence as approved by the convening authority. Art. 66(c), Uniform Code of Military Justice, 10 U.S.C. § 866(c).

For the Court

R.H. TROIDL
Clerk of Court

APPENDIX 2

SUBMISSION UNDER *UNITED STATES V. GROSTEFON*

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant, LCpl Boyd, by and through counsel, respectfully requests that this Court consider the following matter:

Issue Presented

WHETHER THE EVIDENCE IS FACTUALLY AND LEGALLY SUFFICIENT TO SUSTAIN A CONVICTION FOR ADDITIONAL CHARGE I, INDECENT LIBERTIES IN THE PHYSICAL PRESENCE OF A CHILD, WHERE LCPL BOYD DID NOT SPECIFICALLY INTEND TO EXPOSE HIS PENIS TO A CHILD?

Statement of Facts

Charges in this case arise out of three incidents in which LCpl Boyd masturbated in his car in public locations on base. Twice adult dependents witnessed his behavior. On a third occasion a minor female, AN, witnessed LCpl Boyd's behavior. (Charge Sheet, Additional Charge 1.)

LCpl Boyd suffers from acute anxiety disorder, post-traumatic stress disorder, and impulse control disorder. (R. at 252-53.) The acute anxiety and impulse control disorders are rooted in a strict and religious upbringing in which he was punished severely for masturbating. (R. at 255.) As a result LCpl Boyd became addicted to masturbation and masturbated three times a day from his childhood through his entire adult life.

(R. at 90, 309.) Newly married, LCpl Boyd's wife expressed concern over LCpl Boyd's frequent masturbation in the bathroom at the home they shared. (R. at 256.) She did not understand why LCpl Boyd would masturbate at times rather than having sex with her. (R. at 255.) Because of these pressures at home, LCpl Boyd began trying to find secluded locations outside of his home where he could masturbate. (Id.)

Three times LCpl Boyd masturbated in his car while parked on base. Two times this occurred in parking lots where two different women witnessed his actions. (R. at 72.) The final occurrence happened in a base housing neighborhood. LCpl Boyd pulled into the neighborhood and parked on the side of the road. As he was masturbating he looked up and saw an eleven-year-old girl, AN, looking at him with a shocked expression on her face. (R. at 94.) LCpl Boyd attempted to diffuse the situation by saying "Hi" to her. (Id.) The girl ran to a friend's house and told her friend's mother what she saw. (R. at 215.)

AN did not testify at trial pursuant to a pretrial agreement. (Appellate Ex. XXI, at 5.) Instead, the Government entered her stipulated testimony as Prosecution Exhibit 19 (R. at 113), and testimony from her mother (R. at 214). The stipulation of expected testimony says AN was walking to school when she approached a car with a man parked on the side of the road facing her. (Pros. Ex. 19, at 1.) She claims the man made

eye contact with her then called out to her saying "Hey." (Id. at 1-2.) She claims the man then smiled and pointed to his privates with his right hand while he held his cell phone in his left hand. Id. at 2. AN saw his penis. Id.

LCpl Boyd plead guilty to committing an indecent act for the incident involving AN, but pled not guilty to taking indecent liberties in the presence of a child under 16 years of age. (R. at 72.) The military judge noted that the stipulation of fact admitted all of the elements of the crime to which he pleaded not guilty. (R. at 119-128.) The defense argued there was a constitutional issue because without a specific intent requirement because indecent liberties with a child had the same elements as indecent liberties, but carried a higher maximum sentence. (R. at 121.) The military judge found the elements did not require an intent regard to the presence of the child. (R. at 128.)

Argument

THE LOWER COURT ERRED IN AFFIRMING APPELLANT'S CONVICTION OF ADDITIONAL CHARGE I BECAUSE LCPL BOYD DID NOT INTENTIONALLY SHOW AN HIS PENIS.

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
	)	Case No. 201300291
v.	)	
Nathan A. BUTTERS, Lance Corporal (E-3) U.S. Marine Corps Appellant	)	Tried at Marine Corps Air Station Cherry Point, North Carolina, on January 4, and 31, 2013, and March 6, and 19-22, 2013, by General Court-Martial convened by Commanding General, 2d Marine Aircraft Wing, Cherry Point, North Carolina.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

KEITH B. LOFLAND
Lieutenant Commander, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-8384, fax (202) 685-7687

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Errors Assigned

I.

THE EVIDENCE IS FACTUALLY INSUFFICIENT TO SUSTAIN THE CONVICTION OF AGGRAVATED SEXUAL CONTACT UNDER THE CHARGE.

II.

THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED COMPULSORY PRODUCTION OF A DEFENSE WITNESS WHO WOULD HAVE TESTIFIED THAT APPELLANT AND THE VICTIM WERE TWICE PRESENT IN THE SAME LOCATION, FROM WHICH THE MEMBERS COULD HAVE INFERRED EITHER THAT THE VICTIM SELECTED APPELLANT'S PHOTOGRAPH FROM THE ARRAY BASED ON THESE PREVIOUS ENCOUNTERS, OR THAT SHE WAS UNTRUTHFUL WHEN SHE SAID SHE HAD NEVER SEEN HIM BEFORE.

III.

THE MILITARY JUDGE ERRED IN DENYING A CHALLENGE FOR CAUSE AGAINST MASTER SERGEANT HERNANDEZ.

IV.

THE MILITARY JUDGE ERRED IN DENYING THE DEFENSE REQUEST TO DISMISS THE PANEL DUE TO THE EXCLUSION OF MEMBERS BELOW THE RANK OF E-6.

V.

THE MILITARY JUDGE ABUSED HIS DISCRETION BY ADMITTING HEARSAY EVIDENCE OVER DEFENSE OBJECTION AS "EXCITED UTTERANCES."

VI.

THE MILITARY JUDGE ABUSED HIS DISCRETION BY ALLOWING OVER DEFENSE OBJECTION, THE TRIAL COUNSEL TO TEST THE BASIS OF SSgt BRITT'S OPINION OF APPELLANT'S CHARACTER FOR TRUTHFULNESS WITH THE CHARGED OFFENSE.

VII.

APPELLANT'S TRIAL WAS TAINTED BY APPARENT UNLAWFUL COMMAND INFLUENCE WHEN THE MILITARY JUDGE ADMITTED IRRELEVANT EVIDENCE THAT "SOMETHING IS GOING TO HAPPEN" BECAUSE THE TWO COMMANDING OFFICERS AT CHERRY POINT DO NOT TAKE THESE SORTS OF ALLEGATIONS "LIGHTLY."

VIII.

EVEN IF THE PRESENTATION OF THE COLLOQUIES BETWEEN MP AND THE VICTIM ADVOCATE AND SA TAMASH DID NOT AMOUNT TO UNLAWFUL COMMAND INFLUENCE, THE MILITARY JUDGE PLAINLY ERRED IN ADMITTING THE EVIDENCE BECAUSE IT WAS IRRELEVANT AND RESULTED IN MATERIAL PREJUDICE TO A SUBSTANTIAL RIGHT.

IX.

THE MILITARY JUDGE ABUSED HIS DISCRETION BY NOT ADMITTING THE VIDEOTAPE INTERVIEW OF MP, WHICH INCLUDED A PRIOR INCONSISTENT STATEMENT.

X.

THE MILITARY JUDGE ERRED IN PERMITTING SPECIAL AGENT TAMASH TO TESTIFY TO WHAT MP TOLD HIM ABOUT THE INCIDENT. MP'S STATEMENTS TO SPECIAL AGENT TAMASH WERE HEARSAY AND DID NOT FALL INTO ANY EXCEPTION TO THE HEARSAY RULE.

XI.

THE CONVENING AUTHORITY'S POST-TRIAL ACTIONS ESTABLISHED THAT HE COULD NOT BE FAIR AND IMPARTIAL DURING HIS CLEMENCY REVIEW. ACCORDINGLY, THE DEFENSE REQUEST FOR A NEW CONVENING AUTHORITY AND STAFF JUDGE ADVOCATE FOR POST-TRIAL REVIEW AND ACTION SHOULD HAVE BEEN GRANTED.

XII.

THE EVIDENCE IS FACTUALLY INSUFFICIENT TO SUPPORT THE CHARGES OF FALSE OFFICIAL STATEMENTS UNDER THE ADDITIONAL CHARGE.

Statement of Statutory Jurisdiction

Appellant's approved sentence includes one year of confinement. Accordingly, this Court has jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012).

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of false official statements and aggravated sexual contact, in violation of Articles 107 and 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 907 (2006), and 10 U.S.C. § 920 (2012). The Members sentenced Appellant to one year of confinement, and reduction to pay grade E-1. The Convening Authority approved the sentence as adjudged.

Statement of Facts

A. Appellant assaulted Corporal MP during the morning of September 9, 2012.

On the evening of September 8, 2012, Corporal (Cpl) MP attended a party at a barracks on board Marine Corps Air Station, Cherry Point, North Carolina. (R. 435; Prosecution (Pros.) Ex. 5.) Cpl MP consumed alcohol that evening and

characterized herself as: ". . . tipsy but I wasn't stumbling drunk or anything." (R. 435.) Neither the effects of the alcohol she drank nor the nicotine from the cigarettes she smoked during the evening adversely affected her memory that evening or the next morning. (R. 436.)

Cpl MP did not recall meeting Appellant prior to the evening of September 8, 2012. (R. 436.) However, on a couple of occasions during the party Cpl MP came up to Appellant and teased him about the music he was playing. (R. 440, 448-49.) The first time that Cpl MP approached Appellant she and took the purple cap that Appellant was wearing off of his head and then replaced it; the second time she removed Appellant's hat and took a hair pick that Appellant was wearing. (*Id.*; Pros. Ex. 11.)

Cpl MP did not recall precisely when she left the party with her friend Cpl Sepulveda, but her "rough estimation" was that she left at approximately 0500 on September 9, 2012. (R. 441, 449-50.) Cpl Sepulveda offered to walk Cpl MP back to her barracks, but she declined and they separated after she dropped Cpl Sepulveda outside of his barracks. (*Id.*) As Cpl MP got to the midsection of her barracks building, Appellant grabbed Cpl MP's left hip and pulled her towards him. (*Id.*) At this point, Appellant did not appear drunk to Cpl MP and she did not recall smelling alcohol on him. (R. 452-53.)

Cpl MP recalled Appellant saying that he just wanted to talk to her and get to know her. (R. 442.) As he is talking he is pushing Cpl MP away from the door and towards a part of the barracks here where there is a ladderwell. (*Id.*) As they are walking, Cpl MP tells Appellant that she did not want to talk and that she was tired: "I just wanted to go to sleep. I wanted to go to my room. I wanted to go to bed." (*Id.*) As they turned a corner to go into this ladderwell, Appellant forced Cpl MP against a brick wall, pinning her against it, and started touching and kissing her without her consent. (*Id.*) Appellant kissed Cpl MP and sucked on her neck with sufficient force to leave a "hickey" on her neck and placed his hand up her shirt and fondled her breast. (R. 442, 445-46; Pros. Ex. 10.)

Cpl MP struggled against Appellant's advances and managed to push Appellant off of her. (R. 442-43.) Appellant pulled her down as Appellant fell into a bike rack near the ladderwell. (*Id.*) She saw Appellant's hat fall off during this struggle, and she got up and started towards her barracks room while Appellant was still on the ground. (*Id.*) Cpl MP suffered scrapes on her forearm from being forced against the brick wall and bruising from falling against a bike pedal when Appellant pulled her down. (R. 445; Pros. Ex. 10.)

Appellant chased after Cpl MP, grabbed her wrist, and tried to pin her against the door to a maintenance room on the lower

level of the barracks. (R. 443.) Cpl MP managed to get away from Appellant a second time and made her way to her room. (*Id.*)

Cpl MP, still concerned for her safety, estimated she spent "less than a minute" in her room before going to the duty hut and ultimately reporting the assault to LCpl Clarke, who was on duty that morning. (R. 443, 459.) LCpl Clarke had been acquainted with Cpl MP for about five months prior to September 2012 and she did not appear drunk to him. (R. 270.) He described her demeanor in the duty hut as "just scared to death, shaking. . ." (*Id.*)

B. Despite Appellant's denial of assaulting Cpl MP or having any physical contact with her, corroborating evidence of the assault was gathered during NCIS's investigation.

1. Cpl MP identified Appellant in a photographic lineup.

Cpl MP's report of Appellant's assault was reported to her chain of command and referred to the Naval Criminal Investigative Service (NCIS) for investigation. (R. 290-91.) NCIS Special Agent Tamash conducted an initial interview of Cpl MP later in the morning of September 9, 2012 during which she gave a physical description of her assailant as "a black male, about [five feet, ten inches] in height, about 160 pounds with a prominent jaw, thin eyebrows, and a mustache" and indicated that he was wearing a purple hat. (R. 293, 321, 324; Pros. Ex. 11.)

Special Agent Tamash met with Cpl MP again on the morning of September 10, 2012 and she provided Appellant's last name and squadron assignment, which she had obtained from talking to her friends after recalling that she had seen her assailant at the barbeque that she attended. (R. 295-96.) Based on this information, Special Agent Tamash confirmed that a Marine with Appellant's last name was in fact assigned to that squadron and obtained a photograph of Appellant for purposes of conducting a photographic lineup. (R. 296-97.) Special Agent Tamash prepared a photographic lineup consisting of Appellant's photograph and five photographs of other black males so as "to make the photo lineup as not suggestive as possible." (R. 297.) Cpl MP subsequently identified Appellant from this photograph lineup. (R. 297-99, 323-26; Pros. Ex. 3.)

At trial, Trial Defense Counsel did not object when the United States played the entire videotape of the photographic lineup to the Members. (R. 336-42.) The videotape included a brief conversation between Cpl MP and her Victim Advocate. After Cpl MP picked out Appellant's photo, Special Agent Tamash briefly left the room. (R. 338.) Cpl MP then asked her Victim Advocate, who was present in the room with her, "what if nothing happens?" (R. 338.) The Victim Advocate answered:

> I don't know. I don't know how to answer that one for you right now. But I think if you continue to do what you've been doing, something's going to happen, okay?

> Because this is not something that is not [sic] going to be taken lightly. This is not something our CO Colonel Zimmerman takes lightly, and I'm sure the other CO isn't taking it lightly either, okay? So let's not worry about that, okay, right now. We'll cross that bridge when we come to it, okay? Let's just continue to focus on what we need to do, you know, to continue to help you so you can continue to help these guys out, okay? Make Sense [sic]?

(Pros. Ex. 25 at 2-3.) Later, after Special Agent Tamash returned to the room, Cpl MP reiterated her concerns with the investigation and asked him, "What if nothing happens?" (R. 341.) He asked, "What do you mean?" (R. 342.) Cpl MP responded, "What if he just stays free?" (*Id.*) Special Agent Tamash responded, "He won't. At least for the time being. I'm going to get him now." (*Id.*)

2. <u>Appellant's DNA was found inside of Cpl MP's bra during the forensic examination of her clothes</u>.

NCIS collected the blue jeans and t-shirt that Cpl MP had been wearing during the assault as potential evidence. (Pros. Ex. 22, 23.) After Cpl MP identified Appellant from the photographic lineup, Special Agent Tamash collected the clothing that Appellant was wearing (Pros. Ex. 19, 20.) and additional clothing that Cpl MP had been wearing, including her bra. (R. 321-22, 326-27; Pros. Ex. 23, 24.) That bra (Pros. Ex. 23.) and other items of clothing that she and Appellant were wearing that evening were sent to the United States Army Criminal Investigation Laboratory (USACIL) in Fort Gillem, Georgia for

forensic DNA testing. (R. 472, 477.) DNA matching Appellant's DNA profile was found on the inside of Cpl MP's bra. (R. 481-82; Pros. Ex. 13.) The USACIL forensic DNA expert called by the Government described the statistical chances of the DNA being from a contributor other than Appellant as "one in one hundred quintillion Caucasians, one in twenty-eight quintillion blacks and one in seven hundred quintillion Hispanics . . . to give you an idea what that means, if I had a hundred and twenty quintillion Caucasians in the room right now, I'd expect approximately one of them to have this profi1e." (*Id.*) In describing the likelihood of Appellant's DNA having been passively transferred to Cpl MP's clothing instead of through direct contact with Appellant, the Government's expert also testified in light of there being "about five times [Appellant's] DNA versus [Cpl MP's]" the transfer of Appellant's DNA to the inside of Cpl MP's bra cup was "more indicative . . . of a primary transfer versus a secondary transfer. . ." (R. 489-90.)

3. <u>Appellant denied assaulting Cpl MP in his statements to NCIS. His proffered alibi witnesses rebutted his claims and could not account for Appellant's whereabouts while he was assaulting Cpl MP</u>.

On September 10, 2012, Appellant was apprehended by NCIS, advised of his Article 31, UCMJ, rights (Pros. Ex. 16 at 8-9.), and provided a statement to Special Agent Tamash and Special

Agent Grafton regarding his role in Cpl MP's assault. (R. 345.) Appellant denied being at Cpl MP's barracks on the morning of September 9 or having any involvement in the assault of Cpl MP stating: "I did not touch her. I did not do anything to her." (Pros. Ex. 16 at 20, 24.)

In response to questions from Special Agent Grafton, Appellant claims that he remained at the barbeque for the duration of the party in the company of his acquaintances, LCpl Dudley and LCpl Castro, and then went straight to his barracks:

> Q. Who can account for you going up to your room?
>
> A. About three of us were still out there. Myself, what's his name——Dudley, and I want to say, Castro.
>
> Q. Was somebody with you the whole time?
>
> A. Yes. There were right there with me as we went up—we went and put this stuff down. Dudley said he was going up. I was like, hold on, he ended up going up and then me and Castro went up the stairs.
>
> Q. And you're certain you never left?
>
> A. I'm certain sir. I did not leave. I went straight to my bed. I went to the head first and then I went to my bed. I stripped down into my boxers and hopped in bed. Pulled the covers over me and did not want to get out of the bed until five or six in the afternoon.

(R. 346-47; Pros. Ex. 16 at 47.)

LCpl Dudley, when later interviewed, told Special Agent Grafton that he did not go upstairs with Appellant that morning.

(R. 347.) LCpl Dudley later testified that he left the party with another Marine, returned a friend's computer to that Marine's room on the third floor of the barracks, and then went to his own room for the evening. (R. 353.) LCpl Dudley stated that Appellant did not leave the party with him, nor was Appellant with him when he went to his friend's room, nor did he remember seeing Appellant leave the party. (*Id.*)

LCpl Castro told Special Agent Grafton that he left before the end of the party and that he did not leave with Appellant. (R. 348.) LCpl Castro testified that he left the party by himself and that he did not recall seeing Appellant leave the party. (R. 358.)

C. Appellant raised multiple unsuccessful challenges to the Members' panel and during *voir dire*.

1. Appellant's pretrial motion alleging unlawful command influence.

On February 11, 2013, Trial Defense Counsel filed a motion for appropriate relief maintaining that apparent unlawful command influence flowing from statements the Commandant of the Marine Corps made in a series of lectures known as the "Heritage Briefs" prevented Appellant from being able to receive a fair trial. (R. 127; Appellate Ex. XXIII.) The Commandant's Heritage Brief was given at Marine Corps Recruit Depot, Parris Island, South Carolina on April 19, 2012 and was directed towards all officers and staff noncommissioned officers (SNCO).

(Appellate Ex. XXII.) The briefs focused in part on the Commandant's disappointment with the lack of accountability for Marines who commit misconduct. (*Id.*; Appellate Ex. LXIV at 4.) In May 2012, the Commandant disseminated a follow-up letter (White Letter 2-12) requesting support from Marine Leadership in combating, *inter alia*, sexual assaults in the United States Marine Corps. (Appellate Ex. XXII.) In July 2012, the Commandant issued White Letter 3-12 explaining that the Heritage Brief and White Letter 2-12 were not designed to influence any Marine's decision at courts-martial or boards of inquiry. (*Id.* at 4-5.)

The Military Judge denied the Defense motion on the grounds that the Defense had "failed to produce any evidence of [unlawful command influence] sufficient to shift the burden to the Government and has shown no logical connection of the purported [unlawful command influence] to this court-martial." (Appellate Ex. LXIV at 1.)

2. <u>Appellant's pretrial motion to dismiss the panel</u>.

On March 12, 2013, the Staff Judge Advocate (SJA) of 2d Marine Aircraft Wing (2d MAW) forwarded twenty-two questionnaires from prospective panel members and provided memorandum advice to the Convening Authority regarding the selection of members in Appellant's case. (Appellate Ex. XLII.) The memorandum advised the Convening Authority that he was "in

no way bound by or limited to the names contained in" the included questionnaires, and that the Convening Authority had "complete discretion to choose any member [he] wish[ed] so long as [the] selections are guided by the criteria in Article 25, UCMJ. All officer and enlisted members assigned to 2d MAW are eligible to serve as members; however, enlisted members must be senior to [Appellant] and should not be within the same squadron as [Appellant]." (*Id.* at 4.)

Appellant brought a pretrial motion to dismiss the members' panel on the grounds that the Convening Authority excluded consideration of E-5s and E-6s senior to Appellant, as well as officers O-3 or below, and warrant officers below chief warrant officer. (R. 163-64; Convening Order 1-11f, Mar. 13, 2013.) Appellant's motion also asserted that the lack of African American representation among the prospective enlisted members (two African American warrant officers were in the panel) and the lack of female officers or enlisted raised additional concerns with the composition of the panel. (R. 164-65.)

Appellant did not present any specific evidence that the Convening Authority had an improper motive in composing the venire or failed to apply the criteria in Article 25, UCMJ, in selecting the prospective members. (R. 165-66; Appellate Ex. XLII.) The Military Judge denied Appellant's motion, concluding:

> [The] Defense has provided no other evidence other than the composition of the panel and number of excerpts from two member's questionnaires intend [sic] to indicate that the panel was stacked or that minorities or Marines of certain grads [sic] were deliberately or systematically excluded from consideration as panel members. The 1aw in this area is well-settled. An accused is not entitled to a panel that represents a cross section of the military population. Likewise, the mere fact that a panel contains a disproportionate number of senior members does not create a presumption of irregularity.

(R. 167.)

3. Challenge of Master Sergeant Hernandez.

Master Sergeant (MSgt) Hernandez was one of the members of the panel. (R. 177; Appellate Ex. XL.) During *voir dire*, MSgt Hernandez recalled that in his response to Question 15 on the Members Questionnaire that asked "Have you or a close relative or friend ever been the witness to any crime?" that he had forgotten to include that more than twenty years earlier, when he was sixteen-years-old, he was shot and wounded by an unknown assailant. (R. 182, 234-35.) MSgt Hernandez had previously answered on the questionnaire that he had an older brother who had been assaulted and hospitalized. (Appellate Ex. XL at 29.)

Appellant challenged MSgt Hernandez for cause on the theory that his and his older brother's prior victimization "show[ed] actual bias to the traumatic experience that they've been through." (R. 249.) The Military Judge denied the challenge, stating:

> Again, I note the applicability of the Liberal Grant Mandate to this Defense challenge to Master Sergeant Hernandez for implied and actual bias. My recollection from his responses to defense questioning are that he was shot while he was in high school as a result of a random shooting whether that would not influence his role here as an impartial fact finder. He also stated that he believes sexual assault occurs about equally in the Marine Corps and the civilian community or is an equal problem in the Marine Corps and the civilian community. I had the ability to observe his demeanor while he was responding to Defense questions and I found them to be credible and forth right [sic]. He also indicated during the military judge's *voir dire* that he was able to follow the military judge's instructions as to the law and apply the instructions fairly and impartially. I do not believe that there is any evidence of actual bias with respect to Master Sergeant Hernandez nor do I believe that there is implied bias with respect to Master Sergeant Hernandez. I make that determination applying the objective test viewing it through the eyes of the public and focusing on the appearance of fairness. The defense challenge to Master Sergeant Hernandez for cause is denied.

(R. 250.)

D. Appellant raised several evidentiary issues both prior to and during trial.

1. Pretrial witness production request.

On January 15, 2012, Trial Defense Counsel requested production of thirteen witnesses to testify for the Defense at Appellant's trial. (Appellate Ex. VI at 5-6.) The Government denied production of three of the requested witnesses, including a request to produce Sergeant (Sgt) Favorite. (*Id.* at 7-8.) The Defense proffer for why Sgt Favorite was relevant and necessary to the Defense was that he would "testify that Cpl [MP]

and [Appellant] had met on two prior occasions, contrary to Cpl [MP]'s prior testimony." (*Id.* at 6.)

Appellant moved the Military Judge to compel production of Sgt Favorite, and again proffered that he would contradict Cpl MP's statements to NCIS and during her testimony at the Article 32 investigation that she had not met her assailant prior to September 8, 2012: "Sergeant Favorite is going to testify to the fact that [Appellant and Cpl MP] were at the barbeque together for an extended period of time the Easter barbeque. . .as well as to the fact that [Cpl MP] gave [Appellant] a ride from a party on base to—back to the barracks. . ." (R. 15.) Trial Counsel responded that there was no evidence that Sgt Favorite would in fact offer any evidence that in fact contradicted Cpl MP's prior statements, referencing Sgt Favorite's December 5, 2012 statement to NCIS that he had no recollection of Appellant and Cpl MP ever meeting or interacting. (R. 17-18; Appellate Ex. VI at 7-8, 10-13.)

The Military Judge denied the request to compel production of Sgt Favorite:

> With respect to Sergeant Favorite, I do not believe that the defense has proved by preponderance of the evidence that he is relevant or necessary to the defense. He is not a percipient witness. His only testimony w1ll be that the accused and the alleged victim in this case attended a barbeque together at some point in the past—in April 2012 several months before the alleged incident in this case. He never saw them interact by the attachment the defense's

> motion and the Government response as well. Likewise, with this ride in the pick-up truck. Those——you know, Sergeant Favorite observed no interaction between the two in that case either.
>
> Absent any evidence that there was any interaction—— any evidence that he can provide testimony that shows some interaction that he observed between the two, I do not believe he is going to satisfy what it is you are seeking to do with his testimony. I don't believe you have proved by preponderance of the evidence that he is relevant and necessary and the request for his production is denied.

(R. 21-22.)

2. Testimony of Staff Sergeant Britt.

At trial, Appellant called Staff Sergeant (SSgt) Britt, Appellant's immediate supervisor, to testify about Appellant's character for truthfulness. (R. 540-42.) The following colloquy occurred during Trial Counsel's cross-examination of SSgt Britt:

> Q. Staff Sergeant, do you agree with me that someone who is truthful doesn't tell lies; correct?
>
> A. Yes, sir.
>
> Q. And then someone who has a character for truthfulness would then always be telling the truth; correct?
>
> A. Yes, sir.
>
> Q. So you would expect a Marine with a character for truthfulness to tell the truth to other Marines when asked questions?
>
> A. Yes, sir.
>
> Q. And to law enforcement?

A. Yes, sir.

Q. And to tell the truth to NCIS agents if their asked questions?

A. Yes, sir.

Q. And, are you aware that Lance Corporal Butters was interviewed by——

DC: Objection, improper impeachment.

MJ: Response?

TC: Sir, I'm questioning the foundation of his knowledge of his character truthfulness of the accused.

MJ: What do you believe is improper about it?

DC: The trial counsel is trying to impeach the witness on the charges before us, which there has not been findings of whether the accused is guilty of those charges.

MJ: Objection is over ruled at this point.

Q. You would expect that Marine to tell the truth to those NCIS agents, right?

A. Yes, sir.

TC: No further questions.

(R. 542-43.) On redirect, Trial Defense Counsel asked SSgt Britt: "Knowing the fact that Lance Corporal Butters has denied the allegations against him, does that make you change your opinion in regards to his character for truthfulness?" (R. 543.) SSgt Britt responded, "No, ma'am." (*Id.*)

E. Appellant was processed for administrative separation after trial.

On March 28, 2013, Appellant was notified that he was being processed for administrative separation by reason of "Misconduct ——Commission of a Serious Offense" pursuant to paragraph 6210.6 of Marine Corps Order (MCO) P1900.16F (Marine Corps Separation Manual (MARCORPSEPMAN)). (Clemency Request, Jun 28, 2013 at Encl. 1.) Appellant's administrative separation board was held on April 2, 2013; the board found that Appellant committed a serious offense and the board recommended that Appellant be separated with a characterization of service as "Other than Honorable." (*Id*. at Encl. 4.)

The Staff Judge Advocate's Recommendation (SJAR) in Appellant's case was completed on June 22, 2013. (SJAR, Jun. 22, 2013.) On June 28, 2013, Trial Defense Counsel submitted matters in clemency pursuant to Rule for Court-Martial (R.C.M.) 1105 and requested a new Convening Authority and Staff Judge Advocate for post-trial review and action asserting that the post-trial administrative processing of Appellant indicated that the Convening Authority "[could not] approach his post-trial responsibility with the requisite impartiality." (Clemency Request at 2.)

On July 3, 2013, the Staff Judge Advocate submitted an addendum to the SJAR reflecting that he had reviewed the

allegations of legal error raised in Appellant's clemency request and that he did not agree with the assertion of legal error or that corrective action was required. (SJAR Addendum, Jul. 3, 2013.)

The Convening Authority approved the court-martial sentence as adjudged in his action on July 20, 2013. (Convening Authority's Action (C.A.A.), Jul. 20, 2013.)

Summary of Argument

I.

The evidence, including Appellant's DNA found on Cpl MP's clothing, and her identification of him as her assailant support and substantiate her account of Appellant's assault and supports the legal and factual sufficiency of the convictions.

II.

Sgt Favorite had no relevant testimony to offer on the question of whether or not Cpl MP and Appellant had ever met prior to September 8, 2012. Based on the Defense proffer and Sgt Favorite's prior statement to NCIS, the Military Judge did not abuse his discretion in denying production of Sgt Favorite as a witness.

III.

The Military Judge did not abuse his discretion denying the Defense's challenge for cause of MSgt Hernandez as nothing in

the Record had any bearing on his ability to be an impartial member or cast any doubt upon the legality, fairness, and impartiality of Appellant's court-martial.

IV.

There was no impropriety or appearance of impropriety in the composition of the Members' panel. There is no evidence that the Convening Authority had an improper motive in composing the panel or failed to apply the criteria in Article 25, UCMJ, in selecting the prospective members.

V.

The Military Judge did not err in admitting LCpl Clarke's testimony as it was admissible either as non-hearsay or under an excited utterance exception to the hearsay rule.

VI.

The Military Judge did not err in permitting Trial Counsel to inquire into the foundation of SSgt Britt's opinion about Appellant's character for truthfulness. Even if the Military Judge erred in permitting this single question, any error was harmless.

VII.

Appellant fails to demonstrate either actual or apparent unlawful command influence. A fully-informed, disinterested observer would not interpret the assurances of the Victim Advocate and Special Agent Tamash to Cpl MP as reflecting any

expectations that the Convening Authority had in the outcome of this case or as directive for the Members to render a specific verdict.

VIII.

Any statements made during the photographic lineup process were relevant for the Members to judge the reliability of Cpl MP's statement and her identification of Appellant, and the Military Judge did not commit plain error by *sua sponte* failing to redact it.

IX.

Cpl MP explained her prior statement to Special Agent Tamash by clarifying that she meant that she had never seen him before the night of the barbeque. Once she admitted making the inconsistent statement, there was no need for further proof through extrinsic evidence and the Military Judge did not err in denying admission of the additional parts of the videotaped statement.

X.

Special Agent Tamash's testimony as to what statements Cpl MP made to him were not hearsay, as they were not offered for their truth, but rather to explain why he took certain investigative actions. Appellant did not object to this testimony at trial and the Military Judge did not err in permitting it.

XI.

Appellant's administrative separation while action on his court-martial was pending does not presumptively reflect a bias or inelastic attitude on the part of the Convening Authority that disqualified him from taking action on Appellant's court-martial. The Convening Authority was free to initiate and execute Appellant's administrative discharge.

XII.

The physical and circumstantial evidence corroborating Cpl MP's account of her assault and the testimonial evidence from LCpl Dudley and LCpl Castro rebutting Appellant's proffered alibi, establish ample basis for the legal sufficiency of Appellant's conviction for making false official statements.

Argument

I.

APPELLANT'S CONVICTION FOR AGGRAVATED SEXUAL CONTACT IS FACTUALLY SUFFICIENT, BECAUSE IT IS SUPPORTED BY THE TESTIMONY OF CPL MP AND CORROBORATED BY THE FORENSIC EVIDENCE OF APPELLANT'S DNA INSIDE OF HER BRA.

A. These issues are reviewed *de novo*.

This Court has an independent obligation to review each case *de novo* for factual and legal sufficiency. Article 66, UCMJ, 10 U.S.C. § 866; *see United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

B. Viewed in a light most favorable to the prosecution, a reasonable fact finder could have found all essential elements beyond a reasonable doubt because Cpl MP's account of her assault was corroborated and credible.

The test for legal sufficiency of the evidence is "'whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002)(*quoting United States v. Turner*, 25 M.J. 324 (C.M.A. 1987)(*citing Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979))). In resolving questions of legal sufficiency, the Court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). The Court's assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

In this case, conviction of aggravated sexual contact requires the Government to prove beyond a reasonable doubt:

(1) That the accused engaged in sexual contact with Cpl MP; or
(2) That the accused caused sexual contact with or by another person; and
(3) That the accused did so by using force against Cpl MP.

Manual for Courts-Martial (MCM), United States (2012 ed.), Appendix 28 at A28-6, ¶ 45.b(5)(a).

"Sexual contact," as applied here, means "the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person. . .with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person." MCM, Appendix 28 at A28-3, ¶ 45.a.(t)(2).

Although Appellant does not contest the legal sufficiency of his convictions (Appellant's Br., at 9-10.), this Court is statutorily bound to do so. The evidence establishes the legal sufficiency of Appellant's conviction of the offense of aggravated sexual contact, and that a rational panel of members could find beyond a reasonable doubt Appellant was guilty of these crimes.

Cpl MP testified how Appellant forced her against a brick wall, pinning her against it, and forcibly placed his hand under her shirt and bra and touched her breast without her consent. (R. 442, 445-46; Pros. Ex. 10.) She testified as to the injuries she suffered when she fell against the bike rack while attempting to struggle free of Appellant. (R. 445; Pros. Ex. 10.) Cpl MP was able to identify Appellant from a subsequent photo array and the distinctive purple hat he was wearing that evening. (R. 293, 321, 324; Pros. Ex. 11.) Finally, DNA matching Appellant's DNA profile was recovered from the inside of Cpl MP's bra, corroborating her account of Appellant forcibly

touching her breast. (R. 481-82; Pros. Ex. 13.) Viewed in a light most favorable to the prosecution, a reasonable panel of members could have found all the elements beyond a reasonable doubt.

C. This Court should likewise be convinced of Appellant's guilt.

The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having personally observed the witnesses, this Court is convinced of an appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. Under Article 66, UCMJ, this Court "must assess the evidence in the entire record without regard to the findings reached by the trial court, and it must make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). When exercising its Article 66, UCMJ, powers of review, this Court may be convinced beyond a reasonable doubt of an appellant's guilt even though conflicts in the evidence may exist, and may also accord a witness's credibility greater weight on some topics than on others. *United States v. Lepresti*, 52 M.J. 644, 648 (N-M. Ct. Crim. App. 1999).

In testing for factual sufficiency, this Court is required to "recogniz[e] that the trial court saw and heard the

witnesses." *Turner*, 25 M.J. at 325. This is not a *pro forma* legal requirement; rather, it takes into account that the trier of fact is best situated to assess a witness's credibility while testifying. *See United States v. Madey*, 14 M.J. 651, 653 (A.C.M.R. 1982); *see also United States v. Ferguson*, 35 F.3d 327, 333 (7th Cir. 1994), *cert. denied*, 514 U.S. 1100 (1995)(trial court's evaluation of witness credibility "will not be disturbed unless it is completely without foundation.").

The Members weighed the Defense's theme that there was reasonable doubt whether Appellant assaulted Cpl MP against Cpl MP's account of being forcibly groped and the corroborating evidence of her injuries and of Appellant's DNA inside of her bra. (R. 597-98.) They were properly instructed to consider the significance of all the evidence and the credibility of all the witnesses and testimony presented at the court-martial during deliberations. (R. 576.) Appellant now raises no new evidence to suggest the Members did not follow this instruction; rather, the twelve issues Appellant raises in his brief as grounds for reasonable doubt merely rehash the same arguments advanced by the Defense at trial and urge this Court to place different weight upon the same evidence the Member's heard. (R. 587-98.)

Ultimately, Appellant's arguments on appeal are reducible to the tendentious claim that his "denial is itself reasonable

doubt as to his guilt." (Appellant's Br. at 40.) The substantial weight of the evidence here, including Appellant's DNA found inside of Cpl MP's bra, her physical injuries consistent with her account of the assault, and her identification of the clothing he was wearing that evening and morning support and substantiate her account of the events that occurred on September 8 and 9, 2012. However, Appellant's credibility was impeached at trial by the inability of his proffered alibi witnesses to corroborate his whereabouts as neither LCpl Dudley, (R. 353), nor LCpl Castro, (R. 348, 358.), recalled Appellant being with them during the time he was assaulting Cpl MP. Accordingly, this Court has ample bases upon which to discount Appellant's credibility and fully credit Cpl MP's account of her assault.

Weighing this evidence, and making allowances for not observing the witnesses, these facts should convince this Court beyond a reasonable doubt that Appellant's conviction for aggravated sexual contact is both legally and factually sufficient.

II.

THE MILITARY JUDGE PROPERLY DENIED APPELLANT'S WITNESS PRODUCTION REQUEST FOR SGT FAVORITE AS APPELLANT'S PROFFER OF EXPECTED TESTIMONY DID NOT ESTABLISH THAT SGT FAVORITE WOULD PROVIDE ANY RELEVANT OR NECESSARY TESTIMONY REGARDING APPELLANT'S PURPORTED PRIOR INTERACTIONS WITH CPL MP.

A. Rulings on witness production requests are reviewed for an abuse of discretion.

"A military judge's ruling on a request for a witness is reviewed for abuse of discretion." *United States v. McElhaney*, 54 M.J. 120, 126 (C.A.A.F. 2000). "The decision on a request for a witness should only be reversed if, 'on the whole,' denial of the defense request was improper." *McElhaney*, 54 M.J. at 126. An appellate court will not set aside a judicial denial of a witness request "'unless [it has] a definite and firm conviction that the [trial court] committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.'" *United States v. Houser*, 36 M.J. 392, 397-98 (C.M.A. 1993)(internal citation omitted).

B. Appellant's proffer of Sgt Favorite's anticipated testimony did not establish that he would testify consistent with Appellant's construction of the facts, and therefore did not establish that his testimony was relevant or necessary.

All parties to a court-martial "shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." Article

46, UCMJ. Under R.C.M. 703(b)(1), "[e]ach party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary." Relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Mil. R. Evid. 401.

The Defense proffered that Sgt Favorite was relevant and necessary to the Defense in that he would "testify that Cpl [MP] and [Appellant] had met on two prior occasions, contrary to Cpl [MP]'s prior testimony." (Appellate Ex. VI at 6.) In his motion to compel production of Sgt Favorite, Appellant again proffered that Sgt Favorite would contradict Cpl MP's statements to NCIS and during her testimony at the Article 32 investigation that she had not met her assailant prior to September 8, 2012: "Sergeant Favorite is going to testify to the fact that [Appellant and Cpl MP] were at the barbeque together for an extended period of time the Easter barbeque . . . as well as to the fact that [Cpl MP] gave [Appellant] a ride from a party on base to—back to the barracks . . . " (R. 15.)

The Military Judge denied the request to compel production of Sgt Favorite on the grounds that Sgt Favorite "observed no interaction between [Appellant and Cpl MP]" and therefore had no

relevant evidence to corroborate the Defense assertions that Cpl MP had made prior inconsistent statements regarding any prior interactions between her and Appellant. (R. 21-22.)

Contrary to Appellant's argument, Sgt Favorite had no relevant testimony to offer on the question of whether or not Cpl MP and Appellant had ever met or had significant interaction prior to September 8, 2012. At most, Sgt Favorite could testify that Cpl MP and Appellant were at the same Easter barbeque with numerous other people; however, Sgt Favorite had no recollection of Cpl MP and Appellant actually interacting and therefore could not testify that they had previously met. Accordingly, based on the Defense proffer and Sgt Favorite's prior statement to NCIS, the Military Judge did not abuse his discretion in ruling that Sgt Favorite had no relevant or necessary testimony that would support the Defense assertion that Cpl MP and Appellant had previously met and denying his production.

C. Even if the Military Judge erred, Appellant was not prejudiced as he was able to cross-examine Cpl MP about her prior interactions with him.

Appellant had the opportunity at trial to fully develop his theme that he and Cpl MP had met prior to September 8, 2012. Cpl MP testified at trial, and Trial Defense Counsel did elicit from her that she had not met Appellant prior to that evening. (R. 459-60.) However, Trial Defense Counsel did not ask Cpl MP specifically about the purported prior interactions that they

had sought Sgt Favorite to testify regarding, and which he could not recall. Had these interactions in fact occurred, Appellant had the opportunity subsequent to Cpl MP's testimony to take any number of steps to potentially impeach that testimony. The Record does not indicate any attempt by Appellant to avail himself of these opportunities, including revisiting the issue of Sgt Favorite's production as a witness with the Military Judge.

Absent some attempt to at least test Cpl MP's recall of the purported prior interactions with Appellant, Sgt Favorite did not have any theoretically relevant testimony as a potential impeachment witness. Therefore, even if the Military Judge abused his discretion in denying the Defense request to produce Sgt Favorite, Appellant was not in fact prejudiced by that decision since Appellant did not elicit any facts from Cpl MP that Sgt Favorite's testimony might have impeached.

III.

THE MILITARY JUDGE PROPERLY DENIED APPELLANT'S CHALLENGES FOR CAUSE OF MSGT HERNANDEZ BECAUSE THERE WAS NO ACTUAL OR IMPLIED BIAS.

A. Actual bias.

1. The standard of review is abuse of discretion.

A military judge's decision whether to grant a challenge for cause based on actual bias is reviewed for an abuse of

discretion. *United States v. Leonard*, 63 M.J. 398, 402 (C.A.A.F. 2006) (citations omitted).

2. MSgt Hernandez was not actually biased.

A "military judge is given great deference when deciding whether actual bias exists because it is a question of fact, and the judge has observed the demeanor of the challenged member." *Id.* (citing *United States v. Warden*, 51 M.J. 78, 81 (C.A.A.F. 1999). Actual bias is personal bias which will not yield to the military judge's instructions and the evidence presented at trial. *United States v. Reynolds*, 23 M.J. 292, 294 (C.M.A. 1987).

The Military Judge did not abuse his discretion in denying the Appellant's challenge for cause of MSgt Hernandez based on actual bias. Nothing in MSgt Hernandez's responses in his members' questionnaire or during *voir dire* indicate actual bias because MSgt Hernandez was assaulted more than two decades earlier, and there is no logical connection between the facts of his case and Appellant's case. The fact that MSgt Hernandez had been shot by an unknown assailant when he was sixteen years old and had an older brother who had been assaulted and hospitalized are distinct from the allegations of sexual assault and false official statements at issue here. (R. 234-35; Appellate Ex. XL at 29.) The Record does not support a conclusion that MSgt

Hernandez's prior assault or that of his brother impacted his ability to be a fair and impartial member in any way.

Furthermore, the Military Judge evaluated MSgt Hernandez's answers and his demeanor during *voir dire* and did not find grounds for actual bias. (R. 250.) Nothing in the *voir dire* of MSgt Hernandez contradicts his statements that he understood the Government's burden of proof and would follow the instructions of the Military Judge. (R. 183-91.) Therefore, there is no actual bias.

B. No implied bias exists here, because most people in the same position as MSgt Hernandez would not be biased against Appellant.

1. The implied bias test that looks to whether "most people" in the position of the court member would be prejudiced.

A military judge's decision whether to grant a challenge for cause based on implied bias is reviewed with less deference than abuse of discretion, but more deference than *de novo* review. *United States v. Bagstad*, 68 M.J. 460, 462 (C.A.A.F. 2010) (citations omitted). A military judge who addresses implied bias by applying the liberal grant mandate on the record will receive more deference on review than one that does not. *United States v. Bragg*, 66 M.J. 325, 326 (C.A.A.F. 2008) (citing *United States v. Clay*, 64 M.J. 274, 277 (C.A.A.F. 2007).

At its core, the implied bias test asks whether, even if not actually biased, most people in same position as the court

member would be prejudiced; such members should be excused.[1] *See United States v. Moreno,* 63 M.J. 129, 134 (C.A.A.F. 2006). The test is an objective one. *Id.; see also Bragg,* 66 M.J. at 326-27. Challenges for implied bias are evaluated based on the totality of the factual circumstances. *Bagstad*, 68 M.J. at 462. Courts have found that the "doctrine of implied bias should be reserved for 'exceptional situations' in which *objective* circumstances cast concrete doubt on the impartiality of a juror." *United States v. Torres,* 128 F.3d 38, 46 (2d Cir. 1997) (citing *Smith v. United States*, 455 U.S. 209, 222 (1982)(O'Connor, J., concurring)(emphasis added).

2. <u>The Military Judge did not err in denying the challenge for cause as most people in MSgt Hernandez's position would not be biased</u>.

Here, the Military Judge explicitly stated that he had considered the liberal grant mandate. (R. 250.) As such, his ruling that MSgt Hernandez had neither actual nor implied bias should receive a greater level of deference under *Bragg*, and closer to that of abuse of discretion than to *de novo*. 66 M.J. at 326.

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[1] Despite decades of inconsistent "implied bias" precedent suggesting variously that "public perception" is the lens, the test itself, or a separate prong of the test, as the United States has explained in previous pleadings, with reference to Supreme Court precedent, "fairness" is the goal of R.C.M. 912(f)(2)(N); the objective "most people" test is the actual test. *See, e.g.,* Brief for Appellee at 11, United States v. Brown, No. 201300181 (N-M. Ct. Crim. App. Feb 18, 2014).

Appellant cites to *United States v. Smart*, 21 M.J. 15 (C.M.A. 1985), for the general proposition that implied bias has been found in cases "where the member has been the victim of a violent or traumatic crime." (Appellant's Br. at 51.) However *Smart* is factually distinguishable from this case in that it involved a prosecution for armed robbery where the member in question specifically disclaimed an ability to set aside his past experience as a victim and base his findings solely upon the evidence presented in court. *Smart*, 21 M.J. at 19.[2]

Here, the facts of MSgt Hernandez's victimization in an over twenty-year-old assault and his brother's prior assault

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[2] Note also that *Smart* reaches the right implied bias result, but cites to an actual bias concept in reaching that right result. It correctly finds that Sergeant First Class Fair's "mind was open" thus had no actual bias, and correctly concludes that "most people in the same position would be prejudiced." 21 M.J. at 20. However, in its implied bias analysis it takes the interim step of stating: "the risk is too great that——even with the best intentions——*Sergeant Fair could not* remove from his mind the recollections of his own experiences as a victim." *Id.* This finding raises the same conflation of actual bias (i.e., "his mind was not open") and implied bias (i.e., "most other people in the same position would not have an open mind") that caused the appellate correction in *United States v. Nash*, 71 M.J. 83, 89 (C.A.A.F. 2012) (replacing the lower court's "implied bias" finding with an "actual bias" finding). Correctly put, *Smart* should have said: "the risk is too great that——even with the best intentions——any other member with those experiences *could not* remove from his mind the recollections of his own experiences as a victim." If the *Smart* analysis were current law, a military judge's finding on the record that a member was *bias free* would be meaningless. As detailed above, implied bias analysis concerns itself with the appearance of unfairness (R.C.M. 912(f)(1)(N)) created not by the actual bias half of the R.C.M. equation, but instead by the gulf between *this* member, and most people in the same situation——that is, implied bias.

were not factually similar to the sexual assault at issue in Appellant's case. In fact, MSgt Hernandez's shooting was of such *de minimis* impact that he forgot to bring it up until discussions in the Members' deliberation room while awaiting individual *voir dire* refreshed his memory. (R. 234-35.) Moreover, unlike the member in *Smart*, nothing in the record here indicates that "most people in the same position as MSgt Hernandez" would have any inability to deliberate solely on the evidence and hew closely to the Military Judge's instructions. (R. 183-91.) Similarly, there is no implied bias in this case because Appellant adduced no evidence at trial, or now, that *most* people in the same position as MSgt Hernandez who had been victimized by a factually dissimilar crime decades earlier, would be biased.

The Military Judge did not abuse his discretion denying the Defense's challenges for cause of MSgt Hernandez as nothing in his Members' questionnaire or *voir dire* presented any personal circumstances that suggested that he had actual bias, and nothing suggested that objectively speaking, a similarly situated potential member would be biased against Appellant.

IV.

THE CONVENING AUTHORITY PROPERLY SELECTED THE MEMBERS' PANEL IN ACCORDANCE WITH ARTICLE 25, UCMJ. THE MILITARY JUDGE PROPERLY DENIED APPELLANT'S REQUEST TO DISMISS THE ENTIRE PANEL.

A. This issue is reviewed *de novo*.

"Whether a court-martial panel was selected free from systematic exclusion" is a question of law which is reviewed *de novo*. *United States v. Kirkland,* 53 M.J. 22, 24 (C.A.A.F. 2000) (citing *United States McClain,* 22 M.J. 124 (C.M.A. 1986)). Article 25(d)(2), UCMJ, requires that:

> When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.

"Members may not be selected solely on the basis of their rank." *United States v. Roland,* 50 M.J. 66, 68 (C.A.A.F. 1999) (citing *United States v. Nixon,* 33 M.J. 433, 434 (C.M.A. 1991)). Appellant shoulders the burden of establishing qualified personnel were improperly excluded from the selection process. *Roland,* 50 M.J. at 69.

B. Appellant has not offered any specific evidence that the Convening Authority did not properly apply the criteria in Article 25, UCMJ, in selecting the Members in his case.

In *United States v. Bertie,* 50 M.J. 489, 492-93 (C.A.A.F. 1999), the Court of Appeals for the Armed Forces rejected the

argument that Appellant makes here (Appellant's Br. at 51-54.) that the composition of a court-martial panel can give rise to a presumption of irregularity in the absence of evidence that "improper considerations of grade and rank were purposefully utilized by the convening authority." *Bertie,* 50 M.J. at 492. The *Bertie* court found no impropriety in a panel that lacked junior officers and junior enlisted members where, as in this case, the staff judge advocate gave specific advice to the convening authority that rank may not be used to deliberately exclude qualified members, as well as the convening authority's own memorandum acknowledging he used Article 25 criteria. *Id.*

In this case, the Record demonstrates that the Convening Authority received proper legal advice regarding the application of Article 25, UCMJ, to the member selection process and there is no evidence that the Convening Authority failed to follow the criteria of Article 25 or otherwise improperly selected the panel members. The SJA's March 12, 2013, memorandum advised the Convening Authority that he was "in no way bound by or limited to the names contained in" the questionnaires of prospective members that the SJA forwarded, and that the Convening Authority had "complete discretion to choose any member [he] wish[ed] so long as [the] selections are guided by the criteria in Article 25, UCMJ . . ." (Appellate Ex. XLII at 4.)

Furthermore, Appellant has presented no specific evidence that the Convening Authority had an improper motive in composing the panel or failed to apply the criteria in Article 25, UCMJ, in selecting the prospective members. The Military Judge accordingly denied Appellant's motion after permitting the Defense ample opportunity to present any evidence of impropriety, ruling that Appellant "[had] provided no other evidence other than the composition of the panel and number of excerpts from two member's questionnaires intend [sic] to indicate that the panel was stacked or that minorities or Marines of certain grads [sic] were deliberately or systematically excluded from consideration as panel members." (R. 167.) "In view of the extensive hearing held by the judge on this question and the ample evidence of lawful conduct on the part of appellant's convening authority," this Court should also conclude that there was no impropriety or appearance of impropriety and that the panel was properly selected. *Bertie,* 50 M.J. at 493.

C. Assuming *arguendo* that Appellant has met his burden to show the Convening Authority systematically excluded some potential members, the Record demonstrates that no impropriety occurred here.

"Once the defense comes forward and shows an improper selection, the burden is upon the Government to demonstrate that no impropriety occurred." *Roland,* 50 M.J. at 69; *see United*

States v. Bartlett, 66 M.J. 426, 430 (C.A.A.F. 2008) (citing *United States v. Dowty,* 60 M.J. 163, 173-75 (C.A.A.F. 2004). Furthermore, "there is a strong presumption that an error is not structural," and courts employ "a case—specific rather than a structural—error analysis in deciding issues of improper court member selection." *Bartlett,* 66 M.J. at 430.

The Record establishes how the Members were selected, and there is no indication of impropriety. The SJA's memorandum advice to the Convening Authority did not categorically exclude potential members in paygrade E-6 or below. (Appellate Ex. XLII.) The included questionnaires merely reflected the SJA's recommendations as to potential members from other subsets of the command. Additionally, the plain language of the SJA's legal advice establishes that the Convening Authority knew he was not limited to the selection of those recommended, but could select any member of the command he felt qualified. (R. 163-66; Appellate Ex. XLII.)

Here, there are no facts that show that the Members were improperly selected, that the Members were not fair or impartial, or that there was some prejudice to Appellant because of some notional unfairness or impartiality. Appellant's case was convened by a Convening Authority who was authorized to convene a general court-martial; Appellant was tried and sentenced by members personally chosen by the Convening Authority from a pool

of eligible members; and "the court members all met the criteria in Article 25, UCMJ." *Bartlett,* 66 M.J. at 430 (articulating case-specific facts demonstrating any error was harmless); *see also Untied States v. Gooch,* 69 M.J. 353, 361 (C.A.A.F. 2011) (finding error but no prejudice because "the Article 25, UCMJ, criteria were applied to the potential pool of panel members" and the resulting panel that tried appellant was "fair and impartial"). This Court should be convinced that the Record as a whole demonstrates that no impropriety occurred in the selection of the Members in Appellant's case.

V.

THE ADMISSION OF CPL MP'S STATEMENTS TO LCPL CLARKE WAS PROPER AS THE STATEMENTS WERE NOT HEARSAY STATEMENTS OFFERED FOR THEIR TRUTH. EVEN IF THE STATEMENTS WERE HEARSAY THEY WERE ADMISSIBLE AS EXCITED UTTERANCES. EVEN IF THE STATEMENTS WERE HEARSAY THAT DID NOT FALL UNDER ANY EXCEPTION, THE ADMISSION OF THE STATEMENTS WAS HARMLESS.

A. Standard of Review.

A military judge's ruling to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2003). An abuse of discretion occurs when a military judge either erroneously applies the law or clearly errs in making his or her findings of fact. *United States v. Donaldson*, 58 M.J. 477, 482 (C.A.A.F. 2003). Erroneously admitted evidence is tested for material prejudice

to a substantial right of the accused. *See United States v. Thompson*, 63 M.J. 228, 231 (C.A.A.F. 2006); Article 59(a), UCMJ.

B. LCpl Clarke's testimony was non-hearsay as it was offered to establish the timeline of the investigation of Cpl MP's assault, and not for the truth of her statements.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Mil. R. Evid. 801(c). A statement not offered to prove the truth of the matter asserted is not hearsay, and it is therefore not excluded by Mil. R. Evid. 802. *See United States v. Neeley*, 25 M.J. 105, 107 (C.M.A. 1987). Before admitting it, however, a military judge must evaluate it under the criteria of Mil. R. Evid. 401 and 403 for relevance and to prevent confusion or prejudice on the part of the members. *See e.g. United States v. Mancillas*, 580 F.2d 1301, 1309-10 (7th Cir. 1978). Where such a balancing is required, the military judge is afforded less deference when they fail to articulate the balancing analysis on the record. *United States v. Collier*, 67 M.J. 347 (C.A.A.F. 2009).

The United States is unaware of controlling case law from the Court of Appeals for the Armed Forces or from this Court on the question of whether testimony was properly admitted as non-hearsay under an effect-on-the-listener theory. However, this Court in *United States v. Combest*, 2011 CCA LEXIS 638 (N-M. Ct.

Crim. App. Aug. 16, 2011), *pet. for rev. denied*, 2011 CAAF LEXIS 895 (C.A.A.F., Oct. 13, 2011), looked to the framework adopted by other federal appellate courts. *Id.* (citing *United States v. Cass*, 127 F.3d 1218, 1223 (10th Cir. 1997); *United States v. Reyes*, 18 F.3d 65, 70 (2d Cir. 1994); *United States v. Martin*, 897 F.2d 1368, 1371 (6th Cir. 1990)). In these analogous Federal cases, the prosecutors elicited testimony, over hearsay objections, containing out-of-court statements that heightened the culpability of the respective defendants. *Id.* In each case, the court was convinced that the statements were not being offered for their truth, but to elucidate the investigatory background, provide context for the jurors, and show why law enforcement took the steps it did. *Id.* In addressing the admissibility of the statements, the appellate courts employed a balancing test under Fed. R. Evid. 403. *Id.* Those courts first looked to whether the non-hearsay purpose behind the statement's introduction was relevant to the case and, if so, whether the statement's probative value was outweighed by the danger of unfair prejudice. *Id.*

Here, LCpl Clarke testified that he was on duty during the morning of September 9, 2012 when Cpl MP came into the duty room appearing visibly shaken. (R. 270.) Trial Counsel asked LCpl Clarke what she told him, and Trial Defense Counsel objected on hearsay grounds. (R. 269-70.) Trial Counsel proffered "effect

on the listener and excited utterance" as the theories of admissibility, and the Military Judge overruled the Defense objection without further articulating his basis for overruling the objection or conducting a further balancing analysis on the record. (R. 270.) Trial Counsel then repeated his initial question to LCpl Clarke and then posed three additional questions about what steps he took in reaction to Cpl MP's reported assault, including why he did not enter the report of the assault into the duty log. (R. 270-71.)

Trial Counsel elicited Cpl MP's statements to LCpl Clarke for its effect on LCpl Clarke, which is not hearsay. *Neeley*, 25 M.J. at 107. LCpl Clarke explained that when Cpl MP told him she had been assaulted he took the steps of trying to elicit more information from her while attempting to comfort her; he also explained that there were not entries in the duty log because the duty was not "supposed to" enter reports of sexual assaults as a matter of standard operating procedure. (R. 270.) LCpl Clarke's testimony also placed into context the timeline from the initial report of the assault to NCIS becoming involved in the case, and the subsequent identification of Appellant. The facts elicited all went to the effects on LCpl Clarke and contextualized the subsequent actions that he took. Accordingly, the Military Judge did not abuse his discretion in admitting LCpl Clarke's testimony.

C. Even if part of LCpl Clarke's testimony was hearsay, it was admissible under Mil. R. Evid. 803(2) as an excited utterance.

An otherwise inadmissible hearsay statement is admissible under Mil. R. Evid. 803(2), even though the declarant is available as a witness, if (1) the statement relates to a startling event, (2) the declarant makes the statement while under the stress of excitement caused by the startling event, and (3) the statement is "spontaneous, excited or impulsive rather than the product of reflection and deliberation." *United States v. Feltham*, 58 M.J. 470, (C.A.A.F. 2003); *United States v. Arnold*, 25 M.J. 129, 132 (C.M.A. 1987)

The "implicit premise" underlying the excited utterance exception is "that a person who reacts 'to a startling event or condition' while 'under the stress of excitement caused' thereby will speak truthfully because of the lack of opportunity to fabricate." *United States v. Jones*, 30 M.J. 127, 129 (C.M.A. 1990). In determining whether a declarant was under the stress of a startling event at the time of his or her statement, courts have looked to a number of factors. These may include: "the lapse of time between the startling event and the statement, whether the statement was made in response to an inquiry, the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event, and the subject matter of the statement." *United States v. Abdirahman*, 66 M.J.

668, 676 (N-M. Ct. Crim. App. 2008)(quoting *Reed v. Thalacker*, 198 F.3d 1058, 1061 (8th Cir. 1999)).

The fact that a declarant's statements are in response to questioning is not a *per se* excluding factor; rather, courts have looked to whether or not the circumstances suggest that the declarant's statements are the product of the excitement of the event or whether the declarant has had time to think about answers and that the answers are a product of questioning rather than excitement. For instance, in *United States v. Roberts*, 10 M.J. 308 (C.M.A. 1981), immediately after an assault victim had been knifed and was "in a condition of shock, very cold and clammy, scared and worried about her kids," she stated that her husband had committed the assault. The court concluded that the victim's statement was instinctive and impulsive notwithstanding that it was in response to a question by an uninvolved bystander. *Id*. at 315 (citing *United States v. Burge*, 1 M.J. 408, 411 (C.M.A. 1976)); *see e.g. United States v. Moses*, 15 F.3d 774 (8th Cir. 1994) (affirming conviction and admissibility of declarant's statement about the identity of his assailant made to a policeman as declarant ran toward the officer for help).

Here, after Cpl MP escaped from Appellant, she fled to her room, was there for less than a minute and then immediately fled to the duty hut. (R. 443, 459.) LCpl Clarke described her as "just scared to death, shaking. . ." and after about five to ten

minutes she was able to report that she had been attacked, and then LCpl Clarke was able to coax out of her additional details about the assault. (R. 270.) These circumstances indicate that Cpl MP was still in a state of shock immediately after being assaulted, as in *Roberts*, and responded to LCpl Clarke's questions while her mental and physical condition was affected by the stress being assaulted by Appellant. Accordingly, the Military Judge did not err in also admitting LCpl Clarke's testimony as an excited utterance exception to the hearsay rule.

D. Assuming arguendo that the Military Judge erred in admitting LCpl Clarke's testimony as non-hearsay or under the excited utterance exception to the hearsay rule, Appellant has demonstrated no prejudice from the admission of this testimony.

Even assuming the Military Judge erred in admitting portions of LCpl Clarke's testimony, Appellant has not demonstrated material prejudice to any substantial right. *See Thompson*, 63 M.J. at 231; Article 59(a), UCMJ. The case against Appellant was strong and compelling. Cpl MP's account of the events on September 8 and 9, 2012 were corroborated by all of the physical and testimonial evidence, including Appellant's DNA recovered from inside of her bra, the documented bruising and abrasions she suffered during the assault, and her identification of Appellant as her assailant. Further, neither of Appellant's proffered alibi witnesses could corroborate his

account of his whereabouts during the time he was assaulting Cpl MP lending further support to her account of events. Given the strength of the United States' case, this Court has ample bases to conclude that exclusion of any erroneously admitted testimony would not have had any impact on the outcome or sentence in this case.

VI.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN PERMITTING TRIAL COUNSEL TO CROSS-EXAMINE SSGT BRITT ON THE FOUNDATION FOR HIS OPINION REGARDING APPELLANT'S CHARACTER FOR TRUTHFULNESS. EVEN IF THERE WAS ERROR, IT WAS HARMLESS.

A. Standard of Review.

See Assignment of Error V, section A, *supra* at 41.

B. Trial Counsel's cross-examination of SSgt Britt properly inquired into the basis of his opinion for Appellant's character for truthfulness.

Mil. R. Evid. 404(a), generally admonishes that "evidence of a person's character or a trait of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith. . ." One of the three specific exceptions to this rule of exclusion, however, is found in subsection (1), which permits "evidence of a pertinent trait of the character of the accused [to be] offered by an accused. . ." Thus, an accused may offer evidence of a relevant trait or traits that the judge believes relate to the charged conduct, in

order to imply that the accused acted in conformance with that trait on the particular occasion in question. *See generally* Mil. R. Evid. 401 (defining "relevant evidence"), and 402 (relevant evidence admissible; evidence not relevant not admissible). Such evidence may be offered "by testimony as to reputation or by testimony in the form of an opinion." Mil. R. Evid. 405.

Appellant raises the proper scope of cross-examination to test the soundness of opinion testimony implying that the accused's character is such that he is not the sort of person who would do the act with which he is charged. A common approach is to probe into the information base upon which a witness relies for his or her opinion through questions beginning with, "Do you know . . ." or, "Are you aware that . . ." *United States v. Brewer*, 43 M.J. 43, 46 (C.A.A.F. 1995); *see Michelson v. United States*, 335 U.S. 469 (1948). "To the extent that the cross-examiner can show that the witness is unaware of certain salient facts or events that logically bear upon the character trait in issue, the weight of the witness' opinion obviously is diminished." *Brewer*, 43 M.J. at 46 (citation omitted).

In testimony presented on the merits, however, "[i]t is not permissible, in order to test the basis of a witness' character opinion, in effect to ask the witness whether the charge then before the court-martial would affect the witness' opinion."

Brewer, 43 M.J. at 47 n.2. Specifically, the *Brewer* court admonished against use of "the supposedly-hypothetical question asked by trial counsel that in fact incorporated the circumstances underlying the charge. . ." *Id.* (citing *United States v. Mason*, 993 F.2d 406, 409 (4th Cir. 1993)(the hypothetical questions, "Would your opinion of Mr. Mason change if you knew that he distributed drugs?" and "If you did, if that were, in fact, true, and this jury thought it was true, would your opinion of him change?" were improper as they assumed that the defendant was guilty of the charged misconduct)).

During Trial Counsel's cross-examination of SSgt Britt, Trial Counsel tested the foundations of SSgt Britt's opinion regarding the traits of someone with a character for truthfulness:

> Q. Staff Sergeant, do you agree with me that someone who is truthful doesn't tell lies; correct?
>
> A. Yes, sir.
>
> Q. And then someone who has a character for truthfulness would then always be telling the truth; correct?
>
> A. Yes, sir.
>
> Q. So you would expect a Marine with a character for truthfulness to tell the truth to other Marines when asked questions?
>
> A. Yes, sir.
>
> Q. And to law enforcement?

A. Yes, sir.

Q. And to tell the truth to NCIS agents if their asked questions?

A. Yes, sir.

Q. And, are you aware that Lance Corporal Butters was interviewed by——

DC: Objection, improper impeachment.

MJ: Response?

TC: Sir, I'm questioning the foundation of his knowledge of his character truthfulness of the accused.

MJ: What do you believe is improper about it?

DC: The trial counsel is trying to impeach the witness on the charges before us, which there has not been findings of whether the accused is guilty of those charges.

MJ: Objection is over ruled at this point.

Q. You would expect that Marine to tell the truth to those NCIS agents, right?

A. Yes, sir.

(R. 542-43.)

Here, the question "You would expect that Marine to tell the truth to those NCIS agents. . .?" was not, as Appellant asserts (Appellant's Br. at 59.), an improper question that asked SSgt Britt to posit that Appellant was in fact guilty of the charged misconduct. *See Mason*, 993 F.2d at 409. Trial Counsel's questions merely inquired as to SSgt Britt's expectations that a Marine with a character for truthfulness

would tell the truth when questioned. This was a proper inquiry into the foundation of SSgt Britt's opinion and the Military Judge did not err in permitting the question.

C. Assuming *arguendo* that the Military Judge erred in permitting Trial Counsel's one question to SSgt Britt, the other overwhelming evidence that Appellant lied about assaulting Cpl MP renders that error harmless.

Even assuming the Military Judge erred in permitting Trial Counsel to pose his final question to SSgt Britt, Appellant has not demonstrated material prejudice to any substantial right from any error. *See Thompson*, 63 M.J. at 231; Article 59(a), UCMJ. Cpl MP's account of the assault were corroborated by all of the physical and testimonial evidence, including Appellant's DNA recovered from her clothing, her documented physical injuries suffered during the assault, and her identification of Appellant as her assailant. To the extent that credibility was at issue, Appellant's own attempt to provide an alibi placed his credibility in doubt as neither LCpl Dudley (R. 353.) nor LCpl Castro (R. 348, 358.), his proffered alibi witnesses, could corroborate his claim that he was with them during the time when Cpl MP was being assaulted. Given the strength of the United States' case and the evidence in the Record that fully supports Cpl MP's account of events, this Court should conclude that any erroneously admitted testimony would not have had any impact on the outcome or sentence in this case and was therefore harmless.

VII.

APPELLANT HAS FAILED TO IDENTIFY ANY FACTS THAT, IF TRUE, WOULD AMOUNT TO UNLAWFUL COMMAND INFLUENCE OR CALL INTO QUESTION THE FAIRNESS OF HIS COURT-MARTIAL. THE CONVERSATION BETWEEN CPL MP AND HER VICTIM ADVOCATE DURING THE VIDEOTAPE OF THE PHOTOGRAPHIC LINEUP WAS THE VICTIM ADVOCATE'S ATTEMPT TO REASSURE CPL MP AND WAS NOT A STATEMENT OF THE CONVENING AUTHORITY'S OFFICIAL POSITION NOR WAS IT AN ATTEMPT TO UNLAWFULLY INFLUENCE THE MEMBERS.

A. Standard of Review.

This Court reviews allegations of unlawful command influence *de novo*. *United States v. Harvey*, 64 M.J. 13, 19 (C.A.A.F. 2006).

B. Unlawful command influence is influence that "corrupts the truth-seeking function of the trial process."

Statute and regulation prohibit unlawful influence on a court-martial. Article 37, UCMJ; R.C.M. 104. Unlawful command influence involves command influence that "corrupt[s] the truth-seeking function of the trial process." *United States v. Thomas*, 22 M.J. 388, 393-94 (C.M.A. 1986).

Defense has the initial burden to raise unlawful command influence by showing "some evidence" that it exists. *Harvey*, 64 M.J. at 14. When the issue of unlawful influence is raised on appeal, an appellant must: (1) show facts which, if true, constitute unlawful command influence; (2) show that the proceedings were unfair; and (3) show that unlawful command

influence was the cause of the unfairness. *United States v. Biagase,* 50 M.J. 143, 150 (C.A.A.F. 1999) (citing *United States v. Stombaugh*, 40 M.J. 208, 213 (C.M.A. 1994)). When analyzing unlawful command influence on appeal, the alleged unlawful command influence is viewed retrospectively in terms of evaluating the actual impact it had on the completed trial. *Id.* On appeal, prejudice will not be presumed unless the appellant can meet his burden to show "proximate causation between the acts constituting unlawful command influence and the outcome of the court-martial." *Id.* (citing *United States v. Reynolds*, 40 M.J. 198, 202 (C.M.A. 1994)). This standard also applies when actions of those bearing "some mantle of command authority," other than a convening authority or commander, are alleged to have improperly influenced a court- martial. *Stombaugh*, 40 M.J. at 211 (detailing many instances of unlawful command influence, including a staff judge advocate briefing to court members before trial).

"In the course of addressing these issues, military judges and appellate courts must consider apparent as well as actual unlawful command influence." *United States v. Reed,* 65 M.J. 487, 488 (C.A.A.F. 2008). "[T]he appearance of unlawful command influence will exist where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding."

United States v. Lewis, 63 M.J. 405, 415 (C.A.A.F. 2006). "To find that the appearance of command influence has been ameliorated and made harmless beyond a reasonable doubt, the United States must convince [the court] that the disinterested public would now believe [the appellant] received a trial free from the effects of unlawful command influence." *Id.*

C. The comments of the Victim Advocate and Special Agent Tamash reflected personal opinions and were not authorized or endorsed by the Convening Authority. Absent evidence of some improper comments made "under mantle of command authority" there is no apparent unlawful command influence here.

Courts have analyzed for unlawful command influence the actions of those bearing "some mantle of command authority," other than a convening authority or commander, where those actions have been alleged to have improperly influenced a court-martial. *United States v. Mallett*, 61 M.J. 761, 764 (A.F. Ct. Crim. App. 2005); *see United States v. Stombaugh*, 40 M.J. 208, 211 (C.M.A. 1994)(detailing "many instances of unlawful command influence," including a staff judge advocate briefing to court members before trial). For instance, in *United States v. Sparrow*, 33 M.J. 139 (C.M.A. 1991), the court found error where the trial counsel made an explicit reference to the convening authority in his argument before court members. The trial counsel in *Sparrow* argued, "[The convening authority] has selected you. He said, 'Be here. Do it. I know you have good

judgment. I trust you. I know you'll do the right thing.'" *Id.* at 140. The *Sparrow* court found error because those comments were susceptible to an interpretation that the convening authority endorsed the trial counsel's argument was urging the members to impose a sentence that the convening authority supported.

Similarly in *Mallett*, the Air Force Court of Criminal Appeals, despite no evidence indicating a convening authority or commander encouraged the trial counsel's remarks, found that trial counsel's remarks when he asked the court members, "What would a commander say to get his unit's attention and say, 'I mean business about drugs,' if he had the authority to be the judge and jury in a case where you are, in essence, the jury deciding this." were improper under R.C.M. 1001(g). *Mallett*, 61 M.J. at 764. The *Mallett* court concluded that the trial counsel cloaked himself with the "mantle of command authority," thereby creating the appearance of unlawful command influence. *Id.; see Stombaugh*, 40 M.J. at 211.

Here, Trial Defense Counsel did not object when the United States played the entire videotape of the photographic lineup to the Members. (R. 336-42.) The videotape included a brief conversation between Cpl MP and her Victim Advocate. After Cpl MP picked out Appellant's photo, Special Agent Tamash briefly left the room. (R. 338.) Cpl MP then asked her Victim Advocate,

who was present in the room with her, "what if nothing happens?" (R. 338.) The Victim Advocate answered:

> I don't know. I don't know how to answer that one for you right now. But I think if you continue to do what you've been doing, something's going to happen, okay? Because this is not something that is not [sic] going to be taken lightly. This is not something our CO Colonel Zimmerman takes lightly, and I'm sure the other CO isn't taking it lightly either, okay? So let's not worry about that, okay, right now. We'll cross that bridge when we come to it, okay? Let's just continue to focus on what we need to do, you know, to continue to help you so you can continue to help these guys out, okay? Make Sense?

(Pros. Ex. 25 at 2-3.) Later, after Special Agent Tamash returned to the room, Cpl MP reiterated her concerns with the investigation and asked him, "What if nothing happens?" (R. 341.) He asked, "What do you mean?" (R. 342.) Cpl MP responded, "What if he just stays free?" (*Id.*) Special Agent Tamash responded," He won't. At least for the time being. I'm going to get him now." (*Id.*)

Appellant recognizes "it is obvious from the exchanges between [Cpl] MP and [Special Agent] Tamash, that [Cpl] MP was concerned about Appellant getting away and was looking for assurances that the command was going to prevent that from happening," and that there was nothing "improper in the Victim Advocate or [Special Agent] Tamash providing [these] assurances to [Cpl] MP." (Appellant's Br. at 62.) However, Appellant now urges this Court to disregard the obvious context in which these

comments were made and find apparent unlawful command influence. (*Id.*) In contrast to *Sparrow* and *Mallett*, the context of the Victim Advocate's brief assurances to Cpl MP during the videotape of the photographic lineup make clear that neither she nor Special Agent Tamash were speaking for the Convening Authority or otherwise invoking the "mantle of command authority." *Mallett*, 61 M.J. at 764. Rather, these assurances were simply as Appellant recognizes them to be——Cpl MP's advocate and Special Agent Tamash reassuring her through the difficult process of reporting her assault and identifying her assailant. In this context, a fully-informed, disinterested observer would neither impute these statements to the Convening Authority nor believe that Appellant's court-martial was tainted by unlawful command influence.

D. <u>Even if these comments are imputed to the Convening Authority, Appellant has not established these comments had any impact on his court-martial</u>.

Appellant's pretrial motion asserting that the Commandant's Heritage Brief had introduced unlawful command influence by potentially biasing the prospective members in sexual assault cases was appropriately denied as Appellant "failed to produce any evidence of [unlawful command influence] sufficient to shift the burden to the Government and ha[d] shown no logical connection of the purported [unlawful command influence] to this court-martial." (Appellate Ex. LXIV at 1.) Here, Appellant has

similarly failed to meet his burden of production to demonstrate either actual or apparent unlawful command influence as he has failed to show "proximate causation between the acts [allegedly] constituting unlawful command influence and the outcome of the court-martial." *Biagase*, 50 M.J. at 150. Appellant has not alleged any facts that establish that the assurances of the Victim Advocate and Special Agent Tamash to Cpl MP during the photographic lineup conveyed to the members any expectations that the Convening Authority had in the outcome of this case, or had any improper impact in this case. Accordingly, this Court should be convinced that there was no unlawful command influence here.

VIII.

THE MILITARY JUDGE DID NOT COMMIT PLAIN ERROR BY NOT *SUA SPONTE* REDACTING A SHORT CONVERSATION BETWEEN MP AND HER VICTIM ADVOCATE FROM THE VIDEOTAPE OF THE PHOTOGRAPHIC LINEUP. ALTHOUGH THE STATEMENTS WERE NOT RELEVANT FOR THEIR TRUTH, IT WAS NECESSARY TO SHOW THE MEMBERS THE ENTIRE VIDEOTAPE SO THAT THEY COULD DETERMINE THE RELIABILITY OF THE LINEUP PROCESS.

A. <u>This issue is reviewed for plain error</u>.

"Failure to object to the admission of evidence at trial forfeits appellate review of the issue absent plain error." *United States v. Eslinger*, 70 M.J. 193, 197-98 (C.A.A.F. 2011). This rule is "designed to prevent defense counsel from remaining

silent, making no objection, and then raising the issue on appeal for the first time, long after any possibility of curing the problem has vanished." *United States v. Reist*, 50 M.J. 108, 110 (C.A.A.F. 1999)(quotations omitted). Applying the plain error framework, the appellant "has the burden of demonstrating that (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused." *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011).

B. <u>There was no error because any statements made during the photographic lineup were relevant to show that the process was not suggestive</u>.

Relevant evidence is any evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Mil. R. Evid. 401. The relevance standard is a low threshold. *United States v. Reece*, 25 M.J. 93, 95 (C.M.A. 1987).

Here, Trial Defense Counsel did not object when the United States played the entire videotape of the photographic lineup to the Members, (R. 336-42), including the brief conversation between Cpl MP and her Victim Advocate. (Pros. Ex. 25 at 2-3.)

Identity was the key issue at this trial. Appellant's theory was that he was not the attacker. Trial Defense Counsel attacked this photographic lineup as suggestive and not reliable.

(R. 324-26, 591-92.) Any statements made during the lineup process were relevant for the Members to judge the reliability of Cpl MP's statement and her identification of Appellant. Redacting the videotape could have caused the Members to question the reliability of the tape, because they would not know what happened during the missing portion. They might have erroneously speculated that as soon as the NCIS agent left the room, Cpl MP started discussing her identification of Appellant with her Victim Advocate or expressed doubts about how sure she was that she chose the right picture. Seeing the tape in its entirety was relevant to assess the reliability of the process and the Military Judge did not commit plain error by *sua sponte* failing to redact it.

IX.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN RULING THAT EXTRINSIC EVIDENCE OF A PRIOR INCONSISTENT STATEMENT BY MP WAS NOT ADMISSIBLE BECAUSE THE WITNESS ADMITTED MAKING THE PRIOR INCONSISTENT STATEMENT, THEREBY MAKING EXTRINSIC EVIDENCE OF THAT STATEMENT INADMISSIBLE.

A military judge's decision to admit or exclude extrinsic evidence of a prior inconsistent statement is reviewed for an abuse of discretion. *United States v. Harrow*, 65 M.J. 190, 199 (C.A.A.F. 2007). Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same. *Id.*

(quoting Mil. R. Evid. 613(b)). The "more expedient" practice is to disallow extrinsic evidence of a prior inconsistent statement if the witness admits making the statement. *Id.*; *United States v. Gibson*, 39 M.J. 319, 324 (C.M.A. 1994).

Here, Cpl MP admitted that she made the prior inconsistent statement so extrinsic evidence of that fact was unnecessary and inadmissible. Cpl MP testified during direct examination that she saw Appellant and talked to him two times at the party, but she had never seen him before that night. (R. 436, 440.) She also admitted during cross examination that she made a prior inconsistent statement to NCIS:

> Q: Now, you met with NCIS a few hours after this encounter, right?
>
> A: I did.
>
> Q: And that was Special Agent Tamash?
>
> A: Yes.
>
> Q: Now, you told him you had never seen this person before, right?
>
> A: I have never seen him.
>
> Q: I'm sorry, can you say that again?
>
> A: I said I've never seen him before; not before that night.
>
> Q: Well before that night, before that encounter or before the barbeque?
>
> A: Before the barbeque, I had never seen him before that night.

> Q: But when Special Agent Tamash asked you that question he said, "Had you ever seen this person before?" And you said no, correct?
>
> A: Correct.
>
> Q: You didn't say that you had seen him at the barbeque, correct?
>
> A: I did not.
>
> Q: You didn't say that you had seen him over the course of a ten-hour period just before the incident, right?
>
> A: I didn't.
>
> Q: You didn't say there's this guy with a hat; he's the one that did it. Here's all my friends that know him. Go talk to them, right?
>
> A: No, I didn't.
>
> Q: You said you had never seen him before?
>
> A: Correct.

(R. 459-60.)

The Defense later sought to admit a videotaped interview between MP and Special Agent Tamash as extrinsic evidence that she told him she had never seen Appellant before he assaulted her, which the Defense claimed was inconsistent with her in-court testimony that she saw Appellant at the barbeque, but had not seen him before that. (R. 536-38.) The Military Judge reviewed the videotape and ruled that it was not admissible as extrinsic evidence of a prior inconsistent statement. (R. 538-39.) He reasoned that MP admitted making the prior inconsistent

statement, so the impeachment was complete at that time. (R. 538-39.)

This was not incorrect, let alone an abuse of his "considerable" discretion to admit a prior statement. *Harrow*, 65 M.J. at 200. Appellant claims that the extrinsic evidence was admissible because MP never acknowledged the inconsistency in the statement. (Appellant's Br. at 69-70.) According to Appellant, Cpl MP could only "acknowledge the inconsistency" by agreeing with the Defense theory that the two statements were in fact inconsistent and therefore, one of them was likely false.

But that is not what it means for the declarant to "acknowledge the specific inconsistencies between the prior statement and his or her in-court testimony." *Gibson*, 39 M.J. at 324. That language was originally adopted from the Tenth Circuit's case of *United States v. Soundingsides*, 820 F.2d 1232 (10th Cir. 1987). That case makes clear that all that is required is for the declarant to admit making the specific portion of the statement that is inconsistent with the in-court testimony. 820 F.2d at 1240-41. The witness does not need to further agree with the defense about what conclusions may be drawn from the inconsistent statement.

Here, Cpl MP admitted that she told Special Agent Tamash that she had never seen Appellant before, but explained it by saying that what she meant was that she had never seen him

before the night of the barbeque. (R. 538-39.) Because she admitted telling him that she had never seen Appellant before, she acknowledged the specific inconsistency between her prior statement and her in-court testimony. Once she admitted making the inconsistent statement, there was no need for further proof through extrinsic evidence. 820 F.2d at 1241.

Regardless, Appellant had already introduced other extrinsic evidence. Before Cpl MP even testified, Trial Defense Counsel had already elicited from Special Agent Tamash that Cpl MP first told him that she had no idea who her assailant was. (R. 320.) The Trial Defense Counsel argued this point during closing argument. (R. 590.) That argument would not have been any different if the extrinsic evidence had been admitted. The videotape adds nothing since Cpl MP admitted making the statement in question.

X.

THE MILITARY JUDGE DID NOT COMMIT PLAIN ERROR BY NOT *SUA SPONTE* STOPPING SPECIAL AGENT TAMASH FROM TESTIFYING ABOUT STATEMENTS MP MADE TO HIM. THOSE STATEMENTS WERE NOT HEARSAY BECAUSE THEY WERE NOT OFFERED FOR THEIR TRUTH.

Appellant did not object at trial. Therefore, just like Assignment of Error VIII, this issue is reviewed for plain error.

Out of court statements are not hearsay unless they are offered in evidence to prove the truth of the matter asserted. Mil. R. Evid. 801(c). Thus, when investigators take some action based on what they are told, they may provide some explanation for their investigative activity, without violating the rule against hearsay. 2 John W. Strong et al., *McCormick on Evidence* § 246 (5th ed. 1999). One way to analyze this question is to "ask whether the proponent of the statement is requesting the trier-of-fact to treat the statement as if it were made by a witness on the stand and to place faith in it as a true representation of some fact. If the answer is no, the statement is not hearsay." 2 Stephen A. Saltzburg et al., *Military Rules of Evidence Manual* § 801.02[3][b] at p. 8-22 (7th ed. 2011).

Here, while Special Agent Tamash did repeat statements that MP made to him, it is clear that they were not offered for their truth, but rather to explain why he took certain investigative actions. The majority of his testimony was devoted to laying the foundation for photographs that he took of the barracks and MP's injuries, the physical evidence he collected, and the photographic lineup he conducted. (R. 286-319.) Those investigative actions do not make sense without some minimal context about why he took a photograph of a particular location in the barracks, for example.

When Special Agent Tamash did repeat statements that MP made to him, that statement was immediately followed by him listing the physical evidence he collected based on what Cpl MP told him. (R. 293.) He was essentially testifying that "this is the evidence I collected, based on what [Cpl] MP told me." That does not call upon the Members to place faith in the out-of-court statements as true representations of fact. Whether they were true or not, they influenced the evidence collected and photographs taken. Thus, none of Special Agent Tamash's testimony contained inadmissible hearsay, especially considering that Appellant never objected.

What is more, Appellant not only failed to object, he started his cross-examination of Special Agent Tamash by launching into a lengthy recitation of what MP told him. (R. 320-23.) This was part of the Defense's theme that MP made inconsistent statements to Special Agent Tamash. So even if there was error, which there was not, Appellant was not prejudiced by it.

XI.

APPELLANT'S ADMINISTRATIVE DISCHARGE WHILE APPELLATE REVIEW WAS PENDING NEITHER NEGATED BY NOR RESTRICTED THE POWER OF THE CONVENING AUTHORITY TO ACT ON THE FINDINGS AND SENTENCE. APPELLANT'S ADMINISTRATIVE SEPARATION BOARD ALONE DOES NOT ESTABLISH THAT THE CONVENING AUTHORITY HAD AN INELASTIC ATTITUDE TOWARDS PERFORMING HIS POST-TRIAL RESPONSIBILITIES IN APPELLANT'S COURT-MARTIAL.

A. This issue is reviewed *de novo*.

Whether a convening authority is disqualified from taking action on a court-martial sentence is reviewed de novo. *United States v. Davis*, 58 M.J. 100, 102 (C.A.A.F. 2002).

B. Appellant has not demonstrated that his administrative separation reflected an inelastic attitude by the Convening Authority towards his clemency request, or that the Convening Authority was disqualified solely by initiating administrative separation processing.

1. A convening authority's broad "command prerogative" in taking action on a sentence requires that they entertain an accused's post-trial submissions with a requisite degree of impartiality.

A convening authority is vested with substantial discretion when he or she takes action on the sentence of a court-martial. Article 60(c)(2)-(3), UCMJ; R.C.M. 1107. As a matter of "command prerogative" a convening authority "in his sole discretion, may approve, disapprove, commute, or suspend the sentence in whole or in part."

Action on the sentence is not a legal review. Rather, a convening authority considers numerous factors and reasons in determining a sentence that is "warranted by the circumstances of the offense and appropriate for the accused." R.C.M. 1107(d)(2). The convening authority must consider any matters submitted by the accused pursuant to Article 60(b). Article 60(c)(2), UCMJ; *United States v. Lee,* 50 M.J. 296, 297 (C.A.A.F. 1999); *United States v. Howard*, 23 C.M.A. 187, 192 (C.M.A. 1974); *see also* R.C.M. 1105, 1106(f), 1107(b)(3)(A)(iii).

In the performance of post-trial duties, a convening authority acts in a "role . . . similar to that of a judicial officer." *United States v. Fernandez,* 24 M.J. 77, 78 (C.M.A. 1987)(citing *United States v. Boatner,* 20 C.M.A. 376 (C.M.A. 1971)). The requirement for impartiality assures that the convening authority gives full and fair consideration to matters submitted by the accused and determines appropriate action on the sentence. "As a matter of right, each accused is entitled to an individualized, legally appropriate, and careful review of his sentence by the convening authority." *Fernandez,* 24 M.J. at 78. This right is violated where a convening authority cannot or will not approach post-trial responsibility with the requisite impartiality. Under such circumstances, a convening authority must be disqualified from taking action on a record of

court-martial. *See Fernandez*, 24 M.J. at 79; *Howard,* 23 C.M.A. at 192.

2. A convening authority is disqualified where they are an accuser, have a personal interest in the case, have a personal bias against the accused, or have displayed an inelastic attitude towards their post-trial responsibilities.

Cases disqualifying convening authorities from taking post-trial action have fallen into two categories. In the first category, a convening authority will be disqualified if he or she is an accuser, has a personal interest in the outcome of the case, or has a personal bias toward the accused. *United States v. Davis*, 58 M.J. 100, 102 (C.A.A.F. 2002) (citations omitted); *see also* Article 1(9), UCMJ. In the second category, courts have found convening authorities to be disqualified if they display an inelastic attitude toward the performance of their post-trial responsibility. *Davis*, 58 M.J. at 102.

For instance, in *Howard*, the convening authority issued a letter communicating his views to convicted drug dealers. In that letter, he informed them that their pleas for clemency would be answered in the following manner: "'No, you are going to the Disciplinary Barracks at Fort Leavenworth for the full term of your sentence and your punitive discharge will stand.' Drug peddlers, is that clear?" *Howard,* 23 C.M.A. at 191. The *Howard* court held that the convening authority was disqualified

from taking action on those cases because his statement demonstrated an inelastic attitude toward their clemency requests. *Id.* at 192. There are no such statements reflecting an inelastic position on clemency from the Convening Authority here.

3. An administrative discharge is not action on a court-martial. The administrative discharge of a member, while appellate review is pending does not impair the court-martial result; nor does it restrict, or alter, the responsibility of the convening authority to take appropriate action on the sentence.

Courts have consistently held that the administrative separation of a member has no impact on a court-martial finding or sentence, including appellate review. The Court of Appeals for the Armed Forces has held that, if a person is discharged administratively while appellate review is pending, there is "no good reason to hold the findings and sentence of the court-martial are impaired by the discharge." *Steele v. Van Riper*, 50 M.J. 89, 91 (C.A.A.F. 1999) (quoting *United States v. Speller*, 8 C.M.A. 363, 368 (C.M.A. 1957)). Similarly, the power of review authorities over the court-martial is unaffected by the administrative discharge. *Steele*, 50 M.J. at 91 (citations omitted). Moreover, the administrative discharge does not negate the responsibility of the convening authority to act on the findings and sentence; nor does it restrict his power to do

so. *Id.; see also United States v. McPherson*, 68 M.J. 526, 528 (A. Ct. Crim. App. 2009).

In *Steele v. Van Riper,* the Court of Appeals for the Armed Forces considered the effect of an administrative discharge given after trial, but prior to the convening authority taking initial action on a sentence that included a punitive discharge. There the court held: "The earlier honorable discharge through administrative channels had the effect of remitting the [adjudged] bad-conduct discharge . . . [, which] . . . cannot be executed. . ." *Steele*, 50 M.J. at 91-92 (citation omitted). However, the Steele court also recognized that the administrative discharge neither altered the authority of that convening authority to otherwise take action on the sentence and did "not affect the power of. . .appellate tribunals to act on the findings and sentence." *Id.* at 92.

4. <u>This Court should decline Appellant's invitation to establish new precedent that an administrative discharge of a member while his case is pending appellate review, in the absence of disqualifying attitudes or bias, presumptively disqualifies the Convening Authority from taking action</u>.

Appellant's administrative separation board was held on April 2, 2013, eleven days after his trial concluded; and, the board found based on his assault of Cpl MP that Appellant committed a serious offense and recommended that Appellant be

separated with a characterization of service as "Other than Honorable." (*Id.* at Encl. 4.)

On June 28, 2013, Trial Defense Counsel submitted matters in clemency pursuant to R.C.M. 1105 and requested a new convening authority and Staff Judge Advocate for post-trial review and action asserting, as he does now on appeal, that the post-trial administrative processing of Appellant indicated that the Convening Authority "[could not] approach his post-trial responsibility with the requisite impartiality." (Clemency Request at 2.) Consistent with the legal advice that there was no disqualifying condition presented merely by processing Appellant for administrative separation, the Convening Authority approved the court-martial sentence as adjudged in his action on July 20, 2013. (SJAR Addendum, Jul. 3, 2013; C.A.A., Jul. 20, 2013.)

The law provides no support for the proposition that Appellant's administrative separation proceedings while action on his court-martial was pending presumptively reflects a bias or inelastic attitude on the part of the Convening Authority that disqualified him from taking action on Appellant's court-martial. The law is well-settled that a court-martial, including appellate review, is legally and analytically distinct from an administrative discharge. *See Steele*, 50 M.J. at 91-92. There is no legal bar to a scenario, as here, where the

administrative discharge of a member occurs while action on that member's court-martial or appellate review of that court-martial is pending. *See id*. Moreover, Appellant has not met his burden of proffering any evidence that the Convening Authority had a personal bias or interest of the kind discussed in *Davis*, or had expressed an inelastic attitude towards the disposition of cases such as Appellant's as in *Howard*. Absent evidence of such a personal bias or inelastic attitude, the Convening Authority was free to initiate Appellant's administrative discharge and this Court should conclude so in accordance with precedent.

Finally, Appellant's argument urges this Court to adopt a *de facto* rule that would require a convening authority to defer any post-trial administrative discharge processing of a member until after action had been taken on the court-martial. Such a rule is contrary to precedent that an administrative discharge neither negates the responsibility of the convening authority to act on the findings and sentence, nor does it restrict his power to act. See *Steele*, 50 M.J. at 91; *see also McPherson*, 68 M.J. at 528. This Court should decline Appellant's invitation to construct a new rule out of whole cloth that is contrary to precedent.

XII.

APPELLANT'S CONVICTIONS FOR FALSE OFFICIAL STATEMENTS UNDER THE ADDITIONAL CHARGE ARE LEGALLY AND FACTUALLY SUFFICIENT, BECAUSE APPELLANT'S STATEMENTS TO NCIS DENYING PHYSICALLY ASSAULTING CPL MP AND PROFFERING AN ALIBI WERE FALSE AND REBUTTED BY THE FORENSIC EVIDENCE, AND THE TESTIMONY OF CPL MP, LCPL DUDLEY AND LCPL CASTRO.

A. Standard of Review.

See Assignment of Error I, section A, *supra* at 17.

B. The evidence that Appellant lied when he denied assaulting Cpl MP and offered a knowingly false alibi supports the legal and factual sufficiency of his convictions for false official statements.

The test for legal sufficiency is addressed in Assignment of Error I, section B, supra at 24. In this case, conviction of false official statements requires the Government to prove beyond a reasonable doubt:

(1) That the accused signed a certain official document or made a certain official statement;
(2) That the document or statement was false in certain particulars;
(3) That the accused knew it to be false at the time of signing it or making it; and
(4) That the false document or statement was made with the intent to deceive.

MCM (2012), Part IV, ¶ 31.b. A statement may be false in certain particulars. MCM (2012), Part IV, ¶ 31.b(2). It need not be totally false, and, in fact, parts of it may be literally true. *United States v. Wright*, 65 M.J. 373, 374 n.1 (C.A.A.F. 2007)(where a soldier told investigators that several computers

were missing from the spot where he had left them, and it was literally true that the computers were missing from that spot, the statement was still held false *because it* implied that Wright had no explanation for their absence, when in fact he had stolen them).

1. The ample evidence that Appellant lied when he denied assaulting or having any physical contact with Cpl MP supports the legal and factual sufficiency of his conviction under specification 1 of the Additional Charge I.

On September 10, 2012, while being interrogated by NCIS, Appellant denied being at Cpl MP's barracks on the morning of September 9, 2012, or having any involvement in the assault of Cpl MP stating: "I did not touch her. I did not do anything to her." (Pros. Ex. 16 at 20, 24.) The evidence establishing the facts that Appellant forced Cpl MP against a brick wall, pinned her against it, and forcibly placed his hand under her shirt and bra and touched her breast without her consent (R. 442, 445-46; Pros. Ex. 10.) also contradicts Appellant's denials of ever touching Cpl MP. Additionally, the physical evidence of Cpl MP's injuries from falling against the bike rack while attempting to struggle free of Appellant (R. 445; Pros. Ex. 10.), Cpl MP's subsequent identification Appellant (R. 293, 321, 324; Pros. Ex. 11.), and Appellant's DNA being recovered from the inside of Cpl MP's bra (R. 481-82; Pros. Ex. 13.), establish conclusively that Appellant did in fact touch Cpl MP.Viewed in a

light most favorable to the prosecution, these facts establish that Appellant did in fact assault Cpl MP and then lied about his criminal acts to NCIS. Therefore Appellant's conviction for making a false official statement here is legally sufficient.

The test for legal sufficiency is addressed in Assignment of Error I, section B, supra at 26. Making allowances for the fact that the Members had the opportunity to assess the credibility of the witnesses and afford their testimony appropriate weight, Appellant's conviction for a false official statement for denying touching Cpl MP is also factually sufficient. *Turner*, 25 M.J. at 325. The ample evidence here, including Appellant's DNA found during the forensic examination of Cpl MP's clothing, and her identification of the clothing he was wearing that evening and morning support and substantiate her account of the events that occurred on September 8 and 9, 2012. For these reasons, Appellant's conviction for a false official statement under specification 1 of the Additional Charge is both legally and factually sufficient, and should be affirmed by this Court.

2. <u>The evidence that Appellant offered a false alibi supports the legal and factual sufficiency of his conviction for false official statements under specification 2 of the Additional Charge I</u>.

In response to questions from Special Agent Grafton, Appellant claims that he remained at the barbeque for the

duration of the party in the company of his acquaintances, LCpl Dudley and LCpl Castro, and then went straight to his barracks and then to bed. (R. 346-47; Pros. Ex. 16 at 47.) However, when questioned, LCpl Dudley stated that he did not go upstairs with Appellant that morning, that Appellant was not with him when he left the party, nor did he remember seeing Appellant leave the party. (R. 347, 353.)

LCpl Castro similarly rebutted Appellant's proffered alibi stating to NCIS that he had left by himself before the end of the party, that he did not leave with Appellant, and that he did not recall seeing Appellant leave the barbeque. (R. 348, 358.)

Conclusion

WHEREFORE, the Government respectfully requests that this Court affirm the findings and sentence as adjudged and approved below.

KEITH B. LOFLAND
Lieutenant Commander, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-8384, fax (202) 685-7687

/S/
DAVID N. ROBERTS
Major, U.S. Marine Corps
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202)685-7059, fax (202)685-7687

Appendix

1. *United States v. Combest*, 2011 CCA LEXIS 638 (N-M. Ct. Crim. App. Aug. 16, 2011).

Certificate of Filing and Service

I certify the foregoing was delivered to the Court and a copy was served upon opposing counsel and electronically filed with the Court pursuant to N-M. Ct. Crim. App. Rule 5.2(b)(1) on April 29, 2014.

KEITH B. LOFLAND
Lieutenant Commander, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-8384, fax (202) 685-7687

UNITED STATES OF AMERICA v. RALPH D. COMBEST, CULINARY SPECIALIST SEAMAN RECRUIT (E-1), U.S. NAVY

NMCCA 201100185

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

2011 CCA LEXIS 638

August 16, 2011, Decided

NOTICE: AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

SUBSEQUENT HISTORY: Review denied by *United States v. Combest, 2011 CAAF LEXIS 895 (C.A.A.F., Oct. 13, 2011)*

PRIOR HISTORY: [*1]
SPECIAL COURT-MARTIAL.

Sentence Adjudged: 7 January 2011. Military Judge: CDR Sherry King, JAGC, USN. Convening Authority: Commanding Officer, USS RODNEY M. DAVIS (FFG 60). Staff Judge Advocate's Recommendation: LT G. Touchton, JAGC, USN.

COUNSEL: For Appellant: LT Daniel Napier, JAGC, USN.

For Appellee: LT Kevin Shea, JAGC, USN.

JUDGES: Before C.L. REISMEIER, J.K. CARBERRY, G.G. GERDING, Appellate Military Judges.

OPINION

OPINION OF THE COURT

PER CURIAM:

A special court-martial consisting of officers and enlisted members convicted the appellant, contrary to his plea, of wrongful sexual contact, a violation of Article 120(m), Uniform Code of Military Justice, *10 U.S.C. § 920(m)*. The appellant was sentenced to a bad-conduct discharge from the United States Navy.

The appellant raises one assignment of error: that the military judge erred by admitting hearsay evidence over the defense's objection and failing to issue a limiting instruction to the members. We have carefully examined the record of trial and the pleadings of the parties, and we conclude that the findings and the sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant occurred. *Arts. 59(a)* [*2] and *66(c)*, UCMJ.

Facts

In May 2009, the appellant and DW began communicating on an internet dating website. On 7 June 2009, the appellant and two friends drove to DW's house. This was the first time the appellant and DW met in person. They then drove with DW to a nearby beach, stayed for a short while, then left to take DW back home. During the drive, the appellant sexually assaulted DW by touching her breast and taking her hand and placing it on his penis. Soon after arriving home, DW told her sister, AH, that she had been sexually assaulted by the appellant. AH then called the police. It is DW's statement to AH that gives rise to the appellant's assignment of error.

Prior to trial, defense counsel moved *in limine* to exclude AH's recitation of what DW told her. The defense argued that her testimony would be hearsay, irrelevant, improper bolstering, and contrary to judicial economy. Record at 214-15. The military judge denied the motion, but told counsel she would instruct the members that DW's out-of-court statement to AH was only to be considered for its effect on the listener, not for the truth of the matter asserted. *Id.* at 218-19. The military judge did not give that instruction, [*3] either at the time of AH's testimony, or before the members retired for deliberation. *Id.* at 330, 454-67. It appears that this was a matter of

simple neglect, as it was never again brought up by any party. [1]

1 After evidence had been received and before closing arguments, the military judge noted that she had just gone through the proposed instructions with counsel in a RULE FOR COURTS-MARTIAL 802, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) conference. The limiting instruction was not among those discussed. The military judge afforded both counsel an opportunity to object on the record, but neither party did.

Discussion

We test a military judge's decision to admit or exclude evidence for an abuse of discretion. *See United States v. Sullivan, 42 M.J. 360, 363 (C.A.A.F. 1995)*. If we find error, we will take corrective action if we determine that error resulted in material prejudice to a substantial right of the accused. *See United States v. Thompson, 63 M.J. 228, 231 (C.A.A.F. 2006)*. If a required instruction is not given, we test for harmlessness by considering whether it is clear beyond a reasonable doubt that the error did not contribute to the verdict. *See United States v. McDonald, 57 M.J. 18, 20 (C.A.A.F. 2002)*.

Non-Hearsay, [*4] **Effect on the Listener**

We first address the question of whether the military judge erred in finding that DW's statement was non-hearsay. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MILITARY RULE OF EVIDENCE 801(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). A statement not offered to prove the truth of the matter asserted is not hearsay, and it is therefore not excluded by MIL. R. EVID. 802. *See United States v. Neeley, 25 M.J. 105, 107 (C.M.A. 1987)*. Before admitting it, however, a judge must evaluate it under the criteria of MIL. R. EVID 401 and 403 for relevance and to prevent confusion or prejudice on the part of the members. *See, e.g., United States v. Mancillas, 580 F.2d 1301, 1309-10 (7th Cir. 1978)*. [2] Here, the military judge found that DW's statement to her sister that DW had been sexually assaulted was non-hearsay as it was not offered for its truth but instead to show why the police were contacted and the investigation began. The appellant claims that this statement was unrelated to any of the elements of the charged offense and had no probative [*5] value other than to corroborate DW's account.

2 *See also United States v. Berry, 61 M.J. 91, 95 (C.A.A.F. 2005)*. A military judge has a duty to determine whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice. The judge should articulate the reasoning for her determination on the record. If she does not, the reviewing appellate body will accord her determination less deference.

We can locate no case law from the Court of Appeals for the Armed Forces or our own court controlling the question of whether AH's testimony was properly admitted under an effect-on-the-listener theory. This question has, however, been addressed by other federal appellate courts and their treatment of the issue is instructive. *See United States v. Cass, 127 F.3d 1218, 1223 (10th Cir. 1997)*; *United States v. Reyes, 18 F.3d 65, 70 (2d Cir. 1994)*; *United States v. Martin, 897 F.2d 1368, 1371 (6th Cir. 1990)*. The prosecutors in each of the aforementioned cases elicited testimony, over hearsay objections, that contained out-of-court statements that heightened the culpability of the respective defendants. In each case, the Government argued that the statements were not being [*6] offered for their truth, but to elucidate the investigatory background, provide context for the jurors, and show why law enforcement took the steps it did. In addressing the admissibility of the statements, the appellate courts employed a balancing test under *FEDERAL RULE OF EVIDENCE 403*. The courts first looked to whether the non-hearsay purpose behind the statement's introduction was relevant to the case and, if so, whether the statement's probative value was outweighed by the danger of unfair prejudice. [3] We shall employ the same framework.

3 *See Martin, 897 F.2d at 1372* ("[E]ven though the hearsay rule and *confrontation clause* [are] not violated, when inculpatory out of court assertions name the criminal defendant in connection with 'setting the scene' for an investigation, the question of unfair prejudice . . . almost always arises . . . . The relevance and probative value of 'investigative background' is often low, but the potential for abuse is high.")(citing McCormick on Evidence § 249 at 734 (3d ed. 1984).); *Reyes, 18 F.3d at 70* ("[T]he mere identification of a relevant non-hearsay use of such evidence is insufficient to justify its admission if the jury is likely to consider [*7] the statement for the truth of what was stated with significant resultant prejudice."); *Cass, 127 F.3d at 1222-23* ("[O]ut-of-court statements by informants offered to explain the background of an investigation, like all evidence, must be evaluated under the criteria in *FED.R.EVID. Rules 401* and *403* for relevance and to prevent confusion or prejudice

on the part of the jury.'" (quoting *United States v. Freeman, 816 F.2d 558, 563 (10th Cir. 1987))*.

In the instant case, the Government claims that DW's out-of-court statement is not barred by MIL. R. EVID. 802 because it is not being offered for the truth of the matter asserted. Instead, it was offered to show why AH called the police and how the investigation began. The probative value of such testimony strikes us as minimal as compared to its potential for unfair prejudice. The admission appears to have principally bolstered the account of DW, who had already testified, and whose credibility, at least with regard to the question of whether the touching occurred or not, had not been undermined. [4] In light of the minimal value of DW's statement when weighed against its potential for unfair prejudice, we find that the military judge erred [*8] by permitting AH to testify that DW said that she had been sexually assaulted.

4 "The fact that a witness takes the stand to testify does not automatically create the right to offer evidence to bolster [her] credibility." *United States v. Everage, 19 M.J. 189, 192 (C.M.A. 1985)*.

Prejudice

Next, we consider whether the military judge's erroneous admission of AH's testimony caused material prejudice to the appellant's substantial rights. We test for prejudice resulting from the erroneous admission of evidence by examining "(1) the strength of the Government's case, (2) the strength of the defense's case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question.'" *United States v. Durbin, 68 M.J. 271, 275 (C.A.A.F. 2010)*(quoting *United States v. Kerr, 51 M.J. 401, 405 (C.A.A.F. 1999))*.

The Government's case was strong. DW testified about the assault itself, Record at 304-06; the appellant's friends testified that after DW left the car, the appellant boasted of touching her breast and grabbing her hand and shoving it down his pants "so she wouldn't have time to react or stop him," *id.* at 273, 276; AH testified that she found DW crying hysterically soon [*9] after the assault, *id.* at 333; and finally, the Government introduced a written statement made by the appellant to a Naval Criminal Investigative Service agent in which he admitted to the sexual contact and conceded that he "probably got a little carried away." Prosecution Exhibit 2. The appellant's case, on the other hand, was weak. His strategy was to show consent or reasonable mistake of fact as to consent. The theme and theory were predicated on the pre-date internet exchanges he had with DW, and the possibility that his interactions with her at the beach were not as unremarkable as her testimony suggested (lending credence to the reasonableness of his mistaken belief).

As to the materiality of the objectionable portion of AH's testimony, it was not great. That DW said she had been sexually assaulted after leaving the car was neither vital to the Government's case nor fatal to the appellant's. And the quality of AH's contribution to the Government's case was laid bare by the trial defense's cross-examination, which was brief and consisted only of four questions. Applying the *Kerr* test for prejudice to this case, we conclude that the appellant suffered no material prejudice to any [*10] of his substantial rights as a result of the military judge's error.

Failure to Provide Instructions

Whether a jury was properly instructed is a question of law reviewed *de novo. United States v. Schroder, 65 M.J. 49, 54 (C.A.A.F. 2007)*. Failure to object to an instruction given or omitted waives the objection absent plain error. RULE FOR COURTS-MARTIAL 920(f), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). "The plain error standard is met when: (1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights." *United States v. Maynard, 66 M.J. 242, 244 (C.A.A.F. 2008)*(citation and internal quotation marks omitted). Here, the military judge failed to give the promised limiting instruction. In light of the foregoing recitation of strengths and weaknesses of the parties' respective cases, however, we find that the military judge's failure to instruct the members did not materially prejudice a substantial right of the appellant. The members were aware that AH was not in the car at the time of the assault and her only contribution to their understanding of the case was what DW relayed to her after the [*11] assault. We can safely conclude that the members would have reached the same verdict if the military judge had instructed them that they were not to consider AH's account of DW's statement for its truth, but to understand why she contacted law enforcement and how the investigation began. We therefore hold that the error did not materially prejudice the appellant's substantial rights and it does not constitute prejudicial plain error.

Conclusion

We affirm the findings and the sentence as approved by the convening authority.

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
	)	Case No. 201300137
v.	)	
Francis L. CAPTAIN, Sergeant (E-5) U.S. Marine Corps Appellant	)	Tried at Camp Foster, Okinawa, Japan on October 17, 2012 and January 11, 2013 before a General Court-Martial convened by Commanding General, 3d Marine Logistics Group, Camp Kinser, Okinawa.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

CORY A. CARVER
Captain, USMC
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-8504, fax (202) 685-7687

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Errors Assigned

I.

AN ACCUSED HAS A CONSTITUTIONAL RIGHT TO AN IMPARTIAL JUDGE AT ALL STAGES OF A PROCEEDING. HERE, THE MILITARY JUDGE WHO CONDUCTED THE *DUBAY* HEARING WAS THE SAME MILITARY JUDGE WHO PRESIDED OVER THE TRIAL. DESPITE DISAVOWING ANY PERSONAL RECOLLECTION OF THE CASE, THE MILITARY JUDGE ADDED EXTRAJUDICIAL FACTS TO THE RECORD FOR THIS COURT'S CONSIDERATION ON THE FACTS AT ISSUE. WAS SGT CAPTAIN DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO AN IMPARTIAL JUDGE?

II.

DID TRIAL DEFENSE COUNSEL PROVIDE INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OFFER EVIDENCE IN EXTENUATION OR MITIGATION?

III.

DID TRIAL DEFENSE COUNSEL PROVIDE INEFFECTIVE ASSISTANCE OF COUNSEL BY CONCEDING THE APPROPRIATENESS OF A DISHONORABLE DISCHARGE WITHOUT EVIDENCE OF HIS CLIENT'S CONSENT?

Statement of Statutory Jurisdiction

Appellant's approved sentence includes a dishonorable discharge. Accordingly, this Court has jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012).

Statement of the Case

A Military Judge sitting as a general court-martial convicted Appellant, pursuant to his pleas, of one specification

of abusive sexual contact in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2012). The Military Judge sentenced Appellant to sixty-six months confinement, reduction to pay grade E-1, total forfeitures of pay and allowances, a fine of 50,000 dollars, and a dishonorable discharge. The Convening Authority disapproved the fine of 50,000 dollars and approved the remaining sentence as adjudged. In accordance with a pretrial agreement, the Convening Authority suspended confinement in excess of four years for the remainder of Appellant's confinement plus six months and except for the punitive discharge, ordered the remainder of the sentence executed.

On appeal, Appellant alleged that Trial Defense Counsel was ineffective for failing to contact potential character witnesses to testify during sentencing and for conceding the dishonorable discharge. In response, this Court ordered a hearing pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967). (Appellate Ex. VI at 16-18.)

The *DuBay* hearing took place on December 5-6, 2013. The Military Judge at the *Dubay* made Findings of Fact and Conclusions of Law in accordance with this Court's order. (*United States v. Captain*, *DuBay* Hearing Findings of Fact and Conclusions of Law, Mar. 18, 2014; Appellate Ex. VI at 16-18.) On May 21, 2014, Appellant Defense Counsel filed a supplemental pleading.

Statement of Facts

A. Appellant assaulted Mrs. M by penetrating her anus with his finger while she was unconscious and without her consent.

On January 16, 2012, Sgt M and his wife, Mrs. M returned to their on-base residence in Iwakuni, Japan after spending time drinking with friends. (Prosecution Ex. 1 at 2.) Mrs. M was intoxicated and vomited several times. (Pros. Ex. 1 at 2.) Mrs. M went into the marital bedroom to lie down. (Pros. Ex. 1 at 2.) She had nothing on except her t-shirt. (Pros. Ex. 1 at 2.) Appellant then arrived at the residence with a six-pack of beer. (R. 28; Pros. Ex. 1 at 2.) Sgt M and Appellant consumed beers and played video games in the living room. (Pros. Ex. 1 at 2.) Later, Appellant went to the hallway bathroom. (Pros. Ex. 1 at 2.) The bedroom is located on the same hallway as the bathroom. (R. 29; Pros. Ex. 1 at 2.) Appellant could see Mrs. M lying on her stomach with only a t-shirt on. (R. 31.) Appellant entered the bedroom where Mrs. M. was sleeping. (R. 31.) He began rubbing her leg and inserted a finger of his right hand into her anus. (R. 31-33.) He penetrated the outer edge of her anus to his mid-knuckle, and continued putting his finger in her anus for several minutes. (R. 31-33; Pros. Ex. 1 at 2.) Mrs. M did not consent to Appellant penetrating her anus. (Pros. Ex. 1 at 2; R. 33-35.) She was unconscious throughout the assault. (Pros. Ex. 1 at 2; R. 33-35.) At trial, Appellant told the

Military Judge he penetrated Mrs. M's anus for self-pleasure, for his own sexual arousal, and without Mrs. M's consent. (R. 34.)

B. Appellant's Court-Martial.

The Trial Defense Counsel detailed the award and decorations Appellant was entitled to wear. (R. 4.) Trial Defense Counsel stated that Appellant was entitled to two Good Conduct Medals, the Afghanistan Campaign Medal, the Iraq Campaign Medal, four Sea Service Deployment Ribbons, and the NATO ISAF Medal. (R. 4.) The Military Judge then asked Trial Defense Counsel how many combat deployments Appellant had completed. (R. 4.). Trial Defense Counsel indicated that Appellant had completed three combat zone deployments. (R. 4.)

After receiving the factual information to support the guilty plea, the Military Judge delayed entering of findings. (R. 49.) The Military Judge called Appellant's treating physician as a witness to discuss Appellant's diagnosis of Post-Traumatic Stress Disorder (PTSD). (R. 49.) The doctor testified that he diagnosed Appellant with PTSD stemming from his combat experiences as well as other pre-service experiences and recommended continued psychotherapy. (R. 51.) The doctor further testified that the PTSD had no nexus to Appellant's assault on Mrs. M. (R. 51-52.)

During presentencing argument, Trial Counsel recommended a punishment that included a dishonorable discharge, confinement for five years, reduction to pay grade E-1, and total forfeitures. (R. 75.) Trial Defense Counsel offered argument and suggested a sentence that would include "two years [confinement], a dishonorable discharge, [and] reduction to E-1." (R. 78.) Prior to announcing sentence, the Trial Military Judge stated, "I have specifically considered with——and given great credit to the accused's combat experience." (R. 78.)

C. *DuBay* hearing.

1. Assistance of counsel.

Prior to meeting Appellant, Trial Defense Counsel interviewed five percipient witnesses. (*DuBay* R. 82-83.) Mrs. M refused to speak with Trial Defense Counsel, and Sgt M was unavailable. (*DuBay* R. 82.) Trial Defense Counsel then met with Appellant for the first time in August 2012. (*DuBay* R. 54, 80.) They met with each other six to eight times in preparing for trial for a total of twelve to twenty hours. (*DuBay* R. 31, 172.) In addition, they had multiple telephone conversations. (*DuBay* R. 172.) During those meetings, Trial Defense Counsel asked Appellant to provide names of witnesses, to include potential character witnesses. (*DuBay* R. 80, 83.) Additionally, Trial Defense Counsel advised Appellant of the military justice process, Appellant's rights to counsel and forum selection, the

role of defense counsel, and his potential punishments for the charged misconduct. (*DuBay* R. 54-55, 59, 80-81.) Trial Defense Counsel kept Appellant informed as to the evidence against him and the ongoing NCIS investigation that continued to uncover evidence of other misconduct, to include an allegation of rape. (*DuBay* R. 34, 37, 59, 81, 101, 153.) Trial Defense Counsel advised Appellant of the effects of sex offender registration. (*DuBay* R. 103, 124-25, 135-36.) After interviewing percipient witnesses and the evidence obtained by NCIS, including new evidence of other misconduct by Appellant, Trial Defense Counsel recommended that Appellant submit an offer for a pretrial agreement (PTA) in an attempt to limit Appellant's sentence exposure. (*DuBay* R. 29, 32, 45-46, 59, 60-61, 86, 99, 108.) On multiple occasions, Trial Defense Counsel explained the process and implications of agreeing to a PTA. (*DuBay* R. 30, 42, 46, 87-88, 102, 112.) Trial Defense Counsel contacted the Staff Judge Advocate and Trial Counsel in an attempt to secure a favorable PTA. (*DuBay* R. 86-87.) The Convening Authority rejected previously submitted PTA offers with low confinement caps because of the newly discovered evidence of other misconduct. (*DuBay* R. 30, 73-74, 76.) Appellant eventually agreed to a PTA with a confinement cap of four years because he was convinced that he would be found guilty at a contested trial. (*DuBay* R. 32, 46, 60, 62.) Appellant's main concern was to

avoid confinement. (*DuBay* R. 73.) The PTA allowed Appellant to plead guilty to only one specification. (*DuBay* R. 102, 105-06, 135-36.)

From the preparation phase through the initial stages of the trial, Appellant was satisfied with Trial Defense Counsel's representation. (*DuBay* R. 57-58.) He felt his counsel was watching out for him. (*DuBay* R. 46.)

a. Appellant did not provide any presentencing witnesses who could testify about his deployments, and Trial Defense Counsel did not call any of those presentencing character witnesses Appellant did provide because he thought it would open the door to questions about Appellant's other misconduct.

During the preparation of the sentencing case, Trial Defense Counsel asked Appellant for witnesses for sentencing. (*DuBay* R. 25, 208.) Appellant gave Trial Defense Counsel a list of potential witnesses, to include the names of three Marines—— Gunnery Sergeant Weatherly, Staff Sergeant Jerdon, and Staff Sergeant Harms. (Appellate Ex. XXIII; *DuBay* R. 25, 33, 92-93, 169-70, 209.) Two or three meetings were devoted to sentencing witnesses. (*DuBay* R. 63-64.)

After receiving the potential witness list, Trial Defense Counsel contacted Gunnery Sergeant Weatherly via telephone and had his Legal Clerk attempt to contact the other two. (*DuBay* R. 93-94.) Gunnery Sergeant Weatherly sent Trial Defense Counsel a statement outlining Appellant's specific acts of good character.

(*DuBay* R. 178-79.) Staff Sergeant Harms met with Trial Defense Counsel, or another officer, at the defense office about potentially being a character witness for Appellant. (*DuBay* R. 193, 196.) Staff Sergeant Jerdon was not contacted by the defense to be a witness. (*DuBay* R. 184.) He was in the waiting room during the trial and was told by an officer that he was not needed as a witness. (*DuBay* R. 186, 188.) All three potential witnesses were willing to testify on Appellant's behalf and all believed Appellant was an outstanding Marine. (*DuBay* R. 26, 94-95, 180, 192.)

Appellant believed that the character witnesses could testify about two of his deployments. (*DuBay* R. 51-52.) However, none of the three potential witnesses could testify about his combat experience and deployments. (*DuBay* R. 180-81, 185, 195.) Additionally, a fourth witness, First Lieutenant Hernandez, would have testified on Appellant's behalf regarding the previous year leading up to trial. (*DuBay* R. 198-99.) He would have stated that Appellant was an average sergeant among all the high caliber sergeants he had. (*DuBay* R. 198.) First Lieutenant Hernandez never deployed with Appellant and could not testify about Appellant's combat experience or deployments. (*DuBay* R. 198-99.) All four potential witnesses could have addressed Appellant's work ethic in garrison, his leadership abilities, and other good military character traits during the

year prior to his trial. (*DuBay* R. 179-80, 184-85, 192-95, 198-99.) Appellant did not provide Trial Defense Counsel with any names of potential witnesses who served with him in combat. (*DuBay* R. 209.)

Leading up to trial, Trial Defense Counsel received new evidence of additional sexual misconduct. (*DuBay* R. 95.) Trial Counsel informed Trial Defense Counsel that additional evidence was forthcoming and additional charges would be preferred. (*DuBay* R. 95; Appellate Ex. XXII.) These allegations included groping, assault, and rape. (*DuBay* R. 133-34) Trial Defense Counsel stated during the *DuBay* hearing,

> It became apparent to me that the government had options at their disposal for character witnesses -- for bad character witnesses -- evidence to rebut good military character. That was apparent as soon as the anonymous tip came in to NCIS. I still don't know who sent the anonymous tip, but I know that NCIS began to continue to find individuals who either held a very poor opinion of Sergeant Captain or had additional allegations to bring.
>
> And as I got these additional reports as the case progressed, the government was now not willing to take my pretrial agreements. They wanted to press forward. They were more confident in their case, and I told Sergeant Captain that this mounting evidence made it highly problematic for me to present good military character evidence or good conduct evidence on sentencing because it would expose him to the government's scathing rebuttal should they choose to do so.

(*DuBay* R. 125-26.) During sentencing, Trial Defense Counsel decided not call the character witnesses Appellant had provided

because it "would open the door to the did you know, have you heard types of questions[]" and "then obviously open the door to any of [Appellant's] acquaintances that NCIS would find who might hold a contrary opinion." (*DuBay* R. 128.) His strategy was to "limit [Appellant's] exposure" by not exposing the other alleged misconduct to the court. (*DuBay* R. 128.) He wanted to "talk about only one night, one mistake——a drunken mistake and the mercy that should follow that singular error." (*DuBay* R. 128.) He stated,

> [I]t was my understanding at the time that even submitting a statement regarding his combat experience might have been rejoined by statements in like kind that his service had not been meritorious not just in combat but that it might be relevant now since I have made it an issue that he had meritorious combat service. That the rebuttal to that was the remainder of his service had been somewhat unmeritorious.

(*DuBay* R. 207.) He informed Appellant of this strategy and Appellant agreed. (*DuBay* R. 98, 128.) Appellant stated that he does not recall being informed of this strategy. (*DuBay* R. 34.)

b. <u>Appellate conceded the dishonorable discharge to seek less confinement</u>.

Appellant agreed to ask for a dishonorable discharge because he believed it may have helped him minimize his confinement time. (*DuBay* R. 136-139.) He also felt that a dishonorable discharge was unlikely to make a difference in his life because he would already have to register as a sex offender. (*DuBay* R. 136-139.) Trial Defense Counsel discussed with

Appellant the consequences of a dishonorable discharge, including the loss of veteran benefits. (*DuBay* R. 27, 42, 72.)

Appellant told Trial Defense Counsel that his "main point was to avoid incarceration[.]" (*DuBay* R. 31, 125.) Trial Defense Counsel informed Appellant that he would be asking for a couple years during sentencing. (*DuBay* R. 70.) At the *DuBay* hearing, Trial Defense Counsel stated,

> I told him again, as I had told him previously, that I would follow his wishes with regards to sentencing. One of them, again his overriding concern, was to minimize his confinement cap. I covered the dishonorable discharge with him. His statement was again, "I don't care. I want to minimize the time that I serve in confinement."

(*DuBay* R. 134.) Trial Defense Counsel explained the differences between a bad conduct discharge and a dishonorable discharge. (*DuBay* R. 138.) Trial Defense Counsel believed a dishonorable discharge was almost a forgone conclusion due to the nature of the offense and the identity of the Military Judge. (*DuBay* R. 116.) Trial Defense Counsel stated,

> I discussed specifically with him that conceding the likely dishonorable discharge and offering two years of confinement as an adequate sentence would not only gain credibility with the military judge for being a reasonable sentence, but that the military judge is more likely to give them less confinement by conceding the other punishments, reduction to E-1 and the dishonorable discharge, and that coincided with his desire at the time, which was to minimize his exposure to confinement.

(*DuBay* R. 138.)

Trial Defense Counsel stated that Appellant agreed to ask for the dishonorable discharge. (*DuBay* R. 139.) He discussed this strategy with Appellant on three separate occasions and gave Appellant the opportunity to disagree. (*DuBay* R. 139-40.) Because Appellant's main objective was to minimize confinement, he agreed to ask for a dishonorable discharge. (*DuBay* R. 139-40.) Trial Defense Counsel also covered similar questions with Appellant that are found in the "BCD Striker Appendix" of the Trial Guide to ensure Appellant understood the consequences of asking for a dishonorable discharge. (*DuBay* R. 170-71.) Appellant contends that Trial Defense Counsel never spoke with him about requesting a dishonorable discharge. (*DuBay* R. 27, 29.) Trial Defense Counsel believed that if appealled to the Military Judge with a reasonable sentence, that he could potentially limit the confinement to less than the confinement cap. (*DuBay* R. 163-64.) Trial Defense Counsel believed this course of action was tactically sound. (*DuBay* R. 166.)

After the sentence was announced, Trial Defense Counsel spoke with Appellant about clemency, to include the possibility of asking for a reduction or disapproval of the dishonorable discharge. (*DuBay* R. 174.) In response, Appellant stated "I'm not concerned about that" and focused instead on reducing or eliminating the 50,000 dollar fine. (*DuBay* R. 174.) Prior to submitting the clemency request, Trial Defense Counsel spoke

with the Staff Judge Advocate to inquiry if the Convening Authority would be open to disapproval of the fine. (*DuBay* R. 141.) Trial Defense Counsel stated that Appellant agreed to the submitted clemency request, which asked for disapproval of the fine. (*DuBay* R. 142-45.)

2. The Trial Military Judge acted as the *DuBay* Military Judge.

At the beginning of the *DuBay* Hearing, the *DuBay* Military Judge informed the *DuBay* Defense Counsel that he had been the Trial Military Judge at Appellant's trial. (*DuBay* R. 6, 9.) He stated that he had "very little recollection of the case other than [Appellant's] face[.]" (*DuBay* R. 9.) The *DuBay* Military Judge invited voir dire from the *DuBay* Defense Counsel. (*DuBay* R. 9-11.) The *Dubay* Defense Counsel consulted Appellant and declined to voir dire or challenge the *Dubay* Military Judge. (*DuBay* R. 9-11.) Appellant expressly requested that the *DuBay* Military Judge preside over the hearing. (*DuBay* R. 11.)

Throughout the hearing, the *DuBay* Military Judge recalled that Appellant was a "very bright fellow," that he had a distinguished combat record, that he had considered Appellant's combat experience at trial during sentencing, and he had "profound respect" for Appellant regarding "his combat endeavors in both Iraq and Afghanistan." (*DuBay* R. 15, 68, 78, 127, 203-204, 220.)

The *DuBay* Military Judge confirmed on multiple occasions during the hearing that Appellant and the *DuBay* Defense Counsel wanted him to continue to preside over the *DuBay* hearing. (*DuBay* R. 9-11, 14, 117-122, 176.) Each time, Appellant and the *DuBay* Defense Counsel had no objection to the *DuBay* Military Judge. (*DuBay* R. 9-11, 14, 117-122, 176.)

3. The Military Judge's Findings of Fact and Conclusions of Law on the *Dubay* hearing.

After hearing the evidence and observing the witnesses, the *DuBay* Military Judge made Findings of Fact and Conclusions of Law. (*United States v. Captain*, *DuBay* Hearing, Findings of Fact and Conclusions of Law, Mar. 18, 2014.) He stated he "reached the conclusion, beyond any doubt, let alone a reasonable one, that there has been no deprivation of effective counsel within the meaning of *Strickland*." (*DuBay* Hearing, Findings of Fact and Conclusions of Law at 12.)

He found that Trial Defense Counsel "undertook rather exhaustive attempts to interview any and all witnesses that might contribute to the Government's prospective case in chief. (*DuBay* Hearing, Findings of Fact and Conclusions of Law at 13.) Through these efforts, Trial Defense Counsel became "convinced that his client needed to seek the protection of a pre-trial agreement and plead guilty." (*DuBay* Hearing, Findings of Fact and Conclusions of Law at 13.)

The *DuBay* Military Judge found that all Appellant's "prospective sentencing witnesses had anemic prospective value" because "[n]one of the witnesses observed the appellant for anything close to a significant period of time and while most would refer to him as a strong leader, none had served with him in a combat zone." (*DuBay* Hearing, Findings of Fact and Conclusions of Law at 13.) "One proposed sentencing witness referred to him as an average sergeant among several outstanding sergeants." (*DuBay* Hearing, Findings of Fact and Conclusions of Law at 13.) The *DuBay* Military Judge concluded that "[h]ad the trial court heard this testimony it is markedly doubtful that it would have made any difference whatsoever in the sentencing dynamic of this case." (*DuBay* Hearing, Findings of Fact and Conclusions of Law at 13.)

The *DuBay* Military Judge found that Trial Defense Counsel had a "tactical basis" for not offering documentary evidence of Appellant's combat tours. (*DuBay* Hearing, Findings of Fact and Conclusions of Law at 13-14.) He concluded that Trial Defense Counsel believed that "in advancing any matter of character, the Government would be empowered to introduce rebuttal character evidence of uncharged misconduct which [he] felt would ensure a very harsh sentence." (*DuBay* Hearing, Findings of Fact and Conclusions of Law at 13-14.) The *DuBay* Military Judge also stated,

> [A]s I was the trial judge in this case, I am in the unique position to advise the appellate court that I took note of the appellant's combat history both during arraignment and prior to my announcement of sentence. The appellant's combat experience played a major role in my formulation of an appropriate sentence in this case. However, I would be less than genuine if I did not indicate that additional and detailed documentary evidence of the appellant's combat experience would have been beneficial.

(*DuBay* Hearing, Findings of Fact and Conclusions of Law at 13-14.)

Addressing the credibility of the witnesses, the *DuBay* Military Judge stated that "[i]n resolving differences between versions of events offered by both Captain Mills and Private Captain, the Court is compelled to believe the version advanced by Captain Mills." (*DuBay* Hearing, Findings of Fact and Conclusions of Law at 14.) He stated,

> Along with his unsworn statement to the Court above, this Court found Private Captain to be vague, lacking in details and somewhat inconsistent. In rather sharp contrast, Captain Mills was very convincing, willingly conceded areas where his performance could have been improved upon or was lacking. He advanced detailed explanations of his conduct and corrected testimony that, upon reflection, he was even somewhat unsure of.

(*DuBay* Hearing, Findings of Fact and Conclusions of Law at 14.)

The *DuBay* Military Judge found that Trial Defense Counsel "requested a dishonorable discharge. . . as part and parcel of a strategy seeking to convince the trial judge that the defense was approaching sentencing with the utmost reason[]" and thereby "minimiz[ing] the amount of confinement to be awarded." (*DuBay*

Hearing, Findings of Fact and Conclusions of Law at 14.) He stated,

> [t]he Court is convinced that Captain Mills fully vetted this strategy with his client before trial and that then Sergeant Captain, whose primary goal in sentencing was to minimize confinement, adopted this approach. Moreover, Captain Mills conferred with senior Navy and Marine Corps defense counsel prior to executing his sentencing plan.

(*DuBay* Hearing, Findings of Fact and Conclusions of Law at 14.)

The *DuBay* Military Judge found that Trial Defense Counsel was "anemic" in preparing correspondence regarding matters discussed with Appellant and formalizing Appellant's consent. (*DuBay* Hearing, Findings of Fact and Conclusions of Law at 14.) He found that the deficiency stemmed from "absence of experience, rather than incompetence[.]" (*DuBay* Hearing, Findings of Fact and Conclusions of Law at 14.)

As to Appellant's clemency request, the *DuBay* Military Judge found that Trial Defense Counsel "chose not to include a prayer for relief from the dishonorable discharge within his clemency request to the convening authority because he made a tactical decision to seek elimination of the fine." (*DuBay* Hearing, Findings of Fact and Conclusions of Law at 14-15.) He went on to state,

> Clearly, better practice would have called for Captain Mills to seek relief from both the fine and the punitive discharge, at least in the form of a dishonorable discharge. However, the Supreme Court's decision in *Strickland* does not mandate the best

> possible or even superior representation but rather mandates that the representation be of a quality greater than that which could be articulated as ineffective.

(*DuBay* Hearing at 14-15.)

Summary of Argument

I.

Appellant was not deprived of his Constitutional right to an impartial judge. Although the Trial Military Judge also served as the *DuBay* Military Judge, he provided Appellant and his counsel multiple opportunities to seek his recusal, to which both agreed that he was impartial. Furthermore, he did not act outside his role as a judge or add extrajudicial facts to the record. He referenced evidence throughout the *DuBay* Hearing that was readily available to any judge presiding over the *DuBay* Hearing. He obtained the evidence from the witnesses' testimonies at the *DuBay* Hearing and the available Record of Trial.

II.

Trial Defense Counsel was not ineffective in not offering character evidence in extenuation or mitigation because the character evidence was "anemic" and opened Appellant up to the scathing rebuttal by the Government of Appellant's other serious misconduct, including an allegation of rape. Trial Defense Counsel fully vetted his decision with Appellant. Trial Defense

Counsel's decision to avoid good character evidence was sound, reasonable, and not deficient under these circumstances. Therefore, Appellant fails to satisfy the two prong test in *Strickland*.

III.

Trial Defense Counsel was not ineffective in conceding the likely dishonorable discharge because his strategy was to gain credibility with the judge to limit Appellant's adjudged confinement. He fully vetted his decision to concede the appropriateness of a dishonorable discharge with Appellant. Appellant agreed because he was determined to limit his confinement. Trial Defense Counsel's decision was not deficient and therefore Appellant fails to satisfy the two prong test in *Strickland*.

Argument

I.

APPELLANT WAS NOT DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO AN IMPARTIAL JUDGE BECAUSE THE *DUBAY* MILITARY JUDGE WAS IN FACT IMPARTIAL AND DID NOT ACT OUTSIDE OF HIS ROLE AS A JUDGE, APPELLANT DID NOT OBJECT TO THE MILITARY JUDGE, AND THE EVIDENCE HE REFERENCED DURING TRIAL AND IN HIS FINDINGS AND CONCLUSIONS OF LAW WAS READILY AVAILABLE IN THE WITNESSES' TESTIMONY AND FOUND IN THE RECORD OF TRIAL.

A. Standard of review.

A Military Judge's decision on whether to recuse him or herself is reviewed for an abuse of discretion. *United States v. Butcher*, 56 M.J. 87, 90 (C.A.A.F. 2001)(quoting *United States v. Norfleet*, 53 M.J. 262, 270 (2000)). Appellant contends that a *de novo* review is appropriate; however the case law and facts do not support that argument.

B. The *DuBay* Military Judge was impartial, did not act outside his role as judge, and did not add extrajudicial facts to the record.

"An accused has a constitutional right to an impartial judge." *United States v. Butcher*, 56 M.J. 87, 90 (C.A.A.F. 2001)(quoting *United States v. Wright*, 52 M.J. 136, 140 (C.A.A.F. 1999); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Tumey v. Ohio*, 273 U.S. 510 (1927)). A failure to object to the alleged lack of impartiality is reflective of the "defense

belief in [the judge's] neutrality." *United States v. Acosta*, 49 M.J. 14, 18 (1998).

Under R.C.M. 902(b)(1) and (3), a military judge shall disqualify himself "[w]here the military judge has. . . personal knowledge of disputed evidentiary facts concerning the proceeding[]" or "has been or will be a witness in the same case[.]" If the military judge "predicate[s] a judicial determination based upon his own knowledge[]" then he becomes a witness under R.C.M. 902(b)(3). *United States v. Allen*, 31 M.J. 572, 604 (N.M.C.M.R. 1990)(citing *United States v. Head*, 2 M.J. 131, 134 (C.M.A. 1977).

There is a strong presumption that a judge is impartial. *Quintanilla*, 56 M.J. at 44. "A military judge 'has as much obligation not to recuse himself when there is no reason to do so as he does to recuse himself when the converse is true.'" *United States v. Alexander*, No 200001976, 2003 CCA LEXIS 45, *23 (N-M. Ct. Crim. App. Feb. 27, 2003)(quoting *United States v. Bray*, 546 F.2d 851, 857 (10th Cir. 1976)). Therefore, an appellant bears a substantial burden to show that the military judge is not qualified. *United States v. Allen*, 31 M.J. 572, 601 (N.M.C.M.R. 1990); see *United States v. Quintanilla*, 56 M.J. 37, 44 (C.A.A.F. 2000). Furthermore, a military judge's disclaimer of partiality carries great weight. *United States v. Foster*, 64 M.J. 331, 333 (C.A.A.F. 2007).

Here, although the *Dubay* Military Judge was also the Trial Military Judge[1], he had no personal knowledge of the interactions between the Trial Defense Counsel and Appellant which were the subject of the *Dubay* hearing. (*DuBay* R. 13, 14.) He denied any partiality and gave the *DuBay* Defense Counsel and Appellant several opportunities to voir dire and challenge him. (*DuBay* R. 9-11, 14, 117-22, 176.) Trial Defense Counsel and Appellant both agreed with the *DuBay* Military Judge's assessment of his impartiality and did not ask for his recusal. (*DuBay* R. 11, 14, 117-22, 176.) Trial Defense Counsel and Appellant both properly believed he was neutral.

Contrary to Appellant's assertions, the *DuBay* Military Judge did not add extrajudicial facts to the record. He based his findings and conclusion of law on the witnesses' testimony at the *DuBay* Hearing and the Record of Trial that he had access to prior to and throughout the hearing. The Record of Trial establishes that at Appellant's presentencing hearing, and prior to announcing the sentence, the Trial Military Judge stated, "I have specifically considered with [*sic*]——and given great credit to the accused's combat experience." (Appellate Ex. XXIV at 202; R. 78.) Throughout the *DuBay* Hearing, the *DuBay* Military

[1] See *United States v. Bilbrey*, NMCM 89 03566, 1995 CCA LEXIS 424 (N-M. Ct. Crim. App. May 5, 1995)(no issue where the *DuBay* hearing officer was the same officer who presided as military judge).

Judge referenced Appellant's combat experience as reflected in the original Record of Trial, stating that he had taken it into account during the presentencing hearing. (*DuBay* R. 15, 68, 78. 127, 203-04, 220.) He reiterated this in his Findings of Fact and Conclusions of Law, stating that he "took note of the appellant's combat history both during arraignment and prior to [his] announcement of sentence." (*DuBay* Hearing, Findings of Fact and Conclusions of Law, Mar. 18, 2014 at 13-14.) He further stated that "[A]ppellant's combat experience played a major role in [his] formulation of an appropriate sentence in this case." (*DuBay* Hearing, Findings of Fact and Conclusions of Law, Mar. 18, 2014 at 13-14.)

The facts that the *DuBay* Military Judge remembered about Appellant's trial would have been readily available to any judge presiding over the *DuBay* Hearing because those facts were in the original Record of Trial and were also obtained through witnesses' testimony during the *Dubay* hearing. (R. 78-79.) The Trial Military Judge specifically addressed on the record during Appellant's presentencing hearing the weight he was giving to Appellant's combat experience in his determination of an appropriate sentence. (R. 78-79.) Therefore, the *DuBay* Military Judge was impartial, relied on the evidence before him, did not act outside his role as judge, and did not add extrajudicial facts to the record.

II.

TRIAL DEFENSE COUNSEL WAS NOT INEFFECTIVE IN OFFERING LIMITED EVIDENCE IN EXTENUATION OR MITIGATION BECAUSE THE CHARACTER EVIDENCE WAS "ANEMIC" AND WOULD HAVE OPENED THE DOOR TO A SCATHING REBUTTAL BY THE GOVERNMENT.

Claims of ineffective assistance of counsel are reviewed de novo. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). Factual findings are reviewed under a clearly erroneous standard. *United States v. Paxton*, 64 M.J. 484, 488 (C.A.A.F. 2007). Under the *Strickland* two-prong test, the burden is on Appellant to prove (1) that a deficiency in representation existed and (2) that this deficiency by counsel resulted in prejudice to Appellant. *Strickland,* 466 U.S. at 698. Appellant also has the burden of establishing the truth of factual matters associated with the claim of ineffective assistance. *United States v. Gutierrez,* 66 M.J. 329, 331 (C.A.A.F. 2008).

All service members are guaranteed the right to effective assistance of counsel at their court-martial. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005). The right to effective assistance of counsel extends to all stages of the court-martial process, including representation during post-trial matters. *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000).

Trial defense counsel is presumed to have provided effective assistance throughout the trial. *Strickland*, 466 U.S. at 687; *United States v. Garcia*, 59 M.J. 447 (C.A.A.F. 2004).

This presumption may only be rebutted when there exists a showing of specific errors made by defense counsel that were unreasonable under prevailing professional norms. *Davis*, 60 M.J. at 473 (citing *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001)). The evidence in the record must establish that counsel made errors that were so serious that they were no longer functioning as "counsel" guaranteed to the accused by the Sixth Amendment. *Strickland*, 466 U.S. at 687.

Additionally, the errors in counsel's performance must be so prejudicial as to indicate a denial of a fair trial or a trial whose result is unreliable. *Davis*, 60 M.J. at 473 (citing *United States v. Dewrell*, 55 M.J. 131, 133 (C.A.A.F. 2001)). Appellant must demonstrate "a reasonable probability that, but for counsel's error, there would have been a different result." *United States v. Quick*, 59 M.J. 383, 386-87 (C.A.A.F. 2004)(citing *Strickland*, 466 U.S. at 694). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Loving v. United States*, 68 M.J. 1, 6 (C.A.A.F. 2009)(citing *Strickland*, 466 U.S. at 694). Moreover, second-guessing and hindsight are not sufficient to overcome this presumption. *Davis*, 60 M.J. at 473.

A. No deficiency exists in Trial Defense Counsel's representation because he made the reasonable decision to avoid serious rebuttal evidence by not calling character witnesses.

In this case, Trial Defense Counsel was active in seeking potential witnesses, both for the merits and on sentencing. He traveled to Iwakuni to interview several percipient witnesses. (*DuBay* R. 82.) As his focus shifted to sentencing, Trial Defense counsel attempted to contact all three presentencing witnesses that Appellant had provided to him. (*DuBay* R. 93-94.) He spoke with two and attempted to contact the third. (*DuBay* R. 93-94.) Contrary to Appellant's assertions, all the prospective character witnesses provided by Appellant could only testify about Appellant's character in garrison for a very short amount of time prior to trial. (*DuBay* R. 93-94, 180-81, 185, 193, 195-96) On appeal, Appellant identified a fourth potential character witnesses that would have testified that Appellant was an average sergeant. (*DuBay* R. 198-99.)

Appellant mistakenly contends that the witnesses mentioned above could speak to two of his combat deployments. (*DuBay* R. 50-51.) However, not a single witness identified by Appellant could speak to his deployments or combat experience. (*DuBay* R. 93-94, 180-81, 185, 193, 195-96) Indeed, in his declaration to this Court and in his sworn testimony at the *DuBay* Hearing, Appellant failed to identify a single person that could have

testified about his combat experience or his time deployed. Moreover, Appellant failed to provide any of these hypothetical witnesses to Trial Defense Counsel in preparation for trial or sentencing.

As the *DuBay* Military Judge correctly concluded, all the witnesses Appellant actually provided to Trial Defense Counsel "had anemic prospective value[]" and therefore "it is markedly doubtful that it would have made any difference whatsoever in the sentencing dynamic of this case." (*DuBay* Hearing, Findings of Fact and Conclusions of Law, Mar. 18, 2014 at 13.)

Trial Defense Counsel's overall representation was thorough, detailed, and was done with the goal of limiting the government's ability to bring in evidence of the multiple allegations of other misconduct by Appellant, including an allegation of rape. (*DuBay* R. 34, 37, 59, 81, 101, 133-34, 153.) Trial Defense Counsel diligently spent many hours investigating all of these allegations, meeting with Appellant, and preparing for the Article 32 Investigation and trial. (*DuBay* R. 31, 72, 82, 172.) Throughout, he kept Appellant informed as to the ongoing NCIS investigation, newly discovered evidence, and the consequences of sex offender registry and a dishonorable discharge. (*DuBay* R. 31, 34, 37, 54-55, 59, 80-81, 101, 152.)

As NCIS continued to discover additional evidence of unrelated misconduct, Trial Defense Counsel properly shifted his

strategy to that of limiting exposure through a pretrial agreement and avoiding opening the door to a damaging rebuttal of the good military character witnesses. (*DuBay* R. 125-26, 128, 207.) He told Appellant that "this mounting evidence made it highly problematic for [him] to present good military character evidence or good conduct evidence on sentencing because it would expose him to the government's scathing rebuttal[.]" (*DuBay* R. 125-26.) The PTA allowed Appellant to plead guilty to only one specification without being exposed to the other additional charges. (*DuBay* R. 61-62.)

With the limited value of the prospective character witnesses and the increased risk of other misconduct and bad military character evidence available to Trial Counsel, Trial Defense Counsel made the tactical decision to not call the witnesses, and informed the Appellant of this tactical decision. (*DuBay* R. 98, 128)

Trial Defense Counsel's decision to avoid good character evidence was sound, reasonable, and not deficient under these circumstances. As the *DuBay* Military Judge correctly concluded, "beyond any doubt, let alone a reasonable one" there has been "no deprivation of effective counsel within the meaning of *Strickland*." (*DuBay* Hearing, Findings of Fact and Conclusions of Law, Mar. 18, 2014 at 12.) Therefore, Appellant fails to establish the first prong of the *Strickland* test.

B. There was no prejudice to Appellant from the character witnesses not testifying.

Even assuming an unreasonable deficiency, Appellant fails to establish a reasonable probability that, but for the deficiency, there would have been a different result.

All the prospective witnesses stated they could only give an opinion of the short time that each had known Appellant in garrison. (*DuBay* R. 179-81, 184-85, 192-95, 198-99.) As the *DuBay* Military Judge correctly found, all the "prospective sentencing witnesses had anemic prospective value." (*DuBay* Hearing, Findings of Fact and Conclusions of Law, Mar. 18, 2014 at 13.)

Moreover, the potential for severe rebuttal on cross examination as well as the potential to open the door to negative character witnesses from the government far outweighed the limited effect the prospective character witnesses would have had on sentencing. The trial record does not reflect that the Trial Military Judge was aware of Appellant's other misconduct. Had the character witnesses testified, the Trial Military Judge would have been exposed to Appellant's other serious criminal misconduct, including the allegation of rape. (*DuBay* R. 133-34.) The defense's theme——that this was an isolated incident of an otherwise good Marine——would have been destroyed. (*DuBay* R. 128.)

Furthermore, Appellant pled guilty to an extremely serious crime of digitally penetrating the anus of a friend's spouse while she lay unconscious and dressed only in a T-shirt. (R. 31-33; Pros. Ex. 1 at 2.) The penetration lasted a few minutes and was without her consent. (Pros Ex. 1 at 2; R. 31-35.) The seriousness of the crime warranted a serious sentence.

Given the nature and seriousness of the offense, the limited value of the prospective character witnesses, and the scathing rebuttal evidence available against Appellant, the *DuBay* Military Judge was correct in concluding that if "the trial court heard this testimony it is markedly doubtful that it would have made any difference whatsoever in the sentencing dynamic of this case." (*DuBay* Hearing, Findings of Fact and Conclusions of Law, Mar. 18, 2014 at 13.)

Appellant's assertions are further weakened because the Trial Military Judge did have before him evidence of Appellant's deployments and combat experience. Prior to sentencing Appellant, the Trial Military Judge stated that he was aware of Appellant's combat deployments and diagnosis of PTSD. (R. 4, 49-52.) He took those into consideration when determining the appropriate sentence. (R. 78.)

Appellant fails to demonstrate a reasonable probability that there would have been a different result if the witnesses had testified. To the contrary, the outcome would have been

more severe had the witnesses testified. Therefore, Appellant fails the second prong of the *Strickland* test.

III.

TRIAL DEFENSE COUNSEL WAS NOT INEFFECTIVE IN CONCEDING THE APPROPRIATENESS OF A DISHONORABLE DISCHARGE BECAUSE CONCEDING THE LIKELY DISHONORABLE DISCHARGE WAS DONE WITH APPELLANT'S EXPLICIT CONSENT AND WITIH THE TACTICAL PURPOSE OF LIMITING APPELLANT'S ADJUDGED CONFINEMENT.

Claims of ineffective assistance of counsel are reviewed de novo. *Strickland*, 466 U.S. at 698. Factual findings are reviewed under a clearly erroneous standard. *United States v. Paxton*, 64 M.J. 484, 488 (C.A.A.F. 2007). Under the *Strickland* two-prong test, the burden is on Appellant to prove (1) that a deficiency in representation existed and (2) that this deficiency by counsel resulted in prejudice to Appellant. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). See *supra*, AOE II at pages 23-25.

A. <u>There was no deficiency in representation because Trial Defense Counsel, with Appellant's explicit consent and understanding, made the tactical decision to concede the likely dishonorable discharge in his sentencing argument in an attempt to minimize Appellant's confinement, as per Appellant's stated wishes</u>.

As Appellant's primary focus was to limit confinement, Trial Defense Counsel proposed that Appellant request a dishonorable discharge as a strategy to "minimize the amount of confinement to be awarded." (*DuBay* Hearing at 14.7; *DuBay* R. 31,

125.) Appellant was fully informed of the consequences of requesting a dishonorable discharge, and explicitly asked that Trial Defense Counsel do so on his behalf. Appellant stated that he was not worried about the dishonorable discharge because he would have to register as a sex offender anyways. (*DuBay* R. 136.) Trial Defense Counsel fully explained to Appellant the implications and consequences of a dishonorable discharge. (*DuBay* R. 27, 42, 72, 138.)

Moreover, Trial Defense Counsel knew that a dishonorable discharge "was almost a forgone conclusion" given the serious nature of the misconduct. (*DuBay* R. 116.) He had researched the Trial Military Judge's sentencing habits and discovered that Appellant would likely receive a dishonorable discharge. (*DuBay* R. 116.)

The *DuBay* Military Judge properly concluded that Trial Defense Counsel "requested a dishonorable discharge. . . as part and parcel of a strategy seeking to convince the trial judge that the defense was approaching sentencing with the utmost reason[]" and thereby "minimize[ing] the amount of confinement to be awarded." (*DuBay* Hearing, Findings of Fact and Conclusions of Law, Mar. 18, 2014 at 14.)

The *DuBay* Military Judge was "convinced that Captain Mills fully vetted this strategy with his client before trial and that then Sergeant Captain, whose primary goal in sentencing was to

minimize confinement, adopted this approach." (*DuBay* Hearing at 14.7.) The *DuBay* Military Judge based this conclusion on the reliability of Trial Defense Counsel's testimony opposed to the vague and inconsistent statements made by Appellant. (*DuBay* Hearing at 14.6.)

In addition to conferring with Appellant about the sentencing argument on three separate occasions, Trial Defense Counsel also "conferred with senior Navy and Marine Corps defense counsel prior to executing his sentencing plan." (*DuBay* Hearing at 14.7.)

With the Appellant fully informed and with his consent, Trial Defense Counsel conceded the appropriateness of the dishonorable discharge to limit Appellant's adjudged confinement as that was Appellant's desire. The *DuBay* Military Judge properly found that "beyond any doubt, let alone a reasonable one" there has been "no deprivation of effective counsel within the meaning of *Strickland*." (*DuBay* Hearing, Findings of Fact and Conclusions of Law, Mar. 18, 2014 at 12.) Therefore, Appellant fails to establish the first prong of the *Strickland* test.

B. There was no prejudice because the seriousness of the misconduct and the resulting adjudged sentence establish that Appellant would have received a dishonorable discharge regardless.

Even assuming an unreasonable deficiency, Appellant fails to establish a reasonable probability that, but for the deficiency, he would not have received a dishonorable discharge.

The nature and horrific circumstances of Appellant's crime warranted a dishonorable discharge. He digitally penetrated the anus of his friend's spouse while she lay vulnerable in her home. (R. 31-33; Pros. Ex. 1 at 2.) Appellant would have received a dishonorable discharge even if Trial Defense Counsel had not conceded it.

Moreover, the Record of Trial supports a dishonorable discharge. In addition to the discharge, the Trial Military Judge adjudged five and a half years confinement, reduction to E-1, total forfeitures and a 50,000 dollar fine. The heavy adjudged confinement, taken with the enormous fine, establishes that the Trial Military Judge viewed Appellant's crime for the seriousness and horrendous nature it deserved. The adjudged confinement was more than the Government asked for in its sentencing argument. (R. 72; Appellate Ex. XXIV at 196.) It is highly unlikely that the Trial Military Judge would have adjudged anything other than a dishonorable discharge under these circumstances.

Appellant fails to demonstrate a reasonable probability that there would have been a different result if Trial Defense Counsel had not conceded the appropriateness of the dishonorable discharge. Therefore, Appellant fails the second prong of the *Strickland* test.

Conclusion

WHEREFORE, the Government respectfully requests that this Court affirm the findings and sentence as adjudged and approved below.

CORY A. CARVER
Captain, USMC
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-8504, fax (202) 685-7687

ANN E. DINGLE
Lieutenant, JAGC, USN
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7433, fax (202) 685-7687

Appendix

1. *United States v. Alexander*, No 200001976, 2003 CCA LEXIS 45, (N-M. Ct. Crim. App. Feb. 27, 2003)

2. *United States v. Bilbrey*, NMCM 89 03566, 1995 CCA LEXIS 424 (N-M. Ct. Crim. App. May 5, 1995)

Certificate of Filing and Service

I certify that the original and required number of copies of the foregoing were delivered to the Court and a copy was served upon opposing counsel and electronically filed with the Court pursuant to N-M. Ct. Crim. App. Rule 5.2(b)(1) on June 10, 2014.

CORY A. CARVER
Captain, USMC
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-8504, fax (202) 685-7687

UNITED STATES v. Grant R. ALEXANDER, Private (E-1), U.S. Marine Corps

NMCM 200001976

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

2003 CCA LEXIS 45

February 27, 2003, Decided

NOTICE: [*1] AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PRIOR HISTORY: Sentence adjudged 19 May 1999. Military Judge: K.B. Martin. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 1st Marine Division (Rein), Camp Pendleton, CA.

DISPOSITION: Findings and sentence affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Review was granted of a decision of the military judge in a general court-martial, which convicted the servicemember of various offenses arising out of the servicemember's involvement in a barracks melee that broke out, including a conviction for two specifications of assault with a deadly weapon in violation of *10 U.S.C.S. § 928*. The convening authority approved the sentence with a suspension in the length of confinement.

OVERVIEW: The servicemember was convicted for his conduct that started during a barracks melee involving some 70 servicemembers forming two units. According to the testimony, the servicemember was wielding a knife and brandished it in front of a sergeant and a corporal, and threatened others when they were going after an alleged rock thrower. The court found that the testimony at trial was legally and factually sufficient to support a finding of guilt beyond a reasonable doubt. The court rejected the contention that the eyewitness testimony from soldiers that felt threatened by the servicemember when he brandished the knife should be disregarded because the soldiers were all in the unit that had been fighting with the servicemember's unit and all but one had been granted immunity. The court did not find the servicemember's actions to be a justified use of force in defense of another because the evidence showed that the servicemember was clearly engaged in mutual combat and was an aggressor. The fact that the military judge viewed the crime scene at the request of the servicemember's counsel, did not in any way put the legality, fairness, or impartiality of the court-martial into doubt.

OUTCOME: The court affirmed the findings and sentence as approved by the convening authority.

CORE TERMS: military, assault, rock-thrower, melee, scene, dangerous weapon, reasonable doubt, knife, bodily harm, court-martial, rock, self-defense, aggressor, grant of immunity, specifications, unidentified, convicted, fighting, impartiality, testifying, started, find beyond, waiving, combat, fight, inflicted, corporal, viewing, threw, site

LexisNexis(R) Headnotes

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution
Military & Veterans Law > Military Justice > Trials > Burdens of Proof
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review
[HN1] For factual sufficiency, the test is whether, after weighing the evidence of record and making allowances for not having personally observed the witnesses, the court is convinced of the appellant's guilt beyond a reasonable doubt. Where the evidence raises defenses, the prosecution must also prove beyond a reasonable doubt that any defenses so raised do not exist. R.C.M. 916(b), Manual for Courts-Martial (1998).

Military & Veterans Law > Military Justice > Trials > Burdens of Proof
Military & Veterans Law > Military Justice > Trials > Findings
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review
[HN2] The test for legal sufficiency is whether a reasonable fact finder, viewing the evidence in the light most favorable to the prosecution, could find all the essential elements of the offense beyond a reasonable doubt. The term reasonable doubt does not mean that the evidence must be free from all conflict. Furthermore, as factfinders the court may believe one part of a witness' testimony and disbelieve another.

Criminal Law & Procedure > Criminal Offenses > Weapons > General Overview
Criminal Law & Procedure > Defenses > General Overview
Military & Veterans Law > Military Justice > Defenses > General Overview
[HN3] See R.C.M. 916(e)(2)-(5), Manual Courts-Martial (1998).

Criminal Law & Procedure > Criminal Offenses > Weapons > Use > General Overview
Criminal Law & Procedure > Defenses > Self-Defense
Military & Veterans Law > Military Justice > Defenses > Self-Defense
[HN4] Defense of another may excuse liability for assault. It is a special defense. An additional element of the defense requires that the accused may not use more force than the person defended was lawfully entitled to use under the circumstances. An accused who claims the affirmative defense of defending another steps into the shoes of the defended person. Under the well-settled principles of law applicable to self-defense, a person is not entitled to use a dangerous weapon in self-defense where the attacking party is unarmed and commits a battery by means of his fist. And if he uses more force in any defense of his person than the law will allow, he becomes the aggressor. The theory of self-defense is protection and not aggression, and to keep the two in rough balance the force to repel should approximate the violence threatened.

Civil Procedure > Judicial Officers > Judges > General Overview
Governments > Courts > Judges
Military & Veterans Law > Military Justice > Judges
[HN5] A basic right of an accused to military due process includes the right to a judge who appears impartial throughout his court-martial. When a military judge's impartiality is challenged on appeal, the test is whether, taken as a whole in the context of the trial, a court-martial's legality, fairness, and impartiality were put into doubt. A military judge has as much obligation not to recuse himself when there is no reason to do so as he does to recuse himself when the converse is true. An appellant bears a substantial burden" to show that the military judge is not qualified. Failure of the defense to object to the alleged lack of impartiality of a military judge is reflective of the defense belief in the judge's neutrality.

Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review
[HN6] Defense induced error generally constitutes an inappropriate predicate for appellate relief.

Civil Procedure > Judicial Officers > Judges > General Overview
Military & Veterans Law > Military Justice > Judges
Torts > Negligence > Standards of Care > Appropriate Standard > Objectivity
[HN7] Where no actual bias or prejudice is shown, the issue of disqualification under R.C.M. 902(a), Manual Courts-Martial (1998) is considered under an objective standard: Any conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned is a

basis for the judge's disqualification.

COUNSEL: Maj CHARLES C. HALE, USMC, Appellate Defense Counsel.

LT CLARICE B. JULKA, JAGC, USNR, Appellate Government Counsel.

JUDGES: BEFORE C.A. PRICE, K.R. BRYANT, M.E. FINNIE. Senior Judge PRICE and Senior Judge FINNIE concur.

OPINION BY: K.R. BRYANT

OPINION

BRYANT, Judge:

The appellant was convicted at a general court-martial before a military judge alone of unauthorized absence, two specifications of the use of marijuana, simple assault, and two specifications of assault with a dangerous weapon, in violation of Articles 86, 112a, and 128, Uniform Code of Military Justice, *10 U.S.C. §§ 886*, *912a*, and *928*. [1] He was awarded confinement for 15 months, forfeiture of all pay and allowances, and a bad conduct-discharge. The convening authority approved the sentence, but suspended all confinement in excess of 12 months from the date of the action pursuant to the pre-trial agreement. Additionally, [*2] the convening authority approved total forfeitures until such time as the approved and unsuspended confinement terminated and, thereafter, forfeiture of two-thirds pay per month until the discharge was ordered executed.

1 The appellant was acquitted by the military judge of riot, Article 116, Uniform Code of Military Justice, *10 U.S.C. § 916*, and cutting Lance Corporal (LCpl) Mayes with a dangerous weapon, Article 128, UCMJ.

We have carefully considered the record of trial, the appellant's assignments of error, [2] the Government's response, and the superb presentations of counsel during oral argument. Following our review, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

2 I. THE EVIDENCE WAS LEGALLY AND FACTUALLY INSUFFICIENT AS TO THE ADDITIONAL CHARGE AND SPECIFICATIONS OF ASSAULT WITH A DANGEROUS WEAPON.II. THE MILITARY JUDGE ACTED AS A PRETRIAL INVESTIGATOR BY CONDUCTING A VIEWING OF THE CRIME SCENE BEFORE THE [sic] ANY PROCEEDINGS IN TRIAL TOOK PLACE.

[*3] In his first assignment of error the appellant asserts that the evidence was legally and factually insufficient to support the convictions of assault with a dangerous weapon (Additional Charge [I], Specifications 1-2). [3] The appellant argues alternative rationale in support of his assertion of error. First, he argues that the evidence does not support the conclusion he was at the melee scene. Second, assuming he was at the scene, there is insufficient evidence to conclude he threatened anyone with a K-Bar knife. [4] Finally, assuming *arguendo* he did threaten certain persons with a K-Bar, he did so in defense of another. After consideration of the appellant's alternative rationale, we find the evidence both legally and factually sufficient to support his convictions of assault and assault with a dangerous weapon beyond a reasonable doubt.

3 The military judge convicted the appellant of Additional Charge [I], Specification 3, except for the words "a dangerous weapon comma, to wit, semicolon." Record at 180. As excepted the appellant was, therefore, convicted under Additional Charge [I], Specification 3, of a simple assault upon Corporal (Cpl) Carwile "by striking at him with a K-Bar knife." Charge Sheet. Inasmuch as the assault, albeit a simple assault, was consummated through the use of a K-Bar, in our analysis of the appellant's first assignment of error we will apply his arguments in a review of Additional Charge [I], Specification 3.

[*4]

4 Testimony at trial established that a "K-Bar" knife is a military style knife with an 8-10 inch blade. It is axiomatic that under the facts of this case a K-Bar is a dangerous weapon.

Facts

On the evening of 29 October 1998, at Marine Corps Air Ground Combat Center, Twenty-nine Palms,

California, a melee broke out involving upwards of 70 Marines from two units, 3d Battalion, 7th Marines (hereafter 3/7) and 1st Battalion, 7th Marines (hereafter 1/7). [5] Instigated by insults exchanged between members of the respective units earlier in the day, several individual groups of Marines from the 1/7 and 3/7 started fighting in and around the center of their shared barracks. For the most part, the individual fights did not involve weapons. However, in some instances, the combatants used pool sticks, a cue ball, and rocks.

5 The appellant was a member of 1/7.

Sergeant (Sgt) Carwile, [6] a 3/7 Marine testifying under a grant [*5] of immunity, said that he was in one of the barracks rooms on the evening of 29 October 1998, when he heard a commotion outside. He went out to see what was going on, saw that a "fight started getting a little outnumbered," that is, that there was approximately "10 of us" and "maybe about 15 of them," so he "joined in." Record at 160. Sgt Carwile said he took several blows to the head and mouth from pool sticks. It was during the early stages of the melee that Sgt Carwile said he saw the appellant with the K-Bar in the parking lot, near the center of the barracks. The appellant was waving the K-Bar around "warning people to get back, [to] get off" and "like you better get off, you better get off or you're going to get it." *Id*. at 164. Sgt Carwile said the swinging K-Bar knife came within a couple of feet of him, and he felt threatened.

6 Sgt Carwile was a corporal at the time of the fight, but a sergeant when he testified. We will, therefore, refer to him as a sergeant in this discussion.

In another part [*6] of the melee, a 1/7 Marine threw a rock striking a 3/7 Marine. Cpl Bourdlaies, a 3/7 Marine testifying under a grant of immunity, said he saw the alleged rock-thrower [7] and yelled out, "that's the guy who threw the rock; let's get him." *Id*. at 98. Cpl Bourdlaies chased and caught the fleeing rock-thrower. They scuffled until the rock-thrower ran off. Cpl Bourdlaies subsequently chased the rock-thrower across the parking lot and adjacent to an abutting road (Brown Road). Catching him, they once again scuffled. Someone grabbed Cpl Bourdlaies from behind in a chokehold and pulled him off the rock-thrower. A third person then pulled the choke-holder off Cpl Bourdlaies. Cpl Bourdlaies again ran after the rock-thrower, who had gone down Brown Road. Another unidentified person, presumably a 1/7 Marine, was with the rock-thrower. Cpl Bourdlaies said that was when he first saw the appellant waiving a K-Bar. The appellant was swinging the knife in the air in front of him (Cpl Bourdlaies) and towards his (Cpl Bourdlaies') head. Cpl Bourdlaies said the appellant "was yelling, do you want some of this, back off, get the hell out of here, you know, do you want some of this repeatedly, indicating [*7] the knife kind of pointing it at my head." *Id*. at 100. The appellant was "making it pretty clear that if I [Cpl Bourdlaies] was to go after the Marine that had thrown the rock I was going to get cut." *Id*. at 102. Sgt Holly, also a 3/7 Marine, subsequently ran up from the side and started pushing everybody away from the appellant.

7 While there was speculation at trial as to the rock-thrower's identify, his identify was never established.

LCpl Cranford, a 3/7 Marine testifying under grant of immunity, said that he, along with Cpl Bourdlaies and Cpl Samuels (also a 3/7 Marine), chased the rock-thrower. When LCpl Cranford caught up with the rock-thrower, he saw that Cpl Bourdlaies was already fighting with the rock-thrower. He (LCpl Cranford) then fought with the unidentified person who had Cpl Bourdlaies in a chokehold. The fighters separated and the rock-thrower backed away with another unidentified person. LCpl Cranford said that he, Cpl Bourdlaies, and Cpl Samuels once again chased the rock-thrower. [*8] All were now in the middle of Brown Road. LCpl Cranford testified that "I was just telling him [the unidentified 1/7 Marine], that's all we want, we just want him [the alleged rock-thrower]. He hurt the Corporal." *Id*. at 146. LCpl Cranford said he then saw the appellant "coming up quick." *Id*. The appellant got between the two groups (LCpl Cranford, Cpl Bourdlaies, and Cpl Samuels)(the unidentified person and the rock-thrower) and swung a knife at him (LCpl Cranford) and the others saying "you want some of this, you want some of this?" *Id*. at 148. LCpl Cranford said he thought he was going to get stabbed and started to back up just as Sgt Holly arrived on scene, grabbed him (LCpl Cranford), and started pulling him back.

LCpl Samuels, a 3/7 Marine and testifying under a grant of immunity, corroborated LCpl Cranford's testimony.

Sgt Holly, a 3/7 Marine testifying without a grant of immunity, stated that he was on duty when he heard of a

huge fight in progress. He left the duty office and observed about 20 individuals fighting. He saw two of his Marines, LCpls Cranford and Samuels, following someone carrying a K-Bar-like knife. The person, identified by Sgt Holly as [*9] the appellant, subsequently started waiving the K-Bar around telling all to get back. Sgt Holly said he thereupon pulled his Marines (LCpls Cranford and Samuels) away and that, thereafter, the appellant ran off when the military police showed up.

Legal and Factual Sufficiency

[HN1] For factual sufficiency, the test is whether, after weighing the evidence of record and making allowances for not having personally observed the witnesses, this Court is convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)*. Where the evidence raises defenses, the prosecution must also prove beyond a reasonable doubt that any defenses so raised do not exist. *United States v. Berri, 33 M.J. 337, 342 (C.M.A. 1991)*; RULE FOR COURTS-MARTIAL 916(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.). [HN2] The test for legal sufficiency is whether a reasonable fact finder, viewing the evidence in the light most favorable to the prosecution, could find all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)*. The term reasonable doubt does not [*10] mean that the evidence must be free from all conflict. *United States v. Reed, 51 M.J. 559, 562 (N.M.Ct.Crim.App. 1999), aff'd, 54 M.J. 37 (2000)*. Furthermore, as "factfinders[, this Court] may believe one part of a witness' testimony and disbelieve another." *United States v. Lepresti, 52 M.J. 644, 648 (N.M.Ct.Crim.App. 1999)*.

We have carefully considered the appellant's assertion that the testimony of the 3/7 Marines is not worthy of belief. Specifically, the appellant contends that such testimony is not credible because: 1) several 1/7 Marines testified that they either did not see the appellant at the melee scene, or if they did see him, they did not see him waive any K-Bar; 2) the 3/7 Marines, with the exception of Sgt Holly, testified under a grant of immunity; and/or 3) the military judge found him (the appellant) not guilty of assaulting LCpl Mayes, another 3/7 Marine, even though LCpl Mayes specifically testified that he (LCpl Mayes) was cut by the knife-wielding appellant. Appellant's Brief of 17 Apr 2002 at 3-6. We are also mindful of the fact that at trial the Government presented no evidence of any knife, of any kind, [*11] being found at the scene or seized from the appellant on or after the date of the melee. [8]

8 There was testimony from LCpl Borden, the appellant's roommate and a fellow 1/7 Marine, that the appellant purchased a K-Bar knife approximately a year before the melee. LCpl Borden also testified that at some point prior to the melee the appellant told him that he (the appellant) had disposed of the K-Bar. Record at 127.

Having considered all of the evidence, we find beyond a reasonable doubt that the appellant was at the scene of the melee and that he wielded a K-Bar in a threatening manner at Sgt Carwile, Cpl Bourdlaies, and LCpl Cranford. Sgts Holly and Carwile, Cpl Bourdlaies, and LCpls Cranford and Samuels clearly identified the appellant as the one wielding a K-Bar. While their testimony differed in certain ways, each witness' testimony was sufficiently consistent on major points so as to corroborate the others. *See Reed, 51 M.J. at 562*. That these most incriminating witnesses against the appellant [*12] were all 3/7 Marines, and that all but Sgt Holly testified under a grant of immunity, is an insufficient basis to disregard their testimony. There is no evidence of collusion between the 3/7 Marine witnesses to warrant disbelief of the clear import of their testimony. Sgt Holly's uncontradicted testimony is particularly significant given his duty status and non-participation in the melee. The testifying 1/7 Marines, for the most part, either did not see the appellant during the melee, saw him at points of time distinct from the convicted offenses, or were, themselves, so engaged in the melee as to call into question their ability to accurately observe the actions of the appellant.

Furthermore, we find beyond a reasonable doubt that the appellant's assault upon Sgt Carwile was separate in time and place from the assault with the K-Bar upon Cpl Bourdlaies and LCpl Cranford. The assault upon Sgt Carwile took place near the start of the melee, in the center of the barracks, near or in the parking lot. The assault on the other 3/7 Marines took place thereafter and at some point on the adjacent road (Brown Road).

We turn to consideration of whether the appellant's actions were, as he [*13] argues now and as he argued at

trial, a justified use of force in defense of another. *See* R.C.M. 916(b) and (e)(5). We conclude beyond a reasonable doubt that the appellant was not acting in defense of another when he assaulted Sgt Carwile, Cpl Bourdlaies, and LCpl Cranford with the K-Bar.

The pertinent provisions of the Rules for Courts-Martial concerning defense of another, [HN3] provide that:

> (2) *Certain aggravated assault cases.* It is a defense to assault with a dangerous weapon . . . that the accused:
>
> (A) Apprehended, on reasonable grounds, that bodily harm was about to be inflicted wrongfully on the accused; and
>
> (B) In order to deter the assailant, offered but did not actually apply or attempt to apply such means or force as would be likely to cause death or grievous bodily harm.
>
> (3) *Other assaults.* It is a defense to any assault punishable under Article . . . 128 and not listed in subsection[] (e). . . (2) of this rule that the accused:
>
> (A) Apprehended, upon reasonable grounds, that bodily harm was about to be inflicted wrongfully on the accused; and
>
> (B) Believed that the force that accused used was necessary for protection against bodily harm, provided [*14] that the force used by the accused was less than force reasonably likely to produce death or grievous bodily harm.
>
> (4) *Loss of right to self-defense.* The right to self-defense is lost and the defenses described in subsections (e) . . . (2), and (3) of this rule shall not apply if the accused was an aggressor, engaged in mutual combat, or provoked the attack which gave rise to the apprehension, unless the accused had withdrawn in good faith after the aggression, combat, or provocation and before the offense alleged occurred.
>
> (5) *Defense of another*. The principles of self-defense under subsection (e)([2]) through (4) of this rule apply to defense of another. It is a defense to . . . any assault under Article . . . 128 that the accused acted in defense of another, provided that the accused may not use more force than the person defended was lawfully entitled to use under the circumstances.

R.C.M. 916(e)(2)-(5).

[HN4] "Defense of another may excuse liability for assault." *United States v. Ravenel, 26 M.J. 344, 351 (C.M.A. 1988)*. It is a special defense. An additional element of the defense requires that "the accused may not use more force than the [*15] person defended was lawfully entitled to use under the circumstances." *United States v. Scott, 40 M.J. 914, 917 (A.C.M.R. 1994), aff'd, 42 M.J. 457 (1995)*. An accused who claims the affirmative defense of defending another steps into the shoes of the defended person. *United States v. Lanier, 50 M.J. 772, 777-78 (Army Ct.Crim.App. 1999), aff'd, 53 M.J. 220 (2000)*. As it relates to this case, and under the well-settled principles of law applicable to self-defense:

> Generally speaking, a person is not entitled to use a dangerous weapon in self-defense where the attacking party is unarmed and commits a battery by means of his fist. And if he uses more force in any defense of his person than the law will allow, he becomes the aggressor. The theory of self-defense is protection and not aggression, and to keep the two in rough balance the force to repel should approximate the violence threatened.

United States v. Straub, 12 C.M.A. 156, 160, 30 C.M.R. 156, 160 (1961).

It was near the commencement of the general melee that the appellant confronted Sgt Carwile. LCpl Huyghe, a 1/7 Marine, testified [*16] that as the overall melee commenced the appellant was "kind of like swinging at people, and they were swinging at him pretty much." Record at 119-20. Clearly, the appellant was engaged in mutual combat, and, in addition, was an aggressor. R.C.M. 916(e)(4). It was he, and no other, that was waiving a K-Bar around. While pool sticks and rocks

may have been used by some during the overall melee, there is no evidence that on or near the time the appellant assaulted Sgt Carwile such items were being used by anyone. Furthermore, there is no evidence of record that when the appellant brandished the K-Bar at Sgt Carwile the appellant was doing so in defense of anyone. Assuming *arguendo* the appellant ever had any right of defense of some unknown other, or even his own self-defense, at or near the time of his assault on Sgt Carwile he clearly lost any such rights by engaging in mutual combat and/or being the aggressor. R.C.M. 916(e)(4)-(5). It was the appellant that escalated the fight by bringing and using a knife in what was essentially a fistfight. We find, beyond a reasonable doubt, that the military judge correctly convicted the appellant of an assault upon Sgt Carwile.

Turning to [*17] the assaults with a dangerous weapon (K-Bar) upon Cpl Bourdlaies and LCpl Cranford, we concur with the appellant to extent that there is some evidence surrounding these later assaults that could raise the issue of defense another. *See* R.C.M. 916(e)(2) and (5). However, we find, beyond a reasonable doubt, that the appellant was an aggressor when he assaulted Cpl Bourdlaies and LCpl Cranford with the K-Bar. Given the facts of this case, we find, beyond a reasonable doubt, that the military judge correctly convicted the appellant of an assault with a dangerous weapon upon Cpl Bourdlaies and LCpl Cranford.

Our determination is based upon multiple factors. First, the assaults on Cpl Bourdlaies and LCpl Cranford took place after, and at a different location, albeit relatively close, than the assault upon Sgt Carwile. His use of the K-Bar toward Cpl Bourdlaies and LCpl Cranford was not an isolated event necessarily precipitated by a perceived threat directed toward the rock-thrower. To the contrary, the timing and proximity of the later assaults indicate that he was an aggressor throughout the period incorporating all of the assaults. *See United States v. Curtis, 44 M.J. 106, 154 (1996).* [*18]

Second, other than the initial rock thrown by the rock-thrower, there was no weapon of any kind involved in the sequence of chasing and fighting between the rock-thrower and Cpl Bourdlaies. Any fighting between the rock-thrower and Cpl Bourdlaies, prior to the arrival of the appellant, consisted of fists. It was the appellant, and the appellant alone, who brandished a dangerous weapon.

Third, there is no evidence that the appellant had any information or knowledge as to the circumstances surrounding the rock throwing incident or the events prior to his threatening use of the K-Bar. Nevertheless, the appellant came "up quick" on the scene waiving the K-Bar and shouting challenges. Record at 146.

Fourth, the challenges the appellant used while he was waiving the K-Bar included such words as, "you want some of this, you want some of this." *Id. at 148*. These are extremely aggressive words - especially in context of the events of that night. The words used were not the type of words likely to be used by someone trying to de-escalate a potential volatile situation. Rather, they were words that tended to incite further violence.

Fifth, the appellant did more than [*19] simply make it known to Cpl Bourdlaies and LCpl Cranford that he had a K-Bar. Rather, he aggressively waived the K-Bar directly at them. So much so, that LCpl Cranford testified that he thought he was going to get stabbed.

Sixth, other than the words he used when he confronted Cpl Bourdlaies and LCpl Cranford, there is no evidence the appellant actually believed that the force he used was necessary to protect the rock-thrower. In fact, other that the appellant's present interpretation, there is no evidence that the appellant was actually intending, by his threatening gestures, to defend any one.

Seventh, when the appellant burst onto the scene, there was not, contrary to the appellant's assertion, a 3-1 mismatch between 1/7 and 3/7 Marines. Appellant's Brief of 17 Apr 2002 at 7. The evidence indicates that there was at least one other unidentified person, presumably a 1/7 Marine, at the scene who was providing, at a minimum, verbal assistance to the rock-thrower.

Eighth, when the appellant arrived on scene, the parties were not fighting. While a few 3/7 and 1/7 Marines were likely yelling at each other, no one was fighting.

Finally, it is very likely that the rock-thrower, who [*20] was never identified and did not testify at trial, in whose "shoes" the appellant was standing, had no right to self-defense given that he too was an aggressor. *United States v. Cole, 54 M.J. 572, 581 (Army Ct.Crim.App. 2000), aff'd, 55 M.J. 466 (2001)*; R.C.M. 916(e)(5),

Discussion. It was the rock-thrower who initiated the sequence of events when he threw the rock. It was his very actions that provoked the subsequent events that could have then possibly given him an apprehension of bodily harm. *See Curtis, 44 M.J. at 153*; R.C.M. 916(e)(2) and (4). Even assuming the rock-thrower shed his aggressor label by withdrawal in "good faith" after he threw the rock, there is no evidence that at the time the appellant bolted onto the scene, the rock-thrower was under any actual apprehension of bodily harm. R.C.M. 916(e)(2) and (4); *see United States v. Richey, 20 M.J. 251, 252 (C.M.A. 1985)*.

There is a paucity of evidence to indicate that the appellant honestly believed when he came "up quick" on the scene that the force he used was necessary to deter bodily harm being inflicted on the unidentified rock-thrower. *See* [*21] R.C.M. 916(e)(2) and (5). What he believed, or not, is subject to speculation. The facts clearly suggest to us that the appellant's actions were based upon matters other than an honest belief of pending bodily harm to another. Rather, his actions were simply a continuation of his earlier-demonstrated aggressive behavior. Even if the appellant's honestly believed his actions were necessary to defend another, under the circumstances as outlined above, we conclude that such a belief was not reasonable. It is, at best, arguable whether a reasonably prudent person would conclude that the rock-thrower, when the appellant came "up quick," was about to have bodily harm inflicted upon him. There was, likely, no reasonable fear of "imminent death or serious injury" about to befall the rock-thrower such as to entitle the appellant to "resort to a dangerous weapon." *United States v. Regalado, 13 C.M.A. 480, 484, 33 C.M.R. 12, 16 (1963)*. We are convinced that the Government met its burden of proving beyond a reasonable doubt that the appellant was not acting in defense of another.

We find that a reasonable fact finder could find all the essential elements of the offenses of assault [*22] and assault with a dangerous weapon of which the appellant was convicted beyond a reasonable doubt. Furthermore, we are convinced of the appellant's guilt of those same offenses beyond a reasonable doubt. We, therefore, grant no relief.

Military Judge Viewing Crime Scene

The appellant next asserts that the military judge acted as a pretrial investigator by viewing the crime scene before any proceedings of trial took place. Appellant's Brief of 17 Apr 2002 at 10. The appellant argues, among other things, that the military judge's pretrial investigation made him a potential witness. "Because this error undermines the structural integrity of the criminal tribunal itself and the motivations of the military judge are hidden: reversal is required, because it is presumed that the process by which the conviction was obtained is fundamentally flawed." *Id. at 12*. We disagree.

[HN5] A basic right of an accused to military due process includes the right to "a judge who appears impartial throughout his court-martial." *United States v. Cooper, 51 M.J. 247, 250 (1999)*. Our superior Court has held that "when a military judge's impartiality is challenged on appeal, the test [*23] is whether, taken as a whole in the context of [the] trial, a court-martial's legality, fairness, and impartiality were put into doubt." *United States v. Burton, 52 M.J. 223, 226 (2000)*(quoting *United States v. Ramos, 42 M.J. 392, 396 (1995)*(internal quotes omitted)). A military judge "has as much obligation not to recuse himself when there is no reason to do so as he does to recuse himself when the converse is true." *United States v. Bray, 546 F.2d 851, 857 (10th Cir. 1976)*. An appellant bears a "substantial burden" to show that the military judge is not qualified. *United States v. Allen, 31 M.J. 572, 601 (N.M.C.M.R. 1990)*. Failure of the defense to object to the alleged lack of impartiality of a military judge is reflective of the "defense belief in [the judge's] neutrality." *United States v. Acosta, 49 M.J. 14, 18 (1998)*.

Following recitation of his qualifications, and prior to forum selection by the appellant, the military judge voluntarily disclosed that he had been the military judge in two other courts-martial convened as a result of the melee. He stated that he was the assigned military [*24] judge in another, yet to be heard, court-martial involving the melee. Record at 5-6. Additionally, he explained that he had heard testimony regarding the appellant adding "but I've learned that all through my judicial capacity and can disregard that." *Id*. at 6. Following these disclosures, neither Government nor trial defense counsel elected to either voir dire or challenge the military judge.

At the close of opening statements, the military judge indicated that **at the request of both Government and trial defense counsel**, he (military judge), counsel for both sides, and the appellant did a daytime site visit of the melee scene. *Id. at 38*. The military judge described, on the record, in very general terms, what he saw during

his walk-through of the melee site. The Government, the trial defense counsel, and the appellant each specifically agreed with the military judge's description and interjected no objection to the description or to the procedure. *Id. at 39*.

We find nothing in the conduct of the military judge that, in any way, puts the legality, fairness, or impartiality of this court-martial into doubt. *Burton, 52 M.J. at 226*. The military judge [*25] was completely candid and open with counsel. He held back no information concerning his involvement with related melee cases. He viewed the scene at the request of counsel. [HN6] Defense induced error generally constitutes an inappropriate predicate for appellate relief. *United States v. Cox, 23 M.J. 808, 817 (N.M.C.M.R. 1986)*. Furthermore, the appellant makes no claim that the site visit involved a "disputed evidentiary fact[] concerning the proceeding." R.C.M. 902(b)(1). The appellant points to no specific way he was prejudiced by the military judge's prior involvement in related cases or to his site visit. Appellant's Brief of 17 Apr 2002 at 11.

> [HN7] Where no actual bias or prejudice is shown, as in the present case, the issue of disqualification under RCM 902(a) is considered under an objective standard: "Any conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's 'impartiality might reasonably be questioned' is a basis for the judge's disqualification."

United States v. Norfleet, 53 M.J. 262, 270 (2000)(quoting *United States v. Kincheloe, 14 M.J. 40, 50 (C.M.A. 1982))*. We [*26] hold that no reasonable person familiar with the facts in this case would question the military judge's impartiality. *Ramos, 42 M.J. at 396*. We, therefore, decline to grant relief.

Conclusion

Accordingly, the findings and sentence, as approved on review below, are affirmed.

Senior Judge PRICE and Senior Judge FINNIE concur.

UNITED STATES v. Steven W. BILBREY, 295 58 4857 Sergeant (E-5), U.S. Marine Corps

NMCM 89 03566

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

1995 CCA LEXIS 424

May 5, 1995, Decided

NOTICE: [*1] AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PRIOR HISTORY: Sentence adjudged 15 June 1989. Military Judge: J.F. Walsh. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 3d Marine Aircraft Wing, FMFPac, Marine Corps Air Station, El Toro, Santa Ana, CA.

DISPOSITION: Previous decision of this court reaffirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Accused was convicted by a general court-martial composed of officer members of two specifications of assault by intentionally inflicting grievous bodily harm on his infant daughter, in violation of art. 128, Unif. Code of Mil. Justice, *10 U.S.C.S. § 928*. On appeal, the accused's claim of ineffective assistance of detailed military counsel before and during trial was the basis for a remand of the conviction to the court.

OVERVIEW: On remand, the accused requested a post-trial evidentiary hearing, which was initially denied. The motion was later granted when the accused's trial counsel, who was then in private practice, refused to render a full accounting of his representation by limiting his affidavit to pre-trial matters even though the accused's claims covered his trial representation as well. At hearing, the accused disputed essentially any substantive discussions with his military counsel and identified six areas in which he believed his military counsel was ineffective. The court reaffirmed and held that the accused's military counsel was arguably inconsiderate, overconfident, and perhaps arrogant but considering the totality of the circumstances, the accused failed to demonstrate that his military counsel's conduct was seriously deficient or that his level of advocacy fell measurably below the performance ordinarily expected of fallible lawyers. The strategy and tactics of the accused's military counsel were not unreasonable or unworkable.

OUTCOME: The court reaffirmed its previous decision that the accused did not receive ineffective assistance of his military counsel.

CORE TERMS: post-trial, defense counsel, ineffective, hematoma, videotape, subdural, sister, military, pediatric, assistance of counsel, trauma, spouse, baby-sitter, reiterated, consulted, pretrial, delivery, doctor, medical expert, specification, interviewed, vulnerable, assault, temper, times, defense theory, consultation, neurologist, football, counsel's conduct

LexisNexis(R) Headnotes

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Military & Veterans Law > Military Justice > Counsel
Military & Veterans Law > Military Justice > Postconviction Proceedings > General Overview
[HN1] The following principles are among those that apply in resolving post-trial claims of ineffective assistance of trial defense counsel. A military accused is guaranteed the effective assistance of counsel at pretrial stages, at trial, and at post-trial stages of the court-martial proceedings. There is no particular set of detailed rules for counsel's conduct, and any such set of rules would interfere with the independence of counsel and restrict the wide latitude counsel must have in making tactical decisions; however, it may be said representation of the accused entails certain basic duties, for example, a duty to assist the accused, a duty of loyalty, a duty to avoid conflicts of interest, a duty to advocate the accused's cause, a duty to consult with the accused on important decisions, a duty to keep the accused informed of important developments in the course of the prosecution, a duty to educate themselves to attain competence in defending an issue in a particular case, a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary, a duty to adhere to prescribed rules of professional conduct, and a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Criminal Law & Procedure > Appeals > Standards of Review > Deferential Review > Ineffective Assistance
Military & Veterans Law > Military Justice > Counsel
[HN2] The following principles are among those that apply in resolving post-trial claims of ineffective assistance of trial defense counsel. There is a strong presumption that counsel is competent, that is, that counsel's conduct falls within the wide range of reasonable professional assistance, and the burden rests with the accused to demonstrate the contrary. The benchmark for judging any claim of ineffectiveness is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. When a convicted accused complains of the ineffectiveness of counsel's assistance, the accused must show that counsel's representation fell below an objective standard of reasonableness and the deficiency was prejudicial to his defense. To show that his trial defense counsel was ineffective, an accused must demonstrate that his counsel was seriously deficient in some manner and that there was is a reasonable probability that, but for this deficiency, the result of the proceeding would have been different. In weighing such matters, the appellate court must give deference to counsel's tactical judgment and not substitute its view with the benefit of hindsight.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Criminal Law & Procedure > Appeals > Standards of Review > Deferential Review > Ineffective Assistance
Military & Veterans Law > Military Justice > Counsel
[HN3] The following principles are among those that apply in resolving post-trial claims of ineffective assistance of trial defense counsel. The appellate court will consider the totality of the circumstances in judging claims of ineffective assistance of counsel and normally will not second-guess the strategic or tactical decision of trial defense counsel, especially when the strategy used or tactics employed are not on their face unreasonable or unworkable. The fact that appellate defense counsel or the accused on appeal conceives a different trial tactic from the one used at trial does not mean that the counsel at trial was ineffective. The character of a particular lawyer's experience may shed light in an evaluation of his actual performance, but it does not justify a presumption of ineffectiveness in the absence of such an evaluation.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Military & Veterans Law > Military Justice > Depositions & Interrogatories
Military & Veterans Law > Military Justice > Counsel
[HN4] The following principles apply in resolving post-trial claims of ineffective assistance of trial defense counsel. 11. In cases in which the appellant claims ineffective assistance of counsel, the appellate court is confronted with three basic questions: a) are the allegations made by the appellant true; and if they are, is there a reasonable explanation for counsel's actions in the defense of the case? b) If they are true, did the level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers? c) If ineffective assistance of counsel is found to exist, is there a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting

guilt?12. The appellate court may consider trial defense counsel's recalcitrance or contumacy in responding to court-authorized or court-ordered affidavits or interrogatories, being mindful, however, that some counsel may decline to respond out of a misinformed view of their professional duty of loyalty to their client.

COUNSEL: MICHAEL J. DONOVAN, Civilian Defense Counsel.

LT GERARD WM. WITTSTADT, Jr., JAGC, USNR, Appellate Defense Counsel.

Maj LAURA L. SCUDDER, USMC, Appellate Government Counsel.

JUDGES: BEFORE R.M. MOLLISON, E.D. CLARK, WILLIAM A. DeCICCO. Judge CLARK and Judge DeCICCO concur.

OPINION BY: R.M. MOLLISON

OPINION

MOLLISON, Senior Judge:

The appellant's case was remanded to this court to resolve allegations the appellant received ineffective assistance of counsel. We ordered a post-trial evidentiary hearing for this purpose. Based on the record now before us, we again find the appellant has failed to demonstrate that he received ineffective assistance of counsel, and we reaffirm the previous decision in his case.

History of the Case

The appellant was charged, *inter alia*, with two specifications of assault by intentionally [*2] inflicting grievous bodily harm [1] upon his infant daughter, Amanda, in violation of Article 128, Uniform Code of Military Justice [UCMJ], *10 U.S.C. § 928 (1988)*. One assault allegedly occurred during the period 8 August to 15 September 1988; the other, on 10 October 1988. The appellant pled not guilty.

1 Cerebral hemorrhage, subdural hematoma, brain seizures, retinal bleeding, loss of motor control of the head, blindness, bleeding of the optic fund, and mental retardation.

The appellant was tried by general court-martial composed of officer members. The Government called five witnesses -Amanda's mother (the appellant's ex-spouse), Amanda's baby sitter, two employees of the Arizona Child Protective Service, and a pediatrician. Its case may be summarized as follows:

> Amanda was born in February of 1988. She subsequently suffered two head injuries. The first involved bruising to the face and occurred on or about 10 August 1988 when Amanda was in the appellant's custody. The appellant's explanation was [*3] that Amanda had fallen out of her carrier onto her toys; e.g., stuffed animals, plastic rings and a plastic car. Amanda was not taken to a doctor on this occasion, though her baby-sitter encouraged the appellant's spouse to do so. The second injury was suffered by Amanda the following October. Amanda was in the appellant's care on 10 October 1988. During that day, the appellant's spouse telephoned the appellant from her place of employment. The appellant was watching a football game on television. She could hear Amanda crying loudly. The appellant explained to her that when he was running to answer the telephone, he jumped over Amanda and kicked her head, and she hit the floor. The appellant's spouse noticed no changes in Amanda following that, save that Amanda appeared to be a little irritable when she delivered Amanda to the baby-sitter on 12 October 1988. While in the baby-sitter's care, Amanda vomited and then went limp. The spouse of baby-sitter administered mouth-to-mouth resuscitation to Amanda while emergency personnel were summoned. Amanda was transported by helicopter to the Children's Heath Center, St. Joseph's Hospital in Phoenix, Arizona, where she was admitted in the [*4] Pediatric Intensive Care Unit. There, Amanda showed signs of coma and decreased movement on her right side. An examination of her eyes revealed diffuse hemorrhages in the optical fundi of both eyes, meaning blood in the area of the retina. An examination of Amanda's brain revealed that Amanda was suffering from two subdural hematomas. One was

chronic, meaning it was resolving, older bleeding within Amanda's head. That hematoma could have possibly occurred weeks to months earlier, including in August 1988. The other subdural hematoma was acute. Amanda's injuries were consistent with a major head trauma, a life-threatening condition, which occurred 12 to 48 hours prior to her presentation at the Pediatric Intensive Care Unit or prior to the first seizure 5 hours earlier. Amanda's condition was consistent with "shaken baby syndrome." The blood in Amanda's head caused increased cranial pressure. At the time of her discharge Amanda "was not normal," although it was impossible to say at her age whether she was mentally retarded.

Testimony also showed the appellant would get aggravated if Amanda cried. He was jealous of the attention his spouse devoted to Amanda. He was also [*5] rough in his handling of Amanda. For example, he would place his index finger behind his thumb and "flick" Amanda's ears. He would hold her head down on the bed to get her to sleep. Once he threw her in the air and failed to catch her, thus allowing her to fall into the swimming pool in which he was standing. He also once pulled her up by the leg when Amanda was bathing in the bathtub in order to remove her when it appeared she was going to soil the bath. As a result, Amanda's head struck the tub and she cried. [2] The appellant was present at the Pediatric Intensive Care Unit with Amanda, and he became loud and confrontational when officials made inquiries into Amanda's situation. During a subsequent visit with Amanda, supervised by state Child Protective Services personnel, the appellant wept and made the comment, "Sometimes people make mistakes, when they shouldn't have done things they've done," although it is possible the appellant was referring to the mistake of state authorities in removing Amanda from the family. Record at 193, 196-97. The appellant also stated he would go to counselling as many times as he needed.

2 The appellant was charged with an assault on the basis of this incident, however, the members acquitted him on this specification, Specification 2 of Charge II.

[*6] There were potentially four persons who were alone with Amanda and might have injured her -- Amanda's mother, the babysitter, the appellant's sister, and the appellant. Amanda's mother testified and denied inflicting the injuries. The babysitter testified and denied inflicting the injuries. The appellant's sister did not testify. Following the Government's case, the appellant was not called to testify and the defense rested.

A panel of officer members found the appellant guilty and sentenced him to confinement for 6 years, forfeiture of $ 699.00 pay per month for six years, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence without modification.

The appellant's case was automatically appealed to this court in accordance with Article 66, UCMJ, *10 U.S.C. § 866 (1988)*. The appellant assigned five errors. *Inter alia*, he asserted that appellant's detailed military counsel provided ineffective assistance of counsel before and during trial. We found no merit in any of the appellant's assignments of error and affirmed. *United States v. Bilbrey, 1990 CMR LEXIS 1421*, No. 89 3566 (N.M.C.M.R. 20 Nov. 1990). The United States Court of Military Appeals [*7] (now United States Court of Appeals for the Armed Forces) set aside that decision and remanded the record to this court for such proceedings as may be necessary to resolve appellant's allegations concerning the effectiveness of his representation at trial. [3] *34 M.J. 76*.

3 For the current procedure for addressing post-trial claims of ineffective assistance of trial defense counsel, see *United States v. Lewis, 42 M.J. 1 (1995)*.

On remand, the appellant moved for a post-trial evidentiary hearing in accordance with *United States v. DuBay, 17 C.M.A. 147, 37 C.M.R. 411 (1967)*. We

initially denied the appellant's motion, preferring to resolve the allegations through the filing of post-trial affidavits. See *United States v. Mays, 33 M.J. 455, 457 (C.M.A. 1991)*; *see also United States v. Lewis, 42 M.J. 1*, slip op. at 14, No. 94-0072/AR (April 7, 1995). We granted the Government 30 days to file "responsive pleadings and affidavits addressing the appellant's claim that he was [*8] deprived of the effective assistance of counsel *both before and during trial.*" Order of 19 June 1992 (emphasis added). Since trial, appellant's trial defense counsel, Captain Hall Adams, III, U.S. Marine Corps, had been released from active duty and had entered the private practice of law. When Appellate Government Counsel attempted to obtain Mr. Adams' affidavit, Mr. Adams refused to render a full accounting of his representation. More specifically, he incorrectly confined his response to pre-trial matters, despite his client's claim of his incompetence *during trial*, as well. *See Mays*. Therefore, this court felt obliged to grant appellant's motion for a *"DuBay"* post-trial evidentiary hearing, with concomitant delay and expense, in order to carry out the mandate of our senior court. [4] Order of 28 October 1992. The *DuBay* hearing officer was the same officer who presided as military judge. The transcript of the *DuBay* hearing, the military judge's essential findings thereon, post-trial affidavits, and the parties' final pleadings are now before us.

4 Recently, the United States Court of Appeals for the Armed Forces recognized that a military court of criminal appeals may compel civilian attorneys to respond to court-ordered interrogatories and may issue subpoenas to enforce such orders. *Lewis, 42 M.J. 1*, slip op. at 11-12.

[*9] *The Law*

[HN1] The following principles apply in resolving post-trial claims of ineffective assistance of trial defense counsel:

1. A military accused is guaranteed the effective assistance of counsel at pretrial stages, at trial, and at post-trial stages of the court-martial proceedings. *United States v. Fluellen, 40 M.J. 96 (C.M.A. 1994)*; *see also United States v. DiCupe, 21 M.J. 440* (C.M.A.), *cert. denied, 479 U.S. 826, 93 L. Ed. 2d 52, 107 S. Ct. 101 (1986)*.

2. There is no particular set of detailed rules for counsel's conduct, and any such set of rules would interfere with the independence of counsel and restrict the wide latitude counsel must have in making tactical decisions; however, it may be said representation of the accused entails certain basic duties, e.g., a duty to assist the accused; a duty of loyalty; a duty to avoid conflicts of interest; a duty to advocate the accused's cause; a duty to consult with the accused on important decisions; a duty to keep the accused informed of important developments in the course of the prosecution; a duty to educate themselves to attain competence in defending an issue in a particular case; a duty to make reasonable investigations or to make a [*10] reasonable decision that makes particular investigations unnecessary; a duty to adhere to prescribed rules of professional conduct; and a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. *Strickland v. Washington, 466 U.S. 668, 689-90, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)*; *United States v. Kelly, 39 M.J. 235* (C.M.A.), *cert. denied, 513 U.S. 931, 115 S. Ct. 324, 130 L. Ed. 2d 284 (1994)*; Navy JAGINST 5803.1A, Professional Conduct of Attorneys Practicing under the Supervision of the Judge Advocate General (13 Jul 1992 & Chg 1, 12 Jul 1993); *see also United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)*; *United States v. Scott, 24 M.J. 186, 188 (C.M.A. 1987)*.

[HN2] 3. There is a strong presumption that counsel is competent, that is, that counsel's conduct falls within the wide range of reasonable professional assistance, and the burden rests with the accused to demonstrate the contrary. *See Washington, 466 U.S. at 689-90*; *United States v. Cronic, 466 U.S. 648, 658, 80 L. Ed. 2d 657, 104 S. Ct. 2039 (1984)*; *Scott, 24 M.J. at 188*.

4. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that [*11] the trial cannot be relied on as having produced a just result." *United States v. Holt, 33 M.J. 400, 409 (C.M.A. 1991)*(quoting *Washington, 466 U.S. at 686*).

5. When a convicted accused complains of the ineffectiveness of counsel's assistance, the accused must show that counsel's representation fell below an objective standard of reasonableness and the deficiency was prejudicial to his defense. *United States v. Lawson, 40 M.J. 475, 476 (C.M.A. 1994)* (citing *Washington, 466*

U.S. at 688)(emphasis added); *see also United States v. MacCulloch, 40 M.J. 236, 239 (C.M.A. 1994)*; *United States v. Pierce, 40 M.J. 149, 150* (C.M.A.), *cert. denied, 513 U.S. 1059, 115 S. Ct. 669, 130 L. Ed. 2d 603 (1994)*; *United States v. Gilbert, 40 M.J. 652, 653 (N.M.C.M.R. 1994)*.

6. "To show that his trial defense counsel was ineffective, an accused must demonstrate that his counsel was seriously deficient in some manner and that there was is a reasonable probability that, but for this deficiency, the result of the proceeding would have been different." *United States v. Bono, 26 M.J. 240 (C.M.A. 1988)*(citing *Washington*); *see also United States v. Taylor, 38 M.J. 254, 256-57 (C.M.A. 1993)*; [*12] *Scott*.

7. "In weighing such matters, we must give deference to counsel's tactical judgment and not substitute our view with the benefit of hindsight." *Bono, 26 M.J. at 242*.

[HN3] 8. We will consider the totality of the circumstances in judging claims of ineffective assistance of counsel and normally will not "second-guess the strategic or tactical decision of trial defense counsel, especially when the strategy used or tactics employed are not on their face unreasonable or unworkable." *United States v. Foster, 35 M.J. 700, 704 (N.M.C.M.R. 1992)* (quoting *United States v. Haston, 21 M.J. 559, 563 (A.C.M.R. 1985), aff'd, 24 M.J. 313 (C.M.A. 1987), cert. denied, 484 U.S. 955, 98 L. Ed. 2d 374, 108 S. Ct. 348 (1987)*); *see also United States v. Sanders, 37 M.J. 116, 118* (C.M.A.), *cert. denied, 510 U.S. 1010, 114 S. Ct. 600, 126 L. Ed. 2d 565 (1993)*; *United States v. Clear, 34 M.J. 129 (C.M.A. 1992)*.

9. The fact that appellate defense counsel or the accused on appeal conceive a different trial tactic from the one used at trial does not mean that the counsel at trial was ineffective. *United States v. Tharpe, 38 M.J. 8, 16 (C.M.A. 1993)*.

10. "The character of a particular lawyer's experience may shed light [*13] in an evaluation of his actual performance, but it does not justify a presumption of ineffectiveness in the absence of such an evaluation." *Cronic, 466 U.S. at 665*.

[HN4] 11. Thus, in cases in which the appellant claims ineffective assistance of counsel, we are confronted with three basic questions:

> a) Are the allegations made by the appellant true; and if they are, is there a reasonable explanation for counsel's actions in the defense of the case?
>
> b) If they are true, did the level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers?c) If ineffective assistance of counsel is found to exist, is there a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt?

United States v. McGillis, 27 M.J. 462 (C.M.A. 1988) (memorandum opinion and order)(citations and quotations omitted); *see also United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)*.

To the foregoing we add the following principle: We may consider trial defense counsel's recalcitrance or contumacy in responding to court-authorized or court-ordered affidavits or interrogatories, being mindful, however, [*14] that some counsel may decline to respond out of a misinformed view of their professional duty of loyalty to their client.

Appellant's Claims

The appellant identifies essentially six areas in which he believes Mr. Adams was ineffective. We address them *seriatim*:

1. Inadequate Pretrial Consultation

The appellant claims he met only twice, and briefly, with defense counsel. In his post-trial affidavit, Mr. Adams stated that he had no specific recollection of the number of times he met with the appellant; however, he recalled it to have been many more than two. At the *DuBay* hearing, he testified he consulted with the appellant six to twelve times prior to trial, in addition to telephone conversations. Record at 360. The consultations included a discussion of: appellant's right to counsel; appellant's conduct prior to trial; the nature of the charges, the Government's case, including its strengths and weaknesses; the appellant's right to testify and present evidence; and the defense theory. Record at 361-62, 372. He recalls also that the appellant was a more-involved, vice less-involved, client. Record at 375.

Mr. Adams also testified that there were substantive discussions, [*15] but could not provide any particulars as to when or where, or the contents of those discussions. Record at 374. He also testified his case file had been discarded. *Id.* The appellant testified at the *DuBay* hearing that he and Mr. Adams had essentially no substantive discussions about the case.

2. Failure to Discover & Introduce Exculpatory Medical Evidence

The appellant claims Mr. Adams did not conduct adequate medical discovery respecting the source of the victim's injuries or obtain defense experts. In essence, the appellant asserts that Mr. Adams failed to discover and introduce medical evidence showing that Amanda was delivered by means of a suction method whereby she suffered head trauma and a subdural hematoma, which also made her vulnerable to subsequent head trauma.

The trial transcript reflects Mr. Adams did adduce from the appellant's spouse, the method of the victim's birth. Record at 242. He also adduced from the Government's own medical expert that the method of birth might explain the old hematoma. The expert, however, refuted the balance of the defense theory that the method of delivery rendered the child more vulnerable to injuries. Record at 173-74.

In [*16] his affidavit, Mr. Adams states he: reviewed all pertinent medical records; interviewed appellant's ex-wife's gynecologist once; interviewed one of Amanda's treating physicians twice and another treating physician once; had numerous consultations with the senior pediatric neurologist at Balboa Naval Hospital regarding his review of Amanda's medical records; received authority to retain a pediatric neurologist, but ultimately decided not to use him; and consulted numerous medical treatises and journals. The appellant counters with the affidavit of the gynecologist who states he never spoke with defense counsel.

Mr. Adams testified at the *DuBay* hearing that he received documents from the Government regarding Amanda's medical condition; he conducted research at the Yuma Hospital library; he obtained documents from an expert in pediatric neurology; he obtained reports from the persons treating Amanda; he consulted with two medical doctors, one of whom was a pediatric neurologist; he contacted all of Amanda's care providers by telephone; he briefly consulted with the doctor who delivered Amanda; and he placed a request for pediatric neurologist. Record at 383-88. He did not request [*17] records from the doctor who delivered Amanda. In his telephonic contact with the delivering physician, he confirmed that Amanda was delivered by means of vacuum suction. He also learned that the delivery was otherwise uncomplicated. Record at 389. Mr. Adams did not inquire of the delivering physician whether a child delivered by means of vacuum suction would have more of a propensity for subdural hematomas. Mr. Adams believed that there had not been any other intervening symptomology although the source of the belief is not entirely clear. Record at 390, 440. Nonetheless, based on the foregoing, he ultimately elected not to pursue the medical defense because it was his judgment the defense was not going to be productive; that the records were not going to advance a pre-existing condition or causation defense; that it might make the Government's case stronger than it already was; and that the jury was going to find that the injuries were the product of abuse. Record at 386-87.

Later in the *DuBay* hearing, Mr. Adams also testified that he discussed the medical theory with the appellant, and he reiterated he discussed it with medical experts. Mr. Adams concluded that the members would [*18] not accept the theory and that he discussed with the appellant why such a defense should not go forward. Record at 435. In his testimony at the *DuBay* hearing, the appellant disputed essentially any substantive discussions with Mr. Adams.

At trial Mr. Adams obtained testimony from the Government's pediatrician that subdural hematomas resulting from the vacuum extraction method of delivery is not unheard of. Record at 173. However, when Mr. Adams pressed the expert on the question of whether children who sustained subdural hematomas by means of this method of delivery were more vulnerable to subsequent head trauma, the expert stated, "Not to my knowledge." Record at 174. Mr. Adams admitted during the *DuBay* hearing he thought the Government expert would have testified to the contrary. He based that expectation on pretrial conversations with the Government's expert, but admits that he may have misunderstood. Record at 391, 398, 436, 442. Mr. Adams also stated that his own medical experts would have said that a child who suffers a subdural hematoma is more vulnerable to subsequent head trauma, but that at least one of his experts thought that Mr. Adams would have a

"hard road to [*19] hoe if [he] was going to try to prove a pre-existing condition or causation." Record at 388, 393. He also reiterated that it was the opinion of the medical experts, including the ones he consulted, that there was no plausible way to account for the onset of the trauma and acute injuries other than the product of abuse. Record at 395, 396. He was also of the view that the members would likely view the traumas as having the same source, that they would conclude child abuse was the cause, and that they would assign the abuse to one parent or the other. Although Mr. Adams also acknowledged that the medical theory and the theory that someone else caused the injuries were not inconsistent, he recollected none of the doctors would testify as to the medical theory "as a probability to a reasonable degree of medical certainty," and they would all testify that the symptoms diagnosed at the hospital were the product of abuse. Record at 441-43. In any case he elected to pursue a line of defense that the Government could not prove the appellant's guilt beyond a reasonable doubt because there was an equally plausible chance based on the evidence that appellant's estranged wife had perpetrated [*20] the abuse. Record at 392.

3. Failure to Discover or Introduce Alibi Evidence

The appellant claims defense counsel failed to verify defense alibi witnesses that would testify the appellant was elsewhere when bruises were suffered by the victim in August 1988. More specifically, the appellant claims his defense counsel failed to verify with appellant's sister and mother that the appellant was on leave and out of the area away from Amanda in late August. He supplies the affidavits and testimony of the appellant's sister and mother to the effect the appellant was in Ohio and Tennessee, vice Arizona, on or about 20 to 28 August 1988. The appellant also asserts that a videotape, made 17 August 1998, showing an unbruised, healthy and happy Amanda, would have been pertinent to the appellant's responsibility for the August-September injuries. Appellate Exhibit XXXI. He also maintains a videotape available at the time would have shown his deep and abiding love for his daughter. [5]

5 We reviewed Appellate Exhibit XXXI. It depicts scenes of Amanda bathing and playing in her home. Amanda's mother is also depicted. Although it is difficult to tell, there does not appear to be a depiction of injuries to Amanda. The videotape does contain a contemporaneous narrative by the appellant. At one place he verbally dates the scene as 17 August 1988. The audio track of the tape also contains profanities and expletives uttered by the appellant. It also contains a discussion between the appellant and his spouse as to Amanda's and the appellant's tempers. Although impressions of such matters may be highly subjective, the videotape is not particularly probative evidence of a deep and abiding love for Amanda or of a considerate husband. It did quite clearly depict a happy child against which the members could have judged her post-injury condition.

[*21] In his affidavit, Mr. Adams states that he interviewed the appellant's mother (numerous times), the appellant's sister (twice), the appellant's estranged wife, Amanda's baby-sitter, and others. During the *DuBay* hearing, Mr. Adams testified that his client had informed him that he was on leave for a portion of period of time alleged in the first assault specification, and that Mr. Adams believed there would have been supporting leave papers, however, he did not acquire them because the period of leave did not cover the entire period alleged and in his view did not make much of an alibi. Record at 402, 404, 407, 411, 415. Mr. Adams indicated that he did not believe he could mount a successful alibi defense without putting the accused on the stand, which was something he felt would have been detrimental to the defense of the case. Record at 407-08.

Mr. Adams also stated that he reviewed the videotape of Amanda. It depicted Amanda playing with her parents. He saw no depiction of bruising. He did not use the videotape because he could not establish by whom and when it was made and because the contents were not probative. Record at 403, 405-06. Mr. Adams' trial notes reference entries [*22] respecting a tape and the date "17 Aug," leave and "21-28 Aug," as well as "bruises first noticed" and "14 Aug." Appellate Exhibit XXX. He did not recall whether the videotape had any indication of a date on it. He was also of the view that a subdural hematoma might be asymptomatic. Record at 407. Additionally, Mr. Adams stated that the videotape would open the door to other evidence, which was not advantageous to his case. Record at 408, 414, 417.

Mr. Adams was shown Appellate Exhibit XXXI during a recess in the *DuBay* hearing; however, he testified that to the best of his recollection it was not the

one he had been previously shown. Record at 466-67. He maintained that, unlike Appellate Exhibit XXXI, the videotape he had seen before was of outdoor scenes. Contrarily, the appellant asserted there was no other videotape to his knowledge, and he never gave Appellate Exhibit XXXI to Mr. Adams. He did state that he made five copies of the tape and his sister had given one to Child Protective Services. Record at 554-55. Mr. Adams also made a pretrial request for the presence of a videocassette player at trial. Appellate Exhibit XXIII.

Mr. Adams decided not to call the appellant's [*23] sister when she made statements to him that were contradictory to those given to Child Protective Service and recorded on audiotape in which he says the appellant's sister clearly implicated the appellant as the perpetrator causing the symptoms. [6] Record at 409-10, 414, 416-417.

6 Appellant's sister was also called at the *Dubay* hearing. Record at 468-85. The nature of her testimony to some extent underscores Mr. Adams' reservations about calling her.

4. Failure to Interview Good Character Witnesses

The appellant claims his defense counsel did not interview good character witnesses. In his post-trial affidavit, Mr. Adams states he did.

At trial, Mr. Adams also made two motions *in limine* to suppress testimony respecting appellant's bad temper and individual instances of temperament. Appellate Exhibit VI and VII. Mr. Adams was partially successful. Record at 75-82. During the pre-sentencing procedure, Mr. Adams offered a report of one of the witnesses he had suppressed earlier, namely a psychological [*24] evaluation of the appellant by a psychologist. Defense Exhibit A. That evaluation reported the results of a variety of tests. It also included a statement that the appellant described himself as having a "hot temper." It also reflects the appellant "is explosive in temperament," and includes a diagnostic impression of "Intermittent Explosive disorder." Finally, the report includes a recommendation against return of Amanda to the appellant because he did "not have the patience to parent adequately nor in a nurturing fashion."

At the *DuBay* hearing, Mr. Adams stated that he did not call witnesses to testify to the appellant's good character for peacefulness because there were specific instances of non-peaceful behavior and improper parenting that would have come into evidence and that would have been more harmful to the case. Record at 424.

The record of the *Dubay* hearing also has attached to it a form questionnaire of a prospective good character witness. Appellate Exhibit XXV. The potential witness' response can be fairly characterized as less than ringing.

5. Inattention

The appellant claims Mr. Adams doodled and was otherwise preoccupied during the course of the trial [*25] with the preparation for a murder trial the following week, with a football pool [the case was tried in June 1989], and with the preparation and issuance of resumes. Appellate Exhibit XXX is an example of the doodling. In his affidavit, Mr. Adams states that he devoted as much attention to the case as necessary.

At the *DuBay* hearing, Mr. Adams reiterated he was attentive to the appellant's proceedings; that he was not preparing for the subsequent trial when in court during the appellant's trial; and was not otherwise preoccupied. Record at 444-45, 453. Mr. Adams admitted he doodled offensive football plays and probably did so in this case, but was not distracted by doodling. Record at 445-46. He recalled no sporting event that he was dealing with at the time, and he doubted that he was having a communication with anyone about a football pool at that time of the year. Record at 451. Mr. Adams also stated that he was leaving the Marine Corps in the spring of 1990 and that it was possible during a recess a staff secretary might have presented him a resume to amend or correct; however, he denied such occurred during the trial proceedings themselves. Record 453.

6. Advice to Appellant [*26] on Testifying

In his post-trial pleading, the appellant asserts Mr. Adams' confidence in the favorable outcome of the trial misled the appellant and that when Mr. Adams advised him at the conclusion of the Government's case there was no need for the appellant to testify, he accepted Mr. Adams' advice. Brief at 29-30. Then in a post-trial affidavit, the appellant states he was told he would not testify and there was no discussion and no input on his part. Affidavit of 14 July 1992. At the *DuBay* hearing, the appellant reiterated what he had stated in his affidavit. Record at 524-25.

In a post-trial statement, Mr. Adams stated that he believed the Government had not met its burden of proof; he advised the appellant of his right to testify, but he advised the appellant not to exercise that right. At the *DuBay* hearing, Mr. Adams reiterated the same. He also stated that he could have put the appellant on to testify, but he was uncomfortable with the type of witness the appellant would make (e.g., appellant had a temper), and he felt that under effective cross-examination, the appellant would have hurt his own cause. [7] Record at 456, 457, 460. He further testified that the appellant [*27] followed his advice "very reluctantly." Record at 457. Finally, Mr. Adams stated that this was his first child abuse case, that he learned from it, and if he had to try it again, that he would have called the appellant to the stand. Record at 459.

7 In his testimony during the *DuBay* hearing, the appellant was arguably caught in a contradiction as to his knowledge of the substance of the testimony of a potential witness, Rebecca Moss, who allegedly would have established that Amanda was bruised when the appellant was away on leave. At first the appellant stated that he did not know the substance of her testimony until after trial. Record at 521. Then later he indicated he knew of the substance of her testimony before trial. Record at 543-44. The appellant's mother testified at the *DuBay* hearing that she discovered the significance of Mrs. Moss' testimony when she contacted her after the trial. Record at 493-94. In his pretrial affidavit, Mr. Adams stated that he interviewed Rebecca Moss.

Conclusions

[*28] Following the *DuBay* hearing in this case, the hearing officer entered essential findings. Appellate Exhibit XXXIV. They are set out as "Appendix I" to this opinion. They are supported by the evidence of record, and we adopt them as our own.

During the trial the appellant's trial defense counsel conducted discovery; successfully suppressed pre-trial statements; conducted extensive *voir dire* and successfully exercised challenges for cause of two potential court members; registered numerous objections to prosecution evidence; conducted extensive, focussed cross-examination, eliciting testimony in support of defense theories, as well as evidence of a prior inconsistent statement of Amanda's mother and a motive for her to fabricate; made motions for findings of not guilty; actively participated in the formulation of the military judge's instructions; successfully objected to features of trial counsel's summation; and vigorously argued for acquittal, suggesting the absence of eye witnesses, as well as the defense theory that Amanda's injuries were inflicted by her mother and/or by the method of Amanda's delivery at birth.

Mr. Adams was arguably inconsiderate, over confident, and [*29] perhaps arrogant, but considering the totality of the circumstances, we find the appellant has failed to carry his burden to demonstrate that Mr. Adams engaged in inadequate consultation, investigation, discovery, preparation, or attention; that Mr. Adams' conduct was seriously deficient; or, that his level of advocacy fell measurably below the performance ordinarily expected of fallible lawyers. Trial defense counsel's strategy and tactics were not unreasonable or unworkable. Accordingly, we will not substitute our view with the benefit of hindsight.

The previous decision of this court is reaffirmed.

R.M. MOLLISON

Judge CLARK and Judge DeCICCO concur.

E.D. CLARK

WILLIAM A. DeCICCO

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES, Appellee	SUPPLEMENTAL BRIEF AND ASSIGNMENTS OF ERROR Case No. 201300137
Francis L. CAPTAIN, Sergeant (E-5) United States Marine Corps, Appellant	Tried at Camp Foster, Okinawa, Japan on 17 October 2012 and 11 January 2013 before a General Court-Martial convened by Commanding General, 3d Marine Logistics Group, Camp Kinser, Okinawa

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Issues Presented

I.

AN ACCUSED HAS A CONSTITUTIONAL RIGHT TO AN IMPARTIAL JUDGE AT ALL STAGES OF A PROCEEDING. HERE, THE MILITARY JUDGE WHO CONDUCTED THE *DUBAY* HEARING WAS THE SAME MILITARY JUDGE WHO PRESIDED OVER THE TRIAL. DESPITE DISAVOWING ANY PERSONAL RECOLLECTION OF THE CASE, THE MILITARY JUDGE ADDED EXTRAJUDICIAL FACTS TO THE RECORD FOR THIS COURT'S CONSIDERATION ON THE FACTS AT ISSUE. WAS SGT CAPTAIN DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO AN IMPARTIAL JUDGE?

II.

DID TRIAL DEFENSE COUNSEL PROVIDE INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OFFER EVIDENCE IN EXTENUATION OR MITIGATION?

III.

DID TRIAL DEFENSE COUNSEL PROVIDE INEFFECTIVE ASSISTANCE OF COUNSEL BY CONCEDING THE APPROPRIATENESS OF A DISHONORABLE DISCHARGE WITHOUT EVIDENCE OF HIS CLIENT'S CONSENT?

Statement of Statutory Jurisdiction

Sergeant (Sgt) Francis Captain, United States Marine Corps (USMC), received an approved court-martial sentence that included a punitive discharge. Accordingly, his case falls within this Court's Article 66(b)(1), Uniform Code of Military Justice (UCMJ) jurisdiction. 10 U.S.C. § 866(b)(1) (2012).

Statement of the Case

A general court-martial, composed of a military judge alone, tried Sgt Captain on 17 October 2012 and 11 January 2013. Consistent with his pleas, the military judge found Sgt Captain guilty of one specification of abusive sexual contact in violation of Article 120, UCMJ, 10 U.S.C. § 920. The military judge sentenced Sgt Captain to be confined for sixty-six months, to be reduced to pay-grade E-1, to total forfeiture of pay and allowances, a fine of 50,000 dollars, and to be discharged from the service with a dishonorable discharge. (*DuBay* R. at 79.)

On 29 March 2013, the convening authority disapproved the 50,000 dollar fine and approved the remaining sentence as adjudged. (General Court-Martial Order No 01-12, Mar. 29, 2013.) Pursuant to the pretrial agreement, the convening

authority suspended confinement in excess of four years for the remainder of Sgt Captain's confinement plus six months and, with the exception of the discharge, ordered the remainder of the sentence executed. (*Id.*)

During the pendency of the appeal, Sgt Captain, through previous detailed appellate counsel, submitted a declaration for this Court's consideration which alleged his trial defense counsel, Captain (Capt) Mills, USMC, failed to contact witnesses to testify on his behalf during sentencing and asked for a dishonorable discharge without his permission. (Appellate Ex. XVI.) Based on Sgt Captain's declaration, this Court ordered a hearing pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967). (Appellate Ex. VI, at 16-18.)

From 5-6 December 2012, a *DuBay* hearing was conducted in this case. The hearing resulted in findings of fact, conclusions of law, and appellate exhibits that this Court attached to the record. (*United States v. Captain*, *DuBay* Hearing Findings of Fact and Conclusions of law of 18 Mar 2014, hereinafter "*DuBay* Ruling.")

On 3 April 2014, this Court directed Sgt Captain to file a supplemental pleading or to inform the Court of his intention not to file a supplement. (Memorandum for the U.S. Navy-Marine Corps Court of Criminal Appeals, to Directors of Appellate Defense and Appellate Government, subject: GENERAL COURT-MARTIAL

CASE OF SERGEANT FRANCIS L. CAPTAIN, USMC No. 201300137, Ser 51/0012 (3 Apr 2014).) This supplemental brief is in response to this Court's 3 April 2014 memorandum.

Statement of Facts

Sgt Captain adopts the statement of facts from his 8 July 2013 brief and adds the following facts. Sgt Captain gave a list of prospective character witnesses to assigned trial defense counsel, Capt Mills. (*DuBay* R. at 25-26.) Sgt Captain specifically included the names of Gunnery Sergeant (GySgt) Weatherly, Staff Sergeant (SSgt) Jerdon, and SSgt Harms. (*DuBay* R. at 33.) Sgt Captain also informed Capt Mills he could provide more names of character witnesses if requested. Capt Mills recalls only personally speaking with GySgt Weathery, who had positive things to say about Sgt Captain. (*DuBay* R. at 93-94.) GySgt Weatherly only had one brief phone call with Capt Mills, but would have said that he was performing at an exceptional level. (*DuBay* R. at 177-82.) Capt Mills delegated contacting the other witnesses to his clerk, Sgt Gentle. (*DuBay* R. at 83.) Sgt Gentle contacted at least one witness who had positive things to say about Sgt Captain. (*DuBay* R. at 94-95.) SSgt Jerdon would have given Sgt Captain a positive endorsement, but neither Capt Mills nor Sgt Gentle contacted him. (*DuBay* R. at 184.) SSgt Harms would have described Sgt Captain as a "good sergeant" but no one on the defense team contacted him prior to

trial about being a character witness. (*DuBay* R. at 192-97.) First Lieutenant Hernandez Brito was similarly not contacted by the defense team prior to trial and would have testified positively. (*DuBay* R. at 199-200.)

On the date of trial, Sgt Captain asked Capt Mills about the absence of sentencing witnesses and Capt Mills told him they were not necessary for his case. (*DuBay* R. at 65.) Capt Mills claimed the sentencing witnesses were not called because he believed they could be cross-examined about uncharged misconduct. (*DuBay* R. at 133.) Capt Mills expressed this strategy to Sgt Captain on the day of trial. (*DuBay* R. at 146.)

Capt Mills told Sgt Captain he would ask for a sentence of a couple of years but never mentioned a punitive discharge. (*DuBay* R. at 70-71.) Capt Mills claimed Sgt Captain agreed to a strategy of asking for a punitive discharge in order to limit his confinement exposure, but this act was not documented nor was there a colloquy between the court and Sgt Captain at the time of trial. (*DuBay* R. at 131-32.)

The military judge for the *DuBay* hearing was the same military judge who presided over the original court-martial. (*DuBay* R. at 8-9.) In the beginning of the *DuBay*, the military judge told Sgt Captain "I have very little recollection of the case other than your face, Sergeant. So other than that, I have no recollection whatsoever of you or the case." (*DuBay* R. at

9.) On the basis of that representation, Sgt Captain did not challenge the military judge. However, in the military judge's finding of facts and conclusions of law he stated:

> However, as I was the trial judge in this case, I am in the unique position to advise the appellate court that I took note of the appellant's combat history both during arraignment and prior to my announcement of sentence. The appellant's combat experience played a major role in my formulation of an appropriate sentence in this case.

(*DuBay* Ruling, 13.)

Summary of Arguments

The military judge abandoned his role as independent arbiter when he became a witness at the *DuBay* hearing by inserting personally known facts. Such a conflict requires that this Court order a new *DuBay* hearing. Moreover, due to his conflict, his conclusions of law and findings of fact should be disregarded as tainted and clearly erroneous. First, the military judge erroneously found Capt Mills had a reasonable fear about questions in cross-examination relating to uncharged misconduct. Second, his finding that Capt Mills and Sgt Captain had an agreement to argue for a dishonorable discharge in sentencing was clearly erroneous.

Argument

I.

AN ACCUSED HAS A CONSTITUTIONAL RIGHT TO AN IMPARTIAL JUDGE AT ALL STAGES OF A PROCEEDING. HERE, THE MILITARY JUDGE WHO CONDUCTED THE *DUBAY* HEARING WAS THE SAME MILITARY JUDGE WHO PRESIDED OVER THE TRIAL. DESPITE DISAVOWING ANY PERSONAL RECOLLECTION OF THE CASE, THE MILITARY JUDGE ADDED EXTRAJUDICIAL FACTS TO THE RECORD FOR THIS COURT'S CONSIDERATION ON THE FACTS AT ISSUE. SGT CAPTAIN WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO AN IMPARTIAL JUDGE.

Standard of Review

Where an appellant could not have reasonably raised an issue at trial this Court conducts a *de novo* review. *See United States v. Rose*, 71 M.J. 138, 143 (C.A.A.F. 2012). Here, Sgt Captain was not aware of the military judge's bias until the *DuBay* Hearing had concluded.

Discussion

"An accused has a constitutional right to an impartial judge." *United States v. Wright*, 52 M.J. 136, 140 (C.A.A.F. 1999). If an accused is not afforded his right to an impartial judge, the error is structural requiring reversal. *See United States v. Reynolds*, 49 M.J. 260, 262 (C.A.A.F. 1998). The guarantee of an impartial judge extends to the post-trial phase.[1] 28 U.S.C. § 455(d)(1); *United States v. Andreozzi*, 60 M.J. 727,

[1] The military rule for disqualification is based on the federal counterpart at 28 U.S.C. § 455. *United States v. Butcher,* 56 M.J. 87, 90 (C.A.A.F. 2001), *see also* R.C.M. 902, Discussion.

729 n. 5 (A. Ct. Crim. App. 2004). A judge is disqualified if he has personal knowledge of disputed evidentiary facts. Rule for Courts-Martial (R.C.M.) 902. This conflict cannot be waived. 28 U.S.C. § 455(e).

In this case, the military judge who conducted the *DuBay* hearing was the same military judge who presided over the original court-martial and conflated facts from both proceedings. (*DuBay* R. at 8-9.) In the beginning of the *DuBay*, the military judge told Sgt Captain "I have very little recollection of the case other than your face, Sergeant. So other than that, I have no recollection whatsoever of you or the case." (*DuBay* R. at 9.) On the basis of that representation, Sgt Captain did not challenge the military judge. However, in the military judge's finding of facts and conclusions of law, he became a witness when he added this fact for the appellate court's consideration:

> However, as I was the trial judge in this case, I am in the unique position to advise the appellate court that I took note of the appellant's combat history both during arraignment and prior to my announcement of sentence. The appellant's combat experience played a major role in my formulation of an appropriate sentence in this case.

(*DuBay* Ruling, 13.)

Here, the military judge improperly inserted facts for this Court's consideration. Specifically, despite the trial defense counsel's anemic performance in presenting good military

character evidence, that evidence played a major role in the military judge's deliberations. By adding the extrajudicial fact of his deliberative process as a matter for this Court to consider, the military judge converted himself to a witness. Such an act is an absolute bar to his continued service as a judge in the same matter. 28 U.S.C. § 455; R.C.M. 902. Further, this act conflicts with the military judge's proffer to Sgt Captain that he was presiding without conflicting knowledge of the case. Had such information been known to Sgt Captain at the beginning of the hearing, certainly a motion to recuse the military judge would have followed.

The military judge, as the fact-finder, had unique personal knowledge into his sentencing considerations. This was knowledge of disputed evidentiary facts and should operate to conflict him out. He exacerbated the error by publishing that knowledge and incorporating it into his findings. The military judge converted himself into a witness and abandoned his role as an impartial arbiter. Moreover, the trial defense counsel was deprived of his ability to cross-examine this important "witness." In this instance the military judge slipped a disputed fact into evidence without affording Sgt Captain the right of confrontation.

Conclusion

In light of the military judge's action in this case, the appropriate remedy to ensure justice is to order a new *DuBay* hearing with an impartial military judge. Doing so will allow the former military judge to act in his appropriate role: a witness.

II.

TRIAL DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OFFER EVIDENCE IN EXTENUATION OR MITIGATION.

Standard of Review

To establish ineffective assistance of counsel, "an appellant must demonstrate both (1) his counsel's performance was deficient, and (2) this deficiency resulted in prejudice." *United States v. Green*, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Claims of ineffective assistance are reviewed *de novo*. *United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002).

Discussion

Sgt Captain relies on the statement of law set forth in his prior brief and offers further analysis based upon the additional *DuBay* record. In this case, the military judge erred when he found Sgt Captain's sentencing witnesses had "anemic" value in conclusion 3. (*DuBay* Ruling, 13.) He also erred when he found in conclusion 5 that Capt Mills' choice not to advance

positive aspects of Sgt Captain's career and bearing as a part of the sentencing argument was a reasonable tactical choice. (*DuBay* Ruling, 13-14.)

A military judge's conclusions of law are reviewed *de novo*. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004) (citations omitted). The military judge's legal conclusion that Sgt Captain did not suffer prejudice because his sentencing witnesses had anemic value is clearly incorrect. GySgt Weatherly would have said Sgt Captain was performing at an exceptional level. (*DuBay* R. at 177-82.) SSgt Jerdon too would have given Sgt Captain a positive endorsement. (*DuBay* R. at 184.) SSgt Harms would have described Sgt Captain as a "good sergeant." (*DuBay* R. at 192-97.) While these witnesses did not have direct knowledge about Sgt Captain's extensive overseas service, they were able to speak to his military character and ability to excel despite adversity, but these positive factors were not before the military judge at sentencing. Furthermore, Sgt Captain communicated to Capt Mills that he had additional witnesses if Capt Mills needed them. Capt Mills, as his attorney, should have accepted Sgt Captain's offer to produce witnesses that could have testified to his extensive combat experience.

Capt Mills' decision not to pursue both this positive, available, character evidence and the evidence of Sgt Captain's

extensive combat experience was not a reasonable tactical decision. Attorneys cannot escape their duty to represent a client by merely saying they made a tactical decision, rather that decision must be also be reasonable under all the circumstances. *United States v. Matthews*, 16 M.J. 354, 383-64 (C.M.A. 1983).

Capt Mills' decision was not reasonable. First, it appears Capt Mills first discussed the lack of witnesses with Sgt Captain the day of trial, which suggests it was not a well-planned decision, but rather one of convenience. (*DuBay* R. at 65.) Second, Capt Mills' stated reason for not calling the sentencing witnesses--because he believed they could be "cross-examined" about uncharged misconduct--was not objectively reasonable under the circumstances. (*DuBay* R. at 133.) Capt Mills did not question any of the witnesses about the uncharged misconduct to see if they even had any knowledge of it. Furthermore, their testimony at the *DuBay* hearing revealed they did not have knowledge of the dismissed allegations. The most that the prosecution could have done in cross-examination would have been to ask the "did you know" style questions under Military Rule of Evidence (M.R.E.) 608, to which the prospective witnesses would have answered they did not. Moreover, the benefit of the good military character testimony would have far

outweighed the minor points on cross that Capt Mills was concerned about.

Lastly, looking at the record of the court-martial, it did not appear the Government was ready to call any witnesses in rebuttal. Capt Mills' strategy was unreasonable give the objective facts. Accordingly, his representation fell below professional norms. Furthermore, Sgt Captain suffered prejudice because there was no positive character evidence presented on his behalf, which resulted in a severe sentence given the facts.

Request for Relief

Appellant requests that this Court set aside the sentence and order a rehearing to allow Sgt Captain to present a full and complete sentencing case, emphasizing his good military service and additional extenuation denied him by his counsel's ineffective performance.

III.

TRIAL DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY CONCEDING THE APPROPRIATENESS OF A DISHONORABLE DISCHARGE WITHOUT EVIDENCE OF HIS CLIENT'S CONSENT.

Standard of Review

To establish ineffective assistance of counsel, "an appellant must demonstrate both (1) his counsel's performance was deficient, and (2) this deficiency resulted in prejudice." *Green*, 68 M.J. at 361 (citing *Strickland*, 466 U.S. at 687).

Claims of ineffective assistance are reviewed *de novo*. *Sales*, 56 M.J. at 258.

Discussion

Sgt Captain relies on the statement of law set forth in his prior brief. Additionally, Sgt Captain further contends the military judge's findings were clearly erroneous where he credited Capt Mills' account of obtaining Sgt Captain's consent to asking for a dishonorable discharge. Sgt Captain disputes this account. (*Dubay* R. at 70-71.) Such a major strategic decision should be documented by competent counsel. It was not. (*DuBay* R. at 131-32.) Nor did the military judge engage in a colloquy with Sgt Captain during sentencing proceedings. (R. at 78.) There is simply no proof there was ever a meeting of the minds on this critical issue.

Additionally, the military judge who made this credibility determination has an underlying conflicting self-interest in this matter. His self-serving finding relieves him of his culpability for failing to engage Sgt Captain in a colloquy regarding his wishes for his attorney to argue for a punitive discharge. Due to the lack of documentation and the military judge's own self-interest, the finding of fact that Sgt Captain agreed to Capt Mills arguing for a dishonorable discharge is clearly erroneous.

In *United States v. Quick*, the Court of Appeals for the Armed Forces held counsel perform deficiently within the meaning of *Strickland* when they improperly concede the appropriateness of a discharge if the record shows that this concession is against the wishes of the client. 59 M.J. 383, 386 (C.A.A.F. 2004) (citing *United States v. Dresen*, 40 M.J. 462, 465 (C.M.A. 1994)). Here, Capt Mills was ineffective for arguing for a punitive discharge against Sgt Captain's wishes.

Moreover, Sgt Captain suffered prejudice in the face of this error. It is clear Sgt Captain suffers from post-traumatic stress disorder (PTSD) and a dishonorable discharge bars him from receiving veteran's affairs benefits. 38 C.F.R. 3.12(c); Veteran's Benefits Administration Manual (M21-1MR), Part III, subpart v, Chapter 1, section B (23 February 2012)(available at http://www.benefits.va.gov/WARMS/M21_1MR3.asp, last visited 5 May 2014)). Captain Mills never testified he informed Sgt Captain that a dishonorable discharge would completely preclude Sgt Captain from receiving treatment for his PTSD. This was ineffective assistance. Additionally, Sgt Captain suffered prejudice because there is a reasonable probability had Capt Mills not affirmatively argued for the appropriateness of a dishonorable discharge, the military judge would have awarded a lesser-discharge in light of Sgt Captain's multiple deployments.

Request for Relief

Sgt Captain requests that this Court set aside the sentence in this case and order a sentence rehearing.

CARRIE E. THEIS
Lieutenant, JAG Corps, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE
BLDG 58, Suite 100
Washington Navy Yard, DC 20374
P:(202) 685-7390
F:(202) 685-7426
carrie.theis@navy.mil

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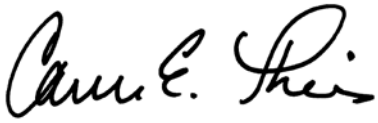

CARRIE E. THEIS
Lieutenant, JAG Corps, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE
BLDG 58, Suite 100
Washington Navy Yard, DC 20374
P:(202) 685-7390
F:(202) 685-7426
carrie.theis@navy.mil

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
	)	Case No. 201400074
v.	)	
Kevin C. CORCORAN, Hospitalman (E-3) U.S. Navy Appellant	)	Tried at Region Legal Service Office Southeast Detachment Mayport, Jacksonville, Florida on June 17, September 5, and October 21-23, 2013, by a General Court-Martial convened by the Commander, Navy Region Southeast, Jacksonville, Florida.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

CORY A. CARVER
Captain, USMC
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7396, fax (202) 685-7687

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Errors Assigned

I.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE RULED THAT THE DEFENSE COULD NOT ATTACK THE VOLUNTARINESS OF HN CORCORAN'S SECOND STATEMENT BY PRESENTING EVIDENCE ABOUT THE POLYGRAPH THAT PRECEDED THAT STATEMENT.

II.

WHETHER THE MILITARY JUDGE CREATED A PREJUDICIAL FATAL VARIANCE IN THE CHARGE WHEN HE CHANGED THE THEORY OF LIABILITY FOR ARTICLE 120(B) IN HIS SPECIAL FINDINGS.

IV.[1]

WHETHER HN CORCORAN LACKED NOTICE OF ONE OF THE ALTERNATIVE THEORIES OF LIABILITY FOR ARTICLE 120(B) ON WHICH THE MILITARY JUDGE PREDICATED HIS FINDINGS OF GUILT.

V.

WHETHER THE MILITARY JUDGE ERRED WHEN HE FORECLOSED THE DEFENSE FROM UNDERMINING B.S.'S CREDIBILITY THROUGH IMPEACHMENT.

VI.

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VII.

WHETHER THE MILITARY JUDGE ERRED WHEN HE RELIED ON PURPORTED WAYS OF THE WORLD AND HUMAN EXPERIENCE TO RECONCILE B.S.'S BLOOD

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[1] This brief mirrors the numbering in Appellant's brief which does not contain an Assignment of Error III in this section.

ALCOHOL CONTENT WITH THE TESTIMONY OF THE WITNESSES.

VIII.

WHETHER THE ELEMENT "INCAPABLE OF CONSENTING TO THE SEXUAL ACT DUE TO IMPAIRMENT BY ALCOHOL" IS UNCONSTITUTIONALLY VAGUE IN THIS PROSECUTION FOR A VIOLATION OF ARTICLE 120(B).

IX.

WHETHER THE TAINT OF APPARENT UNLAWFUL COMMAND INFLUENCE PERMEATED HN CORCORAN'S TRIAL BECAUSE THE MILITARY JUDGE FAILED TO PROVIDE ANY APPLICABLE REMEDIES AFTER FINDING THE PRESIDENT'S REMARKS CONSTITUTED APPARENT UNLAWFUL COMMAND INFLUENCE.

Statement of Statutory Jurisdiction

Appellant's approved sentence includes a dishonorable discharge and two years confinement. Accordingly, this Court has jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012).

Statement of the Case

A Military judge, sitting as a general court-martial, convicted Appellant, contrary to his pleas, of two specifications of sexual assault, in violation of Article 120(b), UCMJ, 10 U.S.C. § 920 (2012). The Military Judge sentenced Appellant to two years confinement, total forfeitures of pay and allowances, reduction to pay-grade E-1, and a dishonorable discharge. The Convening Authority approved the sentence as

adjudged and, except for the dishonorable discharge, ordered the sentence executed.

Statement of Facts

A. Appellant's offenses.

On October 22, 2012, while stationed in Cuba, B.S. agreed to go to the beach with her roommate and three other Sailors, including Appellant. (R. 257-58.) The beach was ten to fifteen minutes from the barracks. (R. 595.) The group arrived at the beach at 1345 and stayed for about an hour-and-a-half to two hours. (R. 258-59, 538, 561, 583, 595.) Appellant brought vodka and orange juice to the beach. (R. 261, 582.)

While at the beach, B.S. drank four cups of vodka mixed with orange juice in a red Solo cup. (R. 261-62, 582, 597; Prosecution Ex. 2 at 1-2; Appellate Ex. XXXVII at 4.) Appellant mixed two of the drinks for B.S. (R. 261-62; Pros. Ex. 2 at 2; Appellate Ex. XXXVII at 4.) The drinks were strong. (R. 261-62.) B.S. did not feel the effects right away; however she had a buzz and recalled talking to people and looking for rocks. (R. 262; Appellate Ex. XXXVII at 4.) B.S.'s roommate realized that the group was getting too intoxicated to stay in the water, so she suggested they head back to the barracks. (R. 599.) When they left, B.S. "seemed Tipsy to [Appellant] but not drunk." (R. 562, 565; Pros. Ex. 2 at 2.) They got into the car and B.S.'s roommate drove them back to the barracks. (R. 563.)

They arrived at the barracks around 1550. (R. 599.) When they arrived, B.S. went to her barracks room by herself. (R. 542, 564, 599.) Appellant and the other two Sailors went to their rooms. (R. 542, 564.)

B.S. remembered being in her room, but she did not remember leaving the beach or arriving at the barracks. (R. 263.) She wanted to call her husband but was unable because she was too drunk. (R. 264-65.) She attempted to shower to clean the salt water out of her hair, but she had a hard time and did not recall if she was successful. (R. 264-65.) B.S. felt nauseous and laid down to sleep. (R. 265.)

After Appellant was at his barracks room for thirty to forty-five minutes, he left and went to B.S.'s room with the intent to "hook up". (R. 546; Pros. Ex. 2 at 2.)

In B.S.'s room, Appellant admitted to taking off all of his and [B.S.]'s clothes without her assistance. (Pros. Ex. 5 at 1.) Appellant "start[ed] to wonder if [B.S.] still is able or wants to have sex." (Pros. Ex. 5 at 1.) Appellant stated,

> I then placed my penis into [B.S.]'s vagina and began to have sex with her to see if she would respond to me. While I was doing this [B.S.] did not say anything. She did not tell me to stop and continued to lay there. I then rolled [B.S.] on top of me and continue[d] to have sex with her, [B.S.] did not resist me doing this but still did not participate in the sex. At this point [B.S.] was still not engaging in the sex which causing [*sic*] me to lose my erection.

(Pros. Ex. 5 at 1.)

In order to arouse himself and B.S., Appellant “rolled [B.S.] back on her back” and “started to give her oral sex for a couple minutes” to which B.S. did not respond. (Pros. Ex. 5 at 1; Pros. Ex. 2 at 2.) Appellant admits that B.S. did not ask him “to go down on her.” (Pros. Ex. 2 at 2.)

Appellant again inserted his penis into B.S.’s vagina; however “[a]fter seeing [B.S.] was unresponsive” Appellant “quit engaging in sex with her”. (Pros. Ex. 5 at 1.) Throughout, B.S. “never tried to push [Appellant] away but her hands just lay at her sides.” (Pros. Ex. 5 at 1.) B.S. just wanted it to stop, but couldn’t move. (R. 268.)

B.S. felt like what had happened was a dream, only remembered glimpses, and did not know specifically what Appellant had done. (R. 266-70.)

Later that evening, B.S. awoke when a neighbor knocked on her door. (R. 268.) B.S. found Appellant and asked him if something had happened, to which Appellant responded “yes” and “I’m sorry”. (R. 270; Pros. Ex. 2 at 2.) B.S. was upset and left. (R. 270.)

Next, B.S. called her mother and told her what happened. (R. 270-71.) Her mother told her to talk to someone about it. (R. 270-71.) B.S. told her roommate that she believed Appellant had taken advantage of her. (R. 608.) B.S.’s roommate then called Appellant to ask him what happened. (R. 602.) Appellant

initially lied and told her that nothing happened, but when confronted he admitted that he had sex with B.S. (R. 602.)

B.S. went to the hospital to undergo a sexual assault forensic exam. (R. 272.) However, after B.S.'s blood alcohol content came in at .09, B.S. had to wait until the next morning because she was too intoxicated. (R. 273.)

B. Expert testimony.

Based on B.S.'s blood alcohol content and the amount of time between the blood draw and B.S.'s last drink, expert witnesses determined that B.S.'s blood alcohol level at the time of the assault was between .21 and .25. (R. 455, 481, 502.)

Upon returning from the beach, B.S. entered the confusion state due to the alcohol levels increasing. (R. 499-500.) B.S. began experiencing dizziness. (R. 264.) She was unable to call her husband, became sedated, and ultimately fell asleep due to the alcohol. (R. 265, 499-500.)

Using Appellant's statement that describes the sexual assault on B.S., the expert witnesses testified that Appellant's description of B.S. at the time of the sexual acts placed her in the stupor state. (R. 455, 481, 500, 502-05.) In a stupor state, B.S. ultimately was unresponsive, unable to respond to external stimuli such as penile/vaginal or oral/vaginal contact, and moved toward unconsciousness. (R. 480, 500, 502-03, 505; Pros. Ex. 5 at 1.)

C. Appellant's statements and polygraph tests.

On October 30, 2012, after being advised of his Article 31(b) rights, Appellant provided his first of two statements to the Naval Criminal Investigative Service (NCIS). (Pros. Ex. 1-2.) Appellant admitted to the sexual acts and that he went to B.S.'s room to "hook up". (Pros. Ex. 2 at 2.)

On January 11, 2013, Appellant took two polygraph tests. (R. 20.) Prior to the first test, NCIS SA Wright again provided Appellant with a Article 31(b) Rights Advisement. (R. 20, 399-400; Pros Ex. 4.) Appellant initialed each of his rights and signed to waive each of his rights. (R. 20-21; Pros. Ex. 4.)

Appellant then signed a polygraph waiver, wherein he gave his permission to undergo the polygraph. (R. 22.) The polygraph waiver is similar to the Rights Advisement. (R. 22, 50-51.) Appellant took the first polygraph test resulting in "no opinion". (R. 26.) Appellant took a second polygraph test resulting in "deception was indicated". (R. 27.)

SA Wright informed Appellant of the results of the second polygraph and began discussing the events of the night with B.S. (R. 28.) Appellant provided a written statement, had the opportunity to make any changes, initialed before and after each paragraph, and swore that it was true by signing at the bottom. (R. 29-30; 408; Pros. Ex. 5 at 1-2.)

Appellant admitted that: (1) B.S. “was unresponsive and did not participate in the sex”; (2) Appellant took off all their clothes without B.S.’s assistance; (3) B.S. did not say anything; (4) B.S. did “not respond to the oral sex”; and (5) throughout the sexual acts, B.S.’s “hands just lay at her sides.” (Pros. Ex. 5 at 1.) During the sexual acts, Appellant “wonder[ed] if [B.S.] still is able or wants to have sex.” (Pros. Ex. 5 at 1.)

Summary of Argument

I.

The Military Judge did not abuse his discretion by excluding polygraph evidence pursuant to Mil. R. Evid. 707 because the *per se* rule did not infringe upon Appellant’s Constitutional interest. Moreover, Appellant never attempted to introduce the polygraph evidence to attack the credibility of Appellant’s second statement. Therefore, there was no error and no prejudice to Appellant.

II., IV.

The Military Judge did not create a variance because his special findings properly stated that he found B.S. incapable of consenting due to impairment by alcohol. The Military Judge referred to “asleep” and “unconscious” in the context of B.S.’s impairment due to alcohol and not as a separate theory of liability. Therefore, Appellant had proper notice.

V.

The Military Judge did not abuse his discretion when he prevented Appellant from eliciting impeachment evidence because Appellant failed to properly follow Mil. R. Evid. 613 because he did not elicit the prior inconsistent statement and did not provide B.S. an opportunity to explain or deny it.

VI.

Appellant's conviction is legally and factually sufficient because Appellant admits that *he* gave "oral sex" to *B.S.*, that she did not ask Appellant to go "down on [her]", and on describing the oral sex, Appellant stated that B.S. was "moaning". Each element is met beyond a reasonable doubt.

VII.

The Military Judge properly relied on the Record of Trial, his common sense, his knowledge of human nature, and the ways of the world to make his findings, and reconcile B.S.'s BAC to conclude that she was incapable of consenting at the time of the sexual acts due to impairment by alcohol. The Military Judge did not solely rely on human experience as Appellant contends, but relied on the entire Record of Trial, which included Appellant's admissions.

VIII.

Article 120(b) is not unconstitutionally vague as applied to Appellant. The statutory language, military and federal case

law, military customs, Appellant's experience and training, and his knowledge that B.S. had consumed multiple alcoholic beverages and was unresponsive and did not participate in the sexual acts, all establish that Appellant had fair notice that his conduct was proscribed. Further, no military or federal case has found the language "incapable of consenting due to impairment by alcohol" unconstitutionally void for vagueness.

IX.

There was no apparent unlawful command influence (UCI) based on the President's statement. Appellant fails to provide "some evidence" because the statement does not rise to apparent UCI and there is no evidence of a nexus between the statement and Appellant's trial, the trier of fact was Military Judge alone, and no witness was tainted by the statement.

Argument

I.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION BECAUSE MIL. R. EVID. 707 PROHIBITS POLYGRAPH EVIDENCE, THERE WAS NO ATTEMPT BY APPELLANT TO USE THE EVIDENCE TO ATTACK THE CREDIBILITY OF THE CONFESSION, AND THE EXCLUSION DID NOT INFRINGE UPON A "WEIGHTY INTEREST" OF APPELLANT.

A. The standard of review is abuse of discretion.

This Court reviews the Military Judge's rulings on admissibility of evidence for an abuse of discretion. *United States v. Holt*, 58 M.J. 227, 230-31 (C.A.A.F. 2003). A military

judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995).

B. Polygraph examination evidence is inadmissible.

"[T]he circumstances surrounding the taking of a confession can be highly relevant to two separate inquiries, one legal and one factual"; one bearing on its voluntariness and the other on its credibility. *Crane v. Kentucky*, 476 U.S. 683, 688 (1986).

Although evidence of voluntariness is relevant at trial, an appellant's "right to present [that] evidence is not unlimited, but rather is subject to reasonable restrictions." *United States v. Scheffer*, 523 U.S. 303, 308 (1998). As a result, "rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials" as long as they are not "arbitrary or disproportionate to the purposes they are designed to serve." *Id*. (quotation and citation omitted). "[E]xclusion of evidence [is] unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused." *Id*.

"The Supreme Court upheld the constitutionality of the *per se* exclusion of polygraph evidence under Mil. R. Evid. 707 when the rule was challenged as an abridgement of an accused's right to present a defense." *United States v. Clark*, 53 M.J. 280

(C.A.A.F. 2000)(citing *Scheffer*, 523 U.S. 303). Mil. R. Evid. 707(a) states:

> Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.

The Supreme Court held that Rule 707 is neither arbitrary nor disproportionate because it does not "implicate a sufficiently weighty interest of the defendant" and it serves several legitimate interests: ensuring the reliability of evidence; preserving the role of trier of fact in determining credibility; and avoiding litigation of collateral matters at trial. *Scheffer*, 523 U.S. at 309.

The Military Judge here did not abuse his discretion in excluding the polygraph examination evidence because under these circumstances there was no infringement upon a weighty interest of Appellant. *See Scheffer*, 528 U.S. 308. Appellant mistakenly asserts that his case is similar to *United States v. Wheeler*, wherein the appellant testified at trial and was denied the opportunity to support his theory by using polygraph evidence to explain that his confession was not credible. 66 M.J. 590 (N-M. Ct. Crim. App. 2008).

In *Wheeler*, the only direct evidence of the appellant's guilt was his confession to the misconduct following four polygraph examinations. *Id*. at 591-92. Prior to trial, the

appellant testified at an Article 39a motions hearing that NCIS "led him to believe that he would be convicted based upon evidence of the failed polygraph" and that if "he confessed to the crimes" then "the results of the polygraph test would not be given to his command". *Id*. at 591. The NCIS agent confronted the appellant after the failed polygraph and "accused [him] of lying." *Id*. Appellant moved to allow evidence of his polygraph examination to show circumstances surrounding his alleged false confession, but was denied. *Id*. at 595.

The appellant testified at trial in that case, but was prevented from presenting factual matters to explain the "*res gestae* of his subsequent confession." *Id*. at 594.

Noting that the Government's only evidence of misconduct was the appellant's confession, this Court held that the military judge's exclusion of polygraph evidence was error that prejudiced the appellant because it infringed on the appellant's "ability to testify in his own defense" regarding the circumstances surrounding his alleged false confession. *Id*. at 594-95 (quotation and citation omitted).

This case is distinguishable from *Wheeler* in five significant ways. First, Appellant's theory at trial here did not involve attacking the credibility of the second statement. Appellant's theory was to attack the *definitions of the words* used in the second statement. (R. 244-48, 628-31.)

In her opening statement, Trial Defense Counsel argued that the second statement is “devoid of context. . . and definitions” and referred to the three problematic phrases in Appellant’s second statement (e.g., “did not participate”, “not engaging”, and “unresponsive”) as “generic language”. (R. 244-45.) Trial Defense Counsel defined all three words using a dictionary, argued that there were “many different meanings depending on the context, depending on the definition” and provided examples in support of her argument. (R. 245-48.) Throughout her opening statement, Trial Defense Counsel used the word “context” five times, “definitions” four times, and referred to the dictionary and interpretations five times. (R. 244-48.) At no time did she state that the second statement was invalid, coerced, or not credible. In fact, she failed to provide any details surrounding the taking of the statement.

In her closing argument, Trial Defense Counsel maintained the same theory of the case (e.g., “context” and “definitions”). (R. 628-31.) The context and definitions provided by Trial Defense Counsel led her to the conclusion that this was “consensual”, but “clumsy” and “awkward” sex with a “lazy partner that did not participate.” (R. 629-631.)

Second, unlike *Wheeler*, there was no evidence of a nexus between the polygraph examination and Appellant’s second statement. There was no evidence presented at the Article 39a

motions hearing or at trial that NCIS SA Wright used the polygraph examination inappropriately. SA Wright did not threaten to use the polygraph results at trial nor did he promise that the polygraph results would not be turned over to Appellant's command if he confessed. (R. 27-28, 422.)

Third, unlike *Wheeler*, here the United States' case was strong because of the ample and uncontroverted evidence to support Appellant's conviction. In addition to Appellant's second statement that followed his polygraph examination, there was the uncontroverted testimony of B.S., B.S.'s roommate, the two experts, the admissions in Appellant's first statement, and B.S.'s blood alcohol content at the hospital, all of which supported Appellant's conviction.

Fourth, unlike *Wheeler*, here there was no infringement upon a weighty interest of Appellant. Appellant here did not testify or even attempt to testify regarding the circumstances surrounding his confession. Even at the Article 39a motions hearing, Appellant did not testify or contradict any of the evidence presented by SA Wright. And he was not prevented from providing his defense of "context" and "definitions".

Fifth, Appellant never attempted to admit polygraph examination evidence to attack the credibility of Appellant's second statement. Appellant mischaracterizes the ruling by the

Military Judge and the circumstances surrounding the exclusion of the polygraph examination evidence under Mil. R. Evid. 707.

At trial, Appellant initially attempted to introduce evidence that Appellant was asked to take a polygraph by SA Petrie after his first statement. (R. 377.) Trial Defense Counsel stated that he wanted the Military Judge to have "some sort of context to this request for a polygraph" since the video of the first interview mentioned the polygraph, "to inform the court as to why there was a subsequent statement." (R. 377-78.) The evidence was not being offered to allege coercive circumstances. In fact, Trial Defense Counsel *never* attempted to admit the polygraph evidence for the purpose of attacking the credibility of Appellant's second statement.

Similar to *Scheffer*, the exclusion of polygraph evidence under Mil. R. Evid. 707, under these circumstances, was appropriate and did not infringe upon a weighty interest of Appellant. *See Scheffer*, 523 U.S. at 317.

C. Even assuming there was error, it was harmless under these circumstances.

The test for harmless error is "whether there is a reasonable probability that the evidence complained of might have contributed to the conviction." *Chapman v. California*, 386 U.S. 18, 23 (1967)(citation omitted).

Here, the error in not admitting the polygraph examination evidence is harmless beyond a reasonable doubt for the following reasons: (1) Appellant failed to show or elicit any evidence of coercion; (2) Appellant's theory of the case did not involve attacking the credibility of the statement, but rather focused on "context" and "definitions", *see supra* at 13-14; (3) the United States' case was strong, *see supra* at 15, and relied on other evidence to support Appellant's conviction; and (4) as this was Military Judge alone, the Judge had already heard and ruled on the voluntariness of Appellant's second statement, and knew the circumstances surrounding the polygraph examination.

Therefore, this Court should conclude that if evidence of the polygraph examination was erroneously excluded that exclusion would not have had any impact on the outcome and was therefore harmless.

II., IV.

THE MILITARY JUDGE DID NOT CREATE A VARIANCE BECAUSE HE PROPERLY FOUND B.S. INCAPABLE OF CONSENTING DUE TO IMPAIRMENT BY ALCOHOL WHICH WAS STATED MULTIPLE TIMES IN HIS SPECIAL FINDINGS. THEREFORE, APPELLANT WAS ON NOTICE OF THE THEORY OF LIABILITY.

A. <u>The standard of review is plain error</u>.

As there was no objection at trial, the objection is waived and any material variance claim will be reviewed only for plain error. *United States v. Finch*, 64 M.J. 118, 121 (C.A.A.F.

2006). The three-part test for plain error is: "(1) that there was an error; (2) that the error was plain, that is, clear or, equivalently obvious; and (3) the plain error affected substantial rights." *Id.* This Court reviews whether Appellant received notice of the offenses *de novo*. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006).

B. No variance exists in the Military Judge's findings.

Here, Appellant was charged and subsequently convicted of two specifications of engaging in sexual acts with B.S. when she was incapable of consenting due to impairment by alcohol. (Charge Sheet.)

The Military Judge properly found that B.S. was incapable of consenting to the sexual acts due to impairment by alcohol and reiterated his findings four times, all of which Appellant ignores in his brief. (Appellate Ex. XXXVII.) First, the Military Judge stated that he found Appellant guilty beyond a reasonable doubt of each element of the offenses, including that B.S. "was incapable of consenting to the sexual act due to impairment by alcohol". (Appellate Ex. XXXVII at 2.)

Second, the Military Judge again stated, "I am also satisfied beyond a reasonable doubt that [B.S.] was incapable of consenting due to impairment by alcohol and that condition was known or reasonably should have been known by the accused." (Appellate Ex. XXXVII at 2.)

Third, the Military Judge provided specific findings of fact regarding B.S.'s consumption of alcohol, the events of the day at the beach, the events at B.S.'s barracks room, Appellant's observations of B.S. as unresponsive, the sexual assault, and B.S.'s blood alcohol content at the hospital and during the time of the sexual assault. (Appellate Ex. XXXVII at 3-7.) The Military Judge then stated,

> Based on the testimony of [B.S.] and [Appellant]'s statements, and supported by the expert testimony . . . I am satisfied beyond a reasonable doubt that [B.S.] transitioned from a fragmentary black-out phase (where she may have appeared somewhat coherent) into a passed-out phase during the initial intercourse with [Appellant] and prior to his inserting his tongue into her vagina and his final insertion of his penis into her vagina.

(Appellate Ex. XXXVII at 7.) This finding is the central holding, refers to B.S.'s alcohol consumption and how it affected her, and satisfies the element of the offenses.

Finally, the Military Judge ultimately concluded "beyond a reasonable doubt, that [B.S.] was incapable of consenting due to impairment by alcohol when [Appellant] inserted his tongue into her vagina and then inserted his penis into her vagina." (Appellate Ex. XXXVII at 8.) All these findings and conclusions are spread throughout the Military Judge's special findings and reinforced by the Military Judge's other findings of fact.

Appellant mistakenly relies on the Military Judge's statement regarding B.S. being "asleep or unconscious" as

evidence of a variance. However, Appellant misconstrues and fails to provide context to the statement.

The statement specifically addressed and rejected Appellant's "mistake of fact" argument. The Military Judge addressed each of the subsections in the "consent" definition in MCM, at IV-69-70, ¶ 45.a.(g)(8). He stated,

> While there was some evidence presented regarding mistake of fact as to whether [B.S.] consented to the sexual acts, the prosecution has proven the elements of the offense beyond a reasonable doubt. Neither "flirting" nor [B.S.]'s manner of dress may constitute consent. A sleeping or unconscious person cannot consent. I find beyond a reasonable doubt that [B.S.] was either asleep or unconscious at the time [Appellant] inserted his tongue and then his penis into her vagina. By his admission alone, it is clear that [Appellant] knew that [B.S.] was incapable of consenting by the point where he inserted his tongue in her vagina (if not sooner). Even if he held the belief that she was consenting, such a belief was not reasonable under all the facts and circumstances.

(Appellate Ex. XXXVII at 7.) The Military Judge simply provided reasons why he rejected the defense of mistake of fact.

The statement is also sandwiched between two statements wherein the Military Judge specifically states that [B.S.] had moved into the passed-out phase, making her incapable of consenting due to impairment by alcohol, and the Military Judge's final statement, finding "that [B.S.] was incapable of consenting due to impairment by alcohol". (Appellate Ex. XXXVII at 7-8.) The Military Judge in referring to B.S. as asleep or

unconscious was specifically referring to the effects of alcohol and not a differing theory of liability.

Further, during Appellant's trial, the expert witnesses testified about the effects of alcohol and how a person becomes sedated which may lead to sleep or unconsciousness due to alcohol. (R. 480, 499-505.) In that context and referring to B.S.'s blood alcohol content, the Military Judge stated, "[t]his is well within the generally accepted range where a non-chronic drinker could experience black-out – especially a fragmentary black-out or actually pass-out, or fall asleep." (Appellate Ex. XXXVII at 7.) The Military Judge's rejection of the defense of mistake of fact was proper because he was referring to B.S. as asleep or unconscious due to impairment by alcohol, making her incapable of consenting.

There was no variance because the statement, taken in the proper context, and the multiple findings by the Military Judge stating that B.S. was incapable of consenting to the sexual acts due to impairment by alcohol, establish that the theory of liability did not change.

C. Even assuming there was a variance, it was not material or substantially prejudicial to Appellant.

"To prevail on a fatal variance claim, [an] appellant must show that the variance was material and that it substantially

prejudiced him." *Finch*, 64 M.J. at 121 (quoting *United States v. Hunt*, 37 M.J. 344, 347 (C.M.A. 1993) (citation omitted)).

1. The variance is not material.

A variance is material where it "substantially changes the nature of the offense, increases the seriousness of the offense or increases the punishment of the offense." *Finch*, 64 M.J. at 121. (quoting *United States v. Teffeau*, 58 M.J. 62, 66 (C.A.A.F. 2003)); *see also* R.C.M. 918(a)(1).

The variance at issue in Appellant's case was not material. Beginning with the second and third prongs, the variance did not increase the seriousness of the offenses nor did it increase the punishment for the original offenses. *See* MCM, at A12-4, ¶ 120. A conviction under either requires the military to notify state and local authorities for possible registration of Appellant as a sex offender. *See* MCM, at IV-69-70, ¶ 45.a.(b).

In looking at the first prong, the variance here did not change the nature of the offense. In *United States v. Hopf*, this Court found a variance *not* to be fatal where, by exception and substitution, the actual name of the victim was changed to "an unknown Korean male". 5 C.M.R. 12, 12-14 (C.M.A. 1952). This Court reasoned that since the appellant knew who he had assaulted, the variance was not material. *Id*. at 14.

The Army Court of Criminal Appeals has noted that when "[t]he date, time and subject matter of the offense remained the

same” then a finding by exceptions and substitutions was not a fatal variance. *United States v. Willis*, 50 M.J. 841, 843 (A.C.C.A. 1999).

Appellant mistakenly relies on two cases in his argument, both of which the court found a material variance because either the charged offense completely changed or the victim of the offense changed. *See Teffeau*, 58 M.J. 62 (finding variance where military judge, through exceptions and substitutions, convicted appellant of entirely different paragraph of regulation.); *United States v. Marshall*, 67 M.J. 418 (C.A.A.F. 2009)(finding material variance where, through substitutions, the “military judge changed the identity of victim of the offense against which the accused had to defend.”).

Unlike *Teffeau* and *Marshall,* and in line with this Court’s and the Army Court of Criminal Appeal’s reasoning in *Hopf* and *Willis,* the essential facts of Appellant’s offenses here did not change with the variance. The variance related to the same sexual acts, the same overriding incident, the same mens rea, and involved the same individuals, the same victim, the same time, the same location, and the same defense as the original charge (e.g., the defense of consent, or in the alternative, mistake of fact as to consent). Therefore, the substance and nature of the charge did not change.

Further, the charged offenses here alleged that B.S. was incapable of consenting due to impairment by alcohol. The *alleged* variance provided that B.S. was incapable of consenting due to being asleep or unconscious. Viewing the Military Judge's statement in context, it is clear he meant that B.S. was asleep or unconscious as a result of alcohol. *See supra* at 19-21. This slight variance did not change the nature of the offenses as both required a showing that B.S. was impaired by alcohol and unable to consent.

The variance was not material because it did not substantially change the nature of the offenses, increase the seriousness of the offenses or increase the punishment of the offenses.

2. <u>The variance was not substantially prejudicial</u>.

"[T]his Court has placed an increased emphasis on the prejudice prong." *Finch*, 64 M.J. at 121. This is true because "even where there is a variance in fact, the critical question is one of prejudice." *United States v. Lee,* 1 M.J. 15, 16 (C.M.A. 1975)(citations omitted).

"A variance can prejudice an appellant by (1) putting 'him at risk of another prosecution for the same conduct,' (2) misleading him 'to the extent that he has been unable adequately to prepare for trial,' or (3) denying him 'the opportunity to

defend against the charge.'" *Marshall*, 67 M.J. at 420 (C.A.A.F. 2009)(quoting *Teffeau*, 58 M.J. at 67).

First, Appellant is not at risk of another prosecution for the same conduct. The Double Jeopardy Clause of the Fifth Amendment makes it clear that the United States cannot "twice put [Appellant] in jeopardy of life or limb" for the same actions he was tried for at his first court-martial. *See* U.S. Const. amend. V. By being charged with and convicted of sexual assault for the same sexual acts, with the same victim, at the same time and at the same location, Appellant is protected from a second prosecution for these same acts.

Turning to the second and third factors, Appellant was not mislead to the extent that he was unable to adequately prepare for trial and he was not denied the opportunity to defend against the charge.

This case is similar to others where this Court has found no prejudice on a variance claim. In *Finch*, this Court found a lack of prejudice in a variance where the appellant failed to show: (1) that he was unable to prepare for trial; (2) how his preparation or presentation of a defense was impacted, and (3) why he did not object to the findings by exceptions and substitutions when they were announced. 64 M.J. at 122-123. In *Hunt*, this Court declared that nothing in the record showed that the appellant in that case was surprised at trial by

the purported discrepancy of proof in a variance claim and that the government's proof was "readily apparent from the witness testimony and other evidence presented at the pretrial investigation under Article 32, UCMJ. . . in which defense counsel participated." 37 M.J. at 347-48.

Like *Finch* and *Hunt*, Appellant has failed to show that he was unable to prepare for trial or how his preparation for trial would have changed. With the same facts, same sexual acts, the same overriding incident, same *mens rea*, and involving the same individuals, same victim, same time, and same location, Appellant knew the sole contested issue was consent. At trial, Appellant's theory was that B.S. consented to the sexual acts, or in the alternative, that there was a mistake of fact as to consent. Whether B.S. was impaired due to alcohol or completely unconscious or asleep due to alcohol, Appellant's defense would have been the same. Therefore, Appellant was not substantially prejudiced by the variance.

D. <u>Appellant was on notice as the Charge Sheet informed Appellant of the elements, and Appellant is protected against double jeopardy</u>.

Modern notice-pleading statutes purged the common-law requirement of detailed allegations. Now, an indictment need only "be a plain, concise, and definite written statement of the essential facts constituting the offense charged." R.C.M. 307(c)(3). The Supreme Court has identified two constitutional

requirements in an indictment: (1) that it contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend; and (2) that the charge protects the defendant against double jeopardy for the same offense. *United States v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007)(quotation and citation omitted). Meeting these threshold requirements is the key, regardless of whether the indictment "could have been made more definite and certain." *United States v. Debrow*, 346 U.S. 374, 376 (1953).

1. As there was no variance, the notice was sufficient.

Here, as no variance in the theory of liability exists, Appellant did not lack notice as the Charge Sheet sufficiently informed Appellant of each element of the offenses and he is protected against double jeopardy for the same offenses.

2. Assuming a variance, *arguendo*, the Charge Sheet sufficiently informed Appellant of the elements of the offenses and Appellant is still protected against double jeopardy.

"A specification is a plain, concise, and definite statement of the essential facts constituting the offense charged." R.C.M. 307(c)(3). The Rule continues, "A specification is sufficient if it alleges every element of the charged offense either expressly or by necessary implication." *Id*.

Here, Appellant was on notice because the specification fairly informed him of the charge against which he must defend:

commission of sexual acts upon B.S. by penetrating her vulva with his penis and tongue when B.S. was incapable of consenting due to impairment by alcohol that was known or should have been known by Appellant. Whether B.S. was impaired due to alcohol or completely unconscious or asleep due to alcohol, Appellant was on notice that he had to defend against lack of consent due to the impairment by alcohol.

Furthermore, the specifications sufficiently protect Appellant against double jeopardy. *See supra* at 24-25. Therefore, both specifications provided Appellant sufficient notice under the military's notice-pleading jurisdiction.

V.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION BECAUSE APPELLANT FAILED TO PROPERLY ELICIT AND CONFRONT B.S. WITH A PRIOR INCONSISTENT STATEMENT; AND EVEN ASSUMING ERROR, *ARGUENDO*, THERE WAS NO PREJUDICE.

A. The standard of review is abuse of discretion.

This Court reviews the Military Judge's ruling limiting cross-examination for an abuse of discretion. *United States v. Israel*, 60 M.J. 485, 487 (C.A.A.F. 2005); *United States v. Smith*, No 201100433, 2012 CCA LEXIS 367 (N-M. Ct. Crim. App. Sep. 28, 2012). A military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect. *Ayala*, 43 M.J. at 298.

B. The Military Judge did not abuse his discretion because Appellant failed to properly elicit and confront B.S. with a prior inconsistent statement and therefore could not bring in extrinsic evidence.

An appellant's Sixth Amendment right to confront witnesses "is violated where it is found that a trial judge has limited cross-examination in a manner that precludes an entire line of relevant inquiry." *Israel*, 60 M.J. at 488. However, military judges retain "wide latitude" to limit cross-examination, even when a line of questioning attacks an accuser's credibility. *United States v. Sullivan,* 70 M.J. 110, 115 (C.A.A.F. 2011) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)).

In the context of impeachment evidence, "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same". Mil. R. Evid. 613(b).

Here, the Military Judge did not abuse his discretion or preclude an entire line of relevant inquiry because he ruled appropriately under the circumstances. During cross-examination, Trial Defense Counsel did not properly confront B.S. with an inconsistent statement. Therefore, the Military Judge did not allow Trial Defense Counsel to offer extrinsic evidence through B.S.'s doctor because B.S. was not "afforded an opportunity to explain or deny" the possible prior inconsistent statement. *See* Mil. R. Evid. 613.

During the cross-examination of B.S., Trial Defense Counsel mistakenly attempted to impeach B.S. using her doctor's document that she neither created nor ratified. (R. 316-24.) To begin, Trial Defense Counsel handed B.S. the doctor's document and attempted to lay a foundation, but failed because it was not B.S.'s document. (R. 316-17.) Trial Defense Counsel attempted and failed to lay a proper foundation on several occasions. (R. 316-24.)

Trial Defense Counsel explained that he was attempting to impeach B.S. with the extrinsic evidence (e.g., the doctor's document) pursuant to Mil. R. Evid. 613 and to show bias and a motive to fabricate pursuant to Mil. R. Evid. 608. (R. 316-24.) The issue that both the Military Judge and Trial Counsel recognized was that the doctor's document was not a prior inconsistent statement of B.S. and therefore could not be offered under Mil. R. Evid. 613.

Trial Defense Counsel continued to rely on the doctor's document to question B.S. about a potential prior inconsistent statement. (R. 317, 320-24.) The Military Judge properly ruled again that he had not laid a proper foundation. (R. 317, 325.) Referring to the doctor's document, the Military Judge stated,

> [Y]ou've locked down [B.S.'s] testimony here in court multiple times, so we know her testimony in court. And she has testified consistent with her statement to NCIS, which was not objected to, properly so. But this is not a statement of hers.

(R. 325.) Before the Military Judge ruled on the objection, Trial Defense Counsel stated, "I will move on". (R. 325.)

Trial Defense Counsel did not properly elicit a prior inconsistent statement from B.S. and did not confront B.S. about the inconsistent statement because his focus was on the extrinsic evidence for which he could not lay a proper foundation since it was not B.S.'s document. Because he failed to properly confront B.S., he was not allowed to bring in extrinsic evidence through the doctor. *See* Mil. R. Evid. 613.

C. Assuming error, *arguendo*, it was harmless because the impeachment evidence had little value in light of the other overwhelming evidence against Appellant, including Appellant's confessions.

Even assuming the Military Judge erred in not allowing Appellant to ask the doctor the impeachment question, Appellant has not demonstrated material prejudice to any substantial right. *See United States v. Thompson*, 63 M.J. 228, 231 (C.A.A.F. 2006); Article 59(a), UCMJ.

Penetration was not in issue because Appellant confessed to the sexual acts. Appellant mistakenly contends that he was denied an opportunity to discredit B.S.'s account of the sexual assault. However, this was not a "he said/she said" case, but rather a "they said" case because B.S.'s account was corroborated and bolstered by Appellant's statements wherein he admitted that B.S. was "unresponsive" and "did not participate"

or “respond”. (Pros. Ex. 5 at 1.) B.S.’s account was also corroborated by the expert witnesses, the testimony of the other witnesses, and B.S.’s blood alcohol content at the hospital.

Further, B.S.’s account at trial was consistent with her statement she gave to NCIS shortly after the sexual assault. (R. 325.) Appellant’s attempt to impeach, even if he had executed it correctly, would have yielded next to nothing and would not have affected the ultimate outcome. Therefore, this Court should conclude that the exclusion of the impeachment evidence was harmless.

VI.

APPELLANT’S CONVICTION OF SEXUAL ASSAULT IN SPECIFICATION TWO IS LEGALLY AND FACTUALLY SUFFICIENT BECAUSE APPELLANT’S CONFESSION AND STATEMENTS AND THE TESTIMONY OF OTHER WITNESSES ESTABLISH EACH ELEMENT OF THE OFFENSE.

A. Standard of review.

This Court reviews claims of legal and factual sufficiency *de novo*. 10 U.S.C. § 866(c); *United States v. Beatty*, 64 M.J. 456, 459 (C.A.A.F. 2007).

B. Appellant’s conviction is legally sufficient because Appellant performed cunnilingus oral sex——penetration of the vulva——as established by Appellant’s statements describing the “oral sex”.

The test for legal sufficiency is whether, considering the evidence admitted at trial in a light most favorable to the prosecution, a reasonable fact-finder could have found all the

elements beyond a reasonable doubt. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000)(citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The Court's assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993). In resolving questions of legal sufficiency, the Court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001).

The elements of the offense are: (1) Appellant committed a sexual act upon B.S., to wit: penetration of the vulva by his tongue with intent to gratify the sexual desire of Appellant or B.S.; (2) B.S. was incapable of consenting to the sexual act due to impairment by alcohol; and (3) Appellant knew or reasonably should have known. (Charge Sheet.); Manual for Courts-Martial, United States (2012 ed.), at IV-68, ¶ 45.a.(b)(3).

Here, all elements were established through Appellant's incriminating statements and the witnesses' testimony at trial. Appellant only challenges the penetration of the vulva.

A sexual act occurs where there is "penetration, however slight, of the vulva . . . of another by any part of the body . . . with an intent . . . to arouse or gratify the sexual desire of any person." Manual for Courts-Martial, United States (2012

ed.), at IV-69, ¶ 45.a.(g)(1). Here, the evidence supports Appellant's sexual act of penetrating B.S.'s vulva.

Appellant relies on *Hansen* to support his argument contending that the mere admission of having "oral sex" is insufficient to prove penetration. *See United States v. Hansen*, 36 M.J. 599, 608 (A.F.C.M.R. 1992). However, this Court rejected the *Hansen* holding in *United States v. Green*, 52 M.J. 803, 805 (N-M. Ct. Crim. App. 2000)(refusing to hold that the term "oral sex" is legally insufficient evidence to establish penetration).

In *Green*, this Court emphasized that the only evidence in *Hansen* was that the appellant "admitted to having 'oral sex' with his daughter, but neither the [appellant] nor the agent was any more specific than that in their description." *Id*. This Court in *Green* had "no difficulty concluding that a reasonable factfinder, properly instructed . . . could have found the element of penetration beyond a reasonable doubt" as to cunnilingus oral sex because there was additional evidence supporting the statement. *Id*. Similarly, in *United States v. Tu*, the Army Court of Military Review found the appellant's admission to licking and kissing the victim's vagina and performing "oral sex" was "circumstantial if not direct evidence that the appellant performed an act of cunnilingus". 30 M.J. 587, 589-90 (A.C.M.R. 1990).

Unlike *Hansen*, and in line with *Tu* and this Court's holding in *Green*, the evidence here establishes that Appellant performed cunnilingus oral sex. Contrary to Appellant's assertion, evidence exists beyond Appellant's admission that he performed "oral sex". First, in describing the oral sex, Appellant admits that B.S. "didn't ask [him] to go down on her." (Pros. Ex. 2 at 2.) This statement immediately follows Appellant's admission that he performed oral sex on B.S. (Pros. Ex. 2 at 2.) Appellant went "down on [B.S.]" by moving his head down to her vulva and he performed "oral sex" by penetrating her vulva with his tongue. The meaning of his statement makes it clear that he was not referring to fellatio oral sex.

Second, in describing the sexual act, Appellant does not simply state that *they* engaged in oral sex as was the situation in *Hansen*. Appellant here admits that it was *Appellant* who gave oral sex to *B.S.* He stated, "I started giving her oral sex" with the hope of "getting her to participate in the sex" and to "get me hard again". (Pros. Ex. 2 at 2; Pros. Ex. 5 at 1.) Appellant's statement further establishes that it was not the reverse, meaning it was not B.S. who gave Appellant oral sex. (Pros. Ex. 2 at 2.) Appellant's assertion that this could have been fellatio oral sex is an impossibility because Appellant could not give B.S. fellatio oral sex. This admission further

discredits Appellant's argument and establishes that Appellant performed cunnilingus oral sex on B.S.

Third, Appellant states that B.S. was "moaning" during the oral sex, further discrediting any assertion by Appellant that this could have been Appellant placing his penis in B.S.'s mouth. (Pros. Ex. 2 at 2.)

When viewed in the light most favorable to the United States, this evidence clearly demonstrates that Appellant performed cunnilingus oral sex. Therefore, the specification is legally sufficient.

C. Appellant's conviction is factually sufficient.

Testing for factual sufficiency, this Court asks whether, after weighing the evidence in the Record of Trial, it is independently convinced of Appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). In testing for factual sufficiency, this Court is required to "recogniz[e] that the trial court saw and heard the witnesses." *Id*. This is not a *pro forma* legal requirement. Rather, it takes into account the legal rule that the trier of fact is best situated to assess a witness's credibility while testifying. *See, e.g., United States v. Madey*, 14 M.J. 651, 653 (A.C.M.R. 1982), *rev. denied*, 15 M.J. 183 (C.M.A. 1983); *United States v. Ferguson*, 35 F.3d 327, 333 (7th Cir. 1994), *rev. denied*, 514 U.S. 1100 (1995) (trial court's evaluation of witness

credibility "will not be disturbed unless it is completely without foundation.").

Appellant's statements here in describing the "oral sex" establish each element of the offense. Appellant states that *he* performed oral sex on *B.S.* and that he went "down on her" with the intent to gratify his and her sexual desire. (Pros. Ex. 2 at 2; Pros. Ex. 5 at 1.) Further, by his own admissions, Appellant knew or reasonably should have known that B.S. was incapable of consenting due to impairment by alcohol. Appellant knew that B.S. was "unresponsive" and "did not participate" or "respond" to the sexual acts. (Pros. Ex. 5 at 1.)

Taken with the corroborating evidence from B.S., the expert witnesses, the other witnesses, and B.S.'s blood alcohol content level at the hospital, Appellant's admissions should independently convince this Court of Appellant's guilt beyond a reasonable doubt.

VII.

THE MILITARY JUDGE PROPERLY RELIED ON "THE ENTIRE RECORD OF TRIAL, AND ALSO CONSULTED ITS COMMON SENSE AND THE COURT'S KNOWLEDGE OF HUMAN NATURE AND THE WAYS OF THE WORLD" TO MAKE HIS FINDINGS. THERE WAS NO ERROR.

A. <u>The standard of review is plain error</u>.

As military judges are presumed to know and follow the law absent evidence to the contrary, the standard of review is plain error. *See United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F.

2007). The three-part test for plain error is: "(1) that there was an error; (2) that the error was plain, that is, clear or, equivalently obvious; and (3) the plain error affected substantial rights." *Finch*, 64 M.J. at 121.

B. The Military Judge appropriately relied on the Record of Trial, common sense, knowledge of human nature, and ways of the world.

The trier of fact can rely on "common knowledge", "ways of the world", and "common sense" in making findings. Fact finders are permitted to weigh the evidence in light of their common knowledge which includes, *inter alia*, "any other matter upon which men in general have a common fund of experience and knowledge, through data notoriously accepted by all." *United States v. Fletcher*, 62 M.J. 175, 183 (C.A.A.F. 2005)(quotation and citation omitted).

Relying on the "ways of the world" is appropriate and refers to court members' evaluation of lay testimony, defenses, and witness credibility. *United States v. Frey*, 73 M.J. 245, 250 (C.A.A.F. 2014). Further, case law has long recognized that the trier of fact is also expected to "use their common sense in assessing the credibility of testimony as well as other evidence presented at trial. *Id*.

Moreover, military judges are presumed to know the law and to follow it absent clear evidence to the contrary. *Erickson*, 65 M.J. at 225.

Here, the Military Judge properly relied on the Record of Trial, his common sense, knowledge of human nature, and the ways of the world to make his findings and conclusions. Appellant misrepresents the Military Judge's statement in the Military Judge's special findings in an attempt to support his argument. The Military Judge actually stated,

> In so finding the aforementioned facts, the court reviewed the *entire record of trial*, and also consulted its common sense and the court's knowledge of human nature and the ways of the world. This allowed the court to reconcile [B.S.]'s BAC in light of the testimony of other witnesses, as well as the statements of [Appellant]. As such, the court finds, beyond a reasonable doubt, that [B.S.] was incapable of consenting due to impairment by alcohol when [Appellant] inserted his tongue into her vagina and then inserted his penis into her vagina.

(Appellate Ex. XXXVII at 8 (emphasis added).) In short, the Military Judge used the Record of Trial, common sense, knowledge of human nature, and the ways of the world, to make his findings, reconcile B.S.'s BAC, and conclude that B.S. was incapable of consenting due to impairment by alcohol.

Appellant mischaracterizes this statement by failing to include that the Military Judge "reviewed the entire record of trial" in his reconciling B.S.'s BAC. The Record included all the evidence to support Appellant's conviction, including Appellant's own admissions. Contrary to Appellant's assertion, the Military Judge did not simply rely on his own experience to reconcile B.S.'s BAC to find Appellant guilty.

Moreover, the Military Judge did not specifically state how he used his "human nature" and the "ways of the world" in making his findings. Certainly there is no evidence that he relied *only* on his "human nature" and "ways of the world" or that he relied on them in an inappropriate way. And as the Military Judge is presumed to know the law and follow it absent clear evidence to the contrary, the findings and sentence should be affirmed. *See Erickson*, 65 M.J. at 225.

VIII.

ARTICLE 120(B) IS NOT UNCONSTITUTIONALLY VAGUE AS APPLIED TO APPELLANT BECAUSE THE STATUTORY LANGUAGE, INTERPRETED BY MILITARY AND FEDERAL CASE LAW, PROVIDES NOTICE THAT COMMITTING SEXUAL ACTS WITH A PERSON INCAPABLE OF CONSENTING DUE TO IMPAIRMENT BY ALCOHOL IS FORBIDDEN UNDER ITS TERMS.

A. The standard of review.

The conclusion of whether a statute is unconstitutional as applied is reviewed *de novo*. *United States v. Ali*, 71 M.J. 256, 265 (C.A.A.F. 2012).

B. The provision of Article 120 is not unconstitutionally vague and therefore Appellant was on notice.

1. The test for vagueness is whether a person would reasonably understand that his contemplated conduct is proscribed. Sources of notice include statutory language and military case law.

Due process requires that a person have fair notice that an act is criminal before being prosecuted for it. *United States v. Saunders*, 59 M.J. 1 (C.A.A.F. 2003). To determine whether a

statute is unconstitutionally vague, the test is whether a person would reasonably know the charged conduct was criminal:

> Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged.

Parker v. Levy, 417 U.S. 733, 757 (U.S. 1974).

The court must ask whether "a person of ordinary intelligence" has "fair notice that his contemplated conduct is forbidden." *Colautti v. United States*, 439 U.S. 379, 390-91 (1979). "Fair notice" that an act is criminal may come from multiple sources, including "federal law, state law, military case law, military custom and usage, and military regulations." *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003). This Court "need not decide whether custom and regulation, state law, or military case law alone would meet the requirements for due process notice" because "when addressed together, appellant should reasonably have understood that [the] contemplated conduct was subject to military criminal sanction." *Id*. at 33.

2. <u>As upheld by case law, Article 120(b) proscribes engaging in sexual acts with persons incapable of consenting due to impairment by alcohol.</u>

Appellant here was convicted of two specifications of sexual assault, both of which required evidence that B.S. was "incapable of consenting to the sexual act due to impairment by

alcohol". (Charge Sheet.); *see* Manual for Courts-Martial, United States (2012 ed.), at IV-68, ¶ 45.a.(b)(3).

Article 120.a.(b)(3), UCMJ, mirrors 18 U.S.C. § 2242, sexual abuse. The federal statute uses similar language: "incapable of appraising the nature of the conduct" and "physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act". 18 U.S.C. § 2242. And there are no federal courts that have found the language in 18 U.S.C. § 2242 unconstitutionally vague.

Further, in *United States v. Booker*, this Court stated that a comparison of the new, new Article 120 and the new Article 120 "further illustrates the close relationship between these two offenses." 72 M.J. 787, 803 (N-M. Ct. Crim. App. 2013); *see United States v. Prather*, 69 M.J. 338, 343 (C.A.A.F. 2010)(referring to the new Article 120 burden shift, the court found "no meaningful constitutional distinction" between "'substantially incapacitated' and 'substantially incapable'"). "Both statutes . . . require: (1) commission of a sexual act upon another person, (2) who is incapacitated or incapable of consenting or declining participation in that sexual act." *Id*.

Moreover, Appellant's assertion that Article 120, UCMJ, is unconstitutionally vague as applied or otherwise is not supported by a single case. *See United States v. Cartwright*, ACM 37641, 2013 CCA LEXIS 735, at *8 (A.F.C.C.A. Aug. 15, 2013).

3. As applied here, Appellant's experience and training, his knowledge that B.S. had been drinking alcohol, and the overwhelming evidence—including Appellant's damaging statements admitting that B.S. was unresponsive and not participating—establish that Appellant had fair notice that his conduct was proscribed.

Here, the Military Judge properly found that Article 120, specifically the language "incapable of consenting due to impairment by alcohol", was not unconstitutionally void for vagueness. (R. 213.) Similarly, this Court should find the same because a person would reasonably know that Appellant's conduct was proscribed. *See Parker*, 417 U.S. at 757.

Appellant knew that B.S. was incapable of consenting due to impairment by alcohol by his own admissions. He admitted that during the sexual acts, B.S. was "unresponsive", "did not participate in the sex", and "did not respond". (Pros. Ex. 5 at 1.) Appellant further admits that he took off all their clothes without B.S.'s assistance, and after he did that, he "wonder[ed] if [B.S.] still is able or wants to have sex." (Pros. Ex. 5 at 1.) Appellant continued to try to get B.S. to participate, but failed. (Pros. Ex. 5 at 1.) Throughout the sexual acts, Appellant knew that B.S. continued not to participate, did not communicate with him, and "her hands just lay at her sides." (Pros. Ex. 5 at 1.)

Further, he knew that B.S. had consumed several alcoholic beverages in a short two hour time period, two of which he mixed

and gave to B.S. (Pros. Ex. 2 at 1-2.) He also admits that he knew that B.S., upon leaving the beach, was "tipsy". (Pros. Ex. 2 at 2.) Under these circumstances, Appellant went, uninvited, to B.S.'s room to "hook up". (Pros. Ex. 2 at 2.) Appellant knew his conduct was proscribed from his training and experiences as a Sailor. Moreover, after the sexual assault Appellant also showed a consciousness of guilt by telling B.S. "sorry" and initially lying by telling B.S.'s roommate that he did not engage in the sexual acts with B.S. (R. 270, 602.)

With the overwhelming evidence of B.S.'s impairment due to alcohol, including Appellant's admissions, B.S.'s testimony, and the experts' testimony, it strains credulity that Appellant could not know that this conduct was forbidden. Therefore, Appellant was on notice that his conduct was proscribed by the statute and the offenses were not unconstitutionally void for vagueness as applied.

IX.

APPELLANT'S COURT-MARTIAL WAS FREE FROM APPARENT UNLAWFUL COMMAND INFLUENCE BECAUSE THE PRESIDENT'S STATEMENT DOES NOT AMOUNT TO "SOME EVIDENCE" AND THERE IS NO NEXUS BETWEEN THE STATEMENT AND APPELLANT'S TRIAL. MOREOVER, THERE WAS NO PREJUDICIAL IMPACT.

A. Standard of review.

The Military Judge's findings of fact are reviewed for an abuse of discretion, but the questions of unlawful command

influence (UCI) flowing from those facts are reviewed *de novo*. *United States v. Reed*, 65 M.J. 487, 488 (C.A.A.F. 2008)(quoting *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994)).

B. Unlawful command influence is influence that "corrupts the truth-seeking function of the trial process".

Statute and regulation prohibit unlawful influence on a court-martial. Article 37, UCMJ; R.C.M. 104. Unlawful command influence involves command influence that "corrupt[s] the truth-seeking function of the trial process." *United States v. Thomas*, 22 M.J. 388, 393-94 (C.M.A. 1986).

Appellant here only alleges apparent UCI. (Appellant Br. at 37.) Therefore, he has the initial burden to raise UCI by showing "some evidence" that it exists. *United States v. Harvey*, 64 M.J. 13, 14 (C.A.A.F. 2006). To raise the issue at trial, Appellant may meet this burden by showing "facts which, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings." *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999)(citation omitted).

"[T]he appearance of unlawful command influence will exist where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *United States v.*

Lewis, 63 M.J. 405, 415 (C.A.A.F. 2006). If the appellant shows some evidence of apparent unlawful command influence, "[t]o find that [it] has been ameliorated and made harmless beyond a reasonable doubt, the United States must convince [the court] that the disinterested public would now believe [the appellant] received a trial free from the effects of unlawful command influence." *Id.*

C. There is no evidence of apparent unlawful command influence because the President's statement alone does not meet the "some evidence" requirement and there was no nexus to Appellant's trial.

On May 7, 2013, the President of the United States stated that assailants of sexual assault should be "held accountable: prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged." (Appellate Ex. XVII at 57.) On August 6, 2013, the Secretary of Defense issued SECDEF Memo making it clear that his and the President's comments in no way were directed at influencing outcomes of cases or sentences and independent judgment was expected. (Appellate Ex. XVII at 29.)

1. The Military Judge properly found no apparent UCI, but left open the possibility of reconsideration once members were seated.

The Military Judge properly found that Appellant had "failed to show 'some evidence' of apparent UCI" because there was no evidence that a "witness had been dissuaded from testifying" or "withdrawn trial support" to Appellant.

(Appellate Ex. XXXII at 2, 7.) Further, the Military Judge found that the SECDEF Memo and the time between the comments and Appellant's trial would dissipate any impact the statements may have had. (Appellate Ex. XXXII at 2, 7.) Therefore, the burden never shifted to the United States to prove that apparent UCI did not exist. (Appellate Ex. XXXII at 2, 6.)

The Military Judge left open the possibility that apparent UCI may arise at trial as some members may not have been aware of the SECDEF Memo. (Appellate Ex. XXXII at 4.) He would allow "expanded and specific *voir dire"* and provide a "tailored instruction" mirroring the SECDEF Memo to ensure the members understood their responsibilities. (Appellate Ex. XXXII at 7.) However, Appellant elected Military Judge alone making the expanded *voir dire* and the tailored instruction unnecessary.

2. <u>This Court should likewise find no apparent UCI because Appellant fails to show "some evidence" of apparent UCI</u>.

To show "some evidence", Appellant must: (1) present evidence that if true, would constitute UCI, and (2) show how the alleged UCI has a "logical connection to the court-martial, in terms of its potential to cause unfairness" at his trial. *Biagase*, 50 M.J. at 150.

Here, Appellant relies exclusively on the President's statement as his sole basis for his apparent UCI argument. Besides the President's statement, no other evidence was

provided at trial and Appellant fails to point to anything in the Record to support his argument.

The President's statement does not constitute apparent UCI. The President has a justifiable concern in maintaining discipline and responding to and preventing illegal practices, especially those that have received considerable adverse publicity in the news media such as sexual assault.

Moreover, the statement was given to a general audience and in response to a question by a reporter. (Appellate Ex. XVII at 57.) The President did not direct his statement to Appellant's Convening Authority, the Military Judge, or any potential witness in Appellant's trial.

Appellant further fails to show a nexus between the President's statement and his trial, and how that connection could have potentially caused unfairness. There is no evidence that a potential witness or another key actor was tainted by the President's statement.

Appellant mistakenly asserts that since he was not afforded "expanded and specific *voir dire*" and a "tailored instruction" that somehow he was prejudiced by apparent UCI. However, those were potential remedies crafted by the Military Judge to ensure the members were not tainted by the President's comments. As there were no members, there was no concern for apparent UCI. And the Military Judge, as the trier of fact, affirmatively

stated that "the comments will not influence [his] discretion regarding this case." (R. 236.) The Military Judge was subject to *voir dire*, understood his role and responsibilities, and was not challenged by Appellant. On appeal, Appellant did not challenge the Military Judge as biased. (R. 236-37.)

Moreover, Appellant had the opportunity to renew his motion for apparent UCI after he elected to be tried by Military Judge alone. The Military Judge, in his initial ruling, stated that he would allow for reconsideration of the UCI motion; however Appellant failed to raise it. (Appellate Ex. XXXII at 7.)

As there is no evidence to support apparent UCI, Appellant fails to meet his burden of showing "some evidence" of apparent UCI. Therefore, the burden never shifts to the United States.

D. Even assuming Appellant met his initial burden, the disinterested public would now believe that Appellant received a trial free from the effects of UCI.

In 1996 and 1997, the sexual abuse of trainees by drill instructors at the Army's Aberdeen Proving Grounds was the subject of intense media attention. *United States v. Ayers,* 54 M.J. 85, 92-94 (C.A.A.F. 2000); *United States v. Simpson*, 58 M.J. 368, 371-72 (C.A.A.F. 2003). Senior officials in the Army made numerous statements on the Army's "zero tolerance" of sexual harassment, and demanded "no leniency" and "severe punishment" for the offenders. *Simpson*, 58 M.J. at 376. The Court of Criminal Appeals for the Armed Forces found beyond a reasonable

doubt that the statements did not taint the appellant's proceeding. *Id.*

Similarly, the President's statement here did not taint Appellant's proceeding. As the trier of fact, the Military Judge had previously read the SECDEF Memo that dissipated the taint of the President's statement and the Military Judge is presumed to know the law and to follow it absent clear evidence to the contrary. *See Erickson*, 65 M.J. at 225.

Further, there were no witnesses silenced as a result of the President's statement. The statement had no prejudicial impact on the trial. The disinterested public would now believe Appellant received a trial free from the effects of unlawful command influence.

Conclusion

WHEREFORE, the Government respectfully requests that this Court affirm the findings and sentence as adjudged and approved below.

CORY A. CARVER
Captain, USMC
Appellate Government Counsel

KEITH B. LOFLAND
Lieutenant Commander, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate

Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7679, fax (202) 685-7687

Certificate of Filing and Service

I certify that the original and required number of copies of the foregoing were delivered to the Court and a copy was served upon opposing counsel and electronically filed with the Court pursuant to N-M. Ct. Crim. App. Rule 5.2(b)(1) on September 2, 2014.

CORY A. CARVER
Captain, USMC
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7396, fax (202) 685-7687

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES, Appellee v. Kevin C. CORCORAN Hospitalman (E-3) United States Navy, Appellant	**APPELLANT'S BRIEF AND ASSIGNMENTS OF ERROR** Case No. 201400074 Tried at the Region Legal Service Office Southeast Detachment Mayport, Jacksonville, Florida on 17 June, 5 September and 21-23 October 2013, by a General Court-Martial convened by the Commander, Navy Region Southeast, Jacksonville, Florida.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

CARRIE E. THEIS
Lieutenant, JAGC, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Bldg. 58, Ste. 100
Washington Navy Yard, DC 20374
(202) 685-7390
Fax (202) 685-7426
Carrie.Theis@navy.mil

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WHETHER SPECIFICATION TWO IS FACTUALLY AND LEGALLY INSUFFICIENT BECAUSE THE ONLY EVIDENCE THAT A SEXUAL ACT OCCURED IS HN CORCORAN'S BARE STATEMENT HE PERFORMED ORAL SEX.

VII.

WHETHER THE MILITARY JUDGE ERRED WHEN HE RELIED ON PURPORTED WAYS OF THE WORLD AND HUMAN EXPERIENCE TO RECONCILE B.S.'S BLOOD ALCOHOL CONTENT WITH THE TESTIMONY OF THE WITNESSES.

VIII.

WHETHER THE ELEMENT "INCAPABLE OF CONSENTING TO THE SEXUAL ACT DUE TO IMPAIRMENT BY ALCOHOL" IS UNCONSTITUTIONALLY VAGUE IN THIS PROSECUTION FOR A VIOLATION OF ARTICLE 120(B).

IX.

WHETHER THE TAINT OF APPARENT UNLAWFUL COMMAND INFLUENCE PERMEATED HN CORCORAN'S TRIAL BECAUSE THE MILITARY JUDGE FAILED TO PROVIDE ANY APPLICABLE REMEDIES AFTER FINDING THE PRESIDENT'S REMARKS CONSTITUTED APPARENT UNLAWFUL COMMAND INFLUENCE.

Statement of Statutory Jurisdiction

Hospitalman (HN) Corcoran's approved general court-martial sentence included a punitive discharge. Accordingly, his case falls within this Court's jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ). 10 U.S.C. § 866(b)(1) (2012).

Statement of the Case

A military judge sitting as a general court-martial convicted HN Corcoran, contrary to his pleas, of two specifications of sexual assault, in violation of Article 120(b), UCMJ. (R. at 645); 10 U.S.C. § 920 (2012). The military judge sentenced him to two years of confinement, total forfeiture of pay and allowances, reduction to pay-grade E-1, and to be discharged from the Navy with a dishonorable discharge. (R. at 718.) The convening authority approved the

adjudged sentence and, except for the dishonorable discharge, ordered the sentence executed. (General Court-Martial Convening Order 04-14, Feb. 12, 2014.)

Statement of Facts

In October 2012, B.S., the alleged victim, was in the Navy as a hospitalman apprentice.[1] (R. at 250.) B.S. reported to Guantanamo Bay in August of 2012. (R. at 255.) She married her husband earlier that year in May, but they were unable to be stationed together. (R. at 251.) While B.S. and her husband were apart, he expected B.S. to abide by certain rules. (R. at 252.) For example, B.S. had to get her husband's permission before participating in social activities such as going to the beach. (*Id.*) Further, she was not allowed to drink if he was not there. (R. at 253.)

Despite these rules, B.S. went to the beach without her husband's permission with a group of people, including HN Corcoran, at approximately 1330 on 22 October 2012. (R. at 256, 259.) Her friend, HN Mullins, was the designated driver and the beach was a fifteen-minute drive away. (R. at 259.) To access the beach they had to walk down a flight of long and narrow steps. (R. at 259; Def. Ex. F-K.) The group stayed at the beach for approximately an hour and a half and B.S. spent her

[1] At the time of trial, B.S. had left the Navy and is identified in the record of trial and in this brief as a civilian.

time playing in the water and flirting with HN Corcoran. (R. at 539, 561, 579.) B.S. reported drinking three or four mixed drinks of vodka and orange juice while she was there, despite knowing she was breaking her husband's rule against drinking when he was not there. (R. at 262, 287.)

While at the rocky beach, no one observed B.S. stumbling or slurring her words. (R. at 583, 587.) Before leaving the beach, B.S. fully dressed herself. (R. at 562.) She also climbed the long and narrow staircase without any apparent difficulty or assistance. (R. at 540, 562.) B.S. then exited the car and walked to her room without stumbling and without assistance. (R. at 541, 585.)

B.S. testified she did not start to feel the effects of the alcohol until right before the group left the beach. (R. at 263.) She claimed to have no memory of leaving the beach and a spotty memory of the events afterwards. (R. at 263-69.) B.S. did recall being back at her room, feeling sticky and gross from the ocean water and sand, and deciding to take a shower. (R. at 264.) To take the shower, B.S. removed her tank top, shorts, and the untied the ties of her bikini top and bottom. (R. at 287.) After showering, B.S. toweled off and put on clothes, to include zipping up a hoodie sweatshirt. (R. 287, 289, 293.) B.S. testified that she did not remember HN Corcoran coming to her room, but recalled having a conversation with him and asking

him why he liked her. (R. at 265, 292.) She also remembered kissing him and him unzipping her hoodie. (R. at 266-67, 293.) B.S. stated she then recalled him being on top of her, but she does not remember feeling penetration. (R. at 267, 292-95.)

The next thing B.S. claimed she remembered was waking up when her neighbor knocked on the door to let her know her husband had been trying to get ahold of her. (R. at 269.) B.S. got out of bed and called her husband but did not tell him she had been drinking or sexually assaulted. (R. at 300.) B.S. testified that at this point she realized she had committed adultery and she was afraid her husband would divorce her. (R. at 297, 306.) B.S. went and found HN Corcoran to confirm what happened and then asked him not to tell anyone about the sexual interaction. (R. at 300.)

B.S. testified she then went to see HN Mullins, who was on duty at the quarterdeck of the hospital. (R. at 270.) HN Mullins called HN Corcoran on B.S.'s behalf to find out whether HN Corcoran had worn a condom. (R. at 270-71.) B.S. then underwent a sexual assault forensic exam and had her blood drawn.

B.S. made an unrestricted report of a sexual assault and Naval Criminal Investigative Service (NCIS) began to investigate. HN Corcoran made a statement to NCIS on 30 October 2012. (Pros. Ex. 2.) In this statement, he described how he

went to B.S.'s room after going to the beach. (Pros. Ex. 2.) HN Corcoran stated that he knocked on the door, she answered, let him in, and the two began talking. While they were talking, B.S. said to HN Corcoran she "wanted him," so the two engaged in romantic physical contact that led to sexual intercourse. (Pros. Ex. 2.)HN Corcoran also performed oral sex on B.S. (*Id.*) B.S. participated in the sexual intercourse by switching positions and moaning. (*Id.*) During the sexual intercourse, HN Corcoran lost his erection due to his previous alcohol consumption. The break in activity caused B.S. to start to cry and state she just cheated on her husband. (*Id.*) At the end of this interrogation, NCIS asked HN Corcoran if he would be willing to take a polygraph to confirm his recollection of events. (R. at 377.)

On 11 January 2013, HN Corcoran took the polygraph. (R. at 26.) The results of the first polygraph were indeterminate. (*Id.*) The agent told HN Corcoran that his results were not high enough to pass and he was offered a second polygraph. (R. at 27.) HN Corcoran took the second polygraph and this time deception was indicated. (*Id.*) SA Wright told HN Corcoran he was being deceptive and then reinitiated an interrogation of HN Corcoran. (R. at 27-28.)

SA Wright did not inform HN Corcoran the polygraph results could not be used against him nor did he go over HN Corcoran's

rights before interrogating him after the two polygraph examinations. (R. at 48-50.) SA Wright conducted the second interrogation alone and did not video or audio-record it. (R. at 55, 423.) SA Wright created and typed a new one-page statement as a result of this interrogation. (Pros. Ex. 5.) This "second statement" was dramatically different than HN Corcoran's first statement and described B.S. as not participating in or responding to the sexual intercourse. (Pros. Ex. 5.)

At trial, the government was permitted to put on two experts to testify about the effects of alcohol on an individual, despite the defense's objection that two experts on blood alcohol content (BAC) were cumulative. (R. at 483.) Due to the inability to precisely determine when the incident occurred, the first expert, LCDR Wilfong, USN, estimated B.S.'s BAC between .14 and .25 during the sexual act. (R. at 470-71.) But LCDR Wilfong and the government's second expert, COL Smith, USA, both agreed that observed behaviors, not BAC, was the best way to judge the level of someone's impairment. (R. at 479, 490-91.) COL Smith relied on the description of B.S.'s behaviors in HN Corcoran's second statement in order to judge B.S.'s impairment and place her in the stupor phase of intoxication. (R. at 472, 524.) COL Smith was not told, nor was defense able to question him, regarding the circumstances of

the polygraph surrounding HN Corcoran's second statement. (R. at 525.)

The experts also explained they both accepted the Dubowski scale, a chart that correlates the ability to do certain tasks with a level of intoxication, as a reliable measure for intoxication. (R. at 492.) According to the Dubowski scale, B.S.'s BAC could cover four different levels of impairment: Euphoria, Excitement, Confusion, and Stupor. (R. at 457.) According to Col Lyons it is in the confusion phase where alcohol just begins to affect the frontal lobe, the area of the brain that governs reasoning. (R. at 497.) The physical signs of the confusion phase include the inability to maintain an upright position, dizziness and have double vision. (R. at 500.) A person loses fine motor skills such as undressing, zipping up a zipper, untying a swimsuit tie and holding a coherent conversation before reaching the confusion phase. (R. at 473, 519.)

During trial, the defense attempted to question the NCIS agents about the polygraph exam that preceded HN Corcoran's second statement. The military judge ruled that Military Rule of Evidence (M.R.E.) 707 *per se* precluded any information about the polygraph from coming into evidence. (R. at 378.) In response the defense proffered they were seeking to introduce

the polygraph to "give context" and to "inform the court as to why there was a subsequent statement given." (R. at 377-78.)

Specification 1 of the Charge alleged that HN Corcoran engaged in a sexual act with B.S. when she was incapable of consenting due to impairment by alcohol. (Charge Sheet.) The military judge made special findings, and while at one point discussed impairment due to alcohol concluded his special findings by stating that "a sleeping or unconscious person cannot consent. I find beyond a reasonable doubt that [B.S.] was <u>either asleep or unconscious</u> at the time HN Corcoran inserted his tongue and then his penis into her vagina." (Appellate Ex. XXXVII, at 7).

Additional necessary facts are contained within the assignments of error.

Summary of Argument

Assignment of Error I

HN Corcoran told NCIS B.S. voluntarily participated in sexual intercourse with him. NCIS then convinced HN Corcoran to take a polygraph. HN Corcoran took the polygraph and was told that the polygraph indicated deception. NCIS then further interrogated him until they produced a contrary statement for him to sign. The military judge precluded the defense from bringing out any evidence about the polygraph by interpreting M.R.E. 707 to require a *per se* exclusion of any evidence of a

polygraph. This legally incorrect interpretation of M.R.E. 707 precluded HN Corcoran from presenting a defense.

Assignment of Error II

The military judge created a fatal variance in the charge by finding HN Corcoran guilty of sexual assault on a theory that was not charged or argued by the government. HN Corocan was charged under Article 120(b) on the theory that B.S. was incapable of consenting due to impairment by alcohol. But the military judge convicted him of sexual assault on the theory that B.S. could not consent because she was asleep or unconscious. This variance was material as it is a completely different theory involving different facts. And HN Corcoran was prejudiced because he was unable to defend against a theory he did not know was at issue. This Court must set aside the findings and sentence in this case.

Assignment of Error IV

HN Corcoran was not on notice that he was being tried for sexual assault under Article 120(b) on the theory that B.S. could not consent because she was asleep. The government did not charge or argue this theory. Yet, the military judge based HN Corcoran's guilt on this new theory. This conviction violates due process and must be thrown out.

Assignment of Error V

B.S. testified at trial that she did not remember HN Corcoran's penis penetrating her. Immediately following the sexual act, B.S. told her treating doctor something different. The military judge, however, precluded the defense counsel from introducing this evidence and thereby challenging B.S.'s credibility. This error was of constitutional magnitude and requires the reversal of HN Corcoran's conviction.

Assignment of Error VI

HN Corcoran's conviction for sexual assault is factually and legally insufficient.

Assignment of Error VII

The military judge in his special findings claimed that his own knowledge of blood alcohol content evidence is an appropriate matter for consideration as a "way of the world." This matter is beyond what may be considered generally accepted knowledge and is therefore knowledge outside the court-martial. By injecting his own knowledge into the court-martial he violated HN Corcoran's Due Process rights.

Assignment of Error VIII

The crime of sexual assault, a violation of the "new new" Article 120(b), is unconstitutionally vague as applied here. There is no identifiable standard for the element of incapable

to consent due to impairment by alcohol from the facts adduced at trial.

Assignment of Error IX

The military judge found that the President of the United States' remarks to reporters amounted to apparent unlawful command influence. The military judge then determined at least part of the trial was tainted by those remarks and fashioned remedies. Those remedies were never implemented. Accordingly, the apparent unlawful command influence went unremediated and this Court must remedy the problem.

Argument

I.

THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE RULED THAT THE DEFENSE COULD NOT ATTACK THE VOLUNTARINESS OF HN CORCORAN'S SECOND STATEMENT BY PRESENTING EVIDENCE ABOUT THE POLYGRAPH THAT PRECEDED THAT STATEMENT.

Standard of Review

A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000). Where such an abuse affects an accused's Constitutional right to present a defense, the case must be reversed unless the government shows the error is harmless beyond a reasonable doubt. *United States v. McAlister*, 64 M.J. 248, 251 (C.A.A.F. 2007). If a military

judge has committed Constitutional error, the burden is on the Government to show that "there is no reasonable possibility" that the error "contributed to the contested findings of guilty." *United States v. Othuru*, 65 M.J. 375, 377 (C.A.A.F. 2007); *McAllister*, 64 M.J. at 252-53.

Principles of Law

"Whether rooted directly in the Due Process clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683 (1986) (citing *California v. Trombetta*, 467 U.S. 479 (1984)). This meaningful opportunity to present a defense includes the right to explain to the trier of fact the circumstances surrounding a confession, even if the confession is deemed legally voluntary and admitted into evidence. In *Crane v. Kentucky* the Supreme Court held, in a unanimous decision, "the requirement that the court make a pretrial *voluntariness* determination does not undercut the defendant's traditional prerogative to challenge the confession's *reliability* during the course of the trial." *Crane*, 476 U.S. at 688 (citing *Jackson v. Denno*, 378 U.S. 368 (1964)). The Supreme Court in *Crane* further stated:

> [T]he physical and psychological environment that yielded the confession can also be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence . . . Indeed, stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?

Crane, 476 U.S. at 689; *see also United States v. Bresnahan*, 62 M.J. 137, 148 (C.A.A.F. 2005) (quoting *Crane* in Judge Erdmann's dissenting opinion).

M.R.E. 707 indicates, "[N]otwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence." M.R.E. 707(a). In *United States v. Scheffer*, 523 U.S. 303 (1998), the Supreme Court upheld the facial constitutionality of M.R.E. 707, but was evenly divided on the appropriateness of a *per se* ban on all polygraph evidence. This Court, after examining *Scheffer*, adopted the view that M.R.E. 707 is not a *per se* bar to admissibility. *United States v. Wheeler*, 66 M.J. 590, 594-96 (N-M. Ct. Crim. App. 2008). In *Wheeler*, after rejecting the *per se* ban interpretation of M.R.E. 707, this Court set aside a finding of guilt because the military judge failed to allow defense counsel to probe the circumstances of a polygraph that preceded a confession. *Wheeler*, 66 M.J. at 594-96.

Furthermore, a finding of voluntariness is not dispositive as to whether the circumstances of a polygraph are properly admissible. Rather, the right of a military accused to challenge the voluntariness and reliability of a confession during the trial on the merits is statutorily codified in the Military Rules of Evidence. M.R.E. 304(e)(2) indicates that "a military judge shall permit the accused to present relevant evidence with respect to voluntariness." *See* M.R.E. 304(e)(2).

Discussion

The military judge violated HN Corcoran's right to confront witnesses against him and prevented him from presenting a defense when he denied him the opportunity to question SA Petrie and SA Wright about the polygraphs that preceded his second statement to NCIS. B.S.'s level of intoxication was the crux of the case. As both experts agreed, B.S.'s observed behavior was the best way to judge the level of her impairment from alcohol. (R. at 479, 490-91.) Relying only on the second statement's description of B.S.'s signs of intoxication, COL Smith put B.S. in the stupor phase of intoxication--a level beyond where mental processing begins to be impaired. (R. at 472, 497, 524.) As COL Smith noted, he trusted the description of B.S.'s behavior in the second statement because "[he] assume[d] he was giving it for the reason that [he] wanted to be more truthful." (R. at 525.) The defense was hamstrung from challenging his reliance

on the second statement to evaluate B.S.'s impairment. Based on the Dubowski scale, had COL Smith relied on the description of B.S.'s behaviors contained in HN Corcoran's first statement, COL Smith would have likely put B.S. in the excited stage of intoxication--a stage of intoxication that does not affect the mental processes.

More importantly, the military judge's refusal to allow defense counsel to question the NCIS agents about the circumstances of the polygraphs precluded the defense from undermining the central evidence against HN Corcoran. The defense simply could not give context to the second statement and argue that this short, undescriptive statement was in response to NCIS action of using the seemingly scientific polygraph to mold his answers rather than an accurate description of how B.S. behaved.

It is clear that an understanding of the circumstances of the polygraph was critical for the experts and the trier of fact to weigh the credibility of HN Corcoran's confession against his first, contrary sworn testimony. HN Corcoran was constitutionally entitled to the opportunity to explain these circumstances to the trier of fact. *See Crane*, 476 U.S. at 685. Defense counsel attempted to do so, but was denied. (R. at 377-78.) Counsel was then powerless to respond to the following closing argument from trial counsel that HN Corcoran gave the

second statement "because he was not completely honest in the first statement because he was scared and embarrassed about the situation. He's finally coming clean at the very end." (R. at 636-37.) Given the importance of the second statement and the government's ability to use to the lack of context for the second statement to their advantage in closing argument, there is a very real probability HN Corcoran would not have been convicted if this evidence was introduced.

The *Wheeler* case is instructive. This Court explained how the use of the polygraph as an investigatory tool created a set of facts relevant to his confession. *Wheeler*, 66 M.J. at 595. This Court reasoned that by limiting the appellant in that case from presenting these facts as evidence, the military judge in that case denied the appellant the right to present relevant evidence in his own defense. *Id.* This error was of a constitutional magnitude and this Court set aside the finding of guilt in that case. *Id.* at 596. The same reasoning applies here because HN Corcoran has suffered a similar constitutional violation from being precluded from presenting relevant facts to question the voluntary and truthful nature of his second statement. The government simply cannot prove that the exclusion of these facts did not contribute to the finding of guilt in this case, rather an examination of the military judge's special findings show that he relied heavily on the

second statement for his findings of guilt. (Appellate Ex. XXXVII.)

Request for Relief

This Court should set aside the findings of guilt in this case and remand for a rehearing.

II.

THE MILITARY JUDGE CREATED A PREJUDICIAL FATAL VARIANCE IN THE CHARGE WHEN HE CHANGED THE THEORY OF LIABILITY FOR ARTICLE 120(b) IN HIS SPECIAL FINDINGS.

Standard of Review

Absent objection, this Court reviews questions of fatal variance for plain error. *United States v. Finch*, 64 M.J. 118, 121 (C.A.A.F. 2006) (citing *United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998)). The three-part test for plain error is: "(1) that there was an error; (2) that the error was plain, that is clear or, equivalently, obvious; and (3) the plain error affected [the] substantial rights [of the accused]." *Finch*, 64 M.J. at 121.

Principles of Law

"A variance between pleadings and proof exists when evidence at trial established the commission of a criminal offense by the accused, but the proof does not conform strictly with the offense alleged in the charge." *United States v. Teffeau*, 58 M.J. 62, 66 (C.A.A.F. 2003) (quoting *United States v. Allen*, 50

M.J. 84, 86 (C.A.A.F. 1999)). For an appellant to prevail on a fatal variance claim, he "must show both that the variance was material and that he was substantially prejudiced thereby." *United States v. Marshall*, 67 M.J. 418, 420 (C.A.A.F. 2009)(citations omitted).

A variance is material if it "substantially changes the nature of the offense, increases the seriousness of the offense, or increases the punishment of the offense." *Finch*, 64 M.J. at 121 (citing *Teffeau*, 58 M.J. 62 at 66 and R.C.M. 918(a)(1)); *See, e.g.*, *Marshall*, 67 M.J. at 420.

"A variance can prejudice an appellant by (1) putting 'him at risk of another prosecution for the same conduct,' (2) misleading him 'to the extent that he has been unable adequately to prepare for trial,' or (3) denying him 'the opportunity to defend against the charge.'" *Marshall*, 67 M.J. at 420 (quoting *Teffeau*, 58 M.J. at 67).

Furthermore, the fact that two alternative theories of a case - one charged and one uncharged - may both involve criminal conduct does not relieve the government of its due process obligations of notice to the accused and proof beyond a reasonable doubt of the offense alleged. *See United States v. Ellsey*, 16 C.M.A. 455, 458-59 (C.M.R. 1966). Due process "mandates that 'an accused has a right to know what offense and what legal theory' he will be convicted. . . ." *United States*

v. Jones, 68 M.J. 465, 468 (C.A.A.F. 2010) (quoting *United States v. Medina*, 66 M.J. 21, 26-27 (C.A.A.F. 2008)). An ambiguity in a specification must be resolved in favor of the accused. *Cf. United States v. Thomas*, 65 M.J. 132, 135 (C.A.A.F. 2007) (citations omitted).

Discussion

A person may engage in a sexual act in a number of ways that violates Article 120(b):

> (1) commits a sexual act upon another person by-
>
> (A) threatening or placing that other person in fear;
> (B) causing bodily harm to that other person;
> (C) making a fraudulent representation that the sexual act serves a professional purpose; or
> (D) inducing a belief by any artifice, pretense or concealment that the person is another person;
>
> (2) commits a sexual act upon another person when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring; or
>
> (3) commits a sexual act upon another person when the person is incapable of consenting due to-
> (A) impairment by any drug, intoxicant, or other similar substance, and that the condition is known or reasonably should be known by the person; or
> (B) a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person.

Manual for Courts-Martial, United States (2012 ed.), pt. IV, ¶ 45(b); 10 U.S.C. § 920 (2012).

The nature of the offense can be fatally altered when the accused is found guilty of an alternative theory of liability

that the government did not charge. *See Ellsey*, 16 C.M.A. 455, 458-59 (finding a fatal variance when appellant was convicted of breach of lawful custody of his guard but charged with escape from confinement). That is what occurred here.

The government charged HN Corcoran with engaging in a sexual act with B.S. when she was incapable of consenting due to impairment by alcohol. (Charge Sheet.) The criminality of this sexual act is predicated on impairment due to alcohol. The military judge's special findings made a clear and obvious error when he provided a different theory of liability, sleep, as the basis for his equivocal finding of guilt. This language changed the basis for the sexual assault offense from impairment by alcohol to an inability to consent because of being asleep or unconscious. As the uncharged theory of liability is not a lesser-included offense of the charged theory, it cannot support a conviction. *See United States v. Tunstall*, 72 M.J. 191, 195 (C.A.A.F. 2013). This change was plain and obvious error, and this Court must test for prejudice.

HN Corcoran suffered prejudice because he was misled "to the extent that [he was] unable adequately to prepare for trial," and he was denied "the opportunity to defend against the change." *Marshall*, 67 M.J. at 420. HN Corcoran focused his defense strategy on challenging B.S.'s impairment due to alcohol. Defense counsel in closing never discusses the matter

of sleep, but rather states it was sex with a "lazy partner." (R. at 629.) The government did not offer evidence to support this theory or argue it in their closing. Despite this, the military judge found that "a sleeping or unconscious person cannot consent. I find beyond a reasonable doubt that [B.S] was either asleep or unconscious at the time HN Corcoran inserted his tongue and then his penis into her vagina." (Appellate Ex. XXXVII at 7.) This change impermissibly altered the nature of the offense to a theory of liability that was not charged. *See Marshall*, 67 M.J. at 421 n.3 (citing *Ellsey*, 16 C.M.A. at 458-59.) Furthermore, it is of no moment that there was only one sexual act involved. For example, in *Marshall*, the Court of Appeals for the Armed Forces explicitly rejected the argument that changes to details of a single event is inconsequential. *Marshall*, 67 M.J. at 421.

Request for Relief

This Court should set aside the findings of guilt in this case and remand for a rehearing.

IV.

HN CORCORAN LACKED NOTICE OF THE ALTERNATIVE THEORY OF LIABILITY FOR ARTICLE 120(b) ON WHICH THE MILITARY JUDGE PREDICATED HIS FINDINGS OF GUILT.

Standard of Review

Whether an accused has received notice of the charge he must defend against is a question of law reviewed *de novo*. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006).

Discussion

The Constitution requires an accused receive notice as to the offense he must defend against. *United States v. Hudson*, 59 M.J. 357, 359 (C.A.A.F. 2004). Indeed, "it is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process." *In re Winship*, 397 U.S. 358, 364 (1970). The government provides actual notice to a military accused in the form of the charge sheet at arraignment. In this case, the charge sheet only alleged that HN Corcoran's conduct satisfied the theory that B.S. could not consent due to her impairment by alcohol. (Charge Sheet.) The government did not choose to charge the alternative theory that B.S. was asleep during the alleged sexual act. Accordingly, HN Corcoran did not receive actual notice. Moreover, the record is devoid of any evidence that HN Corcoran's actions satisfied that theory of liability. Yet the military judge found HN Corcoran guilty on the alternative theory that B.S. was asleep during the sexual act. (Appellate Ex. XXXVII, at 7.)

One problem with this approach is that these two theories are not logically consistent. The focus of the theories of

liability in Article 120(b) is to identify what is keeping a person from consenting. If a person is asleep it is not alcohol impairment that is keeping them from consenting, it is the sleep. A person could have imbibed alcohol and been asleep but not so drunk that they could not consent. Similarly, a person could be clinically unconscious from alcohol and this is not a stage of sleep. The government here only charged one theory of liability. Given the evidence the government presented, the military judge as the trier of fact could not reconcile what the evidence actually showed. He therefore fixed the government's deficient charges and shored up the conviction by finding guilt under alternative theories of the law. His actions violated the very fundamental notions of due process and cannot be countenanced.

Request for Relief

This Court should set aside the findings of guilt in this case and remand for a rehearing.

V.

THE MILITARY JUDGE ERRED WHEN HE FORECLOSED THE DEFENSE FROM UNDERMINING B.S.'S CREDIBILITY THROUGH IMPEACHMENT.

Standard of Review

A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Manns*, 54 M.J. at 166. Where such an abuse affects an accused's Constitutional right to present a defense, the case will be reversed unless the

error is harmless beyond a reasonable doubt. *McAlister*, 64 M.J. at 251. If a military judge has committed Constitutional error, the burden is on the Government to show that "there is no reasonable possibility" that the error "contributed to the contested findings of guilty." *Othuru*, 65 M.J. at 377; *McAllister*, 64 M.J. at 252-53.

Principles of Law

The Constitution protects an accused's right to confront the witnesses against him. U.S. Const. amend. VI; *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974). Though this right is not unlimited, *see United States v. Dimberio*, 56 M.J. 20 (C.A.A.F. 2001), it is "a fundamental element of due process of the law." *Washington v. Texas*, 388 U.S. 14, 19 (1967).

Discussion

The military judge violated HN Corcoran's right to confront witnesses against him. Defense counsel was precluded from asking LT Keck, MC, USN, the sexual assault forensic examiner, whether B.S. recalled penile penetration to him when he conducted his exam of her. On direct and on cross-examination, B.S. clearly articulated she did not recall any penile penetration. (R. at 265-69, 317-25.) However, despite B.S. telling LT Keck she was aware of being penetrated by HN Corcoran's penis, defense counsel was precluded from asking him

about her contradictory statement. (R. at 569-76; Appellate Ex. XXXIV, 4-5.)

B.S.'s ability to perceive what was occurring directly correlates to whether she was impaired by alcohol. Defense counsel was stripped of the ability to show that B.S.'s story had changed from one of being aware to one of being comatose. This is a significant change. If defense counsel had been allowed to use this information, they could have argued that she had changed her story in order to try to convince others that she was taken advantage of when she really had not been. This inconsistency is especially telling in light of B.S.'s motive to fabricate based on her controlling marriage. The military judge's ruling stripped HN Corcoran of a meaningful opportunity to challenge B.S.'s credibility. The government cannot show beyond a reasonable doubt that had defense counsel prevailed on bringing out this important fact, the outcome would have been the same.

Request for Relief

This Court should set aside the findings of guilt in this case and remand for a rehearing.

V

THE EVIDENCE IS FACTUALLY AND LEGALLY INSUFFICIENT TO PROVE PENETRATION OF THE VULVA BY THE TONGUE BECAUSE THE ONLY EVIDENCE THAT SUCH A SEXUAL ACT OCCURED IS

HN CORCORAN'S BARE STATEMENT THAT HE PERFORMED "ORAL SEX".

This Court reviews issues of legal and factual sufficiency *de novo*. *United States v. Hays*, 62 M.J. 158, 162 (C.A.A.F. 2005); *see also* Art. 66(c), UCMJ, 10 U.S.C. § 866(c) (2012).

Principles of Law

The test for legal sufficiency is whether, when viewed in the light most favorable to the Government, the evidence is such that a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *United States v. Harper*, 22 M.J. 157, 161 (C.M.A. 1986).

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing this Court neither saw nor heard the witnesses at trial, this Court is convinced, beyond a reasonable doubt, of the appellant's guilt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). In conducting this review, this Court may independently judge the credibility of the witnesses at trial, resolve questions of fact, and substitute its judgment for that of the military judge or the court-martial members. Art. 66(c), UCMJ, 10 U.S.C. § 866(c) (2012); *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990).

Discussion

Specification 2 of the Charge alleges that HN Corcoran committed a sexual assault in violation of Article 120(b), UCMJ. A conviction under Article 120(b), UCMJ, requires proof of a sexual act. 10 U.S.C. § 920(b) (2012). A sexual act, in the context of oral sex, means penetration of the vulva by the tongue or penetration of the mouth by the penis. 10 U.S.C. § 920(g)(1). Here, the only evidence to support this specification was HN Corcoran's statement that he performed "oral sex" on B.S. (Pros. Ex. 5.)

The only case directly on point is *United States v. Hansen*, 36 M.J. 599 (A.F.C.M.R. 1992). In *Hansen*, the Air Force Court of Criminal Appeals held that use of the term "oral sex" - without more - is insufficient to prove penetration. *Id.* at 608.

This Court discussed *Hansen* in *United States v. Green*, noting that "'[o]ral sex' without more, may refer to fellatio or cunnilingus, neither of which the victim in *Hansen* reported in relation to the charged conduct, and the accused in *Hansen* did not indicate which act had occurred in his admission." 52 M.J. 803, 805 (N-M. Ct. Crim. App. 2000). Green relied on *Hansen* in arguing his conviction for sodomy was factually insufficient. *Id.* But there was additional evidence to support Green's conviction, so this Court affirmed his conviction. *Id.*

In *Green*, this Court found the victim's use of the term "oral sex" coupled with her testimony describing the act was sufficient to establish penetration. *Id.* The victim testified that Green's "head was between her legs, his hands were on her thighs, her legs were spread apart, his mouth was on her vagina, the appellant was 'performing oral sex,' and 'he was in between me.'" *Green*, 52 M.J. at 804-5.

In *United States v. Tu*, 30 M.J. 587 (A.C.M.R. 1990), an Army case, there was not as much amplifying information as in *Green*. But there was still evidence of cunnilingus beyond the appellant's admission of performing "oral sex." *Id.* at 589-90. He also admitted to kissing and licking the victim's vagina, ruling out fellatio. *Id.* at 589-90.

By contrast, HN Corcoran made the conclusory statement that he performed "oral sex." Common experience tells us the names of sexual acts can have different meanings to different people. Without knowing what HN Corcoran means by oral sex, this Court cannot be sure he penetrated B.S.'s vulva or whether he put his penis in her mouth to perform fellatio. And B.S. does not have any recollection of any oral copulation. No court has held that the term "oral sex" alone is sufficient to sustain a conviction for sexual assault or sodomy. This Court should not be the first to do so.

Request for Relief

This Court should examine the evidence and conclude it is insufficient to find HN Corcoran penetrated B.S.'s vulva. The findings of guilt for Specification 2 in this case must bet set aside and the case must be remanded for resentencing.

VI.

THE MILITARY JUDGE ERRED WHEN HE RELIED ON PURPORTED WAYS OF THE WORLD AND HUMAN EXPERIENCE TO RECONCILE B.S.'S BAC IN LIGHT OF THE TESTIMONY OF THE WITNESSES.

Standard of Review

Military judges are presumed to know the law and to follow it absent clear evidence to the contrary. *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007). Accordingly, although there is no clear precedent, it seems appropriate to review the military judge's decision to rely on human experience under a plain error standard. Plain error has three requirements: (1) there must be error; (2) the error must be plain; and (3) the plain error must affect the substantial rights of the accused. *Powell*, 49 M.J. at 463.

Discussion

An accused is entitled to the due process of law and to be convicted only based on the evidence the government presents in court. *United States v. Bouie*, 26 C.M.R. 8, 13 (C.M.A. 1958). Ordinary human experience and matters of common knowledge in the

military community are proper considerations for the trier of fact. *United States v. Meeks,* 41 M.J. 150, 158 (C.M.A. 1994); *United States v. Kropf,* 39 M.J. 107, 108 (C.M.A. 1994). However, there is a limit to what may be considered common knowledge and ordinary human experience. The Court of Appeals for the Armed Forces (C.A.A.F.) in *United States v. Fletcher,* succinctly enumerated what has previously been matters of common knowledge that may be relied upon:

> In the past, 'common knowledge' has included 'knowledge about routine personnel actions,' *United States v. Stargell*, 29 M.J. 92, 94 (C.A.A.F. 1998); knowledge of ongoing military actions overseas, *Meeks,* 41 M.J. at 158-59; knowledge of the Navy's 'zero tolerance' policy for drug offenses, *Kropf*, 39 M.J. at 108-9; the existence in the United States of a 'war on drugs,' *United States v. Barrazamartinez,* 58 M.J. 173, 175-76 (C.A.A.F. 2003); and any other matter 'upon which men in general have a common fund of experience and knowledge, through data notoriously accepted by all.' *United States v. Jones*, 2 C.M.A. 80, 87 (C.M.R. 1952) (quoting Wigmore, *Evidence* § 2570 (3d ed.)).

Fletcher, 62 M.J. 175, 183 (2005).

Here, the military judge stated in his special findings that his knowledge of "human nature and the ways of the world . . . allowed the court to reconcile B.S.'s BAC in light of testimony of other witnesses, as well as the statement of HN Corcoran." (Appellate Ex. XXXVII.) The military judge did not specify or further define what he meant by his human experience. The military judge's reliance on his own "human experience" to reconcile BAC evidence and the testimony of witnesses that B.S.

did not seem significantly impaired, falls outside of the realm of what is proper matters of human experience and into scientific evidence. Here, the government simply did not prove its case and the military judge used his own outside knowledge of unknown scientific facts to overcome the Government's lack of proof. This was error and the error is plain.

Prior to trial, the defense fought vigorously to show the phrase "impairment due to alcohol" lacked a clear definition. (R. at 194-205.) Through the colloquy with the military judge, it becomes clear that he believed the definition of impairment due to alcohol contains a subjective and objective piece and experts provide the objective piece. (R. at 210.) As the military judge recognized, experts are required to explain BAC and the resultant effects from alcohol because they have specialized knowledge. To then later say that his own knowledge reconciled the BAC evidence in some unknown way implicates a matter outside the appropriate realm of "common experience." Therefore, not only was the error plain, but HN Corcoran's substantial rights were implicated. Specifically, HN Corcoran's Due Process rights were violated because his conviction was based on evidence that improperly came from outside of the court-martial.

Request for Relief

HN Corcoran was convicted specialized knowledge in the military judge's mind and not evidence presented at the court-martial. This violated HN Corcoran's Due Process rights. Accordingly, his Court should set aside the findings and sentence.

VI

IN THIS PROSECUTION FOR A VIOLATION OF ARTICLE 120(b), THE ELEMENT THAT B.S. WAS "INCAPABLE OF CONSENTING TO THE SEXUAL ACT DUE TO IMPAIRMENT BY ALCOHOL" IS UNCONSTITUTIONALLY VAGUE.

Standard of Review

Where the issue is raised at trial, whether a statute is unconstitutional as applied is reviewed *de novo*. *United States v. Ali*, 71 M.J. 256, 265 (C.A.A.F. 2012); (R. at 194-205; Appellate Ex. XXV.)

Discussion

Due Process guaranteed by the Fifth Amendment requires fair notice that an act is forbidden and subject to criminal sanctions. *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003) (citing *United States v. Bivens*, 49 M.J. 328, 330 (C.A.A.F. 1998)); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). An act of Congress is unconstitutionally vague if a person cannot reasonably discern whether the contemplated conduct is criminal. *United States v. Harriss*, 347 U.S. 612,

617 (1954). People of "common intelligence" must not be forced to guess at the meaning of the criminal law. *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). "Because we assume man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

In this case "incapable of consenting to the sexual act due to impairment by alcohol" is not sufficiently specific to inform a member of the public as to when it would be illegal to have sex with a person who has been drinking alcohol, because all drinking causes some level of impairment. HN Corcoran was not sufficiently warned by the text of the statute as to when sexual activity with someone who had been drinking would become criminal because it is unclear what factors satisfy the element of "incapable of consent due to impairment of alcohol." The law cannot be understood by the common man.

First, there is no statutory definition of this key term. In the previous iteration of Article 120, UCMJ, 10 U.S.C. § 920 (2006), the theories of incapacitation mirrored the similar federal statute. *Cf* 18 U.S.C. § 2242 ("Whoever knowingly engages in a sexual act with another person if that person is

incapable of appraising the nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage that sexual act" is guilty of sexual assault.) The federal case law in that situation provided awareness regarding where the line of impairment was as to cause a person to be unable to consent due to consumption of alcohol. Now however the words of the statute have changed significantly.[2] Congress is presumed to act with a purpose and here, Congress made a purposeful deviation from the previous iteration of Article 120, UCMJ. This new statute must be presumed to mean something different than the old statute, but whatever that meaning is HN Corcoran could not have been aware of it because the words of the statute are too vague and there are no definitions or other caselaw to provide context.

Secondly, as the military judge noted, "the discussion with the experts leads you as to what the real answer [as to when a person is too impaired by alcohol to consent] is." (R. at 210.) This is problematic and shows the vagueness of the language. If experts are required to come in after the scenario has played out to judge the incapacitation then the ordinary person cannot

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[2] Under the new 120, a person is guilty if they commit a sexual act upon another person when the person is incapable of consenting due to impairment by any drug, intoxicant, or other similar substance, and that the condition is known or reasonably should be known by the person. 10 U.S.C. § 920 (2012).

be aware before they engage in the act that what they are doing is criminal. Notice of criminality must come before the act is undertaken, not after it is dissected by experts.

Furthermore, the crime of Sexual Assault prohibits engaging in a sexual act with a person who because of impairment by alcohol cannot consent. 10 U.S.C. § 920 (2012). Here, the military judge would only acknowledge that there was a line where alcohol caused impairment to the point that a person could not consent, but would not state what that line was. (R. at 210.) The military judge stated further that the element of "incapable of consenting to the sexual act due to impairment due to alcohol" contained an objective and subjective component. (R. at 210.) This insight into the military judge's personal definition of "incapable of consenting due to impairment by alcohol" is concerning. There is no statutory support for adding a subjective component. Further, if there is a subjective component, then individual victims decide whether a crime has been committed. This outcome cannot have been Congress' intent. Rather, the Supreme Court in *Coates v. Cincinnati*, held that an ordinance which punished the sidewalk assemblance of three or more persons who "conduct themselves in a manner annoying to persons passing by. . ." was impermissibly vague because enforcement depended on the completely subjective standard of "annoyance." 402 U.S. 611, 615 (1971). Given this

subjective aspect of the crime added by the military judge and his failure to be able articulate where the line is, it is plain that this statute lacks a standard that the "common person" can understand. Therefore the conviction of HN Corcoran in this case, using a standard the military judge would not articulate except to say it contained a subjective component, leads to the conclusion that Article 120, UCMJ, is unconstitutionally vague as applied in this case.

Request for Relief

This Court should set aside the findings and sentence in this case.

VIII.

THE TAINT OF APPARENT UNLAWFUL COMMAND INFLUENCE PERMEATED HN CORCORAN'S TRIAL BECAUSE THE MILITARY JUDGE FAILED TO PROVIDE ANY APPLICABLE REMEDIES AFTER FINDING THAT THE PRESIDENT'S REMARKS CONSTITUTED APPARENT UNLAWFUL COMMAND INFLUENCE.

Standard of Review

This Court reviews allegations of unlawful command influence *de novo*. *United States v. Harvey*, 64 M.J. 13, 19 (C.A.A.F. 2006).

Principles of Law

Unlawful command influence is "'the mortal enemy of military justice.'" *United States v. Gore*, 60 M.J. 178, 178 (C.A.A.F. 2004) (quoting *United States v. Thomas*, 22 M.J. 388,

393 (C.M.A. 1986)). Where it is found to exist, judicial authorities must take those steps necessary to preserve both the actual and apparent fairness of the criminal proceeding. *United States v. Rivers*, 49 M.J. 434, 443 (C.A.A.F. 1998); *United States v. Sullivan*, 26 M.J. 442, 444 (C.A.A.F. 1988). "The appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial." *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006) (citing *United States v. Stoneman*, 57 M.J. 35, 42-43 (C.A.A.F. 2002)).

At trial, the threshold for raising the issue of unlawful command influence is low; it requires only "some evidence" of facts which, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999) (internal citations omitted).

Once the issue is raised at the trial level, the burden shifts to the Government, which may either show there was no unlawful command influence or show the unlawful command influence will not affect the proceedings. *United States v. Gerlich*, 45 M.J. 309, 310 (C.A.A.F. 1996).

Discussion

On 7 May 2013, the President of the United States, when asked about sexual assault in the military, stated the following:

> I have no tolerance for this . . . I have communicated this to the secretary of defense. We're gonna communicate this again to folks up and down the chain in areas of authority. And I expect consequences. If we find out somebody's engaging in this stuff, they've got to be held accountable: prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged. Period.

(Appellate Ex. XVII, at 57.)

Trial Defense Counsel moved to dismiss all charges due to unlawful command influence that emanated from multiple sources, including the President. (Appellate Ex. XVII.) The military judge partially denied HN Corcoran's motion to dismiss, but found the President's comments on 7 May 2013 constituted apparent unlawful command influence. (Appellate Ex. XXXII at 2.) The military judge determined that to cure the apparent unlawful command influence he would offer liberal voir dire of the potential panel members, carefully adhere to the liberal grant mandate, and craft a special instruction for the members. (Appellate Ex. XXXII, at 7.) HN Corcoran subsequently chose trial by military judge alone. There were not any additional remedies put in place.

Here, some of the statements at issue were made by civilian officials, not subject to the UCMJ as required under Article 37,

UCMJ. But the CAAF has recently recognized that the rubric of apparent unlawful command influence may apply to civilian leaders. *See United States v. Hutchins*, 72 M.J. 294, 312 (C.A.A.F. 2013) (Ryan, J., concurring) (Baker, C.J., dissenting); *see also United States v. Simpson*, 58 M.J. 368, 374-75 (C.A.A.F. 2003); *United States v. Hagen*, 25 M.J. 78, 88 (C.M.A. 1987) (Sullivan, J., concurring); *United States v. Fowle*, 7 C.M.A. 349, 351-52 (C.M.A. 1956). Relying on this precedent it is clear that remarks by the President, our civilian Commander-in-Chief, can unlawfully influence a court-martial. Here, the President's words do exactly what Judge Sullivan warned against in his concurring opinion in *Hagen* because his words "sen[t] signals down the chain of command as to expected results in a criminal case . . . which w[ould] please the leadership." *Hagen*, 25 M.J. at 87 (Sullivan, J., concurring). The President's words are more than the mere policy statement or direction of general accountability that failed to garner relief for the appellant in *Simpson*. 58 M.J. at 374-75. Furthermore, although there was subsequent clarification statement made by the Secretary of Defense, the President has never back tracked on his words.

The military judge here found that remedial measures were necessary to cleanse the potential members panel. However, when the case was changed to military judge alone he did not provide

any remedial measures. Rather, the military judge self-servingly stated that he was not influenced by the President's remarks. Given that apparent command influence can exist even where it is not shown that the speaker intended to influence a particular authority or that the particular authority was actually influenced, *Hutchins*, 72 M.J. at 301 (Ryan, J., concurring), the military judge needed to provide meaningful action rather than just a *pro forma* disavowal that the words of the President would not affect his decision.

Request for Relief

This Court should remediate the unremediated apparent unlawful command influence and disapprove the punitive discharge.

CARRIE E. THEIS
Lieutenant, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris St, SE
Bldg 58, Ste. 100
Washington Navy Yard. D.C. 20374
Tel: (202) 685-7390
Fax: (202) 685-7426
Carrie.theis@navy.mil

Certificate of Filing and Service

I certify that a copy of the foregoing was delivered to the Court and to Director, Appellate Government Division, and electronically filed on 6 June 2014.

CARRIE E. THEIS
Lieutenant, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris St, SE
Bldg 58, Ste. 100
Washington Navy Yard. D.C. 20374
Tel: (202) 685-7390
Fax: (202) 685-7426
Carrie.Theis@navy.mil

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 3

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE Case No. 201300187
v.	)	Tried at Region Legal Service Office Southeast and Region Legal Service Office Southeast Detachment Mayport, Jacksonville, Florida, on October 22 and January 22-25, 2013, by a general court-martial convened by Commander, Navy Region Southeast, Jacksonville, Florida.
Dwayne L. DOCTOR, Master-At-Arms First Class Petty Officer (E-6) U.S. Navy Appellant	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

IAN D. MACLEAN
LT, JAGC, U.S. Navy
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7389, fax (202) 685-7687

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Errors Assigned

I.

IS THE EVIDENCE FACTUALLY AND LEGALLY SUFFICIENT TO AFFIRM THE APPELLANT'S CONVICTION?[1]

II.

DID THE MILITARY JUDGE ERR WHEN HE FAILED TO DECLARE A MISTRIAL AFTER POLYGRAPH TESTIMONY WAS HEARD BY THE MEMBERS IN DIRECT VIOLATION OF [Mil. R. Evid.] 707?

III.

DID THE MILITARY JUDGE ERR WHEN HE ALLOWED RECORDS OF OLD NON-JUDICIAL PUNISHMENTS TO BE ENTERED INTO EVIDENCE BY THE GOVERNMENT DURING PRESENTENCING IN VIOLATION OF JAGMAN 0141?

IV.

DID THE MILITARY JUDGE ERR WHEN HE ALLOWED TRIAL COUNSEL TO QUESTION WITNESSES DURING PRE-SENTENCING ABOUT SPECIFIC DETAILS RELATED TO A TWENTY-ONE YEAR OLD COURT-MARTIAL CONVICTION THAT OCCURRED WHEN APPELLANT WAS EIGHTEEN YEARS OLD?

V.

DID THE MILITARY JUDGE ERR WHEN HE FAILED TO GRANT DEFENSE COUNSEL'S CHALLENGE FOR CAUSE AGAINST CAPT O DESPITE THE LIBERAL GRANT MANDATE?

VI.

WAS APPELLANT'S BAD CONDUCT DISCHARGE INAPPROPRIATELY SEVERE?

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[1] Assignments of error one through thirteen are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

VII.

WAS MILITARY TRIAL DEFENSE COUNSEL INEFFECTIVE WHEN SHE FAILED TO DISCLOSE AN APPARENT CONFLICT OF INTEREST UNTIL THE WEEK OF TRIAL AND THEN, POST-TRIAL, JOINED AN ADVOCACY GROUP DEDICATED TO "EXPOSING DYSFUNCTION" IN MILITARY SEX ASSAULT CASES?

VIII.

DID THE MILITARY JUDGE ERR BY FAILING TO SUA SPONTE, DISMISS THIS CASE FOR UNLAWFUL COMMAND INFLUENCE DUE TO REMARKS MADE BY THE PRESIDENT OF THE UNITED STATES AND OTHER SENIOR CIVILIAN LEADERS THAT CREATED "A SHADOW OF PROSECUTE" [sic] **IN THE ARMED FORCES?**

IX.

DID THE CONVENING AUTHORITY COMMIT LEGAL ERROR BY TAKING ACTION JUST FOUR DAYS LATER RECEIVING CLEMENCY MATTERS IN THIS CASE? THIS COURT CANNOT BE CONFIDENT THAT THE CONVENING AUTHORITY ACTUALLY REVIEWED THE 922 PAGES OF THE RECORD OF TRIAL BEFORE TAKING ACTION.

X.

WAS THE APPELLANT DENIED DUE PROCESS WHEN NCIS INVESTIGATORS TAINTED MA3 A'S STATEMENT AND TESTIMONY BY CONDUCTING A FAULTY INVESTIGATION THAT RESULTED IN A FUNDAMENTALLY UNFAIR COURT-MARTIAL?

XI.

DID THE MILITARY JUDGE ERR WHEN HE REFUSED TO INSTRUCT ON THE LESSER INCLUDED OFFENSE OF ASSAULT WHEN THE MEMBERS COULD HAVE FOUND THAT NO INTENT SPECIFIC INTENT EXISTED.

XII.

DID THE MILITARY ERR BY NOT DECLARING A MISTRIAL WHEN THE MEMBERS BROUGHT OUT AN INAPPROPRIATELY FILLED OUT VERDICT FORM?

XIII.

DID THE MILITARY JUDGE ABUSE HIS DISCRETION UNDER [Mil. R. Evid.] 611 WHEN HE FAILED TO RECESS THE COURT-MARTIAL AT AN APPROPRIATE TIME REQUIRING THE MEMBERS TO REMAIN, DELIBERATE, AND RENDER A VERDICT AT MIDNIGHT AT THE END OF THE BUSNESS WEEK.

Statement of Statutory Jurisdiction

Appellant's approved sentence includes a bad conduct discharge. Accordingly, this Court has jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012).

Statement of the Case

A panel of members, sitting as a general court-martial, convicted Appellant, contrary to his pleas, of one specification of violation of a lawful general order, one specification of false official statement, and one specification of wrongful sexual contact, in violation of Articles 92, 107, and 120, UCMJ, 10 U.S.C. §§ 892, 907, and 920 (2012). The Members sentenced Appellant to ten months confinement, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad conduct discharge. The Convening Authority approved the sentence as adjudged, and except for the punitive discharge, ordered the sentence executed.

Statement of Facts

A. Appellant's underlying misconduct.

Appellant worked with MA3 JA at Naval Station Mayport. (R. 250.) MA3 JA and Appellant were never actually on the same shift at work but saw each other during shift turnover and on training days. (R. 251.) MA3 JA did consider Appellant to be one of his supervisors. (R. 254.) Appellant obtained MA3 JA's cellular telephone number and began communicating with him outside of work. (R. 253.) Eventually, MA3 JA and Appellant made plans to go to a bar near MA3 JA's off base apartment on one of the days they both had liberty. (R. 256, 258.)

Appellant picked up MA3 JA from his apartment and in so doing met MA3 JA's wife. (R. 261.) Both Appellant and MA3 JA consumed several alcoholic beverages at the bar over the course of a few hours. (R. 264-65, 394.) The two planned for Appellant to sleep at MA3 JA's apartment on the couch when they returned from the bar. (R. 260.)

At approximately 0130 Appellant drove MA3 JA back to his apartment. (R. 273.) During the approximately three minute drive Appellant made sexual overtures towards MA3 JA that were rebuffed. (R. 274-75.) While they were both in the vehicle in the parking lot to the apartment complex, Appellant unzipped his pants and exposed his penis to MA3 JA. (R. 277.) Appellant then requested MA3 JA expose his penis as well. (R. 277-78,

344.) Without responding MA3 JA immediately exited the vehicle and went to his apartment. (R. 278.) MA3 JA did allow Appellant into his apartment to sleep on the couch as they had previously planned. (R. 279-80.)

While in the apartment MA3 JA sat on the couch as he ate some food. (R. 289.) After vomiting in the kitchen sink Appellant sat on the couch as well and again asked MA3 JA to expose himself, and repeatedly solicited a threesome with MA3 JA and his wife. (R. 292-94, 356-57, 422, 587.) From the bedroom MA3 JA's wife heard some of the conversation and came into the hallway where she could see both MA3 JA and Appellant. (R. 295, 421-22, 441.) Upon leaning in and touching MA3 JA, Appellant was asked to leave the apartment. (R. 293, 423.)

Appellant left the apartment with MA3 JA escorting him out of the apartment. (R. 297.) Once outside the door of the apartment in the open air exterior hallway, Appellant reached for and grabbed MA3 JA's genitals without permission to do so. (R. 298.) MA3 JA removed Appellant's hand from his genitals and told him to stop. (R. 298-99.) Appellant again grabbed MA3 JA's genitals without permission to do so. (R. 298-99.) MA3 JA told Appellant to leave. (R. 298-99.) MA3 JA returned to his apartment and reported the incident to his chain of command by telephone. (R. 302, 426.)

B. Investigation of the incident.

Upon receiving a report of the incident Naval Criminal Investigative Services (NCIS) opened an investigation. (R. 304, 452.) MA3 JA cooperated and placed a series of three controlled calls to Appellant. (R.305-06, 461-62.) Appellant did not answer those calls but did return a call which was recorded. (R. 462; Pros. Ex. 6 and 7.) During the recorded call Appellant admitted to exposing himself to MA3 JA, soliciting a threesome with MA3 JA and his wife, and grabbing MA3 JA's genitals without permission to do so (Pros. Ex. 6; Pros. Ex. 7 at 2-5, 7.). Appellant and MA3 JA also exchanged a series of text messages, subsequently captured by NCIS, in which Appellant admitted to grabbing MA3 JA's genitals. (R. 483; Pros. Ex. 8; Pros. Ex. 13 at 4-5.) Appellant was interviewed by NCIS later that day. (R. 483.) During the interview and in his written statement Appellant denied exposing himself or touching MA3 JA's genitals. (R. 491; Pros. Ex. 12.) During the interview with NCIS Appellant twice indicated he was willing to take a polygraph examination. (Pros. Ex. 11.)

C. Admission of video recorded interview of Appellant conducted by the Naval Criminal Investigative Service case agent.

Trial Counsel admitted a recording of an interview conducted by the NCIS case agent of Appellant into evidence without objection from Civilian Defense Counsel. (R. 519; Pros.

Ex. 11.) The interview was nearly three hours in duration and recorded on three separate compact discs. (R. 520; Pros. Ex. 11.) Trial Counsel played the video recording of the interview for the Members. (R. 522, 534, 549, 553; Pros. Ex. 11; Appellate Ex. XIX.) At the end of the third disc, the case agent asked, "so like you told him before you are willing to take a polygraph" and Appellant responded "yes."[2] (R. 626; Appellate Ex. XIX disc 3 at 19:16:52–19:17.) The Trial Counsel proceeded to ask a few additional questions of the case agent on the witness stand and concluded his direct examination. (R. 557-61.)

Before going into cross examination the Military Judge *sua sponte* called an Article 39(a) session. (R. 561.) During the Article 39(a) session the Civilian Defense Counsel raised an objection and sought a mistrial based on the mention of an offer to take a polygraph examination. (R. 562.) The Military Judge denied the motion for mistrial and issued a curative instruction to the Members to "completely disregard" any mention of a polygraph examination. (R. 563, 566.) The Members all indicated they had no questions about the curative instruction,

[2] The reference by the case agent to a prior discussion about a polygraph examination was redacted from the second compact disc of the recording that was introduced into evidence. (R. 524-34, 541.) The redaction was made to the second disc pursuant to a defense objection. (R. 524.)

that they understood the curative instruction, and that they would follow the curative instruction. (R. 566-67.)

D. Documents admitted in presentencing.

Trial Counsel offered documents as Prosecution Exhibit 14 from Appellant's Service Record Book demonstrating he was convicted at a special court-martial in 1992 of assault and of communicating a threat in violation of the general article. (R. 766, 785.) Trial Defense Counsel had no substantive objection to admission of Prosecution Exhibit 14. (R. 782.) Before ruling on admissibility, Trial Counsel invited the Military Judge's attention to the discussion addressing Rule for Court-Martial 1001(b)(3) and requested the Military Judge conduct a balancing test under Military Rule of Evidence 403. (R. 784.)

After hearing argument on the probative value of the proffered evidence from Trial Counsel (R. 785-88), the Military Judge gave Civilian Defense Counsel another opportunity to be heard (R. 789). Civilian Defense Counsel argued an objection and clarified it was limited to the documents themselves. (R. 790.) Civilian Defense Counsel proposed the alternative to admitting the documents of Trial Counsel asking "did you know/have you heard" questions of the witnesses. (R. 790.)

The Military Judge conducted a full balancing test and excluded Prosecution Exhibit 14 for identification from evidence. (R. 792.) The Military Judge then stated "the government will

be allowed to ask questions of whether these witnesses know about this prior court-martial conviction." (R. 792.) Trial Counsel asked questions during cross examination of the three good military character witnesses about Appellant's prior court-martial conviction. (R. 819-20, 843, and 854.)

Argument

I.

APPELLANT'S CONVICTIONS WERE LEGALLY AND FACTUALLY SUFFICIENT BECAUSE THE VICTIM'S TESTIMONY ESTABLISHED ALL ELEMENTS OF THE OFFENSES AND WAS CORROBORATED BY OTHER WITNESSES INCLUDING APPELLANT'S OWN ADMISSIONS.

A. Standard of Review.

This Court reviews claims of legal and factual insufficiency de novo. Article 66(c), UCMJ; *United States v. Beatty*, 64 M.J. 456, 459 (C.A.A.F. 2007).

B. Appellant's convictions are legally sufficient.

The test for legal sufficiency is whether, considering the evidence admitted at trial in a light most favorable to the prosecution, a reasonable fact-finder could have found all the elements beyond a reasonable doubt. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Appellant's argument that the Victim was not a credible witness lacks merit. (Appellant's Br. at 5.) In evaluating

legal sufficiency the evidence is reviewed in the light most favorable to the prosecution. Even if the Victim's credibility was damaged on cross examination, that is irrelevant to legal sufficiency, where evidence is considered in the light most favorable to the prosecution. (Appellant's Br. at 5.) The Victim's testimony alone is sufficient to support the convictions, even without the interlocking testimony of other witnesses, and the admissions made by Appellant himself. Further, the Defense theory at trial was not that the underlying conduct did not occur, rather that it was all consensual. (R. 244-46, 705-10, 713-14, 717, 721.)

MA3 JA testified that Appellant exposed his genitals to him while parked in Appellant's vehicle in the parking lot of his apartment. (R. 277-78, 344.) After exposing himself in the parked car, Appellant asked MA3 JA to do the same. (R. 277.) During a controlled call the next day, Appellant admitted this conduct. (Pros. Ex. 7 at 2.)

MA3 JA testified that while in his apartment, Appellant solicited a threesome with him and his wife, and again asked him to expose himself. (R. 292-94, 356-57, 587.) MA3 JA's wife corroborated those events when she testified that she overheard Appellant soliciting a threesome with her. (R. 421.) Lastly, Appellant admitted during the controlled call the following day,

that he had solicited a threesome with MA3 JA and his wife. (Pros. Ex. 7 at 7).

MA3 JA testified that outside his apartment after being asked to leave, Appellant grabbed his genitals without permission. (R. 298.) After MA3 JA told Appellant to stop and then removed his hand, Appellant again grabbed his genitals. (R. 298-99.) During the controlled call the next day, Appellant admitted he grabbed MA3 JA's genitals without permission. (Pros. 6; Pros. Ex. 7 at 3, 4, and 5.) Appellant also admitted grabbing MA3 JA via text message. (Pros. Ex. 8; Pros. Ex. 13 at 4-5.)

When viewed in the light most favorable to the United States, MA3 JA's testimony alone renders the convictions here legally sufficient. Additional support is found in the interlocking and supporting testimony of the Victim's spouse. as well as Appellant's own words in a controlled call. (R. 421; Pros. Ex. 6; Pros. Ex. 7; and Pros. Ex. 8.)

C. Appellant's convictions are factually sufficient.

Testing for factual sufficiency, this Court asks whether, after weighing the evidence in the record of trial, it is independently convinced of Appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). In testing for factual sufficiency, this Court is required to "recogniz[e] that the trial court saw and heard the witnesses."

Id. This is not a *pro forma* legal requirement. Rather, it takes into account the legal rule that the trier of fact is best situated to assess a witness's credibility while testifying. *See, e,g, United States v. Madey*, 14 M.J. 651, 653 (A.C.M.R. 1982), *rev. denied*, 15 M.J. 183 (C.M.A. 1983); *United States v. Ferguson*, 35 F.3d 327, 333 (7th Cir. 1994), *cert. denied*, 514 U.S. 1100 (1995) (trial court's evaluation of witness credibility "will not be disturbed unless it is completely without foundation."). It also takes into account that, where the court members are properly instructed to consider a witness's credibility, this Court should presume that the members followed the Military Judge's instructions to do so here. *See United States v. Collier*, 67 M.J. 347 (C.A.A.F. 2009). (*See* R. 678-79.)

Here, MA3 JA's testimony provides compelling proof of the charged offenses as discussed fully *supra*. Further, large portions of the testimony was corroborated by other percipient witnesses. MA3 JA's wife corroborated his testimony about Appellant's arrival at their residence, the conversation that occurred there, and their departure to the bar. (R. 413.) The events at the bar were corroborated by the interlocking testimony of another bar patron. (R. 389-97.) Some of the events that occurred after they returned from the bar back MA3 JA's residence were corroborated by his spouse. (R. 417-42.)

Lastly, Appellant made a series of admissions during the controlled call the next day that corroborated MA3 JA's testimony as well. (Pros. Ex. 6; Pros. Ex. 7.) The Victim's testimony combined with all of the corroborating witnesses, including Appellant's own admissions, this Court should be convinced beyond a reasonable doubt of Appellant's guilt.

II.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING A MISTRIAL DUE TO A PASSING REFERENCE TO AN OFFER TO TAKE A POLYGRAPH EXAMINATION BECAUSE A TIMELY CURATIVE INSTRUCTION WAS GIVEN.

Evidence of an offer to take a polygraph examination is inadmissible. Mil. R. Evid. 707(a). "A curative instruction is the preferred remedy for correcting error when the court members have heard inadmissible evidence. . . ." *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000). Members are presumed to follow the instructions of the military judge. *United States v. Tyndale*, 56 M.J. 209, 216 (C.A.A.F. 2001).

Here, after hearing a single passing reference to an offer to take a polygraph examination at the end of a nearly three hour interview, the Members were give a strong curative instruction. (R. 563, 566.) The Members all indicated they had no questions about the curative instruction, that they understood the curative instruction, and that they would follow the curative instruction to "completely disregard" any mention

of a polygraph examination. (R. 566-67.) Nothing in the Record suggests they did not follow the instruction. In actuality, as the Members acquitted Appellant of one of the charges he faced, they did follow instructions of the Military Judge. (R. 761.)

A military judge "may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings." R.C.M. 915(a). "The power to grant a mistrial should be used with great caution" as it is such a "drastic remedy." *Taylor*, 53 M.J. at 198. A mistrial is only warranted when "necessary to prevent a miscarriage of justice" and the military judge's ruling will only be reversed where there is a clear abuse of discretion. *Id.*

Nothing here rises to the level of a miscarriage of justice warranting consideration of a mistrial. Even if the Members did not follow the Military Judge's instruction, Appellant suffered no prejudice. Appellant's claimed prejudice is that the Members would believe he failed the polygraph because they did not hear evidence about it. (Appellant's Br. at 5.) During the interview with NCIS Appellant denied any conduct of a sexual nature towards the Victim, then agreed to take a polygraph. (Pros. Ex. 11.) At trial, Appellant acknowledged he was untruthful in the interview and his entire defense theory was

not that the conduct did not occur, rather that the conduct was consensual. (R. 244-46, 705-10, 713-14, 717, 721.) Even if the Members disregarded the instruction from the Military Judge it would have been of no consequence because Appellant's defense theory presumes he was untruthful during the NCIS interview. Consequently, no mistrial was warranted, and Appellant is entitled to no relief.

III.

THE MILITARY JUDGE DID NOT COMMIT PLAIN ERROR IN ADMITTING EVIDENCE OF APPELLANT'S NON JUDICIAL PUNISHMENT AND HIS FITNESS AND EVALUATION REPORTS DURING THE PRESENTENCING CASE.

Evidentiary rulings admitting evidence over defense objection are reviewed for an abuse of discretion. *E.g.*, *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006). However where no objection was made an evidentiary ruling is reviewed for plain error. *E.g.*, *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009).

Here, the initial objections to Prosecution Exhibits 15, 16, 17, and 18 were all withdrawn by Defense Counsel after redactions were made to the documents. (R. 794-96.) Accordingly the admissibility of these documents is reviewed under plain error as there was no objection to their admission into evidence. *Campos*, 67 M.J. at 332. "The plain error standard is met when (1) an error was committed; (2) the error

was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights." *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008) (internal quotations omitted). Here, there was no error in admitting these documents.

Prosecution Exhibit 15, a punitive letter of reprimand issued to Appellant pursuant to non-judicial punishment was properly admitted in sentencing as evidence of a punishment under Article 15, UCMJ. R.C.M. 1001(b)(2). Prosecution Exhibits 16, 17, and 18 are Appellant's fitness evaluation reports that were properly admitted in sentencing as evidence of his prior service reflecting his military efficiency, conduct, and performance. R.C.M. 1001(b)(2). The Military Judge did not commit an error by accepting admissible documents into evidence, let alone a plain, clear, or obvious error.

IV.

ANY ERROR IN ALLOWING "DID YOU KNOW" OR "HAVE YOU HEARD" QUESTIONS REGARDING THE UNDERLYING FACTUAL BASIS OF APPELLANT'S FORMER COURT-MARTIAL CONVICTION WAS INVITED BY APPELLANT, AND TRIAL COUNSEL ENGAGED IN NO PROSECUTORIAL MISCONDUCT BY ASKING SUCH QUESTIONS IN ACCORDANCE WITH THE MILITARY JUDGE'S RULING.

A. <u>If there was any error in allowing questions regarding Appellant's prior court-martial conviction, Appellant is due no relief as he invited the error</u>.

Invited error is not a basis for relief. *United States v. Raya*, 45 M.J. 251, 254 (C.A.A.F. 1996). Appellant cannot create

error at trial then seek to take advantage of that error he created on appeal. *Id*.

Here, Civilian Defense Counsel suggested that Trial Counsel be permitted to ask questions in lieu of admitting the proffered documents. (R. 790.) Civilian Defense Counsel made a tactical decision that allowing the documents into evidence would be more harmful as they would go with the Members into their deliberations. In an effort to prevent that possibility, Civilian Defense Counsel suggested Trial Counsel ask "did you know/have you heard" questions of the witnesses as a less prejudicial means of bringing the information before the Members. (R. 790.) If allowing those questions was erroneous, Appellant invited that error into his court-martial and should not now be permitted to benefit from it. *Raya*, 45 M.J. at 254.

B. <u>There was no prosecutorial misconduct here because Trial Counsel abided by the Military Judge's ruling</u>.

1. <u>Allegations of prosecutorial misconduct are reviewed *de novo*</u>.

Whether a complained of action constitutes prosecutorial misconduct is question of law reviewed *de novo*. *United States v. Argo*, 46 M.J. 454, 457 (C.A.A.F. 1997). If misconduct occurred the determination of whether it resulted in prejudicial error is also a question of law reviewed *de novo*. *United States v. Edmond*, 63 M.J. 343, 347 (C.A.A.F. 2006). Relief is only due where "the trial counsel's misconduct actually impacted on a

substantial right of an accused (i.e., resulted in prejudice)." *United States v. Fletcher*, 62 M.J. 175, 178 (C.A.A.F. 2005) (internal quotations omitted).

2. Trial Counsel did not violate the ruling or guidance of the Military Judge.

Trial prosecutorial misconduct is behavior by the prosecuting attorney that "oversteps the bounds of propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *Fletcher*, 62 M.J. at 178 (quoting *Berger v. United States*, 295 U.S. 78, 84 (1935)). Introducing improper evidence into a trial through disregarding instructions of a trial judge can amount to prosecutorial misconduct. *See United States v. Crutchfield*, 26 F. 3d 1098 (11th Cir. 1994).

Here, the Trial Counsel neither overstepped the bounds of fairness nor disregarded a ruling of the Military Judge. The Military Judge expressly ruled Trial Counsel could ask questions about Appellant's prior court-martial conviction. (R. 792.) Trial Counsel adhered to that ruling.

In cross examination of the first good military character witnesses, Trial Counsel asked a single "have you heard" or "did you know" style question about the underlying factual basis of Appellant's prior conviction. (R. 819-20.) Of the second good military character witness, Trial Counsel asked two "have you

heard" or "did you know" style questions pertaining to Appellant's conduct that resulted in his prior conviction. (R. 843.) The third good military character witness testified that Appellant had an "impeccable record." (R. 851.) On cross examination, in rebuttal to that claim of an "impeccable record," Trial Counsel asked a short series of questions about Appellant's underlying conduct and that it had resulted in a conviction. (R. 854.) The cross-examinations properly probed the value of these witnesses' opinions.

None of Trial Counsel's questions were objected to by Civilian Defense Counsel. Each question was well within the Military Judge's ruling that he could ask questions about "whether these witnesses know about this prior court-martial conviction." (R. 792.) Accordingly, there was no prosecutorial misconduct.

V.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING THE CHALLENGE FOR CAUSE OF CAPT O AND THERE WAS NO BEHAVIOR DEURING THE TRIAL THAT WARRANTED SUA SPONTE DISMISSAL OF THE MEMBER.

A. CAPT O's honest and candid responses volunteering more information than what was specifically asked did not warrant granting a dismissal for cause.

1. Standard of review.

A military judge's decision whether to grant a challenge for cause based on actual bias is reviewed for an abuse of

discretion. *United States v. Leonard*, 63 M.J. 398, 402 (C.A.A.F. 2006) (citations omitted). Implied bias is reviewed under the same standard, but less deference is due when the judge does not articulate the correct test on the record. *See United States v. Clay*, 64 M.J. 274, 277 (C.A.A.F. 2007); *United States v. Bagstad*, 68 M.J. 460, 462 (C.A.A.F. 2010) (citations omitted).

2. The Record demonstrates no actual bias on the part of CAPT O.

"The test for actual bias is whether any bias is such that it will not yield to the evidence presented and the judge's instructions." *United States v. Terry*, 64 M.J. 295, 302 (C.A.A.F. 2007) (internal quotations omitted). As the existence of actual bias is a question of fact appellate courts provide the military judge with significant latitude in determining whether it is present in a prospective member. *Id*. The military judge is specially situated in making this determination because he was physically present during voir dire and watched the challenged member's demeanor. *Id*.

Here, as the Military Judge articulated, CAPT O demonstrated no actual bias. (R. 212.) As the Military Judge explained, CAPT O not only answered every question asked but volunteered additional information to elaborate in many of his responses. (R. 212.) The Military Judge, who had the opportunity to observe CAPT O's demeanor and body language

during the voir dire, noted he completely disagreed with the characterization that CAPT O was inattentive in any way. (R. 212.) Accordingly there is no basis on which to find actual bias and the Judge did not abuse his discretion.

3. The Record demonstrates no implied bias.

The implied bias test has been enunciated both by the Court of Appeals for the Armed Forces and this court in varying ways from case to case and year to year. But posed precisely, it asks whether most people, in the same position as the court member, would be prejudiced; if so, such members should be excused. *See United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006); *United States v. Briggs,* 64 M.J. 285, 287 (C.A.A.F. 2007) (explicitly considering circumstances of member but implicitly concluding that any member in those circumstances would be biased); *Leonard*, 63 M.J. at 402 (same); *United States v. Warden,* 51 M.J. 78 (C.A.A.F. 1999) (same). The test for implied bias is an objective one. *Moreno*, 63 M.J. at 134; *see also United States v. Bragg*, 66 M.J. 325, 326-27 (C.A.A.F. 2008). The burden of persuasion rests with the party making the challenge. R.C.M. 912(f)(3); *see also United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002).

In typical implied bias cases, potential bias is identified at the beginning of trial, where the member may have some relationship with an aspect of the trial. Such a relationship

includes: (a) some substantial emotional involvement, *Clay*, 64 M.J. at 278 (moral convictions and harsh punishment for rape); (b) close personal ties with someone who was a victim of the same or similar crime before the court, *Terry*, 64 M.J. at 305 (ex-girlfriend was raped); or, (c) a close relationship with one of the parties, witnesses, or another member. *Downing*, 56 M.J. at 422-23 (member knew trial counsel); *Leonard*, 63 M.J. at 403 (member's professional relationship with the victim was one of trust); *Bagstad*, 68 M.J. at 460 (senior reporting officer of another member).

Here, no such implied bias exists. The Military Judge discussed implied bias (R. 209), cited applicable case law (R. 216-17), recognized the existence of the liberal grant mandate (R. 213, 217, 224), and applied the liberal grant mandate (R. 213, 217, 224). Even assuming CAPT O was not actually biased, so too there is nothing in CAPT O's circumstances or relationship to a party in the case that gives a necessary appearance of bias. Momentary inattention during a court-martial is not a personal circumstance that, in most individuals, would suggest bias.

VI.

APPELLANT'S SENTENCE WAS APPROPRIATE IN LIGHT OF THE SEVERITY OF THE OFFENSES AND THE MANNER IN WHICH APPELLANT TOOK ADVANTAGE OF A JUNIOR SAILOR FROM HIS OWN UNIT.

Sentence appropriateness is reviewed *de novo*. *United States v. Baier*, 60 M.J. 382, 383—84 (C.A.A.F. 2005). In conducting its analysis this Court may only affirm so much of the sentence as it finds correct in law and fact based on a review of the entire record. 10 U.S.C. § 866(c) (2012). Both the adjudged and approved sentences are considered in reviewing sentence appropriateness. *United States v. Roach*, 69 M.J. 17, 21 (C.A.A.F. 2010). Measuring sentence appropriateness requires an "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 10 C.M.A. 102, 106-07 (C.M.A. 1959)). "Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 396 (C.M.A. 1988).

Appellant's offenses here were serious. He preyed upon a subordinate sailor from his own unit by exposing himself, then soliciting sexual activity with that subordinate and his wife, then sexually assaulting that junior sailor. Appellant took

advantage of the position of trust his seniority afforded him to prey on those junior to him. As a result of Appellant's actions, MA3 JA has suffered problems at work, within the community, and with his wife. (R. 810-11.) As a result of being victimized by a First Class Petty Officer that he trusted, MA3 JA has begun seeing a counselor to help him cope with trouble sleeping, weight loss, depression, and loss of trust. (R. 811.) Appellant's predatory actions on a junior shipmate warrant the adjudged and approved sentence.

VII.

APPELLANT FAILS TO ESTABLISH AN ACTIONABLE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IN ANY OF HIS FOUR SEPARATE ALLEGATIONS.

A. Appellant's claims of ineffective assistance of counsel on appeal are reviewed *de novo*.

To establish ineffective assistance of counsel, "an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green*, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). "With respect to the first prong, whether counsel's performance was deficient, courts 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *United States v. Rose*, 71 M.J. 138, 143 (C.A.A.F. 2012) (quoting *Strickland*, 466

U.S. at 689). "Even under de novo review, the standard judging counsel's representation is a most deferential one." *Harrington v. Richter*, 131 S. Ct. 770, 788 (2011). Appellant has the burden of demonstrating both parts of the *Strickland* test, including the burden of establishing the truth of factual matters underlying his claim of ineffective assistance. *United States v .Gutierrez*, 66 M.J. at 329, 330-31 (C.A.A.F. 2008).

B. Appellant fails to satisfy his burden under *Strickland* as he offers nothing other than the Record itself.

Without post-trial affidavits or other extrinsic evidence that expands the record, only the record of trial itself is reviewed for the presence, or absence, of ineffective assistance of counsel. *See United States v. Henry,* No. 200800028, 2008 CCA LEXIS 617, *10 (N-M. Ct. Crim. App. Aug. 19, 2008) (turning to record of trial to evaluate an ineffective assistance claim where the appellant provided no affidavit); *see generally United States v. Boone,* 49 M.J. 187, 193 (C.A.A.F. 1998).

This Court has several times addressed cases, like this one, and repeatedly rejected appellants' attempts to raise ineffective assistance with no support but bare allegations in appellate briefs, rather than moving to expand the record of trial with extrinsic and sworn evidence. *See, e.g., Henry,* 2008 CCA LEXIS 617 (N-M. Ct. Crim. App. Aug. 19, 2008) ("The appellant's ineffective assistance of counsel assertions

constitute nothing more than bare allegations and speculation [and] . . . are unsupported by any post-trial affidavit of the appellant or other credible evidence."); *United States v. Griffin*, No. 200201471, 2007 CCA LEXIS 565, *15 (N-M. Ct. Crim. App. Dec. 20, 2007) (rejecting a bare claim of ineffective assistance of counsel unsupported by affidavit or other evidence); *United States v. Hayes,* 2007 CCA LEXIS 416 (N-M. Ct. Crim. App. Sept. 25, 2007) (overturned on other grounds). Thus, Appellant's bare allegations here should be rejected outright. Moreover, the Record itself reveals no ineffective assistance of counsel occurred.

C. Appellant fails to make a prima facie showing of ineffective assistance of counsel in any of his four claims of ineffective assistance.

To establish the first prong of the *Strickland* test, an appellant must show that counsel's performance was deficient such that the counsel was not functioning as the counsel guaranteed by the Sixth Amendment. *Denedo v. United States*, 66 M.J. 114, 127 (C.A.A.F. 2008), *aff'd*, 556 U.S. 904 (2009). To meet this standard, the counsel's performance must amount to incompetence under prevailing professional norms. *Harrington*, 131 S. Ct. at 788 (quoting *Strickland*, 466 U.S. at 690). Military appellate courts "will not second-guess the strategic or tactical decisions made at trial by defense counsel." *United States v. Mazza*, 67 M.J. 470, 475 (C.A.A.F. 2006).

1. Appellant made a knowing and voluntary waiver of the possible conflict of interest of Detailed Defense Counsel that he now complains of.

An actual conflict of interest on the part of defense counsel can be waived by an accused. *United States v. Beckley*, 55 M.J. 15, 24 (C.A.A.F. 2001); *United States v. Shadwell*, 58 M.J. 142 (C.A.A.F. 2003). A conflict waiver must be knowingly and voluntarily made "with sufficient awareness of the relevant circumstances and likely consequences." *United States v. Lee*, 66 M.J. 387, 388 (C.A.A.F. 2008) (internal quotations omitted).

Here, regardless of when a possible conflict of interest was brought to Appellant's attention, it was waived. Appellant made a knowing and voluntary waiver of the purported conflict of interest from his detailed Defense Counsel's prior assignment as a Staff Judge Advocate. Appellant was fully aware of the possible conflict of interest of his detailed Defense Counsel. (R. 20-21.) Detailed Defense Counsel brought the possible conflict to the attention of Appellant and the Military Judge. (R. 18, 20.) The Military Judge engaged in a thorough colloquy to confirm Appellant understood his right to conflict free counsel, that he had discussed this issue with his privately retained counsel, and that he wanted to waive the issue and keep his Detailed Defense Counsel on the case. (R. 22-25.) Appellant explained that he felt "there's no conflict" and that

his Detailed Defense Counsel was “a very professional attorney” that he wanted to represent him. (R. 25.)

2. Appellant’s claim that Detailed Defense Counsel was ineffective based on her subsequent employment after leaving active duty is unsupported by evidence and lacks merit.

Where the purported basis of ineffective assistance is conflict of interest “a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer’s performance.” *United States v. Hicks*, 52 M.J. 70, 72 (C.A.A.F. 1999). Questions of deficient performance are reviewed *de novo*. *United States v. Paxton*, 64 M.J. 484, 488 (C.A.A.F. 2007).

Appellant has the burden of establishing the truth of factual matters underlying his claim of ineffective assistance. *Gutierrez*, 66 M.J. at 330-31. Here, Appellant offered no evidence to establish the facts he relies upon, specifically Detailed Defense Counsel’s source of employment after leaving active duty. Even if Appellant had established his assertions as fact, he fails to meet his burden of demonstrating that subsequent employer cause an actual conflict at trial and that any actual conflict “adversely affected his lawyer’s performance.” *Hicks*, 52 M.J. at 72. Accordingly this claim lacks merit.

3. Civilian Defense Counsel was not ineffective by allowing a sole mention of an offer to take a polygraph or by requiring a recess to review documents offered in the presentencing case.

To establish ineffective assistance of counsel, Appellant must demonstrate the Counsel's performance amounted to incompetence under prevailing professional norms. *Harrington*, 131 S. Ct. at 788 (quoting *Strickland*, 466 U.S. at 690). Courts apply a three-part test to determine if the presumption of competence was overcome:

> 1. Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"?
>
> 2. If the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance. . . [ordinarily expected] of fallible lawyers"?
>
> 3. If defense counsel was ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result?

United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (citing *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)).

i. A single passing reference to an offer to take a polygraph within a multi-hour interview of Appellant by NCIS does not rise to the level of ineffective assistance.

Appellant fails to meet his burden of either prong of the Strickland test, that the conduct amounted ot incompetence under prevailing professional norms or that he suffered prejudice as a result. *Strickland*, 466 U.S. at 690. Trial Counsel played an interview of Appellant that lasted nearly three hours. (R. 522,

557; Pros. Ex. 11.) The third disc of Prosecution Exhibit 11 was played for the Members without objection from Civilian Defense Counsel. (R. 553.) During the thirty-five minutes of disc three that was played for the Members without objection there was a reference to an offer to take a polygraph examination. (R. 556, 562; Pros. Ex. 11.) Appellant fails to demonstrate that allowing the Members to hear a single passing reference at the end of a multi-hour interview was "unreasonable under prevailing professional norms." *Mazza*, 67 M.J. at 475. At worst, the failure to object here was a poor tactical decision that should not be second-guessed by this Court. *See id*. The failure to object does not rise to the level of ineffective assistance of counsel.

Even if it had been ineffective assistance, Appellant still shoulders the burden to establish prejudice in his ineffective assistance claim. *See Gooch*, 69 M.J. at 362. Appellant fails to carry that burden here. Curative instructions may render something harmless that in a vacuum would have been prejudicial. *United States v. Thomas*, 62 F.3d 1332, 1343 (11th Cir. 1995); *United States v. Lichenstein*, 610 F.2d 1272, 1282 (5th Cir. 1980). Here, the Military Judge gave a thorough curative instruction to the Members to disregard any reference to a polygraph examination. (R. 566.) All of the Members indicated they had no questions about the instruction (R. 567), that they

understood the instruction (R. 567), and that they would follow the instruction (R. 566). Members are presumed to follow instructions of the Military Judge. *United States v. Stewart*, 71 M.J. 38, 42 (C.A.A.F. 2012).

Accordingly, Appellant fails to establish any prejudice. There is no reasonable probability that the single passing reference to a polygraph examination caused the conviction here. A passing reference to a polygraph examination was inconsequential here in light of the admissions Appellant himself made during the controlled call and text messages the day after the assault.

ii. Accepting a recess to prepare objections to documents offered in presentencing does not rise to the level of ineffective assistance.

Appellant fails in his burden to show prejudice as the Military Judge halted the proceedings and gave counsel all of the time needed to adequately prepare to defend against the proffered evidence in aggravation. The Members were never even aware of the incident as the entire event occurred outside their presence.

Outside the presence of the Members, Trial Counsel offered several excerpts from Appellant's Service Record Book as Prosecution Exhibits 14 through 18 for identification from as evidence in aggravation. (R. 769.) Civilian Defense Counsel objected to each exhibit on the grounds that they were not

provided in discovery. (R. 769.) The prosecution could not produce a discovery receipt to prove Appellant's Service Record Book was produced to the defense. (R. 773.) The Military Judge then allowed Civilian Defense Counsel as much time as he wanted to review the exhibits and prepare before proceeding, repeatedly offering him the entire weekend if he needed it. (R. 774, 777, 781, 782.) Civilian Defense Counsel requested thirty minutes to review the documents, which was granted by the Military Judge. (R. 777.)

Following counsel's preparation, objections to the exhibits were addressed. One exhibit was excluded from evidence based on Civilian Defense Counsel's substantive objection. (R. 792.) The remaining four exhibits were all redacted in accordance with Civilian Defense Counsel's objections before admission into the Record. (R. 794-95.)

Appellant fails to meet his burden to show ineffectiveness or prejudice. Any upbraiding of his counsel occurred outside the presence of the Members. (R. 763, 769, 772, 774-76, 780-81.) Counsel was given as much time as he wanted to prepare to defend against the proffered exhibits. Then one exhibit was excluded and the remaining four were only accepted after redactions in accordance with objections. Prevailing on all objections raised, does not fall measurable below the standard of performance expected of ordinary fallible attorneys.

Accordingly, Appellant fails to state an actionable claim of ineffective assistance of counsel.

VIII.

APPELLANT FAILED TO PRESENT ANY FACTS THAT, IF TRUE, CONSTITUTE UNLAWFUL COMMAND INFLUENCE.

Allegations of unlawful command influence are reviewed *de novo*. *United States v. Villareal*, 52 M.J. 27, 30 (C.A.A.F. 1999). The defense shoulders the initial burden of raising the issue of unlawful command influence. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999) (citing *United States v. Stombaugh,* 40 M.J. 208, 213 (C.M.A. 1994)). To raise the issue, the defense must make a threshold showing that is beyond a mere allegation or speculation; this burden requires the defense to show (1) facts that, if true, constitute unlawful command influence; (2) that the proceedings were unfair; and (3) that unlawful command influence was the cause of the unfairness. *Id*.

If the defense satisfies all three prongs of the threshold showing, the burden shifts to the government to demonstrate beyond a reasonable doubt either that there was no unlawful command influence or that the proceedings were untainted. *United States v. Lewis*, 63 M.J. 405, 413 (C.A.A.F. 2006) (citing *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002)).

The facts of this case do not rise to the level of actual unlawful command influence. Appellant’s argument that unlawful

command influence existed amounts to nothing more than a conclusion that it did. (Appellant's Br. at 9.) Appellant declined to even cite the specific comments by members of the civilian leadership that he believes created the purported "shadow of prosecute" of which he now complains. (Appellant's Br. at 9.)

A naked conclusion is not a showing of anything. *See United States v. Ashby,* 68 M.J. 108, 128 (C.A.A.F. 2009) (stating "[m]ere speculation that unlawful command influence occurred because of a specific set of circumstances is not sufficient.") (citations omitted); *see also United States v. Johnson*, 39 M.J. 242, 244 (C.M.A. 1994) (explaining "a bare allegation" is inadequate to meet proponent's burden). "The burden of production is on the party raising the issue." *Stombaugh*, 40 M.J. at 213. Here, Appellant failed to meet that burden by offering nothing in his argument to support his conclusion. Similarly, Appellant fails to establish his other burdens either, to demonstrate the proceedings were unfair and that any unfairness was tied to actual unlawful command influence. *Biagase,* 50 M.J. at 150.

IX.

THE CONVENING AUTHORTY DID NOT ERR BY TAKING ACTION ON APPELLANT'S COURT-MARTIAL CONVICTION IN A TIMELY MANNER.

There is a presumption of regularity in a convening authority's action. *United States v. Johnson*, 21 C.M.A. 270, 272 (C.M.A. 1972); *see also United States v. Del Carmen Scott*, 66 M.J. 1, 4 (C.A.A.F. 2008). Appellant must make some showing to rebut the presumption of regularity of official documents. *See United States v. Mark*, 47 M.J. 99, 100 (C.A.A.F. 1997); *see also United States v. Nall*, No. 200100469, 2003 CCA LEXIS 85, *7 (N-M. Ct. Crim. App. 2003); *United States v. Lemarbe*, 11 M.J. 864, 865 (N-M.C.M.R. 1980).

Here, the Convening Authority indicated in his action that he reviewed the Record of Trial, along with the recommendation of his Staff Judge Advocate, and substantial matters submitted in clemency prior to reaching his conclusion. (Convening Authority's Action, at 4, May 14, 2013.) Finally, there is no requirement that the Convening Authority personally review the Record of Trial in its entirety. *Mark*, 47 M.J. at 101. Appellant offers nothing other than speculation and displeasure with the Convening Authority's conclusion as support for his suggestion of impropriety. Accordingly Appellant fails to rebut the presumption of regularity in this official document.

X.

INTERVIEWING THE VICTIM AS PART OF THE INVESTIGATION DID NOT DENY APPELLANT DUE PROCESS OF LAW.

Appellant's assertion that NCIS interviewed him prior to interviewing the Victim which somehow tainted the investigation is demonstrably factually incorrect. (Appellant's Br. at 10.) Contrary to Appellant's assertion, the case agent's initial investigative step at approximately 0500 was to interview the Victim. (R. 454-55.) Following the interview of the Victim the case agent went through the Victim's phone to review text messages between the Victim and Appellant. (R. 455.) The case agent then set up and administered a series of controlled phone calls and text message exchanges between the Victim and Appellant. (R. 460.) Following the three controlled calls and a short series of controlled text messages the case agent then interviewed Appellant after administering Article 31(b) warnings. (R. 486, 488; Pros. Ex. 9.)

There was nothing improper in the manner in which this investigation occurred. Appellant's allegation has no merit.

XI.

NO INSTRUCTION ON ASSAULT CONSUMMATED BY BATTERY WAS WARRANTED BECAUSE THE EVIDENCE DID NOT REASOANBLY RAISE IT AS A LESSER INCLUDED OFFENSE. IF THE INSTRUCTION WAS WARRANTED ITS OMISSION WAS HARMLESS BEYOND A REASONABLE DOUBT BECAUSE THE INTENT ELEMENT WAS UNCONTROVERTED AND THE EVIDENCE WAS OVERWHELMING.

Allegations of instructional error are reviewed *de novo*. *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007). Military judges have a *sua sponte* duty to instruct members on lesser included offenses reasonably raised by the evidence. *United States v. Miergrimado*, 66 M.J. 34, 36 (C.A.A.F. 2008); *see also* R.C.M. 920(e)(2). "Evidence reasonably raises a lesser included offense if it could cause members to attach credit or rely upon it if they so choose." *United States v. Bean*, 62 M.J. 264, 266 (C.A.A.F. 2005)(citations and internal quotation marks omitted). "[D]oubt whether the evidence is sufficient to raise the need to instruct on a lesser-included offense must be resolved in favor of the accused." *Id*; *see also United States v. Brown*, 43 M.J. 187, 189 (C.A.A.F. 1995).

Here, the instruction was not due because the facts of the case did not reasonably raise the issue. If the instruction was reasonably raised by the evidence failure to give the instruction was harmless beyond a reasonable doubt in light of

Appellant's defense strategy to concede the actions occurred but were consensual.

A. Assault consummated by battery was not reasonably raised by the evidence.

Generally, a military judge has substantial discretionary power to decide whether to issue a jury instruction. *United States v. Maynulet*, 68 M.J. 374, 376 (C.A.A.F. 2010). A lesser included offense instruction is only due where "some evidence" exists that reasonably raises the applicability of the lesser included offense. *Bean*, 62 M.J. at 266. In *Bean*, the appellant charged with aggravated assault with a loaded firearm argued he was entitled to an instruction on the lesser-included offense of simple assault. *Id*. There, the appellant pointed a loaded, functional firearm at another airman; he argued, however, that because the evidence reasonably raised a question of whether the safety was engaged, he was entitled to the instruction on the lesser offense. *Id*. The Court in *Bean* disagreed, however, holding that even if the safety were engaged as Bean argued, nothing "removes or might remove its character as a dangerous weapon." *Id* at 267. Therefore nothing in the evidence presented at trial reasonably raised the lesser offense and appellant was not entitled to the instruction.

Here, as in *Bean*, the instruction was not reasonably raised by the evidence. There was no evidence adduced by either party

that Appellant acted with the general intent to merely "touch" MA3 JA. The fact that Appellant acted with the specific intent to gratify his sexual desires or in an effort to arouse MA3 JA was uncontested at trial. The only issue contested by Defense was whether MA3 JA consented to Appellant repeatedly grabbing MA3 JA's genitals.

Earlier in the evening Appellant had exposed himself to MA3 JA and repeatedly solicited MA3 JA do the same. (R. 277-78.) Appellant also repeatedly solicited sex acts with MA3 JA and his wife. (R. 292-94, 356-57, 422.) There was no evidence offered that when he grabbed MA3 JA's genitals it was for any other purpose than to gratify his sexual desires or arouse those of MA3 JA. (R. 298-99.)

As there was no evidence admitted that the Members could have attached credit to or relied upon to conclude Appellant acted with a mere general intent, the evidence did not reasonably raise a lesser included offense. Accordingly, no instruction on assault consummated by battery was due.

B. Assuming *arguendo* an assault consummated by battery instruction was due, its exclusion was harmless beyond a reasonable doubt because the intent was not only uncontested it was part of the defense theory of the case.

A failure to provide correct and complete instructions to the members prior to deliberations can carry constitutional implications if the failure amounts to a denial of due process.

See United States v. Jackson, 6 M.J. 116, 117 (C.M.A. 1979). Instructional error that rises to the level of triggering due process concerns is tested for prejudice under the harmless beyond a reasonable doubt standard. *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006). An instructional error is harmless beyond a reasonable doubt where the verdict would be no different had the error not occurred. *Neder v. United States*, 527 U.S. 1, 19 (1999). The verdict would be no different where the element in question was uncontested and it was supported by overwhelming evidence. *Id*.

Here, the element in question was uncontested and supported by overwhelming evidence. Appellant never challenged that he touched the Victim's genitals. (R. 704.) Further Appellant never challenged that his intent was to arouse or gratify sexual desires. (R. 704-05, 721.) Appellant's defense theory focused entirely on arguing the acts that occurred that evening were consensual in nature. (R. 721.)

That it was his intent to gratify sexual desires was not only supported by overwhelming evidence, it is actually both inherent and necessary to the defense theme of the case. The defense argued these were all mutually consensual actions. Inherent in that argument is that the actions were for the purpose of arousing or gratifying sexual desires. Finally, the evidence of Appellant's intent to gratify sexual desires was

overwhelming based on his conduct over the course of the evening discussed *supra*.

XII.

THE CLERICAL ERROR ON THE FINDINGS WORKSHEET THAT WAS CORRECTED BY THE MEMBERS DID NOT CREATE MISCARRIAGE OF JUSTICE WARRANTING A MISTRIAL.

A mistrial may be ordered by a military judge when it is "manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings." R.C.M. 915(a). "The power to grant a mistrial should be used with great caution, under urgent circumstances, and for plain and obvious reasons." *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000).

Here the Members made a clerical error on the findings worksheet. (R. 754.) In returning a mixed verdict, the Members erroneously lined out both the "Guilty" and "Not Guilty" possibilities to both Specifications of Charge I on the findings worksheet but indicated they found him "Guilty" of the Charge. (R. 756, 759; Appellate Ex. XXI at 1-2.) The Military Judge provided clarifying instructions to the Senior Member which he indicated that he understood. (R. 756-57.) The Members are presumed to have followed the Military Judge's clarifying instructions. *Tyndale*, 56 M.J. at 216.

After providing clarifying instructions, the Military Judge provided a fresh findings worksheet and sent the Members back into the deliberations room to clarify their findings. (R. 757; Appellate Ex. XXII.) Appellant raised no objection either to the findings worksheet itself (R. 639) or to the process employed by the Military Judge to issue a clarifying instruction and provide a fresh findings worksheet. (R. 757.) Appellant was expressly afforded an opportunity to object to the process employed by the Military Judge in an Article 39(a) session and declined to do so. (R. 759.)

The Members returned with a findings worksheet finding Appellant guilty of both Specifications of Charge I and guilty of the charge. (R. 761; Appellate Ex. XXII.) The clerical error on the initial findings worksheet seen here did not cause a "manifest injustice against the accused." *United States v. Dancy*, 38 M.J. 1, 6 (C.M.A. 1993). The administrative error here does not warrant invocation of the "drastic remedy" of declaring a mistrial. *See Dancy*, 38 M.J. at 6 (declining to find mistrial warranted even where prosecution ambushed accused on cross examination with his own written statements they had not disclosed in discovery).

XIII.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION BY KEEPING THE MEMBERS DELIBERATING IN THE EVENING BECAUSE THEY WERE PROVIDED AMPLE OPPORTUNITIES FOR BREAKS OVER THE COURSE OF THE DAY AND APPELLANT REPEATEDLY REJECTED OFFERS OF A RECESS FOR THE WEEKEND.

Military judges are charged with exercising "reasonable control over the proceedings" of a court-martial. R.C.M. 801(a)(3). A military judge's action exercising control over the proceedings is reviewed for an abuse of discretion. *United States v. Brown*, 72 M.J. 359, 362 (C.A.A.F. 2013). Appellant alleges the Military Judge abused his discretion by failing to provide the Members adequate time to rest and by keeping them in deliberations on sentence into the night. (Appellant's Br. at 11.)

The Members were not overly taxed during Appellant's Court-Martial. On this final day of Appellant's Court-Martial the Members were offered a full hour for their lunch break and they elected to take only thirty minutes. (R. 739.) In addition to several shorter recesses throughout the day the Members received a full ninety-minute dinner recess prior to the presentencing case. (R. 762, 768, 778, 805.) The Members were aware they could ask for additional breaks at any time and declined to do so here. (R. 234.) As members are presumed to follow the instructions of military judges this Court should presume the

Members here did not need any additional breaks. *Tyndale*, 56 M.J. at 216 (explaining members are presumed to follow instructions).

If this Court were to find error in continuing this Court-Martial into the evening hours, Appellant is due no relief, as it was invited error. Not only did Appellant never raise an objection to the presentencing phase continuing in the evening hours, rather Appellant affirmatively indicated he wished to press on. (R. 777.) Appellant was repeatedly offered a continuance of the pre-sentencing phase for as long as he desired, the weekend, or even multiple weeks. (R. 774, 777, 782.) Appellant rejected those offers and elected to complete the pre-sentencing phase that evening. (R. 777.) Appellant cannot cause the error and then derive benefit from the error he caused on appeal as invited error is not a basis for relief. *Raya*, 45 M.J. at 254.

The Military Judge acted within his discretion to keep the Members deliberating into the evening. If this Court were to find error, Appellant is due no relief as he caused the error himself.

Conclusion

WHEREFORE, the United States respectfully requests that this Court affirm the findings adjudged and approved below.

IAN D. MACLEAN
LT, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7686, fax (202) 685-7687

DAVID N. ROBERTS
Major, U.S. Marine Corps
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7059, fax (202) 685-7687

Certificate of Filing and Service

I certify the foregoing was delivered to the Court and a copy was served upon opposing counsel and electronically filed with the Court pursuant to N-M. Ct. Crim. App. Rule 5.2(b)(1) on February 12, 2014.

IAN D. MACLEAN
LT, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard DC 20374
(202) 685-7686, fax (202) 685-7687

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
	)	Case No. 201300148
v.	)	Tried at Marine Corps Air Ground Combat Center, Twentynine Palms, California on June 18, August 24, September 11 and 26-28, 2012, by a special court—martial convened by Commanding Officer, 1st Battalion, 7th Marines, 1st Marines Division Marine Corps Air Ground Air Ground Combat Center, Twentynine Palms, California.
Ian R. DUNTON, Corporal (E-4) U.S. Marine Corps Appellant	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

IAN D. MACLEAN
LT, JAGC, U.S. Navy
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7389, fax (202) 685-7687

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Errors Assigned

I.

ARTICLE 120(m), UCMJ, PROHIBITS THE TOUCHING OF A "BREAST" WITH SPECIFIC INTENT. HERE, THE GOVERNMENT CHARGED CPL DUNTON WITH WRONGFULLY TOUCHING TWO MEN ON THE "CHEST" UNDER ARTICLE 120(m). DID THE MILITARY JUDGE ERR IN FINDING THAT THE SPECIFICATION STATED AN OFFENSE?

II.

A POTENTIAL MEMBER SHOULD BE CHALLENGED IF THEY DISPLAY A "DECIDEDLY HOSTILE ATTITUDE TOWARDS A PARTY." DURING VOIR DIRE, CAPT [FC] AND CAPT [M] EXPRESSED DEEPLY HELD RELIGIOUS AND MORAL BELIEFS THAT SEXUAL RELATIONS BETWEEN MEN IS INHERENTLY WRONG AND THEY ARE OFFENDED BY THE PHYSICAL PRESENCE OF HOMOSEXUAL PEOPLE. THE MILITARY JUDGE KNEW THE GOVERNMENT WOULD BE PRESENTING EVIDENCE THAT CPL DUNTON ENGAGED IN SEXUAL BEHAVIOR WITH OTHER MEN. DID THE MILITARY JUDGE ERR BY FAILING TO SUA SPONTE CHALLENGE CAPT [FC] AND CAPT [M] AS MEMBERS?

III.

NO PERSON SUBJECT TO THE UCMJ MAY ATTEMPT TO INFLUENCE THE ACTION OF ANY COURT-MARTIAL MEMBER. FOUR OF THE FIVE MEMBERS OF CPL DUNTON'S COURT-MARTIAL SAW THE COMMANDANT OF THE MARINE CORPS' HERITAGTE BRIEF, IN WHICH HE ADVOCATED PUNITIVE DISCHARGES FOR THOSE ACCUSED OF SEXUAL ASSAULT. CPL DUNTON RECEIVED A PUNITIVE DISCHARGE. DID THE COMMANDANT UNLAWFULLY INFLUENCE CPL DUNTON'S COURT-MARTIAL?

IV.

CHARACTER EVIDENCE IS INADMISSIBLE TO SHOW THAT AN ACCUSED HAD A PROPENSITY FOR HOMOSEXUAL BEHAVIOR. OVER OBJECTION LCPL [T] TESTIFIED THAT CPL DUNTON "PASSIONATELY

KISSED" HIS ARM, AND LCPL [J] TESTIFIED THAT CPL DUNTON MADE OTHER MALE MARINES "UNCOMFORTABLE" BY STANDING TOO CLOSE AND PUTTING HIS ARM AROUND THEIR SHOULDERS. DID THE MILITARY JUDGE ERR BY PERMITTING THE TESTIMONY?

V.

ASSAULT CONSUMMATED BY A BATTERY, AS ALLEGED AS A LESSER INCLUDED OFFENSE IF SPECIFICATION 3, REQUIRES AN INTENTIONAL TOUCHING. THE EVIDENCE SHOWS THAT CPL DUNTON WAS SLEEPING WHEN HE TOUCHED LCPL [B]. IS SPECIFICATION 3 LEGALLY AND FACTUALLY SUFFICIENT?

VI.

A PERSON SUSPECTED OF A CRIME MAY BE PLACED IN PRETRIAL CONFINEMENT IF A LESSER MEANS OF RESTRAINT IS INSUFFICIENT TO PREVENT FURTHER MISCONDUCT. CPL DUNTON WAS PLACED IN PRETRIAL CONFINEMENT AFTER HE ALLEGEDLY MADE A LAWFUL ROMANTIC ADVANCE TOWARDS A MALE MARINE AT THE ENLISTED CLUB, WHICH RESULTED IN AN EGREGIOUSLY FALSE REPORT OF FURTHER MISCONDUCT. WAS CPL DUNTON'S PRETRIAL CONFINEMENT LAWFUL?

VII.

A COURT SHOULD CONSIDER THE COMBINED EFFECT OF ALL PRESERVED AND PLAIN ERRORS IN A TRIAL, EVEN IF EACH INDIVIDUAL ERROR DOES NOT WARRANT RELIEF. CPL DUNTON'S CASE IS RIDDLED WITH ERRORS, BOTH LARGE AND SMALL, THAT TOGETHER DENIED HIM A FAIR TRIAL. SHOULD THIS COURT SET ASIDE CPL DUNTON'S CONVICTIONS?

Statement of Statutory Jurisdiction

Appellant's approved sentence includes a bad conduct discharge. Accordingly, this Court has jurisdiction pursuant to

Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012).

Statement of the Case

A panel of members sitting as a special court-martial, convicted Appellant, of two specifications of wrongful sexual contact and one specification of assault consummated by a battery in violation of Articles 120 and 128, UCMJ, 10 U.S.C. §§ 920, 928 (2012). The Members sentenced Appellant to twelve months confinement, reduction to pay grade E—1, forfeiture of $994 pay per month for twelve months, and a bad-conduct discharge. The Convening Authority approved the sentence as adjudged and, except for the bad-conduct discharge, ordered it executed.

Statement of Facts

A. Appellant's underlying conduct.

Appellant was involved in a series of incidents with other Marines in the barracks involving unwanted touches. (Charge sheet, Apr. 23, 2012.)

On September 10, 2011, Appellant, who was the squad leader was involved in an incident with Cpl P. (R. 316.) At the time Appellant was Cpl P's squad leader. (R. 316.) After drinking alcohol at a local bar with Cpl P to the point of intoxication, Appellant returned to the barracks with him. (R. 294, 315.) Cpl P saw his roommate sound asleep on his bed and Appellant

apparently asleep in a chair in the room. (R. 294.) At some point later in the night Cpl P's roommate was awoken by hearing Cpl P tell Appellant to "get your fucking hands out of my pants." (R. 294.) The vicitm's roommate then saw Appellant had move to Cpl P's bed and had his hand down Cpl P's pants. (R. 294.) The roommate then told Appellant to leave, which he did. (R. 294.)

On September 15, 2011, Appellant was involved in an incident with LCpl B. LCpl B went to a drive in movie on the night in question where he consumed several alcoholic beverages. (R. 369.) Following the movie he returned to the barracks and had another alcoholic beverage with LCpl J on the catwalk outside his barracks room. (R. 369-70.) Appellant, himself displaying sings of intoxication, approached LCpl B, who had also been drinking alcohol, on the catwalk outside LCpl B's barracks room shortly after midnight. (R. 340-41, 371.) As Appellant approached, LCpl J excused himself and went to his own room, leaving LCpl B alone with Appellant. (R. 370-71.) LCpl J left because Appellant makes him uncomfortable. (R. 371.)

After briefly conversing with Appellant LCpl B went into his barracks room alone, did not invite Appellant to join him, and went to sleep alone. (R, 341, 351.) When LCpl B awoke approximately five hours later, Appellant was in his bed. (R. 342, 353-54.) LCpl B's covers were pulled down and his t-shirt

pulled up, exposing his chest. (R. 342.) Appellant was completely naked lying on top of the covers spooning LCpl B with his left arm wrapped around his side. (R. 342.) Appellant's hand was pressed against LCpl B's chest, palm down. (R. 342.) LCpl B's roommate observed Appellant naked on LCpl B's bed with his arm around LCpl B. (R. 388.)

On February 27, 2012, Appellant was involved in an incident with LCpl E. Appellant repeatedly knocked on LCpl E's barracks room door after 2200 until LCpl E answered the door. (R. 413.) Appellant entered the room with a mostly empty case of beer in hand. (R. 414.) As LCpl E continued playing video games Appellant sat on the armrest of LCpl E's chair. (R. 414.) Appellant leaned on LCpl E and put his arm around him. (R. 415.) Appellant then plunged his hand into LCpl E's shirt and rubbed his chest area. (R. 417.) LCpl E removed Appellant's hand and told him to stop. (R. 418.) Appellant then briefly rubbed his back and then thrust his hand into the back of LCpl E's pants, going under the sweatpants and underwear to the skin on his buttocks. (R. 418.) LCpl E immediately removed Appellant's hand and exited his own barracks room. (R. 419.)

On May 13, 2012, Appellant was involved in an incident with LCpl T. (R. 467.) This incident was not charge misconduct but was introduced at trial as circumstantial evidence of intent. (R. 482.) Appellant touched LCpl T in a series of escalating

touches. Appellant began with casual touches around the shoulders and neck in a group setting. (R. 468-69.) Then once alone in LCpl T's barracks room Appellant progressed to resting his head on LCpl T's leg above his knee, essentially in his lap. (R. 471, 475.) Appellant then began caressing LCpl T's thigh. (R. 472.) After being confronted about the behavior he removed his head from LCpl T's lap. (R. 472.) A few moments later Appellant began passionately kissing LCpl T's forearm. (R. 473.) After being confronted about the escalating behavior, Appellant apologized and left LCpl T's barracks room. (R. 474.)

B. Pretrial confinement.

Following the incident with LCpl T on May 13, which occurred after a charge with three specifications of wrongful sexual contact was preferred on April 23, Appellant was placed in pretrial confinement. (R. 32, 44; Charge sheet.) Following a hearing the Initial Review Officer continued pretrial confinement. (R. 44.) Appellate Defense Counsel challenged the continued pretrial confinement before the Military Judge. (R. 28; Appellate Ex. X.) There was an evidentiary hearing in which the Initial Review Officer testified. (R. 44.) The Military Judge ultimately concluded the Initial Review Officer did not abuse his discretion in continuing pretrial confinement and that further continued pretrial confinement was warranted. (R. 71-72; Appellate Ex. LXXII at 7.)

C. Member selection.

Trial Defense Counsel requested Supplemental Questionnaires from the potential members to explore the possibility of unlawful command influence from the Commandant's Heritage Briefs and their views on homosexuality. (R. 19, 25; Appellate Ex. XXIV.) The Commandant did present a Heritage Brief at Twentynine Palms, the situs of this Court-Martial. (R. 111.) Despite denying the defense motion to dismiss due to unlawful command influence from the Heritage Brief the Military Judge granted Supplemental Questionnaires. (R. 167.) Counsel were permitted to inquire about potential members views regarding homosexuality and the Military Judge did as well. (R. 167, 262-63.) Of the three members removed for cause, one was specifically removed due to his views on homosexuality. (R. 279.) The Military Judge did make observations about the members general demeanor as one member was removed in part due to his demeanor during questioning. (R. 279.) After being granted all three challenges for cause the defense sought, they also made use of their peremptory challenge. (R. 278-79.)

The Military Judge did not sua sponte dismiss any potential members, which Appellant now alleges was error. (Appellant's Br. at 15.) Two members that are were not challenged, Capt FC and Capt JM, both indicated adverse personal views of homosexuality in their Supplemental Questionnaires. (Appellate

Ex. XXIV at 23, 31.) However both potential members also indicated that their personal views would have no impact on their role as members determining guilt or innocence of charged offenses. (Appellate Ex. XXIV at 23, 31.) Neither Trial Defense Counsel nor the Military Judge asked Capt FC a single question about their views on homosexuality during individual voir dire. (R. 257-59.) A few questions were asked of Capt JM to clarify his views on homosexuality after which no challenge was made by Trial Defense Counsel. (R. 268.) Trial Defense Counsel did challenge one member for cause based solely on his views regarding homosexuality. (R. 278.) That challenge was granted. (R. 279.)

Additional facts are necessary to the resolution of the specific assignments of error are found below.

Summary of Argument

I.

Specfication 1 of Charge I did state the offense of wrongful sexual contact despite using the word “chest” as opposed to the statutory word “breast.” The Military Judge properly defined the undefined statutory term “breast” from dictionaries in common use. The Military Judge then correctly found the charged word “chest” falls within that definition of “breast.”

II.

The Military Judge did not abuse his discretion by not *sua sponte* dismissing the two members now challenged on appeal. While both members expressed personal view regarding homosexuality, both members indicated their personal views would play no role in their responsibilities as members. Both challenged members indicated in both their Supplemental Questionnaires and in individual voir dire that they would decide the case on the facts presented and would follow the instructions of the Military Judge.

III.

The Commandant's Heritage Brief did not cause any actual or apparent unlawful command influence. The Members indicated through voir dire that they would not be influenced by the Commandant's Heritage brief and then demonstrated the truth of their statements by acquitting Appellant on one of the charged specifications of wrongful sexual contact.

IV.

LCpl J's testimony was not character evidence subject to specialized rules of admissibility. LCpl J's testimony was relevant because he was a percipient witness to how Appellant met one of his victims, LCpl B.

LCpl T's testimony about his incident with Appellant was relevant because it established Appellant's intent to gratify

his sexual desires in another situation similar to that of the charged misconduct. LCpl T's testimony was not subject to the specialized rules for admissibility of character evidence because sexual orientation is not a character trait.

V.

The evidence was legally and factually sufficient to support the intentional touch component of the assault consummated by battery conviction. After entering his barracks room alone and going to bed alone, the victim awoke in his bed in the under the covers but with them pulled down to expose his chest, with his t-shirt pulled up, with Appellant's hand pressed against his chest, palm on his chest, Appellant's arm wrapped around him, and Appellant completely naked on top of the covers spooning him.

VI.

Appellant's continued pretrial confinement was warranted. Appellant demonstrated a willingness to continue to assault junior Marines in the barracks even after these charges were pending. Based on that less severe forms of restraint such as restriction to barracks would be counterproductive as that would keep him in the very location where he repeatedly assaulted junior Marines.

VII.

The doctrine of cumulative error is dependent upon the existence of series of actual errors. Here, there are no actual errors to cumulate, therefore no relief is due.

Argument

I.

THE SPECIFICATION ALLEGING WRONGFUL SEXUAL CONTACT OF LPCL E DOES STATE AN OFFENSE BECAUSE THE PLAIN AND ORDINARY MEANING OF THE STATUTORY WORD "BREAST" IN ARTICLE 120(M) INCLUDES THE WORD "CHEST" THAT USED IN THE SPECIFICATION.

A. Standard of Review.

Whether a specification states an offense is a question of law reviewed *de novo*. *E.g.*, *United States v. Humphries*, 71 M.J. 209, 212 (C.A.A.F. 2012). Here, the question of whether this specification states an offense is a matter of statutory construction, which is also a question of law reviewed *de novo*. *E.g.*, *United States v. Lopez de Victoria*, 66 M.J. 67, 73 (C.A.A.F. 2008).

B. Statutory words that are undefined in the statute carry their plain and ordinary meaning found in commonly used dictionaries.

In the absence of a statutory definition of a word used in a statute, where there is no binding case law establishing the definition of the word, service courts consider three sources to discern its meaning: "(1) the plain meaning of the [undefined

term]; (2) the manner in which Article III courts have interpreted the term; and (3) guidance, if any, the UCMJ may provide through reference to parallel provisions of law." *United States v. Keummerle*, 67 M.J. 141, 143 (C.A.A.F. 2009) (citing *Lopez v. Gonzales*, 549 U.S. 47 (2006); *United States v. Craig*, 67 M.J. 742, 744 (N-M. Ct. Crim. App. 2009). Plain meaning of the statutory words means their "ordinary or natural" meaning. *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004); *see also Bailey v. United States*, 516 U.S. 137, 145 (1995); *see also United States v. McCollum*, 58 M.J. 323, 340 (C.A.A.F. 2003) ("[W]ords should be given their common and approved usage.") (citation and quotation marks omitted). The ordinary or natural meaning of words are found from dictionaries. *See Kuemmerle*, 67 M.J. at 143-44 (using *Black's Law Dictionary* and *Meriam-Webster's Third International* Dictionary to find the plain meaning of the undefined statutory word distribute).

C. <u>The Military Judge properly identified the plain and ordinary meaning of the undefined statutory word "breast" from a dictionary in common use</u>.

The charged offense of wrongful sexual contact requires sexual contact. Article 120(t)(m), U.C.M.J. (2008 ed.). Sexual contact is defined in part as intentional touching of the "breast" of another person. Article 120(t)(2), U.C.M.J. (2008 ed.). Here, the specification alleged Appellant touched the victim on the "chest" as opposed to the statutory word "breast."

(Charge sheet.) As “breast” is undefined in the statute the question asked of this Court is whether “chest” is either analogous to or a subpart of “breast.” *See United States v. Spencer*, No. 2011-09, 2012 CCA LEXIS 50, *6 (A.F. Ct. Crim. App. Jan. 26, 2012) (finding the term vulva within the definition of the statutory term genitalia therefore use of the term vulva does state the offense of wrongful sexual contact). Accordingly this Court should begin by finding the appropriate definition of the term “breast” in order to understand what terms fall within that definition. *Id*.

In *Keummerle*, the court was attempting to define a statutory word that lacked a statutory definition. *Kuemmerle*, 67 M.J. at 143. To find the plain and ordinary meaning of the undefined statutory word the Court of Appeals for the Armed Forces consulted two dictionaries, Black’s Law Dictionary and the Meriam-Webster Third International Dictionary. *Keummerle*, 67 M.J. at 143-44. The *Keummerle* court then compared the definition used by the Military Judge to the definitions found in Black’s and Meriam-Webster’s and found the Military Judge’s definition comported with plain and ordinary meaning. *Keummerle*, 67 M.J. at 144. This Court should use that same approach to define the word “breast.”

The specific sources relied upon by the *Keummerle* court are instructive here. The first source relied upon by the *Keummerle*

court, *Black's Law Dictionary*, is not helpful here because that dictionary does not defines the word "breast." *Black's Law Dictionary* (9th ed. 2009); *Black's Law Dictionary* (4th ed. 1957). The second source relied upon by the *Keummerle* court, Meriam-Webster's Third International Dictionary found online has been replaced by Meriam-Webster's Online Unabridged Dictionary, a subscription based website. The subscription based Meriam-Webster online unabridged dictionary defines "breast" as follows:

> 1. *a* : either of two protuberant milk-producing glandular organs situated on the front of the chest or thorax in the human female and some other mammals and normally functional only during the period of lactation following pregnancy
> *b* : any discrete mammary gland
> *c* : a breast in lactation
> *d* : either of the paired and normally nonfunctional mammary glands of the human male especially when excessively enlarged and protuberant (as by reason of accumulated fatty tissue)
> 2 the fore or ventral part of the body between the neck and the abdomen : the front of the chest

Meriam-Webster Unabridged , available at http://unabridged.merriam-webster.com/unabridged/breast (last visited Jan. 6, 2014). Additionally, while not used as a source by the *Keummerle* court, The American Heritage Dictionary's primary definition for breast is "the human mammary gland; a homologous organ in other mammals." *The American Heritage Dictionary* 206 (2nd College Ed. 1982). By way of comparison, the American Heritage dictionary provides a simplified, but

essentially the same, version of the initial component of Meriam-Webster's unabridged definition.

Here, the Military Judge defined "breast" in instructions on findings using the following definition identifying its source as a Meriam-Webster's dictionary:

> [E]ither of the pair of mammary glands extending from the front of the chest in pubescent females and adult human females and some other mammals or either of the analogous but rudimentary organs of the male chest, especially when enlarged.

(R. 528.)[1]

Just as in *Keummerle*, A comparison of the Military Judge's definition against the unabridged definition shows they are essentially the same. *Keummerle*, 67 M.J. at 144. The Military Judge's definition, the Meriam-Webster's Collegiate Dictionary version, is a simplified version of the unabridged definition. Where the unabridged dictionary explains what a mammary gland actually is the Collegiate version used by the Military Judge simply uses the term "mammary gland." Further, the Collegiate version used by the Military Judge omits subparts (b) and (c)

[1] The exact edition of the dictionary from which this definition was drawn is unstated in the Record but it is nearly verbatim of the primary definition of "breast" in Meriam-Webster's Collegiate Dictionary which is "either the pair of mammary glands extending from the front of the chest in pubescent and adult females and some other mammals; also: either of the analogous but rudimentary organs of the male chest esp. when enlarged." *Meriam-Webster's Collegiate Dictionary* 141 (10th ed. 1998).

from the unabridged definition and goes directly to subpart (d), again using a simplified version of the same definition.[2]

The *Kuemmerle* court provided two other avenues for consideration when discerning the definition of an undefined term. *Kuemmerle*, 67 M.J. at 143. First, how have Article III courts interpreted the term. *Id*. And second, any guidance in other portions of the Uniform Code of Military Justice. *Id*. Neither avenue is helpful here. The United States is not aware of any Article III court case interpreting the meaning of the word "breast" in a federal statute. Nor is the United States aware of any guidance elsewhere in the Uniform Code of Military Justice to parallel provisions providing a definition of "breast." As the second and third avenues for consideration provide no assistance the Military Judge was correct to define breast from the Meriam-Webster dictionary as she did.

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[2] Also of note is that the secondary definition for "breast" in all three sources essentially defines it as the front of the body from the abdomen to the neck. See *The American Heritage Dictionary* 206 (2nd College Ed. 1982) ("The superior ventral surface of the body, extending from the neck to the abdomen."); *see also Meriam-Webster's Collegiate Dictionary* 141 (10th ed. 1998) ("the fore or ventral part of the body between the neck and the abdomen.").

D. The charged word "chest" is synonymous with the statutory word "breast" which establishes that the specification does state the offense.

The word "Chest" is either synonymous or falls within the identified definition of "breast." Just as the *Keummelre* court used Meriam-Webster's dictionary to find the definition for a word not defined by statute, this Court should use the same source to define "chest." *Keummerle*, 67 M.J. at 143; *see also Spencer*, No. 2011-09, 2012 CCA LEXIS 50, *6 (using Webster's to find definition of words in charging document for comparison to statutory language). Meriam Webster's Collegiate Dictionary defines "chest" as "the human thorax" where the thorax is defined as the part of the body between the neck and the abdomen. *Meriam-Webster's Collegiate Dictionary* 141, 1227 (10th ed. 1998) (alternative definitions inapplicable as they address containers as opposed to the human body); *see also The American Heritage Dictionary* 264 (2nd College Ed. 1982) (defining "chest" as "[t]he part of the body between the neck and the abdomen, enclosed by the ribs and the breastbone.") (subsequent alternative definitions inapplicable as the pertain to a storage containers as opposed to human body). Meriam-Webster's Collegiate Dictionary goes so far as to identify "breast" as a synonym of "chest." *Meriam-Webster's Collegiate Dictionary* 141 (10th ed. 1998).

The plain and ordinary meaning of “chest” and “breast” render the words interchangeable. The recognized authority for finding the plain and ordinary meaning of non-defined statutory words, actually expressly identifies “breast” as a synonym of “chest.” Further, a close comparison of the two definitions, show the only difference is that the word “breast” arguably refers to portions of the body extending from the actual flat front portion of the torso, while the word chest refers to the same portion of the body just as the front of the body. The definitions use slightly different terms to describe the exact same portion of the human body. As the offense in question addresses touching the body, the words then become completely interchangeable. Accordingly the use of the word chest in the specification does in fact state the offense of wrongful sexual contact.

II.

THERE WAS NO BASIS FOR THE MILITARY JUDGE TO DISMISS MEMBERS WHO’S HONEST AND CANDID RESPONSES IN VOIR DIRE DEMONSTRATED NO ACTUAL OR IMPLIED BIAS.

A. Standard of Review.

Military judges have authority to *sua sponte* dismiss members. R.C.M. 912(f)(4). A “decision whether or not to excuse a member sua sponte is subsequently reviewed for an abuse

of discretion." *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004).[3]

B. Application of the abuse of discretion standard to this situation where there is no ruling from the Military Judge to review.

Applying the traditional abuse of discretion standard of review here, where there is no actual ruling to evaluate, is challenging. There are three components to a traditional abuse of discretion review, the first two of which are difficult to apply here, because there is no actual ruling to evaluate.

First, a military judge can abuse their discretion by relying on clearly erroneous facts. *E.g.*, *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008). Here, there is no ruling, so there are no factual findings to evaluate.

The second way a military judge can abuse their discretion is to rely on an erroneous view of the law. *E.g. Freeman*, 65 M.J. at 453. Again, as there is no ruling here to evaluate, determining what law the Military Judge relied upon is difficult.

[3] Appellant identified the standard of review as plain error. (Appellant's Br. at 17.) The United States agrees plain error review is a more workable standard for application to this situation. However, that standard of review comes from *United States v. Ai*, 49 M.J. 1, 5 (C.A.A.F. 1998), which has been overruled. Six years after *Ai*, *Strand* changed the applicable standard of review to abuse of discretion without mentioning *Ai* or that it was overruling the standard from *Ai*. *Strand*, 59 M.J. at 458. Unfortunately, *Strand* fails to provide guidance to the Courts of Criminal Appeals as to how to apply the abuse of discretion standard of review to these cases where there is no actual ruling from a military judge to review.

However, this Court can evaluate whether the Military Judge knew and applied the correct law pertaining to challenging members because several other members were both challenged and removed for cause. (R. 278-79.) In reaching those rulings removing other panel members, the Military Judge cited Rule for Courts-Martial 912, the applicable rule, recognized the existence of the liberal grant mandate, and applied the liberal grant mandate. (R. 279.) The Military Judge ultimately dismissed three members from the panel, one for actual bias and two for implied bias. (R. 278-79.) Accordingly, this Court can be confident that the Military Judge knew and applied the correct law pertaining to dismissal of members for cause.

The third component of a traditional abuse of discretion review can be applied here. The third way a military judge can abuse their discretion is where their ultimate ruling is "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *E.g.*, *United States v. Baker*, 70 M.J. 283, 287 (C.A.A.F. 2011) (internal quotations omitted). Here, the fact that the Military Judge did not *sua sponte* dismiss Capt FC and Capt JM, demonstrates his ultimate conclusion that neither demonstrated actual or implied bias. *See United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007) (explaining challenging a member for cause is inherently challenging both actual and implied bias). That ultimate conclusion is only an abuse of

discretion if it is "arbitrary, fanciful, clearly erroneous, or clearly unreasonable." *Baker*, 70 M.J. at 287.

C. Neither Capt CF nor Capt JM demonstrated any actual bias towards Appellant based on his purported sexual orientation.

"Actual bias is personal bias that will not yield to the military judge's instructions and the evidence presented at trial." *United States v. Nash*, 71 M.J. 83, 88 (C.A.A.F. 2012) (citing *United States v. Reynolds*, 23 M.J. 292, 294 (C.M.A. 1987)). Actual bias is a question of fact. *United States v. Warden*, 51 M.J. 78, 81 (C.A.A.F. 1999). The question of actual bias is determined from consideration of the totality of the circumstances. *United States v. Terry*, 64 M.J. 295, 302 (C.A.A.F. 2007). "Because a challenge based on actual bias involves judgments regarding credibility, and because the military judge has an opportunity to observe the demeanor of court members and assess their credibility during voir dire, a military judge's ruling on actual bias is afforded great deference." *United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007) (internal quotations omitted). Great deference is not a separate legal standard, rather a recognition that the legal question is largely dependent on the sincerity of the responses from the individual member in question and that the military judge is best positioned to evaluate those responses. *Nash*, 71 M.J. at 88-89.

1. Capt FC explained he would determine guilt or innocence solely on the facts presented uninfluenced by any personally held views regarding homosexuality.

The Military Judge's conclusion that Capt FC demonstrated no actual bias towards Appellant was not arbitrary, fanciful, clearly unreasonable, or clearly erroneous. The Military Judge's conclusion was neither arbitrary nor fanciful as it was an informed decision, both from Capt FC's member questionnaire and the individual voir dire conducted by the Trial Counsel. The Military Judge had the opportunity to observe Capt FC and measure his sincerity as he responded to those questions. *See Nash*, 71 M.J. at 88 (noting great deference due actual bias determinations due to the military judge's ability to observe members answering questions); *see also Terry*, 64 M.J. at 303 (noting military judge best positioned to evaluate truthfulness and sincerity of member's responses). Based on the substance of the responses given, the Military Judge's conclusion was neither clearly unreasonable nor clearly erroneous.

Capt FC indicated in his supplemental questionnaire that while he had moral objections to homosexuality, his personal views on homosexuality would have no impact on his evaluation of this case. (App. Ex. XXIV at 31.) Capt FC further stated that his determination of the case would be made based upon the evidence presented at trial and knowing an accused was

homosexual would have no impact on his determination of guilt of a charged offense. (App. Ex. XXIV at 31.) During individual voir dire the Trial Counsel asked Capt FC to clarify his responses to the supplemental questionnaire. (R. 257.) Capt FC explained that his personal opposition to homosexuality would not in any way hinder his ability to hear the facts presented and evaluate whether the accused was guilty of what he is accused of. (R. 257.)

The substance of those responses demonstrate any possible objections he may have to homosexuality would in no way influence his decision making process in this case. Accordingly, he had no actual bias against Appellant. Both Trial Defense Counsel and the Military Judge demonstrated their lack of concern about this member's views on homosexuality by not asking even a single question on the subject. (R. 257-59.) The Military Judge did inquire of other panel members about the effect of their personal views on homosexuality. (R. 262-63.) The fact that the Military Judge asked those questions of other members but not of Capt FC demonstrates the Military Judge saw no issue based Capt FC's questionnaire and the individual voir dire conducted by Trial Counsel.

Here, Capt FC, articulated that his personal views on homosexuality would play no role in his decision making. The Military Judge did not abuse his discretion in finding no actual

bias against Appellant after observing his demeanor during voir dire. *Reynolds*, 23 M.J. at 294 (noting actual bias is largely based on demeanor of the potential member).

2. Capt JM explained his personal views regarding homosexuality would play no role in his determination of guilt or innocence.

The Military Judge's conclusion that Capt JM demonstrated no actual bias toward Appellant was not clearly erroneous. The conclusion was neither arbitrary nor fanciful as it was informed by Capt JM's responses regarding his views on homosexuality in both his member questionnaire and in individual voir dire conducted by Trial Counsel. The Military Judge observed Capt JM's demeanor during voir dire, measured his credibility, and reached an informed decision. *See Nash*, 71 M.J. at 88 (noting great deference due actual bias determinations due to the military judge's ability to observe members answering questions). Further, the substance of the responses given, demonstrate Capt JM's impartiality and that the Military Judge's conclusion was neither clearly unreasonable nor clearly erroneous.

Capt JM indicated in both his supplemental member questionnaire and during voir dire that his personal beliefs regarding homosexuality would play no role in his determination of guilt or innocence. (App. Ex. XXIV at 23.) Capt JM elaborated that sexual orientation of the accused plays no role in determining whether he did the thing he stands accused of.

(App. Ex. XXIV at 23.) In response to clarifying questions from Trial Counsel during individual voir dire, Capt JM reiterated his personal beliefs about homosexuality have no bearing on the proceedings. (R. 268.) Capt JM also stated that he would follow any instructions provided by the Military Judge. (R. 269.) The substance of those responses demonstrate Capt JM had no bias against Appellant due to his purported sexual orientation.

While both the Military Judge and Trial Defense Counsel asked Capt JM a series of questions on individual voir dire, neither asked a single question about his views on homosexuality or whether they would impact his impartiality. (R. 266-69.) As noted *supra*, the Military Judge did demonstrate his willingness to inquire into members' beliefs on homosexuality in questioning a different member. (R. 262-63.) From the fact that neither the Military Judge nor Trial Defense Counsel asked a single question on the subject of this member, this Court can infer both were satisfied in Capt JM's responses on the supplemental questionnaire and to Trial Counsel's questions on individual voir dire.

The substance of his responses demonstrate his impartiality towards Appellant. Capt JM demonstrated willingness and ability to set aside his personal views regarding homosexuality and to follow the instructions of the Military Judge. The Military

Judge correctly concluded Capt JM had no actual bias against Appellant after observing his demeanor during voir dire. *See Reynolds*, 23 M.J. at 294 (noting actual bias is essentially a credibility question largely based on demeanor of member).

D. Capt CF and Capt JM's honest and forthright responses including their unequivocal statements of a lack of bias demonstrate no implied bias.

"[I]n the absence of actual bias, implied bias should be invoked rarely." *United States v. Clay*, 64 M.J. 274, 277 (C.A.A.F. 2007) (internal quotations omitted); *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004); *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998); *United States v. Lavender*, 46 M.J. 485, 488 (C.A.A.F. 1997). The question of implied bias is considered through the eyes of the public focusing on the perception or appearance of fairness of the trial. *Clay*, 64 M.J. at 276. The question is whether most people, similarly situated as the challenged member, would be prejudiced against Appellant. *United States v. Moreno*, 63 M.J. 129, 134 (C.A.A.F. 2006). Rulings on implied bias are reviewed with less deference than abuse of discretion but more deference than *de novo* review. *E.g, Moreno*, 63 M.J. at 134. However, reversing a military judge's exercise of discretion in this area "will indeed be rare." *Clay*, 64 M.J. at 277.

Implied bias is determined from an objective analysis of the totality of the circumstances. *United States v. Strand*, 59

M.J. 455, 459 (C.A.A.F. 2004). A member's "unequivocal statement" that they harbor no bias carries weight in the analysis of the totality of the circumstances. *Strand*, 59 M.J. at 460. Appellate courts should "also recognize that the military judge is in the best position to judge the sincerity and truthfulness of the challenged member's responses on voir dire." *United States v. Youngblood*, 47 M.J. 338, 341 (C.A.A.F. 1997). Here, both of the members now challenged by Appellant stated unequivocally that they harbored no bias that would intrude upon their weighing of the evidence. Furthter, the Military Judge demonstrated a keen appreciation of the demeanor of the potential members by specifically noting the demeanor of one of the members removed for cause as part of the reson for doing so. (R. 279.)

Both of the members now challenged stated, both in their Supplemental Questionnaires and in voir dire, that any personal views they may have about homosexuality would play no role in their decision making as members. Both challenged members stated in their Supplemental Questionnaires that they would decide this case solely on the facts presented to them during trial. (Appellate Ex. XXIV at 23, 31.) When asked during individual voir dire to elaborate Capt FC explained that his personal views about homosexuality would not in any way hinder his ability to hear the facts presented and evaluate whether the

accused was guilty of what he is accused of. (R. 257.) Similarly, Capt JM explained his personal beliefs would have no bearing on the proceedings and he would follow any instructions provided by the Military Judge. (R. 268-69.)

The fact that members have personal views regarding homosexuality is not only unsurprising it is not dispositive. *United States v. Elfayoumi*, 66 M.J. 354, 357 (C.A.A.F. 2008). The issue is whether those personal views will actually influence or provide the appearance of influencing their decision making as members. *Elfayoumi*, 66 M.J. at 357. In *Elfayoumi*, the male accused stood charged with forcibly sodomy upon a male prison guard among other offenses. *Elfayoumi*, 66 M.J. at 355. A potential member expressed strongly held personal and religious views that homosexuality and pornography are morally wrong. *Elfayoumi*, 66 M.J. at 357. After acknowledging he would follow the military judge's instructions and his personal views would not impact his role as a member the military judge denied the challenge, on both actual and implied bias. *Elfayoumi*, 66 M.J. at 357. Here, just as in *Elfayoumi*, the members indicated their personal views would not color their analysis of the facts of the case. *Elfayoumi*, 66 M.J. at 357. Accordingly, just as in *Elfayoumi*, there was no abuse of discretion in retaining these members.

III.

APPELLANT FAILED TO MEET HIS INITIAL BURDEN TO PRESENT ANY FACTS THAT, IF TRUE, CONSTITUTE UNLAWFUL COMMAND INFLUENCE. A BRIEF FROM THE COMMANDANT OF THE MARINE CORPS REGARDING SEXUAL ASSAULT RESPONSE POLICY WHICH SOME MEMBERS ATTENDED PRIOR TO APPELLANT'S TRIAL EXERTED NO IMPROPER INFLUENCE ON THOSE MEMBERS.

A. Appellant shoulders the burden of establishing a three pronged prerequisite showing to warrant the *de novo* review of unlawful command influence.

Allegations of unlawful command influence are reviewed *de novo*. *United States v. Villareal*, 52 M.J. 27, 30 (C.A.A.F. 1999). Findings of fact made by the Military Judge in conjunction with a ruling regarding unlawful command influence are reviewed under a clearly erroneous standard. *Id*. The defense shoulders the initial burden of raising the issue of unlawful command influence with "some evidence." *United States v. Salyer*, No. 13-0186, 2013 CAAF LEXIS 822, *22 (C.A.A.F. Aug. 2, 2013). To raise the issue, the defense must make a threshold showing that is beyond a mere allegation or speculation; this burden requires the defense to show (1) facts that, if true, constitute unlawful command influence; (2) that the proceedings were unfair; and (3) that unlawful command influence was the cause of the unfairness. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999) (citing *United States v. Stombaugh,* 40 M.J. 208, 213 (C.M.A. 1994)).

If the defense satisfies all three prongs of the threshold showing, the burden shifts to the United States to demonstrate beyond a reasonable doubt either that there was no unlawful command influence or that the proceedings were untainted. *United States v. Lewis*, 63 M.J. 405, 413 (C.A.A.F. 2006) (citing *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002)). The United States can meet this burden by: (1) disproving the predicate facts on which the allegation is based; (2) establishing that the facts do not rise to the level of unlawful command influence; (3) proving that it will not affect the trial; or (4) on appeal, proving it had no prejudicial impact. *Biagase*, 50 M.J. at 151.

"In the course of addressing these issues, military judges and appellate courts must consider apparent as well as actual unlawful command influence." *United States v. Reed,* 65 M.J. 487, 488 (C.A.A.F. 2008). "[T]he appearance of unlawful command influence will exist where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *Lewis*, 63 M.J. at 415. "To find that the appearance of command influence has been ameliorated and made harmless beyond a reasonable doubt, the United States must convince [the Court] that the disinterested public would now believe [the appellant] received a trial free from the effects of unlawful command

influence." *Id.*

B. Appellant fails to make the requisite showing of the existence of unlawful command influence or that his trial was unfair as a result.

Although at trial, the Military Judge may have found the defense met their initial burden on actual unlawful command influence, thereby shifting the burden to the United States, on appeal the burden has not shifted. *See United States v. Ayers*, 54 M.J. 85, 95 (C.A.A.F. 2000). Appellant's discussion of what the Military Judge may or may not have concluded is irrelevant to this Courts *de novo* review of the issue. (Appellant's Br. at 32.) In *Ayers*, the Court of Appeals for the Armed Forces explained the difference between the burden shift at trial and the burden shift on appeal where apparent unlawful command influence is alleged:

> *At trial*, the defense must show 'that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings.' *On appellate review*, the defense must show that the proceedings appeared to be unfair and that the unlawful command influence was the cause of the appearance of unfairness.

Ayers, 54 M.J. at 95 (citation omitted)(emphasis added). The distinction between what Appellant must show at trial, versus on appeal, exists because a military judge's prospective ruling does not have the benefit of voir dire, findings, and sentence. With a hindsight view, an appellant must again demonstrate "some evidence" that his proceedings appeared to be unfair as a result

of unlawful command influence. *See Ayers*, 54 M.J. at 95; *see also Biagase*, 50 M.J. at 151 (noting that the United States may meet its burden to disprove unlawful command influence on appeal, in a different manner than at trial).

Here, Appellant failed to show his Court-Martial was subjected to unlawful command influence. In *United States v. Ashby*, the Court of Appeals for the Armed Forces noted that an acquittal made it "unsurprising" that the appellant could not demonstrate "some evidence" of apparent unlawful command influence. 68 M.J. 108, 128-29 (C.A.A.F. 2009). Here, as in *Ashby* Appellant was partially acquitted undermining his claim that his court-martial was tainted, because the members did not convict him of wrongful sexual contact of LCpl B. 68 M.J. 108, 128-29 (C.A.A.F. 2009). This Court should, therefore, find that Appellant has not shown "some evidence" that his Court-Martial either was or appeared to have been tainted by unlawful command influence.

Considering the specific facts cited by Appellant they do not rise to the level of meeting his initial burden. *See United States v.Lopez*, 2013 CCA LEXIS 579, *11 (N-M. Ct. Crim. App. Jul. 30, 2013) (holding defense failed to meet their initial burden in a Heritage Brief UCI claim explaining, "no indication whatsoever that the proceedings were unfair[,]"). As support for his claim Appellant cites the fact that the members were

aware of the Heritage Brief and the rank of the trial team as compared to the rank of the defense team. (Appellant's Br. at 28, 31, 32.) The Trial Team consisted of a Lieutenant Colonel, a Major, and a Captain while the defense team consisted of two Captains. Neither of these facts meet Appellant's initial burden.

Appellant argues the detailing decision somehow reinforced the message of the Commandant's Heritage Brief. (Appellant's Br. at 31.) Appellant fails to establish any sort of causal link between the detailing decision and the Commandant's Heritage Brief. Without anything to establish a causal link, Appellant offers nothing more than mere speculation that one caused the other. Speculation does not satisfy his threshold burden. *See Ashby*, 68 M.J. at 128 (stating "[m]ere speculation that unlawful command influence occurred because of a specific set of circumstances is not sufficient.") (citations omitted).

Lastly, the fact that some members were present at the Heritage Brief and others were aware of its existence does not meet Appellant's initial burden either. The fact that a person attended a briefing or was aware of the existence of a briefing does not establish that they were influenced by the substance of the briefing. Again, Appellant offers nothing more than speculation to support his claim, which is inadequate to meet his threshold burden. *See Ashby*, 68 M.J. at 128.

C. Even assuming arguendo that the burden had shifted, the United States has proven beyond a reasonable doubt that unlawful command influence neither actually influenced the Court-Martial nor appeared to do so.

Appellant's Court-Martial was not actually impacted by unlawful command influence. Also, an informed, disinterested observer, with knowledge of the following, would view Appellant's Court-Martial as free of unlawful command influence because: (1) the Supplemental Questionnaires and voir dire process ensured no Member seated on Appellant's panel was influenced by the Commandant's brief; and (2) the Members demonstrated their independence by acquitting Appellant of one specification of wrongful sexual contact that was charged.

Appellant was granted Supplemental Questionnaires and the opportunity to inquire into Heritage Brief attendance and influence by the Military Judge. (R. 168.) Following a thorough voir dire, every challenge for cause raised by Trial Defense Counsel was granted. (R. 278-79.) During that voir dire, each potential member that was eventually empaneled agreed that nothing would effect their ability to be fair and impartial, three separate times. (R. 221, 225, 230.) They each agreed they would follow the instructions of the Military Judge. (R. 225.) Each Member that attended or was aware of the Heritage Brief agreed during individual voir dire that they would not be influenced by it in their duties as a member. (R. 237, 245, 254,

267.) One member neither attended nor was aware of the substance of the Heritage Brief. (R. 271.) Based on the thorough voir dire and each member's explanation of their understanding of the content and their take-aways from the Heritage Brief, it is clear it caused neither actual nor apparent unlawful command influence here.

Ultimately, the Members demonstrated that they were not influenced by the Commandant's Brief in the verdict they rendered. The Members acquitted Appellant on one of the charged offenses of wrongful sexual contact. There is no more clear way to demonstrate that they were not influenced than to return a partial acquittal.

IV.

EVIDENCE THAT APPELLANT CARESSED AND KISSED LCPL T'S ARM AND MADE ADVANCES TOWARD LCPL J WERE ADMISSIBLE AS PROOF OF HIS INTENT TO GRATIFY HIS SEXUAL DESIRE IN THE CHARGED OFFENSES. MILITARY RULES OF EVIDENCE 404 AND 405 ARE INAPPLICABLE TO THE CHALLENGED EVIDENCE BECAUSE SEXUAL ORIENTATION DOES NOT FALL WITHIN THE SCOPE OF A RECOGNIZED CHARACTER TRAIT.[4]

A. Standard of review.

Evidentiary rulings are reviewed for an abuse of discretion. *E.g.*, *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008).

[4] While neither LCpl T nor LCpl J are victims of charged offenses requiring redaction of the full names their full names the United States has elected to do so in an abundance of caution for the sake of their privacy.

"The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion." *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010) (internal quotations omitted). A military judge abuses his discretion where he relies on clearly erroneous facts, where he relies on an erroneous view of the law, or his ultimate conclusion is "arbitrary, fanciful, clearly unreasonable or clearly erroneous." *E.g.*, *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987) (internal quotations omitted); *Miller*, 66 M.J. at 307.

B. Sexual orientation is not a "character trait" therefore its admissibility was not governed by Military Rules of Evidence 404 and 405 as Appellant claims.

Appellant encourages this Court to erroneously consider sexual orientation within the rubric of a character trait to achieve more favorable framework of evidentiary rules for appellate review. (Appellant's Br. at 34.) Appellant's purported authority for the proposition that sexual orientation qualifies as a character trait governed by the rules applicable to character evidence simply does not support the proposition. Appellant cited no authority and the United States is not aware of any authority that clearly places sexual orientation within the definition of a character trait in Military Rules of Evidence 404 and 405.

1. Appellant provided no actual authority for his proposition that sexual orientation is a character trait under the Rules of Evidence.

Appellant cited two cases from outside military justice as authority for sexual orientation being a character trait. (Appellant's Br. at 34.) Notably, those two cases are from 1981 and 1975 respectively, a time period with very different and misguided understandings of sexual orientation than exist today. Further, Appellant misstates the two cases cited as support for the proposition that sexual orientation is a character trait, when neither actually provides support for that proposition.

Appellant misinterpreted the only federal court case he cited for the proposition that sexual orientation is a character trait. (Appellant's Br. at 34.) *Cohn v. Papke* was a federal civil lawsuit alleging police brutality following an arrest. 655 F.2d 191, 192 (9th Cir. 1981). Mr. Cohn was arrested for solicitation of a sexual act from an undercover male law enforcement officer in violation of state law. *Cohn*, 655 F.2d at 192. During the federal police brutality trial, evidence of Cohn's sexual orientation was introduced during his cross examination. *Cohn*, 655 F.2d at 193. The evidence consisted of excerpts from previous psychiatric evaluations where Mr. Cohn stated among other things he was bisexual and had engaged in homosexual acts in the past. *Cohn*, 655 F.2d at 193. The trial judge admitted the records as impeachment evidence over

objection. *Cohn*, 655 F.2d at 193. On appeal, admission of the psychiatric records was found erroneous "because there was nothing to impeach." *Cohn*, 655 F.2d at 193. The opinion goes on, in dicta, to discuss other possible bases for admission of the evidence. *Cohn*, 655 F.2d at 193. The brief discussion on the admissibility of sexual orientation as a character trait occurred within that dicta. *Cohn*, 655 F.2d at 193. Appellant's reliance on *Cohn* as a source of authority for sexual orientation falling within the rubric of a character trait is misplaced. *Cohn* actually addressed when and how impeachment evidence is admissible.

Similarly, Appellant over states the significance of the only state case he cites as support for the proposition that sexual orientation is a character trait. (Appellant's Br. at 34.) In *Illinois v. Limas*, the relevant issue was that of self-defense in a murder trial. 45 Ill. App. 3d 643, 649 (Ill. App. 1977). Limas' defense theory was that when he drew his pistol and shot the victim four times he was defending himself. *Limas*, 45 Ill. App. 3d at 646. Limas' defense theory was that the victim had grabbed Limas' hand and pulled it towards his groin. *Limas,* 45 Ill. App. 3d at 646. Following that initial grab a scuffle ensued. *Limas,* 45 Ill. App. 3d at 646. Limas claimed the victim reached for something that he believed was a knife so he shot the victim. *Limas,* 45 Ill. App. 3d at 646.

At trial the defense attempted to offer evidence that the victim was an “aggressive homosexual” that Limas had to defend himself from. *Limas*, 45 Ill. App. 3d at 649. The testimony was excluded by the trial judge as irrelevant. *Limas*, 45 Ill. App. 3d at 649. In affirming, the appellate court noted that while violent disposition of the victim would have been a relevant character trait in light of a self-defense theory, sexual orientation was not relevant. *Limas*, 45 Ill. App. 3d at 649. *Limas* simply does not provide support for the proposition that sexual orientation is a character trait that should be analyzed under the character evidence rules. Sexual orientation was never considered under character evidence in *Limas*, it was excluded under the relevance rule. *Limas*, 45 Ill. App. 3d at 649. Appellant’s reliance upon it here is misplaced.

2. Sexual orientation is not a character trait governed by the rules applicable to character evidence.

Neither the Military Rules of Evidence nor the Federal Rules of Evidence define what qualifies as a character trait. While no comprehensive definition of what qualifies as character trait has been accepted in case law, it does not follow that as a result everything about a person qualifies as a character

trait.[5] Barrett J. Anderson, *Recognizing Character: A New Perspective on Character Evidence*, 121 Yale L.J. 1912, 1914 (2012). "Character trait refers to elements of one's disposition, such as honesty, temperance or peacefulness." *United States v. Doe*, 149 F.3d 634, 638 (7th Cir. 1998) (internal quotations omitted). Character traits are "personality traits, such as diligence, aggressiveness, honesty, and the like, that create a propensity for acting in certain ways under certain conditions." *Id*. Character traits tend to have a moral aspect. *See Michelson v. United States*, 335 U.S. 469, 477 (1948); *see also State v. Fergusin*, 803 P.2d 676, 685 (N-M. Ct. App. 1990) (noting character traits carry moral connotations).

Sexual orientation does not properly fall within the scope of things governed by the character evidence rules as sexual orientation is not a character trait. *See United States v. Whitner*, 51 M.J. 457, 460 (C.A.A.F. 1999) (analyzing admissibility of evidence of accused's sexual orientation in a forcible homosexual sodomy case under M.R.E. 410 and 403 as

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[5] Habits are not character traits. *United States v. Holman*, 680 F.2d 1340, 1350-51 (11th Cir. 1982) (noting habits are specifically observable whereas character traits are not). Intelligence, memory, and communication abilities are not character traits. *United States v. Cortez*, 935 F.2d 135, 138-39 n. 3 (8th Cir. 1991); *United States v. West*, 670 F.2d 675, 682 (7th Cir. 1982).

opposed to as character evidence); *but see United States v. Hernandez*, No. 201200369, 2013 CCA LEXIS 327, *7 (N-M. Ct. Crim. App. Apr. 18, 2013) (analyzing acts addressing sexual orientation under rubric of 404(b) without explaining why the evidence falls within the purview of M.R.E. 404.) Sexual orientation has nothing to do with a person's disposition and therefore is not a character trait. A person's sexual orientation displays nothing about a person similar to the things demonstrated by recognized character traits such as honesty, aggressiveness, temperance, peacefulness, or diligence. Further, as sexual orientation does not carry a moral connotation, either positive or adverse, it demonstrates nothing about one's character. The specialized rules of admissibility pertaining to character evidence simply do not apply to sexual orientation. The admissibility of this evidence was properly governed by the remainder of the Military Rules of Evidence, specifically that of relevance and whether its probative value was substantially outweighed by the danger of unfair prejudice.

C. Evidence of Appellant's incident with LCpl T was admissible here as circumstantial evidence of Appellant's intent to gratify his sexual desires which is an element of the charged offenses.

Appellant was charged with three specifications of wrongful sexual contact in violation of Article 120(m) as the offenses occurred prior to June 27, 2012. (Charge sheet.) The first

element of that offense is "[t]hat the accused had sexual contact with another person." M.C.M., ¶ 45(b)(13), page A28-9 (2012 ed.). Sexual contact is defined as "intentional touching . . . with an intent to . . . arouse or gratify the sexual desire of any person." M.C.M., ¶ 45(a)(t)(2), page A28-3 (2012 ed.). Accordingly, the United States was required to prove Appellant was acting with an intent to gratify his sexual desires, or those of another, when he touched his three victims. (R. 528, 531, 533.) The United States pursued the theory that Appellant was acting to gratify his own sexual desires. Absent a complete confession from Appellant, the only way to prove such an element was through inferences drawn from circumstantial evidence.

Here, as part of the proof of intent to arouse or gratify sexual desires in the actions that formed the basis of the charged specifications, the Trial Counsel offered evidence of intent to arouse or gratify sexual desires in an incident with LCpl T. (R. 467-75.) Appellant's actions towards LCpl T demonstrated his intent to arouse or gratify sexual desires through unwanted touches other Marines.

The Military Judge properly found the incident with LCpl T admissible evidence. (Appellate Ex. LXXIII at 5-6.) The Military Judge explained the evidence was relevant because it provides circumstantial evidence of Appellant's intent.

(Appellate Ex. LXXIII at 5-6.) As authority that intent can be proven in in one incident from intent in another incident, the Military Judge correctly cited, as an example, *United States v. Tanksley*, 54 M.J. 169, 175 (C.A.A.F. 2000). (Appellate Ex. LXXIII at 4.) The Military Judge did not make note of the fact that *Tanksley* was subsequently overruled three years later on other grounds. *United States v. Inong*, 58 M.J. 460, 465 (C.A.A.F.). But as the basis for *Tanksey* being overruled was not relevant to this issue, and it was merely cited as an example of a recognized principle, which has not been overruled, reliance upon *Tanksley* was not misplaced.

During the incident in question, Appellant made romantic overtures towards LCpl T in the form of a series of escalating unwanted touches. Appellant's conduct towards LCpl T is evidence of his intent in that interaction to arouse or gratify his sexual desires or those of LCpl T. *See generally United States v. Quintanilla*, 56 M.J. 37, 42 (C.A.A.F. 2001) (recognizing communicative ability of non-verbal body language); *see also United States v. Robinson*, 26 M.J. 361, 368 (C.M.A 1988) (same). Appellant's touches began innocuously, throwing his arm around LCpl T's neck while drinking a beer and talking in a group setting. (R. 468-69.) The touches then escalated once Appellant had LCpl T alone in his barracks room. Appellant placed his head in LCPl T's lap and caressed his thigh. (R.

471-72.) Appellant then passionately kissed LCpl T's forearm. (R. 473.) Both the nature of the touches and the escalation of the touches from relatively innocuous in a group setting to overtly sexual in private shortly thereafter provide circumstantial evidence of Appellant's intent to satisfy his own sexual desires or arouse those of LCpl T.

Evidence of Appellant's intent to satisfy his sexual desires in the incident with LCpl T is transferrable to the charged incidents as well. *See Whitner*, 51 M.J. at 459 (finding evidence of possession of homosexual pornographic materials valid circumstantial evidence to show requisite desires of accused in homosexual sodomy prosecution). Appellant, an adult male, was charged with three specifications of wrongful sexual contact upon other adult males. (Charge sheet.) Proving Appellant's intent was to satisfy his sexual desires, or those of his victims, the prosecution had to establish Appellant's interest in homosexual activity. Demonstrating Appellant's interest in homosexual activity in a separate situation is then circumstantial evidence from which an inference can be drawn that his charged actions were done for the purpose of satisfying his sexual desires. *See Whitner*, 51 M.J. at 459; *see also State v. Ford*, 926 P.2d 245, 250 (Mont. 1996) (finding where charged with rape where victim was same gender evidence of homosexuality would be probative of whether defendant would commit such act to

satisfy sexual desires); *see also* *Florence v. State*, 755 So. 2d 1065, 1071-72 (Miss. 2000) (finding evidence of possession of homosexual pornography has some tendency to make homosexual tendencies more probable).

Having established the evidence is relevant the only remaining evidentiary question is a balancing of whether the probative value is substantially outweighed by unfair prejudice. M.R.E. 403. A military judge's balancing of probative value versus prejudicial impact it is due substantial deference when done on the record. *E.g.*, *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000). Here, the Military Judge did measure the probative value of the evidence in question in his written ruling, finding it valuable to establishing Appellant's intent, a necessary element. (Appellate Ex. LXXIII at 5-6.) The Military Judge concluded the evidence was not unfairly prejudicial at all. (Appellate Ex. LXXIII at 6.) Where there is no unfair prejudice, nothing exists to outweigh the probative value of the evidence, let alone substantially outweigh the probative value.

Appellant's argument that the evidence was prejudicial is flawed. Appellant's argument that the sexual orientation evidence was prejudicial is circular, dependent upon finding the evidence not relevant in the first place. (Appellant's Br. at 40.) As previously discussed, the evidence was relevant as it

provided circumstantial proof of an element of the charged offenses, that of intent. The use of the evidence was expressly limited to that purpose by the Military Judge in a limiting instruction. (R. 482.) There is no unfair prejudice in proving an element of an offense. Further, as discusses fully *supra*, each empanelled member set aside any personal feelings they may or may not have towards homosexual conduct. As such, Appellant fails to establish any actual unfair prejudice the Military Judge's conclusion was not clearly unreasonable or clearly erroneous. There was no abuse of discretion in admitting evidence of the incident between Appellant and LCpl T.

D. Even if sexual orientation were a character trait under M.R.E. 404 and 405 the Military Judge did not abuse his discretion in admitting the testimony of LCpl T.

Appellant does not challenge any of the factual findings as clearly erroneous or that the Military Judge relied on an erroneous view of the law. (Appellant's Br. at 8.) The only remaining way the Military Judge could have abused his discretion is if the ultimate conclusion was "arbitrary, fanciful, clearly unreasonable or clearly erroneous." *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010) (internal quotations omitted). Appellant does take issue with the Military Judge's ultimate conclusion. (Appellant's Br. at 38.) However, merely disagreeing with a Military Judge's conclusion

does not render that conclusion an abuse of discretion. *See e.g.*, *United States v. Mott*, 72 M.J. 319, 329 (C.A.A.F. 2013) (recognizing within abuse of discretion review trial judges have "a range of choices and will not be reversed so long as the decision remains within that range.")

The conclusions reached by the Military Judge here were neither arbitrary nor fanciful. The six page written ruling addressing the testimony of LCpl T demonstrates reasoned analysis to a valid conclusion. (Appellate Ex. LXXIII.) The Military Judge's reasoned approach is further evidenced by the fact that the defense motion to exclude was granted in part. (Appellate Ex. LXXIII.) The Military Judge excluded evidence regarding two other incidents the prosecution wanted to introduce. (Appellate Ex. LXXIII.) Evidence of those instances were excluded because they were not relevant. (Appellate Ex. LXXIII at 4.) The Military Judge reasoned as those instances did not involve touches of a romantic or sexual manner they did not make any fact of consequence of the charged offenses more or less probable. (Appellate Ex. LXXIII at 4.)

The Military Judge's conclusions regarding the incident with LCpl T was neither clearly unreasonable nor clearly erroneous. The Military Judge determined the incident in question demonstrated intent to arouse sexual desires. (Appellate Ex. LXXIII at 5.) Accordingly, based on the

similarity between the incidents and the charged misconduct they were circumstantial evidence of Appellant's intent.

Lastly, Appellant argues for a change in the status of the law, claiming military justice is out of step with civilian courts.[6] (Appellant's Br. at 36.) This could possibly be construed as a challenge of reliance on an erroneous view of the law. However, by the very nature of asking this Court to change the status the law, Appellant inherently concedes the Military Judge here acted within the law as it exists today. Accordingly, the Military Judge did not abuse his discretion and Appellant is due no relief under the applicable standard of review.

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[6] The United States in no way concedes the allegation that jurisprudence within the military justice system is out of step with civilian courts as Appellant alleges. The two cases cited by Appellant fail to support such a claim as neither actually addresses whether sexual orientation qualifies as a character trait. Sexual orientation as character evidence was not actually at issue in *King v. State*, 857 So.2d 702 (Miss. 2003). Despite Appellants suggestion, *King* actually addressed the admissibility of prior sexual assaults as character evidence in a sexual assault prosecution. *King*, 857, So.2d. at 734. The evidence addressed the character trait of violence, not sexual orientation. Similarly, sexual orientation as a character trait was not at issue in *State v. Bates*, 507 N.W.2d 847 (Minn. 1993). The issue in *Bates* was whether evidence of the defendant's homosexuality was improperly admitted at trial because it was not relevant. 507 N.W.2d. at 852. The evidentiary error in *Bates* had nothing to do whether it qualified as character evidence. The issue was simply one of relevance. Neither case addresses whether sexual orientation qualifies as a character trait. Accordingly, Appellant failed to cite any cases that military justice jurisprudence is purportedly out of step with.

E. LCpl J's testimony explaining what he saw and his reason for leaving when he saw Appellant approaching was not subject to specialized evidentiary rules for character evidence because it established no character trait nor other act of Appellant and was relevant because it explained the circumstances of how the victim and Appellant met prior to the charged incident.

Evidence is admissible as character evidence where it is proof of a pertinent character trait of the accused. M.R.E. 404(a)(1). Evidence is also admissible as character evidence where it establishes an other crime, wrong, or act on the part of the accused in limited circumstances where it provides proof of something such as motive, opportunity, intent, preparation, plan, knowledge, absence of mistake or identity. M.R.E. 404(b). The complained of evidence here is a witness' reason for leaving a scene between Appellant and the eventual victim. (R. 372.) The complained of evidence does not fall within the scope of character evidence because it was neither a character trait of Appellant nor evidence of any other crime, wrong, or act on the part of Appellant. The evidence was that he left LCpl B, the eventual victim, alone with Appellant and his reason for leaving, that Appellant made him uncomfortable. (R. 372.)

LCpl J testified about going to a drive in movie with a group of people including LCpl B on the evening in question. (R. 368-69.) LCpl J testified about alcohol consumption on the part of the victim at the movie. (R. 369.) LCpl J also testified about returning to the barracks and seeing Appellant approach

him and LCpl B, the eventual victim, on the catwalk. (R. 370.) Cpl J provided his lay opinion, based on his observations, that Appellant was intoxicated when he approached the two of them. (R. 371.) LCpl J left as Appellant approached. (R. 371.) Trial Defense Counsel objected to LCpl J explaining why he left as Appellant approached. (R. 372.)

During an Article 39(a) session the witness explained he left because he expected Appellant to make him uncomfortable. (R. 372.) Appellant had in the past, gotten uncomfortably close to him and made him uncomfortable. (R. 372.) Trial Defense Counsel clarified the objection as a general relevance objection as well as a Military Rule of Evidence 404 objection. (R. 372.) The Military Judge overruled both objections, finding the evidence not within the scope of character evidence and that it was relevant to explain why the percipient witness left the scene. (R. 373.) When the members were brought back, LCpl J testified that he left as Appellant approached because Appellant makes him uncomfortable and he wanted to avoid any possible situation. (R. 373-74.)

Appellant overstates the actual testimony before the members and erroneously attempts to characterize the testimony as character evidence to argue additional procedural protections were not satisfied. (Appellant’s Br. at 39.) Appellant attempts to lump this testimony in with the testimony of LCpl T

by including it in the same assignment of error. Appellant attempts to imply this evidence is somehow part of proving sexual orientation as a character trait within the scope of M.R.E. 404(a)(1). (Appellant's Br. at 33.) The Military Judge correctly reached the conclusion that this testimony was outside the scope of M.R.E. 404(b) as it does not show any other crime, wrong, or act on the part of Appellant. (R. 373.) The Military Judge then explained the testimony was relevant because it explains why the percipient witness left the scene where Appellant met the victim alone. (R. 373, 340.)

The Military Judge correctly concluded this testimony was outside the scope of character evidence. The complained of testimony is neither evidence of a pertinent character trait nor is it evidence of any other crime, wrong, or act on the part of Appellant. As discussed supra, evidence is only character evidence where it establishes a character trait. Here, the evidence that LCpl J is uncomfortable with Appellant because he stands too close does not establish a character trait on the part of Appellant. Similarly, the complained of testimony is not an other crime, wrong or act on the part of Appellant. The complained of evidence explains why the witness left the scene and the circumstances under which Appellant and the victim met. As this was not character evidence, no advance notice was due

the defense of its intended use as Appellant claims. (Appellant's Br. at 38.)

Evidence is relevant where it has any tendency to make a fact of consequence more or less probable. M.R.E. 401. The evidence in question here is the testimony of LCpl J, a percipient witness to the events of the evening of the charged incident including how the victim, LCpl B, and Appellant met on that evening prior to the sexual assault and his reason for leaving. (R. 372.) That testimony was relevant as it contributes to establishing Appellant's opportunity to commit the charged offense. The Military Judge did not abuse his discretion in admitting it.

V.

APPELLANT'S ASSAULT CONSUMATED BY BATTERY CONVICTION FOR TOUCHING LCPL B ON THE CHEST WAS LEGALLY AND FACTUALLY SUFFICIENT BECAUSE THE VICTIM AWOKE WITH HIS BED COVERS PULLED DOWN, HIS SHIRT PULLED UP, APPELLANT SLEEPING NAKED BEHIND HIM ON TOP OF THE COVERS, WITH APPELLANT'S ARM WRAPPED AROUND HIS TORSO, AND APPELLANT'S HAND ON HIS CHEST.

A. The Court reviews legal and factual sufficiency *de novo*.

This Court reviews legal and factual sufficiency of the evidence *de novo*. Article 66(c), UCMJ; *United States v. Beatty*, 64 M.J. 456, 459 (C.A.A.F. 2007); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987).

B. The evidence was legally sufficient because the victim awoke with Appellant naked and his arm wrapped around him with his hand placed on the victim's exposed chest.

A conviction is legally sufficient if when considering the evidence in a light most favorable to the prosecution, a reasonable fact-finder could have found all the elements beyond a reasonable doubt. *E.g.*, *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (internal citations omitted). Assault consummated by battery carries two elements, that the accused did bodily harm to a certain person and that the bodily harm was done with unlawful force or violence. 10 U.S.C. § 928. The bodily harm requirement is satisfied by "any offensive touching of another, however slight." *United States v. Bonner*, 70 M.J. 1, 3 (C.A.A.F. 2011). Assault consummated by battery is a general intent crime. *United States v. Singletary*, 14 C.M.A. 146, 150 (C.M.A. 1963). The general intent nature of the crime means Appellant need only have intended the touch occur. Here, the touch in question is that of touching LCpl B's chest. Appellant limits his challenge to the intent component, alleging no reasonable fact finder could have found Appellant intentionally touched LCpl B's chest. (Appellant's Br. at 43.)

The testimony of the victim, LCpl B, alone provides the legal sufficiency for Appellant's conviction. LCpl B testified that he left Appellant outside his room shortly after midnight. (R. 340-41.) LCpl B went into his room alone and did not invite

Appellant to join him. (R. 341, 351.) LCpl B went immediately into his bed wearing a t-shirt and jeans and promptly fell asleep. (R. 341.) LCpl B went to sleep alone that night. (R. 341, 351.) LCpl B is generally a heavy sleeper and particularly so after drinking alcohol as he had that evening. (R. 341, 361). LCpl B awoke at approximately 0530 under his covers but with his sheets pulled slightly down to expose his chest. (R. 342.) LCpl B's t-shirt was pulled up. (R. 342.) Appellant's left hand was on his exposed chest, between his pectorals, palm down with his fingers spread out. (R. 342.) Appellant was behind him on the bed, spooning him, with his left arm around him. (R. 342.) Appellant was on top of the covers but completely naked. (R. 342, 353-54.) When LCpl B awoke and discovered the situation it felt sexual to him. (R. 342.) LCpl B's roommate, LCpl R, supports LCpl B's testimony, in that he saw the two in a spooning position in the bed at approximately 0505 that morning. (R. 388.)

Looking at that evidence in the light most favorable to the prosecution, any reasonable fact finder would find Appellant acted with the general intent of touching LCpl B on the chest. In the light most favorable to the prosecution, Appellant, fully naked and spooning LCpl B, pulled the sheet down and the t-shirt up to expose LCpl B's chest. An arm draped over his side could potentially be an unintentional touch. However, here there was

more than an arm draped over a side. The sheet was pulled down and the t-shirt was pulled up to expose bare skin. The inference from those actions is that they were both done to expose skin. Then add in the fact that Appellant was naked spooning LCpl B with his arm wrapped around him and that his hand was on the exposed skin, it becomes inescapable that the actions were done intentionally for the purpose of the touch. A reasonable fact finder not only could, but would, conclude beyond a reasonable doubt that Appellant acted intentionally in touching LCpl B's chest.

C. The evidence was factually sufficient because the victim's uncontroverted testimony was partially corroborated by other witnesses and Appellant's intent was clear both from his nudity and from his prior actions towards LCpl T.

Factual sufficiency requires that, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the Court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. Reasonable doubt does not mean that the evidence must be free from conflict. *United States v. Rankin*, 63 M.J. 552, 557 (N-M. Ct. Crim. App. 2006), *aff'd*, 64 M.J. 348 (C.A.A.F. 2007). The Court may, as did the fact-finder at trial, accept or reject some or all of a witness's testimony. *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979).

In testing for factual sufficiency, this Court is required to "recognize[e] that the trial court saw and heard the witnesses." *Turner*, 25 M.J. at 325. This is not a pro forma legal requirement. Rather, it takes into account that the trier of fact is best situated to assess a witness' credibility while testifying. *See United States v. Madey*, 14 M.J. 651, 653 (A.C.M.R. 1982), *rev. denied*, 15 M.J. 183 (C.M.A. 1983); *see generally United States v. Ferguson*, 35 F.3d 327, 333 (7th Cir. 1994), *cert. denied*, 514 U.S. 1100 (1995) (trial court's evaluation of witness credibility will not be disturbed unless found completely without foundation).

Here, for the same reasons that the conviction is legally sufficient, this Court should find it factually sufficient as well. LCpl B's testimony of the situation he found himself in when he awoke is uncontroverted in the Record. Further, components of his testimony are supported form other witnesses, bolstering his credibility. His roommate found him in a spooning sleeping position with Appellant, exactly as he testified he found himself when he awoke. (R. 388.) Further, LCpl J's testimony is consistent with and therefore supports LCpl B's credibility further. LCpl J testified, just as LCpl B did, that Appellant approached the two of them while they were outside LCpl B's barracks room around midnight and was visibly intoxicated. (R. 370-71.) The uncontroverted nature of the

testimony of how LCpl B woke up, combined with the interlocking testimony of other witnesses should suffice to convince this Court beyond a reasonable doubt that Appellant acted with general intent of touching LCpl B's chest.

If that was insufficient, this Court can also consider the circumstantial evidence of Appellant having acted with intent to arouse or satisfy his sexual desires in touching LCpl T in a sexual manner without his permission. As discussed supra in response to assignment of error four, the intent demonstrated in that incident is circumstantial evidence that his actions in this charged incident were of the same type, to arouse or gratify either his or his victim's sexual desire. If Appellant was acting to arouse or gratify sexual desire, then he meant to touch the target of his sexual interest. This Court should be convinced beyond a reasonable doubt that Appellant acted with the general intent to touch LCpl B on the chest.

VI.

THE MAGISTRATE HAD OVERWHELMING EVIDENCE TO JUSTIFY CONTINUATION OF APPELLANT'S PRETRIAL CONFINEMENT.[7]

A. Appellant's challenge is limited to the Military Judge's ruling that the new evidence did not warrant Appellant's release from pretrial confinement.

There are two ways in which pretrial confinement can be challenged. R.C.M. 305(j)(1). The first is that the initial reviewing officer, or magistrate, incorrectly continued the pretrial confinement following the seven day hearing. R.C.M. 305(j)(1)(A). A military judge reviews a magistrate's decision following the seven day hearing to continue confinement for an abuse of discretion. *United States v. Gaither*, 45 M.J. 349, 351 (C.A.A.F. 1996). In so doing the military judge is limited to the evidence that was presented to the magistrate. *Gaither*, 45 M.J. at 351. The second form of challenge before a military judge is that confinement should not presently continue in light of new information not disclosed to the magistrate. *Gaither*, 45 M.J. at 351. Military judges perform a *de novo* review to reach the conclusion regarding further continuation of pretrial confinement. *Gaither*, 45 M.J. at 351.

Here, the Military Judge ruled that the magistrate did not abuse his discretion in concluding continued confinement was

[7] Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

appropriate based on the information presented to him in the seven day review hearing. (R. 70; Appellate Ex. LXXII at 6.) The Military Judge also concluded the new information that was not presented to the magistrate did not merit release from confinement. (R. 71-72; Appellate Ex. LXXII at 7.)

Appellant fails to clearly articulate which ruling of the Military Judge he challenges on appeal. (Appellant's Br. at 45.) Appellant does reference that some of the information presented to and considered by the magistrate was factually incorrect. (Appellant's Br. at 45.) Because the existence of an error in the information presented to the magistrate was discovered after the magistrate rendered his decision, it is the equivalent of new information that was not presented to the magistrate. Accordingly, Appellant appears to challenge the Military Judge's *de novo* review of that new information and ruling that it did not warrant release from pretrial confinement. *See Gaither*, 45 M.J. at 351.

B. Standard of review.

An appellate court "reviews a military judge's ruling on the legality of pretrial confinement for abuse of discretion." *United States v. Wardle*, 58 M.J. 156, 157 (C.A.A.F. 2003). "Abuse of discretion is a term of art applied to appellate review of the discretionary judgments of a trial court. An abuse of discretion occurs when the trial court's findings of

fact are clearly erroneous or if the court's decision is influenced by an erroneous view of the law." *United States v. Freeman*, 65 M.J. at 452; *see also United States v. Six*, No. 201100016, 2012 CCA LEXIS 721 (N-M. Ct. Crim. App. Aug. 18, 2012).

C. Ample evidence existed to support the Military Judge's ruling that continued pretrial confinement was warranted.

Here, the Military Judge did take note that there was new evidence not presented to the magistrate and considered it in conducting her *de novo* review of whether continued confinement was warranted. (Appellate Ex. LXXII at 7.) The Military Judge did not abuse her discretion because she cited and applied the correct legal principles, her factual findings were supported by the Record, and her conclusions were not arbitrary, fanciful, clearly unreasonable or clearly erroneous.

The Military Judge correctly identified that she was conducting a *de novo* review of whether pretrial confinement remained appropriate in light of the current state of the evidence at the time of her review. (Appellate Ex. LXXII at 7, 8.) The Military Judge also correctly noted an accused is properly in pretrial confinement where a preponderance of the evidence shows that:

(i) An offense triable by court-martial has been committed;
(ii) The prisoner committed it; and

(iii) Confinement is necessary because it is foreseeable that:
(a) The prisoner will not appear at trial, pretrial hearing, or investigation, or
(b) The prisoner will engage in serious criminal misconduct; and
(iv) Less severe forms of restraint are inadequate.

(Appellate Ex. LXII at 7 (citing R.C.M. 305(h)(2)(B)).

The new evidence did not impact the conclusion that the preponderance of the evidence showed Appellant committed offenses triable by court-martial. (Appellate Ex. LXXII at 6.) The new evidence was pertinent to the questions of foreseeability of further serious criminal misconduct and whether less severe forms of restraint were inadequate.

There were two new relevant items of evidence. The first was that one of the incidents relied upon by the magistrate turned out to be incorrect. (Appellate Ex. LXXII at 8.) That alleged incident occurred at a bar on the base. The Military Judge reasoned that if that were the only new evidence then a less severe form of restraint, possible barracks restriction, would prevent any further misconduct in a bar. (Appellate Ex. LXXII at 8.)

However, while investigating the prior incident that turned out to be incorrect, three additional incidents were discovered. (Appellate Ex. LXXII at 8.) The Military Judge found one of those three incidents warranted continued confinement. This newly discovered incident, with LCpl T, occurred in the barracks.

(Appellate Ex. LXXII at 8.) In this incident, fully discussed *supra* in assignment of error four, Appellant made use of rank disparity and engaged in a series of unwanted touches of a junior Marine. (Appellate Ex. LXXII at 8.) The touches escalated from innocuous to overtly sexual.

As this newly discovered incident occurred while these criminal charges were pending the Military Judge reasoned Appellant will continue to engage in serious criminal misconduct. (Appellate Ex. LXXII at 8.) The Military Judge also reasoned that less severe forms of restraint, such as barracks restriction, would be counterproductive as that is the exact location where he has demonstrated a pattern of serious criminal misconduct. (Appellate Ex. LXXII at 8.)

The Military Judge applied the correct law to facts supported by evidence in the Record. The conclusions ultimately reached were reasoned as opposed to arbitrary or fanciful. Accordingly the Military Judge did not abuse her discretion in ruling continued pretrial confinement was warranted.

VII.

THE CUMULATIVE-ERROR DOCTRINE DOES NOT APPLY HERE BECAUSE THE UNDERLYING ALLEGED ERRORS ARE WITHOUT MERIT THEREFORE THERE IS NOTHING TO CUMMULATE.

"The implied premise of the cumulative-error doctrine is the existence of errors, 'no one perhaps sufficient to merit

reversal, [yet] in combination [they all] necessitate the disapproval of a finding' or sentence." *United States v. Gray,* 51 M.J. 1, 61 (C.A.A.F. 1999) (*quoting United States v. Banks*, 36 M.J. 150, 170-71 (C.M.A. 1992)). "Assertions without merit are not sufficient to invoke this doctrine." *Id.* Because Appellant's assigned errors do not contain merit individually, the doctrine of cumulative-error does not apply in this case.

Conclusion

WHEREFORE, the United States respectfully requests that this Court affirm the findings adjudged and approved below.

IAN D. MACLEAN
LT, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7686, fax (202) 685-7687

Certificate of Filing and Service

I certify the foregoing was delivered to the Court and a copy was served upon opposing counsel and electronically filed with the Court pursuant to N-M. Ct. Crim. App. Rule 5.2(b)(1) on January 7, 2014.

IAN D. MACLEAN
LT, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard DC 20374
(202) 685-7686, fax (202) 685-7687

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 3

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
	)	Case No. 201300067
v.	)	
Roger E. EASTERLY, Sergeant (E-5) U.S. Marine Corps Appellant	)	Tried at Marine Corps Air Station Beaufort, South Carolina, on April 16, September 11, 25-28 and October 1-2, 2012, and at Marine Corps Recruit Depot Parris Island, South Carolina, on June 16, 2012 by a general court-martial convened by Commanding General, 2d Marine Aircraft Wing.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

BRIAN C. BURGTORF
Lieutenant Commander, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
brian.burgtorf@navy.mil

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Error Assigned

MILITARY LEADERS ARE PROHIBITED FROM CREATING AN OBJECTIVE APPEARANCE THAT A COURT-MARTIAL PROCEEDING IS UNFAIR. HERE, THE COMMANDANT OF THE MARINE CORPS GAVE A "HERITAGE BRIEF" TO MANY MARINES INCLUDING MEMBERS OF APPELLANT'S LATER COURT-MARTIAL. HE DECLARED THAT 80% OF CASES LIKE APPELLANT'S ARE "LEGITIMATE SEXUAL ASSAULTS" AND THAT THEY SHOULD "GET RID" OF MARINES SUSPECTED OF MISCONDUCT. DID THE MILITARY JUDGE ERR IN FINDING NO UNLAWFUL COMMAND INFLUENCE AND IN DENYING THAT DEFENSE MOTION?

Statement of Statutory Jurisdiction

Appellant's approved sentence includes a bad-conduct discharge. Accordingly, this Court has jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012).

Statement of the Case

In a mixed plea general court-martial, a military judge convicted Appellant, pursuant to his plea, of adultery, in violation of Article 134, UCMJ, 10 U.S.C. § 934 (2006). Contrary to his pleas, a panel of members, with enlisted representation, convicted Appellant of making a false official statement, assault consummated by a battery, and adultery, in violation of Articles 107, 128, and 134, UCMJ, 10 U.S.C. §§ 907, 928, 934 (2006). The Members acquitted Appellant of rape and aggravated sexual assault, in violation of Article 120, UCMJ, 10

U.S.C. § 920 (2012). The Members sentenced Appellant to two years confinement, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. The Convening Authority approved the sentence as adjudged, and except for the punitive discharge, ordered the sentence executed.

Statement of Facts

A. The adultery guilty plea.

Appellant met Mrs. Cheldon Boling ("Chel") through a friend in downtown Beaufort. (R. 109, 572.) She was married to a deployed Marine, which Appellant knew. (R. 110-11.)

Appellant and Chel became friends and they eventually became intimate. (R. 109.) Between December 1, 2011 and January 14, 2012, Appellant went to the movies with Chel, had lunch, and engaged in sex. (R. 109.) At the time, Appellant was separated from his wife. (R. 110.)

B. The assault.

Chel was friends with Mrs. L. (R. 472-73, 572.) They went out for drinks in Beaufort, South Carolina on January 13, 2012. (R. 471-72.) They went to numerous bars, starting at around 2200. (R. 472.) Mrs. L consumed about five or six drinks and a couple of shots before she saw Appellant at Luther's. (R. 473.) Mrs. L had met Appellant only twice before, but had never

previously spoken to him. (R. 472-74.) She knew that Appellant and Chel were having an affair. (R. 474.)

Mrs. L and Chel went to Panini's after Chel became upset with Appellant due to a comment he made about her hair, and consumed more alcohol. (R. 475.) Appellant met them again at Panini's and continued to argue with Chel about her hair. (R. 476.) Mrs. L did not speak to Appellant at Panini's. (R. 476.)

After Panini's, Chel and Mrs. L went to Hemmingway's. (R. 476.) Appellant later followed them to Hemingway's and bought them Jell-O shots. (R. 476.) Mrs. L had between ten and fifteen drinks that evening. (R. 475.) They all then went back to Panini's before Chel decided that she wanted to go home because she felt sick. (R. 476.)

Mrs. L drove Chel to her on-base residence. (R. 476). During the drive, Chel became ill and vomited out the window a few times. (R. 476.) Chel ran into the bathroom upon arrival at the residence. (R. 477.) While Chel was in the bathroom her small dog, Lantern, bit Mrs. L under her chin. (R. 477-78.)

Mrs. L held a paper towel to her chin and watched over Chel when Appellant suddenly walked into the bathroom. (R. 478.) This surprised Mrs. L because Appellant and Chel had been arguing, but she knew that Appellant had stayed at Chel's house before. (R. 479.) Appellant put a blanket around Chel and then

asked Mrs. L what happened to her chin. (R. 479.) Mrs. L relayed that Chel had been bitten by the dog, Appellant then asked if he could kiss her chin to make it better. (R. 479.)

Appellant kissed Mrs. L's chin and gave her a paper towel. (R. 480.) Appellant then got a bottle of Jack Daniels from the refrigerator and poured a couple of shots. (R. 480.) Mrs. L initially refused the shots, but acquiesced when Appellant held her around the waist. (R. 481.) Appellant pulled Mrs. L closer and kissed her. (R. 481.) Mrs. L resisted, saying: "you belong to Chel." (R. 481.) Chel then came out of the bathroom and announced that she was going to bed. (R. 482.) Mrs. L followed Chel to the master bedroom and then went to the guest bedroom, but started feeling woozy. (R. 482.) Mrs. L did not recall if she actually made it into the guest bedroom. (R. 482.)

The next thing Mrs. L remembered was waking up with a male on top of her, penetrating her, and it was enjoyable. (R. 482.) However, Mrs. L also recalled being disgusted because she was on her period. (R. 482.) The man began biting her shoulder. (R. 483.) Mrs. L came to full consciousness and realized Appellant was having sex and biting her. (R. 483.) Appellant bit Mrs. L by grabbing her lip with his teeth and dragged his teeth off her bottom lip. (R. 483.) Mrs. L described this as dragging teeth

across a popsicle to get the last frozen part off the stick. (R. 483.) Appellant also bit her on the chest and dragged his teeth the same way. (R. 483.) When Mrs. L tried to push Appellant off, he bit down harder and pumped his hips faster. (R. 483.) Mrs. L told Appellant that he needed to stop because it hurt. (R. 483.) When Appellant called Mrs. L “Chel,” she said: “You need to get off.” (R. 483.) Appellant kept on biting her on the neck, the lip, and down her arms. (R. 483-84). Mrs. L began crying and Lantern, the dog, started barking. (R. 484.) Mrs. L asked Appellant to quiet the dog. (R. 484.)

When Appellant got up to stop Lantern’s barking, Mrs. L got up and dressed as fast as she could and told Appellant that she needed to go to the bathroom. (R. 484.) In the bathroom mirror Mrs. L saw her swollen lip and the bruises on her collar bone, shoulder, neck, and chest. (R. 484-85.)

After seeing her injuries, Mrs. L awoke Chel and showed them to her. (R. 485.) Chel gave Mrs. L her car keys and distracted Appellant so that Mrs. L could drive to the hospital. (R. 485.)

Mrs. L’s injuries included a swollen lip, bruises on her neck, chest, arm, and shoulder. (Pros. Ex. 3 and 4.) According to the emergency room physician, the injuries were from bite marks. (R. 431.)

When the Naval Criminal Investigative Service investigated the case, Appellant gave them a false sworn statement indicating that he did not have any type of sexual relations with Mrs. L. (Pros. Ex. 6 at 4; R. 840.)

C. Timeline of Appellant's court-martial and the Commandant of the Marine Corps' statements related to sexual assaults.

1. Preferral and referral of charges.

On February 13, 2012, the United States preferred charges against Appellant. (Charge Sheet, Feb. 13, 2012.) The charges included a false official statement, rape, assault consummated by a battery, and adultery. (Charge Sheet.)

On March 8, 2012, pursuant to an order by the special court-martial convening authority, Appellant had an Article 32, UCMJ, pretrial investigation. (Commanding Officer, Marine Fighter Attack Squadron 251 ltr., Mar. 17, 2012; Investigating Officer's Report, Mar. 12, 2012.)

On March 19, 2012, the United States preferred an additional charge of aggravated sexual assault. (Charge Sheet.)

On April 4, 2012, the Convening Authority referred Appellant's charges to a general court-martial. (Charge Sheet).

On April 16, 2012, the Military Judge arraigned Appellant. (R. 1-10.)

2. The Commandant of the Marine Corps' statements.

In the spring of 2012, the Commandant of the Marine Corps (Commandant) and the Sergeant Major of the Marine Corps began a series of briefs across the major bases and installations, known as "Heritage Briefs," to discuss the problems facing today's leaders. (Appellate Ex. V, Encl. 7, 8, 9, 11, 12, 13, 26.)

On April 18, 2012, the Commandant held a "Heritage Brief" at Cherry Point. (Appellate Ex. V, Encl. 4.) The Convening Authority attended this brief. (Appellate Ex. V, Encl. 4; Appellate Ex. VI, Encl. 2.)

On April 19, 2012, the Commandant held a "Heritage Brief" at Marine Corps Air Station (MCAS) Beaufort and at Marine Corps Recruit Depot Parris Island. (Appellate Ex. V, Encl. 7, 8, 9.) No media coverage was permitted for the brief at MCAS Beaufort. (Appellate Ex. V, Encl. 10.) A verbatim transcript exists for the brief at Parris Island. (Appellate Ex. V, Encl. 9.)

In his speech at Parris Island, the Commandant talked about the Marine Corps' ethos, how Marines, such as Medal of Honor Recipient Sergeant Dakota Myer, reflected that ethos and how he, as Commandant, was responsible for maintaining that certain ethos that sets Marines apart——the "spiritual health of the Corps." (Appellate Ex. V, Encl. 9 at 3-4.) The Commandant then talked about what he perceived to be current threats to the

reputation of the Marine Corps and its ethos. (Appellate Ex. V, Encl. 9 at 6.)

The Commandant started by talking about the desecration of bodies and killing of civilians in Afghanistan, and he also discussed incidents of hazing. (Appellate Ex. V, Encl. 9 at 8-9.) He talked about how Congress had no confidence in the military's ability to deal with the sexual assault problem, but that as Commandant he was going to write a campaign plan to deal with the issue and fix it. (Appellate Ex. V, Encl. 9 at 8-9.) During a lengthy discussion on the problem of sexual assault the Commandant made a number of general statements which were the subject of the Appellant's motion alleging unlawful command influence. (Appellate Ex. V.)

First, he stated that eighty percent of the 348 reported sexual assaults in 2011 were "legitimate." (Appellate Ex. V, Encl. 9 at 9-10.) He stated that he arrived at his conclusions after consulting unnamed experts, and from talking with female Marines who told him they had been sexually assaulted at every rank they held in the Marine Corps. (Appellate Ex. V, Encl. 9 at 9-10.)

Next, the Commandant stated that he was not happy with the problem of sexual assault in the Marine Corps:

> It is a scar on the United States Marine Corps. I am ashamed of it. And I am going to convince you that it

> is real . . . . And if you do not believe in statistics, just hang with me because I am going [to] make a believer out of you, because it is real.

(Appellate Ex. V, Encl. 9 at 11.)

He ended his discussion on sexual assault by criticizing members of boards and courts-martial who retain Marines after they get into trouble. (Appellate Ex. V, Encl. 9 at 13.) He referred to members' decisions to retain Marines who commit serious misconduct as "misguided loyalty," a "lack of accountability," and said that he was "very, very disappointed." (Appellate Ex. V, Encl. 9, at 13.)

On May 3, 2012, the Commandant issued White Letter No. 2-12. with the subject line "Sexual Assault." (Appellate Ex. V, Encl. 11.) The letter described sexual assault as an "ugly mark . . . incompatible with our core values . . . crime . . . an aberration that has no place in the Marine Corps." (Appellate Ex. V, Encl. 11.) The letter asserted that sexual assaults are underreported, and called on leaders to "spare no effort in changing the prevailing conditions and attitudes that are allowing this crime to happen among our ranks." (Appellate Ex. V, Encl. 11.) The Commandant also referenced an upcoming Corps-wide campaign plan against sexual assault. (Appellate Ex. V, Encl. 11.)

On July 12, 2012, the Commandant issued White Letter No. 3-12, with the subject line "Leadership." (Appellate Ex. V, Encl. 26.) In the letter he stated:

> [I] am not directing or suggesting specific administrative or military justice be taken absent compliance with established law. My intent is not to influence the outcome or response in any particular case, but rather to positively influence the behavior of our Marines across our Corps. As senior leaders, we have the inherent responsibility to ensure the sanctity of our justice system, this includes the presumption of innocence unless proven otherwise.

(Appellate Ex. V, Encl. 26.)

3. The Convening Authority's affidavit.

On August 2, 2012, the Convening Authority signed an affidavit explaining that he had attended the Commandant's "Heritage Brief," but that he would not be influenced in any way when exercising his duties in any court-martial:

> I have not been and will not be influenced by any statements made by the [Commandant] or [Sergeant Major of the Marine Corps] during these [Heritage Briefs] in referring charges, selecting members, taking action, considering matters in clemency, or in discharging any other function attendant to my role as General Court-Martial Convening Authority in any case.
>
> I did not understand any statements made by [the Commandant] or [the Sergeant Major of the Marine Corps] as suggesting that I use my discretion in any manner other than those which serve in the interests of justice . . . . After the brief, as before, my discretion remains unfettered by any member of my command either subordinate or superior.

(Appellate Ex. VI, Encl. 2.)[2]

4. In response to Appellant's motion for appropriate relief and claim of unlawful command influence, the Military Judge's ruling provides adequate trial relief.

As a result of the Commandant's statements, on August 13, 2012, Appellant filed a motion for appropriate relief for unlawful command influence. (Appellate Ex. V.) On August 27, 2012, the United States provided a written response to Appellant's motion. (Appellate Ex. VI.)

On September 11, 2012, the Military Judge heard argument on the motion from Appellant (R. 52-54) and the United States (R. 54-57). In argument and written pleadings the United States conceded, that the Appellant had shifted the burden to the United States to disprove unlawful command influence beyond a reasonable doubt. (R. 55.) After closing for deliberations (R. 67) the Military Judge provided a ruled on the Record to Appellant's motion. (R. 69-71.)

The Military Judge agreed with Trial Counsel that the burden had shifted to the United States to disprove beyond a reasonable doubt that unlawful command influence had not impacted the proceedings. The Military Juge also found that: (a) the Commandant had the responsibility to train, equip,

[2] This affidavit is a contained on a compact disc, which may be found in the record in a yellow envelope attached to Appellate Exhibit VI.

administer, recruit, organize, supply, and maintain the Marine Corps; (b) the Commandant had not directed or suggested any particular action in Appellant's court-martial; (c) the Commandant had not attempted to influence any case, other than based on the facts presented; (d) no evidence existed that the Convening Authority convened Appellant's court-martial in response to any statements by the Commandant; (e) the Commandant used his position to reach a wide audience to educate the Marine Corps, consistent with his mandated responsibilities; (f) the Commandant did not target members of courts-martial, rather, he targeted leaders to set a standard and discourage sexual assaults from occurring; (g) no logical nexus existed between the Commandant's statements and Appellant's court-martial; and (h) the "Heritage Tour" was meant to uphold traditions, discipline, and professionalism, not to influence Appellant's or any other court-martial. (R. 69-70.)

The Military Judge denied the extraordinary relief of dismissal of charges requested by Appellant. (R. 70.) The Military Judge, however, ordered "ample opportunity for voir dire" in empanelling the Members. (R. 70.)

5. Voir dire.

On September 25-26, 2012, Appellant, the United States, and the Military Judge voir dired the Members. (R. 151-350.) After

peremptory and for cause challenges, Appellant's panel comprised six Members: Warrant Officer 2 (CWO2) Jones, Warrant Officer (WO) Radford, Master Sergeant (MSgt) Schriver, Gunnery Sergeant (GySgt) Jauregui, GySgt Moreno, and Staff Sergeant (SSgt) Fox. (R. 350.) Of these Members, only two had attended the Commandant's "Heritage Brief": MSgt Schriver and SSgt Fox. (R. 176; 223.) And only four of the Members had read the Commandant's White Letters: MSgt Schriver, GySgt Jauregui, CWO2 Jones, and SSgt Fox. (R. 176.)

In individual voir dire, all the Members stated that they had not been and would not be influenced by either the Commandant's White Letters or the "Heritage Brief," and that they could be fair. (R. 219, 222-23, 250, 285-86, 303-04, 311-13.) CWO2 Jones stated that the White Letters did not make him more inclined to convict, nor did they make him more inclined to give a harsher sentence. (R. 219.) WO Radford clarified that he had not attended the "Heritage Brief," nor had he read the White Letters. (R. 222-23.) GySgt Moreno confirmed that the White Letters did not make him more likely to convict, and did not make it more likely that he would impose a harsher sentence. (R. 250.) MSgt Schriver said that the "Heritage Brief" would not influence him and that he would make a determination based solely on the evidence presented. (R. 285-86.) GySgt Jauregui

said that he could be a fair member and make a determination after hearing the evidence in the case. (R. 303-04.) SSgt Fox said that his only take away from the "Heritage Brief" was that sexual assaults happen in the Marine Corps. (R. 311-12.) He also said that he could be a fair member. (R. 313.)

All the Members confirmed that they could base their sentencing decision solely on the evidence presented at trial and on the Military Judge's instructions. (R. 166.)

6. The adjudged findings and sentence.

On October 1, 2012, the Members acquitted Appellant of rape and aggravated sexual assault, but convicted him of a false official statement, assault consummated by a battery, and adultery. (R. 840; Convening Authority's Action, Feb. 5, 2013.) On the same date, the Members sentenced Appellant. (R. 882-83.) Trial Counsel asked for seven years and six months confinement and a dishonorable discharge. (R. 867.) The Members adjudged two years confinement and a bad-conduct discharge. (R. 882-83.)

7. Post-trial clemency and the Convening Authority's Action.

On January 31, 2013, Defense Counsel submitted a clemency request to the Convening Authority. (Request for Clemency, Jan. 31, 2013.) On Appellant's behalf, Defense Counsel requested a six-month reduction in confinement and deferment of forfeitures

for the benefit of his dependents. (Request for Clemency, Jan. 31, 2013.)

On February 5, 2013, the Convening Authority approved Appellant's convictions and adjudged sentence, except for the punitive discharge. (Convening Authority's Action, Feb. 13, 2013.)

Summary of Argument

Apparent unlawful command influence did not taint Appellant's court-martial. His assertion that the Commandant's sexual assault statements infected the fairness of his trial ignores the best measure of improper influence—the findings. The sexual assault acquittals show that Appellant received a trial free from any improper influence.

The test for apparent unlawful command influence analyzes whether an informed, disinterested observer would have "significant doubt" about the fairness of the trial. To raise apparent unlawful command influence, Appellant must show "some evidence" of undue influence. Only when Appellant meets this burden is the Government forced to disprove apparent unlawful command influence beyond a reasonable doubt, by showing that the public would believe the trial was not prejudiced.

Appellant's acquittal, voir dire, and sentence, prevent him from meeting his burden to show "some evidence" of unlawful

command influence on appeal. But even assuming that the Commandant's sexual assault statements shifted the burden to the United States, the acquittals and voir dire remove any "significant doubt" for an objective observer, and show that an informed public would view Appellant's trial as free from undue influence. This is consistent with several Court of Appeals for the Armed Forces (CAAF) decisions that have dealt with public statements from senior military leadership and CAAF found no apparent unlawful command influence.

In his attempt to show apparent unlawful command influence, Appellant relies on other military judges' rulings, a board of inquiry for another Marine, and the Commandant's early attempt to curb recording his sexual assault prevention statements. With the Commandant's subsequent corrective action and an informed observer's knowledge of *Appellant's* court-martial, the impartial panel *he* received, and *his* acquittal, leave no "significant doubt" that the unrelated military judges' rulings and a premature focus on the Commandant's actionsare immaterial.

Argument

APPELLANT'S SEXUAL ASSAULT ACQUITTALS AND VOIR DIRE SHOW THAT AN INFORMED OBSERVER WOULD HARBOR NO SIGNIFICANT DOUBT THAT APPELLANT'S TRIAL WAS FREE OF APPARENT UNLAWFUL COMMAND INFLUENCE FROM THE COMMANDANT'S SEXUAL ASSAULT STATEMENTS.

A. Standard of Review.

This Court reviews an allegation of unlawful command influence *de novo*. *United States v. Salyer*, No. 13-0186, 2013 CAAF LEXIS 822, at *20 (C.A.A.F. Aug. 2, 2013) (citation omitted). If any findings of fact are made at trial in conjunction with ruling upon a motion regarding unlawful command influence, the findings are reviewed under a clearly erroneous standard. *Id*. A military judge's remedy for unlawful command influence is reviewed for an abuse of discretion. *United States v. Douglas*, 68 M.J. 349, 354 (C.A.A.F. 2010).

B. The unlawful command influence standard.

Statute and regulation prohibit unlawful influence on a court-martial. Art. 37, UCMJ; Rule for Courts-Martial (R.C.M.) 104. Unlawful command influence involves command influence that "corrupt[s] the truth-seeking function of the trial process." *United States v. Thomas*, 22 M.J. 388, 393-94 (C.M.A. 1986). The "appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any

given trial." *United States v. Simpson*, 58 M.J. 368, 374 (C.A.A.F. 2003) (quotation and citation omitted).

The defense has the initial burden to raise unlawful command influence by showing "some evidence" that it exists. *Salyer*, No. 13-0186, 2013 CAAF LEXIS 822, *22. To raise the issue at trial, the defense may meet its burden by showing "facts which, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings." *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999)(citing *United States v. Stombaugh*, 40 M.J. 208, 213 (C.M.A. 1994)).

Once the defense sufficiently raises unlawful command influence, the burden shifts to the United States at trial to demonstrate beyond a reasonable doubt either that there is no unlawful command influence or that the proceedings will be untainted. *United States v. Lewis*, 63 M.J. 405, 413 (C.A.A.F. 2006)(citing *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002)). The United States may meet this burden by: (1) disproving the predicate facts on which the allegation of unlawful command influence is based; (2) persuading the military judge or appellate court that the facts do not constitute unlawful command influence; (3) if at trial, by producing

evidence proving that the unlawful command influence will not affect the proceedings; or (4) if on appeal, by persuading the appellate court that the unlawful command influence had no prejudicial impact on the court-martial. *Biagase*, 50 M.J. at 151.

"In the course of addressing these issues, military judges and appellate courts must consider apparent as well as actual unlawful command influence." *United States v. Reed,* 65 M.J. 487, 488 (C.A.A.F. 2008). "[T]he appearance of unlawful command influence will exist where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *Lewis*, 63 M.J. at 415. "To find that the appearance of command influence has been ameliorated and made harmless beyond a reasonable doubt, the United States must convince [the Court] that the disinterested public would now believe [the appellant] received a trial free from the effects of unlawful command influence." *Id.*

C. <u>Appellant has not demonstrated "some evidence" of apparent unlawful command influence, but assuming *arguendo* that he has, no apparent unlawful command</u>

influence tainted his court-martial because an informed, disinterested observer would view his trial as free of improper influence.

Appellant has not argued that *actual* unlawful command influence pervaded his court-martial. (Appellant Br.) He asserts only *apparent* unlawful command influence existed, but he incorrectly assumes that the burden has shifted to the United States, on appeal, to disprove unlawful command influence beyond a reasonable doubt. Recently, this Court in *United States v. Lopez*, 2013 CCA LEXIS 579 (N-M. Ct. Crim. App. Jul. 30, 2013), considered whether the Commandant exerted undue influence on the members as a result of the Heritage Briefs. In that case the Court found "no indication whatsoever that the proceedings were unfair[,]" and that the defense failed to meet its initial burden at trial and on appeal *Lopez*, 2013 CCA LEXIS 579 at *11 (*citing Stombaugh*, 40 M.J. at 213).

1. Despite the burden shift at trial, the burden has not shifted to the United States, on appeal, and Appellant has failed to demonstrate "some evidence" of unlawful command influence.

Although the Trial Counsel conceded the burden shift at trial, and the Military Judge found that the burden shifted (R. 55, 69; Appellate Ex. VI), on appeal the burden has not shifted to the United States to disprove apparent unlawful command influence beyond a reasonable doubt. *See United States v. Ayers*, 54 M.J. 85, 95 (C.A.A.F. 2000). In *Ayers*, the Court of Appeals

for the Armed Forces explained the difference between the burden shift at trial and the burden shift on appeal where apparent unlawful command influence is alleged:

> *At trial*, the defense must show 'that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings.' *On appellate review*, the defense must show that the proceedings appeared to be unfair and that the unlawful command influence was the cause of the appearance of unfairness.

Id. (citation omitted)(emphasis added). The distinction between what Appellant must show at trial, versus on appeal, exists because a military judge's prospective ruling does not have the benefit of voir dire, findings, and sentence. With a hindsight view, an appellant must again demonstrate "some evidence" that his proceedings appeared to be unfair as a result of unlawful command influence[3]. *See Ayers*, 54 M.J. at 95; *see also Biagase*, 50 M.J. at 151 (noting that the United States may meet its burden to disprove unlawful command influence on appeal, in a different manner than at trial).

With the acquittals for rape and aggravated sexual assault, Appellant has not demonstrated "some evidence" that his

[3] The law of the case doctrine does not prevent Appellant from again having to raise "some evidence" of apparent unlawful command influence because the additional fact of an acquittal was not known to the Military Judge, or the United States, when conceding, and finding, that the burden had shifted. *See United States v. Erickson*, 65 M.J. 221, 224 n.1 (C.A.A.F. 2007) (noting that the law-of-the-case doctrine generally precludes review of a ruling that was not appealed to the lower court).

proceedings appeared to be unfair as a result of unlawful command influence. *Ayers*, 54 M.J. at 95. As in *United States v. Ashby*, where the the Court of Appeals for the Armed Forces noted that an acquittal made it "unsurprising" that the appellant could not demonstrate "some evidence" of apparent unlawful command influence, Appellant's acquittal on some charges undermines his claim that his court-martial was tainted. 68 M.J. 108, 128-29 (C.A.A.F. 2009). This Court should, therefore, find that Appellant has not shown "some evidence" that his court-martial appeared to have been tainted by unlawful command influence.

2. Even assuming *arguendo* that the burden has shifted, the United States has proven beyond a reasonable doubt that no apparent unlawful command influence infested Appellant's court-martial.

An informed, disinterested observer, with knowledge of the following, would view Appellant's court-martial as free from unlawful command influence because: (a) the Members acquitted him of rape and aggravated sexual assault, which shows that the Commandant's sexual assault statements did not affect the court-martial; (b) the voir dire process ensured that no Member on Appellant's panel was influenced by the Commandant's statements; (c) the Convening Authority made his pretrial decision to charge Appellant before any of the Commandant's statements, and

explicitly stated that he would not be influenced by any superior regarding his duties as a convening authority; and (d) the Members' rejection of the Trial Counsel's maximum sentence—awarding an appropriate punishment, in light of Appellant's brutal assault, lie to authorities, and adultery with a deployed Marine's spouse—shows that Appellant's sentence was free from apparent unlawful command influence. Each of these reasons are discussed below.

a. The rape and aggravated sexual assault acquittals prove the lack of apparent unlawful command influence.

Appellant's argument that apparent unlawful command influence permeated his court-martial is belied by the best barometer that exists for improper influence—the findings. The Members acquitted Appellant of rape and aggravated sexual assault (R. 840) These are the very charges that were the primary focus of the Commandant's "Heritage Brief" and White Letter 2-12. (Appellate Ex. V, Encl. 9, 11.) The Members, therefore, were not influenced by the Commandant's statements and an informed public would view the findings as an unequivocal message that no improper influence tainted Appellant's court-martial.

To illustrate the lack of apparent unlawful command influence, assume *arguendo* that the Commandant personally

ordered each Member to convict Appellant of the politically sensitive charges: rape and aggravated sexual assault. By disobeying this imaginary order, the Members unambiguously announced that they had not been tainted by unlawful command influence. An informed, disinterested observer—with knowledge of the acquittals—would therefore have no "significant doubt" that unlawful command influence had not infected Appellant's court-martial. *See Lewis*, 63 M.J. at 415.

b. The voir dire process, and Appellant's opportunity to request a curative instruction, removed any perception of apparent unlawful command influence.

An informed observer, with knowledge of the voir dire and Appellant's opportunity to request a curative instruction, would not view Appellant's court-martial as tainted by unlawful command influence. *See Reed*, 65 M.J. at 492 (noting that the panel members had been questioned about a command email and briefing discussing the appellant's fraud, in finding no apparent unlawful command influence). Just like the hindsight of findings shows no taint from apparent unlawful command influence, the hindsight of voir dire—which the Military Judge did not then have the benefit of when making his pretrial ruling below—shows both that Appellant has not raised "some evidence" and that the United States has proven, beyond a reasonable doubt,

that no Member was influenced by the Commandant's "Heritage Brief" or White Letter 2-12.

Indeed, only two of the six Members attended the Commandant's "Heritage Brief." (R. 176, 223.) Only four of the six Members had read the Commandant's White Letters. (R. 176.) And all of the Members stated that they had not been and would not be influenced by either the Commandant's White Letters or the "Heritage Brief," or that they could be fair. (R. 219, 222-23, 250, 285-86, 303-04, 311-13.) All the Members also confirmed that they could base their sentencing decision solely on the evidence presented at trial, and the Military Judge's instructions. (R. 166.)

Appellant also had "ample opportunity," as awarded by the Military Judge, to ask any questions that he desired of the Members regarding the "Heritage Brief," or the White Letters, or any misperceptions about sexual assaults or punishment. (R. 70, 243-311.) Appellant's opportunity for voir dire is comparable to the opportunity in *Reed*. In *Reed,* the military judge permitted exploration of the unlawful command influence issues during voir dire, and the Court of Appeals for the Armed Forces found no unlawful command influence, noting that the members did not have any negative recollection of command climate. 68 M.J. at 492; *see also Simpson,* 58 M.J. at 376-77 (noting the voir

dire of panel members in finding that the United States proved beyond a reasonable doubt that no apparent unlawful command influence occurred). Here, just as in *Reed*, none of the Members had a negative take-away from the "Heritage Brief," nor did they perceive any negative command influence implications from the White Letters. (R. 219, 222-23, 250, 285-86, 303-04, 311-13.) And just as in *Reed,* the Military Judge permitted "ample opportunity," for voir dire on the potential unlawful command influence issues. (R. 70.)

Appellant also had the opportunity to request a curative instruction regarding the Commandant's statements, and he chose not to, despite discussing the usefulness of a cautionary instruction. (R. 54, 770-71; Appellate Ex. XXII). This tactical decision shows that Appellant felt, possibly after hearing the voir dire, that the Members needed no specific instruction from the Military Judge to disregard statements that they may have heard from the Commandant. Just like an appellant may or may not want an instruction about the right to remain silent, an appellant also may or may not want an instruction about alleged apparent unlawful command influence. *See United States v. Forbes*, 61 M.J. 354, 358-59 (C.A.A.F. 2005)(finding that a military judge erred when giving an instruction on the right to remain silent, over a defense objection). Appellant

may not, on appeal, assert that the Military Judge erred by failing to provide an instruction regarding the Commandant's statements, due to invited error. *See United States v. Anderson*, 51 M.J. 145, 153 (C.A.A.F. 1999) (finding that where defense attempts to impeach a witness highlighted adverse testimony, the appellant could not retreat from that strategy on appeal).

Appellant's assertion that the Military Judge erred by not providing a cautionary instruction about the Commandant's statements (Appellant Br. at 37-38) fails to recognize that Appellant declined to ask for a curative instruction. (R. 770-71; Appellate Ex. V, XXII.) His failure to request an instruction may and should be held against him. *See Douglas*, 68 M.J. at 356. In *Douglas*, the high military Court noted that an appellant's "acquiescence and silence are factors to consider" when analyzing whether the United States had satisfied its burden, beyond a reasonable doubt. *See Id.*; *see also Ayers*, 54 M.J. at 93 (noting the defense counsel's failure to ask questions about the public statements from military leadership in finding the lack of "some evidence" of apparent unlawful command influence). Here, Appellant's decision not to request that the Members receive an instruction about the Commandant's statements, likewise, should be considered when determining if

Appellant has raised “some evidence” of apparent unlawful command influence. *See Douglas*, 68 M.J. at 356.

Possessed with knowledge of the Members’ statements in voir dire, and that Appellant felt it unnecessary to request an instruction about the Commandant’s statements, an informed, disinterested observer would have no perception that Appellant’s court-martial was improperly influenced. An informed observer would therefore have no “significant doubt” that Appellant’s court-martial was free of improper influence, after voir dire and the opportunity to request a curative instruction. *See Biagase*, 50 M.J. at 151.

c. An informed member of the public would view the Convening Authority as free from apparent unlawful command influence.

As the timeline depicts, the Commandant’s statements about sexual assaults, and the issuance of the White Letters, occurred *after* Appellant’s charges were preferred and referred to a general court-martial, and *after* the Military Judge arraigned Appellant on the charges. (Charge Sheet; Disposition of the Charges, Commanding Officer, Marine Fighter Attack Squadron 251, Mar. 17, 2012; Investigating Officer’s Report, Mar. 12, 2012; R. 1-10; Appellate Ex. V, Encl. 4.) The Convening Authority, therefore, was not influenced by the Commandant’s statements in

making pretrial decisions. *Salyer*, No. 13-0186, 2013 CAAF LEXIS 822, *22.

As to the Convening Authority's decisions *after* the Commandant's statements, an informed observer would view the Convening Authority's affidavit as a clear statement that the Commandant did not improperly influence the Convening Authority's decision making. (Appellate Ex. VI, Encl. 2.) An informed observer, with knowledge of the Convening Authority's affidavit, would have no "significant doubt" about the fairness of Appellant's court-martial because the Convening Authority plainly stated that he did not believe the Commandant intended to undermine the fair administration of justice, and that the Convening Authority's discretion making remained "unfettered." (Appellate Ex. VI, Encl. 2.); *Biagase*, 50 M.J. at 151.

Moreover, Appellant's post-trial clemency did not request disapproval of his punitive discharge, which also shows that an informed observer would not view Appellant's post-trial clemency as tainted by the Commandant's statements regarding separating wrongdoers. (Request for Clemency, Jan. 31, 2013; Appellate Ex. V, Encl. 9 at 13.) Appellant only asked for a twenty-five percent reduction in his confinement and deferment of forfeitures for his dependents. (Request for Clemency, Jan. 31, 2013.) By not requesting disapproval of his punitive discharge,

an informed observer would not view Appellant's post-trial clemency as having been tainted by the Commandant's statements. The Convening Authority could not be expected to disapprove that which was never requested. Accordingly, an informed observer would not view his clemency as tainted by unlawful command influence, and the record shows that the United States has proven beyond a reasonable doubt that clemency was free from improper influence.

d. Appellant's appropriate sentence—for a brutal assault, false official statement, and adultery with a deployed Marine's spouse—along with the voir dire and the acquittals show that an objective observer would view his sentence as free from undue influence.

Appellant's assertion that his "stiff" sentence is evidence of apparent unlawful command influence (Appellant Br. at 38-39), is contradicted by the nature of his offenses and by case law.

Appellant brutally assaulted a woman by biting her repeatedly on the neck, nipples, arms, and shoulders, leaving her with significant injuries and bruising. (Pros. Ex. 3, 4.) Appellant then lied to the Naval Criminal Investigative Service. (Charge Sheet; Pros. Ex. 6.) He also had an affair with a deployed Marine's wife. (R. 109-11.) These offenses earned his adjudged sentence and a punitive discharge, regardless of any statements from the Commandant and regardless of his previous

service. Appellant now takes issue with his bad-conduct discharge (Appellant Br. 39-40.), in light of the Commandant's statements, which is odd given that Appellant did not believe that disapproval of his punitive discharge was a reasonable clemency request. (Request for Clemency, Jan. 31, 2013.)

To further show the adjudged sentence does not present "some evidence" of apparent unlawful command influence, the Members rejected Trial Counsel's request for seven years and six months confinement and a dishonorable discharge by adjudging two years confinement and a bad-conduct discharge. (R. 882-83, 867.) If the Members were somehow influenced by the Commandant's statement about being "soft," (Appellate Ex. V, Encl. 9 at 13.) the Members would not have so thoroughly rejected the United States' request for a much harsher sentence. Far from being "some evidence" of apparent unlawful command influence, Appellant's sentence indicates that the Members considered only the evidence before them and awarded an appropriate punishment.

Even where government officials have publicly commented on an Appellant's individual case, the Court of Appeals of the Armed Forces has found an absence of apparent unlawful command influence. *See Ayers,* 54 M.J. at 94-95. In *Ayers*, a spokesman for an Army base told a local newspaper that disciplinary action in the appellant's case could range from a reprimand to

something more severe, but that the "lower end of the range [was] probably not going to be considered." *Ayers,* 54 M.J. at 94. The *Ayers* court found no apparent unlawful command influence because the appellant failed to show that his court-martial appeared unfair. *Id.* at 95. Just like the comments in *Ayers*, the Commandant's statements about getting rid of Marines who commit misconduct were disregarded by those Members that heard them. (R. 219, 222-23, 250, 285-86, 303-04, 311-13.) The Members also said that they could base their sentencing decision solely on the evidence presented at trial and the Military Judge's instructions. (R. 166.) Members are presumed to follow instructions, unless demonstrated otherwise. *United States v. Washington*, 57 M.J. 394, 403 (C.A.A.F. 2002).

The Members' decision to acquit Appellant as to arguably the most severe charges indicate a clear disregard of the Commandant's statements. This also indicates that they disregarded his statements and followed the Military Judge's instructions for sentencing. If the Members were able to disregard the Commandant and were not influenced in one respect, than they also were not influenced by the Commandant's statements in another respect——for sentencing.

The voir dire, along with the nature of Appellant's offenses, known to an informed observer, would leave no

"significant doubt" that Appellant's trial was free from unlawful command influence, and that his sentence was determined solely by the evidence before the Members. The United States therefore met its burden to prove that Appellant's court-martial was free of improper influence beyond a reasonable doubt. *See Lewis*, 63 M.J. at 415.

D. The Military Judge's prospective ruling properly found no apparent unlawful command influence and Appellant's reliance on decisions from other military judges, and the Commandant's recording restrictions, are misplaced.

1. The Military Judge did not err because precedent exists for public statements from senior military leaders where no apparent unlawful command influence existed, and the Military Judge's prospective ruling proved correct in the hindsight of the acquittals.

The Military Judge did not err by finding that the Commandant's wide-reaching statements about a politically sensitive issue, sexual assault, did not cause apparent unlawful command influence. (R. 69-70.) The Commandant is charged with "recruiting, organizing, supplying, equipping, training, servicing, mobilizing, demobilizing, administering, and maintaining of the Marine Corps . . . ." 10 U.S.C. § 5042. In the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Congress required the Commandant to establish a comprehensive policy for preventing and responding to sexual assaults. Public Law 108-375, Title V, Subtitle J, § 577, 118

Stat. 1926. This law required education and training. *Id.* Consistent with his congressional directive and responsibility, the Commandant trained leadership through the "Heritage Brief" about preventing and curbing sexual assaults. (Appellate Ex. V, Encl. 9.) The Military Judge did not err in finding that the Commandant's statements were consistent with his duties, and that the Commandant did not attempt to influence, or appear to influence, Appellant's court-martial. (R. 70.) The Military Judge also did not err by permitting "ample opportunity for voir dire," to ensure that no misperception about the Commandant's statements affected Appellant's court-martial. (R. 70.)

The Military Judge's ruling was consistent with case law dealing with similar public statements from high ranking military and civilian officials about publicized crimes. In *Simpson*, Army leadership made several public statements about an investigation related to trainee abuse and sexual harassment. *Simpson*, 58 M.J. at 371-72. The Court of Appeals for the Armed Forces held that: "The prohibition against unlawful command influence does not require senior military and civilian officials to refrain from addressing such concerns . . . through press releases, responses to press inquiries, and similar communications." *Id.* at 374. The *Simpson* court also noted the "extensive ventilation of the unlawful command influence

allegations at trial," in finding that the Government proved beyond a reasonable doubt that the appellant's trial was untainted by the appearance of unlawful command influence. *Simpson,* 58 M.J. at 376-77. In another Court of Appeals for the Armed Forces case, *Ashby*, an international incident involving a Marine fixed-wing aircraft striking a ski gondola resulted in numerous public statements from senior military and civilian leadership. 68 M.J. at 128-29. The Court found that the appellant had not shown "some evidence" of apparent unlawful command influence holding that "[u]nder these circumstances, the comments made by senior military officials in the aftermath of the gondola accident . . . could not reasonably be perceived by a disinterested member of the public as improper command influence." *Ashby*, 68 M.J. at 128-29.

Simpson and *Ashby* both involved public statements by senior military officials dealing specifically with the appellants in those cases, yet the Court found no apparent unlawful command influence. *Simpson,* 58 M.J. at 376-77; *Ashby*, 68 M.J. at 128-29. With this precedent as guidance, the Military Judge did not err. (R. 69-70.)

The focus on the Military Judge's ruling is less consequential, however, given that the hindsight afforded on appeal permits analysis of the findings. Appellant was

acquitted of the sexual assault charges. The Military Judge, thus, proved correct in finding no apparent unlawful command influence and not awarding precautionary remedial measures. (R. 69-70.)

2. Appellant's focus on rulings from other military judges, and a board of inquiry, do not bear on the existence of apparent unlawful command influence in his court-martial.

Appellant raises rulings made by other military judges, and a board of inquiry for another Marine, in an attempt to show apparent unlawful command influence. (Appellant Br. 35-36.) These rulings have no bearing on whether an informed member of the public would perceive Appellant's trial as tainted by apparent unlawful command influence. This is especially true in light of Appellant's acquittals. The prospective remedies fashioned by other military judges proved unnecessary in Appellant's court-martial, where he achieved an acquittal from the politically charged offenses that were the subject of the Commandant's statements. Accordingly, the rulings in other trials, and a misguided board member in a board of inquiry, do not inform this Court's decision on whether an informed observer would view Appellant's court-martial as tainted by unlawful command influence.

3. The Commandant's alleged efforts to "conceal" the "Heritage Brief" do not create the appearance of unlawful command influence for Appellant's court-martial.

Preventing recording of the "Heritage Brief," does not show apparent unlawful command influence, in light of later corrective actions. (Appellate Ex. V, Encl. 20.) On May 21, 2012, the Commandant made an about face, and permitted the "Heritage Brief," to be recorded at Marine Barracks Washington. (Appellate Ex. VI at 5.) The Commandant also issued White Letter 3-12, on June 12, 2012, to dispel any misperception about unlawful command influence. (Appellate Ex. V, Encl. 26.) In White Letter 3-12, the Commandant stated:

> [I] am not directing or suggesting specific administrative or military justice be taken absent compliance with established law. My intent is not to influence the outcome or response in any particular case, but rather to positively influence the behavior of our Marines across our Corps. As senior leaders, we have the inherent responsibility to ensure the sanctity of our justice system, this includes the presumption of innocence unless proven otherwise.

(Appellate Ex. V, Encl. 26.)

Both the subsequent permission to record the "Heritage Brief," and the issuance of White Letter 3-12, occurred prior to voir dire in Appellant's court-martial. (Appellate Ex. VI at 5; Appellate Ex. V, Encl. 26.) These corrective measures negate Appellant's assertion of apparent unlawful command influence because an informed member of the public would be aware of the

corrective actions. *See Simpson*, 58 M.J. at 376-66 (noting the corrective actions taken by the command to ameliorate the appearance of unlawful command influence in finding no unlawful command influence). The corrective measures taken by the Commandant also show that no "significant doubt" exists, for an informed observer, that Appellant's trial was tainted by unlawful command influence. *See Lewis*, 63 M.J. at 415.

Therefore, apparent unlawful command influence did not infect Appellant's trial. Appellant's acquittals and the voir dire process, viewed in hindsight, prevent Appellant from showing "some evidence," of apparent unlawful command influence from the Commandant's statements. But even assuming that the burden shifted to the United States, consistent with precedent, the acquittals, voir dire, and the remedial measures, remove "significant doubt" that an objective observer would view Appellant's trial as corrupted by unlawful command influence.

Conclusion

WHEREFORE, the Government respectfully requests that this Court affirm the findings and sentence as adjudged and approved below.

BRIAN C. BURGTORF
Lieutenant Commander, JAGC, USN
Appellate Government Counsel
NAMARA 116
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
brian.burgtorf@navy.mil

Appendix

1. *United States v. Lopez*, 2013 CCA LEXIS 579 (N-M. Ct. Crim. App. Jul. 30, 2013)

Certificate of Filing and Service

I certify that the original and required number of copies of the foregoing were delivered to the Court and to Appellate Defense Counsel, Captain David A. Peters, USMC, and electronically filed in CMTIS with the Court pursuant to N-M. Ct. Crim. App. Rule 5.2(b)(1) on September 7, 2013.

PHILIP S. REUTLINGER
LIEUTENANT, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard DC 20374
(202) 685-7396, fax (202) 685-7687

Signing for

BRIAN C. BURGTORF
Lieutenant Commander, JAGC, USN
Appellate Government Counsel
NAMARA 116
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
brian.burgtorf@navy.mil

UNITED STATES OF AMERICA v. JOSE M. LOPEZ, MASTER SERGEANT (E-8), U.S. MARINE CORPS

NMCCA 201200457

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

2013 CCA LEXIS 579

July 30, 2013, Decided

NOTICE: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

PRIOR HISTORY: [*1]

GENERAL COURT-MARTIAL. Sentence Adjudged: 2 July 2012. Military Judge: LtCol Stephen Keane, USMC. Convening Authority: Commanding General, 1st Marine Division (Rein), Camp Pendleton, CA. Staff Judge Advocate's Recommendation: Maj V.G. Laratta, USMC.

CASE SUMMARY:

OVERVIEW: HOLDINGS: [1]-Evidence was sufficient to support the kidnapping conviction because, through testimony and video evidence from surveillance cameras, the Government established that the servicemember seized the victim and held her against her will, and that his conduct was willful and wrongful, and there was testimony from the victim that everyone knew about the incident upon her return to her unit and that it was treated as a joking matter; [2]-Servicemember's undue command influence (UCI) claim was without merit, as the record was devoid of any facts that constituted UCI, and the court found no indication whatsoever that the proceedings were unfair.

OUTCOME: Findings and sentence were affirmed.

COUNSEL: For Appellant: CaptJason Wareham, USMC; Capt Michael D. Berry, USMC.

For Appellee: LCDR Keith B. Lofland, JAGC, USN; Maj David N. Roberts, USMC.

JUDGES: Before J.R. PERLAK, M.D. MODZELEWSKI, E.C. PRICE, Appellate Military Judges. Chief Judge PERLAK participated in the decision of this case prior to detaching from the court.

OPINION

OPINION OF THE COURT

PER CURIAM:

A panel of members with enlisted representation sitting as a general court-martial convicted the appellant, contrary to his pleas, of violation of two lawful general regulations, wrongful sexual contact, an indecent act, assault consummated by a battery, possession of child pornography, and kidnapping in violation of Articles 92, 120, 128, and 134, Uniform Code of Military Justice, *10 U.S.C. §§ 892, 920, 928,* and *934*. The members sentenced the appellant to four years of confinement,

reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority [*2] (CA) approved the sentence as adjudged. As a matter in clemency, the CA waived the automatic forfeitures and suspended the adjudged forfeitures for a period of six months after his action, contingent upon the appellant maintaining an allotment to his wife.

The appellant now assigns eight errors: in summary, he argues that his conviction for kidnapping is legally and factually insufficient; that the military judge abused his discretion in denying the appellant's motion to dismiss the kidnapping charge pursuant to RULE FOR COURTS-MARTIAL 917, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.); that the Commandant of the Marine Corps exerted undue command influence through his "Heritage Brief"; that the various convictions for fraternizing with Lance Corporal (LCpl) VT, for committing sexual offenses against Sergeant (Sgt) JR, and for possessing child pornography are all legally and factually insufficient; and that the trial counsel committed prosecutorial misconduct both by attempting to manipulate a witness and by knowingly allowing a witness to give false testimony. [1] We disagree, and will affirm the findings and sentence.

1 With the exception of the two assignments of error pertaining [*3] to the kidnapping conviction, all assignments of error are raised pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*.

Background

In April 2009, the appellant hosted a platoon function at his home for subordinate Marines; during that party, two events unfolded that ultimately became the subject of charges at his 2012 court-martial. First, the appellant accosted Sgt JR as she exited his restroom, led her into his bedroom, and kissed and fondled her breasts. Second, later in the evening, LCpl VT became visibly intoxicated and needed to lie down; the appellant initially escorted LCpl VT to his bedroom and left her there. As the party was winding down, LCpl VT exited the bedroom, still clearly intoxicated and not wearing her pants. When a female Marine accompanied LCpl VT back into the bedroom to retrieve her pants, she saw the appellant completely naked and passed out on the bed on his back. Within a short period, another Marine stepped into the bedroom and observed the same. For various reasons thoroughly explored at trial, neither the assault of Sgt JR nor the incident involving LCpl VT was reported to the chain of command in the weeks or months that followed, but instead [*4] came to light only after the events recited below were reported.

In April 2011, the appellant and Sgt JR were on assignment in Japan and were billeted at the New Sanno Hotel, a U.S. military facility in Tokyo. On the night in issue, they went out together for dinner and drinks, and returned to the hotel by cab. Sgt JR was very intoxicated, fell asleep in the cab, and awoke to feel the appellant removing his hand from under her shirt and bra. Upon arrival at the hotel, the appellant followed Sgt JR into her room on the sixth floor. While Sgt JR was placing a call to her husband on Skype, the appellant appeared to pass out on her bed. Sgt JR then went into the bathroom and either fell asleep or passed out on the floor, believing that she had locked the door.

Sgt JR woke to find the appellant in the bathroom with her, lifting her from the floor and urging her to "get to bed." When she saw that the appellant intended to get into the bed with her, Sgt JR went to the desk and pretended to place another Skype call, but the appellant shut the laptop computer to prevent the call. When Sgt JR then attempted to leave her hotel room, the appellant blocked her path and pushed her back onto the bed. [*5] She attempted to leave again, but the appellant lay on top of her to prevent her from doing so. After struggling unsuccessfully with the appellant, Sgt JR feigned sleep. She then felt the appellant lift her skirt, and saw what appeared to her to be camera flashes and believed that the appellant has taken pictures underneath her skirt; her leggings and underwear had been removed, and Sgt JR testified that she had not removed them herself. Shortly thereafter, Sgt JR succeeded in leaving the bed and the room.

The appellant followed Sgt JR down the hallway and out onto a fire escape balcony, where he attempted first to convince her to come back into the hotel and then to pull her back in. Sgt JR eventually freed herself from the appellant, went down the fire escape, and entered the hotel on the third floor with the appellant still following her. Surveillance camera footage shows the appellant holding Sgt JR in a bear hug and forcing her into the elevator on the third floor as she struggled to free herself and leave the elevator.

By this time, a hotel security officer, Mr. Giuliani, had been alerted by alarm that a fire escape door on the

6th floor had opened. He reviewed the hotel's surveillance [*6] camera footage, which showed Sgt JR leaving the sixth floor with the appellant in pursuit, and went in search of the couple in the hotel. While looking for them on the sixth floor, Mr. Giuliani observed the elevator doors open and the appellant carrying Sgt JR out of the elevator in a bear hug. Mr. Giuliani confronted the appellant, who claimed that Sgt JR had too much to drink and that he was escorting her back to her room. Mr. Giuliani noticed Sgt JR mouthing to him what appeared to be "help me," at which time he separated the two. When Mr. Giuliani asked Sgt JR what had happened, she asked instead to speak to her Officer-in-Charge. Upon his arrival, Sgt JR reported the events of the evening to him.

During the ensuing investigation, law enforcement agents seized the appellant's digital camera, a cell phone that had been issued to him for use in Japan, his personal laptop computer, and hard drive. [2] The forensic examination of the laptop and hard drive revealed, *inter alia*, searches for nude images of Sgt JR, searches for pornography involving sleeping or "passed out" females, searches using the term "lolita," the use of peer-to-peer software, and a limited number of child pornography [*7] images. Further facts relevant to the assigned errors are included in the discussion below.

2 Investigators did not find the photographs that Sgt JR described the appellant taking while he pinned her down; the members acquitted the appellant of the indecent act specification alleging that he took such photographs.

Discussion

We turn first to the two assigned errors regarding the kidnapping conviction, averring that it is legally and factually insufficient in that there was no evidence presented on the terminal element and that the military judge abused his discretion in denying the R.C.M. 917 motion to dismiss. The test for legal sufficiency is whether any rational trier of fact could have found that the evidence met the essential elements of the charged offenses, viewing the evidence in a light most favorable to the Government. *United States v. Turner, 25 M.J. 324, 324-25 (C.M.A. 1987)*. The test for factual sufficiency is whether we are convinced of the appellant's guilt beyond a reasonable doubt, allowing for the fact that we did not personally observe the witnesses. *Id. at 325*. We readily find in the affirmative as to both.

Through the testimony of Sgt JR, the testimony of Mr. Giuliani, [*8] and the video evidence from the surveillance cameras, the Government established at trial that the appellant seized Sgt JR, that he held her against her will, and that his conduct was willful and wrongful, satisfying the first three elements of the charge. On appeal, the appellant appears not to challenge the sufficiency of that evidence. Instead, he avers that the Government adduced no testimony or evidence that his actions were prejudicial to good order and discipline, the fourth and terminal element. We disagree.

"The terminal element in a clause 1 . . . Article 134 case is an element of the offense like any other. . . . [It] must be proved beyond a reasonable doubt like any other element. Whether any given conduct violates clause 1 . . . is a question for the trier of fact to determine, based upon all the facts and circumstances; it cannot be conclusively presumed from any particular course of action. *United States v. Phillips, 70 M.J. 161, 165 (C.A.A.F. 2011)*. Here, Sgt JR testified that everyone knew about the incident upon her return to her unit, that it was "uncomfortable," that there was "a lot of immaturity," and that her co-workers treated her assault by the appellant, a [*9] Master Sergeant of Marines and her direct supervisor, as "just a joking matter." Record at 431.

After carefully reviewing the record of trial and considering the evidence in the light most favorable to the prosecution, we are persuaded that a reasonable fact-finder, in this case the members, could indeed have found all the essential elements of kidnapping beyond a reasonable doubt. Furthermore, after weighing all the evidence in the record of trial and recognizing that we did not personally see the witnesses' testimony, we are convinced beyond a reasonable doubt of the appellant's guilt as to this charge.

We turn now to the appellant's argument that the military judge abused his discretion in denying an R.C.M. 917 motion to dismiss the kidnapping charge and specification. Having found that the appellant's conviction of this offense legally and factually sufficient, the appellant's assignment of error as to the military judge's R.C.M. 917 ruling is moot.

The appellant also summarily avers that the Commandant of the Marine Corps exerted undue command influence (UCI) on the members. [3] We review allegations of UCI *de novo. United States v. Villareal, 52 M.J. 27, 30 (C.A.A.F. 1999)*. Article 37(a), UCMJ, [*10]

states, "No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence . . . the action of any convening, approving, or reviewing authority with respect to his judicial acts." The appellant has the initial burden of producing sufficient evidence to raise unlawful command influence. *United States v. Stombaugh, 40 M.J. 208, 213 (C.M.A. 1994)*. This threshold is low, but it must be more than "a bare allegation or mere speculation." *United States v. Johnston, 39 M.J. 242, 244 (C.M.A. 1994)* (citation omitted).

3 AE III: "Whether the Commandant of the Marine Corps exerted undue command influence on the members when they attended a "Heritage Brief" about the Marine Corps' response to alleged sexual assaults?"

At trial, the military judge *sua sponte* raised the issue of a recent brief by the Commandant and asked whether counsel intended to inquire into its impact on the members, as neither counsel had addressed the issue during group *voir dire*. Record at 224. The civilian defense counsel then questioned five of the members. Their responses indicated that the Commandant had discussed the statistics for sexual assaults in the Marine Corps, [4] emphasized [*11] that "we needed to just take care of each other," [5] and that Marines need to "live up to our ethos." [6] None of the members indicated that they felt any pressure from the Commandant or the CA for any particular outcome in the appellant's case. Record at 230-32, 239-43. At the conclusion of *voir dire*, the military judge again raised the question of whether the defense desired to raise a motion asserting UCI, and defense counsel expressly declined to do so. *Id.* at 300.

4 Record at 231, 240, 246.
5 *Id* at 231.
6 *Id.* at 253.

Because of the insidious nature of UCI and its potential devastating impact on the very integrity of the court-martial process, we decline to reflexively apply waiver even here where the civilian defense counsel specifically declined to raise a UCI motion. However, the record before us is devoid of any facts that, if true, constitute UCI. Moreover, we find no indication whatsoever that the proceedings were unfair. *Stombaugh, 40 M.J. at 213*. The defense has failed entirely to meet its initial burden of production both at trial and on appeal, and we find this assignment of error to be without merit.

As noted above, the appellant submitted five additional summary assignments of [*12] error with citation to *United States v. Grostefon, 12 M.J. 431 (C.M.A 1982)*. After careful consideration of the record and the pleadings, we find that those matters raised by the appellant are not substantiated by the record and do not merit further analysis or relief. *United States v. Matias, 25 M.J. 356, 363 (C.M.A. 1987)*.

Conclusion

We conclude that the findings and the sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant exists. Arts. 59(a) and 66(c), UCMJ. The findings and the sentence are affirmed.

Chief Judge PERLAK participated in the decision of this case prior to detaching from the court.

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 3

United States, Appellee v. Patrick G. EDMOND Midshipman Third Class (MIDN 3/C) United States Navy, Appellant	**BRIEF AND SUPPLEMENTAL ASSIGNMENT OF ERROR** Case No. 201200168 Tried at Naval District Washington, Washington Navy Yard, Washington, D.C. on 25-29 September 2011 by a general court-martial convened by Superintendent, U.S. Naval Academy.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

CARRIE E. THEIS
Lieutenant, JAGC, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Bldg. 58, Ste. 100
Washington Navy Yard, DC 20374
(202) 685-7390
Fax (202) 685-7426

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Assignment of Error

I.

WHETHER TRIAL DEFENSE COUNSEL'S NUMEROUS ERRORS AMOUNTED TO INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF MIDN 3/C EDMOND'S SIXTH AMENDMENT RIGHTS?

Statement of Statutory Jurisdiction

Midshipman Third-Class (MIDN 3/C) Edmond's case falls within this Court's jurisdiction per Article 66(b)(1), Uniform Code of Military Justice (UCMJ), because MIDN 3/C Edmond received an approved court-martial sentence that included a dismissal.

Statement of the Case

A panel of members, sitting as a general court-martial, convicted MIDN 3/C Edmond, contrary to his pleas, of one specification of making a false official statement, two specifications of forcible rape, two specifications of aggravated sexual assault, and one specification of wrongful sexual contact, in violation of Articles 107 and 120, UCMJ, 10 U.S.C. §§ 907, 920 (2006). (R. at 1206-07.); The members sentenced MIDN 3/C Edmond to 180 days of confinement and to be dismissed from the naval service. (R. at 1347.)

Following the conclusion of the trial but before they submitted clemency, the Trial Defense Counsel (TDC) brought a post-trial motion for a mistrial alleging a discovery violation on the part of the Government. (Appellate Ex. LXX.)

A post-trial 39(a) session was held on 27 January 2012, and the military judge denied the motion because the TDC actually had in their possession the information they claimed the Government failed to turn over. (R. at 1352; Appellate Ex. LXXV.)

On 1 March 2012, TDC submitted clemency on behalf of MIDN 3/C Edmond. (Clemency of 1 Mar 2012.) On 15 March 2012, the staff judge advocate (SJA) completed the initial staff judge advocate's recommendation (SJAR). (SJAR of 15 Mar 2012.) On 22 March 2012, lead TDC submitted additional clemency materials that explained MIDN 3/C Edmond received ineffective assistance of counsel during the court-martial. (Supplemental Clemency of 25 Mar 2011.) On 2 April 2012, the SJA prepared an addendum to the SJAR that recommended approving the adjudged sentence. (Addendum to SJAR of 2 Apr 2012.) On 3 April 2012, the convening authority (CA) approved the sentence as adjudged and, with the exception of the dismissal, ordered it executed. (Convening Authority's Action of 3 Apr 2012.)

On 26 September 2012, this Court ordered briefing on whether MIDN 3/C Edmond was properly afforded conflict-free counsel during the post-trial process. (NMCCA No. 201200168 Order of 26 Sept 2012.) On 10 October 2012, this Court also ordered the Government to produce affidavits from the TDCs in response to an ineffective assistance of counsel claim.

(NMCCA No. 201200168 Order of 10 Oct 2012.) The Government responded on 19 October 2012, with affidavits from Lieutenant (LT) James Sylvan, Judge Advocate General's Corps (JAGC), United States Navy (USN), and LT Temperance Tysk, JAGC, USN. (Sylvan Aff. 19 Oct 2012; Tysk Aff. 18 Oct 2012.)

After receiving the affidavits, both MIDN 3/C Edmond and the Government submitted briefs on the court-specified issue. On 7 January 2013, this Court set aside the original CA's action and returned the record of trial to the Judge Advocate General for remand to an appropriate convening authority for proper post-trial processing with conflict-free counsel. (NMCCA No. 201200168 Order of 7 Jan 2013.)

A new SJAR was prepared and MIDN 3/C Edmond was given a new TDC for the purposes of submitting clemency on his behalf. (SJAR of 15 Feb 2013.) LT Chris Cox, JAGC, USN, was detailed, and he submitted clemency on 25 March 2013 that alleged the original TDC were ineffective. (Clemency of 25 Mar 2013.) In an addendum to the new SJAR, the SJA acknowledged the claim, did not provide any legal analysis, and stated "[he] still recommended that [the CA] approve the findings and sentence as adjudged." (Addendum to the SJAR of 3 Apr 2013.) On April 4, 2013, the CA again approved the sentence as adjudged and, with the exception of the dismissal, ordered it executed. (Convening Authority Action of 4 Apr 2013.)

On 9 April 2013, this Court returned the record to the panel and ordered MIDN 3/C Edmond to either file supplemental pleadings or inform the Court that he wished to submit the case on its merits. (Memorandum from The U.S. Navy-Marine Corps Court of Criminal Appeals, to Directors of Appellate Defense and Appellate Government, subject: GENERAL COURT-MARTIAL CASE OF MIDNSHIPMAN THIRD CLASS PATRICK G. EDMOND, USN NMCCA No. 201200168, Ser 51/0033 (9 Apr 2013).) On 12 June 2013, MIDN 3/C Edmond filed a supplemental brief and assignments of error, alleging the following: 1) his TDC were ineffective; 2) the military judge abused his discretion by admitting an unrelated Facebook message; and 3) the military judge abused his discretion when he failed to admit relevant Military Rule of Evidence (M.R.E.) 412 evidence. (Appellant's Br. of 12 Jun 2013). In support of his allegations of ineffective assistance of counsel, MIDN 3/C Edmond attached to the record a declaration he made on 25 September 2013 pursuant 28 U.S.C. § 1746, declaring under penalty of perjury that his declaration was true and correct. (Appellant's Decl..)

In response to MIDN 3/C Edmond's 12 June 2013 supplemental brief and the Government's Answer, this Court on 8 October 2013 ordered a hearing pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1968), in order to develop a factual record and make conclusions of law regarding whether

MIDN 3/C Edmond received ineffective assistance of counsel at trial. (NMCCA No. 201200168 Order of 8 Oct 2013.) The *DuBay* hearing was held from 17-19 December 2013 at the Washington Navy Yard. The military judge who conducted the *DuBay* hearing submitted his findings of fact and conclusions of law to the convening authority on 2 June 2014. (*United States v. Edmond, DuBay* Hearing Findings of Fact and Conclusions of Law of 2 June 2014, hereinafter "*DuBay* FOF and Concl. of Law".) The *DuBay* judge found numerous instances of deficient performance and determined the TDC's errors were prejudicial. (*Id.*) The convening authority returned the record to this Court on 18 June 2014.

On 19 June 2014, by memorandum, this Court returned the record to the panel and ordered MIDN 3/C Edmond to either file supplemental pleadings or inform the Court that he did not wish to submit any additional pleadings. (Memorandum from The U.S. Navy-Marine Corps Court of Criminal Appeals, to Directors of Appellate Defense and Appellate Government, subject: GENERAL COURT-MARTIAL CASE OF MIDNSHIPMAN THIRD CLASS PATRICK G. EDMOND, USN NMCCA No. 201200168, Ser 51/0026 (19 Jun 2014).) This additional brief responds to that order and supplements, but does not supplant, MIDN 3/C Edmond's 12 June 2013 supplemental brief and assignments of error. Specifically, MIDN 3/C Edmond asks this Court to consider

Assignment of Error II and III in his 12 June 2013 brief although they are not raised again in this brief.

Statement of Facts

MIDN 3/C Edmond adopts the statement of facts in his 12 June 2013 supplemental brief. Additionally, MIDN 3/C Edmond adopts the military judge's findings of fact from the *DuBay* hearing. The military judge's findings of fact from the *DuBay* hearing are well-supported by the record, are quite extensive, covering thirty-four pages of single-spaced type, and are not reproduced in the brief in the interest of judicial economy.

In short, MIDN 3/C Edmond was convicted of digital penetration and forcible rape of a fellow Midshipman, XM, and of lying to Naval Criminal Investigative Service (NCIS) about this sexual encounter. (R. at 1206-07.) This was a he-said/she-said case that arose from a sexual encounter between two Midshipman with a previous sexual history together. (R. at 552-553.) Serious questions about the quality of TDC's representation began to arise from the beginning of opening statement and continued throughout the trial. As the *DuBay* judge determined, TDC performed deficiently during the trial by failing to properly challenge the complaining witness' testimony, missing the opportunity to put on favorable evidence, aiding the Government's case by putting on damaging evidence, failing to properly weigh the risks and benefits of

putting MIDN 3/C Edmond on the stand and overall delivering a poor performance. (*DuBay* FOF.) The *DuBay* judge also found without a question that TDC's errors amounted to cumulative error that was sufficiently prejudicial to render the verdict unsafe. (*DuBay* Concl. of Law 10.)

The facts from the *DuBay*, along with other necessary facts, are referenced below.

Summary of Argument

MIDN 3/C Edmond went to a court-martial and faced life in prison without the assistance of counsel, a right guaranteed to him by the *Sixth Amendment* to the Constitution. His assigned TDC, both novices, were left to fend for themselves by their supervisors and stumbled their way through the trial. They neglected to form a cogent trial strategy based on the evidence, failed to impeach the complaining witness and other Government witnesses despite available impeachment evidence, put MIDN 3/C Edmond on the stand without proper preparation or advice concerning the impact of his testimony, asked for a dismissal in sentencing despite MIDN 3/C Edmond's wishes, and overall delivered a disastrous performance that was a product of a virtual mental and physical breakdown from the lead counsel.

Many of TDC's errors in themselves satisfy the standard for deficient performance and prejudicial error articulated in

Strickland v. Washington, 466 U.S. 668, 687 (1984). Moreover, the cumulative effect of the numerous errors by TDC was highly prejudicial to MIDN 3/C Edmond. This Court should set aside the findings and sentence because the verdict here is simply unreliable.

Argument

I.

TRIAL DEFENSE COUNSEL'S NUMEROUS ERRORS AMOUNTED TO INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF MIDN 3/C EDMOND'S SIXTH AMENDMENT RIGHTS.

Standard of Review

To establish ineffective assistance of counsel, "an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green*, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing *Strickland*, 466 U.S. at 687). In reviewing for ineffectiveness, this Court "looks at the questions of deficient performance and prejudice *de novo*." *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012) (citing *United States v. Gutierrez*, 66 M.J. 329, 330-31 (C.A.A.F. 2008)).

Discussion

1. Trial Defense Counsel's Performance Was Deficient

"The right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it

has on the ability of the accused to receive a fair trial." *United States v. Cronic*, 466 U.S. 648, 658 (1984). Moreover, when there is a defense team, the performance of the TDC is judged without separating their individual contributions. *United States v. McConnell*, 55 M.J. 479, 481 (C.A.A.F. 2001) (citation omitted). Here, as the *DuBay* judge recognized, MIDN 3/C did not receive a fair trial because TDC's performances were deficient in the following respects:

1) TDC failed to effectively challenge MIDN 3/C XM's credibility and testimony;

2) TDC presented evidence that affirmatively assisted the Government's case;

3) TDC erred by failing to challenge the credibility of Nurse Boal, a key witness;

4) TDC failed to use available advantageous evidence;

5) TDC erred in the presentation of MIND 3/C Edmond's testimony;

6) TDC performed poorly in front of the members;

7) TDC's motions practice was inadequate;

8) TDC was ineffective during sentencing argument; and

10) The culmination of all TDC's errors.

After examining these deficiencies, it is clear MIDN 3/C Edmond has met his burden of demonstrating TDC's performance fell below an objective standard of reasonableness and TDC were not functioning as counsel within the meaning of the

Sixth Amendment. *See United States v. Terlep*, 57 M.J. 344, 349 (C.A.A.F. 2002). Despite the strong presumption that counsel provide adequate professional service (*United States v. Garcia*, 59 M.J. 447 (C.A.A.F. 2004)), the specific facts of this case overcome the presumption of competence. TDC's actions in this case were simply unreasonable under prevailing professional norms.

A. Trial Defense Counsel Failed to Properly Challenge MIDN 3/C XM's Credibility and Testimony

TDC failed to present the entire story to the members. If the members had been given the true picture of the complaining witness', MIDN 3/C XM, credibility, the outcome of the trial would have been different. In a rape case that hinges on credibility, counsel performs deficiently if, for other than strategic reasons, they fail to impeach an alleged victim's credibility. *United States v. Gibson*, 51 M.J. 198, 202 (C.A.A.F. 1999).

TDC's choice in this case to leave MIDN 3/C XM's credibility unchallenged was not a strategic choice, but rather it was a consequence of inexperience. TDC were aware this case was a "he-said/she-said" case that hinged on credibility. (*DuBay* FOF 226.) Despite being aware that credibility was paramount, TDC failed in several respects to challenge MIDN 3/C XM's credibility.

1. TDC failed to show the members that MIDN 3/C XM's testimony changed between the Article 32 hearing and trial.

Most notably, TDC did not impeach MIDN 3/C XM with changes between her Article 32 testimony and her testimony at trial. The following chart illustrates the differences between MIDN 3/C XM's testimony at the Article 32 hearing and at trial:

Trial	Article 32
MIDN 3/C Edmond grabbed MIDN 3/C XM's arm and told her to get up from her chair with a full voice. (R. at 528-29.)	MIDN 3/C Edmond whispered to MIDN 3/C XM to get up from her chair and she complied without being grabbed on her arm. (Appellate Ex. 89 at 17-18.)
MIDN 3/C XM attempted to remove MIDN 3/C Edmond's fingers from her vagina by pushing his body away with a gesture of her palms up and elbows bent at a 90 degree angle. (R. at 532-33.)	MIDN 3/C XM attempted to remove MIDN 3/C Edmond's fingers from her vagina by pulling his arms. (Appellate Ex. 89 at 19.)
MIDN 3/C Edmond held MIDN 3/C XM by her hip and shoulder, without specifying which one, during the entire time he rectally penetrated her. (R. at 534-35.) *(Significance of this change in testimony is that Nurse Boal testified she identified a bruise on MIDN 3/C XM's left shoulder only. (R. at 631-32.))	MIDN 3/C Edmond held MIDN 3/C XM with both hands on her waist while rectally penetrating her and moved to hold her on her right shoulder. (Appellate Ex. 89 at 23-24.)
During the anal and vaginal penetration, MIDN 3/C XM kept "trying to take his hands off" the entire time. (R. at 535.)	During the anal and vaginal penetration, MIDN 3/C XM did not try to take his hands off of her but rather "just froze." (Appellate Ex. 89 at 25.)
MIDN 3/C Edmond did not ejaculate on her. (R. at 536,	MIDN 3/C Edmond ejaculated on her and on his sweatpants.

584-85.)	(Appellate Ex. 89 at 26.)

MIDN 3/C XM's story of MIDN 3/C Edmond's behavior that day in the dorms changed significantly between the Article 32 hearing and the day of trial. She alleged he used much more force than at the Article 32, yet TDC failed to bring those changes to the attention of the members.

TDC could not bring these inconsistencies to the attention of the members because they never reduced the audio testimony of MIDN 3/C XM into a transcribed form. (*DuBay* FOF 27.) Nor did the defense have equipment present at the defense table by which they could play her Article 32 testimony. (*DuBay* FOF 48; *DuBay* R. at 135-36.) TDC believed that having the transcript ready for cross-examination of the alleged victim at trial was an absolute requirement, but failed to have it ready. (*DuBay* FOF 47; *DuBay* R. at 132-33.) TDC's failure to impeach MIDN 3/C XM on the changes in her story between the Article 32 and trial was clearly not a tactical decision. This failure prejudiced MIDN 3/C Edmond because MIDN 3/C XM, unchallenged, was able to present a picture of a more forcible encounter than she originally described. Moreover, the members were left with the impression that the bruise on MIDN 3/C XM's left shoulder could have been caused by MIDN 3/C Edmond forcibly holding her

during the sexual episode, despite MIDN 3/C XM's original testimony that he held her by the right shoulder. These failures in themselves are sufficient to find deficient performance and prejudice within the meaning of *Strickland.*

2. TDC failed to employ proper cross-examination techniques when questioning MIDN 3/C XM.

TDC also assisted MIDN 3/C XM in presenting a cogent history of the case when he used an open-ended question to ask MIDN 3/C XM about he r original failure to tell NCIS about her previous relationship with MIDN 3/C Edmond. (R. at 568.)

> TDC: Then you went to NCIS and you gave a statement, did you tell them about that relationship?
>
> XM: No, sir. In the second statement I did, sir.
>
> TDC: Why not in the first statement?
>
> XM: She just asked how I knew Edmond, she never asked about our relationship, sir.

(R. at 568.) On this important point, TDC failed to use a key tool of advocacy: the leading question on cross-examination. Using an open-ended question allowed her to equivocate on the omission and minimized the impact of this important fact, which tended to impugn her credibility.

A central tenant of cross-examination is also to confront witnesses with important evidence that you want to highlight to the members. During cross-examination MIDN 3/C XM stated when MIDN 3/C Edmond asked her through text message if she

would be surprised if he kissed her, she said she texted back "it will be a surprise." (R. at 556.) MIDN 3/C actually texted back the rather coy response, "then it wouldn't be a surprise." (Defense Ex. E, D.) TDC did not correct her with her coy response though, rather he corrected her by stating that she said, "it would be a surprise." (R. at 556.) TDC missed the opportunity to show MIDN 3/C XM was trying to minimize her flirtation with MIND 3/C Edmond and missed the opportunity to show the members evidence that could have at least lent to mistake of fact as to consent on the part of MIDN 3/C Edmond.

3. TDC failed to use available witnesses and evidence to challenge MIDN X/M's credibility.

a. MIDN 3/C Lindsay Boyd, USN

MIDN 3/C Lindsay Boyd was a witness for the defense but TDC failed to use her to bring out favorable evidence. Most notably, MIDN 3/C Boyd would have testified that after the alleged rape, MIDN 3/C XM told her that MIDN 3/C Edmond assaulted her while she was lying on the floor and he was on top of her. (R. at 806.) This was a stark difference from her version at trial where she claimed she was standing during the sexual encounter. (*DuBay* FOF 106; *DuBay* R. at 739-41; R. at 553, 561-63, 806.) TDC admitted this failure to expose the dramatic change in story was not intentionally omitted for

tactical reasons. (*DuBay* R. at 743.) MIDN 3/C Boyd could have also testified that MIDN 3/C XM told her that she hated MIDN 3/C Edmond after they broke up. (*DuBay* FOF 264; *DuBay* R. at 621-22; Clemency of 1 Mar 2, Encl. 40, MIDN 3/C XM ltr to MIDN 3/C Lindsay Boyd of 8 Jul 10.) This fact is significant because MIDN 3/C XM testified at trial that she never hated MIDN 3/C Edmond. (R. at 557.)

MIDN 3/C Boyd would have also testified that before the alleged rape she was interested in restarting her previous romantic relationship with MIDN 3/C Edmond. (*DuBay* FOF 264; *DuBay* R. at 621-22; Clemency of 1 Mar 12, Encl. 28, Decl. of Lindsay Boyd.) This information would have not only added evidence of consent or mistake of fact as to consent but it also would have impeached MIDN 3/C XM's trial testimony that she was not interested in MIDN 3/C Edmond romantically after they broke-up. (R. at 554-55.)

MIDN 3/C Boyd also could have testified that she observed MIDN 3/C XM at the hospital during her sexual assault exam, did not see her curled up in a ball in the waiting room, and that MIDN 3/C XM was particularly vibrant after the exam. (Clemency of 1 Mar 12, Encl. 38, Boyd Decl.) This version of MIDN 3/C XM's behavior would have contradicted her and Nurse Boal's version of the sexual assault exam. (R. at 640.) Finally, MIDN 3/C Boyd could have provided an additional

motive for MIDN 3/C XM to fabricate by testifying that the night before the alleged rape, MIDN 3/C XM told her she was thinking of leaving the academy. (Clemency of 1 Mar 12, Encl. 28, Boyd Decl.)

MIDN 3/C Boyd was a key witness and TDC only questioned her for six pages. (R. at 806-12.) He did not have any strategic reason for his failure to exploit this witness' impeachment evidence.

b. Captain Andrea Manning, USMC

The defense called Captain (Capt) Andrea Manning, United States Marine Corps (USMC), to the stand and attempted to elicit her opinion that MIDN 3/C XM was an untruthful person. Capt Manning, clearly unprepared by TDC, was unsure how to answer TDC's questions regarding MIDN 3/C XM's reputation for untruthfulness or poor military character, despite that such evidence was her sole purpose as a witness. (R. at 889-90, 892.)

Further, on cross-examination, the Government elicited specific instances, which opened the door for the defense to question her on specific instances of untruthfulness. (R. at 571-74, 890, 892, 893-902.) TDC did not seize this opportunity to question Capt Manning about how MIDN 3/C XM lied to her about violating Naval Academy regulations. *Id.* This was an important point because sexual interactions in the

dormitory were also a violation of Naval Academy regulations. Probing MIDN 3/C XM's previous lies regarding Academy regulations could have significantly undermined her credibility.

c. MIDN 3/C XM's medical records

TDC did not request MIDN 3/C XM's medical records despite the fact she attributed bruises on her body to the sexual encounter between herself and MIDN 3/C Edmond. TDC acknowledged this was not a tactical decision, but rather an oversight on his part. (*DuBay* FOF 62, 90, 92; *DuBay* R. at 174, 285, 290.) It is not clear what the records may have shown because the *DuBay* judge would not order the records produced. For certain, one matter would have been in there that would have impugned MIDN 3/C XM's testimony - a record of a concussion she received from playing rugby. (Appellate Ex. 88, Memorandum of Chief Cornue of 23 Feb 12.) MIDN 3/C XM testified at trial that her bruises could not have come from playing rugby because they were above the waist. (R. at 588.) However, Chief Cornue was available to testify that MIDN 3/C XM received a concussion from playing rugby - an injury above the waist. (Appellate Ex. 88, Memorandum of Chief Cornue 23 Feb 12.)

TDC missed opportunities to use the other court-martial witnesses to challenge MIDN 3/C XM's testimony and this

failure amounts to deficient performance and prejudice under the *Strickland* standard. For example, in *Adams v. Bertrand*, the Seventh Circuit found a defense counsel's performance deficient where, although the counsel cross-examined the alleged victim about prior inconsistent statements, he did not call an available witness to testify to evidence that would have impeached the victim's testimony. *Adams v. Bertrand*, 453 F.3d 428, 436-37 (7th Cir. 2006). Here, similar to the *Adams* case, although TDC asked MIDN 3/C XM some cross-examination questions, he was nevertheless ineffective for failing to use the other available witnesses to impeach her credibility. TDC's failure to present the relevant evidence from available witnesses is enough to establish deficient performance and prejudice under *Strickland*, but there are more examples of ineffective assistance of counsel in the record.

B. TDC presented evidence that affirmatively assisted the Government's case.

TDC did more than just fail to challenge the Government's case, some of his errors assisted the Government in making its case. Counsel who bolster the Government's case against the accused are not assisting as counsel within the meaning of the Sixth Amendment. *Garcia*, 59 M.J. at 447 (citing *Cronic*, 466 U.S. at 656-57.)

A counsel's performance is deficient when they elicit damaging character evidence against a defendant. *Glancy v. State*, 941 So. 2d 1201, 1203 (Fla. Dist. Ct. App. 2006) (counsel ineffective in burglary and sexual battery case for eliciting damaging character evidence against the defendant). Here, most notably, TDC assisted the Government's case by presenting MIDN 3/C Rebecca Dolce's testimony. MIDN 3/C Dolce was a defense witness and TDC elicited the following information from her:

> TDC: Do you feel like you can trust [MIDN 3/C Edmond]?
>
> MIDN D: No, sir.

(R. at 735.) Here, TDC was clearly within this described deficiency when he asked a question he did not know the answer to, but of which he should have been aware. (*DuBay* FOF 45; *DuBay* R. 120-22; R. at 735.) Earlier the Government had unsuccessfully moved to admit MIDN 3/C Dolce's testimony for the purpose of showing MIDN 3/C Edmond was unwelcome in his pursuit of a continued relationship with MIDN 3/C Dolce after they broke up. (Appellate Ex. III; R. at 84-91.) TDC clearly should have known that MIDN 3/C Dolce would not answer favorably when asked if she trusted MIDN 3/C Edmond. Indeed, the evidence elicited was so damaging that it dominated the media coverage the next day and caused the military judge to

sua sponte call an Article 39(a) session to ensure that counsel was prepared to question the next witness. (*DuBay* FOF 45, n.8; R. at 735.)

Notable as well was TDC's consistent effort to reinforce the Government's case by describing the sexual encounter as if it was a crime.[1] Indeed, the *DuBay* judge described the TDC's use of criminal words in the opening statement and closing argument as akin to a "prosecutor's summation" of the evidence. (*DuBay* Concl. of Law 5.)

TDC's inaction also bolstered the Government's case when he failed to object to improper testimony from MIDN 3/C XM on direct examination. MIDN 3/C XM introduced herself to the members by recounting her immigrant status, how much this country has given her, and how her deep reaction to the tragedy of September 11, 2001, compelled her to join the military. (R. at 501.) TDC should have objected to this irrelevant evidence, which improperly bolstered MIDN 3/C XM's

[1] R. at 438, 441, 561, 568, 582 (She was "violently sexually assaulted and sodomized;" she "decided to go unrestricted, a difficult decision;" she went to NCIS because "she wanted them to know exactly what happened;" MIDN 3/C XM was "the only witness to the sexual assault;" "Did you tell her about the assault?"; "You pointed out which clothing had been the clothing you were wearing during the assault;" "I want to ask you a question about the sexual assault itself;" "Isn't it true that the week of the sexual assault you had practice;" and "Explain for me how this assault actually happened").

character as a patriot in a case that was all about character. *See* M.R.E. 401, 402, 403.

Secondly, TDC failed to object when MIDN 3/C XM testified to MIDN 3/C Edmond's thought-process after the conclusion of the sexual encounter. In describing MIDN 3/C Edmond, MIDN 3/C XM testified "He's like, 'oh, I made a mistake, I'm mad.' Like, 'Okay, I'm just going to get out of here.'" (R. at 527.) TDC should have objected to improper speculation and lack of foundation. *See* M.R.E. 602. Rather, the members were given as fact a baseless inculpatory assessment of MIDN 3/C Edmond's mindset at the time of the alleged incident.

The true facts surrounding the incident and MIDN 3/C XM's credibility never made it to the members because of TDC's failures. In *Gibson*, TDC's failure to notice minor differences in the victim's report, failure to investigate evidence of conflicting versions of the rape allegation, and failure to investigate a reputation for untruthfulness was prejudicial error because it was a close case that hinged on credibility. *Gibson*, 51 M.J. at 198-202. This case is even more egregious than *Gibson*. Here, the case hinged on the credibility of MIDN 3/C XM and through action and inaction, TDC helped the Government present her as a credible, consistent witness. The *Strickland* standard has clearly been met.

C. TDC Erred By Failing to Challenge Nurse Boal's Credibility.

TDC was also deficient in his cross-examination of the sexual assault nurse examiner (SANE), Nurse Boal. Nurse Boal's testimony played a pivotal role in the trial. (*DuBay* FOF 35.) She conducted the SANE exam, noted the bruises that became the linchpin of the Government's case for force, and gave a colorful description of MIDN 3/C XM's uncontrollable emotions during the exam. (R. at 626-27.) Moreover, during Nurse Boal's testimony, TDC introduced Defense Exhibit Bravo, records of the sexual assault exam that included MIDN 3/C XM's account of the sexual act. (R. at 647-48; Defense Ex. B. at 7-10.) By introducing MIDN 3/C XM's statement as taken by Nurse Boal, TDC inextricably linked Nurse Boal and MIDN 3/C XM's credibility, making TDC's failure to properly confront her even more prejudicial.

TDC did not obtain a certified copy of Nurse Boal's prior federal conviction for forgery, nor did he confront her with her prior conviction despite knowing about it and its admissibility. (*DuBay* FOF 35, 98; *DuBay* R. 101-02; Clemency of 25 Mar 2013 at Enclosure (1)); *see* M.R.E. 609(a)(2). This error was prejudicial because had the members known about her crime of dishonesty, it would have undermined the great weight the members gave Nurse Boal's testimony. (*DuBay* FOF 97; *DuBay*

R. at 447; Clemency of 25 Mar 2013 at Enclosure (1).) Furthermore, TDC was aware from the testimony at the pre-trial motions session that Nurse Boal had a tendency to "chart a little too much." (R. at 127.) This evidence of adding more into a record than other providers, along with her conviction for forgery, could have cause a reasonable group of members to question Nurse Boal's credibility. (*DuBay* Concl. of Law 9.)

Whether Nurse Boal was an entirely truthful witness was a very salient point to the Government's case against MIDN 3/C Edmond because of her account of MIDN 3/C XM's statement and her assessment of MIDN 3/C XM's injuries and demeanor. TDC's failure to challenge her credibility with available evidence was itself prejudicial, deficient performance under *Strickland*.

D. Trial Defense Counsel Erred in the Presentation of MIDN 3/C Edmond's Testimony

Equally important and damaging to MIDN 3/C Edmond's case was TDC's decision to put him on the stand without advice or proper preparation.

According to JAGINST 5803.1C[2], Rule 1.4(b), an attorney must explain matters to their client to the extent that allows

[2] Judge Advocate General Instruction 5803.1C, Professional Conduct of Attorney Practicing Under the Cognizance and Supervision of the Judge Advocate General (9 Nov 2004) (hereinafter JAGINST), governed at the time of trial and was replaced on 1 May 2012 by JAGINST 5803.1D.

them to make an informed decision regarding the representation. Failure to adequately explain fundamental choices to a client amounts to deficient performance under *Strickland*. *Garcia*, 59 M.J. at 448.

Here, TDC failed to fully inform MIDN 3/C Edmond about the consequences of his testimony. Mainly, that if he testified his previously suppressed statement to NCIS could, and likely would, come into evidence. (*DuBay* FOF 64, 66, 269; *DuBay* R. at 182, 187, 644.) Indeed, MIDN 3/C Edmond was surprised by its admission in the middle of his cross-examination on the stand. (*DuBay* Concl. of Law 8.) This surprise was likely a factor that played into MIDN 3/C Edmond's noticeable, emotional performance during cross-examination. (*DuBay* FOF 237; *DuBay* R. at 556.) TDC's failure to advise MIDN 3/C Edmond of the consequences of testifying not only deprived him of counsel for that important decision, but it also unnerved him when he was unexpectedly confronted with his statement mid-testimony.

TDC also failed to properly prepare MIDN 3/C Edmond to take the stand. MIDN 3/C Edmond was never taken through a run of his entire testimony. (*DuBay* FOF 94; *DuBay* R. at 441.) Small sections of testimony were placed before a murder board of other counsel on only one occasion. (*DuBay* FOF 94, 230; *DuBay* R. at 441, 540.) That session lasted about ninety

minutes. (*DuBay* FOF 290; *DuBay* R. at 721.) MIDN 3/C Edmond never practiced his testimony in the courtroom. (*DuBay* FOF 95; *DuBay* R. at 442.) During the trial, TDC allowed MIDN 3/C Edmond to return to the Naval Academy in the evenings to tutor other students in chemistry instead of preparing him for testimony, consulting with him, or resting him so he would be ready for the next day. (*DuBay* FOF 67; *DuBay* R. 190.) More preparation for testimony was clearly needed as MIDN 3/C Edmond did poorly during cross-examination. (*DuBay* FOF 237; *DuBay* R. at 556.)

TDC also mistakenly advised MIDN 3/C Edmond to take the stand. Counsel is deficient where the direct examination of an accused opens the door for the Government in its cross-examination to elicit aggravating and damaging details not previously established. *See Garcia*, 59 M.J. at 452-53.[3]

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[3] For example, in *Robertson v. State*, counsel were ineffective in an aggravated assault case for eliciting from the defendant testimony that he was incarcerated on two convictions and that he was in possession of a knife at the time of the previous arrests. 214 S.W.3d 665 (Tex. App. 2007). This testimony opened the door for the state to elicit testimony on cross-examination that the defendant had two prior drug convictions with "deadly weapon findings on both charges." *Id.* The state used this evidence in argument to undermine the defendant's credibility in arguing self-defense. *Id.; see also State v. Barr*, 814 N.E.2d 79 (Ohio Ct. App. 2004) (counsel ineffective for opening the door in cross-examination of a police officer to admission of the defendant's statements that had previously been suppressed as involuntary); *Bowers v. State*, 929 So. 2d 1199 (Fla. Dist. Ct. App. 2006) (counsel ineffective for questioning the defendant

TDC made the decision very early in the litigation to advise MIDN 3/C Edmond to take the stand. (*DuBay* FOF 52; *DuBay* R. at 141.) MIDN 3/C Edmond did not want to take the stand, but acquiesced to his attorney's advice. (*DuBay* FOF 281, 282; *DuBay* R. at 713.) TDC believed they had to put MIDN 3/C Edmond on the stand so he could explain to the members that he lied to the NCIS about sex occurring because he faced expulsion from the Naval Academy for having consensual sex in the dormitories. (*DuBay* FOF 236; *DuBay* R. at 553.)

TDC could have made the argument the sex was consensual and MIDN 3/C Edmond lied to NCIS because he faced getting kicked out without MIDN 3/C Edmond taking the stand. Indeed, the *DuBay* judge found TDC failed to properly balance the potential gains of MIDN 3/C Edmond's testimony against the devastating impact of the admission of his previously suppressed statement. (*DuBay* Concl. of Law 7.)

This second, previously suppressed statement contained inconsistencies that significantly damaged MIDN 3/C Edmond's credibility in front of the members, in a case all about credibility. Putting MIDN 3/C Edmond on the stand allowed trial counsel to bring out proof of the following damning

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concerning his prior criminal convictions and eliciting numerous details that the State would not have been entitled to elicit).).

inconsistencies that would not have been introduced without his testimony:

1. His direct testimony was that MIDN 3/C XM was a caring person but he had previously told NCIS that she hated him.
2. His direct testimony contradicted his earlier statement about how long his track practice lasted.
3. He acknowledged on the stand that he lied to NCIS about seeing MIDN 3/C XM on the day of his NCIS interview.
4. He acknowledged on the stand there were not a lot of people around when he went into MIDN 3/C XM's room unlike what he previously told NCIS.

(R. at 1016-20.)

TDC were also aware, and failed to account for, the fact that MIDN 3/C Edmond would testify that he did not ejaculate during the sexual encounter, but rather went back to his room and ejaculated in his shorts. (*DuBay* FOF 108; *DuBay* Concl. of Law 6, *DuBay* R. at 686-87, 745; R. at 485-87.) This testimony contradicted the forensic evidence in the case that indicated semen was discovered on the alleged victim, her clothing, and on his running pants-but not his shorts. (R. at 485-87.) Indeed, by putting MIDN 3/C Edmond on the stand, TDC affirmatively presented evidence that contradicted the forensic evidence in the case.

TDC's decision to put MIDN 3/C Edmond on the stand strengthened the Government's case by giving it ammunition to attack MIDN 3/C Edmond's credibility that it would not have

otherwise had. Moreover, MIDN 3/C Edmond was not advised of these consequences or adequately prepared to take the stand. Consequently, like in *Garcia*, TDC's presentation of MIDN 3/C Edmond's testimony amounted to prejudicial, deficient performance. *Garcia*, 59 M.J. at 452-53.

E. Trial Defense Counsel Performed Poorly in Front of the Members

Competent counsel is more than a warm body in a chair. As Justice Sutherland explained in *Powell v. Alabama*:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible.

Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

LT Sylvan's performance as lead TDC fell below what is meant by competent assistance of counsel. First, his presentation of the opening statement was not only problematic in substance but the delivery was "listless and halting." (*DuBay* Concl. of Law 5.) LT Sylvan's co-counsel described the opening as "halting and disorganized" and privately told him afterwards to get his act together. (*DuBay* FOF 254; *DuBay* R. at 599-601.) Captain Erin Stone, JAGC, USN, observing him on

her first day as Commanding Officer of Defense Service Office (DSO) North, was immediately concerned after seeing his opening statement. (*DuBay* FOF 215-17; *DuBay* R. at 512-13.) She directed leadership to stay in the courtroom for the rest of the trial and that he receive remedial training before being allowed in the courtroom on another case. (*DuBay* FOF 217-18; *DuBay* R. at 513.)

LT Sylvan's performance issues continued beyond the opening statement. Even his co-counsel agreed his extreme anxiety made him come across as unprepared throughout the trial. (*DuBay* FOF 248, 255; *DuBay* R. at 589, 601.) LT Sylvan struggled to think on his feet and labored over every question. (*DuBay* FOF 192; *DuBay* R. at 478-49.) Indeed, Commander (CDR) Maule, executive officer for DSO North, observed parts of the trial and was amazed there was often up to a sixty second delay between the delivery of a witness' answer and LT Sylvan's next question. (*DuBay* FOF 159; *DuBay* R. at 391.) LT Sylvan himself admitted he had grave difficulty keeping up with the pace of direct testimony in the case and this precluded him from making a proper determination as to what issues he wished to attack on cross-examination. (*DuBay* FOF 50; *DuBay* R. at 140-41.)

Furthermore, TDC were often not ready to question or cross-examine witnesses. (R. at 546, 707, 852.) TDC asked

for multiple, lengthy recesses to the point that they drew the ire of the military judge who noted he had been "very patient" with them. (R. at 642.) These lengthy recesses broke up the presentation of evidence and disjointed their choppy performance even further.

LT Sylvan's delivery must have affected the members. CDR Chrisfield, senior defense counsel for DSO North, saw much of the trial and was convinced that LT Sylvan's performance problems were severe enough that the members noticed his difficulties. (*DuBay* FOF 194; *DuBay* R. at 481.) LT Sylvan himself also believes that his inability to deal with the pace and fluidity of the court-martial was truly detrimental the case. (*DuBay* FOF 91; *DuBay* R. at 290.) For example, he stated that when the Government failed to call Special Agent Biesisi as a witness, his strategy fell apart and he became completely flustered. (*DuBay* FOF 28, 29; *DuBay* R. at 70-73.)

Adding to LT Sylvan's performance problems was his inadequate understanding of the rules of evidence. For example, he did not know how to cross-examine MIDN 3/C XM about a prior inconsistent statement despite being given the sequence of questions by senior defense counsel, (*DuBay* FOF 193; *DuBay* R. at 479-80; R. at 564), he asserted MIDN 3/C XM was a party-opponent and offered her out-of-court statement for the truth of the matter asserted, (R. at 789), he asked a

question that elicited triple hearsay, (R. at 799-809), he attempted to use the rule of completeness to enter a document that had not been previously entered, (R. at 961), and he did not know the rule of evidence that permits evidence of a pattern of lying. (R. at 573-75.)

In some of the noted instances, the evidence ultimately came in, often through the assistance of the military judge. However, at the *DuBay* hearing, LT Sylvan testified that his unfamiliarity with the Military Rules of evidence kept him from illustrating important facts to the members. (*DuBay* FOF 31; *DuBay* R. at 78.) Although some, but not all, of the evidence may have ultimately been received, the broken and disjointed presentation of the case likely negatively affected their opinion of MIDN 3/C Edmond's case.

In short, TDC lost credibility in front of the members, which ultimately trickled down to prejudice MIDN 3/C Edmond.

F. TDC Performed Deficiently by Failing to Sufficiently Make a Motion to Suppress and by Waiving the Issue of Multiplicity

Because TDC failed to present the basic facts in his motion to suppress the first statement MIDN 3/C Edmond made to NCIS, the military judge denied the motion. If this evidence had been suppressed, the false official statement charge would have been unsupported, and MIDN 3/C Edmond's credibility would not have been harmed in front of the members.

When a claim of ineffective assistance of counsel is premised on counsel's failure to make a motion, an appellant must show that there is a reasonable probability that such a motion would have been meritorious. *United States v. Jameson*, 65 M.J. 160, 163-64 (C.A.A.F. 2007) (citing *McConnell*, 55 M.J. at 482). That standard is met here.

1. Trial Defense Counsel was Deficient in his Motion to Suppress MIDN 3/C Edmond's First Statement to NCIS.

TDC filed a motion to suppress MIDN 3/C Edmond's first and second statements to NCIS. (Appellate Ex. XIV.) But he failed to adequately support his motion to suppress the first statement despite the availability of evidence. In the written motion he noted he would call Aviation Structural Mechanic Senior Chief (AMCS) Winn. (Appellate Ex. XIV. at 5), but at the motion session, TDC did not put forth any witnesses of his own. R. at 63. The only evidence TDC offered was an interview log and MIDN 3/C Edmond's statements to NCIS, but this evidence did not support suppression. (Appellate Ex. XIV.)

Then, during argument to suppress MIDN 3/C Edmond's first statement to NICS, TDC tried to argue the culture of the academy created an atmosphere of forced compliance on MIDN 3/C Edmond's part. (R. 69-70.) But the military judge quickly cut him off because he failed to enter any evidence of that

culture for the court's consideration. (R. 69-70.) In fact, there was no evidence before the Court to support TDC's argument to suppress the first statement to NCIS. Consequently, the military judge denied his motion to suppress it. (R. at 189.)

If TDC had presented the following readily available evidence of compulsion from MIDN 3/C Edmond's superiors, there is a reasonable probability that his motion to suppress the first statement would have been successful. On 3 November 2010, MIDN 3/C Edmond was summoned by an upperclassman to Captain Manning's office where she and AMCS Winn were present. (R. at 977.) AMCS Winn was the Senior Enlisted Leader, which was the immediate superior in MIDN 3/C Edmond's chain of command. (R. at 887-89.) Capt Manning, USMC, the Company Officer, was immediately superior to AMCS Winn and the two ran the Company as a team. (R. at 889.)

AMCS Winn testified that while MIDN 3/C Edmond was in the Company Officer's office, "[w]e told him he had to go to NCIS and answer some questions for them." (R. at 11.) AMCS Winn then had the Company's Conduct Officer immediately escort MIDN 3/C Edmond to NCIS. (R. at 978-79.) The escort stayed throughout the interview and MIDN 3/C Edmond was "released" to him at the conclusion of the interview. (R. at 43.)

Applying these facts, which TDC failed to present, to the law, it is clear that there was at least a reasonable probability that MIDN 3/C Edmond's first statement would have been suppressed.

Statements that are the product of coercion, either physical or psychological, cannot stand. *Rogers v. Richmond*, 365 U.S. 534, 540 (1961). The determination of whether a statement is voluntary is based upon the totality of the circumstances. *See United States v. Bubonics*, 45 M.J. 93, 95 (C.A.A.F. 1996). The necessary inquiry is whether the confession is the product of an essentially free and unconstrained choice by its maker. *Id.* "When the authorities have 'overborne' the maker's will or 'critically impaired' his 'capacity for self-determination,' use of the confession in a court-martial would offend due process." *United States v. Mason*, 48 M.J. 946, 950 (N-M. Ct. Crim. App. 1998) (quoting *Bubonics*, 45 M.J. at 95). "Both the subtleties of the superior-subordinate relationship and the conditioned response, consciously created from the first day of basic training, to respond almost unthinkingly to the wishes of a military superior can permit no other result." *United States v. Ravenel*, 26 M.J. 344, 349 (C.M.A. 1988).

MIDN 3/C Edmond was an inexperienced nineteen year-old Midshipman with less than two years of service exclusively in

training environments. (R. at 54, 552-53.) This made him act in a way described in *Bubonics* where he was "conditioned . . . to respond with discipline to figures of authority." *Bubonics*, 45 M.J. at 95. MIDN 3/C Edmond, told by his immediate superior, AMCS Winn, to make a statement, was escorted to NCIS by the Company's Conduct Officer, and he obeyed and went to NCIS to make a statement. He asked no questions about the waiver or oath or process. (R. at 41.) In his naïve and conditioned state, he obeyed AMCS Winn and spoke to NCIS.

MIDN 3/C Edmond's statement was not an essentially free and unconstrained choice. The outcome was determined before he set foot in NCIS. The use of the first statement, therefore, offends the notions of Due Process and TDC was deficient in failing to bring forth available facts to allow the court to properly consider the question. There is a reasonable probability that had TDC supported his motion with these facts, the military judge would have suppressed MIDN 3/C Edmond's first statement to NCIS.

2. TDC was Deficient in Waiver of the Issue of Multiplicity.

The Military Judge *sua sponte* raised with counsel whether Specifications 3, 4, and 5 of Charge II were lesser-included offenses of Specifications 1 and 2 of Charge II. (R. at

1186.) As the military judge later noted, Specifications 3, 4, and 5 were clearly "the same people, same acts, same time, same place" as the greater offenses in Specifications 1 and 2 of Charge II. (R. at 1219.)

After findings, TDC should have moved for the dismissal of the aggravated sexual assault and wrongful sexual contact charges because they were the lesser-included offenses of rape by force and thus multiplicious with that charge. Defense, however, agreed with the Government that they were not lesser-included offenses and did not make a motion to dismiss. (R. at 1187-88.) Had defense counsel made the proper multiplicity motion, there is a reasonable probability it would have been granted.

In looking at the issue of multiplicity, "if a court, *contrary to the intent of Congress*, imposes multiple convictions and punishments under different statutes for the same act or course of conduct," the court violates the Double Jeopardy Clause of the Constitution. *United States v. Teters*, 37 M.J. 370, 373 (C.M.A. 1993). Absent a clear expression of Congress' intent in the legislative history, intent is determined using the separate elements test established in *Blockburger v. United States*. *Blockburger v. United States*, 284 U.S. 299, 304 (1932). In so doing, both the statute and the specifications are examined to determine the essential

elements of each offense. *United States v. Weymouth*, 43 M.J. 329, 333 (C.A.A.F. 1995).

The military judge correctly determined that the specifications involved the same acts, time, and people. Looking at the elements of the two crimes, it becomes clear that it would be impossible to prove the force required for the greater offense of rape by force without also proving the bodily harm, wrongfulness and lack of permission required for the lesser-offenses of aggravated sexual assault and wrongful sexual contact.

Force is defined as "action to compel submission of another or to overcome or prevent another's resistance." Article 120(a)(t)(5), UCMJ. Applying the common and ordinary understanding of these words, an allegation that a victim is compelled to submit to sexual acts by force sufficient so she cannot escape clearly includes as a subset that there is bodily harm and that victim is not consenting. Therefore, the element of force in the charged offense necessarily includes the elements of bodily harm for the lesser-offense of aggravated sexual assault and lack of permission in the lesser-offense of wrongful sexual contact.

Further, in *United States v. Alston*, the CAAF found that although not listed in the Manual as a lesser-included offense, under some circumstances, aggravated sexual assault

can be a lesser-included offense of rape by force if the factual circumstances underlying the offenses are the same. *United States v. Alston*, 69 M.J. 214, 216-17 (C.A.A.F. 2010). Moreover, while not controlling on this issue, the Manual supports instructing on wrongful sexual contact as a lesser-included offense of aggravated sexual contact depending on the facts and circumstances of the case. MCM, Part IV, ¶ 45.e.(5)(a) (2008 ed.). TDC was deficient in conceding that these were not lesser-included offenses, and in failing to move for Specifications 3, 4, and 5 of Charge II to be dismissed as multiplicous of specifications 1 and 2. There is a reasonable probability that had he made this motion, it would have been granted.

3. TDC's Overall Motion Practice was Deficient.

MIDN 3/C Edmond concedes that there is not enough in the record to argue that the following motions would have been successful; however, MIDN 3/C Edmond highlights the following instances of TDCs' failure to litigate and follow-up on potentially important issues as substantiation of his claim of his counsel's overall deficient performance and of their enumerated deficiencies.

TDC filed a discovery motion for medical records inside a motion for continuance. (R. at 182.) TDC then tried to

orally make the motion, to which the military judge responded "I'm not-I'm not going to take a motion that isn't supported by facts." (*Id.*) He also filed three motions that the military judge noted were not in compliance with the circuit rules. (R. at 1416.)

TDC also abandoned a motion to compel appointment of a Naval Academy graduate as Individual Military Counsel (IMC) after his original request for someone, who by the rules was unavailable, was denied. (R. at 18; Request for Individual Military Counsel ICO MIDN 4/C Patrick G. Edmond, USN, Ser 5817 of 31 May 2011.) After abandoning the motion, TDC did not pursue the expertise he knew he needed. (*DuBay* FOF 53; *DuBay* R. at 148-49.) Indeed, LT Sylvan himself felt he was not competent to handle the case, but after attempting to find an individual military counsel for months, he gave up because he felt the new counsel would not be able to get up to speed. (*DuBay* FOF 53, 71; *DuBay* R. at 148-49, 196.)

TDCs' motion practice was clearly deficient, and his failure to advance MIDN 3/C Edmond's interests through motions practice kept multiple charges on the table that should have been dismissed.

G. Trial Defense Counsel Was Ineffective During his Sentencing Argument

In *United States v. Quick*, the CAAF held that counsel performs deficiently within the meaning of *Strickland* when they improperly concede the appropriateness of a discharge if the record shows that this concession is against the wishes of the client. *United States v. Quick*, 59 M.J. 383, 386 (C.A.A.F. 2004) (citing *United States v. Dresen*, 40 M.J. 462, 465 (C.M.A. 1994)).

During his sentencing argument TDC asked the members for a dismissal despite his client indicating during his testimony that he wanted to stay in the military. (R. at 1314-15.) The military judge then instructed the members that TDC did not mean what he said and gave TDC a "do-over" of his argument on sentencing. (R. at 1319-20.) Despite this extra bite at the apple, TDC again acted contrary to his client's interest. The second time , rather than arguing for retention, TDC again conceded the appropriateness of the discharge by saying that MIDN 3/C Edmond wanted to stay in the Navy but said that MIDN 3/C Edmond understood that staying in may no longer be possible. (R. at 1319-20.)

Trial defense counsel was clearly within the proscription of *Quick* in this regard and thus performed deficiently.

H. Trial Defense Counsel's Performance was Cumulatively Deficient

"Prejudice may result from the cumulative impact of multiple deficiencies." *Harris v. Wood*, 64 F.3d 1432 (9th Cir. 1995) (citing *Cooper v. Fitzharris*, 586 F.2d. 1325, 1333 (9th Cir. 1978) (en banc)); *see also United States v. Loving*, 41 M.J. 213, 252 (C.A.A.F. 1994). For example, in *Harris v. Wood*, the Ninth Circuit found cumulative error in the defense counsel's following deficiencies:

> (1) failure to investigate and prepare adequately for trial;
> (2) failure to consult adequately with the client;
> (3) failure to investigate adequately the client's mental and emotional status;
> (4) failure to challenge the admissibility of the client's statements made before October 22, 1984, regarding the events of the murder;
> (5) failure to conduct proper voir dire;
> (6) failure to object to evidence;
> (7) failure to propose, or except to, jury instructions;
> (8) failure to raise or preserve meritorious issues in appellate proceedings;
> (9) advice to make statement to prosecutor;
> (10) decision to call the client to testify at trial; and
> (11) closing argument in the guilt phase.

Harris, 64 F.3d at 1438.

Seven of the defense counsel's deficiencies in *Harris* are similar claims of deficiencies that MIDN 3/C Edmond raises here.[4] Accordingly, TDC should be found similarly deficient. Indeed, the *DuBay* judge found-without question-that TDC errors

[4] MIDN 3/C Edmond concedes the inapplicability of reasons 7, 8, 9, and 11 to his case.

amounted to cumulative error that was sufficiently prejudicial to render the verdict unsafe. (*DuBay* Concl. of Law 10.)

1. *The Polk Factors Favor Finding Cumulative Error*

Looking at the specific instances of deficiency outlined above, and the three factors identified in *United States v. Polk*, MIDN 3/C Edmond has clearly demonstrated that the presumption of competence was overcome in this case by the culmination of the errors. *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991). In *Polk* the Court of Military Appeals identified a three-pronged test to determine if the presumption of competence has been overcome:

> (1) Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions[?]";
>
> (2) If the allegations are true, did defense counsel's level of advocacy fall "measurably below the performance . . . [ordinarily expected] of fallible lawyers[?]"; and
>
> (3) If defense counsel were ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result?

Polk, 32 M.J. at 153.

As to the first *Polk* factor, the record and the *DuBay* hearing substantiated MIDN 3/C Edmond's claims. And the *DuBay* record demonstrates that there is no reasonable explanation for counsels' actions. LT Sylvan, in his post-trial clemency submission acknowledged that he was in over his head on this

case; and his court-ordered affidavit does not offer any strategic reasoning for the deficient performance. (Clemency of 25 Mar 13 at Enclosure (1) (Letter in Support of Clemency ICO Midshipman Patrick G. Edmond).) LT Sylvan's testimony at the *DuBay* hearing was consistent with this. (*DuBay* FOF 91; *DuBay* R. at 290.)

As to the second factor, the number and the severity of TDC's mistakes fell "measurably below the performance" ordinarily expected of fallible lawyers. The reaction of the chain of command to his performance-instituting a new training program, requiring all motions to go through supervisors, and requiring LT Sylvan himself to go through remedial training-all signal how badly the trial went. (*DuBay* FOF 196, 206, 216; *DuBay* R. at 483, 499, 513.)

As for the third *Polk* factor, there is a reasonable probability that there would have been a different result absent the errors. The discussion of prejudice below ties into this factor.

2. TDC's Deficient Performance Resulted in the Denial of a Fair Trial

The appellant must demonstrate such prejudice as to indicate a denial of a fair trial or a trial whose result is unreliable. *United States v. Dewrell*, 55 M.J. 131, 133 (C.A.A.F. 2001). The appropriate test for prejudice under

Strickland is whether there is a reasonable probability that, but for counsel's error, there would have been a different result. *Quick*, 59 M.J. at 387.

If cumulative prejudice is found there is no need to analyze the individual prejudicial effect of each deficiency. *Harris*, 64 F.3d at 1439. TDC's actions here amount to cumulative prejudice. Because the number of the errors and the gravity of the errors in this case are comparable to *Harris*, this Court should find prejudice.

However, if the Court does not agree as to cumulative error, many of TDC's actions and inactions were sufficiently prejudicial as described above in the individual sections outlining the errors. Most of the deficiencies boil down to the negative effects on MIDN 3/C Edmond's credibility that TDC created. When credibility is the key to a case, trial defense counsel's deficiencies that directly affect credibility establish prejudice. *Gibson*, 51 M.J. at 198.

In this case, credibility was the crux of the Government's case as evidenced by the Government's closing: "Let's look at who has more credibility infractions, the accused or Midshipman [XM]?" (R. at 1167.) Trial counsel then listed all of MIDN 3/C Edmond's credibility issues in argument and in a visual slide shown to the members. (R. at 1167-72; Appellate Ex. LVII.) TDC missed many opportunities

to cross-examine MIDN 3/C XM with inconsistent testimony, failed to use other witnesses to bring out inconsistent testimony, and bolstered MIDN 3/C XM's credibility in the words he used to describe the sexual encounter and her actions. Further, his affirmative acts of putting MIDN 3/C Edmond on the stand and his questions to Midshipman 3/C Dolce reduced MIDN 3/C Edmond's credibility in the mind of the members. Additionally, the credibility of Nurse Boal was also very much at issue, and TDC knowingly failed to use his opportunity to bring out her "over charting" and her prior conviction for a forgery.

TDC's lack of preparation and numerous evidentiary difficulties interrupted the flow of the trial and affected the presentation of evidence. The unfocused and broken-up presentation made the poor case they presented even less compelling. The members were not unaffected by TDC's poor presentation of the case. Two wrote letters in support of clemency. (Letter in Support of Clemency[sic] Request ICO MIDN 3/C Patrick Edmond of 23 Mar 2012; Clemency Letter of Captain Roger Isom, USN, ICO U.S. versus MIDN Patrick G. Edmond of 25 Mar 2012.) More importantly, one member, LT Allison Keller, USN, wrote a letter indicating that she supports reconsidering this case based on the ineffective

representation. (Letter in Support of Clemency[sic] Request ICO MIDN 3/C Patrick Edmond of 23 Mar 2012.)

Finally, MIDN 3/C Edmond asserts his right to speedy post-trial review. His case was tried in September 2011. It is almost three years later and he asks this Court to act with proper speed to remedy the almost three years he has wrongly been labeled a felon and sexual offender.

Conclusion

This Court should find that TDC performed deficiently and that their deficiencies materially prejudiced MIDN 3/C Edmond. Because of the ineffective assistance of counsel, the findings and sentence should be set aside.

CARRIE E. THEIS
Lieutenant, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris St, SE
Bldg 58, Ste. 100
Washington Navy Yard. D.C. 20374
Tel: (202) 685-7390
Fax: (202) 685-7426

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

HS, Lieutenant (O-3) Dental Corps, U.S. Navy Petitioner	)	PETITION FOR EXTRAORDINARY RELIEF IN THE FORM OF A WRIT OF MANDAMUS
v.	)	Case No. _____
Nicole HUDSPETH, Lieutenant Colonel (O-5) U.S. Marine Corps, In her official capacity as Military Judge Respondent	)	
and	)	
Blake ENTRALGO, Lieutenant (O-3) Dental Corps, U.S. Navy Real Party in Interest	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

PATRICK KORODY
LIEUTENANT COMMANDER, U.S. Navy
Victim's Legal Counsel
Building 1, Naval Station Mayport
Jacksonville, FL 32228
Phone (904) 270-5191, x 1213
patrick.korody@navy.mil

SAMUEL C. MOORE
Counsel for Petitioner
815 King St., Suite 210
Alexandria, VA 22314
Phone (703) 535-7809
Fax (703) 997-5666
scmoore@scmoorelaw.com

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APPENDIX

A. “Navy Creates Victims’ Legal Counsel,” Defense Media Activity-Navy, dated August 9, 2013.

B. VLC Notice of Representation of October 31, 2013.

C. VLC Notice of Appearance of November 4, 2013.

D. VLC email requesting information of November 4, 2013.

E. Defense Motion under Mil. R. Evid. 412 of November 8, 2013.

F. Defense Motion under Mil. R. Evid. 513 of November 8, 2013.

G. LT HS FOIA and PA request of November 14, 2013.

H. VLC Amended Request for Continuance of Article 39(a) of November 15, 2013.

I. Military Judge Ruling on VLC Request for Continuance dtd November 21, 2013.

J. VLC Response to Defense Motion under Mil. R. Evid. 412 of November 21, 2013.

K. VLC Response to Defense Motion under Mil. R. Evid. 513 of November 21, 2013.

L. Government Response to Defense Motion under Mil. R. Evid. 412 of November 22, 2013.

M. Government Response to Defense Motion under Mil. R. Evid. 513 of November 22, 2013.

N. VLC email requesting decision on FOIA/PA request of December 2, 2013.

O. Commander, 2d MLG response to LT HS FOIA/PA request of December 4, 2013.

P. VLC Motion for Materials Necessary to Exercise Rights of December 6, 2013.

Q. Government Response to VLC Motion for Materials Necessary to Exercise Rights of December 11, 2013.

R. Cleansed Charge Sheet.

S. Defense attachment – Mil. R. Evid. 513 Motion.

T. Military Judge email regarding written rulings of December 16, 2013.

U. VLC Motion for Delay of Review of Mental Health Records of December 26, 2013.

V. Military Judge email responding to VLC Motion for Delay of Review of Mental Health Records of December 27, 2013.

W. Military Judge Order to Conduct *Ex Parte* 39(a) of December 30, 2013.

Preamble

Lieutenant HS, Dental Corps, United States Navy, respectfully requests that this Court instruct the Trial Court to provide LT HS with meaningful notice and afford her a meaningful opportunity "to be heard" prior to public disclosure of intimate details of her private sexual history and confidential mental health communications. To enforce her right to receive meaningful notice and to be afforded a meaningful opportunity "to be heard" under Military Rules of Evidence (Mil. R. Evid.) 412 and 513, LT HS asks this Court to issue a stay of the trial proceedings in the general court-martial of *United States v. Entralgo*, to set aside the Trial Court's rulings of December 16, 2013, made under Mil. R. Evid. 412 and 513, and to direct the Trial Court to provide LT HS investigative materials relevant to the motions and responses made by the Parties under Mil. R. Evid. 412 and 513.

LT HS is not seeking "discovery" as a matter of right simply because her name appears on the charge sheet or access to all investigative materials in the case. However, when the Parties intend to publicly disclose intimate details of her private sexual history and seek to produce confidential mental health communications, the Mil. R. Evid., constitutional due process, and the right to be treated with fairness and respect for dignity and privacy require that she receive meaningful

notice and be afforded a meaningful opportunity “to be heard” at an evidentiary hearing prior to such disclosure. An alleged victim or patient is deprived of these rights when he or she is unable, because of a lack of investigative materials, to make an informed decision as to whether to exercise the opportunity “to be heard” and, if necessary, to prepare to and actually exercise that right by presenting facts and legal argument.

LT HS asks this Court to provide her more than the bare notice and hollow opportunity “to be heard” that she was given by the Trial Court. This Court should find that the right to receive notice and to be afforded an opportunity “to be heard” includes the right to an even playing field where all participants at the Mil. R. Evid. 412 and 513 evidentiary hearing have access to the relevant investigative materials.

History of the Case

The Government preferred charges against LT Entralgo on an unknown date alleging violations of Articles 120 and 134, Uniform Code of Military Justice (UCMJ). The Government preferred an Additional Charge alleging a violation of Article 133, UCMJ, on an unknown date. The Charges and Additional Charge name LT HS as the victim.

An Article 32, UCMJ, investigation was held in July 2013, and LT HS testified as a witness. The Charges and Additional Charge were referred for trial by general court-martial at an

unknown date. Arraignment in the case of *United States v. Entralgo* was held on an unknown date. An Article 39(a) session was held on December 16, 2013, to address pretrial motions, and trial on the merits is scheduled to commence on January 26, 2013.

Jurisdictional Statement

This Court has jurisdiction to issue all writs necessary or appropriate in aid of its existing statutory jurisdiction. 28 U.S.C. § 1651(a) (2006); *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999); *Loving v. United States*, 62 M.J. 235, 239 (C.A.A.F. 2005). The All Writs Act provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

Specific Relief Sought

Petitioner seeks a Stay until this Court rules on this Petition and Petitioner seeks a Writ of Mandamus setting aside the Trial Court's rulings of December 16, 2013, under Mil. R. Evid. 412 and 513, and directing the Military Judge to order the United States to provide LT HS investigative materials that are relevant to the motions made under Mil. R. Evid. 412 and 513.

Issue Presented

WHETHER THE MILITARY JUDGE ERRED BY DENYING LT HS'S REQUEST FOR INVESTIGATIVE MATERIALS THAT ARE RELEVANT TO MOTIONS MADE UNDER MIL. R. EVID. 412 AND 513 THEREBY DEPRIVING LT HS OF HER RIGHT TO RECEIVE MEANINGFUL NOTICE AND A MEANINGFUL OPPORTUNITY TO BE HEARD UNDER THE MILITARY RULES OF EVIDENCE.

Statement of Facts

LT HS made an unrestricted report of sexual assault to authorities on or about October 28, 2012. LT HS reported that Lieutenant Blake D. Entralgo, Dental Corps, United States Navy, sexually assaulted her in his vehicle outside a Halloween party at the home of another Naval officer at or near Jacksonville, North Carolina in the early morning hours of October 28, 2012. The Naval Criminal Investigative Service (NCIS) assumed investigative jurisdiction of the case and conducted an extensive investigation into the allegations made by LT HS.

An investigation pursuant to Article 32, UCMJ, was held in July 2013. LT HS testified at the investigation, but she was not present for the testimony of any other witnesses, including LT Entralgo, who testified under oath.

In October 2013, the United States Navy, at the direction of the Secretary of Defense, created the Victims' Legal Counsel Program to provide legal representation, advice, and assistance to eligible victims of sexual assault. (Appendix A.) Lieutenant Commander Patrick K. Korody, JAGC, USN, was detailed

as Victims' Legal Counsel (hereinafter "VLC") for LT HS on October 31, 2013. VLC provided notice of representation to the United States and Civilian Defense Counsel that same day. (Appendix B.) Trial Counsel informed VLC that the case was pending trial by general court-martial in the Eastern Judicial Circuit, Navy-Marine Corps Trial Judiciary. On November 4, 2013, VLC entered a notice of appearance in the case of *United States v. Entralgo*. (Appendix C.) On November 4, 2013, VLC requested via email that Trial Counsel provide him copies of a redacted charge sheet and any statements made by his client. (Appendix D.) Trial Counsel never responded to this request in writing but indicated orally to VLC on several occasions that he was waiting to receive guidance from his superiors as to what, if any, materials could be provided to a VLC.

On or about November 8, 2013, Trial Counsel informed VLC that an Article 39(a), UCMJ, session was scheduled for December 10, 2013, at Camp Lejeune to hear pretrial motions. The next day, Trial Counsel forwarded copies of the Defense motions filed under Mil. R. Evid. 412 (Appendix E) and 513 (Appendix F) to VLC. The Defense motion under Mil. R. 412 included three redacted pages from a NCIS report of investigation as an attachment. The Defense motion under Mil. R. Evid. 513 did not include any attachments. On November 14, 2013, LT HS made a request to the General Court-Martial Convening Authority for investigative

materials in the case of *United States v. Entralgo* under the Privacy Act, 5 U.S.C. § 552a, and Freedom of Information Act (FOIA), 5 U.S.C. § 552. (Appendix G.)

On November 15, 2013, VLC requested a continuance of the Article 39(a) session because of planned OCONUS leave. (Appendix H.) The then-assigned Military Judge granted VLC's request for a continuance on November 21, 2013, and the Article 39(a) was re-scheduled for December 16, 2013. (Appendix I.) On November 21, 2013, LT HS, through VLC, filed responses to the defense motions under Mil. R. Evid. 412 (Appendix J) and Mil. R. Evid. 513 (Appendix K). VLC indicated in a footnote that LT HS and he were disadvantaged in responding to the motions because the United States had refused to provide copies of requested investigative materials and a copy of the charge sheet. On November 22, 2013, the United States filed its responses to the defense motions under Mil. R. Evid. 412 (Appendix L) and Mil. R. Evid. 513 (Appendix M). VLC was provided copies of these responses. The responses did not include any supporting evidentiary documents.

On December 2, 2013, having received no response to his repeated requests for investigative materials, VLC sent an email to Trial Counsel indicating that if VLC did not receive a response to LT HS's Privacy Act and FOIA request within 48 hours, LT HS may seek other avenues of redress, including contacting

her congressional representatives. (Appendix N.) On December 4, 2013, the General Court-Martial Convening Authority responded to LT HS's request: he released a copy of the standing general court-martial convening order and denied the remainder of the request. (Appendix O.)

On December 6, 2013, LT HS, through counsel, filed a motion to compel the United States to provide LT HS investigative material necessary for her to exercise the legal rights afforded to her as an alleged victim and patient in the military justice system under Mil. R. Evid. 412 and 513. (Appendix P.) On December 11, 2013, the United States filed a motion asking the court to deny the VLC motion. (Appendix Q.) The defense did not file a pleading in response to this VLC motion.

On December 16, 2013, LT HS and VLC appeared via video teleconferencing at the Article 39(a) session in the case of *United States v. Entralgo* from Naval Station Mayport, Florida. The parties and the Military Judge were in a military courtroom on-board Camp Lejeune, North Carolina. Lieutenant Colonel Nicole K. Hudspeth, United States Marine Corps, was detailed as the new military judge.

The Military Judge first heard LT HS's motion to compel the United States to provide material necessary for her to exercise her legal rights under Mil. R. Evid. 412 and 513. The Military Judge asked VLC to present evidence on the motion. VLC

responded that the precise issue was that the United States had refused to provide any investigative materials to LT HS and, therefore, he had no evidence. The Military Judge ruled from the bench that LT HS, as the moving party, had the burden of proof on the motion. After hearing argument, the Military Judge ruled from the bench and denied the motion because LT HS had failed to demonstrate "necessity." The Military Judge stated that she saw "no harm" in providing LT HS a copy of the cleansed charge sheet and ordered the United States to do so. The charge sheet was provided to VLC by Trial Counsel the following day. (Appendix R.)

The next motion addressed by the Military Judge was the defense motion under Mil. R. Evid. 412. Neither the United States nor the defense presented any evidence to the court, other than the three (3) pages of investigative materials attached to the Defense motion. LT HS chose to testify regarding specific sexual behavior alleged by the Defense in its motion; the Defense alleged that LT Entralgo and LT HS had a "flirtatious interaction" on the front porch of the house where the Halloween party took place prior to the alleged sexual assault. LT HS testified under oath that no such interaction on the front porch took place. The materials attached to the defense motion did not address this specific sexual behavior.

The Military Judge and the parties alluded that this proffered interaction had been discussed previously at a prior Article 39(a) session or Rule for Courts-Martial (R.C.M.) 802 conference—LT SH was not present for this session—and that she would accept the proffers of the parties. LT HS has never received any investigative materials that would support a basis to believe that this alleged flirtatious interaction took place. After argument by the parties and VLC on behalf of LT HS, who opposed admitting such evidence, the Military Judge ruled from the bench that evidence of the proffered "flirtatious interaction" was admissible at trial. The Military Judge made additional rulings from the bench pertaining to other evidence of LT HS's sexual predisposition and prior sexual behavior that the Defense sought to admit.

The next motion addressed by the Military Judge was the defense motion to under Mil. R. Evid. 513 to compel production of LT HS's mental health records. The defense introduced a document (Appendix S)[1] at the hearing that listed prescription drugs filled by LT HS; the Military Judge ordered the United States to forward the document to VLC during a recess. After argument by the Parties and VLC on behalf of LT HS, who opposed production, the Military Judge, from the bench, ordered production of LT HS's mental health records in the possession of

[1] This document was not redacted when received by VLC.

a civilian provider for an *in camera* review. The records were to be provided to the Military Judge by December 27, 2013.

On December 16, 2013, VLC requested copies of the Military Judge's written rulings relating to the VLC motion for investigative materials, the Mil. R. Evid. 412 motion, and the Mil. R. Evid. 513 motion; the Military Judge responded that she would not be drafting written rulings. (Appendix T.)

On December 26, 2013, VLC made a motion to delay the production of LT HS's mental health records to the Military Judge for an *in camera* review. (Appendix U.) The Military Judge responded that she had already reviewed the material. (Appendix V.) On December 30, 2013, the Military Judge ordered an *ex parte* Article 39(a) for Monday January 6, 2014. (Appendix W.) The Military Judge further noted that she had already decided that parts of the records were admissible and will be turned over to the defense counsel, but she would allow LT SH and her VLC to make argument on whether the Military Judge should disclose additional parts of the privileged records.

Reasons Why the Writ Should Issue

A WRIT OF MANDAMUS IS APPROPRIATE BECAUSE THE MILITARY JUDGE DENIED LT HS THE ABILITY TO EXERCISE HER RIGHTS IN A MEANINGFUL WAY—CONTRARY TO THE RULES, *KASTENBERG*, DUE PROCESS, AND FAIRNESS—WHEN THE MILITARY JUDGE REFUSED TO ORDER THE DISCLOSURE OF RELEVANT INVESTIGATIVE MATERIALS.

A. This Court has jurisdiction over this writ because it is "in aid of" the Court's jurisdiction and the harm alleged has the potential to affect the findings and sentence.

The petitioner must meet two conditions before this court may provide extraordinary relief in the form of a writ of mandamus: (1) the writ must be "in aid of" the court's existing jurisdiction; and (2) the writ must be "necessary and appropriate." *Denedo v. United States*, 66 M.J. 114, 119 (C.A.A.F. 2008); *see also Cheney v. United States Dist. Court*, 542 U.S. 367, 380-81 (2004). As the Court of Appeals for the Armed Forces (CAAF) noted in *Denedo*, "in aid of" includes cases where a petitioner seeks to "modify an action that was taken within the subject matter jurisdiction of the military justice system." *Denedo*, 66 M.J. at 120.

This includes interlocutory matters where no finding or sentence has been entered. *LRM v. Kastenberg*, 72 M.J. 364, 368 (C.A.A.F. 2013); *see also Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012). The harm alleged must have the "potential to affect the findings and sentence." *Ctr. For Constitutional Rights v.*

United States (CCR), 72 M.J. 126, 129 (C.A.A.F. 2013) (citation omitted).

CAAF recently considered a similar question of whether a court of criminal appeals had jurisdiction to hear an alleged victim's interlocutory appeal from the military judge's ruling that limited the right to be heard under Mil. R. Evid. 412 and 513. *Kastenberg*, 72 M.J. at 368. The court held that the court of criminal appeals did have jurisdiction because the victim was "seeking to protect the rights granted to her by the President in duly promulgated rules of evidence, namely to a claim of privilege under M.R.E. 513 and a right to a reasonable opportunity to be heard under M.R.E. 412(c)(2) and 513(e)(2)." *Id.* Further, the military judge's ruling would affect the very foundation of the finding and sentence:

> The military judge's ruling has a direct bearing on the information that will be considered by the military judge when determining the admissibility of evidence, and thereafter the evidence considered by the court-martial on the issues of guilt or innocence ....

Id. Thus, CAAF concluded that the "CCA erred by holding that it lacked jurisdiction." *Id.* (citation omitted).

Similarly here, LT HS is seeking to protect the rights granted to her by the President in Mil. R. Evid. 412 and 513. The Military Judge's ruling limits her right to be heard and affects the very foundation of the findings and sentence in this

case. As with the court of criminal appeals in *Kastenberg*, this Court has jurisdiction because LT HS's petition is "in aid of" the court's jurisdiction and the harm alleged has the potential to affect the findings and sentence. LT HS is not a "stranger[] to the court-martial," *CCR*, 72 M.J. at 129, and she should not be treated as one.

B. LT HS has standing to protect the rights afforded to her, and the issue is ripe since the injury is taking place and will continue unless this Court issues a writ.

The holder of a privilege has a right to contest and protect the privilege, even where the holder is a nonparty to the court-martial. *Kastenburg*, 72 M.J. at 368 (citing "long-standing precedent" in the military justice system). Similarly, federal courts "have frequently permitted third parties to assert their interests in preventing disclosure of material sought in criminal proceedings or in preventing further access to material already so disclosed." *Id.* at 369 (quoting *United States v. Hubbard*, 650 F.2d 293, 311 n.67 (D.C. Cir. 1980) (citations omitted)).

Standing also requires a showing of injury-in-fact: "an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Clapper v. Amnesty Int'l. USA*, 133 S. Ct. 1138, 1147 (2013) (discussing standing in Article III courts).

That is, the issue must be ripe, which can be evidenced by a concrete ruling by the military judge in an adversarial setting. *United States v. Chisholm*, 59 M.J. 151, 153 (C.A.A.F. 2003).

Though she is a nonparty, the President provided LT HS rights and privileges in this court-martial in Mil. R. Evid. 412 and 513. She sought to exercise her rights at the court-martial, but the Military Judge's ruling denied LT HS access to the relevant investigative materials necessary to exercise these rights and privileges. In addition, since this ruling, the Military Judge has received the privileged records, and she has ruled that portions of the records will be turned over to the defense imminently.

LT HS is attempting to enforce her rights and protect her interests by preventing disclosure of privileged records and in preventing further public disclosure of the records already reviewed by the Military Judge. LT HS has standing to challenge the Military Judge's ruling—which denied her access to relevant investigative materials—and the issue is ripe since the injury is taking place and will continue unless this court issues a writ. *See Clapper*, 133 S. Ct. at 1147.

C. <u>The President afforded LT HS the right to receive notice and to be afforded the opportunity to be heard under Mil. R. Evid. 412 and 513</u>.

Mil. R. Evid. 412 is a rule of exclusion. Mil. R. Evid. 412(b) prescribes certain exceptions, however, that make

evidence of an alleged victim's prior sexual behavior and sexual predisposition admissible in a court-martial. A "party intending to offer evidence" under Mil. R. Evid. 412(b) must "file a written motion ... describing the evidence and stating the purpose for which it is offered" and "notify the alleged victim." Mil. R. Evid. 412(c)(1). Before admitting this evidence, the military judge must conduct a hearing and the "alleged victim must be afforded a reasonable opportunity to attend and be heard." Mil. R. Evid. 412(c)(2).

Mil. R. Evid. 513 affords similar rights to patients with respect to confidential mental health communications. The President prescribed that "a patient has a privilege to refuse to disclose and prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist." Mil. R. Evid. 513(a). Before a military judge pierces the psychotherapist-patient privilege and orders production or admits confidential psychotherapist-patient communications, the moving party must "notify the patient" and the patient "shall be afforded a reasonable opportunity to attend the hearing and be heard ...." Mil. Evid. 513(e)(1-2). In *Kastenberg*, CAAF considered these Rules and held that a "reasonable opportunity to be heard at a hearing includes the right to present facts and legal argument, and that a victim or patient who is represented through counsel be heard through

counsel." 72 M.J. at 370. The victim or patient's right, therefore, is not merely as a fact witness; instead, the right to be heard "includes through counsel on legal issues." *Id.* As the court noted, this is supported by statutory construction, military case law, and federal precedent. *Id*.

D. Mil. R. Evid. 412 and 513, *Kastenberg*, due process, and crime victim rights logically dictate that the right to receive notice and to be afforded the opportunity "to be heard" must include the right to be informed of the relevant facts and evidence and the positions of the parties.

LT HS, through counsel, is asking to receive meaningful notice and the meaningful opportunity "to be heard" on evidentiary issues impacting her privacy in this court-martial. But the Military Judge deprived LT HS of these rights when she denied LT HS's request for investigative materials that were relevant to motions made under Mil. R. Evid. 412 and 513. This violates the logical mandate of the Rules, *Kastenberg*, constitutional due process, and crime victim rights laws that require treating a victim with fairness and with respect for dignity and privacy.

1. The Rules logically require that the alleged victim or patient be informed of the relevant facts and evidence and legal positions of the parties to be able to meaningfully exercise his or her rights.

Mil. R. Evid. 412 and 513 are designed to protect an alleged victim's and a patient's privacy in the military justice system. Mil. R. Evid. 412 protects an alleged sexual assault

victim from unwarranted public intrusion into the victim's private life and thereby protects the alleged victim from embarrassment, humiliation, and further trauma. *See, e.g., United States v. Sanchez*, 44 M.J. 174, 177 (C.A.A.F. 1996).

Mil. R. Evid. 513 establishes a qualified patient-psychotherapist privilege in courts-martial to promote individual and social interests related to successful mental healthcare treatment. *See* Analysis of Mil. R. Evid. 513, Appendix 22, Manual for Courts-Martial (2012); *see also Jaffee v. Redmond*, 518 U.S. 1, 10 (1996) (examining analogous federal rule) ("[T]he mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.").

Even though there is no explicit language in the UCMJ, R.C.M., or Mil. R. Evid. requiring relevant investigative materials be provided to an alleged victim or patient, the plain meaning of Mil. R. Evid. 412 and 513 and use of the phrase "to be heard" in both the Mil. R. Evid. and the R.C.M. demonstrate that an alleged victim or patient must be informed of the relevant facts and evidence and legal positions of the parties.

Each and every time the phrase is used it refers to an occasion where the parties (through counsel) can provide argument to the military judge on a legal issue in which the parties are informed of the relevant facts and evidence and

legal positions. *See, e.g.*, R.C.M. 806(d), Discussion (parties have an opportunity to be heard before issues a protective order); R.C.M. 917(c) (parties have an opportunity to be heard regarding a motion for finding of not guilty); R.C.M. 920(c) (parties have an opportunity to be heard on the findings instructions); R.C.M. 920(f) (parties have an opportunity to be heard on objections to instructions); R.C.M. 1005(c) (parties have an opportunity to be heard on sentencing instructions); R.C.M. 1102(b)(2) (parties have an opportunity to be heard at post-trial 39(a) sessions); Mil. R. Evid. 201(e) (parties have an opportunity to be heard regarding judicial notice). At these discrete milestones in every trial, the parties have an opportunity "to be heard," and there is a logical and obvious requirement in law that the parties be informed of the relevant facts and evidence so as to be in a position to meaningfully exercise this right to present facts and legal argument to the court.

Like the parties to a court-martial, an alleged victim or patient with the opportunity "to be heard" must be informed of the relevant facts and evidence and legal positions of the parties to make an informed decision as to whether to exercise that right and, if necessary, to prepare to and actually exercise that right. The President promulgated Mil. R. Evid. 412 and 513 to specifically grant an alleged victim and a

patient procedural due process—the right to receive notice and to be afforded the opportunity "to be heard" at an evidentiary hearing prior to public disclosure of private and privileged information[2]; the President gave citizens like LT HS, who find themselves thrust into the military justice system, the right to present legal argument and facts because their privacy interests are at stake. This can only be accomplished—the rights only become meaningful—if the non-party with so much at stake is provided relevant information known by the parties. The Rules logically require that LT HS be provided relevant investigative materials when motions are filed under Mil. R. Evid. 412 and 513.

2. *Kastenberg* logically requires that an alleged victim or patient be informed of the relevant facts and evidence and legal positions of the parties to be able to meaningfully exercise his or her rights.

CAAF could not have imagined that an alleged victim or patient would be afforded the opportunity "to be heard" in a court-martial, especially through counsel, without the aid of a copy of the charge sheet, relevant investigative materials, and copies of the parties' pleadings. To the contrary, it necessarily and logically follows that a victim or patient must be informed of the relevant facts and evidence and legal

[2] In the case of Mil. R. Evid. 513, public disclosure occurs when mental health records or communications are made known to anyone, including the military judge, who is not the patient or psychotherapist.

positions of the parties in order to receive meaningful notice and to be afforded a meaningful opportunity "to be heard." A foundational requirement of the holding in *Kastenberg* is that an alleged victim or patient must be informed such that he or she would be able to present facts and legal argument, especially where interests were not aligned with trial counsel, at an evidentiary hearing. *See Kastenberg*, 72 M.J. at 371. This necessarily and logically requires that an alleged victim or patient be informed of the relevant facts and evidence and the legal positions of the parties under similar circumstances.

An alleged victim or patient who is provided mere notice that a party seeks to admit evidence under Mil. R. Evid. 412 or 513 but not a copy of the parties' pleadings will not know what evidence or legal arguments will be addressed at the hearing. An alleged victim or patient who is unaware of the parties' legal positions and theory of admissibility or production is unable to make it known whether his or her interests are aligned with or opposed to those of trial counsel and unable to present legal argument. An alleged victim or patient who is denied access to relevant witness statements, forensic reports, and other investigative materials known by the parties but unknown to the alleged victim or patient is unable to review the merits of a party's position, much less prepare to call witnesses and present evidence at a hearing.

It is illogical to provide an alleged victim or patient the right to receive notice and the opportunity "to be heard" on complex legal issues but fail to provide him or her with the information necessary to present facts and legal argument. Thus, an alleged victim or patient who is not informed is denied notice and the opportunity "to be heard."[3]

3. Due process logically requires that an alleged victim or patient be informed of the relevant facts and evidence and legal positions of the parties to be able to meaningfully exercise his or her rights.

The right to receive notice and to be afforded the opportunity "to be heard" in the context of Mil. R. Evid. 412 and 513 are not intended to be hollow rights; instead, these rights, when interpreted through the lens of basic constitutional due process, are extremely meaningful. In

[3] CAAF did not order the lower court to provide investigative materials to the alleged victim in *Kastenberg*. 72 M.J. at 372 ("However, while this Court may appropriately take action at this time, a writ of mandamus is not the appropriate remedy. At the lower court, LRM petitioned for a writ of mandamus directing the military judge 'to provide an opportunity for [LRM] to be heard through counsel at hearings conducted pursuant to [M.R.E.] 412 and 513, and to receive any motions or accompanying papers reasonably related to her rights as those may be implicated in hearings under [M.R.E.] 412 and 513.' The military judge's ruling must be based on a correct view of the law. M.R.E. 412 and M.R.E. 513 create certain privileges and a right to a reasonable opportunity to be heard on factual and legal grounds, which may include the right of a victim or patient who is represented by counsel to be heard through counsel. However, these rights are subject to reasonable limitations and the military judge retains appropriate discretion under R.C.M. 801, and the law does not dictate the particular outcome that LRM requests.").

Kastenberg, CAAF addressed the opportunity "to be heard" in the context of Mil. R. Evid. 412 and 513 and found that it includes the right to "present facts and legal argument, and allows a victim or patient who is represented by counsel to be heard through counsel." 72 M.J. at 370; *see also United States v. Carlson*, 43 M.J. 401, 405 (C.A.A.F. 1995) (Ordering that sexual assault victims seeking to assert privileges "will be giving the opportunity, with the assistance of counsel if they so desire, to present evidence, arguments and legal authority to the military judge regarding the propriety and legality of disclosing any of the covered documents.").

While CAAF did not conduct a due process analysis in its decision, the holding in *Kastenberg* ensured that alleged victims and patients were afforded due process by the trial court before private matters and privileged communications were publically disclosed. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254, 263 (1970) ("Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved, as well as of the private interest that has been affected by governmental action." (internal citations omitted)).

Due process requires more than bare notice and the opportunity to speak in a court-martial; due process requires that an alleged victim or patient be informed in order to

receive meaningful notice and be afforded a meaningful opportunity "to be heard." The Supreme Court routinely recognizes that legal rights afforded individuals become meaningless unless those with due process interests are adequately informed about the pending matter. *See, e.g., Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (applying constitutional due process to Texas adoption proceeding and finding "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (stating that notice must "reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections," which includes the corollary requirement that notice "must be of such nature as reasonably to convey the required information.").

"For more than a century, the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right, they must first be notified.' It is equally fundamental that *the right to notice and an opportunity to be*

heard must be granted at a meaningful time and in a meaningful manner." *Fuentes v. Shevin*, 407 U.S. at 79, 80 (1972) (addressing Due Process Clause of Fourteenth Amendment to state action authorizing seizure of property) (emphasis added) (internal citations omitted); *see also Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'") (citing *Armstrong*, 380 U.S. at 552). Due process requires that those with an interest be "given a meaningful opportunity to present their case." *Eldridge*, 424 U.S. at 349.

In short, the right to receive notice and to be afforded the opportunity "to be heard" provided to an alleged victim or patient under Mil. R. Evid. 412 and 513 is imbued with the requirement that alleged victim or patient be informed so as to be in a position to choose to exercise the right "to be heard" and, if necessary, to prepare to and exercise that right in a meaningful manner. To interpret the Rules otherwise would ignore the basic legal principle founded in constitutional due process that the right to receive notice and be afforded the opportunity "to be heard" be meaningful.

4. Fairness and respect for dignity and privacy require that an alleged victim be informed of the relevant facts and evidence to be able to meaningfully exercise his or her rights.

Crime victims under the UCMJ are to be treated with fairness and respect for their dignity and privacy by the military justice system. *Victim and Witness Assistance*, DoDD 1030.01 dated 23 Apr 07 (interim change); *see also* 10 U.S.C. § 806b (2013) (NDAA FY 2014) (A victim of a crime under the UCMJ has "[t]he right to be treated with fairness and respect for the dignity and privacy of the victim of an offense under this chapter."). Although "fairness" has not been specifically defined in this circumstance, it must guarantee that a victim's rights are given similar consideration to those of an accused and the government. *cf. Snyder v. Massachusetts*, 29 U.S. 97, 122 (1934) (Cardozo, J.) ("[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."), reaffirmed by *Payne v. Tennessee*, 501 U.S. 808, 827 (1991); *Morris v. Slappy*, 461 U.S. 1, 14 (1983) (stating that "in the administration of criminal justice, courts may not ignore the concerns of victims"); *United States v. Heaton*, 458 F. Supp. 2d 1271, 1271 (D. Utah 2006) (finding that under the federal Crime Victims' Rights Act, treating "a person with

‘fairness’ is generally understood as treating them ‘justly’ and ‘equitably’”). If the constitutional guarantee of due process requires that “criminal defendants be afforded a meaningful opportunity to present a complete defense,” *California v. Trombetta*, 467 U.S. 479, 485 (1984), then an alleged victim or patient has a similar guarantee to fairness and an opportunity to present a complete case against disclosure of private matters and privileged communications.

An alleged victim is not treated with fairness and respect for dignity and privacy if not given access to relevant information known by the parties litigating the disclosure of the alleged victim’s sexual history and confidential patient-psychotherapist communications. Treating an alleged victim in such an uneven manner is contrary to the intent of Congress, the President, and CAAF, as well as the explicit crime victim rights provisions in lawful regulations and, now, the UCMJ.

An alleged victim must be treated fairly and with respect for dignity and privacy; within Mil. R. Evid. 412 and 513, this means providing meaningful notice and affording a meaningful opportunity “to be heard” by informing the alleged victim of the relevant facts and evidence and legal positions of the parties through, at minimum, a copy of the charge sheet, relevant investigative materials, and copies of the parties’ pleadings.

E. A writ is necessary and appropriate because the Military Judge deprived LT HS of her right to receive meaningful notice and to be afforded a meaningful opportunity "to be heard" when she denied LT HS's request for relevant investigative materials.

While Trial Counsel voluntarily provided VLC copies of the Defense motions[4] and his responses, Trial Counsel and the General Court-Martial Convening Authority denied repeated requests by LT HS and her counsel, in various forms, for a redacted copy of the charge sheet, statements made by LT HS, and other relevant investigative materials. Trial counsel also filed a motion opposing LT HS's request that the Military Judge order disclosure of the charge sheet and relevant investigative materials. The United States made clear that it was unwilling to meaningfully afford LT HS the rights provided to her by the Mil. R. Evid. 412 and 513.

When the Military Judge denied LT HS's request for investigative materials relevant to the motions made under Mil. R. Evid. 412 and 513, she validated the United States' position and deprived LT HS of right to receive meaningful notice and to be afforded a meaningful opportunity "to be heard." This left LT HS to prepare to and actually exercise her opportunity "to be heard"—to present facts and legal argument to the court—armed

[4] No other form of notice was provided to LT HS or required by the military judge.

with only the marginal, and biased, information that the Parties chose to include in their motions.

This deprivation was most clear when the Military Judge ruled that evidence of an alleged flirtatious and consensual encounter between the Accused and LT HS was admissible at trial under an exception found in Mil. R. Evid. 412. The Defense and United States did not submit any evidence or call any witnesses in support or opposition of the admissibility of this evidence. With nothing before the Military Judge establishing that such an encounter even took place, LT HS testified under oath that no such encounter occurred. The Military Judge, however, accepted the proffers of both Defense Counsel and Trial Counsel that the Accused testified under oath to such an encounter at the Article 32, UCMJ investigation.[5]

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[5] The parties and the military judge referenced a previous Article 39(a) or R.C.M. 802 conference where they discussed this evidence. Neither LT HS nor her counsel were present for this and have no knowledge of the substance of the statements made by the parties and the military judge. Although a military judge is not asked to determine if evidence offered under Military Rule of Evidence 412 is true, a proffer by a party is not evidence. *See, e.g., United States v. Thompson*, 29 C.M.R. 68, 71 (C.M.A. 1960); *United States v. Alexander*, 32 M.J. 664, 667 n.3 (A.F.C.M.R. 1991) (stating counsel and judges must be careful to establish a proper factual basis for evidentiary rulings). "To overcome the prohibition of Mil. R. Evid. 412, the defense must establish a foundation demonstrating constitutionally required relevance, such as 'testimony proving the existence of a sexual relationship that would have provided significant evidence on an issue of major importance to the case. . . .'" *United States v. Carter*, 47 M.J. 395, 396 (C.A.A.F. 1997) (citing United States v. Moulton, 47 M.J. 227, 229

LT HS did not receive meaningful notice and was not afforded a meaningful opportunity "to be heard" prior to this ruling. Neither LT HS nor her counsel was provided an opportunity to review the Accused's sworn testimony prior to the Military Judge making her ruling. Neither LT HS nor her counsel was permitted an opportunity to review statements of witnesses who were present at the house when the alleged "flirtatious interaction" took place to determine if such witnesses corroborated the Accused's version of events. To be clear, neither LT HS nor her counsel was provided anything other than mere proffers of counsel that would support a finding that such an encounter took place (or did not take place). Unlike the parties, who presumably had access to the entire NCIS report of investigation and Article 32 investigation report and transcript for many months, LT HS was left to present facts and legal

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(C.A.A.F. 1997)). Similar to this case, in *Carter*, the alleged victim testified at an Article 39(a) session and disputed the defense proffer of evidence under Military Rule of Evidence 412. The defense did not call any witnesses to support its proffer. CAAF found, "[i]n these circumstances, and in view of the denial of the prosecutrix, we hold that the military judge did not abuse his discretion in finding that appellant failed to establish a sufficient foundation to demonstrate that the evidence was constitutionally required to be admitted under Mil. R. Evid. 412." *Id.* at 397. Even though the evidence at issue in this court-martial fell likely falls under the exception contained in Mil. R. Evid. 412(b)(1)(B), the evidence is still subject to the relevancy requirement and balancing tests under Mil. R. Evid. 401 and 403.

argument to the Military Judge based solely on the marginal and bias information contained the pleadings.

Similarly, LT HS was deprived of her opportunity "to be heard" on the Defense motion to produce LT HS's mental health records under Mil. R. Evid. 513. Again, the Trial Counsel presented no evidence to support opposing the Defense motion. The Defense produced a single document at the hearing that allegedly documented LT HS's prescription medications at the time of the alleged sexual assault and argued that it supported reasonable grounds that LT HS may suffer from serious mental disorders. Neither LT HS nor her counsel was provided any investigative materials related to how and under what circumstances this record was obtained or with relevant witness statements to LT HS's behavior that would indicate whether or not she did or did not suffer serious mental disorders at the time of the alleged offenses or when she made her report to authorities.[6]

The Military Judge deprived LT HS of meaningful notice and a meaningful opportunity "to be heard" and demonstrated a lack of fairness and respect for LT HS's dignity and privacy when she

[6] LT HS may, of course, conduct her own thorough investigation into the facts and circumstances alleged by the parties in their pleadings. In this case, LT HS would have had to seek to interview the Accused and re-interview numerous party-goers, duplicating much of the work already performed by trained investigators.

failed to order disclosure of relevant investigative materials. Although LT HS and VLC were present during a hearing, LT HS was the only participant in the courtroom who did not have access to relevant investigative materials.

Conclusion

LT HS did not create the military justice system; nor did she cause the events that forced the system upon her. She is simply asking that the rights afforded to her under the military justice system have meaning. LT HS therefore asks this Court to issue a stay of the trial proceedings in the general court-martial of *United States v. Entralgo*, to set aside the Trial Court's rulings of December 16, 2013, made under Mil. R. Evid. 412 and 513, and to direct the Trial Court to provide LT HS investigative materials relevant to the motions made by the Parties under Mil. R. Evid. 412 and 513. Only then, will she be afforded her right to receive meaningful notice and to be afforded a meaningful opportunity "to be heard."

SAMUEL C. MOORE
Counsel for Petitioner
Law Office of Samuel C. Moore PLLC
815 King St., Suite 210
Alexandria, VA 22314
Phone (703) 535-7809
Fax (703) 997-5666
scmoore@scmoorelaw.com

PATRICK KORODY
LIEUTENANT COMMANDER, U.S. Navy
Victim's Legal Counsel
Building 1, Naval Station Mayport
Jacksonville, FL 32228
Phone (904) 270-5191, x 1213
Fax (904) 270-6879
patrick.korody@navy.mil

Certificate of Filing and Service

I certify that a copy of the foregoing writ petition was filed with the Court in accordance with Rule 5.2 at NMCCAOJAGCODE07@navy.mil and electronically served by email on the Military Judge, LT Entralgo—through his Trial Defense Counsel and by facsimile the Appellate Defense Division and Appellate Government Division on January 3, 2014.

SAMUEL C. MOORE
Counsel for Petitioner
Law Office of Samuel C. Moore PLLC
815 King St., Suite 210
Alexandria, VA 22314
Phone (703) 535-7809
Fax (703) 997-5666
scmoore@scmoorelaw.com

APPENDIX A

Navy Creates Victims' Legal Counsel

Story Number: NNS130809-13 Release Date: 8/9/2013 4:58:00 PM

A A A

From Defense Media Activity-Navy

FORT GEORGE G. MEADE, Md. (NNS) -- The Navy announced the establishment of the Navy's newest Sexual Assault Prevention and Response (SAPR) initiative, the Victims' Legal Counsel (VLC) Program, which will provide legal advice and advocacy for eligible victims of sexual assault.

The Victims' Legal Counsel will help victims understand the investigation and military justice process, advocate their legal rights and interests and, when appropriate, appear in court on their behalf.

"The Navy is committed to protecting the rights and interests of victims of sexual assault and ensuring the administration of a fair, transparent and efficient military justice system that guarantees due process for the accused and promotes good order and discipline," said Vice Adm. Nanette M. DeRenzi, Judge Advocate General of the Navy. "The Navy's Victims' Legal Counsel program complements the Navy's broader efforts to care for victims of sexual assault by providing them with legal advice and assistance throughout the military justice process."

Initially, the VLC Program will consist of 29 specially-trained, independent judge advocates assigned regionally to maximize availability of counsel across the Fleet. Navy VLCs will serve every geographic region, including the United States, Europe, the Pacific, and the Middle East. The program's attorneys will not be in the victim's or the accused's chain of command and will not be involved in case prosecution or defense.

"Through increased training and bystander intervention we are confronting sexual assault fleet wide, while ensuring that we provide needed care and support to victims," said Rear Adm. Sean Buck, director, 21st Century Sailor Office (N17). "This program further adds to that support."

For more information and resources to combat sexual assault visit www.sapr.navy.mil. Sexual assault affects Navy readiness, and the Navy is committed to preventing sexual assault. Join the Navy's conversation about sexual assault on social media and help raise awareness by using #NavySAPR.

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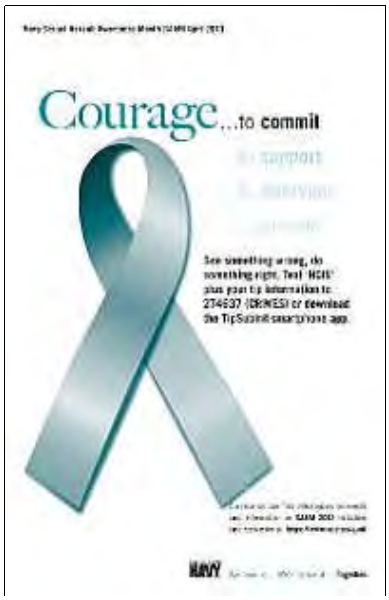

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130412-N-ZZ999-001 FT. GEORGE G. MEADE, Md. (April 12, 2013) Sexual Assault Prevention and Response is an important element of the readiness area of the 21st Century Sailor and Marine initiative which consolidates a set of objectives and policies, new and existing, to maximize Sailor and Marine personal readiness, build resiliency and hone the most combat-effective force in the history of the Navy and Marine Corps. The Department of the Navy is working to aggressively to prevent sexual assaults, to support sexual assault victims, and to hold offenders accountable. Help raise awareness by joining the conversation on social media using #SexualAssault and #SAAPM. (U.S. Navy graphic)

April 12, 2013

RELATED CONTENT

Navy's Training Headquarters' Civilians Part of SAPR 'One Team, One Fight' - 8/21/2013

Navy Social Media

To sign up for updates or to access your subscriber preferences, please click on the envelope icon in the page header above or click here.

APPENDIX B

31 Oct 13

From: Victims' Legal Counsel, NS Mayport, FL
To: Naval Criminal Investigative Service Resident Agency, MCB Camp Lejeune, NC
Staff Judge Advocate, 2nd MLG, MCB Camp Lejeune, NC
Trial Counsel, LSSS-E, MCB Camp Lejeune, NC
Mr. Phil Stackhouse, Civilian Defense Counsel

Subj: VICTIMS' LEGAL COUNSEL NOTICE OF REPRESENTATION

Ref: (a) VLC Mayport ltr 5800 Ser 13/001 dtd 31 Oct 13

1. Per reference (a), I be etailed as Victims' Legal Counsel for Lieutenant H[redacted] S[redacted], DC, USN, in connection with an unrestricted report of sexual assault made on or about 29 October 2012. The Accused is Lieutenant Blake D. Entralgo, DC, USN, 2nd Dental Battalion, 2nd MLG, MCB Camp Lejeune, NC have formed an attorney-client relationship with Lieutenant S[redacted].

2. If any government agent, military authority, or other person wishes to interview or question my client regarding her reported sexual assault, that authority shall contact me to discuss the general nature of the questions to be asked and to schedule the potential interview. My client has requested that I be present for any interview. If I am unable to attend an interview in person, my attendance may be accomplished using remote means.

3. My client requests that all further communications related to the investigation and/or prosecution of her reported sexual assault be made through counsel.

4. I can be reached at (904) 270-5191, Ext. 1213 or patrick.korody@navy.mil.

/s/
P. K. KORODY

Copy to:
CO, NAVHOSP JAX
SARC, NAS JAX
Assigned VA

APPENDIX C

DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT

U N I T E D S T A T E S	)	
	)	VICTIMS' LEGAL COUNSEL
v.	)	COURT-MARTIAL NOTICE OF
	)	APPEARANCE ON BEHALF OF
LT BLAKE ENTRALGO, DC, USN	)	LT H.S., DC, USN
	)	

1. I, LCDR Patrick Korody, JAGC, USN, Navy Victims' Legal Counsel Program, Naval Station Mayport, Florida, admitted to practice law and currently in good standing in the State of Maryland and, although not appearing in a as a defense counsel or trial counsel, certified in accordance with Article 27(b), UCMJ, hereby enter my appearance in the above captioned court-martial on behalf of LT H.S., DC, USN, a named victim in the charges.

2. On 31 October 2013, I was detailed to represent LT H.S., and I have entered into an attorney-client relationship with her. I have not acted in any manner which might disqualify me in the above captioned court-martial.

3. I have reviewed the Navy-Marine Corps Trial Judiciary Uniform Rules of Practice and the Eastern Judicial Circuit Rules of Court.

4. LT H.S. reserves the right to be present throughout the court-martial in accordance with Military Rule of Evidence 615, with the exception of closed proceedings that do not involve LT H.S..

5. To permit a meaningful exercise of my LT H.S.'s rights and privileges, I respectfully request that this Court direct the defense and government to provide me with informational copies of motions and accompanying papers filed pertaining to issues that fall under Military Rules of Evidence 412, 513, 514, and 615 and in which LT H.S.'s rights and privileges are addressed.

6. LT H.S. has limited standing in this court-martial, and LT H.S. reserves the right to make factual statements and legal arguments herself or through counsel.

7. My current contact information is as follows:

Room 1104, Building 1
NS Mayport
Mayport, FL 32227
(904) 270-5191, Ext 1213
patrick.korody@navy.mil

Respectfully submitted this 4th day of November 2013,

P. K. KORODY

CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appearance was served upon the Court, Trial Counsel, and Defense Counsel on this 4th day of November 2013 via email.

P. K. KORODY

APPENDIX D

Korody, Patrick K LCDR NAVSTA Mayport, N001

From: Korody, Patrick K LCDR NAVSTA Mayport, N001
Sent: Monday, November 04, 2013 15:17
To: Lewis, Andrew M USMC, LSSS-E, HqSptBn, MCI-East
Subject: charge sheet and statements
Signed By: patrick.korody@navy.mil

Capt Lewis,

Can you please send me a copy of the charge sheet (I don't care if PII is redacted) and copies of any statements made by S[redacted] including any results of interview, and the summary of her 32 testimony? If the answer is no, I'll probably try to FOIA and Privacy Act it through the SJAs office.

Thanks.

v/r
Patrick K. Korody
LCDR, JAGC, USN
Navy VLC Program, Naval Station Mayport, FL
Comm: 904.270.5191 Ext. 1213

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APPENDIX E

NAVY-MARINE CORPS TRIAL JUDICIARY
NORTHERN CIRCUIT
GENERAL COURT MARTIAL

UNITED STATES	)	DEFENSE MOTION
v.	)	Mil.R.Evid. 412 Witness Production
Blake Entralgo Lieutenant U.S. Navy	)	Friday, November 8, 2013

1. NATURE OF MOTION. This is a motion filed in accordance with MRE 412(c) to determine the admissibility of the defense intent to question the Complaining Witness and her former girlfriend about their relationship. Further, it is a motion to compel the production of EM for trial, because if the motion is granted under Mil.R.Evid 412, EM becomes a relevant and necessary witness.

2. BURDEN OF PROOF. The burden is by a preponderance of the evidence.

3. BURDEN OF PERSUASION. The burden is on the defense.

4. SUMMARY OF FACTS.

The accused is alleged to have, among other things, raped the Complaining Witness during the Halloween party held at a mutual friends house in October 2012.

During the days after the complaint, the Complaining Witness has made inconsistent statements and vacillated on her desire to make the complaint at all.

During the conduct of the investigation, there was no other

witness who corroborated any of the Complaining Witnesses accounts.

During the conduct of the pretrial investigation, Article 32, UCMJ, both the accused and the Complaining Witness testified. The accused testified that he did, in fact, engage in consensual sexual intercourse with the Complaining Witness; however, it occurred hours before the Complaining Witness alleges.

The facts are that the accused and the Complaining Witness were both on the front porch of the house in which the party was being held. The accused was allowing his dog to go to its "business" and the Complaining Witness was talking to the accused. The conversation turned flirtatious and the accused ask the Complaining Witness if she wanted to go someplace more private.[1]

The Complaining Witness agreed and the accused returned his dog to the inside of the house. Be accused returned outside, and the Complaining Witness and the accused went to his vehicle and entered the backseat. While in the backseat the accused and the Complaining Witness engaged in consensual sexual activities that included sexual intercourse and the accused kissing the neck and breasts of the Complaining Witness.

[1] The accused is married. His wife was at the party, but had retired to the bedroom in which they were going to sleep in order to study for an exam she had the next day.

1 Prior to the sexual intercourse, the accused removed
2 portions of his clothing and the Complaining Witness removed
3 portions of her clothing. While engaging in sexual intercourse,
4 the accused began feeling guilty about what he was doing and
5 ended the sexual activity. The accused and Complaining Witness
6 each dressed themselves and both returned to the house and
7 resumed the party.
8 During the party, the accused and Complaining Witness
9 continued to socialize with one another. As the party ended, the
10 accused, Complaining Witness and three others were the last to
11 be awake - as others had departed or went to bed. The party
12 ended in the kitchen with the accused and Complaining Witness,
13 and another couple, dancing together in a sort of grinding
14 (sexually provocative) dance. This interaction was witnessed by
15 three others in the kitchen.
16 Everyone went to bed at about 0300, except the hostess of
17 the party. The hostess of the party stayed up cleaning till
18 0530.
19 The hostess confirmed that the accused went to the bedroom
20 in which his wife was sleeping and the Complaining Witness slept
21 on a chair in the living room.

1 After everyone retired to sleep, the hostess never saw or
2 heard any movement before she went to bed, the door chime never
3 alerted, and the slamming screen dork never slammed.
4 The Complaining Witness alleges that she did not go to the
5 Accused's vehicle during the party, but that she was awaken by
6 the Accused after everyone had went to sleep and she led out to
7 his SUV. The Complaining Witness alleges that she did not
8 remove her own clothing, that she tried to prevent her clothes
9 from being removed, but relented. The Complaining Witness
10 alleges that she said "no" on multiple occasions. The
11 Complaining Witness alleges that when the Accused was finished
12 having sex with her, they got dressed and went back into the
13 house - where he went to his bedroom and she went back to sleep
14 on the chair.
15 Witnesses testified during the pretrial investigation and
16 witness statements provide that the Complaining Witness texting
17 someone several times during the party. Witness statements
18 indicate that the Complaining Witness was in a fight with her
19 girlfriend, "EM", the night of the party.
20 **5. DISCUSSION.**
21 M.R.E. 412(a) provides that the following evidence is not
22 admissible in any proceeding involving an alleged sexual offense
23 except as provided in M.R.E. 412(b) and M.R.E 412(c):

1 (1) evidence offered to prove that any alleged victim
2 engaged in other sexual behavior and
3 (2) evidence offered to prove any alleged victim's
4 sexual predisposition.
5 However, there are exceptions.
6 In a proceeding, the following evidence is admissible, if
7 otherwise admissible under these rules: evidence of specific
8 instances of sexual behavior by the alleged victim with respect
9 to the person accused of the sexual misconduct offered by the
10 accused to prove consent and evidence the exclusion of which
11 would violate the constitutional rights of the accused.
12 Mil.R.Evid 412(b)(1)(B),(C).
13 The defense intends to present evidence of the flirtatious
14 interaction that occurred on the front porch between the accused
15 and the Complaining Witness. This interaction is direct evidence
16 of the Complaining Witnesses consent to engage in sexual
17 intercourse and other sexual activities with the accused.
18 Further, the defense intends on asking the Complaining
19 Witness about her relationship with Elizabeth McKnight, her
20 girlfriend at the time. The purpose of this inquiry will go to a
21 motive to fabricate.
22 **Factors To Consider**
23 In order to overcome the exclusionary purpose of M.R.E.
24 412, an accused must "demonstrate why the general prohibition in

1 [M.R.E.] 412 should be lifted to admit evidence of the sexual
2 behavior of the victim[.]" *United States v. Moulton*, 47 M.J.
3 227, 228 (C.A.A.F. 1997). In particular, the proponent must
4 demonstrate how the evidence fits within one of the exceptions
5 to the rule. *Id.* at 228-29. *United States v. Banker*, 60 M.J.
6 216, 222 (C.A.A.F. 2004)

7 **The Test To Be Applied For Admissibility**

8 First, the military judge must determine on the basis of
9 the hearing described in M.R.E. 412(c)(2) that the evidence that
10 the accused seeks to offer is relevant for a purpose under
11 subsection M.R.E. 412(b), *and*

12 Second, the military judge must determine that the
13 probative value of such evidence outweighs the danger of unfair
14 prejudice to the alleged victim's privacy.

15 If the judge determines both of facts, in the conjunctive,
16 for the proponent of the evidence, then such evidence shall be
17 admissible under this rule to the extent an order made by the
18 military judge specifies evidence that may be offered and areas
19 with respect to which the alleged victim may be examined or
20 cross-examined.

21 **Flirtatious Behavior To Show Consent**

22 The flirtatious behavior between the accused and the
23 Complaining Witness was the precursor to them going to the
24 accused's SUV and engaging in intercourse. The Complaining

1 Witness started the behavior by getting into the accused's
2 personal space. The accused responded by suggesting people
3 would talk if they saw them in so close together. The
4 Complaining Witness continued the banter and, finally, the
5 accused asked the Complaining Witness if she wanted to go
6 somewhere private - meaning somewhere to have sex. She agreed,
7 and they went to his SUV.
8 This behavior is relevant to show that the Complaining
9 Witness had the intent to engage in sexual intercourse with the
10 accused, that she voluntarily went to his car, and that the sex
11 was consensual.
12 This evidence is admissible under M.R.E. 412(b)(1)(B)
13 **The Complaining Witness's Relationship With "EM" Goes To The**
14 **Complaining Witness's Motive To Fabricate**
15 On October 27, 2013, the accused was married and the
16 Complaining Witness was in a relationship with "EM". The
17 Complaining Witness's relationship with "EM" provides multiple
18 motives to fabricate, all of which are relevant and necessary
19 under M.R.E. 412(b)(1)(c).
20 When two people in a relationship are angry with one
21 another, it is not uncommon to have a desire desire to hurt one
22 another either physically or emotionally. Cheating on a
23 significant other out of anger is commonplace. So is remorse
24 afterwards.

1 Unsure if anyone would find out about the sexual dalliance
2 with the accused, the complaining witness claims to "EM" that
3 she is "fairly sure [sic] got raped last night" and that she
4 "felt bad about what happened and wanted to reach out to the
5 guy."[2]
6 If a relationship is in a state of instability, creating a
7 scenario wherein one person can make the other feel sorry for
8 them can bring a couple back together.
9 Further, if "EM" found out about the Complaining Witness
10 having consensual sex with a man, it may end their relationship.
11 To preempt "EM" from finding out about the consensual behavior
12 through other means - mutual friends, the complaining witness
13 getting in trouble for committing adultery, etc - she can claim
14 rape and then not fear the break up.
15 Finally, if the Complaining Witness is in a committed same
16 sex relationship and is a "huge gay advocate"[3] - but it turns out
17 that she engaged in sexual intercourse with a man, it has the
18 potential for "EM" to turn the Complaining Witness's life upside
19 down by revealing her actions.
20 These, and other motives, demonstrate that the Complaining
21 Witness's motive to fabricate the allegations against the
22 accused and the defense must be allowed to inquire into them

[2] See EM Statement and Notes
[3] See Hochschwender Statement and Notes

1 during the trial. Mil.R.Evid. 412(b)(1)(C).

2 **6. EVIDENCE.**

3 Where, as here, the defense seeks to offer evidence under
4 Mil. R. Evid. 412 to support a theory that a witness has a
5 motive to lie and should not be believed, the military judge may
6 require the defense to present additional evidence to explain
7 the nexus between the evidence offered and the alleged motive to
8 lie, unless, as it is here, the defense theory is one which is
9 "commonly understood and obvious." *United States v. Sanchez*, 40
10 M.J. 782, 785 (A.F.C.M.R. 1994) (citing *United States v. Colon-*
11 *Angueira*, 16 M.J. 20 (C.M.A. 1983)), *aff'd*, 44 M.J. 174
12 (C.A.A.F. 1996); *Dorsey*, 16 M.J. at 5-6.

13 If the military judge erroneously excludes evidence that is
14 constitutionally required to be admitted, the case will be
15 overturned unless the appellate courts can conclude, beyond a
16 reasonable doubt, that the error was harmless. *United States v.*
17 *Buenaventura*, 45 M.J. 72 at 79-80 (citing *United States v. Bins*,
18 43 M.J. 79, 86 (C.A.A.F. 1995)).

19 The defense request the court to consider the attached
20 notes and statements of "EM" and Jessica Hochschwender

1 **7. Witness Production.** The defense requests the production of
2 the complaining witness, EM, and Jessica Hochschwender.
3 **8. Relief Requested.** The defense requests to be able to inquire
4 into the two aforementioned areas.
5 **9. Argument.** Oral argument is requested.
6
7 Phillip Stackhouse
8
9 I certify a copy of this motion and attachments were served on
10 the trial counsel and the court today, Friday, November 8, 2013,
11 by email delivery.
12
13 Phillip Stackhouse
14

Contact w/ V/[redacted] [redacted]

5/9/13
1450
GBR

E[redacted]

→ [redacted] → texted from party (ex-girlfriend)

→ Jessica → called on Sunday
Hochschwender
(603[redacted]
603[redacted]

(lives in Winston Salem
704-3[redacted])

having argument via text

→ nothing about anything at party

Jessica Hochschwender interview 1445

→ V/ called from car on way home (~900 AM)

→ (family is military → checked w/ family for advice

→ told V/ needed a kit done + not to change clothes

→ V/ said at a party, got drunk, S/ + girlfriend at party

S/ got V/ to car + had sex

V/ said she said "no"

→ V/ felt uncomfortable, didn't have means to fight + back b/c drunk

V/ felt sideways wrong place wrong time

felt really guilty, had done something wrong

[V/ usually very peppy, but somber during conversation]

- didn't want to get S/ in trouble

S/ made a comment to her while having sex?

ENTRALGO 00480e

U.S. NAVAL CRIMINAL INVESTIGATIVE SERVICE

INVESTIGATIVE ACTION 10MAY13

CONTROL: [redacted]

S/ENTRALGO, BLAKE DANIEL/LT USN
[redacted]

RESULTS OF CONTACT WITH JESSICA HOCHSCHWENDER, CIV

1. On 09May13, Reporting Agent (RA) contacted Jessica HOCHSCHWENDER, CIV, ([redacted] via telephone regarding her contact with V/[redacted] the weekend of 27-28Oct12. HOCHSCHWENDER currently lives in New Hampshire and has known V/[redacted] since Apr12.

2. HOCHSCHWENDER stated V/[redacted] called her around 0900 on Sunday morning while V/[redacted] was driving home. V/[redacted] told her that she had been at a party, got drunk, the suspect (name unknown by HOCHSCHWENDER) got V/[redacted] to his car and had sex with her. V/[redacted] said she said "no." V/[redacted] also said the suspect was at the party with his girlfriend.

3. HOCHSCHWENDER also believes V/[redacted] mentioned that the suspect made a comment to her while he was having sex with her, however HOCHSCHWENDER could not recall what the comment was.

4. HOCHSCHWENDER said V/[redacted] told her that she felt uncomfortable while the incident was happening, but that she didn't have the means to fight back because she was drunk. V/[redacted] also said she felt like she was in the wrong place at the wrong time, and felt really guilty, like she had done something wrong. HOCHSCHWENDER said V/[redacted] didn't want to get the suspect in trouble.

5. HOCHSCHWENDER explained that she has a brother and sister in the military and that she called them for advice. HOCHSCHWENDER stated she then told V/[redacted] that she needed to have a SAFE kit done and not to change her clothes.

6. HOCHSCHWENDER stated V/[redacted] is usually a very peppy person, however V/[redacted] was very somber when she called that Sunday morning. HOCHSCHWENDER also explained V/[redacted] is a huge gay advocate, therefore V/[redacted] was not interested at all in sexual relations with men.

REPORTED BY: GILLIAN RUPPERT, Special Agent
OFFICE: RESIDENT AGENCY CAMP LEJEUNE

GBR

ENTRALGO

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U.S. NAVAL CRIMINAL INVESTIGATIVE SERVICE

INVESTIGATIVE ACTION 10MAY13

CONTROL: [redacted]

S/ENTRALGO, BLAKE DANIEL/LT USN
M/W/[redacted]

RESULTS OF CONTACT WITH E[redacted], CIV

1. On 09May13, Reporting Agent (RA) contacted E[redacted], CIV, (DOB:[redacted] via telephone regarding her contact with V/[redacted] the weekend of 27-28Oct12. K[redacted] was V/[redacted] girlfriend at the time of the incident, and currently lives in Winston-Salem, NC.

2. E[redacted] stated she received a phone call from V/[redacted] on Sunday while she was at work. K[redacted] said V/[redacted] was upset and stated she was "fairly sure got raped last night."

3. K[redacted] said V/[redacted] told her that she went to a party, was drinking; the guy (name unknown by K[redacted]) was harassing her all night, saying her was "going to fuck her." V/[redacted] said she got real sleepy, the guy led her to his car, he pulled her pants down, and she was trying to pull them back up. V/[redacted] then said she remembers waking up alone in the car.

4. K[redacted] said that V/[redacted] doesn't drink very much on a normal basis and that she had never seen V/[redacted] drunk. K[redacted] stated she did receive text messages from V/[redacted] on Saturday night, however none of them had to do with the party V[redacted] was at.

5. K[redacted] stated V/[redacted] felt bad about what happened and wanted to reach out to the guy. K[redacted] stated she didn't know if V[redacted] ever reach out to the guy. K[redacted] did not know of any known relationship between V/[redacted] and the guy.

REPORTED BY: GILLIAN RUPPERT, Special Agent
OFFICE: RESIDENT AGENCY CAMP LEJEUNE

(b)(6)

ENTRALGO

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00288

EXHIBIT (35)

APPENDIX F

NAVY-MARINE CORPS TRIAL JUDICIARY
NORTHERN CIRCUIT
GENERAL COURT MARTIAL

UNITED STATES	)	DEFENSE MOTION TO COMPEL DISCOVERY
v.	)	(513)
Blake Entralgo Lieutenant U.S. Navy	)	Friday, November 8, 2013

1. NATURE OF MOTION. This is a motion to compel the government to discover the mental health records of the Complaining Witness under MRE 513(d)(8), RCM 701, and RCM 905(b)(4).

2. BURDEN OF PROOF. The burden is by a preponderance of the evidence.

3. BURDEN OF PERSUASION. The burden is on the defense.

4. SUMMARY OF FACTS.

The facts as set out in the Defense Motion to Compel Expert Consultant (Fabian) is incorporated by reference as if set forth herein in its entirety.

Further, on around October 3, 2013, the defense requested the following:

> *"Disclosure of all mental health records, substance abuse treatment program records, and medical records (whether military or civilian), and any other government records relating to all witnesses or potential witnesses in the instant case, where such*

1 *records may relate to the character of these persons,*
2 *their motives for testifying, their tendency to*
3 *fabricate or exaggerate, or where such records may*
4 *evidence a witness' mental or emotional instability,*
5 *history of substance abuse, low intelligence, or may*
6 *otherwise contain information relating to instances of*
7 *lying to military or civilian authorities or others,*
8 *and/or evidence of bias against the accused or any*
9 *defense witnesses."*
10 On around October 17, 2013, the trial counsel responded
11 with the following:
12 *Denied as to mental health record, substance abuse*
13 *treatment program records, and medical records (beyond*
14 *those associated with the Sexual Assault Forensic*
15 *Exam). Not necessary or relevant. Furthermore, any*
16 *information outside the control of Military*
17 *authorities would be a request for production under*
18 *RCM 703(f) and the defense must provide the Government*
19 *a description of the each item sufficient to show its*
20 *relevance and necessity, a statement where it can be*
21 *obtained, and, if known, the name, address, and*
22 *telephone number of the custodian of the evidence. The*
23 *request for "other government records" is denied as*
24 *vague and overbroad.*

1 As part of the initial discovery provided to the defense, a
2 copy of the Complaining Witness's Pharmacy Report was
3 discovered. Included on that document were the following
4 prescriptions that preceded the evening of the allegation:
5 Doxepin, Citalopram, and Zolpidem Tartrate.

6 **Doxepin**

7 Doxepin is used to treat depression and anxiety. Doxepin is
8 in a class of medications called tricyclic antidepressants. It
9 works by increasing the amounts of certain natural substances in
10 the brain that are needed for mental balance. Side effects of
11 Doxepin include, inter alia, nightmares and changes in sex drive
12 and ability.[1]

13 **Citalopram**

14 Citalopram is used to treat depression. Citalopram is in a
15 class of antidepressants called selective serotonin reuptake
16 inhibitors (SSRIs). It is thought to work by increasing the
17 amount of serotonin, a natural substance in the brain that helps
18 maintain mental balance. Side effects of Citalopram include,
19 inter alia, changes in sex drive and confusion, problems with
20 concentration and memory.[2]

21 **Zolpidem (Ambien)**

22 Zolpidem is used to treat insomnia (difficulty falling

[1] http://vsearch.nlm.nih.gov
[2] Id.

1 asleep or staying asleep). Zolpidem belongs to a class of
2 medications called sedative-hypnotics. It works by slowing
3 activity in the brain to allow sleep. Side effects include,
4 inter alia, unusual dreams, drugged feeling and, if you get up
5 too soon after taking zolpidem, you may experience memory
6 problems.

7 **5. DISCUSSION.**

8 MRE 513 provides that A patient has a privilege to refuse
9 to disclose and to prevent any other person from disclosing a
10 confidential communication made between the patient and a
11 psychotherapist or an assistant to the psychotherapist, in a
12 case arising under the UCMJ, if such communication was made for
13 the purpose of facilitating diagnosis or treatment of the
14 patient's mental or emotional condition.

15 In any case in which the production or admission of records
16 or communications of a patient other than the accused is a
17 matter in dispute, a party may seek an interlocutory ruling by
18 the military judge.

19 **Evidence And Purpose For Which Mental Health Records Is Sought**

20 Based upon the (1) types of medications prescribed, (2) the
21 evidence of the Complaining Witness arguing with her girlfriend,
22 (3) feeling of guilty after alleging that she was "fairly sure"
23 she got raped, but felt bad and wanted to reach out to the
24 Accused, and (4) reaching out to the accused personally after

1 making the allegation, they are, together, indicators of someone
2 who has been traumatized in the past or is suffering from sever
3 depression. With a person who has been traumatized in the past,
4 there are issues of transference (which could include
5 transference onto the Accused) and other conditions wherein the
6 Complaining Witness could be concerned with engaging in a
7 consensual casual or chance sexual relationship, as it would
8 deal with her current condition.
9 Further, if the Complaining Witness is suffering from
10 depression, as it appears, it could include psychotic
11 depression, which has the possibility to result in breaks with
12 reality; or it could include a bi-polar disorder, characterized
13 by cycling mood changes, which could explain her consensual
14 behavior evolving into an allegation of rape.
15 **Service On Opposing Party And Notifying The Patient**
16 I do not intend on notifying the Complaining Witness;
17 however, she does have counsel assigned and I suggest a copy of
18 this motion be served upon him.
19 **6. EVIDENCE.**
20 The defense will provide a redacted copy of the medical record
21 cited to the court if needed.

1 **7. RELIEF REQUESTED.**

2 The defense requests the military judge order a

3 hearing to determine the discoverability and admissibility

4 of the mental health records of the Complaining Witness.

5 **8. ARGUMENT.** Oral argument is requested.

6

7 Phillip Stackhouse

8

9 I certify a copy of this motion and attachments were served on

10 the trial counsel and the court today, Friday, November 8, 2013,

11 by email delivery.

12

13 Phillip Stackhouse

14

APPENDIX G

14 Nov 13

From: LT H[redacted] S[redacted], DC, USN
To: Commanding General, 2nd Marine Logistics Group

Subj: FREEDOM OF INFORMATION ACT AND PRIVACY ACT REQUEST
ICO U.S. V. LT BLAKE ENTRALGO, DC, USN

Ref: (a) The Freedom of Information Act, 5 U.S.C. §552
(b) The Privacy Act, 5 U.S.C. §552a
(c) SECNAVINST 5211.5E
(d) SECNAVINST 5720.42

1. This is a request pursuant to references (a) through (d) for documents regarding the investigation and court-martial of Lieutenant Blake Entralgo, DC, USN, in connection with an unrestricted report of sexual assault at Camp Lejeune, North Carolina made on or about 28 October 2012.

2. I respectfully request a copy of the following documents:

a. The Article 34, UCMJ Advice, Charge Sheet, and Convening Order for the subject court-martial, less redactions of signatures and social security numbers pursuant to exemption (b)(6) of the FOIA.

b. The Article 32, UCMJ Investigating Officer Report, including the summary of any testimony by me in the subject court-martial less redactions of personally identifiable information, signatures and social security numbers pursuant to exemption (b)(6) of the FOIA. Redactions of opinions and pre-decisional recommendations made according to exemption (b)(5) are specifically not requested, however the factual summaries of testimony are not recommendations.

c. Any statements signed by me, or any "Results of Interview" or similar written documents summarizing statements made by me that are relevant to the charges in the subject court-martial.

3. The above documents are requested under the more liberal of either reference (a) or (b), as said acts apply to the respective documents. Sexual assaults in the military are an item of general public interest, and this request is not primarily in the commercial interests of the requester. Therefore, I request any fees be waived. If you do not agree to waive fees associated with this request, please contact me through my Victims' Legal Counsel, LCDR Patrick Korody, JAGC, USN, at (904) 270-5191 x1213 or patrick.korody@navy.mil.

Subj: FREEDOM OF INFORMATION ACT AND PRIVACY ACT REQUEST
ICO U.S. V. LT BLAKE ENTRALGO, DC, USN

4. If you deny any portion of this request, please cite each specific exemption you feel justifies the refusal to release the information, and provide the remaining information with the redactions shown.

5. Please direct any questions regarding this request and provide the requested documents to my Victims' Legal Counsel, LCDR Patrick Korody, JAGC, USN, at (904) 270-5191 x1213 or patrick.korody@navy.mil.

Very Respectfully,

[redacted] 14Nov13

H[redacted] S[redacted]
LT, DC, USN

APPENDIX H

DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT

U N I T E D S T A T E S	)	**AMENDED**
	)	VICTIMS' LEGAL COUNSEL
v.	)	REQUEST FOR CHANGE OF DATE
	)	FOR ARTICLE 39(a) MOTIONS
LT BLAKE ENTRALGO, DC, USN	)	HEARING
	)	

1. Nature of Request. This is a request supported by good cause to change the date of the Article 39(a) Motions Hearing in the above captioned case. The hearing is currently scheduled for 10 December 2013; however, detailed Victims' Legal Counsel (VLC) has a planned out-of-country family vacation during the week of 9 December 2013. Detailed VLC respectfully requests the Article 39(a) Motions Session be docketed for 3 December 2013.

2. Summary of Facts.

a. On 31 October 2013, the undersigned counsel, LCDR Patrick Korody, JAGC, USN, was detailed as VLC for LT H.S., DC, USN, the named victim in the charges in this court-martial.

b. On 31 October 2013, notice of VLC representation was served on Trial Counsel and Civilian Defense Counsel.

c. On 4 November 2013, detailed VLC entered a Notice of Appearance with the Eastern Judicial Circuit in this court-martial.

d. On 8 November 2013, Trial Counsel informed detailed VLC that an Article 39(a) Motions Hearing was scheduled for 10 December 2013.

e. On 12 November 2013, detailed VLC received two defense motions that implicate LT H.S.'s privacy interests and privileges under Military Rules of Evidence (M.R.E.) 412 and 513.

f. LT H.S. desires to present legal argument and possibly present facts through counsel at the Article 39(a) Motions Hearing in response to the defense motions under M.R.E. 412 and M.R.E. 513.

g. In October 2013, detailed VLC booked a family vacation on Carnival Cruise Lines, which is non-refundable and non-transferrable. The cruise departs 9 December 2013 and returns on 14 December 2013. Leave was authorized by Deputy Chief of Staff, Navy Victims' Legal Counsel Program prior to purchase of this cruise.

3. Discussion.

M.R.E. 412 and M.R.E. 513 provide LT H.S. the reasonable opportunity to be heard, including the opportunity to present facts and legal argument to the court. M.R.E. 412(c); M.R.E. 513(e); *LRM v. Kastenberg*, 72 M.J. 364 (C.A.A.F. 2013). This

includes the right to be heard through counsel. *Kastenberg*, 72 M.J. 370-71. LT H.S. desires to exercise her right to be heard through counsel, and in order to effectively exercise her right to be heard, detailed VLC respectfully requests a change of date for the Article 39(a) Motions Hearing in which these matters will be litigated.

On the scheduled date for the Article 39(a) Motions Hearing, detailed VLC has planned leave that cannot be re-scheduled without significant personal strife and financial loss. However, detailed VLC has no obligations in the weeks after or before the currently scheduled Article 39(a) Motions Hearing.

At the present time, it is unclear if LT H.S.'s interests are entirely aligned with those of Trial Counsel. Detailed VLC intends to file written pleadings on behalf of LT H.S. addressing the defense motions by 21 November 2013; however, such pleadings may not be sufficient to address any arguments or presentation of evidence that may occur at the hearing. Without her detailed VLC being present at the hearing,[1] LT H.S. may be denied her right to be heard.

---

[1] Detailed VLC is co-located with LT H.S. in Jacksonville, FL. Detailed VLC has access to a VTC site and has requested that Trial Counsel propose using this technology pursuant to Rule for Courts-Martial 703(b) and 914B in lieu of LT H.S. and detailed VLC traveling to Camp Lejeune. However, LT H.S. and detailed VLC recognize that the defense requested LT H.S.'s production in its M.R.E. 412 motion.

4. **Remedy.** Detailed VLC respectfully requests this honorable Court to reschedule the Article 39(a) Motions Hearing for 3 December 2013. There is no request at this time to modify trial dates or trial milestone dates.

P. K. KORODY
LCDR, JAGC, USN
Victims' Legal Counsel

CERTIFICATE OF SERVICE

I certify that a copy of this pleading was served upon the Court, Trial Counsel, and Defense Counsel on this 15th day of November 2013 via email.

P. K. KORODY

****

Motion Responses

1. Trial Counsel does / does not oppose this rescheduling request.

_____, 20__ _____

Date A. M. LEWIS
Capt, U.S. Marine Corps
Trial Counsel

1. Defense Counsel does / does not oppose this rescheduling request.

_____, 20__ _____

Date P. STACKHOUSE
Civilian Defense Counsel

****

Court Ruling

1. The above request is approved / disapproved. The court-martial shall convene for an Article 39(a) session on _____, 20__; Trial will commence on _____, 20__.

_____, 20__ _____

Date Military Judge

APPENDIX I

****

Motion Responses

1. Trial Counsel does / does not oppose this rescheduling request.

_____, 20__ _____

Date A. M. LEWIS
Capt, U.S. Marine Corps
Trial Counsel

1. Defense Counsel does / [redacted] oppose this rescheduling request.
** Please see below.

November 19, 20 13

Date P. STACKHOUSE
Civilian Defense Counsel

****

Court Ruling

1. The above request is approved / disapproved. The court-martial shall convene for an Article 39(a) session on _____, 20__; Trial will commence on _____, 20__.

_____, 20__ _____

Date Military Judge

I am currently docketed for an Administrative Separation Board at WNY on 2 December 2013, a special court-martial at SJAFB from 3-5 December 2013, 39a MBCL on 16 December, 39a at MCBQ 19 December, and 39a at NAB on 20 December 2013. I'm scheduled for vacation 22 December 2013 to 5 January 2014. Further I have a contested members trial the weeks of 6, 13, 20, and 27 (Entralgo) January 2013.

****

Motion Responses

1. Trial Counsel ~~does~~ / does not oppose this rescheduling request.

15 Nov, 2013
Date

A. M. LEWIS
Capt, U.S. Marine Corps
Trial Counsel

1. Defense Counsel does / does not oppose this rescheduling request.

_____, 20__
Date

P. STACKHOUSE
Civilian Defense Counsel

****

Court Ruling

1. The above request is approved / ~~disapproved~~ as modified. The court-martial shall convene for an Article 39(a) session ~~on~~ at 0900 16 DECEMBER, 2013; Trial will commence on 27 JANUARY, 2014.

21 NOVEMBER, 2013
Date

Military Judge

Chris Greer
LtCol, USMC
Military Judge

APPENDIX J

DEPARTMENT OF THE NAVY
GENERAL COURT-MARTIAL
NAVY-MARINE CORPS TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT

UNITED STATES	)	VICTIM'S RESPONSE
	)	TO DEFENSE MOTION
V.	)	TO DETERMINE THE
	)	ADMISSIBILITY OF
	)	EVIDENCE UNDER
	)	M.R.E. 412
BLAKE ENTRALGO	)	
LT, DC, USN	)	

1. NATURE OF RESPONSE

LT H.S., through counsel, respectfully requests that this Court prohibit the parties from introducing evidence of specific instances of sexual behavior with her former partner. Further, while LT H.S. acknowledges that some evidence of her relationship with her former partner may be relevant and material to the defense, and even the government, LT H.S. requests that this Court exercise its broad power to limit the parties' presentation of evidence regarding LT H.S.'s sexual predisposition. With regard to an alleged "flirtatious interaction" between LT H.S. and the Accused on the front porch prior to his sexual assault of LT H.S., LT H.S. requests that this Court impose reasonable limitations on the scope and manner of any examination on the said alleged interaction.

2. SUMMARY OF FACTS[1]

(1) LT H.S. is the named victim in the charges in this court-martial. The charges in this case stem from the Accused's sexual assault of LT H.S. in the early morning hours on 28 October 2012. The Accused and LT H.S. attended a Halloween party that began the evening of 27 October 2012, and both planned to sleep over at the host's residence. The Accused assaulted LT H.S. in the middle of the night in his vehicle.

(2) At the time of the sexual assault, LT H.S. was highly intoxicated, and the Accused overcame her verbal and physical resistance to sexual contact and sexual acts.

(3) On 27 October 2012, LT H.S. was in a relationship with E.M., a female person. They had been in this relationship for close to a year.

(4) On 8 November 2013, the defense provided notice that it intends to present evidence of "flirtatious interaction" between the Accused and LT H.S. on the front porch of the host's house, evidence of LT H.S.'s relationship with E.M., and evidence that LT H.S. is a "huge gay advocate" at

[1] LT H.S. and her counsel have been disadvantaged in reciting the facts of this court-martial as the government has refused to provide copies of the charge sheet, LT H.S.'s statements, and other ancillary documents despite repeated requests from LT H.S. including a FOIA/Privacy Act request.

trial. The defense also requested that E.M. be produced for trial.

(5) LT H.S. will testify at trial that she did not have a "flirtatious interaction" with the Accused on the front porch of the house.

3. DISCUSSION

I. EVIDENCE OF A "FLIRTATIOUS INTERACTION" BETWEEN THE ACCUSED AND LT H.S. ON THE FRONT PORCH OFFERED TO PROVE CONSENT

LT H.S. does not contest that the type of sexual behavior alleged by the defense may fall under the exception to in Military Rule of Evidence (M.R.E.) 412 found in M.R.E. 412(b)(1)(B). Presumably, based on the defense proffer that there were no eyewitnesses to this alleged behavior, the defense intends to cross-examine LT H.S. on this subject. If this Court finds such evidence admissible, LT H.S. asks this Court to impose reasonable limitations on the parties' examination to prevent questioning that is repetitive, harassing, and only marginally relevant.

Military judges have wide latitude to impose reasonable limits on examinations of witnesses, especially in areas that trigger M.R.E. 412. Importantly, the right to confront witnesses by cross examination is not unlimited. See Delaware v. Van Arsdall, 475 U.S. 673, 678-

79 (1986). Trial judges have "wide latitude" to "impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Id. "[T]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Id. (quoting Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (per curiam)). Although an accused has a right to confront and cross-examine witnesses, he does not have a "free license to cross-examine a witness to such an extent as would 'hammer th[e] point home to the jury.'" United States v. Collier, 67 M.J. 347 (C.A.A.F. 2009) (quoting United States v. James, 61 M.J. 132, 135 (C.A.A.F. 2005)). Cross-examination is sufficient if the motivation for testifying has been exposed, and "further inquiry . . . would [be] marginally relevant at best and potentially misleading." Id. (citing United States v. Carruthers, 64 M.J. 340, 344 (C.A.A.F. 2007)).

In light of LT H.S.'s expected testimony that there was no "flirtatious interaction" on the front porch, LT H.S. asks this Court to prevent the parties from continuing

to ask questions about the alleged "flirtatious interaction" once it has been established that LT H.S. denies that the said interaction ever took place. Further inquiry would be marginally relevant at best because it would result in LT H.S. repeating her answer that the said interaction did not take place and would result in harassment of LT H.S. Further, the defense theory that such evidence supports a defense of consent, or mistake of fact as to consent, would not be furthered by repetitive questioning on the subject by the defense and repetitive denials that the alleged interaction took place by LT H.S.

II. EVIDENCE OF LT H.S.'S RELATIONSHIP WITH E.M. OFFERED TO DEMONSTRATE A MOTIVE TO FABRICATE

The defense argues that evidence that LT H.S. was in an argument with E.M., a female with whom LT H.S., also a female, was in a relationship with on the night that she was sexually assaulted by the Accused, is "constitutionally required" to support a defense theory that LT H.S. fabricated the sexual assault. The danger of permitting any party to pursue this line of questioning is that it can implicate LT H.S.'s sexual predisposition to engage in same-sex sexual behavior or cross into areas of other

sexual behavior by LT H.S., and such evidence is specifically excluded under M.R.E. 412.

In its motion, the defense argues that the proffered evidence is admissible under the "constitutionally required" exception to M.R.E. 412 found at M.R.E. 412(b)(1)(C). Under that exception, the defense bears the burden of showing that the evidence is relevant, material, and that the probative value of the proffered evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading to the members, or by considerations of undue delay, waste of time, or needless presentation of evidence.

M.R.E. 412 is applicable to proceedings such as this court-martial involving alleged sexual offenses. M.R.E. 412 operates to exclude evidence that an alleged victim of a sexual offense engaged in other sexual behavior or to prove an alleged victim's sexual predisposition unless such evidence falls within one of the rule's three exceptions: (1) evidence of specific instances of sexual behavior offered by the accused to show that he was not the source of semen, injury, or other physical evidence; (2) evidence of the victim's past sexual behavior with the accused when offered to show the victim's consent; or (3) evidence that is constitutionally required to be admitted. M.R.E.

412(a)&(b). The defense has the burden of establishing evidence of other sexual behavior or sexual predisposition of the victim falls under one of these three exceptions before the evidence may be admitted. United States v. Carter, 47 M.J. 395, 396 (C.A.A.F. 1998).

"Generally, evidence must be admitted within the ambit of [the "constitutionally required" exception found in] M.R.E. 412(b)(1)(C) when the evidence is relevant, material, and the probative value of the evidence outweighs the dangers of unfair prejudice." United States v. Ellerbrock, 70 M.J. 314, 318 (C.A.A.F. 2011) (citing United States v. Gaddis, 70 M.J. 248 (C.A.A.F. 2011)). The relevance standard is the M.R.E. 401 relevance standard. Whether the evidence is material depends upon "the importance of the issue for which the evidence [is] offered in relation to the other issues in this case; the extent to which this issue is in dispute; and the nature of the other evidence in the case pertaining to this issue." United States v. Banker, 60 M.J. 216, 222 (C.A.A.F. 2004). (citing United States v. Colon-Angueira, 16 M.J. 20, 26 (C.M.A. 1983)). "Finally, if evidence is material and relevant, then it must be admitted when the accused can show that the evidence is more probative than the dangers of unfair prejudice. Those dangers include concerns about

'harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" Ellerbrock, 70 M.J. at 318-19 (citing M.R.E. 412(c)(3) & Van Arsdall, 475 U.S. at 679).

In this case, the defense's vague proffer that it intends to present evidence "about [LT H.S.'s] relationship with [E.M.]" does not permit LT H.S., and presumably this Court, to intelligently apply the legal standards to determine the admissibility of specific evidence. However, any evidence beyond establishing the existence of a relationship between LT H.S. and E.M. that implicates sexual predisposition or presents sexual behavior would not be relevant and material to the defense theory of motive to fabricate. LT H.S.'s sexual predisposition - her sexual orientation - and specific sexual behavior with E.M. are not relevant or important to the issue of whether or not LT H.S. fabricated, as alleged by the defense, to protect a relationship; the specific details of the relationship and sexual orientation of the parties in the relationship are inconsequential. It is the existence of the relationship that may be relevant and material to the defense theory.

Finally, applying the M.R.E. 403 balancing test to evidence of LT H.S. sexual orientation in this context and specific details of LT H.S.'s relationship with E.M., the

minimal probative value of this evidence as it relates to the alleged motive to fabricate is substantially outweighed by the danger of unfair prejudice, confusing the issues, and wasting time. LT H.S. should not be prejudiced by being required to disclose intimate details of a same-sex relationship and her sexual orientation, nor the Court be required to endure more than minimal questioning regarding LT H.S.'s same-sex relationship with E.M.

III. EVIDENCE THAT LT H.S. IS A "HUGE GAY ADVOCATE" OFFERED DEMONSTRATE A MOTIVE TO FABRICATE

The defense also argues in its motion that LT H.S. has a motive to fabricate based on her sexual orientation and advocacy of equality for gay and lesbian persons. Such evidence clearly is evidence of sexual predisposition and covered under M.R.E. 412. See, e.g., United States v. Grant, 49 M.J. 295, 297 (C.A.A.F. 1998) (upholding military judge's application of M.R.E. 412 to defense proffer that evidence of victim's sexual orientation was admissible under the "constitutionally required" exception). In order for such evidence to be admissible under the "constitutionally required" exception to M.R.E. 412, the defense must demonstrate that the evidence is relevant and

material to a defense theory and that it passes the M.R.E. 403 balancing test.

The defense has failed to demonstrate that this evidence is relevant and material to its theory. First, for this theory to be relevant material to the defense, the defense would have to present evidence that LT H.S. believed that the Accused, a married man, planned to publicize that he committed adultery with a fellow Naval officer prior to LT H.S. making her report of sexual assault on the morning of 28 October 2012. Therefore, its relevance at best is conditioned on the presentation of some evidence that LT H.S. believed that the Accused intended to publicize the sexual assault as a consensual sexual encounter. The defense motion is devoid of any such evidence; the defense theory rests entirely on speculation, and applying the legal standard, the defense has failed to demonstrate that such evidence is relevant and material.

Further, applying the M.R.E. 403 balancing test, evidence of LT H.S.'s sexual orientation and alleged advocacy of equality for gay and lesbian persons may still be highly inflammatory in today's military culture even with the repeal of "Don't Ask, Don't Tell," resulting in unfair prejudice, confusion of the issues, and wasting the Court's time. The probative value, if any, of such

evidence is extremely low since the defense has failed to connect the evidence to its theory of fabrication. The evidence should be properly excluded at trial under M.R.E. 412 and M.R.E. 403.

4. BURDEN

As the moving party, the defense has the burden by a preponderance of the evidence that other sexual behavior or sexual predisposition of LT H.S. falls under one of the three M.R.E. 412 exceptions before the evidence may be admitted. R.C.M. 905(c); United States v. Carter, 47 M.J. 395, 396 (C.A.A.F. 1998).

5. ORAL ARGUMENT

LT H.S., through counsel, desires to present legal argument orally and possibly present evidence.

Respectfully submitted,

P. K. KORODY
LCDR, JAGC, USN
Victims' Legal Counsel
For LT. H.S.

****

Certificate of Service

I hereby attest that a copy of the foregoing pleading was served on the Court, Defense Counsel, and Trial Counsel electronically on 21 November 2013.

P. K. KORODY

APPENDIX K

DEPARTMENT OF THE NAVY
GENERAL COURT-MARTIAL
NAVY-MARINE CORPS TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT

UNITED STATES	)	PATIENT'S RESPONSE
	)	TO DEFENSE MOTION
V.	)	TO COMPEL DISCOVERY
	)	AND PRODUCTION OF
	)	PRIVILEGED RECORDS
	)	UNDER M.R.E. 513
BLAKE ENTRALGO	)	
LT, DC, USN	)	

1. NATURE OF RESPONSE

LT H.S., through counsel, respectfully requests that this Court deny the defense motion to compel the discovery and production of LT H.S.'s mental health records. The defense has failed to demonstrate the threshold showing to order production of LT H.S.'s mental health records, even for an in camera review by the military judge, under Military Rule of Evidence (M.R.E.) 513(e).

2. SUMMARY OF FACTS[1]

(a) LT H.S. is the named victim in the charges in this court-martial. The charges in this case stem from the Accused's sexual assault of LT H.S. in the early morning hours on 28 October 2012. The Accused and LT H.S. attended

[1] LT H.S. and her counsel have been disadvantaged in reciting the facts of this court-martial as the Government has refused to provide copies of the charge sheet, LT H.S.'s statements, and other ancillary documents despite repeated requests including a FOIA/Privacy Act request.

a Halloween party that began the evening of 27 October 2012, and both planned to sleep over at the host's residence. The Accused assaulted LT H.S. in the middle of the night in his vehicle.

(2) At the time of the sexual assault, LT H.S. was highly intoxicated, and the Accused overcame her verbal and physical resistance to sexual contact and sexual acts.

(3) LT H.S. arrived at the party at approximately 1730 on 27 October 2010 and began consuming alcohol soon after she arrived. LT H.S. had not consumed alcohol on that date prior to arriving at the party.

(4) Although LT H.S. was prescribed certain medications in October 2012 to address depression and difficulty sleeping, she had not taken any medication since 26 October 2012 at approximately 2130. She last took Doxepin at approximately 2130 on 26 October 2013. She last took Citalopram at approximately 2130 on 26 October 2013. She last took Zolpidem (Ambien) several weeks, perhaps months, prior to 27 October 2012.

(5) LT H.S. invokes her right under M.R.E. 513 to prevent disclosure of confidential communications made between her and any psychotherapist.

3. DISCUSSION

In 1996, the Supreme Court recognized a psychotherapist-patient privilege under Federal Rule of Evidence 501 in Jaffee v. Redmond, 518 U.S. 1 (1996). In 1999, the Military Rules of Evidence were amended to codify a new psychotherapist-patient privilege. Military Rule of Evidence (M.R.E.) 513 codifies a qualified psychotherapist-patient privilege in military courts-martial. A patient has the right to refuse disclosure of confidential communications made between the patient and psychotherapist if such communications were made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition. M.R.E. 513(a). M.R.E. 513(d) details a series of exceptions to the psychotherapist-patient privilege, including when admission or disclosure of the communication is "constitutionally required." M.R.E. 513(d)(8).

In any case in which the production of records of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. M.R.E. 513(e)(1). In order to obtain such a ruling, the party seeking the records must file a written motion "specifically describing the evidence and stating the

purpose for which it is sought or offered." M.R.E. 513(e)(1)(A) (emphasis added).

Before ordering production or admission of disputed evidence, the military judge must conduct a hearing. M.R.E. 513(e)(2). The patient must be afforded a reasonable opportunity to attend the hearing and be heard, including the opportunity to present facts and legal argument to the court. Id.; LRM v. Kastenberg, 72 M.J. 364 (C.A.A.F. 2013). This includes the right to be heard through counsel. Kastenberg, 72 M.J. at 370-71.

The procedure for producing records claimed privileged under M.R.E. 513 was outlined by the Navy-Marine Corps Court of Criminal Appeals in United States v. Klemick. 65 M.J. 576 (2006). An in camera review of such records is appropriate upon a threshold showing based on a three part test:

> (1) Did the moving party set forth a specific factual basis demonstrating a reasonable likelihood that the requested privileged records would yield evidence admissible under an exception to M.R.E. 513?
>
> (2) Is the information sought merely cumulative of other information available? And,
>
> (3) Did the moving party make reasonable efforts to obtain the same or substantially similar information through a non-privileged source?

Id. at 580. The court also noted that "this standard is not high, because we know that the moving party will often

be unable to determine the specific information contained in a psychotherapist's records." Id. Nevertheless, in order for the privilege under M.R.E. 513 to have any legal force, courts must strictly hold the moving party to this threshold showing, or else privileged records will be produced for an in camera review in every case when requested by a party based on nothing more than speculation.

The purpose of a legal privilege is to promote individual and social interests. In Jaffee v. Redmond, the Supreme Court emphasized the role of trust in psychotherapy. Noting that effective psychotherapy requires an "atmosphere of confidence and trust" and that the problems discussed with a mental health care provider are often private and sensitive, the Court concluded that "the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment." Jaffee, 518 U.S. at 10.

Even review by a military judge defeats this recognized individual and social interest and pierces the privilege under M.R.E. 513 because a "confidential communication" as defined by M.R.E. 513(b) is one that is not intended to be disclosed to a third party, and there is no written exception for review by the military judge

unless the required threshold showing for production and an in camera review has been made by the moving party. Patients must be confident that their statements to mental health providers will not be revealed to anyone - even a military judge - simply because an accused speculates that there might be a communication that could be helpful to the defense. Adopting a standard of speculation would defeat the privilege, chill communications between patients and mental health care providers, and jeopardize the mental health of society. To pierce the M.R.E. 513 privilege, more than speculation is required by the law, and the defense has failed to make its threshold showing in this court-martial.

In its motion, the defense failed to set forth a specific factual basis demonstrating a reasonable likelihood that the requested records would yield evidence admissible under an exception to M.R.E. 513. The majority of the defense motion relates to medications prescribed to LT H.S. but does not address what evidence is contained in the requested records that would be admissible under an exception to M.R.E. 513. Simply because a certain type of evidence may be helpful to the defense, if it exists, does not dismiss the defense's obligation to demonstrate a reasonable likelihood that the requested records would

yield such admissible evidence and surely does not give the defense a right to compel production and a search through LT H.S.'s mental health record in fanciful hopes that such evidence may be found. Protecting the confidentiality of individuals and preventing a "blanket fishing expedition" by the defense are legitimate interests for military judges to uphold. United States v. Kelly, 52 M.J. 773, 775 (A.C.C.A. 1999). For the privilege under M.R.E. 513 to have legal meaning, the defense must do more than simply cast its fishing line by alleging commonly prescribed medications indicate that a Naval officer and practicing dentist suffers serious mental health disease. The defense has provided no specific factual basis that the requested records contain evidence that would be admissible at trial.

In its motion, the defense generally avers that it seeks evidence that LT H.S. suffers from "depression" which could include "psychotic depression, which has the possibility to result in breaks with reality" or that LT H.S. suffers from "bi-polar disorder, characterized by cycling mood changes, which could explain her consensual behavior involving into an allegation of rape." Defense Motion at 5. Yet, the defense has provided no statements from any person who alleges that they have observed LT H.S. exhibiting any indicators of such serious mental health

disease. At least one commentator agrees that defense counsel must obtain some knowledge about the contents of the requested records before being able to make a threshold showing to pierce M.R.E. 513. LTC Peter Masterson states:

> The defense counsel often will not know the contents of the statements they seek. This makes it difficult to argue that their production is constitutionally required. Therefore, defense counsel must obtain as much background information about the victims and witnesses as possible to determine what their statements to psychotherapists and their mental health records may contain. Defense counsel should talk to the witnesses and victims and their families, friends, and co-workers.

LTC Peter Masterson, The Military's Psychotherapist-Patient Privilege: Benefit or Bane for Military Accused, 2001 ARMY LAW. 18, 23. .

To pierce the privilege, order production, and conduct an in camera review, the defense must set for a specific factual basis demonstrating a reasonable likelihood that LT H.S.'s records would contain evidence admissible under an exception to M.R.E. 513. The defense motion is devoid of any mention of what specific evidence it believes is contained in the privileged records and what exception under M.R.E. 513 such evidence would be admissible under at trial. Even assuming that that the defense has set forth a specific factual basis, such a proffer must demonstrate a reasonable likelihood that the records would contain

evidence admissible under an exception to M.R.E. 513, such as the "constitutionally required" exception to M.R.E. 513, which is commonly argued by defense counsel.

M.R.E. 513(d)(8) provides that the psychotherapist-patient privilege does not apply "when admission or disclosure of a communication is constitutionally required." To amount to a constitutional right, an accused must show that by excluding such evidence he was denied a "meaningful opportunity to present a complete defense." United States v. Jones, 2008 CCA LEXIS 484, *17 (A.F.C.C.A. Oct. 22, 2008) rev'd on other grounds, 68 M.J. 465 (C.A.A.F. 2010) (citing Holmes v. South Carolina, 547 U.S. 319, 324 (2006)). The defense has failed to demonstrate a reasonable likelihood that there is evidence in LT H.S.'s mental health records and that the failure to produce that evidence would deny the Accused a meaningful opportunity to present a complete defense. If this Court adopts the defense argument, the privilege under M.R.E. 513 would be pierced on every occasion where the defense speculates that the witness suffers from a serious mental health disease.

In addition to failing to meet the factual threshold of the first part of the Klemick test, the defense also failed to satisfy the second or third parts of the test. The information sought, if it exists, is cumulative of

other information available. Despite the fact that LT H.S. did not take the medications on the night she was sexually assaulted by the Accused, the Court may nevertheless find the defense has a reasonable basis for inquiring as to how these medications may have affected - if at all - LT H.S.'s ability to perceive, remember, and recount the details of the Accused's sexual assault. See M.R.E. 602 (a witness may testify only if evidence is introduced sufficient to support a finding that the witness has personal knowledge). The defense can question the many eyewitnesses to determine whether LT H.S. behaved in any unusual ways that may indicate she suffered from some kind of disorder on the night of the assault and the following day when she reported the assault. The defense can also cross-examine LT H.S. about her behavior and actions on the night of the sexual assault and throughout her decision to report the Accused's sexual assault. Moreover, LT H.S. has already admitted that she was intoxicated on the night in question.

Finally, it is unknown what efforts, if any, the defense has made to obtain information about LT H.S.'s behavior or possible mental health disease from non-privileged sources. As stated above, the defense has produced no statements or evidence indicating that it has obtained information that LT H.S. presents any symptoms of

the serious mental health disease it alleges, or that it even attempted to obtain such information.

The defense has failed to meets the threshold showing to require production of LT H.S.'s mental health records, even for an in camera review by the military judge. Therefore, this Court should deny the defense request for production of LT H.S.'s mental health records.

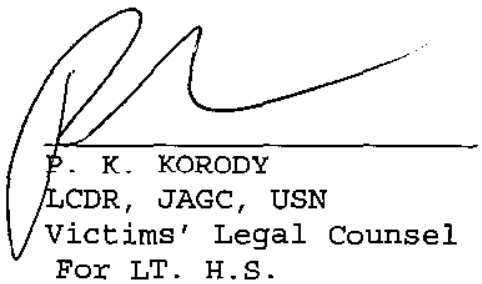
4. BURDEN

The burden is on the defense to meet the threshold showing for production of LT H.S.'s mental records for in camera review. United States v. Klemick, 65 M.J. 576 (N.M.C.C.A. 2006).

5. ORAL ARGUMENT

LT H.S., through counsel, desires to present legal argument orally and possibly present evidence.

Respectfully submitted,



P. K. KORODY
LCDR, JAGC, USN
Victims' Legal Counsel
For LT. H.S.

****

Certificate of Service

I hereby attest that a copy of the foregoing pleading was served on the Court, Defense Counsel, and Trial Counsel electronically on 21 November 2013.

P. K. KORODY

APPENDIX L

GENERAL COURT-MARTIAL
EASTERN JUDICIAL CIRCUIT
UNITED STATES MARINE CORPS

U N I T E D S T A T E S v. Blake D. ENTRALGO Lieutenant/O-3 U.S. Navy	))))))))))	Government Response to Defense Motion "Mil. R. Evid. 412 Witness Production" 22 November 2013

1. **Relief Requested**: The Government respectfully moves the court, pursuant to Rule for Courts-Martial 906(b)(13) and Military Rule of Evidence (M.R.E.) 412, to deny the defense motion in part and preclude the introduction of evidence or eliciting of testimony regarding specific instances of sexual conduct involving the victim in this case. Furthermore, the Government respectfully requests that the court deny any requested production of E.K.

2. **Summary of Facts**:

a. The accused is charged with violations of Articles 120, 133, and 134 UCMJ, related to his sexual assault of LT H.S., another dentist at a Halloween party in October 2012.

b. On or about October 2012 the victim was in a same-sex relationship with E.K. (identified as "E.M." in the defense filing).

3. **Discussion**

a. Applicable Law

Evidence regarding the sexual behavior of the victim of a sexual assault is generally inadmissible. Mil. R. Evid. 412(a). Sexual behavior includes "any sexual

behavior not encompassed by the alleged offense." Mil. R. Evid. 412(d). The rule "is intended to shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to prosecutions of such offenses." Manual for Courts-Martial (M.C.M.) 2012, A22-36, (Analysis of M.R.E. 412). The rule is one of exclusion: evidence offered of a victim's sexual behavior or predisposition will not be admitted unless it meets one of the three exceptions found in M.R.E. 412(b). *United States v. Gaddis*, 70 M.J. 248, 251-52 (C.A.A.F. 2011). Those three exceptions include: 1) "when specific instances of sexual behavior by the victim are offered to prove that someone other than the accused was the source of some evidence"; 2) "when the behavior is offered to prove consent"; or 3) "when exclusion would violate the appellant's constitutional rights." *United States v. Key*, 2012 CCA LEXIS 321, 15 (N.M.C.C.A., July 10, 2012) (citing *United States v. Banker*, 60 M.J. 216, 221 (C.A.A.F. 2004)). Under the third "constitutional rights" exception, evidence of sexual behavior is to be admitted only when "the evidence is relevant, material, and the probative value of the evidence outweighs the dangers of unfair prejudice," to include the risk of "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Key*, 2012 CCA LEXIS 321 at 15-16 (citing *United States v. Ellerbrook*, 70 M.J. 314, 319 (C.A.A.F. 2011)).

b. <u>"Flirtatious Behavior to Show Consent"</u>

The Government believes that depending on how the facts come out at trial, evidence relating to allegedly flirtatious behavior on the part of the victim and the accused may be relevant. However, the Government would request the court to

appropriately limit the questions posed by the defense to just those necessary to inquire into whether or not this activity took place.

c. The Victim's Relationship with E.K.

The Government believes that while limited questioning may be allowed about the victim's relationship with E.K., it should not be as broad or as unbridled as the defense suggests. While the fact that the victim was in a relationship may be relevant, further inquiry into it is not necessary or relevant and would serve only to harass or embarrass LT H.S. Such inquiry into specific instances of sexual conduct would not further the defense aim of establishing a motive to fabricate, and would not be permissible under M.R.E. 412(b)(1)(C). However, at this point the defense has failed to properly articulate just what information they are trying to introduce or how they intend to introduce it, limiting the Government's ability to respond to this portion of the defense motion.

d. "Huge Gay Advocate" Evidence

The Government believes that any evidence relating to LT H.S. being a "huge gay advocate" is properly excluded under M.R.E. 412 and does not fit under the constitutional exception of M.R.E. 412(b)(1)(C). The defense has failed to identify specifically how this information is relevant to their defense. Specifically, they have failed to demonstrate the nexus between being a "huge gay advocate" and the potential impact on her life due to having a relationship with a man. Furthermore, the defense has failed to present any evidence which would make being a "huge gay advocate" relevant. They have not presented or proffered any evidence that would suggest that LT H.S. had any reason to believe that the sexual activity would become known to other people, that such people

would share that information with people that know LT H.S. and that it would somehow impact her life. Such an attenuated supposition hardly rises to the level of relevance necessary to outweigh the dangers of proceeding down this line of testimony or questioning.

e. Production of E.K.

Finally, the defense has failed to demonstrate why the testimony of E.K. would be relevant and necessary for to the defense. Even if the defense is permitted to cross-examine LT H.S. about her relationship with E.K., that does not mean that E.K. need be produced to testify at trial. Such production would have little probative value and would result in the asking of personal and intimate questions of a person with an extremely attenuated involvement in the events in question.

4. **Burden of Proof**: The defense "has the burden of demonstrating why the general prohibition in Mil.R.Evid. 412 should be lifted to admit evidence of the sexual behavior of the victim." *United States v. Carter*, 47 M.J. 395, 396 (C.A.A.F. 1998).

5. **Evidence**:

The Government intends to make the witnesses requested by the defense available through remote means pursuant to R.C.M. 703(b)(1). LT H.S. is currently stationed in Florida and will have access to VTC. E.K. is currently in Winston-Salem, NC and will likely be telephonic. Ms. Hochschwender currently resides in New Hampshire, and will likely be telephonic.

6. **Argument**: The government requests oral argument.

A. M. LEWIS
Captain, U.S. Marine Corps
Trial Counsel

I hereby certify that a copy of the above motion was served upon defense counsel and the Court by electronic means on 22 November 2013.

A. M. LEWIS
Captain, U.S. Marine Corps
Trial Counsel

APPENDIX M

GENERAL COURT MARTIAL
NAVY-MARINE CORPS TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT

UNITED STATES v. Blake D. ENTRALGO Lieutenant/O-3 U.S. Navy	GOVERNMENT RESPONSE TO DEFENSE MOTION FOR APPROPRIATE RELIEF: COMPEL DISCOVERY (M.R.E. 513) 22 November 2013

1. **Nature of Motion.** This is the Government's response to a defense motion for appropriate relief to compel discovery. The Government opposes the compulsion of discovery. As set forth in greater detail below, the Government respectfully requests that the court deny the defense motion in that it is not relevant and necessary to the preparation of the defense and that such information is protected by Military Rule of Evidence (M.R.E.) 513.

2. **Summary of Facts.**

a. The accused is charged with violations of Articles 120, 133, and 134 UCMJ, related to his sexual assault of another dentist at a Halloween party in October 2012.

3. **Discussion.**

Rule for Court-Martial 703(a) and Article 46, UCMJ both provide that the Defense shall enjoy equal access to obtain witnesses and evidence, to include production of evidence and witnesses, but only when such evidence would be "relevant and necessary" to the preparation of the defense. *See generally, U.S. v. Rodriguez*, 57 M.J. 765, 770 (N.M.C.C.A 2002); *aff'd*, 60 M.J. 239 (C.A.A.F. 2002). Thus, this right is not without limits. *Id*. at 772. The touchstone is relevance and necessity. When the Defense fails to articulate in any meaningful way how the requested discovery would lead to evidence that tends to make the existence of any fact that is of

consequence more or less probable, the request ought to be denied. Moreover, the request must be reasonable and not be a "fishing expedition." United States v. Franchia, 32 C.M.R. 315 (C.M.A. 1962). Reasonableness, like relevance, depends on the facts of the case and the nature and scope of the request including the purpose for which the information is sought. United States v. Dienst, 16 M.J. 727 (A.F.C.M.R. 1983). Also to be considered is whether the request is narrow or broad and whether it identifies the information with particularity to include whether or not the information exists. A general request provides the government with no more notice of the information sought than if the defense does not ask at all. *See* United States v Agurs, 427, U.S. 97 (1976). Moreover, the government is under no general duty to do investigative work for the defense, including identifying and locating all favorable information that is not otherwise known. *See* United States v. Gans 23 M.J. 540 (A.C.M.R. 1986). That responsibility rests with the accused and his counsel. *Id*

The military rules of evidence (M.R.E.) provide a psychotherapist-patient privilege. stating:

> "A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition."

M.R.E. 513. Any patient may claim this privilege and may authorize the trial counsel to claim it on his or her behalf. Id. at (c). If the victim did see a psychotherapist as defined in M.R.E. 513(b), then the privilege applies to any statements she made during the course of her treatment. The government, at her request and on behalf of the victim, respectfully requests that the court deny disclosure of these records based on the psychotherapist-patient privilege. Once a patient has asserted the privilege, the Court must conduct a hearing in accordance with M.R.E. 513(e) to

determine whether the privilege applies and, if so, whether any of the exceptions in MRE 513(d) mandate disclosure.

The defense has moved the Court to order the disclosure of the victim's private communications made to her psychotherapist. M.R.E. 513 prevents such a disclosure unless one of the exceptions listed in subsection (d) apply. On their face, the exceptions described in 513(d)(1-7) are inapplicable. The only possible exception – and the only exception the defense claims in this case – is (d)(8) which requires disclosure "when constitutionally required."

The defense must articulate more than the mere possibility of constitutionally required evidence. *Pennsylvania v. Ritchie*, 480 U.S. 39, 51-52 (1987). The text of the rule requires that the party seeking admission must specifically describe the evidence sought and the purpose for which it is sought. M.R.E. 513(e)(1)(A). Courts are unwilling to allow the defense to go on a "fishing expedition" into a patient's records based upon mere speculation that those records might contain some helpful cross-examination material. *United States v. Briggs*, 48 M.J. 143 (1998).

In *Pennsylvania v. Ritchie*, the United States Supreme Court faced a similar issue to the one currently before the court. In *Richie*, a state law made certain government agency documents privileged. *Id*. The accused claimed that his Sixth Amendment confrontation rights were violated by the law because the documents limited his ability to impeach the only eyewitness, his daughter, and that the file may contain names of some witnesses favorable to him. *Id*. at 51-52. The Supreme Court specifically rejected the Pennsylvania State Supreme Court's holding that "a statutory privilege cannot be maintained when a defendant asserts a need, prior to trial, for the protected information that might be used at trial to impeach or otherwise undermine a witness' testimony." *Id.* Instead, the court held that the "ability to question adverse

witnesses . . . does not include the power to require disclosure of any and all information that might be useful in contradicting unfavorable testimony." *Id*. at 53. The court also stated that "the Confrontation Clause only guarantees 'an opportunity for effective cross examination, not cross examination that is effective in whatever way and to whatever extent the defense might wish'." *Id*.

The Supreme Court also examined the clash of privileged documents and the Sixth Amendment in *Davis v. Alaska*, 415 U.S. 308 (1974). In *Davis*, the defense had a concrete, specific theory of possible motive to fabricate based on specific facts that it discovered through witness interviews, namely that the witness was still on probation from a juvenile offense and he therefore would want to implicate someone else in order to keep from violating his probation. *Id*. at 308-309. *Davis* differs from *Ritchie* in that in *Davis*, the Confrontation Clause was violated because even though the defense already knew of the information, they were prevented from even asking the question because of the state law that sealed juvenile records. However, in *Ritchie* the defense could ask whatever questions it wanted but they could not overcome a statutory privilege and view a private document because it might contain more ammunition. *Id.* at 53.

The case law on the "constitutionally required" exception under M.R.E. 513 is scarce. *United States v. Klemick* provides the standard threshold the defense must show in order to get an *in camera* review of the victim's records. 65 M.J. 576, 578 (NMCCA 2006). However, the court in *Klemick* was dealing with the exception under M.R.E. 513(d)(2), the "child and spousal abuse exception," not the "constitutionally required" exception under MRE 513(d)(8). *Id*. at 578. Furthermore, in the first prong of the *Klemick* test, the moving party must show a reasonable likelihood that the records would yield evidence admissible under one of the M.R.E.

513 exceptions, but the court in *Klemick* does not define admissibility under the "constitutionally require" exception. However, the "constitutionally required" exception does appear in another section of the Military Rules of Evidence. M.R.E. 412(b)(1)(C). Under M.R.E. 412, the evidence sought is constitutionally required if the defense can articulate how the evidence sought is relevant, material, and favorable to the defense. *United States v. Morris*, 47 M.J. 695, 704 (NMCCA 1997).

In *Morris*, a pre-M.R.E. 513 case, the defense sought a victim's psychological records to look for possible impeachment evidence. *Id*. at 700. The court in *Morris* only released psychotherapist patient records in which the victim specifically discussed the incident in question. *Id*. Even without an actual privilege, the judge still balanced the need for privacy against the accused's Sixth Amendment right of confrontation and refused to disclose her entire record for the defense to peruse. *Id*.

From the text of M.R.E. 513, as well as cases like *Klemick*, *Briggs*, *Morris*, *Ritchie*, and *Davis*, the parameters of the "constitutionally required" exception take shape. First the defense must meet the three prong test in *Klemick* and establish: 1) the specific factual basis demonstrating a reasonable likelihood that the requested privileged records would yield evidence admissible under an exception to M.R.E. 513; 2) that the information sought is not cumulative of other information available; and 3) that the defense made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.

However, the Court's inquiry does not stop with the *Klemick* test. In order to establish the first prong in *Klemick* and demonstrate that the records are likely to reveal information on the "constitutionally required" exception that the defense is claiming, the defense must meet the requirements set forth in *Briggs*, *Morris*, *Ritchie* and *Davis*. The defense must specifically

describe the evidence sought and the purpose for which it will be used. The courts are not willing to allow the privilege to be defeated for a defense "fishing expedition" into records, which *might* contain *some* useful information for cross-examination (emphasis added). The Confrontation Clause is violated by restriction on the ability to ask relevant questions, not by denial of unrestricted access to privileged records in order to figure out which questions would be best to ask. Furthermore, the defense must show that the information sought is relevant, material, and favorable to the defense.

Turning to the facts of this case, the defense has failed to establish all of the elements of the *Klemick* test. First, the defense is seeking review the victim's records in search of evidence that "may relate to the character of these persons, their motives for testifying, their tendency to fabricate or exaggerate, or where such records may evidence a witness' mental or emotional instability, history of substance abuse, low intelligence, or may otherwise contain information relating to instance of lying to military or civilian authorities or others, and/or evidence of bias against the accused or any defense witness." Such a broad request is tantamount to the "fishing expedition" envisioned by *Briggs*. 48 M.J. 143. Any impeachment evidence that might be contained in her records is cumulative to the impeachment evidence already available to the defense regarding her perceptions, memory and drugs she may have been taking. Secondly, the impeachment evidence that is available to the defense is available through non-privileged means, such as the toxicology report cited by the defense and her basic ability to recollect as well as any information that they have otherwise gathered. Therefore, the defense fails to meet the second and third prongs in *Klemick*. Additionally, the basis the defense provided for why the victim's records may provide some impeachment material fails to demonstrate anything inconsistent with her allegation that she and the accused assaulted her.

The defense wants access to the victim's records in order to extract embarrassing facts and attempt to impeach her on the witness stand by simply inflaming the passions of the members. Both M.R.E. 513 and *Pennsylvania v. Ritchie* deny the defense access to such a fishing expedition. Unless and until the defense can demonstrate by the preponderance of the evidence why any communications to the therapist are relevant, material, and favorable, then the records must remain protected.

Now that the defense has requested the psychiatric records and the government has claimed the privilege on the victim's behalf, the Court must conduct a hearing in accordance with M.R.E. 513(e). At this hearing, the Court must determine whether the privilege applies and if any exceptions to the rule apply. The party seeking admission must specifically describe the evidence sought and the purpose for which it is sought. M.R.E. 513(e)(1)(A). If the Court is persuaded by the party seeking the records, the Court must hold a hearing and view the evidence *in camera*, issuing protective orders as necessary and sealing the motion and related papers in order to protect the patients privacy. *Id*. at (2)-(5).

Therefore, if and only if the Court believes that the defense has established the proper basis in accordance with M.R.E. 513 and case law, the Court should receive a sealed, authenticated copy of the victim's psychiatric records and view them *in camera*. At the hearing the burden will be on the defense to show by a preponderance of the evidence that the privilege does not apply or that an exception applies. R.C.M. 905 (c)(1-2).

4. **Evidence and Burden of Proof.** The burden of proof is a preponderance of the evidence, R.C.M. 905(c)(1). As the moving party, the defense bears the burden of persuasion, R.C.M. 905(c)(2). The government offers no evidence in support of its motion response.

5. **Relief Requested.** The requests that the court deny the defense's motion in its entirety except as to those provisions to which the government has agreed to produce.

6. **Argument.** The government requests oral argument.

A. M. Lewis
Captain, U.S. Marine Corps
Trial Counsel

****

Certificate of Service

I hereby attest that a copy of the foregoing motion was served on the court and opposing counsel electronically on 22 November 2013.

A. M. Lewis
Captain, U.S. Marine Corps
Trial Counsel

APPENDIX N

Korody, Patrick K LCDR NAVSTA Mayport, N001

From: Korody, Patrick K LCDR NAVSTA Mayport, N001
Sent: Monday, December 02, 2013 12:04
To: Lewis, Andrew M USMC, LSSS-E, HqSptBn, MCI-East
Subject: status on FOIA/Privacy Act Request
Signed By: patrick.korody@navy.mil

Importance: High

Capt Lewis,

I respectfully request a written response to LT S[redacted]s FOIA/Privacy Act request in the next 48 hours. Failure for the government to provide a response will lead me to explore additional options, such as contacting LT S[redacted] s congressional representative, the IG, appealing to M&RA, and/or requesting a continuance from the court until this issue is resolved.

I'd like to resolve this without creating additional work and exposure for all parties, but my client and I need the requested information to adequately address and protect her interests and rights.

v/r
Patrick K. Korody
LCDR, JAGC, USN
Navy VLC Program, Naval Station Mayport, FL
Comm: 904.270.5191 Ext. 1213

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APPENDIX O

UNITED STATES MARINE CORPS
2D MARINE LOGISTICS GROUP
II MARINE EXPEDITIONARY FORCE
PSC BOX 20002
CAMP LEJEUNE NC 28542-0002

IN REPLY REFER TO:
5800
SJA

DEC 4 2013

From: Commander, 2d Marine Logistics Group
To: LT H[redacted] S[redacted], DC, USN
Via: LCDR Patrick Korody, JAGC, USN

Subj: FREEDOM OF INFORMATION ACT AND PRIVACY ACT REQUEST ICO U.S. v. LT BLAKE ENTRALGO, DC, USN

Ref: (a) The Freedom of Information Act, 5 U.S.C. 552
(b) LT S[redacted] ltr of 14 Nov 13

Encl: (1) Convening Order

1. Your request of 14 November 2013 is denied in part and granted in part.

a. Your request for the Article 34, UCMJ Advice Letter is denied pursuant to exemption (b)(5) of reference (a) as it is a pre-decisional recommendation.

b. Your request for the Charge Sheet is denied as it is exempted by section 7(b) of reference (a) in that its disclosure "could reasonably be expected to interfere with enforcement proceedings, [or] would deprive [LT Entralgo] a right to a fair trial."

c. Your request for the Convening Order is granted and is enclosed.

d. Your request for the Article 32 Investigating Officer Report is denied pursuant to exemptions (b)(5) and (7) of reference (a) as it is a pre-decisional recommendation and its disclosure "could reasonably be expected to interfere with enforcement proceedings, [or] would deprive [LT Entralgo] a right to a fair trial." Your request for the summaries of your testimony and the testimony of others is denied. At present, section 7(b) of reference (a) exempts disclosure of the requested summaries because revealing them "could reasonably be expected to interfere with enforcement proceedings, [or] would deprive [LT Entralgo] a right to a fair trial."

e. Your request for any statements signed by your or any "Results of Interview" or similar written documents summarizing statements made by you that are relevant to the charges is denied. At present, section 7(b) of reference (a) exempts their disclosure because revealing the requested documents "could reasonably be expected to interfere with enforcement proceedings, [or] would deprive [LT Entralgo] a right to a fair trial."

Subj: FREEDOM OF INFORMATION ACT AND PRIVACY ACT REQUEST ICO U.S. v. LT BLAKE ENTRALGO, DC, USN

2. The point of contact on this matter is Captain Matthew E. Neely, at 910-451-5806, or matthew.e.neely@usmc.mil.

A. L. THOMA

UNITED STATES MARINE CORPS
2D MARINE LOGISTICS GROUP
PSC BOX 20002
CAMP LEJEUNE, NORTH CAROLINA 28542-0002

IN REPLY REFER TO:
5817
GCMCO 1-12

OCT 01 2012

GENERAL COURT MARTIAL CONVENING ORDER 1-12

Pursuant to the authority contained in Article 22, Uniform Code of Military Justice, Rule for Courts-Martial 504, and section 0120 of the Judge Advocate General Manual of the Navy, a General Court-Martial is hereby convened. It may proceed at Marine Corps Base, Camp Lejeune, North Carolina, or any such authorized place as directed. The court will be constituted as follows:

MEMBERS

Lieutenant Colonel M. A. Dumenigo, U.S. Marine Corps
Major R. R. Grimm, U.S. Marine Corps
Major R. L. Corl, U.S. Marine Corps
Major R. J. Livingston Jr., U.S. Marine Corps
Major D. M. Bartos, U.S. Marine Corps
Captain K. V. Phillips, U.S. Marine Corps

E. D. BANTA
Commanding General
U.S. Marine Corps

ORIGINAL
ENCLOSURE (1)

APPENDIX P

DEPARTMENT OF THE NAVY
GENERAL COURT-MARTIAL
NAVY-MARINE CORPS TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT

UNITED STATES	)	MOTION
	)	FOR MATERIALS NECESSARY
V.	)	TO EXERCISE SUBSTANTIVE
	)	LEGAL RIGHTS ON BEHALF
	)	OF VICTIM H.S.
	)	
	)	
BLAKE ENTRALGO	)	
LT, DC, USN	)	

1. NATURE OF MOTION

LT H.S., through counsel, respectfully requests that this Court order the government to provide materials necessary for her to exercise substantive legal rights afforded to her as a crime victim in the military justice system.

2. SUMMARY OF FACTS

(a) LT H.S. is the named victim in the charges in this court-martial. The charges in this case stem from the Accused's sexual assault of LT H.S. in the early morning hours on 28 October 2012.

(b) On 31 October 2013, the undersigned counsel was detailed as Victims' Legal Counsel for LT H.S., and on 4 November 2013, the undersigned counsel entered an appearance in this court-martial.

(c) The undersigned counsel has made repeated requests in writing and orally to the government to provide certain documents necessary for LT H.S. to exercise her substantive legal rights a crime victim in the military justice system. The government denied these requests, including a request made under the Freedom of Information Act and Privacy Act that was denied on 4 December 2013.[1]

(d) The defense in this case has filed motions seeking to admit evidence that falls under Military Rule of Evidence (M.R.E.) 412 and to compel the production of LT H.S.'s psychotherapist records that are privileged under M.R.E. 513.

3. DISCUSSION

Historically, the military justice system, like the federal criminal justice system, "functioned on the assumption that crime victims should behave like good Victorian children - seen but not heard." Kenna v. U.S. Dist. Court, 435 F.3d 1011, 1013 (9th Cir. 2006) (discussing the application of the Crime Victims' Rights Act (CVRA) in federal court). In 1994, the Department of

[1] While LT H.S. did make a FOIA and Privacy Act request to the General Court-Martial Convening Authority in this case for a copy of the charge sheet and certain investigative materials, LT H.S. is not relying on these authorities in this Motion. Rather, the legal authority for this Motion rests on a crime victim's substantive legal rights in the military justice system. FOIA and the Privacy Act are ways for members of the general public to obtain information from the government. LT H.S., while a member of the general public, has substantive legal rights in the military justice system as a crime victim.

Defense issued its first Victim Witness Assistance Procedures (VWAP) directive and instruction, and subsequently issued a new VWAP directive instruction in 2004 that enumerated seven of the eight rights codified in the Crime Victims' Rights Act (CVRA) of 2004, 18 U.S.C. sec. 3771. See DoDD 1030.01 and DoDI 1030.2 series. These lawful regulations, and other additions to the Uniform Code of Military Justice (UCMJ) and Military Rules of Evidence (M.R.E.), ushered in a new era in which crime victims are full participants in the military justice system.

Department of Defense Directive (DoDI) 1030.01 dated 23 April 2007 (interim change) provides a crime victim substantive legal rights. Paragraph 4.4 provides that "[a] crime victim has the right to:

4.4.1. Be treated with fairness and respect for the victim's dignity and privacy.

4.4.2. Be reasonably protected from the accused offender.

4.4.3. Be notified of court proceedings.

4.4.4. Be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial.

4.4.5. Confer with the attorney for the Government in the case.

4.4.6. Receive available restitution.

4.4.7. Be provided information about the conviction, sentencing, imprisonment, and release of the offender."

Although it is unclear if the CVRA directly applies to military justice proceedings, the Department of Defense has, by instruction, and the military courts have recognized as much, adopted the overwhelming majority of substantive rights that the CVRA provides to crime victims. See Daniels v. Kastenberg, 2013 LEXIS CCA 286, *22 (A.F.C.C.A. April 2, 2013) ("We note Department of Defense Instruction (DoDI) 1030.01, Victim and Witness Assistance, ¶ 4.4 (23 April 2007, interim change), provides victims of crimes under the UCMJ with generally the same rights found in 18 U.S.C. § 3771(a)(1)-(8). . . .") (rev'd on other grounds in LRM v. Kastenberg, 72 M.J. 364, (C.A.A.F. 2013)).

Congress and the President have given substantive legal rights to crime victims through the UCMJ and M.R.E. For example, Congress amended Article 54, UCMJ in 2012 to provide a sexual assault victim who testifies with the right to receive a copy of the authenticated record of trial. Art. 54(e), UCMJ. The President, by Executive Order 13643 in 2013, re-issued the M.R.E. which contain substantive legal rights for crime victims. M.R.E. 412 provides that a sexual assault victim has the right to be

notified and heard before evidence of other sexual behavior or predisposition is admitted at a court-martial. M.R.E. 513 provides similar rights for patients with respect to mental health records. M.R.E. 615 plainly lays out a crime victim's right to be present during court proceedings absent specific findings made by the military judge.

In July 2013, the Court of Appeals for the Armed Forces (C.A.A.F) enforced a victim's substantive legal right to present facts and make legal argument, including through counsel, to the court when given the opportunity to be "heard" by the M.R.E. In LRM v. Kastenberg, the C.A.A.F. reviewed the statutory construction of M.R.E. 412 and M.R.E. 513 and case law to find that "[a] reasonable opportunity to be heard at a hearing includes the right to present facts and legal argument, and that a victim or patient who is represented by counsel be heard through counsel." 72 M.J. 364, 370 (2013). The court in Kastenberg understood that when the Congress and the President codified these substantive legal rights for crime victims (or patients), they did so with the intent of providing these interested parties - like defendants - with a meaningful opportunity to exercise these rights; such an opportunity is embodied in the notion of fairness and due process that is the bedrock of the American legal system.

Like an accused represented by a defense counsel, a crime victim with substantive legal rights must be afforded access to the information necessary to exercise those rights. When an accused requests information through counsel, he does so in order to have the means to meaningfully exercise his substantive legal rights; these means include challenging the admissibility of evidence, cross-examining witnesses, and making legal argument. A victim is afforded the same means to exercise substantive legal rights, such as under M.R.E. 412 and 513, but can only meaningfully do so, like an accused, if given the necessary information.

The Congress, the President, and the C.A.A.F. recognized that these substantive legal rights afforded to crime victims become meaningless unless they are viewed through the lens of due process guaranteed under the due process clause of the Fifth Amendment to the Constitution. See Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (applying constitutional due process to Texas adoption proceeding and finding "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to

present their objections."). In other words, all of the substantive legal rights that are afforded to crime victims in the military justice system are imbued with the requirements that they be interpreted in a meaningful manner - to do otherwise would ignore the mandate that victims be these afforded rights. Due process and fairness require that crime victims - like the government and defense - be adequately informed in order to meaningfully exercise their substantive rights.

Among these rights are the right to confer[2] with the attorney for the government in the case[3], to be treated with fairness and respect for dignity and privacy, and to be "heard" under M.R.E. 412 and M.R.E. 513; these rights are implicated in this case. To make a victim's views and legal arguments fully and effectively to the parties and the court and to present evidence, the victim must first be adequately informed, and LT H.S. seeks materials - namely

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[2] The word "confer" supports the existence of a substantive legal right that can only be exercised with information. Webster's New World Dictionary defines "confer" to mean "to have a conference or talk; to meet for discussion." Black's Law Dictionary defines "conference" as a "meeting of several persons for deliberation, for the interchange of opinion, or for the removal of differences or disputes." A crime victim cannot "confer" with the attorney for the government if they have no information upon which to form opinions and differences, or on which to base a dispute. This right becomes meaningless if only one party to the conference has information.

[3] The Discussion to R.C.M. 306(b) makes clear the policy that commanders consider the views of the victim when reaching disposition decisions. This is often accomplished by the crime victim conferring with government counsel.

copies of her statements,[4] a copy of the charge sheet, and other investigatory documents that provide information necessary to establish the totality of the circumstances of the alleged crime. Information that establishes the totality of circumstances of the alleged crime is imperative since evidence for or against the admissibility, for example, of evidence falling under M.R.E. 412 may be derived from statements of other witnesses, including the accused.

Crime victims deprived of access to information cannot be meaningfully informed such that he or she can fully and effectively confer with government counsel, exercise legal rights, or be heard under M.R.E. 412 and 513. This principle that information is necessary to make an informed and effective decision or legal argument is not new to military courts. For example, military courts recognize that to support an *in camera* review of mental health records under M.R.E. 513, a party must make a threshold showing but that "this standard is not high, because [the courts] know that the moving party will often be unable to determine the specific information contained in a

[4] LT H.S. made her unrestricted report of sexual assault more than 1 year ago. She has made sworn statements and testified at an Article 32, UCMJ investigation. While LT H.S. knows the facts of this case, these statements are needed to determine what statements - and specific words or phrases - were used in the past to describe the facts related to the case.

psychotherapist's records." United States v. Klemick, 65 M.J. 576, 580 (N.M.C.C.A. 2006). Likewise, a victim cannot meaningfully form views, let alone make their views known or present legal arguments or evidence to parties or the court, if not meaningfully informed. At this time, LT H.S. does not know what evidence exists in this case such that she can even present it to the parties and the court since she has been denied access by the government. Therefore, in this case, LT H.S. will be denied her substantive legal rights to "confer" with government counsel and be "heard" by the court unless she is afforded access to key information.

Importantly, while neither the Constitution, Congress, or the President has specifically defined the terms "fairness" and "respect," those words must at minimum guarantee a victim's rights are given no less consideration than an accused's rights or government interests. See Snyder v. Massachusetts 291 U.S. 97, 122 (1934) (Cardozo, J.) ("[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."), reaffirmed by Payne v. Tennessee, 501 U.S. 808, 827 (1991); Morris v. Slappy, 461 U.S. 1, 14 (1983) (stating that "in the

administration of criminal justice, courts may not ignore the concerns of victims"); United States v. Heaton, 458 F. Supp. 2d 1271, 1272 (D. Utah 2006) (finding that under the federal Crime Victims' Rights Act, treating "a person with 'fairness' is generally understood as treating them 'justly' and 'equitably'"). The legislative history of the CVRA instructs that "fairness includes the notion of due process." 150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004) (statements of Sen Kyl).

Victims are not on an even playing field if the victim – the persons most impacted by the crime – is not given access to key information known by the parties when the victim's rights are implicated. Treating victims in such an uneven manner is contrary to the intent of Congress, the President, and the C.A.A.F., as well as the explicit provision of a right to fairness and respect in the DoD regulations. Accordingly, denying a crime victim access to information denies a crime victim the ability to exercise those legal rights in a meaningful manner.

LT H.S., as described above, has a right to the requested information. In this case, where the defense is seeking to admit both evidence of sexual predisposition and other sexual behavior and seeking production of her mental health records, LT H.S. has compelling privacy

interests at stake. LT H.S. must be afforded a meaningful opportunity to protect public disclosure of private information during a court-martial, and the only way to meaningfully exercise these rights is to know what information is known by the parties that may have some bearing on these issues.

Lastly, the government and defense will likely respond that providing the requested information to LT H.S. will somehow taint her testimony in this case. But they do not cry foul when an accused has access to the entire discovery provided by the government to the defense, attends an entire Article 32, UCMJ investigation, is present for all court sessions and trial on the merits, and then testifies last in his own defense. The only thing that providing LT H.S. the requested information will accomplish is the enforcement of the substantive legal rights that are provided to her under the law.

4. BURDEN

The burden is on the government to demonstrate that it has afforded LT H.S. her substantive legal rights as a crime victim.

5. REMEDY REQUESTED

LT H.S. requests that this Court order the government to provide her copies of her statements, a copy of the

charge sheet, and other investigatory documents that provide information necessary to establish the totality of the circumstances of the alleged crime.

At this time, LT H.S. is not seeking a continuance of the Article 39(a) session. LT H.S. requests that this Court hear this Motion first and, if the Court orders production, give a sufficient recess to permit LT H.S. and her counsel to review the information prior to presenting facts and legal argument on the M.R.E. 412 and 513 motions.

6. ORAL ARGUMENT

LT H.S., through counsel, desires to present legal argument orally.

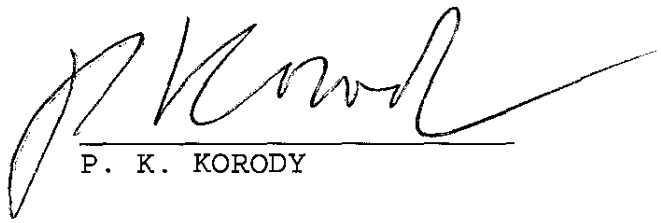
Respectfully submitted,

P. K. KORODY
LCDR, JAGC, USN
Victims' Legal Counsel
For LT. H.S.

****

Certificate of Service

I hereby attest that a copy of the foregoing pleading was served on the Court, Defense Counsel, and Trial Counsel electronically on 6 December 2013.



P. K. KORODY

APPENDIX Q

GENERAL COURT-MARTIAL
EASTERN JUDICIAL CIRCUIT
UNITED STATES MARINE CORPS

U N I T E D S T A T E S v. Blake D. ENTRALGO Lieutenant/O-3 U.S. Navy	))))))))))	Government Response to Victim Motion "For Materials Necessary to Exercise Substantive Legal Rights on Behalf of Victim H.S." 11 December 2013

1. **Relief Requested**: The Government respectfully moves the court to deny LT H.S.'s motion in its entirety.

2. **Summary of Facts**:

The accused is charged with violations of Articles 120, 133, and 134 UCMJ, related to his sexual assault of LT H.S., another dentist at a Halloween party in October 2012.

3. **Discussion**

Rules for Courts-Martial (R.C.M) 701 and 703 provide the statutory guidance for the management of disclosure and production of evidence by the Government. However, the rules only govern disclosures to the *defense* and production of items requested by the *defense*. It should be noted that these rules do not make reference to "all parties," instead they specifically refer to "the prosecution and the defense"[1] or "the *trial counsel* shall provide . . . to *the defense*."[2]

In *LRM v. Kastenberg* the Court of Appeals for the Armed Forces (C.A.A.F) specifically addressed the question of whether certain Military Rules of Evidence

[1] R.C.M. 703(a)
[2] R.C.M. 701(a)

(M.R.E.) require that a victim be allowed to make certain arguments before the court, through a counsel. 72 M.J. 364 (C.A.A.F. 2013). C.A.A.F. looked at M.R.E.s 412 and 513 and the actual language that was used addressed the victim's rights. Specifically, C.A.A.F. focused on the M.R.E.s' references to the victim being afforded an opportunity to be "heard." *Id.* at 369-370. C.A.A.F.'s decision said nothing about rights to documents, such as statements, charge sheets, or investigations, beyond the filings that implicate rights under those M.R.E.s.

LT H.S.'s argument regarding Due Process is also misplaced. The Fifth Amendment states, in the relevant part, that no person shall "be deprived of life, liberty, or property, without due process of law." While a criminal defendant has a readily cognizable claim that in a criminal prosecution one faces the potential depravation of all three, a crime victim cannot make the same claim.

LT H.S., through her VLC, has been able to properly exercise her rights without the requested documentation. She has been provided copies of both defense motions which implicate her rights under M.R.E. 412 and 513. She has filed responses to both of those motions. Through her counsel she has been able to confer with the Government counsel about the progression of the case. She, along with her VLC, are scheduled to appear via VTC at the 39(a) on 16 December.

The potential danger of the disclosure of the requested documents is significant. LT H.S.'s request is for "copies of her statements, a copy of the charge sheet, and other investigatory documents that provide information necessary to establish the totality of the circumstances of the alleged crime." VLC Motion at 11-12. Provision to a witness of copies of their own statements, the charge sheet, or other investigatory documents

threatens to taint the judicial proceeding. While it is certainly not improper for a witness to review their statement prior to testifying, or even while having his/her recollection refreshed, being provided copies to take home is another matter. The charge sheet presents additional concerns related to potential violations of the accused's privacy. A victim in possession of a charge sheet could also create the appearance of impropriety, as a member of the public may believe that this would potentially taint a victim's testimony. The final request dealing with "investigatory documents" is so broad and vague as to render it meaningless. A request so lacking in specificity can hardly be responded to. It is sufficient to say that LT H.S. has failed to specifically articulate *what* she is looking for, *where* she believes it to be located, *how* it will assist her in the exercise of her rights, and *why* she is unable to exercise her rights without it. There is a significant risk of danger if a witness were to be provided copies of an investigation which detailed the statements, or summaries of statements, of other witnesses.

4. **Burden of Proof**: The Government specifically disagrees with LT H.S.'s assertion that the burden is on the Government. LT H.S. has provided no case, statute, or authority for that proposition. Under R.C.M. 905(c)(2), LT H.S., as the moving party, has the burden of proof. Under R.C.M. 905(c)(1), the burden of proof for this motion is by a preponderance of the evidence.

5. **Evidence**: The Government offers no additional evidence for this motion.

6. **Argument**: The Government requests oral argument.

A. M. LEWIS
Captain, U.S. Marine Corps
Trial Counsel

I hereby certify that a copy of the above motion was served upon defense counsel and the Court by electronic means on 11 December 2013.

A. M. LEWIS
Captain, U.S. Marine Corps
Trial Counsel

APPENDIX R

CHARGE I: **Violation of the UCMJ, Article 134**

SPECIFICATION: In that Lieutenant Blake D. ENTRALGO, U.S. Navy, 2d Dental Battalion, 2d Marine Logistics Group, Camp Lejeune, North Carolina, did, at or near Jacksonville, North Carolina, on or about 28 October 2012, orally communicate to Lieutenant H[redacted] S[redacted], U.S. Navy, certain indecent language, to wit: "I'm going to fuck you tonight," or words to that effect, which conduct was to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces.

CHARGE II: **Violation of the UCMJ, Article 120**

SPECIFICATION 1: In that Lieutenant Blake D. ENTRALGO, U.S. Navy, 2d Dental Battalion, 2d Marine Logistics Group, Camp Lejeune, North Carolina, did, at or near Jacksonville, North Carolina, on or about 28 October 2012, commit a sexual act upon Lieutenant [redacted] S[redacted] U.S. Navy, to wit: penetration of her vulva with his penis, by using unlawful force against her.

SPECIFICATION 2: In that Lieutenant Blake D. ENTRALGO, U.S. Navy, 2d Dental Battalion, 2d Marine Logistics Group, Camp Lejeune, North Carolina, did, at or near Jacksonville, North Carolina, on or about 28 October 2012, commit a sexual act upon Lieutenant Hi[redacted] S[redacted] U.S. Navy, to wit: penetration of her vulva with his penis, by causing bodily harm to her.

SPECIFICATION 3: In that Lieutenant Blake D. ENTRALGO, U.S. Navy, 2d Dental Battalion, 2d Marine Logistics Group, Camp Lejeune, North Carolina, did, at or near Jacksonville, North Carolina, on or about 28 October 2012, commit a sexual act upon Lieutenant H[redacted] S[redacted] U.S. Navy, to wit: penetration of her vulva with his penis, when Lieutenant S[redacted] was incapable of consenting to the sexual act due to impairment by a drug, intoxicant, or other similar substance, and that condition was known or reasonably should have been known by the accused.

SPECIFICATION 4: In that Lieutenant Blake D. ENTRALGO, U.S. Navy, 2d Dental Battalion, 2d Marine Logistics Group, Camp Lejeune, North Carolina, did, at or near Jacksonville, North Carolina, on or about 28 October 2012, commit sexual contact upon Lieutenant H[redacted]. S[redacted] U.S. Navy, to wit: touching her breast with his mouth, by using unlawful force against her.

SPECIFICATION 5: In that Lieutenant Blake D. ENTRALGO, U.S. Navy, 2d Dental Battalion, 2d Marine Logistics Group, Camp Lejeune, North Carolina, did, at or near Jacksonville, North Carolina, on or about 28 October 2012, commit sexual contact upon Lieutenant H[redacted] S[redacted] U.S. Navy, to wit: touching her breast with his mouth, by causing bodily harm to her.

SPECIFICATION 6: In that Lieutenant Blake D. ENTRALGO, U.S. Navy, 2d Dental Battalion, 2d Marine Logistics Group, Camp Lejeune, North Carolina, did, at or near Jacksonville, North Carolina, on or about 28 October 2012, commit sexual contact upon Lieutenant H[redacted] S[redacted] U.S. Navy, to wit: touching her breast with his mouth, when Lieutenant S[redacted] was incapable of consenting to the sexual contact due to impairment by a drug, intoxicant, or other similar substance, and that condition was known or reasonably should have been known by the accused.

SPECIFICATION 7: In that Lieutenant Blake D. ENTRALGO, U.S. Navy, 2d Dental Battalion, 2d Marine Logistics Group, Camp Lejeune, North Carolina, did, at or near Jacksonville, North Carolina, on or about 28 October 2012, commit sexual contact upon Lieutenant H[redacted] S[redacted] U.S. Navy, to wit: touching her vagina with his penis, by using unlawful force against her.

SPECIFICATION 8: In that Lieutenant Blake D. ENTRALGO, U.S. Navy, 2d Dental Battalion, 2d Marine Logistics Group, Camp Lejeune, North Carolina, did, at or near Jacksonville, North Carolina, on

or about 28 October 2012, commit sexual contact upon Lieutenant H[redacted]. S[redacted] U.S. Navy, to wit: touching her vagina with his penis, by causing bodily harm to her.

SPECIFICATION 9: In that Lieutenant Blake D. ENTRALGO, U.S. Navy, 2d Dental Battalion, 2d Marine Logistics Group, Camp Lejeune, North Carolina, did, at or near Jacksonville, North Carolina, on or about 28 October 2012, commit sexual contact upon Lieutenant H[redacted] S[redacted] U.S. Navy, to wit: touching her vagina with his penis, when Lieutenant [redacted] was incapable of consenting to the sexual contact due to impairment by a drug, intoxicant, or other similar substance, and that condition was known or reasonably should have been known by the accused.

ADDITIONAL CHARGE: Violation of the UCMJ, Article 133

SPECIFICATION: In that Lieutenant Blade D. ENTRALGO, U.S. Navy, 2d Dental Battalion, 2d Marine Logistics Group, Camp Lejeune, North Carolina, did, at or near Jacksonville, North Carolina, on or about 28 October 2012, wrongfully and dishonorably engage in sexual intercourse with Lieutenant H[redacted] S[redacted], U.S. Navy, a woman not his wife, while she was incapable of consenting due to impairment by a drug, intoxicant or similar substance, and that condition was known or reasonably should have been known by the said Lieutenant ENTRALGO, which conduct was unbecoming an officer and a gentleman.

APPENDIX S

***** S[redacted] H[redacted] C[redacted] *****

PDTS Cardholder ID: [redacted]
Age: 27y Sex: FEMALE

PDTS Person Code: 28 Oct 2012 12:51
Profile Length: 180 DAYS

Allergies: NKA

Pharmacy Comment: NONE

==========

CHCS PROFILE (LAST 180 DAYS)

RX #	DRUG	STATUS	QTY	FILL DATE	REF LEFT
[redacted]					

[redacted]

PDTS RX#	DRUG NAME <PHARMACY NAME/PHYSICIAN>	CPD QTY	DAYS SUPPLY	NEW/ REFILL	DATE FILLED
7035546	DOXEPIN 10 MG CAPSULE <TARGET PHARMACY #1107/BOEKER, THOMAS WHITEFORD>	90	30	0	26 Oct 2012
7030229	CITALOPRAM HBR 20 MG TABLET <TARGET PHARMACY #1107/BOEKER, THOMAS WHITEFORD>	30	30	1	26 Oct 2012
~~4473272~~	ZOLPIDEM TARTRATE 10 MG TAB <TARGET PHARMACY #1107/BOEKER, THOMAS WHITEFORD>	30	30	0	12 Sep 2012

*** END OF REPORT ***

et Mirana

K Fahr
10-25-12

ENTRALGO

XII
AE 00155
Pg ___ of ___

APPENDIX T

Korody, Patrick K LCDR NAVSTA Mayport, N001

From: Hudspeth LtCol Nicole K <nicole.hudspeth@usmc.mil>
Sent: Monday, December 16, 2013 17:06
To: Korody, Patrick K LCDR NAVSTA Mayport, N001
Cc: Rottkamp, Peter B USMC, LSSS-E, HqSptBn, MCI-East; Miller, Simon, FCT-ACCT: See telephone tab for POC/Owners; 'stackhouse@militarydefender.com'; Lewis, Andrew M USMC, LSSS-E, HqSptBn, MCI-East
Subject: RE: US v Entralgo
Signed By: nicole.hudspeth@usmc.mil

I will not do written rulings.

-----Original Message-----
From: Korody, Patrick K LCDR NAVSTA Mayport, N001
[mailto:patrick.korody@navy.mil]
Sent: Monday, December 16, 2013 3:28 PM
To: Hudspeth LtCol Nicole K
Cc: Rottkamp Capt Peter B; EJC Clerk of Court;
'stackhouse@militarydefender.com'; Lewis Capt Andrew M
Subject: US v Entralgo

LtCol Hudspeth,

I forgot to ask during the Art 39(a), but will I be provided a copy of your written rulings and findings of fact for the MRE 412, 513 and my motion for information/documentation?

Thank you.

v/r
Patrick K. Korody
LCDR, JAGC, USN
Navy VLC Program, Naval Station Mayport, FL
Comm: 904.270.5191 Ext. 1213

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APPENDIX U

DEPARTMENT OF THE NAVY
GENERAL COURT-MARTIAL
NAVY-MARINE CORPS TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT

UNITED STATES	)	LT HCS REQUEST TO
	)	DELAY REVIEW OF
V.	)	MENTAL HEALTH
	)	RECORDS IN
	)	ANTICIPATION OF
	)	A WRIT OF MANDAMUS
BLAKE ENTRALGO	)	
LT, DC, USN	)	

LT HCS, through counsel, respectfully requests this Court to delay review of her mental records by the Court until 3 January 2014. LT HCS intends to seek a Writ of Mandamus under the All Writs Act, 28 U.S.C. § 1651 with the Navy-Marine Corps Court of Criminal Appeals (NMCCA) prior to that date. LT HCS intends to ask NMCCAA for a stay of the proceedings and to set aside the military judge's ruling denying LT HCS's motion for investigative materials, the military judge's ruling regarding the admissibility of evidence under M.R.E 412, and the military judge's order to produce records that fall under M.R.E. 513.

This request will not delay any proceeding or prevent any party from adequately preparing for trial, which is not scheduled to commence until 28 January 2014. Granting this request will permit LT HCS the opportunity to pursue further legal action to enforce her legal rights and protect her privacy interests prior to review of these confidential records by the military judge or release of these records to any party.

Respectfully submitted,

P. K. KORODY
LCDR, JAGC, USN
Victims' Legal Counsel
For LT. H.S.

****

Certificate of Service

I hereby attest that a copy of the foregoing pleading was served on the Court, Defense Counsel, and Trial Counsel electronically on 26 December 2013.

P. K. KORODY

APPENDIX V

Korody, Patrick K LCDR NAVSTA Mayport, N001

From: Hudspeth LtCol Nicole K <nicole.hudspeth@usmc.mil>
Sent: Friday, December 27, 2013 12:25
To: Korody, Patrick K LCDR NAVSTA Mayport, N001
Cc: Rottkamp, Peter B USMC, LSSS-E, HqSptBn, MCI-East; Miller, Simon, FCT-ACCT: See telephone tab for POC/Owners; 'stackhouse@militarydefender.com'; Lewis, Andrew M USMC, LSSS-E, HqSptBn, MCI-East; 'Sam Moore'
Subject: RE: US v Entralgo - LT HCS REQUEST TO DELAY REVIEW OF MH RECORDS
Signed By: nicole.hudspeth@usmc.mil

I had already reviewed the records; they were delivered prior to the holiday but I have not had an opportunity to properly redact irrelevant information.

-----Original Message-----
From: Korody, Patrick K LCDR NAVSTA Mayport, N001
[mailto:patrick.korody@navy.mil]
Sent: Thursday, December 26, 2013 1:24 PM
To: Hudspeth LtCol Nicole K
Cc: Rottkamp Capt Peter B; EJC Clerk of Court;
'stackhouse@militarydefender.com'; Lewis Capt Andrew M; 'Sam Moore'
Subject: US v Entralgo - LT HCS REQUEST TO DELAY REVIEW OF MH RECORDS
Importance: High

LtCol Hudspeth,

Please find the attached request on behalf of LT HCS to delay your review of her mental health records until after 3 January 2014. LT HCS intends to file a writ of mandamus with NMCCA, and has retained Mr. Sam Moore to assist her with the writ. I am assisting Mr. Moore and believe that the writ will be filed early next week.

Very respectfully,

Patrick K. Korody
LCDR, JAGC, USN
Navy VLC Program, Naval Station Mayport, FL
Comm: 904.270.5191 Ext. 1213

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APPENDIX W

GENERAL COURT-MARTIAL
EASTERN JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY

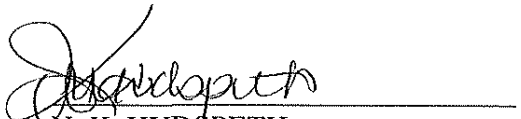
UNITED STATES	)	
v.	)	ORDER TO CONDUCT EX PARTE 39A
ENTRALGO, Blake LIEUTENANT U.S. NAVY	)	30 December 2013

1. On 16 December 2013, in accordance with MRE 513, this court ordered an *in camera* review of the September and October 2012 mental health records of the complaining witness, LT HCS, held in the possession of Dr. Tom Boeker of Wilmington, NC.

2. After reviewing these records, the court has determined portions of the records are relevant and should be released to defense counsel. However, there are other portions of the records that this court will allow LT HCS and her legal counsel (LC) to be heard on, prior to making a determination regarding releasing the privileged information. LC may contact the military judge in the form of an ex parte RCM 802 conference in order to focus on the issue to be discussed during the 39A session.

3. **ORDER.** LT HCS and her LC are hereby ordered to conduct an ex parte 39A with the below signed military judge on Monday, 6 January at 1300. Videoteleconferencing is permitted.

SO **ORDERED**, this 30th day of December 2013



N. K. HUDSPETH
Lieutenant Colonel, U.S. Marine Corps
Military Judge

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES, Appellee v. Blas M. ESCAMILLA Private First Class (E-2) U.S. Marine Corps, Appellant	**BRIEF AND ASSIGNMENT OF ERROR** Case No. 201400168 Tried at Camp Pendleton, California, on 6 September 2013, 21 October, 15 and 27 November, and 16–20 December 2013, before a general court-martial convened by the Commanding General, 1st Marine Logistics Group.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

JOHN J. STEPHENS
Major, USMC
Appellate Defense Division
1254 Charles Morris Street SE
Building 58, Suite 100
Washington Navy Yard, D.C. 20374
Office: (202) 685-7394
Fax: (202) 685-8587
john.j.stephens@navy.mil

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Assignment of Error

TO AFFIRM A CONVICTION FOR SEXUAL ASSAULT, THIS COURT MUST BE CONVINCED PRIVATE FIRST CLASS ESCAMILLA'S MISTAKE-OF-FACT WAS NOT REASONABLE. THE ALLEGED VICTIM TESTIFIED THAT HE INITIALLY DECLINED THE OFFER OF ORAL SEX, BUT THEN MADE NO OTHER OBJECTIONS AS PRIVATE FIRST CLASS ESCAMILLA MASSAGED HIM AND PERFORMED ORAL SEX ON HIM FOR AN ENTIRE MINUTE. THE ALLEGED VICTIM ALSO TESTIFIED THAT HE WAS NOT A HOMOSEXUAL. CAN THIS COURT AFFIRM THE CONVICTION IF PRIVATE FIRST CLASS ESCAMILLA HAD NO REASON TO BELIEVE THE ALLEGED VICTIM WAS NOT STILL OBJECTING TO THE ORAL SEX?

Statement of Statutory Jurisdiction

The approved sentence of Private First Class (PFC) Blas M. Escamilla, U.S. Marine Corps, included a bad-conduct discharge. Accordingly, this Court has jurisdiction under Article 66, Uniform Code of Military Justice (UCMJ).[1]

Statement of the Case

The Government charged PFC Escamilla with misconduct arising from his homosexual contact with four Marines: Lance Corporal (LCpl) J.N., PFC J.C., LCpl S.S., and LCpl M.H. The Government alleged PFC Escamilla twice performed oral sex on LCpl J.N., touched his anus with an unknown object, touched his inner thigh once, and twice touched his head in violation of Articles 120 and 128, UCMJ, respectively.[2] Regarding PFC J.C.,

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[1] 10 U.S.C. § 866(b)(1) (2012).
[2] 10 U.S.C. § 920, 928 (2012).

the Government alleged PFC Escamilla touched his chest and solicited him for an act of prostitution, in violation of Articles 128 and 134, UCMJ.[3] The Government alleged PFC Escamilla touched LCpl S.S.'s penis in violation of Article 120, UCMJ.[4] PFC Escamilla was also charged with performing oral sex on LCpl M.H., in violation of Article 120, UCMJ, and of providing alcohol to minors in violating of Article 92, UCMJ.[5]

Sitting as a general court-martial, a panel of members with enlisted representation convicted PFC Escamilla, contrary to his pleas, of one specification of violating Article 120, UCMJ, for performing oral sex on LCpl M.H, and one specification of providing alcohol to minors.[6] He was acquitted of the remaining ten specifications. The members sentenced PFC Escamilla to be reduced to the pay-grade of E-1, to confinement of 235 days, which covered time already served, and a bad-conduct discharge.[7] The Convening Authority (CA) approved the findings and sentence and, except for the discharge, ordered the sentence executed.[8]

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[3] 10 U.S.C. § 928, 934 (2012); CAL. PEN. CODE § 647(b).
[4] 10 U.S.C. § 920 (2012).
[5] 10 U.S.C. § 920, 892 (2012).
[6] Results of Trial; R. at 1226.
[7] Staff Judge Advocate Recommendation (SJAR) Apr. 15, 2014, Encl. (1), Results of Trial; R. at 1252.
[8] General Court-Martial Order No. 03-2014, Apr. 17, 2014.

Introduction

This case is simple. PFC Escamilla is an openly homosexual Marine. He was even before the repeal of Don’t Ask Don’t Tell. He had a serious falling-out with one of his best friends, LCpl Sara Shalkowski. After he confronted her over her infidelity to her Marine boyfriend and called her a whore, she became enraged. She retaliated by reporting PFC Escamilla as a homosexual predator of Marines whom he plied with alcohol. It is certain she was told at Sexual Assault Prevention and Response training that alcohol vitiates consent to sexual activity and that the Government would seriously investigate sexual assault claims. Her plan worked.

LCpl Shalkowski reported the names of three male Marines to the command. These Marines were then forced to make a choice. They could either admit to being homosexual and possibly receive disciplinary measures for their own minor misconduct, such as underage drinking, or they could tell the Government they were unwilling victims of PFC Escamilla. They chose victimhood, a lack of consequences to themselves, and avoided publicizing their sexual orientation.

The Government then baselessly placed PFC Escamilla in pretrial confinement for eight months while he went to general court-martial. During the trial, the members learned PFC Escamilla was an openly homosexual Marine even while the Don’t Ask Don’t Tell policy was still in effect. The military judge

instructed them that PFC Escamilla would have been subject to administrative processing for separation, but such action was no longer possible due to the repeal of the policy.

Statement of Facts

1. PFC Escamilla was accused of sexual assault after he had a falling-out with his friend, LCpl Sara Shalkowski.

On 25 August 2008, Blas Escamilla enlisted in the United States Marine Corps.[9] Two years later, Congress repealed the "Don't Ask Don't Tell Policy" that prohibited homosexual service members, like PFC Escamilla, from being "open" about their sexual orientation.[10] PFC Escamilla was then allowed to be openly homosexual,[11] and like other young service members, had sexual relations with other service members.[12] Not all of his partners were themselves open about their sexual orientation[13] and PFC Escamilla, as a rule, was confidential about these encounters.[14] However, he sometimes confided in LCpl Shalkowski about his sexual partners.[15] He told her about his trysts with LCpl J.N.,[16] and possibly other Marines. He also told PFC J.C.,

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[9] Charge Sheet.
[10] Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3516 (2010).
[11] R. at 1034-35.
[12] R. at 1035, 1110.
[13] R. at 1036.
[14] R. at 1080.
[15] R. at 1098.
[16] R. at 1099.

LCpl J.N., and LCpl M.H. about his encounters, though he did not reveal his partners' identities.[17]

On 22 February 2013, three weeks after the sexual encounter with LCpl M.H., PFC Escamilla had a falling-out with LCpl Shalkowski. He publicly confronted her about her infidelity to her Marine boyfriend.[18] She retaliated against PFC Escamilla by reporting his sexual activity with LCpl J.N., PFC S.S., and LCpl M.H. to the command.[19] Each of the Marines initially claimed that they were not homosexual or even bi-sexual, and that PFC Escamilla's sexual contact was totally unwanted.[20] Despite their testimony,[21] and PFC J.C.'s testimony,[22] the members acquitted PFC Escamilla of all of the charges and specifications relating to the these Marines, except for the single incident of oral sex with LCpl M.H.

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[17] R. at 1036.
[18] R. at 1098, 1100-02.
[19] Article 32 Investigating Officer's Exhibit 9, Shalkowski Statement, Apr. 5, 2013.
[20] Art. 32 IO Ex. 5 at 4, J.N. Statement, Feb. 26, 2013; Art. 32 IO Ex. 7, Statement of PFC S.S. dated 28 February 2013; Art. 32 IO Ex. 6, Statement of LCpl H.M. dated 26 February 2013; Art. 32 IO Ex. 8, Statement of PFC J.C. dated 13 March 2013.
[21]R. at 480-84 (LCpl J.N.'s testimony);R. at 881 (PFC S.S.'s testimony). LCpl J.N and PFC S.S. both deny they are homosexual and that there was consent.
[22]R. at 662-63, 665 (PFC J.C.'s testimony). PFC J.C. denies he is a homosexual and that there was any interest in the sex act.

2. PFC Escamilla and LCpl M.H. had a sexual encounter.

LCpl M.H. testified that PFC Escamilla performed oral sex on him without his consent.[23] On Friday, 1 February 2013, several Marines went out in Oceanside, California.[24] At the beginning of the evening, PFC Escamilla and LCpl Shalkowski found LCpl M.H. and PFC J.C. in the barracks.[25] Though LCpl M.H. and PFC J.C. (both underage) had been drinking, they agreed to go out to Oceanside and serve as designated drivers at the end of the evening.[26] Once in Oceanside, PFC Escamilla and LCpl Shalkowski went to a nightclub and LCpl M.H. and PFC J.C. went to a tattoo parlor, and then took in a movie.[27] After the movie, they returned to PFC Escamilla's car and waited.[28]

While waiting, the pair met with two other Marines they knew.[29] This group then walked to the beach, where LCpl M.H. jumped into the Pacific Ocean with his clothes on.[30] After this,

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[23] R. at 794.
[24] R. at 782-83.
[25] *Id*.
[26] R. at 782.
[27] *Id*.
[28] R. at 785.
[29] There may have been some confusion as to who was there. LCpl M.H. testified that these two Marines were "Whitman and somebody else." R. at 785. Later, LCpl M.H. testified that he believed that "Whitman and Corporal Lamothe" were the two Marines who stayed in the other hotel room. R. at 790. LCpl M.H. probably meant Cpl Damoth.
[30] R. at 785.

the group returned to PFC Escamilla's car.[31] Soon after, PFC Escamilla and LCpl Shalkowski exited the nightclub with two other Marines[32] they met that evening, a female Marine named Private (Pvt) Whitman and a Corporal (Cpl) David Damoth.[33]

PFC Escamilla, LCpl Shalkowski, LCpl M.H., PFC J.C., LCpl S.S., Cpl Damoth, and Pvt Whitman all met at PFC Escamilla's parked car.[34] Rather than risk the possibility of getting stopped at the Camp Pendleton gate for driving while intoxicated, the group decided to get two rooms at a nearby hotel.[35] PFC Escamilla, LCpl M.H., PFC J.C., LCpl S.S., and LCpl Shalkowski rented one room and Pvt Whitman and Cpl Damoth rented another. At the hotel, the group continued drinking and socializing.[36] After a short time, everyone, except for PFC Escamilla and LCpl M.H., went outside for a cigarette.[37]

According to LCpl M.H., he was lying on his stomach on the bed when PFC Escamilla came over to him and began giving him a back massage.[38] Then PFC Escamilla turned him over and unzipped

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[31] *Id*.
[32] R. at 981 (Private Whitman testified that she and Cpl Damoth met PFC Escamilla and LCpl Shalkowski at the club).
[33] R. at 1083.
[34] R. at 882.
[35] R. at 786.
[36] R. at 789-90.
[37] R. at 794.
[38] *Id*.

LCpl M.H.'s pants and pulled them down to his thighs.[39] According to LCpl M.H., despite him initially saying "no," PFC Escamilla placed his mouth on his penis and performed oral sex for about a minute.[40] The footsteps and noise of the others preceded their return to the room.[41] Just before they opened the door, PFC Escamilla moved back to his bed, while LCpl M.H. pulled up his pants and fastened his zipper.[42]

On cross-examination, LCpl M.H. admitted that in his earlier versions of his story (to the Naval Criminal Investigative Service (NCIS) and at the Article 32 hearing) he only said "no" when PFC Escamilla initially asked him if he could perform oral sex on him, and that he never said "no" as all of the other events transpired.[43] LCpl M.H. even admitted that he could not remember if he "said 'yes' or 'no'"[44] when PFC Escamilla performed oral sex on him "for about a minute or so."[45]

PFC Escamilla also testified that he told the members that LCpl M.H. initially declined his offer to perform oral sex.[46]

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[39] *Id*.
[40] R. at 847.
[41] R. at 802.
[42] *Id*.
[43] R. at 845-46.
[44] R. at 848.
[45] Appellate Ex. XLVIII, NCIS Statement, Feb. 26, 2013; R at 873.
[46] R. at 77.

However, LCpl M.H., by his actions, eventually relented.[47] PFC Escamilla testified that he believed his friend was "playing hard to get."[48]

When the group returned, the socializing commenced as normal.[49] After a short time, LCpl M.H. testified that he took a long shower.[50] When he exited the bathroom, he found everyone asleep.[51] He got into a bed with LCpl Shalkowski and PFC J.C. and went to sleep.[52] PFC Escamilla and LCpl S.S. were asleep in the other bed.[53]

When LCpl M.H. awoke the next morning, he was on the bed with PFC J.C. and PFC Escamilla was on the other bed.[54] Everyone else was gone.[55] The trio then went to breakfast at a Mexican restaurant, got haircuts, and then returned to Camp Pendleton.[56]

3. Aftermath and court-martial.

After PFC Escamilla's falling out with LCpl Shalkowski, the Government investigated his sexual activity and placed him on

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[47] *Id*.
[48] *Id*.
[49] R. at 802.
[50] *Id*.
[51] R. at 803.
[52] *Id*.
[53] R. at 803-04.
[54] R. at 804.
[55] *Id*.
[56] R. at 755-56, 805.

pretrial restriction.[57] When PFC Escamilla violated the conditions of his restriction for an unrelated nonjudicial punishment, he was placed in pretrial confinement.[58]

During the defense case, PFC Escamilla called several witnesses that both supported his character and attacked the character for truthfulness of the complaining witnesses. One witness, Corporal Hasaniafshar, testified that PFC Escamilla told her in March 2010 that he was a homosexual[59] and that he was giving and receiving homosexual favors in the barracks with other Marines.[60] At the end of her testimony, the senior member, a Lieutenant Colonel, asked, "Why was Escamilla not brought up on charges upon announcing he was gay to Cpl Hasani[afshar] in March 2010, since Don't Ask Don't Tell had not been repealed yet? If he was openly gay back then, how did leadership address this issue?"[61]

After a colloquy with counsel, the military judge instructed the members that the military's policy concerning homosexuality was

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[57] Appellate Ex. XVI.
[58] *Id*.; R. at 151-178. PFC Escamilla was on restriction from an unrelated nonjudicial punishment during the investigation. He went to the PX and purchased soup and tuna when he was only allowed to purchase hygiene items. This caused the command to place him in pretrial confinement. His time-served sentence at this court-martial affords him no actual remedy.
[59] R. at 1006-07.
[60] R. at 1027.
[61] Appellate Ex. LVI.

irrelevant and that PFC Escamilla would not have been charged with any misconduct, but could have been subject to administrative processing initiated by his command.[62]

Summary of Argument

LCpl M.H. is not a credible witness. His testimony alone is the only evidence for PFC Escamilla's conviction for sexual assault. Even accepting his testimony, the evidence still supports PFC Escamilla's mistake-of-fact defense. It is simply unreasonable that PFC Escamilla performed oral sex on LCpl M.H. for "about a minute" without his consent or a reasonable belief that he consented.

Argument

TO AFFIRM A CONVICTION FOR SEXUAL ASSAULT, THIS COURT MUST BE CONVINCED PRIVATE FIRST CLASS ESCAMILLA'S MISTAKE-OF-FACT WAS NOT REASONABLE. THE ALLEGED VICTIM TESTIFIED THAT HE INITIALLY DECLINED THE OFFER OF ORAL SEX, BUT THEN MADE NO OTHER OBJECTIONS AS PRIVATE FIRST CLASS ESCAMILLA MASSAGED HIM AND PERFORMED ORAL SEX ON HIM FOR AN ENTIRE MINUTE. THE ALLEGED VICTIM ALSO TESTIFIED THAT HE WAS NOT A HOMOSEXUAL. BECAUSE PRIVATE FIRST CLASS ESCAMILLA HAD NO REASON TO BELIEVE LANCE CORPORAL M.H. WAS NOT CONSENTING TO THE ORAL SEX, THIS COURT CANNOT AFFIRM PRIVATE FIRST CLASS ESCAMILLA'S SEXUAL ASSAULT CONVICTION.

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[62] R. at 1028.

Standard of Review and Principles of Law

This Court has an independent obligation to review each case *de novo* for factual and legal sufficiency, and may substitute its own judgment for that of the trial court.[63] The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt."[64] The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [this Court is] convinced of the accused's guilt beyond a reasonable doubt."[65] In exercising this duty, this Court may judge the credibility of witnesses, determine controverted questions of fact, and substitute its judgment for that of the military judge.[66]

A conviction for sexual assault requires the Government to prove beyond a reasonable doubt that PFC Escamilla placed his mouth on LCpl M.H.'S penis and did so without his consent. A

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[63] Art. 66, UCMJ; *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987).
[64] *Turner*, 25 M.J. at 324 (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).
[65] *Turner*, 25 M.J. at 325.
[66] Art. 66(c), UCMJ; *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990).

"lack of consent may be inferred based on the circumstances. All of the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person's actions."[67] "A mistake-of-fact defense to a charge of [sexual assault] requires that a mistake be both honest *and* reasonable."[68] "To be reasonable the ignorance or mistake of fact must have been based on information, or lack of it, that would indicate to a reasonable person that the other person consented."[69]

Discussion

A. The oral sex was either consensual, or it was reasonable for PFC Escamilla to believe it was, because LCpl M.H. allowed PFC Escamilla to give him oral sex for "about a minute" without saying "no."

It is simply unreasonable for the finder-of-fact to see the sexual encounter between PFC Escamilla and LCpl M.H. as anything other than an awkward, but consensual, homosexual encounter. LCpl M.H. repeatedly testified that he was "not gay" and not attracted to men in any way.[70] Yet, LCpl M.H. found himself alone in a hotel room with his friend, PFC Escamilla.

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[67] Appellate Ex. LXIII at 3.
[68] *United States v. Willis*, 41 M.J. 435, 438 (C.A.A.F. 1995) (citing *United States v, Langley*, 33 M.J. 278 (C.M.A. 1991)).
[69] Appellate Ex. LXIII at 5.
[70] R. at 807, 850-52, 867, 875.

He knew PFC Escamilla was openly homosexual, and sexually active.[71] He also knew PFC Escamilla had discreet sexual encounters with other male Marines.[72] PFC Escamilla lived right across the hall in the same barracks.[73] It is also very possible LCpl M.H. was aware of the continuing homosexual relationship between PFC Escamilla and his own close friend, LCpl J.N.[74] He had occasionally seen PFC Escamilla wear a t-shirt with the words, "Sorry ladies, I suck dick better than you do."[75] Though he initially denied it, he also regularly received back rubs and chest and stomach massages from PFC Escamilla in the past.[76]

With the two of them alone in the hotel room, LCpl M.H. asked PFC Escamilla for a back massage.[77] As LCpl M.H. lied on his stomach, PFC Escamilla massaged his back and hips.[78] LCpl M.H. then rolled over on his back and let PFC Escamilla massage his stomach.[79] Then PFC Escamilla asked if he could perform oral sex on his friend, but was turned down, when LCpl M.H. said,

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[71] R. at 1036.
[72] R. at 1036, 1080.
[73] R. at 1069.
[74] PFC Escamilla testified in great detail about his homosexual encounters with LCpl J.N. starting in November 2012. R. at 1039-1061.
[75] R. at 1071. The shirt was a gift from LCpl Shalkowski, R. at 1099.
[76] R. at 811, 812, 814, 1072, 1080.
[77] R. at 1083.
[78] R. at 1085.
[79] R. at 1085.

"Nah, I'm good, just keep giving me a massage."[80] PFC Escamilla took this to mean that his friend was "playing hard to get."[81]

PFC Escamilla continued massaging LCpl M.H.'s chest as he moved his hands down to his side.[82] As he did this, he noticed LCpl M.H. had partially closed his eyes and had a smile on his face.[83] He went to kiss him on his lips, but LCpl M.H. pushed him away.[84] But there was no resistance as PFC Escamilla continued to massage his friend's hips and upper thighs.[85]

PFC Escamilla massaged LCpl M.H.'s inner thighs and started to undue his belt for his pants[86] and unzipped his jeans.[87] Because LCpl M.H.s jeans were still wet from jumping in the ocean, he lifted his hips and helped PFC Escamilla with taking them down to his mid-thigh range.[88] His pants were only taken down that far so that they could be quickly pulled up in the event that the other Marines returned to the room unexpectedly.[89]

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[80] R. at 1086.
[81] R. at 1086.
[82] R. at 1086.
[83] R. at 1087.
[84] R. at 1088.
[85] R. at 1087.
[86] R. at 1090.
[87] R at 1091.
[88] R. at 1091-92.
[89] R. at 1092.

LCpl M.H. then swung his leg around and placed it on the floor as PFC Escamilla kneeled down on the floor.[90] As PFC Escamilla took his friend's penis into his mouth, LCpl M.H. made no action other than to put his hands on his own face.[91] He let PFC Escamilla give him oral sex for about a minute.[92]

Suddenly the couple heard footsteps from outside the room.[93] PFC Escamilla jumped up and returned to his bed and LCpl M.H. pulled up his pants and zipped them up.[94] When the rest of the group entered the room, the two Marines were as they were before, each sitting on a bed.[95] The socializing continued as before until everyone went to sleep.[96]

One theme of LCpl M.H.'s testimony was his insistence that he was too drunk to know what was happening to him or to respond in any way. LCpl M.H. claimed he initially laid down on his stomach because he was "messed up" or "drunk."[97] He said he did not physically resist PFC Escamilla because he "couldn't think of hitting somebody" while he "was intoxicated."[98] LCpl M.H. said he did not jump up and run out of the room because he "was

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[90] R. at 1093.
[91] R. at 1093.
[92] R. at 1093.
[93] R. at 1093.
[94] R. at 1094.
[95] R. at 1094.
[96] R. at 1094.
[97] R. at 795.
[98] R. at 801.

drunk and already stumbling and didn't know if [he] could manage all that."[99] He remembered having a hard time taking a shower that evening because he was "really messed up" and was "still really messed up" when he laid down to go to sleep.[100]

However, on cross-examination, LCpl M.H. retreated from his claim that he was too drunk to physically resist PFC Escamilla. He admitted that when the group checked into the hotel, he was not drunk.[101] He also admitted the reason for checking into the hotel was because his intoxication level risked "get[ting] in trouble for drinking and driving" rather than being stumbling drunk.[102] He also admitted he neglected to tell the Naval Criminal Investigative Service (NCIS) agent or the Article 32 Investigating Officer that he did not go outside with the group for a cigarette because he was "stumbling by the time they wanted to leave."[103] This "extra memory"[104] was new information for his court-martial testimony––ten and five months, respectively, after his NCIS statement and his Article 32 testimony.[105]

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[99] R. at 801.
[100] R. at 803-04.
[101] R. at 828.
[102] R. at 786.
[103] R. at 829.
[104] R. at 846.
[105] Appellate Ex. XLVIII, NCIS Statement, Feb. 26, 2013; Appellate Ex. XLIX, Article 32 testimony, July 2, 2013.

Another theme of LCpl M.H.'s testimony was that he could not remember anything that happened. LCpl M.H. was able to provide "extra memory" of his intoxication, but was unable to provide extra memories to explain his actions, or lack thereof, during the encounter with PFC Escamilla. He does not remember any details when PFC Escamilla was unzipping his pants, because he was "kind of like . . . blacking out."[106]

Despite his selective memory problems, LCpl M.H. claimed he told PFC Escamilla "no" for the entire duration of the encounter.[107] However, these constant protestations were not in his NCIS statement, which he gave about three weeks after the encounter. LCpl M.H. admitted that in his original version of his story he only said "no" when PFC Escamilla initially asked him if he could perform oral sex on him, and that he never said "no" as all of the other events transpired.[108] LCpl M.H. even admitted that he could not remember if he "said 'yes' or 'no'"[109] when PFC Escamilla performed oral sex on him "for about a minute or so."[110]

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[106] R. at 794.
[107] R. at 794, 796-97, 799.
[108] R. at 845-46.
[109] R. at 848.
[110] Appellate Ex. XLVIII, NCIS Statement, Feb. 26, 2013; R at 873.

Because of LCpl Shalkowski's report against PFC Escamilla, LCpl M.H. inadvertently faced a decision. He could either "out" himself and likely face nonjudicial punishment for underage drinking, or he could choose to be a victim.[111] The latter option would have no adverse consequences to himself and, as a result of his choice to be a victim, he received preferential treatment from his command.[112] The incident occurred on 2 February 2013 and LCpl M.H. never reported it to any authority.[113]

Pvt Whitman's testimony conflicts with LCpl M.H.'s in several ways. She testified that when everyone left the room to smoke cigarettes, PFC Escamilla was sitting on one bed and LCpl M.H. was sitting on the other.[114] When they all returned, the situation was the same and the socializing carried on as before without any abnormality.[115] At the end of the evening, when she and Cpl Damoth left for their room, she saw LCpl M.H., PFC J.C., and LCpl Shalkowski in one bed and LCpl S.S. and PFC Escamilla in the other bed.[116] She testified that she never saw LCpl M.H.

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[111] R. at 818-19, 874-75.
[112] R. at 960-73.
[113] R. at 865.
[114] R. at 983.
[115] R. at 983.
[116] R. at 984.

take a shower that evening.[117] No one, including LCpl M.H., asked to go to the other bedroom.[118] LCpl M.H. knew that Pvt Whitman and Cpl Damoth were not a romantic item and were not going to the other room to be alone.[119] The next morning, she was in the other room as everyone was leaving and woke the others by playfully jumping on their beds.[120] PFC Escamilla, PFC J.C., and LCpl M.H. were there and awake.[121]

LCpl John Clark testified that he saw PFC Escamilla, LCpl M.H., and one of the other alleged victims, drinking and happily socializing on 10 February 2013, just eight days after the sexual encounter between PFC Escamilla and LCpl M.H.[122] LCpl Clark remembered the date because it was his birthday.[123] In his testimony, LCpl M.H. denied he was voluntarily socializing with PFC Escamilla, but was just tolerating his presence.[124]

B. The circumstances of the investigation show the Government's evidence is factually insufficient.

On 22 February 2013, three weeks after the oral sex with LCpl M.H., PFC Escamilla and LCpl Shalkowski had a serious

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[117] R. at 984. PFC Escamilla also testified that LCpl M.H. did not take a shower that evening. R. at 1094.
[118] R. at 984.
[119] R. at 984.
[120] R. at 985-86.
[121] R. at 986-87.
[122] R. at 1001.
[123] R. at 1001.
[124] R. at 806.

falling-out.[125] PFC Escamilla, LCpl Shalkowski, and her boyfriend, were drinking in her barracks room.[126] PFC Escamilla and LCpl Shalkowski left her boyfriend behind in her room and decided to visit PFC J.C. and LCpl J.N.'s room, which was only two doors from her room.[127] PFC Escamilla testified that LCpl Shalkowski and PFC J.C. each were attracted to each other.[128]

PFC Escamilla went in and laid down on LCpl J.N.'s empty bed (he was in the field) and LCpl Shalkowski got in bed with PFC J.C.[129] After a few minutes, PFC Escamilla heard kissing and giggling from the other two Marines. He threw a pillow at them and hit LCpl Shalkowski, causing wine to spill on her.[130] LCpl Shalkowski yelled "What the fuck are you doing?" and PFC Escamilla called her a "ho"[131] because she was cheating on her boyfriend.[132] She became enraged and pursued PFC Escamilla as he left the room, swearing and yelling at him.[133] Their friendship was over.

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[125] R. at 1100.
[126] R. at 1100-01.
[127] R. at 1101-02.
[128] R. at 1101.
[129] R. at 1102.
[130] R. at 1103.
[131] A common vernacular for "whore." Urban Dictionary, http://www.urbandictionary.com/define.php?term=ho (last visited Sept. 12, 2014).
[132] R. at 1103.
[133] R. at 1103. PFC J.C. gives the same account as PFC Escamilla. R. at 761.

Until that point, the two were like "brother and sister," with LCpl Shalkowski even volunteering to shave PFC Escamilla's back hair.[134] They did not speak for about a week.[135] When they finally spoke, PFC Escamilla described her as having a different attitude and looked "kind of guilty."[136] What PFC Escamilla did not know at the time was that his former-friend had contacted LCpl J.N.,[137] PFC S.S.,[138] and LCpl M.H.[139] and then reported him to the command as a serial homosexual predator.[140] A few days

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[134] R. at 1103.
[135] R. at 1104.
[136] R. at 1104.
[137] Art. 32 IO Ex. 5 at 4, J.N. Statement, Feb. 26, 2013 ("I am coming forward now because SKI texted me...SKI reported this to my XO...and I was called into his office to discuss this matter.").
[138] Art. 32 IO Ex. 7, S.S. Statement, Feb. 28, 2013 ("A *few days ago* (emphasis added), Sara contacted me and told me that a few other Marines were also sexually assaulted by ESCAMILLA. She told me the Marines weren't going to come forward.").
[139] Art. 32 IO Ex. 6, Statement of LCpl H.M. dated 26 February 2013, "Also *this weekend* (emphasis added) SKI texted me and told me she had an important question for me. . . . She told me she was sorry and I asked her not to tell anyone but she said she had to report it to the UVA. . . . I had been pulled into the company office and that this whole thing came up."
[140] Art. 32 IO Ex. 12, NCIS Report of Investigation (ROI), dated 24 April 2013, at 2, "On *25 Feb 13*, (emphasis added) upon notification from 1stLt Ryan MULDER, USMC, Adjutant, CLR-17, NCIS initiated an investigation into allegations made against S/ESCAMILLA for sexually assaulting three Marines later identified as V/[LCpl J.N.], V/[LCpl M.H.], and V/[PFC S.S.]." The ROI also shows that LCpl Shalkowski contacted LCpl J.N. on 23 February 2013 at 2157 about PFC Escamilla. She contacted LCpl M.H. on 25 February 2013 at 0239.

later, PFC Escamilla was in pre-trial confinement.[141] Pvt Whitman testified that LCpl Shalkowski was "untruthful" and a "deceitful person."[142]

C. The evidence for PFC Escamilla's guilt does not even approach the required standard of proof.

Proof beyond a reasonable doubt is supposed to mean "proof to an evidentiary certainty, although not necessarily to an absolute or mathematical certainty" and be "proof that leaves [the finder-of-fact] firmly convinced of [the accused's] guilt."[143] Proof beyond a reasonable doubt must exclude "every fair and rational hypothesis except that of guilt" and if there "is a real possibility" that an accused is not guilty, he must be given the benefit of the doubt.[144]

PFC Escamilla has been convicted solely on the testimony of LCpl M.H. Yet, his testimony is rife with inconsistencies and embellishment. Even accepting his version of events, PFC Escamilla still had a reasonable mistake-of-fact defense. One additional piece of evidence is instructive, and should be dispositive. It is undisputed that PFC Escamilla expressed frustration when LCpl M.H. was not able to achieve a full

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[141] R. at 1104-05; Charge Sheet; Appellate Ex. XVI.
[142] R. at 987.
[143] Appellate Ex. LXIII, Findings Instructions at 7.
[144] *Id*.

erection during the oral sex.[145] Why would PFC Escamilla even say this if he believed LCpl M.H. was not consenting to this activity? Would a rapist have a reasonable expectation that his victim should physically respond with arousal during the rape?

D. The conviction and sentence only make sense because the members believed PFC Escamilla should have been administratively separated prior to the repeal of the Don't Ask Don't Tell policy.

After PFC Escamilla called Cpl Hasaniafshar[146] as a character witness, the senior member requested to ask: "Why was Escamilla not brought up on charges upon announcing he was gay to Cpl Hasani in March 2010, since Don't Ask Don't Tell had not been repealed yet? If he was openly gay back then, how did leadership address this issue?"[147]

The military judge excused the members when the defense objected for relevance and a concern that Cpl Hasaniafshar may be required to be advised of her rights under Article 31(b), UCMJ.[148] The military judge decided that a rights warning would not be necessary because he did not believe the relevant Navy regulation required her to report PFC Escamilla's sexual

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[145] R. at 802, 1121.
[146] The military judge asked the witness if he could refer to her as "Cpl Hasani." R. at 1023.
[147] Appellate Ex. LVI.
[148] R. at 1023-24.

orientation when she met him in March 2010.[149] The military judge expressed his concern that the senior member's question was whether PFC Escamilla was "brought up on charges."[150]

The military judge brought the members in and asked Cpl Hasaniafshar if PFC Escamilla revealed his sexual orientation to her in March 2010; if he told her about other homosexual Marines and his sexual contact with them; and whether anyone in the command was aware of any of this.[151] She confirmed PFC Escamilla's orientation and activities, but did not believe the command was aware of them.[152] She also answered that she was aware of the Don't Ask, Don't Tell policy, but was unsure of the extent of the policy.[153]

The military judge excused the witness and instructed the members:

> Okay. Members, that last line of questioning we had with Corporal Hasani was not precisely what was asked on the question form. But I want to let you know that any concerns about what the military's policy was related to homosexuality is irrelevant to these proceedings.
>
> We're existing in a time for which it has been repealed. I do recognize that the time period for which PFC Escamilla revealed to Corporal Hasani, that

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[149] R. at 1024.
[150] R. at 1026.
[151] R. at 1026-27.
[152] R. at 1027.
[153] R. at 1027.

> was during a time for which our ban was in place, but it was also close in time into a moratorium.
>
> So when someone maybe violates a policy like that, they're not charged. There's no duty for someone to report. ***That is a separate administrative processing that requires separate action by the command.*** So that type of information will ultimately be irrelevant. I allowed that line of questioning to be asked so you understood the type of communications PFC Escamilla may have had with those who were close in his life. [154]

The military judge improperly instructed the members by telling them PFC Escamilla should have been processed for administrative separation. That opportunity expired with the repeal of the Don't Ask Don't Tell policy. The only remaining remedy was obvious––find PFC Escamilla guilty of something and separate him from the Marine Corps.

Conclusion

The Government failed to provide evidence demonstrating beyond a reasonable doubt that PFC Escamilla's belief of LCpl M.H.'s consent was unreasonable. Under the circumstances, PFC Escamilla had no reason to believe LCpl M.H. objected to receiving oral sex. PFC Escamilla engaged in what appeared to be consensual, if awkward, homosexual conduct with LCpl M.H.––who did not show any signs of objecting. Because this conduct is not illegal, the conviction for Charge II, Specification 4, must be set aside and the charge dismissed with prejudice. This

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[154] R. at 1028 (emphasis added).

Court must then reassess the sentence to include a sentence that does not include a punitive discharge.

Respectfully Submitted,

JOHN J. STEPHENS
Major, USMC
Appellate Defense Division
1254 Charles Morris Street SE
Building 58, Suite 100
Washington Navy Yard, D.C. 20374
Office: (202) 685-7394
Fax: (202) 685-8587
john.j.stephens@navy.mil

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to Director, Appellate Government Division, and electronically filed on 22 September 2014.

JOHN J. STEPHENS
Major, USMC
Appellate Defense Division
1254 Charles Morris Street SE
Building 58, Suite 100
Washington Navy Yard, D.C.
20374
Office: (202) 685-7394
Fax: (202) 685-8587
john.j.stephens@navy.mil

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES, Appellee v. Blas M. ESCAMILLA Private First Class (E-2) U.S. Marine Corps, Appellant	**BRIEF AND ASSIGNMENT OF ERROR** Case No. 201400168 Tried at Camp Pendleton, California, on 6 September 2013, 21 October, 15 and 27 November, and 16–20 December 2013, before a general court-martial convened by the Commanding General, 1st Marine Logistics Group.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

JOHN J. STEPHENS
Major, USMC
Appellate Defense Division
1254 Charles Morris Street SE
Building 58, Suite 100
Washington Navy Yard, D.C. 20374
Office: (202) 685-7394
Fax: (202) 685-8587
john.j.stephens@navy.mil

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Assignment of Error

TO AFFIRM A CONVICTION FOR SEXUAL ASSAULT, THIS COURT MUST BE CONVINCED PRIVATE FIRST CLASS ESCAMILLA'S MISTAKE-OF-FACT WAS NOT REASONABLE. THE ALLEGED VICTIM TESTIFIED THAT HE INITIALLY DECLINED THE OFFER OF ORAL SEX, BUT THEN MADE NO OTHER OBJECTIONS AS PRIVATE FIRST CLASS ESCAMILLA MASSAGED HIM AND PERFORMED ORAL SEX ON HIM FOR AN ENTIRE MINUTE. THE ALLEGED VICTIM ALSO TESTIFIED THAT HE WAS NOT A HOMOSEXUAL. CAN THIS COURT AFFIRM THE CONVICTION IF PRIVATE FIRST CLASS ESCAMILLA HAD NO REASON TO BELIEVE THE ALLEGED VICTIM WAS NOT STILL OBJECTING TO THE ORAL SEX?

Statement of Statutory Jurisdiction

The approved sentence of Private First Class (PFC) Blas M. Escamilla, U.S. Marine Corps, included a bad-conduct discharge. Accordingly, this Court has jurisdiction under Article 66, Uniform Code of Military Justice (UCMJ).[1]

Statement of the Case

The Government charged PFC Escamilla with misconduct arising from his homosexual contact with four Marines: Lance Corporal (LCpl) J.N., PFC J.C., LCpl S.S., and LCpl M.H. The Government alleged PFC Escamilla twice performed oral sex on LCpl J.N., touched his anus with an unknown object, touched his inner thigh once, and twice touched his head in violation of Articles 120 and 128, UCMJ, respectively.[2] Regarding PFC J.C.,

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[1] 10 U.S.C. § 866(b)(1) (2012).
[2] 10 U.S.C. § 920, 928 (2012).

the Government alleged PFC Escamilla touched his chest and solicited him for an act of prostitution, in violation of Articles 128 and 134, UCMJ.[3] The Government alleged PFC Escamilla touched LCpl S.S.'s penis in violation of Article 120, UCMJ.[4] PFC Escamilla was also charged with performing oral sex on LCpl M.H., in violation of Article 120, UCMJ, and of providing alcohol to minors in violating of Article 92, UCMJ.[5]

Sitting as a general court-martial, a panel of members with enlisted representation convicted PFC Escamilla, contrary to his pleas, of one specification of violating Article 120, UCMJ, for performing oral sex on LCpl M.H, and one specification of providing alcohol to minors.[6] He was acquitted of the remaining ten specifications. The members sentenced PFC Escamilla to be reduced to the pay-grade of E-1, to confinement of 235 days, which covered time already served, and a bad-conduct discharge.[7] The Convening Authority (CA) approved the findings and sentence and, except for the discharge, ordered the sentence executed.[8]

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[3] 10 U.S.C. § 928, 934 (2012); CAL. PEN. CODE § 647(b).
[4] 10 U.S.C. § 920 (2012).
[5] 10 U.S.C. § 920, 892 (2012).
[6] Results of Trial; R. at 1226.
[7] Staff Judge Advocate Recommendation (SJAR) Apr. 15, 2014, Encl. (1), Results of Trial; R. at 1252.
[8] General Court-Martial Order No. 03-2014, Apr. 17, 2014.

Introduction

This case is simple. PFC Escamilla is an openly homosexual Marine. He was even before the repeal of Don’t Ask Don’t Tell. He had a serious falling-out with one of his best friends, LCpl Sara Shalkowski. After he confronted her over her infidelity to her Marine boyfriend and called her a whore, she became enraged. She retaliated by reporting PFC Escamilla as a homosexual predator of Marines whom he plied with alcohol. It is certain she was told at Sexual Assault Prevention and Response training that alcohol vitiates consent to sexual activity and that the Government would seriously investigate sexual assault claims. Her plan worked.

LCpl Shalkowski reported the names of three male Marines to the command. These Marines were then forced to make a choice. They could either admit to being homosexual and possibly receive disciplinary measures for their own minor misconduct, such as underage drinking, or they could tell the Government they were unwilling victims of PFC Escamilla. They chose victimhood, a lack of consequences to themselves, and avoided publicizing their sexual orientation.

The Government then baselessly placed PFC Escamilla in pretrial confinement for eight months while he went to general court-martial. During the trial, the members learned PFC Escamilla was an openly homosexual Marine even while the Don’t Ask Don’t Tell policy was still in effect. The military judge

instructed them that PFC Escamilla would have been subject to administrative processing for separation, but such action was no longer possible due to the repeal of the policy.

Statement of Facts

1. PFC Escamilla was accused of sexual assault after he had a falling-out with his friend, LCpl Sara Shalkowski.

On 25 August 2008, Blas Escamilla enlisted in the United States Marine Corps.[9] Two years later, Congress repealed the "Don't Ask Don't Tell Policy" that prohibited homosexual service members, like PFC Escamilla, from being "open" about their sexual orientation.[10] PFC Escamilla was then allowed to be openly homosexual,[11] and like other young service members, had sexual relations with other service members.[12] Not all of his partners were themselves open about their sexual orientation[13] and PFC Escamilla, as a rule, was confidential about these encounters.[14] However, he sometimes confided in LCpl Shalkowski about his sexual partners.[15] He told her about his trysts with LCpl J.N.,[16] and possibly other Marines. He also told PFC J.C.,

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[9] Charge Sheet.
[10] Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3516 (2010).
[11] R. at 1034-35.
[12] R. at 1035, 1110.
[13] R. at 1036.
[14] R. at 1080.
[15] R. at 1098.
[16] R. at 1099.

LCpl J.N., and LCpl M.H. about his encounters, though he did not reveal his partners' identities.[17]

On 22 February 2013, three weeks after the sexual encounter with LCpl M.H., PFC Escamilla had a falling-out with LCpl Shalkowski. He publicly confronted her about her infidelity to her Marine boyfriend.[18] She retaliated against PFC Escamilla by reporting his sexual activity with LCpl J.N., PFC S.S., and LCpl M.H. to the command.[19] Each of the Marines initially claimed that they were not homosexual or even bi-sexual, and that PFC Escamilla's sexual contact was totally unwanted.[20] Despite their testimony,[21] and PFC J.C.'s testimony,[22] the members acquitted PFC Escamilla of all of the charges and specifications relating to the these Marines, except for the single incident of oral sex with LCpl M.H.

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[17] R. at 1036.
[18] R. at 1098, 1100-02.
[19] Article 32 Investigating Officer's Exhibit 9, Shalkowski Statement, Apr. 5, 2013.
[20] Art. 32 IO Ex. 5 at 4, J.N. Statement, Feb. 26, 2013; Art. 32 IO Ex. 7, Statement of PFC S.S. dated 28 February 2013; Art. 32 IO Ex. 6, Statement of LCpl H.M. dated 26 February 2013; Art. 32 IO Ex. 8, Statement of PFC J.C. dated 13 March 2013.
[21]R. at 480-84 (LCpl J.N.'s testimony);R. at 881 (PFC S.S.'s testimony). LCpl J.N and PFC S.S. both deny they are homosexual and that there was consent.
[22]R. at 662-63, 665 (PFC J.C.'s testimony). PFC J.C. denies he is a homosexual and that there was any interest in the sex act.

2. PFC Escamilla and LCpl M.H. had a sexual encounter.

LCpl M.H. testified that PFC Escamilla performed oral sex on him without his consent.[23] On Friday, 1 February 2013, several Marines went out in Oceanside, California.[24] At the beginning of the evening, PFC Escamilla and LCpl Shalkowski found LCpl M.H. and PFC J.C. in the barracks.[25] Though LCpl M.H. and PFC J.C. (both underage) had been drinking, they agreed to go out to Oceanside and serve as designated drivers at the end of the evening.[26] Once in Oceanside, PFC Escamilla and LCpl Shalkowski went to a nightclub and LCpl M.H. and PFC J.C. went to a tattoo parlor, and then took in a movie.[27] After the movie, they returned to PFC Escamilla's car and waited.[28]

While waiting, the pair met with two other Marines they knew.[29] This group then walked to the beach, where LCpl M.H. jumped into the Pacific Ocean with his clothes on.[30] After this,

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[23] R. at 794.
[24] R. at 782-83.
[25] *Id*.
[26] R. at 782.
[27] *Id*.
[28] R. at 785.
[29] There may have been some confusion as to who was there. LCpl M.H. testified that these two Marines were "Whitman and somebody else." R. at 785. Later, LCpl M.H. testified that he believed that "Whitman and Corporal Lamothe" were the two Marines who stayed in the other hotel room. R. at 790. LCpl M.H. probably meant Cpl Damoth.
[30] R. at 785.

the group returned to PFC Escamilla's car.[31] Soon after, PFC Escamilla and LCpl Shalkowski exited the nightclub with two other Marines[32] they met that evening, a female Marine named Private (Pvt) Whitman and a Corporal (Cpl) David Damoth.[33]

PFC Escamilla, LCpl Shalkowski, LCpl M.H., PFC J.C., LCpl S.S., Cpl Damoth, and Pvt Whitman all met at PFC Escamilla's parked car.[34] Rather than risk the possibility of getting stopped at the Camp Pendleton gate for driving while intoxicated, the group decided to get two rooms at a nearby hotel.[35] PFC Escamilla, LCpl M.H., PFC J.C., LCpl S.S., and LCpl Shalkowski rented one room and Pvt Whitman and Cpl Damoth rented another. At the hotel, the group continued drinking and socializing.[36] After a short time, everyone, except for PFC Escamilla and LCpl M.H., went outside for a cigarette.[37]

According to LCpl M.H., he was lying on his stomach on the bed when PFC Escamilla came over to him and began giving him a back massage.[38] Then PFC Escamilla turned him over and unzipped

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[31] *Id*.
[32] R. at 981 (Private Whitman testified that she and Cpl Damoth met PFC Escamilla and LCpl Shalkowski at the club).
[33] R. at 1083.
[34] R. at 882.
[35] R. at 786.
[36] R. at 789-90.
[37] R. at 794.
[38] *Id*.

LCpl M.H.'s pants and pulled them down to his thighs.[39] According to LCpl M.H., despite him initially saying "no," PFC Escamilla placed his mouth on his penis and performed oral sex for about a minute.[40] The footsteps and noise of the others preceded their return to the room.[41] Just before they opened the door, PFC Escamilla moved back to his bed, while LCpl M.H. pulled up his pants and fastened his zipper.[42]

On cross-examination, LCpl M.H. admitted that in his earlier versions of his story (to the Naval Criminal Investigative Service (NCIS) and at the Article 32 hearing) he only said "no" when PFC Escamilla initially asked him if he could perform oral sex on him, and that he never said "no" as all of the other events transpired.[43] LCpl M.H. even admitted that he could not remember if he "said 'yes' or 'no'"[44] when PFC Escamilla performed oral sex on him "for about a minute or so."[45]

PFC Escamilla also testified that he told the members that LCpl M.H. initially declined his offer to perform oral sex.[46]

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[39] *Id*.
[40] R. at 847.
[41] R. at 802.
[42] *Id*.
[43] R. at 845-46.
[44] R. at 848.
[45] Appellate Ex. XLVIII, NCIS Statement, Feb. 26, 2013; R at 873.
[46] R. at 77.

However, LCpl M.H., by his actions, eventually relented.[47] PFC Escamilla testified that he believed his friend was "playing hard to get."[48]

When the group returned, the socializing commenced as normal.[49] After a short time, LCpl M.H. testified that he took a long shower.[50] When he exited the bathroom, he found everyone asleep.[51] He got into a bed with LCpl Shalkowski and PFC J.C. and went to sleep.[52] PFC Escamilla and LCpl S.S. were asleep in the other bed.[53]

When LCpl M.H. awoke the next morning, he was on the bed with PFC J.C. and PFC Escamilla was on the other bed.[54] Everyone else was gone.[55] The trio then went to breakfast at a Mexican restaurant, got haircuts, and then returned to Camp Pendleton.[56]

3. Aftermath and court-martial.

After PFC Escamilla's falling out with LCpl Shalkowski, the Government investigated his sexual activity and placed him on

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[47] *Id*.
[48] *Id*.
[49] R. at 802.
[50] *Id*.
[51] R. at 803.
[52] *Id*.
[53] R. at 803-04.
[54] R. at 804.
[55] *Id*.
[56] R. at 755-56, 805.

pretrial restriction.[57] When PFC Escamilla violated the conditions of his restriction for an unrelated nonjudicial punishment, he was placed in pretrial confinement.[58]

During the defense case, PFC Escamilla called several witnesses that both supported his character and attacked the character for truthfulness of the complaining witnesses. One witness, Corporal Hasaniafshar, testified that PFC Escamilla told her in March 2010 that he was a homosexual[59] and that he was giving and receiving homosexual favors in the barracks with other Marines.[60] At the end of her testimony, the senior member, a Lieutenant Colonel, asked, "Why was Escamilla not brought up on charges upon announcing he was gay to Cpl Hasani[afshar] in March 2010, since Don't Ask Don't Tell had not been repealed yet? If he was openly gay back then, how did leadership address this issue?"[61]

After a colloquy with counsel, the military judge instructed the members that the military's policy concerning homosexuality was

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[57] Appellate Ex. XVI.
[58] *Id*.; R. at 151-178. PFC Escamilla was on restriction from an unrelated nonjudicial punishment during the investigation. He went to the PX and purchased soup and tuna when he was only allowed to purchase hygiene items. This caused the command to place him in pretrial confinement. His time-served sentence at this court-martial affords him no actual remedy.
[59] R. at 1006-07.
[60] R. at 1027.
[61] Appellate Ex. LVI.

irrelevant and that PFC Escamilla would not have been charged with any misconduct, but could have been subject to administrative processing initiated by his command.[62]

Summary of Argument

LCpl M.H. is not a credible witness. His testimony alone is the only evidence for PFC Escamilla's conviction for sexual assault. Even accepting his testimony, the evidence still supports PFC Escamilla's mistake-of-fact defense. It is simply unreasonable that PFC Escamilla performed oral sex on LCpl M.H. for "about a minute" without his consent or a reasonable belief that he consented.

Argument

TO AFFIRM A CONVICTION FOR SEXUAL ASSAULT, THIS COURT MUST BE CONVINCED PRIVATE FIRST CLASS ESCAMILLA'S MISTAKE-OF-FACT WAS NOT REASONABLE. THE ALLEGED VICTIM TESTIFIED THAT HE INITIALLY DECLINED THE OFFER OF ORAL SEX, BUT THEN MADE NO OTHER OBJECTIONS AS PRIVATE FIRST CLASS ESCAMILLA MASSAGED HIM AND PERFORMED ORAL SEX ON HIM FOR AN ENTIRE MINUTE. THE ALLEGED VICTIM ALSO TESTIFIED THAT HE WAS NOT A HOMOSEXUAL. BECAUSE PRIVATE FIRST CLASS ESCAMILLA HAD NO REASON TO BELIEVE LANCE CORPORAL M.H. WAS NOT CONSENTING TO THE ORAL SEX, THIS COURT CANNOT AFFIRM PRIVATE FIRST CLASS ESCAMILLA'S SEXUAL ASSAULT CONVICTION.

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[62] R. at 1028.

Standard of Review and Principles of Law

This Court has an independent obligation to review each case *de novo* for factual and legal sufficiency, and may substitute its own judgment for that of the trial court.[63] The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt."[64] The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [this Court is] convinced of the accused's guilt beyond a reasonable doubt."[65] In exercising this duty, this Court may judge the credibility of witnesses, determine controverted questions of fact, and substitute its judgment for that of the military judge.[66]

A conviction for sexual assault requires the Government to prove beyond a reasonable doubt that PFC Escamilla placed his mouth on LCpl M.H.'S penis and did so without his consent. A

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[63] Art. 66, UCMJ; *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987).
[64] *Turner*, 25 M.J. at 324 (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).
[65] *Turner*, 25 M.J. at 325.
[66] Art. 66(c), UCMJ; *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990).

"lack of consent may be inferred based on the circumstances. All of the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person's actions."[67] "A mistake-of-fact defense to a charge of [sexual assault] requires that a mistake be both honest *and* reasonable."[68] "To be reasonable the ignorance or mistake of fact must have been based on information, or lack of it, that would indicate to a reasonable person that the other person consented."[69]

Discussion

A. The oral sex was either consensual, or it was reasonable for PFC Escamilla to believe it was, because LCpl M.H. allowed PFC Escamilla to give him oral sex for "about a minute" without saying "no."

It is simply unreasonable for the finder-of-fact to see the sexual encounter between PFC Escamilla and LCpl M.H. as anything other than an awkward, but consensual, homosexual encounter. LCpl M.H. repeatedly testified that he was "not gay" and not attracted to men in any way.[70] Yet, LCpl M.H. found himself alone in a hotel room with his friend, PFC Escamilla.

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[67] Appellate Ex. LXIII at 3.
[68] *United States v. Willis*, 41 M.J. 435, 438 (C.A.A.F. 1995) (citing *United States v, Langley*, 33 M.J. 278 (C.M.A. 1991)).
[69] Appellate Ex. LXIII at 5.
[70] R. at 807, 850-52, 867, 875.

He knew PFC Escamilla was openly homosexual, and sexually active.[71] He also knew PFC Escamilla had discreet sexual encounters with other male Marines.[72] PFC Escamilla lived right across the hall in the same barracks.[73] It is also very possible LCpl M.H. was aware of the continuing homosexual relationship between PFC Escamilla and his own close friend, LCpl J.N.[74] He had occasionally seen PFC Escamilla wear a t-shirt with the words, "Sorry ladies, I suck dick better than you do."[75] Though he initially denied it, he also regularly received back rubs and chest and stomach massages from PFC Escamilla in the past.[76]

With the two of them alone in the hotel room, LCpl M.H. asked PFC Escamilla for a back massage.[77] As LCpl M.H. lied on his stomach, PFC Escamilla massaged his back and hips.[78] LCpl M.H. then rolled over on his back and let PFC Escamilla massage his stomach.[79] Then PFC Escamilla asked if he could perform oral sex on his friend, but was turned down, when LCpl M.H. said,

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[71] R. at 1036.
[72] R. at 1036, 1080.
[73] R. at 1069.
[74] PFC Escamilla testified in great detail about his homosexual encounters with LCpl J.N. starting in November 2012. R. at 1039-1061.
[75] R. at 1071. The shirt was a gift from LCpl Shalkowski, R. at 1099.
[76] R. at 811, 812, 814, 1072, 1080.
[77] R. at 1083.
[78] R. at 1085.
[79] R. at 1085.

"Nah, I'm good, just keep giving me a massage."[80] PFC Escamilla took this to mean that his friend was "playing hard to get."[81]

PFC Escamilla continued massaging LCpl M.H.'s chest as he moved his hands down to his side.[82] As he did this, he noticed LCpl M.H. had partially closed his eyes and had a smile on his face.[83] He went to kiss him on his lips, but LCpl M.H. pushed him away.[84] But there was no resistance as PFC Escamilla continued to massage his friend's hips and upper thighs.[85]

PFC Escamilla massaged LCpl M.H.'s inner thighs and started to undue his belt for his pants[86] and unzipped his jeans.[87] Because LCpl M.H.s jeans were still wet from jumping in the ocean, he lifted his hips and helped PFC Escamilla with taking them down to his mid-thigh range.[88] His pants were only taken down that far so that they could be quickly pulled up in the event that the other Marines returned to the room unexpectedly.[89]

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[80] R. at 1086.
[81] R. at 1086.
[82] R. at 1086.
[83] R. at 1087.
[84] R. at 1088.
[85] R. at 1087.
[86] R. at 1090.
[87] R at 1091.
[88] R. at 1091-92.
[89] R. at 1092.

LCpl M.H. then swung his leg around and placed it on the floor as PFC Escamilla kneeled down on the floor.[90] As PFC Escamilla took his friend's penis into his mouth, LCpl M.H. made no action other than to put his hands on his own face.[91] He let PFC Escamilla give him oral sex for about a minute.[92]

Suddenly the couple heard footsteps from outside the room.[93] PFC Escamilla jumped up and returned to his bed and LCpl M.H. pulled up his pants and zipped them up.[94] When the rest of the group entered the room, the two Marines were as they were before, each sitting on a bed.[95] The socializing continued as before until everyone went to sleep.[96]

One theme of LCpl M.H.'s testimony was his insistence that he was too drunk to know what was happening to him or to respond in any way. LCpl M.H. claimed he initially laid down on his stomach because he was "messed up" or "drunk."[97] He said he did not physically resist PFC Escamilla because he "couldn't think of hitting somebody" while he "was intoxicated."[98] LCpl M.H. said he did not jump up and run out of the room because he "was

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[90] R. at 1093.
[91] R. at 1093.
[92] R. at 1093.
[93] R. at 1093.
[94] R. at 1094.
[95] R. at 1094.
[96] R. at 1094.
[97] R. at 795.
[98] R. at 801.

drunk and already stumbling and didn't know if [he] could manage all that."[99] He remembered having a hard time taking a shower that evening because he was "really messed up" and was "still really messed up" when he laid down to go to sleep.[100]

However, on cross-examination, LCpl M.H. retreated from his claim that he was too drunk to physically resist PFC Escamilla. He admitted that when the group checked into the hotel, he was not drunk.[101] He also admitted the reason for checking into the hotel was because his intoxication level risked "get[ting] in trouble for drinking and driving" rather than being stumbling drunk.[102] He also admitted he neglected to tell the Naval Criminal Investigative Service (NCIS) agent or the Article 32 Investigating Officer that he did not go outside with the group for a cigarette because he was "stumbling by the time they wanted to leave."[103] This "extra memory"[104] was new information for his court-martial testimony––ten and five months, respectively, after his NCIS statement and his Article 32 testimony.[105]

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[99] R. at 801.
[100] R. at 803-04.
[101] R. at 828.
[102] R. at 786.
[103] R. at 829.
[104] R. at 846.
[105] Appellate Ex. XLVIII, NCIS Statement, Feb. 26, 2013; Appellate Ex. XLIX, Article 32 testimony, July 2, 2013.

Another theme of LCpl M.H.'s testimony was that he could not remember anything that happened. LCpl M.H. was able to provide "extra memory" of his intoxication, but was unable to provide extra memories to explain his actions, or lack thereof, during the encounter with PFC Escamilla. He does not remember any details when PFC Escamilla was unzipping his pants, because he was "kind of like . . . blacking out."[106]

Despite his selective memory problems, LCpl M.H. claimed he told PFC Escamilla "no" for the entire duration of the encounter.[107] However, these constant protestations were not in his NCIS statement, which he gave about three weeks after the encounter. LCpl M.H. admitted that in his original version of his story he only said "no" when PFC Escamilla initially asked him if he could perform oral sex on him, and that he never said "no" as all of the other events transpired.[108] LCpl M.H. even admitted that he could not remember if he "said 'yes' or 'no'"[109] when PFC Escamilla performed oral sex on him "for about a minute or so."[110]

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[106] R. at 794.
[107] R. at 794, 796-97, 799.
[108] R. at 845-46.
[109] R. at 848.
[110] Appellate Ex. XLVIII, NCIS Statement, Feb. 26, 2013; R at 873.

Because of LCpl Shalkowski's report against PFC Escamilla, LCpl M.H. inadvertently faced a decision. He could either "out" himself and likely face nonjudicial punishment for underage drinking, or he could choose to be a victim.[111] The latter option would have no adverse consequences to himself and, as a result of his choice to be a victim, he received preferential treatment from his command.[112] The incident occurred on 2 February 2013 and LCpl M.H. never reported it to any authority.[113]

Pvt Whitman's testimony conflicts with LCpl M.H.'s in several ways. She testified that when everyone left the room to smoke cigarettes, PFC Escamilla was sitting on one bed and LCpl M.H. was sitting on the other.[114] When they all returned, the situation was the same and the socializing carried on as before without any abnormality.[115] At the end of the evening, when she and Cpl Damoth left for their room, she saw LCpl M.H., PFC J.C., and LCpl Shalkowski in one bed and LCpl S.S. and PFC Escamilla in the other bed.[116] She testified that she never saw LCpl M.H.

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[111] R. at 818-19, 874-75.
[112] R. at 960-73.
[113] R. at 865.
[114] R. at 983.
[115] R. at 983.
[116] R. at 984.

take a shower that evening.[117] No one, including LCpl M.H., asked to go to the other bedroom.[118] LCpl M.H. knew that Pvt Whitman and Cpl Damoth were not a romantic item and were not going to the other room to be alone.[119] The next morning, she was in the other room as everyone was leaving and woke the others by playfully jumping on their beds.[120] PFC Escamilla, PFC J.C., and LCpl M.H. were there and awake.[121]

LCpl John Clark testified that he saw PFC Escamilla, LCpl M.H., and one of the other alleged victims, drinking and happily socializing on 10 February 2013, just eight days after the sexual encounter between PFC Escamilla and LCpl M.H.[122] LCpl Clark remembered the date because it was his birthday.[123] In his testimony, LCpl M.H. denied he was voluntarily socializing with PFC Escamilla, but was just tolerating his presence.[124]

B. The circumstances of the investigation show the Government's evidence is factually insufficient.

On 22 February 2013, three weeks after the oral sex with LCpl M.H., PFC Escamilla and LCpl Shalkowski had a serious

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[117] R. at 984. PFC Escamilla also testified that LCpl M.H. did not take a shower that evening. R. at 1094.
[118] R. at 984.
[119] R. at 984.
[120] R. at 985-86.
[121] R. at 986-87.
[122] R. at 1001.
[123] R. at 1001.
[124] R. at 806.

falling-out.[125] PFC Escamilla, LCpl Shalkowski, and her boyfriend, were drinking in her barracks room.[126] PFC Escamilla and LCpl Shalkowski left her boyfriend behind in her room and decided to visit PFC J.C. and LCpl J.N.'s room, which was only two doors from her room.[127] PFC Escamilla testified that LCpl Shalkowski and PFC J.C. each were attracted to each other.[128]

PFC Escamilla went in and laid down on LCpl J.N.'s empty bed (he was in the field) and LCpl Shalkowski got in bed with PFC J.C.[129] After a few minutes, PFC Escamilla heard kissing and giggling from the other two Marines. He threw a pillow at them and hit LCpl Shalkowski, causing wine to spill on her.[130] LCpl Shalkowski yelled "What the fuck are you doing?" and PFC Escamilla called her a "ho"[131] because she was cheating on her boyfriend.[132] She became enraged and pursued PFC Escamilla as he left the room, swearing and yelling at him.[133] Their friendship was over.

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[125] R. at 1100.
[126] R. at 1100-01.
[127] R. at 1101-02.
[128] R. at 1101.
[129] R. at 1102.
[130] R. at 1103.
[131] A common vernacular for "whore." Urban Dictionary, http://www.urbandictionary.com/define.php?term=ho (last visited Sept. 12, 2014).
[132] R. at 1103.
[133] R. at 1103. PFC J.C. gives the same account as PFC Escamilla. R. at 761.

Until that point, the two were like "brother and sister," with LCpl Shalkowski even volunteering to shave PFC Escamilla's back hair.[134] They did not speak for about a week.[135] When they finally spoke, PFC Escamilla described her as having a different attitude and looked "kind of guilty."[136] What PFC Escamilla did not know at the time was that his former-friend had contacted LCpl J.N.,[137] PFC S.S.,[138] and LCpl M.H.[139] and then reported him to the command as a serial homosexual predator.[140] A few days

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[134] R. at 1103.
[135] R. at 1104.
[136] R. at 1104.
[137] Art. 32 IO Ex. 5 at 4, J.N. Statement, Feb. 26, 2013 ("I am coming forward now because SKI texted me...SKI reported this to my XO...and I was called into his office to discuss this matter.").
[138] Art. 32 IO Ex. 7, S.S. Statement, Feb. 28, 2013 ("A *few days ago* (emphasis added), Sara contacted me and told me that a few other Marines were also sexually assaulted by ESCAMILLA. She told me the Marines weren't going to come forward.").
[139] Art. 32 IO Ex. 6, Statement of LCpl H.M. dated 26 February 2013, "Also *this weekend* (emphasis added) SKI texted me and told me she had an important question for me. . . . She told me she was sorry and I asked her not to tell anyone but she said she had to report it to the UVA. . . . I had been pulled into the company office and that this whole thing came up."
[140] Art. 32 IO Ex. 12, NCIS Report of Investigation (ROI), dated 24 April 2013, at 2, "On *25 Feb 13*, (emphasis added) upon notification from 1stLt Ryan MULDER, USMC, Adjutant, CLR-17, NCIS initiated an investigation into allegations made against S/ESCAMILLA for sexually assaulting three Marines later identified as V/[LCpl J.N.], V/[LCpl M.H.], and V/[PFC S.S.]." The ROI also shows that LCpl Shalkowski contacted LCpl J.N. on 23 February 2013 at 2157 about PFC Escamilla. She contacted LCpl M.H. on 25 February 2013 at 0239.

later, PFC Escamilla was in pre-trial confinement.[141] Pvt Whitman testified that LCpl Shalkowski was "untruthful" and a "deceitful person."[142]

C. The evidence for PFC Escamilla's guilt does not even approach the required standard of proof.

Proof beyond a reasonable doubt is supposed to mean "proof to an evidentiary certainty, although not necessarily to an absolute or mathematical certainty" and be "proof that leaves [the finder-of-fact] firmly convinced of [the accused's] guilt."[143] Proof beyond a reasonable doubt must exclude "every fair and rational hypothesis except that of guilt" and if there "is a real possibility" that an accused is not guilty, he must be given the benefit of the doubt.[144]

PFC Escamilla has been convicted solely on the testimony of LCpl M.H. Yet, his testimony is rife with inconsistencies and embellishment. Even accepting his version of events, PFC Escamilla still had a reasonable mistake-of-fact defense. One additional piece of evidence is instructive, and should be dispositive. It is undisputed that PFC Escamilla expressed frustration when LCpl M.H. was not able to achieve a full

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[141] R. at 1104-05; Charge Sheet; Appellate Ex. XVI.
[142] R. at 987.
[143] Appellate Ex. LXIII, Findings Instructions at 7.
[144] *Id*.

erection during the oral sex.[145] Why would PFC Escamilla even say this if he believed LCpl M.H. was not consenting to this activity? Would a rapist have a reasonable expectation that his victim should physically respond with arousal during the rape?

D. The conviction and sentence only make sense because the members believed PFC Escamilla should have been administratively separated prior to the repeal of the Don't Ask Don't Tell policy.

After PFC Escamilla called Cpl Hasaniafshar[146] as a character witness, the senior member requested to ask: "Why was Escamilla not brought up on charges upon announcing he was gay to Cpl Hasani in March 2010, since Don't Ask Don't Tell had not been repealed yet? If he was openly gay back then, how did leadership address this issue?"[147]

The military judge excused the members when the defense objected for relevance and a concern that Cpl Hasaniafshar may be required to be advised of her rights under Article 31(b), UCMJ.[148] The military judge decided that a rights warning would not be necessary because he did not believe the relevant Navy regulation required her to report PFC Escamilla's sexual

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[145] R. at 802, 1121.
[146] The military judge asked the witness if he could refer to her as "Cpl Hasani." R. at 1023.
[147] Appellate Ex. LVI.
[148] R. at 1023-24.

orientation when she met him in March 2010.[149] The military judge expressed his concern that the senior member's question was whether PFC Escamilla was "brought up on charges."[150]

The military judge brought the members in and asked Cpl Hasaniafshar if PFC Escamilla revealed his sexual orientation to her in March 2010; if he told her about other homosexual Marines and his sexual contact with them; and whether anyone in the command was aware of any of this.[151] She confirmed PFC Escamilla's orientation and activities, but did not believe the command was aware of them.[152] She also answered that she was aware of the Don't Ask, Don't Tell policy, but was unsure of the extent of the policy.[153]

The military judge excused the witness and instructed the members:

> Okay. Members, that last line of questioning we had with Corporal Hasani was not precisely what was asked on the question form. But I want to let you know that any concerns about what the military's policy was related to homosexuality is irrelevant to these proceedings.
>
> We're existing in a time for which it has been repealed. I do recognize that the time period for which PFC Escamilla revealed to Corporal Hasani, that

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[149] R. at 1024.
[150] R. at 1026.
[151] R. at 1026-27.
[152] R. at 1027.
[153] R. at 1027.

> was during a time for which our ban was in place, but it was also close in time into a moratorium.
>
> So when someone maybe violates a policy like that, they're not charged. There's no duty for someone to report. ***That is a separate administrative processing that requires separate action by the command.*** So that type of information will ultimately be irrelevant. I allowed that line of questioning to be asked so you understood the type of communications PFC Escamilla may have had with those who were close in his life. [154]

The military judge improperly instructed the members by telling them PFC Escamilla should have been processed for administrative separation. That opportunity expired with the repeal of the Don't Ask Don't Tell policy. The only remaining remedy was obvious––find PFC Escamilla guilty of something and separate him from the Marine Corps.

Conclusion

The Government failed to provide evidence demonstrating beyond a reasonable doubt that PFC Escamilla's belief of LCpl M.H.'s consent was unreasonable. Under the circumstances, PFC Escamilla had no reason to believe LCpl M.H. objected to receiving oral sex. PFC Escamilla engaged in what appeared to be consensual, if awkward, homosexual conduct with LCpl M.H.––who did not show any signs of objecting. Because this conduct is not illegal, the conviction for Charge II, Specification 4, must be set aside and the charge dismissed with prejudice. This

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[154] R. at 1028 (emphasis added).

Court must then reassess the sentence to include a sentence that does not include a punitive discharge.

Respectfully Submitted,

JOHN J. STEPHENS
Major, USMC
Appellate Defense Division
1254 Charles Morris Street SE
Building 58, Suite 100
Washington Navy Yard, D.C. 20374
Office: (202) 685-7394
Fax: (202) 685-8587
john.j.stephens@navy.mil

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to Director, Appellate Government Division, and electronically filed on 22 September 2014.

JOHN J. STEPHENS
Major, USMC
Appellate Defense Division
1254 Charles Morris Street SE
Building 58, Suite 100
Washington Navy Yard, D.C.
20374
Office: (202) 685-7394
Fax: (202) 685-8587
john.j.stephens@navy.mil

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 3

UNITED STATES, Appellee v. Gerald A. FAIRLEY Seaman Apprentice (E-2) United States Navy, Appellant	BRIEF AND ASSIGNMENTS OF ERROR Case No. 201400268 Tried at Region Legal Service Office, Naval District Washington on 15 April 2014 by General Court-Martial convened by Commandant, Naval District Washington, Washington Navy Yard

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

ASSIGNMENTS OF ERROR

I.

WHETHER THE CONVENING AUTHORITY'S ACTION ON SA FAIRLEY'S SENTENCE IS DEFECTIVE REQUIRING A NEW REVIEW?

II.

IN THE ALTERNATIVE, WHETHER SA FAIRLEY IS ENTITLED TO HAVE THE CONVENING AUTHORITY'S ACTION CORRECTLY REFLECT THE RESULTS OF HIS GENERAL COURT-MARTIAL?

STATEMENT OF STATUTORY JURISDICTION

Appellant received a sentence that included a bad-conduct discharge. Accordingly, his case falls within this Court's jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ).

STATEMENT OF THE CASE

A military judge, sitting as a general court-martial, convicted Appellant, consistent with his pleas, of three specifications of assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928 (2012). The military judge also found Appellant not guilty of three specifications of Article 120, UCMJ, 10 U.S.C. 920 (2013), but guilty of three specifications of the lesser included offense assault consummated by a battery in violation of Article 128, UCMJ.

Appellant was sentenced to confinement for 14 months, reduction to pay-grade E-1, total forfeitures, and a bad conduct discharge. (R. at 216).

On 14 July 2014, the Convening Authority (CA) purported to approve the adjudged sentence. (General Court-Martial Order No. 3-14, 10 Jul 14.)

STATEMENT OF FACTS

Appellant entered into a Pretrial Agreement (PTA) with the CA. (R. at 397). His pleas at trial were consistent with his PTA. Appellant did not violate any provisions of his PTA.

Part II of the Appellant's PTA provided that "all confinement in excess of 6 months will be suspended for the period of confinement served plus six (6) months thereafter, at which time, unless sooner vacated, the suspended portion will be remitted without further action." (R. at 405). The PTA also

provided that all other punishments may be approved as adjudged. (R. at 405).

However, the CA's action stated, ". . . the sentence is approved and, except for that portion of the sentence extending to a bad conduct discharge, will be executed." (GCMO No. 3-14; R. at 10). The CA's action did not contain any other provisions or language that addressed the PTA's suspension of confinement in excess of six (6) months.

SUMMARY OF ARGUMENT

Because the CA's action failed to properly take into account the terms of Appellants PTA, the CA's review of Appellant's case was improper and erroneous requiring a new review by the CA.

Alternatively, at the very least, Appellant is entitled to have the record of his court-martial be accurate and this Court should order a corrected CA's action.

ARGUMENT

I.

THE CONVENING AUTHORITY'S ACTION ON SA FAIRLEY'S SENTENCE IS DEFECTIVE AND REQUIRES A NEW REVIEW

"When the action of a convening authority is 'incomplete, ambiguous, or contains clerical error' a Court of Criminal Appeals may 'instruct' the convening authority who took the

action ‘to withdraw the original action and substitute a corrected action.’” *United States v. Mendoza,* 67 M.J. 53, 54 (C.A.A.F. 2008); R.C.M. 1107(g).

Moreover, “[i]f the original convening authority has been replaced by a successor, there must be some evidence that the successor convening authority communicated with the original convening authority and that the corrected action reflects the original convening authority’s intent.” *United States v. Lower*, 10 M.J. 263, 265 (C.M.A. 1981). Alternatively, a successor CA may only issue a new action after receiving a new Staff Judge Advocate Recommendation (SJAR), to be served on the defense and providing the appellant a new opportunity to submit clemency. *See United States v. Gosser*, 64 M.J. 93, 96-97 (C.A.A.F. 2006).

In the present case, the Appellant was sentenced to confinement for 14 months, reduction to pay-grade E-1, total forfeitures, and a bad conduct discharge. (R. at 216).

Part II of the Appellant’s Pretrial Agreement required confinement in excess of 6 months to be suspended for the period of confinement served plus six and then remitted. (R. at 405). The CA’s action, however, only approved the sentence as adjudged and executed the sentence, besides the punitive discharge. (GCMO No. 3-14). It did not contain any other provisions or language that addressed the PTA’s suspension of confinement in excess of six months.

By failing to accurately take into account the terms of the PTA in the CA's action, the CA's review of the entirety of Appellant's record was, *ipso facto*, incomplete and not accurate. Accordingly, this Court should remand this case back to the CA for new post-trial processing.

II.

IN THE ALTERNATIVE, SA FAIRLEY IS ENTITLED TO HAVE THE CA ACTION CORRECTLY REFLECT THE RESULTS OF HIS GENERAL COURT-MARTIAL

"Appellant is entitled to have [his] official records correctly reflect the results of this proceeding." *United States v. Crumpley*, 49 M.J. 538, 539 (N-M. Ct. Crim. App. 1998). The remedy for erroneous information is a corrected record. *Id.* Because the CA failed to properly note a requirement of the PTA, this Court should order a corrected CA's action.

CONCLUSION

Wherefore, for the foregoing reasons, the Appellant respectfully requests that this Court remand this case to the CA for new review and post-trial processing by the CA.

John T. Zelinka
LCDR, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris St. SE Suite 100
Washington Navy Yard, D.C. 20374-5047

CERTIFICATE OF FILING AND SERVICE

I certify that the original of the foregoing was delivered to the Court, and that copies were delivered to Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity on 14 October 2014.

John T. Zelinka
LCDR, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris St., SE
Suite 100
Washington Navy Yard, D.C. 20374-5047

DEPARTMENT OF THE NAVY
GENERAL COURT-MARTIAL
NAVY-MARINE CORPS TRIAL JUDICIARY
EUROPE, AFRICA, SOUTHWEST ASIA JUDICIAL CIRCUIT

U N I T E D S T A T E S **v.** **ESTEVAN FLOREZ** **HM3 USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS SPECIFICATIONS 3, 4, AND 5 OF CHARGE I AS UNCONSTITUTIONAL** **22 May 2014**

1. Nature of the Motion

This motion is filed pursuant to Rule for Courts-Martial 907 in response to the Defense's motion to dismiss of 19 May 2014 because the term "incapable of consenting due to impairment" or "incompetent" is unconstitutionally vague and overbroad and violates the constitutionally protected right to privacy.

2. Summary of Facts[1]

The accused is charged with violations of the Uniform Code of Military Justice, Article 120, supported by six specifications. The charges stem from two separate incidents in which the accused is alleged to have sexually assaulted two separate female shipmates: MASA BR (Specifications 1-2, and the additional charge), and MA3 DN (Specifications 3-5), specifically while MA3 DN was incapable of consenting due to impairment by an intoxicant. *See* Charge Sheet.

[1] Attachments which set forth evidence necessary for the resolution of this motion have been previously submitted and attached to the Government's Response to Defense Motion to Dismiss Due to an Improper Article 32 Investigation filed 24 April 2014. Specifically, Attachments 1, 12, 13, 15, and 16 of that Government Response set forth the facts relevant to this particular motion.

The sexual assaults charged in Specifications 3-5 (the only specifications relevant to this particular motion) occurred on the night of 22 June 2013, after MA3 DN consumed numerous drinks at various bars in and around NAS Sigonella, Italy, and had become intoxicated. Multiple witnesses confirm that a group of friends, including MA3 DN (known to her friends as "Nunu"), had drunk alcohol from approximately 2000 hours to 0700 the next morning. The drinks consisted of beer, shots and mixed drinks. MA3 DN, along with all of her friends, was very drunk. They ended up in the "smoke pit" area of their barracks, the same barracks in which HM3 Florez had raped MASA BR (separately charged in Specifications 1-2). The group continued to drink alcohol. The accused came to their picnic table and had a non-sexual conversation with the people at the table, including MA3 DN, who vaguely recalls the encounter.

Later, MA3 DN headed to her barracks room. Video recordings of the barracks hallway show her coming into the hallway where her room was located. She can, however, be seen doing the following: going to the wrong barracks room door and trying to enter to no avail; sitting down on the floor of the hallway for several seconds; making a staggered, curved walk to her room; and entering. Article 32 testimony established and the video supported that several minutes later her roommate came to the room to retrieve more drinks. The roommate testified that she found MA3 DN passed out on her back just inside the hallway door. She was on the floor of the common area of the barracks room with the back of her head pressed against the lowest area of the shut door to her own room.

The roommate was able to rouse MA3 DN enough to help her get in the roommate's room and into the roommate's bed because MA3 DN appeared to be locked out of her own room. MA3 DN passed back out.

When the roommate returned to the smoke deck, the accused discussed how he was locked out of his room and needed to call the barracks "RA" (resident attendant). The roommate offered to let him use her phone that was charging in her room. The video shows the accused at 0857 entering the barracks room in which MA3 DN was sleeping in the roommate's room. The accused was alone when he entered. The video shows the accused leaving at 1051, having spent approximately two hours in the room.

MA3 DN remembers only a few images: awaking to the man she met downstairs on top of her, being at the bathroom sink facing the mirror with only her shirt on and the man behind her, and then being half dressed back in a room, not hers, with the man she met at the table next to her. Upon awakening she panicked. She asked the accused if they were in her roommate's room and the accused responded, "Don't worry, all we did was cuddle."

During the time the accused had been in the room, MA3 DN's roommate had returned to the room with a male friend in an effort to find out where the accused had gone when he went to retrieve her phone. She knocked on the door and eventually kicked it but the accused never answered.

Believing more than "cuddling" had occurred, MA3 DN filed a restricted report with the hospital and underwent an hours-long invasive SANE exam conducted professionally by two Lieutenant Commander female nurses. DNA swabs that LCDR Theresa Devitt-Lynch obtained from inside MA3 DN's vagina (the "vaginal pool") contained sperm with a DNA profile that matched (to odds in the quadrillions) the accused's DNA profile.

During an interview with NCIS, the accused explained that he and MA3 DN went to the room together, a fact the barracks video refutes. He also said he spent approximately a half hour in the room, a fact the video refutes. He also said he returned the room key to MA3 DN's

roommate, a fact the video refutes. A review of the Barracks RA's phone showed no phone call from the accused. The accused claimed that when he entered the barracks room to retrieve the phone, MA3 DN invited him to bed and repeatedly begged him for more sex when he tried to leave the room. According to him, she begged him to "fuck" her harder and harder. According to him he repeatedly obliged her vaginally, in addition to orally which she reciprocated. (Attachment 1).

3. Authorities:

Rule for Courts-Martial 907, MANUAL FOR COURTS-MARTIAL (2012 ed.);
United States v. Vaughan, 58 M.J. 29 (C.A.A.F. 2003);
United States v. Cartwright, 2013 CCA LEXIS 735, (A.F.C.C.A., Aug. 15, 2013);
Parker v. Levy, 417 U.S. 733 (1974);
United States v. Mansfield, 33 M.J. 972 (A.F.C.M.R. 1991);
Grayned v. City of Rockford, 408 U.S. 104 (1972);
United States v. Frantz, 1953 CMA LEXIS 1020, (C.M.A., Feb. 6, 1953);
Krichman v. United States, 256 U.S. 363 (1921);
American Communications Assn. v. Douds, 339 U.S. 382 (1950);
Nash v. United States, 229 U.S. 373 (1913);
United States v. Moore, 58 M.J. 466 (C.A.A.F. 2003);
Coates v. Cincinnati, 402 U.S. 611 (1971);
United States v. Brown, 55 M.J. 375 (C.A.A.F. 2001);
United States v. Marcum, 60 M.J. 198 (C.A.A.F. 2004);
Lawrence v. Texas, 539 U.S. 558 (2003);
United States v. Goings, 72 M.J. 202 (C.A.A.F. 2013);
United States v. Stratton, 2012 CCA LEXIS 16 (N-M. Ct. Crim. App., Jan. 26, 2012);
Planned Parenthood v. Casey, 505 U.S. 833 (1992);
United States v. Vasquez, 72 M.J. 13 (C.A.A.F. 2013);
United States v. Ali, 71 M.J. 256 (C.A.A.F. 2012).

4. Discussion

I. **Article 120, Uniform Code of Military Justice, Is Not Unconstitutionally Vague Because It Appropriately Provides Fair Notice of Its Proscribed Conduct**.

A law is void for vagueness "if one could not reasonably understand that his contemplated conduct is proscribed." *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003). "A basic principle of due process requires 'fair notice' that an act is subject to criminal sanction

and about the standard that is applicable to the forbidden conduct." *United States v. Cartwright*, 2013 CCA LEXIS 735, *19 (A.F.C.C.A., Aug. 15, 2013) (citing *Vaughan*, 58 M.J. at 31). What is sufficient from a notice standpoint "is determined in light of the conduct with which a defendant is charged." *Parker v. Levy*, 417 U.S. 733, 757 (1974). Essentially, "[v]oid for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his or her contemplated conduct is proscribed." *Id*. Additionally, "[c]riminal statutes are presumed to be constitutionally valid, and the party attacking the constitutionality of a statute has the burden of proving otherwise." *United States v. Mansfield*, 33 M.J. 972, 989 (A.F.C.M.R. 1991), *aff'd*, 33 M.J. 972 (C.M.A. 1993).

When it comes to criminal statutes, exact certainty as to the proscribed conduct is not required. According to the Supreme Court, "because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Put another way, "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." *Id*. at 110. Even with the most artfully drafted criminal statutes, "[a] certain minimum element of indistinction remains which, in legislation of this entirely defensible character, can never be expunged completely, and must be dealt with on a case-by-case basis." *United States v. Frantz*, 1953 CMA LEXIS 1020, *7 (C.M.A., Feb. 6, 1953); *see also Krichman v. United States*, 256 U.S. 363, 367-68 (1921). Of course, [i]t will always be true that the fertile legal 'imagination can conjure up hypothetical cases in which the meaning of [disputed] terms will be in nice question.'" *Grayned*, 408 U.S. at 111 (citing *American Communications Assn. v. Douds*, 339 U.S. 382, 412 (1950)). Nevertheless, some ambiguity in criminal statutes is completely justifiable, "for 'the law is full of instances

where a man's fate depends on his estimating rightly . . . some matter of degree.'" *Frantz*, 1953 CMA LEXIS at *7 (citing *Nash v. United States*, 229 U.S. 373, 377 (1913)).

UCMJ Article 120 is not constitutionally void for vagueness. Defense Counsel specifically asserts that the terms "incapable of consenting due to impairment" or "incompetent" are constitutionally vague and asserts that not only is the statute itself deficient, but that the accused could not have been expected to conform his specific conduct to the law. Both arguments are without merit.

A. The Statutory Language of Article 120, UCMJ, Is Constitutional.

Defense Counsel argues that the terms "incapable of consenting due to impairment" and "incompetent" are included in the statutory language of the current Article 120 but that no additional amplifying information is provided to explain or define this specific terms, and because of this, the statute is unconstitutionally vague. In its motion, Defense Counsel notes that the previous version of Article 120, UCMJ, included the term "substantial incapacitation" and noted that this specific term was difficult to define with any clarity. *United States v. Moore*, 58 M.J. 466, 469 (C.A.A.F. 2003). Yet, even with some lacking of particular clarity, it is important to note that, as of 15 August 2013, "no appellate court has found Article 120, UCMJ, to be facially unconstitutional." *Cartwright*, 2013 CCA LEXIS at *8.[2]

Thus, correctly stating that the new version of Article 120 repeats the same problem of the 2007 Article 120 statute first requires an actual constitutional vagueness problem in the 2007 version, which no appellate court has ever determined. Even if Congress did omit one indistinct term and replace it with another, no court has determined that the previous term was unconstitutionally vague. Thus, even though the current statute may not provide a definition of

[2] Trial Counsel is also not able to locate any military case, to date, that has held that the prior version of Article 120, UCMJ, is unconstitutional.

the specific terms at issue, the specific terms and the change between the 2007 and 2012 versions of Article 120, UCMJ, do not present an issue of unconstitutional vagueness.

B. The Statute Is Not So Vague That The Accused Could Not Have Appropriately Conformed His Conduct to The Law, And It Does Not Deny Him Due Process.

Defense Counsel also argues that the statute is so vague that the accused could not possibly have been expected to conform his conduct to the law. As stated above, whether a statute is unconstitutionally vague "is determined in light of the conduct with which a defendant is charged." *Parker*, 417 U.S. at 757. Because there is no definition provided in the statute, "[w]e are thus relegated, at best, to the words of the [statute] itself." *Grayned*, 408 U.S. at 110 (quoting *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971)). Additionally, as the Defense states in its motion, other sources may exist to provide notice to the accused of his potentially criminal conduct, including military custom and usage, training, pamphlets, and materials. *See United States v. Brown*, 55 M.J. 375, 384 (C.A.A.F. 2001).

In this case, the accused is alleged to have committed sexual acts and contact upon the alleged victim when she was incapable of consenting due to impairment from alcohol; specifically, the sexual acts of vaginal and oral penetration and the sexual contact of the vagina with his mouth. Additionally, alcohol is a central issue in this incident, which occurred after a night of alcohol consumption at local bars. After drinking out at the bars, the accused returned to his residence on base and sexually assaulted the alleged victim in her roommate's bedroom.

The accused is a 23-year old Third Class Petty Officer in the United States Navy. In his time in the Navy, he has received no less than eight separate trainings on the topic of sexual assault. Additionally, he has received no less than four separate trainings on the topic of alcohol and/or drug abuse. (Attachment 2). It is reasonable to assume that this training, and the training materials used and presented at these trainings, were at least of general "importance in providing

notice of the [proscribed conduct]" which involves elements of overindulgence in alcohol and at least risky sexual activity. *Id*. Furthermore, the actual words used in the statute are not overly complicated or technical such that the accused could not have reasonably understood their meaning. The Merriam-Webster Dictionary defines "impair" as "to damage or make worse by or as if by diminishing in some material respect," (Attachment 3), and defines "incapable" as "lacking capacity, ability, or qualification for the purpose or end in view" (Attachment 4). With these rather plain definitions, it is reasonable to believe that the accused was able to conform his conduct to the law, especially when the law and conduct at issue is the commission of oral and vaginal penetration and vaginal contact upon a female shipmate who had consumed alcohol directly before the sexual acts and contact.

Additionally, the accused is not denied due process from the specific terminology of Article 120, UCMJ. First, as noted above, the accused, and nearly all military members, have received training on both alcohol use and sexual assault. This training is relevant as to the issue of whether the accused was on notice of what conduct is potentially criminal in nature. Second, the accused is not denied due process from the application of the semi-scientific, but more common-sense, qualities of alcohol, because he has been appointed a specifically-requested forensic psychologist who specializes in the effects of alcohol on the body and mind. (Attachment 5). The use of this expert goes a long way in guaranteeing that the accused will have a fair trial and his counsel will be able to understand, confront, and argue the appropriate issues and factors present in this case. For these reasons, the accused has not been denied due process.

Finally, the fact that a member in a separate court-martial has signed an affidavit describing his apparent confusion as to the term "competent person" is wholly irrelevant to this

case. The case of *United States v. IT2 Jacob Pease* is a completely separate case with completely separate facts and completely different members. The fact that one member apparently felt confusion regarding one aspect of the court's instructions (as applied to the facts of that particular case) in no way means, or even implies, that the term is unconstitutionally vague, or that the accused in this case would be denied due process by the standard court-martial instructions explaining the law to the members. Additionally, even if one particular member may have been confused (again, in a completely separate case with completely separate facts), there is no showing that the accused in that other case would still not have been convicted of the Article 120 offenses because the military justice system does not require unanimous voting for a conviction. One member's apparent confusion (even if that member is the court-martial president) in a separate case with separate facts and separate evidence does not mean, in any way, that the accused in this case has been or will be denied his constitutional right to due process.

II. **Article 120, Uniform Code of Military Justice, Does Not Violate The Constitutional Right to Privacy**.

"It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *United States v. Marcum*, 60 M.J. 198, 203 (C.A.A.F. 2004) (citing *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)). In *Lawrence*, a case in which the United States Supreme Court invalidated a Texas state statute criminalizing consensual homosexual sodomy, "the focal point of the constitutional protection involved an act of sexual intimacy between two individuals in a wholly private setting without more." *United States v. Goings*, 72 M.J. 202, 206 (C.A.A.F. 2013). Essentially, *Lawrence*, as applied to the military via *Marcum*, establishes "that individuals have a liberty interest that protects consensual 'private sexual conduct' including oral and anal sodomy." *United States v. Stratton*, 2012 CCA LEXIS 16, *7 (N-M. Ct. Crim. App.,

Jan. 26, 2012) (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992)). As such, "[n]o one disagrees that wholly private and consensual sexual activity, without more, falls within Lawrence." *Goings*, 72 M.J. at 206; *see also Lawrence*, 539 U.S. at 578 (stating that the case "involve[s] two adults who, **with full and mutual consent** from each other, engaged in sexual practices") (emphasis added).

"However, it is also clear that there are tangible limits to this liberty interest." *Stratton*, 2012 CCA LEXIS at *7. "*Lawrence* did not establish a presumptive constitutional protection for all offenses arising in the context of sexual activity." *Goings*, 72 M.J. at 206 (citing *Lawrence*, 539 U.S. at 578). Instead, the Court of Appeals for the Armed Forces set up a three-part test to determine when sexual activity is protected by the ruling in *Lawrence* on an as-applied basis. *Marcum*, 60 M.J. at 206-207. Only the first prong applies here[3], which is "is the conduct that the accused was found of committing of a nature to bring it within the liberty interest identified by the Supreme Court?" *Id*. at 206. Essentially, this first prong asks "[i]n other words, did the 'conduct involve private, **consensual** sexual activity between two adults?'" *Stratton*, 2012 CCA LEXIS at *8 (quoting *Marcum*, 60 M.J. at 207) (emphasis added).

In this case, the conduct charged, sexual acts of oral and vaginal penetration and vaginal sexual contact committed upon a person who was incapable of consenting to the sexual acts and sexual contact because of impairment, is not protected by the liberty interest embodied in the Constitution and protected in *Lawrence* and *Marcum*. The basis of the charged conduct is that MA3 DN was incapable of consenting, and as such, the sexual activity between her and the accused was not the "private, consensual sexual activity" which receives constitutional protection. Rather, the Defense is essentially arguing that a dispute as to an issue of fact, *i.e.*,

[3] The other two prongs are not relevant because the analysis of the first prong results in a finding that the charged conduct is not within the liberty interest identified by the Supreme Court, and as such, the analysis ends there.

whether MA3 DN was incapable of consenting because of impairment, somehow removes the charged conduct from other classifications of sexual assault, and moves it into a classification of protected sexual activity. But this is not the case, as both parties will present evidence on this central issue of fact before the trier of fact: the Government will present testimony and evidence which seeks to prove that MA3 DN was impaired and thus incapable of consenting, and the Defense will presumably introduce evidence and argue to the contrary. But this disputed issue of consent between the parties does not mean that the charged conduct is constitutionally protected. Unlike the defendant in *Lawrence* and the accused in *Marcum*, the accused in this case is not being prosecuted solely because of private sexual activity, but rather based on sexual activity upon a person who was incapable of consenting to such sexual activity. The Court of Appeals for the Armed Forces added clarity to this important distinction by stating:

> When the conduct being charged does not fall directly within the focal point of Lawrence – sexual conduct between two individuals in a wholly private setting that was criminal for no other reason than the act of the sexual conduct itself – and where, as here, the predicate sexual conduct is criminal because of some additional factor . . . the burden of demonstrating that such conduct should nonetheless be constitutionally protected rests with the defense at trial . . . Put another way . . . the individual must develop facts at trial that show why his interest should overcome the determination of Congress and the President that the conduct be proscribed.

Goings, 72 M.J. at 207 (citing *United States v. Vasquez*, 72 M.J. 13, 16-21 (C.A.A.F. 2013); *United States v. Ali*, 71 M.J. 256, 265 (C.A.A.F. 2012)). The defense fails with their burden, because the charged conduct here is not the simple act of the sexual activity itself, which may or may not be constitutionally protected, *see Marcum*, 60 M.J. 198, but rather the sexual activity made criminal because of the Government's charged element of an additional factor – the impairment of the other involved party which removes the sexual activity from its otherwise potentially protected realm. As such, Article 120, whether facially, or as applied to the accused in this case, is not unconstitutional and does not violate the right to privacy.

5. Relief Requested.

The Government respectfully requests that the Defense Motion to Dismiss be denied.

6. Evidence.

Attachment 1:	Results of Interrogation of Accused and Statement of Accused dated 3 Sep 13
Attachment 2:	Training Record of Accused
Attachment 3:	Merriam-Webster Dictionary Definition Excerpt
Attachment 4:	Merriam-Webster Dictionary Definition Excerpt
Attachment 5:	Convening Authority Expert Assistance Approval, Ser NOOJ/034

7. Oral Argument.

The Government does not request oral argument on this motion.

//s//

_____
Michael F. Whitican
LT, JAGC, USN
Trial Counsel

****

CERTIFICATE OF SERVICE

I hereby certify that a copy of this filing was served on the Detailed Defense Counsel, LT Lisa Redmond, via email on 22 May 2014.

//s//

_____
Michael F. Whitican
LT, JAGC, USN
Trial Counsel

DEPARTMENT OF THE NAVY
GENERAL COURT-MARTIAL
UNITED STATES NAVY-MARINE CORPS TRIAL JUDICIARY
EUROPE, AFRICA, SOUTHWEST ASIA JUDICIAL CIRCUIT

U N I T E D S T A T E S	)	**MOTION TO DISMISS SPECIFICATIONS 3, 4 AND 5 OF CHARGE I AS UNCONSTITUTIONAL**
v.	)	
ESTEVAN FLOREZ	)	
HM3, USN	)	**19 May 2014**

1. <u>Nature of Motion</u>

The Defense respectfully moves this court-martial to dismiss Specifications 3, 4 and 5 of Charge I as unconstitutional. Specifically, the statutory scheme of Article 120 of the Uniform Code of Military Justice (UCMJ) pertaining to alcohol incapacitation is unconstitutional in that it criminalizes sexual conduct with a person who is "incapable of consenting due to impairment" or "incompetent." Neither term is defined within the statute, nor does either lend itself to a commonly recognized practical definition. As such, the statutory scheme is unconstitutionally vague and overbroad. Additionally, because within this realm are included sexual acts in which the alleged victim manifests apparent consent, the scheme violates the constitutionally protected right to privacy.

2. <u>Statement of Facts</u>

a. HM3 Florez is defending himself against one Article 120 charge and its six specifications stemming from the accusations of two complaining witnesses.

b. Three specifications stem from MASN B.R.'s allegation that HM3 Florez raped her, either with unlawful force or by threatening grievously bodily harm, and that he

touched her breast during the rape. Those specifications are not pertinent to, and are not addressed in this motion.

c. The other three specifications are rooted in an allegation made by MA3 D.N.that HM3 Florez sexually assaulted her in her roomate's bed, on 22 June 2013, while she was incapacitated due to voluntary intoxication. She claims she went out drinking with a friends and ended up at the barracks' smoke deck ten hours later. At the smoke deck she met and conversed with HM3 Florez. At some point she went upstairs to her room. Her roommate found her sitting in the common area sleeping and woke her up and put her in her own bed because she did not know where MA3 D.N.'s key was and went back downstairs to hang out with HM3 Florez until her boyfriend got off of work. She claims to have experienced what is referred to by psychologists and toxicologists as a "fragmentary blackout." Specifically, she alleges that she has blank spots in her memory and only remembers three things after getting to the smoke deck: speaking with HM3 Florez, waking up to a strange man on top of her, and looking into a mirror with a strange man behind her in the mirror. The next thing she claims to remember is waking up with HM3 beside her and he looks at her and says "Don't worry, we just cuddled."

d. HM3 Florez, in a statement to NCIS, maintained his innocence. He told NCIS tht the sexual encounter was consensual, and that the complaining witness actively participated in the sexual activity.

3. <u>Discussion.</u>

The statute is unconstitutional because (1) the language is unconstitutionally vague and overbroad and (2) it is facially violative of the constitutionally protected right to privacy articulated in *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472 (2003).

Our Constitution's Due Process Clause requires that an accused's conduct "be measured against objective, clearly understood standards of criminality." *United States v. Cochrane*, 60 M.J. 632, 633-634 (N-M.C.C.A. 2004). "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." *Parker v. Levy*, 417 U.S. 733, 757 (U.S. 1974), citations omitted. The void-for-vagueness doctrine "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited." *United States v. Dunn*, 2005 CCA LEXIS 9 (N-M.C.C.A. Jan. 14, 2005), citing *Kolender v. Lawson*, 461 U.S. 352, 357, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983). It also requires that penal statutes be "defined in a manner that does not encourage 'arbitrary and discriminatory enforcement.'" *United States v. Rheel*, 2011 CCA LEXIS 370 (N-M.C.C.A. Dec. 20, 2011), citing *Kolender*. Therefore the law requires us to review two questions in the void-for-vagueness context: (1) does the statue provide fair notice and warning to HM3 Florez in terms of what is prohibited or required by the statute? and (2) does it provide an ascertainable standard of guilt for a panel of members so that it does not encourage arbitrary and discriminatory enforcement?

The latest iteration of Article 120 of the Uniform Code of Military Justice seeks to proscribe certain forms of sexual conduct, including situations where one participant has consumed alcohol or other intoxicants to the level that they are, statutorily, incapable of consenting to the sexual activity. The statute describes this state as "incapable of consenting due to impairment." The statute goes on to muddy the water by adding that "an incompetent person

cannot consent." As neither term is defined – in the statute, the implementing rules provided by the President, or the Military Judge's Benchbook – it is left to the individual member to decide what "competence" means—or more simply, "how drunk is too drunk?" Under the current framework, a member could resolve that question in favor of the Government, while finding the witness's condition to fall anywhere along the spectrum of "physically incapable of resisting" to "unfit to stand duty."[1]

I. Article 120(b)(3) is unconstitutionally vague.

Since the 1950's Congress has attempted to address military sexual crimes in the UCMJ, 10 U.S.C. §§ 800 *et. seq*. Historically, nonconsensual sexual behavior was addressed in Arts. 120, 125 and 134, UCMJ. In 1992, Congress began to implement amendments to Article 120 that ultimately revamped and expanded the scope of Article 120. The most notable changes to Article 120 came in the 2007 and 2012 Congressional amendments respectively. Specifically, Congress made key modifications to the definition of sexual assault in their 2007 and 2012 amendments to Article 120.

In many military sexual assault cases the accusing witness alleges that he or she was impaired by the ingestion of alcohol or drugs. The degree of impairment is a frequent area of dispute during trial. In 2007, Congress completely overhauled the scope of Article 120 making a "sexual act" illegal if the victim was "substantially incapacitated" or "substantially incapable" of appraising the nature of the sexual act, declining participation in the sexual act, or communicating unwillingness to engage in the sexual act.

In 2011, Congress undertook another round of amendments to Article 120, UCMJ, which took effect on 28 June 2012. In the 2012 amendment to Article 120, often referred to as "the

[1] BUMED INSTRUCTION 5350.6 provides that anyone who blows over a .02 in a handheld alcohol detection device may, at the discretion of the CO or OIC, be considered unfit for duty.

new-new 120," Congress attempted to shift the focus to what the accused "knew or reasonably should have known." The new-new 120 omits the term "substantially incapacitated," and instead inserts an element that the complaining witness was "incapable of consent due to impairment."

Unfortunately, the 2012 Article 120 repeats and exacerbates the failure of Congress to clearly define the parameters of sexual assault because it fails to provide definitions for "incapable" and "incompetent" in a manner that identifies with any degree of specificity when an individual is so impaired that they are no longer legally able to have sex. Congress essentially omitted one vague term - "substantially incapacitated" - and replaced it with two others" "incapable" and "incompetent" to the detriment of the panel and the accused's Constitutional rights. This statute is too vague to provide the accused with notice of the definitions of the law's key element. Specifically, the law fails to define the requisite level of impairment necessary for the accused to determine that the complaining witness is incapable of consenting to a sexual act due to impairment. Effectively, the new-new Article 120 exacerbates the clarity problems we encountered with its predecessor by focusing on the mental state of the complaining witness, using a term that has no medical, legal, or practical meaning.

I. Article 120 is so vague that HM3 Florez could not possibly have been expected to conform his conduct to the law.

The disputed specifications allege violations of Articles 120(b)(3) and 120(d), which prohibit committing a sexual act or having sexual contact with a person who is incapable of consenting due to impairment. Thus, the Government must prove in this case, beyond a reasonable doubt, that:

1. HM3 Florez committed a sexual act/had sexual contact upon/with MA3 DN;
2. MA3 D. N. was incapable of consenting due to impairment; and

3. HM3 Florez knew, or should have known, the complaining witness was incapable of consenting due to impairment.

The first prong is clear, as the statute provides a clear definition of what constitutes a sexual act or sexual contact. Article 120(g)(1). The statute also defines consent, and provides some specific instances in which a person cannot consent, such as "a sleeping, unconscious, or incompetent person" or a person "under threat or fear." Article 120(g)(8). The terms sleeping and unconscious are commonly understood and readily ascertainable. The term *incompetent*, however, is not defined. No is it readily definable; because incompetence can range, based upon who is assessing it, from failing to comply with the Naval correspondence manual or poor driving up to a legal determination by a court ordering one into involuntary commitment. Moreover, the section defining consent conspicuously omits "impairment" in the delineation of specific conditions in which, as a matter of law, a person cannot consent. This means that under some circumstances, a person is capable of consent when impaired. The question then, is when does a person reach a level of impairment such that they are no longer capable of consent, and any person who has sex with them would be criminally liable under Articles 120(b)(3) and 120(d). Unfortunately, there is no definition provided in the text of the statute as to what "incapable of consenting," "impairment," or "incompetent" specifically mean. Furthermore, the Analysis of Punitive Articles in the Manual for Courts-Martial, a review of Legislative History, and the Military Judge's Benchbook are also silent, and of no help in defining these critical terms. The key term here, "incapable of consenting," is the very crux of the proscribed conduct, and is impermissibly and unconstitutionally vague such that HM3 Florez could not have read the law's key elements and understood what "incapable of consenting due to impairment" means.

This vagueness left HM3 Florez with insufficient notice that his conduct may or may not have been proscribed. *See United States v. Moore*, 58 M.J. 466, 469 (C.A.A.F. 2003).[2]

B. Article 120 is so vague as applied to HM3 Florez, he is denied Due Process.

Courts have on a number of occasions examined the question of whether a statute is impermissibly vague. A law will be deemed facially void if it is so unclear that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). A law failing to clearly define the conduct it proscribes "may trap the innocent by not providing fair warning," inevitably leading to impermissible delegation of "basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. Rockford*, 408 U.S. 104, 108-109 (1972). The D.C. Court of Appeals in *United States v. Capital Traction Co.*, 34 App. D.C. 592 (1910), analyzed a statute prohibiting municipal street railway companies from running an insufficient number of cars to accommodate passengers "without crowding." *Id.* The opinion's language, cited approvingly by the U.S. Supreme Court in *Connally*, is pertinent to this case and helpful to reproduce at length:

> *What shall be the guide to the court or jury in ascertaining what constitutes a crowded car? What may be regarded as a crowded car by one jury may not be so considered by another. What shall constitute a sufficient number of cars in the opinion of one judge may be regarded as insufficient by another*. . . . There is a total absence of any definition of what shall constitute a crowded car. This important element cannot be left to conjecture, or be supplied by either the court or the jury. It is of the very essence of the law itself, and without it the statute is too indefinite and uncertain to support an information or indictment…*The*

[2] Notably, the term "incapable of consenting" (which is not defined anywhere in the Manual for Courts-Martial) was employed over other terms which are far more common. The federal sexual abuse statute uses "(A) incapable of appraising the nature of the conduct; or (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act" terms which are far more easily subject to definition and understanding. Moreover, Congress did not use the simple standard "incapacitated person," which Black's Law Dictionary defines as: "A person who is impaired by an intoxicant … to the extent that personal decision-making is impossible." Black's Law Dictionary, Seventh Edition.

> *dividing line between what is lawful and unlawful cannot be left to conjecture.* The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, *must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue*. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another. *Id.* at 596, 598 (Emphasis added).

Capital Traction and *Connally* provide basic background on the doctrine of void-for-vagueness. The modern seminal case on the question is *Parker v. Levy*.[3] In *Parker*, the Court states, "void-for-vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." *Id.* at 757.[4] This standard is expanded upon in a series of military cases. In *United States v. Saunders*, C.A.A.F. framed the issue of whether an individual was on sufficient notice as an objective inquiry. 59 M.J. 1, 29 (2003). Later, *United States v. Pope* lists examples of "fair notice" sources to include federal law, state law, military case law, military custom and usage, and military regulations. 63 M.J. 68 (C.A.A.F. 2006). Training, pamphlets, and other materials may also serve as sources of notice by giving context to regulations and articulating differences between permissible and impermissible behavior. *See United States v. Brown*, 55 M.J. 375, 384 (C.A.A.F. 2001).

Here, HM3 Florez had no notice that the MA3 D. N. had allegedly reached the undefined level of impairment such that her apparent consent was invalidated by alcohol consumption. The

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[3] 417 US 733 (1974), citing *U.S. v. Harris*, 347 US 612, 617 (1954).

[4] While *Parker* upheld the statute, the Court explained that the military is subject to a less stringent analysis than our civilian counterparts. But this reasoning stems from the unique military nature of the laws at issue, Articles 133 and 134. The rationale used to justify an unclear statute in Parker cannot be used to compensate for Art. 120's failings. Arts. 133 and 134 are particularly inherent to our military structure and unknown in the civilian world. Not so with laws prohibiting sex crimes. The Government would be hard pressed to articulate a legitimate reason why a servicemember should receive less protection from the dangers of an unconstitutionally vague law than a civilian accused of the same conduct.

statute unrealistically expected him to gauge whether the complaining witness was "incapable of consenting due to impairment." Does "incapable of consenting due to impairment" mean that a person is *extremely impaired*? *Mostly* impaired? Above the legal blood alcohol content ("BAC") limit for operating a motor vehicle? When does the switch between capable of consenting and incapable of consenting occur? As an impaired individual's BAC inevitably drops, when does the person revert back to "capable" once again? Who is culpable in a situation where both parties have reached a level of impairment such that neither party was capable of consenting?

Determining whether someone is "incapable of consenting due to impairment" requires the ability to make accurate, immediate determinations based on usually incomplete information (such as a potential sexual partner's height, weight, tolerance for alcohol, knowledge of how much alcohol was consumed, and knowledge of when alcohol consumption ceased). Consider the intoxicated complaining witness during a period of "black-out": externally appears capable of consenting, externally appears to actually consent, and it is not determined until later (usually by experts, analyzing facts that weren't necessarily known to the accused) that she was "incapable" of consenting at the time. Indeed, an Article 120(b)(3) or 120(d) referral all but assures the government will present evidence by a forensic toxicologist to convince panel members that a complaining witness was indeed incapable to consent. This court should not expect that level of analysis from HM3 Florez, or any other lay person for that matter, on the night in question.

Article 120 is not "so clearly expressed" that HM3 Florez could "intelligently choose, in advance, what course it is lawful for him to pursue." *Capital Traction Co.*, 34 App. D.C. at 598. As a result, Hm3 Florez could not have reasonably known whether the complaining witness had reached a level of impairment such that she was incapable of providing consent.

II. **Article 120 violates the right of adults to engage in consensual sexual behavior, thus violating the constitutionally protected right to privacy.**

Adults have a constitutional right to privacy, and within that right to privacy is the right, generally, to engage in private, consensual sexual conduct without governmental intrusions. See *Lawrence v. Texas*, *supra*. Service members generally maintain this right. See also, *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004). With the 2007 amendment to Article 120, Congress removed the element of "lack of consent" in a misguided effort to shift the focus in sexual assault cases from victim to offender. Removal of this element reasonably suggests that Congress intended to criminalize certain otherwise consensual sexual behavior. The 2012 amendment exacerbates this. As noted above, a plain reading of the language "incapable of consenting due to impairment" suggests that individuals reach a level of impairment such that they are no longer capable of consent, and any person who commits a sexual act upon them would be criminally liable. Based upon this plain reading, Congress has effectively deprived individuals and servicemembers of their ability to engage in consensual sexual behavior. In essence, they have paternalistically stated that once you consume some unknown quantity of an intoxicant, and reach some undefined mental state of impairment, as a matter of law you can't have sex with anyone, or that person would be criminally liable. On its face, this is constitutionally impermissible.

An alternative interpretation that would salvage the constitutionality of the 2007 and 2012 amendments (at least in terms of right to privacy), is that lack of consent – even though removed as an express element and notwithstanding the addition of the term "incapable of consenting" – must be included in any rational determination of the criminality/wrongfulness of a sexual act. In this case, where HM3 Florez and MA3 D. N. are both junior enlisted, not within the same chain of command, and the alleged conduct was confined to a private, closed room, the

only potential compelling Government interest in regulating their private sexual behavior is if the sexual behavior was *nonconsensual*. Therefore, unless the intent is to criminalize consensual sexual behavior amongst adults, "consent" and "mistake of fact as to consent" must remain available defenses under Article 120, and HM3 Florez is entitled to instructions on these defenses if required by the evidence at trial.[5]

4. <u>Relief Requested</u>

The Defense respectfully requests Specifications 3, 4 and 5 be dismissed as unconstitutionally vague and in violation of the constitutionally protected right to privacy.

5. <u>Evidence and Burden of Proof</u>.

The burden of proof in attacking the constitutionality of the statute is upon the defense. The defense offers the affidavit of CDR Blake W. Kent, USN.

6. **<u>Argument</u>**. The Defense does not desire oral argument.

//s//
L. M. REDMOND
LT, JAGC, USN

****

Certificate of Service

I hereby attest that a copy of the foregoing Motion to Dismiss was served on the Court and opposing counsel by email on 19 May 2014.

//s//
L. M. REDMOND
LT, JAGC, USN

[5] It should be noted that this conclusion would not resolve the vagueness problem described above. To the contrary, it only reaffirms the vagueness problem, in that if Congress did not mean to criminalize sexual acts with a person who had reached a statutorily proscribed level of impairment such that they could not consent, then what does "incapable of consenting" actually mean?

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES, Appellee v. Juan A. GARCIA Private First Class (E-2) U. S. Marine Corps, Appellant	**APPELLANT'S BRIEF AND ASSIGNMENT OF ERRORS** NMCCA No. 201400108 Tried at Marine Corps Air Ground Combat Center, Twentynine Palms, California, on 22 July, 16 October, and 19-22 November 2013, by a general court-martial convened by the Commanding General, Training Command.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

JOHN J. STEPHENS
Major, USMC
Appellate Defense Division
1254 Charles Morris Street SE
Building 58, Suite 100
Washington Navy Yard, D.C.
20374
Office: (202) 685-8587
Fax: (202) 685-7426
john.j.stephens@navy.mil

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I

Prosecutors may not improperly vouch for a complaining witnesses' credibility, assert facts not in evidence, or mischaracterize evidence. This Trial Counsel, who was senior in rank to all of the members and the defense counsel, did all of these and even asked the members to consider all of "our other junior female Marines in the Marine Corps" when deliberating. This prosecutorial misconduct permeated the entire closing argument and materially prejudiced Private First Class Garcia's right to a fair trial.....19

II

To affirm a conviction for sexual assault, this Court must be convinced that Private First Class Garcia's mistake-of-fact was not reasonable under the circumstances. The evidence indicates Private First Class Garcia made an offer for further sexual contact with Lance Corporal A.A., but ceased when she manifested her lack-of-consent. Because there is nothing unreasonable about this behavior, this Court cannot affirm Private First Class Garcia's sexual assault convictions. 25

Summary Assignment of Error I

When civilian law-enforcement works in conjunction with military authority, suspects are entitled to rights warnings under article 31(b), UCMJ. The Palm Springs detective was aware military investigators opened an investigation on Private First Class Garcia and it was foreseeable he would be subject to punishment under the UCMJ. He was entitled to rights warnings. Because he did not receive them, his statements must be suppressed. 29

Summary Assignment of Error II

Out-of-court statements offered for the truth of the matter asserted are hearsay and inadmissible without some exception. A Government witness, Lance Corporal Morrison, testified that the following morning, the alleged victim told him that Private First Class Garcia penetrated her with his penis while she was asleep (r. at 319-20). There is no exception for this hearsay. This is plain error and is prejudicial because it goes directly to the gravamen of the offenses charged. 30

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Issues Presented

I

PROSECUTORS MAY NOT IMPROPERLY VOUCH FOR A COMPLAINING WITNESS' CREDIBILITY, ASSERT FACTS NOT IN EVIDENCE, OR MISCHARACTERIZE EVIDENCE. HERE, THE TRIAL COUNSEL, WHO WAS SENIOR IN RANK TO ALL OF THE MEMBERS AND THE DEFENSE COUNSEL, OFFENDED ALL OF THESE PRINCIPLES AND EVEN ASKED THE MEMBERS TO CONSIDER ALL OF "OUR OTHER JUNIOR FEMALE MARINES IN THE MARINE CORPS". DID THESE "FOUL BLOWS" MATERIALLY PREJUDICE PRIVATE FIRST CLASS GARCIA'S RIGHT TO A FAIR TRIAL?

II

TO AFFIRM A CONVICTION FOR SEXUAL ASSAULT, THIS COURT MUST BE CONVINCED THAT PRIVATE FIRST CLASS GARCIA'S MISTAKE-OF-FACT WAS NOT REASONABLE UNDER THE CIRCUMSTANCES. THE EVIDENCE INDICATES PRIVATE FIRST CLASS GARCIA MADE AN OFFER FOR FURTHER SEXUAL CONTACT WITH LANCE CORPORAL A.A., BUT CEASED WHEN SHE MANIFESTED HER LACK-OF-CONSENT. BECAUSE THERE IS NOTHING UNREASONABLE ABOUT THIS BEHAVIOR, CAN THIS COURT AFFIRM PRIVATE FIRST CLASS GARCIA'S SEXUAL ASSAULT CONVICTIONS?

Statement of Statutory Jurisdiction

Private First Class (PFC) Juan A. Garcia, U.S. Marine Corps, received a sentence that included a bad-conduct discharge. Accordingly, this Court has jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ).[1]

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[1] 10 U.S.C. § 866(b)(1) (2012).

Statement of the Case

A general court-martial composed of members with enlisted representation convicted PFC Garcia, contrary to his pleas, of two specifications of abusive sexual contact, in violation of Article 120, UCMJ,[2] and one specification of violating Article 134, UCMJ,[3] for providing alcohol to a minor. He was acquitted of a third specification of sexual assault in violation of Article 120, UCMJ,[4] but found guilty of the lesser-included offense (LIO) of attempted sexual assault, in violation of Article 80, UCMJ.[5]

The members sentenced PFC Garcia to be reduced to pay-grade E-1, to be confined for five months and twenty-nine days, and a bad-conduct discharge.[6] The Convening Authority (CA) approved the adjudged sentence and, except for the punitive discharge, ordered it executed.[7]

Statement of Facts

1. The weekend liberty in Palm Springs.

In June 2012, the alleged victim, Lance Corporal (LCpl) A.A., U.S. Marine Corps, was a student at the Marine Corps Communications-Electronics School at the Marine Corps Air Ground

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[2] 10 U.S.C. § 920 (2012).
[3] 10 U.S.C. § 934 (2012).
[4] 10 U.S.C. § 920 (2012).
[5] 10 U.S.C. § 880 (2012).
[6] R. at 622.
[7] GCMO No. 02-0214, Mar. 7, 2014.

Combat Center in Twentynine Palms, California.[8] On Friday, 29 June 2012, she took a trip to Palm Springs, California, with four other students from the schoolhouse.[9] She originally planned to go only with her friend, LCpl Jill Barker, but three other junior Marines, LCpl Joseph Morrison, LCpl Aaron Avitia, and the accused, PFC Garcia, joined them.[10] The alleged victim was friends with LCpl Barker and was acquainted from a smoke-pit near her barracks with LCpl Morrison.[11] She had just met LCpl Avitia and PFC Garcia that day.[12] The group used a free USO shuttle to get to Palm Springs, and did the same when they returned on Sunday, 1 July 2012.[13] While there, the group shared a single, small hotel room with two beds.[14] They drank alcohol, went shopping, socialized at the pool, and engaged in various sexual acts with one another.

On the first evening, LCpl Morrison and LCpl A.A. slept in one bed, while PFC Garcia was in the other bed, along with LCpls Barker and Avitia.[15] That evening, LCpl Morrison was very drunk

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[8] R. at 187.
[9] R. at 187-88.
[10] *Id*.
[11] R. at 189.
[12] *Id*.
[13] R. at 188-89, 320.
[14] R. at 188, 193-94; Pros. Exs. 5, 10.
[15] R. at 194.

and urinated on the bed he shared with LCpl A.A. while he slept.[16] LCpl A.A. woke up and went to sleep in the bathtub.[17]

The next morning, the group, except for LCpl Morrison, went out to eat breakfast, and then PFC Garcia, LCpl Barker, and LCpl A.A. went shopping.[18] In the afternoon, the group went to the hotel pool, where LCpl A.A. became very sunburned.[19] After dinner at a nearby fast-food restaurant, they returned to the hotel and continued drinking alcohol and socializing.[20]

While socializing, PFC Garcia was applying aloe to LCpl A.A.'s sun-burned legs, as she lied on the floor between the hotel beds.[21] As PFC Garcia was rubbing LCpl A.A.'s legs, their touching turned sexual.[22] Both LCpls Barker and Avitia, lying on one of the beds, saw the couple engage in oral sex and vaginal intercourse.[23] As things escalated, the pair went to the bathroom and emerged several minutes later.[24]

Saturday's sleeping arrangements differed from Friday's. LCpls Barker and Avitia were still in one bed together, but PFC Garcia was now with LCpl A.A. For some time, LCpl Morrison was

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[16] R. at 196.
[17] *Id*.
[18] R. at 199-200.
[19] R. at 202.
[20] R. at 202-03.
[21] R. at 207-12.
[22] R. at 357-61, 398-401.
[23] *Id*.
[24] R. at 360-61, 400.

also in that bed, but he later moved to sleep on the floor.[25] He believed the couple were "about to get it on."[26]

Later on, LCpl Morrison saw LCpl A.A. get up from the bed and leave the room.[27] He saw PFC Garcia follow her.[28] The couple remained outside for ten to twenty minutes.[29] When PFC Garcia returned to the room, he got into the bed they had just occupied.[30] When LCpl A.A. returned, she got into the other bed with LCpls Barker and Avitia.[31]

The next day, in the early afternoon, the Marines all returned to Twentynine Palms on the USO van.[32] On the return trip, LCpl Morrison rode up-front with the driver and LCpls Barker and Avitia sat together in the middle row.[33] LCpl A.A. sat in the rear row with PFC Garcia.[34] He had his arm around her and she slept with her head on his shoulder and in his lap during the ride home.[35]

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[25] R. at 323.
[26] *Id*.
[27] R. at 318.
[28] R. at 323.
[29] R. at 319.
[30] *Id*.
[31] *Id*.
[32] R. at 320.
[33] *Id*.
[34] *Id*.
[35] R. at 320, 366, 405.

2. The Government and the Palm Springs Police Department investigate LCpl A.A.'s claim that she was raped by PFC Garcia.

Later that week, on the morning of Friday, 6 July 2012, LCpl A.A. told her Staff Non Commissioned Officer (SNCO) she was raped by PFC Garcia.[36] Her SNCO directed her to a Uniformed Victim Advocate (UVA) and then she went to medical.[37] The Provost Marshall's Office (PMO) was also informed.[38] Agents from the Naval Criminal Investigative Service (NCIS) began an investigation by interviewing LCpl A.A.[39] and then contacted the Palm Springs Police Department (PSPD). NCIS Special Agent (SA) Clifton Randolph drove LCpl A.A., and her UVA, to Palm Springs to link-up with the PSPD.[40]

A PSPD officer interviewed LCpl A.A. and took some photographs of her neck.[41] In her interview, LCpl A.A. alleged that around 0230 in the early hours of Sunday, 1 July, PFC Garcia inserted his erect penis into her while she was sleeping and said, "No matter how much you fight it, I'll get mine."[42] As she awoke completely, he placed his hand on her right breast

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[36] Art. 32 Investigating Officer's Report, May 31, 2013, Investigating Officer Exhibit (IE) 7, Palm Springs Police Department (PSPD) Report Case #1207P-1142 (PSPD Report), Narrative Report at 1, 4.
[37] R. at 232-33.
[38] *Id*.
[39] IE 4, Results of Preliminary Interview with PFC A.J.A. on 6 Jul 12.
[40] IE 7, PSPD Report, Narrative Report at 4.
[41] Pros. Ex. 1.
[42] IE 7, PSPD Report, Narrative Report at 2.

while his penis was inside her vagina. LCpl A.A. then got up from the bed and exited the hotel room and PFC Garcia followed.

While outside, according to LCpl A.A., PFC Garcia said several times, "At one point, I felt like I was raping you."[43] After the last time he said that, LCpl A.A. said, "Then why the fuck did you keep going then?!" to which PFC Garcia responded, I don't know."[44] PFC Garcia returned to the room, followed by LCpl A.A. According to LCpl A.A., when she got in the other bed, apart from PFC Garcia, he exclaimed "Oh fuck me, right?"[45] LCpl A.A. also played a surreptitious recording she made of part of the conversation between her and PFC Garcia while they were outside. Though the recording did not include PFC Garcia's alleged statements that he "felt like he was raping" LCpl A.A., it did contain this statement: "That was the last thing I wanted you to feel like. I hope you're not mad. You're cool, I think you're cool."[46] LCpl A.A. made no mention of any other sexual contact with PFC Garcia during that weekend.

The following week, NCIS agents conducted a database check on PFC Garcia, and PFC Garcia's command placed a Military Protective Order (MPO) on him preventing him from contact with

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[43] IE 7, PSPD Report, Narrative Report at 3; Pros. Ex. 4. LCpl A.A. admits that the recording never captures this admission, R. at 277.
[44] IE 7, PSPD Report, Narrative Report at 3.
[45] IE 7, PSPD Report at LCpl Morrison testified that this never happened and that he would have heard it if it did. R. at 324.
[46] IE 7, PSPD Report, Narrative Report at 4; Pros. Ex. 4.

LCpl A.A.[47] Detective (Det.) Stephanie Campbell, PSPD, was assigned to conduct the investigation. With the help of NCIS agents,[48] she interviewed LCpl Barker (1130, 12 July); LCpl A.A. (1420, 12 July); LCpl Morrison (1615, 12 July); a second interview of LCpl A.A. (16 July); LCpl Garcia (17 July); and LCpl Avitia (19 July).[49] During this period, NCIS filed its first Report of Investigation (13 July) and conducted an Official Military Personnel File (OMPF) check on PFC Garcia (18 July).[50]

LCpl A.A. never mentioned any sexual contact between her and PFC Garcia other than the reported assault. Det. Campbell learned of the earlier sexual contact from LCpl Barker.[51] In Det. Campbell's follow-up interview with LCpl A.A., she adamantly denied any earlier sexual contact occurred and claimed anyone who said that was "sticking up for Garcia because they don't want him to get in trouble."[52] LCpl A.A. also e-mailed Det. Campbell a text message from LCpl Avitia that read:

> Like, I know you didn't tell all the details and everything that happened because I was still awake and saw because I looked over. I wasn't expecting it all

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[47] IE 6.
[48] IE Report at 8. "However, during his testimony, Special Agent (SA) Bruce Rogers mentioned that NCIA assisted PSPD in obtaining telephonic interviews by 'facilitating Marines coming down to NCIS so that they could be interviewed telephonically.'"
[49] IE 7, PSPD Report, Supplemental Report at 1-10.
[50] IE 4, 5, 6.
[51] IE 7, PSPD Report, Supplemental Report at 3-5.
[52] IE 7, PSPD Report, Supplemental Report at 6.

> because I know it might be slightly embarrassing or whatever so I was cool with it. He was thinking you were down for what you guys had already started, and to go Fuck up his whole life and him thinking that you were cool with it just sucks. He's a really cool guy in a horrible situation over that. His career and record is messed up and getting a job so he can support his kid with a good life is out the window. He's not a predator or a bad guy and doesn't go around trying to force girls to do anything. If you had straight up told him you didn't want to do anything else, he wouldn't have. I just hope you realize that.[53]

When Det. Campbell interrogated PFC Garcia, she never advised him of his rights under Article 31(b), UCMJ. According to Det. Campbell, PFC Garcia was aware the Government suspected him of sexually assaulting LCpl A.A.[54] PFC Garcia told Det. Campbell about the oral and vaginal sex that occurred on Saturday afternoon. It ended with LCpl A.A. asking, "Do you mind if we finish later?"[55] PFC Garcia attempted to initiate sex with LCpl A.A. later that evening when they were in bed together.[56]

PFC Garcia told Det. Campbell that later that night, he began "scratching" and "biting" LCpl A.A., "trying to get her into it." He further recalled:

> She said "no." Not "no," but I thought she was playing around. I was like – she wasn't really, like, trying to push me off. She was, like, Ooh. And she was like, okay. But I kept trying to poke at it. And the she woke up, she went outside. I went outside.

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[53] IE 7, PSPD Report, Supplemental Report at 6.
[54] Pros. Ex. 3, at 8.
[55] *Id*. at 5.
[56] *Id*.

> And I said, like, are we going to do anything tonight? She said no. I was like, okay, and I went back.[57]

PFC Garcia also denied inserting his fingers or his penis in LCpl A.A.'s vagina.[58]

On 24 July 2012, Det. Campbell completed her portion of the investigation and filed her report. "Due to conflicting statements and the lack of physical evidence, I am unable to prove a crime occurred. I am submitting this case to the District Attorney's Office for review."[59]

3. LCpl A.A.'s three-month unauthorized absence from the Marine Corps and PFC Garcia's general court-martial.

On 2 September 2012, the Riverside County District Attorney declined to prosecute the case.[60] The following day, NCIS agents received the PSPD photographs of LCpl A.A. NCIS agents then re-interviewed LCpl A.A. and LCpl Barker, and received typed statements from LCpls Avitia and Morrison.[61] When NCIS agents interviewed PFC Garcia, he invoked his Article 31(b), UCMJ, rights, though the Government obtained a DNA sample from him.[62]

A few weeks later, LCpl A.A., after making an un-related allegation that she was assaulted onboard MCAGCC Twentynine

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[57] Pros. Ex. 3, at 5.
[58] Pros. Ex. 3, at 5.
[59] IE 7, PSPD Report, Supplemental Report, at 10.
[60] Appellate Ex. VI.
[61] IE 12, Interview of PFC A.J.A. on 20 Sep 12; IE 13, Sworn Statement of PFC Jill E. Barker; IE 14, Sworn Statement of LCpl Joseph P. Morrison; IE 15, Sworn Statement of LCpl Aaron J. Avitia.
[62] IE 16, Contact with PFC Garcia on 5 Oct 12.

Palms while jogging, received a requested transfer from Twentynine Palms to Camp Pendleton.[63] On 26 November 2012, LCpl A.A. returned home, without authorization, to Missouri.[64] She stayed with her family through Christmas and refused to return until the Marine Corps agreed she would not have to conduct field training exercises at Twentynine Palms with her new unit from Camp Pendleton.[65] Though the MPO was never lifted, LCpl A.A. believed she might encounter PFC Garcia while there.[66] She returned to Camp Pendleton on 6 February 2013.[67] Charges were preferred on 23 April 2013, and referred to general court-martial on 3 July 2013.[68]

4. The Trial Counsel's closing argument was text-book prosecutorial misconduct.

The Trial Counsel, Major Brett Minor, U.S. Marine Corps, gave the closing argument for the Government.[69] In it he said the following to the members, all of whom were junior to him in rank[70]:

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[63] Appellate Ex. VI; R. at 294.
[64] R. at 295.
[65] R. at 296.
[66] R. at 294.
[67] R. at 295-96.
[68] Charge Sheet.
[69] R. at 499-516, 535-44.
[70] General Court-Martial Convening Order, GCMCO 1-12a, Nov. 7, 2013.

- In referring to any suggestion that LCpl A.A. suddenly decided to frame PFC Garcia and record their conversation so soon after consensual sex:

> You know what, I'm going to frame the accused for sexual assault. I got some motive and I'm going to frame him. That's asinine. Twenty-year-old females partying on their first time down in Palm Springs are not going to start that recording because they got it in their mind that they want to get PFC Garcia.[71]

- In assuring the members that PFC Garcia was upset about not having fulfilling sexual contact with LCpl A.A., he told them, "The accused said, oh, F-me, right. Think about that. Now he's a little bit blue-balled. He's not getting any. That is exactly something that a young Marine would say partying."[72]

- He informed the members, without any evidence, that when any person has some amount of alcohol, "people sleep at a deeper level."[73]

- He mischaracterized PFC Garcia's statements to Det. Campbell and included as PFC Garcia's "Admitted statements"[74] that he "fingers her vagina while she's fast asleep. And finally, he goes for the gusto and penetrates her, which wakes her up."[75]

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[71] R. at 500.
[72] R. at 501.
[73] R. at 505.
[74] *Id*.
[75] *Id*.

- He informed the members that "people don't just get up and run out of the bed when they're having consensual sex"[76] and that the idea that LCpl A.A. did all this to frame PFC Garcia is "asinine"[77] and "just doesn't come close to making sense."[78] He added that this "motive to frame"[79] PFC Garcia "doesn't make sense."[80]
- In explaining to the members that this was not about LCpl A.A's regrets, he told the members, "It's not about regret. Regrets are like if you're at a frat house and you wake up with a girl that you had some drinks of alcohol the night before and you're like, woo. That's a regret. That's not this case."[81]
- He told the members that LCpl A.A. was truthful, "If you think that she's fabricating, now you have to believe that LCpl A.A. is willing to engage with law enforcement and start framing the accused. It's not logical."[82] He then states her participation in the investigation and her actions after the alleged incident, such as having anxiety, is "consistent with being sexually assaulted."[83]

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[76] R. at 506.
[77] R. at 506.
[78] *Id*.
[79] R. at 506-07.
[80] *Id*.
[81] R. at 507.
[82] *Id*.
[83] *Id*.

- When LCpl A.A. absented herself, without authorization for three months, this showed she was credible, because she told her parents about the sexual assault and she would not do that if she "is framing PFC Garcia."[84]
- He told the members that PFC Garcia gave an "apology immediately following"[85] when he did not.
- He repeatedly told the members that PFC Garcia admitted LCpl A.A. was "asleep" when all of the events happened,[86] when he did not. He told the members that LCpl A.A. was asleep when he "pokes at her vagina with his penis" and was "biting and kissing her on the neck."[87]
- He told the members that "the only evidence you've heard is that she was sleeping, and she gets up and goes outside after. There's just nothing to support a reasonable mistake of fact."[88]
- He mischaracterized PFC Garcia's statement to Det. Campbell, claiming that PFC Garcia said he "didn't even touch [LCpl A.A.]."[89]
- He told the members that LCpl A.A. was credible.

> Lance Corporal A.J.A., credible witness. She had the balls to get up on the stand and tell you what happened. That's relevant for so many things. Under

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[84] R. at 508.
[85] R. at 508.
[86] *Id*.
[87] R. at 509.
[88] R. at 512.
[89] *Id*.

> the theory that this is not an actual sexual assault, you have to think that this young lady is coming in here, willing to testify under oath and frame the accused. That's asinine. Her testimony was actually very credible. There wasn't a lot of questions from you guys. She did well under cross-examination.[90]

- He told the members that a Government witness, LCpl Morrison was, "totally cap forward," was a "good Marine," "a United States Marine, one of our brothers"[91] and that, aside from LCpl A.A., was "the only other non-biased witness."[92] LCpl Barker, was "pregnant with the baby of the accused" and "slime[d] in here and regurgitates (sic) all of the witnesses."[93]
- He again mischaracterized PFC Garcia's statement to Det. Campbell about how LCpl A.A. "woke up."[94] "He says she said no. But I kept trying to poke at it. And then she woke up and went outside. Those are his words."[95]
- He told the members that "You will know in your heart and your mind that he is guilty of the offenses."[96]

The trial defense counsel, a Captain, did not object to any of these statements. In his rebuttal argument, the Trial Counsel continued:

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[90] R. at 513.
[91] R. at 513.
[92] *Id*.
[93] R. at 513-14.
[94] R. at 516.
[95] *Id*.
[96] *Id*.

- He told the members they should not be bothered that PFC Garcia did not make a full confession to Det. Campbell.

> And it's interesting, like I said, talking about the statements and talking to law enforcement, you are never going to get a full confession out of an accused where he says, Oh, yeah, I did it, da, da, da, da, da. You're never going to get that. Or a full – you're never going to get some partial truth, some incriminating statements, but stuff like this is unambiguous and it's an incriminating admission of guilt.[97]

- The Trial Defense Counsel finally objected to one of the Trial Counsel's Microsoft Power Point slides concerning LCpl A.A's credibility, which said "Lance Corporal A.J.A. deserves equal protection under the law."[98] The Government never showed this slide to the defense before using it.[99] The Trial Defense Counsel argued that it implied LCpl A.A. could only be found not credible if she was not credible beyond a reasonable doubt.[100] The military judge sustained the objection and directed the members to disregard it.[101]

- The Trial Counsel, at the very end of his rebuttal argument, asked the members to hold PFC Garcia accountable. He said, "And when you think about our junior female Marines in the

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[97] R. at 536.
[98] R. at 542; Appellate Ex. XXIII.
[99] R. at 541.
[100] *Id*.
[101] R. at 543.

Marine Corps, a situation like this, this is exactly (inaudible)."[102]

The members took a brief recess and listened to the military judge's procedural instructions.[103] Three hours later they returned with guilty findings.[104]

Summary of the Argument

I

The Trial Counsel's closing argument is unconscionable and speaks for itself -– it is blatant prosecutorial misconduct. He vouched for the Government witnesses' credibility, especially the complaining witness, LCpl A.A. He told the members repeatedly that the idea that LCpl A.A. would "frame" PFC Garcia is "asinine", even though this was never a defense theory. He mischaracterized the statements PFC Garcia gave to the civilian detective and inserted his own facts that were not in evidence. Finally, the Trial Counsel implored the members to consider all "our junior female Marines in the Marine Corps" when deliberating. As such, this Court should set aside the findings for both specifications of Charge I and for Additional Charge I, and reassess PFC Garcia's sentence.

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[102] R. at 544.
[103] R. at 552. Deliberations began at 1558, 21 November 2013.
[104] R. at 552. The court-martial was called to order for findings at 1720, 21 November 2013.

II

PFC Garcia’s mistake-of-fact defense was reasonable under the circumstances and the Government was unable to present any evidence to the contrary. PFC Garcia had a consensual sexual encounter with LCpl A.A. a few hours prior to the incident in question. This was directly witnessed by two other Marines, though LCpl A.A. denied it. That evening, when PFC Garcia initiated sexual contact with LCpl A.A., he was attempting to see if she desired further sexual contact. When she denied his advances –- he ceased. This Court should set aside the findings for both specifications of Charge I and for Additional Charge I, and reassess PFC Garcia’s sentence.

Argument

I

PROSECUTORS MAY NOT IMPROPERLY VOUCH FOR A COMPLAINING WITNESS' CREDIBILITY, ASSERT FACTS NOT IN EVIDENCE, OR MISCHARACTERIZE EVIDENCE. HERE, THE TRIAL COUNSEL, WHO WAS SENIOR IN RANK TO ALL OF THE MEMBERS AND THE DEFENSE COUNSEL, OFFENDED ALL OF THESE PRINCIPLES AND EVEN ASKED THE MEMBERS TO CONSIDER ALL OF "OUR OTHER JUNIOR FEMALE MARINES IN THE MARINE CORPS." THESE "FOUL BLOWS" PERMEATED THE ENTIRE CLOSING ARGUMENT AND MATERIALLY PREJUDICED PRIVATE FIRST CLASS GARCIA'S RIGHT TO A FAIR TRIAL.

Standard of Review and Principles of Law

Improper argument by a trial counsel is a question of law reviewed *de novo*.[105] When improper argument is raised for the first time on appeal, it is reviewed for plain error.[106] An Appellant must prove: "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right."[107]

Prosecutorial misconduct occurs when a "prosecuting attorney oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense."[108] A trial counsel commits

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[105] *United States v. Pope*, 69 M.J. 328, 334 (C.A.A.F. 2011).
[106] Article 59, UCMJ; Mil. R. Evid. 103.
[107] *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2007) (citation and quotation marks omitted).
[108] *United States v. Fletcher*, 62 M.J. 175, 178 (C.A.A.F. 2005) (citing *Berger v. United States*, 295 U.S. 78, 84 (1935)) (internal quotations omitted).

prosecutorial misconduct if he interjects his personal beliefs and opinions, by making disparaging comments about the accused, and by introducing facts not in evidence.[109]

A trial counsel interjects his personal beliefs or opinions during closing argument through improper vouching.[110] "When a trial counsel offers her personal opinions, they become a form of unsworn, unchecked testimony and tend to exploit the influence of [the] office and undermine the objective detachment which should separate a lawyer from the cause for which she argues."[111]

A court-martial may only make findings based on facts in evidence.[112] When a trial counsel introduces facts not in evidence, it creates prosecutorial misconduct because his arguments are not evidence and he fatally undermines the court-martial by arguing such facts.[113]

Once misconduct is found, this Court must assess its prejudicial impact. In *Fletcher* the U.S. Court of Appeals for the Armed Forces (CAAF) identified three relevant factors for

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[109] *Fletcher*, 62 M.J. at 179 (internal quotations omitted).
[110] *Id*. (citing *United States v. Horn*, 9 M.J. 429, 430 (C.M.A. 1980)) (citations omitted).
[111] *Id*. (quoting *Horn*, 9 M.J. at 430).
[112] *Id*. at 183 (citing *United States v. Bouie*, 26 C.M.R. 8, 13 (C.M.A. 1958)).
[113] *Fletcher*, 62 M.J. at 179 (citing *United States v. Clifton*, 15 M.J. 26, 19 (C.M.A. 1983)).

prejudice: the severity of the misconduct, the curative measures employed, and the strength of the Government's case.[114]

The severity of the misconduct is analyzed based on the number of instances of misconduct compared to the length of the argument, the scope of the misconduct throughout the presentation of the case, the length of the trial, the length of the panel's deliberations, and whether the trial counsel followed the military judge's instructions.[115]

Discussion

"It is improper for a trial counsel to interject herself into the proceedings by expressing a personal belief or opinion as to the truth or falsity of any testimony or evidence."[116] Here, the Trial Counsel repeatedly offered substantive commentary, in the form of his personal opinions, on (1) the idea that LCpl A.A. would "frame" PFC Garcia, (which was never actually a defense theory), (2) that this case was not about LCpl A.A.'s regret, (3) the relative credibility of witnesses, especially LCpl A.A., (4) how deeply people sleep after drinking, (5) whether people ever interrupt consensual sex, (6) whether law enforcement ever obtains full confessions, and (7) what behavior is consistent with sexual assault.

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[114] *Fletcher*, 62 M.J. at 184.
[115] *Id*. (citations omitted).
[116] *Id*. at 179 (citing *Horn*, 9 M.J. at 430).

The Trial Counsel also consistently mischaracterized PFC Garcia's statements to Det. Campbell. He told the members that (1) PFC Garcia gave an apology for raping LCpl A.A., and (2) that PFC Garcia admitted that LCpl A.A. was "asleep" when all of the sexual contact occurred. The Trial Counsel also told the members (3) that PFC Garcia claimed he never even touched LCpl A.A., when he clearly told Det. Campbell about his attempt to engage LCpl A.A. in sexual contact and that (4) when PFC Garcia used the term "woke up" that it could not have meant that LCpl A.A. had simply gotten up from the bed and that she was "asleep" prior to that.

The Trial Counsel consistently and deliberately bolstered LCpl A.A.'s credibility before the members. He was blunt: "Lance Corporal A.J.A., credible witness."[117] He opined that she was credible because "she had the balls to get up on the stand and tell you what happened," –- as if this was not a Constitutional requirement that PFC Garcia be able to face his accuser.[118] This also comes perilously close to violating PFC Garcia's Fifth Amendment right to not act as a witness against himself. Trial Counsel invited comparison between LCpl A.A., who "had the balls" to testify, and PFC Garcia, who apparently, did not.

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[117] R. at 513.
[118] U.S. Const. amend. VI.

The Trial Counsel repeatedly referred to the defense theory –- or his “straw man” of the defense theory -- as “asinine” or “not coming close to making sense,” or “not logical.” He implored the members to look, not to the evidence, but in their “heart[s]” and “mind[s]” to know that PFC Garcia was guilty. Also, in light of his commentary, the Trial Counsel’s slide that erroneously instructed the members that LCpl A.A.’s testimony could only be impeached if the defense undercut her credibility “beyond a reasonable doubt.” This was contrary to the military judge’s instructions and utterly unsupported by any known authority.

For the Trial Counsel to suggest to the members that LCpl A.A. had a right to “equal protection under the law” and to have the same burden protecting her testimony as PFC Garcia’s presumption of innocence, is a tactic that “is not to be condoned” and one that “tilts the scales of justice, risk[s] prejudicing the defendant, and carr[ies] the potential for distracting the jury from its assigned task of assessing the credibility based solely on the evidence presented at trial and the demeanor of the witnesses.”[119]

The Trial Counsel’s final comment is egregious in the extreme. He infused the Marine Corps’ Sexual Assault Prevention

[119] *Fletcher*, 62 M.J. at 179 (citing *United States v. Perez-Ruiz*, 353 F.3d 1, 9-10 (1st Cir. 2003)).

and Response (SAPR) policy into the members' deliberative process.[120] It is impossible that the Trial Counsel was not fully aware of the perceived "sexual assault" problem in the Marine Corps. Voir dire also showed the members were aware of it.[121] Knowing this, and having just had the Trial Defense Counsel finally object to his commentary, the Trial Counsel said, "And when you think about ***our junior female Marines in the Marine Corps***, a situation like this, this is exactly (inaudible)." This is an unmistakable appeal to the members to remember their Sexual Assault Prevention and Response training, the Commandant's Heritage Brief, what Congress might think of a case like this, and how this impacts the "big picture" for the Marine Corps. It had nothing to do with the facts of this case, which from the Trial Counsel's perspective is understandable – because the facts demanded an acquittal of all the sexual assault charges.

Conclusion

The Trial Counsel's prosecutorial misconduct speaks for itself. There are numerous examples of improper vouching for the Government witnesses, disparaging the accused and defense

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[120] *United States v. Kropf*, 39 M.J. 107, 109 (C.M.A. 1994) (citing *United States v. Toro*, 37 M.J. 313, 316 (C.M.A. 1993); (*United States v. Fisher*, 21 M.J. 327 (C.M.A. 1986)).

[121] The military judge ordered expanded voir dire as a remedy to the existence of apparent unlawful command influence emanating from the Heritage Brief from the Commandant of the Marine Corps that was meant to address sexual assault, Appellate Ex. IX.

witnesses, personal opinion of the credibility of the LCpl A.A, mischaracterization of the defense theory, and mischaracterization of PFC Garcia's statements to Det. Campbell. In short, it is an example of an overzealous prosecutor who is unfamiliar with the basics of appropriate conduct. Given the weakness of the Government's case, the relative rank differences between the Trial Counsel, the Trial Defense Counsel, and the members, it is impossible to conclude there was no prejudice to PFC Garcia. Therefore, this Court should set aside the court-martial's findings as to Charge I and Additional Charge I, because these clear errors improperly bolstered a factually weak case, and approve a sentence that does not include a punitive discharge.

II.

TO AFFIRM A CONVICTION FOR SEXUAL ASSAULT, THIS COURT MUST BE CONVINCED THAT PRIVATE FIRST CLASS GARCIA'S MISTAKE-OF-FACT WAS NOT REASONABLE UNDER THE CIRCUMSTANCES. THE EVIDENCE INDICATES PRIVATE FIRST CLASS GARCIA MADE AN OFFER FOR FURTHER SEXUAL CONTACT WITH LANCE CORPORAL A.A., BUT CEASED WHEN SHE MANIFESTED HER LACK-OF-CONSENT. BECAUSE THERE IS NOTHING UNREASONABLE ABOUT THIS BEHAVIOR, THIS COURT CANNOT AFFIRM PRIVATE FIRST CLASS GARCIA'S SEXUAL ASSAULT CONVICTIONS.

Standard of Review and Principle of Law

This Court has an independent obligation to review each case *de novo* for factual and legal sufficiency, and may

substitute its own judgment for that of the trial court.[122] The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt."[123] The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [this Court is] convinced of the accused's guilt beyond a reasonable doubt."[124] In exercising this duty, this Court may judge the credibility of witnesses, determine controverted questions of fact, and substitute its judgment for that of the military judge.[125]

Discussion

The Government failed to prove, beyond a reasonable doubt, that PFC Garcia's mistake of fact consent was not reasonable. He engaged LCpl A.A. for continued sexual activity, after she asked earlier in the same day to continue their intercourse at another time. The evidence clearly showed he was attempting to entice her into sexual activity and had a reasonable belief that she would want to continue.

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[122] Art. 66, UCMJ; *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987).
[123] *Turner*, 25 M.J. at 324 (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).
[124] *Turner*, 25 M.J. at 325.
[125] Art. 66(c), UCMJ; *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990).

LCpl A.A. is simply not credible. Over that weekend, she told LCpl Avitia, and possibly others, that she was upset about her fiancée recently dying.[126] It appears not only did he not die, but that he was a deployed U.S. Army National Guard soldier whom she later told about the alleged incident through a text message.[127]

She claimed that PFC Garcia admitted to her that he "felt like he was raping her"[128] but her surreptitiously-recorded conversation with him did not indicate that at all.[129] It indicated that PFC Garcia wanted to initiate sexual contact with her, but she rebuffed him –- possibly because she felt guilty for cheating on her fiancée. Perhaps she also realized she just had sex with what she described as a "dirty Mexican."[130]

The Government was required to prove beyond a reasonable doubt that PFC Garcia's mistake-of-fact was not reasonable under the circumstances.[131] For PFC Garcia to be guilty of any kind of sexual assault, or even an attempted sexual assault, he would have had to be ignorant or mistaken about LCpl A.A.'s desire for further sexual activity, and that ignorance or mistake would have to be reasonable. To be reasonable, PFC Garcia would have

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[126] R. at 409. LCpl A.A. denied saying this. R. at 287-88.
[127] R. at 578.
[128] R. at 277.
[129] R. at 277.
[130] R. at 232.
[131] Appellate Ex. XXXII, Defense of Mistake of Fact as to Consent.

to be acting on information that would indicate to a reasonable person that LCpl A.A. consented. LCpl A.A. had sexual intercourse with PFC Garcia on the floor of the hotel room with other people in immediate proximity. Then she took him into the bathroom to continue. She stopped the intercourse and asked if they could continue later. It is reasonable for PFC Garcia to take LCpl A.A. at her word and continue the sexual activity later that night.

PFC Garcia could also be guilty if his ignorance or mistake was based on his absence of due care, or what a reasonably careful person would do, under the circumstances. Here, a reasonably careful person would do exactly as PFC Garcia did in attempting to entice LCpl A.A. into another sexual encounter. LCpl Morrison testified that the couple looked as if they were about to "get it on." He didn't testify that it looked like PFC Garcia was about to rape a sleeping woman. He also testified that he would have intervened had something objectionable been occurring.[132]

> Mistake of fact is a special defense. It is a defense when it negatives the existence of a mental state essential to the crime charged. In other words, an accused may not be convicted when it is shown that he does not have the mental state required by law for commission of that particular offense.[133]

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[132] R. at 334.

[133] *United States v. Goodman*, 70 M.J. 396, 399 (C.A.A.F. 2011) (citing *United States v. Wilson*, 66 M.J. 39, 40 (C.A.A.F. 2008);

All of the evidence, except for LCpl A.A.'s completely uncorroborated and flatly-contradicted testimony, indicates PFC Garcia tried to initiate sex with a young girl whom he reasonably believed would consent. When, to his surprise and frustration, she declined, the attempt stopped. That's not illegal – that's how young people have sex.

Conclusion

The Government failed to provide evidence demonstrating beyond a reasonable doubt that PFC Garcia was doing, or did, anything other than seek to continue the consensual sexual encounter with LCpl A.A. When he was rebuffed, he ceased. Because this is not illegal, the convictions for Charge I, Specification 2, the lesser included offense for Charge I, Specification 1, and the sole specification under Additional Charge I must be set aside and the charges dismissed with prejudice. This Court must then reassess the sentence under the additional Charge II to include a sentence that does not include a punitive discharge.

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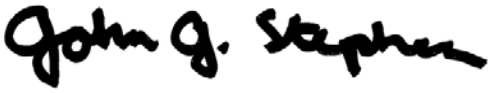
1 Wayne R. LaFave, *Substantive Criminal Law* § 5.6(a), at 395 (2d ed. 2003)) (internal quotations omitted).

Summary Assignment of Error I

WHEN CIVILIAN LAW-ENFORCEMENT WORKS IN CONJUNCTION WITH MILITARY AUTHORITY, SUSPECTS ARE ENTITLED TO RIGHTS WARNINGS UNDER ARTICLE 31(B), UCMJ. THE PALM SPRINGS DETECTIVE WAS AWARE MILITARY INVESTIGATORS OPENED AN INVESTIGATION ON PRIVATE FIRST CLASS GARCIA AND IT WAS FORESEEABLE HE WOULD BE SUBJECT TO PUNISHMENT UNDER THE UCMJ. HE WAS ENTITLED TO RIGHTS WARNINGS. BECAUSE HE DID NOT RECEIVE THEM, HIS STATEMENTS MUST BE SUPPRESSED.[134]

Summary Assignment of Error II

OUT-OF-COURT STATEMENTS OFFERED FOR THE TRUTH OF THE MATTER ASSERTED ARE HEARSAY AND INADMISSIBLE WITHOUT SOME EXCEPTION. A GOVERNMENT WITNESS, LANCE CORPORAL MORRISON, TESTIFIED THAT THE FOLLOWING MORNING, THE ALLEGED VICTIM TOLD HIM THAT PRIVATE FIRST CLASS GARCIA PENETRATED HER WITH HIS PENIS WHILE SHE WAS ASLEEP (R. AT 319-20). THERE IS NO EXCEPTION FOR THIS HEARSAY. THIS IS PLAIN ERROR AND IS PREJUDICIAL BECAUSE IT GOES DIRECTLY TO THE GRAVAMEN OF THE OFFENSES CHARGED.[135]



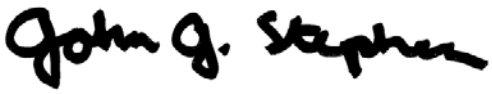
JOHN J. STEPHENS
Major, U.S. Marine Corps
Appellate Defense Counsel
1254 Charles Morris St, SE
Bldg 58, Suite 100
Washington Navy Yard, D.C. 20374

[134] Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[135] Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Tel: (202) 685-8587
Fax: (202) 685-7426
john.j.stephens@navy.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and required copies of the foregoing were delivered to the Court on 11 August 2014. I further certify a copy of the foregoing was delivered to Director, Appellate Government Division, and electronically filed in CMTIS and CMS pursuant to Rule 5.2(b)(1) of this Court's Rules for Practice and Procedure, on 11 August 2014.



JOHN J. STEPHENS
Major, U.S. Marine Corps
Appellate Defense Counsel
1254 Charles Morris St, SE
Bldg 58, Suite 100
Washington Navy Yard, D.C. 20374
Tel: (202) 685-8587
Fax: (202) 685-7426
john.j.stephens@navy.mil

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

L.C. **Midshipman** **U.S. Navy,** **Petitioner**	)	**PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF MANDAMUS**
v.	)	**Case No. _____**
Daniel J. Daugherty **Colonel** **USMC** **(in his official capacity as Military Judge),** **Respondent**	)	
Eric Graham **Midshipman** **U.S. Navy,** **Real Party in Interest**	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

COMES NOW Petitioner, Midshipman ("MIDN") L.C., pursuant to Rule 20 of the Joint Courts of Criminal Appeals Rules of Practice and Procedure and Rule 20.1 of this Honorable Courts Rules of Practice and Procedure, and respectfully requests the Court to issue an emergency stay of the Military Judge's order requiring production *in camera* of MIDN L.C.'s psychotherapy records and further grant this petition for extraordinary relief in the nature of a *Writ of Mandamus* relating to the Military Judge's erroneous order.

Specific Relief Sought

MIDN L.C. respectfully requests:

(1) An emergency stay of Respondent Military Judge's order requiring production of MIDN L.C.'s psychotherapy records pending this Court's final ruling;

(2) A *Writ of Mandamus* directing Respondent Military Judge to reverse his order for the production and *in camera* review of MIDN L.C.'s privileged counseling records.

Issue Presented

WHETHER A MILITARY JUDGE CAN ORDER DISCLOSURE OF PRIVILEGED COUNSELING RECORDS FOR *IN CAMERA* REVIEW IN VIOLATION OF RULE 513 BASED UPON THE APPLICATION OF A PER SE RULE AND WITHOUT EXERCISING DISCRETION.

Jurisdictional Statement

As a court established by Congress, this Court has jurisdiction to issue writs under the All Writs Act, 28 U.S.C. Section 1651(a). *United States v. Denedo*, 556 U.S. 904, 911 (2009) ("[M]ilitary courts ... are empowered to issue extraordinary writs under the All Writs Act."); *United States v. Booker*, 72 M.J. 787, 797 (N-M. Ct. Crim. App. 2013) (concluding the court had jurisdiction to issue writs "in aid of [its] jurisdiction"). Issuing a writ under the All Writs Act requires a determination that the writ is "in aid of" the court's existing jurisdiction, and whether the requested writ is

"necessary or appropriate."[1] *Denedo v. United States*, 66 M.J. 114, 119 (C.A.A.F. 2008).

A writ is "in aid of" a court's jurisdiction where a petitioner seeks "to modify an action that was taken within the subject matter jurisdiction of the military justice system." *LRM v. Kastenberg*, 72 M.J. 364, 368 (C.A.A.F. 2013) (quoting *Denedo*, 66 M.J. at 120) (concluding a military judge's ruling on victim's privilege was within the court's subject matter jurisdiction). The "harm alleged must have had the potential to directly affect the findings and sentence." *Id.* (internal quotations and citation omitted). The findings and sentence need not be final. A court has jurisdiction to address an interlocutory matter before a finding or sentence is entered by the court-martial. *See, e.g.*, *Booker*, 72 M.J. at 808.

Review of this petition for extraordinary relief is in aid of this Court's subject matter jurisdiction. The Military Judge's order for production of MIDN L.C.'s privileged victim's counseling records have "a direct bearing on the information that will be considered" for admissibility as evidence, and thereafter considered by the court-martial in determining the defendant's guilt or innocence. *Kastenburg*, 72 M.J. at 368. MIDN L.C.'s ability to rightfully assert her Rule 513 privilege

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[1] Whether the request writ is necessary or appropriate is addressed below in the section "Reasons for Granting the Writ."

directly affects whether her counseling records become evidence, the "very foundation of a finding and sentence." *Id.* Additionally, this Court could acquire appellate jurisdiction over this case pursuant to review under Article 66(b) or Article 69(d). *Booker*, 72 M.J. at 797. Therefore, this Court has jurisdiction to review MIDN L.C.'s petition for a *Writ of Mandamus*.

History of the Case

On 18 June 2013, the Convening Authority preferred charges against MIDN Eric Graham, MIDN Joshua Tate, and MIDN Travis Bush. An Article 32 hearing was held on 17 August - 3 September 2013. On October 10, 2013, the Convening Authority referred charges against both MIDN Eric Graham and MIDN Joshua Tate.

MIDN Eric Graham is charged with violating one specification of Article 120 and two specifications of Article 107 of the Uniform Code of Military Justice (UCMJ). He is charged with unlawful sexual contact, to wit: on or about 14 April 2012, intentionally causing MIDN L.C. to touch his penis while she was substantially incapacitated. He is also charged with making a false official statement to the Naval Criminal Investigative Service (NCIS) claiming that his girlfriend attended an off-campus party with him and then drove him home, which was known by MIDN Graham to be false. And he is charged with making a false official statement to NCIS in claiming he

did not see MIDN L.C. at the same party, which was then known by him to be false.

On November 29, 2013, MIDN Graham filed a motion for *in camera* review of counseling records pursuant to M.R.E. 513 ("Def's Motion" Exhibit A). On December 6, 2013, both Independent Counsel for MIDN L.C. and the Government filed responses in opposition (Exhibits B and C). On December 11, 2013, the Military Judge conducted an Article 39(a) session. Two days later, on December 13, 2013, the Military Judge granted MIDN Graham's motion for an *in camera* review of MIDN L.C.'s counseling records. *See* Court Order for *in Camera* Review of Counseling Records ("Order"),(13 December 2013)(Exhibit D).

Statement of Facts

The Naval Academy football team previously maintained a "football house" at 1843 Witmer Court, Annapolis, MD, which was used for the purposes of partying outside the confines of Naval Academy grounds. On or about April 14, 2012, MIDN L.C. attended a party at the house along with some friends. MIDN L.C. has only very limited recall of being sexually assaulted or raped but on or about April 15, 2012 learned that she may have been as a result of certain football players bragging on social media.

On or immediately after April 15, 2012, the NCIS was informed of the crimes by another Midshipman, and began a criminal investigation. Initially, MIDN L.C. did not want to

learn about the extent of what had been done to her body or by whom but ultimately agreed to cooperate with NCIS investigators, including assisting NCIS in conducting successful wiretaps on various suspects.

At various times following her sexual assault, MIDN L.C. sought professional mental health services. In mid to late 2012, MIDN L.C. started to seek counseling at the Fleet and Family Service Center in the Naval Support Activity, Annapolis, MD. In approximately early 2013, MIDN L.C. switched to a counselor at the Young Women's Christian Association (YWCA) of Annapolis and Anne Arundel County. Since that time, MIDN L.C. has received some counseling (on and off) from the YWCA. Following the Military Judge's Order, MIDN L.C., however, has stopped attending counseling.

On 18 June 2013, charges were preferred in this case. An Article 32 hearing was held on 17 August - 3 September 2013. During the Article 32, MIDN L.C. testified for over twenty (20) hours fielding largely irrelevant and baseless questions about her private sexual history. The Convening Authority eventually forwarded charges against MIDN Eric Graham and MIDN Joshua Tate. Specifically, MIDN Eric Graham is charged with violating one specification of Article 120 (abusive sexual contact) and two specifications of Article 107 of the UCMJ.

On November 29, 2013, MIDN Graham filed a motion for *in camera* review of counseling records pursuant to M.R.E. 513. On December 13, 2013, the Military Judge granted MIDN Graham's motion for an *in camera* review of MIDN L.C.'s counseling records.

Reasons for Granting the Writ

AN EXTRAORDINARY WRIT IS NECESSARY AND APPROPRIATE BECAUSE THE RESPONDENT'S ORDER IS ARBITRARY, UNREASONABLE, AND CLEARLY ERRONEOUS.

I. Standard of Review for Extraordinary Writs

A petitioner bears the burden of showing a clear and indisputable right to extraordinary relief. *Ponder v. Stone*, 54 M.J. 613, 616 (N-M. Ct. Crim. App. 2000). In order to prevail on a *Writ of Mandamus*, a petition must satisfy three conditions: "(1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances." *Hasan v. Gross*, 71 M.J. 416, 418 (C.A.A.F. 2012) (citing *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004)).

II. MIDN L.C. Lacks Any Other Adequate Means to Appeal Rulings Affecting Her Rights as a Victim

MIDN L.C. has two means by which to appeal Respondent's ruling: direct appeal and extraordinary relief. A direct appeal is a remedy that "is implicit as a necessary corollary of the

rule's explicit protection of [patient] privacy." *Doe v. U.S.*, 666 F.2d.43, 46 (1981) (holding Rule 412 implicitly permits a direct appeal by victims). The "injustice" to victims caused by denying a right to appeal "is manifest" and frustrates Congress's intent to provide protection for victims. *Id.* Delaying appeal of evidentiary rulings "following the defendant's acquittal or conviction is no remedy, for the harm that [Rule 513] seeks to prevent already will have occurred." *Id.*

Petitioner recognizes, however, that within the military judicial system direct appeals are limited. And a victim's ability to directly appeal M.R.E. 412 and 513 rulings is further stunted by erroneous dicta in *Kastenburg*. *See* 72 M.J. at 371 ("M.R.E. 412 and 513 do not create ... any right to appeal an adverse evidentiary ruling."). Consequently, to the extent this Court holds that MIDN L.C. may not directly appeal the Military Judge's erroneous M.R.E. 513 determination, MIDN L.C.'s sole *adequate* means to appeal is to petition this Court for extraordinary relief under the All Writs Act.

III. MIDN L.C. has a Clear and Indisputable Right to a Writ of Mandamus Because of the Lower Court's Per Se Unreasonable and Erroneous Ruling

"[T]he question of the propriety of [an *in camera*] review turns on whether the policies underlying the privilege and its

exceptions are better fostered by permitting such review or by prohibiting it." *United States v. Zolin*, 491 U.S. 554, 569 (1989). The examination of information, "even by the judge alone," destroys the privilege and "force[s] the disclosure of the thing the privilege was meant to protect." *Id.* at 570 (citing *United States v. Reynolds*, 345 U.S. 1, 73 (1953)). A blanket *per se* rule that always permits or prohibits *in camera* review is impermissible. *Id.* at 569-71. Rather, the moving party must make a threshold showing "of a factual basis" upon which the judge, considering the importance of the privilege and the "facts and circumstances of the particular case," must exercise discretion. *Id.* at 572.

Specifically, the threshold showing for M.R.E. 513 requires: (1) a specific factual basis demonstrating a reasonable likelihood that the requested privileged records would yield evidence admissible under an exception to M.R.E. 513; (2) that the information sought is not merely cumulative of other information available; and (3) that he or she made reasonable efforts to obtain the same or substantially similar information through non-privileged sources. *United States v. Klemick*, 65 M.J. 576, 580 (N-M. Ct. Crim. App. 2006).

The defense failed to make the requisite threshold showing of a factual basis, and the Respondent failed to exercise discretion. Instead, the Military Judge ordered production of

MIDN L.C.'s records based upon what amounts to a *per se* rule: when a victim's credibility is at issue, a court must review *all* privileged counseling records because "[t]he records may contain exculpatory material." Order, at 4. Because credibility of the victim is an issue in virtually all sexual assaults, this ruling has the practical effect of making meaningless M.R.E.'s command that defendant "make a specific factual showing" before breaching the protections. The Military Judge's decision was therefore void of discretion, and thus unreasonable and erroneous. *See Klemick*, 65 M.J. at 581 ("We will reverse a disputed evidentiary decision only when it [is] arbitrary, fanciful, clearly unreasonable or clearly erroneous.") (internal quotations and citation omitted).

A. Specific Factual Basis of Admissibility

Crime victims often need confidential professional mental health services. For this reason, M.R.E. 513 provides strong protection for the privileged relationship between a patient and her therapist. The rule provides that "[a] patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist." M.R.E. 513.

A limited exception permits production of privileged patient-psychotherapist information where constitutionally required. M.R.E. 513(d)(8). Military case law does not provide

specific guidance on when the disclosure is constitutionally required, but case law interpreting other areas of military law is instructive.

For example, in *U.S. v. Banker,* 60 M.J. 216 (C.A.A.F. 2004), the court considered M.R.E. 412, which prohibits admitting evidence of an alleged victim's prior sexual relationships or predisposition. M.R.E. 412 similarly contains a "constitutionally required" exception. *See* M.R.E. 412(b)(1)(C). The court in *Banker* stated that the exception applies where the exclusion of the evidence would violate the accused's Sixth Amendment right of confrontation or Fifth Amendment right to a fair trial. *Id.* at 221.

By analogy, *Banker* suggests that a patient-psychotherapist communication retains its privilege unless doing so would violate either the defendant's right to confront witnesses against him or his due process rights. *See also U.S. v. Gaddis,* 70 M.J. 248, 254 (C.A.A.F. 2011) (affirming that the constitutional rights exception in M.R.E. 412 involves whether the exclusion of evidence would violate the defendant's Sixth Amendment rights).

Broad statements based on potential relevancy -- rather than on constitutional necessity -- are insufficient to meet this burden. As the court in *Banker* stressed, "where evidence is offered pursuant to this exception, it is important for

defense counsel to detail an accused's theory of relevance and constitutional necessity." *Banker* at 221. The Supreme Court has echoed similar statements and emphasized that courts should not allow defendants access to privileged information based on vague theories that the records might contain potentially useful or relevant information. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 51-53 (1987).

1. Sixth Amendment

The Sixth Amendment guarantees the accused in a criminal trial the right to be confronted by the witnesses against him. U.S. Const. Amen. VI. The Supreme Court has held that the accused's right of confrontation includes two types of protections: the right to face the witnesses against him, and the right to conduct cross-examination. *Delaware v. Fensterer*, 474 U.S. 15, 18-19 (1985). The right to cross-examine encompasses the right to impeach. *Olden v. Kentucky*, 488 U.S. 227, 231 (1988) (quoting *Davis v. Alaska*, 415 U.S. at 308, 316 (1988)). This right, however, is not unlimited. The Supreme Court has made clear that the Confrontation Clause does not "require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony" and that the accused is not allowed "cross-examination that is effective in whatever way, and to whatever extent, the defense might

wish." *Ritchie*, 480 U.S. at 53 (*quoting* Fensterer, 474 U.S. at 20).

Where, as here, the defense seeks the production of privileged information, the court must determine whether the probative value of the evidence is outweighed by, among other things, "harassment, prejudice, confusion of the issues, witness safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986); *Gaddis*, 70 M.J. at 255 (where the accused seeks to admit privileged information under the constitutionally required exception, "the probative value of the evidence must be balanced against and outweigh the ordinary countervailing interests" at stake.)[2]

The defense's argument that MIDN L.C.'s counseling records are constitutionally required in order for the accused to impeach MIDN L.C. is based on a general theory of relevance and not rooted in any specific factual basis. The defense asserts that MIDN L.C. has made inconsistent statements that bear on her character for truthfulness and credibility. To this end, the defense argues that MIDN L.C.'s counseling records are necessary in order for the accused to properly cross-examine and impeach

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[2] As discussed below, the Military Judge engaged in no such balancing, but instead made the functional equivalent of a *per se* ruling.

MIDN L.C. This argument is indistinguishable from argument defense would raise in virtually all sexual assault cases -- that the victim is lying or mistaken.

But, the defense did not present any factual basis demonstrating that MIDN L.C.'s counseling records would provide additional evidence to the existing record that is necessary for the accused to impeach MIDN L.C. To the contrary, the defense only argued that this evidence is necessary to preserve the constitutional right of the accused because "statements made to the counselors are likely different than statements made to others." Def's Motion at 6. The same could be said for communications made to one's lawyer, but that is not grounds for destroying the protections of the attorney-client privilege and it should not be grounds here.

Given that MIDN L.C. has already testified on the record at length at the Article 32 hearing, and is available for cross-examination at trial, MIDN L.C.'s therapist records are not necessary to preserve defendant's right of confrontation and will only lead to repetitive or marginally relevant cross-examination at the cost of destroying the victim's right to privacy in her dealings with mental health professional.

2. Fifth Amendment

The defense also fails to provide any specific factual basis showing that exclusion of MIDN L.C.'s counseling records

would violate defendant's Fifth Amendment due process rights. Due process requires that the government "turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment." *Ritchie*, 480 U.S. at 57 (*citing United States v. Agurs*, 427 U.S. 97 (1976); *Brady v. Maryland*, 373 U.S. 83 (1963)). "Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* at 57 (*quoting United States v. Bagley*, 473 U.S. 667, 682 (1985)). Where the evidence sought is privileged, the trial court must balance the interests in protecting the privileged information against the probative value of the evidence sought. *Id.* at 58; *Gaddis*, 70 M.J. at 255.

Most importantly, the defense seeks evidence the prosecution simply does not possess, and is therefore not constitutionally required under *Brady*. The Supreme Court in *Brady* made clear that due process only requires the government to turn over favorable, material evidence to the defense that is *in its possession*. *Brady*, 373 U.S. at 87. The prosecution has not inspected, nor do they have possession of, the counseling records that the defense seeks, some of which are from private organizations having no connection or affiliation with the

military. *Brady* is inapplicable to MIDN L.C.'s counseling records.

Even if the counseling records were in the prosecution's possession, the defense failed to demonstrate the records are material to MIDN Graham's guilt or innocence. The defense made only the general assertion that the records "likely" contain statements MIDN L.C. made about the events of April 14, 2012, that are inconsistent with statements she made on the record and to the press. Further, the defense states that such "likely" statements would only be helpful in impeaching MIDN L.C., not necessary. The lack of necessity is underscored by the fact that the defense's motion discusses at length the material currently available that it believes reveals MIDN L.C.'s inconsistent statements: statements made in the NCIS investigative reports, statements made during the Article 32 hearing, and statements made to various media outlets. There is no reasonable indication that results of the proceeding would be different if MIDN L.C.'s counseling records were disclosed. In other words, the records are not material. They would only yield cumulative evidence, and the defense's efforts amount to nothing more than a "fishing expedition."

B. In the Absence of a Factual Basis, the Respondent Applied a Per Se Rule Instead of Exercising Discretion

The Military Judge did not exercise proper discretion here.[3] Indeed, the practical effect of its ruling eliminates all discretion in the M.R.E. 513 determination. By permitting a breach in the patient-therapist privilege simply because credibility is an issue in the case the Military Judge effectively removed any requirement of a threshold showing of need. The result in virtually every sexual assault case will be the same -- victim's highly personal mental health records will be reviewed by the military judge.[4]

Respondent's finding that the records *may* contain exculpatory information overlooks the fact that the defense must first make a showing of a *factual* basis as required by *Klemick*.[5]

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[3] After the defense makes the requisite threshold showing of a factual basis, which it has not, the military judge must exercise discretion in deciding whether to order an *in camera* review. *Zolin*, 491 U.S. at 572; *Klemick*, 65 M.J. at 580-81.

[4] As stated in the order, the rule provides that "evidence to impeach ... is constitutionally required to be disclosed, and because such medical health information is privileged, the Court must hold an in-camera review." This *per se* rule assumes that *Brady* requires disclosure of all information. As discussed above, this assumption is incorrect -- *Brady* applies only to material information in the prosecution's possession. The rule also assumes that privileged information mandates *in camera* review. Again, this assumption is incorrect. Privileged information mandates the application of *Klemick*, which in turn requires the court to exercise discretion in weighing the defense's need for the information, the accused's constitutional rights, and the victim's congressionally granted privilege. The rule is fundamentally erroneous.

[5] As stated in the order itself: "records may contain exculpatory material"; "[t]he records are subject to production because it is probable that they are relevant and necessary to the defense at trial"; "It is very possible that MIDN L.C.'s counseling records documenting her version of events prior to

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The Military Judge held that "defense has 'made as specific a showing of relevance as possible' making an *in camera* review appropriate." Order at 4. The Order, however, does not articulate what showing the defense made, and a review of the defense's brief reveals that the defense made none. *See* Def's Motion at 6. A proper use of discretion would consider the defense's baseless request, the lack of threat to the accused's constitutional rights, and the victim's steadfast privilege, falling in favor of the victim. The Military Judge, however, exercised no discretion, and instead applied an unreasonable and clearly erroneous *per se* rule.

Respectfully, the Military Judge's analysis is also logically incorrect. The Military Judge believes that the victim's prior statements call her credibility into serious doubt. And thus, the argument appears to be, there is reason to believe there might be more statements bearing on her credibility. The court notes that patients tend to be truthful with their therapist. Order at 5. But these positions, even if true, do not go to the fundamental question of defendant's need. Indeed, the defendant who might truly need to see therapy records is one where the victim has not been subject to 20-plus

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her interactions with national media outlets, may document a more accurate, less exaggerated story." Order at 4-5.

hours of cross examination in advance of trial and where no other means to challenge her credibility exist. The "need" in this latter situation is far greater. But it is still not a specific factual showing of relevance and is therefore not a permissible basis upon which to justify *in camera* review.

IV. MIDN L.C.'s Request is Appropriate Under the Circumstances

A writ under these circumstances is particularly appropriate given MIDN L.C.'s lack of means to appeal, the gravity of the erroneous ruling, and the broad social and policy implications if the ruling is allow to stand.

The confidential nature of the patient-psychotherapist privilege allows for the open and legitimate disclosure of sensitive material in order to facilitate much needed therapy. Without reliable confidentiality, a psychotherapist could no more treat a patient than an attorney could zealously represent their client.

Safeguarding the patient-psychotherapist privilege is of profound importance to both the individual and the public. The privilege is critical in facilitating the "confidential [patient-therapist] relationship necessary for successful treatment," much as the attorney-client privilege is critical for administering justice. *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996). This relationship in turn "serves the public interest

by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem." *Id.* at 11. Failing to recognize and enforce the importance of the patient-psychotherapist privilege will undermine the policies supporting the privilege, and, more immediately, discourage victims from seeking needed treatment. Indeed, MIDN L.C. has already ceased treatment following the Military Judge's ruling for fear of disclosure of her private medical information. The gravity of the precedent set by the Military Judge's ruling mandates the need for this extraordinary writ.

V. MIDN L.C. Will Suffer Irreparable Harm if This Court Does not Grant a Stay of Proceedings

MIDN L.C. will suffer immediate and irreparable injury if this Court does not grant a stay of proceedings. Disclosure and review, even *in camera*, of MIDN L.C.'s privileged counseling records will inflict immediate harm. *See Zolin*, 491 U.S. at 570.

Conclusion

The Military Judge's ruling mandating the production and *in camera* review of MIDN L.C.'s counseling records is based on an arbitrary, unreasonable, and clearly erroneous *per se* rule, and lacks any form of judicial discretion. Consequently, MIDN L.C. respectfully requests this Court grant her request for an

emergency stay of the Military Judge's *in camera* review and petition for a *Writ of Mandamus* overturning Respondents order for production and *in camera* review of MIDN L.C.'s privileged counseling records.

MATTHEW SULLIVAN
(CIVILIAN COUNSEL)
SIGNING FOR:

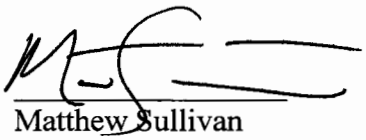
Ryan Guilds /MS

Ryan D. Guilds
Arnold & Porter LLP
Ryan.Guilds@aporter.com
555 Twelfth Street, N.W.
Washington, D.C. 20004
Telephone: (202) 942-6188
Facsimile: (202) 942-5999

Matthew Sullivan
Arnold & Porter LLP
Matthew.Sullivan@aporter.com
555 Twelfth Street, N.W.
Washington, D.C. 20004
Telephone: (202) 942-5616
Facsimile: (202) 942-5999

CERTIFICATE OF SERVICE

I hereby attest that a copy of this brief was served on the Military Judge and counsel of record for the defense and Government by email on 23 December 2013.



Matthew Sullivan
Independent Counsel for the Petitioner

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Andrew R. Hasley Machinist's Mate Third Class (E-4), U.S. Navy, Appellant	SUPPLEMENT TO THE PETITION FOR GRANT OF REVIEW Crim.App. No. 201400026 USCA Dkt. No. _____/NA

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

Statement of Statutory Jurisdiction

Machinist's Mate Third Class (MM3) Andrew R. Hasley, United States Navy, received an approved court-martial sentence that included a punitive discharge. His case fell within the Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012), jurisdiction of the Navy-Marine Corps Court of Criminal Appeals. He now invokes this Court's jurisdiction under Article 67, UCMJ, 10 U.S.C. § 867 (2012).

Statement of the Case

On September 20, 2013, members, with enlisted representation, sitting as a general court-martial, convicted Appellant, contrary to his pleas of one specification of violating Article 120, UCMJ, 10 U.S.C. § 920 (2012), sexual assault on a person incapable of consenting due to alcohol

intoxication.[1] Appellant was sentenced to three years' confinement, a reduction to pay grade E-1, forfeiture of all pay and allowances and to be discharged with a dishonorable discharge.[2] The convening authority approved the findings and sentence, and, but for the discharge, ordered it executed.[3] However, the convening authority, in a response to a recommendation from the members for clemency, deferred and suspended all adjudged forfeitures for three months from the date of the action and deferred and waived all automatic forfeitures for six months for the benefit of Appellant's dependents.[4]

On May 22, 2014, Appellant submitted his case for appellate review to the service court without any specified assignments of error. After reviewing the record of trial pursuant to Article 66, UCMJ, 10 U.S.C. § 66 (2012), on August 14, 2014, the lower court affirmed the findings and sentence as approved by the convening authority. *United States v. Hasley*, No. 20140026, 2014 CCA LEXIS 584 (N-M. Ct. Crim. App. Aug. 14 2014).

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[1] Charge Sheet; Report of Results of Trial, *United States v. Hasley*, No. 20140026, 2014 CCA LEXIS 584 (September 20, 2013).

[2] *Id.*

[3] General Court-Martial Order No. 01-14 dated January 13, 2014.

[4] *Id.*

Following this final order, Appellant filed a timely petition for review contemporaneously with this supplement.

SUBMISSION OF THE CASE WITHOUT SPECIFIC ASSIGNMENTS OF ERROR

The undersigned counsel states that he has been designated by the Judge Advocate General of the U.S. Navy as appellate defense counsel in the above-captioned case pursuant to Appellant's request. Undersigned counsel further states that in his examination of the most recent opinion and record in this case he has identified no errors materially prejudicial to the substantial rights of the accused. While neither the undersigned nor Appellant admits that the findings and sentence are correct in law and fact, this case is submitted on its merits to this Honorable Court without additional assignments of error or brief.

JASON R. WAREHAM
Captain, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE
BLDG. 58, Suite 100
Washington Navy Yard, DC 20374
P:(202) 685-7394
F:(202) 685-7426
jason.wareham@navy.mil
Bar no. 35802

Appendix 1: *United States v. Hasley*, No. 20140026, 2014 CCA LEXIS 584 (N-M. Ct. Crim. App. Aug. 14 2014).

Certificate of Filing and Service

I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on October 13, 2014.

Certificate of Compliance

This supplement complies with the type-volume limitations of Rule 21(b) because it contains less than 9,000 words. Using Microsoft Word version 2010 with 12-point-Court-New font, this supplement contains 1,074 words.

JASON R. WAREHAM
Captain, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE
BLDG 58, Suite 100
Washington Navy Yard, DC 20374
P:(202) 685-7394
F:(202) 685-7426
jason.wareham@navy.mil
Bar no. 35802

Appendix 1

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS WASHINGTON, D.C.

Before
J.R. MCFARLANE, K.M. MCDONALD, T.J. STINSON
Appellate Military Judges

UNITED STATES OF AMERICA

v.

ANDREW R. HASLEY
MACHINIST'S MATE THIRD CLASS (E-4), U.S. NAVY

NMCCA 201400026
GENERAL COURT-MARTIAL

Sentence Adjudged: 20 September 2013.
Military Judge: CAPT Robert Blazewick, JAGC, USN.
Convening Authority: Commander, Navy Region Southeast, Naval Air Station, Jacksonville, FL.
Staff Judge Advocate's Recommendation: CDR N.O. Evans, JAGC, USN.
For Appellant: Capt Jason Wareham, USMC; LT Jared A. Hernandez, JAGC, USN.
For Appellee: Mr. Brian K. Keller, Esq.

14 August 2014

OPINION OF THE COURT

After careful consideration of the record, submitted without assignment of error, we affirm the findings and sentence as approved by the convening authority. Art. 66(c), Uniform Code of Military Justice, 10 U.S.C. § 866(c).

For the Court

R.H. TROIDL
Clerk of Court

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES, Appellee v. Matthew HOFFMANN, Corporal (E-4) United States Marine Corps Appellant	**APPELLANT'S BRIEF AND ASSIGNMENTS OF ERROR** Case No. 201400067 Tried at Camp Lejeune, North Carolina, on 10, 17 October 2012, 31 January, 12 February, 19 June, 19-23 August 2013, by a general court-martial convened by Commanding General, II Marine Expeditionary Force

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

JESSICA L. FICKEY
LT, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris St, SE
Bldg 58, Suite 100
Washington Navy Yard, D.C. 20374
Tel: (202) 685-7297
Fax: (202) 685-7426
jessica.fickey@navy.mil

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Assignments of Error

I.

A SEARCH MUST BE SUPPORTED BY PROBABLE CAUSE. HERE, TO SUPPORT A SEARCH AUTHORIZATION FOR CHILD PORNOGRAPHY, THE SUPPORTING AFFIDAVIT ONLY ASSERTED (1) ALLEGATIONS OF A DIFFERENT CRIME, ATTEMPTED CHILD ENTICEMENT, AND (2) AN NCIS AGENT'S OPINION THERE IS INTUITIVE RELATIONSHIP BETWEEN THE TWO OFFENSES. DID THE MILITARY JUDGE ABUSE HIS DISCRETION BY FAILING TO SUPPRESS THE EVIDENCE FOR LACK OF PROBABLE CAUSE?

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A MILITARY JUDGE MUST APPEAR TO BE IMPARTIAL. HERE, THE MILITARY JUDGE ACKNOWLEDGED THERE WAS A CONCERN WITH HER APPEARANCE OF IMPARTIALLY DURING A MOTIONS HEARING, BUT ONLY RECUSED HERSELF FOR THAT MOTION. DID THE MILITARY JUDGE ABUSE HER DISCRETION BY NOT RECUSING HERSELF FROM THE ENTIRE PROCEEDINGS?

III.

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IV.

A COMMANDING OFFICER CAN ONLY PLACE AN ACCUSED IN PRE-TRIAL CONFINEMENT (PTC) IF HE DETERMINES THE ACCUSED IS A FLIGHT RISK OR WILL COMMIT SERIOUS MISCONDUCT, AND LESSER FORMS OF RESTRAINT ARE INADEQUATE. HERE,

THE COMMAND ONLY ORDERED CPL HOFFMANN INTO PTC ONCE IT BECAME AWARE THE SPEEDY TRIAL CLOCK STARTED AFTER IT PREFERRED CHARGES. DID THE MILITARY JUDGE ABUSE HER DISCRETION WHEN SHE FOUND THE COMMAND'S ACTION PROPER?

Statement of Statutory Jurisdiction

Corporal (Cpl) Matthew Hoffmann's, United States Marine Corps, case is within this Court's Article 66(b)(1), Uniform Code of Military Justice (UCMJ), jurisdiction because he received an approved court-martial sentence that included a dishonorable discharge and confinement for seven years.

Statement of the Case

A panel of members, sitting as a general court-martial, convicted Cpl Hoffmann, contrary to his pleas, of attempted sodomy of a child, indecent liberties with a child, possession of child pornography, and enticement, in violation of Articles 80, 120, and 134, UCMJ, 10 U.S.C. §§ 880, 920, 934 (2008).[1] (Charge Sheet; R. at 665-66.) The members also convicted Cpl Hoffmann of attempted abusive sexual contact with a child, but the military judge dismissed that specification as an unreasonable multiplication of charges. (R. at 665-66, 677.) The members acquitted Cpl Hoffmann of attempted abusive contact with a child, attempted sodomy with a child, two specifications

[1] The members only convicted Cpl Hoffmann of service discrediting conduct in violation of Article 134 and excepted the language relating to prejudice to good order and discipline. (Charge Sheet; R. at 665-66.)

of indecent liberties with a child, and a second specification of enticement, in violation of Articles 80, 120, and 134, UCMJ, 10 U.S.C. §§ 880, 920, 934 (2008). (Charge Sheet; R. at 665-66.) The members sentenced Cpl Hoffmann to reduction in rank to pay-grade E-1, total forfeitures, confinement for seven years, and a dishonorable discharge. (R. at 712.) The convening authority approved the sentence as adjudged and ordered the sentence executed, subject to the limitations in relevant statutes and regulations. (GCMO No. M14-01, at 3.)

Statement of Facts

On 22 September 2011, AL, a thirteen-year old male, was walking home after school on Camp Lejeune. (R. at 396.) AL testified a man in a white sports utility vehicle (SUV) drove by him twice and made a gesture that was a "symbol which refers to oral or a blow-job or whatever."[2] (R. at 396-97, 399.) The third time the man drove by he completed the gesture again and asked AL, "do you want to go for a ride?" (R. at 397.) AL replied "no." (R. at 397.) The man then asked AL if he was sure and said "it'll be fun," before driving away. (R. at 397.) AL only saw the man for a few seconds during each encounter. (R. at 412-13.) Several days later on 28 September 2011, PM, a

[2] AL reenacted this gesture during his testimony, which trial counsel described as, "the witness brought his closed right hand towards the right side of his face in an in and out fashion." (R. at 397.)

ten-year old male, was also walking home after school on Camp Lejeune. PM testified a SUV drove by and the driver made a "nasty gesture" by bringing his closed right hand to his mouth in an in-and-out fashion toward him. (R. at 375.)

Over a month later on 1 November 2011, AL was again walking home from school and saw a SUV he claimed was the same car from the prior incident. (R. at 401.) AL also saw a quick glimpse of the driver and testified he recognized him from before. (R. at 401.) AL took a photo of the car and alerted his parents, who in turn alerted the authorities. (R. at 401-02; Pros. Ex. 7.) Based upon the registration, base authorities discovered the car belonged to Cpl Hoffmann. (R. at 450.)

After Cpl Hoffmann was identified as a suspect, local law enforcement informed Naval Criminal Investigative Service (NCIS) on 15 November 2011 of another similar incident that occurred earlier in the year. (R. at 457.) On 18 April 2011, RW, a thirteen-year old male, was walking home after school in Jacksonville, North Carolina. (R. at 352-54.) A man in a silver SUV drove by him four times. (R. at 354, 356.) During the third approach, RW claimed the man asked if he "wanted a quickie" and RW replied, "no." (R. at 355.) The man asked if he knew "what that is," RW again replied "no," and the man drove off. (R. at 355.) The car returned again and the man asked RW "are you sure?" and RW said "yes." (R. at 356.) The man then

told RW "you'll like it," and RW told the man "no" one last time. (R. at 356.) RW only saw the man for five to ten seconds each time he drove by. (R. at 366-67.)

All three alleged victims took part in photographic line-ups, but only RW accurately identified Cpl Hoffmann. (R. at 130-31, Pros. Ex. 4.)

In addition to these allegations, a subsequent search of Cpl Hoffmann's laptop computer, which the defense challenged as a Fourth Amendment violation, revealed child pornography. (R. at 568-69; Pros. Exs. 13, 15; Appellate Ex. VIII.) The Government also introduced two internet searches run on that computer on 8 February 2011 that included the queries "where is sex with children legal" and "lowest age of consent." (R. at 561.)

The members convicted Cpl Hoffmann of the crimes relating to RW and possession of child pornography. (R. at 665-66.) The members acquitted Cpl Hoffmann of all charges and specifications relating to AL and PM. (R. at 665-66.)

Summary of Argument

First, a search authorization must be supported by probable cause. Here, the supporting affidavit asserted probable cause existed to search Cpl Hoffmann's computer for child pornography based on (1) allegations of the separate crime of child enticement, and (2) the NCIS agent's opinion there is an

intuitive link between the two offenses. Under persuasive federal case law, these assertions alone, without a digital nexus to child pornography, are insufficient. Because probable cause was lacking and the good faith exception does not apply, this Court should suppress the evidence of child pornography and vacate the verdict.

Second, a military judge must appear to be impartial. Here, the military judge lost her appearance of impartiality during the suppression hearing when, before hearing all evidence on the matter, she found the Government met its burden. The military judge acknowledged a concern about the appearance of bias, but recused herself only for the suppression motion. This limited recusal was improper and did not remove the appearance of partiality. The military judge should have recused herself from the entire proceeding.

Third, Cpl Hoffmann's conviction for attempted sodomy is factually and legally insufficient for two reasons. The crime of attempt requires a substantial step, but mere solicitation is not a substantial step. The crime of attempt also requires a specific intent to engage in the underlying offense, but the Government presented no evidence Cpl Hoffmann intended to engage in the specific act of sodomy as it was instructed by the military judge. This Court should set aside and dismiss this conviction.

Lastly, the commanding officer placed Cpl Hoffmann in pre-trial confinement based upon the start of the speedy trial clock, which is improper. This act was an abuse of discretion and Cpl Hoffmann should receive additional confinement credit.

Argument

I.

A SEARCH MUST BE SUPPORTED BY PROBABLE CAUSE. HERE, TO SUPPORT A SEARCH AUTHORIZATION FOR CHILD PORNOGRAPHY, THE SUPPORTING AFFIDAVIT ONLY CONTAINED (1) ALLEGATIONS OF A DIFFERENT CRIME, ATTEMPTED CHILD ENTICEMENT, AND (2) AN NCIS AGENT'S OPINION THERE IS INTUITIVE RELATIONSHIP BETWEEN THE TWO OFFENSES. THE MILITARY JUDGE ABUSED HIS DISCRETION BY FAILING TO SUPPRESS THE EVIDENCE FOR LACK OF PROBABLE CAUSE.

As a result of the initial allegations by AL and PM, Staff Sergeant (SSgt) Rivera, Criminal Investigative Division (CID), brought Cpl Hoffmann in for questioning on 1 November 2011. (R. at 96.) Cpl Hoffmann immediately invoked his right to counsel and SSgt Rivera terminated the interview. (R. at 97.) After invoking his rights, Cpl Hoffmann granted two Permissive Authorizations for Search and Seizure (PASS) – one for his vehicle and one for his barracks room.[3] (R. at 97-98; Pros. Exs. 8, 9.) Both PASS forms listed the suspected offense as "indecent liberty" with no mention of the offenses involving child pornography. (Pros. Exs. 8, 9.)

[3] The search of the vehicle is not at issue.

Cpl Hoffmann was present during the search of his barracks room. (R. at 99.) SSgt Rivera started gathering computer equipment and media storage devices and placing them on the desk. (R. at 99-100, 105-09.) At this point Cpl Hoffmann verbally revoked his consent so SSgt Rivera stopped searching. (R. at 100, 110.) Despite this withdraw of consent, SSgt Rivera still seized the items he had gathered, including a laptop computer. (R. at 111-12.) The following day Cpl Hoffmann delivered a written revocation of consent and demanded the return of his property. (R. at 103; Appellate Ex. VIII, Encl. 5.) CID did not comply and withheld the property for four months before taking further action.

Fifteen days after the seizure, civilian law enforcement alerted NCIS about the incident with RW. (R. at 457.) All three alleged victims then took part in photographic line-ups--PM identified a different individual, AL identified Cpl Hoffmann with "maybe fifty percent" certainty, and RW identified Cpl Hoffmann with ninety-five percent certainty. (R. at 130-31; Pros. Ex. 4.) Importantly, RW's line-up occurred seven months after his incident. Also, civilian law enforcement conducted RW's line-up and the procedures they used did not meet the requirements of the North Carolina identification statute. (R. at 465-73; Pros. Ex. 19; Appellate Ex. XLII.)

NCIS continued to search for evidence against Cpl Hoffmann. They canvassed Cpl Hoffmann's friends and acquaintances, which revealed no negative information. (R. at 136.) NCIS put a GPS tracker on Cpl Hoffmann's car from November 2011 to January 2012, which revealed no negative information. (R. at 122, 584.) Most importantly, NCIS checked with the Internet Crimes Against Children (ICAC) taskforce to see if Cpl Hoffmann was associated with any child pornography activity online, which also revealed no negative information. (R. at 132-33.) In sum, these investigative actions revealed no new evidence against Cpl Hoffmann, and instead weakened the Government's case because two of the alleged victims failed to accurately identify him.

On 9 March 2012, over four months after the initial seizure, Cpl Hoffmann's commanding officer signed a Command Authorization for Search and Seizure (CASS) for Cpl Hoffmann's laptop. (Appellate Ex. VIII, Encl 1.) The purpose of the CASS was to search for "evidence of the sexual exploitation of children by means of the receipt and possession of child pornography." (*Id.*) The commanding officer relied on an affidavit from Special Agent (SA) Dana Shutt, NCIS, to support the CASS. (Appellate Ex. VIII, Encl 2.)

The supporting affidavit began by stating SA Shutt's experience and training in the field of child exploitation. (*Id.* at 1.) The affidavit then stated SA Shutt knows, based on

her training and experience, there is "an intuitive relationship" between molestation and child pornography -- individuals interested in sexual gratification may use it as a "precursor to physical interaction" or use it to "reduce the inhibitions of [] children." (*Id.* at 2-3.) She did not cite any studies or quantitative evidence to support this proposition. (*Id.*; R. at 149.) Under the section "FACTS AND CIRCUMSTANCES GIVING RISE TO PROBABLE CAUSE" SA Shutt outlined the facts of the three alleged solicitations of AL, PM, and RW. (Appellate Ex. VIII, Encl 2, at 7-8.) Importantly, she stated AL identified Cpl Hoffmann, but did not note the identification was only with fifty percent certainty. (*Id.* at 7.) Also, she stated PM was "unable to identify" Cpl Hoffmann, but did not include the fact PM identified another individual. (*Id.* at 7.)

The commanding officer met with SA Shutt to discuss Cpl Hoffmann's case before signing the CASS. (R. at 125, 147.) SA Shutt testified she informed him of the problematic details underlying AL and PM's identifications. (R. at 138-39.) The commanding officer, however, testified differently. He stated, "[t]he second child was reasonably sure. And I know it was – I'm going to guess – just guess – because I don't have my notes, it's 70 percent or higher that it was the accused." (R. at 150.) Furthermore, he stated SA Shutt did not inform him one of the alleged victims identified another individual entirely. (R.

at 150.) The commanding officer testified he did not know if his probable cause determination would have been different based on the accurate facts. (R. at 155.)

The defense moved to suppress the evidence resulting from the execution of the CASS because the search lacked probable cause. (Appellate Ex. VIII, Encl. 2.) Defense counsel argued allegations of soliciting underage males alone did not create probable cause to search for child pornography, a separate crime. (Appellate Ex. VIII, at 8.) During the suppression hearing, SA Shutt acknowledged a majority of the nine-page affidavit contained boilerplate language. (R. at 128-29.) She also conceded that aside from the enticement allegations and the fact Cpl Hoffmann owned a computer, there were no other factors that would lead her to believe he possessed child pornography. (R. at 135.)

The military judge denied the defense's motion, finding the CASS was based on probable cause based on:

> The commanding officer engaged in a one-to-two hour discussion with Special Agent Shutt prior to authorizing the search and seizure of the digital media; the affidavit from Special Agent Shutt detailing her training and experience provides a reasonable basis for the accused's commanding officer to believe in an intuitive link between the alleged child enticement and possession of child pornography; this Court gives substantial deference to the decision of the accused's commanding officer as an impartial magistrate with respect to search authorization; and the commanding officer's probable cause determination is supported by at least one federal case that documents the existence of "an intuitive

> relationship between acts such as child molestation or enticement and possession of child pornography."

(Appellate Ex. LVII, at 5.)

Here, the evidence of child pornography should be suppressed because the search was not supported by probable cause and the good faith exception does not apply.

Standard of Review

A military judge's denial of a motion to suppress is reviewed for an abuse of discretion. *United States v. Leedy*, 65 M.J. 208, 212 (C.A.A.F. 2007) (citing *United States v. Rader*, 65 M.J. 30, 32 (C.A.A.F. 2007); *United States v. Khamsouk*, 57 M.J. 282, 286 (C.A.A.F. 2002)). An abuse of discretion occurs when the military judge's findings of fact are clearly erroneous or he misapplied the law. *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996). The legal question of the sufficiency of a probable cause finding is reviewed *de novo* under the totality of the circumstances. *Id.*

Discussion

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and states "no Warrants shall issue, but upon probable cause." U.S. Const. amend IV. Evidence obtained through an unlawful search is inadmissible.

Military Rule of Evidence (M.R.E.) 311(a); *United States v. Calandra* 414 U.S. 338, 348 (1974).

M.R.E. 315(f)(2) defines probable cause as "a reasonable belief that . . . property or evidence sought is located in the place or on the person to be searched." A probable cause determination must be based on the "totality-of-the-circumstances." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). The person making the decision must determine there is a "fair probability that . . . evidence of a crime will be found in a particular place." *Id.* These determinations are "inherently contextual, dependent upon the specific circumstances presented as well as the evidence itself." *Leedy*, 65 M.J. at 213.

The Court of Appeals for the Armed Forces (C.A.A.F.) has summarized the framework for M.R.E. 315 probable cause determinations:

1. A neutral and detached magistrate's determination of probable cause is entitled to substantial deference;
2. Resolution of doubtful or marginal cases should be largely determined by the preference for warrants, with "close calls" resolved in favor of sustaining the magistrate's decision;
3. A warrant should not be invalidated by interpreting the affidavit in a "hypertechnical, rather than a commonsense, manner;" and
4. The evidence is considered in the light most favorable to the prevailing party.

United States v. Macomber, 67 M.J. 214, 218-19 (C.A.A.F. 2009) (citations omitted). Even applying this standard, this Court should suppress the evidence because the military judge applied

the incorrect law while the application of correct persuasive precedent requires suppression. Further, the good faith exception does not apply.

a. The military judge applied a minority view of the law without justification.

A military judge abuses his discretion when his "decision is influenced by an erroneous view of the law." *United States v. Kelly*, 72 M.J. 237, 242 (C.A.A.F. 2013) (citing *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008)).

The military judge abused his discretion because he applied a minority view of the law, ignoring the overwhelming majority of federal circuit law on point. No military precedent directly addresses the issue of whether allegations of child enticement can support probable cause for the separate crime of possessing child pornography. The military judge turned to federal law for guidance on this issue, but only considered one case and ignored precedent from six jurisdictions which held contrary. Relying on *United States v. Colbert*, 605 F.3d 573 (8th Cir. 2010), he concluded, "the commanding officer's probable cause determination is supported by at least one federal case that documents the existence of 'an intuitive relationship between acts such as child molestation or enticement and possession of child pornography.'" (Appellate Ex. LVIII, at 4-5.) The Eighth

Circuit's opinion in *Colbert* is the minority view, however.[4] Six other circuits who have examined the issue reject this approach. These Circuits hold evidence of child molestation or enticement alone, without other connecting information in the affidavit, cannot establish probable cause to search for child pornography.[5]

The Eighth Circuit's holding in *Colbert* finding there is an intuitive connection between the two crimes is an outlier compared to the overwhelming majority of federal case law. The

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[4] The Eleventh Circuit took a somewhat similar position in one unpublished opinion. *United States v. Haynes*, 160 Fed. Appx. 940, 944 (11th Cir. Dec. 28, 2005) (holding when defendant engaged in sexual conversation online with undercover agent, evidence of child pornography was admissible under the good faith exception). *Haynes* is distinguishable because the defendant there used a computer during the alleged enticement.

[5] *Virgin Islands v. John*, 654 F.3d 412, 419 (3d Cir. 2011) (allegations of sex crimes against minors are "not sufficient to establish--or even to hint at--probable cause as to the wholly separate crime of possessing child pornography"); *United States v. Doyle*, 650 F.3d 460, 472 (4th Cir. 2011) ("[E]vidence of child molestation alone does not support probable cause to search for child pornography."); *Dougherty v. City of Covina*, 654 F.3d 892, 899 (9th Cir. 2011) (bare inference that those who molest children likely to possess child pornography insufficient for probable cause); *United States v. Falso*, 544 F.3d 110, 122 (2d Cir. 2008) ("Although offenses relating to child pornography and sexual abuse of minors both involve the exploitation of children, that does not compel, or even suggest, [a] correlation . . . ."); *United States v. Hodson*, 543 F.3d 286, 293 (6th Cir. 2008) ("[I]t was unreasonable for the officer executing the warrant in this case to believe that probable cause existed to search Hodson's computers for child pornography based solely on a suspicion . . . that Hodson had engaged in child molestation."); *cf. United States v. Clark*, 668 F.3d 934, 939 (7th Cir. 2012) (requiring evidence of sexual interest in children along with use of computer to connect accused to "collector profile" needed for probable cause).

military judge failed to mention, let alone analyze, the prevailing jurisprudence. Furthermore, he did not discuss *Colbert* or evaluate why it was more persuasive than the opinions of six other federal circuits. The military judge's reliance on the minority view, with no further explanation, is erroneous.

b. The military judge did not properly apply *United States v. Colbert*.

Even if *Colbert* were controlling in this case, the military judge still abused her discretion by failing to properly analyze the facts or holding in *Colbert*. Instead, she only relied on part of the holding. In *Colbert*, the accused interacted with a five-year old girl in a park for forty minutes in an effort to entice her to come to his apartment. 605 F.3d at 575. The court found the fact the accused attempted to entice a child was one factor in determining probable cause to search for child pornography, because of the "intuitive relationship" between the two crimes. *Id.* at 578. During the interaction, however, the accused also told the child he had movies she would like to watch in his apartment. *Id.* at 575. The court found this information "established a direct link to Colbert's apartment and raised a fair question as to the nature of the materials to which he had referred." *Id.* at 578. The court said it would "strain credulity" under the circumstances to believe the movies were innocent, so this supported a fair probability there was

child pornography at the apartment. *Id.* at 578-79. Thus, the court's finding of probable cause was also predicated on the accused mentioning media in relation to the attempted enticement, a fact not present in Cpl Hoffmann's case.

If the military judge had applied the actual rationale in *Colbert* to Cpl Hoffmann's case, she could not have found probable cause because there is no similar connection to digital media here. The military judge only relied on one factor from the holding in *Colbert*. He ignored the other factor that was not present in this case, the link to digital media. This conclusion was a misapplication of the law.

c. The affidavit lacked probable cause to search for child pornography because it did not have a nexus to a digital component.

If the military judge had examined all persuasive federal precedent applicable to this case, he should have found probable cause to be lacking. Here, SA Shutt's affidavit consisted of three primary sections: SA Shutt's training and experience, her opinions based upon her training and experience, and the factual allegations of child enticement against Cpl Hoffmann.

Within the second section, SA Shutt stated there is an intuitive relationship between child molestation acts and possession of child pornography.[6] The pertinent case law

[6] SA Shutt also spent several paragraphs discussing the habits of child pornography collectors in order to justify why all of the

examines whether, in the absence of any connection to online child pornography, acts of child molestation alone are sufficient to support probable cause. In these cases, the supporting affidavits generally lacked a specific correlation between the two offenses, which is present here.[7] It is important to note, however, this case law states an expert's opinion linking the two crimes *may* establish probable cause. Cpl Hoffmann is unaware of any published case where an investigator's opinion, combined with allegations of enticement, are the sole basis for finding probable cause.[8]

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seized electronic media should be searched. Cpl Hoffmann is not challenging the particularity of the affidavit, rather just whether there was probable cause to initially identify him as a possessor of child pornography.

[7] *See John*, 654 F.3d at 420 ("We acknowledge the possibility that studies might show that a correlation exists between one crime and the other, or perhaps extensive investigator experience might reveal a pattern substantial enough to support a reasonable belief on the part of a police detective. But Joseph's affidavit did not allege the existence of the connection in question, let alone any evidentiary reason to believe in it."); *Falso*, 544 F.3d at 122 ("Perhaps it is true that all or most people who are attracted to minors collect child pornography. But that assertion is nowhere stated or supported in the affidavit."); *Hodson*, 543 F.3d at 289 ("Moreover, Detevtive Pickrell offered no assertion – in either the affidavit or any other evidence (e.g. expert testimony) then before the magistrate judge – of any relational nexus between child molestation and child pornography".).

[8] *But see United States v. Adkins*, 169 Fed. Appx. 961, 967 (6th Cir. Mar. 2, 2006) (holding evidence of child molestation combined with Federal Bureau of Investigation's "Preferential Child Sex Offender" profile sufficient to support probable cause for child pornography); *Haynes*, 160 Fed. Appx. at 944 (when defendant engaged in sexual conversation online with undercover

In the few cases where federal courts have upheld evidence of child abuse as sufficient to establish probable cause for child pornography, the holdings were predicated on one additional factor: a nexus to some form of digital media relating to the abuse. In *United States v. Clark*, the supporting affidavit alleged the accused molested three children. 668 F.3d at 936. In that affidavit a detective, based on his training and experience, described the typical characteristics of a child pornography collector. *Id.* at 938. The Seventh Circuit considered the fact the accused "employed a computer in at least one of his inappropriate advances" as "sufficiently particularized facts" to characterize him as someone who collects child pornography. *Id.* at 941. Thus the court's probable cause finding was based upon the use of a computer during the actual assault. *Id.* at 941.

The holding in *Colbert*, discussed in the prior section, also relied on a reference to media during the attempted assault as an integral factor in the probable cause determination. 605 F.3d at 578; *see also United States v. Kapordelis*, 569 F.3d 1291, 1311 (11th Cir. 2009) (finding evidence Defendant traveled to Russia where he molested several boys, *created images of boys while in Russia*, and had an interest in young boys predating his

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agent, evidence of child pornography admissible under good faith exception).

travel was sufficient to support probable cause to search for child pornography and sexual tourism) (emphasis added).

Lastly, in *United States v. Doyle*, the accused allegedly sexually assaulted children in his home and the Government sought to search his computer for the separate crime of child pornography. 650 F.3d at 464. The affidavit alleged "[o]ne victims [sic] disclosed to an [u]ncle that Doyle had shown the victim pictures of nude children," so child pornography was specifically linked to one of the acts of assault. *Id.* The Fourth Circuit found there was "remarkably scant evidence . . . to support a belief that Doyle in fact possessed child pornography" for three reasons. *Id.* at 472. One, evidence of child molestation alone did not support probable cause to search for child pornography.[9] *Id.* Two, while pictures of "nude children" allegedly existed, the police took no efforts to determine whether those photos were actually child pornography, considering not all pictures of naked children are illegal. *Id.* at 473. Lastly, assuming the photos were child pornography, the information was stale because there was no indication of when the accused may have possessed the photos. *Id.* at 474. Thus, probable cause for child pornography was lacking even when a victim was shown "pictures of nude children" during an assault.

[9] The opinion is silent on the issue of whether the affidavit included an expert link between the two crimes, but based upon the outcome, it appears this link was missing.

The affidavit here, however, alleged no nexus whatsoever to digital media in relation to the alleged enticements. SA Shutt conceded there was a complete absence of any electronic component to the crime during her testimony. (R. at 135.) *Colbert* and *Clark* are distinguishable from the present case because there was no evidence Cpl Hoffmann employed or offered any type of media during the alleged enticements. This is an imperative difference. The holding in *Doyle*--"naked photos of children" used during an alleged sexual assault were not sufficient for probable cause--is even more pertinent.

Here, the witnesses did not allege Cpl Hoffmann used or referenced any digital media or electronic devices in the three alleged enticements. NCIS even specifically searched for a connection between Cpl Hoffmann and online child pornography, to no avail.[10] The only other evidence submitted in the affidavit was Cpl Hoffmann owned two computers and several media storage devices--the previously seized items. Because most individuals in the country own a computer or a media device, this ownership is insufficient to justify a search.

The actual evidence of child enticement was also weak--in fact the members acquitted Cpl Hoffmann of all allegations involving AL and PM. It appears NCIS knew its case was weak and

[10] SA Shutt did not include this fact in the affidavit and it is unclear from the record whether she discussed this issue with the commanding officer.

did not believe there was sufficient evidence to support probable cause to search at the time of the seizure—otherwise it begs the question, why let evidence sit for an extended time? NCIS did not seek an immediate CASS after seizing the property, but rather waited four months to take further investigative steps. But the continued investigation further weakened the Government's case. Only one alleged victim positively identified Cpl Hoffmann. Another identified a different person and the last could only identify him with "maybe fifty percent" certainty. (R. at 130-31.) The supporting affidavit did not include the identification concerns, and the commanding officer testified that he was not aware of them. (R. at 150.)

In sum, NCIS had limited evidence relating to child enticement and no evidence of possession of child pornography. Under the totality of the circumstances, the weak evidence of enticement and the lack of a digital nexus to child pornography did not equate to probable cause. There is not substantial evidence in the record to support the commanding officer's issuance of the warrant, so the search must fail for lack of probable cause.

d. The good-faith exception does not apply.

The Supreme Court has said, "evidence should be suppressed 'only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the

search was unconstitutional under the Fourth Amendment.'" *Herring v. United States*, 555 U.S. 135, 145 (2009) (quoting *Illinois v. Krull*, 480 U.S. 340, 348-49 (1987)). Thus, even if an affidavit lacks probable cause, the evidence obtained as the result of the search may still be admissible under the "good faith" exception established in *United States v. Leon*, 468 U.S. 897, 922 (1984), and codified in M.R.E. 311(b)(3). The good faith exception states evidence from an unlawful search or seizure may be used if:

> (A) The search or seizure resulted from an authorization to search, seize or apprehend issued by an individual competent to issue the authorization under Mil. R. Evid. 315(d) or from a search warrant or arrest warrant issued by competent civilian authority;
>
> (B) The individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause; and
>
> (C) The officials seeking and executing the authorization or warrant reasonably and with good faith relied on the issuance of the authorization or warrant. Good faith shall be determined on an objective standard.

M.R.E. 311(b)(3). This provision is to be construed consistent with the requirements of *Leon*. *United States v. Carter*, 54 M.J. 414, 422 (C.A.A.F. 2001); *see also* M.R.E. 311(b), Drafter's Analysis.

This "'good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer

would have known that the search was illegal' in light of 'all of the circumstances.'" *Herring*, 555 U.S. at 145 (quoting *Leon*, 468 U.S. at 922 n.23). "It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination." *Leon*, 468 U.S. at 922 n.24.

Here, the good faith exception does not apply because SA Shutt did not objectively act in good faith. First, SA Shutt continued to investigate Cpl Hoffmann for four months after the initial seizure of the evidence, but uncovered no more evidence, before applying for the CASS. The logical inference from this delay is SA Shutt did not believe there was sufficient evidence to support a search authorization for child pornography at the time of seizure. During the next four months, she attempted to find further inculpatory information. (R. at 122-36.) But she was unsuccessful and was left in the original position of insufficient probable cause. Also, the factual claims giving rise to the enticement allegations were weak because only one out of three victims positively identified Cpl Hoffmann, and that identification occurred seven months after the incident. If anything, the delay in seeking the CASS further weakened the Government's evidence.

Moreover, SA Shutt did not act in good faith because she omitted material information from the affidavit. Reliance on a warrant is not in "good faith" when the deciding official "was misled by information in the affidavit the affiant knew was false. . . ." *Carter*, 54 M.J. at 420. Furthermore, omissions can undermine probable cause when they are international or "made with reckless disregard for the accuracy of the information." *United States v. Figueroa*, 35 M.J. 54, 56-57 (C.M.A. 1992). Here, SA Shutt intentionally excluded the details of AL and PM's identifications that were not just unhelpful to the Government's position, but harmful. SA Shutt claimed she informed the commanding officer of the problems with those identifications during their in-person meeting, but he specifically testified she did not. (R. at 150.) The commanding officer stated he was not aware one alleged victim identified a different individual and the other had only a "maybe fifty percent" level of certainty. (R. at 130-31.) Furthermore, the commanding officer conceded he was not sure if his decision would have changed based on those details. (R. at 155.) SA Shutt also did not include the negative results from the IPAC inquiry in her affidavit, and it is unclear from the record whether the commanding officer was informed about the negative IPAC search. SA Shutt deliberately omitted relevant

information from the affidavit and these errors misled the commanding officer.

Also, SA Shutt was both the affiant for the search warrant and the investigator who reviewed the forensic data extraction (FDE) of Cpl Hoffmann's laptop for media. (R. at 546, 567.) It cannot be said she relied on the issuance of the authorization in "good faith" when she was the individual who provided the insufficient underlying evidence for the authorization.

Lastly, no objective officer could reasonably rely on the facts in this affidavit to find probable cause. Similarly in *Doyle*, discussed above, the Fourth Circuit held the *Leon* good-faith exception did not apply when, "the application for a warrant to search a private residence for evidence of child pornography failed to indicate the that pictures allegedly possessed by the resident were in fact pornographic and provided no indication as to when the pictures were allegedly possessed." 650 F.3d at 463. There, the affidavit included at least some nexus to pornographic photos, but the Fourth Circuit still found it unreasonable for law enforcement officials to rely on the warrant. *See also Hodson*, 543 F.3d at 293 (good-faith exception did not apply when the affidavit alleged the defendant used a computer for a sexual conversation with a minor, albeit with no connection or link to child pornography); *but see Falso*, 544 F.3d at 128-29 (good-faith exception applied because the

question of whether probable cause excited was "an issue upon which reasonable minds can differ.")

In sum, SA Shutt did not act in good-faith by purposefully excluding facts adverse to her investigation from the affidavit. Thus, she could not then claim ignorant reliance on the CASS based on her affidavit. The underlying evidence of enticement was negligible and there was no specific digital nexus to child pornography, so reliance on the warrant was objectively unreasonable. The good-faith exception does not apply and exclusion is the proper remedy.

Conclusion

Because probable cause was insufficient and the good-faith exception does not apply, this Court should suppress the evidence of child pornography. This Court should set aside and dismiss Cpl Hoffmann's conviction under Charge III and remand for a sentence rehearing.[11]

[11] Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Cpl Hoffmann also asks this Court to set aside and dismiss all of his remaining convictions relating to RW as a result of this illegal search. The search of the computer also revealed two internet searches that referenced having sex with minors. (R. at 561.) Cpl Hoffmann asserts this evidence should also have been suppressed and it prejudiced him because it improperly contributed to his convictions for attempted sodomy of a child, indecent liberties with a child, and enticement. Thus, this Court should set aside and dismiss all of Cpl Hoffmann's guilty findings and remand for a new trial.

II.

A MILITARY JUDGE MUST APPEAR TO BE IMPARTIAL. HERE, THE MILITARY JUDGE ACKNOWLEDGED THERE WAS A CONCERN WITH HER APPEARANCE OF IMPARTIALLY DURING A MOTIONS HEARING, BUT ONLY RECUSED HERSELF FOR THAT MOTION. THE MILITARY JUDGE ABUSED HER DISCRETION BY NOT RECUSING HERSELF FROM THE ENTIRE PROCEEDINGS.

Based on the issues described in AOE I, the defense moved to suppress the evidence of child pornography prior to trial. (Appellate Ex. VIII.) During the motions session on 31 January 2013, the Government's last witness was the commanding officer who authorized the search. (R. at 140.) Because the witness testified telephonically, no one in the court room initially realized he was improperly using notes during testimony. (R. at 142.) The military judge instructed the witness to put the notes away, and the defense requested a copy of the documents before conducting cross-examination. (R. at 142-43.) In response the military judge stated, "[u]h, that's fine. But, listen, I'm going to tell you right now, the evidence has reached – that they have met their burden," meaning the Government had met its burden before all the evidence was submitted. (R. at 143.) The military judge and the civilian defense counsel had a brief dialogue about the military judge's premature determination, during which the military judge became

terse with the civilian defense counsel and admonished, "Don't cut me off; okay?" (R. at 144.)

The civilian defense counsel then made a motion challenging the military judge, because, "she's lost her ability to be fair and impartial during this hearing." (R. at 144.) The defense argued the military judge made a decision on the motion before all of the evidence was presented. (R. at 145.) The military judge responded while the Government had met its burden, the defense still had the opportunity to undermine the Government through cross-examination. (R. at 145.) The military judge initially refused to grant the defense's challenge. (R. at 146.)

The witness finished his testimony and the court took a forty-seven minute recess. (R. at 156.) Back on the record, the military judge stated she reconsidered her ruling and was granting a partial recusal. (R. at 157.) She stated:

> Given the nature of these charges and my desire to avoid unnecessary appellate issues, despite disagreeing that I have lost my impartiality, I am not going to allow that to be an issue for which -- as a technicality, if a conviction is reached in this case. Accordingly, I am going to recuse myself from this particular motion, no other motions, for the sole purpose because of the accusations made by the defense were regarding this particular motion. So we aren't going to go further with this motion.

(R. at 157.) The military judge ordered a new motion session for the suppression issue with a different military judge. (R. at 157.)

Before the start of trial, the defense filed a motion challenging the military judge's partial recusal, arguing once a judge is recused from part of a trial, she is recused from all of the trial. (Appellate Ex. XXXI.) The military judge ruled orally, stating she had not formed an opinion on guilt, would view all facts in evidence, and would apply the appropriate law. (R. at 207-08.) Specifically on the issue of partial recusal, she stated:

> And with respect to the defense position that once recused, always recused; I disagree with that position. I understand you're citing from *Atritus* [ph]. But the case goes -- the case cited by the defense goes on to say that the judge should not play any procedural or substantive role with regard to the matter about which he is recused. And that is the law of the land that I will follow.

(R. at 207.) The military judge then presided over Cpl Hoffmann's trial, but did not participate in any actions relating to the suppression motion.

Cpl Hoffmann alleges the military judge abused her discretion by only recusing herself from one motion and not the entire proceeding, including trial.

Standard of Review

A military judge's decision on the issue of recusal is reviewed for an abuse of discretion. *United States v. Butcher,* 56 M.J. 87, 90 (C.A.A.F. 2001).

Discussion

"An accused has a constitutional right to an impartial judge." *United States v. Wright*, 52 M.J. 136, 140 (C.A.A.F. 1999) (citing *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Tumey v. Ohio*, 273 U.S. 510 (1927)). Under R.C.M. 902(a), a military judge must recuse herself "in any proceeding in which that military judge's impartiality might reasonably be questioned." Thus, a military judge may be disqualified solely based on the appearance of bias – actual bias is not required. *United States v. Quintanilla*, 56 M.J. 37, 44-45 (C.A.A.F. 2001). This appearance standard serves two purposes: it "enhance[s] public confidence in the integrity of the judicial system" and "reassure[s] the parties as to the fairness of the proceedings. *Id.* at 45 (citation and quotation marks omitted).

Disqualification is viewed objectively, so it is "assessed not in the mind of the military judge [her]self, but rather in the mind of a reasonable man . . . who has knowledge of all the facts." *Wright*, 52 M.J. at 141 (citation and quotation marks omitted). Possible reasons for disqualification should be

broadly construed, but a military judge should also not recuse herself unnecessarily. *Id.;* R.C.M. 902(d)(1), Discussion. In executing her duties, a military judge "must avoid undue interference with the parties' presentations or the appearance of partiality." *Quintanilla*, 56 M.J. at 42 (citing R.C.M. 801(a)(3), Discussion).

Here, the military judge appeared biased. Her impartiality was reasonably questioned due to her inappropriate comments on the evidence during the motion hearing. The military judge acknowledged this appearance of bias and attempted to remove this taint by partially recusing herself. The military judge, however, did not survey the case law to determine whether a partial recusal was proper.

a. <u>The partial recusal did not remove the appearance of bias.</u>

There is scant military law on partial recusals. Generally, a military judge must recuse herself "in any proceeding in which that military judge's impartiality might reasonably be questioned." R.C.M. 902(a). A proceeding includes "pretrial, trial, post-trial, appellate review, or other stages of litigation." R.C.M. 902(c)(1). If a military judge is disqualified, "all the judge's actions from that moment on are void -- except for those immediately necessary to assure the swift and orderly substitution of judges." *United States v.*

Sherrod, 26 M.J. 30, 33 (C.M.A. 1988) (holding if a judge is disqualified to sit as judge alone, he is also disqualified to sit with members). On its face, it appears the Rules for Courts-Martial do not specifically authorize partial recusals because there is no mention of the concept of impartially being limited to one issue or subject. Furthermore, the definition of "proceeding" unambiguously includes entire stages of litigation, which also does not support the idea of limited recusal.

The military rule on recusal is identical to the federal recusal statute, 28 U.S.C. § 455(a). *See* R.C.M. 902, Discussion; *Wright*, 52 M.J. at 141. There appears to be a circuit split on whether partial recusal is appropriate. Two federal circuit courts have expressly rejected the concept of partial recusal.[12] But, three circuits approve the use of partial recusals, albeit only in some types of situations.[13]

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[12] *See Murray v. Scott*, 253 F.3d 1308, 1311 (11th Cir. 2001) (stating a judge must "consider his potential conflict with regard to the overall case, not just his potential conflict for each separate issue or each stage of the litigation"); *United States v. Feldman*, 983 F.2d 144, 145 (9th Cir. 1992) (holding a judge does not have the discretion to recuse by subject matter).

[13] *See Ellis v. United States*, 313 F.3d 636, 641-42 (1st Cir. 2002) (holding "a judge may, in an appropriate case, decide certain issues and recuse himself or herself as to others" when trial judge recused himself only for judicial misconduct challenge for 28 U.S.C. § 2255 motion); *Pashaian v. Eccelston Props.*, 88 F.3d 77, 84-85 (2d Cir. 1996) (distinguished *Feldman* because judge only ruled on one preliminary injunction after recusal); *United States v. Kimberlin*, 781 F.2d 1247, 1259 (7th Cir. 1985) (finding recusal from sentencing for some charges

In cases where partial recusal was found to be appropriate, there were isolated and discrete issues. These issues included a judicial misconduct challenge against the judge in *United States v. Ellis* or limited knowledge of improper sentencing information in *United States v. Kimberlin*. 313 F.3d at 641-42; 781 F.2d at 1259. Or a situation where prejudice would be limited, like in *United States v. Pashaian* where the judge only ruled on a preliminary injunction and did not preside over trial. 88 F.3d at 84-85. Cpl Hoffmann's case is different, however, because the military judge lost the overall appearance of impartiality when she demonstrated bias in favor of the Government.

This Court should adopt the Ninth Circuit's analysis in *Feldman*. There, the Ninth Circuit stated the federal judicial recusal statutes discuss a federal judge being reassigned or disqualified from a "proceeding." *Feldman*, 983 F.2d at 145. The Ninth Circuit held:

> when a judge determines that recusal is appropriate it is not within his discretion to recuse by subject matter or only as to certain issues and not others. Rather, recusal must be from a whole proceeding, an entire 'stage of litigation.'

Id. A plain reading of R.C.M. 902 supports this holding. Nowhere in the rule does it state a military judge may recuse by

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appropriate because judge exposed to a pre-sentence report that contained prejudicial information for only those counts).

one issue or type of bias; rather the appearance of impartiality applies to the entire "proceeding." Once a military judge has lost the appearance of fairness toward an accused, the appearance cannot be limited to once specific corner of the trial.

Here, the military judge recused herself for one specific issue – the suppression motion. She failed to examine whether a partial recusal was appropriate under case law. Once the military judge appeared to be partial, she should have recused herself from Cpl Hoffmann's entire proceeding, including pretrial, trial, and post-trial stages of litigation.

b. Reversal is required under the *Liljeberg* test.

Because it was error for the military judge to only partially recuse herself, this Court must now determine whether reversal is required under *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 (1988). *Butcher,* 56 M.J. at 92. The three-part *Liljeberg* test examines:

> (1) the risk of injustice to the parties,
> (2) the risk that the denial of relief will produce injustice in other cases, and
> (3) the risk of undermining public confidence in the judicial process.

486 U.S. at 864; *Butcher*, 56 M.J. at 92-93. Applying these criteria, reversal is warranted in this case.

For the first factor, "the risk of injustice to the parties is high when a military judge who has stated her bias

nonetheless presides over a court-martial, even when she does not act as the trier of fact." *United States v. McIlwain*, 66 M.J. 312, 315 (C.A.A.F. 2008). Here, the military judge acknowledged the appearance of bias but still presided over Cpl Hoffmann's members court-martial. "A military judge is charged with making a number of decisions, any one of which could affect the members' decision as to guilt or innocence, or with regard to the sentence." *Id.* (citing *Quintanilla*, 56 M.J. at 41). Thus the risk of injustice to Cpl Hoffmann was high when the military judge continued to preside over his trial in front of the members. As to the second factor, the risk of injustice in other cases if relief is denied, is limited. The military judge's appearance of bias was limited to the facts of this case, so it will unlikely impact other cases.

The third factor weighs heaviest in Cpl Hoffmann's favor, because there is a substantial risk of undermining the public's confidence in the judicial system. Just like in *McIlwain*, "every time the military judge made a decision, she exercised her discretion -- a discretion which she herself had found was biased." 66 M.J. at 315. This action negatively impacts the public's confidence in the military justice system. The military justice system has received wide-spread media attention recently, much of it negative, and a military judge losing her impartially only further lowers the system in the public's eye.

The significance of this factor is highlighted where "questions of judicial appearance may be particularly important in the military justice system where trial judges wear government green and blue and not just judicial black." *Buchter*, 56 M.J. at 94 (Baker, J., concurring). A reasonable person would question the fairness of the military justice system under these circumstances, which undermines the public's confidence in our judicial system.

The sum of the *Liljeberg* factors weigh in Cpl Hoffmann's favor, so reversal is required.

Conclusion

The military judge lost her appearance of impartially and should have recused herself for the entire proceedings. This Court should set aside Cpl Hoffmann's findings and sentence and remand for a trial with a new military judge.

III.

THE CRIME OF ATTEMPT REQUIRES BOTH A SPECIFIC INTENT TO COMMIT THE UNDERLYING OFFENSE AND A SUBSTANTIAL STEP TOWARD COMMITTING THAT OFFENSE. HERE, CPL HOFFMANN MERELY ASKED RW IF HE WANTED A "QUICKIE." THIS OFFER DID NOT SHOW A SPECIFIC INTENT TO ENGAGE IN SODOMY, NOR WAS IT A SUBSTANTIAL STEP. CPL HOFFMANN'S CONVICTION FOR ATTEMPTED SODOMY IS FACTUALLY AND LEGALLY INSUFFICIENT.

RW alleged Cpl Hoffmann drove by while he was walking home after school and asked if he "wanted a quickie" and RW replied,

"no." (R. at 355.) Cpl Hoffmann asked if he knew "what that is," RW again replied "no," and he drove off. (R. at 355.) The car allegedly returned again and Cpl Hoffmann asked RW "are you sure?" and RW said "yes." (R. at 356.) Cpl Hoffmann then told RW "you'll like it," and RW told the man "no" one last time. (R. at 356.) Because of this interaction, Cpl Hoffmann was convicted of attempted sodomy, enticement, and indecent liberties with a child.

Standard of Review

This Court has an independent obligation to review each case *de novo* for factual and legal sufficiency, and may substitute its own judgment for that of the trial court. Art. 66, UCMJ; *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987).

Discussion

The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *Turner*, 25 M.J. at 324 (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [this Court is] convinced of the accused's guilt beyond a reasonable doubt."

Turner, 25 M.J. at 325. In exercising this duty, this Court may judge the credibility of witnesses, determine controverted questions of fact, and substitute its judgment for that of the military judge. Article 66(c), UCMJ; *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990).

To sustain a conviction for attempted sodomy, the Government must prove beyond a reasonable doubt that:

1. The accused did a certain overt act;
2. The act was done with the specific intent to commit sodomy;
3. The act amounted to more than mere preparation; and
4. The act apparently tended to effect the commission of sodomy.

MCM, Part IV para 4.b. The elements of sodomy are:

1. The accused engaged in unnatural carnal copulation with another person; and
2. The act was done with a child who had attained the age of 12 but was under the age of 16.

MCM, Part IV para 51.b. "Unnatural carnal copulation" has three relevant definitions:

1. For a person to take into that person's mouth or anus the sexual organ of another person; or
2. to place that person's sexual organ in the mouth or anus of another person; or
3. to have carnal copulation in any opening of the body, except the sexual parts, with another person.

MCM, Part IV para 51.c. Cpl Hoffmann's attempted sodomy conviction is legally and factually insufficient for two reasons: (1) the question "do you want a quickie" is not a substantial step because it is a mere solicitation; and (2) the

Government did not prove Cpl Hoffmann had the specific intent to engage in sodomy as the offense was instructed.

a. Cpl Hoffmann's words were not a substantial step.

For an attempt offense, the "overt act required goes beyond preparatory steps and is a direct movement toward the commission of the offense." MCM Part IV para. 4.c(2). "Preparation consists of devising or arranging the means or measures necessary for the commission of the offense." *Id.* While the difference between mere preparation and a substantial step is "elusive," *United States v. Schoof*, 37 M.J. 96, 103 (C.M.A. 1993), a substantial step must still "'unequivocally demonstrat[e] that the crime will take place unless uninterrupted by independent circumstances.'" *United States v. Winckelmann*, 70 M.J. 403, 407 (C.A.A.F. 2011) (quoting *United States v. Goetzke*, 494 F.3d 1231, 1237 (9th Cir. 2007)). It also must strongly corroborate the firmness of the accused's criminal intent. *United States v. Byrd*, 24 M.J. 286, 290 (C.M.A. 1987). Merely soliciting another to commit an offense does not constitute an attempt. MCM, Part IV, ¶ 4.c(5).

Here, Cpl Hoffmann merely solicited or enticed RW to engage in a "quickie." This offer alone, without any further action, is not a substantial step to completing the sodomy. As the MCM states, soliciting another is not enough to constitute an attempt. MCM, Part IV, ¶ 4.c(5). Many other steps would have

to transpire before the act of sodomy occurred -- moving to a secluded location, removal of clothing, attempted penetration, etc. The offer of a "quickie," combined with any of these acts, would have been a substantial step. Here, however, there was only evidence of the separate crime of enticement.

This Court noted the distinction in *United States v. Hurd*, where it held the act of asking for oral sex was attempted sodomy, when "appellant and A.L. [were] already naked and engaged in consensual sexual foreplay and [had] a history of prior sexual intercourse." No. 200101126, 2004 CCA LEXIS 37, at *12 (N-M. Ct. Crim. App. Feb. 24, 2004). This Court stated in dicta the situation would have been different if "appellant had gone up to a strange woman in a bar and, on impulse, just asked her to perform oral sex." *Id.* at 13. The referenced hypothetical is what happened here--Cpl Hoffmann had no prior relationship with RW, the request happened in public, and did not happen during a continuing sexual encounter.

The Army and Air Force Courts of Criminal Appeals have also recognized this distinction in cases related to illegal drugs. In *United States v. Jackson*, the Army Court of Military Review held an offer to sell marijuana was "mere preparation" and not a substantial step. 5 M.J. 765, 767 (A.C.M.R. 1978). The court overturned the appellant's conviction for attempt to wrongfully sell marijuana, but found his conduct constituted criminal

solicitation, in violation of Article 134, UCMJ. *Id.* at 767-68. In *United States v. Rothenberg*, the Air Force Court of Criminal Appeals overturned a guilty plea for attempted distribution because an offer to provide ecstasy was not a substantial step. 53 M.J. 661, 665 (A.F. Ct. Crim. App. 2000). Similarly here, Cpl Hoffmann made an offer to engage in a "quickie." This proposal was only enticement and Cpl Hoffmann was convicted of that separate offense.

The offer alone was not a substantial step toward completing the crime of sodomy. Because there was not a substantial step, Cpl Hoffmann's attempted sodomy conviction is factually and legally insufficient.

b. <u>The Government did not present evidence Cpl Hoffmann had the specific intent to engage in sodomy as it was instructed.</u>

"To constitute an attempt there must be a specific intent to commit the offense . . . ." MCM, Part IV para. 4.c(1). Here, the Government did not prove Cpl Hoffmann had the specific intent to engage in sodomy because it presented no evidence a "quickie" equates to an act of sodomy. Merriam-Webster Dictionary defines the term "quickie" as "an act of sexual intercourse that is done in a very short amount of time." *See* http://www.merriam-webster.com/dictionary/quickie. A common understanding of the phrase an "act of sexual intercourse" encompasses different types of sexual acts, whether vaginal,

oral, or anal.[14] In this case, the military judge instructed the members only on one particular type of sodomy, stating, "'[u]nnatural carnal copulation' occurs when a person takes into his mouth the reproductive sexual organ of another person." (R. at 595.)

As listed *supra*, the term unnatural carnal copulation encompasses three different definitions, so there are different ways to complete the act of sodomy. The military judge's instructions, however, limited the members to considering only one type of sodomy--Cpl Hoffmann taking RW's penis into his mouth. There was no evidence showing Cpl Hoffmann had the specific intent to engage in this particular type of sodomy (taking RW's penis into his mouth) compared to the other different types (anal penetration or putting his penis into RW's mouth). Based on the charge sheet and the instructions, the Government had to prove beyond a reasonable doubt Cpl Hoffmann had the specific intent to commit oral sodomy by taking RW's

---

[14] Merriam-Webster Dictionary defines sexual intercourse as:

> 1: heterosexual intercourse involving penetration of the vagina by the penis : Coitus;
>
> 2: intercourse (as anal or oral intercourse) that does not involve penetration of the vagina by the penis.

Available at http://www.merriam-webster.com/dictionary/sexual+intercourse?show=0&t=1396021953

penis into his mouth. Evidence that he propositioned for a "quickie" does not support the specificity of the sexual act as instructed. The Government did not prove beyond a reasonable doubt Cpl Hoffmann had the specific intent to engage in the instructed version of sodomy. This Court should find this conviction factually and legally insufficient.

Conclusion

Cpl Hoffmann's offer of a "quickie" was merely solicitation and not a substantial step toward committing the crime of sodomy. Furthermore, the Government did not prove beyond a reasonable doubt Cpl Hoffmann specifically intended to engage in oral sodomy. This Court should find Cpl Hoffmann's conviction for attempted sodomy legally and factually insufficient, set aside and dismiss the conviction with prejudice, and reassess the sentence.

IV.

A COMMANDING OFFICER CAN ONLY PLACE AN ACCUSED IN PRE-TRIAL CONFINEMENT (PTC) IF HE DETERMINES THE ACCUSED IS A FLIGHT RISK OR WILL COMMIT FURTHER SERIOUS MISCONDUCT, AND LESSER FORMS OF RESTRAINT ARE INADEQUATE. HERE, THE COMMAND ORDERED CPL HOFFMANN INTO PTC BECAUSE IT REALIZED THE SPEEDY TRIAL CLOCK STARTED AFTER IT PREFERRED CHARGES. THE MILITARY JUDGE ABUSED HER DISCRETION BECAUSE SHE FOUND THE COMMAND'S ACTION WAS PROPER.

Cpl Hoffmann became a suspect on 1 November 2011. (R. at 96.) The Government did not prefer charges against Cpl Hoffmann

until 10 May 2012. (Charge Sheet.) Cpl Hoffmann was then put in pre-trial confinement (PTC) on 14 May 2012. The defense submitted a motion to release Cpl Hoffmann and to award him additional confinement credit because both the commanding officer and initial review officer (IRO) abused their discretion.[15] (Appellate Ex. III.)

In the PTC memorandum, Cpl Hoffmann's commanding officer stated he believed confinement was necessary because Cpl Hoffmann was a flight risk, he would engage in serious criminal misconduct, and lesser forms of restraint were inadequate. (Appellate Ex. III, at 26-27.) The defense argued, however, these explanations were not the real reason Cpl Hoffmann was put into PTC. Rather the command did not realize preferral of charges started the 120-day speedy trial clock, so the defense asserted once the clock was started "there was no reason not to put the accused in pretrial confinement." (Appellate Ex. III, at 7-8.) Thus, the defense argued the command abused its discretion because:

> the only reason they put him in pretrial confinement on the 14th of May, after the – the charges had been preferred on the 10th of May, was because of the speedy trial clock had already begun. And that's not

[15] The military judge found the IRO abused his discretion and awarded day-for-day credit for Cpl Hoffmann's PTC from 14 May until the date of the hearing on 17 October 2012. (R. at 68.) Nevertheless, the military judge conducted a *de novo* review and found Cpl Hoffmann should not be released from PTC. (R. at 68-70.) Neither of these rulings are at issue.

> a proper reason to put somebody in pretrial confinement.

(R. at 63.)

At the hearing for this motion, Cpl Hoffmann's executive officer testified and supported the defense's claim. The following exchange occurred:

> Q. What changed between May the 10th and May the 14th that caused the command to put him in pretrial confinement?
>
> A. Well, at that point, nothing changed, sir. What really the big one was we had waited -- we were trying to give NCIS some time to further develop some stuff. And had not realized that the speedy trial clock started at the prefer of charges not on -- on the confinement. Once that was discovered, we confined the Marine.
>
> Q. Is it fair to say that if you then would not have found out that the speedy trial clock begin to start ticking until May 20th, that you would not have put him in the brig until May 20th?
>
> A. No it's not. I it wasn't -- there was an intent to place him in pretrial confinement. And we were balancing days with -- with other things. Balancing the timing of when we would have him placed in pretrial confinement . . . .

(R. at 41.) The executive officer also stated from 1 November, the date Cpl Hoffmann became a suspect, until PTC in May, Cpl Hoffmann had no restrictions on his activities, besides the denial of leave. (R. at 33, 45.) Lastly, there was no indication Cpl Hoffmann would not follow the command's requirements if he was restricted to base. (R. at 46.) The military judge then ruled orally:

> With respect to the command actions for what it's worth, which I would imagine could potentially give remedy to the accused under 305(i)(1), I find that the command acted properly in confining the accused when they did. It was very clear and evident from the testimony of the XO that the command distinguished allegations versus evidence with respect to the time continuum that the defense relies on in their motion.
>
> Additionally, the command didn't want to create a flight risk situation with respect to confining someone based on speculation and allegations without more evidence knowing that they would probably be released from an IRO hearing, and waited until what they thought was enough evidence to drive confinement, which appeared to be preferred charges on a charge sheet.

(R. at 67-68.)

The military judge abused her discretion in finding the command acted properly, so this Court should award Cpl Hoffmann additional confinement credit.

Standard of Review

A military judge's ruling on the legality of pretrial confinement is reviewed for an abuse of discretion. *United States v. Wardle*, 58 M.J. 156, 157 (C.A.A.F. 2003) (citing *United States v. Gaither*, 45 M.J. 349, 351-52 (C.A.A.F. 1996). An abuse of discretion occurs if a finding of fact is clearly erroneous or if a decision is based on an erroneous view of the law. *United States v. Taylor*, 47 M.J. 322, 325 (C.A.A.F. 1997); *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995). A military judge’s determination of the proper application of

R.C.M. 305(k) is reviewed *de novo*. *United States v. Plowman*, 53 M.J. 511, 512 (N-M. Ct. Crim. App. 2000).

Discussion

Pretrial confinement is only warranted when the commander believes upon probable cause that:

(i) an offense triable by court-martial has been committed;
(ii) the prisoner committed it;
(iii) confinement is necessary because it is foreseeable that:
  (a) the prisoner will not appear at trial, pretrial hearing, or investigation, or
  (b) the prisoner will engage in serious criminal misconduct; and,
(iv) less severe forms of restraint are inadequate.

R.C.M. 305(h)(2)(B). If the commanding officer abuses his discretion by not following the above requirements, the military judge shall order administrative credit against the adjudged sentence. *United States v. Fisher*, 37 M.J. 812, 816 (N-M.C.M.R. 1993); R.C.M. 305(j)(2). An accused is entitled to administrative credit under R.C.M. 305(k) even if the military judge is not required to release him. *Id.* at 816, n.2.

Here, the military judge abused her discretion by finding the command acted properly. While the commanding officer included the proper language under R.C.M. 305(h)(2)(B) in the PTC memorandum, the executive officer's testimony shows this language in the PTC memorandum was a pretext for inappropriate action. The executive officer stated the only fact that changed

from the preferral of charges to Cpl Hoffmann being put in PTC was the command's awareness of the speedy trial clock. Because the command did not know preferring charges on 10 May would start the 120-day speedy trial clock, they had no reason to confine Cpl Hoffmann. Once that clock started, however, they had nothing to lose so they put him in PTC. This action is an abuse of discretion.

The military judge acknowledged this issue when she stated, "[w]ith respect to the command actions for what it's worth, which I would imagine could potentially give remedy to the accused under 305(i)(1)." (R. at 67.) However, the military judge then misinterpreted the executive officer's testimony by saying, "the command distinguished allegations versus evidence with respect to the time continuum that the defense relies on in their motion." (R. at 67.) In actuality, the executive officer agreed the command knew about the enticement allegations since November and the child pornography allegations since 30 March. (R. at 33-36.) The fact the command did not put Cpl Hoffmann into PTC for over a month after child pornography allegations indicates PTC only occurred because the command learned preferral of the charges triggered the speedy trial clock. In addition, the command did not restrict Cpl Hoffmann's activities or movements, besides denying leave, for roughly seven months prior to confining him, which undermines the command's claim he

would commit further misconduct or was a flight risk. Lastly, the executive officer acknowledged there was no reason to believe Cpl Hoffmann would not comply with limitations of restriction, showing the command did not believe lesser forms of restraint were inadequate.

The military judge abused her discretion by finding the command applied the correct criteria in R.C.M. 305(h)(2)(B). The executive officer's testimony revealed the command took into account an improper factor, the start of the 120-day speedy trial clock, in placing Cpl Hoffmann in PTC. This Court should award Cpl Hoffmann additional confinement credit for his PTC from 14 May-17 October 2012.

Conclusion

Cpl Hoffmann respectfully requests this Court set aside and dismiss his attempted sodomy conviction with prejudice. Cpl Hoffmann also respectfully requests this Court set aside and dismiss his findings and sentence and remand for a hearing with a new military judge. In the alternative, this Court should set aside and dismiss Cpl Hoffmann's child pornography conviction and remand for a rehearing on sentence. Lastly, Cpl Hoffmann respectfully requests additional confinement credit.

JESSICA L. FICKEY
LT, JAGC, USN

Appellate Defense Counsel
1254 Charles Morris St, SE
Bldg 58, Suite 100
Washington Navy Yard, D.C. 20374
Tel: (202) 685-7297
Fax: (202) 685-7426
jessica.fickey@navy.mil

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2. *United States v. Haynes*, 160 Fed. Appx. 940 (11th Cir. Dec. 28, 2005).

3. *United States v. Hurd*, No. 200101126, 2004 CCA LEXIS 37 (N-M. Ct. Crim. App. Feb. 24, 2004).

CERTIFICATE OF FILING AND SERVICE

I certify that the original and required copies of the foregoing were delivered to the Court on 13 May 2014. I further certify a copy of the foregoing was delivered to Director, Appellate Government Division, and electronically filed in CMTIS and CMS pursuant to Rule 5.2(b)(1) of this Court's Rules for Practice and Procedure, on 13 May 2014.

JESSICA L. FICKEY
LT, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris St, SE
Bldg 58, Suite 100
Washington Navy Yard, D.C. 20374
Tel: (202) 685-7297
Fax: (202) 685-7426
jessica.fickey@navy.mil

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE Case No. 201300346
v.	)	Tried at Marine Corps Air Station Miramar, California, on January 24 and April 19, 2013 and at Marine Corps Recruit Depot San Diego, California on March 20 and April 30 – May 3, 2013, by a general court-martial convened by Commanding General, 12th Marine Corps District, Western Recruiting Region, Marine Corps Recruit Depot San Diego.
Nicholas A. HOWARD, Gunnery Sergeant (E-7) U.S. Marine Corps Appellant	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

IAN D. MACLEAN
LT, JAGC, U.S. Navy
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7389, fax (202) 685-7687

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Errors Assigned

I.

WHETHER THE MILITARY JUDGE ERRED IN ADMITTING, OVER DEFENSE OBJECTION, A HEARSAY STATEMENT REGARDING PENETRATION UNDER M.R.E. 803(4), WHEN THE STATEMENT WAS MADE TO A FORENSIC NURSE DURING THE COURSE OF A SEXUAL ASSAULT EXAMINATION?

II.

WHETHER THE CONVICTIONS UNDER ARTICLES 120 AND 134, UCMJ, ARE FACTUALLY AND LEGALLY INSUFFICIENT?

III.

WHETHER THE MILITARY JUDGE ERRED WHEN HE FAILED TO GIVE THE REQUESTED MISTAKE OF FACT AS TO CONSENT INSTRUCTION?

Statement of Statutory Jurisdiction

Appellant's approved sentence includes a dishonorable discharge. Accordingly, this Court has jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012).

Statement of the Case

A panel of members with enlisted representation, sitting as a general court-martial, convicted Appellant, contrary to his pleas, of one specification of aggravated sexual assault by causing bodily harm and one specification of adultery, in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920 and 934 (2012). The Members sentenced Appellant to reduction to pay

grade E-1, total forfeiture of all pay and allowances, and a dishonorable discharge. The Convening Authority approved the sentence as adjudged, and except for the dishonorable discharge, ordered the sentence executed.

Statement of Facts

A. Appellant's sexual assault of KK.

Staff Sergeant (SSgt) Cooley worked for Appellant at the recruiting station in Anchorage, Alaska. (R. 344-45, 426.) KK met them both through her work in a coffee shop and restaurant near the recruiting station. (R. 344, 427.) KK began a romantic relationship with SSgt Cooley. (R. 344-45.) Over the course of that dating relationship KK was at Appellant's home on two or three occasions. (R. 348-49, 432.) Appellant was married. (Pros Ex. 1; Pros. Ex. 9 at 20.) KK knew Appellant's wife and his two children. (R. 345, 430.)

On December 30, 2011, KK and SSgt Cooley went to dinner with Appellant and his wife to celebrate her birthday. (R. 349-50, 430-31.) After dinner and drinks they returned to Appellant's residence where more alcohol was consumed. (R. 353-54, 431.) After consuming alcohol at Appellant's residence, SSgt Cooley and KK made a plan to spend the night there rather than drive back to either KK's or SSgt Cooley's residence. (R. 358, 432.) The plan was to sleep in the camper parked next to Appellant's residence. (R. 358; Prosecution Ex. 2 at 1.) KK

borrowed a swimming suit from Appellant's wife and went to the hot tub off the back deck with SSgt Cooley and Appellant. (R. 356, 435.) KK soon began to doze off in the hot tub. (R. 358, 435.)

SSgt Cooley went back into the house to change out of the borrowed swimming suit. (R. 436.) Appellant carried KK over his shoulder from the hot tub to the trailer. (R. 358; Prosecution Ex. 2 at 5.) Once inside the trailer KK laid down on the bed in the fetal position. (R. 360, 394, 398; Pros. Ex. 2 at 4.) KK was laying on top of the covers facing away from the living area still wearing only the bikini she was wearing in the hot tub. (R. 360-61, 437.) SSgt Cooley entered the trailer experiencing no problems or difficulties with the door to the trailer. (R. 437.)

The camper was heated by an indoor/outdoor propane heater. (R. 438.) The smoke detector in the trailer was missing batteries. (R. 438.) SSgt Cooley left the trailer to obtain batteries for the smoke detector from the residence. (R. 395, 438.) When he left the trailer Appellant climbed onto the bed behind KK and pulled her bikini bottoms down. (R. 363, 369, 415.) Appellant wrapped his arm around her spooning her as she lay on her side facing away from him. (R. 363.) KK reached back with her left hand and pushed against his legs trying to roll away from him. (R. 363.) KK felt unable to escape the

situation. (R. 414.) When unable to escape KK tried unsuccessfully to remove her tampon using her right hand because she “didn’t want it to get stuck inside me.” (R. 363, 397, 412-13, 415-16.) KK never gave Appellant any indication that she wanted to have sexual intercourse with him. (R. 369, 371, 414.)

After approximately five minutes, SSgt Cooley returned to the trailer with batteries. (R. 363, 438.) When SSgt Cooley returned he was unable to get the camper door open. (R. 365, 438.) SSgt Cooley had to knock and Appellant got up and let him into the camper. (R. 364, 438.) KK was upset and crying. (R. 364, 369, 439.) Appellant left the camper and returned to the house. (R. 364.)

SSgt Cooley was unable to elicit any information from KK about what happened in the camper while he was gone looking for batteries for the smoke detector. (R. 440.) SSgt Cooley decided to take KK home rather than stay in the camper for the night. (R. 440.) After going back into the house to change, SSgt Cooley drove KK from Appellant’s house back to his house with her crying the whole way and not answering his questions about what happened. (R. 366, 443.) SSgt Cooley had never seen KK as upset as she was that night, not even when she previously had a miscarriage. (R. 443, 449, 460.)

Upon reaching the house KK immediately went to the bathroom and tried unsuccessfully to locate the string to her tampon. (R.

366.) KK asked for his assistance and SSgt Cooley was unable to locate the string either. (R. 367, 445.) In the bathroom KK informed SSgt Cooley that Appellant forced himself upon her. (R. 444, 454.) Removal of the impacted tampon was KK's "first" priority. (R. 367.) KK contacted her mother, a registered nurse, for advice about what to do about the impacted tampon. (R. 367.) KK's mother then came to SSgt Cooley's residence along with KK's sister. (R. 367.) KK's mother drove SSgt Cooley and KK to the emergency department at Alaska Regional. (R. 367.)

B. KK's statements during the sexual assault examination and her medical treatment.

After reporting the rape at Alaska Regional Hospital local law enforcement transferred her to a second facility, Providence Alaska Medical Center (Providence). (R. 566, 570, 564.) In Anchorage, Alaska, regardless of whether law enforcement is involved or not, all patients reporting sexual assault are transferred to Providence. (R. 567-68.) Providence contains a small clinic, set aside within the larger hospital that is used to treat persons that have reported sexual assaults. (R. 559.) Many medical treatments can be handled entirely within the clinic. (R. 560.) When a patient has a treatment need beyond the capability in the clinic they are brought to the emergency department. (R. 561.)

Ms. Henry was the nurse on call when KK was brought to Providence. (R. 559.) Ms. Henry is a forensic nurse and a nurse practitioner. (R. 557.) Forensic nurses specialize in providing medical care for patients who are affected by crime. (R. 558.) Nurse practitioner is an advanced credential of a registered nurse that requires training and education beyond that of a registered nurse. (R. 568.) A nurse practitioner is authorized to place sutures (stitches), write prescriptions, order laboratory work, and order x-rays. (R. 568.)

An encounter with a patient in the Providence clinic is considered "an episode of care by a medical provider." (R. 570.) The primary purpose of the appointment with KK was to perform a medical examination and provide needed treatment. (R. 566.) Any evidence collection was a secondary purpose. (R. 566.)

At the outset of their appointment, Nurse Practitioner Henry introduced herself and informed KK that her job is to make sure she is medically okay. (R. 561.) Nurse Practitioner Henry also explained that while she can collect samples for evidence in an investigation, her priority was taking care of KK's medical needs. (R. 561.)

Nurse Practitioner Henry completed a seven part process with KK. (R. 559.) The first step was a screening examination to ensure there were no injuries requiring emergent care such as an actively bleeding wound or a bone fracture. (R. 559.) After

determining she was medically stable, Nurse Practitioner Henry moved on to taking a medical history. (R. 559.) Following the medical history came consent forms, then a medical forensic history, then a medical forensic examination, then treatment, and finally discharge. (R. 559.) If a patient does not consent to evidence collection they still do the entire medical work up. (R. 566.)

All of the forms used in this specialized clinic during this episode of care are part of the patient's medical record. (R. 565.) As stated by Nurse Practitioner Henry, the primary purpose is medical evaluation and treatment, not evidence collection. (R. 566.) The Military Judge found as fact that there was a medical purpose. (R. 575.)

During the second step of the process, taking a medical history, Nurse Practitioner Henry's role is that of a medical provider, acting as a nurse. (R. 560.) The medical history covers the current event that brought the patient to the hospital. (R. 560.) While taking a medical history, Nurse Practitioner Henry asks a variety of questions to determine what happened, to evaluate any injuries the patient may have sustained, and determine any treatment the patient might need. (R. 560.) When presenting as a victim of a sexual assault the medical providers need to know details of how it happened to

know what tests may need to be done and what course of treatment to offer. (R. 560.)

Here, during the medical history component, KK reported that she had an impacted tampon and that it was caused when Appellant "put his penis in her vagina." (R. 562, 584.) KK was also concerned about sexually transmitted diseases. (R. 585.) Following completion of the medical history Nurse Practitioner Henry performed a full medical examination. (R. 585-86.) During the medical examination Nurse Practitioner Henry observed the impacted tampon turned horizontal. (R. 586-87; Pros. Ex. 3.) Nurse Practitioner Henry removed the impacted tampon in the Providence clinic. (R. 368, 405, 588-89.) During the process of removing the tampon it did not touch KK's external genitalia. (R. 589.) Nurse Practitioner Henry indicated the only impacted tampons turned horizontal that she has seen have occurred when sexual intercourse occurred while the female had a tampon in. (R. 590.)

Following removal of the tampon, Nurse Practitioner Henry collected a series of swabs from KK. (R. 591.) She swabbed near the cervix and the cervix itself for both forensic purposes and to test for sexually transmitted diseases. (R. 591.) Nurse Practitioner Henry collected swabs from the vaginal walls for forensic purposes and to test for different sexually transmitted

diseases. (R. 591.) Prior to discharge, KK was treated with antibiotics, emergency contraception, and ibuprofen. (R. 593.)

C. Appellant's DNA was found on the vaginal swabs taken from KK.

Some of the swabs taken during KK's sexual assault examination were sent to the United States Army Criminal Investigation Laboratory (USACIL) for testing including DNA testing. (R. 492.) Vaginal swabs, cervical swabs, labia major swabs, labia minora swabs, perineum swabs, the tampon itself, and her underwear were all sent to USACIL. (R. 499.) Semen was found on all of the swabs taken from CK as well as the tampon and the underwear. (R. 499, 525; Pros. Ex. 5.) The semen on the vaginal swabs from the vaginal cavity was tested for DNA. (R. 499.) The DNA profile from the semen matched Appellant. (R. 499-500, 504; Pros. Ex. 5.)

D. Trial Defense Counsel's objections to statements made by KK to Nurse Practitioner Henry at trial.

Trial Defense Counsel objected to a question asking Nurse Practitioner Henry to explain KK's statements during her medical history questioning. (R. 562.) Trial Counsel responded that the statements qualified for the hearsay exception for medical diagnosis or treatment. (R. 562.) Neither the Trial Defense Counsel nor the Trial Counsel cited any case law or other source of authority in raising the objection or in responding to it.

During an Article 39(a) session, Trial Defense Counsel took the witness on an extended voir dire. (R. 564-74.) The Military Judge found as fact, that KK did "have a medical concern, an impacted tampon." (R. 580.) The Military Judge also found there was medical purpose in the visit to the Providence clinic and recognized that a statement having a dual purpose does not negate its ability to qualify for the medical diagnosis or treatment hearsay exception. (R. 575, 607.)

After hearing arguments from counsel, the Military Judge sustained the objection in part and overruled the objection in part. (R. 583-84.) The Military Judge did not cite any case law he was relying on reaching his ruling. Trial Counsel then asked the Nurse Practitioner to state what physical acts KK described that helped her in "further assessments in treatment?" (R. 584.) Nurse Practitioner Henry responded "[s]he reported that the suspect put his penis in her vagina." (R. 584.) Trial Defense Counsel again objected on hearsay grounds and was overruled. (R. 585.)

E. <u>The Military Judge's denial of a mistake of fact as to consent instruction due to lack of evidence adduced at trial to support giving such an instruction</u>.

Trial Defense Counsel sought an instruction on mistake of fact as to consent. (R. 691, 695.) The discussion between the parties regarding instructions occurred in part in a Rule for Courts-Martial (R.C.M.) 802 conference. (R. 691.) The Military

Judge summarized the R.C.M. 802 conference, including Civilian Defense Counsel's argument as to why there was some evidence to support the instruction. (R. 691, 695.) The Military Judge also provided Civilian Defense Counsel an opportunity to put his full basis for seeking the instruction on the Record. (R. 695.)

Civilian Defense Counsel's basis for seeking the mistake of fact as to consent was: (1) KK asking SSgt Cooley if she had been flirting with Appellant over the course of the evening during the drive home from Appellant's residence after the assault; (2) characterizing KK's testimony as her not recalling if she had been flirting with Appellant; (3) that Appellant did not use physical force to overpower KK to accomplish the sexual assault; (4) KK's purported "lack of action" as Appellant pulled down her bikini bottoms; and (5) KK not saying the word "no" during the assault itself. (R. 695.) After continued discussion of the issue Civilian Defense Counsel added a sixth basis, the attempted removal of the tampon. (R. 697.)

The Military Judge cited the case of *United States v. DiPaola*, 67 M.J. 98 (C.A.A.F. 2008), and denied the request for a mistake of fact instruction. (R. 691, 699.) The Military Judge stated the some evidence standard and that doubt on the issue of the instruction should be resolved in favor of Appellant on the Record. (R. 699.) The Military

Judge did find the instruction for the affirmative defense of consent applicable. (R. 700.)

Argument

I.

THE VICTIM'S STATEMENT TO THE NURSE PRACTITIONER MADE DURING THE SEXUAL ASSAULT EXAMINATION ABOUT THE SOURCE AND CAUSE OF HER IMPACTED TAMPON WAS ADMISSIBLE BECAUSE IT WAS MADE FOR THE PURPOSE OF MEDICAL DAIGNOSIS AND WITH THE EXPECTATION OF RECEIVING MEDICAL TREATMENT.

A. The applicable standard of review for evidentiary rulings requires significantly more than merely disagreeing with the Military Judge's ultimate ruling.

Evidentiary rulings are reviewed for an abuse of discretion. *E.g.*, *United States v. Rodriguez-Rivera*, 63 M.J. 372, 381 (C.A.A.F. 2006). "A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion." *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010) (internal quotations omitted). An ultimate conclusion that is "arbitrary, fanciful, clearly unreasonable or clearly erroneous" is an abuse of discretion.

E.g., *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987) (internal quotations omitted).

B. KK's statement to the nurse practitioner examining her about the source of her medical concern and its cause was properly admitted by the Military Judge.

In conducting review of evidentiary rulings the evidence is considered in the light most favorable to the prevailing party. *E.g.*, *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996). Hearsay statements are generally inadmissible. Mil. R. Evid. 802. An exception to the general prohibition on hearsay exists for statements "made for the purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Mil. R. Evid. 803(4). To qualify for the exception the statement must satisfy a two part test: "[f]irst the statements must be made for the purposes of medical diagnosis or treatment; and second, the patient must make the statement with some expectation of receiving medical benefit for the medical diagnosis or treatment that is being sought." *United States v. Cucuzzella*, 66 M.J. 57, 59 (C.A.A.F. 2008) (internal quotations omitted).

Here the statement in question, "[s]he reported that the suspect in question put his penis in her vagina" was a statement

made for purposes of medical diagnosis and treatment. (R. 584.) There are two components to the challenged statement, first that Appellant was the perpetrator. Second, that his penis penetrated her vagina. Both components of the statement fall squarely within the express language of the rule. The victim, KK, was describing the "inception or general character of the cause or external source" of her medical issue. Mil. R. Evid. 803(4). Appellant's penetration of her vagina with his penis is the external source, or the general character of the cause of her medical issue, the impacted tampon. Mil. R. Evid. 803(4).

The statement in question also satisfies both prerequisite prongs for the medical diagnosis and treatment exception. *See United States v. Edens*, 31 M.J. 267, 269 (C.M.A. 1990) (establishing two prong test for medical diagnosis or treatment exception to hearsay). KK made the statement to explain her current medical condition and she did so for the purpose of receiving medical treatment, including removal of the impacted tampon.

1. <u>KK's statements to Nurse Practitioner Henry during the medical history component of the examination were made for the purpose of medical diagnosis or treatment</u>.

A Military Judge's finding that a statement was made with an expectation of receiving medical treatment is a finding of fact that shall not be overturned unless clearly erroneous.

United States v. Ureta, 44 M.J. 290, 297 (C.A.A.F. 1996). Findings of fact are clearly erroneous when they are entirely unsupported by the record, *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004), or where despite support in the record "the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985); *United States v. Martin*, 56 M.J. 97, 106 (C.A.A.F. 2001).

Here, the Military Judge found both that KK had a legitimate medical concern in the impacted tampon and that there was a medical purpose for her appointment at the Providence clinic with Nurse Practitioner Henry. (R. 575, 580.) Those factual findings are not clearly erroneous as they are amply supported in the Record.

KK reported the rape and the impacted tampon at Alaska Regional Hospital and was transferred to Providence without receiving medical treatment. (R. 546, 566, 570.) KK's first actual medical appointment occurred at the Providence clinic for victims of sexual assault with Nurse Practitioner Henry. (R. 559.) At the outset of the appointment, Nurse Practitioner Henry informed KK that her job is to make sure she is medically alright. (R. 561.) Therefore, KK was aware this appointment was for the purpose of medical treatment. *See*, *e.g.*, *United States v. Cox*, 45 M.J. 153, 157 (C.A.A.F. 1996) (noting

prerequisites for statement to qualify as for purposes of medical diagnosis or treatment may be established by caregiver's testimony).

The first step in this episode of care was a screening examination to ensure KK had no injuries requiring immediate emergent care such as a fracture or an actively bleeding wound. (R. 559.) Following the screening examination the nurse practitioner took a medical history from KK. (R. 559.) Nurse Practitioner Henry considers herself as acting as a medical care provider during the medical history portion of the episode of care. (R. 560.) Medical history questioning covers the current event that brought the patient to the hospital. (R. 560.) Accordingly, Nurse Practitioner Henry asked KK what happened to cause her to come in for treatment. (R. 560.)

In *Cucuzzella*, statements made to a Family Advocacy Nurse were found to satisfy the medical diagnosis and treatment exception. *Cucuzzella*, 66 M.J. at 60. There a married couple was referred to a Family Advocacy Nurse out of concerns about neglect of a newborn. *Id.* at 58. Sometime after that initial referral the wife came back to see the Family Advocacy Nurse alone. *Id*. The wife began by reporting she was writing bad checks and then eventually reported that her husband had been physically and sexually abusing her for years. *Id*. Despite the Family Advocacy Nurse's inability to provide any actual

treatment as she was not a licensed counselor, the statements, including identifying the abuser were found within the hearsay exception for medical diagnosis and treatment. *Id*. at 60.

Here, KK's statements are even more clearly for the purposes of medical diagnosis and treatment than seen in *Cucuzzella*. *Cucuzzella*, 66 M.J. at 58. In *Cucuzzella*, the medical care provider was not capable of diagnosing or of providing actual treatment, she was only capable of providing a referral. *Id*. at 59. Here, Nurse Practitioner Henry, to which KK made the statements, was not only capable of but did provide specific treatments as a direct result of the statements made.

Nurse Practitioner Henry needed to know the details of what occurred because the tests required and treatment rendered could differ based on how the sexual assault occurred. (R. 560.) Here, KK reported that she had an impacted tampon and that it was caused when Appellant "put his penis in her vagina." (R. 562, 584.) Accordingly, as a direct result of that statement Nurse Practitioner Henry knew that she had to locate and extract the impacted tampon, that she needed to test for sexually transmitted diseases, that she needed to offer preventative measures against sexually transmitted diseases and emergency contraceptive options due to the penile penetration. (R. 586-89; Pros. Ex. 3.) Nurse Practitioner Henry also provided antibiotics as a preventative measure against some sexually

transmitted diseases and provided ibuprofen for general discomfort. (R. 591, 593.)

2. KK made the statements to Nurse Practitioner Henry with the expectation of receiving medical treatment to remove the impacted tampon.

"The critical question is whether she had some expectation of treatment when she spoke to the caregivers." *United States v. Rodriguez-Rivera*, 63 M.J. 372, 381 (C.A.A.F. 2006) (citing *United States v. Haner*, 49 M.J. 72, 76 (C.A.A.F. 1998)). "The key factor in determining whether a particular statement is embraced by the medical-treatment exception is the state of mind or motive of the patient in giving the information to the physician and the expectation or perception of the patient that if he or she gives truthful information, it will help him or her to be healed." *United States v. Donaldson*, 58 M.J. 477, 485 (C.A.A.F. 2003).

Here, as the Military Judge found, the Record demonstrates the impacted tampon was a significant concern to KK. (R. 580, 584.) KK testified that she was concerned about it as the sexual assault was occurring. (R. 364.) When she knew she could not escape the sexually assault, she tried to remove the tampon because she "didn't want it to get stuck inside me." (R. 364, 397, 412-13, 415-16.) The first thing she did upon reaching home after the sexual assault was try to locate the impacted tampon. (R. 366.) She then solicited assistance from

SSgt Cooley who could not locate the tampon either. (R. 367, 445.) KK then contacted her mother, a registered nurse, for advice and assistance about the impacted tampon. (R. 367.) KK then went to the emergency department and reported two things, that she was raped and that she had an impacted tampon. (R. 367.) Based on her consistent concern about the impacted tampon and that she immediately reported it to the first medical care provider she came in contact with demonstrate she was seeking medical treatment to remove the tampon.

The initial hospital referred her to a second facility. (R. 564, 566, 570.) Her first substantive meeting with a medical care provider was with Nurse Practitioner Henry. She again reported her medical condition to that care provider. (R. 652, 584.) As a result, KK obtained what she was seeking, treatment to remove the impacted tampon.

3. Identifying Appellant as the source of her medical concern did not take the statement outside the scope of the hearsay exception for diagnosis and treatment.

Identifying the cause or source of injuries, including who caused them, can be part of a statement for the purpose of medical diagnosis or treatment. *Haner*, 49 M.J. at 74-75; *see also United States v. Brimeyer*, No. 201100141, 2012 CCA LEXIS 235, *37-38 (N-M. Ct. Crim. App. Jun. 28, 2102) (noting identity of a perpetrator can fall within the medical diagnosis and

treatment exception); *see also United States v. Hollis*, 54 M.J. 809, 812 (N-M. Ct. Crim. App. 2000) (citing *United States v. Deland*, 22 M.J. 70, 74 (C.M.A. 1986)(same)). In *Haner*, the victim was both physically and sexually assaulted for hours. *Haner*, 49 M.J. at 74-75. After escaping from her tormentor she was referred to a hospital by a District Attorney to have her injuries documented. *Id*. at 76. During her medical examination which revealed significant bruising she told the doctor the source of her injuries and how they occurred. *Id*. at 77. Among other things she explained that her husband duct taped her hands and ankles and repeatedly struck her with a belt. *Id*. at 77. Those statements, including the cause or source of the injuries, were within the hearsay exception for medical diagnosis and treatment. *Id*. at 77.

Here, as in *Haner*, KK explained the cause or source of the injury. In *Haner*, the source of the injury was her husband tying her up and repeatedly striking her with a belt. *Haner*, 49 M.J. at 77. Here, the injury was an impacted tampon, and KK explained that it occurred when Appellant drove it inside of her with his penis. (R. 662, 584.) Just as in *Haner* where explaining the source of the injury, both the who and the how, was within the scope of the hearsay exception, here explaining the source of the injury was within the scope of the hearsay exception.

C. Neither being referred to a medical facility by law enforcement nor that a statement made may also be usable for a dual purpose of law enforcement does not negate its ability to qualify for a hearsay exception.

Appellant's argument that Nurse Practitioner Henry's primary purpose was law enforcement which prevents statements to her from qualifying for the hearsay exception for medical diagnosis is both factually inaccurate and legally incorrect. (Appellant's Br. at 16, 17.) Nurse Practitioner Henry testified repeatedly that her primary purpose was as a health care provider and that any evidence collection was secondary. (R. 560, 561, 566, 570.) The Military Judge made no finding to the contrary. *See Reister*, 44 M.J. at 413 (noting evidence considered in light most favorable to prevailing party below). Nurse Practitioner Henry testified that even if KK had not consented to any forensic evidence collection she still would have completed all the other portions, including the medical history, the examination, and provided the treatment. (R. 566.) Further, the Military Judge found there was a legitimate medical purpose for KK's appointment at the Providence clinic. (R. 575.) Being referred to hospital by law enforcement does not negate the ability of statements to qualify for hearsay exception for medical diagnosis or treatment. *Haner*, 49 M.J. at 76. Similarly, that a statement has a dual investigative purpose does not negate its ability to qualify for hearsay exception for

medical diagnosis or treatment. *United States v. Hollis*, 54 M.J. at 809, 814 (N-M. Ct. Crim. App. 2000), *aff'd*, 57 M.J. 74 (C.A.A.F. 2002), *cert. denied*, 2002 U.S. LEXIS 8746 (U.S. Dec. 2, 2002); *see also Haner*, 49 M.J. at 77 (finding statements still qualify for hearsay exception where doctor's testimony explained that he had dual purpose of documenting injuries when referred by law enforcement as well as treating). Here, the Military Judge correctly noted that dual purpose does not negate applicability of hearsay exception. (R. 607.) Appellant's arguments lack merit.

D. The Military Judge did not abuse his discretion by not citing *United States v. Edens* in explaining the ruling.

Appellant's argument that the Military Judge abused his discretion by not citing *United States v. Edens*, 31 M.J. 267 (C.M.A. 1990) in reaching his ruling was an abuse of discretion is incorrect. (Appellant's Br. at 19-20.) The *Edens* test consists of two prongs, that the statement was explaining a current medical condition and that the statement was made for the purpose of receiving treatment for that medical condition. *Edens*, 31 M.J. at 269. Here, while the Military Judge did not articulate he was applying *Edens*, he did make factual findings relevant to the two prongs of the *Edens* test. (R. 575, 580, 607.) The Military Judge found KK was explaining a legitimate medical concern to her health care provider. (R. 580.) The

Military Judge also found KK's statement was for the purpose of receiving treatment for the medical condition. (R. 575, 607.) As the Military Judge's factual findings were pertinent to the two prongs of the applicable *Edens* test, it is clear he was applying that test in his analysis of the issue. *See United States v. Mott*, 72 M.J. 319, 329 (C.A.A.F. 2013) (noting factual findings failing to address relevant considerations constitutes abuse of discretion).

E. Assuming arguendo it was error to admit KK's statement to her medical provider, no prejudice resulted because it was completely inconsequential in light of the DNA evidence.

Erroneous admission of evidence only warrants relief where it resulted in material prejudice to a substantial right. 10 U.S.C. § 859; *United States v. Goodin*, 67 M.J. 158, 160 (C.A.A.F. 2009). This Court evaluates "prejudice from an erroneous evidentiary ruling by weighing (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999) (citation omitted). Here, the overwhelming strength of the evidence of Appellant's guilt establishes that there was no prejudice.

1. Strength of the case against Appellant.

The strength of the case against Appellant was strong. KK reported Appellant raped her to SSgt Cooley as soon as he got her safely home. (R. 444, 454.) Semen was found on all of the swabs collected from KK, including from her labia majora, her labia minora, inside of her vagina, near her cervix, from her impacted tampon, and from her underwear. (R. 499, 525.) Appellant's DNA was found in semen inside KK's vagina. (R. 499-500, 504; Pros. Ex. 5.) Further, large portions of KK's testimony about the events preceding the rape and about the aftermath of the rape were corroborated by other witnesses.

SSgt Cooley corroborated all of the victim's testimony regarding Appellant's opportunity to commit the sexual assault. SSgt Cooley corroborated KK's testimony that Appellant was in the camper while KK was laying on the bed. (R. 360-61, 437.) SSgt Cooley then corroborated that he left Appellant alone in camper with KK when he went to locate batteries. (R. 395, 438.) SSgt Cooley corroborated that when he returned to the camper, the door was locked and Appellant had to unlock the door and let him into the camper. (R. 363, 365, 438.) SSgt Cooley also corroborated that KK was crying when he got back into the camper. (R. 364, 369, 439.)

SSgt Cooley corroborated the events after the sexual assault as well. SSgt Cooley corroborated KK was so upset that

he decided to drive her home despite their prior plans to spend the night due to their alcohol consumption. (R. 440, 449, 460.) SSgt Cooley corroborated that KK sought his assistance in finding the string to the impacted tampon. (R. 367, 445.)

When KK first presented herself to the hospital she reported she was raped and that her tampon was impacted. (R. 367.) The evidence collected at Providence corroborated KK's report. All of the swabs collected at Providence by Nurse Practitioner Henry were found to contain semen, corroborating KK's allegation that sexual intercourse occurred. Further, the impacted tampon had turned horizontal. (R. 586-87; Pros. Ex. 3.) Nurse Practitioner Henry testified that the only impacted tampons turned horizontal she has seen in her nineteen year career were as a result of sexual intercourse while the female had the tampon in. (R. 590.)

2. Strength of the Defense's case.

Appellant's case was weak. Appellant acknowledged some sexual contact occurred and put forward alternate theories that any touching that occurred was consensual and that actual intercourse never occurred. (R. 299, 485, 730, 732, 734.) However, Appellant offered no actual evidence of any of his theories, only conjecture and argument from counsel. The victim was adamant that there was no consensual contact. (R. 369, 371, 414.) Further, the evidence demonstrated sexual intercourse did

occur. The theory that Appellant never actually penetrated her vulva lacked merit as KK's tampon was impacted up against her cervix, turned sideways, consistent with sexual intercourse, with semen found on it, and Appellant's DNA was found inside her vagina. *See United States v. Hall*, 66 M.J. 53, 55-56 (C.A.A.F. 2008) (finding defense case that consisted of relatively unsupported alternative theories weak).

3. The materiality of the evidence in question.

Admittedly, the evidence in question did pertain to the penetration element of the charged offense. In the statement to her medical care provider, KK did both identify Appellant and indicate that he inserted his penis into her vagina. (R. 562, 584.) However in light of the other evidence the statement was insignificant as it was cumulative of other evidence establishing penetration. Trial Defense Counsel found this evidence so insignificant that he never mentioned it in his closing argument spanning sixteen pages of transcript instead focusing on challenging the forensic evidence. (R. 728-44.) Further demonstrating the relative insignificance of this statement as evidence, it was mentioned once in passing in the prosecution's closing argument spanning eleven pages of transcript and never mentioned in the rebuttal argument. (R. 720, 744-47); *see United States v. Durbin*, 68 M.J. 271, 276 (C.A.A.F. 2010) (finding brief references in closing and

rebuttal arguments demonstrate limited materiality of the evidence in question).

4. The quality of the evidence in question.

The statement made to Nurse Practitioner Henry identifying Appellant was qualitatively insignificant in light of the other evidence. *See Hall*, 66 M.J. at 56 (noting challenged evidence not qualitatively significant where duplicative of other stronger evidence). First, it was cumulative of SSgt Cooley's testimony that KK informed him Appellant had forced himself upon her. (R. 444, 454.) Second, the testimony of both KK, and SSgt Cooley established Appellant's opportunity to commit the offense during the period he was alone with KK in the camper. (R. 395, 438.)

KK reported to SSgt Cooley that Appellant raped her as soon as she was safely at her residence. (R. 444, 454.) The impacted tampon was found inside her near her cervix. (R. 586-87; Pros. Ex. 3.) The tampon was found to have semen on it. (R. 525.) And the most significant evidence of all, the semen found inside KK's vagina contained Appellant's DNA. (R. 499-500; Pros. Ex. 5.) The significance of the DNA evidence overwhelms the statement made that Appellant inserted his penis in her vagina and renders the statement qualitatively insignificant.

As all four factors of the prejudice analysis favor the prosecution, Appellant suffered no material prejudice to a substantial right.

II.

APPELLANT'S CONVICTIONS WERE LEGALLY AND FACTUALLY SUFFICIENT BECAUSE THE TESTIMONY ESTABLISHED ALL ELEMENTS OF THE OFFENSES AND WAS CORROBORATED BY THE FORENSIC EVIDENCE INCLUDING APPELLANT'S DNA.

A. Standard of Review.

This Court reviews claims of legal and factual sufficiency de novo. 10 U.S.C. § 866(c); *United States v. Beatty*, 64 M.J. 456, 459 (C.A.A.F. 2007).

B. Appellant's convictions are legally sufficient because the victim's testimony was corroborated by both SSgt Cooley and her medical care provider as well as compelling forensic evidence in that semen found in KK's vagina matched Appellant's DNA profile.

The test for legal sufficiency is whether, considering the evidence admitted at trial in a light most favorable to the prosecution, a reasonable fact-finder could have found all the elements beyond a reasonable doubt. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The Court's assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993). In resolving questions of legal sufficiency, the Court is "bound to draw every reasonable inference from the evidence of record in

favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001).

Testing for factual sufficiency, this Court asks whether, after weighing the evidence in the record of trial, it is independently convinced of Appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). In testing for factual sufficiency, this Court is required to "recogniz[e] that the trial court saw and heard the witnesses." *Id*. This is not a *pro forma* legal requirement. Rather, it takes into account the legal rule that the trier of fact is best situated to assess a witness's credibility while testifying. *See, e.g., United States v. Madey*, 14 M.J. 651, 653 (A.C.M.R. 1982), *rev. denied*, 15 M.J. 183 (C.M.A. 1983); *United States v. Ferguson*, 35 F.3d 327, 333 (7th Cir. 1994), *cert. denied*, 514 U.S. 1100 (1995) (trial court's evaluation of witness credibility "will not be disturbed unless it is completely without foundation."). It also takes into account that, where the court members are properly instructed to consider a witness' credibility, this Court should presume that the members followed the Military Judge's instructions to do so. *See United States v. Collier*, 67 M.J. 347 (C.A.A.F. 2009); (R. 711-12.)

Appellant's argument that neither the aggravated sexual assault nor the adultery convictions are legally sufficient is fatally flawed as it essentially reduces to challenging the

credibility of the victim, alleging she was impeached twice during cross examination. (Appellant's Br. at 26-27.) Even assuming *arguendo* KK's credibility was damaged on cross examination, that is completely irrelevant to legal sufficiency, where evidence is considered in the light most favorable to the prosecution. (Appellant's Br. at 26-27); *e.g.*, *Reed*, 54 M.J. at 41.

1. The aggravated sexual assault conviction was legally and factually sufficient.

The elements here of aggravated sexual assault by causing bodily harm are: (1) causing another person to engage in a sexual act; (2) by causing bodily harm to another person. Manual for Courts-Martial, United States (2012 ed.), App. 28, at A28-3, ¶ 45(b)(3)(b). Here, those elements were alleged as (1) sexual intercourse with KK; (2) by placing his arm across her upper body. (R. 708; Charge sheet.) These elements were both satisfied from testimony alone without even consideration of the forensic evidence.

KK testified that Appellant got on the bed behind her in the camper. (R. 363, 364.) KK testified that she felt her bikini bottoms being pulled down. (R. 369.) KK testified that Appellant's arm was wrapped around her and that she could not get away from him when she pushed on his legs. (R. 363.) KK testified that she was unable to find her tampon to remove it

and that it was impacted, or pushed completely inside of her. (R. 363, 397, 412-13, 415-16.) The door to the camper was locked when SSgt Cooley returned with the batteries.

SSgt Cooley testified that KK informed him that Appellant had forced himself upon her. (R. 444, 454.) KK testified that she informed the intake nurse at Alaska Regional, the first hospital she went to that she was raped. (R. 564, 566, 570.) Nurse Practitioner Henry, from the medical facility KK was transferred to, testified that KK informed her that Appellant inserted his penis into her vagina. (R. 562, 584.) Even without any of the forensic evidence, including the DNA evidence of Appellant's semen inside KK's vagina, this conviction is legally sufficient. (R. 499-500.) When the forensic evidence is considered this Court should be convinced of the factual sufficiency of the conviction as well. Nurse Practitioner Henry has only seen impacted tampons turned horizontal, as seen here, when it was caused by sexual intercourse. Semen was found on all of the swabs, including on the tampon itself. And Appellant's DNA was found in the semen insider KK's vagina.

2. <u>The adultery conviction was legally and factually sufficient</u>.

The elements of adultery here are: (1) that the accused wrongfully had sexual intercourse with KK; (2) that the accused was married to another person at the time; and (3) that the

conduct was prejudicial to good order and discipline. (R. 706); Manual for Courts-Martial, United States (2012 ed.), pt. IV, ¶ 62(b). That sexual intercourse occurred was established through the testimony of KK, SSgt Cooley, and Nurse Practitioner Henry, as discussed *supra* at 24-25 and 29-30, without even having to consider the forensic evidence which provides further support for the fact that sexual intercourse occurred. That Appellant was married to another was established through the testimony of KK, SSgt Cooley, and Appellant's own service record documents. (R. 345, 430; Pros Ex. 1; Pros. Ex. 9 at 20.) That Appellant's conduct was prejudicial to good order and discipline was established through SSgt Cooley's testimony. (R. 449-51.) Appellant's conduct made SSgt Cooley reconsider his commitment to the Marine Corps. (R. 450.) As a result of Appellant's conduct, SSgt Cooley now questions the legitimacy of mentor-mentee relationships, that a mentor may have very different interests in mind than the best interests of the mentee. (R. 451.) SSgt Cooley has lost trust in the Marine Corps as a result of Appellant's actions. (R. 450.)

III.

THE MILITARY JUDGE DID NOT ERR IN DECLINING TO GIVE THE MISTAKE OF FACT INSTRUCTION BECAUSE THERE WAS NO EVIDENCE TO WARRANT IT.

A. Standard of Review.

Mistake of fact as to consent does potentially apply to a charge of aggravated sexual contact. Manual for Courts-Martial, United States (2012 ed.), App. 28, at A28-3, ¶ 45(r). Military judges are required to instruct members on affirmative defenses "in issue." *E.g.*, *United States v. Lewis*, 65 M.J. 85 (C.A.A.F. 2007) (*citing* R.C.M. 920(e)(3)). An allegation of error in regard to a failure to give a mandatory instruction is reviewed *de novo*. *United States v. Schumacher*, 70 M.J. 387 (C.A.A.F. 2011) (*citing United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007)).

B. The Military Judge correctly concluded that mistake of fact as to consent was not raised by the evidence.

A matter is considered "in issue" when "some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose." *United States v. Neal*, 68 M.J. 289, 297-98 (C.A.A.F. 2010). "In other words, 'some evidence,' entitling an accused to an instruction, has not been presented until 'there exists evidence sufficient for a reasonable jury to find in [the accused's] favor.'" *Schumacher*, 70 M.J. at 389 (*quoting Mathews v. United States*, 485 U.S. 58,

63 (1988)). The evidence can be raised by the prosecution, the defense, or by the court-martial itself. *United States v. Hibbard*, 58 M.J. 71, 73 (C.A.A.F. 2003). A military judge's duty to instruct is not determined by a defense theory of the case, rather by the actual evidence presented during trial. *United States v. Brown*, 43 M.J. 187, 189 (C.A.A.F. 1995); *but see Hibbard*, 58 M.J. at 73 (noting theory can be considered but is not dispositive).

Mistake of fact as to consent in a general intent offense, such as aggravated sexual assault, requires both a subjective and objective showing. *United States v. Peterson*, 47 M.J. 231, 234-35 (C.A.A.F. 1997). Appellant must have had a subjective belief his victim was consenting and that belief must have been objectively reasonable. Manual for Courts-Martial, United States (2012 ed.), App. 28, at A28-5, ¶ 45(t)(15); *Peterson*, 47 M.J. at 235. To warrant the instruction, there must be some evidence from which members could find both the subjective and the objective components.

In *Peterson*, the instruction was not due because there was no affirmative evidence on the merits that appellant had a subjective belief the victim consented. *Peterson*, 47 M.J. at 235. Here, as in *Peterson*, Appellant points to no evidence of his subjective belief KK consented. Appellant neither took the stand and testified as to his belief nor was there any statement

offered indicating his subjective belief she was consenting. *See United States v. Thomas*, No. 200900367, 2009 CCA LEXIS 463, *9 (N-M. Ct. Crim. App. Dec. 29, 2009) (finding instruction due where there was affirmative evidence that accused believed sexual activity was consensual). Accordingly, exactly as in *Peterson*, no mistake of fact as to consent instruction was due.

Assuming *arguendo* there was some evidence of Appellant's subjective belief KK was consenting there is no evidence upon which members could find that mistaken belief was reasonable. Appellant provides no assistance in explaining where some evidence might be found as he points to no specific evidence in the argument in his brief. (Appellant's Br. at 35.) Instead Appellant simply claims some evidence existed "as noted in the factual summaries above." (Appellant's Br. at 35.) Accordingly the United States will address the seminal case that the Military Judge cited and relied upon as well as each of the six possibilities Civilian Trial Defense Counsel argued provided some evidence. (R. 695, 697.)

The Military Judge properly relied upon *United States v. DiPaola*, 67 M.J. 98 (C.A.A.F. 2008), in concluding the instruction was not warranted here. (R. 691.) The facts of *DiPaola*, where the instruction was warranted, are significantly beyond the facts seen here. In *DiPaola*, the victim willingly participated in some sexual activity. *Dipaola*, 67 M.J. at 101.

Specifically she kissed the appellant, allowed him to remove her shirt, to kiss her bare breasts, and allowed him to rub her "crotch area" with his hand. *Id*. Further, the victim and appellant had a prior sexual relationship that had lasted several months. *Id*. at 99. Under those circumstances some evidence existed upon which reasonable members could have found a "mixed message" and therefore a mistake of fact as to consent. *Id*. at 102. Here, completely unlike *DiPaola*, KK had no prior sexual relationship with Appellant. Also unlike *DiPaola*, KK never kissed Appellant allowed him to kiss her bare breasts, or to rub her crotch area. The facts that provided "some evidence" in *DiPaola* are completely absent here.

None of the things Civilian Trial Defense Counsel mentioned in seeking the instruction actually establish some evidence justifying the instruction. (R. 695, 697.)

1. <u>Neither KK's lack of memory of flirting with Appellant nor her asking SSgt Cooley if she had flirted with Appellant over the course of the evening provide any evidence of mistake of fact as to consent</u>.

Consent requires words or overt acts. Manual for Courts-Martial, United States (2012 ed.), App. 28, at A28-5, ¶ 45(t)(14). Mistake of fact as to consent requires a reasonable belief that certain words or overt acts were consent when in fact they were not. Manual for Courts-Martial, United States (2012 ed.), App. 28, at A28-5, ¶ 45(t)(15). Accordingly, there

must be at least one actual word or overt act for the accused to misinterpret to constitute his mistake of fact as to consent. *See United States v. Rozmus*, No. 200900052, 2009 CCA LEXIS 320, *8 (N-M. Ct. Crim. App. Sep. 10, 2009) (noting mistake of fact instruction not due where there was no overt act on part of victim that could have been misconstrued). Trial Defense Counsel's first two rationales for the instruction point to no actual word or overt act that Appellant misinterpreted, therefore they cannot form the basis of some evidence to justify the instruction.

KK did not recall touching Appellant, flirting with him, or giving him any indication she wanted to engage in sexual intercourse with him. (R. 369, 371, 414.) Trial Defense Counsel argued that lack of memory means it either "could have happened or could not have happened" implying the mere possibility provides some evidence to warrant the instruction. (R. 695.) Trial Defense Counsel's argument fails for two reasons. First, KK never answered affirmatively, therefore the only substance in the Record are the questions from counsel which are not evidence. *Williams v. Illinois*, 132 S.Ct. 2221, 2234 (2012). Secondly, the only actual evidence in the Record is KK denying she did anything to indicate to Appellant she wanted to engage in sexual intercourse. (R. 369, 371, 414.)

After the sexual assault occurred while SSgt Cooley was driving KK to his residence KK asked him if it appeared to him that she was flirting with Appellant over the course of the evening. (R. 372.) This event provides no evidence to support a mistake of fact instruction for three reasons. First, as this question occurred after the sexual assault it could play no role in whether Appellant's purported mistake of fact as to consent was reasonable at the time of the sexual assault. *Hibbard*, 58 M.J. at 75 (explaining applicability of mistake of fact instruction evaluated from the circumstances at the time of the offense). Second, there is no evidence Appellant was aware KK asked this question so it can play no role in evaluating the reasonableness of his purported mistake. If Appellant was not aware of a fact, he can't have relied on that fact in reaching his conclusion that KK was consenting. Finally, the actual evidence adduced indicates KK never flirted with Appellant, which is the underlying implication on which he relies here.

As is often seen in victims of sexual assault, KK was struggling with what happened to her and wondering if she brought it on herself somehow. Her question demonstrates she was exploring whether she did something to bring about the assault. KK provided no testimony about SSgt Cooley's response to her inquiry. (R. 372.) SSgt Cooley never testified to observing any flirtatious behavior on the part of KK towards

Appellant. The only testimony in the Record is KK denying she did anything to indicate to Appellant she wanted to engage in sexual intercourse. (R. 369, 371, 414.) Asking another person who was physically present their opinion of what they saw prior to the sexual assault, which is all the evidence shows happened here, does not provide actual evidence of mistake of fact as to consent.

2. The absence of words or overt acts by KK cannot form the basis of a mistake of fact as to consent.

Civilian Trial Defense Counsel's argument that KK's failure to say the word "no" or purported lack of resistance as Appellant pulled down her bikini bottoms cannot form the basis of a mistake of fact as to consent. (R. 695.) Appellant's claim reduces to the absence of words or acts on the part of KK is evidence of consent, or restated, the basis on which Appellant mistakenly believed KK was consenting. That argument is fatally flawed. Consent is statutorily defined as "words or overt acts indicating a freely given agreement to the sexual conduct at issue[.]" Manual for Courts-Martial, United States (2012 ed.), App. 28, A28-5, ¶ 45(t)(14). Consent is only manifested through an actual word or act on the part of the participant. Mistake of fact as to consent means the word or act was misinterpreted to mean consent when in truth it was not

manifesting consent. Here, Appellant points to no actual word or overt act that he misinterpreted.

3. KK's unsuccessful attempt to remove her tampon does not provide any evidence of mistake of fact as to consent.

KK tried to remove her tampon when it became obvious to her that she could not escape the event. (R. 363, 393.) This fact alone provides no evidence to justify a mistake of fact as to consent instruction for two reasons. First, there is no evidence in the Record that Appellant was aware she tried to remove her tampon. KK lay on her side facing away from Appellant at the time of the assault. (R. 363.) Appellant assaulted her from behind. KK used her left hand to try and push away from him. (R. 363.) Then with her right hand, while laying on her right side, she reached for the string to her tampon. There is no evidence in the Record that Appellant, from his position behind her, was even aware she tried to remove her tampon. Second, as evidenced by the fact that she was unable to find the string, the tampon was already impacted when she tried to remove it. Meaning Appellant had already penetrated her with his penis and pushed it completely inside of her. Accordingly, as her action occurred after the intercourse had begun it cannot be used to provide some evidence that she was consenting to something that had already happened.

Conclusion

WHEREFORE, the United States respectfully requests that this Court affirm the findings and sentence adjudged and approved below.

IAN D. MACLEAN
LT, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7686, fax (202) 685-7687

Certificate of Filing and Service

I certify the foregoing was delivered to the Court and a copy was served upon opposing counsel and electronically filed on May 19, 2014.

IAN D. MACLEAN
LT, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard DC 20374
(202) 685-7686, fax (202) 685-7687

DEPARTMENT OF THE NAVY
GENERAL COURT-MARTIAL
NAVY AND MARINE CORPS TRIAL JUDICIARY
EUROPE, AFRICA, SOUTHWEST ASIA JUDICIAL CIRCUIT

U N I T E D S T A T E S **v.** **JUSTIN H. HUMPHREY** **IT2 USN**	**15 January 2014** **BENCH BRIEF ON ADEQUACY OF CHARGE II AND SPECIFICATIONS 1 & 2**

1. Question Presented.

This brief analyzes the adequacy of the charged language in Charge II and its two specifications.

2. Summary of Facts.

The accused is charged with violations of the Uniform Code of Military Justice, Article 128 Assault, supported by two specifications, and Article 120, Sexual Assault, supported by two specifications, stemming from an incident in which the accused is alleged to have sexually assaulted a female shipmate, HM3 EB, by committing bodily harm when he unlawfully removed her underwear and clothing and digitally and orally penetrated her vagina.

3. Discussion.

Rule for Courts-Martial 307(c) states that "[a] specification is a plain, concise, and definite statement of the essential facts constituting the offense charged. A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication . . . No particular format is required."

I. **<u>The Elements of the Charged Offense are Included Within the Specifications</u>**.

A violation of Article 120(b)(1)(B) requires proving the elements of (1) "committing a sexual act upon another person by" (2) "causing bodily harm to that other person." Article 120 (2102 ed.). The previous version of Article 120 required proving the elements of (1) "causing another person of any age to engage in a sexual act by" (2) "causing bodily harm." Article 120 (2007 ed.). Essentially, both statutes require the proof of a sexual act and the proof of bodily harm.

First, as to a "sexual act," under the 2007 version of the statute, the term "sexual act" was defined as "the penetration, however slight, of the genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person." Under the current version of Article 120, the term "sexual act" is defined as "the penetration, however slight, of another by any part of the body or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person. A comparison of these two elemental definitions reveals that they are strikingly similar in wording and include the same conduct other both definitions. Additionally, in the specifications charged, the text includes the term "sexual act" specifically and clearly.

Second, as to the term of "bodily harm," under the 2007 version of the statute, the term "bodily harm" was defined as "any offensive touching of another, however slight." Under the current version of Article 120, the term "bodily harm" is defined as "any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact." Again, a comparison of these two elemental definitions reveals a striking similarity, and only the addition of a final phrase in the current statutory version. Additionally, in the

specifications charged, the text includes the term "bodily harm" specifically, and then describes the specific bodily harm alleged in each specification.

The similarities between the two statutory versions, with respect to the definitions discussed above, have been noted by the Navy-Marine Corps Court of Criminal Appeals, which has stated that "[c]omparison of the statutory text confirms that the charged offense is a minor revision of the 2007 version of the offense." *United States v. Booker*, NMCCA 201300325, at *6. In *Booker*, which dealt with review of a petition for extraordinary relief, the Court stated that "[b]oth statutes define 'sexual act' as including [the same contact]" and that "[b]oth statutes also require: (1) commission of a sexual act with another person, and (2) 'causing bodily harm.'" *Id*. The court stated, in a footnote and not in the body text of its opinion, that "[t]he **only** distinction of note is that the amended Article 120(b)(1)(B) substitutes the language 'commits a sexual act upon another person' for the words 'causes another person of any age to engage in a sexual act.'" *Id*., n. 3 (emphasis added). As such, the Navy-Marine Corps Court of Criminal Appeals noted that the difference between the two statutes, with respect to these specific elements was "minor" and essentially only included the swap of the word "causes" with "commits." What is important is that the Court noted that both statutes retain the same elements – a sexual act and bodily harm.

In this case, the accused has been appropriately placed on notice, from a plain reading of the specification, of the elements of the specifications. Both specifications include the terms "sexual act" and "bodily harm" and also factually assert the relevant aspects of the sexual act which is alleged to have occurred and the manner of bodily harm employed by the accused in violating the law. Therefore, the specifications comply with R.C.M. 307(c) and also provide the accused with his right to due notice as to his alleged criminal behavior.

4. Conclusion.

Because Charge II and its two specifications adequately place the accused on notice of the two necessary elements, the charges and specifications are legally sufficient to proceed to court-martial.

5. Oral Argument.

The Government requests oral argument on this issue only if opposed by the Defense or requested by the Court.

//s//

Michael F. Whitican
LT, JAGC, USN
Trial Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this filing was served on the Detailed Defense Counsel, LT Matthew Sonn, via email on 15 January 2014.

//s//

Michael F. Whitican
LT, JAGC, USN
Trial Counsel

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES, Appellee v. Jeramie M. HUTCHINSON, Information Systems Technician Second Class (E-5) U.S. Navy Appellant	)))))))))))	ANSWER ON BEHALF OF APPELLEE Case No. 201400022 Tried at Region Legal Service Office Groton, Naval Submarine Base New London, Connecticut, on June 25, and August 26-29, 2013, by a general court martial convened by Commander, Navy Region Mid-Atlantic

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Errors Assigned

I.

THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE ADMITTED THE TESTIMONY OF DR. TAMBLING, AN EXPERT IN THE FIELD OF SEXUAL ASSAULT TRAUMA RESPONSE. BECAUSE THE MEMBERS HELD NO PRECONCEIVED BELIEFS REGARDING HOW A VICTIM OF SEXUAL ASSAULT SHOULD RESPOND TO TRAUMA, AN EXPERT IN THAT FIELD FAILED TO MEET THE CRITERIA FOR ADMISSIBILITY UNDER M.R.E. 702 AND 402. RATHER THAN ASSIST THE TRIER OF FACT, THE GOVERNMENT'S EXPERT IMPERMISSIBLY BOLSTERED ITS CASE.

II.

THE CONVICTION UNDER ARTICLE 120, UCMJ, IS LEGALLY AND FACTUALLY INSUFFICIENT. THE GOVERNMENT DID NOT PROVE THE ELEMENT OF UNLAWFUL FORCE BEYOND A REASONABLE DOUBT. FURTHERMORE, GIVEN THE SIGNIFICANT CREDIBILITY PROBLEMS OF MA3 B, AND CONSIDERING THE EXCEPTIONAL MILITARY

CHARACTER OF ITS2 HUTCHINSON, THIS COURT SHOULD SET ASIDE THE FINDING AND SENTENCE.

III.

THE COMMANDER IN CHIEF, THE SECRETARY OF DEFENSE, THE SECRETARY OF THE NAVY, MEMBERS OF CONGRESS, THE CHIEF OF NAVAL OPERATIONS, THE MASTER CHIEF PETTY OFFICER OF THE NAVY, THE FORCE MASTER CHIEF FOR NAVY RECRUITNG COMMAND, JUDGE PALMER, AND THE COMMANDANT OF THE MARINE CORPS DELIVERED REMARKS THAT CREATED THE APPEARANCE OF UNLAWFUL COMMAND INFLUENCE. THIS UNLAWFUL COMMAND INFLUENCE INFECTED ITS2 HUTCHINSON'S COURT-MARTIAL. THIS SENTENCE SHOULD SET ASIDE THE FINDINGS AND SENTENCE.

Statement of Statutory Jurisdiction

Appellant's approved sentence includes a punitive discharge. Accordingly, this Court has jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012).

Statement of the Case

Members with enlisted representation, sitting as a general court-martial, convicted Appellant, contrary to his pleas, of one specification of rape, in violation of Article 120, UCMJ, 10 U.S.C §920 (2012). In accordance with his pleas, the Members found appellant not guilty of one specification of forcible sodomy and one specification of sexual assault. The Members sentenced Appellant to be confined for three months and a bad-conduct discharge. The Convening Authority approved the sentence as adjudged and, except for the punitive discharge,

ordered it executed.

Statement of Facts

A. Sexual assault of Master-At-Arms Third Class JB.

1. Initial communications and first date.

Master-At-Arms Third Class (MA3) JB met Appellant when she sent him an instant message on the online dating site "Plenty of Fish." (R. 390.) MA3 JB found Appellant physically attractive and believed they had a lot in common. (R. 390.) The two sailors communicated via text messages and Facebook for approximately two and a half years before finally meeting in person on March 10, 2013. (R. 390-91.) At the time they finally met, MA3 JB was twenty two years-old and stationed at Naval Station Newport, Rhode Island. (R. 390-91.) Appellant was stationed relatively close by at Naval Station Groton, Connecticut. (R. 391.) MA3 JB felt excited to finally meet Appellant for an outdoor date of hiking at a nearby state park (R. 392.)

After meeting at Appellant's house, the two made their way to the park. (R. 393-94.) Once there, the two engaged in flirtatious banter, skipped rocks, hiked and joked around with one another. (R. 394.) At various points on the hike, Appellant touched MA3 JB's buttocks and breasts. (R. 394, 396.) Not wanting the contact to go "too far" on the first date, she rebuffed the physical advances by playfully saying, "Oh, no.

Don’t be doing that.” (R. 394.) MA3 JB did consent to kissing and holding hands with Appellant at the park, and “was fine with that.” (R. 396.) On the drive back to Appellant’s house, he repeatedly attempted to place her hand onto his penis, which she would remove and place back on Appellant’s knee. (R. 396.) After Appellant kept moving her hand to his penis, MA3 JB stroked his penis while they drove back to his house. (R. 397.)

2. Appellant’s house.

Even after Appellant’s advances towards her in the park and car, MA3 JB thought that Appellant held “boyfriend potential,” based upon their lengthy online history. (R. 397.) She hoped that by setting physical boundaries, he would adapt his conduct and understand what her wishes were with respect to touching. (R. 397.) “I kept trying to justify what he was doing because I wanted to give him the benefit of the doubt, like make him know that—where my boundaries were so maybe he would change and not be so forceful.” (R. 397.)

After returning to Appellant’s house, he called for her to come upstairs while he cleaned his room. (R. 397.) Once she joined him, he “gently tossed me on the bed and we started making out.” (R. 398.) MA3 JB was comfortable with the making out, but sought to clarify the boundaries by stating, “Don’t be placing your hands anywhere they don’t belong and clothes are staying on. This is as far as it goes.” (R. 397.) In

response, Appellant stated, “You never said anything about my clothes,” and he began to undress. (R. 399.) Appellant then tried to take her pants off, but she rebuffed him and said, “No, no, no, no.” (R. 399.) Hoping he would stop trying to take her pants off, she also told Appellant she was on her period. (R. 399-400.)

In response, Appellant flipped her onto her stomach and tried to pull her pants off while he held her face into the pillow with his hand on the back of her neck. (R. 400.) Appellant then turned her onto her back, choked her with his hand on her neck, and pulled her pants off. (R. 400.) Whenever she could breathe, MA3 JB would tell him to stop. (R. 401.) Appellant responded by stating, “Don’t worry. It’s not like I’m going in.” (R. 401.) Eventually his penis penetrated her vagina and he thrusted into her several times. (R. 401.) As MA3 JB shouted “no,” Appellant replied, “Well, I’m about to cum anyways.” (R. 402.) Appellant than used lotion to masturbate himself, and he ejaculated on MA3 JB’s stomach. (R. 402.)

3. <u>After the assault</u>.

a. <u>Fear of making a scene</u>.

After the sex ended, both Appellant and MA3 JB dressed and went downstairs. (R. 403.) Fearful of what Appellant may do next, MA3 JB did not want to “make a scene,” so she sat next to him on the couch and made small talk about local gyms. (R.

403.) Approximately ten minutes later, Appellant's roommate came home. (R. 403-04.) Sensing an opportunity to leave without a "scene," MA3 JB allowed Appellant to walk her to the door and she left. (R. 404.)

b. Text messages with Appellant.

After MA3 JB left Appellant's home, he sent her a text message that read, "Did [you] have fun?" She replied, "Yes, I had fun at the park. But I don't like how forceful you were with me. I felt you had no respect for me." Appellant replied, "I'm sorry. I must have misread your signs." (R. 404.)

c. Reporting the assault.

The day after the assault, Master-At-Arms First Class (MA1) TB, found MA3 JB sobbing while she manned her post at the front gate of Naval Station Newport. (R. 381.) At the time, MA1 TB served in the Operations Department in a supervisory role responsible for the safe operations of the patrol sections. (R. 380.) After he found her crying, MA3 JB asked him if she could speak with a chaplain right away. (R. 381.) MA1 TB felt that crying was out of character for MA3 JB and that her emotional instability rendered her unfit for duty. (R. 382.) Shortly thereafter, he disarmed her and relieved her of her post. (R. 382.)

On March 12, 2013, MA3 JB filed an unrestricted sexual assault report and underwent a sexual assault examination. (R.

407.) The civilian doctor who performed the sexual assault exam noted injury to MA3 JB's cervix as well as an abrasion to her vaginal wall. (R. 533, 540.) Neither injury would be present in a normal vaginal exam, and was likely the result of forceful friction. (R. 547.)

B. Appellant's admissions to law enforcement.

On March 13, 2013, Investigator Bridget Nordstrom of the Groton Police went to Appellant's home and identified herself as conducting a sexual assault investigation. (R. 495.) Appellant invited her in and agreed to answer questions related to MA3 JB's allegation. (R. 495.) Appellant voluntarily admitted he had sexual relations with MA3 JB and described certain acts in vulgar terms such as "I rubbed her clit and pussy," and "I put my dick on her clit." (R. 496.) Based on her experience with the sex crimes unit, Investigator Nordstrom found this behavior to be unusual for a man accused of sexual assault. (R. 497.) Appellant also told Investigator Nordstrom that MA3 JB was initially standoffish at the park, and "that she was a little harder to break down than some as far getting [sic] her to relax and laugh." (R. 497.) Appellant then stated that the two returned to his house and when he tried to put his hands down her pants, MA3 JB said, "No, no, too far." (R. 497.) Nonetheless, Appellant then stated that he proceeded to, "rub[bed] her clit and her pussy and he started rubbing his dick

on her pussy and then jacked off on her stomach." (R 498.) Appellant denied penetration. (R. 498-99.)

Regarding whether MA3 JB consented to the sex acts, Appellant stated that she must have been, "okay with it," because if she wasn't "her car was like ten feet away." (R. 498.) Finally, Appellant admitted that he pulled her hair and put his left hand across her throat, because he could "see it in her eyes," that "[S]he was one of those girls that liked it." (R. 498.) Appellant also admitted that MA3 JB sent him a text message after the assault that said things moved to fast and went too far. (R. 499.) Appellant subsequently deleted the text messages from MA3 JB. (R. 499.)

C. Cross-examination of MA3 JB.

Defense counsel focused on what MA3 JB *did not do* as a result of Appellant's sexual touches in the time period leading up to the assault. (R. 417-19.) Additionally, Defense Counsel commented several times that MA3 JB willingly went into Appellant's home and bedroom even after he showed her his gun and he had been forceful in his sexual touches at the park and in his car. (R. 421.) Moreover, Defense Counsel challenged whether MA3 JB removed her own clothing for Appellant's benefit and asked about perceived inconsistences in her statements to NCIS and at the Article 32 hearing. (R. 427-31.) Finally, Defense Counsel alleged that MA3 JB fabricated the rape claim

because she did not like being stationed at Newport, and the sexual assault claim provided her a means of expedited transfer from the base. (R. 440-41.) MA3 JB denied this claim. (R. 440.)

D. Dr. Rachel Tambling.

1. Defense Motion to Exclude Testimony.

Dr. Tambling is a licensed marriage and family therapist. (R. 459.) In a pre-trial motion, the Defense sought to exclude her testimony as irrelevant and Dr. Tambling's qualifications as insufficient to qualify her as an expert witness in rape trauma. (Appellate Exhibit XVI.) The Military Judge disagreed with the Defense and denied their motion to exclude Dr. Tambling's testimony. (Appellate Ex. XXIII.) In doing so, the Military Judge found that Dr. Tambling had "ample qualifications," to "assist the trier of fact to understand the evidence in this case." (Appellate Ex. XXIII at 8.) Moreover, the Military Judge cited *United States v. Houser* for the premise that expert testimony of the subject of rape-trauma syndrome and counter intuitive victim behavior post-assault is relevant. (Appellate Ex. XXIII at 8.) Finally, the Military Judge conducted a detailed M.R.E. 403 balancing test and concluded that the probative value testimony of Dr. Tambling's testimony was not substantially outweighed by the risk of unfair prejudice,

confusion of the issues or misleading the members. (Appellate Ex. XXIII at 12.)

2. Trial testimony.

At trial, Dr. Tambling testified for the United States as an expert in the areas of rape victim trauma, behaviors and responses. (R. 461, 466.) Her testimony included debunking commonly-held societal "rape myths," such as a real victim would scream and physically struggle against her assailant. (R. 470.) To the contrary, Dr. Tambling explained to the Members that self-preservation often drives a victim to be compliant as a means of protecting themselves from further harm. (R. 471.) Additionally, it is especially common for victims in an acquaintance rape scenario to delay reporting of an assault and to communicate with their assailant afterwards out of a sense of "I can't believe he did that," or a desire for things to be "normal" again. (R. 470-72.)

3. Defense's rebuttal testimony.

In response to Dr. Tambling's testimony, the Defense presented the testimony of Dr. Thomas Grieger, a clinical psychiatrist. (R. 561.) Dr. Grieger's testimony largely sought to diminish the credibility of the "rape myth" studies cited by Dr. Tambling during her testimony. (R. 569-575.)

F. Motion to Dismiss for Unlawful Command Influence.

During pre-trial motions, Appellant alleged unlawful command influence by: (1) President Obama; (2) assorted Congressmen; (3) the Chief of Naval Operations; (4) former Secretary of Defense Leon Pannetta; (5) Secretary of the Navy Ray Maybus; (6) Lieutenant Colonel Greg Palmer, USMC; (7) Master Chief petty Officer of the Navy, Mike Stevens; (8) Force Master Chief of Navy Recruiting Command, Earl Gray; and (9) Commandant of the Marine Corps, General James Amos. (Appellate Exhibit XII at 4-8.) In response, the Convening Authority, Rear Admiral T.G. Alexander, provided a memorandum to the court in which he denied that he had been influenced by recent media accounts or comments by leadership when he decided to refer Appellant to a general court-martial. (Appellate Ex. XVIII.)

1. Denial of Motion to Dismiss by first Military Judge.

Commander R.P Monahan, the Military Judge for motions, received written briefs and heard arguments from counsel on the issue of UCI. In written conclusions of law, the Military Judge found that the Defense failed to meet its initial burden of “some evidence” of either apparent or actual UCI and he denied the motion. (R. 181; Appellate Ex. XXII.)

2. Further consideration of the UCI issue by second Military Judge.

Colonel D.J. Daugherty, USMC, served as the trial judge for Appellant's court-martial. (R. 181.) In an abundance of caution, Colonel Daugherty supervised "extensive *voir dire* questions on unlawful command influence." (R. 355.) Like the judge before him, he concluded,

> The court finds beyond a reasonable doubt that the members have not been nor will they be influenced by any outside sources, statements, media coverage, the President's comments on sentencing or any other comments by any other leaders within the Department of Defense or the congressional interest that has occurred regarding sexual assault.

(R. 355.)

Argument

I.

THE MILITARY JUDGE DID NOT ERR WHEN HE ADMITTED THE TESTIMONY OF DR. TAMBLING, AN EXPERT IN RAPE TRAUMA AND VICTIM BEHAVIOR.

A. Standard of Review.

This Court reviews a military judge's decision to admit evidence for an abuse of discretion. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000).

B. Dr. Tambling's testimony was relevant and not substantially outweighed by the danger of unfair prejudice to Appellant.

Pursuant to M.R.E. 403, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by

the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." A military judge who conducted a proper balancing test under M.R.E. 403 will not be overturned absent a clear abuse of discretion. Where a military judge failed to conduct a balancing test on the record, the ruling will receive less deference, but not necessarily be overturned. *United States v. Stephens,* 67 M.J. 233, 235 (C.A.A.F. 2009) (citing *United States v. Manns* 54 M.J. 164, 166 (C.A.A.F. 2000)).

Here, the Military Judge heard from both sides, conducted a proper balancing test, found that Dr. Tambling had “ample qualifications,” to “assist the trier of fact to understand the evidence in this case.” (Appellate Ex. XXIII at 8.) Moreover, the Military Judge cited *United States v. Houser* for the premise that expert testimony of the subject of rape-trauma syndrome and counter intuitive victim behavior post-assault is relevant. (Appellate Ex. XXIII at 8.) Finally, during his detailed M.R.E. 403 balancing test, the Military Judge concluded that the probative value testimony of Dr. Tambling’s testimony was not substantially outweighed by the risk of unfair prejudice, confusion of the issues or misleading the members. (Appellate Ex. XXIII at 12.)

C. Assuming arguendo that the admission of Dr. Tambling's testimony was in err, it was harmless error as Appellant suffered no prejudice and this Court can still affirm the findings and sentence.

The court analyzes four factors when determining whether an appellant suffered prejudice as a result of a military judge's ruling: (1) the strength of the government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question, and (4) the quality of the evidence in admission. *United States v. Ediger*, 68 M.J. 243, 250 (C.A.A.F. 2010)(quoting *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999)).

Appellant cannot show prejudice because the United States presented an extraordinarily strong case in support of Appellant's rape of MA3 JB. In order to be found guilty of the offense of rape, the Members must find that Appellant caused MA3 JB to engage in a sexual act, to wit: penetration of her vagina with his penis, by force and without her consent. Article 120, UCMJ (2006).

Here, the facts support the charge that Appellant forced MA3 JB to engage in non-consensual sexual acts. Appellant admitted to forcible and aggressive conduct during the course of the sexual intercourse to include pulling MA3 JB's hair and putting his arm across her throat. (R. 498.) This evidence far outweighed the largely unsupported character attacks on MA3

JB's credibility or the military character of Appellant. Importantly, the testimony of Dr. Tambling was not the sole piece of evidence upon which the Members could rest their rape conviction. Rather, her testimony merely served to rebut the Defense's attack on MA3 JB's credibility, the focus of which centered on her behavior, lack of fighting back, and temporary delay in reporting. (R. 417, 461-72.) Arguably, the United States would not have needed the testimony of Dr. Tambling had the Defense not attacked the behavior and credibility of MA3 JB. In response, the Defense presented the testimony of Dr. Grieger. (R. 569.) Dr. Grieger's testimony largely sought to diminish the credibility of the "rape myth" studies cited by Dr. Tambling during her testimony. (R. 569-575.) Where Appellant had ample notice of Dr. Tambling's testimony, as well as the opportunity to present expert testimony in rebuttal, Appellant suffered no prejudice from the admission of Dr. Tambling's testimony.

II.

APPELLANT'S CONVICTIONS FOR THE SEXUAL ASSAULT OF MA3 JB IS LEGALLY AND FACTUALLY SUFFICIENT.

A. <u>These issues are reviewed *de novo*</u>.

This Court reviews claims of legal and factual insufficiency *de novo*. Article 66(c), UCMJ; *United States v. Beatty*, 64 M.J. 456, 459 (C.A.A.F. 2007).

B. Considering the evidence admitted at trial in a light most favorable to the prosecution, a reasonable fact-finder could have found each element beyond a reasonable doubt.

The test for legal sufficiency is whether, considering the evidence admitted at trial in a light most favorable to the prosecution, a reasonable fact-finder could have found all the elements beyond a reasonable doubt. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000 (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Testing for factual sufficiency, this Court asks whether, after weighing the evidence in the record of trial, this Court is independently convinced of Appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

In testing for factual sufficiency, this Court is required to "recogniz[e] that the trial court saw and heard the witnesses." *Id.* This is not a *pro forma* legal requirement. Rather, it takes into account that the trier of fact is best situated to assess a witness's credibility while testifying. *See United States v. Madey*, 14 M.J. 651, 653 (A.C.M.R. 1982), *rev. denied*, 15 M.J. 183 (C.M.A. 1983); *see also United States v. Ferguson*, 35 F.3d 327, 333 (7th Cir. 1994), *cert. denied*, 514 U.S. 1100 (1995)(trial court's evaluation of witness credibility "will not be disturbed unless it is completely without foundation."). It also takes into account that, where the court

members are properly instructed to consider a witness's credibility, this Court should presume that the members followed the Military Judge's instructions. *See United States v. Collier*, 67 M.J. 347 (C.A.A.F. 2009).

The elements of sexual assault are:

> (1) That Appellant caused MA3 JB to engage in a sexual act, to wit: penetration of her vagina with his penis; and
> (2) That Appellant did so by using force against MA3 JB to wit: by using strength and restraint sufficient that she could not avoid or escape the sexual contact.

(Article 120, UCMJ (2006 ed.); R. 1074.)

Appellant admitted to law enforcement that he engaged in sexual intercourse with MA3 JB, pulled her hair and placed his hand across her neck during intercourse. (R. 448.) Therefore, the only remaining element in contest is whether the sexual intercourse occurred by force and without the consent of MA3 JB. The Members personally observed MA3 JB's demeanor in court, heard her testimony and obviously found her credible since they convicted Appellant of raping her. (R. 1203.) The Defense engaged in a vigorous and intensely personal cross examination of her during which they sought to discredit her in numerous ways, to include the alleged motive to fabricate as discussed in Appellant's Brief and accusations of consensual flirting. (R. 704-765.) And yet despite all defense efforts to rattle MA3 JB, the Members still found her creditable and believed Appellant

raped her. In the light most favorable to the United States, this Court can be convinced beyond a reasonable doubt that a reasonable fact finder would have considered the same evidence and came to the same conclusion regarding Appellant's guilt.

III.

A DISINTERESTED OBSERVOR WOULD HARBOR NO CONCERNS ABOUT THE FAIRNESS OF APPELLANT'S COURT-MARTIAL WHEN TWO INDEPENDENT MILITARY JUDGES DETERMINED THAT UNLAWFUL COMMAND INFLUENCE DID NOT EXIST IN APPELLANT'S CASE, AND IN FACT THE MEMBERS FOUND APPELLANT NOT GUILTY OF TWO OF THE THREE SEXUAL ASSAULT CHARGES HE FACED.

A. Standard of Review.

This Court reviews an allegation of unlawful command influence *de novo*. *United States v. Salyer*, No. 13-0186, 2013 CAAF LEXIS 822, at *20 (C.A.A.F. Aug. 2, 2013) (citation omitted). If any findings of fact are made at trial in conjunction with ruling upon a motion regarding unlawful command influence, the findings are reviewed under a clearly erroneous standard. *Id*. A military judge's remedy for unlawful command influence is reviewed for an abuse of discretion. *United States v. Douglas*, 68 M.J. 349, 354 (C.A.A.F. 2010).

B. UCI did not exist in Appellant's case.

Statute and regulation prohibit unlawful influence on a court-martial. Art. 37, UCMJ; Rule for Courts-Martial (R.C.M.) 104. Unlawful command influence involves command influence that "corrupt[s] the truth-seeking function of the trial process."

United States v. Thomas, 22 M.J. 388, 393-94 (C.M.A. 1986). The "appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial." *United States v. Simpson*, 58 M.J. 368, 374 (C.A.A.F. 2003) (quotation and citation omitted).

The defense has the initial burden to raise unlawful command influence by showing "some evidence" that it exists. *Salyer*, No. 13-0186, 2013 CAAF LEXIS 822, *22. To raise the issue at trial, the defense may meet its burden by showing "facts which, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings." *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999)(citing *United States v. Stombaugh*, 40 M.J. 208, 213 (C.M.A. 1994)).

Once the defense sufficiently raises unlawful command influence, the burden shifts to the United States at trial to demonstrate beyond a reasonable doubt either that there is no unlawful command influence or that the proceedings will be untainted. *United States v. Lewis*, 63 M.J. 405, 413 (C.A.A.F. 2006)(citing *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002)). The United States may meet this burden by: (1) disproving the predicate facts on which the allegation of unlawful command influence is based; (2) persuading the military

judge or appellate court that the facts do not constitute unlawful command influence; (3) if at trial, by producing evidence proving that the unlawful command influence will not affect the proceedings; or (4) if on appeal, by persuading the appellate court that the unlawful command influence had no prejudicial impact on the court-martial. *Biagase*, 50 M.J. at 151.

"In the course of addressing these issues, military judges and appellate courts must consider apparent as well as actual unlawful command influence." *United States v. Reed,* 65 M.J. 487, 488 (C.A.A.F. 2008). "[T]he appearance of unlawful command influence will exist where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *Lewis*, 63 M.J. at 415. "To find that the appearance of command influence has been ameliorated and made harmless beyond a reasonable doubt, the United States must convince [the Court] that the disinterested public would now believe [the appellant] received a trial free from the effects of unlawful command influence." *Id.*

Here, two independent Military Judges considered and rejected Appellant's claim of UCI during his court martial. First, Commander R.P Monahan, USN, the Military Judge during pre-trial motions, received written briefs and heard arguments

from counsel on the issue of UCI. In written conclusions of law, Commander Monahan found that the Defense failed to meet its initial burden of "some evidence" of either apparent or actual UCI, and he denied the motion. (R. 181; Appellate Ex. XXII.) Thereafter, Colonel D.J. Daugherty, USMC, served as the trial judge for Appellant's court-martial. (R. 181.) In an abundance of caution, Colonel Daugherty supervised "extensive *voir dire* questions on unlawful command influence." (R. 355.) Like the judge before him, he also concluded,

> The court finds beyond a reasonable doubt that the members have not been nor will they be influenced by any outside sources, statements, media coverage, the President's comments on sentencing or any other comments by any other leaders within the Department of Defense or the congressional interest that has occurred regarding sexual assault.

(R. 355.) Based on the record, neither Military Judge abused his discretion when each determined in specific findings that the Defense failed to meet its initial burden of "some evidence" of UCI. This Court can be convinced that no evidence of UCI existed and the Members appropriately deliberated free from any improper influence.

Conclusion

WHEREFORE, the United States respectfully requests this Court to affirm the findings and sentence below.

CRISTA D. KRAICS
MAJOR, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-8378, fax (202) 685-7687

Certificate of Filing and Service

I certify the foregoing was delivered to the Court and a copy was delivered to the Appellate Defense Counsel, Lieutenant Jessica Fickey, JAGC, USN, and electronically filed in CMTIS with the Court pursuant to N-M. Ct. Crim. App. Rule 5.2 (b) (1) on this August 5, 2014

CRISTA D. KRAICS
MAJOR, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-8378, fax (202) 685-7687

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES, Appellee v. Jeramie M. HUTCHINSON, Information Systems Technician (Submarines) Second Class (E-5) U.S. Navy Appellant	**APPELLANT'S BRIEF AND ASSIGNMENTS OF ERROR** Case No. 201400022 Tried at Region Legal Service Office Detachment Groton, Naval Submarine Base New London, CT, on 25 June, and 21, 26-29 August 2013, before a General Court-Martial convened by Commander, Navy Region Mid-Atlantic.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

DAVID C. DZIENGOWSKI
Lieutenant, JAGC, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE
Bldg. 58, Suite 100
Washington, D.C. 20374
P: (202) 685-7292
F: (202) 685-7426
david.dziengowski@navy.mil

JOHN J. STEPHENS
Major, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE
Bldg. 58, Suite 100
Washington, D.C. 20374
P: (202) 685-8587
F: (202) 685-7426
john.j.stephens@navy.mil

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Assignments of Error

I.

UNDER M.R.E. 702, 401, AND 402, EXPERT TESTIMONY MUST ASSIST THE TRIER OF FACT TO EITHER UNDERSTAND THE EVIDENCE OR TO DETERMINE A FACT IN ISSUE. HERE, DURING *VOIR DIRE*, THE MEMBERS AGREED THAT (1) TRAUMA AFFECTS PEOPLE IN VARIOUS WAYS; (2) TRAUMA MANIFESTS ITSELF IN VARIOUS WAYS; AND (3) VICTIMS REACT IN VARIOUS WAYS TO TRAUMA FOLLOWING A SEXUAL ASSAULT. DID THE MILITARY JUDGE ABUSE HIS DISCRETION WHEN HE ADMITTED A GOVERNMENT EXPERT ON SEXUAL ASSAULT TRAUMA RESPONSE?

II.

WHETHER APPELLANT'S CONVICTION IS LEGALLY AND FACTUALLY INSUFFICIENT?

III.

WHETHER APPELLANT'S COURT-MARTIAL WAS INFECTED WITH UNLAWFUL COMMAND INFLUENCE BY REMARKS OF THE COMMANDER IN CHIEF, THE SECRETARY OF DEFENSE, THE SECRETARY OF THE NAVY, MEMBERS OF CONGRESS, THE CHIEF OF NAVAL OPERATIONS, THE MASTER CHIEF PETTY OFFICER OF THE NAVY, THE FORCE MASTER CHIEF FOR NAVY RECRUITING COMMAND, JUDGE PALMER, AND THE COMMANDANT OF THE MARINE CORPS?

Statement of Statutory Jurisdiction

Appellant, Information Systems Technician (Submarines) Second Class (ITS2) Jeramie M. Hutchinson, U.S. Navy, received a bad-conduct discharge. As a result, this Court has jurisdiction under Article 66(b), Uniform Code of Military Justice (UCMJ). *See* 10 U.S.C. § 866(b).

Statement of the Case

ITS2 Hutchinson was tried by a panel of officer and enlisted members, sitting as a general court-martial, on 21 through 26 August 2013. Consistent with his pleas, he was acquitted of two specifications under Article 120, UCMJ. *See* 10 U.S.C. § 920. Contrary to his pleas, he was convicted of one specification under Article 120, UCMJ (forcible rape). *Id.* The members sentenced ITS2 Hutchinson to confinement for three months and a bad-conduct discharge. (R. at 849.)

On 3 January 2014, the Convening Authority (CA) approved the sentence as adjudged and, except for the portion relating to the punitive discharge, ordered it executed. (CA's Action, Jan. 3, 2014.) This appeal follows.

Statement of Facts

A. An Internet Flirtation Sours

MA3 B had difficulty eating and chewing food. She had injured her jaw during a horseback riding accident in 2004. (R. at 388.) Because she needed jaw surgery, she transferred from Suda Bay, Greece, to Newport Naval Station in Newport, Rhode Island. She had been in Suda Bay for only four months before her transfer. (*Id.*) ITS2 Hutchinson, a submariner, was stationed on nearby Naval Submarine Base New London in Connecticut when she arrived.

At some point, MA3 B initiated communications with ITS2 Hutchinson. (R. at 390.) They interfaced through Facebook and iMessage. (R. at 391.) Based on pictures he had posted online, she thought he was good looking. (R. at 375, 390.) And they had a lot in common: the two liked the outdoors and they enjoyed exercise. (*Id.*) Their Internet flirtation spanned two and one-half years before they finally met in person. (*Id.*) Finally, having found a good day, the two Sailors met for a hike. (R. at 391-92.) She went to his house, and together they drove to Bluff Point State Park. (R. at 392-94.)

There, MA3 B and ITS2 Hutchinson walked, talked, and skipped rocks together. (R. at 394.) They held hands. (R. at 415.) They flirtatiously bumped into each other during their hike. (R. at 395, 414.) At some point, MA3 B bent over and ITS2 Hutchinson, continuing the flirtation, grabbed her butt. (*Id.*) She laughed and told him no, not on a first date. (R. at 416.) ITS2 Hutchinson complied. Later, they hiked to a secluded area and started kissing. (*Id.*) This kissing included open-mouth, tongue kissing. (*Id.*) They migrated to his car, where she eventually stroked his penis. (R. at 377, 418-19, 425.) After spending approximately two hours in the park together, the two returned to ITS2

Hutchinson's house. (R. at 398, 417.) As MA3 B testified, she was interested in a relationship with him. (R. at 418.)

When they arrived at his house, MA3 B followed ITS2 Hutchinson to his bedroom. They started kissing again. According to MA3 B, ITS2 Hutchinson "playful[ly]" tossed her onto his bed. (R. at 423.) As she did in the car, she then stroked his penis. (R. at 399, 425, 497.) MA3 B said she stroked his penis because ITS2 Hutchinson "placed" her hand "there[.]" (R. at 399.) Then ITS2 Hutchinson rubbed his penis in the area of MA3 B's vagina.[1] (R. at 497.) MA3 B claimed that, at some point during their encounter on the bed, ITS2 Hutchinson "flipped" her onto her back and placed his hand on her neck. (R. at 400.) She further claimed she could not breathe, and that, while this was happening, ITS2 Hutchinson was grabbing her hair. (R. at 400-01.) MA3 B also claimed he penetrated her vagina with his finger and his penis. (R. at 401-02.) She said she told him "No, no, no." (R. at 401.) He eventually ejaculated by masturbating onto

[1] MA3 B also claimed ITS2 Hutchinson "violently" thrust his penis into her mouth. (R. at 400-01, 456.) Despite her claims of having jaw problems severe enough to force a transfer from Greece to Rhode Island, she never sought any treatment for her jaw after this claimed incident. (R. at 456, 724.) Notably, the members acquitted ITS2 Hutchinson on this related charge. (R. at 766.) They also acquitted him of digital penetration, though she testified to that as well. (*Id.*)

her. (R. at 402.) Then he grabbed a towel and cleaned MA3 B's stomach. (R. at 402.)

Afterward, MA3 B went downstairs and sat on the couch with ITS2 Hutchinson. (R. at 403-04.) It was a large couch. (R. at 666.) Yet she sat on the same cushion as ITS2 Hutchinson. (R. at 668.) They talked. (*Id.*) She also helped him find a gymnasium so he could exercise. (R. at 403.) Their time downstairs lasted approximately eight or ten minutes. She then went to Five Guys to get a burger. (R. at 405.)

Before she left, ITS2 Hutchinson's roommate, LS2 Javier Ramirez, U.S. Navy, arrived. (R. at 663-65.) He observed MA3 B and ITS2 Hutchinson sitting closely on the couch together. (R. at 668.) He observed her face. Despite MA3 B's claim that she was choked during the sex and was crying afterward, (R. at 408, 428), she exhibited no bruises, no redness, and no scratches on her neck. (R. at 668.) Her eyes were neither puffy nor runny. (*Id.*) And her clothes did not appear disheveled. (R. at 669.) LS2 Ramirez got a good look at MA3 B when she got up and shook his hand. (R. at 435.) She was friendly to him, and did not seem withdrawn. (R. at 670.) According to LS2 Ramirez, nothing about MA3 B indicated "distress." (*Id.*) After a couple minutes, LS2 Ramirez left

ITS2 Hutchinson and MA3 B alone because he did not want to be a third wheel. (*Id.*)

ITS2 Hutchinson and MA3 B exchanged text messages later that day. (R. at 404-05.) In those messages, MA3 B told ITS2 Hutchinson that she had fun at the park but was upset at how he was forceful with her. (*Id.*) She claims that he apologized for misreading her signs. (*Id.*) For whatever reason, MA3 B deleted all these text messages. (R. at 405.) She claims she did not want to see ITS2 Hutchinson's name on her phone. (*Id.*)

MA3 B made an unrestricted report on 12 March. (R. at 407.) Member selection commenced on 26 August 2013. (R. at 196.)

B. <u>The Members Explained their Beliefs on Sexual Assault Trauma Response</u>

During group *voir dire*, the following exchange between the military judge and the members occurred:

> MJ: Has any member been through a traumatic event, such as a car accident or physical injury?
>
> Affirmative response by Lieutenant Hart, Lieutenant Kyle, Commander Foster, and YNC Ski.
>
> Do all the members understand that trauma may affect people in various ways?
>
> MBRS: [Indicated an affirmative response.]
>
> MJ: Affirmative response by all members.

Do all the members agree that trauma can manifest itself in various ways?

MBRS: [Indicated an affirmative response.]

MJ: Affirmative response by all members.

(R. at 214.) Defense Counsel probed those answers during individual *voir dire*.

Q. Do you mind if I ask you [LT Hart] what was the nature of that traumatic event?

A. Car accident.

. . . .

Q. Has that experience going through that traumatic event, has that enlightened you as to how people can deal with trauma?

A. Yes, sir. Yes, sir.

Q. Do you think there is anyone [*sic*] way somebody could react to traumatic event?

A. No, sir.

(R. at 241.) Because LT Hart later offered a close familial connection to a similar crime, both parties agreed he should be removed from the panel. (R. at 248-50.) The military judge did just that. (R. at 250.) But other members shared LT Kyle's opinion that victims of trauma have no set pattern of behavior post-trauma:

Q. [LT Kyle] You indicated on group voir dire that you personally have been through a traumatic event; is that correct?

A. Yes.

. . . .

Q. Do you think that event has given you some perspective on how people would react to a traumatic event in general?

A. I think so.

Q. Do you think there is any one way that a person would react to a traumatic event?

A. People are all different and I feel that, you know, trauma can manifest in a bunch of different ways. And depending on the person and how they are brought up, and their physical conditions, they could--I can't name any specific way that everyone is going to react.

Q. What about sexual assault? Do you think that there is any way that a person should react if they are sexually assaulted?

A. Like a specific way?

Q. Do you have any expectations as to how somebody should react if they were claiming to be sexually assaulted?

A. No. . . .

Q. Do you think it is a fair premise that people could react to sexual assault in all different kinds of ways?

A. Yes. Some might react right away. Some might repress it, you know, that sort of thing.

(R. at 257-58.) The next member entered the panel box for individual *voir dire*.

Q. Sir, [CDR Foster], you have been--you stated that you have been part of a traumatic experience?

A. Life changing--well, potentially life changing surgery.

. . . .

Q. You were able to handle the trauma pretty well it sounds like?

A. Yes.

Q. Do you believe that other people might handle a traumatic experience differently?

A. Yes.

Q. And you understand that that might be based upon a number of factors including just their personality?

A. Yes.

(R. at 270.) Then the next member entered the box.

Q. [LT Cody] During . . . any sexual assault training that you have gone through while being in the military, have you ever been trained on . . . how people might react to sexual assault or how they might respond after being sexually assaulted?

A. Yes. A couple of the SAPR, I think it was SAPR-L training that we sat through. They talked about . . . some people may not want to come forward. Some people, you know, react differently in each situation . . . .

Q. So, do you think that it is fair to say that different people may react differently when they have been sexually assaulted or when they claim they have been sexually assaulted?

A. Yes.

(R. at 288-89.) The next member agreed with the previous members.

Q. Okay, Chief [Tomaszewski]. Even though you have experienced car accidents, you wouldn't necessarily characterize it as traumatic, but do you understand that people can . . . respond to trauma in all different kinds of ways?

A. Yes, sir, I do.

. . . .

Q. During the SAPR training that you received, was there any training about how people . . . who are victims of sexual assault or who allege to be victims of sexual assault how they might react after being sexually assaulted?

A. Besides everybody takes it differently, sir, I don't----

Q. Is it fair then to say, Chief, that you believe that people can respond to . . . being sexually assaulted in all different kinds of ways.

A. Everybody can respond in all different ways, yes, sir.

Q. Do you personally think that there is any one specific way somebody should or would respond to being sexually assaulted?

A. Is there on [sic] particular way? I would have to [say], "No." That is why we have so many options out there.

(R. at 302.) The next member was no different. He agreed victims of sexual assault react in different ways to trauma.

Q. [STS1 Dunn], [d]o you have any personal feelings or beliefs as to how someone would or should react if they are sexually assaulted?

A. No, sir.

Q. Do you think that everybody can behave differently?

A. Yes, sir.

Q. Do you think that it is possible for people to respond to sexual assault, to the trauma of sexual assault, in many different ways?

A. Yes, sir.

(R. at 317-18.) And the next member, LTJG Chitty:

Q. Do you think that it is fair to say that people could react to being sexually assaulted in a variety of different ways?

A. Yes, sir.

Q. Is there any one way that you would expect someone who had been sexually assaulted to react to that sexual assault.?

A. No. I think *it is just very unpredictable*. It is like when a shocking event happens to somebody, they could react any number of ways and you can't predict it.

(R. at 327 (emphasis added).) Defense counsel did not probe HMC Himes's answer from group *voir dire*, but he did probe YN1 Clark's.

Q. Did you receive any training or instruction about how someone who has been the victim of sexual assault or someone who has claimed to be the victim of sexual assault might react after that sexual assault?

A. Yes. They talked about it a little bit, sir.

Q. What kind of things did they talk about?

A. They said that that person might be closed off, not wanting to talk, or blaming themselves for the incident that happened.

Q. Is there any way that you personally feel somebody should react to a sexual assault or would react to a sexual assault?

A. No, sir.

Q. Do you think that people could react to a sexual assault in any number of ways?

A. I am pretty sure there are different ways that a person could react to sexual assault.

(R. at 341-42.)

The defense relied on this *voir dire* when it renewed its challenge of Dr. Tambling--the Government's proposed expert in sexual assault trauma response. (R. at 357.) But before turning to that issue, the military judge also relied on *voir dire*.

C. The Military Judge Relied on *Voir Dire* to Reject Appellant's UCI claim.

Consistent with the ruling of Commander (CDR) Monahan, the first military judge, Colonel (Col) Daugherty, the new military judge, "conducted extensive *voir dire* questions on unlawful command influence."[2] (R. at 355.) Based, in part, on that *voir dire*, the military judge made the following finding:

> I have watched the members both while they were being asked questions and their answers. I watched their demeanor and whether or not they were open to giving a quick and responsive answer to the

[2] The defense filed a pre-trial motion to dismiss for unlawful command influence (UCI). (Appellate Ex. XII.)

> questions that were being asked. The court finds that all of the members were very open; their demeanor appeared to be very honest; *and based upon all the voir dire that was conducted by counsel and their answers*, including their answers--or the court's, the government's, and the defense's questions on the SAPR training as well as SAPR leader training. The court finds beyond a reasonable doubt that the members have not been nor will they be influenced by any outside sources, statements, media coverage, the President's comments on sentencing or any other comments by any other leaders within the Department of Defense or the congressional interest that has occurred regarding sexual assault.

(R. at 355 (emphasis added).) Thus, the military judge relied on *voir dire* to dismiss the defense's motion to dismiss for UCI. But when the defense relied on *voir dire* to support its challenge of Dr. Tambling, the military judge gave it no weight.

D. <u>The Military Judge Disregarded *Voir Dire* to Reject Appellant's Expert Challenge</u>

After conducting its thorough *voir dire*, the defense renewed its objection to the Government's expert on sexual-assault trauma response: "Your Honor, at this time, the defense would like . . . the court to reconsider its ruling with regard to the testimony of Doctor Tambling in light of the *voir dire* we just conducted."[3] (R. at 356.) "Based on

[3] The military judge admitted Dr. Tambling as an expert "in the areas of victim trauma related to sexual assaults, victim behavior and response during and after a sexual assault." (R. at 466.) For the sake of brevity, throughout this brief she is referred to as an expert in sexual assault trauma response.

both . . . general *voir dire* and on individual *voir dire,*" the defense continued, "none of the members hold any rape myths or feel that there is any one way someone should react to either trauma, or sexual assault in particular." (R. at 357.) Citing *United States v. Houser*, 36 M.J. 392 (C.M.A. 1993), the defense argued the Government's expert lacked "any utility" for the members. (*Id.*)

The military judge disagreed. Employing the opposite approach he took regarding *voir dire* as it related to UCI, the military judge made another finding: "*The court finds that voir dire is voir dire.* It is not evidence and questions on *voir dire* are not--and answers that are given on *voir dire* are not based on evidence." (R. at 362.) The military judge cited M.R.E. 403, but he did not cite M.R.E. 702, 401, 402, or *Houser* when he made this tautological ruling.

Any additional facts not included herein are found in the argument below.

Summary of the Argument

I.

The military judge abused his discretion when he admitted the expert testimony of Dr. Rachel Tambling. During *voir dire*, the members agreed they held no pre-conceived beliefs regarding victim response to trauma, generally, or sexual-assault trauma, specifically. But the military judge placed

no stock in this significant fact. He allowed a Government expert to testify to sexual assault trauma response, which impermissibly bolstered the Government's case. This abuse of discretion materially prejudiced ITS2 Hutchinson's substantial right to a fair trial. As a result, this Court should set aside the finding and sentence.

II.

The conviction under Article 120, UCMJ, is legally and factually insufficient. No reasonable factfinder could have found all the essential elements of forcible rape beyond a reasonable doubt. Further, viewing the entirety of the evidence, this Court cannot be convinced beyond a reasonable doubt that ITS2 Hutchinson is guilty of this offense. For these reasons, among others, this Court should set aside the finding and sentence.

III.

The Commander in Chief, the Secretary of the Navy, members of Congress, the Chief of Naval Operations, the Master Chief Petty Officer of the Navy, the Force Master Chief for Navy Recruiting Command, Judge Palmer, and the Commandant of the Marine Corps unlawfully influenced ITS2 Hutchinson's court-martial. Their remarks created the appearance of UCI. The military judge erred when he found otherwise. This Court should set aside the finding and the sentence.

Argument

I.

THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE ADMITTED THE TESTIMONY OF DR. TAMBLING, AN EXPERT IN THE FIELD OF SEXUAL ASSAULT TRAUMA RESPONSE. BECAUSE THE MEMBERS HELD NO PRECONCEIVED BELIEFS REGARDING HOW A VICTIM OF SEXUAL ASSAULT SHOULD RESPOND TO TRAUMA, AN EXPERT IN THAT FIELD FAILED TO MEET THE CRITERIA FOR ADMISSIBILITY UNDER M.R.E. 702, 401, AND 402. RATHER THAN ASSIST THE TRIER OF FACT, THE GOVERNMENT'S EXPERT IMPERMISSIBLY BOLSTERED ITS CASE.

Standard of Review

This Court reviews a military judge's decision to admit expert testimony over defense objection for abuse of discretion. *United States v. Elmore*, 56 M.J. 533, 538 (N-M. Ct. Crim. App. 2001).

Principles of Law

Under Military Rule of Evidence (M.R.E.) 702, opinion testimony exhibiting "scientific, technical, or other specialized knowledge" is only admissible if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." Mil. R. Evid. 702. To decide whether "testimony will assist the trier of fact, the standard is helpfulness, not absolute necessity." *United States v. Ruth*, 42 M.J. 730, 733 (A.C.C.A. 1995) (citing *United States v. Meeks*, 35 M.J. 64, 68 (C.M.A. 1992)). As the Advisory

Committee's Note to Rule 702 explains, "opinions are excluded [when] they are unhelpful and therefore superfluous and a waste of time." Fed. R. Evid. 702, Advisory Committee's Note. Relevance, of course, must also be satisfied. *See United States v. Houser*, 36 M.J. 392, 399 (C.M.A. 1993) (citing M.R.E. 401); *see also United States v. Natson*, 469 F.Supp.2d 1253, 1258 n.1 (M.D. Ga. 2007) ("In addition to the Rule 702 'assist the trier of fact' standard, evidence may be excluded separate and apart from Rule 702 when it is not relevant.") (citing Fed. R. Evid. 401-02). Ultimately, it is the military judge who, in his "gatekeeping role", must determine what expert evidence shall go before a panel of members. *Cf. Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 597 (1993).

Discussion

Dr. Tambling should not have testified. Her opinion failed the threshold criterion under M.R.E. 702 in that it did not assist the trier of fact. It also failed the relevance requirement found in M.R.E. 401 and 402. Rather than helping the members understand a fact in issue or making a fact more or less likely to be true, Dr. Tambling's opinion impermissibly bolstered the Government's case; it sanctioned MA3 B's narrative with the imprimatur of an expert, a result that runs afoul of M.R.E. 702 and 402. *Cf. United States v. Banks*, 36 M.J. 150, 163 (C.M.A. 1992) ("We find error . . . in

trial counsel's use of *expert opinion* to proffer to the members a characteristic 'profile' of child sexual abuse and then reliance on this 'profile' to bolster the Government's case to establish appellant's guilt.") (emphasis in original).

Some perspective is helpful here. In *Houser*, 36 M.J. at 399, the U.S. Court of Military Appeals (C.M.A.) observed "[c]ertain behavioral patterns such as failure to resist or delay in reporting a rape could be confusing to the fact-finders because these may be counter-intuitive." Due in part to that "confusi[on]," the C.M.A. affirmed the admission of an expert on rape trauma there. But context is everything. *Houser* was decided in 1993, more than a decade before the Department of Defense originated the detailed training on sexual assault prevention and response (SAPR) in 2004. *See* SAPR Home Page: Mission and History, *available at* http://www.sapr.mil/index.php/about/mission-and-history. That training addressed, among other issues, manners of victim response to sexual assault trauma. (R. at 288-89, 302, 341-42.)

Significantly, the members who sat on ITS2 Hutchinson's panel all testified they received SAPR training within six months of his court-martial. (R. at 220.) By questioning each member during *voir dire* on their beliefs regarding how victims respond to sexual assault trauma, the defense shed

light on the progress the Navy has made in educating its Sailors on rape response. But more to the point, the defense also exposed the unhelpfulness of Dr. Tambling. *See* Fed. R. Evid. 702, Advisory Committee's Note. The members already understood sexual assault trauma response, so her testimony not only was unhelpful, it was superfluous. *Id.* The military judge erred when he failed to grant the defense motion to preclude it.

When proposed expert testimony will not be helpful, i.e. it will not assist the trier of fact, it must be excluded under M.R.E. 702. The federal circuits are in accord. In *United States v. Mitchell*, the U.S. Court of Appeals for the D.C. Circuit affirmed a district court's decision to preclude an expert on discerning "tape recorded conversations." 49 F.3d 769, 780 (D.C. Cir. 1995). As that circuit court put it, "Such material not only involves matters of general knowledge, but is squarely within the traditional province of the jury." *Id.* (citations omitted). The Fifth Circuit applied a similar rule in *United States v. Edelman*, 873 F.2d 791, 795 (5th Cir. 1989) (affirming preclusion of expert whose testimony "concerned matters within the common knowledge of the jury[.]"). So did the Seventh Circuit. *See United States v. Devine*, 787 F.2d 1086, 1088 (7th Cir. 1986) (affirming in part

because "what is said in a tape recorded conversation is not outside the average person's understanding.").

Unlike in *Devine*, this Court need not examine the *shallow* well of "an average person's understanding." *Devine*, 787 F.2d at 1088. That is because military members are chosen, in part, for their "education, training, experience . . . and judicial temperament." Article 25, UCMJ, 10 U.S.C 825. As a result, this Court has the luxury of examining the *deep* well of a member's understanding. *See United States v. Rome*, 47 M.J. 467, 471 (C.A.A.F. 1998) ("A military panel of court members has often been called a 'blue ribbon' panel due to the quality of its members.") (Crawford, J., dissenting). Given their answers during *voir dire*, and considering the requirements of Article 25, UCMJ, this Court should easily find the issue of sexual assault trauma response to be within the panel's understanding. Accordingly, the military judge abused his discretion when he admitted the testimony of Dr. Tambling.

The members revealed no preconceived beliefs regarding how an alleged victim responds to sexual assault. In fact, they revealed just the opposite. Their descriptions of potential responses to sexual assault trauma revealed considerable granularity on the issue. For example, one member described responses as being unpredictable while

another suggested response is dependent somewhat on the victim's personality. (R. at 270, 327.) A third answer from a member acknowledged responses could depend on the way in which the victim was raised as a child. (R. at 257-58.) As such, that MA3 B (1) went to Five Guys to get a burger after the alleged rape, or (2) sat on the same cushion as ITS2 Hutchinson while trying to find him some place to exercise (also after the alleged rape), constitute "matters of general knowledge" within this blue-ribbon panel of members. Dr. Tambling was not helpful.

Turning to prejudice, the trial counsel harped on the testimony of Dr. Tambling during the Government's closing argument. "Common sense will tell you," he argued, "if she's being choked, if she's being raped, she's not processing all the information, and that's backed up by Dr. Tambling's testimony about her research . . . ."[4] (R. at 713.) He continued to place the weight of her expertise behind the Government's otherwise shaky case: "Dr. Tambling testified about how victims react to traumatic experiences. She talked about how they try to act normal." (R. at 714.) And he did

[4] Pointedly, trial counsel demonstrated the strength of ITS2 Hutchinson's argument on appeal with this segment of his closing argument. By linking Dr. Tambling's testimony so directly with "common sense," trial counsel informed the Court her testimony was not actually helpful. Sexual assault trauma response is well within the province of this member's panel, as demonstrated by their granular responses during *voir dire*.

not stop there. Underscoring Dr. Tambling's importance to the Government's case, the trial counsel implored the members to "[t]hink about Dr. Tambling's testimony. I know you all took a lot of notes. *Think about what she said. Think about all the research she talked about. Think about all the studies she talked about . . . .*" (R. at 718 (emphasis added).) Of course, the more the members thought of Dr. Tambling's "research" and "studies," the less they thought about the weakness of the Government's case, which, interestingly, did not include any DNA evidence. (R. at 735.) The trial counsel maintained this focus on Dr. Tambling during his rebuttal argument, where he mentioned her at least three more times. (R. at 750-52.)

Notably, when testing for prejudice, the U.S. Court of Appeals for the Armed Forces places considerable weight on what the trial counsel says--or does not say--during closing argument. *See United States v. Harrow*, 65 M.J. 190, 203 (C.A.A.F. 2007) (finding no prejudice where "trial counsel . . . did not mention" the arguably erroneous evidence during "his argument on findings[.]"). Here, that trial counsel so heavily relied on Dr. Tambling in his closing argument weighs in favor of finding prejudice. This Court should set aside the finding and sentence.

Conclusion

The military judge abused his discretion when he admitted the expert testimony of Dr. Rachel Tambling. During *voir dire*, the members agreed they held no pre-conceived beliefs regarding sexual assault trauma response. Erroneously, the military judge placed no stock in this significant fact. He allowed a Government expert to testify to sexual assault trauma response, which impermissibly bolstered the Government's case. This abuse of discretion materially prejudiced ITS2 Hutchinson's substantial right to a fair trial. For all these reasons, this Court should set aside the finding and sentence.

II.

THE CONVICTION UNDER ARTICLE 120, UCMJ, IS LEGALLY AND FACTUALLY INSUFFICIENT. THE GOVERNMENT DID NOT PROVE THE ELEMENT OF UNLAWFUL FORCE BEYOND A REASONABLE DOUBT. FURTHERMORE, GIVEN THE SIGNIFICANT CREDIBILITY PROBLEMS OF MA3 B, AND CONSIDERING THE EXCEPTIONAL MILITARY CHARACTER OF ITS2 HUTCHINSON, THIS COURT SHOULD SET ASIDE THE FINDING AND SENTENCE.

Standard of Review

This Court has an independent obligation to review each case *de novo* to ensure the factual and legal sufficiency of the findings. Article 66(c), UCMJ, 10 U.S.C. § 866; *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). In doing so,

this Court is empowered to substitute its judgment for that of the trial court. *Id.*

Principles of Law

When deciding legal sufficiency, the test is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Humphreys*, 57 M.J. 83, 94 (C.A.A.F. 2004). A review of legal sufficiency is limited to the evidence introduced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993). As for factual sufficiency, "the test is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses," this Court is unconvinced of the accused's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325.

Discussion

A. The conviction is legally insufficient. This Court should set aside the finding.

The conviction under Article 120, UCMJ, is legally insufficient because the Government failed to prove the element of unlawful force.

Some definitions are helpful. The military judge defined "unlawful force" as "an act of force done without legal justification or excuse." (R. at 692.) The word "force"

describes "the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or inflict physical harm sufficient to coerce or compel submission by the alleged victim." (*Id.*) Consent is relevant to this element because it "may cause a reasonable doubt as to whether [ITS2 Hutchinson] used unlawful force." (*Id.*)

As discussed above, MA3 B reported a supposedly violent encounter with ITS2 Hutchinson. In her words, "I remember him placing his hand on my neck and I couldn't breathe." (R. at 400.) She also testified, "He grabbed the back of my head and he thrusted [*sic*] violently in my mouth." (R. at 401). But importantly, the members acquitted ITS2 Hutchinson of penile penetration of the mouth. (R. at 766.) So that evidence should be of no moment to this Court. As for the alleged grabbing of the neck, it simply does not meet the military judge's definition of unlawful force. Put differently, that force was not "sufficient to overcome, restrain, or injure" MA3 B. Once again, context is everything.

Q. Eventually, you both got down on the bed, right?

A. He tossed me down first and then----

Q. When he tossed you down, was this violent?

A. No, sir.

Q. This was more playful?

A. Yes, sir.

Q. And up until this point, you were still okay with everything that had happened?

A. Yes, sir.

Q. All right. And you were still okay with making out?

A. Yes, sir.

(R. at 423.) Admittedly, this playful conduct occurred before the alleged neck grabbing. But it still provides important context on the alleged neck grabbing for this Court. The best evidence that any force ultimately used was not unlawful flows from LS2 Ramirez who testified to his observations of MA3 B's neck just moments after the alleged forcible rape. He testified that MA3 B's neck was not red, not bruised, and not scratched. (R. at 668.) Her eyes were neither puffy nor runny, (*id.*), despite her claim that she was crying afterward. These facts--from an objective observer--significantly undercut MA3 B's narrative of violence. This Court should place much stock in LS2 Ramirez's testimony because he got a good look at MA3 B; she sat up from the couch and shook his hand just moments after the alleged rape. (R. at 435.) She was friendly to LS2 Ramirez, and she did not seem withdrawn. (R. at 670.) What is more, according to LS2 Ramirez, nothing about MA3 B indicated "distress." (*Id.*)

Viewed collectively, these facts weigh in favor of legal insufficiency on the issue of unlawful force.

Consent, per the military judge's instruction, is also relevant here. MA3 B admitted she stroked ITS2 Hutchinson's penis while she was in his bed--just as she had done before in his car while at Bluff Point State Park. (R. at 425, 497.) She also admitted to making out with him while on the bed. In context, these facts suggest a consensual encounter. For all these reasons, this Court should set aside the finding and sentence. The conviction is legally insufficient.

B. The conviction is factually insufficient. This Court should set aside the finding.

Even if this Court disagrees with ITS2 Hutchinson's legal insufficiency contention, it should still set aside the findings and sentence. The conviction is factually insufficient. MA3 B is simply not credible. As a result, this Court should disregard her testimony. The testimony of MAC James Michael Aarnio, U.S. Navy, provides a great example of her established dishonesty.

At the time of ITS2 Hutchinson's trial, MAC Aarnio had been a Navy Chief for approximately five years. (R. at 599.) He served as the Deputy Director for the Security Department at Naval Station Newport, Rhode Island. (*Id.*) And he caught MA3 B in a significant lie. Specifically, MA3 B told MAC

Aarnio, her supervisor, that the Referrals Office at medical wanted her to transfer to Bethesda, Maryland.[5] (R. at 610.) Doing his due diligence, MAC Aarnio went to the Referrals Office, which told him the transfer request was not true. (R. at 610-11.) In fact, the office said MA3 B--on her own volition--requested to go to Bethesda. (*Id.*) The office quickly denied her transfer request, and instead offered her more opportunities to see another doctor in the New England area. (*Id.*)

Just months after her transfer from Greece to Rhode Island, then, MA3 B tried to engineer yet another transfer to a different duty station. She posted comments on the Newport Naval Station Facebook page expressing her unhappiness in being stationed there. (R. at 657.) And importantly, her failed attempt to procure a transfer occurred before she made the allegation of sexual assault. (R. at 612.) This fact not only undercuts MA3 B's overall credibility, it also presents a motive to fabricate. Per NAVADMIN 132/12 (Apr. 12, 2012), alleged victims who file unrestricted reports of sexual assault may request an expedited transfer "to a unit in a different geographic location."

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[5] She presented this tale to MAC Aarnio sometime after she expressed her dislike for Newport and said she wanted to go elsewhere. (R. at 609.)

Other Sailors testified to MA3 B's penchant for dishonesty. MA1 Andrew J. Howard, U.S. Navy, for example, worked with MA3 B on a regular basis. (R. at 653-54.) He testified that she is both capable and willing to be deceptive. (R. at 654.) In fact, she has lied to him before. (R. at 656.) MA1 Brian A. Stuart, U.S. Navy, corroborates her dishonesty. He also worked with MA3 B. He noted her failure to be forthcoming with accurate information. (R. at 661.)

Contrasting her character for untruthfulness with ITS2 Hutchinson's exceptional military character, a fact introduced through the testimony of no less than four witnesses, (R. at 586-87, 594-95, 643, 649), a clear sight-picture emerges: the Government did not satisfy its burden of proof. The Government did not even offer any DNA evidence inculpating ITS2 Hutchinson. (R. at 735.) For all these reasons, the conviction is factually insufficient. Using its broad fact-finding powers under Article 66, UCMJ, this honorable Court should set aside the finding and sentence.

Conclusion

The conviction under Article 120, UCMJ, is legally and factually insufficient. No reasonable factfinder could have found all the essential elements of forcible rape beyond a reasonable doubt. Specifically, the Government failed to prove the element of unlawful force. Further, viewing the

entirety of the evidence, this Court cannot be convinced beyond a reasonable doubt that ITS2 Hutchinson is guilty of this offense. For these reasons, among others, this Court should set aside the findings and sentence.

III.

THE COMMANDER IN CHIEF, THE SECRETARY OF DEFENSE, THE SECRETARY OF THE NAVY, MEMBERS OF CONGRESS, THE CHIEF OF NAVAL OPERATIONS, THE MASTER CHIEF PETTY OFFICER OF THE NAVY, THE FORCE MASTER CHIEF FOR NAVY RECRUITING COMMAND, JUDGE PALMER, AND THE COMMANDANT OF THE MARINE CORPS DELIVERED REMARKS THAT CREATED THE APPEARANCE OF UNLAWFUL COMMAND INFLUENCE. THIS UNLAWFUL COMMAND INFLUENCE INFECTED ITS2 HUTCHINSON'S COURT-MARTIAL. THIS COURT SHOULD SET ASIDE THE FINDINGS AND THE SENTENCE.

Standard of Review

Claims of unlawful command influence are reviewed *de novo*. *See United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013) (citing *United States v. Harvey*, 64 M.J. 13, 19 (C.A.A.F. 2006)). A presumption of prejudice attaches, however, "once unlawful command influence is raised at the trial level. . . ." *United States v. Douglas*, 68 M.J. 349, 354 (C.A.A.F. 2010) (citing *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999)). In such a case, this Court must set aside the findings and sentence unless it is "convinced *beyond a reasonable doubt* that the unlawful command influence

had no prejudicial impact on the court-martial." *Id.* (citing *Biagase*, 50 M.J. at 150-51) (emphasis added).

Principles of Law

Article 37, UCMJ, prohibits any person subject to the UCMJ from attempting to "coerce or, by any unauthorized means, influence the action of a court-martial . . . ." 10 U.S.C. § 837. This prohibition has an important historical context: "[f]ollowing victory in World War II, returning veterans, practitioners, and the American public all joined in roundly criticizing a system rife with both real and perceived unlawful command influence and abuses." Major General William A. Moorman, *Fifty Years of Military Justice: Does the Uniform Code of Military Justice Need to be Changed?*, 48 A.F. L. Rev. 185, 187 (2000).

Given this important backdrop, even the appearance of unlawful command influence may require drastic remedy from appellate courts. *See, e.g.*, *Salyer*, 72 M.J. at 428 (dismissing with prejudice after finding the *appearance* of unlawful command influence) (emphasis added); *United States v. Lewis*, 63 M.J. 405, 416-17 (C.A.A.F. 2006) (same). Thus, where it is found to exist, judicial authorities must take those steps necessary to preserve both the actual and apparent fairness of the criminal proceeding. *United States v. Rivers*, 49 M.J. 434, 443 (C.A.A.F. 1998); *United States v. Sullivan*,

26 M.J. 442, 444 (C.A.A.F. 1988). "The appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial." *Lewis*, 63 M.J. at 415 (citing *United States v. Stoneman*, 57 M.J. 35, 42-43 (C.A.A.F. 2002)).

The test is straightforward and objective: this Court "focus[es] upon the perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public." *Salyer*, 72 M.J. at 423 (quoting *Lewis*, 63 M.J. at 415). Apparent UCI arises when "an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *Id.*

At trial, the threshold for raising the issue of UCI is low; it requires only "some evidence" of facts which, if true, constitute UCI, and that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings. *Biagase*, 50 M.J. at 150 (internal citations omitted). Once the issue is raised at trial, the burden shifts to the Government, which may either show there was no unlawful command influence or show the unlawful command influence will not affect the proceedings. *United States v. Gerlich*, 45 M.J. 309, 310 (C.A.A.F. 1996).

Discussion

On 7 May 2013, the Commander in Chief, when asked about sexual assault in the military, stated the following:

> I have no tolerance for this . . . I have communicated this to the secretary of defense. We're gonna communicate this again to folks up and down the chain in areas of authority. And I expect consequences. If we find out somebody's engaging in this stuff, they've got to be held accountable: prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged. Period.

(Appellate Ex. XIII, at 5.)

Nearly thirty days after President Obama delivered those remarks, Representatives Niki Tsongas (D-Mass) and Michael Turner (R-Ohio) delivered problematic remarks of their own. According to Representative Tsongas, "This is clearly a systemic problem, and accountability is needed at every level, from everyone, officer and enlisted alike." (Appellate Ex. XII, at 2.) Representative Turner was even more pointed: "The word should go out clearly and strongly that if you commit a sexual assault in the military, you are out." (*Id.*)

Former Secretary of Defense Panetta raised the issue of zero tolerance and sexual assault. He said, "We have absolutely *no tolerance* for any form of sexual assault." (Appellate Ex. XII, at 5 (emphasis added).) The Secretary of the Navy is also on the record regarding sexual assaults. In his words, "If prevention fails, we have to be ready to

respond and to hold offenders accountable." (Appellate Ex. XII, at 5.)

The C.A.A.F. has recently recognized that the rubric of apparent unlawful command influence may apply to civilian leaders. *See United States v. Hutchins*, 72 M.J. 294, 312 (C.A.A.F. 2013) (Ryan, J., concurring) (Baker, C.J., dissenting); *see also United States v. Simpson*, 58 M.J. 368, 374-75 (C.A.A.F. 2003); *United States v. Hagen*, 25 M.J. 78, 88 (C.M.A. 1987) (Sullivan, J., concurring); *United States v. Fowle*, 7 C.M.A. 349, 351-52 (C.M.A. 1956). Further, "[w]hile statutory in form, the prohibition can also raise due process concerns, where for example unlawful command influence undermines a defendant's right to a fair trial . . . ." *Salyer*, 72 M.J. at 423. It seems beyond debate, then, that "the Commander in Chief of the Army and Navy[,]" U.S. Const., art. II, § 2, can unlawfully influence a court-martial proceeding. So it is with members of Congress who hold the sacred power to "declare War" and to "provide and maintain a Navy[,]" U.S. Const. art. I, § 8, and with the Secretary of the Navy, who "is responsible to the Secretary of Defense for . . . [t]he functioning and efficiency of the Department of the Navy." 10 U.S.C. § 5013; 32 C.F.R. § 700.301.

Here, the Commander in Chief, the Secretary of Defense (SECDEF), the Secretary of the Navy (SECNAV), and members of

Congress created the appearance of UCI, undermining ITS2 Hutchinson's right to a fair trial. As for the President, his words do exactly what Judge Sullivan warned against in his concurring opinion in *Hagen* because his words "sen[t] signals down the chain of command as to expected results in a criminal case . . . which w[ould] please the leadership." *Hagen*, 25 M.J. at 87 (Sullivan, J., concurring). The President's words are more than the mere policy statement or direction of general accountability that failed to garner relief for the appellant in *Simpson*. 58 M.J. at 374-75. Furthermore, although there was subsequent clarification statement made by SECDEF,[6] (Appellate Ex. XX), the President has never retracted or even clarified his words. Nor has SECNAV or Representatives Tsongas and Turner.

These actors, however, do not present the entire UCI picture here. As highlighted in the defense's motion to dismiss, the Chief of Naval Operations (CNO) and the Master Chief Petty Officer of the Navy (MCPON) also made problematic remarks. Regarding the latter, he issued a call to arms via the Navy Times: "I'm going to issue every chief petty officer in the Navy a cutlass and tell them to get to work . . . I

[6] As aptly argued by the defense, that the SECDEF had to issue a clarification of President Obama's remarks shows, at minimum, his concern that the statements could run afoul of Article 37, UCMJ. (R. at 84.)

knew I could go to my chiefs and call them to action in wiping this [sexual assault] from our ranks. " (Appellate Ex. XII, at 7.) Regarding the former, he said he "can't tolerate" sexual assault. (Appellate Ex. XII, at 3.) Noting "today about two sailors are going to sexually assault two other sailors[,]" the CNO then said, "I don't know if that bothers you, but it bothers the hell out of me." (*Id.*)

Individually and collectively, these remarks created the appearance of UCI in ITS2 Hutchinson's court-martial. The remarks not only placed undue pressure on court-martial members to convict the accused, they also created the impression that the reported assault was true. Such a result offends Article 37, UCMJ. *See* 10 U.S.C. § 837. A disinterested observer, aware of these statements and the facts in this case, would harbor a significant doubt regarding the fairness of the court-martial process. *Lewis*, 63 M.J. at 415.[7]

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[7] One fact, in particular, stands out here. The members convicted ITS2 Hutchinson of forcible rape for what MA3 B described as an incredibly violent offense. Despite the guilty finding, the members sentenced ITS2 to only a Bad-Conduct Discharge and *confinement for three months*. (R. at 849.) A fair inference from this incredibly light sentence--for an offense that carries a maximum punishment of life without eligibility for parole (R. at 839)--is that the members followed the orders of their leaders, showing zero tolerance and presuming guilt. In other words, they did what they thought was their duty, and they held the accused, ITS2 Hutchinson, to account.

The defense motion to dismiss also raised UCI flowing from Force Master Chief for Navy Recruiting Command (FORCM) Earl S. Grey, U.S. Navy, former military Judge LtCol Palmer, and the Commandant of the Marine Corps (CMC), Gen. James F. Amos. (Appellate Ex. XII, at 4-7.) These persons also delivered problematic comments that contributed to the appearance of UCI here. FORCM Gray sent a one-page newsletter to senior enlisted personnel across the Navy on 14 Match 2013 wherein he stated, "False allegations of sexual assaults are 3% (per NCIS data) which means 97% of allegations are true." (Appellate Ex. XII, at 7.) As for Judge Palmer and the CMC, they also issued statements regarding the need to obtain "more convictions", while at the same time declaring the legitimacy of the majority of sexual assault allegations. (Appellate Ex. XII., at 6-8.)

Erroneously, the military judge found the defense "failed to produce 'some evidence' of apparent UCI in this case." (Appellate Ex. XXII, at 17.) That finding whistles past the gravity and consistency of these troublesome remarks. It also ignores the low threshold of 'some evidence.' *See Biagase*, 50 M.J. at 150 (describing the threshold for raising UCI at trial as "low[.]"). Regarding a connection to ITS2 Hutchinson's court-martial, LTJG Chitty, a seated member, wrote an article for the base newspaper, The Dolphin, where he propagated a

message of zero tolerance and victim believability regarding sexual assaults. LTJG Phillip Chitty, *SUBASE Sailors dialogue with leadership in facilitated SAPR-SD Sessions*, The Dolphin (July 3, 2013), available at http://www.dolphinnews.com/articles/2013/07/03/news.[8] Quoting Captain Carl Lahti, U.S. Navy, the New London base commanding officer, LTJG Chitty wrote: "Sexual assaults are crimes and will not be tolerated in our Navy[.]" *Id.* Quoting the Commander Michael Pennington, the base executive officer, LTJG Chitty further wrote:

> Not believing a shipmate when they have been sexually assaulted re-victimizes them, makes them feel disconnected from others, and also discourages them from reporting it. *The first job as a bystander is to believe the victim.*

Id. (emphasis added). At minimum, these passages show the UCI, detailed above, impacted at least one member at ITS2 Hutchinson's court-martial--over one month before it began.

For these reasons, among others, the military judge erred when he denied ITS2 Hutchinson's motion to dismiss. This Court should correct that significant error, reverse the military judge, and set aside the finding and sentence. ITS2 Hutchinson deserves a trial from free the taint of UCI.

---

[8] For ease of reference, this article is appended to ITS2 Hutchinson's Brief.

Conclusion

The President of the United States, the Secretary of Defense, the Secretary of the Navy, members of Congress, the Chief of Naval Operations, the Master Chief Petty Officer of the Navy, the Force Master Chief for Navy Recruiting Command, Judge Palmer, and the Commandant of the Marine Corps unlawfully influenced ITS2 Hutchinson's court-martial. Collectively and individually, their remarks created the appearance of UCI, which undermined the fairness of ITS2 Hutchinson's court-martial. The military judge erred when he found otherwise. Because ITS2 Hutchinson deserves a trial free from the taint of unlawful command influence, this Court should set aside the finding and the sentence.

DAVID C. DZIENGOWSKI
Lieutenant, JAGC, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE
Bldg. 58, Suite 100
Washington, D.C. 20374
P: (202) 685-7292
F: (202) 685-7426
david.dziengowski@navy.mil

JOHN J. STEPHENS
Major, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE
Bldg. 58, Suite 100
Washington, D.C. 20374
P: (202)685-8587
F: (202)685-7426
john.j.stephens@navy.mil

Appendix

1. LTJG Phillip Chitty, *SUBASE Sailors dialogue with leadership in facilitated SAPR-SD Sessions*, The Dolphin (July 3, 2013).

Certificate of Filing and Service

I certify that a copy of the foregoing was delivered to the Court and to Director, Appellate Government Division, and uploaded electronically onto CMTIS on 16 June 2014.

DAVID C. DZIENGOWSKI
Lieutenant, JAGC, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE
Bldg. 58, Suite 100
Washington, D.C. 20374
P: (202) 685-7292
F: (202) 685-7426
david.dziengowski@navy.mil

The Dolphin (Dolphin-News.com)

News

SUBASE Sailors dialogue with leadership in facilitated SAPR-SD Sessions

Wednesday, July 3, 2013

By Lt. j.g. Phillip Chitty

GROTON, Conn. –

From the deck plates to the highest ranking officers, all Sailors, and many civilians, attached to Naval Submarine Base New London (SUBASE) participated in Sexual Assault Prevention and Response Stand Down (SAPR-SD) training through a series of facilitated discussion sessions, June 13 through 28.

Led by Capt. Carl Lahti, base commanding officer, Cmdr. Michael Pennington, base executive officer, and CMDCM Jay Gladu, base command master chief, the sessions represented a different approach by the Navy to educate Sailors about sexual assault awareness and prevention.

"Sexual assaults are crimes and will not be tolerated in our Navy," said Lahti. "The intent of the Stand-down is to ensure service members and civilian personnel clearly understand they are accountable for fostering a climate where sexist behaviors, sexual harassment, and sexual assault are not tolerated, condoned, or ignored."

Sailors were required to participate in the training, and while not a requirement for base civilians, many also attended the training.

Appendix (1)

To meet training quality intent and to facilitate discussion participation by every Sailor and civilian attending, each session was kept small.

"Groups in Stand-down sessions were not to exceed 50 participants because that's what was deemed ideal for maximum participation in the facilitated discussions," said Pennington.

Training participants were also addressed through recorded videos by Secretary of the Navy Ray Mabus, and Chief of Naval Operations, Adm. Jonathan Greenert.

"We owe our Sailors, Marines, and the American people a solution to the sexual assault problem in our ranks," said Mabus. "None of them [Sailors and Marines] expect the danger to come from other Sailors and Marines. ...Imaginative training and new programs are necessary."

Greenert echoed this concern.

"We need to refocus our attention on this very, very serious challenge," said Greenert. "The fact of the matter is we still have shipmates assaulting other shipmates. "

With role-playing and open group discussions, the Navy's more involved approach to addressing the problem of sexual assault with Sailors and Marines seemed to hit its mark across all ranks and rates, said Gladu.

"In the training, we're looking at one another, speaking to one another, and actively addressing problems and concerns," said Gladu.

A major concern tackled by the training was "bystander intervention," or as Pennington termed it "shipmates looking out for shipmates."

"As soon as you [a bystander] doubt a shipmate's claim, you are calling them a liar," said Pennington. "Not believing a shipmate when they have been sexually assaulted re-victimizes them, makes them feel disconnected from others, and also discourages them from reporting it. The first job as a bystander is to believe the victim."

According to the Department of Defense there were 26,000 sexual assault cases throughout the military in 2012, but only 3,300 of them were reported. In addition, 45 percent of the victims were male.

To Lahti, every Sailor and civilian attending the training should have left fully aware of the following three key points:

- Victims' reports are treated with the utmost seriousness; their privacy is protected; and they are treated with sensitivity.

- Shipmates and bystanders should always feel motivated to intervene in situations because offensive or criminal conduct is neither tolerated nor condoned.

- Offenders should know they will be held appropriately accountable by an effective system of justice.

In addition to conveying an understanding of policies and broadening awareness, the open discussions highlighted how sexual interactions, harassing behaviors, and even assault may be viewed differently by everyone; thus making it a "very grey" issue.

"Perception is key," said Pennington. "The Navy represents a cross section of society... but dignity, trust, and respect must be the core values we live by and how we treat one another."

Lahti recognized the impact on daily routine that the sessions represented.

"While many may wish they were spending time doing other things than participating in these Stand-down sessions, our Navy leaders emphasis on this issue highlights that there are few, if any, more important things than participating in these discussions," said Lahti.

URL: http://www.dolphin-news.com/articles/2013/07/03/news/doc51d307a1a9e84341743600.prt

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DEPARTMENT OF THE NAVY
GENERAL COURT-MARTIAL
NAVY AND MARINE CORPS TRIAL JUDICIARY
HAWAII JUDICIAL CIRCUIT

U N I T E D S T A T E S **v.** [redacted] **IS3 USN**	**DEFENSE MOTION** **FOR APPROPRIATE RELIEF** **– BILL OF PARTICULARS** **19 AUGUST 2013**

RELIEF SOUGHT

Pursuant to RCM 906(b)(6), the Defense submits the following Motion for a Bill of Particulars. The Defense requests this relief in order to apprise IS3 [redacted] of the charges with sufficient precision so as to enable him to "prepare for trial, to prevent surprise, and to interpose a plea of double jeopardy should he be prosecuted a second time for the same offense."[1] Specifically, the Defense moves for a Bill of Particulars in regards to the relationship between the six specifications of Charge II and Charge I. Moreover, the Defense moves for a Bill of Particulars in regards to the relationship between Charge II, Specifications 1, 2, and 3, and Charge II, Specifications 4, 5, and 6, respectively.

BURDEN OF PROOF AND STANDARD OF PROOF

1. As the moving party, the defense bears the burden of proof in this motion and that burden is a preponderance of the evidence. RCM 905(c)(1).

FACTS

2. IS3 [redacted] has been charged with one Specification of Article 80, UCMJ, for attempted rape. Charge II also charges IS3 [redacted] with three specifications of aggravated sexual contact and three specifications of abusive sexual contact:

Specification 1: that the accused, using unlawful force, used his hand to touch IS3 [redacted]'s genitalia

Specification 2: that the accused, unlawful force, used his hand to touch IS3 [redacted]'s breast

Specification 3: that the accused, using unlawful force, used his penis to touch IS3 [redacted]'s buttock

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[1] United States v. Bortnovsky, 820 F.2d 572, 574 (2d Cir. 1987); *see also* Hamling v. United States, 418 U.S. 87, 117 (1974); Wong Tai v. United States, 273 U.S. 77, 82 (1927); United States v. Ahmad, 992 F. Supp. 682, 684 (S.D.N.Y. 1998).

Specification 4: that the accused used his hand to touch IS3 [redacted]'s genitalia by causing bodily harm to her, to wit: holding her legs over his shoulder with his arm, with an intent to gratify his own sexual desire

Specification 5: that the accused used his hand to touch IS3 [redacted]'s breast by causing bodily harm to her, to wit: holding her legs over his shoulder with his arm, with an intent to gratify his own sexual desire

Specification 6: that the accused used his penis to touch IS3 [redacted]'s buttock by causing bodily harm to her, to wit: holding her legs over his shoulder with his arm.

3. On 6 August 2013, the Defense requested a Bill of Particulars from Trial Counsel. To date, that request has gone unacknowledged and unanswered.

Law

4. The Defense relies on the following authorities in support of its motion:

RCM 906(b)(6)
US v. Williams, 40 MJ 379 (CMA 1994)
United States v. Bortnovsky, 820 F.2d 572, 574 (2d Cir. 1987)

Argument

5. RCM 906(b)(6) discussion states one of the purposes of a Bill of Particulars is, "to inform the accused of the nature of the charge with sufficient precision to enable the accused to prepare for trial..." The test for whether a bill of particulars is necessary is whether "the specification contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet; and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." US v. Williams, 40 M.J. 379 (C.M.A. 1994).

6. A court should deny a request for a bill of particulars "if the information sought by defendant is provided in the indictment or in some acceptable alternate form." United States v. Bortnovsky, 820 F.2d 572, 574 (2d Cir. 1987). Applying that premise to the military, the Court should deny the request if the charge sheet contains the requested information. However, the Second Circuit has cautioned that the prosecution does not fulfill its obligations "merely by providing mountains of documents to defense counsel who were left unguided" as to the nature of the charges pending. Id. at 575.

7. In the prior discovery provided and our understanding of the case, the Defense has concerns about what offenses the Government is charging IS3 [redacted] with, which are lesser-included specifications of others, and which are alternative theories of proof. Without some clarity on this issue, IS3 [redacted] will not be able to prepare properly for trial, nor will he be able to ensure that his rights are protected in regards to potential double jeopardy.

Relief Requested

8. The Defense submits that the information that has been previously provided by the Government is insufficient to enable IS3 [redacted] to prepare for trial without the requested order for a Bill of Particulars. Furthermore, to prepare for trial the defense needs to know the particular facts the government is relying on in making these allegations.

9. The Government should either provide the defense with the particulars it is relying on or amend the charges pleading the specification with sufficient particularity for the defense to understand exactly what the government is alleging.

Evidence

10. The Defense requests the Court consider the Charge Sheet and the Defense Request for a Bill of Particulars, (enclosure 1), be considered for purposes of this motion.

Oral Argument

11. The defense does not request oral argument.

__/S/_____
J. A. STEPHENS
LT, JAGC, USN
Defense Counsel

****

Certificate of Service

I certify that a true copy of this motion was served on opposing counsel this 19 day of August 2013.

__/S/_____
J. A. STEPHENS
LT, JAGC, USN
Defense Counsel

6 August 2013

From: LT Jackson A. Stephens, JAGC, USN, Detailed Defense Counsel
To: LT Robert Singer, JAGC, USN, Trial Counsel

Subj: REQUEST FOR BILL OF PARTICULARS ICO UNITED STATES V. IS3 [redacted], USN

Ref: (a) Rule for Courts-Martial 906(b)(6)
(b) Charge Sheet ICO U.S. v. IS3 [redacted], USN
(c) United States v. Rogers, 54 M.J. 244 (C.A.A.F. 2000)

1. In accordance with reference (a), the defense requests that the government provide a bill of particulars for specifications 1 through 6 of Charge II as reflected in reference (b). The discussion section of reference (a) states that the purpose of a bill of particulars is to "inform the accused of the nature of the charges with sufficient precision to enable the accused to prepare for trial [and] to avoid or minimize the danger of surprise at the time of trial."

2. Per Reference (b), IS3 [redacted] is charged with one specification of Article 120, UCMJ for attempted rape. Additionally, Charge II alleges three specifications of aggravated sexual contact and three specifications of abusive sexual contact:

Specification 1: that the accused used his hand to touch IS3 [redacted]'s genitalia

Specification 2: that the accused used his hand to touch IS3 [redacted]'s breast

Specification 3: that the accused used his penis to touch IS3 [redacted]'s buttock

Specification 4: that the accused used his hand to touch IS3 [redacted]'s genitalia by causing bodily harm to her, to wit: holding her legs over his shoulder with his arm, with an intent to gratify his own sexual desire

Specification 5: that the accused used his hand to touch IS3 [redacted]'s breast by causing bodily harm to her, to wit: holding her legs over his shoulder with his arm, with an intent to gratify his own sexual desire

Specification 6: that the accused used his penis to touch IS3 [redacted]'s buttock by causing bodily harm to her, to wit: holding her legs over his shoulder with his arm

Subj: REQUEST FOR BILL OF PARTICULARS ICO UNITED STATES V. IS3 [redacted], USN

3. Reference (c) provides an example of information contained in a bill of particulars. In order to adequately prepare a defense, the defense respectfully requests answers to the following:

a. Are the six specifications of Charge II charged as lesser included offenses of Charge I, Specification 2, or is Charge I, Specification 2 a wholly separate offense?

b. What is the Government's theory of charging with respect to how Specifications 1-3 of Charge II are related to Specifications 4-6 of Charge II? Specifically, are those alleged as alternative theories of the same conduct, or as wholly separate offenses?

3. I very much appreciate your prompt attention to this matter. Please let me know if you have any questions or desire clarification as to the specific information the defense is requesting.

/s/
J. A. STEPHENS

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
	)	Case No. 201300210
v.	)	Tried at Region Legal Service Office Southeast and Region Legal Service Office Southeast Detachment Pensacola, Florida, on October 11, December 2, 2012, and January 28-31, 2013, by a general court-martial convened by Commander, Navy Region Southeast, Jacksonville, Florida.
Christopher M. JANUSKI, Ensign (O-1E) U.S. Navy Appellant	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

IAN D. MACLEAN
LT, JAGC, U.S. Navy
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7389, fax (202) 685-7687

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Errors Assigned

I.

WHETHER THE EVIDENCE IS FACTUALLY AND LEGALLY SUFFICIENT TO SUPPORT FINDINGS OF GUILTY TO THE CHARGE AND SPECIFICATION THEREUNDER.

II.

WHETHER THERE WAS AN APPEARANCE OF UNLAWFUL COMMAND INFLUENCE WHERE THE CONVENING AUTHORITY REFERRED THE CHARGES AND SPECIFICATIONS THEREUNDER TO TRIAL AFTER THE IMPARTIAL ARTICLE 32 INVESTIGATING OFFICER RECOMMENDED AGAINST REFERRAL AND THEN FAILED TO GRANT RELIEF TO APPELLANT IN TAKING POST-TRIAL ACTION ON THE RECORD.[1]

Statement of Statutory Jurisdiction

Appellant's approved sentence includes a dismissal and one year or more of confinement. Accordingly, this Court has jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012).

Statement of the Case

A panel of members, sitting as a general court-martial, convicted Appellant, contrary to his pleas, of one specification of rape by force, in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2012). The Members sentenced Appellant to four years' confinement and a dismissal. The Convening Authority approved

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[1] Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1992).

the sentence as adjudged and, except for the dismissal, ordered the sentence executed.

Statement of Facts

A. The victim repeatedly rebuffed Appellant's advances over the course of the evening.

The victim, MD, met Appellant in flight school. (R. 397-98.) She was ahead of him in the training pipeline and met him in passing in the academic building. (R. 398.) As she was ahead of him in the training pipeline she offered to answer questions he may have along the way. (R. 398.) On July 1, 2012, Appellant contacted MD and invited her to a concert with him near his residence, which was a significant distance from her residence. (R. 399-400.) MD declined the invitation but invited him to a small gathering at her house instead. (R. 400.) MD was planning an afternoon at the pool with her roommates and a few friends followed by a cookout. (R. 400-01.)

Appellant met the group of four at the pool that afternoon. (R. 401-02.) After a brief period of small talk at the pool, the group of five people went back to MD's house for dinner. (R. 403-04.) At the residence the group cooked and ate dinner. (R. 546, 572, 589.) Appellant continued drinking and became visibly intoxicated. (R. 408, 548, 589.) Over the course of the evening Appellant began making physical overtures toward MD. (R. 405-06, 574, 576.) The overtures progressed from standing

inappropriately close (R. 550, 574), to putting his arm around her (R. 550), to touching the small of her back (R. 405, 450), to grabbing her leg under the kitchen table (R. 409), to grabbing her buttocks (R. 406), and finally to trying to kiss her. (R. 414.) MD rebuffed all of Appellant's advances. (R. 406, 549-50, 574.) The other attendees noted that MD did not show any reciprocal interest in Appellant. (R. 554, 574, 578, 590.) MD consumed three cans of beer over approximately six hours. (R. 458.)

As Appellant had become visibly intoxicated over the course of the evening one of the other attendees offered Appellant a ride home. (R. 577.) Appellant declined the offer of a ride home. (R. 410, 551, 578.) MD put an air mattress down in a spare room normally used as an office or storage space for Appellant to sleep. (R. 410, 413-14.) The spare room was attached to the living room that contained a pool table. (R. 413.) The room is separated from the living room by only double door glass doors that were open to the living room. (R. 413.) The spare room is small in size such that the air mattress took up most of the space. (R. 414.)

B. Appellant physically overpowered MD and raped her.

As everyone was going to bed MD showed Appellant the air mattress in the spare room where he could sleep. (R. 414.) As MD was cleaning up the living room, Appellant asked if she could

come over so that he could show her something. (R. 415.) Appellant again tried to kiss her and she rebuffed the advance. (R. 416.) Appellant grabbed her wrist after she rebuffed his advance and pulled her down onto the air mattress. (R. 417.) Appellant then rolled on top of her and held her two wrists down above her head. (R. 417-18.) Appellant disregarded her protestations and demands that he stop. (R. 418-19, 421.)

At this point MD essentially froze and was unable to move. (R. 419.) Appellant pulled her underwear to one side. (R. 420.) Appellant then penetrated her vagina with his penis. (R. 420-21, 422, 450.) While inside of her Appellant said "I knew you'd eventually beg for it, bitch." (R. 421.)

Appellant then spit on his hand and used his saliva as a lubricant on MD's vagina. (R. 422.) Appellant then began penetrating her vagina with his penis again. (R. 422.) Appellant ejaculated inside of her. (R. 423.) After Appellant rolled off of her, MD left and went upstairs to her bedroom. (R. 423.) Prior to this assault MD was a virgin. (R. 483.)

C. MD's struggle to report the rape.

MD did not report the rape to any of the other occupants of the house that night. (R. 424.) MD did not want anyone to know what had happened to her. (R. 424-25.) MD went to her volunteer job at the firehouse in the morning and returned to

her house afterwards with breakfast as previously planned. (R. 425.)

For months MD wanted to forget the rape had even happened to her. (R. 439.) She tried to set it aside and move on with flight school. (R. 439.) She was afraid reporting the rape would result in her being grounded or even removed from flight school. (R. 440.) When she was unable to set is aside she spoke with her squadron's sexual assault representative, LT Willette, in January. (R. 439.) She was hesitant, provided little information, and did not want to make an official report. (R. 615.) She did not tell LT Willette the full story out of fear of consequences to her career. (R. 441.)

LT Willette strongly encouraged MD to make an official report. (R. 610-11.) When MD would see LT Willette in passing and he continued to encourage her to report, she perceived it as pressure to do so. (R. 442.) MD eventually falsely told LT Willette that she had reported the incident so that he would discontinue pressuring her to report. (R. 443.)

During an annual well-woman medical exam in February of 2013, MD asked to speak with the doctor privately after the appointment. (R. 437-38, 654.) MD did not report sexual assault on the exam paperwork because she knew several people other than the doctor would see the paperwork and she knew some of the people that worked at the clinic. (R. 431.) Dr. Knigge

testified in his experience it is common for patients to circle one thing on a medical questionnaire and then privately report different information directly to him during an examination. (R. 658.) Dr. Knigge also explained a traumatic event, such as a sexual assault, could potentially medically ground a flight student. (R. 653.)

MD did not specifically report the rape to Dr. Knigge but had a private conversation with him after the examination about his findings and whether there were any physical injuries. (R. 438, 654.) Dr. Knigge noted a change in her demeanor in this appointment from his previous interactions with her. (R. 654.) Dr. Knigge provided her with reference materials and asked if she wanted testing for sexually transmitted diseases. (R. 438.) MD declined the testing that day but changed her mind and had the testing approximately one week later. (R. 439.)

MD ultimately decided that she needed to report what happened as she was still unable to effectively cope with it on her own. (R. 439.) MD received a black eye from an item falling from the closet and striking her in the face. (R. 445.) MD used that black eye as the justification for choosing then to report. (R. 445.) MD falsely told LT Willette that she got into a physical altercation with the guy that sexually assaulted her and he struck her resulting in the black eye. (R. 446.) MD believed if she could get to the police station, she would be

able to report the rape. (R. 447.) LT Willette drove MD to the local police station to report both the previous sexual assault and what he believed was the recent assault that resulted in the black eye. (R. 447.)

MD ended up in a multi hour interview with a civilian law enforcement officer. (R. 447.) MD was distraught in the interview. (R. 640-41.) She did not provide full information to the officer, refusing to even identify her rapist. (R. 447-48, 640-41.) A Naval Criminal Investigation Service (NCIS) Special Agent joined the interview several hours in. (R. 449.) NCIS took over the case. (R. 449.) The next day MD was interviewed by NCIS and told the Special Agent the whole story of her sexual assault. (R. 449.)

D. Referral of the charges against Appellant.

The sole charge of rape by force was investigated at an Article 32 hearing. (Investigating Officer's Report, DD Form 457, Aug. 19, 2012.) MD was the only witness to testify at the Article 32 hearing. (Investigating Officer's Report, DD Form 457, Aug. 19, 2012.) The Investigating Officer (IO) issued a report ultimately concluding "[b]ased on the testimony of the witness and the exhibits entered during the proceedings, I find that the charge and specification is not supported by the evidence and should be dismissed." (Investigating Officer's Report, DD Form 457, at 5, Aug. 19, 2012; Appellate Ex. XVI at 9.) The Staff

Judge Advocate (SJA) received the IO's report in a promulgation package from the Chief of Naval Air Training to the Commander, Navy Region Southeast. (Letter to Commander, Navy Region Southeast, Sep. 10, 2012; Appellate Ex. XVI at 11.) The Chief of Naval Air Training disagreed with the IO's recommendation, instead finding there was sufficient evidence to support the charge. (Letter to Commander, Navy Region Southeast, Sep. 10, 2012; Appellate Ex. XVI at 11.)

After reviewing the promulgation package, the IO's report, and the evidence offered at the Article 32 hearing, the SJA drafted Article 34 advice to the Convening Authority (CA) disagreeing with the IO's recommendation. (R. 97; Memorandum to Commander, Navy Region Southeast from Staff Judge Advocate, at 1, Sep. 19, 2012; Appellate Ex. XVI at 10.) The SJA recommended referral of the charge, along with an additional charge of aggravated sexual assault, to a general court-martial. (Memorandum to Commander, Navy Region Southeast from Staff Judge Advocate, at 2, Sep. 19, 2012.) The SJA recommended referring the additional charge of aggravated sexual assault as pleading in the alternative. (R. 110.)

The SJA was aware "in general" of comments made by the Secretary of Defense (SECDEF) regarding sexual assault prosecutions. (R. 92.) The SJA had "not seen or heard any specific comments" from SECDEF regarding sexual assault

prosecutions until he read Appellant's motion alleging unlawful command influence on the referral decision. (R. 92, 94, 95.) The SJA was not aware of any official instructions coming down the chain of command regarding prosecution of sexual assault allegations. (R. 96.) The SJA's advice to refer the charge and the additional charge to a general court-martial was not influenced by any comments made by SECDEF or others. (R. 105, 110.) The SJA never discussed any statements made by SECDEF regarding sexual assault prosecutions with anyone prior to Appellant filing a motion alleging unlawful command influence. (R. 95.) Now being aware of the specific comments made by the SECDEF he interprets them to mean "the Navy should be fully investigating claims of sexual assault and then taking appropriate action in credible allegations." (R. 95.)

The CA concurred with the SJA's recommendation and referred both the charge and an additional charge to general court-martial. (Charge sheet, Sep. 2, 2012.) The CA was aware of "various statements" made by the SECDEF and the Chief of Naval Operations "regarding the military's need to prevent and properly prosecute sexual assault cases." (Appellate Ex. VI.) Those statements however, played no role in his referral decision in this case. (Appellate Ex. VI.) He decided to refer the charges based on his review of the available evidence and the advice he received from his SJA. (Appellate Ex. VI.)

Appellant filed motions alleging unlawful command influence and seeking new Article 34 advice. (R. 87; Appellate Ex. III.) The unlawful command influence motion was denied. (R. 151; Appellate Ex. XX; Appellate Ex. XXI.) The motion for new Article 34 advice was granted. (R. 151; Appellate Ex. XIV.) The Military Judge entered an order directing new and more thorough Article 34 advice be drafted and provided to the CA for reconsideration as to disposition of the charge against Appellant. (Appellate Ex. XIV.) In accordance with the Military Judge's ruling, the SJA provided amended Article 34 advice to the CA. (Memorandum from Staff Judge Advocate to Commander, Navy Region Southeast, Dec. 17, 2012; Appellate Ex. XVII; Appellate Ex. XXI at 6; Appellate Ex. XXXII.) The CA reviewed the new amended Article 34 advice of December 17, 2012, and concluded the charges and specifications were properly referred to general court-martial. (Appellate Ex. XXXII.)

E. Expert testimony about behaviors often seen from victims of sexual assaults.

Dr. Cynthia Lischick testified at trial on the merits in the prosecution's case in chief immediately after the victim's testimony. (R. 494.) Dr. Lischick was recognized as an expert in the field of sexual assault victim behavior. (R. 500.) Dr. Lischick explained one of the three responses during a sexual assault is that the victim essentially shuts down or freezes as

a coping mechanism. (R. 501.) A victim that is responding by freezing would discontinue physical resistance and would not scream during the attack. (R. 509.) The expert explained that victims often feel shame and blame themselves when they knew their attacker. (R. 503.) Dr. Lischick explained that victims rarely provide full details of their assault when they are initially reporting it and small details frequently change as victims become more comfortable talking about their attack and explaining what exactly happened to them. (R. 507, 509.)

Argument

I.

APPELLANT'S CONVICTIONS ARE LEGALLY AND FACTUALLY SUFFICIENT BECAUSE THE VICTIM'S TESTIMONY ESTABLISHED ALL ELEMENTS OF THE OFFENSE AND OTHER PERCIPIENT WITNESSES CORROBORATED THE EVENTS OF THE EVENING LEADING UP TO THE RAPE.

A. Standard of Review.

This Court reviews claims of legal and factual sufficiency de novo. Article 66(c), UCMJ; *United States v. Beatty*, 64 M.J. 456, 459 (C.A.A.F. 2007).

B. Appellant's conviction is legally sufficient because the victim's testimony alone established all of the elements of the offense.

The test for legal sufficiency is whether, considering the evidence admitted at trial in a light most favorable to the prosecution, a reasonable fact-finder could have found all the

elements beyond a reasonable doubt. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

The test for legal sufficiency of the evidence is "'whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002)(quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987)(citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). The Court's assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993). In resolving questions of legal sufficiency, the Court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001).

Appellant's argument that the conviction is not legally sufficient is fatally flawed as it essentially reduces to challenging the victim's credibility. (Appellant's Br. at 4.) Appellant's argument that the victim, MD, failed to "clearly" establish penetration, that she lied, or that her testimony was uncorroborated by physical evidence fails to grasp the applicable legal test. (Appellant's Br. at 4.) Even assuming *arguendo* MD's credibility was damaged on cross examination or

was uncorroborated, that is irrelevant to legal sufficiency, where evidence is considered in the light most favorable to the prosecution. (Appellant's Br. at 2, 4); *E.g.*, *Reed*, 54 M.J. at 41.

MD's testimony alone is sufficient to support Appellant's conviction against a legal sufficiency challenge, even without any corroborative testimony of the other percipient witnesses that evening. Here, MD identified Appellant as her attacker. (R. 414-15, 450-51.) She explained how Appellant grabbed her wrist after she rebuffed his attempt to kiss her. (R. 417.) She explained how he pulled her down onto the mattress and rolled on top of her. (R. 417-18.) MD explained how he held her two wrists down above her head. (R. 418.) She explained how he disregarded her protestations and demands that he stop. (R. 418-19, 421.) She explained how she then froze as he pulled her underwear to one side. (R. 419-20.) She explained that he penetrated her vagina with his penis. (R. 420-21, 422, 450.)

She explained that while inside her he said "I knew you'd eventually beg for it, bitch." (R. 421.) She explained that he then spit on his hand and used his saliva as a lubricant on her vagina and then penetrated her vagina with his penis again. (R. 422.) She explained that he ejaculated inside of her. (R. 423.)

The victim's testimony alone established all of the elements of rape by force, including penetration of her vulva by

his penis. Three separate times the victim testified that Appellant penetrated her with his penis. (R. 420-21, 422, 450.) Appellant's argument that MD's testimony did not "clearly testify" that Appellant penetrated her vulva with his penis lacks merit. (Appellant's Br. at 4.)

C. Appellant's conviction is factually sufficient because the victim testified credibly, her testimony was corroborated by several other percipient witnesses, and her delay in reporting was caused by both shame and fear of consequences to her career.

Testing for factual sufficiency, this Court asks whether, after weighing the evidence in the record of trial, it is independently convinced of Appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). In testing for factual sufficiency, this Court is required to "recogniz[e] that the trial court saw and heard the witnesses." *Id*. This is not a *pro forma* legal requirement. Rather, it takes into account the legal rule that the trier of fact is best situated to assess a witness's credibility while testifying. *See, e,g, United States v. Madey*, 14 M.J. 651, 653 (A.C.M.R. 1982), *rev. denied*, 15 M.J. 183 (C.M.A. 1983); *United States v. Ferguson*, 35 F.3d 327, 333 (7th Cir. 1994), *cert. denied*, 514 U.S. 1100 (1995) (trial court's evaluation of witness credibility "will not be disturbed unless it is completely without foundation."). It also takes into account that, where the court members are properly instructed to consider a witness'

credibility, this Court should presume that the members followed the Military Judge's instructions to do so. *See United States v. Collier*, 67 M.J. 347 (C.A.A.F. 2009); (*See* R. 784-85.)

Here, contrary to Appellant's claims, MD's testimony provides compelling proof of the rape as discussed fully *supra* at 13-14. (Appellant's Br. at 4.) Further, large portions of her testimony was corroborated by other percipient witnesses. The other three people at the house that evening all confirmed that Appellant was visibly intoxicated. (R. 548, 575, 589.) They also confirmed that Appellant was making physical advances towards MD and touching her. (R. 550, 574, 590.) Two of the witnesses noted Appellant's advances became increasingly aggressive as the night wore on. (R. 550, 576.) All three witnesses corroborated that MD rebuffed Appellant's advances. (R. 549-50, 554, 590.) One witness characterized the interactions between Appellant and MD as "strained." (R. 590.) Another witness explained that it appeared to her MD was "uncomfortable and uninterested" in Appellant. (R. 554.) The corroborating testimony from the other witnesses about all of the events leading up to rape itself increase the credibility of MD's full version of events.

The testimony of the corroborating witnesses combined with MD's account of the rape completely rebuts any suggestion of consensual sexual activity. MD was a virgin prior to

Appellant's attack. (R. 483.) It is not plausible to believe that after spending the evening rebuffing Appellant's advances, as noted by the other witnesses present, that she elected to lose her virginity on an air mattress, to a man she showed no interest in, in a room lacking any privacy as the glass double doors were open to the living room, with house guests sleeping in the second living room on couches, while the privacy of her bedroom was merely a few feet away. (R. 413.) Further, MD did not make a bad decision as a result of intoxication as she consumed only three beers over the course of approximately six hours preceding the rape. (R. 458.) Suggestion that this incident was consensual sexual activity that MD came to regret is meritless.

The members did not believe the Civilian Defense Counsel's attacks on MD's credibility. Appellant now claims that this Court should not believe MD because she delayed reporting the rape, was not forthcoming with the details of the rape in reporting it, and lied to her command's sexual assault representative. (Appellant's Br. at 5-6.) Completely legitimate reasons for each of these things were provided to the Members.

The expert in the field of sexual assault victim behavior explained that delays in reporting are common as victim's often feel shame. (R. 503.) MD herself explained she did not want

anyone to know what happened to her, essentially stating that she was ashamed. (R. 424-25.) MD further explained that she was afraid of the consequences to her career of reporting, that she may be grounded or even removed from flight school entirely. (R. 440.) MD's fears were well founded as her former flight surgeon, Dr. Knigge testified that a traumatic event such as a sexual assault would be cause for possibly being medically grounded. (R. 653.) She twice sought help, once from her command's sexual assault representative and once from a treating physician, without providing full information. (R. 437-38, 439, 615.)

Her treating physician noted a change in her demeanor from his prior interactions with her. (R. 654.) Dr. Knigge also explained it is common for a patient to report one thing on a medical questionnaire and then privately tell him something different during an examination. (R. 658.) After learning she suffered no physical injuries during her private conversation with Dr. Knigge she had no more reason to provide the doctor with full details of what had happened to her. (R. 438, 654.) The fact that she left without sexually transmitted disease testing, then returned a week later for testing, demonstrates she was still struggling with accepting what happened to her. (R. 438-39.)

After months of struggling with it on her own, she finally came forward to report the rape. (R. 445.) Even then, she struggled to report the details of what happened to her. (R. 447-48.) The civilian law enforcement officer explained she was visibly distraught and it was incredibly difficult to extract information from her. (R. 640-41.) The expert explained that victims rarely provide full information when they initially report their sexual assault. (R. 507, 509.)

The Record demonstrates that this victim was still struggling to come to terms with this assault at the time of trial. The Members observed MD testify and saw her struggle mightily to control her emotions during her testimony. At times she was unable to answer questions, at times crying, and once even blurting out a profanity during her response to a question. (R. 421, 422, 423, 427, 450.) The Members, who were instructed by the Military Judge to gauge credibility did so and found her along with the testimony from the corroborating witnesses credible. *See Collier*, 67 M.J. 347 (explaining appellate courts presume members followed instructions to determine credibility). This Court should not now overturn their findings of the Members who were present in the courtroom during the testimony based on a read of the cold Record. *See Turner*, 25 M.J. at 325 (recognizing members who saw and heard witnesses testify are best situated to determine matters of credibility).

II.

APPELLANT FAILED TO PRESENT ANY FACTS THAT, IF TRUE, CONSTITUTE APPARENT UNLAWFUL COMMAND INFLUENCE AS HE POINTS TO NO SPECIFIC STATEMENT FROM EITHER THE SECRETARY OF DEFENSE OR FROM A MEMBER OF CONGRESS A THE SOURCE OF THE PURPORTED UNLAWFUL COMMAND INFLUENCE.

Allegations of unlawful command influence are reviewed *de novo*. *United States v. Villareal*, 52 M.J. 27, 30 (C.A.A.F. 1999). The defense shoulders the initial burden of raising the issue of unlawful command influence. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999) (citing *United States v. Stombaugh,* 40 M.J. 208, 213 (C.M.A. 1994)). To raise the issue, the defense must make a threshold showing that is beyond a mere allegation or speculation; this burden requires the defense to show (1) facts that, if true, constitute unlawful command influence; (2) that the proceedings were unfair; and (3) that unlawful command influence was the cause of the unfairness. *Biagase*, 50 M.J. at 150.

If the defense satisfies all three prongs of the threshold showing, the burden shifts to the government to demonstrate beyond a reasonable doubt either that there was no unlawful command influence or that the proceedings were untainted. *United States v. Lewis*, 63 M.J. 405, 413 (C.A.A.F. 2006) (citing *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002)).

A. Appellant failed to meet his burden as he provided nothing more than mere speculation.

Appellant challenges only apparent unlawful command influence from the referral decision and the failure to grant clemency. (Appellant's Br. at 3, 8.) Appellant's argument that unlawful command influence existed rests on nothing more than unsupported speculation. (Appellant's Br. at 10-11.) Appellant declined to provide any actual evidence of any specific comments by either the Secretary of Defense or Members of Congress that he believes created the unlawful command influence of which he now complains. (Appellant's Br. at 10-11.) As the Military Judge noted in his ruling denying Appellant's motion, Appellant provided no transcripts, no recordings, and offered no testimony regarding any specific comment. (Appellate Ex. XXI at 2-3.) All that Appellant did at the trial level was extract limited quotations from larger statements taken out of context. The quotations were so heavily edited the Military Judge found them "mislead[ing] regarding their content." (Appellate Ex. XXI at 2-3.) Appellant fares no better on appeal, as he continues to fail to provide any evidence of the comments themselves that he complains of. On appeal he fails to even reference specific comments.

Mere speculation or a naked conclusion is not a showing of anything. *See United States v. Ashby,* 68 M.J. 108, 128 (C.A.A.F.

2009) (stating "[m]ere speculation that unlawful command influence occurred because of a specific set of circumstances is not sufficient.") (citations omitted); *see also United States v. Johnson*, 39 M.J. 242, 244 (C.M.A. 1994) (explaining "a bare allegation" is inadequate to meet proponent's burden). "The burden of production is on the party raising the issue." *Stombaugh*, 40 M.J. at 213. Here, Appellant failed to meet that burden by offering nothing in evidence to support his speculation. Similarly, Appellant fails to establish his other burdens either, to demonstrate the proceedings were unfair and that any unfairness was tied to actual unlawful command influence. *Biagase,* 50 M.J. at 150. Accordingly, Appellant is due no relief.

B. <u>If this Court were to find the comments Appellant complains of were part of the Record he is still due no relief as the declarants are incapable of engaging in unlawful command influence</u>.

Unlawful command influence can only be committed by two categories of persons. 10 U.S.C. § 837. The broader category is persons "subject to this chapter." 10 U.S.C. § 837. There are thirteen categories of persons "subject to this chapter" expressly laid out in Article 2, UCMJ. 10 U.S.C. § 802(a). The parties Appellant complains of, Members of Congress, the general public, and the Secretary of Defense, do not fall into any of those thirteen categories of persons laid out in Article 2 as

subject to this chapter.[2] (Appellant's Br. at 9-11); 10 U.S.C. § 802(a).

The other category of persons that can commit unlawful command influence are an authority that convenes a court-martial or any other commanding officer that interjects itself into the court-martial or "censure[s], reprimand[s], or admonish[es] the court or any member, military judge, or counsel thereof." 10 U.S.C. § 837. Of the three groups Appellant complains of, Members of Congress, the general public, and the Secretary of Defense, only the Secretary of Defense is even an authority capable of convening a court-martial. 10 U.S.C. § 822. The Secretary of Defense does not satisfy Article 37 here because he does not satisfy either of the dual requirements of convening the court-martial and interjecting himself into it. 10 U.S.C. §

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[2]Although none of the parties Appellant complains of are covered by the plain text of Article 37, the United States acknowledges that it could be at least argued that Article 37 has been expanded through judicial interpretation to cover statements by the Secretary of Defense. *See generally United States v. Simpson,* 58 M.J. 368, 376 (C.A.A.F. 2003) (discussing statements made by service secretary as potential sources of unlawful command influence); *United States v. Hagen*, 25 M.J. 78, 88 (C.M.A. 1987) (Sullivan, J., concurring) (noting civilians in policy positions should refrain from commenting on military justice matters); *United States v. Fowle*, 7 C.M.A. 349, 351-52 (C.M.A. 1956) (noting service secretary's policies should play no role in court-martial). However, the United States does not concede that a court may alter a statute in that manner. And regardless, nothing in these cases supports the proposition that a member of the public or an elected representative is a person who could commit unlawful command influence.

837. The Secretary of Defense neither convened Appellant's Court-Martial nor did he interject himself into it or censure, reprimand, or admonish any member, military judge, or counsel. *See United States v. Hutchins*, No. 200800393, 2012 CCA LEXIS 93, *6-7 (N-M. Ct. Crim. App. Mar. 20, 2012) (noting interplay between Articles 2 and 37 limits possibly UCI from civilian and secretariat leadership to courts-martial they convened themselves). Accordingly none of the persons Appellant complains of could have committed unlawful command influence here.

Apparent unlawful command influence only exists where "an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006). The fully informed person knows who can and cannot commit unlawful command influence under Article 37. An objective, disinterested observer, with that information, would not harbor a significant doubt about the fairness of these proceedings on the basis of unlawful command influence. If they did harbor significant doubt then they were either not fully informed, or not objective and reasonable. *But see Hutchins*, No. 200800393, 2012 CCA LEXIS 93 (N-M. Ct. Crim. App. Mar. 20, 2012) (assuming arguendo legally possible and conducting apparent UCI analysis); *see generally Simpson*, 58 M.J. at 374-77 (evaluating

whether interest from the general public could cause apparent unlawful command influence without explaining how that would be statutorily possible).

C. Assuming *arguendo* the declarants are capable of committing unlawful command influence no reasonable fully informed person would perceive an unfair trial here.

Apparent unlawful command influence only exists where "an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006). Appellant complains of two decisions made by the CA, to refer charges against the recommendation of the IO and the denial of clemency. (Appellant's Br. at 8.) Neither decision would cause any doubt, let alone a significant doubt about the fairness of the proceedings.

1. The referral decision against the recommendation of the Investigating Officer did not constitute unlawful command influence because the IO's report did not sufficiently account for all of the evidence presented and two other reviews of the evidence recommended referral to general court-martial.

The fully informed observer would know the IO's recommendation was based solely on the evidence presented at the Article 32 hearing. (IO's Report, DD Form 457, Aug. 19, 2012.) The fully informed observer would also be aware of the deficiencies in the IO report. (IO's Report, DD Form 457, Aug.

19, 2012.) The IO report focused almost exclusively on the testimony of MD and did not comment on the other evidence introduced or that testimony from other potential witnesses listed in the NCIS investigation may resolve many of the perceived deficiencies in the victim's testimony. (IO's Report, DD Form 457, Aug. 19, 2012.)

For example, NCIS interviewed Dr. Knigge who commented on MD's general apprehensiveness during her medical exam. (IO's Report, DD Form 457, Investigation Ex. 9, at 3-4.) Dr. Knigge explained she was concerned about confidentiality and about restricted versus unrestricted reporting of sexual offenses. (IO's Report, DD Form 457, Investigation Ex. 9, at 3-4.) Dr. Knigge also opined that he believed some sort of sexual trauma had occurred to MD. (IO's Report, DD Form 457, Investigation Ex. 9, at 3-4.) Another NCIS interview resulted in consciousness of guilt evidence, that when given a Military Protective Order to stay away from MD, Appellant began to cry. (IO's Report, DD Form 457, Investigation Ex. 9, at 21.) The interview write up from the civilian law enforcement officer that interviewed MD indicated she was distraught and had a great deal of trouble providing any information. (IO's Report, DD Form 457, Investigation Ex. 9, at 24.) The officer elaborated that he found her credible as he had never seen a victim so distraught

and have so much trouble talking about her assault. (IO's Report, DD Form 457, Investigation Ex. 9, at 47.)

The NCIS interview of the victim herself indicated she delayed reporting due to fear for the impact on her career and out of shame as she did not want anyone to know what happened to her. (IO's Report, DD Form 457, Investigation Ex. 9, at 31.) NCIS agents interviewed and included statements from the other witnesses at the party that largely corroborated the victim's version of events. (IO' S Report, DD Form 457, Investigation Ex. 9, at 40-46.)

These other evidentiary items were not addressed by the IO in her report and recommendation of dismissal. The IO focused almost exclusively on the victim's testimony and discounted all information from other possible witnesses provided as evidence in the hearing. The Chief of Naval Air Training that ordered the Article 32 hearing reviewed the evidence package and disagreed with the IO's recommendation.

The Chief forwarded the package to Commander, Navy Region Southeast, opining that he believed the evidence did sufficiently support the charge. (Letter to Commander, Navy Region Southeast, Sep. 10, 2012; Appellate Ex. XVI at 11.) The SJA received the package and performed his own independent review. (R. 101-02, 105, 110.) The SJA also disagreed with the IO and found the charge supported by the evidence adduced at the

Article 32 hearing. (R. 102.) The SJA testified he was in no way influenced by any comments made by the Secretary of Defense. (R. 105, 110.) The SJA explained there were weaknesses in the case, the evidence presented at the Article 32 hearing did meet the threshold for the case proceeding to court. (R. 107.)

The CA referred the charges on the advice and recommendation of his SJA along with his review of the available evidence. (Appellate Ex. VI.) While the CA was aware of statement made by the Secretary of Defense, those statements played no role in his decision to refer the charges. (Appellate Ex. VI.) The Military Judge, in an abundance of caution, actually ordered a second more thorough analysis and recommendation be completed. The second analysis and amended Article 34 advice was completed. (Memorandum from Staff Judge Advocate to Commander, Navy Region Southeast, Dec. 17, 2012; Appellate Ex. XVII; Appellate Ex. XXI at 6; Appellate Ex. XXXII.) The CA reviewed the new amended Article 34 advice of December 17, 2012, and concluded the charges and specifications were properly referred to general court-martial. (Appellate Ex. XXXII.)

The CA's referral decision was completely vindicated when the Members, with the benefit of the testimony of all of the witnesses that the IO had essentially disregarded, convicted Appellant. An objective, reasonable, disinterested, fully informed observer would harbor no doubt about, let alone a

significant doubt about the fairness of this trial based on the referral decision.

2. Denial of clemency did not create the appearance of unlawful command influence as Appellant was due no clemency based on the extreme impact his actions have had on his victim.

The decision of whether or not to bestow clemency is a "command prerogative" of a convening authority. *United States v. Healy*, 26 M.J. 394, 396 (C.M.A. 1988). Appellant's claims that denial of clemency here by the CA demonstrates apparent unlawful command influence lack merit. (Appellant's Br. at 8.) Appellant did submit a large clemency package consisting of a transcription of the victim's Article 32 testimony, and excerpt of her trial testimony, and thirty-four letters of support vouching for Appellant's character. (LT Danielson letter to Commander, Navy Region Southeast, Apr. 11, 2013.) What Appellant completely omits is the impact his actions had on his victim amply demonstrated throughout the Record.

To begin with, MD lost her virginity, which she had been saving for marriage, in this attack. (R. 829-30.) Her very first sexual experience was being raped by Appellant. She had to testify during the Article 32 hearing about her own blood on her thighs as a result of the assault. (LT Danielson letter to Commander, Navy Region Southeast, encl. 1 at 85, Apr. 11, 2013.)

MD also testified in presentencing that she began having nightmares following the attack. (R. 817.) She explained that she became withdrawn in social settings such that people commented on changes in her personality and demeanor. (R. 817.) She has been in counseling to help her with the nightmares and to deal with the emotional aftermath of being raped. (R. 817, 833.)

She has suffered professionally as well. She has missed flights in flight training as a result. (R. 818.) Her relationship with her fellow students has changed and they treat her differently now. (R. 823.) They hold back around her now to avoid upsetting her. (R. 823.) She no longer trusts fellow military officers as she used to. (R. 826.)

MD has not been able to enter a romantic relationship since she was raped. (R. 824-25.) She does not want a man to touch her and she does not trust people as she used to. (R. 825.) She doesn’t want to meet new people. (R. 828.) Someone touching her arm or grabbing her wrist can set her off reliving the attack. (R. 827.) She does not want to be around people she has not known for a long time in her house. (R. 829.)

The CA was aware of all of the victim impact testimony when he made his discretionary decision to deny clemency. The CA was also aware of how much trouble the victim still has talking about what happened to her from her testimony on the merits.

Appellant may have submitted many letters of support for consideration, but an objectively reasonable, fully informed, disinterested observer would not harbor significant doubt about the fairness of the proceedings based on the denial of clemency here. Appellant's actions had a profound impact on his victim. She has not gotten through the aftermath of being raped yet and from every indication in the Record it will be quite some time before she is able to return to a relatively normal state of existence. Denial of clemency here was the correct decision and does not create the appearance of unfairness in these proceedings.

Conclusion

WHEREFORE, the United States respectfully requests that this Court affirm the findings and sentence adjudged and approved below.

IAN D. MACLEAN
LT, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7686, fax (202) 685-7687

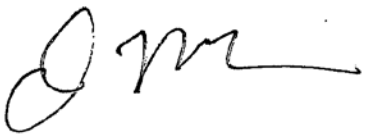
/s/

KEITH B. LOFLAND
Lieutenant Commander, JAGC, USN

Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-8384, fax (202) 685-7687

Certificate of Filing and Service

I certify the foregoing was delivered to the Court and a copy was served upon opposing counsel and electronically filed on May 7, 2014.



IAN D. MACLEAN
LT, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard DC 20374
(202) 685-7686, fax (202) 685-7687

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES, Appellee v. Christopher M. JANUSKI, Ensign (O-1E) U.S. Navy, Appellant	BRIEF AND ASSIGNMENTS OF ERROR Case No. 201300210 Tried at Pensacola, Florida, on 11 Oct 2012, 6 Dec 2012, and 28-31 Jan 2013 by general court-martial convened by Commander, Navy Region Southeast

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Assignments of Error

I.

WHETHER THE EVIDENCE IS FACTUALLY AND LEGALLY INSUFFICIENT TO SUPPORT FINDINGS OF GUILTY TO THE CHARGE AND SPECIFICATION THEREUNDER.

II.

WHETHER THERE WAS AN APPEARANCE OF UNLAWFUL COMMAND INFLUENCE WHERE THE CONVENING AUTHORITY REFERRED THE CHARGES AND SPECIFICATIONS THEREUNDER TO TRIAL AFTER THE IMPARTIAL ARTICLE 32 INVESTIGATING OFFICER RECOMMENDED AGAINST REFERRAL AND THEN FAILED TO GRANT RELIEF TO APPELLANT IN TAKING POST-TRIAL ACTION ON THE RECORD.[1]

[1] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1992).

Statement of Statutory Jurisdiction

Appellant received a court-martial sentence that included a punitive discharge. Accordingly, his case falls within this Court's Article 66(b), UCMJ, jurisdiction. 10 U.S.C. § 866(b).

Statement of the Case

Ensign (ENS) Christopher M. Januski was tried by general court-martial, with members, on 11 October 2012, 6 December 2012, and 28-31 January 2013. Contrary to his pleas, ENS Januski was convicted of one specification of rape, in violation of Article 120(a), Uniform Code of Military Justice, 10 U.S.C. § 920 [hereinafter UCMJ].

ENS Januski was adjudged a sentence consisting of confinement for four years and a dismissal. On 22 May 2013, the convening authority approved the findings and sentence as adjudged.

Statement of Facts

Those facts necessary to the disposition of the assigned errors are set forth in the arguments, below.

Summary of Argument

I.

The evidence presented at trial is legally and factually insufficient to prove guilt, in that penetration was not clearly established, the complaining witness lacked credibility due to multiple inconsistent statements she made, she had a motive to misrepresent, and no testimonial or physical evidence corroborated her claim.

II.

There is an appearance of unlawful command influence upon the convening authority, given that he failed to accept the recommendation of the impartial Article 32 investigating officer who recommended against referral, followed by the same convening authority's denial of post-trial relief after a conviction was obtained, which can only be remedied by setting aside the conviction and dismissing the Charge and Specification thereunder.

Argument

I.

THE EVIDENCE IS FACTUALLY AND LEGALLY INSUFFICIENT TO SUPPORT FINDINGS OF GUILTY TO THE CHARGE AND SPECIFICATION THEREUNDER.

Standard of Review

This Court has an independent obligation to review each case *de novo* for factual and legal sufficiency, and it may substitute its own judgment for that of the trial court. Art. 66, UCMJ, 10 U.S.C. § 866 (2000); *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987). The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *Turner*, 25 M.J. at 324 (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [this Court is] convinced of the accused's guilt beyond a reasonable doubt." *Id.* at 325. In exercising this duty, this Court may judge the credibility of witnesses, determine controverted questions of fact, and substitute its judgment for that of the military judge, or

court-martial members. Art. 66(c), UCMJ; *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990).

Facts and Argument

As will be seen by the argument below, the government failed to prove that ENS Januski raped LTJG MJD on the evening of 1 July 2011, when he was one of a number of guests at her residence in Milton, Florida. First and foremost, she did not clearly testify that he penetrated her "vulva with his penis." (R. 421-423, 430, 450). Beyond this critical failure of proof, the defense demonstrated that LTJG MJD was not credible and admittedly lied to different authorities at multiple points, describing her claim of sexual assault inconsistently. No objective evidence was presented that corroborated her claim. (R. 483-484). Finally, LTJG MJD possessed a motive to misrepresent as argued, below. LTJG MJD testified at trial and ENS Januski did not. (R. 396-491).

Summary of Uncontested Facts:

In the summer of 2011, ENS Januski and LTJG MJD were both students attending pilot training at Whiting Field, Milton, Florida. (R. 397-398). Although they were not in the same student class, their paths crossed in a social setting. (R. 399). ENS Januski invited LTJG MJD to join him on a trip to a concert at Perdido Key. (R. 400). Instead of going to the concert, she invited him to come to her place in Milton, along with some of her male and female friends, for an informal gathering. (R. 400).

At that gathering, alcohol was consumed and games were played, including pool. (R. 402-404, 406-408, 452-454, 456). In fact, at some point, LTJG MJD provided her guests "moonshine." (R. 458). ENS Januski, having consumed a fair amount of alcohol, elected to stay, rather than drive home to his residence. (R. 453, 459). LTJG MJD, whose level of

sobriety was unclear, prepared a place for him to sleep in a downstairs room. (R. 412-413, 415). She intended to sleep in her own bed, upstairs. (R. 412, 423).

The next morning she got up and went to "training at the firehouse" where she was volunteering as an EMT firefighter. (R. 403, 424). When ENS Januski woke up and ate some breakfast, LTJG MJD was not there. Upon her return, she saw ENS Januski at her house but there was little conversation. (R. 426). She eventually walked him to the door and he departed. (R. 427). She admitted acting "normal" during her interaction with him before he left. (R. 464). Over the ensuing months, when they had social contact, LTJG MJD agreed that ENS Januski was "always cordial and pleasant." (R. 465).

Contested Facts and LTJG MJD's Inconsistent Statements:

LTJG MJD alleged that, after her other guests had either departed or gone to bed, ENS Januski sexually assaulted her in the downstairs room she provided for him to spend the night. (R. 414-423). She did not complain that night, the next day, or for a long period of time after the alleged assault, which she testified occurred on 1 July 2011. (R. 424-425).

On 9 February 2012, for example, when filling out a medical form, LTJG MJD indicated no history of physical or sexual abuse. (R. 472). On 6 April 2012, LTJG MJD reported to LT Willette, the command Sexual Assault Reporting Coordinator (SARC), that a male officer had just given her a black eye in a physical assault. Even though in prior conversations, starting in approximately January 2012, she never told LT Willette about a specific sexual assault, he took her to civilian police and NCIS investigators to file a formal complaint. (R. 439, 441, 445, 473, 615). In her testimony, LTJG MJD said that first she told LT Willette the black eye injury was from an accident when a gun box fell on her. (R. 445, 490). She admitted that this claim was a lie. (R. 445). Instead, she then told LT Willette

that a guy had assaulted her after she had confronted him. But this was also a lie. (R. 446). She also lied to LT Willette, by saying that she had obtained a "no contact" order against someone who was texting and harassing her, when, in fact, she had not. (R. 474). Subsequently, she changed her story, again, telling the civilian police instead that a friend assaulted her to keep her from confronting the male officer. (R. 489). To assess the extent of her detailed inconsistent statements, her description of her conversations with LT Willette should be compared with his. (R. 473-476, 603-622). The bottom line is that LTJG MJD was willing to lie repeatedly to authorities, including the NCIS, tasked with investigating her allegations. (R.481, 489-490).

The Santa Rosa County Sheriff's Office prepared a report that LTJG MJD was sexually assaulted by an unnamed assailant at an undisclosed residential location in approximately February 2012, not July 2011. The story, as given to them by LTJG MJD, included details that she was a designated driver attending a party and that the male assailant attacked her in an upstairs bedroom, slammed her against the wall and then threw her on the floor where he raped her. (R. 477-479). At this point, she claimed that she and her assailant left the party, leaving her friends behind, ignorant of the assault. LTJG MJD decided not to cooperate further with the civilian police, so they elected to terminate their investigation. At trial, she admitted that she lied to the civilian police. (R. 448).

LTJG MJD proceeded to report her claims to NCIS. On 7 April 2012 she met with NCIS agents and told them that the assailant threw her on an air mattress, where he sexually assaulted her. After meeting with NCIS multiple times, she said in an interview on 12 April 2012, "'If I told NCIS that I lied, could this please go away?'" (R. 480).

Finally, at trial, LTJG MJD said under oath that ENS Januski spoke to her during the sexual assault, saying "I knew you would beg for it eventually, bitch." (R. 421-422, 486-487). At the Article 32 hearing, however, she testified under oath that ENS Januski never spoke during the sexual assault. (R. 486-487, Art 32 transcript at 40-42).

In conclusion, at trial, LTJG MJD admitted to purposely fabricating facts and misleading her command SARC, the civilian investigators, and the NCIS agents.

No Clear Evidence of Penetration:

In addition to the fact that no medical evidence was presented to substantiate the claim of penetration, when LTJG was asked about penetration, she was unable to clearly articulate whether her vulva was penetrated. (R. 421-423, 430, 450). This is consistent with her testimony at the Article 32 hearing. (Transcript at 40-44).

Other Pertinent Facts:

It is inconceivable that if ENS Januski was as intoxicated as LTJG MJD claims, that she was helpless to defend herself against such an assault. Her description of how the assault began and that she was unable to resist is simply implausible. (R. 462-463). Additionally, even though she had friends sleeping nearby the purported assault in her house, she never cried for help. (R. 491).

LTJG MJD possessed a clear motive to misrepresent from the fact that she subsequently learned that ENS Januski was already engaged to another women when he came to her home the night of the allegation. (R. 482). Furthermore, LTJG MJD unsuccessfully tried to get ENS Januski to admit he assaulted her in pretextual phone calls she made to him starting on 16 April 2012. (R. 484-486).

Because of the entire state of the record of trial and the evidence presented, this Honorable Court should set aside the findings of guilty and the sentence. Given LTJG MJD's lack of credibility and corroboration, the government simply failed to prove beyond a reasonable doubt that ENS Januski sexually assaulted her.

WHEREFORE, Appellant respectfully requests this Court set aside the findings of guilty to the Charge and Specification thereunder, set aside the sentence and dismiss the Charge and Specification.

II.

THERE WAS AN APPEARANCE OF UNLAWFUL COMMAND INFLUENCE WHERE THE CONVENING AUTHORITY REFERRED THE CHARGES AND SPECIFICATIONS THEREUNDER TO TRIAL AFTER THE IMPARTIAL ARTICLE 32 INVESTIGATING OFFICER RECOMMENDED AGAINST REFERRAL AND THEN FAILED TO GRANT RELIEF TO APPELLANT IN TAKING POST-TRIAL ACTION ON THE RECORD.[2]

Standard of Review

"Allegations of unlawful command influence are reviewed de novo. . . [citations omitted]. On appeal, the accused bears the initial burden of raising unlawful command influence." *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013).

Facts and Argument

As reflected in the allied papers, CDR Stephanie Carter, Article 32 Investigating Officer, after hearing LTJG MJD's testimony and reviewing the evidence, recommended against referring the Article 120 Charge and Specification thereunder to trial. In her report, CDR Carter relevantly stated, "*This case is lacking any credible evidence* of a sexual assault

[2] This issue is raised pursuant to *United States v, Grostefon*, 12 M.J. 431 (C.M.A. 1992).

of LTJG [MJD] by the Accused." (Allied Papers) (emphasis added). Over that strong recommendation, the convening authority referred the case forward.

At trial, the defense sought relief from unlawful command influence and the referral of an Additional Charge, also under Article 120, and the Specification thereunder, which covered the same allegation as the original Charge, arguably presenting a case of pleading in the alternative. (Appellate Ex. III). ENS Januski was acquitted of this Additional Charge and the Specification thereunder. (R. 795). Specifically, the defense asked the military judge to dismiss the entire case based on unlawful command influence. (R. 125-126). The military judge ordered the government to produce a new Article 34 advice, but otherwise denied any relief to the defense. (Appellate Ex. XIV, R. 151).

After trial, the defense raised the question of unlawful command influence before the same convening authority who referred the Charges to trial and was now contemplating post-trial action. (Allied papers). Enclosure 37 was attached to the Defense Clemency Request, dated 11 April 2013. This enclosure is a copy of a memorandum, dated 12 March 2013, which was sent by Air Force Lieutenant General Craig A. Franklin to "Secretary Donley," the Secretary of the Air Force. Lt Gen Franklin used this memorandum to explain and justify his decision, as a general court-martial convening authority, to overturn the sexual assault conviction of Lieutenant Colonel James A. Wilkerson III. It illustrates the tremendous Congressional and public pressure being placed on the Department of Defense and convening authorities to deny favorable relief to military members in cases where sexual assault is alleged.

Article 37(a), UCMJ states, in relevant part:

> "...No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial

> or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts…"

As stated in *United States v. Lewis*, 63 M.J. 405 at 413 (C.A.A.F. 2006):

> As a general matter, "the defense has the initial burden of raising the issue of unlawful command influence." *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999) (citing *United States v. Stombaugh*, 40 M.J. 208, 213 (C.M.A. 1994)). At trial, the defense meets its burden by showing "facts which, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings." *Id.* at 150. Once the issue of unlawful command influence has been raised, the burden shifts to the government to demonstrate beyond a reasonable doubt either that there was no unlawful command influence or that the proceedings were untainted. *Stoneman*, 57 M.J. at 41. This burden is high because "'command influence tends to deprive servicemembers of their constitutional rights.'" *Gore*, 60 M.J. at 185 (quoting *Thomas*, 22 M.J. at 393).

Unlawful command influence prejudices a court-martial whether it is actual or by appearance. As also set forth in *Lewis*, *supra*, at 406:

> Unlawful command influence is 'the mortal enemy of military justice.' *United States v. Gore*, 60 M.J. 178, 178 (C.A.A.F. 2004) (quoting *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986)). Where it is found to exist, judicial authorities must take those steps necessary to preserve both the actual and apparent fairness of the criminal proceeding. *United States v. Rivers*, 49 M.J. 434, 443 (C.A.A.F. 1998); *United States v. Sullivan*, 26 M.J. 442, 444 (C.A.A.F. 1988). The "'appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial.'" *United States v. Simpson*, 58 M.J. 368, 374 (C.A.A.F. 2003) (quoting *United States v. Stoneman*, 57 M.J. 35, 42-43 (C.A.A.F. 2002)).

In this case, the perceived unlawful command influence has been committed by the very top echelons of the United States Government, Department of Defense and then at each subordinate level, to tip the scales of justice dramatically in favor of the prosecution with the

goal of conviction. Members of Congress have shouted for more prosecutions and convictions in what they describe as an "epidemic" of rape and sexual assault in the military, as evidenced by the publicly released documentary, The Invisible War. The SECDEF has publically announced the need for more prosecutions and convictions.

Public pronouncements by Members of Congress over recent years unquestionably indicate that the leadership in the Department of Defense is under intense pressure to prosecute, convict, and sentence military members facing sexual assault allegations, regardless of whether the accused are innocent, as long as it serves the purpose of more convictions and severe punishment. The issue is not that anyone *wants* to prosecute and convict the innocent, it is that they do not care if those they prosecute and convict are innocent. If an allegation is made, Members of Congress want a prosecution, a conviction, and severe punishment; correct trial results and justice are considered to be irrelevant in the current environment. Every indication is that the Department of Defense and subordinate military chains of command are succumbing to this pressure.

The goals and ideals of a search for truth, justice, and fairness in the military and Navy criminal justice systems have long since given way, in sexual assault cases, to the drumbeat of "win more, lose less, 'hang them' as high and as often as you can" – coming from the very top of the Department of Defense. What is lost in this rhetoric is that military accused are supposed to be presumed to be innocent because in many of these cases they *ARE* actually innocent.

While military judges in the Navy and other service branches have attempted to counter the impact of the unfair environment by issuing written instructions that advise court members that they may have been subject to incorrect sexual assault public pronouncements,

a simple corrective member instruction in a given case cannot adequately address the systemic push for convictions, and the cumulative impact this publicity has had on all members of the Navy military justice system over the years – including the convening authority and court members who sat in judgment in ENS Januski's case.

Now, due to the overly aggressive efforts of Members of Congress, the civilian and military Department of Defense and Navy chains-of-command to spur higher numbers of sexual assault prosecutions and convictions, any Sailor who enters a courtroom facing sexual assault allegations knows that all forces are arrayed against him; his conviction is the expected and desired outcome, regardless of actual truth, or evidence, or burdens of proof. ENS Januski's substantial rights to fundamental fairness, equal protection, due process, and justice have been denied because of the appearance of unlawful command influence by Members of Congress and Department of Defense leadership.

WHEREFORE, Appellant respectfully requests this Court set aside the findings of guilty to the Charge and Specification thereunder, set aside the sentence, and dismiss the Charge and Specification.

Conclusion

Appellant respectfully requests this Court set aside the findings of guilty to the Charge and Specification of which Appellant was convicted, as the evidence is not legally or factually sufficient to support his convictions *and* was obtained through unlawful command influence.

Respectfully Submitted,

DAVID C. DZIENGOWSKI
LT, JAGC, USN
Signing For
F. J. SPINNER
Attorney at Law
P.O. Box 38463
Colorado Springs, CO 80937
(719) 576-1175
Lawspin@aol.com

DAVID C. DZIENGOWSKI
LT, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris St SE
Bldg. 58, Suite 100
Washington Navy Yard, DC 20374
(202) 685-7292
david.dziengowski@navy.mil

Certificate of Filing and Service

I certify that the original of the foregoing in the case of *United States v. Januski* was delivered to the U.S. Navy-Marine Corps Court of Criminal Appeals, that a copy was electronically filed with the Court, and that a copy was served on LT Ann E. Dingle, JAGC, USN, Appellate Government Counsel, on 22 January 2014.

DAVID C. DZIENGOWSKI
LT, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
Bldg. 58, Suite 100
Washington Navy Yard, D.C. 20374
(202) 685-7292
david.dziengowski@navy.mil

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Bryan S. LaCount Sergeant (E-5) U. S. Marine Corps, Appellant	SUPPLEMENT TO PETITION FOR GRANT OF REVIEW Crim.App. No. 201300259 USCA Dkt. No. 14-0777/MC

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

Statement of Statutory Jurisdiction

Sergeant (Sgt) Bryan S. LaCount, United States Marine Corps, received a court-martial sentence that included a dishonorable discharge and more than one year of confinement. Accordingly, his case fell within the lower court's Article 66 jurisdiction. Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012). Sgt LaCount's petition for grant of review was timely filed on August 18, 2014, properly bringing his case within this Court's jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A military judge, sitting as a general court-martial, convicted Sgt LaCount, pursuant to his pleas, of one

specification of committing an indecent act, in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2012). (Charge Sheet; R. at 41.) The military judge sentenced Sgt LaCount to reduction to pay-grade E-1, confinement for four years, and a dishonorable discharge. (R. at 92.) Pursuant to a pre-trial agreement, the convening authority approved the sentence as adjudged, suspended execution of all confinement in excess of twenty-four months, waived forfeiture of pay and allowances for six months, and, "[s]ubject to the limitations contained in the Uniform Code of Military Justice, the Manual for Courts-Martial, applicable regulations, and [the convening authority's] action" ordered the sentence executed. (Convening Authority's Action at 2.)

The lower court rendered a decision on June 19, 2014, affirming the findings and sentence. *United States v. LaCount*, No. 201300259, 2014 CCA LEXIS 366 (N-M. Ct. Crim. App. June 19, 2014).

Submission of the Case without Specific Assignments of Error

The undersigned states that he has been designated by the Judge Advocate General of the Navy as appellate defense counsel in the above captioned case. Pursuant to Sgt LaCount's's request, he has carefully examined the record of trial in this case, he does not admit that the findings and sentence are correct in law and fact, and he submits the case on its merits to

this Honorable Court without specific assignment of errors or brief.

Additionally, Appellant, through counsel, raises one issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), which is presented in a separate Appendix in accordance with Rule 21A of this Court's Rules of Practice and Procedure.

JONATHAN M. HAWKINS
Lieutenant, JAGC, U.S. Navy
CAAF Bar No.: 36265
NAMARA
1254 Charles Morris Street SE
Suite 100
Washington, D.C. 20374-5124
(202)685-7291

Appendix

1. *United States v. LaCount*, No. 201300259, 2014 CCA LEXIS 366 (N-M. Ct. Crim. App. June 19, 2014).

2. Issue raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Certificate of Filing and Service

I certify on September 8, 2014, the foregoing was electronically filed with the Court, and copies were electronically delivered to the Appellate Government Division and Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity.

JONATHAN M. HAWKINS
Lieutenant, JAGC, U.S. Navy
CAAF Bar No.: 36265
NAMARA
1254 Charles Morris Street SE
Suite 100
Washington, D.C. 20374-5124
(202)685-7291

APPENDIX 1

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS WASHINGTON, D.C.

Before
F.D. MITCHELL, J.A. FISCHER, M.K. JAMISON
Appellate Military Judges

UNITED STATES OF AMERICA

v.

BRYAN S. LACOUNT
SERGEANT (E-5), U.S. MARINE CORPS

NMCCA 201300259
GENERAL COURT-MARTIAL

Sentence Adjudged: 19 March 2013.
Military Judge: LtCol Nicole K. Hudspeth, USMC.
Convening Authority: Commanding General, 2d Marine Division, Camp Lejeune, NC.
Staff Judge Advocate's Recommendation: Maj J.N. Nelson, USMC.
For Appellant: CDR Michael C. Pallesen, JAGC, USN.
For Appellee: LT Ann E. Dingle, JAGC, USN.

19 June 2014

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of one specification of committing an indecent act in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. The appellant was sentenced to confinement for four years, reduction to pay grade E-1, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged and, pursuant to a pretrial agreement (PTA), suspended execution of

confinement in excess of twenty-four months and waived imposition of automatic forfeitures for a period of six months.

In his two assignments of error, the appellant alleges: (1) that the Government violated the PTA by failing to defer or waive the automatic forfeitures associated with the appellant's sentence after the appellant had established an allotment in favor of his dependents[1]; and (2)that the sentence awarded the appellant is inappropriately severe.

After careful examination of the record of trial and the pleadings of the parties, we are satisfied that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

Sentence Severity

In his remaining assignment of error averring that his sentence is inappropriately severe, the appellant makes two arguments: (1) that because the appellant did not receive the benefit of his bargain with the CA regarding the deferral and subsequent waiver of automatic forfeitures, he asks that the sentence affirmed by the court not include the reduction in pay grade awarded by the military judge; and, (2) that his sentence which includes a dishonorable discharge is unduly severe.

"Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 10 C.M.A. 102, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

The appellant pleaded guilty to one specification of violating Article 120, UCMJ, in that he committed an indecent act

[1] One of the alternative forms of relief requested by the appellant was that the court order "immediate compl[iance] with the forfeiture waiver portion of the Pretrial Agreement." Appellant's Brief of 15 Nov 2013 at 8. The Government in its Answer moved to attach an affidavit from CWO2 ST, Officer in Charge, Legal Section, Installation Personnel Administration Center, Camp Lejeune, confirming that on 5 February 2014, the appellant's wife received all monies due from the appellant's automatic forfeiture of pay. That motion was granted by this court and this assignment of error is now moot.

upon his stepdaughter, who was then 11 years old. Based on the circumstances surrounding the indecent act, the psychological impact upon the child as indicated by the record, together with the remaining evidence in aggravation, as well as the evidence offered by the defense in extenuation and mitigation, we find that the punishment awarded was appropriate for this offender and this offense. Granting the appellant the requested relief would amount to an act of clemency which is left to "command prerogative" of the CA. *Healy,* 26 M.J. at 396. Accordingly, we decline to grant relief.

Conclusion

The findings and the sentence approved by the CA are affirmed.

For the Court

R.H. TROIDL
Clerk of Court

APPENDIX 2

SUBMISSIONS UNDER *UNITED STATES v. GROSTEFON*

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Appellant, Sergeant (Sgt) Bryan S. LaCount, through counsel, respectfully requests this Court consider the following matter:

WHETHER SGT LACOUNT'S SENTENCE OF FOUR YEARS' CONFINEMENT AND A DISHONORABLE DISCHARGE IS INAPPROPRIATELY SEVERE.

Statement of Facts

Sgt LaCount pled guilty to, on a single occasion sometime between 1 June and 1 July of 2009, touching his stepdaughter's vagina. (R. at 26.) At the time the girl was 11 years old. (R. at 27.) Sgt LaCount, at the plea colloquy, indicated that his motivation for committing the misconduct was "sexual curiosity" and not out of a desire to gratify his own sexual desire. (R. at 28.) Sgt LaCount testified that his misconduct did not "excite [his] sexual desire" when he committed the misconduct. (Id.) He testified that he "immediately" realized that what he had done was wrong. (R. 30.)

Argument

SGT LACOUNT'S SENTENCE OF FOUR YEARS' CONFINEMENT AND A DISHONORABLE DISCHARGE IS INAPPROPRIATELY SEVERE.

APPENDIX 2

Conclusion

WHEREFORE, Sgt LaCount respectfully requests this honorable Court grant review of this issue.

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 3

UNITED STATES, Appellant	)	INTERLOCUTORY APPEAL BY THE UNITED STATES
v.	)	
	)	Case No. 201300297
Giovanni F. MAZA, Gunnery Sergeant (E-7) U.S. Marine Corps Appellee	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

PAUL M. ERVASTI
Major, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard DC 20374
(202) 685-7679, fax (202) 685-7687

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Preamble

COMES NOW the United States, pursuant to Article 62, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 862 (2012), and respectfully asks this Court to reverse the Military Judge's ruling suppressing: (1) Appellee's oral and written statements to Special Agent (SA) Santee; (2) Appellee's DNA sample; and (3) the results of testing that sample. The Military Judge initially denied Maza's pretrial motion to suppress his statement, but later felt compelled to reverse his ruling mid-trial after the Court of Appeals for the Armed Forces issued its opinion in *United States v. Hutchins*, 72 M.J. 294 (C.A.A.F. 2013).

His decision to reverse his prior ruling was incorrect for two reasons. First, *Hutchins* does not compel the conclusion that Maza's statement must be suppressed. Maza admits that, after invoking his right to counsel, he changed his mind and sought out SA Santee because he thought that by providing a statement he could distract the investigators from their search and lure them away from finding incriminating and embarrassing evidence. Because Maza sought out SA Santee to provide a statement, he himself initiated the conversation that led to him providing that statement. Thus, there was no violation of the

Edwards rule, and it was error for the Military Judge to suppress Maza's statement. Second, regardless of whether the statement should have been suppressed, there was no basis to exclude the DNA evidence. Suppressing that physical evidence was a vast expansion of the *Edwards* rule unsupported by the law.

Statement of Statutory Jurisdiction

The United States may appeal "[a]n order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding." Article 62(a)(1)(B), UCMJ. Here, the Military Judge's ruling suppressed Maza's statements and the DNA evidence that were both substantial proof that he engaged in sexual acts with a Private First Class in a barracks room while he was on duty as the Command Duty Officer. The Trial Counsel timely certified that the suppressed evidence was substantial proof of a fact material to the proceedings. Therefore this Court has jurisdiction under Article 62(a)(1)(B), UCMJ.

Questions Presented

I.

DID THE MILITARY JUDGE ERR IN FINDING THAT CAAF'S DECISION IN *UNITED STATES V. HUTCHINS* COMPELLED THE CONCLUSION THAT MAZA'S STATEMENT MUST BE SUPPRESSED, BECAUSE MAZA DID NOT INITIATE FURTHER COMMUNICATION WITH LAW ENFORCEMENT AFTER HE HAD INVOKED HIS RIGHT TO COUNSEL?

II.

EVEN ASSUMING ARGUENDO THAT MAZA'S STATEMENT MUST BE SUPPRESSED, DID THE MILITARY JUDGE ERR IN RULING THAT THE PHYSICAL DNA EVIDENCE MUST ALSO BE SUPPRESSED?

Statement of the Case

On April 3, 2013, the Convening Authority referred charges to a general court-martial against Maza for multiple violations of a general order and sexual assault in violation of Articles 92 and 120, UCMJ, 10 U.S.C. §§ 892 and 920 (2012). The charges all related to instances of alleged sexual misconduct, sexual harassment, and sexual assault of female junior enlisted Marines by Maza. Before trial, Maza moved to suppress oral and written statements he made to SA Santee in which he admitted that he had sex with PFC KL. The Military Judge denied the motion on June 12, 2013. Maza then pled guilty to a specification of Article 92. He admitted that he violated an order that prohibited having sex with PFC KL while she was a student. He pled not guilty to all other charges.

Maza was then tried before a panel of officer members on the remaining charges. The Members were informed of Maza's guilty plea, and he entered into a stipulation of fact in which he admitted to having sexual intercourse and oral sex with PFC KL. After four days of trial, the United States had finished its case in chief, and the Defense was presenting evidence. The

Trial Counsel had not introduced Maza's statement to SA Santee as evidence. The Trial Counsel had mentioned the DNA evidence during opening statement, and that evidence was presented to the Members.

On June 26, 2013, CAAF decided *United States v. Hutchins*, 72 M.J. 294 (C.A.A.F. 2013). The next morning, the Military Judge asked for briefings by both sides on how this case impacted his previous ruling. Maza's Civilian Defense Counsel filed a motion for the Military Judge to reverse his previous ruling, and rule that Maza's statement must be suppressed in light of *Hutchins.* Civilian Counsel also filed a separate motion to suppress the DNA evidence. On July 10, 2013, the Military Judge reversed his previous ruling and granted the motions to suppress Maza's oral and written statements to SA Santee and to suppress Maza's DNA sample and the results of testing that sample. The next day, July 11, 2013, Trial Counsel provided the Military Judge with written notice of appeal pursuant to R.C.M. 908.

Statement of Facts

A. Maza allegedly sexually assaulted PFC KL.

In October 2012, Maza was assigned as permanent personnel to the Marine Detachment at Fort Leonard Wood, Missouri. (R.

61, Jun. 17, 2013.[1]) He was part of Training Command, and would either serve as an instructor, or as a Staff Non-Commissioned Officer-in-charge in support of the students receiving training there. (R. 62, Jun. 17, 2013.) Private First Class KL was a "Marine Awaiting Training" at Ft. Leonard Wood, and would be a student there as soon as the course for her MOS school started. (R. 63, Jun. 17, 2013.) On October 21, 2013, Maza was on duty as the Command Duty Officer for the Marine Detachment and PFC KL was assigned fire watch duty for the female barracks. (R. 65, Jun. 17, 2013.) While both were on duty, Maza obtained access to an unoccupied barracks room and led PFC KL there. What occurred inside the room is disputed. PFC KL reported that Maza raped and forcibly sodomized her, while Maza admitted that he had sexual intercourse and oral sex with PFC KL, but maintained the encounter was consensual. (Appellate Ex. LXIX at 9.)

B. Maza's statement to SA Santee.

After PFC KL reported the incident, she underwent a forensic sexual assault examination. The next day, Maza was brought to the Army CID office to be interviewed by SA Santee. (Appellate Ex. XC, XXII.) The Military Judge heard SA Santee and Maza testify at the motion session, and made the following

[1] The full Record of Trial has not been completed yet. The page numbers for each session that have been authenticated start over at page 1 for each date. Therefore, a date is included with any citation to the record for clarity.

findings of fact related to what occurred during the interview:

d. Prior to the attempted interview that occurred at approximately 1006, SA Santee properly advised the accused of his Article 31(b) rights for "Cruelty of Subordinates, Forced Sodomy, Rape of an adult by Force" by using DA Form 3881 and asking the accused to read aloud and initial after each of his rights.

e. The accused invoked his right to counsel and SA Santee ceased his efforts to question him. The accused did not invoke his right to remain silent.

f. SA Santee next asked the accused if he would consent to the search of his body to seize DNA evidence, to submit to a physical examination to search for and seize any physical evidence regarding the alleged offenses, as well as a search of his residence and vehicle to seize his clothing and his cell phone. The accused refused SA Santee's request for his consent to search and/or seize any of the requested items.

g. SA Santee then informed the accused that although he had a right to refuse to consent to the search for and potential seizure of these items, that he (SA Santee) had an obligation to seek a search authorization from a military magistrate to obtain these items. SA Santee informed the accused that he was going to fill out an affidavit and then go see the magistrate to seek the search authorization. SA Santee further explained that it would take approximately 45 minutes for him to draft the affidavit, that he then would have to find the magistrate, and go over the affidavit with him. SA Santee informed the accused that he would have to remain in the interview room while SA Santee did these things, that afterwards he would be "booked", that SA Santee would next have to brief the accused's command regarding the investigation, and then arrange for someone from the accused's unit to pick him up. SA Santee further explained to the accused that while he was waiting for these things to occur, he could not wander through the CID building alone and that if he needed anything such as water or to go to the bathroom, he would need to knock on the door and let someone know.

h. SA Santee's purpose for telling the accused all the things that would be transpiring while the accused remained in the interview room was to give the accused an understanding why he was going to be sitting in the room for an extended period that day.

i. Subsequently, SA Santee departed the interview room, leaving the accused alone. While sitting alone in the room, the accused decided that he would seek out SA Santee and talk to him about the allegations. As established by his testimony on the Defense's original motion to suppress his statements to SA Santee, the accused's purpose in doing so was to distract SA Santee from his efforts to search his cell phone, as the accused had previously had naked pictures of himself on the phone. The accused was concerned that if his phone was forensically analyzed, these embarrassing photos could be retrieved.

j. Approximately 15 to 30 minutes after SA Santee departed, the accused stepped out of the interview room and informed SA Gibbs, another CID agent whom the accused encountered, that he had changed his mind and now wanted to talk to SA Santee about the allegations.

k. SA Gibbs informed SA Santee that the accsused (sic) had approached him and told him that he now wanted to talk. A few minutes later, SA Santee returned to the interview room, where the accused told him that he was now willing to make a statement. When SA Santee asked him why he had changed his mind, the accused replied, "I know in my heart that I have nothing to hide," or words to that effect.

l. SA Santee believed it to be unusual that a suspect would change his mind about his invocation of his right to counsel as quickly as the accused had done. Because of this, SA Santee left the accused in the interview room and went to his boss, Assistant Special Agent-in-Charge (ASAC) Cunningham to see if it would be permissible to interview the accused subsequent to the accused's initial invocation of his right to counsel. ASAC Cunningham told SA Santee that based on the circumstances, SA Santee could interview the accused, but first had to administer a new rights advisement to the accused and seek a waiver of his

rights.

> m. At approximately 1119, SA Santee returned to the interview room and re-advised the accused of his Article 31(b) rights. . . The accused waived his rights and so indicated by signing Block 3 under the waiver section of the document.
>
> n. Thereafter, the accused provided oral statements and ultimately, a written and sworn statement, admitting that he had engaged in a consensual sexual encounter with PFC K.L. on 21 October 2012.
>
> o. In his sworn written statement the accused stated that, "I feel in my heart I have nothing to hide," as the reason he wanted to provide a statement without speaking to a lawyer.
>
> p. During all relevant time periods, the accused was under the apprehension of CID. Therefore, he was not free to leave the CID office, and could reasonably believe that he was not free to leave.
>
> q. At approximately 1125 on 22 October 2012, SA Santee obtained a Consent to Search from the accused to search, among other things, buccal cells from his mouth. A sample of the accused's buccal cells were subsequently seized from the accused by SA Peebles at about 1914 on 22 October 2012.

(Appellate Ex. LXX at 3-5.)

On January 4, 2013, before the DNA sample had been sent to the lab for testing, Maza's Civilian Defense Counsel sent a letter to CID formally rescinding any prior consent Maza may have given. (Appellate Ex. LXX at 6.) On January 16, 2013, CID SA Hall obtained search authorization from a magistrate to test the sample provided by Maza. (*Id.* at 6-7.) The affidavit presented to the magistrate referenced Maza's admission to SA Santee that he had sex with PFC KL. (*Id.*) The DNA sample

provided by Maza was tested by USACIL, and the results provide evidence of sexual contact between Maza and PFC KL. (*Id.*)

Summary of Argument

The Military Judge incorrectly held that CAAF's recent decision in *United States v. Hutchins* requires the suppression of Maza's statement. Here, SA Santee's request for consent to search did not initiate the generalized discussion that led to another statement. Maza sought out SA Santee because he thought that he could distract SA Santee from obtaining evidence by waiving his right to counsel and providing another statement. Therefore, Maza himself initiated the future conversation with law enforcement and the prophylactic *Edwards* rule does not require the suppression of his statement.

Even assuming that Maza's statement must be suppressed, the Military Judge further erred by suppressing the physical DNA evidence. Maza's consent to the collection of the DNA was voluntary, and CID would have obtained the DNA evidence even without his statement. Therefore, even if the *Edwards* violation required the suppression of the DNA, which it does not, the evidence should still be admissible due to inevitable discovery.

Argument

I.

CAAF's DECISION IN *UNITED STATES V. HUTCHINS* DOES NOT REQUIRE THE SUPPRESSION OF MAZA'S STATEMENT BECAUSE, UNDER THE FACTS OF THIS CASE, MAZA HIMSELF INITIATED FURTHER COMMUNICATION WITH LAW ENFORCEMENT.

A. This Court has jurisdiction to hear this appeal.

Jurisdiction to hear an Article 62 appeal is a question of law reviewed *de novo*. *United States v. Daly*, 69 M.J. 485, 486 (C.A.A.F. 2011) (citation omitted). An appeal under Article 62 may not be taken unless the trial counsel provides the military judge with written notice that includes, among other things, a certification that "the evidence excluded is substantial proof of a fact material in the proceedings." Article 62(a)(2), UCMJ.

Congress intended for Article 62 appeals to be conducted under procedures similar to those governing an appeal in a federal civilian prosecution under 18 U.S.C. § 3731. *United States v. Wuterich*, 67 M.J. 63, 71 (C.A.A.F. 2008) (citations omitted). Therefore, military courts consistently look to the decisions of the federal courts under 18 U.S.C. § 3731 for guidance in interpreting the parallel provisions of Article 62. *Id.* at 64.

A certification by a U.S. attorney that evidence is a substantial proof of a material fact is treated as conclusive in all the federal circuits. *United States v. Moskowitz*, 702 F.3d

731, 733-34 (2nd Cir. 2012).[2] That is, federal courts reject arguments that they lack jurisdiction because the suppressed evidence is cumulative with other evidence, unimportant, or is not substantial proof of a material fact.

Here, there is no question that the Trial Counsel's certification met all the threshold requirements in Article 62. That is sufficient to establish jurisdiction. *United States v. Postle*, 20 M.J. 632, 634 (N.M.C.M.R. 1985) ("The threshold requirements of the codal and R.C.M. provisions having been apparently met, we turn to a consideration of the specified issue.")

B. The standard of review is abuse of discretion.

When this Court rules on an appeal under Article 62, UCMJ, it "may act only with respect to matters of law, notwithstanding [Article 66(c), UCMJ]." Article 62(b), UCMJ. "When a court is limited to reviewing matters of law, the question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are 'fairly supported by the record.'" *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004) (quoting *United States v. Burris*, 21 M.J. 140, 144 (C.M.A.

[2] *See also United States v. Centracchio*, 236 F.3d 812, 813 (7th Cir. 2001) (treating U.S. Attorney's certification as conclusive of whether the evidence is substantial proof of material fact.); *United States v. Johnson*, 228 F.3d 920, 924 (8th Cir. 2000) ("[W]e need not examine whether [the suppressed evidence] would actually be substantial proof of a material fact. The government has so certified; that suffices.").

1985)). When reviewing a ruling on a motion to suppress, this Court considers "the evidence in the light most favorable to the prevailing party." *United States v. Cowgill*, 68 M.J. 388, 390 (C.A.A.F. 2010) (citation and internal quotation marks omitted).

When the government appeals a military judge's evidentiary ruling on a motion to suppress, this Court reviews that ruling for abuse of discretion. *United States v. Dease*, 71 M.J. 116, 120 (C.A.A.F. 2012) (citations omitted). The abuse of discretion standard calls "for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" *United States v. Baker*, 70 M.J. 283, 287 (C.A.A.F. 2011) (quoting *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010)). A military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995).

C. After a suspect invokes his right to counsel, he may not be further interrogated while he remains in custody until counsel has been made available, unless the suspect himself initiates further dialogue with the authorities.

1. The *Edwards* rule prevents police from badgering a suspect into waiving his previously asserted right to counsel.

"No person . . . shall be compelled in any criminal case to be a witness against himself[.]" U.S. Const. amend. V. The Supreme Court has created safeguards to protect this right, one

of which is that prior to custodial interrogation, an accused must be informed that he has the right to the presence of counsel during the interrogation. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). If an accused invokes his right to counsel, he may not be further interrogated without counsel unless the accused initiates further communication with the police:

> [A]n accused. . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Edwards v. Arizona, 451 U.S. 477, 484-85 (1981).

The fundamental purpose of the judicially crafted prophylactic rule in *Edwards* is to "[p]reserve[e] the integrity of an accused's choice to communicate with police only through counsel." *Patterson v. Illinois*, 487 U.S. 285, 291 (1988). The need for such a rule is to provide added protection against the potentially coercive nature of continuous custody after an individual has invoked his right to counsel, because he is "cut off from his normal life and companions, thrust into and isolated in an unfamiliar, police-dominated atmosphere, where his captors appear to control his fate." *Maryland v. Shatzer*, 559 U.S. 98, 106 (2010).

In *Edwards*, the defendant had invoked his right to counsel and refused to make a statement. But "[t]he following day

detectives accosted the defendant in the county jail, and when he refused to speak with them he was told that 'he had' to talk." *Oregon v. Bradshaw*, 462 U.S. 1039, 1043 (1983) (summarizing the relevant facts in *Edwards*). The *Edwards* rule was "designed to protect an accused in police custody from being badgered by police officers in the manner in which the defendant in *Edwards* was." *Id.* at 1044. The rule prevents that sort of badgering by requiring that "before a suspect in custody can be subjected to further interrogation after he requests an attorney there must be a showing that the 'suspect himself initiates dialogue with the authorities.'" *Id.* (quoting *Wyrick v. Fields*, 459 U.S. 42, 46 (1982) (per curiam).

2. <u>In *Hutchins*, CAAF found that a request for consent to search initiated a conversation with the accused in violation of the *Edwards* rule. That holding was based on the unique circumstances of that case</u>.

The issue in *Hutchins* was "whether, *under the circumstances of this case*, it was the Government or Hutchins that reinitiated further communication under *Edwards* and *Bradshaw*." 72 M.J. at 297 (emphasis added). There, Hutchins was deployed in a foreign country in a combat environment and after he initially invoked his right to counsel, he was held under circumstances that CAAF determined included coercive pressures:

> Hutchins was held in essentially solitary confinement in a trailer for seven days after invoking his right to counsel; despite his request for counsel, no

> attorney was provided during this period and no explanation was provided to Hutchins as to why; he was held incommunicado (other than a chance conversation with a chaplain for three or four minutes); and he was not allowed to use a phone, the mail system, or other means of communication to contact an attorney, family, friends, or anyone else.

72 M.J. at 298 n. 5. After seven days of this, NCIS approached Hutchins late at night and asked for consent to search his belongings, presenting him with a form that informed him he was still under investigation for various offenses, including murder. *Id.* at 297, 299. While reading the form, Hutchins asked if the door was still open to give his side of the story. *Id.* at 297. The next day, he waived his rights and provided a statement. *Id.*

The Court found that the request for consent to search initiated a generalized discussion which related to the investigation, as opposed to a bare inquiry about routine incidents of Hutchins's custody. *Id.* at 299. Because NCIS initiated the conversation by requesting consent to search, the Court held that "under the circumstances of this case" it was error to admit Hutchins's statement into evidence. *Id.*[3]

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[3] The United States does not accept that *Hutchins* was a correct application of the *Edwards* rule. It is clear that *Edwards* does not "govern other, non-interrogative types of interactions between the defendant and the State (like pretrial lineups). *Montejo v. Louisiana*, 556 U.S. 778, 795 (2009). Because a request for consent to search is non-interrogative, CAAF should have ruled that the request did not violate the *Edwards* rule. *See Everett v. State*, 893 So.2d 1278 (Fla. 2004) (request for

D. <u>This Court should reverse the Military Judge's decision, because he misapplied the law when he concluded that *Hutchins* required the suppression of Appellee's statement to SA Santee</u>.

As stated earlier, a military judge abuses his discretion if his findings of fact are clearly erroneous or if his conclusions of law are incorrect. Here, the military judge's findings of fact are supported by the evidence, and this Court should adopt them for the purposes of this appeal. However, the Military Judge's conclusion of law that CAAF's holding in *Hutchins* requires the suppression of Maza's statement is incorrect. The Military Judge found no logical reason why Maza's statement must be suppressed, and only did so because he thought that result was compelled:

> But for the *Hutchins* court's recent interpretation of the *Edwards* rule, which established a bright line rule prohibiting criminal investigators from requesting permission to search from a suspect after he invokes his right to remain silent, this Court would reaffirm its previous ruling that the accused was the one who initiated further communication with SA Santee, and that after doing so, the accused validly waived his rights under Article 31(b) and M.R.E. 304 & 305, as well as *Miranda*, *Edwards* and their progeny.

(Appellate Ex. LXX at 18.) This conclusion of law is incorrect for two reasons. First, Hutchins did not establish a bright line rule that any request for consent to search violates the *Edwards* rule. Second, even if it did, that does not foreclose

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DNA sample did not violate *Edwards* rule). However, for the purpose of this appeal, it will be assumed that *Hutchins* is currently binding precedent.

finding that Maza himself initiated further communication in this case.

1. The Military Judge misapplied the law because Hutchins did not establish a rule that any request for consent to search violates the *Edwards* rule.

CAAF held that "under the circumstances of [that] case," the request initiated a generalized discussion about the ongoing investigation. 72 M.J. at 299. Therefore, Hutchins' question to NCIS asking "if the door was still open to tell his side of the story" was in response to the actions by NCIS, and was not re-initiation of a dialogue by Hutchins himself. But CAAF also explained that "[f]idelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which that concerns that powered the decision are implicated." *Id.* at 298 n.5 (quotations omitted). None of the concerns that the Hutchins Court listed as reasons for its decision are present in this case.

- Hutchins was being held in an unfamiliar setting while in a foreign country in a combat environment. Maza was being questioned at Ft. Leonard Wood, Missouri, which was his permanent duty location.

- Hutchins was held in solitary confinement under armed guard in a billeting trailer for seven days after he invoked his right to counsel, and was not allowed to communicate with an attorney, family, friends, or anyone else. Maza knew that his temporary restriction in the CID interview room would be very brief. SA Santee explained that it would take about 45 minutes to seek authorization from a magistrate, that afterward Maza would be "booked," and that SA Santee would have to arrange for someone from Maza's

command to pick him up from the CID office. Maza knew that his detention would be over soon.

- Hutchins was confined for seven days, and the government made no effort to secure an attorney for him, despite the requirements of R.C.M. 305(f) and Mil. R. Evid. 305(d)(2). Maza was going to be released to his command soon, so the United States was not required to secure an attorney for him.

- NCIS approached Hutchins late at night to request consent to search after Hutchins had been isolated for seven days. Hutchins then asked if he could provide a statement while he was reading the consent to search form. Maza did not ask about making a statement when SA Santee asked him for consent to search. Unlike in Hutchins, the request did not initiate a dialogue that led to a statement. Rather, SA Santee left Maza alone, and Maza later sought out SA Santee because he wanted to distract SA Santee from the search.

In summary, none of the "surrounding circumstances" of Hutchins are present here. 72 M.J. at 299 n. 10. Absent those special circumstances, this case becomes more like *Everett v. State*, 893 So.2d 1278 (Fla. 2004) where the Florida Supreme Court held that a request for a DNA sample after a suspect invoked his right to counsel did not violate the *Edwards* rule. Therefore, the request for consent to search, in this case, did not constitute a re-initiation of conversation in violation of the *Edwards* rule.

2. <u>Maza himself initiated further dialogue because he wanted to distract SA Santee from the planned search</u>.

Even if CAAF did hold that any request for consent to search violates the *Edwards* rule, this does not foreclose the conclusion that Maza himself initiated the conversation that led

to a subsequent statement. In Hutchins, CAAF found that the accused asked about making a statement in response to the request for consent to search and while he was reading the consent form. 72 M.J. at 299. By contrast, in this case, it was not the request for consent to search that initiated a further conversation. Maza initially responded by simply refusing the request for consent. (Appellate Ex. LXX at 3.) Maza's desire to change his mind and make another statement was due to his knowledge that CID was obtaining search authorization, and he wanted to distract them from their search. But SA Santee's explanation to Maza about why he would need to remain in the interview room while he obtained search authorization, and why he would not be free to roam around the building for the near future, were merely statements related to the routine incidents of Maza's custody, which are permissible. *Hutchins*, 72 M.J. at 299.

Maza knew exactly what he was doing and got exactly what he wanted. He sought out SA Santee because he thought that by providing a statement, he could distract CID from the search and prevent them from obtaining naked pictures on his cell phone. Therefore, Maza himself initiated further communication with CID, and there is no valid reason to expand the prophylactic *Edwards* rule and find that Maza's waiver of his right to counsel was involuntary. Rather, it was a calculated decision on his

part. The Military Judge erred when he held otherwise.

II.

EVEN IF *HUTCHINS* REQUIRES THE SUPPRESSION OF MAZA'S STATEMENT, HE VOLUNTARILY CONSENTED TO THE COLLECTION OF HIS DNA, AND THERE IS NO VALID REASON WHY THAT PHYSICAL EVIDENCE MUST NOW BE SUPPRESSED.

A. Maza voluntarily consented to the collection of his DNA sample based on the totality of the circumstances.

Law enforcement agents may request a servicemember's consent to conduct a search; and when valid consent is given, a constitutionally reasonable search may take place. *United States v. Roa*, 24 M.J. 297, 298 (C.M.A. 1987); Mil. R. Evid. 314(e)(1). Whether consent to a search is valid is measured by whether the consent was freely and voluntarily given as determined by the "totality of the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Courts consider the following non-exhaustive factors with respect to the voluntariness of consent:

> (1) the degree to which the suspect's liberty was restricted; (2) the presence of coercion or intimidation; (3) the suspect's awareness of his right to refuse based on inferences of the suspect's age, intelligence, and other factors; (4) the suspect's mental state at the time; (5) the suspect's consultation, or lack thereof, with counsel; and (6) the coercive effects of any prior violations of the suspect's rights.

United States v. Wallace, 66 M.J. 5, 9 (C.A.A.F. 2008) (citing *United States v. Murphy*, 36 M.J. 732, 734 (A.F.C.M.R. 1992)).

Here, the Military Judge simply found that Maza's consent to the seizure of his buccal DNA cells for analysis was involuntary and invalid because it came closely after the *Edwards* violation. (Appellate Ex. LXX at 22.) This ruling to suppress physical evidence due to an *Edwards* violation was incorrect because it misinterprets the holding in *Hutchins* and greatly expands the *Edwards* rule contrary to CAAF and federal case law.

The *Edwards* rule is a judicially prescribed prophylactic rule designed to protect an accused's Fifth Amendment rights, not a constitutional mandate. *Shatzer*, 130 S. Ct. at 122010). But the "prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." *Schmerber v. California*, 384 U.S. 757, 763 (1966). There, the Supreme Court held that drawing and testing a blood sample did not involve compulsion in violation of the Fifth Amendment. *Id.* at 761. Thus, even assuming a violation of the prophylactic *Edwards* rule, that violation should not impact the admissibility of physical evidence that does not involve the Fifth Amendment. *State v. May*, 434 S.E.2d 180, 182 (N.C. 1993).[4]

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[4] The Court of Military Appeals cited *May* in a footnote, and left open the question of whether a distinction could be drawn

Consistent with that principle, the clear rule in the Federal circuits is that a request for consent to search is not a custodial interrogation triggering a previously invoked *Miranda* right to counsel. *See, e.g.*, *United States v. Shlater*, 85 F.3d 1251, 1256 (7th Cir. 1996) (holding that a "consent to search is not an interrogation within the meaning of Miranda"); *United States v. Hidalgo*, 7 F.3d 1566, 1568 (11th Cir. 1993) (holding that consent to search obtained after defendant invoked right to remain silent is not a self-incriminating statement because it is neither testimonial nor communicative); *United States v. Smith*, 3 F.3d 1088, 1098 (7th Cir. 1993) ("We have held that a consent to search is not a self-incriminating statement and, therefore, a request to search does not amount to interrogation. This view comports with the view taken by every court of appeals to have addressed the issue.").

Likewise, CAAF previously agreed that "[a] request for a consent to search does not infringe upon Article 31 or Fifth Amendment safeguards against self-incrimination because such requests are not interrogations and the consent given is ordinarily not a statement." *United States v. Frazier*, 34 M.J. 135, 137 (C.M.A. 1992).

CAAF's holding in *Hutchins* did not alter that basic premise

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between a statement by an accused and physical evidence. *United States v. Murphy*, 39 M.J. 486, 488 (C.M.A. 1994).

or call the validity of *Frazier* into question. 72 M.J. at 297, 299. In other words, if Hutchins had consented to the search, but NCIS did not question him further, *Frazier* and all the previous Federal cases would apply, and any evidence obtained during that search would be admissible. The request for consent only becomes an *Edwards* violation if the accused makes another statement, and a Court determines that the request for consent initiated the conversation that led to the next statement.

The Military Judge's ruling that the *Edwards* violation makes the consent to search involuntary creates an absurd result. An accused may validly consent to a search after he has invoked his right to counsel. But if the accused takes it one step further and decides to change his mind and provide a statement, then the future statement could violate *Edwards* and that in turn makes the consent suddenly become involuntary. This is not the law.

Here, instead of relying solely on the *Edwards* violation to find the consent involuntary, the Military Judge should have analyzed the voluntariness of the consent based on the totality of all the circumstances. *Wallace*, 66 M.J. at 8-9. Doing so, the Military Judge would have concluded that Maza was an experienced Gunnery Sergeant, he was mentally sound when he gave consent, he knew the restrictions on his liberty were going to be brief, and that SA Santee acted in good faith and did not use

any coercion or intimidation. Most importantly, Maza demonstrated full awareness of all of his rights, and wielded them or waived them based on what he thought was in his own best interests. Therefore, under the totality of the circumstances, his consent was voluntary.

B. Even if Maza's consent to the collection of DNA from his buccal cells was involuntary, his DNA sample would have been obtained by other lawful means.

"The doctrine of inevitable discovery creates an exception to the exclusionary rule allowing admission of evidence that, although obtained improperly, would have been obtained by another lawful means." *Wallace*, 66 M.J. at 10 (citing *Nix v. Williams,* 467 U.S. 431, 444 (1984)). M.R.E. 311(b)(2) embodies this exception, stating that "[e]vidence that was obtained as a result of an unlawful search or seizure may be used when the evidence would have been obtained even if such unlawful search or seizure had not been made." CAAF explained the doctrine in *United States v. Owens*, 51 M.J. 204 (C.A.A.F. 1999), where it upheld the legality of a warrantless search of the appellant's car and seizure of stolen stereo equipment because overwhelming probable cause and routine police procedure made discovery of the evidence inevitable. *Id.* at 210-11.

Here, the Military Judge misapplied the law by not applying the doctrine of inevitable discovery to the collection of Maza's DNA sample. (Appellate Ex. LXX at 23-24.) The prosecution

should not profit from an error, but neither should the prosecution be put in a worse position simply because of some earlier police error. *Nix*, 467 U.S. at 443. But that is exactly what the Military Judge's ruling did.

Before Maza sought out SA Santee to try to distract him from the planned search, SA Santee was preparing to seek authorization from a magistrate. (Appellate Ex. LXX at 4.) At that point, CID already knew the following information: (1) that PFC KL had reported being sexually assaulted by Maza in an unoccupied barracks room while she was serving as fire watch; (2) that PFC KL reported that Maza did not wear a condom during the alleged assault; (3) that other Marines on fire watch verified the general timeline of the assault and confirmed that Maza and PFC KL were alone "making rounds" at the time of the alleged assault; (4) that a search of the empty barracks room was consistent with PFC KL's description of it; and (5) that PFC KL had underwent a sexual assault forensic examination during which her clothing and vaginal swabs were collected. (Appellate Exs. XX, XC, LXIX at 9.) Therefore, had Maza not tried to distract SA Santee from the search by asking to make another statement, SA Santee would have obtained search authorization from the magistrate. And the information SA Santee already possessed would have easily established probable cause to collect buccal DNA cells from Maza and compare his DNA profile

with any DNA recovered from PFC KL's examination. Therefore, since the DNA sample would have been obtained even without Maza's statement, it should not have been suppressed.

This might be a different case under the following hypothetical situation. Suppose Maza had admitted to an unrelated sexual assault that CID had no previous knowledge of, and CID used his statement to obtain DNA evidence of that assault. That situation would present a closer case of the evidence being obtained by "exploitation" of the initial illegal activity, like in *Brown v. Illinois*, 422 U.S. 590 (1975). *See also United States v. Marine*, 51 M.J. 425, 428 (C.A.A.F. 1999) (the pertinent inquiry is whether the seizure of the evidence has been come at by exploitation of the illegality).

That is not what happened here. In this case, there is no "reasonable likelihood" that SA Santee would have abandoned his efforts to obtain authorization to collect Maza's DNA sample, and therefore the evidence would have been inevitably discovered. *Owens*, 51 M.J. at 210-11. "Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial." *Nix*, 467 U.S. at 446. Therefore, regardless of any claimed *Edwards* violation, the Military Judge should not have suppressed the results of the DNA testing, because that evidence would have been collected even without Maza's statement.

The same flawed analysis impacted the Military Judge's determination that the later results of testing Maza's DNA sample must be suppressed. (Appellate Ex. LXX at 22-23.) After the DNA sample was collected, but before it was tested, Appellee's counsel revoked his consent. (Appellate Ex. LXX at 23.) But the United States obtained authorization from a magistrate before any testing was conducted on the DNA sample. (*Id.*) The Military Judge relied exclusively on the fact that the affidavit presented to the magistrate referenced the fact that Appellee had provided a statement and admitted to sexual activity. (*Id.* at 22.) According to the judge, since the United States could not prove that the magistrate did not rely on Appellee's statement in making his probable cause determination, the results of the DNA test must be suppressed. (*Id.*)

But probable cause is founded not on the determinative features of any particular piece of evidence provided to the issuing magistrate, but rather upon the overall effect or weight of all the factors. *United States v. Clayton*, 68 M.J. 419, 424 (C.A.A.F. 2010). For the same reasons discussed earlier, there was clearly enough evidence in the affidavit to establish probable cause even without Appellee's statement. If he would not have provided the statement, CID would have still obtained authorization to collect and test his DNA sample. So it was

error for the Military Judge to exclude it.

Conclusion

Wherefore, the Government requests that this Court set aside the Military Judge's erroneous ruling excluding Appellee's statements to SA Santee and suppressing Appellee's DNA sample and the results of testing that sample and direct the Military Judge to deny the Defense motions to suppress.

PAUL M. ERVASTI
Major, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE,
Bldg. 58, Suite B01
Washington Navy Yard, DC 20374
(202)685-7679, fax (202)685-7687

Certificate of Filing and Service

I certify that the original and required number of copies of the foregoing were delivered to the Court on August 20, 2013, and that a copy of the foregoing was delivered to the Appellate Defense Division on August 20, 2013.

PAUL M. ERVASTI
Major, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE,
Bldg. 58, Suite B01
Washington Navy Yard, DC 20374
(202)685-7679, fax (202)685-7687

DEPARTMENT OF THE NAVY
GENERAL COURT-MARTIAL
NAVY AND MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT

U N I T E D S T A T E S v. FABIAN D. MEDINA ET3 / E-4 UNITED STATES NAVY	DEFENSE RESPONSE TO GOVERNMENT MOTION CONCERNING MAXIMUM PUNISHMENT FOR SPECIFICATIONS CHARGED UNDER ARTICLE 120 02 July 2013

1. **Nature of Motion.** The United States filed a motion with the Court on 27 June 2013, requesting a ruling regarding the maximum punishment for offenses at issue in this case. Specifically, the United States requested a ruling with respect to specifications charged under Article 120 of the Uniform Code of Military Justice (UCMJ), which allege acts that occurred between 28 June 2012 and 15 May 2013. The United States argued that the maximum punishment for each specification at issue should be dishonorable discharge from the Naval service, forfeiture of all pay and allowances, and confinement for 30 years. The defense opposes the Government's motion and argues that a court-martial may not impose a greater sentence than that which is authorized at summary court-martial for any of the specifications at issue. In the alternative, the defense argues that the maximum punishment that a court-martial may

impose is that which would be available for an offense charged under Article 128(a)—assault consummated by a battery.

2. **Summary of Facts.**

a. The National Defense Authorization Act for Fiscal Year 2006 included significant overhauls to Article 120, UCMJ. Included in the 2006 amendments were interim maximum punishments that could be imposed upon a person convicted under the 2006 version of Article 120. *See* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 109-163 § 552(b), 119 Stat. 3263 (2006). The interim punishments Congress wrote into the 2006 statute remained in effect until the President exercised his power under Article 56, UCMJ, to specify punishments for offenses that lack a statutory penalty.

b. The National Defense Authorization Act for Fiscal Year 2012 included changes to existing sexual offenses and their respective elements under Article 120, UCMJ. Unlike the 2006 amendments, however, the 2012 Act did not impose interim maximum punishments in the event that the President delayed in exercising his powers under Article 56[1]. With respect to punishment that may be imposed upon persons convicted under the offenses enumerated in Article 120, the statute merely explained that those persons "shall be punished as a

[1] Congress also refrained from directing cases charged under the 2012 version of Article 120 to a specific court-martial and also elected not to impose its own maximum punishment. *Contra* Article 106, UCMJ (directing trial by general court-martial or military commission and a mandatory punishment of death).

court-martial may direct." These amendments—signed into law on 31 December 2011—took effect on 28 June 2012.

c. On 18 March 2013, the United States preferred charges against ET3 Medina, alleging two specifications under Article 120(b) and one specification under Article 12(d) for conduct that occurred on or about 1 December 2012. Those specifications were then investigated under Article 32, UCMJ, and subsequently referred to general court-martial on 20 June 2013.

d. On 15 May 2013, the President signed Executive Order 13643—Amendments to the Manual for Courts-Martial, United States. That Order imposed the following maximum punishment for the two specifications that the United States has referred against ET3 Medina under Article 120(b): dishonorable discharge from the Naval service, forfeiture of all pay and allowances, and confinement for 30 years. With respect to the specification under Article 120(d), Executive Order 13643 imposed the following punishment: dishonorable discharge from the Naval service, forfeiture of all pay and allowances, and confinement for 7 years.

3. **Discussion.**

a. In this case, the maximum authorized punishment is the jurisdictional limit of a summary court-martial.

(1) Applying the recent executive order to offenses that occurred between 28 June 2012 and 14 May 2013 would violate the United States Constitution's expressed proscription of *ex post*

facto laws under Article I, Section 9. Declining to avail itself of powers exercised when making prior amendments to Article 120 and enacting other articles under the UCMJ, Congress's most recent iteration of Article 120 is ambiguous with respect to maximum punishment. As such, this Court should invoke the Rule of Lenity and read the statute in the light most favorable to ET3 Medina. Such a reading leads to the conclusion that the maximum punishment is that which can be imposed by a summary court-martial.

(2) Alternatively, the Court may invoke Rule for Courts-Martial 1003(c)(1)(B)(i) because—absent maximum punishment, among other things—the charged offenses of sexual assault and abusive sexual contact are not listed under Part IV of the current edition of the Manual for Courts-Martial. Assault consummated by a battery under Article 128 of the Uniform Code of Military Justice is listed under Part IV and is related to the charged specifications. Under R.C.M. 1003(c)(1)(B)(i), therefore, the maximum sentence authorized for the three specifications is that which may be imposed for commission of assault consummated by a battery: bad conduct discharge, forfeiture of all pay and allowances, and confinement for up to 6 months.

b. Because the language regarding maximum punishment under the 2012 version of Article 120 is ambiguous, the maximum punishment for each charged specification is that which could be imposed by a summary court-martial.

(1) The maximum punishment for offenses charged under Article 120 that allege conduct occurring between 28 June 2012 and 14 May 2013 is the jurisdictional limit of a summary court-martial. The Rule of Lenity provides that criminal statutes are to be strictly construed, with any ambiguity resolved in favor of an accused. *See, e.g., United States v. Thomas*, 65 M.J. 132, 135 n.2 (C.A.A.F. 2007). When engaging in statutory interpretation and applying a statute, courts must avoid reading a statute in isolation and instead consider the context of the overall statutory scheme. *See, e.g., Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). Here, the National Defense Authorization Act for Fiscal Year 2012 must be interpreted in the context of Congress's overall statutory scheme. One must consider, therefore, Congress's overhaul of Article 120 in the National Defense Authorization Act for Fiscal Year 2006 as well as other criminal statutes that Congress has included in the UCMJ. Contrary to its 2006 amendments to Article 120, Congress elected not to include interim punishments in its 2012 iteration. Congress also decided not to explicitly state a maximum punishment or limit disposition of offenses charged under Article 120 to a specific court-martial with established

jurisdictional limits on punishment as it did with Article 106—directing trial by general court-martial or military commission and a mandatory punishment of death.

(2) When Congress enacted the statute at issue in this case, it chose to neither impose interim maximum punishment nor direct a statutory maximum punishment nor to direct disposition of applicable cases at a specific court-martial with known jurisdictional limits. Instead, Congress left determination of maximum punishment to the convening authority during the referral process, and thereafter, to the judiciary. One must guess at what Congress intended when it left determination of maximum punishment open to interpretation. Considering the overall statutory scheme, the statutory language that a person convicted under the 2012 version of Article 120 "shall be punished as a court-martial may direct" is inherently ambiguous. Because it is ambiguous this Court should invoke the Rule of Lenity to resolve such ambiguity when determining the language's meaning. Considering the statute in the light most favorable to ET3 Medina, one must find that the maximum punishment in this case is that which is within the jurisdictional limit of a summary court-martial.

c. Applying Executive Order 13643 to offenses that occurred between 28 June 2012 and 14 May 2013 violates the expressed proscription of *ex post facto* laws under Article I, Section 9 of the United States Constitution.

(1) "An increase in the maximum sentence to confinement authorized for a crime would clearly be *ex post facto* legislation." *United States v. Gorski*, 47 M.J. 370, 373 (C.A.A.F. 1997). As discussed *supra*, the ambiguous language with respect to maximum punishment that exists in the 2012 Article 120 statute requires that the maximum punishment available is that which may be imposed by a summary court-martial. Such a statutory interpretation is appropriate for offenses that occurred between 28 June 2012 and 14 May 2013.

(2) In *United States v. Kebodeaux*, the Court held that Congress maintained authority under the Necessary and Proper Clause to impose additional civil registration requirements upon sex offenders who had already served their criminal sentences. 570 U.S. ___ (2013). Paramount to the Court's ruling was the fact that these offenders were already subject to federal registration requirements under preceding legislation. *See Id.* The Government argues that the *Kebodeaux* Court, "provided an example where an increase in the federal penalty is not a violation of the *ex post facto* clause. Government Brief para. c(vi), dated 27 June 2013

(emphasis added). The United States is incorrect in its assertion, and *Kebodeaux* is not analogous to the case at bar. Several factors differentiate ET3 Medina's case from *Kebodeaux*.

(3) First, *Kebodeaux* dealt with civil requirements, not punitive measures as the Government characterizes them. Though sex offender registration is a consequence when a person is convicted of a sex offense, it is not a penalty that is imposed at sentencing. The issue here is a punitive one, as the question before the Court asks what punishment ET3 Medina faces if convicted.

(4) Second, Kebodeaux was subject to federal sex offender registration requirements, both when he was convicted and when Congress enacted changes to existing legislation. Because he was already subject to civil registration requirements, merely altering some of those requirements fell within the scope authorized under the Necessary and Proper clause, which allows Congress to pass legislation to bring uniformity to a "patchwork" of existing federal and state requirements. *Id.* (quoting *Reynolds v. United States*, 565 U.S. ___ (2012)). The Court began its ruling with an assumption that the civil requirements did not violate *ex post facto*, so it would be errant to analogize the Court's analysis of the Necessary and Proper Clause to the *ex post facto* issue in this case.

(5) Applying Executive Order 13643 to Article 120, UCMJ, offenses that occurred between the statute's effective date and the date on which the order was issued would clearly violate the Constitution's proscription of *ex post facto* legislation. *Cf. Peugh v. United States*, 569 U.S. ___ (2013)(holding that it was an *ex post facto* violation to sentence a defendant under sentencing guidelines that were promulgated after the date on which the offense occurred when the new guidelines resulted in a higher sentence than that which would have been imposed under the preceding sentencing guidelines). Unlike civil requirements considered in *Kebodeaux*, *Peugh* involved punitive measures. Though Congress maintained authority to adjust already-imposed civil restrictions under the Necessary and Proper Clause, the proscription of *ex post facto* legislation precluded the Government from increasing punishment after the date of the offense.

d. <u>If the Court does not find the maximum punishment language to be ambiguous, the Court should apply R.C.M. 1003(c)(1)(B) to determine a maximum punishment for the charged specifications.</u>

(1) R.C.M. 1003(b) lists the only possible punishments that a non-capital court-martial may adjudge: a reprimand, forfeiture of pay and allowances, a fine, reduction in pay grade, restriction to specified limits, hard labor without confinement, confinement, and/or punitive discharge. In addition to other limits found in

the M.C.M.[2], R.C.M. 1003(c)(1) places maximum limits on those punishments based on the offense committed.

(2) Maximum punishment limits based on offenses are separated into two categories: limits for offenses that are listed in Part IV and limits for offenses that are not listed in Part IV. See R.C.M. 1003(c)(1). R.C.M. 1003(c)(1)(A)(i) contemplates that "the maximum limits for the authorized punishments . . . are set forth for *each*[3] offense listed in Part IV of this Manual." (emphasis added). The use of the word "each" in R.C.M. 1003(c)(1)(A)(i) suggests that an offense without maximum authorized punishment is not considered a listed offense.

(3) There is further guidance in the Discussion section that precedes the punitive articles in Part IV of the M.C.M.:

> Other than Articles 77 and 79, the punitive articles of the code are discussed using the following sequence: a. Text of the article; b. Elements of the offense or offenses; c. Explanation; d. Lesser included offenses; e. Maximum punishment; [and] f. Sample specifications.

Under Part IV of the 2012 edition of the M.C.M., Articles 120, 120(b), and 120(c) only include the text of the statute. Those Articles do not include elements of the offense or offenses, an

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[2] *See* R.C.M. 201(f) and 1301(d) (jurisdictional limits of a court-martial); R.C.M. 1003(c)(2) (limits based on the rank of the accused).

[3] "Each: A distributive adjective pronoun, which denotes every one of the persons or things mentioned; every one of two or more persons or things; composing the whole, separately considered." *Black's Law Dictionary* 507 (6th ed. 1990).

explanation section, stated lesser included offenses, authorized maximum punishment, or sample specifications. It is also worth noting that the quoted Discussion section was modified to reflect case law from 2012 prior to its insertion into the 2012 M.C.M. Modifications were *not* inserted, however, to specifically exclude Article 120 from the stated punitive article format, an example of which can be found in language that discusses Articles 77 and 79[4].

(4) One should conclude—based on the recognized meaning of the word "each," as used in R.C.M. 1003(c)(1)(A) and the Discussion section that precedes Part IV of the M.C.M.—that if an offense is "listed" in Part IV, then so too are elements of the offense or offenses, an explanation section, stated lesser included offenses, authorized maximum punishment, and sample specifications. To the contrary, when an offense does not contain elements of the offense or offenses, an explanation section, stated lesser included offenses, authorized maximum punishment, or sample specifications, that offense is not "listed," under the language of R.C.M. 1003(c)(1)[5].

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[4] Listings for Articles 77 and 79 in Part IV of the M.C.M. contain neither sample specifications nor maximum punishments, but unlike Article 120, they "are not chargeable offenses." M.C.M. Part IV (Discussion).

[5] Though the Rules for Courts-Martial are neither statutes, nor are they promulgated by a legislative body, any ambiguity therein should be resolved in favor of the accused. *Cf. United States v. Thomas*, 65 M.J. 132, 135 (C.A.A.F. 2007)(citation omitted).

(5) In this case, the charged specifications allege that ET3 Medina violated Article 120. Though a section labeled "Article 120" can be found in Part IV of the current M.C.M., that section lacks several of the subsections intended to appear within every "punitive article of the code," as indicated in the Discussion section that precedes Part IV of the M.C.M. Among four other subsections, the portion labeled "Article 120" is missing a subsection discussing maximum authorized punishment. Such a scenario directly contradicts the language the Discussion section preceding Part IV as well as the language in R.C.M. 1003(c)(1)(A), which contemplates that maximum authorized punishments accompany *each* listed offense. For these reasons, the section labeled "Article 120" in the current edition of the M.C.M. is not a "listed offense," as described in R.C.M. 1003(c)(1)(A).

(6) Because the charged offense under Article 120 is not listed in Part IV of the M.C.M. using conclusions drawn from R.C.M. 1003(c)(1)(A) and the Discussion section preceding Part IV, one must then examine whether R.C.M. 1003(c)(1)(B) applies to the present case. Specifically, subsection (i) of the stated Rule directs:

> For an offense not listed in Part IV of [the M.C.M.] which is included in or closely related to an offense listed therein the maximum punishment shall be that of the offense listed.

The inquiry is to determine whether Part IV lists an offense that is included in, or related to, the charged offenses of sexual assault and abusive sexual contact. If so, then the appropriate maximum punishment that should be attributed to the unlisted charged offenses is that which can be attributable to the related offense that *is* listed in Part IV. Here, there exists a related offense to the alleged sexual assaults and the alleged abusive sexual contact. The most appropriate listed offense to use as a guidepost is assault consummated by a battery under Article 128.

(a) The United States alleges two specifications of sexual assault in violation of Article 120(b) of the UCMJ and one specification of abusive sexual contact in violation of Article 120(d) of the UCMJ. The elements of specification 1 are: (1) that ET3 Medina committed a sexual act upon another person; and (2) that ET3 Medina knew or reasonably should have known that the other person was asleep and otherwise unaware that the sexual act was occurring. The elements of specification 2 are: (1) that ET3 Medina committed a sexual act upon another person; and (2) that the sexual act caused bodily harm to that person. The elements of specification 3 are: that ET3 Medina committed a sexual contact upon another person; and (2) that ET3 Medina knew or reasonably should have known that the other person was asleep and otherwise unaware that the sexual act was occurring.

(b) The elements of assault consummated by a battery are: (1) "that the accused did bodily harm to a certain person;" and (2) "that the bodily harm was done with unlawful force or violence." Article 128(b)(2), UCMJ. Bodily harm under Article 128 means committing any offensive touching of another, however slight, and unlawful force or violence means that the accused wrongfully caused the contact, in that no legally cognizable reason existed that would excuse or justify the contact. *See United States v. Bonner*, 70 M.J. 1, 6 (C.A.A.F. 2011) (citations omitted). The maximum imposable punishment for assault consummated by a battery is "[b]ad conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months." M.C.M., Part IV para. 54e.(2).

(7) Because Part IV of the M.C.M. enumerates no maximum punishment for the alleged sexual assaults and the alleged abusive sexual contact, the maximum punishment for each specification should be that of assault consummated by a battery under Article 128. Specifications 1, 2, and 3 put ET3 Medina on notice that he must to defend against an accusation of bodily harm, specifically a nonconsensual sexual act upon the complaining witness. Under Article 128, the accused would similarly have to defend against an accusation of bodily harm, specifically an offensive touching of the complaining witness for which no legally cognizable reason existed that would excuse or justify the contact, i.e. consent. In effect, charging the conduct at issue under either Article 120 or

Article 128 would require the accused to defend against a nonconsensual offensive touching of the complaining witness. One could easily substitute the conduct alleged in all three specifications as the basis for a specifications alleging assault consummated by a battery. For these reasons, the appropriate maximum punishment that a court-martial may impose for violation of the charged specifications is bad conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

e. It would be an error to extend the maximum authorized punishment for the charged offense to a court-martial's jurisdictional limit when the President has issued guidance for determining the maximum punishment for offenses not listed in Part IV of the M.C.M.

(1) Citing R.C.M. 1003(c)(1)(A), the United States argues that the maximum punishments listed in Part IV of the M.C.M. "only apply to those offenses listed in Part IV of the MCM and are set at the maximum limit established in Part IV." Government Brief para. d(iv), dated 27 June 2013. On this basis, the United States argues that—since no maximum authorized punishment is included in Part IV for Article 120 offenses—the maximum punishment in this case extends to "the range of lawful punishments available to the court-martial." *Id.* at para. d(v). Such an argument, however, disregards subsection (B) of the very same rule and instead suggests a procedure for which there are no supportive grounds.

Nowhere in R.C.M. 1003 is a court-martial instructed to defer to its jurisdictional limit in the absence of an enumerated maximum authorized punishment. Rather, the Rule provides several steps for narrowing the authorized punishment for a charged offense within a court-martial's jurisdictional limits. Most notably, the maximum authorized punishment is narrowed within a court-martial's jurisdictional limits when the charged offense is without an enumerated maximum punishment but is related to an offense for which a maximum punishment is listed in Part IV of the M.C.M.

(2) In fact—as R.C.M. 1003(c)(1)(B)(i) tells us—the maximum punishments enumerated in Part IV of the M.C.M. extend to "[i]ncluded or related offenses" with respect to listed offenses. In addition, R.C.M. 1003(c)(1)(B)(ii) offers further guidance when Part IV of the M.C.M. is without an offense that is related to the charged offense. Therefore, the Government's argument is only applicable when several factors have been met: (1) the charged offense is not listed in Part IV of the M.C.M.; (2) Part IV of the M.C.M. does not contain maximum authorized punishment for an offense that is related to the charged offense; (3) the United States Code does not authorize a punishment for the charged offense; and (4) the custom of the service does not authorize a punishment for the charged offense. *See* R.C.M. 1003(c)(1)(B)(i)-(ii).

(3) In this case, the United States cannot demonstrate that all of these factors have been met. As discussed *supra*, there exists at least one offense—assault consummated by a battery—that is included in, and/or related to, the charged specifications. Further, Part IV of the M.C.M. states the maximum authorized punishment for commission of assault consummated by a battery. As such, the maximum imposable punishments for assault consummated by a battery are also the most appropriate guideposts with respect to the conduct the Government alleges in this case.

(4) To open ET3 Medina up to any punishment available within the court-martial's jurisdictional limit would be to disregard guidance that the President issued in R.C.M. 1003(c)(1)(B)(i). Because assault consummated by a battery is an offense listed in Part IV of the M.C.M., and because it is related to the alleged specifications, it would be an error to instead defer to the court-martial's jurisdictional limit for maximum authorized punishment.

f. <u>It would be an error to base maximum punishment in this case off of 18 U.S.C. § 2242(2)(A-B) because Part IV of the Manual already contains a closely related offense, and because the specifications at issue here do not include conduct and *mens rea* directly analogous to 18 U.S.C. § 2242(2)(A-B) are</u> .

(1) In the absence of an enumerated punishment authorized by the President or a related offense listed in Part IV of the

M.C.M., a charged offense is punishable by a sentence authorized by the United States Code or the custom of the service. R.C.M. 1003(c)(1)(B)(ii). In the present case, however, the Court need not turn to the United States Code or the custom of the service because the M.C.M. lists a related offense in Part IV.

(2) R.C.M. 1003(c)(1)(B)(ii) does not authorize—for application in a court-martial—a sentence applicable to criminal statutes found in the United States Code that are similar to offenses charged at court-martial. *See United States v. Beaty*, 70 M.J. 39, 42 n.7 (C.A.A.F. 2011)("[w]e observe that the closely related language [in R.C.M. 1003(c)(1)(B)(i)] . . . refers to offenses that are closely related to offenses listed in the M.C.M. -not offenses in the United States Code)(internal quotations and citations omitted). Following the court's guidance, one should not look to related criminal conduct enumerated in the United States Code in an effort to determine a maximum authorized sentence for conduct charged under the UCMJ. Here, the M.C.M. lists a related offense in Part IV—assault consummated by a battery. Turning to the Code is an inappropriate and unnecessary solution to a problem that does not exist. R.C.M. 1003(c)(1)(B)(ii) provides us an ample guide to determine a maximum authorized sentence for the charged conduct, and that approach is to consider related offenses that are listed in the M.C.M.

(3) If, however, the Court disagrees, it would be error to entertain the Government's argument that the maximum punishment in this case should be based on 18 U.S.C. § 2242(2)(A-B). The elements of specification 1 are: (1) that ET3 Medina committed a sexual act upon another person; and (2) that ET3 Medina knew or reasonably should have known that the other person was asleep and otherwise unaware that the sexual act was occurring. The elements of specification 2 are: (1) that ET3 Medina committed a sexual act upon another person; and (2) that the sexual act caused bodily harm to that person. The elements of specification 3 are: that ET3 Medina committed a sexual contact upon another person; and (2) that ET3 Medina knew or reasonably should have known that the other person was asleep and otherwise unaware that the sexual act was occurring.

(4) In contrast, 18 U.S.C. § 2242(2)(A-B), criminalizes sexual abuse when an individual (1) engages in a sexual act with another person, and the other person is (2) incapable of appraising the nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act. These elements, contrary to the Government's argument, do not "contain the same 'conduct and *mens rea* proscribed by directly analogous federal criminal statute[.]'" and are neither closely related nor "'essentially the same.'" Government Brief para. f(v), dated 27 June 2013 (quoting *United States v. Leonard*,

64 M.J. 381, 384 (C.A.A.F. 2007)). The only shared conduct is the *actus reas* requirement of a sexual act with a complaining witness that is present in the charged specifications and sec. (1) of the 18 U.S.C. § 2242(2)(A-B).

(5) Additionally, specification 1 maintains an essential *mens rea* requirement that is not present in the statute criminalizing sexual abuse under the United States Code. To prove specification 1, the United States is required to prove that ET3 Medina knew or should have known something about the complaining witness; the Government must prove ET3 Medina knew or should have known she was asleep or otherwise unaware that the sexual act was occurring. The Government need not prove the complaining witness's level of awareness, only what ET3 Medina "should have known" about that state. Sexual abuse charged under 18 U.S.C. § 2242(2)(A-B) sec. (2), however, focuses on the complaining witness's physical state. Without an element that requires the Government to prove the accused's knowledge, the charge under the United States Code requires that the Government actually prove that the complaining witness was "incapable of appraising the nature of the conduct; or physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act." The Government disproportionally focuses on the apparent similarity in the language of incapacitation while failing to realize the essential difference with respect to *mens rea*. The military

statute focuses on what the accused knew or should have known while the United States Code focuses on the complaining witness. In effect, an act that is criminal under the military code because of what the accused "should have known," might not qualify as sexual abuse under the United States Code if the complaining witness was not actually incapacitated. *Cf. Beaty*, 70 M.J. at 44 ("while the Government can charge an offense of possession of what appears to be child pornography under Article 134, UCMJ, the maximum punishment under the United States Code for possession of what 'appears to be' child pornography is, in fact, no punishment at all" because that is not an offense under the Code).

(6) Next, specification 2 at issue contains an *actus reas* requirement of causing bodily harm. Sexual abuse charged under the U.S.C., however, requires no such conduct and, therefore, does not address the same conduct as specification 2.

(7) It would be an error for the Court to look to 18 U.S.C. § 2242(2)(A-B) in an effort to quantify the maximum punishment for the offenses charged under Article 120 in this case. More appropriate routes, as discussed *supra*, are available to the Court. In addition, the conduct and *mens rea* that the Government must prove under the charged specifications are not directly analogous to the conduct and *mens rea* made criminal under 18 U.S.C. § 2242(2)(A-B).

g. The custom of the service does not authorize a punishment in this case. Similar to the United States Code, the custom of the service is an inappropriate guidepost for determining a maximum sentence in this case. Our service has operated under three different versions of Article 120 of the UCMJ and two different commanders in chief since fiscal year 2006. Based on this, it is impossible to determine what the custom of the service has been with respect to the maximum punishment for the specifications at issue. Our service has not had adequate time and/or continuity in the law to establish a custom with respect to punishments authorized under Article 120. Observing maximum authorized punishment promulgated with respect to prior versions of the law or by prior commanders in chief are of no use. If the prior methods for dealing with the charged conduct were adequate guideposts, Congress would not have rewritten the statute, and the President would have instantly applied prior authorized punishments to the current version of Article 120. Neither is the case. For these reasons, the custom of the service has not authorized a punishment in this case.

h. In this case, the maximum authorized punishment is the jurisdictional limit of a summary court-martial.

(1) Because the statutory language with respect to maximum punishment under the 2012 version of Article 120 is ambiguous, the Court should turn to the Rule of Lenity when interpreting the

language. In so doing, the maximum punishment for each specification at issue is that which interprets the ambiguous language in the light most favorable to ET3 Medina. And such a reading would cap the punishment that may be imposed upon ET3 Medina for each specification at the jurisdictional limit of a summary court-martial.

(2) Alternatively, should the Court find the maximum punishment language at issue to be unambiguous, the Court should turn to R.C.M. 1003 to determine the maximum punishment applicable to this case. Because application of Executive Order 13643 to the alleged conduct in this case violates the Constitution's proscription of *ex post facto* legislation, Article 120—as applied to the alleged conduct—was without the necessary subsections to constitute a listed offense under Part IV of the M.C.M., as interpreted by R.C.M. 1003(c)(1)(A). Assault consummated by a battery under Article 128 of the UCMJ is related to the charged offense. Therefore, if the Court elects not to interpret the statute at issue using the Rule of Lenity, the defense respectfully requests that the Court invoke guidance issued under R.C.M. 1003(c)(1)(B)(i) and find that the maximum sentence authorized for the offense charged in specification 2 is bad conduct discharge, forfeitures of all pay and allowances, and confinement for up to 6 months.

4. **Relief Requested.** The defense respectfully requests that the Court impose the jurisdictional limit of a summary court-martial as the maximum authorized punishment for each specification charged under Article 120 in this case.

5. Argument. The defense does not request oral argument.

6. Burden of Persuasion. As the moving party, the United States bears the burden of persuasion on any factual issue the resolution of which is necessary to decide this motion.

//s//
N. D. LINSTROTH
LT, JAGC, USN
Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served electronically upon Trial Counsel and the Court on 2 July 2013.

//s//
N. D. LINSTROTH
LT, JAGC, USN
Defense Counsel

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IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

UNITED STATES, Petitioner	)	GOVERNMENT PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF MANDAMUS
v.	)	Case No. 201300_____
Lewis T. BOOKER, JR, Commander U.S. Navy (in his official capacity as Military Judge) Respondent	)	
Fabian D. MEDINA, Electronics Technician Petty Officer Third Class (E-4) U.S. Navy Real Party in Interest	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

IAN D. MACLEAN
LT, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7686, fax (202) 685-7687

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Preamble

COMES NOW THE UNITED STATES and respectfully requests that this Court issue a stay of the trial proceedings in the general court-martial of *United States v. ET3 Fabian D. Medina* and grant Petitioner's Petition for a Writ of Mandamus, set aside the Military Judge's ruling of July 3, 2013, setting the maximum punishment for violations of Article 120 at the jurisdictional maximum of a summary court—martial, and direct the Military Judge to apply the correct authorized maximum punishment.

I

History of the Case

The United States preferred charges against ET3 Medina on March 18, 2013, alleging three specifications under the amended version of Article 120 that became effective on June 28, 2012. After a pretrial investigation and receiving advice from his Staff Judge Advocate, the Convening Authority referred charges against the Accused under Article 120(b)(2), 120(b)(1)(B), and 120(d), UCMJ, 10 U.S.C. § 920 (2012), to a General Court-Martial on February 14, 2013. (Charge Sheet, Feb. 14, 2013.)

The United States filed a Motion *In Limine* to determine the maximum punishment for the charged offenses. (Pet'r Mot., Jun. 27, 2013.) On July 3, 2013, the Military Judge ruled that the maximum punishment for each Article 120 offenses at the time of this offense was the jurisdiction maximum of a Summary Court-

Martial. (Appellate Ex. III at 12.)

II

Jurisdictional Statement

This Court has jurisdiction to issue all writs necessary or appropriate in aid of its existing statutory jurisdiction. 28 U.S.C. § 1651(a); *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999); *Loving v. United States*, 62 M.J. 235, 239 (C.A.A.F. 2005); *United States v. Curtin*, 44 M.J. 439, 440 (C.A.A.F. 1996) (explaining United States "may file a petition for extraordinary relief with the appropriate Court of Military Review, now the Court of Criminal Appeals."); *United States v. Mahoney*, 36 M.J. 679, 684 (A.F.C.M.R. 1992) ("The authority of this Court to grant the government extraordinary relief from a ruling or action of a military judge is well established."); *see also United States v. Reinert*, No. 20071195, 2008 CCA LEXIS 526 (A. Ct. Crim. App., Aug. 7, 2008). Relief under the All Writs Act is available to both parties. *See LRM v. Kastenberg,* No. 13-5006, 2013 CAAF LEXIS 804, *9 (C.A.A.F. July 18, 2013) (explaining even a non-party can have standing to seek extraordinary relief); *see also Dettinger v. United States*, 7 M.J. 216, 222 (C.M.A. 1979) (explaining United States may seek extraordinary relief from a trial judge's action).

A. The applicability of the All Writs Act is not predicated upon the issue being subject to an interlocutory appeal.

The availability of the All Writs Act as a means of relief is in no way predicated upon the applicability of an interlocutory appeal. *United States v. Jarman*, 687 F.3d 269, 270 (5th Cir. 2012) (explaining trial court order that would force United States to violate a federal statute subject to mandamus relief); *In re United States*, 397 F.3d 274, 287 (5th Cir. 2005) (granting United States a writ of mandamus ordering a trial court to vacate a discovery order which was outside the scope of an interlocutory appeal); *United States v. Pabon-Cruz*, 391 F.3d 86, 91-92 (2d Cir. 2004) (granting United States a writ of mandamus due to erroneous jury instructions which would not be subject to interlocutory appeal); *United States v. Wexler*, 31 F.3d 117, 128 (3d Cir. 1994) (same); *see also United States v. Brooks*, 42 M.J. 484, 486 (C.A.A.F. 1995) (explaining Article 62 intended by Congress to be interpreted and applied in the same manner as the statute authorizing interlocutory appeals in the civilian system); *Dettinger*, 7 M.J. at 222 (explaining where ruling is subject to interlocutory appeal no need for resort to extraordinary relief). The issue here, establishing a maximum punishment, is beyond the scope of an interlocutory appeal. As such the matter is clearly within the scope of extraordinary relief. *See John Gund Brewing Co. v. United States*, 204 F. 17,

20 (8th Cir. 1913).

B. The requested writ of mandamus is in aid of this Court's jurisdiction.

This Court's jurisdiction includes the mandate to review the findings and sentences approved by a Convening Authority at certain courts-martial and determine if they should be approved as correct in law and fact. Article 66, UCMJ. The requested writ here does not deal with something that is only remotely related to the courts-martial process. *See Clinton v. Goldsmith*, 526 U.S. 529 (1999) (finding writ inappropriate to address whether service member remains on military's administrative rolls); *see also Center for Constitutional Rights v. United States*, 72 M.J. 126 (C.A.A.F. 2013) (whether third parties have access to court documents); *see also United States v. Kobzev*, No. 201100059 (N-M. Ct. Crim. App. Jun. 22, 2011) (order) (issuance of administrative guidance on calculation of good time credit). Rather, the requested relief here deals directly with the sentence that may be awarded at court-martial ——an issue firmly within this Court's jurisdiction. Therefore, the writ is in aid of this Court's jurisdiction.

That jurisdiction "extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected." *FTC v. Dean Foods Co.*, 384 U.S. 597, 603-04 (1966); *see also Gale v. United States*, 17 C.M.A 40, 42-43

(C.M.A. 1967). The United States avers that the maximum allowable sentence for the charged offenses here is dishonorable discharge and thirty years confinement. Thus, upon completion of sentencing proceedings below, this Court will likely have jurisdiction pursuant to Art. 66, UCMJ, to review this case. Because an appeal may later be perfected, this Court has jurisdiction to entertain this Petition.

A writ is also in aid of a court's jurisdiction when an action by a lower court may thwart an appellate court's prospective jurisdiction. *National Farmers' Organization, Inc. v. Oliver*, 530 F.2d 815, 816 (8th Cir. 1976) (citing *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21 (1943)); *Chandler v. Judicial Council of Tenth Cir.*, 398 U.S. 74, 112 (1970) (Harlan, J., concurring) (explaining statute empowers court to issue extraordinary writ to lower federal court). Here, the action of the trial court, capping the maximum punishment below the threshold for normal appellate review, is an action attempting to thwart appellate review. As such, review of the trial court's action here is in aid of this Court's jurisdiction.

III

Specific Relief Sought

The United States respectfully requests that this Court order a stay of the proceedings, set aside the Military Judge's ruling of July 3, 2013, and apply the correct process of

statutory and regulatory construction to find the maximum punishments for the charged offenses per Rule for Courts—Martial 1003 and Executive Order 13643 or Executive Order 13447. The Military Judge's ruling should be set aside, and this case remanded so that trial may proceed apace.

IV

Issue Presented

> DID THE MILITARY JUDGE COMMIT A JUDICIAL USURPATION OF POWER BY IGNORING THE PROCESS MANDATED IN RULE FOR COURTS-MARTIAL 1003, DISREGARDING EXECUTIVE ORDERS 13447 AND 13643, IGNORING A SERIES OF APPLICABLE FEDERAL STATUTES, AND INSTEAD MISAPPLYING THE RULE OF LENITY IN ORDER TO SET THE MAXIMUM PUNISHMENT FOR VIOLATIONS OF ARTICLE 120 AT THE JURISDICTIONAL MAXIMUM PUNISHMENT OF A SUMMARY COURT-MARTIAL?

V

Statement of Facts

A. The underlying crimes.

The conduct alleged on the charge sheet relates to events that began on December 1, 2012. (Pet'r Mot. at 1, Jun 27, 2013.) ET3 Medina attended a wedding reception that evening at KB's residence. (Pet'r Mot., at 1.) ET3 Medina met KB for the first time that evening. (Pet'r Mot., at 1—2.) At approximately 0100 ET3 Medina left the party with several other revelers and went to a bar. (Pet'r Mot., at 2.) KB did not leave her residence with the group. (Pet'r Mot., at 2.) In the

early morning hours, ET3 Medina returned to KB's residence and entered her bedroom. (Pet'r Mot., at 2.) KB awoke to ET3 Medina in her bed and on top of her thrusting his penis into her vagina. (Pet'r Mot., at 2.) KB resisted and after struggling was able to push ET3 Median off of her. (Pet'r Mot., at 2.) KB fled to her neighbor's apartment and reported the sexual assault. (Pet'r Mot., at 2.) KB submitted to a Sexual Assault Forensic Exam that same morning and reported the sexual assault to Naval Criminal Investigative Service. (Pet'r Mot., at 2.)

B. Executive Order 13447 directed amendments made to 10 U.S.C. § 920 be added to Part IV of the Manual for Courts-Martial.

On September 28, 2007, the President signed Executive Order 13447, directing the addition of amendments to 10 U.S.C. § 920 into Part IV of the Manual for Courts—Martial. Exec. Order No. 13447, 72 Fed. Reg. 190, 10-11 (Oct. 2, 2007). The President created a maximum punishment for the crime of Aggravated sexual assault of "Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years." Exec. Order No. 13447, 35; Manual for Courts—Martial, A28—11, ¶ (f)(2). The President also created a maximum punishment for the offense of Abusive sexual contact of "Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years." Exec. Order No. 13447, 35; Manual for Courts—Martial, A28—11, ¶ (f)(4).

C. The statutory language of 10 U.S.C. § 920 was amended in the 2012 National Defense Authorization Act for offenses on or after June 28, 2012.

The National Defense Authorization Act (NDAA) for Fiscal Year 2012, Pub.L.No. 112-81, 125 Stat. 1298, 1404-07 (2011), amended 10 U.S.C. § 920, known as Article 120 of the Uniform Code of Military Justice. The new statute took effect on June 28, 2012. The Accused was charged under this new version of 10 U.S.C. § 920. The Accused was charged with three offenses under the newly amended 10 U.S.C. § 920. (Charge sheet.)

1. Comparison between the statutory language charged in Specification 1 against the former statutory language in existence before 2012 NDAA.

Here, Specification 1 alleges a violation of 10 U.S.C. § 920(b)(2), sexual assault on an incapacitated person. (Charge sheet.) This statutory language of the charged offense reads as follows:

> Sexual Assault. Any person subject to this chapter who . . . (2) commits a sexual act upon another person when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring. . . .

10 U.S.C. § 920(b)(2). Prior to the 2012 NDAA taking effect the applicable statutory language for a sexual assault on an incapacitated person was:

> Aggravated sexual assault. Any person subject to this chapter who— . . . (2) engages in a sexual act with another person of any age if that other person is substantially incapacitated or substantially incapable of (A) appraising the nature of the sexual act; (B)

> declining participation in the sexual act; or (C) communicating unwillingness to engage in the sexual act; is guilty of aggravated sexual assault and shall be punished as a court—martial may direct.

Manual for Courts—Martial, A28—1 ¶ 45(a)(c).

2. Comparison between the statutory language charged in Specification 2 against the former statutory language in existence before 2012 NDAA.

Here, Specification 2 alleges a violation of 10 U.S.C. § 920(b)(1)(B), sexual assault by causing bodily harm. (Charge sheet.) This statutory language of the charged offense reads as follows:

> Sexual Assault. Any person subject to this chapter who . . . (1) commits a sexual act upon another person by- - . . . (B) causing bodily harm to that other person; . . . .

10 U.S.C. § 920(b)(1)(B). Prior to the 2012 NDAA taking effect the applicable statutory language for a sexual assauly by causing bodily harm was:

> Aggravated sexual assault. Any person subject to this chapter who— . . . (1) causes another person of any age to engage in a sexual act by— . . . (B) causing bodily harm . . . .

Manual for Courts—Martial, A28—1 ¶ 45(a)(c).

3. Comparison between the statutory language charged in Specification 3 against the former statutory language in existence before 2012 NDAA.

Here, Specification 3 alleges a violation of 10 U.S.C. § 920(d), abusive sexual contact. (Charge sheet.) This statutory offense charged reads as follows:

> *Abusive Sexual Contact*. Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (b) (sexual assault) had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court—martial shall direct.

10 U.S.C. § 920 (d). Prior to the 2012 NDAA taking effect the applicable statutory language was:

> *Abusive Sexual Contact*. Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate subsection (c) (aggravated sexual assault) had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court—martial shall direct.

Manual for Courts—Martial A28—1 ¶45(a)(h) (2012 ed.).

D. Publication of the 2012 Manual for Courts-Martial in or around January, 2012.

The Manual for Courts-Martial is reviewed annually and revised by the Joint Service Committee on Military Justice. Department of Defense Directive 5500.17 (May 3, 2003). In approximately January 2012, the Joint Service Committee published the verbatim text of the 2012 statute under which the Accused was charged in Paragraph 45(a) of Part IV of the 2012 Manual for Courts-Martial. Manual for Courts-Martial (2012 ed), Part. IV, ¶45.

However, Part IV of the 2012 Manual for Article 120 does not contain subparagraphs that list maximum punishments. Rather, it contains the following caveat in brackets following the statutory text of the Article 120 that the Accused was

charged under:

> Note: The subparagraphs that would normally address elements, explanation, lesser included offenses, maximum punishments, and sample specifications are generated under the President's authority to prescribe rules pursuant to Article 36. At the time of publishing this MCM, the President had not prescribed such rules for this version of Article 120. Practitioners should refer to the appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide.

Manual for Courts-Martial, Pt IV, ¶45.

E. <u>The President's May 2013 Executive Order listing elements and setting a maximum punishments for Article 120 established the same maximum punishments for the offenses charged here, sexual assault and abusive sexual contact, that were already in place under Executive Order 13447 signed in 2007</u>.

On May 15, 2013, the President signed Executive Order 13643, which amended the Manual for Courts-Martial. Exec. Order No. 13,643, 78 Fed. Reg. 98, May 15, 2013. This Executive Order directed the amendment, *inter alia,* of paragraph 45 of Part IV of the Manual, providing the following maximum punishments for the Article 120 offenses the Accused was charged with:

> e. *Maximum punishment . . .*
> (2) *Sexual assault.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years.
> (3) *Abusive sexual contact*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.

Id. at 47. To date, the President has not directed the amendment of those subparagraphs in Article 120 containing the Presidential glosses of "explanation," "elements," or "sample

specifications."

F. The United States' Motion *In Limine*.

As the Accused's crimes occurred after June 28, 2012, but prior to Executive Order 13643 on May 15, 2013, the United States filed a Motion *In Limine* to resolve the maximum punishment for the charged offenses. (Pet'r Mot., Jun. 27, 2013.) On July 3, 2013, the Military Judge ruled that the maximum punishment for offenses that took place under the amended statute but prior to the new Executive Order was the Summary Court-Martial maximum punishment:

> Because the smallest punitive burden is found at a summary court-martial, as a matter of due process it is only those punishments authorized for that forum (confinement for 1 month, hard labor without confinement or 45 days, restriction for 2 months, forfeiture of 2/3 pay per month for one month) that may be imposed upon ET3(SS) Medina if he is convicted of either of the offenses alleged or of any lesser included offense under the authority of Article 79, UCMJ, 10 U.S.C. § 879.

(Appellate Ex. III at 12.)

The Military Judge concluded Rule for Courts—Martial 1003 was inapplicable. (Appellate Ex. III at 6—8.) The Military Judge concluded that application of Executive Order 13643, signed on May 15, 2013, violated the *ex post facto* clause and was therefore also inapplicable. (Appellate Ex. III at 10.) The Military Judge concluded Executive Order 13447 that was signed in 2007 was inapplicable to the charged offenses.

(Appellate Ex. III at 3, 6.) The Military Judge reasoned the amendments made to 10 U.S.C. § 920 in the 2011 National Defense Authorization Act were so significant that their "effect was the same as a repeal" therefore the Executive Order in place does not apply to the amended statute. (Appellate Ex. III at 3.)

VI

Summary of Reasons Why the Writ Should Issue

The Military Judge engaged in a demonstrably incorrect process of statutory construction in which he ignored both binding rules created by the President and acts of Congress in his analysis in order to render an arbitrary ruling in clear contravention of the law.

Here, the applicable regulations are Rules for Courts—Martial 1002 and 1003. R.C.M. 1002 and 1003 are valid regulations created by the President under a Congressional grant of authority in 10 U.S.C. § 836. The Military Judge's refusal to apply these valid regulations was legally incorrect. Separate and distinct from the obligation to follow the process in R.C.M. 1003 to find the maximum punishment, the Military Judge also declined to apply binding Executive Orders 13643 and 13447.

Under the process found in R.C.M. 1003(c)(1)(A) this Court should find Executive Order 13643 applicable to establish punishments limitations as of the day it became effective, May

15, 2013. If this Court finds Executive Order 13643 inapplicable then it should find Executive Order 13447, signed in 2007 and currently found printed in Appendix 28 of the 2012 edition of the Manual for Courts—Martial, remained in effect.

An Executive Order remains in place unless one of three things happens: (1) Congress expressly writes over the Executive Order with new statutory language; (2) the President executes a new Executive Order thereby writing over the prior Executive Order; or (3) the statute that the Executive Order furthers is repealed by Congressional action. Here, none of those things happened, thus the Executive Order that was in place remained in place and provided the applicable punishment limitations. The Military Judge's refusal to apply these Executive Orders was legally incorrect.

If this Court finds neither Executive Order sets the maximum punishment, then this Court should move to the next steps of the R.C.M. 1003 analysis. Under R.C.M. 1003(c)(1)(B), this Court should find the Military Judge failed to apply the law: a "closely related" offense was listed in Part IV, and the Military Judge failed to apply that maximum punishment. Here, that "closely related" offense is the former Article 120, currently printed in Appendix 28 of the 2012 Manual, and never

by Executive Order.[1] The statutory language of the specific offenses charged here in the new amended version of 10 U.S.C. 920 is “closely related” to the language of the former Article 120. Under R.C.M. 1003, the maximum punishment applicable to the “closely related” offenses, is applicable to the new amended offenses charged here.

Even if no “closely related” provision exists, R.C.M. 1003(c)(1)(B)(ii) required the Military Judge to identify whether an offense exists that is “essentially the same” in the United States Code, and apply its maximum punishment to the offense charged here. Caselaw requires judges to look to “analogous” offenses. The Military Judge failed to do so, ignoring a virtually identical statute elsewhere in the United States Code that provides a lifetime confinement maximum.

If this Court were to find all of R.C.M. 1003 inapplicable and both Executive Orders inapplicable, rules of statutory construction must be applied to resolve the novel ambiguity the Military Judge found in the statutory phrase “shall be punished as a court-martial may direct.” The Government is unaware of any precedent or trial judge that has ever found ambiguity in that statutory language, which appears in nearly *every* statuory

[1] If the new Article 120 is not in Part IV because it has not been placed there by Executive Order, then the old Article 120 is still in Part IV because it has not been removed by Executive Order.

crime in the Code——and also appears in R.C.M. 1002. It is a gross usurpation of power to find this otherwise clear language, which is open-ended because there are three levels of courts-martial, ambiguous and restricting the maximum punishment at special and general courts-martial. When properly construed the phrase contains no ambiguity. The statutory phrase is properly construed in the context of the entire statutory scheme which the Military Judge failed to do. Except for "simple disorders" under Article 134, the Code permits punishment under R.C.M. 1002, R.C.M. 1003, and "as a court-martial may direct," up to the jurisdictional maximum for the instant court——but the Military Judge here turns the system on its head.

Three other statutes within the scheme inform the meaning of the phrase being construed. In light of 10 U.S.C. § 856, Article 56 of the Uniform Code of Military Justice, a court-martial may direct punishments up to limits established by the President. Accordingly, if the President has not established a limitation on maximum punishment through Executive Order, a court-martial is authorized to impose the punishment up to the jurisdictional maximum imposed by Congress in 10 U.S.C. §§ 818–820. The decision of which forum to select for the offense was expressly given by Congress to certain persons in 10 U.S.C. § 822. The Military Judge's immediate invocation of the Rule of Lenity without performing the prerequisite steps of statutory

construction disregarded Congressional intent and was therefore a judicial usurpation of power.

Lastly, if this Court were to proceed through all of these steps and still believe the statutory maximum punishment provision was ambiguous and turn to the Rule of Lenity, it should still reach the same maximum punishment from the Executive Orders. The correct application of the Rule of Lenity in the sentencing context under *United States v. Beaty* requires consideration of all of the proper maximum punishment options and selection of the least severe. Here, that means the "closely related" former Article 120, the analogous offense from the United States Code that carried life without parole, and the statutory construction based jurisdictional maximum. Then selecting the least severe among those three options, you get the former Article 120 with Executive Order 13447's maximum punishments.

VII

Reasons Why the Writ Should Issue

THE MILITARY JUDGE COMMITTED A JUDICIAL USURPATION OF POWER BY DISREGARDING RULES FROM BOTH THE LEGISLATIVE AND EXECUTIVE BRANCHES FOR DETERMINING MAXIMUM PUNISHMENTS. THESE RULES ARE FOUND IN R.C.M. 1003 AND TWO EXECUTIVE ORDERS. INSTEAD, THE MILITARY JUDGE DISREGARDED THESE BINDING RULES AND FOUND AN AMBIGUITY IN OTHERWISE CLEAR LANGUAGE APPLICABLE TO CHOICE OF FORUM, NOT TO MAXIMUM PUNISHMENT, AND INCORRECTLY APPLIED LENITY, SETTING A PUNISHMENT EVEN LOWER THAN THAT RESERVED FOR NOVEL ARTICLE 134 CRIMES UNDER THE HALF-CENTURY OLD "SIMPLE DISORDER" DOCTRINE.

The issuance of an extraordinary writ is a "drastic" remedy that should be granted "only in truly extraordinary situations." *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983); *see Gray v. Mahoney*, 39 M.J. 299, 304 (C.M.A. 1994). "[A] judicial 'usurpation of power' will justify the invocation of this extraordinary remedy." *Will v. United States*, 389 U.S. 90, 95 (1967) (citation omitted); *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957) (finding writ warranted where judge disregarded binding procedural rules). A petitioner must show that: (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances. *Hasan v. Gross*, 71 M.J. 416, 418 (C.A.A.F. 2012) (citing *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380-81

(2004)). To warrant a writ of mandamus, a Petitioner must establish a ruling or action that is contrary to statute, settled case law, or valid regulation. *See, e.g., Dettinger*, 7 M.J. at 224; *McKinney v. Jarvis*, 46 M.J. 870 (A. Ct. Crim. App. 1997).

A. There is no other means by which the United States may obtain relief from the Military Judge's usurpation of power.

In the absence of action by this Court there will be no appellate review, as Military Judge's application of the summary court-martial jurisdictional maximum punishment forecloses the possibility of a record that will be reviewable under Article 66, UCMJ. Moreover, even if this case reached appellate review, the Military Judge's ruling limiting the maximum punishment would be irrevocable and not amenable to correction in the ordinary course of appellate review. *Cf. Cobbledick v. United States*, 309 U.S. 323, 325 (1940).

B. The right to issuance of the writ is clear and indisputable because The Military Judge disregarded a series of valid regulations issued by the President found in Rules for Courts—Martial and Executive Orders then engaged in a demonstrably incorrect process of statutory construction thwarting the will of Congress followed by an erroneous application of the Rule of Lenity.

The Military Judge disregarded the process established by the President in Rule for Courts—Martial 1003 for determining the maximum punishment of a charged offenses. Separate and

distinct from the Rules for Courts—Martial the Military Judge also failed in his duty to apply valid regulations in the form of Executive Orders. Lastly the Military Judge disregarded a required step of statutory construction, consideration of the entire statutory scheme, in order to erroneously invoke the Rule of Lenity and reach a completely arbitrary conclusion.

1. The Military Judge erroneously disregarded the valid and applicable regulation found in Rule for Courts-Martial 1003 that establishes the process for determining the maximum punishments for the charged offenses.

The Military Judge erroneously concluded Rule for Courts-Martial 1003 was inapplicable because the amended 10 U.S.C. § 920 was not within Part IV of the Manual for Courts-Martial. (Appellate Ex. III at 7.) The Military Judge erroneously concluded the amended statute was not in Part IV because it was not yet placed there through an Executive Order. (Appellate Ex. III at 7.) R.C.M. 1003 is applicable because it governs how maximum punishment is determined for "Offenses listed in Part IV":

> (i) *Maximum punishment*. The maximum limit for the authorized punishments of confinement, forfeitures and punitive discharge *(if any)* are set forth for each offense listed in Part IV of this Manual.

R.C.M. 1003(c)(1)(A)(i) (emphasis added). The first question is then whether the amended 10 U.S.C. § 920 is an "offense listed in Part IV of this Manual." The Military Judge concluded it was

not, at the time of the Accused's offenses: "because the rulemaking process (including modes of proof, explanations, and the like...) has only recently been completed and an Executive Order issued, [Article 120 has only] just now become a full-fledged part of the Manual for Courts-Martial." (Appellate Ex. III. at 7.) The Military Judge's "full-fledged" test should be reversed because it was created out of thin air without any cited support or any explained legal basis, rendering it completely arbitrary. (Appellate Ex. III at 7.)

a. Inclusion of the statutory language of the amended 10 U.S.C. § 920 into Part IV of the Manual did not require Presidential action as the Military Judge claims.

To begin, the Manual simply does not say that every change to the Manual must be made via Executive Order. The Manual does state that (a) any amendments *made by* Executive Order must be named in a certain way, and (b) that the Joint Service Committee is responsible for proposing amendments. Manual for Courts-Martial, Part I, para 4 (emphasis added).

The United States Code is created by Congress not by an amendment made by Executive Order under a grant of authority from Congress. Accordingly the United States Code does not enter the Manual in the same manner as Presidentially created additions do. The United States Code contains the crimes that can be charged at court-martial as of their effective date.

Congress' criminal statutes need no "enacting legislation" to take effect. Every statute passed by Congress, unless otherwise specified, "takes effect on the date of its enactment." *See United States v. Pritt*, 54 M.J. 47, 50 (C.A.A.F. 2000). As Congressional enactments: "A charge states the *article of the code . . .* which the accused is alleged to have violated." R.C.M. 307(c)(1).

Part IV is entitled "Punitive Articles." Manual for Courts-Martial, IV-1. The immediate subtitle to this Chapter reads: "(Statutory text of each Article is in bold)." *Id.* The Discussion further indicates that each paragraph of Part IV mirrors its source in the United States Code: "Part IV of the Manual addresses the punitive articles, 10 U.S.C. §§ 877-934." *Id.* Therefore, when the United States Code changes, Part IV of the Manual changes to mirror the new effective United States Code. The Manual is simply not reprinted upon every statutory change. No Presidential action is required to make the Manual mirror the United States Code.

Here, the insertion of Congress' verbatim statute into the 2012 edition of the Manual without "Presidential rulemaking" merely demonstrated the constitutional division of labor between the President and Congress. Congress alone creates the enumerated crimes and substantive criminal law, that is, the statutory offenses. U.S. Const. art I, § 8, cl 14; *United*

States v. Fosler, 70 M.J. 225, 231 (C.A.A.F. 2011); *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010) ("it is for Congress to define criminal offenses and their constituent parts."). While the President may pass more restrictive and narrowing Presidential "glosses" on Congress' statutory elements. Those Presidential "glosses" must enter the Manual via Executive Order. Manual for Courts-Martial, Part I, para 4.

Those Presidentially created "glosses" typically appear in later subparagraphs of Part IV, such as the Presidential "elements," the President has no power to create the text of each statute——Congress alone creates the enumerated crimes of the Uniform Code. *Cf. United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010). Upon those criminal statutes becoming law, part of the United States Code, they enter Part IV of the Manual.

b. <u>The Manual is routinely updated without Presidential action</u>.

There are many parts of the Manual that the President simply never "amends," but are changed nonetheless. The President never amends, for example, Appendix 2 of the Manual for Court-Martial to include Congress' new statutes——the new statutory text is simply incorporated into each Manual at the unilateral decision of the Joint Service Committee. Ever since the first Manual for Courts-Martial, Appendix 2 has been updated

both with and without Executive Order——sometimes an Executive Order inserts the current text of the United States Code——and other times, the publishers of the Manual simply update Appendix 2 to reflect the current statutory language of the Uniform Code, without "amendment" or Executive Order. *Compare, e.g.,* Exec. Order No. 10,214, 16 Fed. Reg. 1,303 (Feb. 10, 1951), *with* Manual for Courts-Martial (2005 ed.), (2008 ed., (2012 ed.) (Appendix 2 is editorially revised).

Prior to 1984, the Manual never included the statutory text in the "Punitive Articles" section. In 1984 and with the creation of Part IV of the Manual for Courts-Martial, the statutory text was inserted——verbatim. But no Executive rulemaking was required to effect that. Likewise, Appendices to the Manual reflecting the pre-2007 and 2007-2012 versions of Article 120 were added to the 2012 Manual unilaterally by the Joint Service Committee. But no one contests that the statute appears properly in the Appendix, can be charged under R.C.M. 307, nor that the bald statutory language appears in Part IV.

The Military Judge's holding that Article 120 is not "fully fledged" as part of Part IV thus ignores not only this division of powers and past practice, but is contrary to settled law. The President cannot create or define military crimes——only Congress can. The Joint Service Committee did not err in inserting Congress' new statutory text of Article 120 into Part

IV of the 2012 Manual, hence Article 120 was an offense "listed in Part IV." The Military Judge cited no authority for his conclusion to the contrary, that the amended Article 120 was not a "full—fledged part of the Manual for Courts—Martial." (Appellate Ex. III at 7.)

2. The Military Judge erroneously disregarded Executive Order 13643 because it took effect on May 15, 2013 and caused no *ex post facto* concerns. The new Executive Order applies to all cases after May 15, 2013, and does not increase the maximum punishment, but rather restricts a court-martial from punishing up to its jurisdictional maximum, subject to R.C.M. 1002 and R.C.M. 1003 limitations.

The *Ex Post Facto* Clause, Article I, § 9, cl. 3, is implicated where a "change in law presents a sufficient risk of increasing the measure of punishment attached to the covered crimes." *Peugh v. United States*, 133 S.Ct. 2072, 2082 (2013) (internal quotations omitted.). "The prohibition against *ex post facto* laws has from the outset been viewed as concerned with punishment." *United States v. Gorski*, 47 M.J. 370, 373 (C.A.A.F. 1997) (citations omitted). The *ex post facto* clause prohibits an increase in punitive exposure. *Peugh*, 133 S.Ct. at 2081; *see generally Dorsey v. United States,* 132 S. Ct. 2321 (2012). An accused cannot be subjected to a new Act's increased penalties for actions he took that preceded the new Act and its higher penalties. *Peugh*, 133 S.Ct. at 2078. Here the *ex post facto* clause is not implicated because the accused will not be

subjected to increased punishments under Executive Order 13643.

Executive Order 13643 was signed by the President on May 15, 2013. 78 Fed. Reg. 29559. By the express terms of the Executive Order itself, it took effect immediately upon the signature of the President. 78 Fed. Reg. 29559. As the accused in this case has not yet been sentenced, if he does reach the sentencing phase, he should be sentenced under Executive Order 13643. In federal district courts, a convict faces the sentencing guidelines in place at the time of sentencing, not at the guidelines that were in place at the time of the criminal conduct. *See Dorsey*, 132 S.Ct. at 2332. Courts-Martial are intended to mimic the procedures in federal district courts whenever practicable. *See* Art. 36, UCMJ; *United States v. Valigura*, 54 M.J. 187, 191 (C.A.A.F. 2000) (explaining "Congress intended that, to the extent 'practicable,' trial by court—martial should resemble a criminal trial in a federal district court."). Accordingly, just as in district courts, here the accused should face the sentencing scheme in place at the time of sentencing as opposed to the time his criminal conduct occurred.

The Military Judge concluded that use of Executive Order 136443 would violate the ex post facto clause. (Appellate Ex. III at 10.) The Military Judge reasoned the current Executive Order is inapplicable because it exposes the Accused to an

increased maximum punishment. (Appellate Ex. III at 10.) In order to reach that conclusion the Military Judge erroneously started his analysis from his ultimate conclusion, that the maximum is that of a summary court-martial. The Military Judge engaged in a process of bootstrapping during his analysis in order to justify his predetermined conclusion.

This makes no sense, and is itself contrary to well settled law. Under the Military Judge's bootstrapping approach, every time the President exercises his rule making authority under 10 U.S.C. § 856 to set a maximum punishment he creates an *ex post facto* law because he increases the maximum punishment from the level of a summary court-martial. This would be an absurd result and would frustrate Congressional intent that the President have the authority to prescribe maximum punishments. See 10 U.S.C. § 856.

The correct stating place for analyzing whether the Executive Order 13643 causes an increase in the maximum punishments is the Executive Order that it replaced, 13447.[2] The maximum punishments in the new Executive Order for the offenses charged here are exactly the same as the maximum punishments in the precursor Executive Order: for Specifications One and Two, thirty years and a dishonorable discharge; for Specification

[2] A full explanation of why Executive Order 13447 remained in place at the time of the offense here is contained *infra*, in the following subsection.

Three, seven years and a dishonorable discharge. The new Executive Order did not increase the maximum punishments the Accused faced, it maintained the same punishments, and therefore it did not implicate the *ex post facto* clause in any way. *See Peugh*, 133 S.Ct. at 2078 (holding ex post facto clause only invoked where the new sentencing guideline increased the maximum punishment).

Even if this Court were to conclude the prior Executive Order was not in place at the time of the criminal conduct, then the new Executive Order still does not increase the maximum punishments the accused faced. As discussed fully *infra*, in Section E, absent an Executive Order in place, the maximum punishment is that of the jurisdictional maximum of the forum to which the charges were referred. Congress demonstrated that intent in the statutory language of Article 56. The language there is permissive authorizing punishment up to the point of a maximum set by the President under the rule making authority they were granting him. Therefore absent the President stepping in and creating a maximum punishment, the only thing left to restrain a court-martial is other federal law. Those laws are fond in the jurisdictional maximums of the various court-martial forums.

Here, the ex post facto clause is simply inapplicable. As such the actions by the Military Judge invoking it in this case

reflect a judicial usurpation of power by taking action contrary to an established statutory and regulatory scheme, and the writ should therefore issue.

3. The Military Judge erroneously disregarded Executive Order 13447 because the amendments to 10 U.S.C. § 920 of the offenses charged here were not the functional equivalent of a repeal of the existing statute therefore it remained in place.

An Executive Order from the President that provides a limitation on the maximum punishment is issued under a grant of rule making authority bestowed by Congress. 10 U.S.C. § 856. As with any regulation created under a grant of authority from Congress, it remains in place unless one of three events occur: (1) the agency, here the President, writes a new rule replacing the former rule; (2) Congress creates a new statute that replaces the existing regulatory rule; or (3) the statute the regulatory rule furthers is repealed. *See Chem. Mfr. Ass'n. v. NRDC*, 470 U.S. 116, 126 (1985).

Here, none of those things happened.[3] Even the Military Judge conceded that the 2011 NDAA did not repeal 10 U.S.C. § 920. (Appellate Ex. at 3.) Therefore as the statute was not repealed, the existing regulatory rule, Executive Order 13447,

[3] There is an obligation to apply this Executive Order as part of the process laid out in R.C.M. 1003. However, even if R.C.M. 1003 were completely inapplicable, there is an independent duty to apply this valid Executive Order as a regulation promulgated under a grant of authority from Congress in 10 U.S.C. § 856 to interpret the statutory language "shall be punished as a court-martial may direct."

remained in effect. Accordingly, the maximum punishments for Appellant's violations of 10 U.S.C. § 920 are found in Executive Order 13447, which is currently published in Appendix 28 of the 2012 edition of the Manual for Courts-Martial.

The Military Judge concluded the Existing Executive Order was no longer applicable because "[w]hile the NDAA did not repeal existing law, it did so heavily modify the elements and definitions of the offenses that the effect was the same as a repeal." (Appellate Ex. III at 3.) The Military Judge appears to argue that the amendments were the functional equivalent of repealing the statute; therefore the Executive Order in place is no longer applicable to the amended statute. The Military Judge failed to conduct any actual analysis of the statutory amendments to support his conclusion.

A close inspection of the actual amendments made to 10 U.S.C. § 920 renders the Military Judge's position untenable. A close inspection shows the applicable portions of the statute underwent inconsequential changes. The *de minimis* changes made do not amount to anything near the functional equivalent of a repeal of the statute as the Military Judge claims. (Appellate Ex. III at 3.)

Here, Congress did not repeal the statute, they amended it and that legislative action is presumed to be for a purpose. *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1993)

(explaining "it is generally presumed that Congress acts intentionally and purposely"); *see also United States v. Wilson*, 66 M.J. 39, 45—46 (2007) (noting even Congressional inaction in amending statutory scheme presumed an intentional choice). Accordingly it is presumed, the Congressional action of amending this statute as opposed to repealing it and replacing it with a new statute was an intentional action. Congress was well aware that amendment as opposed to repeal would leave existing rules in place. Therefore, their intentional action of amendment rather than repeal is presumed for the purpose of leaving the existing rules in place. Accordingly the Executive Order in place before the statute was amended remained in place following the amendments.

a. Abusive Sexual Contact was barely altered in the amendments passed to 10 U.S.C. § 920 in the 2011 NDAA.

Here, Specification 3 alleges a violation of 10 U.S.C. § 920(d), abusive sexual contact. (Charge sheet.) This statutory language of the charged offense reads as follows:

> *Abusive Sexual Contact*. Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (b) (sexual assault) had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court—martial shall direct.

10 U.S.C. § 920 (d). Prior to the 2012 NDAA taking effect the applicable statutory language was:

> *Abusive Sexual Contact*. Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate subsection (c) (aggravated sexual assault) had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court—martial shall direct.

Manual for Courts—Martial A28—1 ¶45(a)(h) (2012 ed.). A close inspection of the amended statute shows only two changes were made to the statutory language. Neither change impacts the *actus reus* or the *mens rea* required of the accused.

The only effect the minor changes have is to focus the statutory language on the conduct of the accused rather than that of the victim. The two changes shift the focus from whether the accused "engages in" the act "with" the victim to the accused "commits" the act "upon" the victim. These are inconsequential changes. The amended statute also updated an internal reference within the statute to reflect the new location of the referenced subsection, an inconsequential amendment. These *de minimis* amendments do not rise to the level of the functional equivalent of a repeal of the existing statute and an entirely new statute put in its place as the Military Judge concluded. (Appellate Ex. III at 3.) Accordingly, the Military Judge committed a judicial usurpation of power by deciding to disregard a valid Executive Order. Further, the Military Judge's determination is due no deference as he provided no analysis or explanation to support a conclusion that

was contrary to existing law and norms of statutory and regulatory interpretation. *See e.g.*, *United States v. Collier*, 67 M.J. 347, 353 (C.A.A.F. 2009) (explaining where military judge fails to articulate his or her reasoning his or her conclusion receives considerably less deference on review).

Here, Executive Order 13447 lowered the maximum punishment from the statutory and R.C.M. 1002 and 1003 before the statute was amended and remained in place and continued to provide the maximum punishment cap after the statute was amended. Executive Order 13447 provided for a maximum punishment of "Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years." Exec. Order No. 13447, 35; Manual for Courts—Martial, A28—11, ¶ (f)(4). That maximum punishment is applicable to the charged offense in Specification 3.

b. <u>The statutory language of Sexual Assault by bodily harm (Specification 2) was barely altered in the amendments passed to 10 U.S.C. § 920 in the 2011 NDAA</u>.

Specification 2 in this case alleges a violation of 10 U.S.C. § 920(b)(1)(B), sexual assault by causing bodily harm. (Charge Sheet.) This statutory language of the charged offense reads as follows:

> Sexual Assault. Any person subject to this chapter who . . . (1) commits a sexual act upon another person by- - . . . (B) causing bodily harm to that other person; . . . .

10 U.S.C. § 920(b)(1)(B). Prior to the 2012 NDAA taking effect

the applicable statutory language for a sexual assault by causing bodily harm was:

> Aggravated sexual assault. Any person subject to this chapter who— . . . (1) causes another person of any age to engage in a sexual act by— . . . (B) causing bodily harm . . . .

Manual for Courts—Martial, A28—1 ¶ 45(a)(c). A close inspection of the original statute compared to the amended statute reveals only a single minor change which does not rise to the level of the functional equivalent of repeal and replacement with an entirely new statute in its place as the Military Judge concluded. (Appellate Ex. III at 3.)

Just as seen in the amendment to Abusive Sexual Contact discussed *supra*, the amended language merely focuses the language on the conduct of the accused as opposed to conduct of the victim. The prior language was "causes another person of any age to engage in a sexual act" and the amended language is "commits a sexual act upon another person." The amendment does not alter the *actus reus* or the *mens rea* required of the accused. The amendment merely eliminates consideration of the conduct of the victim. The amendment, focusing the statutory language, is not the functional equivalent of a repeal of the existing statute and replacement with an entirely new statute.

Accordingly, the Executive Order that was in place establishing the maximum punishment for this offense that was

titled Aggravated Sexual Assault remains in place for the amended offense titled Sexual Assault. That Executive Order capped the maximum punishment for this offense at "Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years." Exec. Order No. 13447, 35; Manual for Courts—Martial, A28—11, ¶ (f)(2). That maximum punishment is applicable to the offense charged here in Specification 2.

c. The amendments to the statutory language of Sexual Assault upon an unconscious or incapacitated person (Specification 1) actually reduced the scope of offenders it was applicable to.

Here, Specification 1 alleges a violation of 10 U.S.C. § 920(b)(2), sexual assault on an incapacitated person. (Charge Sheet.) This statutory language of the charged offense reads as follows:

> Sexual Assault. Any person subject to this chapter who . . . (2) commits a sexual act upon another person when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring. . . .

10 U.S.C. § 920(b)(2). Prior to the 2012 NDAA taking effect the applicable statutory language for a sexual assault on an incapacitated person was:

> Aggravated sexual assault. Any person subject to this chapter who— . . . (2) engages in a sexual act with another person of any age if that other person is substantially incapacitated or substantially incapable of (A) appraising the nature of the sexual act; (B) declining participation in the sexual act; or (C) communicating unwillingness to engage in the sexual

> act; is guilty of aggravated sexual assault and shall be punished as a court—martial may direct.

Manual for Courts—Martial, A28—1 ¶ 45(a)(c). Similarly here, a close inspection of the original statute compared to the amended statute reveals only two changes, neither of which rise to the level of the functional equivalent of repeal and replacement with an entirely new statute in its place as the Military Judge concluded. (Appellate Ex. III at 3.)

The first change here is the same change seen in the two specifications previously discussed, shifting the focus from the victim being a party to the sexual act to the conduct of the accused. As discussed *supra*, this is an insignificant change and does not amount to the functional equivalent of a repeal of the statute.

The second amendment adds a *mens rea* element, that the accused "knows or reasonably should know" that the victim is asleep, unconscious, or otherwise unaware. This additional knowledge requirement actually makes the offense more difficult to prove and restricts the applicability of the prior statute as a result. Accordingly, the amended statute will not encompass all of the conduct captured by the prior statute. As the amended statute only covers more severe conduct, where the accused has knowledge the victim is incapacitated, the prior limitation on maximum punishment set for the accused without

knowledge, actually inures to his benefit.

To demonstrate, consider the converse situation. The prior statute required knowledge, then the amendment removed the knowledge requirement. There would be larger number of offenders that would be captured within the amended, broader statute. Therefore it would be inappropriate to apply the previous maximum punishment to the new offenders whose conduct would not have fallen within the scope of the prior statute.

Accordingly, the maximum punishment provided by the Executive Order in place referring to the prior broader statute, applies as well to the amended statute that will only capture a subset of those persons whose conduct falls within the prior broader statute. The maximum punishment for Specification 3 here should be "[d]ishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years." Exec. Order No. 13447, 35; Manual for Courts—Martial, A28—11, ¶ (f)(2).

4. <u>If application of R.C.M. 1003 produces no result, then the Military Judge usurped his power by refusing acknowledge that in the absence of a Presidential maximum for non-Article 134 cases, the statutory maximum applies. Further, the Military Judge clearly erred by improperly expanding the *Beaty* reasoning beyond Article 134 when no ambiguity like that in *Beaty* exists, and as explained elsewhere, found statutory ambiguity in the language "as a court-martial may direct," language appearing in nearly *every* statutory section of the Code</u>.

Because the Military Judge held that "rulemaking" was

required to place Congress' statute in the Manual, the Military Judge erred by never ruling on whether the jurisdictional maximum was an appropriate punishment. (Appellate Ex. III at 7.) Rather than ruling that the R.C.M. 1003(b) maximums apply absent restrictions imposed by the President, the Military Judge simply rules that Aggravated Sexual Assault is tantamount to a novel Article 134 offense, contrary to the dictates of the Rules, *United States v. Ramsay,* and decades of precedent, and defaults to a summary court-martial maximum. 40 M.J. 71 (C.M.A. 1994). But as Article 120 is "listed in Part IV," whether R.C.M. 1003 (a) and (b), the Executive Order, and the jurisdictional maximum applies are necessary rulings——and the Military Judge clearly erred in not applying what he calls the "guidance" of R.C.M. 1003(c)(1)(A). In fact, R.C.M. 1003(c)(1)(A) governs this case, if 10 U.S.C. § 920 is in Part IV of the Manual.

Congress prescribes that an individual "shall be punished as a court-martial may direct." Congress separately passed Article 56, which delegates to the President the power to set the maximum punishment for each offense. *United States v. Turner*, 30 M.J. 1276, 1280 (N-M.C.M.R. 1990) (discussing delegation of authority and statutory restriction on President). The President, acting under the authority granted to him in Article 56, UCMJ, further defined limits for punishments

available at trial by court-martial in R.C.M. 1003:

> (a) *In general*. Subject to the limitations in this Manual, the punishments authorized in this rule may be adjudged in the case of any person found guilty of an offense by a court-martial.

R.C.M. 1003(b) identifies those punishments that "may be adjudged." These punishments include: (1) reprimand; (2) forfeiture of pay and allowance; (3) a fine; (4) a reduction in pay grade; (5) restriction to specified limits; (6) hard labor without confinement; (7) confinement; (8) punitive separation, including dismissal for officers, and a dishonorable or bad-conduct discharge for Warrant Officers not commissioned and enlisted personnel; (9) death; and (10) punishments authorized under the law of war. R.C.M. 1003(b)(1)-(10).

But for the enumerated offenses, the President is never required to create maximum punishments aside from those found under R.C.M. 1003(b)——R.C.M. 1003(c)(1)(A) explicitly refers to "maximum limits for the authorized punishments . . . (if any)..." As the statutory text of the offenses of 10 U.S.C. § 920(b)(2) and § 920 (b)(3)(A) are Part IV of the 2012 Manual, life without parole is the maximum punishment. MCM, Pt. IV, ¶45b, 45c; R.C.M. 1003(b). This is not a case of a novel and military-specific Article 134 offense. Thus the Military Judge clearly erred in finding an "ex post facto" problem, as the May Executive Order lowered the maximum punishment for Article 120

offenses under the new statute. And, the Military Judge clearly erred in bypassing this step of the analysis, presuming that 10 U.S.C. § 920 is an offense that does not appear in Part IV, and finding that the maximum is that of a summary court-martial.

Notably, not only did the Military Judge never reach the issue of what punishment could be adjudged if 10 U.S.C. § 920 was indeed in Part IV, but the cases the Military Judge cites to, including *United States v. Beaty,* 70 M.J. 39 (2011), are entirely inapplicable. This is not a case where R.C.M. 1003 produces *no* result, as in *Beaty*——rather, this is a case where each subsection of R.C.M. 1003 produces a *clear* result, depending on whether the offense is said to appear, or not appear, within Part IV of the Manual. Nor should this Court extend the longstanding "general offense" or "simple disorder" doctrine specific to military-specific Article 134 "novel offenses" to the enumerated offenses.

C. <u>If this Court concludes that offenses become "listed in Part IV" only by explicit Executive Order, thereby concluding the amended 10 U.S.C. § 920 is not a Part IV offense, then under the R.C.M. 1003(c)(1)(B) analysis, 10 U.S.C. § 920 is closely related to offenses that are in Part IV by Executive Order</u>.

"For an offense not listed in Part IV of this Manual which is . . . closely related to an offense listed therein the maximum punishment shall be that of the offense listed." R.C.M. 1003(c)(1)(B)(i). The "closely related" language refers to

offenses that are closely related to offenses listed in the Manual for Courts-Martial. *United States v. Leonard*, 64 M.J. 381, 383 (C.A.A.F. 2007). Here, the charged provisions of 10 U.S.C. § 920 are nearly identical to an offense that remains in Part IV of the Manual, the former Article 120. If the former 120 were not in Part IV, the amended 120 is still closely related to Article 128,

1. The Military Judge erroneously concluded the application of R.C.M. 1003(c)(1)(B)(i) is limited to Article 134 offenses.

The Military Judge refused to apply the "closely related" requirements set by the President because he finds "no case" interpreting the "closely related" language *vis a vis* the enumerated articles. The Military Judge is simply wrong that R.C.M. 1003(c)(1)(B)(i) has not been applied outside the Article 134 context. (Appellate Ex. III at 7.) The Military Judge apparently means that he can only find cases where "novel Article 134" offenses, with no set maximum, are examined under Rule 1003. But the Rule has been applied in many circumstances, resulting in some cases in rulings that no offense "closely related" exists and the "simple disorder" punishment of four months inures, *United States v. Beaty,* 70 M.J. 39, 45 (C.A.A.F. 2011), and others where *enumerated* offenses have been found to be the most "closely related" offense, resulting in punishments of many years, *e.g., United States v. Ramsey, 40 M.J. 71, 76*

(C.M.A. 1994). Nothing restricts the application of the Rule. Indeed, the Military Judge's restriction of R.C.M. 1003 is an action clearly contrary to the President's rule and settled law.

In *Ramsey,* the Court of Military Appeals ruled that a military judge "failed to follow the clear mandate of R.C.M. 1003(c)(1)(B)(i)" when he chose Article 134, rather than the enumerated Article 115, Malingering, as the most "closely related" offense to a novel charge for the purposes of assessing the maximum sentence. 40 M.J. at 76. The court looked to several factors, including the "social cost," the "damage to the military," and the President's listing of the novel offense as a possible "lesser included" offense, despite the fact that the novel offense actually appeared in no paragraph of the Manual, and had no Presidentially-prescribed elements or punishment. *Id.* at 75. Granted, under today's *Fosler/Jones* precedent for the purposes of *charging,* the offenses would not be a "lesser included" offenses under the *Schmuck* analysis. Nevertheless, for the purposes of sentencing, courts have indeed applied R.C.M. 1003(c)(1)(B)(i) to the enumerated offenses, finding enumerated offenses to be "closely related" to the charged offense. *Ramsey,* 40 M.J. at 75. If 10 U.S.C. § 920 is not "listed" in Part IV, no law prevents the application of the "closely related" doctrine in this case to reach a sensible sentence maximum.

2. The subsections of 10 U.S.C. § 920 charged here are closely related to provisions of the former Article 120 as their language is almost identical.

Under the Military Judge's reasoning, Part IV of the Manual still contains the old Article 120, inserted by Executive Order, which applies to offenses from 2007 to 2012. When the 2011 National Defense Authorization Act became law, including the current 10 U.S.C. § 920, the President did not concurrently sign an Executive Order prescribing Presidential elements or punishments for that crime. However, nor did the President rescind Executive Order 13447, signed in 2007, which set the maximum punishment for the prior version of sexual assault on an incapacitated person, Article 120(c)(2), 10 U.S.C. § 920 (c)(2)(2006), at thirty years' confinement, *inter alia*.

Although not done by explicit Executive Order, the new statutory text was inserted verbatim into Part IV, and two prior versions of "Article 120"——one for crimes prior to 2007, and one for crimes from 2007 through 2012——were moved by the Joint Service Committee into Appendices 27 and 28, respectively, in the 2012 Manual for Courts-Martial.

But as demonstrated in the Statement of Facts and in prior Argument, *supra,* the elements of pre-amended statutes and the post amendment statutes of which the Accused stands charged with violating are nearly identical.

The largest change is seen in the offense charged in Specification 1. Both crimes' titles include the words "Sexual Assault." Both crimes actually punish a "sexual act" committed on another person who is unconscious or whose consciousness is impaired by a foreign substance. The statutes are only slightly different: the 2012 amended statute requires additional proof, that the accused "knows or reasonably should have known that the other person" was incapacitated, or that the impairment due to a foreign substance be a "condition . . . known or reasonably should be known by" the accused. 10 U.S.C. § 920(b)(2); (b)(3)(A). Because the new statute contains an additional element, the older statute——which bears a thirty year sentence——is, by definition, a "lesser included offense" of the current Article 120. *Jones*, 68 M.J. at 468.

No Executive Order has rescinded the older version of Article 120. Under the Military Judge's holding that Executive Order and full rulemaking is required, the older version of Article 120 thus still appears in Part IV of the Manual. And, the elements, title, and *actus reus* of the offense are virtually identical. Thus because the old Executive Order placing the old Article 120 and punishment has not been rescinded (and indeed the old Article 120 appears physically in Appendix 28 of the current Manual), because the "social cost" under *Ramsey,* the *actus reus,* and the offense are virtually identical, if this

Court disagrees that the current 10 U.S.C. § 920 is in Part IV, then the maximum should be the "closely related" offense's punishment that includes, *inter alia,* thirty years and a dishonorable discharge.

3. Even if not closely related to the former Article 120, the Military Judge still erred by defaulting to a summary court-martial. To a far lesser extent than the new Article 120 is related to the old Article 120, 10 U.S.C. § 920 is also closely related offense to Article 128, Assault.

Although the Executive Order, current and prior, provide a clearly applicable sentence under the Rule, the United States Code, *see infra,* also supplies a virtually identical offense, elements, and is "essentially the same," and thus likewise supplies the correct maximum punishment. *See Ramsey*, 40 M.J. at 76; *Leonard*, 64 M.J. at 384.

Again, there is no particular order in which R.C.M. 1003 must be applied. Yet before moving to the United States Code, it is worth noting that even Article 128, Assault, is still a more rational choice than the Military Judge's resort to a "summary court-martial" punishment. Assault and the former Article 120 are *not equally* closely related to the new Article 120; but even Assault is a better fit than the Military Judge's result. A simple comparison of the elements of Article 128, Assault consummated by a battery, and 10 U.S.C. § 920, Aggravated Sexual Assault, demonstrates that the former is a

lesser-included offense of the latter. Art. 120, 128, UCMJ; *see, e.g., United States v. Johanson*, 71 M.J. 688, 693 (C. G. Ct. Crim. App. 2012) ("Wrongful sexual contact and assault consummated by battery appear to be possible lesser offenses included in abusive sexual contact of a person substantially incapable of declining participation." (citing to *United States v. Bonner,* 70 M.J. 1 (C.A.A.F. 2011)) *Cf.* Manual for Courts-Martial, A28-9 (explicitly listing battery as a lesser-included of the predecessor Article 120(c)(2)); *Bonner,* 70 M.J. at 3 (C.A.A.F. 2011) (assault consummated by a battery is a lesser-included offense, and nearly identical, to Article 120(m), Wrongful Sexual Contact)*; United States v. Carr*, 65 M.J. 39, 40 (C.A.A.F. 2007) (finding battery to be a lesser-included offense of the then-existing Article 134 offense of "indecent assault). *And* bodily harm is a lesser included offense of the force used in sexual assault. *See United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010).

Without dispute, even Assault Consummated by a Battery under Article 128 is a more closely analogous offense listed in Part IV, than the Summary Court-Martial maximum employed by the Military Judge. Indeed, that choice seems less rational and more an attempt to punish the Executive for not rescinding and replacing the Executive Order more speedily.

The new 10 U.S.C. § 920 is, albeit to a far lesser extent,

closely related to Article 128, Assault, and Article 128 is an offense that appears——physically, and perhaps also via Executive Order——in Part IV. Employing the *Ramsey* court's "social cost" analysis, the social cost and harm of assault include an offensive touching. *See Ramsey,* 40 M.J. 71, 75. As demonstrated by media attention to sexual assaults both in society at large and in the military, by reference to the civilian parts of the United States Code, *infra,* and the immediately preceding section, the social cost of a sexual assault is almost universally deemed even more serious than "assault consummated by a battery," and is punished more severely. Thus the social cost of simple assault is far less—but still more similar than a "general summary court-martial." The Military Judge clearly stepped outside of reasonable action when, looking for "closely related" offenses, he found none and employed a still lesser punishment than even that appearing in Article 128, Assault. *See Ramsey,* 40 M.J. at 75-76.

Whereas the new Article 120 requires additional proof of "knew or should have known," and is thus more serious than the previous Article 120, simple assault is far less serious still than even this previous Article 120——simple assault lacks *both* the elements of "sexual" assault, and also the assault on an "incapacitated" person. And, the maximum punishment reflects this lesser seriousness: simple assault bears a maximum

punishment of bad-conduct discharge, forfeiture of all pay and allowances, and confinement for six months. But as in *Ramsey* where Article 115 Malingering, with a maximum of ten years' confinement, was more closely related than the one year of the Paragraph 81, Part IV, Article 134 charge, so too here, even the far less serious charge of Assault, is more closely related to this case's serious charge of sexual assault on an incapacitated person, than a "simple disorder" Article 134 offense, levied typically against military-specific offenses capable of supporting the Article 134 terminal element.

Granted the distinction between six months' confinement and the thirty days' confinement employed by the Military Judge is not *de minimus*. But given the similarities between Assault Consummated by a Battery and the instant charge, the Military Judge's resort to lenity in the face of clear and more appropriate alternatives, *see infra* and *supra,* depending on whether the offense is "listed in Part IV" or not, is a clear judicial usurpation of power and violative of the President's regulatory scheme. Battery provides the possibility of a punitive discharge. Because Assault is a lesser-included offense of aggravated sexual assault, the fact that both increased confinement and a punitive discharge remain available for Battery all support that even Battery is a more appropriate result than a "summary court-martial" maximum. But far more

apposite than the Battery which has a far less serious "social cost" under the *Ramsey* analysis, the United States Code provides an offense that is "essentially the same" and provides an appropriate punishment——and which the Military Judge erred in failing to apply.

D. <u>If this Court concludes both that 10 U.S.C. § 920 is not "listed in Part IV" and also that prior Executive Order does not provide a "closely related offense," then under R.C.M. 1003(c)(1)(B)(ii), the maximum punishment may be derived from a provision of the United States Code that is "essentially the same," or a custom of the service</u>.

"An offense not listed in Part IV and not included in or closely related to any offense listed therein is punishable as authorized by the United States Code, or as authorized by a custom of the service." R.C.M. 1003(c)(1)(B)(ii). This provision of R.C.M. 1003 is entirely different than the "closely related" provision of R.C.M. 1003(c)(1)(B)(i), and has a different standard. *Beaty*, 70 M.J. at 42 n.7. To determine whether the United States Code may be used for the maximum punishment of an offense neither listed in Part IV nor closely related to one listed in Part IV, courts look to "whether the offense as charged is 'essentially the same,' as that proscribed by the federal statute." *Leonard*, 64 M.J. at 384.

The Military Judge erroneously refused to apply the Rule, claiming that the fact that *Leonard* involved an Article 134 charge operated to restrict the application of R.C.M.

1003(c)(1)(B)(ii) to Article 134 offenses. (Appellate Ex. III at 7.) This makes little sense given both the plain language of the Rule, but also military court's treatment of Article 134, for pleading and proof purposes, virtually identically to any other criminal statute. *See, e.g., Fosler,* 70 M.J. 225 (C.A.A.F. 2011); *United States v. Humphries,* 71 M.J. 209 (C.A.A.F. 2012). Following the plain language of the Rule, as we must, nothing restricts the R.C.M. 1003(c)(1)(B)(ii)'s application to the Article 134 context. If an offense is "not listed in Part IV" and is not "closely related" to an offense therein, then the Rule applies. The Military Judge's refusal to apply any of R.C.M. 1003's plain language readings is erroneous.

18 U.S.C. § 2242(2)(A-B) (2012), criminalizes sexual abuse when an individual (1) engages in a sexual act with another person, and the other person is (2) incapable of appraising the nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act. A sleeping victim satisfies the second element: "A reasonable jury may conclude that a person who is asleep when a sexual act begins is physically unable to decline participation in that act." *United States v. Wilcox*, 487 F.3d 1163, 1169 (8th Cir. 2007); *see also United States v. Barrett*, 937 F.2d 1346, 1347-48 (8th Cir. 1991).

Similarly here, Specification 1 alleges that the accused

engaged in a (1) sexual act with a victim (2) who he knew or should have known was asleep. These elements contain the same "conduct and *mens rea* proscribed by directly analogous federal criminal statute[]" and are otherwise "essentially the same." *Leonard*, 64 M.J. at 384.

The elements are the same. If 10 U.S.C. § 920 is not "listed" in Part IV, and the prior Executive Order for the nearly identical offense ordering that prior offense to be placed in Part IV does not supply a "closely related" offense, then surely the United States Code can be read to provide a punishment for an offense that is "essentially the same" as sexual assault in this case. As there is a directly analogous provision under United States Code, application of the punishment of a dishonorable discharge, forfeiture of all pay and allowances, and confinement for thirty years, would not present *ex post facto* challenges to the case at bar.

The Military Judge should have applied the Federal statute's maximum confinement: imprisonment "for any term of years or for life" as a maximum punishment for this offense, and then as a matter of lenity reduced it to that found under either of the two previous analyses. His failure to do so reflects a judicial usurpation of power and is inconsistent with an established statutory and regulatory scheme, and a Writ should therefore issue.

E. After disregarding all of the applicable regulations that should have informed his process of statutory construction the Military Judge continued his erroneous process of statutory construction by skipping analysis of the entire statutory scheme and jumping directly to an incorrect invocation of the Rule of Lenity.

Statutory construction is a question of law reviewed *de novo*. *Brown v. United Airlines*, 720 F.3d 60, slip op. at *4 (1st Cir. Jul. 9, 2013) (reviewing a trial court's ruling that depended upon statutory construction de novo); *United States v. Segarra*, 582 F.3d 1269, 1271 (11th Cir. 2009) (explaining questions of statutory construction reviewed de novo); *Stone v. Instrumentation Lab. Co.*, 591 F.3d 239, 242-43 (4th Cir. 2009) (explaining appellate courts review statutory construction de novo); *United States v. Williams*, 551 F.3d 182, 185 (2d Cir. 2008) (explaining a trial court's ruling supported by statutory construction is reviewed de novo); *United States v. Quintana-Gomez*, 521 F.3d 495, 496 (5th Cir. 2008) (same); *United States v. Wilson*, 290 F. 3d 347, 352 (D.C. Cir. 2002) (statutory interpretation by a district court is reviewed de novo); *Studiengesellschaft Kohle v. Shell Oil Co.*, 112 F.3d 1561, 1564 (Fed. Cir. 1997) (explaining issues of statutory construction reviewed de novo). Here, the Military Judge applied a demonstrably incorrect process of statutory construction to the phrase "shall be punished as a court—martial may direct" to reach the conclusion that the phrase was ambiguous. (Appellate

Ex. III at 3.)

The Military Judge did note this statutory language is common within the statutory scheme commonly referred to as the UCMJ. (Appellate Ex. III at 3.) The Military Judge then failed to apply the basic tenet of statutory construction that a statute is read in the context of the entire statutory scheme. Here the entire statutory scheme includes all the statutes which, taken together, comprise the Uniform Code of Military Justice. Instead of conducting the required analysis of the statutory scheme, the Military Judge erroneously jumped straight to the Rule of Lenity.

1. <u>The statutory language at issue here is not ambiguous when it is properly considered in the context of the statutory scheme as a whole</u>.

The statutory phrase "shall be punished as a court-martial may direct" is not ambiguous. Statutory language is only ambiguous when it is reasonably susceptible to more than one reasonable interpretation. *United States v. Hatcher*, 560 F.3d 222, 231 (4th Cir. 2009); *United States v. Godin*, 534 F.3d 51, 56 (1st Cir. 2008); *Guinness Imp. Co. v. Mark Vii Distribs.*, 153 F.3d 604, 611 (8th Cir. 1998); *United Servs. Auto Ass'n v. Perry*, 102 F.3d 144, 146 (5th Cir. 1996). Here, that is not the case. Assuming *arguendo* the statutory language was ambiguous when read in isolation as the Military Judge did, he still erred. *See e.g., Davis v. Michigan Dept. of Treasury*, 489 U.S.

803, 809 (1989) (explaining it is a “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”); *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (explaining individual statutes are affected by other statutes and accordingly they must be interpreted as part of a complete scheme). Several other statutes within the statutory scheme, the Uniform Code of Military Justice, provide the necessary context to correctly interpret the phrase. *Roberts v. Sea-Land Servs*., 132 S.Ct. 1350, 1357 (2012) (Looking to other statutes within an Act to interpret an ambiguous statute within the Act); *Fla. Dep’t of Revenue v. Picadilly Cafeterias, Inc*., 554 U.S. 33, 51-52 (2008) (interpreting statutory language in light of the other statutes within the same statutory chapter); *United Ass’n of Tex. V. Timbers of Inwood Forest Assocs*., 484 U.S. 365, 371 (1988) (performing statutory construction by considering other statutes within the chapter); *Smith v. Zacahary*, 255 F.3d 446, 448 (7th Cir. 2001) (looking to related act to assist in interpreting statute)

Congress provided jurisdictional maximum penalties for each forum type of court—martial. 10 U.S.C. §§ 818-820. Congress also bestowed the authority to certain designated persons to decide which forum of court—martial charges would be referred

to. 10 U.S.C. § 822. Lastly, Congress bestowed upon the President the authority to provide a reduced maximum punishment for any offense where he decides to do so. 10 U.S.C. § 856; *United States v. Turner*, 30 M.J. 1276, 1280 (N-M.C.M.R. 1990) (discussing delegation of authority and statutory restriction on President). In that statutory grant of authority Congress stated "[t]he punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense." 10 U.S.C. § 856. The language used is permissive, stating a court—martial is authorized to give punishments up until a limitation is imposed.

In that specific statute, Article 56, the limitation being discussed is one put in place by the President. Absent a Presidential limitation created under Article 56, the limitation on a court—martial's authority to impose punishment is found from other locations within the statutory scheme. *See Food and Drug Admin. V. Brown & Williamson Tobacco Corp.*, 529 U.S. at 133 (explaining individual statutes are affected by other statutes within the statutory scheme). Those limitations are found in the jurisdictional maximum possible punishments based on the particular forum. 10 U.S.C. §§ 818—820.

Under the correct process of statutory construction, analyzing the newly amended statute in light of the complete statutory scheme, the maximum possible punishments here are

based on the forum to which the charges were referred. Here, the jurisdictional maximum of a general court—martial.

2. The Military Judge relied on an erroneous view of the law to find the Rule of Lenity applicable by misapplying the authority on which he relied, by omitting other binding authority from his analysis, and by conducting none of the predicate analysis to warrant invocation of the Rule of Lenity.

A military judge abuses his discretion where his ruling is "influenced by an erroneous view of the law." *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008). An erroneous view of the law is demonstrated by failure to cite, apply, and consider binding case law. *United States v. Seay*, 60 M.J. 73, 77 (C.A.A.F. 2004); *see also United States v. Zarbatany*, 70 M.J. 169, 170 (C.A.A.F. 2011) (finding failure to consider alternatives laid out in case law an application of erroneous view of law); *see also United States v. Davis*, 65 M.J. 749 (N—M. Ct. Crim. App. 2007) (holding application of additional restrictions not supported in case law reliance on an erroneous view of law). Misapprehension of the law cited and applied also demonstrates reliance on an erroneous view of the law. *United States v. Cokeley*, 22 M.J. 225, 229 (C.M.A. 1986).

Here, the Military Judge cited a single case for the authority to invoke the Rule of Lenity, *United States v. Thomas*, 65 M.J. 132 (C.A.A.F. 2007). (Appellate Ex. III at 11.) Further, within the sole case he relied upon, he cited a

footnote, and took it out of context. (Appellate Ex. III at 11.) A very different view of the law emerges when the footnote from *Thomas* relied upon by the Military Judge is placed in context of the full opinion. *Thomas*, 65 M.J. at 135 n.2.

In *Thomas* the question was whether the statutory word "wrongful" required knowledge on the part of the accused or whether "wrongful" introduction of a controlled substance was a strict liability crime. *Thomas*, 65 M.J. at 133. The court began its analysis by noting neither the statute nor the President defined the word sufficiently. *Thomas*, 65 M.J. at 133. The court then continued the process of statutory construction, attempting to discern the intent of the draftsman for sources outside the statutory text. *Thomas*, 65 M.J. at 134. There was nothing of value to resolve the ambiguity in the rest of the statutory scheme or in the legislative history of this specific offense. *Thomas*, 54 M.J. at 134. The court then turned to the body of case law in existence to determine what usage the word had developed over time through case law that the legislature would have been aware of when creating the statutory language. *Thomas*, 65 M.J. at 134. After conducting an exhaustive analysis of surrounding case law the court concluded that the word "wrongful" does require knowledge on the part of the accused. *Thomas*, 65 M.J. at 135. They reached the conclusion because that is how the word was used in their

analysis of case law. *Thomas*, 65 M.J. at 135.

The Rule of Lenity played no role in the *Thomas* court's reasoning. The footnote mentioning the Rule of Lenity was inserted, as it expressly states, entirely in response to the dissenting opinion. *Thomas*, 65 M.J. 135 n.2. The correct principle to extract from *Thomas*, is that the Rule of Lenity is invoked rarely, if ever, and only after a complete and thorough process of statutory construction is completed.

Before even considering invocation of the Rule of Lenity a court must pass through all of the steps of statutory construction. *United States v. R.L.C.*, 503 U.S. 291, 305-306 (1992); *Moskal v. United States*, 498 U.S. 103, 108 (1990); *United States v. Wilkerson*, No. 200300375, 2005 CCA LEXIS 424, *4 (N-M.Ct. Crim. App. 2005). "The rule [of lenity] comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers. That is not the function of the judiciary." *Callanan v. United States*, 364 U.S. 587, 596 (1961).

The process of statutory construction is a multi—step linear process. First, a reviewing court must identify an ambiguity in need of resolution. Then the first step of resolution is to examine the statutory language itself to discern the plain and ordinary meaning of the words used. *E.g.*,

Barnhart v. Sigmon Co., 534 U.S. 438, 450 (2002). If the plain and ordinary meaning of the words does not resolve the ambiguity, second, the court considers the statutory language in the context of the entire statutory scheme. *E.g.*, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). If the language remains ambiguous at that point, then a court looks beyond the statutory language in an effort to discern the intent of the draftsman. *E.g.*, *United States v. Great Northern Ry.*, 287 U.S. 144, 154 (1932). Looking beyond the statutory language means consideration of legislative history to find an explanation or policy the language intends to further and also to case law to find accepted usage of terms. *E.g.*, *Blum v. Stenson*, 465 U.S. 886, 896 (1984). Where a possible ambiguity in statutory language can be resolved through the process of statutory construction, there is no occasion to resort to lenity. *Barrett v. United States*, 423 U.S. 212, 217 (1976); *see also United States v. Waltberger*, 18 U.S. 76, 95-96 (1820).

Here, the Military Judge took the *Thomas* footnote out of context to erroneously suggest it authorized him to immediately jump to invocation of the Rule of Lenity without conducting a thorough process of statutory construction. (Appellate Ex. III at 11.) This clear and gross error is highlighted by the fact that the Military Judge found an ex post facto violation: no ex post facto violation could *possibly* exist unless the Military

Judge presumed the “as a court martial may direct” language was ambiguous and required a summary court-martial maximum. Applying the Rules and Code’s plain language, the Executive Orders *lessen* the maximum punishment——they do not *enlarge* it past the summary court-martial maximum.

To begin, the Military Judge never clearly pointed to statutory language that was ambiguous. A statutory ambiguity exists when the language in the statute is susceptible to more than one reasonable interpretation. *Hatcher*, 560 F.3d at 231; *Godin*, 534 F.3d at 56; *Guinness*, 153 F.3d at 611; *United Servs. Auto Ass’n*, 102 F.3d at 146. The Military Judge failed to point to any wording within the text of the statute that is susceptible to more than one reasonable interpretation and explained what those differing reasonable interpretations are.

The Military Judge failed to expressly state what is ambiguous about the statutory language “shall be punished as a court-martial may direct.” (Appellate Ex. III at 11.) That language is neither ambiguous nor new. Assuming *arguendo* the language is ambiguous on its face the Military Judge failed to conduct any of the analysis required to resolve the ambiguity.

The Military Judge provided no discussion or analysis of the plain and ordinary meaning of the statutory words. The Military Judge conducted no analysis of the statutory scheme in an effort to resolve the purported ambiguity. The Military

Judge conducted no analysis of legislative history in an effort to resolve the purported ambiguity. The Military Judge conducted no analysis of surrounding case law in an effort to resolve the purported ambiguity. In short, the Military Judge conducted none of the predicate analysis required before invocation of the Rule of Lenity can properly even be considered.

As discussed fully supra, here, Congressional intent is clear from consideration of the statutory scheme as a whole. Absent the President stepping in and capping the maximum possible punishment for a particular offense, a court-martial is authorized to impose punishment up to its jurisdictional maximum. Accordingly, there was no basis on which to reach the Rule of Lenity in this case. If the Executive Order does not control, then under the principles of statutory construction, the maximum punishment is the jurisdictional maximum of the forum to which the charges were referred.

3. <u>If this Court were to find a statutory ambiguity existed after all of the aforementioned steps of analysis even application of the Rule of Lenity results in the same maximum punishment found in the Executive Orders</u>.

Unlike *United States v. Beaty,* 70 M.J. 39 (C.A.A.F. 2011), where the application of R.C.M. 1003(c)(1) turned up "no result," here clear results inure, depending on whether this Court agrees the offense is listed, or not, in Part IV.

The *Beaty* court *only* resorted to the simple disorder punishment, after finding that the offense was (1) not in the Manual, (2) not closely related to any other offense in Part IV, (3) not criminalized under any other provision of the United States Code, (4) not authorized by a "custom of the service," *and most critically,* after noting that it would "violate the rule of lenity by permitting the imposition of greater punishment for the possession of what 'appears to be' child pornography, an action which Congress now deems, in accord with Supreme Court precedent, not criminal, than Congress saw fit to impose for the possession of actual child pornography." *Beaty,* 70 M.J. at 45.

In contrast here, none of those four aforementioned situations are applicable. The offenses here are in the Manual. Even if they were not, then they are closely related to an offense that remains in the Manual, the former Article 120. If the former Article 120 were not in the Manual, then the offenses here are still, less so but still, closely related to Article 128. If the offenses here were not closely related to an offense in the Manual, then they are analogous to an offense elsewhere in the United States Code. Simply put, none of the situations seen in *Beaty* exist here. *Beaty*, 70 M.J. at 45.

The Military Judge's drastic extension of *Beaty* in order to apply it to the facts here was erroneous. *Beaty* was limited to

a novel Article 134 offense. *Beaty*, 70 M.J. at 44. There, neither Congress nor the President had spoken creating specific statutory language as the charge was a novel Article 134 offense pertaining to virtual child pornography. *Beaty*, 70 M.J. at 44. Neither Congress nor the President had considered the specific offense that occurred in *Beaty*. Here, the exact opposite is the case. Congress created specific statutory language to cover this conduct. The President exercised his rulemaking authority to prescribe maximum punishments for this conduct. *Beaty* is completely inapplicable here.

If *Beaty* was somehow invoked here, its answer would come from the closely related offense of the former Article 120. Meaning applying *Beaty* when it should not be applied, would actually result in the same maximum punishment as either of the Executive Orders at issue. Under *Beaty* the other two options would be the analogous offense from the United States Code that carries life without the possibility of parole or the statutory construction in light of the entire chapter of the Uniform Code of Military Justice which provides a maximum of the jurisdictional maximum of the forum to which charges were referred. Under *Beaty*, you select the least severe option, which would be the closely related offense. Hence, the same maximum punishment as the Executive Orders. Yet, somehow the Military Judge found an option that did not even exist under

Beaty to apply. For this reason too, the misapplication of law requires that this ruling be set aside, and this extraordinary writ granted.

VII

Conclusion

WHEREFORE the United States respectfully requests that this Court immediately order the Trial Court to stay the proceedings, set aside the Trial Court's ruling of May 28, 2013, and apply the process outlined by the President in Rule for Courts—Martial 1003 to find the maximum punishment.

Under that process the maximum punishment is found in Executive Order 13643, which took effect on May 15, 2013. If that Executive Order does not control then the maximum punishment is found from Executive Order 13447 that remained in place because the amendments to 10 U.S.C. §920 were not the functional equivalent of a repeal. Under either Executive Order, the maximum punishments are the same: for Specifications One and Two, thirty years and a dishonorable discharge; for Specification 3, seven years and a dishonorable discharge.

If neither of the Executive Orders apply then this Court should find a "closely related" offense and apply that maximum punishment. Here, the closely related offense is the former Article 120, located in Appendix 28 of the 2102 Manual, which again results in the same maximum punishment. If there is no

closely related offense in Part IV of the Manual then this Court should look to the United States Code for an analogous offense.

If this Court were to determine the entire Rule for Courts-Martial 1003 was inapplicable then it should conduct a correct process of statutory construction and find the maximum punishment is that set by federal statute, the jurisdictional maximum of a general court-martial.

IAN D. MACLEAN
LT, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202)685-7686, fax (202)685-7687

VIII

Respondent's Address, Telephone, and Email Address

Lewis T. BOOKER, Jr.
Commander (O-5), U.S. Navy
Military Judge
365 S Barclay
Building 433
Bremerton, WA 98314
(360) 476-6466
lewis.booker@navy.mil

Appendix

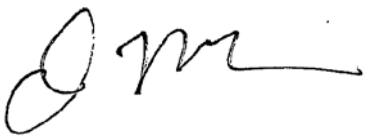
1. Military Judge's ruling, July 3, 2013
2. Government Motion, May 17, 2013
3. Defense Response, May 23, 2013
4. Charge Sheet and convening order

Certificate of Filing and Service

I certify that Pursuant to N—M. Ct. Crim. App. Rule 5.2(b)(3) on August 16, 2013, the foregoing original petition and one copy were delivered to the Court; that a copy was delivered via electronic mail to:

Lewis T. BOOKER, Jr.
Commander (O-5), U.S. Navy
Military Judge
365 S Barclay
Building 433
Bremerton, WA 98314
(360) 476-6466
lewis.booker@navy.mil; and

that A copy of the foregoing was hand delivered to the Appellate Defense Division. Lastly, an electronic copy of the petition will be uploaded to CMTIS, as required by Rule 5.2(b)(3), upon creation by the Court of an appellate case entry in the CMTIS system for the document to be attached to.



IAN D. MACLEAN
LT, JAGC, USN
Appellate Government Counsel

Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202)685-7686, fax (202)685-7687

DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES V. ET3(SS) FABIAN D. MEDINA, USN

The accused has been arraigned on a Charge alleging three separate violations of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. The allegations all relate to activity that occurred on or about 01 December 2012, thus placing them after the effective date of the current version of Article 120. Trial on the merits has not yet begun.

THE ALLEGATIONS AND THE GOVERNMENT'S MOTION

The Government alleges that ET3(SS) Medina committed sexual acts upon a female by inserting his penis into her vulva. The Government also alleges that ET3(SS) Medina engaged in sexual contact with the same female, intentionally touching her with an intent to gratify his sexual desires. The three Specifications were referred for trial by General Court-Martial on 20 June 2013 and the accused was arraigned on 03 July 2013. The Government's motion *in limine* requests that the court determine the maximum punishment before proceeding to trial.

To resolve the issue of the maximum punishment that can be imposed upon ET3(SS) Medina for his offenses if convicted, it is necessary to consider the complementary nature of Congressional and Presidential power regarding the "rules for government and regulation of the land and naval forces." It is also necessary to consider what effect the prohibition on *ex post facto* laws may have. It is finally necessary to determine what punishment is permissible if neither the Congress nor the President speaks definitively before a statute under Chapter 47 of title 10, U.S Code, takes effect.

On 15 May 2013, the President signed Executive Order 13643, amending Part IV of the MANUAL FOR COURTS-MARTIAL, UNITED STATES, to incorporate legislative changes to the UCMJ and to fix punishments. The legislative changes apply to offenses that occur on or after 28 June 2012. Upon consideration of the revisions to the substantive portion of the Uniform Code of Military Justice, the parties' arguments, the Executive Order purporting to effect the 2011 amendments to the UCMJ, and case law, it is the court's determination that the maximum imposable punishment for each offense alleged, and for each offense

AE III

necessarily included (*see* Article 79, UCMJ), is the punishment that can be imposed by a summary court-martial: confinement for 1 month, restriction for 2 months, hard labor without confinement for 45 days, and forfeiture of 2/3 pay per month for 1 month. The restraint-type punishments, moreover, may not be combined for any single offense.

Ripeness

Courts of the United States (28 U.S.C. § 451) do not issue advisory opinions, as there is no "case or controversy" before the courts. U.S. Const. Art. III § 2. *See Flast v. Cohen*, 392 U.S. 83, 95 (1968)(issue must be capable of resolution through the judicial, as opposed to political, system). Courts created by an Act of Congress under Article I of the Constitution, including courts-martial, are not bound by the Article III stricture, but they generally observe the prudential limitation. *See United States v. Chisholm*, 59 M.J. 151, 152 (C.A.A.F. 2003).

In ET3(SS) Medina's case, there is in fact a "case or controversy" independent of the Government's motion *in limine*. A charge has been referred for trial, and the parties are at liberty to negotiate a pretrial agreement as provided in Rule for Courts-Martial 705. That negotiation is only reasonable, however, if the parties understand the stakes. *See, e.g., United States v. Perron*, 58 M.J. 72, 78 (C.A.A.F. 2003). Questions of punishment arise during the voir dire process and must be resolved to ensure that members fully understand the accused's punitive exposure. If there is a conviction, members will need to be instructed properly on the maximum permissible sentence. R.C.M. 1005.

This case is ripe from the Government's perspective because, if the maximum punishment is incorrectly determined, the Government has no recourse to seek a greater punishment than that imposed by the court-martial (unlike in the United States District Court, for example, where an appeal may be taken to the United States Court of Appeals for departure from a sentencing guideline range that represents an abuse of discretion). This case is ripe from the accused's perspective as well, because if a panel were to award a punishment based on the maximum advocated by the Government, for example (in this case, confinement for 30 years, dishonorable discharge, forfeiture of all pay and allowances, reduction to pay grade E-1 for Specifications 1 and 2, 7 years and the accessory punishments for Specification 3), and the actual permissible punishment is well below those limits, then he would be illegally confined if

he served more than a minimal amount of confinement, and the only "meaningful relief" available could be disapproval of the findings and adjudged sentence. The normal post-trial and appellate review processes provided by Articles 60, 64, 66, and 67 are insufficiently nimble to prevent this illegal confinement, and while deferment of sentence or a writ of *habeas corpus* might be beneficial, once again the risk to the accused is palpable. Accordingly, this matter is ripe for decision.

2011 Amendments to Article 120

When the National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2011), became law, it included amendments to Article 120, Uniform Code of Military Justice. Those amendments set out new offenses involving sexual acts, and further established new offenses involving video recording and acts with children. *See id.* §§ 541 *et seqq.*, 125 Stat. 1404 *et seqq.* While the NDAA did not repeal existing law, it did so heavily modify the elements and definitions of the offenses that the effect was the same as a repeal. As previously noted, the amendments relate to offenses occurring on or after 28 June 2012.

All the new articles (120, 120a, 120b, and 120c) include the vague penalty provision common to most other punitive articles of the UCMJ, which is that the offender shall be punished "as a court-martial may direct." By contrast, the previous major overhaul to the statutes involving sexual offenses included interim punishments in anticipation of a delay between the effective date of the legislation and the determination and publication of limits. *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163 § 552(b), 119 Stat. 3263 (2006).

There are two extremes to be considered for punishment for the offenses defined by the 2011 amendments. One could take an expansive approach and argue that any punishment not prohibited by the Code could apply; in other words, any offense in the 2011 amendments to the Code could subject the offender to imprisonment for life without the possibility of parole and all the accessory punishments. This is the approach necessarily taken by the Government when it argues that the recent Executive Order does not constitute an *ex post facto* law, although the bulk of the Government's argument is that punishments for the now superseded Article 120 should apply. The other extreme is that, because the President has not specified limits, the limit is "no punishment".

The court's decision is informed to some degree by a basic tenet of administrative law, which is that "an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments, [and] [w]hen a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 864-65 (1984). The question is what a court is to make of the Executive's decision not to exercise the authority granted by Article 56 to fill the gap created by the 2011 amendments until adoption of Executive Order 13643 on 15 May 2013, 78 Fed. Reg. 29559. If Executive inaction is actually "agency policy," then the answer is clearly that the wisdom of not specifying punishments may not be successfully challenged, and that the Executive is saddled with the choice -- no substantial punishment for offenses that occurred between the effective date of the statute and the date of the Executive Order -- that it has made.

PUNISHMENT UNDER THE UCMJ

In the usual course of business, the President exercises his authority under Article 56 to specify punishments for those offenses that do not have a statutory penalty, and those punishments are set out in Executive Orders that usually coincide with the effective date of the statutes. The language of the Article shows that Congress clearly intends complementary action by the President, as punishments "may not exceed such limits as the President may prescribe." 10 U.S.C. § 856. Congress's provision of interim punishments in the 2006 NDAA clearly reflected an awareness of this authority and a concern about a possible lag in its exercise.

The President's determinations for individual offenses are set out in Part IV of the MANUAL FOR COURTS-MARTIAL after going through an administrative rulemaking process similar to that set out in section 553 of title 5, *United States Code*. *See generally* Department of Defense Instruction 5500.17 of 03 May 2003, Enclosure (2). In certain limited cases, the President may bypass the rulemaking process, *see id.*, but only he has the authority to amend Parts I through V of the Manual, and he does so by Executive Order. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), Part I, ¶ 4 Discussion.

Prior editions of the MANUAL FOR COURTS-MARTIAL placed punishments for the most part in a Table of Maximum Punishments. *See, e.g.*, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1969), ¶ 127. Prior editions also noted statutorily prohibited punishments (those punishments forbidden in Article 55) and punishments prohibited by custom of the service. 1969 MANUAL, ¶ 125. Today's MANUAL maintains the Table of Maximum Punishments as Appendix 12. Today's MANUAL also lists, in Part IV, the maximum punishment available for individual offenses.

Statutory Expressions of Punishments

The Uniform Code of Military Justice is unique among criminal statutes in that most of the Articles in the Code are silent as to punishment. Indeed, court-martial sentencing is unique in that it is the finder of fact who sentences, and in practical effect all sentence pronouncements are "advisory" given the procedure of Article 60.

The typical penalty language provides that the offender "shall be punished as a court-martial may direct." In the imposition of punishments, courts-martial are subject to three general limitations. Courts may not impose punishments prohibited by the Code (for example, the punishments forbidden by Article 55, among them flogging and tattooing). Courts may not exceed the jurisdictional limits of the three types of court-martial (general, special, and summary) contained within Articles 18 through 20 of the Code. Courts may not exceed limitations imposed by the President for various offenses. *United States v. Varnadore*, 26 C.M.R. 251, 253 (C.M.A. 1958).

While most penalty provisions in the UCMJ are "as a court-martial may direct," some offenses contained within the UCMJ do specify limits on punishments, usually in the nature of mandatory punishments, among them Spying in violation of Article 106 (mandatory death), Misbehavior of a Sentinel in violation of Article 113 (death or other punishment in time of war, any punishment but death if not in time of war), and Premeditated or Felony Murder in violation of Article 118(1) and 118(4), respectively (death or mandatory life).

In contrast, every statute in the United States Criminal Code (title 18) and offenses scattered throughout the rest of the United States Code (*e.g.*, 16 U.S.C. § 1540; 17 U.S.C. § 506; 21 U.S.C. § 848; 22 U.S.C. § 2778; 26 U.S.C. § 7201; 31 U.S.C. § 5324; 36 U.S.C. § 509; 38 U.S.C. § 6102) set out a statutory

limit on punishment. Some specify mandatory minimum punishments as well. Similarly, State criminal codes specify punishments, whether within a specific criminal provision or by classification as a particular degree of misdemeanor or felony. Also, as noted above, the 2006 revisions to Article 120 in the Uniform Code of Military Justice did contain interim punishments pending Executive determination.

Regulatory Basis for Punishment

Because the 2011 amendments did not specify punishments, and because the President has only within the last two weeks set out limitations, one must look to other sources for determining available punishments. The MANUAL FOR COURTS-MARTIAL does have some guidance on sentences that may be imposed at any court-martial, and that guidance appears in Rule for Courts-Martial 1003.

The Rule begins by stating that "[s]ubject to the limitations in this Manual, the punishments authorized in this rule may be adjudged in the case of any person found guilty of an offense by a court-martial". R.C.M. 1003(a), MCM, Part II. Subdivision (b) of the Rule describes the various penalties. Critically, subdivision (c) discusses limitations on punishments. The President through the rulemaking process that created R.C.M. 1003 has previously determined that there are two categories of offenses whose punishments are subject to the limitations in subdivision (c), those that are listed within Part IV of the MANUAL and those that are not listed within Part IV of the MANUAL.

One could argue, as the Government does, that because the predecessor to the current Article 120 is listed in Part IV of the MANUAL, then those limits should apply. The Government's argument has some appeal because it provides some certainty to courts-martial hearing the new Article 120 cases and it generally results in punishments less than the jurisdictional maximum of a general court-martial. Referring to the predecessor of Article 120 is inappropriate, however, because, at the time that the alleged crime occurred, in December 2012, the activity was not a violation of the 2006 version of Article 120. Granted, there are some similarities in elements and definitions, but the fact of the matter is that for all offenses that occurred after the effective date of the 2011 amendments, the 2006 provisions cannot apply.

It bears repeating that the President only recently included the 2011 amendments to the punitive articles in Part IV

of the MANUAL, and that he only recently specified any maximum punishments. The Department of Defense, acting through the Joint Service Committee on Military Justice, began the rulemaking process by advising the public of proposed changes and calling for comments. 77 Fed. Reg. 64854 (2012). The 2012 version of the MANUAL does include, in Part IV, the statutory text of the 2011 amendments, but because the rulemaking process (including modes of proof, explanations, and the like, areas commended to the President under a separate provision, Article 36) has only recently been completed and an Executive Order issued, those amendments have just now become a full-fledged part of the MANUAL FOR COURTS-MARTIAL. (The inclusion of the offenses in the MANUAL is no mere ministerial act, moreover; it represents a determination by the President, under his statutory rulemaking authority in Article 36, that the jurisdiction of courts-martial should be exercised in a certain fashion and with certain modes of proof.) The current version of Article 120 is thus not an offense listed in Part IV of the MANUAL, so the guidance of R.C.M. 1003(c)(1)(A) does not apply.

Turning to R.C.M. 1003(c)(1)(B), one could conclude that because a sexual act with an unconscious or intoxicated person is related to an offense that is listed in the pre-15 May 2013 Part IV of the MANUAL, then the maximum punishment for the previously extant offense should apply. The difficulty with this approach is that no case interpreting Rule 1003(c)(1)(B) has ever applied its provisions to Articles 80 through 132 of the Uniform Code of Military Justice; instead, the Rule has been used only in those cases where offenses have been laid under Clause 1 or Clause 2 of the General Article and have not been included in the MANUAL as "various circumstances in which the elements of Article 134 could be met," *United States v. Jones*, 68 M.J. 465, 471 (C.A.A.F. 2010), or in prosecutions under Clause 3 of the General Article for noncapital crimes and offenses, whether violations of other portions of the United States Code or violations of state law that are prosecuted under the Federal Assimilative Crimes Act, 18 U.S.C. § 13. *See, e.g., United States v. Beaty*, 70 M.J. 39 (C.A.A.F. 2011); *United States v. Leonard*, 64 M.J. 381 (C.A.A.F. 2007); *United States v. Bivins*, 49 M.J. 328 (C.A.A.F. 1998).

The Government is correct that past statutes and customs may support a cry for "substantial punishment" in sexual assault cases that approaches the jurisdictional maximum of a general court-martial. *See Beaty*, 70 M.J. at 49 (Baker, J., dissenting). Certainly, the current political climate points in that direction. Unfortunately, however, the "custom of the

service" language appears in a portion of the Rules for Courts-Martial, 1003(c)(1)(B)(ii), that is inapplicable to the statutory offense with which ET3(SS) Medina is charged. The Government has likewise failed to present evidence of any "custom of the service" specific to the newly enacted legislation. *See Beaty*, 70 M.J. at 44 (absence of a custom "cannot mean" that the maximum of life without parole applies). Finally, the term "custom of the service" has historically been applied as one of limitation, not expansion, on punishments. *E.g.*, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1969), ¶ 125.

As a final note on the regulatory scheme, I reject the suggestion to look to other, analogous, statutes for guidance as provided in R.C.M. 1003(c)(1)(B)(ii). The plain language of the Rule directs consulting "the United States Code" for similar offenses if there is no punishment provided for a Part IV offense. Title 10 is indisputably part of the United States Code, and it provides for no punishments in these new Article 120 offenses.

The Government's suggestion is consonant with the Defense's proposed alternative middle ground, which is to adopt the punishment of battery for the offenses contained within the 2011 amendments. The difficulty with the Defense's position in this regard is that an arguably closely related statute -- battery in violation of Article 128, 10 U.S.C. § 928 -- also does not provide a definitive punishment; the punishment is provided by the President using his Article 56 authority. Even using the various stated punishments under Article 128 poses problems, as the assorted types of assault and battery are, logically, offenses that are included within the greater sexual assault offenses, yet they are punished more harshly (as will be discussed more fully below).

The Government's position is even more tenuous, as the constitutional basis for title 10 -- Congressional authority to enact laws for the regulation of the government of the land and naval forces complemented by the President's authority as Commander in Chief -- is different from the constitutional or other legal basis of other titles of the Code. *Compare, e.g.*, 18 U.S.C. § 1001 (frustration of a federal purpose) *with* 18 U.S.C. § 2422 (use of a means of interstate commerce to effect the crime). *Cf. United States v. Kebodeaux*, No. 12-418 (U.S. June 24, 2013), slip op. at 6-8 (noting that the Military Clause in the constitution may be carried into force by the Necessary and Proper clause). These constitutional bases are also reflected in jurisprudence over the ages recognizing a military

society that is distinct from civilian society. *See, e.g., Parker v. Levy*, 417 U.S. 733, 743 (1974). While it is gratuitous perhaps to restate the point, neither the parties' briefs nor my own research reveals any instance in which the "other analogous statute" authority has been used outside the General Article context.

Ex Post Facto concerns

There is a case to be made that, because the President's Executive Order is not legislation, the constitutional *ex post facto* prohibition does not apply. The prohibition in fact is found in the "legislative" portion of the constitution. U.S. Const. art. I, § 9, cl. 3. *See also United States v. Gorski*, 47 M.J. 370, 373 (C.A.A.F. 1997)(opinion apparently limited to the effect of legislation). Considering, however, the manner in which the UCMJ is drafted and implemented, and because of the separation and sharing of powers envisioned by the Constitution in military and naval criminal matters, this strict textual argument must fail. Even if the *ex post facto* clause does not by its terms apply, the concept of the judicial interpretation that any law that aggravates an offense is harsh and oppressive, *see Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925), does, and accordingly due process, if nothing else, requires limiting the punishment. *See also Peugh v. United States*, No. 12-62 (U.S. June 10, 2013), slip op. at 13-14 (citing fifth amendment due process concerns for curtailing *ex post facto* effect).

Congress may not normally delegate legislative authority to the Executive branch, as to do so would violate the "finely wrought" constitutional provisions, especially the Presentment Clause, U.S. Const. Art. I § 7, cl. 2. *See Clinton v. City of New York*, 524 U.S. 417, 421 (1998). In some limited cases, however, where the Executive is in control, as in foreign relations, Congress may constitutionally allow some discretion in shaping the contours of its legislation. *Id.* at 445 n.38 (citing *Field v. Clark*, 143 U.S. 649 [1892], upholding portions of the Tariff Act allowing the President to "suspend" various aspects of the Act in appropriate cases). Congress has in fact delegated some authority to the Executive in cases of controlled substances. *See* 21 U.S.C. § 811. Certainly any prosecution for a substance added to the various schedules of controlled substances is subject to the *Ex Post Facto* clause.

So, too, should a delegation to the Executive to decide punishments at courts-martial, recognizing the President's role as Commander in Chief of the Armed Forces, be considered a valid

exercise of the legislative power, thus bringing such a determination into the fold of Article I authority for the purposes of *ex post facto* scrutiny. Congress is in all cases "the constitutionally recognized source of authority over the military system of justice." *Chappell v. Wallace*, 462 U.S. 296, 304 (1983). *Accord Jones*, 68 M.J. at 468. The President is the Commander in Chief of the Armed Forces. U.S. Const. Art. II § 2. "The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive branches." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973).

The Government argues that, because the potential maximum punishment was confinement for life without parole and all accessory punishments, then the Executive Order of 15 May 2013 works to the benefit of all service members and does not therefore constitute an *ex post facto* law. For the reasons discussed throughout this order, the Government's argument begins at the incorrect starting point. Accordingly, any punishment exceeding that which could be imposed by a summary court-martial is prohibited as *ex post facto*. *See, e.g., Beazell*, 269 U.S. at 169-70 (1925)(law is so well settled that citation is not necessary to support the proposition that making punishment more burdensome than previously violates the clause).

As a final point in its argument that the amendments are not *ex post facto*, the Government invokes *Taylor v. Garaffa*, 57 M.J. 645 (N.M.C.C.A. 2002). *Taylor* involved a challenge to the increase of the jurisdictional limit on punishments that could be imposed at a special court-martial. Before the amendments to Article 19, the maximum confinement that could be imposed at a special court-martial was 6 months, irrespective of any greater maximum punishment authorized for the offense; the amendments increased the limit to confinement for a year. *Taylor*, 57 M.J. at 647-48.

Taylor's legal footing, however, was vastly different from ET3(SS) Medina's case. Sergeant Taylor would always have been subject to the maximum punishment for his offense of wrongful cocaine use -- confinement for 5 years, a dishonorable discharge, and other punishments -- had his case been referred for trial by a general court-martial. The legislation did not increase the punishment for that particular offense, merely the ceiling on the forum to which it had been referred. *See Taylor*, 57 M.J. at 651 (citing *Duncan v. Missouri*, 152 U.S. 377, 382-83

[1894] for the proposition that creating a new forum did not constitute a prohibited *ex post facto* law).

The Rule of Lenity

The Rule of Lenity provides that criminal statutes are to be strictly construed, with any ambiguity resolved in favor of an accused. *See, e.g., United States v. Thomas*, 65 M.J. 132, 135 n.2 (C.A.A.F. 2007). *But see United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820)(interpretation must give effect to the intent of the legislature).

When interpreting a statute and giving it effect, it is not enough to read it in isolation. Rather, the statute must be read in the context of the overall statutory scheme. *See, e.g., Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). Congress created the revised Article 120 in the context of the Uniform Code of Military Justice, Chapter 47 of title 10, and that Chapter's provisions include the three different courts-martial. Congress could have limited disposition of these types of offenses as it did in Article 106 (all allegations of Spying shall be referred to a general court-martial), but it chose not to do so. Indeed, as further evidence of Congress's understanding of its authority to specify fora and mandatory minimum punishments, one need look only as far as the draft National Defense Authorization Act for Fiscal Year 2014 proposed by the House Subcommittee on Military Personnel, H.R. Rep. No. 1960, 113th Cong., 1st Sess. 13 (2013)(providing that all sexual misconduct cases shall carry a mandatory minimum punishment of dismissal for officers or dishonorable discharge for enlisted members, punishments available only at a general court-martial). Congress could have enacted interim punishments as it did with the 2006 provisions, but it chose not to do so. *See also Gorski*, 47 M.J. at 372 n.1 (setting out "severance" language to permit the legislation to survive a challenge against retrospective application). Instead, it left referral and punishment to convening authority and court-martial discretion.

Applying the Rule of Lenity leads to the conclusion that, while a service member may be convicted of the offenses established by the 2011 amendments, thus giving effect to the intent of the legislature to criminalize sexual offenses, the maximum punishment that can be imposed is the statutory limit imposed on a summary court-martial. This maximum punishment (confinement for 1 month, hard labor without confinement for 45 days, restriction to limits for 2 months, forfeiture of 2/3 pay per month for 1 month) may be imposed irrespective of forum.

This maximum criminal penalty is, in the area of sexual offenses, augmented by a civil disability created by a requirement to register as a sex offender and to comply with conditions of varying degrees of severity from state to state. *See generally* Chapter 151 of title 42, *United States Code*. *See also Kebodeaux*, No. 12-418, (U.S. June 24, 2013), opinion of Roberts, C.J., concurring in the judgment at 2 (Congress can give rules in the Military Clause force by imposing consequences such as sex-offender registration on those who violate them). The legislature's interests are thus protected.

The Rule of Lenity extends to any conviction of ET3(SS) Medina of a lesser included offense under the authority of Article 79, UCMJ, 10 U.S.C. § 879. While Article 79's language addresses offenses that are "necessarily included" within a charged offense, in the military justice arena that statute has always been understood to mean "lesser included offense." *See generally United States v. Jones*, 68 M.J. at 467. The universal view in the cases, moreover, is that "lesser" describes not only the quantity or quality of elements, but also punishment. *See, e.g., Carter v. United States*, 530 U.S. 255, 260 n.2 (2000). It is here that due process dictates that the maximum punishment be limited to that of a summary court-martial.

CONCLUSION

This order is necessarily limited to the three Specifications contained within the Charge, namely, violations of Articles 120(b)(2), 120(b)(1)(B), and 120(d), respectively. Additionally, because of the nature of a court-martial, this order has no precedential effect; it may, however, be persuasive before other courts-martial and on other aspects of the 2011 amendments.

Because the smallest punitive burden is found at a summary court-martial, as a matter of due process it is only those punishments authorized for that forum (confinement for 1 month, hard labor without confinement for 45 days, restriction for 2 months, forfeiture of 2/3 pay per month for one month) that may be imposed upon ET3(SS) Medina if he is convicted of any of the offenses alleged or of any lesser included offense under the authority of Article 79, UCMJ, 10 U.S.C. § 879. So ordered.

LEWIS T. BOOKER, JR.
CDR, JAGC, USN
Military Judge
03 JULY 2013

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**PETITION FOR EXTRAORDINARY**
	)	**RELIEF IN THE NATURE OF A WRIT**
Petitioner	)	**OF MANDAMUS AND MOTION TO STAY**
	)	**PROCEEDINGS**
v.	)	
	)	**NMCCA No. 201300325**
	)	
Lewis T. BOOKER, JR.	)	
CDR, JAGC, USN	)	
Military Judge	)	**O R D E R**
	)	
Respondent	)	
	)	
Fabian D. MEDINA	)	
ET3, USN	)	
	)	
Real Party in Interest	)	

Upon consideration of the Petition for Extraordinary Relief in the Nature of a Writ of Mandamus, the supporting Brief, and the Motion to Stay Proceedings, all filed on 16 August 2013, it is, by the Court, this 22nd day of August 2013,

ORDERED:

That the proceedings below shall be stayed until further order of the Court.

For the Court

R.H. TROIDL
Clerk of Court
22 August 2013

Copy to:
NMCCA (51.3)
Respondent (via email)
45 (LT Myers)
46 (Lt MacLean)
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IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 3

UNITED STATES, Petitioner v. Lewis T. BOOKER, JR, Commander U.S. Navy (in his official capacity as Military Judge) Respondent Fabian D. MEDINA, Electronics Technician Petty Officer Third Class (E-4) U.S. Navy Real Party in Interest	)	PETITIONER'S CONSENT MOTION FOR LEAVE TO FILE AND MOTION FOR EXPIDITED RULING Case No. 201300325

UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
MOTION DENIED
OCT 24 2013

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Pursuant to N-M. Ct. Crim. App. R. 23.10, the United States seeks leave to file this motion seeking an expedited ruling in the above captioned case. Appellate Defense counsel, LT Jenny Myers, JAGC, USN, consents to this motion.

Under this Court's rules "[a]ll writ petitions filed in the course of an on-going proceeding will be given priority consideration by the Court." N-M Ct. Crim. App. R. 20.1(c)(1). The United States filed a petition seeking extraordinary relief on August 16, 2013. This Court issued a stay in the on-going trial proceedings on August 22, 2013. (Order Granting Motion for Stay, Aug. 22, 2013.) To date, this Court has neither

issued an opinion nor a show cause order requesting briefing from the Real Party in Interest.

As essentially the same issues were recently decided by this Court in a published opinion, the United States requests expedited consideration of the above captioned case so that the trial may proceed. *See United States v. Schaleger*, No. 201300247, 2013 CCA LEXIS 771 (N-M. Ct. Crim. App. Sep. 20, 2013).

IAN D. MACLEAN
LT, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7686, fax (202) 685-7687

Certificate of Filing and Service

I certify the foregoing was delivered to the Court and a copy served upon Appellate Defense Counsel, LT Jenny Myers, JAGC, USN, on October 10, 2013.

IAN D. MACLEAN
LT, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7686, fax (202) 685-7687

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 3

UNITED STATES, Appellee v. Gregory T. Miles LCpl (E-3) U.S. Marine Corps, Appellant	**APPELLANT'S BRIEF AND ASSIGNMENTS OF ERROR** Case No. 201300272 Tried at Camp Foster, Okinawa, Japan, by general court-martial convened by Commanding General, III Marine Expeditionary Force, on 7 Jan, 7 Mar, and 3-4 Apr 2013.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

JARED A. HERNANDEZ
Lieutenant, JAGC, USN
Appellate Defense Counsel
Navy Marine Corps
Appellate Review Activity
1254 Charles Morris Street SE
Suite 100
Washington, D.C. 20374-5124

Assignments of Error

I.

TOGETHER, BNC AND EED ENGAGED IN CONSENSUAL SEXUAL CONDUCT WITH LCPL MILES. LCPL MILES WAS THEN CHARGED UNDER ARTICLES 120 AND 125, UCMJ FOR THIS ONE ACT. THIS WAS AN UNREASONABLE MULTIPLICATION OF CHARGES.

II.

"INDECENT ACT", AS DEFINED BY ARTICLE 120(k), UCMJ, IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

III.

"INDECENT ACT", AS DEFINED BY ARTICLE 120(k), UCMJ, IS UNCONSTITUTIONAL AS APPLIED TO LCPL MILES.

IV.

"SODOMY", AS DEFINED BY ARTICLE 125, UCMJ, IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

V.

"SODOMY", AS DEFINED BY ARTICLE 125, UCMJ, IS UNCONSTITUTIONAL AS APPLIED TO LCPL MILES.

Statement of Statutory Jurisdiction

Lance Corporal (LCpl) Gregory T. Miles received an approved court-martial sentence that included confinement for one year and a punitive discharge. Accordingly, his case falls within this Court's Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1), jurisdiction.

Statement of the Case

LCpl Miles was charged with violating Articles 107, 120, 125, and 134, UCMJ. But a general court-martial, consisting of military judge alone, acquitted LCpl Miles of the most serious offenses charged. In fact, LCpl Miles was found not guilty, in whole or in part, of all charges except adultery.[1]

Specifically, LCpl Miles was found not guilty of making a false official statement in violation of Article 107, UCMJ. He was also found not guilty of aggravated sexual assault, abusive sexual assault, and wrongful sexual contact in violation of Article 120, UCMJ. And LCpl Miles was found not guilty of consensual sodomy in violation of Article 125, UCMJ.

LCpl Miles was convicted of *attempted consensual sodomy* and adultery in violation of Articles 80 and 134, UCMJ. Also, he was convicted of indecent acts for consensual sexual conduct between adults in violation of Article 120(k), UCMJ.[2]

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[1] R. at 234-35.
[2] 10 U.S.C. § 920(k)(2006).

This resulted in a sentence of a reduction to pay grade E-1, forfeiture of all pay and allowances, confinement for one year and a bad-conduct discharge that the convening authority subsequently approved.[3]

Statement of Facts

BNC was angry with her husband.[4] This was not the first time they had fought since arriving to Okinawa.[5] They had bickered over money, their marriage, and a recent miscarriage.[6]

But this night was supposed to be different.[7] This night was a "girl's night" that had been planned for weeks and BNC was going to have fun.[8] It didn't matter if she was only eighteen years old and underage; she was going to drink in the club.[9]

She was out with her best friend EED; and they were going to drink, and dance, and flirt the night away.[10] So after loading up on drinks in town, the girls headed to "The Palms."[11]

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[3] R. at 268; Convening Authority's Action of 8 Jul 13.
[4] R. at 57.
[5] R. at 70, 108; Appellate Exhibit VIII.
[6] *Id.*
[7] R. at 52, 77, 107, 154.
[8] *Id.*
[9] R. at 56, 158.
[10] R. at 77, 80, 100, 106, 154, 157-58. Prosecution Exhibit 14 at 14-16.
[11] R. at 53; Appellate Exhibit X at 1 ("I think I had two shots of liquor while I was in this bar, one of Bailey's, and one Tequila. I also had two mixed drinks, both of them were Peach Schnapps and Sprite. We then went to Yumi's and stayed for about fifteen or twenty minutes. During that time I had a shot called a 'snake bite.' It's a mixture of Southern Comfort and Red Bull. ... We left and then went to East Coast and stayed

The Palms is the on-base enlisted club; it was there that they met LCpl Miles.[12]

LCpl Miles arrived with a few of his friends just as BNC and EED were about to leave The Palms.[13] The three hit it off immediately so BNC and EED decided to stay at the club to dance and talk to this Marine.[14]

LCpl Miles was clearly flirting with the girls and he believed they were flirting back.[15] There was playful poking and grabbing and EED knew that her actions could be perceived as flirtatious.[16] BNC was throwing out flirtatious signs as well.[17] The atmosphere was definitely friendly.[18]

After flirting with LCpl Miles, the group went to the dance floor.[19] That's when the girls began dancing together.[20] And just when the music was pumping, BNC threw her hands up and everybody saw it: no wristband.[21]

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until 11:00. I had one mixed drink at this bar, a vodka and orange juice drink.")

[12] Prosecution Exhibit 14 at 11-15. Appellate Exhibit X at 2.
[13] Prosecution Exhibit 14 at 11-15, 64.
[14] Prosecution Exhibit 14 at 11.
[15] Prosecution Exhibit 14 at 11-15.
[16] R. at 100; Prosecution Exhibit 14 at 15, 65.
[17] Prosecution Exhibit 14 at 15.
[18] R. at 57.
[19] Appellate Exhibit IX at 1.
[20] R. at 157.
[21] Prosecution Exhibit 14 at 67.

The bouncers pulled BNC off the dance floor and, since she was caught drinking underage, kicked her out of the club.[22] One of the bouncers confiscated BNC's ID, escorted her to the front desk, and made her call her husband.[23] But BNC wasn't ready to leave yet, so she talked her way back into the club and gave LCpl Miles her phone number.[24]

After flirting all night, EED and BNC gave LCpl Miles their phone number.[25] After all, BNC had a party at her house next weekend so if LCpl Miles wanted to see EED again, he needed their digits.[26] BNC told him that she was always with EED, and if you hang out with EED, you'll always get the both of them.[27]

After the girls left, LCpl Miles began texting back and forth with EED.[28] Not wanting the night to be over, EED invited LCpl Miles to the barracks where the girls were staying.[29] After talking and hanging out for a bit, the group went to the "mat room" to wrestle.[30]

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[22] R. at 56, 158; Prosecution Exhibit 14 at 67.
[23] Appellate Exhibit X at 2.
[24] Appellate Exhibit X at 2; Prosecution Exhibit 14 at 68.
[25] Prosecution Exhibit 14 at 16, 69.
[26] R. at 82; Prosecution Exhibit 14 at 16, 69.
[27] Prosecution Exhibit 14 at 69.
[28] Prosecution Exhibits 11-13, 16-19; Prosecution Exhibit 14 at 17.
[29] R. at 84; Prosecution Exhibit 14 at 18.
[30] R. at 84-85.

The night began winding down and the girls, along with LCpl Miles and LCpl S went upstairs to go to sleep.[31] LCpl S gave LCpl Miles permission to stay in her room with the girls.[32] That's when EED and BNC began to tease LCpl Miles about "snuggling" and the fact that he had no "snuggle buddy."[33]

Before going to sleep herself, LCpl S saw LCpl Miles climb into bed with EED and BNC.[34] The last thing LCpl S heard before dozing off was LCpl Miles flirting with EED and BNC while laughing and giggling came from the bed.[35]

At that point, LCpl Miles was on the bed "sandwiched" in-between EED and BNC.[36] BNC was against the wall while LCpl Miles was spooning EED on the other side.[37] The three were cuddling together in bed.[38]

Sometime during the night, BNC began pushing closer to LCpl Miles and grabbing at him.[39] LCpl Miles turned around and they began kissing and it quickly escalated.[40] BNC and LCpl Miles began having sex.[41]

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[31] R. at 63, 86; Prosecution Exhibit 14 at 19.
[32] *Id.*
[33] Prosecution Exhibit 14 at 74.
[34] R. at 64.
[35] R. at 64, 71.
[36] Prosecution Exhibit 14 at 19.
[37] Prosecution Exhibit 14 at 21.
[38] *Id.*
[39] Prosecution Exhibit 14 at 22.
[40] *Id.*
[41] *Id.*

LCpl Miles was rubbing BNC's breasts and grabbing her buttocks while BNC was directing him and controlling the sex.[42] That's when EED began rubbing on LCpl Miles's chest and stomach.[43] EED and LCpl Miles began kissing while BNC was on the other side.[44]

BNC then got out of bed while EED and LCpl Miles continued their liaison.[45] BNC realized things had gone too far and knew that one of her husband's friends lived in the barracks.[46] She raced to the friend's barracks room and claimed that she had just been sexually assaulted.[47]

Summary of Argument

I.

Together, BNC and EED engaged in consensual sexual conduct with LCpl Miles. BNC, fearing that her husband would find out, reported the act as a sexual assault. Because of that, LCpl Miles was charged "six ways from Sunday".

The evidence did not sustain any of the sexual assault claims made by BNC and LCpl Miles was found not guilty of the most serious charges. But, the government had charged several "catch-all crimes" in order to ensure a conviction. Two of

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[42] Prosecution Exhibit 14 at 25-26.
[43] Prosecution Exhibit 14 at 27, 79, 80.
[44] *Id.*
[45] Prosecution Exhibit 14 at 33, 81.
[46] Appellate Exhibit X at 2; Prosecution Exhibit 14 at 84.
[47] Appellate Exhibit X at 2.

those offenses, indecent acts and sodomy, consisted of the same conduct.

Since this charging decision misrepresented LCpl Miles' criminality and unreasonably increased his punitive exposure. This was an unreasonable multiplication of charges. Thus, this Court should dismiss the conviction for indecent acts and reassess the sentence accordingly.

II.

Article 120(k), UCMJ, Indecent Act, is unconstitutionally vague and overbroad. Precedent pertaining to "Article 134 style" indecent acts is inapplicable. Precedent upholding Article 120(k) is wrongly decided.

III.

Article 120(k), UCMJ, Indecent Act, is unconstitutional as applied to LCpl Miles. Consensual sexual conduct between three partners is not "vulgar, obscene, and repugnant to common propriety" when applying contemporary community standards.

Congress itself has already removed indecent acts from Article 120.[48] In fact, as of June 28, 2012, "Indecent Acts" is no longer an enumerated crime at all.[49]

[48] National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 541, 125 Stat. 1298 (2011).

IV.

"Sodomy", as defined by Article 125, UCMJ, is unconstitutionally vague and overbroad.

V.

"Sodomy", as defined by Article 125, UCMJ, is unconstitutional as applied to LCpl Miles. LCpl Miles was convicted of *attempted consensual sodomy*. The government never alleged force in this case and the military judge did not articulate *Marcum* factors for sodomy.

Argument

I.

THE GOVERNMENT SUBJECTED LCPL MILES TO AN UNREASONABLE MULTIPLICATION OF CHARGES.

Standard of Review

An unreasonable multiplication of charges is reviewed under an abuse of discretion standard.[50]

Principles of Law

The Manual for Courts-Martial states, and courts have agreed that, "what is substantially one transaction should not be made the basis for an unreasonable multiplication of

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[49] LCpl Miles was alleged to have committed these acts on February 3, 2012. This means that just five months later, his conduct would not have been criminal under Article 120.
[50] *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004)(quoting *United States v. Monday*, 52 M.J. 625, 628 n.8 (A. Ct. Crim. App. 1999).

charges."[51] A claim based on unreasonable multiplication of charges is conceptually different than a claim of multiplicity.[52] The concept of unreasonable multiplication of charges "promotes fairness considerations separate from an analysis of the statutes, their elements, and the intent of Congress."[53] This issue may be raised for the first time on appeal.[54]

In *United States v.* Quiroz, this Court applied five factors to determine whether a multiplication of charges or specifications was unreasonable.[55]

1. Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?
2. Is each charge and specification aimed at distinctly separate criminal acts?
3. Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?
4. Does the number of charges and specifications unreasonably increase the appellant's punitive exposure? and;
5. Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?[56]

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[51] *See* R.C.M. 307(c)(4), Discussion.
[52] *See United States v. Joyce*, 50 M.J. 567, 568 (N-M. Ct. Crim. App. 1999).
[53] *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001).
[54] *Id.* at 338.

When charges refer to the same factual conduct, they are not directed at "distinctly separate" criminal acts.[57] Similarly, an accused's criminality is exaggerated when punished separately for charges that are based upon the same factual conduct.[58] In *Quiroz*, the defendant's criminality was exaggerated because charges that were based on the same conduct were considered separate offenses for findings and sentencing.[59]

Discussion

A. Charged and punished separately for the same offense.

Here, LCpl Miles was charged and punished two separate ways for one act, consensual sexual conduct with EED and BNC.[60] Specifically, LCpl Miles was charged with, and punished for,

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[55] *United States v. Quiroz*, 57 M.J. 583 (N-M. Ct. Crim. App. 2002).
[56] *Id.* at 585-86.
[57] *See United States v. Akes*, No. 98-01284, 2000 CCA LEXIS 62 (N-M. Ct. Crim. App. 31 Mar. 2000)(unpublished decision)(slip op. at 8)(finding charges of maltreatment and indecent assault were not discrete criminal acts because they were based on the same factual conduct); *Quiroz*, 53 M.J. at 607-08 (finding appellant was punished for the same conduct twice when he was charged under separate statutes for selling the same explosive).
[58] *Quiroz*, 53 M.J. at 608; *see also Akes*, slip op. at 8-9; *United States v. Hinkle*, 54 M.J. 680 (N-M. Ct. Crim. App. 2000)(finding appellant's criminality was exaggerated and he was unfairly exposed to the risk of greater punishment when he was convicted of unauthorized absence (UA) and violating an order to report to the correctional custody unit by going UA).
[59] *Quiroz*, 53 M.J. at 608.
[60] Charge Sheet; R. at 234-35, 268.

indecent acts and sodomy with EED and BCN for consensual sexual conduct with each.[61] This is both wrong and legally incorrect.

Looking at the indecent act specifications alone, it becomes clear that the government has overcharged this case. The government charged that LCpl Miles committed indecent conduct by "penetrating the vagina and anus with his penis, digitally penetrating the vagina and anus, and touching the vagina and buttocks of [BNC]."[62] Further, that he again committed indecent conduct by: "penetrating the vagina and anus with his penis and rubbing the breast and vagina of [EED]."[63]

Leaving aside for the moment that the government now considers penetration of the vagina by the penis and rubbing breasts to be "indecent,"[64] the government is charging sodomy twice. Put simply, the same conduct charged above forms the basis for the specifications that follow.

Examine for a moment Charge III. This is the charge for *consensual* sodomy. In it, LCpl Miles is alleged to have committed sodomy with BNC and EED, respectively, by: "penetrating her anus with his penis."[65]

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[61] *Id.*; *Cf* R. at 234 (Military Judge finds LCpl Miles not guilty of *consensual sodomy* in violation of Article 125, UCMJ but guilty of *attempted consensual sodomy* in violation of Article 80, UCMJ).
[62] Charge Sheet (Specification 4 of Charge II).
[63] Charge Sheet (Specification 5 of Charge II).
[64] Discussed *infra* at 33.
[65] Charge Sheet (Specifications 1 & 2 of Charge III).

You read that correctly. The very same conduct alleged in the indecent act charge was alleged in the sodomy charge. The gravamen, "penetrating the anus with his penis" is identical.[66]

It is instructive to examine the five factors posited by this Court to determine whether an unreasonable multiplication of charges has occurred.[67] A full four out of five of these factors weigh in favor of LCpl Miles. Thus, this Court should find that the government created an unreasonable multiplication of charges in this case.

B. Four *Quiroz* factors favor LCpl Miles.

Quiroz factors two through five favor LCpl Miles. First, charges in this case were not aimed at distinctly criminal acts.[68] The government alleged the same act two separate ways. Compare Specifications 4 & 5 of Charge II ("Penetrating the… anus with his penis") and Specifications 1 & 2 of Charge III ("penetrating her anus with his penis"). The act of sodomy has been subsumed by the indecent act charge. The same criminal conduct was charged and punished two separate ways; this violates the second *Quiroz* factor.[69]

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[66] *Compare* Specifications 4 & 5 of Charge II ("Penetrating the… anus with his penis") and Specifications 1 & 2 of Charge III ("penetrating her anus with his penis").
[67] *Quiroz*, 57 M.J. at 585-86.
[68] *Id.* (Is each charge and specification aimed at distinctly separate criminal acts?)
[69] *Id.*

Next, the extent of LCpl Miles's criminality was misrepresented and exaggerated because, like *Quiroz*, charges based on the same conduct were considered separate offenses for findings and sentencing.[70] It's worth noting that the military judge actually found LCpl Miles guilty of *attempted sodomy*.[71] This occurred immediately after he found LCpl Miles guilty of committing an indecent act by...*attempting sodomy*.[72] The third *Quiroz* factor favors LCpl Miles because all of the alleged conduct occurred at virtually the same time with the two females.[73]

With regard to the fourth *Quiroz* factor, the number of specifications and charges unreasonably increased LCpl Miles' punitive exposure.[74] LCpl Miles's punitive exposure was doubled from a possible five years confinement to ten years,[75] simply because the government chose to include the fall back charge of *consensual sodomy*.[76]

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[70] *Quiroz*, 53 M.J. at 608; Charge Sheet; R. at 234-35, 268.
[71] R. at 234.
[72] *Id.* ("…except the words 'and anus with his penis' and substituting therefore the words 'with his penis and touching the anus with his penis.'")
[73] *Quiroz*, 57 M.J. at 585-86 ("…the number of charges and specifications misrepresent or exaggerate appellant's criminality").
[74] *Quiroz*, 57 M.J. at 585-86 ("Does the number of charges and specifications unreasonably increase the appellant's punitive exposure?")
[75] Manual for Courts-Martial, Appendix 12 (2008 ed.).
[76] *See infra* at 38.

In fact, the government charged a series of "catch-alls" in an attempt to capture a shred of criminality in this consensual act. The same act was charged six separate ways in decreasing levels of culpability.[77]

It is understandable that the government sought to preserve contingencies of proof. But once overlapping findings had been entered, trial counsel should have requested the military judge consolidate the offenses for sentencing. He did nothing of the sort.[78] This is evidence of prosecutorial overreach, the fifth *Quiroz* factor.[79]

Conclusion

Here, there is an unreasonable multiplication of charges for findings and sentencing. Dismissal of the unreasonable charge is an appropriate remedy.[80] LCpl Miles was prejudiced by the additional guilty findings because an "'unauthorized conviction . . . constitutes unauthorized punishment in an [sic]

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[77] Charge Sheet (Charges II, III, and IV; all specifications thereunder).
[78] R. at 234-35, 268.
[79] *See Akes*, slip op. at 8.
[80] *Campbell*, 71 M.J. at 22-23; cf. *United States v. Ducharme*, 59 M.J. 816, 819-20 (N-M. Ct. Crim. App. 2004) (court dismissed the conviction deciding it was an unreasonable multiplication of charges and merged specifications).

of itself.'"[81] Therefore, this Court should set aside the indecent acts charge and reassess the sentence accordingly.

If instead this Court finds that there is an unreasonable multiplication of charges for sentencing alone, then this Court should reassess the sentence by setting aside the punitive discharge.

II.

ARTICLE 120(k), UCMJ, INDECENT ACT, IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD. PRECEDENT PERTAINING TO "ARTICLE 134 STYLE" INDECENT ACTS IS INAPPLICABLE. PRECEDENT UPHOLDING ARTICLE 120(k) IS WRONGLY DECIDED.

Standard of Review

This Court reviews the constitutionality of statutes *de novo*.[82]

Principles of Law

Due process requires fair notice that an act is forbidden and subject to criminal sanctions.[83] It also requires fair notice as to the standard applicable to the forbidden conduct.[84] Potential sources of "fair notice" that one's conduct is

[81] United States v. Falcon, 65 M.J. 582, 586 (N-M. Ct. Crim. App. 2006) (quoting United States v. Savage, 50 M.J. 244, 245 (C.A.A.F. 1999)).
[82] *United States v. Disney*, 62 M.J. 46, 48 (C.A.A.F. 2005).
[83] *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003)(citing *United States v. Bivens*, 49 M.J. 328, 330 (C.A.A.F. 1998).
[84] *Parker v. Levy*, 417 U.S. 733, 755 (1974).

definitively proscribed include federal law, state law, military case law, military custom and usage, and military regulations.[85]

As the Supreme Court has stated, "[v]oid for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed."[86] The void-for-vagueness doctrine also requires that penal statutes be defined in a manner that does not encourage "arbitrary and discriminatory enforcement" by law enforcement authorities.[87] In determining the sufficiency of the notice, "a statute must of necessity be examined in the light of the conduct with which the defendant is charged."[88]

A criminal statute is overbroad if, in addition to prohibiting conduct which is properly subject to government control, it also proscribes activities which are constitutionally protected or otherwise innocent.[89] A statute should be invalidated when its overbreadth is substantial.[90] Also, when there is a realistic danger that the statute could

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[85] *Vaughan*, 58 M.J. at 31.
[86] *Parker*, 417 U.S. at 757.
[87] *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).
[88] *Parker*, 417 U.S. at 757; *See also United States v. Mazurie*, 419 U.S. 544, 550 (1975).
[89] *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972).
[90] *New York v. Ferber*, 458 U.S. 747, 769 (1982).

significantly compromise recognized First Amendment protections of parties *not before the court* it should be struck down.[91]

Discussion

This Court must answer two basic questions in determining whether Article 120(k), indecent conduct is void for vagueness. First, did it provide fair notice or warning to the appellant as far as what is prohibited or required by the statute? Second, did it provide an ascertainable standard of guilt so that it did not encourage arbitrary and discriminatory enforcement?[92] The answer to both questions must be in the affirmative for the statute to be upheld against a void for vagueness challenge.[93]

Here, both questions should be answered in the negative. The statute does not provide fair notice and also encourages arbitrary and discriminatory enforcement. A Marine should not have to guess how each new commanding general defines "immorality" before engaging in consensual sex between adults.

A. Article 134, UCMJ, Indecent Acts case law is inapplicable.

Prior to October 1, 2007, "indecent acts with another" was an example of conduct that could satisfy the elements of Article 134.[94] That offense consisted of three elements:

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[91] *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984).
[92] *Kolender*, 461 U.S. at 357.
[93] *United States v. Powell*, 423 U.S. 87, 92-93 (1975).
[94] *See United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010)("Enumerated" Article 134, UCMJ, paragraphs do not define

1) That the accused committed a certain wrong;
2) That the act was indecent; and
3) That under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.[95]

The term "indecent" contained in the second element was explained as follows:

> Indecent" signifies that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust *and* deprave morals with respect to sexual relations.[96]

This explanation, coupled with the terminal element of this offense, sufficiently defined conduct that could be considered "indecent." Under Article 134, a Marine was on notice that his sexual conduct, even if protected outside the military, would be criminal if it was prejudicial to good order and discipline or service discrediting.[97] In upholding the general article – a precursor to Article 134 – the Supreme Court stated:

> Notwithstanding the apparent indeterminateness of [the general article], it is not liable to abuse; for what those crimes are, and how they are to be punished, is *well known by practical men* in the navy and army.[98]

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offenses but merely indicate examples of circumstances where elements of Article 134, UCMJ, could be met).

[95] 10 U.S.C. § 934 ¶90.b. Manual for Courts-martial (2005 Ed.)

[96] Manual for Courts-martial (2008 Ed.) Appendix A27-4(emphasis added).

[97] *Dynes v. Hoover*, 61 U.S. 65 (1857).

[98] *Dynes*, 61 U.S. at 82 (emphasis added).

The Supreme Court looked to *Dynes* and the "longstanding customs and usage" of Article 134 to uphold restrictions on servicemember's conduct.[99] Similarly, ever since two non-commissioned officers met a couple of *frauleins*, our senior Court has held that "open and notorious" sexual conduct is discrediting to the military service.[100]

The idea that open and notorious sexual conduct is a violation of Article 134 has been reapplied several times throughout military jurisprudence.[101] Each time, emphasis was placed on the fact that the act was either service discrediting or prejudicial to good order and discipline.[102] Violation of "the longstanding customs and usage" of Article 134 made the act criminal.

Appellant does not contest that this precedent was wrongly applied to Article 134 offenses. Rather, that these cases are inapplicable to Article 120(k) offenses that do not allege a terminal element. Unlike Article 134, Article 120(k) has no longstanding custom or usage.

Without the terminal element, the term "indecent" is open to myriad definition.

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[99] *Parker*, 417 U.S. at 747-48.
[100] *United States v. Berry*, 6 U.S.C.M.A. 609, 614, 20 C.M.R. 325, 330 (1956).
[101] *United States v. Izquierdo*, 51 M.J. 421 (C.A.A.F. 1999); *United States v. Goings*, 72 M.J. 202 (C.A.A.F. 2013).
[102] *Id.*

B. Practical men in the armed services do not know what the crime is or how it will be punished.[103]

From October 1, 2007 through June 27, 2012 indecent acts was punishable under Article 120.[104] The text of the statute during this period read:

> Any person subject to this chapter who engages in indecent conduct is guilty of an indecent act and shall be punished as a court-martial may direct.

Congress demonstrated its clear intent to remove the terminal element from consideration in determining whether an indecent act was criminal. Instead, Congress altered its previous definition of "indecent conduct" to read:

> ...that form of immorality relating to sexual impurity that is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire *or* deprave morals with respect to sexual relations.[105]

Congress may have intended that the interim definition, a rough approximation of the previous, subsume the case law defining indecent conduct under the old Article 134.[106] But in

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[103] *See Dynes*, 61 U.S. at 82.
[104] "Indecent Acts" has been repealed and is no longer an enumerated crime. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 541, 125 Stat. 1298 (2011).
[105] Article 120(t)(12)(2008 ed.)(emphasis added).
[106] *See Analysis of Punitive Articles*, MANUAL FOR COURTS-MARTIAL (2008 ed.), UNITED STATES at A23-15; *See also United States v. Walton*, 2010 CCA LEXIS 250, *3-*4(A.F.C.C.A. 2010).

seemingly making it 1) easier to commit an indecent act[107] and 2) untethering the offense from the terminal element, Congress failed to provide a reasonable standard to determine when conduct is indecent.[108]

Congress defined "indecent conduct" as a "form of immorality relating to sexual impurity." The problem here is that what one person defines as immoral as it relates to sexual impurity can differ drastically from what another might think. Morality with respect to consensual sex amongst adults is entirely subjective.

How then, should a Marine know what defines "common propriety"? Does that mean that most people engage in the behavior? That most people are accepting of the behavior in others? Or that most people are proud to publically declare their support for the behavior?

Consider a convening authority or military judge with strongly held religious beliefs prohibiting premarital sex. Could every Friday night "hook-up"[109] be considered "grossly

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[107] Compare the 2005 definition ("…tends to excite lust *and* deprave morals with respect to sexual relations.") with the 2008 ("…tends to excite sexual desire *or* deprave morals with respect to sexual relations")(emphasis added).

[108] *But see United States v. Rheel*, 2011 CCA LEXIS 370 (unpublished)*; United States v. Hancock*, 2012 CCA LEXIS 110 (unpublished)*; United States v. King*, 71 M.J. 50 (C.A.A.F. 2012).

[109] *See Sexual hookup culture: A review*. Garcia, Justin R.; Reiber, Chris; Massey, Sean G.; Merriwether, Ann M. Review of

vulgar, obscene, and repugnant to common propriety"? Must a Marine be concerned at every change of command that what was permissible last week is now indecent in the eyes of the commanding general?

What about a long married couple looking to spice up their love life? Could an exploration of the *Kama Sutra* subject this couple to perdition from a military prosecutor who believed that any coitus other than missionary was "repugnant to common propriety"?[110]

This is the precise problem that Justice O'Connor identified in *Kolender* – arbitrary and discriminate law enforcement with no discernable standard.[111] Indeed, convening authorities, prosecutors, and the judiciary may use Article 120(k) to pursue their personal predilections. Without

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General Psychology, Vol 16(2), Jun 2012, 161-76 ("Hookups," or uncommitted sexual encounters, are becoming progressively more engrained in popular culture, reflecting both evolved sexual predilections and changing social and sexual scripts. Hook-up activities may include a wide range of sexual behaviors, such as kissing, oral sex, and intercourse. However, these encounters often transpire without any promise of, or desire for, a more traditional romantic relationship. A review of the literature suggests that these encounters are becoming increasingly normative among adolescents and young adults in North America, representing a marked shift in openness and acceptance of uncommitted sex).

[110] *See generally The Complete Kama Sutra: The First Unabridged Modern Translation of the Classic Indian Text*. Daniélou, Alain (1993). Published by Inner Traditions; *"Missionary Positions: Christian, Modernist, and Postmodernist"*. Priest, Robert J. Current Anthropology 42 at 29–68 (2001).

[111] *Kolender*, 461 U.S. 352, 357.

prospectively knowing what is prohibited, service members are deprived of due process in the form of "chilled" conduct or arbitrary persecution.

C. *United States v. Rheel*, an unpublished decision by this Court, was wrongly decided.

Rheel was an uncontested guilty plea where the appellant sent pictures of his naked penis via text-message to the nine-year-old daughter of his former fiancée.[112] In that case, this Court reasoned that "[a]ny reasonable person would know sending such an offending photograph to a nine-year-old child via electronic message would be a crime."[113] Further, that "*common sense* supports the conclusion that the appellant was on notice that his conduct violated the UCMJ."[114]

This Court then held, absent analysis, that: "[t]he statutory definition provides adequate notice to an ordinary person about what conduct is forbidden."[115] Granted, common sense puts reasonable people on notice that showing your penis to a nine-year-old is a crime. However not all sexual activity is so clearly criminal, and the Court failed to provide a rationale for the why an ordinary person would intuitively understand a shifting and subjective definition of "immorality"

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[112] *United States v. Rheel*, 2011 CCA LEXIS 370 *6 (unpublished).
[113] *Id.*
[114] *Id.* (emphasis added).
[115] *Id.*

in gray areas. Instead, the Court relied on a logical fallacy by offering a conclusion within its premise.

The Court's rationale breaks down as: "ordinary people" know what indecent conduct is, therefore, *res ipsa* the statute provides adequate notice. But simply calling people "ordinary" doesn't make them prescient as to what their convening authority will determine to be immoral regarding sexual conduct.

The Court concludes its consideration of the vagueness argument stating that: "because the law's meaning is readily understood, we are convinced that it will not be applied by commanders, law enforcement, or the courts in an arbitrary or discriminatory manner."[116] Despite this assurance, LCpl Miles finds himself subject to charges that, on their face, appear to describe normal sexual conduct between heterosexual adults.[117]

LCpl Miles is accused of wrongfully committing indecent conduct, "to wit: penetrating the vagina and anus with his penis, digitally penetrating the vagina and anus, and touching the vagina and buttocks of [BNC]."[118] He is also accused of: "penetrating the vagina and anus with his penis and rubbing the breast and vagina of [EED]." With the exception of the alleged consensual sodomy (a crime only in the world of American military justice and countries like Libya, Sierra Leone, and

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[116] *Id.* *8.
[117] *See generally* http://www.nationalsexstudy.indiana.edu/.

Somalia[119]) none of these acts would be considered criminal by "ordinary persons."[120]

The government appears to now consider vaginal sex and rubbing the female breasts and buttocks to be indecent. So much for, "will not be applied by…commanders in an arbitrary manner."[121]

Even if the government had tailored the specification to allege "open and notorious" conduct or "in the presence of a third person", which it did not, this was still not a crime. LCpl Miles discretely engaged in consensual sexual conduct with two adult women.[122] Nothing about that act would have immediately put him on notice that his conduct was "vulgar, obscene, and repugnant to common propriety."[123]

D. This Court's decision in *Barbier* opened the floodgates.

This Court has determined that the definition and examples contained in Article 120(t)(12) are illustrative and not exhaustive.[124] Specifically, the Court held:

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[118] Charge Sheet of 14 Sep 12. Charge II Specification 4.
[119] See, e.g., http://76crimes.com/76-countries-where-homosexuality-is-illegal/ (last accessed on 15 December 2013).
[120] See, e.g., http://www.iub.edu/~kinsey/resources/images/SexualBehaviorPIc.jpg (last accessed on 15 December 2013).
[121] *United States v. Rheel*, 2011 CCA LEXIS 370 *8 (unpublished).
[122] Prosecution Exhibit 14.
[123] *See* Article 120(t)(12), UCMJ.
[124] *United States v. Barbier*, 2012 CCA LEXIS 128, *10-*11 (N-M. Ct. Crim. App. 2012).

> We reject the appellant's assertion that indecent conduct is limited to situations involving the violation of a person's reasonable expectation of privacy and without the person's consent. While the statute sets forth examples of indecent conduct under Article 120(t)(12), the list is not exhaustive. Nor is the list exclusive.[125]

Effectively then, this Court has opened the floodgates to what could be considered "indecent." This Court offered no limiting principle whatsoever.

The implication of this precedent is staggering. Now, anything that a commander finds "indecent" may be charged as a crime regardless of whether the act is consensual. Where then does the line get drawn?

Consider viewing pornography that depicts willing actors engaging in a consensual threesome. What prevents a commander from deeming such material "grossly vulgar, obscene, and repugnant to common propriety"? Nothing under this Court's current precedent would stop such a prosecution.

What if a particularly fusty commanding general found out that one of his Marines enjoyed light bondage with his sexual partners?[126] Despite being able to buy books depicting such acts

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[125] *Id.*

[126] "Bondage: the sexual practice that involves the tying up or restraining of one partner." New Oxford American Dictionary 2nd ed., Oxford University Press (2005).

on Amazon and at Barnes and Noble Bookstore,[127] could this subordinate find himself the accused at a general courts-martial? Of course, provided only that the practice of bondage is considered "indecent."

From these examples, this Court should begin to realize the scope of precluded conduct that such a permissive interpretation allows. Otherwise protected sexual behaviors could be swept up by the overbroad reach of Article 120(k) and this Court's precedent. In the case before this Court now, LCpl Miles was charged with, *inter alia*, rubbing the breasts and buttocks of a female partner.

Are the breasts and buttocks of willing female partners now considered by the government to be indecent? What strange territory Sailors and Marines find themselves in when two breasts are beautiful, but four require averting their eyes as though they've viewed the gorgon.

E. Article 134's terminal element acted as an anchor in previous cases. Without that anchor, "indecent conduct" drifts into protected areas.

A statute is unconstitutionally overbroad if it proscribes both protected and criminal conduct.[128] In *Parker*, the Supreme Court upheld the validity of Articles 133 and 134 on the basis

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[127] http://www.barnesandnoble.com/s/bondage?dref=1 (Last accessed on 14 December 2013); http://www.amazon.com/Bondage-Books/lm/R2SIW9HG6HWPUE (Last accessed on 14 December 2013).
[128] *Grayned*, 408 U.S. at 114.

that civilian conduct that would otherwise be protected can be punished in the military.[129] The underlying rationale for this is that Articles 133 and 134 are narrowly tailored to satisfy specific concerns and needs of the military – obedience to orders, good order and discipline, and mission readiness.[130]

Congress did not tailor Article 120(k) in the same way it did Article 134. Instead Congress affirmatively removed good order and discipline and service discredit as elements with respect to indecent acts. This unmoored the pre-existing legal standard, and for that interim period servicemembers could be convicted and punished for *anything* that the government deemed "indecent."

Previous case law rested on Article 134's terminal element. The Air Force Court of Military Review considered "the elusive concepts of indecency" in the case of *United States v. Woodard*.[131] Though this case was later set-aside on other grounds, the *dicta* contained therein is instructive.

When considering an Article 134 type indecent act, the *Woodard* court began by noting that the definition of indecency was "highly subjective in nature."[132] Recognizing the problem

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[129] *Parker*, 417 U.S. at 759-60.
[130] *Parker*, 417 U.S. at 760-61.
[131] *United States v. Woodard*, 23 M.J. 514, 516 (A.F.C.M.R. 1986), *set aside on other grounds*, 23 M.J. 400 (C.M.A. 1987).
[132] *Woodard*, 23 M.J. at 515.

this caused, the court rejected the idea that it would merely assume that everyone understood the definition of indecent.

> We would have to assume that reasonable men are in general agreement that such conclusions were universally understood to mean one thing clearly and not another within a given context and, thus capable of ready application to the facts at hand. We do not believe this is so based on existing case law…[133]

Instead, the court employed a "totality of the evidence" approach that was anchored to the terminal element of Article 134.[134] Stating *what was then* a maxim, the court opined that "it is clear enough that the Uniform Code of Military Justice does not generally purport to regulate the moral standards and sexual behavior of military members."[135] Since Congress dragged indecent acts out of Article 134, this is no longer the case.

Indecent acts under Article 120(k) criminalized, without restriction, any conduct deemed indecent. But the general prohibitions of Article 134 survived precisely because its reach was restricted to conduct that was service discrediting or prejudicial to good order and discipline. Without similar tailoring, article 120(k), UCMJ is unconstitutionally overbroad.

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[133] *Id.*
[134] *Id.* at 516-17 ("We have no problem concluding that the appellant's acts were prejudicial to good order and discipline…").
[135] *Id.* at 515.

This results in an impermissible chilling effect on servicemembers who might avoid constitutionally-protected conduct out of fear or ignorance of the law. The overbreadth here is not only "real, but substantial as well."[136] Without the anchor of the terminal element and with the "highly subjective" nature of indecency, servicemembers could not know when their conduct became impermissible.

Conclusion

Without a terminal element alleging prejudice to good order and discipline or service discredit, the definition of "indecent" is left to the subjective morality of men. An individual service member does not know what an "Article 120 type Indecent Act" looks like because its definition is vague and subject to whim. Absent "longstanding customs and usage" to guide him/her, a conscientious Marine would abstain from constitutionally protected conduct in an over abundance of caution.

Because the reach of Article 120(k) impermissibly extends to speech and expressive conduct that is protected under the First Amendment this Court should declare it unconstitutional. Such action would be of little legal import because Congress

[136] *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

itself has already removed indecent acts from Article 120.[137] In fact, as of June 28, 2012, "Indecent Acts" is no longer an enumerated crime at all.[138]

Thus, this Court should declare Article 120(k) unconstitutional because it lacks a definite meaning to provide notice to service members about the type of conduct that is forbidden and it impermissibly extends to speech and expressive conduct that is protected under the First Amendment of the Constitution.

III.

ARTICLE 120(k), UCMJ, INDECENT ACT, IS UNCONSTITUTIONAL AS APPLIED TO LCPL MILES. DISCRETE CONSENSUAL SEXUAL CONDUCT BETWEEN ADULTS IS NOT "VULGAR, OBSCENE, OR REPUGNANT TO COMMON PROPRIETY."

A. "Obscenity" is to be determined by applying "contemporary community standards."[139]

History is replete with examples of consensual threesomes being mentioned approvingly.[140] The act is as old as the Greeks. Literally.[141]

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[137] National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 541, 125 Stat. 1298 (2011).

[138] LCpl Miles was alleged to have committed these acts on February 3, 2012. This means that just five months later, his conduct would not have been criminal under Article 120.

[139] *Miller v. California*, 413 U.S. 15, 37 (1973).

[140] *See generally The Complete Kama Sutra: The First Unabridged Modern Translation of the Classic Indian Text*. Daniélou, Alain (1993).

But let us dispense with the history lesson and examine a more salient timeframe. The lifetime of LCpl Miles; who was 22 years of age when this conduct occurred.[142] Interestingly, this places him in the vast majority of enlisted Marines, 62% of whom are under the age of 25.[143]

The last twenty years, the entire lifetime of the majority of Marines, is littered with positive cultural references to threesomes.[144] The effect has been to normalize, and even encourage, this behavior between individuals.[145] There is

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[141] *Looking at Lovemaking: Constructions of Sexuality in Roman Art 100 B.C.-A.D. 250*, p. 233-34, Clarke, John R. University of California Press, (1998, 2001).

[142] Prosecution Exhibit 21.

[143] "The Marine Corps 'A Young and Vigorous Force'", Demographics Update at 2 (June 2013)(The Marine Corps is the youngest, most junior, and least married of the four military Services). https://www.manpower.usmc.mil/portal/page/portal/MRA HOME2/Related%20Links/Demographics%20Booklet%20June%202013.pdf

[144] *See The Threesome Handbook: A Practical Guide to Sleeping with Three*, Vantoch, Victoria, Avalon Publishing Group (August 30, 2007)("A step-by-step guide to realizing the American dream, The Threesome Handbook: A Practical Guide to Sleeping with Three is the first book to give tri-curious men and women the inside scoop on threesomes. Having finally slipped into the mainstream on MTV, Boston Legal, Entourage, magazines, movies, and just about every respectable blog, sexuality historian and threesome dabbler Victoria Vantoch offers practical and humorous advice on our most popular fantasy") ; *See also* "Threesome" (a 1994 film starring Lara Flynn Boyle, Stephen Baldwin and Josh Charles. Rated R); Gossip Girl (a 2009 television episode starring Hilary Duff); "Wild Things" (a 1998 film starring Matt Dillon, Neve Campbell, and Denise Richards. Rated R); "Zoolander" (a 2001 film starring Ben Stiller); and "Vicky Christina Barcelona" (a 2008 Woody Allen film starring Scarlett Johansson, Javier Bardem, and Penelope Cruz).

[145] See, e.g., http://abcnews.go.com/Primetime/PollVault/story?id=156921&page=1

nothing vulgar, obscene, and repugnant to common propriety about a consensual threesome to this generation's LCpl.

So when Congress speaks about "common propriety" that term must necessarily be applied to the population it seeks to regulate; the majority of service members. It is the 62% of Marines under the age of 25 who define "contemporary community standards."[146]

Sexual morality from the age of Kennedy and Khrushchev should not be applied to today's Marines.[147] Acts alleged to be "obscene" must be determined by applying "contemporary community standards".[148]

B. Marie Claire, a "mainstream housewife magazine", does not write articles encouraging their readers to participate in acts "repugnant to common propriety."

In September of 2011, the magazine *Marie Claire,* published an article entitled: "How I planned a Ménage-a-Trois."[149] In

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&singlePage=true (a 2004 ABCNews poll finding that 28% of single men and 14% of the general population has engaged in a threesome); http://www.cosmopolitan.com/advice/tips/great-female-survey/threesome-statistic (a 2010 survey finding that a threesome is the number one fantasy for 33% of all men); and http://www.askmen.com/media_kit/survey/sexuality_dec2004.html (a 2004 survey where 61% of men responded that they would like to engage in a threesome, and only 23% responded they would never engage in a threesome).

[146] *Supra* n.72; *Miller v. California*, 413 U.S. 15, 37 (1973).

[147] *See United States v. Berry*, 6 U.S.C.M.A. 609, 614, 20 C.M.R. 325, 330 (1956).

[148] *Miller*, 413 U.S. at 37.

[149] *See* http://www.marieclaire.com/sex-love/relationship-issues/threesome-sex-menage-a-trois-planning (Last accessed 16 December 2013).

that article, the writer describes planning a threesome for her husband's fortieth birthday. Now *Marie Claire* isn't some sort of hardcore pornographic magazine.

Marie Claire is published worldwide, has a circulation of nearly a million[150], and generally writes about health, beauty, and fashion. It's geared toward the housewife set and is about as mainstream a magazine as you can get. Yet here it is, openly discussing a subject declared *verboten* by the Court of Military Appeals in 1956.

Times have changed. A mainstream housewife's magazine would not encourage their readership to engage in conduct that is "vulgar, obscene, and repugnant to common propriety." And so it is with many contemporary cultural references to threesomes.

On May 21, 2011, Saturday Night Live, a venerable comedy institution, broadcast a skit entitled "3-way."[151] In it Justin Timberlake, Andy Samberg, and "Lady Gaga" portrayed a threesome relationship as humorous. This skit received an Emmy nomination for outstanding original music and lyrics.[152]

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[150] *See* http://abcas3.auditedmedia.com/ecirc/magtitlesearch.asp (statistics compiled June 30, 2013).
[151] Wagner, Curt (May 23, 2011). "Justin Timberlake, Andy Samberg, Lady Gaga caught in '3-way'". Chicago Tribune. (Retrieved December 16, 2013).
[152] *See* www.emmys.com.

An act that was once talked about in hushed tones is now mainstream and prevalent. Put simply, a consensual threesome is not indecent nor should it be criminal.

C. "Indecent Acts" is no longer an enumerated offense.

Even Congress agrees that threesomes, in and of themselves, should be criminal. Congress already removed indecent acts from Article 120.[153] In fact, as of June 28, 2012, "Indecent Acts" is no longer an enumerated crime at all.[154]

What this means, is that if LCpl Miles, EED, and BNC would have hooked up just five months later it wouldn't have been criminal under 120(k). The government would have had to prove the case under a novel Article 134 offense. Not only would this have eliminated potential sex offender registration,[155] but would have also reduced the total confinement from five years to six months.

120(k) was meant to punish the peeping Tom's, the voyeurs, and the "hidden camera guys." It should not be applied to a consensual sexual act between three partners.

The Oath of Enlistment does not include a vow of chastity. For all their heraldry, the United States Marine Corps is not

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[153] National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 541, 125 Stat. 1298 (2011).
[154] LCpl Miles was alleged to have committed these acts on February 3, 2012. This means that just five months later, his conduct would not have been criminal under Article 120.
[155] *See* DODINST 1325.7.

The Knights Templar. Marines do not take a vow of chastity upon agreeing to defend their country. If the government wants to invade a Marine's bedroom they should be forced to prove a military nexus through the terminal element. Anything less amounts to a violation of the Constitution's right to privacy as applied to LCpl Miles.

Conclusion

Discrete consensual sexual activity between adults is not "vulgar, obscene, or repugnant to common propriety." Attitudes about sex have changed; so should the case law.

This Court should find that Article 120(k), Indecent Act, was unconstitutionally applied to LCpl Miles. This Court should set aside LCpl Miles's convictions for Indecent Act and reassess the sentence by disapproving the punitive discharge.

IV.

ARTICLE 125, UCMJ, SODOMY, IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

Standard of Review

The constitutionality of a statute is reviewed *de novo*.[156]

Principles of Law and Discussion

A. The legislative history of Article 125.

The UCMJ includes two types of crimes: 1) common-law offenses, sometimes called "civil type" offenses, and 2)

[156] *United States v. Disney*, 67 M.J. 46, 48 (C.A.A.F. 2008).

uniquely military offenses.[157] The prohibitions against "common law crimes" were enacted to subject service members to the basic norms of civil society; in the military and combat offenses, "[t]he Code likewise imposes other sanctions for conduct that in civilian life is not subject to criminal penalties."[158]

Article 125 falls in the common-law offense category and traces its history to the wholesale adoption of the British Article of War by the Continental Congress in 1775.[159] The British Articles of War had in turn incorporated, by use and custom, British common law prohibitions against murder, suicide, manslaughter, burglary, arson, robbery, larceny, rape, sodomy, and mayhem.[160] Congress first enumerated a number of common-law offenses, including sodomy, as military crimes in 1920 when it amended the Articles of War.[161]

When Congress enacted the UCMJ in 1950, it continued to criminalize the British common-law felonies listed in the Articles of War, but explicitly defined them based on the

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[157] *See United States v. Harris*, 8 M.J. 52 at 55-56(C.A.A.F. 1999)(quoting the legislative history of the UCMJ as distinguishing between "so-called military offenses" and "civil types of crimes"); 1 Frances A. Giligan & Fredric I. Lederer, *Court-Martial Procedure* 16 (2d ed. 1999).
[158] *Parker*, 417 U.S. 749.
[159] *See* James E. Valle, *Rocks and Shoals: Order and Discipline in the Old Navy 1800-1861*, at 40-41(1980).
[160] *See* William Winthrop, *Military Law and Precedent* 67-72 (2d ed. 1920).
[161] *See* Article 93, Army Manual for Courts-Martial (1928).

civilian laws of Maryland.[162] As a result, the 1920 one-word prohibition against "sodomy" was changed to a criminal prohibition against "engaging in unnatural carnal copulation with another person of the same or opposite sex."[163] There is *no* separate legislative history expressing a congressional purpose in prohibiting consensual sodomy through Article 125, other than the general purpose to prohibit the kinds of criminal conduct generally proscribed in civil society.[164] As the C.M.A.. has stated, [t]he background material on the adoption of the UCMJ indicates Congress made no findings as to the possible harmful consequences of privately performed sexual acts upon the military community."[165]

B. Appellant has standing to challenge the law.

A party has standing to challenge the Constitutionality of a statute only insofar as it has an adverse impact on his own rights.[166] As a general rule, if there is no Constitutional defect in the application of the statute to a litigant, he does

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[162] *See United States v. Henderson*, 34 M.J. 174, 176 (1992)("The range of conduct proscribed by Article 125(a) is consistent with the then-existing laws of Maryland, after which the common-law punitive articles were generally patterned.").
[163] 10 U.S.C. § 925(a).
[164] *See Harris*, 8 M.J. at 55.
[165] *United States v. Scoby*, 5 M.J. 160(C.M.A. 1977).
[166] *Ulster Cnty v. Allen*, 442 U.S. 140, 154-55 (1979).

not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations.[167]

Appellant has standing to challenge Article 125, UCMJ, because the application of the statute to his conduct, consensual sodomy, is unconstitutionally vague. As the Fourth Circuit Court of Appeals found in *MacDonald v. Moose*, anti-sodomy provisions written like Article 125, are "unconstitutional when applied to any person" and thus any challenger convicted of the unconstitutional law has articulated a concrete interest.[168]

The Fourth Circuit explained that a finding of a lack of standing in these types of cases is necessarily predicated on an adverse ruling on the as-applied challenge and therefore, there should not be a barrier to an appellant's standing to challenge the statute.[169] What makes the anti-sodomy statute different from other statutes is that there is no identifiable act that is lawful to criminalize without qualification.[170]

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[167] *Id.*

[168] *MacDonald v. Moose*, 2013 U.S. App. LEXIS 4921, *20-*24 (4th Cir. March 12, 2013). The statute in issue was Va. Code Ann.§ 18.2-361(A): Crimes against nature. -- If any person shall carnally know in any manner any brute animal, or carnally know any male or female person by the anus or by or with the mouth, or voluntarily submit to such carnal knowledge, he or she shall be guilty of a felony and shall be confined in the penitentiary not less than one year nor more than three years.

[169] *MacDonald*, 2013 U.S. App. LEXIS at *22.

[170] *MacDonald*, 2013 U.S. App. LEXIS at *30-*31.

Judicial elements,[171] Presidentially promulgated rules, and additional unalleged facts must be added to the bare words legislated against by Congress in order to turn Article 125 into something a legislature may have a rational basis to criminalize.[172] Article 125, UCMJ, by itself is unlawful in its application to any person convicted of it. Appellant's case therefore satisfies the threshold inquiry articulated in *Ulster County* for a Constitutional controversy because he has been denied Due Process by being convicted of a statute that is unconstitutional in its plain application.

C. The vagueness argument should be revisited.

In 2004, in *United States v. Marcum*, the Court of Appeals for the Armed Forces (CAAF) declined to evaluate a facial challenge to Article 125, UCMJ, because at the time the unique military environment—including the existence of 10 U.S.C. § 654—provided a rational basis for the existence of the law, despite the serious Constitutional concerns raised by the appellant.[173] In addition to the uniquely military concerns justification, the CAAF also gave the alternative reasoning, that because "Article

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[171] See *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004).

[172] This analysis takes into account that the application of the element of force was inapplicable against Appellant as discussed in Assignment of Error III.

[173] *Marcum*, 60 M.J. at 206.

125 addresses both forcible and non-forcible sodomy, a facial challenge reaches too far."[174]

Appellant acknowledges that the Supreme Court has long recognized that "the military is, by necessity, a specialized society" and that "the fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be Constitutionally impermissible outside it."[175] However, Article 125, UCMJ, lacks a military purpose.

Times have changed since the CAAF decided *Marcum* in 2004. The uniquely military concerns no longer exist. 10 U.S.C. § 654, known as "Don't Ask, Don't Tell," was repealed on December 22, 2010.[176] The concerns regarding the detrimental impact of sodomy, a form of sexual expression in both the hetero and homosexual communities, on good order and discipline have been dismissed through legislation.

Further, since *Marcum* was decided in 2004, major changes to the military criminal law have taken place including the major redrafting of Article 120. Now, more specific sexual assault laws reach all other conceivable acts of nonconsensual sodomy

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[174] *Id.*

[175] *Parker v. Levy*, 417 U.S. 733, 743, 758 (1974).

[176] Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3516 (2010).

which might impact good order and discipline.[177] Additionally, *Marcum* factors can easily be recast as offenses under the general Article 134, UCMJ, for any act that would also be detrimental to good order and discipline or service discrediting; eliminating the need or rational basis for an independent sodomy statute.

Finally, to the CAAF's second point that Article 125, UCMJ, sometimes catches what might be readily identifiable illegal conduct in its net, the fact that a properly crafted statute prohibiting sodomy may survive Constitutional challenges does not mean that Article 125, UCMJ, is saved. *Bowers v. Hardwick* analyzed a facial challenge to the validity of anti-sodomy laws and found them facially Constitutional.[178] *Lawrence v. Texas* overruled *Bowers v. Hardwick's* holding and found that anti-sodomy laws that further no legitimate state interest are facially unconstitutional.[179] This Court should follow and find that Article 125, UCMJ, does not serve a military purpose and is unconstitutionally vague and overbroad.

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[177] 10 U.S.C. § 120 (2006); 2011 Amendments to the Manual for Courts-Martial, 76 Fed. Reg. 78451, 78461 (Dec. 16, 2011). The two revisions of Article 120 have criminalized sodomy in various forms, including forcible sodomy, sodomy committed when a person is incapable of consenting, and sodomy committed with minors

[178] *Bowers v. Hardwick*, 478 U.S. 186 (1986).

[179] *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual").

Given Congress's specific criminalization of certain acts of sodomy within the code, the broad overreaching language of Article 125, UCMJ, does not support any military purpose that is not already covered in other laws, other than perhaps bestiality. The facial Constitutional challenge should be revisited. This Court will find the statute facially vague under the two theories of unconstitutional vagueness: (1) it fails to provide notice of what conduct is forbidden; and (2) it does not provide standards for law enforcement officials.[180]

D. Article 125, UCMJ, is facially vague because it does not provide fair notice to the common person of what is prohibited.

An act of Congress is unconstitutionally vague if a person cannot reasonably discern whether the contemplated conduct is criminal.[181] Due Process guaranteed by the Fifth Amendment requires fair notice that an act is forbidden and subject to criminal sanctions.[182] People of "common intelligence" must not be forced to guess at the meaning of the criminal law.[183]

In the military context what the common person can understand was addressed when the general "catch-all" article in

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[180] *Parker*, 417 U.S. at 774-75 (quoting *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974)).
[181] *United States v. Harriss,* 347 U.S. 612, 617 (1954).
[182] *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003)(citing *United States v. Bivens*, 49 M.J. 328, 330 (C.A.A.F. 1998)); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).
[183] *Connally v. General Construction Co.,* 269 U.S. 385, 391 (1926).

the Code was challenged back in 1857.[184] In upholding the general article — a precursor to Article 134, UCMJ — the Supreme Court in *Dynes* stated:

> Notwithstanding the apparent indeterminateness of [the general article], it is not liable to abuse; for what those crimes are, and how they are to be punished, is *well known by practical men* in the navy and army.[185]

In *Parker*, the Supreme Court looked to *Dynes* and the "longstanding customs and usage" of Article 134, UCMJ, for guidance.[186] In contrast to Article 134, UCMJ, Congress did not sufficiently narrow the scope of Article 125, UCMJ, nor are there any customs of the service that makes it clear to the common Sailor or Marine when their acts of sexual expression may be criminalized.

Article 125, UCMJ, is facially vague and practically unworkable. Here, the statute's broad general sweep requires people of common intelligence to guess as to the application of the law to their conduct. Article 125, UCMJ states:

> (a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however, slight, is sufficient to complete the offense.

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[184] *Dynes v. Hoover*, 61 U.S. 65 (1857).
[185] *Dynes*, 61 U.S. at 82 (emphasis added).
[186] *Parker*, 417 U.S. at 747-48.

> (b) Any person guilty of sodomy shall be punished as a court-martial may direct.[187]

"Article 125 forbids sodomy whether it is consensual or forcible, heterosexual or homosexual, public or private."[188] The statute does not explain or even hint at how this sometimes-protected conduct becomes illegal.

Even conduct that the majority of people understand is illegal, such as manslaughter, is defined with significantly more precision.[189] Sodomy is a not as recognizably illegal as killing a human being.

Further, the circumstances under which sodomy is more recognizably illegal to a common person, such as by force or with a minor, are not within the text of the statute and are redundantly proscribed elsewhere in the code. This leads to further confusion as to what exactly Article 125, UCMJ criminalizes. Additionally, unlike murder, large amounts of legal and constitutionally-protected conduct are subsumed by the plain words of Article 125.

Article 125, UCMJ, is similar to the statute in *Ricks v. District of Columbia*, that the D.C. District Court condemned as

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[187] 10 § U.S.C. 925.

[188] *Marcum*, 60 M.J. at 202.

[189] "Any person subject to this chapter who with an intent to kill or inflict great bodily harm, unlawfully kills a human being in the heat of sudden passion caused by adequate provocation is guilty of voluntary manslaughter." Manual for Courts-Martial, United States (2008 ed.), Part IV, ¶ 44.

unconstitutionally vague.[190] *Ricks* involved a prohibition on "wander[ing] about the streets at late or unusual hours . . . without any visible or lawful business."[191] The D.C. Court explained that this language "failed to point up the prohibited act . . . and thus did not differentiate conduct calculated to harm and that which is essentially innocent."[192] Article 125, UCMJ, is similarly vague as the statute itself fails to reveal what really makes an act criminal, and similarly to the D.C. District Court in *Ricks*, this Court should find the statute unconstitutionally vague.

The lack of any specificity as to the type of sodomy that is proscribed, the existence in the code of other statutes criminalizing similar conduct, and the nature of the act being one that is not naturally understood to be illegal in most circumstances, a person of common intelligence cannot be said to understand what is proscribed or not proscribed by Article 125, UCMJ.

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[190] *Ricks v. District of Columbia*, 414 F.2d 1097, 1104 (D.C. Cir. 1968).
[191] *Ricks*, 414 F.2d at 1104 (internal citations omitted).
[192] *Id.*

E. Article 125 is facially vague because it does not provide minimal enforcement guidelines thereby allowing discriminatory enforcement.

Statutes can also be unconstitutionally vague when they do not provide standards for prosecutors and law enforcement officials.[193]

Where a criminal statute fails to provide minimal guidelines, it "permit[s] a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."[194] A vague statute furnishes a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure."[195]

"The Constitution does not permit a legislature to 'set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.'"[196]

In *Marcum*, the CAAF recognized that Article 125, UCMJ, sets a wide net.[197] The statute leaves prosecutors and convening authorities without guidelines to choose whose

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[193] *Parker*, 417 U.S. at 774-75.
[194] *Goguen*, 415 U.S. at 572-73.
[195] *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940) (noting how prosecutors can charge at their pleasure).
[196] *City of Chicago v. Morales*, 527 U.S. 41, 60 (1999) (quoting *United States v. Reese*, 92 U.S. 214, 221 (1876)).
[197] *Marcum*, 60 M.J. at 202.

conduct can be charged — by implication allowing prosecution by personal preference over legal equality.

F. Judicial intervention in an attempt to "save" Article 125, UCMJ, has gone beyond what is Constitutionally permissible.

The CAAF has previously attempted to avoid a Constitutional issue with Article 125, UCMJ, by creating tests that except out certain conduct from Article 125, UCMJ's application. The sheer amount of litigation surrounding the *Marcum* factors has proved that the application of the law is fraught with peril. Appellant's case will involve further legal manipulation of the statute. Article 125, UCMJ, can no longer be stretched to avoid the inevitable Constitutional conflict, it must break.

It is not proper or prudent for the Court to undertake the role of the legislature by judicial fiat in order to attempt to fix what is facially unconstitutional.[198] Article 125, UCMJ, suffers from the same infirmity as the vague statute described by the Supreme Court in *Raines*:

> The statute in question has already been declared unconstitutional in the vast majority of its intended applications, and it can fairly be said that it was not intended to stand as valid, on the basis of fortuitous circumstances, only in a fraction

[198] *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 884-85 (1997) (explaining, in upholding facial Constitutional challenge, that "[t]his Court 'will not rewrite . . . law to conform it to Constitutional requirements'" (quoting *Virginia v. Am. Booksellers Ass'n, Inc.,* 484 U.S. 383, 397 (1988)).

> of cases it was originally designed to cover.[199]

As the Supreme Court explained in *Ayotte*, there are great dangers of too much judicial meddling:

> [M]indful that our Constitutional mandate and institutional competence are limited, we restrain ourselves from rewriting state law to conform it to Constitutional requirements even as we strive to salvage it . . . . [M]aking distinctions in a murky Constitutional context, or where line-drawing is inherently complex, may call for a far more serious invasion of the legislative domain then we ought to undertake.[200]

The Fourth Circuit in *MacDonald* similarly declined to judicially legislate factors into Virginia's Anti-Sodomy statute in order to make the statute Constitutional. In *MacDonald*, a forty-seven year-old adult solicited a seventeen year-old to engage in oral sex.[201] Instead of legislating through caselaw in order to make an act that could legitimately be within the state's criminal interest fit within the broad prohibition, the Fourth Circuit interpreted the Supreme Court's decision in *Lawrence* to invalidate all anti-sodomy laws that are not narrowly tailored on their face.[202]

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[199] *United States v. Raines*, 362 U.S. 17, 23 (1960).
[200] *Ayotte v. Planned Parenthood*, 546 U.S. 320, 329-30 (2006) (citations, alterations, and internal quotation marks omitted).
[201] *MacDonald,* 2013 U.S. App. LEXIS 4921 at *5-*6.
[202] *Id.* at *23-*24.

In light of *Marcum*, Article 125 requires too much judicial "meddling" in order to settle the application of the law. The statute is too broad and the acts of intervention required to lasso it into the Constitutional realm have become too complex and fraught with litigation as prosecutors and trial judges try to apply it to the varied facts of individual cases. This Court should therefore find Article 125, UCMJ, facially unconstitutionally vague.

G. Article 125, UCMJ is overbroad.

The First Amendment overbreadth doctrine is separate from a due process vagueness challenge. It is one of the few exceptions to the general principle that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court.[203] Even where the conduct of an appellant making the attack is clearly unprotected and could be proscribed by a law drawn with the requisite specificity, the appellant may make an attack where the law's effects substantially criminalize protected expression.[204]

Overbreath challenges to statutes proscribing conduct and speech requires an appellant to show that the overbreadth of the

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[203] *New York v. Ferber*, 458 U.S. 747, 767-69 (1982).

statute is real and substantial as judged in relation a to the government's legitimate interests in the regulation.[205] Further, in the military context, the First Amendment may be curtailed where the speech undermines the good order and discipline.[206]

An act touching on First Amendment rights must be narrowly drawn so that the precise evil is exposed.[207] In *Shelton v. Tucker*, the Supreme Court struck down as overbroad a law that required all public school teachers in Arkansas to submit an affidavit "listing all organizations to which he at the time belongs and to which he has belonged during the past five years."[208]

A federal statute challenged as overbroad should be construed to avoid constitutional problems, if the statute is subject to a limiting construction.[209] For example, in *Crowell v. Benson*, the Supreme Court found that the statute's words that allowed a Federal Court to set aside a compensation order when it was "not in accordance with the law," could be construed to fix the Constitutional challenge to the law by allowing judicial

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[204] *Ferber*, 458 U.S. at 768-69 (citing *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 634 (1980)).
[205] *Ferber*, 458 U.S. at 770.
[206] *Parker*, 417 U.S. at 759 (citing *United States v. Gray*, 20 U.S.C.M.A. 63 (1970)).
[207] *Shelton v. Tucker*, 364 U.S. 479, 487, 490 (1960).
[208] *Id.* at 481.
[209] *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

oversight.[210] If a statute does not contain language that allows a narrowing construction like in *Crowell*, then courts should attempt to sever only the unconstitutional portion.[211] Only when neither of these is possible will a court impose the "strong medicine" of striking down legislation for overbreadth.[212]

Regardless of considerations of whether Appellant's conduct is considered to criminal or not, Article 125 is overbroad and should be stricken. As the Supreme Court held in *Lawrence v. Texas,* laws such as Article 125, implicate First Amendment rights.[213] Article 125's implication on the conduct of everyday citizens is substantial. Determining substantiality, the Supreme Court has suggested comparing the number of cases to which the statute's literal application would violate a person's constitutional rights to the number of cases in which there would be constitutionally valid applications.[214]

While this requires some speculation, it is not unreasonable to say that a majority of sexually active members

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[210] *Crowell*, 285 U.S. at 62.
[211] *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971).
[212] *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).
[213] *Lawrence*, 539 U.S. at 577.
[214] *United States v. Osborne*, 495 U.S. 103, 111-114 (1990)(finding that the limiting language in the statute proscribing possession of nude minors keeps constitutionally protected conduct such as having pictures of your own children taking a bath from being subsumed within the law).

of the military violate Article 125.[215] As one study of military sexual practices noted, "[i]t seems reasonable to assume, based on general population estimates, that a majority of both married and unmarried personnel engage in oral sexual activity, at least occasionally."[216] If all of the acts were brought to trial and subjected to the literal statutory interpretation, a substantial majority of the convictions would violate a person's privacy rights.

As required by *Parker v. Levy*, the military's interest in good order and discipline must also be factored into the analysis. However, as stated above, times have changed. Congress has repealed "Don't Ask, Don't Tell," and acts of sodomy that are forceful, done against those substantially incapacitated or minors, are now specifically legislated against. Further, acts of sodomy that are either service discrediting or prejudicial to good order and discipline may be prosecuted by Article 134. This statute does not serve a military purpose in so much as there are other statutes in the UCMJ that cover any conceivable military interest.
This statute is also not subject to limiting construction. Limiting construction means you can take the words of the statute and construe those to fix the constitutional problem.

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[215] *See* RAND, *Sexual Orientation an U.S. Military Personnel Policy: Options and Assessment* at 58(1993).

Words and tests must be added to the statute in order to fix its constitutional problems.[217]

Conclusion

This Court should find Article 125, UCMJ unconstitutionally vague and overbroad, set aside Appellant's conviction for attempted consensual sodomy, disapprove the sentence and send the case back for a new sentencing hearing.

V.

ARTICLE 125, UCMJ, SODOMY, IS UNCONSTITUTIONAL AS APPLIED TO LCPL MILES. CONSENSUAL SODOMY IS NOT CRIMINAL.

A. Article 125, UCMJ, is unconstitutionally vague as applied.

Article 125, UCMJ, is unconstitutionally vague as applied to Appellant for two reasons. First, Appellant's conviction of attempted consensual sodomy was a conviction for a crime using an inconsistent non-statutory definition.

Article 125, UCMJ, itself fails to articulate how the act of consensual sodomy may become criminal. The government alleged that Appellant committed unnatural carnal copulation. Unnatural carnal copulation, in this case attempted consensual anal sex, without any qualifying facts is not a crime.

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[216] *Id.*

[217] Appellant concedes that the statute may be excised by taking out "another person of the same or opposite sex or" and leave the statute to prohibit bestiality.

This Court's recent decision in *United States v. Brown*, invited a challenge from an appellant charged with and convicted of consensual sodomy rather than forcible sodomy.[218] This is just such a case. The government never alleged that LCpl Miles used unlawful force when attempting to commit sodomy. Just that the act, in and of itself, was criminal.

The government should be forced to explain what criminal purpose it has for proscribing consensual acts of sodomy amongst military members. Of what concern is it to the government that a Marine may engage with his partners in sexual conduct protected by the Constitution?

B. Even Congress recognizes criminalizing consensual sodomy is crazy.

Congress has proposed the elimination of "consensual sodomy" as a crime in the 2014 National Defense Authorization Act.[219] Section 1707, of that compromise bill repeals the offense of consensual sodomy. Even Congress recognizes that criminalizing consensual sodomy is unconstitutional.

Conclusion

LCpl Miles was found guilty for attempting an act that is not criminal. This Court should set aside his conviction for

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[218] *United States v. Brown*, No. 201300020 2013 CCA LEXIS 911 (N.M. Ct. Crim. App. Oct. 31, 2013).
[219] *See* http://armedservices.house.gov/index.cfm/files/serve?File_id=215

attempted consensual sodomy and reassess the sentence by disapproving the bad-conduct discharge.

JARED A. HERNANDEZ
Lieutenant, JAGC, USN
Appellate Defense Counsel
Navy Marine Corps
Appellate Review Activity
1254 Charles Morris Street SE
Suite 100
Washington, D.C. 20374-5124

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was delivered to the Navy-Marine Corps Court of Criminal Appeals, and that a copy was served on Appellate Government Division on 16 December 2013.

JARED A. HERNANDEZ
Lieutenant, JAGC, USN
Appellate Defense Counsel
Navy Marine Corps
Appellate Review Activity
1254 Charles Morris Street SE
Suite 100
Washington, D.C. 20374-5124
(202) 685-7389

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IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
	)	Case No. 201200299
v.	)	
Ronnie G. OAKLEY, Jr., Information Systems Technician Third Class (E-4) U.S. Navy Appellant	)	Tried at Region Legal Service Office SW, San Diego, California on July 1, August 6-7, and September 9-13, by general court-martial convened by Commander Navy Region Northwest.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

CORY A. CARVER
Captain, USMC
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7396, fax (202) 685-7687

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Errors Assigned

I.

DID THE MILITARY JUDGE'S FINDINGS OF NOT GUILTY TO THE WORDS "ON DIVERS OCCASIONS" IN THE FIRST TRIAL CREATE AN AMBIGUOUS VERDICT AND A DOUBLE JEOPARDY VIOLATION THAT PRECLUDES THIS COURT'S REVIEW OF SPECIFICATIONS 1 AND 2 UNDER ARTICLE 66, UCMJ?

II.

COURT-MARTIAL MEMBERS MUST BE FREE OF BIAS. DID THE MILITARY JUDGE ABUSE HIS DISCRETION BY DENYING THE DEFENSE CHALLENGE FOR CAUSE AGAINST LT S FOR IMPLIED BIAS WHERE LT S WAS THE VICTIM OF A SEXUAL ASSAULT AND EXPRESSED BELIEFS ABOUT ONE'S ABILITY TO CONSENT TO SEXUAL CONDUCT AFTER HAVING DRANK ALCOHOL THAT ARE INCONSISTENT WITH THE LAW?

III.

NO PERSON SUBJECT TO THE UCMJ MAY INFLUENCE A WITNESS TO A COURT-MARTIAL. DID THE MILITARY JUDGE ABUSE HIS DISCRETION BY FAILING TO DECLARE A MISTRIAL WHERE ONE OF THE WITNESSES CHANGED HIS TESTIMONY AFTER HIS CO AND SENIOR ENLISTED LEADER ADMONISHED HIM NOT TO TESTIFY FAVORABLY FOR IT3 OAKLEY?

IV.

NO PERSON SUBJECT TO THE UCMJ MAY INFLUENCE A COURT-MARTIAL MEMBER. THE NAVY'S MOST SENIOR LEADERS HAVE WIDELY PUBLICIZED THEIR PREFERRED OUTCOMES FOR SEXUAL ASSAULT CASES. DID THE MILITARY JUDGE ERR IN FINDING THERE WAS NO APPARENT UNLAWFUL COMMAND INFLUENCE IN THIS CASE.

V.

DID THE MILITARY JUDGE ERR IN ADMITTING IT3 OAKLEY'S STATEMENTS TO NCIS WHERE THE NCIS

SPECIAL AGENTS DID NOT ORIENT HIM TO THE ALLEGATIONS AGAINST HIM AND, WHEN ASKED, REFUSED TO IDENTIFY THE CONDUCT AT ISSUE IN LAYMEN'S TERMS?

VI.

DID THE MILITARY JUDGE ERR BY ADMITTING EVIDENCE THAT IT3 OAKLEY SEXUALLY ASSAULTED CS3 FC WHEN HE WAS TWELVE YEARS OLD WHERE THE EVIDENCE WAS NOT RELEVANT AND THE DANGER OF UNFAIR PREJUDICE WAS EXTREMELY HIGH?

VII.

DID THE MILITARY JUDGE ERR BY PERMITTING CS3 FC'S MOTHER TO TESTIFY THAT CS3 FC TOLD HER "RONNIE ATTACKED ME" AS AN EXCITED UTTERANCE WHEN CS3 FC MADE THE STATEMENT AFTER SLEEPING FOR SEVERAL HOURS AND REFLECTING ON THE CONSEQUENCES OF REPORTING A SEXUAL ASSAULT?

VIII.

WHEN A MATERIAL FACT IS NECESSARILY DETERMINED BY A PREVIOUS ACQUITTAL A SUBSEQUENT PROSECUTION IS BARRED BY ISSUE PRECLUSION AND DOUBLE JEOPARDY. DID THE MILITARY JUDGE HERE ERR BY FAILING TO DISMISS SPECIFICATION 1 WHERE THE MEMBERS IN THE FIRST TRIAL NECESSARILY ACQUITTED IT3 OAKLEY OF ALL OF THE ELEMENTS OF AGGRAVATED SEXUAL ASSAULT?

Statement of Statutory Jurisdiction

Appellant's approved sentence includes a bad-conduct discharge. Accordingly, this Court has jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2006).

Statement of the Case

At Appellant's retrial, a panel of members with enlisted representation, sitting as a general court-martial, convicted Appellant, contrary to his pleas, of one specification of aggravated sexual assault and one specification of an indecent act, in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2008). The Members sentenced Appellant to five years confinement, total forfeitures of pay and allowances, reduction to pay-grade E-1, and a dishonorable discharge. The Convening Authority approved only so much of the sentence as provided for three months confinement, total forfeitures of pay and allowances, reduction to pay-grade E-1, and a bad-conduct discharge. Except for the bad-conduct discharge, the Convening Authority then ordered the sentence executed.

Statement of Facts

A. Background.

In August 1999, F.C.'s mother married Appellant's father and the families moved in together. (R. 41-42, 722-23.) F.C. and Appellant became stepsiblings. (R. 41-42.) As F.C. was born in 1991, she was eight at the time of the marriage. (R. 41-42, 56.) Appellant was born in 1987 and is three to four years older than F.C. (R. 41-42, 56; Pros. Ex. 10 at 1.)

When Appellant was seventeen or eighteen years-old he left the family home. (R. 48, 631-32, 747.) Appellant had limited contact with the family until April 29, 2011. (R. 958.)

B. Appellant's offenses.

On April 29, 2011, at around 1900, F.C. arrived at her parents' home in La Mesa. (R. 633, 758.) Appellant had already arrived at the home. (R. 636.) The family came together to celebrate the father's birthday and the grandparents' anniversary. (R. 632-36, 727.) F.C. and Appellant had not spent a night in the same house since Appellant had left the family home in 2007 at the age of eighteen.[1] (R. 631-32, 747.)

F.C., Appellant, and their family began celebrating by drinking alcohol, smoking, and socializing mainly in the father's office. (R. 636-37.) F.C. began drinking around 2000 or 2030 and stopped around 2230. (R. 638.) F.C. consumed five shots of tequila and three mixed drinks of rum and pineapple juice. (R. 636, 728.) F.C. became "very intoxicated", began slurring her words, lost her "hand/eye coordination" and became sick. (R. 638-39, 731, 761-62.)

At the end of the evening, the family members eventually left the office to go to sleep. (R. 643, 962, 965.) As it was the plan to have F.C. sleep by herself in the office, she

[1] In 2007, Appellant was either nineteen or twenty years-old. Therefore, either he moved out of his parents' home at nineteen or twenty, or he moved out earlier than 2007.

remained and “passed out” on the sofa recliner for the remainder of the night. (R. 83, 644.) Appellant was the last to leave the office. (R. 643.) Appellant slept in another room. (R. 962, 965.)

Sometime during the night, Appellant entered the office where F.C. was asleep. (R. 699.) Appellant lifted the blanket off F.C., moved her shorts and underwear to the side, and penetrated her vagina with his fingers and tongue. (R. 700-01.) Appellant simultaneously masturbated. (R. 701.) F.C. was aware of the sexual assault, but was “scared,” “frozen,” “immobile,” “half-asleep,” and “intoxicated.” (R. 628-29, 649-50.) F.C. did not say anything to Appellant. (R. 701.) After Appellant left, F.C. fell back asleep. (R. 704-05.)

Appellant reentered the office to smoke. (R. 705.) F.C. awoke after smelling cigarette smoke. (R. 705.) She told Appellant to “smoke on the front stoop.” (R. 645, 648.) Appellant left. (R. 708.) F.C. fell back asleep. (R. 648.)

Later, Appellant again entered the office while F.C. was asleep, lifted the blanket off F.C., moved her shorts and underwear, and penetrated her with his fingers and tongue while simultaneously masturbating. (R. 648, 653, 708-09, 711.) F.C. was not fully alert as she was still “intoxicated,” “half asleep,” and “scared.” (R. 649-50.)

Appellant attempted to position his body directly on top of F.C. to penetrate her vagina with his penis. (R. 653, 710.) However, the sofa recliner suddenly made a loud noise. (R. 64, 710, 732.) Appellant then continued to penetrate F.C. with his fingers and tongue. (R. 712.) F.C. did not do anything to stop Appellant because she was “still drunk” and “half asleep.” (R. 655-56.) F.C. froze and “felt scared . . . like it was a nightmare.” (R. 656.)

Appellant eventually ejaculated. (R. 656; Pros. Ex. 10 at 1.) And then left. (R. 658.) F.C. fell back asleep. (R. 658, 712.)

Sometime between 0730 and 0900 on April 30, 2011, F.C.’s mother entered the office where F.C was sleeping. (R. 44-45, 67, 95, 659-60, 733.) F.C. awoke, looked puzzled and frightened, began crying, and felt like her world had collapsed around her. (R. 45-46, 86, 102, 734.) Upon seeing F.C. frightened, her mother asked what was wrong, to which F.C. stated, “I wish it was a nightmare” but “[Appellant] attacked me last night.” (R. 46, 67, 86, 95, 101, 661, 734.) F.C. was frightened and crying at the time. (R. 46.)

F.C. later reported the sexual assault to her command, provided a statement to Naval Criminal Investigative Service (NCIS), and turned over her underwear and pajama bottoms for analysis. (R. 662-63.)

C. Appellant's rights advisement and statements.

On May 15, 2011, Appellant met with NCIS Special Agent (SA) Yerevanian. (R. 16-17.) SA Yerevanian informed Appellant that he was suspected of an "Article 134, indecent assault" from an "incident occur[ing] between [Appellant] and [his] stepsister on April 29th". (R. 17-19.) At that point, Appellant understood the term "assault" indicated a crime. (R. 993.) He also understood that SA Yerevanian was "talking about the sexual encounter [Appellant] had with [his] sister" that took place on April 29, 2011. (R. 979, 994.)

Although Appellant wanted to know more about the allegation, SA Yerevanian advised Appellant of his Article 31(b) rights, via a cleansing rights advisement, prior to discussing it further. (R. 18.) Appellant "wanted to know what [his] sister was talking about". (R. 980.) Appellant initialed next to each of his rights and signed at the bottom indicating a waiver of his rights. (Prosecution Ex. 7.)

As Appellant was typing his sworn statement, SA Yerevanian realized that Article 134, indecent assault, was no longer listed in the Manual for Courts-Martial. (R. 19-20, 36.) Upon realizing the mistake, SA Yerevanian told Appellant the incident was no longer considered an Article 134, indecent assault, but rather an Article 120. (R. 20, 789.) SA Yerevania offered to reread Appellant his Article 31(b) rights, but Appellant stated

that he understood, acknowledged that he desired to continue to give his statement, and declined to exercise his rights. (R. 20, 789-90.)

In his written statement, Appellant admitted that he "went into [the] den and saw [my] step sister there. Did not have the coherentcy [*sic*] to stop myself from having sexual encounters. Started manipulatn [*sic*] vaginal region." (Pros Ex. 8.) In his typed statement, Appellant admitted entering the office while F.C. was asleep and stated,

> I lifted my head up and saw down [F.C.]'s legs, being extremely inebriated at the time did not realize this was my sister. I vaguely remember in my inebriated state that there was a possibility that I penetrated the vaginal orphise [sic] using my fingers, though I am not sure. I distinctly remember touching her with in [sic] that area using my fingers.

(Pros. Ex. 10 at 1.) He admitted that he had two sexual encounters with F.C. (R. 986. 1005.) He further admitted to masturbating and "ejaculating into [his] hand" during the sexual assault. (Pros. Ex. 10 at 1; R. 975.)

The Military Judge found that SA Yerevanian's error in using the outdated Article 134, indecent assault, was not intentional and she "had no deceitful or manipulative intention." (Appellate Ex. LIV at 5.) Moreover, he found that "[a]t all times during the rights advisement, [Appellant] understood the words used by SA Yerevanian both orally and on the rights advisement form, and he did not say or do anything suggesting

confusion." (Appellate Ex. LIV at 3.) He further found that Appellant understood that

> [t]he word "indecent," whether understood as morally offensive or simply not decent, implies conduct of a sexual nature; the word has no other rational meaning. The word "assault" is commonly understood to mean an offensive touching of another. Combined, the words convey the nature of the suspected offense to be an offensive touching of a sexual nature.

(Appellate Ex. LIV at 5.) "With this understanding and awareness, with more precision than the law requires, [Appellant] waived his rights and agreed to speak with SA Yerevanian." (Appellate Ex. LIV at 6.)

D. Childhood offense and evidence.

In 2000 or 2001, Appellant, F.C., and their family vacationed at a cabin in New Mexico. (R. 73, 651.) F.C. was ten years-old at the time.[2] (R. 74, 651.) Appellant was thirteen years-old at the time.[3] (R. 41-42, 56, 722-23.) F.C. slept in a bed and Appellant slept on the floor. (R. 77.)

Sometime during the night, F.C. awoke with Appellant on top of her. (R. 55-56, 76-77, 652.) F.C.'s shorts and underwear had been pulled to the side. (R. 652.) Appellant's boxers were

[2] F.C. testified consistently that she was ten years-old at the time of the sexual assault; however she was unsure of the exact year. (R. 74, 651.) Although she stated that it was either 2000 or 2001, as she was ten at the time, the sexual assault had to take place in 2001 since she was born in 1991. (R. 73, 651.)
[3] Appellant is three to four years older than F.C. As F.C. was ten at the time of the sexual assault, Appellant was at least thirteen years-old.

pulled down. (R. 652.) Appellant's lower body was between F.C.'s legs and his hip was in F.C.'s groin. (R. 77.) Appellant partially penetrated F.C.'s vagina with his penis. (R. 55, 59, 77-78, 652.) After awaking, F.C. pushed Appellant off and stated, "what the fuck are you doing?" or words to that effect. (R. 78.) In response, Appellant stated, "I'm sorry, I'm sorry. Don't tell dad and Donna". (R. 78, 653.)

F.C. reported the sexual assault to her mother when F.C. was sixteen years-old which was after Appellant had "been kicked out of the home." (R. 80, 744.)

E. Appellant's character witness on sentencing.

During the hearing on sentencing, Trial Defense Counsel discovered that a character witness, Chief F, had been counseled after his favorable testimony in Appellant's first trial. (R. 1198.) Nevertheless, Trial Defense Counsel called Chief F to testify at the pre-sentencing hearing. (R. 1172.) During his testimony, Chief F stated that "[o]utside of the Navy, [he] would work with [Appellant] any day." (R. 1178.)

After Chief F's testimony, Trial Defense Counsel informed the Military Judge of possible unlawful command influence. (R. 1188.) The Military Judge discovered that immediately after Appellant's first trial, Chief F's Commanding Officer and Senior Enlisted Leader told him he was an "inexperienced chief" because he had testified that Appellant should remain in the Navy after

his original conviction. (R. 1192.) Since that time, Chief F changed commands and does not report to the same Commanding Officer or Senior Enlisted Leader. (R. 1194.)

As a result of the influence, Chief F altered his testimony at sentencing to indicate that Appellant would not be fit for the Navy, but he would work with Appellant outside of the Navy. (R. 1193-94.) But Trial Defense Counsel agreed that Chief F's testimony on the merits was unchanged. (R. 1207.)

The Military Judge found unlawful command influence and crafted remedies to eradicate the unlawful command influence, to include: providing Chief F's original character testimony to the Members; instructing the members of the unlawful command influence; allowing the members to hold the Government accountable for the unlawful command influence; and allowing the Members to "provide [Appellant] relief in the form of a less-severe sentence because of this unlawful command influence." (R. 1222, 1224, 1246.)

Summary of Argument

I.

Appellant's verdict was not ambiguous and does not implicate the Double Jeopardy Clause because after the Military Judge found Appellant "not guilty" of the language "on divers occasions," he properly instructed the Members that they could only find Appellant guilty of either his misconduct prior to or

after his smoke break. The Members found Appellant guilty of specifications one and three based on Appellant's misconduct after his smoke break.

II.

The Military Judge did not abuse his discretion denying Appellant's challenge for cause against LT S. LT S's victimization when he was four years old, over twenty-seven-years ago, does not result in implied bias. Just as LT S was not actually biased, so too, most people in LT S's circumstances would not be biased against Appellant.

Further, LT S's ultimate conclusion as to intoxication and consent was consistent with the law.

III.

The Military Judge did not abuse his discretion because the remedies he provided to dissipate the taint of unlawful command influence were within his discretion.

IV.

There was no apparent unlawful command influence based on the President's and other senior leaders' statements. Appellant fails to provide "some evidence" because the statements do not rise to apparent unlawful command influence, and there is no evidence of a nexus between the statements and Appellant's trial because no Member or witness was tainted by the statements.

V.

Appellant was properly informed of the “general nature of the allegations” against him prior to waiving his Article 31 rights. SA Yerevanian sufficiently oriented Appellant that he was suspected of an “indecent assault” from an “incident occur[ing] between [Appellant] and [his] stepsister on April 29th.” Prior to waiving his Article 31 rights, Appellant understood that “they were talking about the sexual encounter [Appellant] had with [his] sister.” The Military Judge did not abuse his discretion because the requirements of Article 31 were met.

VI.

The Military Judge did not abuse his discretion admitting testimony of Appellant’s prior acts of sexual assault under Mil. R. Evid. 413 because under the broad and inclusive rule, the evidence established that by a preponderance of the evidence Appellant similarly sexually assaulted his stepsister ten years prior. The circumstances and Appellant’s actions were similar. Moreover, the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice under Mil. R. Evid. 403.

Further, under Mil. R. Evid. 404(b), the admissibility of Appellant’s prior acts of sexual assault was proper to show Appellant’s intent.

VII.

The Military Judge did not abuse his discretion in admitting F.C.'s statement that Appellant "attacked" her as an excited utterance. F.C. made the statement immediately upon awakening from her intoxicated sleep, was frightened, and crying. Even assuming error, Appellant fails to demonstrate prejudice.

VIII.

Appellant's rehearing for the same offense to which he was previously convicted did not implicate the Double Jeopardy Clause because this Court authorized it. Appellant's original convictions did not create an inconsistent verdict because here the charges were not lesser-included-offenses.

Argument

I.

APPELLANT'S VERDICT IN HIS FIRST TRIAL WAS NOT AMBIGUOUS AND DOES NOT IMPLICATE THE DOUBLE JEOPARDY CLAUSE BECAUSE THE MILITARY JUDGE'S INSTRUCTIONS AND THE FINDINGS SPECIFIED WHICH INSTANCE SERVED AS THE BASIS FOR APPELLANT'S GUILTY FINDING. THEREFORE UNDER ARTICLE 66, UCMJ, THIS COURT HAS AUTHORITY TO REVIEW SPECIFICATIONS 1 AND 2.

A. Standard of review.

Whether a verdict is ambiguous and precludes a Court of Criminal Appeals from performing a factual sufficiency review

under Article 66, UCMJ, is a question of law reviewed *de novo*. *United States v. Ross*, 68 M.J. 415, 417 (C.A.A.F. 2010).

B. Appellant's convictions did not create an ambiguous verdict because the Members provided the specific factual basis for the offenses to which Appellant was convicted, and therefore this Court can conduct its Article 66 review.

1. A verdict is not ambiguous if the factual basis for the offenses is clear from the record.

Where an offense is charged "on divers occasions" but the language is excepted or the guilty verdict is for a single occasion, there is a possibility of an ambiguous verdict requiring the military judge to ensure the factual basis for the offense is clear on the record. *See United States v. Augspurger*, 61 M.J. 189, 192 (C.A.A.F. 2005). If a military judge fails to clarify, it creates an ambiguous verdict. *See United States v. Ross*, 68 M.J. 415 (C.A.A.F. 2010) (finding ambiguous verdict where military judge excepted "on divers occasions" without explanation); *United States v. Trew*, 68 M.J. 364 (C.A.A.F. 2010) (finding ambiguous verdict where military judge excepted "on divers occasion" and failed to make clear statement on record indicating which conduct formed basis for conviction); *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003) (error for military judge to fail to obtain clarification of members' findings where they found appellant guilty of single use and not guilty of "on divers occasions").

In *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003), the Court observed that when the phrase "on divers occasions" is removed from a specification, but the Government has presented evidence of more than one instance of misconduct at trial, the factfinder must specify which instance serves as the basis for the guilty finding or a Court of Criminal Appeals cannot conduct its Article 66 review. *Id*. at 396-97. And "the same unique character of the verdict that precludes any factual sufficiency review also precludes any rehearing in th[e] matter." *Id*.

The *Walters* court advised trial practitioners and military judges to "take appropriate steps through instruction and pre-announcement review of findings to ensure that no ambiguity occurs. *Id*. at 396 (citation omitted).

2. <u>The Military Judge here properly avoided an ambiguous verdict through: (a) his clarifications on the Record; (b) his instructions to the Members; and, (c) the findings worksheet. This Court can proceed with Article 66, UCMJ, review</u>.

In line with the Court of Appeals for the Armed Forces' reasoning in *Augspurger*, *Ross*, *Trew*, and *Walters*, after making a "not guilty" finding to the language "on divers occasions," the Military Judge ensured the factual basis for Appellant's convictions was clear on the record. (*R. 681.)[4] Appellant,

[4] Citations to Appellant's first trial will include an asterisk immediately preceding the citation, e.g., (*R. "page number".). Citations to Appellant's second trial will use normal citations.

however, misleadingly characterizes the Military Judge's actions as a sua sponte R.C.M. 917 ruling.

While discussing Trial Defense Counsel's motion to dismiss for unreasonable multiplication of charges and multiplicity, the Military Judge stated that "there is an easy way out for [him], and that is simply to enter a finding of not guilty with respect to the words 'on divers occasions'." (*R. 680-81.) This ruling was in response to Trial Defense Counsel's motion, and the Military Judge specifically stated that he was "not sure that that gives the defense everything that it wants" with regard to its motion. (*R. 680.)

As soon as the Military Judge ruled, he discussed Members' instructions and the findings worksheet, both of which further clarified that ruling. (*R. 681-82; Appellate Ex. LVIII.) Trial Defense Counsel objected to neither the findings worksheet nor the instructions. (*R. 693; 774-75.) Trial Defense Counsel submitted no proposed instructions or alternative findings worksheet of his own.

The Military Judge immediately instructed the Members that he had "entered a not-guilty finding" to the "language, 'on divers occasions'" and that they could find Appellant guilty of only one occasion. (*R. 696.)

Moreover, the findings worksheet allowed the Members to specify which conduct they found Appellant guilty of:

Appellant's misconduct prior to, or after, his smoke break. (*R. 696, 771-79; *Appellate Ex. LVIII.) The Members chose the *latter*: they convicted Appellant of misconduct after the smoke break; the Record clearly evinces this. (*Appellate Ex. LVIII.) This clarification satisfies the requirements outlined in *Walters* and its progeny, avoiding an ambiguous verdict.

Appellant further asserts that his misconduct after the smoke break was broken up into two further separate instances of misconduct. But all parties, including all Trial Defense Counsel at both Appellant's first and second trials, agreed that Appellant's offenses occurred at two, not three, separate times: (a) before the smoke break; and (b) after the smoke break. (R. 986, 1005; *R. 678-79, 774-75; *Appellate Ex. IV at 9.) Until now, on appeal, Appellant has never claimed that his post-smoke break misconduct was actually two separate crimes.

Appellant's misconduct after the smoke break was one continuous sexual assault because after his smoke break, Appellant entered the office while F.C. was asleep, lifted the blanket off her, moved her shorts and underwear, and penetrated her with his fingers and tongue. (R. 648, 653, 708-09, 711.) Although at some point Appellant attempted to climb onto the recliner resulting in a loud noise, this was not a break in the continuous sexual assault. (R. 64, 653, 712.) To continue his sexual assault, Appellant did not have to again lift up F.C.'s

blanket, move her shorts and underwear to penetrate her because the sexual assault never terminated. As the Military Judge, Trial Defense Counsel, and Trial Counsel agreed, Appellant's sexual assault of F.C. after the smoke break was a continuous offense of which Appellant was properly convicted.

As such, the Military Judge's affirmative actions avoided an ambiguous verdict because the Members were able to provide the specific factual basis for the convictions. Therefore, this Court can conduct its Article 66, UCMJ, review.

II.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING THE CHALLENGE FOR CAUSE AGAINST LT S BECAUSE LT S DOES NOT REMEMBER MUCH OF HIS VICTIMIZATION IN A TWENTY-SEVEN YEAR OLD SEXUAL ASSAULT AND HE DOES NOT "HARBOR ANY KIND OF RESENTMENT OR ANGER" AND MOVED PASSED THE EXPERIENCE A LONG TIME AGO. FURTHER, LT S'S ULTIMATE VIEW ON CONSENT AND INTOXICATION ARE CONSISTENT WITH THE LAW. UNDER THESE CIRCUMSTANCES, MOST PEOPLE IN HIS POSITION WOULD NOT BE BIASED AGAINST APPELLANT.

A. Standard of review.

A military judge's decision whether to grant a challenge for cause based on actual bias is reviewed for an abuse of discretion. *United States v. Leonard*, 63 M.J. 398, 402 (C.A.A.F. 2006) (citations omitted). Implied bias is reviewed under the same standard, but less deference is due when the judge does not articulate the correct test on the record. *See United States v.*

Clay, 64 M.J. 274, 277 (C.A.A.F. 2007); *United States v. Bagstad*, 68 M.J. 460, 462 (C.A.A.F. 2010) (citations omitted).

The Military Judge here applied the liberal grant mandate on the Record in denying the challenge for cause. (R. 581, 587-88.) Therefore, his ruling warrants increased deference.

B. No implied bias exists from LT S's previous sexual assault experience when he was four years-old or his view of intoxication and consent.

The implied bias test has been enunciated both by the Court of Appeals for the Armed Forces and this Court in varying ways from case to case and year to year. But posed precisely, it asks whether most people, in the same position as the court member, would be prejudiced; if so, such members should be excused. *See United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006); *United States v. Briggs,* 64 M.J. 285, 287 (C.A.A.F. 2007) (explicitly considering circumstances of member but implicitly concluding that any member in those circumstances would be biased); *Leonard*, 63 M.J. at 402 (same); *United States v. Warden,* 51 M.J. 78 (C.A.A.F. 1999) (same). The test for implied bias is an objective one. *Moreno*, 63 M.J. at 134; *see also United States v. Bragg*, 66 M.J. 325, 326-27 (C.A.A.F. 2008). The burden of persuasion rests with the party making the challenge. R.C.M. 912(f)(3); *see also United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002).

"[W]hen there is no actual bias, implied bias should be invoked rarely." *United States v. Warden*, 51 M.J. 78, 81-82 (C.A.A.F. 1999)(citation and quotation omitted). Courts have found that the "doctrine of implied bias should be reserved for 'exceptional situations' in which objective circumstances cast concrete doubt on the impartiality of a juror." *United States v. Torres,* 128 F.3d 38, 46 (2d Cir. 1997)(citing *Smith v. United States*, 455 U.S. 209, 222 (O'Connor, J., concurring)).

1. <u>No implied bias exists from LT S's victimization in an over twenty-seven-year-old sexual assault when he was four years-old because under those circumstances, most people in his position would not be biased against Appellant</u>.

A member is not *per se* disqualified simply because the member or a close relative was the victim of a similar crime. *See*, e.g., *United States v. Reichardt*, 28 M.J. 113, 116 (C.M.A. 1989) (larceny victim not disqualified in robbery case); *United States v. Porter*, 17 M.J. 377 (C.M.A. 1984) (larceny victim not disqualified in robbery case); *United States v. Spicer*, No 201000241, 2010 CCA LEXIS 397 (N-M. Ct. Crim. App. Dec. 21, 2010) (member not disqualified in rape case where his friend was raped even though member was still angry); *United States v. Moreno*, No 200100715, 2009 CCA LEXIS 225 (N-M. Ct. Crim. App. Jun. 23 2009) (member not disqualified in rape case where close cousin was rape victim even where military judge failed to cite to the liberal grant mandate in denying challenge).

In *Porter*, the appellant was convicted of robbery and assault consummated by a battery. 17 M.J. at 377. During *voir dire*, a member stated that he was the victim of a larceny the day before the trial began. *Id*. at 378. In finding no implied bias, the court found that the "positive assurances" of the member removed any implied bias. *Id*. at 379.

In *Lucas*, a member's wife was the victim of a violent assault and another member's daughter had recently been violently raped. *United States v. Lucas*, No 200300760, 2005 CCA LEXIS 293, *26-27 (N-M. Ct. Crim. App. Sep. 15, 2005). The appellant was charged with multiple assaults, and cruelty and maltreatment. *Id*. at *1. As the crimes were similar, the appellant challenged both members. *Id*. at *26-28. But one member "stated that he could look at the facts and sentence issues fairly" and the other stated that the incident would not cloud his ability to be impartial. *Id*. This Court found that the military judge did not abuse his discretion in denying the challenges because "[b]ased on the totality of these circumstances" the members' service on the panel "did not raise a significant question of legality, fairness, or impartiality, to the public observer". *Id*. at *30.

Similar to *Porter* and *Lucas*, and in line with *Reichardt*, based on the totality of the circumstances, LT S's service on

the panel does not raise concerns and most people in LT S's position would not be biased against Appellant.

In denying the challenge, the Military Judge compared and contrasted LT S's demeanor with another Member's responses that the Military Judge had dismissed under the liberal grant mandate. (R. 585-87.) The other Member was dismissed because the charge sheet invoked feelings in him of anger over a similar sexual assault of his wife. (R. 585-87.) To contrast LT S with the dismissed Member, the Military Judge stated,

> [LT S], in contrast to [the other member], did have a different affect. What gave me pause for concern with [the other member] was the interaction with him in the courtroom, and seeing his expressions and seeing how he reacted. His hesitancy, his pause, his concern, that made that case . . . a close call.

(R. 587.)

The Military Judge properly found no actual or implied bias with LT S because LT S: (1) was candid and forthright with the Military Judge; (2) "[didn't] recall much in the way of details" regarding the sexual assault when he was four years-old; (3) did not "harbor any kind of resentment or anger"; (4) was not in therapy; (5) did not participate in a trial as a child; (6) stated that he had moved passed that period of his life as it happened over twenty-seven years ago; (7) stated that he could consider the full range of punishments; and (8) believed he could be fair and impartial. (R. 473-74, 479-80, 587-88.)

The Military Judge found that the "simple fact that that was part of [LT S's] history, that in and of itself does not give me pause for concern or an ability to find implied bias, particularly given his candor and demeanor before the court." (R. 588.) The Military Judge properly held that an objective observer would not have substantial doubt about the fairness. (R. 587-88.)

Moreover, the Military Judge clearly understood the rule for implied bias and the liberal grant mandate. In denying the challenge to LT S for cause, the Military Judge cited and articulated a lengthy and thoughtful analysis of the liberal grant mandate on the record. (R. 581, 587-88.)

Appellant relies entirely on *United States v. Daulton* to support his argument, but *Daulton* is distinguishable from this case. 45 M.J. 212 (C.A.A.F. 1996). In *Daulton*, the appellant was charged with indecent acts with children. *Id*. at 213. A member's sister was likewise abused as a child by her grandfather. *Id*. at 214. The sister was still undergoing mental therapy and had been for many years. *Id*. When asked if she could separate her sister's incident with the appellant's case, the member stated, "I believe so." *Id*. When asked if believing her sister would affect whether she believes the testifying children, the member responded, "No, it shouldn't." *Id*. In finding that the military judge abused his discretion

for denying the challenge for cause, the Court of Appeals for the Armed Forces based its ruling on: (1) the member's sister was the same age as the victims when she was abused; (2) the member was shocked and initially disbelieving when her sister told her about the sexual abuse; and (3) the member's responses of "I believe so" and "No, it shouldn't" were less than resounding. *Id*. at 217-18.

Unlike *Daulton*, here LT S's sexual assault when he was four years-old does not reasonably suggest implied bias. First, unlike *Daulton*, LT S was a victim over twenty-seven years before, when he was small child, overcame it many years before sitting as a member, and had no anger or resentment toward the person who sexually assaulted him. (R. 477, 479-80.) Further, LT S does not even remember much about the assault. (R. 479.)

Second, unlike *Daulton*, the crimes here are not similar in the following ways: the victim here was an intoxicated and asleep female adult, not a four year-old male child; Appellant's prior sexual assault of F.C. was also post-pubescent; and the Record lacks details of LT S's sexual assault when he was four years-old to find any similarities. (R. 74-78, 83-86, 479-84.) Appellant had the burden to establish those facts in support of his challenge and failed to do so. *Warden*, 51 M.J. at 81; R.C.M. 912(f)(3).

Third, unlike *Daulton*, LT S here gave solid and resounding responses to the *voir dire* questions. LT S stated, "I don't harbor any kind of resentment or anger." (R. 480.) When asked if he would be fair and impartial even if presented with evidence of child sexual abuse, LT S stated, "Yes, sir, I would." (R. 484.) The Military Judge based his findings on LT S's resounding responses, his candor and demeanor. (R. 588.)

Fourth, unlike *Daulton*, nothing in the Record here indicates that most people in the same position as LT S would have an inability to deliberate solely on the evidence and adhere closely to the Military Judge's instructions. Appellant adduced no evidence at trial, or now, that most people in the same position as LT S who had been victimized by a factually dissimilar crime decades earlier, would be biased. *See Warden*, 51 M.J. at 81 (appellant carries burden to establish facts in support of challenge).

Under these same circumstances, most people in LT S's situation would not be biased. And no "exceptional" circumstances exist to cast doubt as to his impartiality.

2. <u>No implied bias exists from LT S's view of intoxication and consent because nothing in his clarifying statements indicated an inconsistency with the law, and regardless he stated he would follow the Military Judge's instructions</u>.

In *Napolitano*, a member made a written statement that suggested his distaste of defense attorneys. 53 M.J. at 166.

The member's opinion evolved through discussions with the military judge and trial counsel during *voir dire*, ultimately resulting in the member directly stating that he "was not actually biased against appellant or his civilian defense counsel." *Id*. at 167. In finding no actual or implied bias, the Court of Appeals for the Armed Forces focused on the member's retraction of his initial opinion during *voir dire* and his final belief that he had "no bias". *Id*.

Similarly, during individual *voir dire* here, LT S indicated that he thought that if a person consumes alcohol to the point of intoxication, that removes his or her ability to consent. (R. 480-81.) He defined "intoxication" as an "[i]nability or loss of coordination, loss of higher-level thinking ability". (R. 481.) Like *Napolitano*, as the discussion progressed, LT S's original statements evolved. Ultimately, when asked by Trial Defense Counsel whether a crime occurs where a person is legally unable to drive a car due to intoxication and a person has sex with that intoxicated person, LT S properly stated that "it would entirely depend on all the facts" and that sex "between two people that have been drinking" even to the point of intoxication does not "in and of itself make[] it a crime. (R. 481.) When pressed by Trial Defense Counsel, LT S repeated that it would depend on the "facts of any particular situation" and that he "can't say one way or another at this point". (R. 482.)

Nothing in his clarifying statements—specifically whether a crime had been committed—indicated an inconsistency with the law. In fact, his views were consistent with the law because he acknowledged that a crime may not have been committed even if the person was intoxicated because it depended on the facts and circumstances. (R. 482.) As the *Napolitano* court stated, "most people in [LT S]'s position would not consider themselves bound by their initial comments suggesting a bias." 53 M.J. at 167.

Further, LT S affirmatively stated that he would follow the Military Judge's instructions on the law which ultimately defined consent and substantial incapacitation. (R. 398.)

No "exceptional" circumstances existed that cast doubt as to LT S's impartiality. Based on these circumstances, most people, in the same position as LT S, would not be prejudiced. As such, the Military Judge did not abuse his discretion in finding that LT S had no implied bias and denying the challenge for cause against him.

III.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION BY PROVIDING APPROPRIATE REMEDIES TO DISSIPATE THE TAINT OF THE UNLAWFUL COMMAND INFLUENCE.

A. Standard of review.

The Military Judge's findings of fact are reviewed for an abuse of discretion, but the questions of unlawful command

influence (UCI) flowing from those facts are reviewed *de novo*. *United States v. Reed*, 65 M.J. 487, 488 (C.A.A.F. 2008)(quoting *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994)).

The Military Judge's remedies for unlawful command influence are reviewed for an abuse of discretion. *United States v. Douglas,* 68 M.J. 349, 354 (C.A.A.F. 2010).

B. Unlawful command influence is influence that "corrupts the truth-seeking function of the trial process".

Unlawful command influence involves command influence that "corrupt[s] the truth-seeking function of the trial process." *United States v. Thomas*, 22 M.J. 388, 393-94 (C.M.A. 1986).

If the defense raises UCI by showing "some evidence" that it exists, then the burden shifts to the United States to demonstrate beyond a reasonable doubt either that there is no UCI or that the proceedings will be untainted. *United States v. Lewis,* 63 M.J. 405, 413 (C.A.A.F. 2006) (citing *United States v. Stoneman,* 57 M.J. 35, 41 (C.A.A.F. 2002)).

The United States may meet this burden at trial by producing evidence proving that the unlawful command influence will not affect the proceedings or if on appeal, by persuading the appellate court that the unlawful command influence had no prejudicial impact on the court-martial. *United States v. Biagase,* 50 M.J. 143, 151 (C.A.A.F. 1999). The Court must

consider both actual and apparent unlawful command influence. *United States v. Reed,* 65 M.J. at 488.

If the appellant shows some evidence of apparent unlawful influence, "[t]o find that [it] has been ameliorated and made harmless beyond a reasonable doubt, the United States must convince [the court] that the disinterested public would now believe [the appellant] received a trial free from the effects of unlawful command influence." *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006).

C. Assuming, *arguendo*, unlawful command influence existed, the Military Judge did not abuse his discretion in ameliorating the effects of any UCI by providing Appellant with appropriate remedies.

The military judge is the "last sentinel" in the trial process to protect a court-martial from UCI. *United States v. Harvey*, 64 M.J. 13, 14 (C.A.A.F. 2006). Reviewing courts are to grant a military judge "broad discretion" in crafting a remedy to remove the taint of unlawful influence, and are admonished not to reverse "so long as the decision remains within that range." *Douglas*, 68 M.J. at 354.

With respect to the remedies taken by the Military Judge in this case, this Court need only consider whether the appearance of unlawful command influence was ameliorated and "the disinterested public would now believe [Appellant] received a

trial free from the effects of ”unlawful command influence.” *Lewis*, 63 M.J. at 415.

Here, the Military Judge found that Appellant’s sentencing witness, Chief F, was affected because his Commanding Officer and Senior Enlisted Leader at the time of Appellant’s first trial told him he was an “inexperienced chief” after he testified at Appellant’s first pre-sentencing hearing because he testified that Appellant should remain in the Navy. (R. 1192.)

Although Chief F testified favorably at Appellant’s second pre-sentencing hearing, he was not as favorable as his testimony at Appellant’s first pre-sentencing hearing despite the fact he was no longer with the same command. (R. 1194.) As a result of the influence, he altered his testimony at sentencing to indicate that Appellant would not be fit for the Navy, but he would work with Appellant outside of the Navy. (R. 1193-94.)

The Military Judge recognized and addressed the influence by providing remedies to ensure a fair proceeding and to ensure that the public’s confidence in the court-martial was maintained.

First, the Military Judge provided Trial Defense Counsel with two options: (a) have Chief F testify again without the fear of repercussions; or (b) provide Chief F’s previous testimony from the first trial to the Members for their consideration. (R. 1213-15.) Trial Defense Counsel

elected for option two——providing the Members with Chief F's previous testimony. (R. 1215.)

Second, upon providing the Members with Chief F's previous statement, the Military Judge included an explanation and instruction favorable to Appellant. The Military Judge informed the Members of the influence, the effect it had on Chief F's testimony at pre-sentencing, and the importance of Appellant receiving "an absolutely fair trial and sentencing hearing". (R. 1225.) All members stated that they would read Chief F's previous statement prior to deliberations on sentencing. (R. 1225.)

Third, after closing arguments by counsel, the Military Judge further instructed the Members that: (1) the unlawful command influence prevented a witness from testifying "more favorabl[y]", "specifically that [Appellant] should be retained in the Navy"; (2) they "should consider . . . Chief [F's]" testimony "that [Appellant] be retained in the Navy during . . . deliberations"; (3) they "may infer that the United States, represented . . . by the prosecution, is responsible for that [UCI]"; and (4) they "may . . . provide [Appellant] relief in the form of a less-severe sentence because of this [UCI]". (R. 1245-46.)

As the Military Judge appropriately found, these remedies eliminated any unfairness concerns the public had about the

military justice system in general and Appellant's court-martial in particular. As such, the Military Judge did not abuse his discretion in providing these remedies to ameliorate the UCI as the remedies were well within his discretion.

IV.

APPELLANT'S COURT-MARTIAL WAS FREE FROM APPARENT UNLAWFUL COMMAND INFLUENCE BECAUSE THE PRESIDENT'S AND OTHER SENIOR LEADERS'[5] STATEMENTS DO NOT AMOUNT TO "SOME EVIDENCE" AND THERE IS NO NEXUS BETWEEN THE STATEMENT AND APPELLANT'S TRIAL. MOREOVER, THERE WAS NO PREJUDICIAL IMPACT.

A. Standard of review.

The Military Judge's findings of fact are reviewed for an abuse of discretion, but the questions of unlawful command influence flowing from those facts are reviewed *de novo*. *United States v. Reed*, 65 M.J. 487. 488 (C.A.A.F. 2008)(quoting *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994)).

B. Unlawful command influence is influence that "corrupts the truth-seeking function of the trial process".

Unlawful command influence involves command influence that "corrupt[s] the truth-seeking function of the trial process." *United States v. Thomas*, 22 M.J. 388, 393-94 (C.M.A. 1986); *see* Article 37, UCMJ; R.C.M. 104. Appellant here only alleges

[5] Appellant makes a general reference to other senior leaders' statements and cites to news stories and other articles in Appellate Exhibit XI, but fails to indicate which statements constitute UCI. (Appellant's Br.) Therefore, the United States will refer to senior leaders' statements generally.

apparent UCI. (Appellant Br. at 37.) Therefore, he has the initial burden to raise UCI by showing "some evidence" that it exists. *United States v. Harvey*, 64 M.J. 13, 14 (C.A.A.F. 2006). Appellant may meet this burden by showing "facts which, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings." *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999)(citation omitted).

"[T]he appearance of unlawful command influence will exist where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006). If the appellant shows some evidence of apparent UCI, "[t]o find that [it] has been ameliorated and made harmless beyond a reasonable doubt, the United States must convince [the court] that the disinterested public would now believe [the appellant] received a trial free from the effects of [UCI]." *Id.*

C. <u>There is no evidence of apparent UCI because the President's and senior leaders' statements alone do not meet the "some evidence" requirement and further there was no prejudicial impact on Appellant's trial</u>.

On May 7, 2013, the President of the United States stated that assailants of sexual assault should be "held accountable:

prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged." (Appellate Ex. XI at Encl. 13.)

1. The Military Judge found no apparent unlawful command influence.

Although the Military Judge here mistakenly found "some evidence" based solely on the statements by senior leadership without a nexus to Appellant's trial, he appropriately found that "beyond a reasonable doubt the public comments do not amount to unlawful command influence, either actual or apparent." (Appellate Ex. LV at 5.)

The Military Judge left open the possibility that apparent unlawful command influence may arise at trial with the Members. (Appellate Ex. LV at 5 n.4.) As a result, the Military Judge stated that he would allow "liberal individual *voir dire*" to ensure there is no apparent unlawful command influence. (Appellate Ex. LV at 5 n.4.) In addition to the liberal *voir dire*, the Military Judge also read the memorandum from the Secretary of Defense dated August 6, 2013 to the Members. (R. 404-05.)

The Memorandum makes it clear that senior leaders' and the President's comments in no way were directed at influencing outcomes of cases or sentences and that independent judgment is expected. (R. 404-05.) The Memorandum was directed, *inter alia*, at the members of courts-martial. (R. 405.) It also

states that the independent judgment "must be based purely on the facts of each individual case, not personal interests, career advancement or an effort to produce what is thought to be the outcome desired by senior officials, military or civilian. (R. 405.) Further, the Memorandum makes it clear that "[t]here are no expected or required dispositions, outcomes or sentences in any military-justice case other than what result from the individual facts and merits of a case and the application to the case of the fundamentals of due process of law." (R. 406.)

2. <u>This Court should likewise find no apparent unlawful command influence because Appellant fails to show "some evidence" of apparent unlawful command influence</u>.

To show "some evidence", Appellant must: (1) present evidence that if true, would constitute unlawful command influence, and (2) show how the alleged UCI has a "logical connection to the court-martial, in terms of its potential to cause unfairness" at his trial. *Biagase*, 50 M.J. at 150.

Here, Appellant relies exclusively on the President's and other senior leaders' statements as his sole basis for his apparent unlawful command influence argument. Besides the statements, no other evidence was provided at trial and Appellant fails to point to anything in the Record to support his argument or to show a "logical connection" to his trial.

In looking at the first prong, the President's and other senior leaders' statements do not constitute apparent unlawful command influence. The senior leaders have a justifiable concern in maintaining discipline and responding to and preventing illegal practices, especially those that have received considerable adverse publicity in the news media such as sexual assault.

Turning to the second prong, Appellant further fails to show a nexus between the statements and his trial, and how that connection could have potentially caused unfairness. There is no evidence that a potential witness, a member, or another key actor was tainted by these comments.

No evidence was elicited that a member was influenced unlawfully by the President's and other senior leaders' statements. And Trial Defense Counsel made no challenges for cause based on apparent unlawful command influence. (R. 583-94.)

Contrary to Appellant's assertion, all members indicated that they would "give fair consideration to the entire range of permissible punishments in this case" including "the least severe which could be no punishment at all". (R. 420.) This pronouncement came after a few confusing questions posed by Trial Defense Counsel which elicited potentially problematic responses by the Members. (R. 419.) But after the Military

Judge appropriately explained their role in sentencing, each member correctly stated that they could consider “the entire range of permissible punishments” including “no punishment at all”. (R. 420.) During individual *voir dire*, the Members reiterated that they “could consider the whole range” at sentencing. (R. 427-579.) The only potential member that indicated that he could not consider the full range was challenged and dismissed for cause. (R. 588-91.)

Moreover, Appellant mistakenly points to the increased sentence in Appellant’s rehearing as “evidence” that the Members must have been inappropriately influenced. But there is no evidence linking the increased sentence to unlawful command influence. Other reasons for the increased sentence are apparent from the Record, e.g., the Members in the second trial were aware of Appellant’s previous sexual assault of F.C. Appellant’s assertion is speculative and unsupported by the Record.

As the statements were not UCI and with no evidence of the nexus between the statements and Appellant’s trial, especially considering a nexus was not alleged by Appellant, Appellant fails to show “some evidence” of apparent unlawful command influence. (Appellant Br. at 35-38.) The burden never shifts to the United States.

D. Even assuming Appellant met his initial burden, the disinterested public would now believe that Appellant received a trial free from the effects of apparent unlawful command influence.

In 1996 and 1997, the sexual abuse of trainees by drill instructors at the Army's Aberdeen Proving Grounds was the subject of intense media attention. *United States v. Ayers,* 54 M.J. 85, 92-94 (C.A.A.F. 2000); *United States v. Simpson*, 58 M.J. 368, 371-72 (C.A.A.F. 2003). Senior officials in the Army made numerous statements on the Army's "zero tolerance" of sexual harassment, and demanded "no leniency" and "severe punishment" for the offenders. *Simpson*, 58 M.J. at 376. The Court of Criminal Appeals for the Armed Forces found beyond a reasonable doubt that the statements did not taint the appellant's proceeding. *Id.*

Similarly, the President's and other senior leaders' statements here did not taint Appellant's proceeding. The Military Judge read the Memorandum to the Members ensuring they understood their role as independent factfinders. Further, the statements had no prejudicial impact because there were no witnesses silenced as a result of the President's and other leaders' statements. The disinterested public would now believe Appellant received a trial free from the effects of apparent unlawful command influence.

V.

APPELLANT WAS PROPERLY INFORMED OF THE "GENERAL NATURE OF THE ALLEGATIONS" AGAINST HIM PRIOR TO WAIVING HIS ARTICLE 31 RIGHTS AND THEREFORE THE REQUIREMENTS OF ARTICLE 31 WERE SATISFIED AND THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN ADMITTING APPELLANT'S STATEMENTS AT TRIAL.

A. Standard of review.

This Court reviews the denial of a motion to suppress a confession for an abuse of discretion, *United States v. Pipkin*, 58 M.J. 358, 360 (C.A.A.F. 2003)(citing *United States v. Simpson*, 54 M.J. 281, 283 (C.A.A.F. 2000)), and accepts the military judge's findings of fact unless they are clearly erroneous. *Simpson*, 54 M.J. at 283(internal citation omitted).

B. Considered in light of the surrounding circumstances and Appellant's admitted understanding of the general nature of the allegations, SA Yerevanian properly oriented Appellant to the "general nature" of the allegations against him.

Article 31(b) requires that the person requesting a statement from an accused "first inform[] him of the nature of the accusation". "'[A]dvice as to the nature of the charge need not be spelled out with particularity of a legally sufficient specification'". *Pipkin*, 58 M.J. at 360 (quoting *United States v. Davis*, 8 C.M.A. 196 (C.M.R. 1957)). Moreover, "'[i]t is not necessary to spell out the details of [an accused's] connection with the matter under inquiry with technical nicety.'" *Pipkin*, 58 M.J. at 360 (quoting *United States v. Rice*, 11 C.M.A. 524,

526 (C.M.R. 1960)). Further, "[i]t is not necessary that an accused . . . be advised of each and every possible charge under investigation, nor that the advice include the most serious or any less-included charges". *Simpson*, 54 M.J. at 284.

The accused must simply "be informed of the general nature of the allegation, to include the area of suspicion that focuses the person toward the circumstances surrounding the event." *Simpson*, 54 M.J. at 284. "[I]t is enough if, from what is said and done, the accused knows the general nature of the charge." *Pipkin*, 58 M.J. at 360 (quoting *Davis*, 8 C.M.A. at 196).

A partial advice, considered in light of *the surrounding circumstances* and *the manifest knowledge of the accused*, can be sufficient to satisfy this requirement of Article 31[.]'" *Pipkin*, 58 M.J. at 360 (quoting *Davis*, 8 C.M.A. at 196)(emphasis added). A factor to consider, *inter alia*, is "whether the conduct was within the frame of reference supplied by the warnings". *Simpson*, 54 M.J. at 284.

In *Simpson*, investigators learned of allegations against the appellant that he had sexually abused a nine year-old. 54 M.J. at 282. The suspected offenses included rape, sodomy, assault, failure to obey an order, and indecent acts or liberties with a child. *Id*. But the investigator, prior to advising the appellant of his Article 31(b) rights, only informed the appellant "that the matter he was investigating was

‘indecent acts or liberties with a child.’” *Id*. at 284. There was no mention of rape, sodomy, or assault. *Id*. Appellant waived his rights and provided an incriminating statement. *Id*. In finding that the phrase “indecent acts or liberties with a child” properly oriented the appellant to all the allegations, including the allegation of rape and sodomy, the Court of Appeals for the Armed Forces stated that “[t]he offenses of indecent acts and sodomy are sufficiently related”. *Id*.

Similarly, SA Yerevanian here sufficiently oriented Appellant toward the nature of the accusation against him because she told Appellant that he was suspected of an “indecent assault” from an “incident occur[ing] between [Appellant] and [his] stepsister on April 29th”. (R. 17-19.) Like *Simpson*, the term “indecent assault” sufficiently indicated a sexual offense.

Although SA Yerevanian mistakenly indicated an offense no longer a part of the UCMJ, it was not necessary to “spell[] out with particularity . . . a legally sufficient specification”. *See Pipkin*, 58 M.J. at 360. Appellant asserts that since “indecent assault” was no longer a crime under the UCMJ, using the phrase was not sufficient. Like *Simpson*, however, the “general nature of the allegation” is all that was required, which was provided to Appellant.

Appellant spends over five pages independently defining “indecent” and then “assault”. (Appellant’s Br. at 44-48.) But

the words were not presented to Appellant independent of each other. Appellant was informed that he was suspected of an "indecent assault." Appellant's argument that this could have been a "rude" assault or "immodest" assault is unreasonable. (Appellant's Br. at 47.) The Military Judge properly found that "indecent" in this context "implie[d] conduct of a sexual nature; the word has no other rational meaning." And combined with "assault", "the words convey the nature of the suspected offense to be an offensive touching of a sexual nature." (Appellate Ex. LIV at 5.)

Moreover, implicit in Appellant's argument is an acknowledgement that "indecent assault" was sufficient at some point in the past to orient an accused to the general nature of a sexual assault type crime. (Appellant's Br. at 42.) An accused's understanding of the term "indecent assault" would not change simply because the offense is not currently in the UCMJ. Appellant fails to cite a single case where "indecent assault" was "too technical" or somehow insufficient to orient an accused to the general nature of the crime. (Appellant's Br. at 42.)

Further, Appellant testified and admitted that prior to waiving his rights, he understood that SA Yerevanian was "talking about the *sexual encounter* [Appellant] had with [his] sister" that took place on April 29, 2011. (R. 979, 994

(emphasis added).) He also admitted he understood that the term "assault" indicated a crime. (R. 993.)

Considered in light of the surrounding circumstances, including Appellant's admitted understanding of the general nature of the allegations against him prior to waiving his rights, the requirements of Article 31 were satisfied. And the Military Judge did not abuse his discretion.

VI.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION BY ADMITTING TESTIMONY OF APPELLANT'S PRIOR ACT OF SEXUAL ASSAULT UNDER BOTH MIL. R. EVID. 413 AND 404(B) BECAUSE: (1) UNDER MIL. R. EVID. 413 A PREPONDERANCE OF THE EVIDENCE SHOWED THAT APPELLANT COMMITTED A SIMILAR SEXUAL ASSAULT AND THE PROBATIVE VALUE OF THE EVIDENCE WAS NOT SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE; AND (2) UNDER MIL. R. EVID. 404(B) THE EVIDENCE SHOWED INTENT.

A. The standard of review is abuse of discretion.

A military judge's decision to admit evidence is reviewed for an abuse of discretion. *United States v. Berry*, 61 M.J. 91 (C.A.A.F. 2005). The challenged action must be "arbitrary, fanciful, clearly unreasonable," or "clearly erroneous." *United States v. Miller*, 43 M.J. 63, 65 (C.A.A.F. 1997).

B. Under the broad and inclusive Mil. R. Evid. 413, admission of Appellant's prior sexual assault of F.C. was not an abuse of discretion.

Mil. R. Evid. 413 is broad in scope and inclusive in nature and is "an exception to Rule 404(b)'s general prohibition

against the use of [an appellant]'s propensity to commit crimes". *United States v. Wright*, 53 M.J. 476, 480 (C.A.A.F. 2000). The plain language of Mil. R. Evid. 413 states,

> In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant.

Mil. R. Evid. 413 (a).

The inclusive nature is plainly stated: "This rule shall not be construed to limit the admission or consideration of evidence under any other rule." Mil. R. Evid. 413(c).

Case law has amplified and fortified the plain language of this rule. Inherent in Mil. R. Evid. 413 is "a general presumption in favor of admission." *Berry*, 61 M.J. at 95 (*citing Wright*, 53 M.J. at 476). In *Wright*, this Court articulated three threshold requirements for admissibility:

> 1. The accused is charged with an offense of sexual assault;
> 2. The evidence proffered is evidence of defendant's commission of another offense of sexual assault; and
> 3. The evidence is relevant under [Mil. R. Evid.] 401 and 402.

53 M.J. at 482 (citation and internal quotation marks omitted).

If the threshold requirements are met, this Court determined that the military judge must apply a balancing test under Mil. R. Evid. 403, considering the following factors: "strength of proof of the prior act——conviction versus gossip;

probative weight of evidence; potential for less prejudicial evidence; distraction of factfinder; time needed for proof of prior conduct; temporal proximity; frequency of prior acts; presence or lack of intervening circumstances; and relationship between the parties." *Id*. (citations omitted). No single factor is dispositive. *Berry*, 61 M.J. at 95. The *Berry* court also stated that the military judge should make detailed findings on the record or he will "receive less deference from the court". *Id*. at 96.

For these reasons, it is clear that Mil. R. Evid. 413 establishes a broad range of evidence admissible for consideration on any relevant matter. As long as the Government follows the procedural guidelines in Mil. R. Evid. 413 and the Military Judge evaluates the evidence according to the Court's guidance in *Berry* and *Wright*, there is no abuse of discretion.

Here, Appellant was charged with an offense of sexual assault and evidence was proffered regarding his previous commission of another offense of sexual assault, satisfying the first two requirements under Mil. R. Evid. 413.

The third requirement under Mil. R. Evid. 413 was also satisfied. The evidence of Appellant's previous sexual assault on his stepsister is highly probative and relevant under Mil. R. Evid. 401 and 402 because of the significant similarities between the offenses.

Appellant mistakenly focuses much of his argument on the differences in how F.C. reacted to the sexual assault as opposed to the similarities of Appellant's actions. But F.C.'s reaction to the sexual assault is not what makes Appellant's misconduct probative. Appellant's actions are highly probative because of the similarities of the circumstances and his actions during both offenses. Both sexual assaults involved: (1) the same victim; (2) the same step-sibling relationship; (3) Appellant and F.C. not at their home; (4) F.C. sleeping and vulnerable at the time of the sexual assault; (5) Appellant first pulling down F.C.'s underwear to expose her vagina; and (6) Appellant attempting to, or succeeding at, penetrating F.C.'s vagina without her consent.

The Military Judge's findings of fact reflect each of the above similarities and are supported by the Record of Trial. (Appellate Ex. XXXVIII at 5.)

C. <u>The Military Judge appropriately conducted a Mil. R. Evid. 403 analysis and found that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice</u>.

The Military Judge appropriately performed a Mil. R. Evid. 403 prejudice analysis and found that there was no unfair prejudice or confusion. (Appellate Ex. XXXVIII at 10.)

In making his conclusion, the Military Judge examined the nine non-exhaustive factors provided by the Court of Appeals for

the Armed Forces. (Appellate Ex. XXXVIII at 7-10); *See United States v. Ediger*, 68 M.J. 243 (C.A.A.F. 2010); *Berry*, 61 M.J. 91 (C.A.A.F. 2005). He found that the factors favoring admission included: (1) strength of proof of prior act; (2) the probative weight of the prior act; (3) the relationship of the parties as step-siblings which was the reason both were in the same house for the celebrations; (4) F.C.'s testimony was the least prejudicial evidence; (5) the time required was minimal as it involved the same victim that would testify; and (6) as the probative value focuses directly on Appellant's sexual interest in F.C., there would be no distracting effect. The only factors favoring potential exclusion was the frequency of the prior acts and the temporal proximity as it had been ten years since the previous sexual assault.

The Military Judge found that the evidence weighed in favor of admission. (Appellate Ex. XXXVIII at 7-10.) His findings are supported by the Record and his conclusions of law are correct. As such, Appellant's prior sexual act was properly admitted under Mil. R. Evid. 413 for the propensity inference.

D. <u>The admission of Appellant's prior sexual assault on F.C. to show Appellant's intent was proper under Mil. R. Evid. 404(b)</u>.

The scope of Mil. R. Evid. 404(b), in contrast, is more limited than that of Mil. R. Evid. 413. To be admissible under Mil. R. Evid. 404(b), the evidence must satisfy a three pronged

test: (1) the evidence must reasonably support a finding that the appellant committed the prior crimes, wrongs or acts; (2) the evidence must be probative under Mil. R. Evid. 401 as to something other than propensity; and (3) the probative value cannot be substantially outweighed by the danger of unfair prejudice under Mil. R. Evid. 403. *United States v. Diaz*, 59 M.J. 79 (C.A.A.F. 2003).

Here, the Military Judge properly found that the evidence of Appellant's previous sexual assault of F.C. when she was ten-years-old satisfied all three requirements, including Mil. R. Evid. 403. (Appellate Ex. XXXVIII at 6-8;) *see supra* at 47-48. But he found that the evidence was only probative of Appellant's intent to commit the sexual assault on F.C. (Appellate Ex. XXXVIII at 7.) Appellant was adamant that he did not know that the person he sexually assaulted was F.C. which could go to Appellant's mistake of fact as to consent if he believed the imagined person had consented. (Pros. Ex. 10; Appellate Ex. XXXVIII at 7.)

As the evidence satisfied all elements of both Mil. R. Evid. 413 and 404(b), Appellant's previous sexual assault was admissible to prove propensity and to show his intent.

VII.

F.C.'S STATEMENT TO HER MOTHER WHEREIN SHE STATED, "RONNIE ATTACKED ME" WAS ADMISSIBLE AS AN EXCITED UTTERANCE. EVEN IF THE EXCEPTION DID NOT APPLY, THE ADMISSION OF THE STATEMENT WAS HARMLESS.

A. The standard of review.

A military judge's ruling to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010). An abuse of discretion occurs when a military judge either erroneously applies the law or clearly errs in making his or her findings of fact. *United States v. Donaldson*, 58 M.J. 477, 482 (C.A.A.F. 2003). Erroneously admitted evidence is tested for material prejudice to a substantial right of the accused. *See United States v. Thompson*, 63 M.J. 228, 231 (C.A.A.F. 2006); Article 59(a), UCMJ.

B. F.C.'s statement was admissible under Mil. R. Evid. 803(2) as an excited utterance.

An otherwise inadmissible hearsay statement is admissible under Mil. R. Evid. 803(2), even though the declarant is available as a witness, if (1) the statement relates to a startling event, (2) the declarant makes the statement while under the stress of excitement caused by the startling event, and (3) the statement is "spontaneous, excited or impulsive rather than the product of reflection and deliberation." *United States v. Feltham*, 58 M.J. 470 (C.A.A.F. 2003).

The “implicit premise” underlying the excited utterance exception is “that a person who reacts ‘to a startling event or condition’ while ‘under the stress of excitement caused’ thereby will speak truthfully because [no] opportunity to fabricate.” *United States v. Jones*, 30 M.J. 127, 129 (C.M.A. 1990).

In determining whether a declarant was under the stress of a startling event at the time of his or her statement, courts have looked to a number of factors. These may include, *inter alia*, “the lapse of time between the startling event and the statement, whether the statement was made in response to an inquiry, the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event, and the subject matter of the statement.” *United States v. Abdirahman*, 66 M.J. 668, 676 (N-M. Ct. Crim. App. 2008)(quoting *Reed v. Thalacker*, 198 F.3d 1058, 1061 (8th Cir. 1999)).

The fact that a declarant’s statements are in response to questioning is not a *per se* excluding factor; rather, courts have looked to whether or not the circumstances suggest that the declarant’s statements are the product of the excitement of the event or whether the declarant has had time to think about answers and that the answers are a product of questioning rather than excitement. For instance, in *United States v. Roberts*, 10 M.J. 308 (C.M.A. 1981), immediately after an assault victim had been knifed and was “in a condition of shock, very cold and

clammy, scared and worried about her kids," she stated that her husband had committed the assault. The court concluded that the victim's statement was instinctive and impulsive notwithstanding that it was in response to a question by an uninvolved bystander. *Id*. at 315 (citing *United States v. Burge*, 1 M.J. 408, 411 (C.M.A. 1976)).

Here, Appellant sexually assaulted F.C. sometime after 0300 on April 30, 2011 while F.C. was asleep and intoxicated. (R. 44-45, 67, 95, 659-60, 733, 966.) Upon waking from her intoxicated sleep, F.C. was frightened, looked puzzled, began crying, and felt like her world had collapsed around her. (R. 45-46, 86, 102, 734.) Upon seeing her daughter in that frightened and emotional state of mind, F.C.'s mother asked her what was wrong, to which F.C. stated, "[Appellant] attacked me last night." (R. 46, 67, 86, 95, 101, 661, 734.) F.C. made the statement immediately after waking from her intoxicated sleep with no time for reflection. (R. 45-46, 86, 102, 734.)

These circumstances indicate that F.C. was still in a state of shock after being sexually assaulted. Like *Roberts*, F.C. made the statement because of her excitement of the sexual assault regardless of the question posed by her mother. In fact, her mother asked her what was wrong because F.C. was in an excited state, frightened and crying.

Accordingly, the Military Judge did not abuse his discretion in admitting F.C.'s statement as an excited utterance.

C. Assuming, *arguendo*, the Military Judge erred, Appellant has demonstrated no prejudice from the admission of the statement.

Even assuming the Military Judge erred in admitting F.C.'s statement to her mother, Appellant has not demonstrated material prejudice to any substantial right. *See Thompson*, 63 M.J. at 231; Article 59(a), UCMJ.

F.C.'s statement to her mother was only relevant for two purposes: (1) the statement identified Appellant; and (2) alleged nonconsensual sexual acts. But Appellant's identity and actions were not in issue because Appellant admitted that he performed the sexual acts on F.C. (Pros. Ex. 8, 10.) The only potential fact in issue was whether there was consent. But the case against Appellant was overwhelmingly strong and compelling. First, immediately following the sexual assault and throughout all the proceedings, F.C. consistently stated that Appellant sexually assaulted her without her consent as she was intoxicated and asleep. (R. 649.)

Second, F.C.'s account of the events on April 30, 2011 was corroborated by all of the physical and testimonial evidence, including Appellant's own admissions. (Pros. Ex. 8, 10.)

As the case against Appellant was strong and compelling, this Court has ample bases to conclude that exclusion of any

erroneously admitted testimony would not have had any impact on the outcome or sentence in this case.

VIII.

APPELLANT'S AUTHORIZED REHEARING FOR THE SAME SPECIFICATIONS TO WHICH HE WAS CONVICTED AT HIS FIRST TRIAL DID NOT IMPLICATE THE DOUBLE JEOPARDY CLAUSE AND WAS AUTHORIZED UNDER ARTICLE 66, UCMJ.

A. Standard of review.

Whether an offense is a lesser included offense is a question of law we review de novo." *United States v. Arriaga*, 70 M.J. 51, 54 (C.A.A.F. 2011).

B. Appellant's rehearing was consistent with the law, appellate mandate, and sound judicial practice.

1. The Double Jeopardy Clause does not bar a retrial after this Court sets aside a conviction based on error at trial provided this Court authorizes it.

The Double Jeopardy Clause of the Fifth Amendment provides: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." The Double Jeopardy Clause protects "against a second prosecution for the same offense after acquittal." *North Carolina v. Pearce*, 395 U.S. 711 (1969). Moreover, it "prohibit[s] a reviewing court from rehearing any incidents for which the accused was found not guilty." *United States v. Wilson*, 67 M.J. 423 (C.A.A.F. 2009)(citation omitted).

However, the Double Jeopardy Clause does not prevent the United States from retrying an accused whose conviction was set aside because of an error in the trial proceedings. *United States v. Tateo*, 377 U.S. 463, 465 (1964). Congress vested this Court with the statutory authority to order a rehearing:

> If the Court of Criminal Appeals sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing.

Article 66(d), UCMJ.

Similarly, the discussion following R.C.M. 1203(b) provides that the court "may, except as to findings set aside for lack of sufficient evidence in the record to support the findings, order an appropriate type of rehearing or reassess the sentence as appropriate." This authority substantially tracks 28 U.S.C. § 2106, which permits an appellate court to order further appropriate hearings.

Here, Appellant's rehearing did not implicate the Double Jeopardy Clause because on review of Appellant's first trial, this Court did not find any factual deficiencies with Appellant's initial convictions, only an instructional error. *United States v. Oakley*, No. 201200299, 2013 CCA LEXIS 245, *3 (N-M. Ct. Crim. App. Mar. 26, 2013). This Court set aside the conviction and authorized a rehearing. *Id.* at *26-27.

At Appellant's rehearing, Appellant was tried only for those specifications to which he was found guilty in his first trial as authorized by this Court. (Charge Sheet.) The language of the specifications remained the same at Appellant's rehearing. (Charge Sheet; *Charge Sheet.) As such, the remand did not implicate the Double Jeopardy Clause and was authorized under this Court's Article 66(d), UCMJ, power.

2. Appellant's initial conviction and acquittal was not inconsistent because specification 2 was not a lesser-included offense of specification 1 as it was charged.

To determine whether there was an inconsistency in the verdict, the first step is to determine whether one offense is necessarily a lesser-included offense of the other. The elements test is used to determine a lesser-included offense. *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010). The question is whether the elements of the LIO would necessarily be proven by proving the elements of the greater offense. *United States v. Wilkins*, 71 M.J. 410 (C.A.A.F. 2012)(citation omitted).

After analyzing the elements, "to decipher what a jury has necessarily decided" this Court "should examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue

other than that which the defendant seeks to foreclose from consideration." *Yeager v. United States*, 557 U.S. 110, 120 (2009)(internal quotation and citation omitted). The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Id*. (quoting *Ashe v. Swenson*, 397 U.S. 436, 445 (1970)).

Wrongful sexual contact may be a lesser-included offense of aggravated sexual assault in some instances, but it depends on how the offenses are charged. *See United States v. Wilkins*, 71 M.J. 410 (C.A.A.F. 2012)(finding abusive sexual contact and aggravated sexual assault were not LIOs because of charged language).

The elements of wrongful sexual contact, as charged, are:

(a) Engaged in sexual contact, to wit: touching F.C.'s groin;
(b) Without F.C.'s permission; and
(c) With no legal justification or lawful authorization.

(Article 120, UCMJ, 10 U.S.C. § 920 (2008); Charge Sheet; *Charge Sheet.)

The elements of Aggravated Sexual Assault, as charged, are:

(a) Engaged in a sexual act, to wit: penetration of the genital opening with his finger; and
(b) The F.C. was substantially incapable of declining participation in the sexual act.

(Article 120, UCMJ, 10 U.S.C. § 920 (2008); Charge Sheet; *Charge Sheet.)

The Military Judge defined “sexual act” as “penetration, however slight, of the genital opening of another”. (*R. 733.) “Genital opening” was further defined as “the entrance to the vagina, which is the canal that connects the genital opening to the uterus.” (*R. 733.) “Sexual contact”, on the other hand, required a showing that Appellant wrongfully contacted F.C.’s “groin” without her consent. (*R. 734-35.)

The two specifications are distinguished by the use of the words “groin” versus “genitalia.” They are further distinguished because Wrongful Sexual Contact requires a showing that F.C. did not consent to the sexual contact.

In *Wilson*, the appellant was charged with rape, but found guilty of indecent assault as an LIO even though both the victim and the appellant admitted to sexual intercourse. *United States v. Wilson*, 13 M.J. 247, 251 (C.M.A. 1982). The appellant argued that his conviction was inconsistent with his acquittal because to find consensual sexual intercourse after he had committed indecent assault in the same transaction was “inherently inconsistent.” *Id*. But the court recognized that there were at least four different theories under which the military judge could have reached his finding, all of which differentiated the sexual contact and the sexual intercourse. *Id*. at 252.

Similarly, here there are several different theories under which the Members could have reached its consistent finding,

e.g., finding a distinction between the “genital opening” from the “groin”; finding reasonable doubt whether Appellant was mistaken as to F.C.’s consent to the Wrongful Sexual Contact while at the same time being satisfied that Appellant knew she did not consent to the ultimate penetration. *See Wilson*, 13 M.J. at 252.

At his first trial, the Military Judge instructed the Members that they could find Appellant guilty of both offenses because they went to different conduct. Moreover, Trial Defense Counsel agreed that there was no lesser-included offense for the Aggravated Sexual Assault. (*R. 692.) And Trial Defense Counsel did not object to the instructions that gave the Members the ability to convict for both offenses. (*R. 693.)

Appellant relies heavily on *United States v. Stewart,* 71 M.J. 38 (C.A.A.F. 2012). But the facts in *Stewart* are easily distinguishable here. In *Stewart*, the Military Judge bifurcated the sole specification, creating two theories of liability: “substantially incapacitated” and “substantially incapable of declining participation in the sexual act.” *Id*. at 41 (C.A.A.F. 2012). The Military Judge instructed the Members that they could only find the appellant guilty of one of the two, but not both. *Id*. at 42. The Military Judge, however, provided the Members with identical definitions for “substantially incapacitated” and “substantially incapable of declining

participation". *Id*. Because the specifications went to the same misconduct and included the identical definitions, the *Stewart* Court found that "the Double Jeopardy Clause . . . made it impossible for the CCA to conduct a factual sufficiency review . . . without finding as fact the same facts the members found [the appellant] not guilty of". *Id*. at 43.

Unlike *Stewart*, all parties agreed here that the charged offenses went to different misconduct. (*R. 679, 692.). Further, unlike *Stewart*, the Military Judge did not instruct the Members of the same definition of "genital opening" and "groin" which allowed the Members to find distinctions between the two and ultimately find Appellant not guilty of the Wrongful Sexual Contact. (*R. 733-35.)

Because this Court authorized a rehearing on the convictions, and considering the original verdict is consistent, the Double Jeopardy Clause is not implicated and Appellant's rehearing was consistent with the law, appellate mandate, and sound judicial practice.

Conclusion

WHEREFORE, the Government respectfully requests that this Court affirm the findings and sentence as adjudged and approved below.

CORY A. CARVER
Captain, USMC
Appellate Government Counsel

KEITH B. LOFLAND
Lieutenant Commander, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7679, fax (202) 685-7687

Certificate of Filing and Service

I certify that the original and required number of copies of the foregoing were delivered to the Court and a copy was served upon opposing counsel and electronically filed with the Court pursuant to N-M. Ct. Crim. App. Rule 5.2(b)(1) on October 14, 2014.

CORY A. CARVER
Captain, USMC
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7396, fax (202) 685-7687

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES, Appellee v. Ronnie G. OAKLEY, Jr. Information Systems Technician Third Class (E-4) U.S. Navy, Appellant	**BRIEF AND ASSIGNMENTS OF ERROR** Case No. 201200299 General Court-Martial convened by Commander Navy Region Northwest tried at Region Legal Service Office SW, San Diego, California on 1 July, 6-7 August, and 9-13 September 2013.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

JENNIFER L. MYERS
Lieutenant, JAGC, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
Bldg. 58, Ste. 100
Washington, D.C. 20374
Phone (202) 685-7713
Fax (202) 685-7426
jennifer.l.myers@navy.mil

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ISSUES PRESENTED

I.

DID THE MILITARY JUDGE'S FINDINGS OF NOT GUILTY TO THE WORDS "ON DIVERS OCCASIONS" IN THE FIRST TRIAL CREATE AN AMBIGUOUS VERDICT AND A DOUBLE JEOPARDY VIOLATION THAT PRECLUDES THIS COURT'S REVIEW OF SPECIFICATIONS 1 AND 2 UNDER ARTICLE 66, UCMJ?

II.

COURT-MARTIAL MEMBERS MUST BE FREE OF BIAS. DID THE MILITARY JUDGE ABUSE HIS DISCRETION BY DENYING THE DEFENSE CHALLENGE FOR CAUSE AGAINST LT S FOR IMPLIED BIAS WHERE LT S WAS THE VICTIM OF A SEXUAL ASSAULT AND EXPRESSED BELIEFS ABOUT ONE'S ABILITY TO CONSENT TO SEXUAL CONDUCT AFTER HAVING DRANK ALCOHOL THAT ARE INCONSISTENT WITH THE LAW?

III.

NO PERSON SUBJECT TO THE UCMJ MAY INFLUENCE A WITNESS TO A COURT-MARTIAL. DID THE MILITARY JUDGE ABUSE HIS DISCRETION BY FAILING TO DECLARE A MISTRIAL WHERE ONE OF THE WITNESSES CHANGED HIS TESTIMONY AFTER HIS CO AND SENIOR ENLISTED LEADER ADMONISHED HIM NOT TO TESTIFY FAVORABLY FOR IT3 OAKLEY?

IV.

NO PERSON SUBJECT TO THE UCMJ MAY INFLUENCE A COURT-MARTIAL MEMBER. THE NAVY'S MOST SENIOR LEADERS HAVE WIDELY PUBLICIZED THEIR PREFERRED OUTCOMES FOR SEXUAL ASSAULT CASES. DID THE MILITARY JUDGE ERR IN FINDING THERE WAS NO APPARENT UNLAWFUL COMMAND INFLUENCE IN THIS CASE?

V.

DID THE MILITARY JUDGE ERR IN ADMITTING IT3 OAKLEY'S STATEMENTS TO NCIS WHERE THE NCIS SPECIAL AGENTS DID NOT ORIENT HIM TO THE ALLEGATIONS AGAINST HIM AND, WHEN ASKED, REFUSED TO IDENTIFY THE CONDUCT AT ISSUE IN LAYMEN'S TERMS?

VI.

DID THE MILITARY JUDGE ERR BY ADMITTING EVIDENCE THAT IT3 OAKLEY SEXUALLY ASSAULTED CS3 FC WHEN HE WAS TWELVE YEARS OLD WHERE THE EVIDENCE WAS NOT RELEVANT AND THE DANGER OF UNFAIR PREJUDICE WAS EXTREMELY HIGH?

VII.

DID THE MILITARY JUDGE ERR BY PERMITTING CS3 FC'S MOTHER TO TESTIFY THAT CS3 FC TOLD HER "RONNIE ATTACKED ME" AS AN EXCITED UTTERANCE WHEN CS3 FC MADE THE STATEMENT AFTER SLEEPING FOR SEVERAL HOURS AND REFLECTING ON THE CONSEQUENCES OF REPORTING A SEXUAL ASSAULT?

VIII.

WHEN A MATERIAL FACT IS NECESSARILY DETERMINED BY A PREVIOUS ACQUITTAL A SUBSEQUENT PROSECUTION IS BARRED BY ISSUE PRECLUSION AND DOUBLE JEOPARDY. DID THE MILITARY JUDGE HERE ERR BY FAILING TO DISMISS SPECIFICATION 1 WHERE THE MEMBERS IN THE FIRST TRIAL NECESSARILY ACQUITTED IT3 OAKLEY OF ALL OF THE ELEMENTS OF AGGRAVATED SEXUAL ASSAULT?

STATEMENT OF STATUTORY JURISDICTION

Appellant's approved general court-martial sentence includes a bad-conduct discharge. (General Court-Martial Order No. (hereinafter GCMO) 01-14 dated 9 January 2014.) Accordingly, this Court has jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ). 10 U.S.C. § 866 (2006).

STATEMENT OF THE CASE

In this retrial, a panel of members with enlisted representation, sitting as a general court-martial convicted Information Systems Technician (IT3) Ronnie G. Oakley, Jr., U.S.

Navy, contrary to his pleas, of one specification of aggravated sexual assault and one specification of indecent act, in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2008). (R. at 1134; Appellate Ex. LXXXII.) The members sentenced IT3 Oakley to reduction to pay grade E-1, total forfeiture of pay, confinement for five years, and a dishonorable discharge. (R. at 1251.) Due to the limitations required by the previous court-martial, the Convening Authority (CA) approved only so much of the sentence as provided for bad-conduct discharge, confinement for three months, total forfeiture of pay, and reduction to pay grade E-1. (GCMO No. 01-14, 2.) The CA then ordered the sentence, except for the bad-conduct discharge, executed. (GCMO No. 01-14, 2.)

At the first trial, the Government charged IT3 Oakley with aggravated sexual assault, wrongful sexual contact, indecent conduct, and attempted aggravated sexual assault, in violation of Articles 80 and 120, UCMJ.[1] 10 U.S.C. §§ 880, 920 (2008). (Charge Sheet*.)[2] The members acquitted IT3 Oakley of wrongful

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[1] The Government also charged IT3 Oakley with aggravated sexual assault for penetrating her genital opening with his tongue but the military judge dismissed the charge for failure to state an offense. (R. at 174*.)

[2] References to the first record of trial will be marked by an asterisk (*) throughout this brief.

sexual contact and attempted aggravated sexual assault. (R. at 783*; Appellate Ex. LVIII*.) They convicted him of committing an indecent act and aggravated sexual assault, both after the smoke break.[3] (R. at 783*; Appellate Ex. LVIII*.)

Due to an instructional error, this Court set aside the convictions and the Government retried IT3 Oakley for only aggravated sexual assault and indecent conduct after the smoke break as described above. *United States v. Oakley*, No. 201200299, 2013 CCA LEXIS 245 (N-M. Ct. Crim. App. Mar. 26, 2013).

STATEMENT OF FACTS

At ten years old, Ronnie Oakley Junior[4] and his biological brother, Greg, moved in with their father, Ronnie Senior, his new wife, Ms. Donna Moore, and her two children, Ryan and FC, the alleged victim in this case. (R. at 722-23, 1181.) FC was approximately seven or eight years old at the time. (R. at 360-61.) Ronnie Jr. did not get along with his father and repeatedly rebelled against him and his new stepmother for the remainder of his time at home. (*Id.*) When Ronnie Jr. was fired

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[3] The "smoke break" is a time marker that is very important and explained in depth below.

[4] This brief will refer to IT3 Oakley as Ronnie Jr. as it pertains to events that happened pre-military service.

from his job at age eighteen, Ronnie Sr. kicked him out of the house. (R. at 631, 958.)

Ronnie Jr. returned to his mother's home in Las Vegas and shortly thereafter, became an alcoholic. (R. at 956.) Ronnie Jr.'s mother died soon thereafter, and he began a downward spiral. (R. at 956, 1180.) Eventually Ronnie Jr. joined the Navy to start a career and became IT3 Oakley. IT3 Oakley had a very strong work ethic and completed any job without complaint. (R. at 1044, 1056-58.) But off duty he continued to drink to excess. (R. at 956.) Over the course of six years, he never visited his father's house, and he had very limited contact with his family. (R. at 667, 958.)

On 29 April 2011, IT3 Oakley finally returned to his father's house in La Mesa, California to celebrate Ronnie Sr.'s birthday and their grandparent's anniversary. (R. at 632, 727, 959.) His brother, Greg and stepsister, FC, were also home at the time. (R. at 636.) Both had since joined the military—Greg was in the Air Force (R. at 755-57), and FC was in the Navy as a Culinary Specialist Third Class (CS3) (R. at 632). IT3 Oakley had "no relationship" with CS3 FC by that time. (R. at 631-32.)

Ronnie Sr. and Greg picked up IT3 Oakley from the naval base where his ship was in port. (R. at 759.) When they arrived back at the family home, everyone began drinking

alcohol. (*Id.*) The family spent the night catching up in Ronnie Sr.'s office because it was one of two places they could smoke in the house. (R. at 636-37.)

IT3 Oakley consumed an entire bottle of Jack Daniels whiskey and some beer. (R. at 389, 728-29, 959; Pros. Ex. 6, 8:43.) CS3 FC claims she drank the equivalent of seventeen shots within two hours (R. at 670), but she threw up a good deal of the liquor before going to bed. (R. at 500, 639.) Neither parent nor their brother, Greg, expressed concern about the amount of alcohol or the level of intoxication of either IT3 Oakley or CS3 FC. (R. at 738-39.) In fact, Greg testified his stepsister did not drink to excess that night. (R. at 391.)

IT3 Oakley and CS3 FC stayed awake in the office for approximately twenty minutes after everyone else went to bed. (R. at 641, 674, 963.) Since there were not enough bedrooms, Greg slept on the living room couch, CS3 FC slept in the office where everyone had congregated, and IT3 Oakley slept in the spare bedroom. (R. at 639.) Before IT3 Oakley went to bed, CS3 FC asked him to ash her cigarette, close the door, and turn off the light before he left. (R. at 642, 675, 964-65.) He complied-he ashed her cigarette, turned off the light, and closed the door most of the way. (R. at 644, 675, 965.) IT3

Oakley left the office between 2300 and midnight that night. (R. at 965-66.)

At 0300, IT3 Oakley awoke because his alarm was set to wake him for watch. (*Id.*) IT3 Oakley wanted a cigarette and went to the office to look for his cigarettes and smoke. (R. at 966.) He approached the recliner where CS3 FC slept and bent over to look for his cigarettes. (Pros. Ex. 6, 9:26.) From this angle, he noticed CS3 FC's pelvic area. (*Id.*) CS3 FC testified she woke up to see IT3 Oakley in the office at the foot of the couch moving her blanket off her legs. (R. at 676, 697.) She claims he penetrated her vagina with his fingers and tongue and she heard him masturbating. (R. at 649, 701, 969-70.) After fifteen minutes of sexual activity, CS3 FC testified IT3 Oakley left the room and she fell back to sleep. (R. at 702-04.)

CS3 FC claims she woke again sometime later to the smell of cigarette smoke. (R. at 645, 705, 971-72.) She saw IT3 Oakley and admonished him to go smoke somewhere else. (R. at 647-48, 705-06, 971-72.) He obeyed her directions and left the room. (*Id.*) CS3 FC claims she was irritated by the exchange and went back to sleep.[5] (R. at 707.)

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[5] The record refers to this incident as the "smoke break." The first panel of members acquitted IT3 Oakley of all offenses alleged before this "smoke break." (Appellate Ex. LVIII*.)

CS3 FC woke up yet again after the smoke break. This time CS3 FC awoke and saw IT3 Oakley at the foot of the recliner again moving the blanket off her legs. (R. at 709.) She then felt IT3 Oakley touch her legs. (R. at 648, 709.) She claims he moved her shorts and underwear to the side then began digitally penetrating and licking her vagina again. (R. at 648, 653, 974.) CS3 FC claimed that IT3 Oakley climbed onto the sofa and attempted to penetrate her vagina with his penis. (R. at 654-55, 970.) The movement rocked the sofa and it made a loud sound. (R. at 710.) He stopped trying to penetrate with his penis and returned to digitally penetrating and licking her vagina again while masturbating. (R. at 655, 712.) CS3 FC claims she again heard IT3 Oakley masturbating. (R. at 657, 975.) IT3 Oakley eventually stopped and left the room. (R. at 658, 975.)

CS3 FC was awake before IT3 Oakley touched her sexually. (R. at 698, 709, 983, 986.) But CS3 FC did not tell IT3 Oakley to stop or call out for help. (R. at 656, 703.) Neither did she physically try to stop IT3 Oakley. (R. at 656.) CS3 FC claimed she was scared, shocked, and intoxicated. (R. at 656.)

The next morning CS3 FC woke up around 0900 and considered her situation. (R. at 659.) She told her mother "Ronnie attacked me. I wish it was a dream but I know it's not." (R.

at 661.) Then, the three siblings and Ms. Moore went to a restaurant for breakfast. (R. at 713-14, 736, 743, 763-64, 743.) Later that day the family, this time including Ronnie Sr. and the siblings' grandparents, gathered for dinner at Joe's Crab Shack. (R. at 719, 767.) At both meals, CS3 FC and IT3 Oakley were in close proximity. (R. at 716, 767.) After dinner, IT3 Oakley did not return to the house. (R. at 765.)

The following week CS3 FC reported a sexual assault to her chief and the investigation began. (R. at 662.)

SUMMARY OF ARGUMENT

I.

By finding IT3 Oakley not guilty of the words "on divers occasions" in the first trial, Judge Booker necessarily acquitted IT3 Oakley of two of CS3 FC's three allegations of aggravated sexual assault and indecent conduct. By not telling the members which allegation remained, he created an ambiguous verdict, which should have prevented this Court from exercising its factual sufficiency review under Article 66, UCMJ. Further, double jeopardy barred retrial.

II.

The military judge abused his discretion by failing to dismiss LT S from the members panel. LT S was the victim of

sexual assault when he was four years old. The liberal grant mandate required his dismissal.

III.

IT3 Oakley's commanding officer and senior enlisted advisor committed actual unlawful command influence when they counseled Chief Fern for his testimony in support of IT3 Oakley in the first trial. As a result, Chief Fern significantly changed his testimony in the second trial. The military judge erred by failing to declare a mistrial.

IV.

The Navy's most senior leaders have created the appearance of apparent unlawful command influence with their strong comments on sexual assault prosecutions. The military judge erred by failing to dismiss the charges with prejudice.

V.

Special Agent Yerevania failed to orient IT3 Oakley to the charges against him when she used the term "indecent assault" and refused to explain its meaning. Her advisement under Article 31(b), UCMJ was vague and ineffective. The military judge erred by admitting IT3 Oakley's statements into evidence.

VI.

The military judge erred in admitting testimony that Ronnie Jr. sexually assaulted his stepsister when she was ten years old

because the evidence was not relevant to his state of mind in this case.

VII.

The military judge erred by permitting Ms. Donna Moore, CS3 FC's mother, to testify that CS3 FC told her something to the effect of "Ronnie attacked me" the morning after the alleged event. CS3 FC contemplated her statement to her mother and said it in response to a question. The statement was not spontaneous and she was not under the stress of a startling event as required for an excited utterance.

VIII.

IT3 Oakley's previous acquittal for wrongful sexual assault precluded the Government from later trying him for aggravated sexual assault at a new trial. Wrongful sexual contact, as charged in this case, necessarily included all of the elements of aggravated sexual assault. So the Government is precluded from retrying the issue by double jeopardy.

ARGUMENT

I.

THE MILITARY JUDGE'S FINDINGS OF NOT GUILTY TO THE LANGUAGE "ON DIVERS OCCASIONS" IN THE FIRST TRIAL CREATED AN AMBIGUOUS VERDICT AND A VIOLATION OF THE DOUBLE JEOPARDY CLAUSE THAT PRECLUDED THIS COURT'S REVIEW OF SPECIFICATIONS 1 AND 2[6] UNDER ARTICLE 66, UCMJ AND RETRIAL.

In the first trial, the military judge found IT3 Oakley not guilty, of the phrase "on divers occasions" in Specifications 1*, 3*, and 4*[7] (aggravated sexual assault, wrongful sexual contact, and indecent conduct for masturbating in her presence) prior to instructing the members on findings. (R. at 681*.) Judge Booker[8] told the members,

> And you'll notice that the language in each of the specifications under the Charge includes the words "on divers occasions." If you see that language in there, scratch it out, please. What I have done is <u>I have entered a not-guilty finding with regard just to that language, "on divers occasions</u>," which means more than

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[6] Specifications 1 and 2 in the second court-martial were Specifications 1 and 4 respectively in the first court-martial. References to the specifications from the first court-martial will be marked by an asterisk (*) throughout this brief.

[7] The members acquitted IT3 Oakley of wrongful sexual contact. (R. at 783*.) This acquittal is relevant to Assignment of Error VIII.

[8] Judge Booker heard the entire first trial. Judge O'Neil heard the motions in the retrial. And Judge Henderson presided over the retrial after the motions hearing.

> once. The evidence that has come in might allow you to find Petty Officer Oakley guilty of each of those specifications on one occasion, but they will not allow- - but the evidence will not allow you to find him guilty of doing those things more than once, so that's why I've entered the finding of not guilty with respect to the words "on divers occasions," . . . .

(R. at 696*) (emphasis added).

Specification 1* alleged that IT3 Oakley penetrated CS3 FC's vaginal opening with his finger and Specification 3* alleged indecent conduct for masturbating in the presence of CS3 FC without her permission. (Charge Sheet.)[9] But CS3 FC claimed IT3 Oakley digitally penetrated her vagina while he masturbated at least three times-before the smoke break (R. at 434*, 473-77*, 701), after the smoke break (R. at, 485-87*, 653, 711), and then again after he attempted to penetrate her vagina with his penis (also after the smoke break) (R. at 440-41*, 491*, 655, 657, 975; see also R. at 679* (Judge Booker acknowledging "at least two, if not three, different episodes.")).

During deliberations, the military judge realized his finding of not guilty created the potential for an ambiguous verdict and tried to remedy the issue by creating a special findings worksheet. (R. at 771-79*; Appellate Ex. LVIII*.) He instructed the members to determine if IT3 Oakley committed

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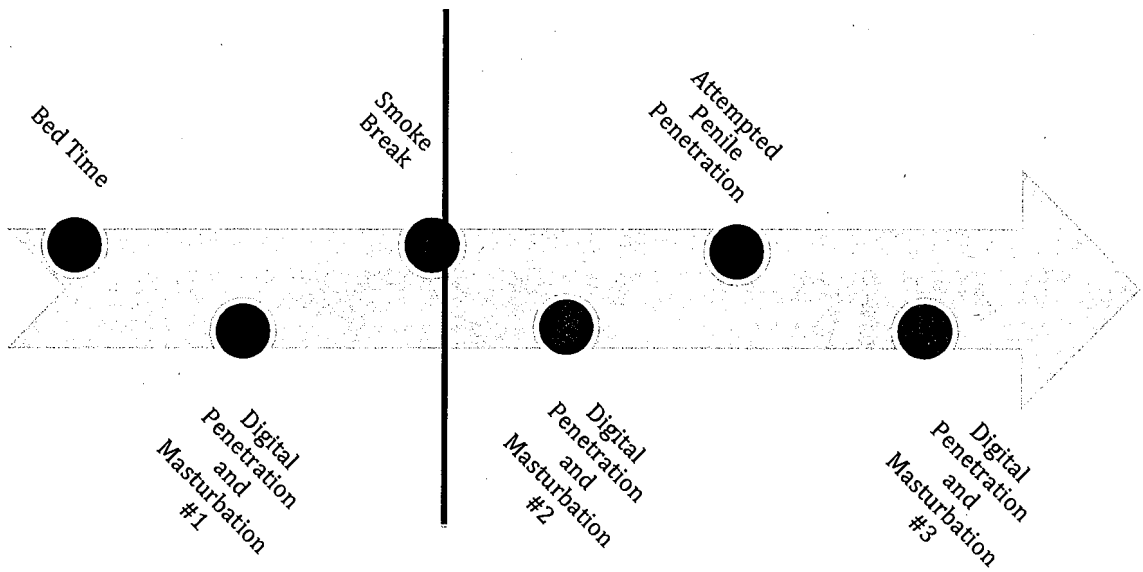
[9] The members acquitted IT3 Oakley of wrongful sexual contact (specification 2*) in the first trial so it is not at issue in this assignment of error.

aggravated sexual assault and indecent conduct both before and after the smoke break, and to indicate those findings on the findings worksheet. (R. at 771-79*; Appellate Ex. LVIII*.)

The members convicted IT3 Oakley of digitally penetrating CS3 FC and masturbating in her presence after the smoke break, but not guilty of the offense before the smoke break. (Appellate Ex. LVIII.) But the special findings worksheet did not differentiate between the two allegations that occurred after the smoke break. (*Id.*) A summary of those events is depicted on the timeline below.



Standard of Review

This Court reviews whether a verdict is ambiguous and thus precludes this Court's factual-sufficiency review under Article

66, UCMJ, *de novo*. *See United States v. Rodriguez*, 66 M.J. 201, 203 (C.A.A.F. 2008).

Principles of Law

"The longstanding common law rule is that when the factfinder returns a guilty verdict on an indictment charging several acts, the verdict stands if the evidence is sufficient with respect to any one of the acts charged." *Id.* at 204 (citing *Griffin v. United States*, 502 U.S. 46, 49 (1991)). But "[a] clear record as to the occasion for which an accused is found guilty is necessary when the words 'on divers occasions' are excepted from findings." *United States v. Ross*, 68 M.J. 415, 416 (C.A.A.F. 2010); *see also United States v. Wilson*, 67 M.J. 423, 428 (C.A.A.F. 2009); *United States v. Augspurger*, 61 M.J. 189, 190 (C.A.A.F. 2005). When the phrase "on divers occasions" is removed through exceptions and substitutions, the effect is that "the accused has been found guilty of misconduct on a single occasion and not guilty of the remaining occasions." *Wilson*, 67 M.J. at 428 (quoting *Augspurger*, 61 M.J. at 190) (emphasis added); *see also United States v. Walters*, 58 M.J. 391, 396-97 (C.A.A.F. 2003).

> If the record does not indicate which of the alleged incidents forms the basis of the conviction, the resulting ambiguous findings -- along with double-jeopardy principles -- bar the CCA from performing its usual factual-sufficiency review.

Ross, 68 M.J. at 417 (citing *Wilson*, 67 M.J. at 428; *Green v. United States*, 355 U.S. 184, 187-88 (1957); and *United States v. Scheurer*, 62 M.J. 100, 112 (C.A.A.F. 2005)).

Article 66, UCMJ, requires courts of criminal appeals to conduct a *de novo* review of the factual and legal sufficiency of each conviction before it. Art. 66, UCMJ; *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citing *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)). While the power conferred by Article 66 upon this Court is an "awesome, plenary, *de novo* power of review," it is not without limits. *See United States v. Smith*, 39 M.J. 448, 451 (C.M.A. 1994). This Court, for instance, may not find as facts allegations contained in a specification of which the factfinder has found an accused not guilty. *Smith*, 39 M.J. at 451-52 (citing *United States v. Nedeau*, 23 C.M.R. 182, 185 (C.M.A. 1957); *United States v. Hogan*, 20 M.J. 221 (C.M.A. 1985)).

Discussion

By acquitting IT3 Oakley of the language "on divers occasions," the military judge necessarily acquitted IT3 Oakley of at least two of CS3 FC's three allegations of aggravated sexual assault and indecent conduct. *See generally Wilson*, 67 M.J. at 428; *Augspurger*, 61 M.J. at 190. But Judge Booker failed to identify the specific allegations of which he

acquitted IT3 Oakley. By submitting all allegations to the members for deliberation without informing them of which allegations he acquitted IT3 Oakley, the military judge put IT3 Oakley in jeopardy for a second time; the members may have convicted IT3 Oakley of conduct of which Judge Booker acquitted him. Further, because of the ambiguity, this Court should not have conducted its Article 66, UCMJ, review of these convictions after the first trial and it cannot do so now.

a. The military judge necessarily acquitted IT3 Oakley of two allegations of aggravated sexual assault and indecent conduct.

> The military judge, on motion by the accused or *sua sponte*, shall enter a finding of not guilty of one or more offenses charged after the evidence on either side is closed and before findings on the general issue of guilty are announced if the evidence is insufficient to sustain a conviction of the offense affected.

R. Ct. Martial 917(a).

> A ruling granting a motion for a finding of not guilty is final when announced and may not be reconsidered. Such a ruling is a finding of not guilty of the affected specification, or affected portion thereof, and when appropriate, of the corresponding charge.

R. Ct. Martial 917(f).

At the close of the Government's case, the defense moved to dismiss the additional charge* (attempted aggravated sexual assault) and specification 1* (aggravated sexual assault) pursuant to M.R.E. 917 because the evidence was insufficient to

prove CS3 FC was substantially incapable. (R. at 655-56.) Judge Booker denied the motion at that time. (R. at 659.)

But later Judge Booker entered his findings of not guilty in an Article 39(a) session: "Very well, I'm going to enter findings of not guilty with respect the words "divers occasions" with respect to Specification 1 . . . 3 and 4. . . ." (R. at 681*.) The counsel were discussing a defense motion regarding multiplicity and unreasonable multiplication of charges. (*Id.*) Judge Booker expressed concern about potential ambiguity and entered a finding of not guilty to the words "on divers occasions." (R. at 680*.) While the military judge seemed to think of this as a remedy to the ambiguity issue, he also stated, ". . . I think it actually fairly describes what happened on the 30th of April." (R. at 680*.) Then, later in the same Article 39(a) session, Judge Booker explicitly addressed the unreasonable multiplication of charges and multiplicity arguments of the defense and denied those motions. (R. at 682*.)

While the timing of Judge Booker's ruling is irregular, it was a valid exercise of his power under R.C.M. 917. His language to the members made his intention to utilize his power under R.C.M. 917 clear, because, as he explained "the evidence will not allow you to find him guilty of doing those things more

than once." (R. at 696*.) Indeed, the Government conceded this was a ruling pursuant to R.C.M. 917 during motions practice in the second trial. (R. at 217-18.) As with findings by exceptions and substitutions, Judge Booker's ruling here necessarily acquitted IT3 Oakley of two of the three allegations of aggravated sexual assault and indecent conduct. But he did not indicate which two.

b. The member's special findings do not cure the ambiguous verdict or the double jeopardy violation.

Judge Booker's special findings worksheet left two problems unsolved. First, R.C.M. 917(e) provides, where a military judge enters a finding of not guilty to a portion of the specification, in cases before members, "the military judge shall instruct the members accordingly, so that any findings later announced will not be inconsistent with the granting of the motion." But Judge Booker never informed the members which allegations resulted in acquittals. This Court has no way to determine now whether Judge Booker acquitted IT3 Oakley of an allegation that the members later convicted him of. Since his ruling necessarily acquitted IT3 Oakley of two of the three allegations, he must have acquitted IT3 Oakley of at least one allegation from after the smoke break. And the members convicted IT3 Oakley of an incident after the smoke break, but they did not indicate which one. In short, the members may have

convicted IT3 Oakley of conduct that Judge Booker acquitted him of, resulting in a "finding later announced" that is inconsistent with Judge Booker's prior ruling.

Second, the special findings worksheet did not require the members to distinguish between the two allegations that occurred after the smoke break. Therefore, some members could have been convinced beyond a reasonable doubt as to the second allegation, while others could have been convinced beyond a reasonable doubt as to the third. So not only does this Court not know of which allegation of aggravated sexual assault the members convicted IT3 Oakley, it does not know whether it *actually* convicted him of either.

c. This Court cannot review the findings as required by Article 66 because the findings are ambiguous.

In *United States v. Walters*, the CAAF overturned a finding of guilty with prejudice where the members convicted Walters of drug use on one occasion but acquitted him of the language "on divers occasions" in the same specification. 58 M.J. at 391. The Government presented evidence of multiple instances of drug use, but the military judge failed to instruct the members to identify which instance of drug use they convicted the appellant of, if they convicted using variance. *Id.* at 396-97. The CAAF concluded that the Court could not conduct its Article 66, UCMJ, review because it was impossible to tell of which allegations

the members convicted and acquitted the appellant. *Id.* at 397. For the same reason, the Court concluded double jeopardy precluded a retrial. *Id.* The CAAF has consistently upheld this ruling. *See, e.g.*, *United States v. Seider*, 60 M.J. 36, 37-38 (C.A.A.F. 2004); *United States v. Trew*, 68 M.J. 364 (C.A.A.F. 2010).

As in *Walters*, the members here convicted IT3 Oakley where there was more than one theory of liability. But the military judge acquitted him of "on divers occasions." In *Walters*, this occurred due to variance and here it occurred due to the military judge's finding of not guilty. But the record in this case is equally ambiguous and this Court cannot conduct an Article 66 factual sufficiency review. *See Ross*, 68 M.J. at 418 (setting aside a conviction for possession of child pornography with prejudice where a military judge alone convicted the appellant of possession by excepting the words "on divers occasions"); *United States v. Saxman*, No. 200900412, 2010 CCA Lexis 68, *17 (N-M. Ct. Crim. App. May 27, 2010) (setting aside a conviction for possession of child pornography where the members excepted the word "twenty-two" (referring to images) and substituted "four," but did not identify the four images).

Neither can the Government retry IT3 Oakley because double jeopardy precludes trial for the same offense twice, and it is

impossible to tell of which allegations the military judge and the members acquitted him. This Court must set aside the findings with prejudice. *Wilson*, 67 M.J. at 429 (citing *United States v. Scheurer*, 62 M.J. 100, 112 (C.A.A.F. 2005).

II.

COURT-MARTIAL MEMBERS MUST BE FREE OF BIAS. HERE, THE MILITARY JUDGE ABUSED HIS DISCRETION BY DENYING THE DEFENSE CHALLENGE FOR CAUSE AGAINST LT S FOR IMPLIED BIAS WHERE LT S WAS THE VICTIM OF A SEXUAL ASSAULT AND EXPRESSED BELIEFS ABOUT ONE'S ABILITY TO CONSENT TO SEXUAL CONDUCT AFTER HAVING DRANK ALCOHOL THAT ARE INCONSISTENT WITH THE LAW.

During *voir dire,* Lieutenant (LT) S disclosed that a fourteen-year-old boy "raped" him when he was four years old. (R. at 479.) When asked how this affected LT S, he stated, "I've had a lot of time to kind of deal with it and get over it, or, hey, you get over something like -- I don't harbor any kind of resentment or anger." (R. at 480.) He did not remember all of the details but did attend counseling as a child and prepared to testify against his assailant. (R. at 479.) Charges were brought against the boy, but LT S ultimately did not have to testify at trial. (*Id.*) Neither the Government nor the military judge asked LT S any further clarifying questions regarding the sexual assault.

On a different topic, LT S expressed his beliefs about the effects of alcohol on a person's ability to consent to sexual

activity. In group *voir dire*, he raised his hand to express that he did not believe a person could consent to sexual activity after drinking alcohol. (R. at 410.) Then he expounded on his point of view in individual *voir dire*. "I think if you are consuming alcohol to the point of intoxication, I think that that removes your ability to consent." (R. at 480.) When questioned further, LT S stated "I mean if you would be legally unable to operate a motor vehicle, I think, then by that same token you are legally incapable of making that same decision to consent to a sexual act thought process at the time." (R. at 481.) LT S then seemed to retreat from this position slightly and said, "The simple act of sex occurring between two people -- between two people that have consumed alcohol to the point of intoxication, once again, without knowing all of the facts of any particular situation in which two people engage in sex after alcohol, I can't say one way or another at this point in time that a crime has occurred." (R. at 482.) Neither the Government nor the military judge asked LT S any further clarifying questions regarding his understanding of how alcohol affects one's ability to consent to sexual activity.

LT S also disclosed his father was arrested for domestic violence when he was very young (R. at 475) and his wife was abused by a prior spouse for six years (R. at 478).

The defense challenged LT S for cause citing implied bias based on LT S's sexual assault. (R. at 586.) The military judge denied the challenge. (R. at 588.) The military judge also denied the defense's challenge for cause of Chief N. (R. at 594.) Then, the defense preserved this issue for appellate review by using its preemptory challenge on Chief N. (R. at 595.)

Standard of Review

This Court reviews a military judge's denial of a challenge for cause under the liberal grant mandate for an abuse of discretion. *United States v. Armstrong*, 54 M.J. 51, 53 (C.A.A.F. 2000). But a ruling on implied bias is accorded less deference than actual bias because implied bias is an objective issue that focuses on the appearance of the trial and whether the public would perceive it to be fair with the challenged member sitting on the fact-finding panel. *See United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998).

Principles of Law

"[A]s a matter of fundamental fairness and Fifth Amendment due process, a service-member has the right to impartial court

members." *United States v. Elfayoumi*, 66 M.J. 354, 356 (C.A.A.F. 2008); *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001). The Rules for Courts-Martial also establish bases for challenge of a potential member for actual and implied bias. "A member shall be excused for cause whenever it appears that the member should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." R. Ct. Martial 912(f)(1)(N), MCM, U.S. (2012). Regarding an implied bias, a military judge should exclude members "where the presence of that member on the panel would create an objective appearance of unfairness in the eyes of the public." *United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007); *United States v. Glenn*, 25 M.J. 278, 280 (C.M.A. 1987). The CAAF has enjoined military judges to be liberal in granting such challenges. *United States v. Moreno*, 63 M.J. 129, 134 (C.A.A.F. 2006).

In making judgments regarding implied bias, this Court looks at the totality of the factual circumstances. *United States v. Strand*, 59 M.J. 455, 459 (C.A.A.F. 2004). And military judges must follow the "liberal-grant mandate" in ruling on challenges for cause. *United States v. Youngblood*, 47 M.J. 338 (C.A.A.F. 1997). In *United States v. Smart*, the Court

of Military Review described the rationale behind the liberal grant mandate:

> Our responsibility is especially great—perhaps greater than that of other appellate courts—because in courts-martial peremptory challenges are much more limited than in most civilian courts and because the manner of appointment of court-martial members presents perils that are not encountered elsewhere. Therefore, we do not accept as conclusive a challenged member's perfunctory disclaimer of personal interest of his assertion of impartiality.

21 M.J. 15, 19 (C.M.A. 1985).

Discussion

As a child, another child sexually assaulted LT S. His father physically abused his mother. A previous husband abused LT S's wife for six years. And LT S expressed grossly misguided notions about a person's ability to consent to sexual activity after consuming alcohol. Objectively, most people in LT S's position would have a difficult time fairly judging this case, which involved sexual assault after consuming alcohol and domestic violence.

LT S's presence on the members panel in IT3 Oakley's case created the appearance of unfairness to the general public, and undermines the perception of fairness in the military justice system. See *Moreno*, 63 M.J. at 133-34 (C.A.A.F. 2006); *United States v. Leonard*, 63 M.J. 398, 401 (C.A.A.F. 2006). Although, distaste for a certain crime is not automatically disqualifying,

victims of similar crimes can be excused for implied bias, especially when applying the liberal grant mandate. *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996) (citing *Smart*, 21 M.J. at 19).

In *United States v. Daulton*, the CAAF found that a member whose sister and mother were victims of child sexual abuse created implied bias where the accused was charged with indecent acts with children. 45 M.J. at 218. The trial counsel asked the member if she could separate her family's situation from the case and she said, "I believe so." *Id.* at 214. Then she told the military judge she would not have any particular difficulty or discomfort hearing the case. *Id.* at 214. The CAAF found her responses "less than resounding." *Id.* at 218. The CAAF also found that the military judge's "assessment of the member's credibility" useful but not dispositive of an implied bias. *Id.* at 218. The Court concluded that asking the member to serve impartially was "asking too much of both [her] and the system" and set aside the convictions. *Id.*

As in *Daulton*, the military judge here asked too much of LT S when he asked LT S to sit as an impartial member as he was a victim of sexual assault. His responses during *voir dire* were also not resounding, so much so that he stopped short of saying he was over his childhood "rape." (R. at 480.)

Like the military judge in *Daulton*, here, Judge Henderson praised LT S's honesty-"He was completely candid and forthright." (R. at 588.) But as the CAAF has consistently held, that is not dispositive to the inquiry. *Armstrong*, 54 M.J. at 53-53; *United States v. Warden*, 51 M.J. 78, 81-82 (C.A.A.F. 1999); *Daulton*, 45 M.J. at 214. "Implied bias exists when, regardless of an individual member's disclaimer of bias, most people in the same position would be prejudiced [i.e., biased]." *United States v. Napolitano,* 53 M.J. 162, 167 (C.A.A.F. 2000).

The facts of LT S's sexual assault are quite similar to evidence in the present case. CS3 FC claimed IT3 Oakley sexually assaulted her while they were still children. This evidence was the subject of extensive motions and the military judge was well aware it would be admitted at trial. Nothing in *voir dire* explored LT S's sensitivity to children involved in a sexual assault. Further, LT S's family experienced substantial domestic violence and CS3 FC claims she experienced domestic violence as a child in the form of this alleged sexual assault. The military judge's perception of his honesty cannot overcome these facts.

This Court should set aside the findings and sentence in this case.

III.

NO PERSON SUBJECT TO THE UCMJ MAY INFLUENCE A WITNESS TO A COURT-MARTIAL. THE MILITARY JUDGE ABUSED HIS DISCRETION BY FAILING TO DISMISS THE CHARGES WITH PREJUDICE WHERE ONE OF THE WITNESSES CHANGED HIS TESTIMONY AFTER HIS CO AND SENIOR ENLISTED LEADER ADMONISHED HIM NOT TO TESTIFY FAVORABLY FOR IT3 OAKLEY.

IT3 Oakley's strongest supporter at his first trial was Information Systems Technician Chief Petty Officer (ITC) Fern. He testified both on the merits and in sentencing. (R. at 663*, 817*.) But after the first trial, IT3 Oakley's father, Ronnie Sr., a retired Master Chief, emailed Chief Fern's senior enlisted advisor and complained about Chief Fern's testimony on behalf of his son because he felt it was "incorrect" for a chief to support his son staying in the Navy. (R. at 1191.) As a result, both Chief Fern's commanding officer and his senior enlisted advisor separately counseled Chief Fern about his testimony and told him he was an "inexperienced chief." (R. at 1192.)

Chief Fern testified that the frigate community, to which he belongs, is small and he was likely to work with both the commanding officer and the senior enlisted advisor again. (R. at 1201-02.) He stated that he was not comfortable testifying as he testified before because of repercussions to his career. (R. at 1196.)

Chief Fern first told the assistant defense counsel he would have to "toe the party line" immediately before taking the stand in presentencing but did not explain himself. (R. at 1199.) Chief Fern took the stand and substantially changed his testimony from the first trial. (R. at 1173.) In an Article 39(a) session after his testimony, Chief Fern told the military judge he felt pressured to "toe the company line" and changed his testimony in presentencing at the second trial to reflect that retaining IT3 Oakley was against the values of the U.S. Navy. (R. at 1193.) He told the military judge "there's a struggle between my personal feelings and my duty to the Navy. My personal feelings, you know, direct me to one way, but I have to look at overall what is good for the Navy." (R. at 1195.) "In my head, I honestly think that Oakley, if he was able to stay in the Navy, would be a benefit more than a hindrance because of his knowledge and his work ethic, particularly after he completed his treatment." (R. at 1196.)

The defense requested the military judge dismiss the charges with prejudice. (R. at 1214-15.) Instead of dismissing the charges, Judge Henderson gave the defense the option of putting Chief Fern on the stand again in a closed courtroom session or giving the members a transcribed copy of the testimony from the previous trial. (R. at 1214.) The defense

continued to object to either option but ultimately choose to give the members a copy of Chief Fern's previous testimony along with an instruction from the military judge. (R. at 1215.)

The military judge instructed the members:

> At the previous trial, Chief Fern, who testified on behalf of Petty Officer Oakley, he testified at the first trial, as well as testifying here. After his testimony here, the court learned his previous testimony at the first trial had been even more supportive than it was here at this trial. The court also learned that his test- - after his testimony at the first trial, he was counseled by senior leadership at his command for being too supportive. That is beyond inappropriate. That is what we call unlawful command influence, and how or if that behavior is dealt with externally is beyond our purview.

(R. at 1225.)

Standard of Review

This court reviews a military judge's ruling on unlawful command influence *de novo*. *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013); *United States v. Harvey*, 64 M.J. 13, 19 (C.A.A.F. 2006). And this Court reviews the military judge's findings of fact in conjunction with the appellant's claim under a clearly erroneous standard. *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994). Finally, this Court reviews a military judge's remedy for unlawful command influence for an abuse of discretion. *United States v. Douglas*, 68 M.J. 349, 354 (C.A.A.F. 2010).

Principles of Law

"No person subject to [the UCMJ] may attempt to coerce or, by any unauthorized means, influence the action of a court-martial . . . or any member thereof . . . ." Art. 37, UCMJ, 10 U.S.C. § 837 (2012). Unlawful command influence is "the mortal enemy of military justice." *United States v. Gore*, 60 M.J. 178, 178 (C.A.A.F. 2004). An appearance of unlawful command influence is just as problematic as actual command influence. It creates "a question whether the influence of command placed an 'intolerable strain on public perception of the military justice system.'" *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006) (citation and internal quotation marks omitted).

On appeal, the defense still has the initial burden of raising the issue of actual unlawful command influence. *United States v. Stombaugh*, 40 M.J. 208, 213 (C.M.A. 1994). The defense must show "(1) facts which, if true, constitute unlawful command influence; (2) that the proceedings were unfair; and (3) that unlawful command influence was the cause of the unfairness." *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999) (internal citations omitted). If the defense produces some evidence of proximate causation between the acts constituting unlawful command influence and the outcome of the court-martial, *United States v. Stoneman*, 57 M.J. 35, 41

(C.A.A.F. 2002), there is a rebuttable presumption of prejudice, *Biagase*, 50 M.J. at 150-51.

To rebut the presumption of prejudice the Government must prove beyond a reasonable doubt:

> (1) the predicate facts do not exist; or
> (2) the facts do not constitute unlawful command influence; or
> (3) the unlawful command influence . . . did not affect the findings and sentence.

Id. at 151.

Even if there is not actual unlawful command influence, the mere appearance of it may be "as devastating to the military justice system as the actual manipulation of any given trial." *United States v. Ayers*, 54 M.J. 85, 94-95 (C.A.A.F. 2000) (citation and quotation marks omitted). The appearance of unlawful command influence exists when "an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *Id.*

To review for apparent unlawful command influence, this Court considers, "the perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public." *Lewis*, 63 M.J. at 415. The test for apparent unlawful command influence is whether the Government has proven beyond a reasonable doubt that "the disinterested public would

now believe that [Appellant] received a trial free from the effects of unlawful command influence." *Id.* An appearance of unlawful command influence arises "where an objective, disinterested observer, fully informed of all the facts and circumstances would harbor a significant doubt about the fairness of the proceeding." *Id.*

Discussion

Judge Henderson's remedial measure, providing the members an instruction and Chief Fern's previous testimony, was insufficient to remove the taint of unlawful command influence. He also erred in failing to consider apparent unlawful command influence on the merits and sentencing. In *United States v. Gore*, the convening authority ordered a chief not to testify during presentencing for a guilty plea case heard by a military judge alone. 60 M.J. at 179. The Court dismissed the charges against Gore with prejudice finding the convening authority's actions denied him a fair trial by even though those actions only affected the sentencing phase of the trial. *Id.* at 189.

Judge Henderson erred by relying on his finding that the unlawful command influence did not affect the merits. (R. at 1213.) Whether or not the testimony affected the merits portion of the trial, IT3 Oakley's commanding officer denied him a fair trial. The military judge's remedy did nothing more than inform

the members IT3 Oakley's commanding officer believed IT3 Oakley has bad military character and cannot be rehabilitated into the Navy. Further, any future trial is also impacted because Chief Fern's testimony has been changed and diluted due to the unlawful actions.

This Court should dismiss the charges against IT3 Oakley with prejudice because there is no way he can receive a fair trial. Further, an informed member of the general public would not be convinced beyond a reasonable doubt that IT3 Oakley received a fair trial. This behavior puts the integrity of the entire military justice system into question and the result cannot stand.

IV.

NO PERSON SUBJECT TO THE UCMJ MAY INFLUENCE A COURT-MARTIAL MEMBER. THE NAVY'S MOST SENIOR LEADERS HAVE WIDELY PUBLICIZED THEIR PREFERRED OUTCOMES FOR SEXUAL ASSAULT CASES. THE MILITARY JUDGE ERRED BY FINDING THERE WAS NO APPARENT UNLAWFUL COMMAND INFLUENCE IN THIS CASE.

The Commander-in-Chief, President Barack Obama, stated the following about sexual assault in the military:

> The bottom line is: I have no tolerance for this. I expect consequences. So I don't just want more speeches or awareness programs or training, but ultimately folks look the other way. If we find out somebody's engaging in this, they've got to be held accountable - prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged. Period.

(Appellate Ex. XI, Encl. 13 at 1.) Other senior leaders of the military and the U.S. Navy have made similar, widely publicized, statements. (*See* Appellate Ex. XI, Encls.)

The trial defense counsel moved to dismiss all charges due to unlawful command influence emanating from the Navy's most senior leaders. (Appellate Ex. XI.) In his ruling, the military judge found the burden shifted to the Government, but that these statements did not constitute actual or apparent unlawful command influence.[10] (Appellate Ex. LV at 5.)

Nevertheless, Judge Henderson, Judge O'Neil's successor, attempted to cure the appearance of unlawful command influence that Judge O'Neil previously ruled did not exist. He read a statement to the members from Secretary of Defense Hagel reiterating his "expectations and those of the President regarding the integrity of the military justice process." (Appellate Ex. LXIV.) In the memo, Secretary Hagel mandated court-martial panels to "apply his or her independent judgment." (*Id.*) He continues,

> Senior military and civilian leaders in the Department have an obligation to establish the standards of

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[10] The military judge promised, "[a]dditional findings of fact, analysis, and conclusions of law will be attached to the record of trial prior to authentication." (Appellate Ex. LV at 1 n.1.) But no such materials exist. (Appellee's Opposition to Appellant's Nonconsent Motion to Compel Production of Additional Ruling on UCI and Government's Slide Show, 1, June 16, 2014.)

> conduct expected of all military personnel. . . . . [S]exual assault . . . [is] not acceptable; senior leaders have made that clear and will continue to do so. But those comments are not made with the intent to indicate in any way what should or should not occur in any case.

(*Id.*)

Standard of Review and Principles of Law

The standards of review and principles of law for this assignment of error are the same as the previous assignment of error.

Discussion

Civilian officials are not subject to the UCMJ as required under Article 37, UCMJ. But the CAAF has recently recognized that the rubric of apparent unlawful command influence applies to civilian leaders. *See United States v. Hutchins*, 72 M.J. 294 (C.A.A.F. 2013) (Ryan, J., concurring) (Baker, C.J., dissenting). The military judges in this case erroneously found no actual or apparent unlawful command influence. Four of the eight members stated that they would not be able to consider "no punishment" if there were a conviction in a sexual assault case. (R. at 419.) All of the members stated they would not be able to consider "no confinement" if there was a conviction in a sexual assault case. (*Id.*)

Further, IT3 Oakley's first trial resulted in three months of confinement (R. at *885), while the second resulted in a

sentence of five years of confinement (R. at 1251). That stark difference is evidence that the political and command pressures applied to servicemembers with regard to sexual assault has had a deleterious effect on the independence of court-martial panels. The first trial ended on 9 March 2012, prior to the media storm. President Obama made his comments in May 2013. (Appellate Ex. XI, Encl. 13 at 1.) This second trial concluded 13 September 2013.

This Court should dismiss the charges with prejudice because the military judges erred in finding no unlawful command influence. And the curative measures were inadequate to create the appearance of a fair trial in this highly charged political climate.

V.

THE MILITARY JUDGE ERRED IN ADMITTING IT3 OAKLEY'S STATEMENTS TO NCIS BECAUSE THE AGENTS DID NOT ORIENT IT3 OAKLEY TO THE ALLEGATIONS AGAINST HIM AND, WHEN ASKED, THE SPECIAL AGENTS REFUSED TO IDENTIFY THE CONDUCT AT ISSUE IN LAYMEN'S TERMS.

On 15 May 2011, Naval Criminal Investigative Service (NCIS) Special Agent (SA) Seza Yerevanian and another special agent interrogated IT3 Oakley at the NCIS office. (R. at 977; Pros. Ex. 6.) After attempting to build rapport and collect biographical data for approximately twelve minutes, SA Yerevanian asked IT3 Oakley if he knew why he was there. (Pros.

Ex. 6, 8:35.) When IT3 Oakley responded in the negative, SA Yerevanian said, "Apparently something happened. Um, I guess you were at your dad's place in La Mesa and an incident occurred . . . Something happened and it got reported here." (Pros. Ex. 6, 8:36.) For another two minutes IT3 Oakley expressed confusion over the topic they wanted to discuss and reluctance to speak until he knew what the special agents wanted to discuss. (Pros. Ex. 6, 8:36-8:39.)

SA Yerevanian showed him the Article 31(b) cleansing waiver form that identified the suspected crime as "indecent assault" under Article 134, UCMJ. (R. at 17; Pros. Ex. 6, 08:37; Pros. Ex. 7.) She explained that the waiver only meant he understood his rights and after he waived his rights, "we will discuss what [indecent assault] is and what the claim is." (Pros. Ex. 6, 8:37-8:38.) When he continued to express reluctance she said "an incident occurred between you and your stepsister at a family gathering . . . on April 29th." (*Id.* at 8:38.) He responded, "What happened?" (*Id.*) SA Yerevanian replied, "Would you like to talk to us?" (*Id.*) He then said, "I want to know what's going on," and agreed to speak with the special agents. (*Id.*) After IT3 Oakley waived his rights, SA Yerevanian finally said, "So we got information apparently that on the night of the 29th, that you may have had a sexual

interaction with your stepsister." (Pros. Ex. 6, 8:40; R. at 29.) This is the first time she used the word "sex."

IT3 Oakley went on to admit to various sexual acts with CS3 FC. Prior to trial, the defense moved to suppress IT3 Oakley's statement because the rights advisement failed to orient him to the conduct at issue as required by Article 31(b), UCMJ. (Appellate Ex. IX.) Judge O'Neil denied the defense motion to suppress and admitted the videotaped recording of IT3 Oakley's interrogation, two written statements, a drawing made by IT3 Oakley, and the rights waiver into evidence. (R. at 116; Appellate Ex. LIV; Pros. Exs. 6, 7, 8, 9, 10.)

Standard of Review

This Court reviews a military judge's ruling denying a motion to suppress a confession for abuse of discretion. *United States v. Young*, 49 M.J. 265, 266-67 (C.A.A.F. 1998). This Court reviews whether the military judge's ruling on a rights advisement is consistent with the applicable rights warning requirements *de novo*. *United States v. Simpson*, 54 M.J. 281, 283 (C.A.A.F. 2000) (finding an advisement of suspicion of indecent liberties with a child sufficient to cover suspicion of rape and sodomy of the same child).

Principles of Law

A rights waiver must be knowing, intelligent, and voluntary. Mil. R. Evid. 305(g)(1), MCM (2012). An interrogator must inform a military suspect of the "general nature" of the allegations against him sufficiently to orient the accused to the event, before the suspect can "knowingly" waive his rights under Article 31(b), UCMJ. *Simpson*, 54 M.J. at 284 (citations omitted). This does not require a precise description of the "legally sufficient specification . . . a partial advice, considered in light of the surrounding circumstances and knowledge of the accused, may be sufficient to satisfy article 31(b)." *United States v. Pipkin*, 58 M.J. 358, 360 (C.A.A.F. 2003) (citing *United States v. Davis*, 24 C.M.R. 6, 8 (C.M.A. 1957)); *see also Simpson*, 54 M.J. at 284 ("It is not necessary to spell out the details of his connection with the matter under inquiry with technical nicety.") (citing *United States v. Rice*, 29 C.M.R. 340, 342 (C.M.A. 1960)).

Discussion

Judge O'Neil abused his discretion by admitting IT3 Oakley's statements to NCIS because SA Yerevanian failed to orient IT3 Oakley to the allegation against him. The recording clearly shows IT3 Oakley did not understand the term "indecent assault" and he repeatedly asked what the allegations were

before waiving his rights. (Pros. Ex. 6.) SA Yerevanian induced IT3 Oakley to waive his rights by telling him that was the only way to learn more about the allegations. Such a waiver is neither voluntary nor knowing.

Possible factors for courts to consider in deciding whether the advisement properly oriented the accused to the conduct in question are "whether the conduct is part of a continuous sequence of events, whether the conduct was within the frame of reference supplied by the warnings, or whether the interrogator had previous knowledge of the unwarned offenses." *Simpson*, 54 M.J. at 284 (internal citation omitted).

Before the interrogation, SA Yerevanian read at least one investigative report that included CS3 FC's claim that IT3 Oakley digitally penetrated her vagina. (R. at 24-25.) SA Yerevania knew about the allegations of aggravated sexual assault and sodomy prior to the interrogation. (*Id.*) Indecent assault has not been a crime under the UCMJ since 2008, three years before the alleged offense. MCM, pt. IV (2008). SA Yerevanian testified she informed IT3 Oakley using this article because another special agent used it on the report of investigation. (R. at 17, 19.)

The advisement here used the phrase "indecent assault." That was too technical and SA Yerevanian's references to "an

incident" were too vague to orient IT3 Oakley to the conduct at issue.

a. IT3 Oakley did not understand the technical explanation of the special agent or the vague references to an "incident."

The military judge's finding of fact that, "[a]t all times during the rights advisement process, the accused understood the words used by SA Yerevanian both orally and on the rights advisement form, and he did not say or do anything suggesting confusion" is clearly erroneous. (Appellate Ex. LIV at 3.) "Advice as to the nature of the charge need not be spelled out with particularity of a legally sufficient specification; it is enough if, from what is said and done, the accused knows the general nature of the charge. . ." *Simpson*, 54 M.J. at 284 (citing *Davis*, 8 C.M.A. at 198). But the accused must actually understand the "general nature" of the conduct at issue.

In *United States v. Hernandez*, the Court of Military Appeals (CMA) stated, "We entertain no doubt [Article 31(a)] requires that an accused who is so 'advised' must actually understand his rights." 16 C.M.R. 39, 42 (C.M.A. 1954). In *Hernandez*, the accused had a limited understanding of English. *Id.* at 469. The Court found the rights waiver conveyed in English was insufficient, and affirmed the reversal ordered by the lower court. *Id.* IT3 Oakley speaks and understands

English. But he does not have a law degree or even a college degree.

The military judge erred in finding that laypersons commonly understand the words "indecent" and "assault." He stated,

> The accused understood everything SA Yerevanian read to him during the rights advisement. The word "indecent," whether understood as morally offensive or simply not decent, implies conduct of a sexual nature; the word has no other rational meaning. The word "assault" is commonly understood to mean an offensive touching of another.

(Appellate Ex. LIV at 5) (emphasis added). Merriam-Webster's Online dictionary defines "indecent" as:

> : Sexually offensive or shocking
> Of clothes: not covering enough of your body
> : using language that offends people
> : including behavior or ideas that people find offensive
> . . .
> : not decent
> A : grossly improper or offensive
> B : unseemly, inappropriate[11]

Merriam-Webster's Online Dictionary, *Indecent*, http://www.merriam-webster.com/dictionary/indecent (last visited

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11 Merriam Webster updated this definition during the drafting of this brief. On 16 June 2014, the primary definition of indecent was:

> 1. offending against generally accepted standards of propriety or good taste; improper; vulgar: indecent jokes; indecent language; indecent behavior.
> 2. not decent; unbecoming or unseemly: indecent haste.

Jul. 9, 2014). Black's Law Dictionary defines indecent as, "[t]he state or condition of being outrageously offensive, [especially] in a vulgar or sexual way. . . ." Black's Law Dictionary 783 (8th ed. 2004). Judge Henderson defined "indecent conduct" for the members pursuant to the Military Judge's Bench Book: "'Indecent conduct' means that form of immorality relating to sexual impurity which is grossly vulgar, or obscene and repugnant to common propriety and tends to excite sexual desire or deprave morals with respect to sexual relations." (R. at 1079.) Notably, the legal definitions focus far more on sexuality than Merriam-Webster's lay-definition. And presumably, the Benchbook defines indecent conduct because courts do not expect laypersons to inherently understand the meaning.

Judge O'Neil's conclusion that laypersons understand assault to be an "offensive touching" is also clear error. This definition is actually the common law definition of battery, *see, e.g.*, *United States v. Williams*, 197 F.3d 1091, 1096 (11th Cir. 1999), and the definition of "bodily harm" in the UCMJ, MCM, Pt. IV, para 45(t)(8) (ed. 2008) ("The term 'bodily harm' means any offensive touching of another, however slight.").

Merriam Webster's online Dictionary defines assault as,

1. A : a violent physical or verbal attack

B : a military attack usually involving direct combat with enemy forces
C : a concerted effort.

2. A : a threat or attempt to inflict offensive physical contact or bodily harm on a person . . . that puts the person in immediate danger of or in apprehension of such harm or contact

B : Rape[12]

Merriam-Webster's Online Dictionary, *Assault*, http://www.merriam-webster.com/dictionary/assault (last visited Jul. 9, 2014). The military judge's assertion that IT3 Oakley understood not just the words, but also the implications of SA Yerevanian's rights advisement, is clearly erroneous.

IT3 Oakley did not understand the nature of the allegations before waiving his rights. Once the agents showed little interest in his recent DUI, IT3 Oakley began to suspect that they wanted to discuss the incident with his stepsister. (R. at 979.) But, SA Yerevanian's veiled statements about an

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[12] Merriam Webster also updated the definition of assault during the drafting of this brief. On 16 June 2014 the definition was:

1. a sudden, violent attack; onslaught: *an assault on tradition*.
2. *Law*. an unlawful physical attack upon another; an attempt or offer to do violence to another, with or without battery, as by holding a stone or club in a threatening manner.
3. *Military*. the stage of close combat in an attack.
4. rape.

"incident" and use of the term "indecent assault" failed to confirm his suspicion.

b. Special Agent Yerevanian should have used layman's terms or the word "sexual" to orient IT3 Oakley to the conduct at issue.

SA Yerevanian did not use the word "sexual" until after the rights waiver. (R. at 29.) The military judge erred by finding SA Yerevanian could not risk using the word "sex" in her description of the nature of the offenses because it "could be considered of a nature to elicit an incriminating response." (Appellate Ex. LIV at 6 n.3.) This conclusion is clearly erroneous because an advisement for aggravated sexual assault-that is, after all, what he was suspect of-- would have been appropriate and no court has found the word "sex" to *per se* elicit a response.

The military judge erred further by finding it material that the special agent did not act intentionally by misleading IT3 Oakley with his rights advisement. (*Id.* at 5.) The appropriate query is whether IT3 Oakley actually understood the nature of the allegations the special agents wished to discuss. Here, he did not.

An appropriate advisement in this case could have included a frank reference to sexual activity with CS3 FC. "Rude" or "immodest" behavior-both synonyms of indecent-is not a crime and

IT3 Oakley's lack of understanding of the reference to "indecent assault" was warranted. SA Yerevania was purposefully vague in identifying the conduct at issue. While she may not have intended to mislead IT3 Oakley, her overly cautious and coy wording was unacceptable. She told IT3 Oakley that she could not explain what "indecent assault" was until he waived his rights. (Pros. Ex. 6, 8:37-8:38.) This both acknowledged IT3 Oakley's lack of understanding and stoked his curiosity. (*Id.* at 8:36-8:39.)

This Court should set aside the conviction because the military judge abused his discretion in admitting Prosecution Exhibits 6, 7, 8, 9, and 10.

VI.

THE MILITARY JUDGE ERRED BY ADMITTING EVIDENCE THAT IT3 OAKLEY SEXUALLY ASSAULTED CS3 FC WHEN HE WAS TWELVE YEARS OLD BECAUSE THE EVIDENCE WAS NOT RELEVANT AND THE DANGER OF UNFAIR PREJUDICE WAS EXTREMELY HIGH.

Before the first trial, the Government notified the defense pursuant to Military Rule of Evidence (M.R.E.) 404(b) it intended to offer evidence that Ronnie Jr. sexually assault CS3 FC when she was ten years old. She claims she woke up in the middle of the night to IT3 Oakley lying on top of her with her shorts pulled to the side and his penis partially penetrating her vagina. (Appellate Ex. VI*, VII*; R. at 652.) CS3 FC claims this happened while the family was on a vacation and

Ronnie Jr. slept on a cot in her room. (R. at 73-78, 651.) CS3 FC did not report the incident for six years. (R. at 653, 717.)

Judge Booker granted a defense motion, excluding the evidence:

> It is impossible to conclude from the evidence as it exists that an encounter between two juveniles, not biologically related but members of a newly blended family in any way relevant to conduct between two adults, both of whom had been drinking heavily and at least one of whom, the accused, was admittedly sexually active, over a decade later. Furthermore, the time that would be consumed in establishing relevance, included time necessary to explore and discount the accused's statement that he was sleepwalking at the time of the 2000 incident and could not have formed any lustful intent, is likely to be substantial, and the relevance of the 2000 incident to a present intention to gratify one's lust, or abuse, humiliate or degrade the victim, is strained at best.

(Appellate Ex. IX at 5-6*.)

On retrial, the defense again moved to suppress this evidence. (Appellate Exs. VII, VIII.) Judge O'Neil admitted the evidence under M.R.E. 404(b) and M.R.E. 413. MCM (2012). He claimed the evidence showed a specific sexual intent—that is an ongoing sexual interest in CS3 FC-and that IT3 Oakley did not mistake her identity at the time of the sexual behavior on 30 April 2011. (Appellate Ex. XXXVIII at 10.)

Standard of Review

This Court reviews a military judge's evidentiary rulings for an abuse of discretion. *United States v. Thompson*, 63 M.J. 228, 230 (C.A.A.F. 2006).

Principles of Law

a. M.R.E. 413.

M.R.E. 413(a) provides that,

> [i]n a court-martial preceding for a sexual offense, the military judge may admit evidence that the accused committed any other sexual offense. The evidence may be considered on any matter to which it is relevant.

M.R.E. 413 even allows "the admissibility of similar sexual misconduct to show propensity to act in a certain way. *United States v. James*, 63 M.J. 217, 220 (C.A.A.F. 2006).

To admit evidence under M.R.E. 413 the Government must show: (1) the accused is charged with an offense of sexual assault; (2) the proffered evidence is evidence of the accused's commission of another offense of sexual assault; and (3) the evidence is relevant under M.R.E. 401 and M.R.E. 402. *United States v. Berry*, 61 M.J. 91, 95 (C.A.A.F. 2005). For the second requirement, "[c]ourts must conclude that the members could find by a preponderance of the evidence that the offenses occurred." *United States v. Wright*, 53 M.J. 476, 483 (C.A.A.F. 2000). If the Government satisfies all three prongs, the military judge

must then apply a balancing test under M.R.E. 403. *Berry*, 61 M.J. at 95.

b. M.R.E. 404(b).

"Evidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . ." Mil. R. Evid. 404(a)(1), MCM, U.S. (2012). "Evidence of other crimes, wrongs, or acts . . . may, however, be admissible . . . as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." Mil. R. Evid. 404(b).

In *United States v. Reynolds*, the Court of Military Appeals (CMA) applied a three-prong test to determine the admissibility of uncharged misconduct under M.R.E. 404(b):

> 1. Does the evidence reasonably support a finding by the court members that appellant committed prior crimes, wrongs or acts?
>
> 2. What "fact . . . of consequence" is made "more" or "less probable" by the existence of this evidence?
>
> 3. Is the "probative value . . . substantially outweighed by the danger of unfair prejudice"?

29 M.J. 105, 109 (C.M.A. 1989) (internal citation omitted). The evidence at issue must fulfill all three prongs to be admissible. *Id.* The second prong mirrors the relevance concerns reflected under M.R.E. 401 and M.R.E. 402, while the

third prong reflects the concerns ordinarily handled under M.R.E. 403. *United States v. Yammine*, 69 M.J. 70, 77 (C.A.A.F. 2010).

c. M.R.E. 403.

Notwithstanding M.R.E. 404 or 413, "[t]he military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting of time, or needlessly presenting cumulative evidence." Mil. R. Evid. 403. When conducting an M.R.E. 403 balancing test, courts should consider: the strength of the proof of the prior act; the probative weight of the evidence; the potential to present less prejudicial evidence; the possible distraction of the fact-finder; the time needed to prove the prior conduct; the temporal proximity of the prior event; the frequency of the acts; the presence of any intervening circumstances; and the relationship between the parties. *Berry*, 61 M.J. at 95-96.

Discussion

Evidence of an assault that allegedly occurred when IT3 Oakley was twelve years old was not admissible under M.R.E. 404(b) or 413 because it was not relevant to a fact in issue.

Further, any tangential probative value the military judge gleaned from the proffer was far outweighed by unfair prejudice.

a. Judge' O'Neil relied on clearly erroneous findings of fact.

Judge O'Neil's ruling includes at least two clearly erroneous and material findings of fact. First, he found that "the parties and their relationship to each other are the same in both alleged offenses." (Appellate Ex. XXXVIII at 5.) While the title "stepsiblings" may have been unchanged due to the marital status of their parents, the relationship between IT3 Oakley and CS3 FC changed significantly over the intervening six years. When they were children, Ronnie Jr. and CS3 FC lived in the same house and spent a great deal of time together. (R. at 723.) As of 2011, they had not seen each other in at least six years. (R. at 630.) CS3 FC testified that they in fact had "no relationship" at the time of the incident. (R. at 631.)

Most egregiously, Judge O'Neil stated that the sexual interest IT3 Oakley developed in CS3 FC, "shortly after the family blended" and "continued to the charged offense." (Appellate Ex. XXXVIII at 5-6.) In fact, this is the only incident in which Ronnie Jr. displayed sexual interest in CS3 FC as a child and occurred approximately three years after the family blended. CS3 FC testified she met Ronnie Jr. when she

was six or seven years old (R. at 628) and that the incident in the cabin occurred when she was ten years old (R. at 74).

The military judge based his finding of an ongoing sexual interest on CS3 FC's allegations that Ronnie Jr. looked in her window a few times while smoking on the front stoop. (R. at 60, 80-81.) However, this is not evidence of sexual interest because she was always fully clothed. (R. at 82.) The alleged peeping incidents do not overcome the six-year separation of IT3 Oakley and CS3 FC. That separation makes a "continued sexual interest" impossible.

b. The evidence is not relevant because there is insufficient evidence of IT3 Oakley's motivations and intentions when he was twelve years old.

In a footnote, Judge O'Neil acknowledged that "in comparing two acts by the same person, one committed as a child and one as an adult, military judges must 'meaningfully analyze the different phases of the accused's development.'" (Appellate Ex. XXXVIII at 6 n. 5 (citing *Berry*, 61 M.J. at 97).) Yet, in the same footnote the military judge dismissed this requirement stating that the evidence of an accused's phases of development are rarely available to the Government and that hearsay testimony from Ms. Moore and testimony from CS3 that Ronnie Jr. looked into FC's window a few times after the alleged first incident somehow satisfied that requirement. (*Id.*)

In fact, evidence of a prior offense as a child is not relevant "absent evidence of that . . . adolescent's mental and emotional state, sufficient to permit meaningful comparison with Appellant's state of mind as an adult. . . ." *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004).

Here, there is no evidence of Ronnie Jr.'s mental and emotional state and therefore there can be no meaningful comparison. Twelve-year-old boys are sexually curious, hormonal, and have not yet developed a mature concept of right and wrong or sense of self. *See, e.g.*, Lawrence Kohlberg, The Philosophy of Moral Stages and the Idea of Justice, in Essays on Moral Development (1981).

The military judge erred by finding the situations to be very similar because they involved the same two people and those two people were in a new sleeping arrangement at the time of the incidents. (Appellate Ex. XXXVIII at 5.) In fact, the circumstances were vastly different.

IT3 Oakley's mental and emotional maturity also changed significantly in the ten-year period between the allegations. The first incident allegedly occurred prior to IT3 Oakley finishing high school. (R. at 631, 958.) This was before his father kicked him out of the house (R. at 631, 958), before his mother died (R. at 956), before he entered the Navy and became a

sailor with an outstanding work ethic and technical knowledge (R. at 1044, 1056-58). It was also before he became an alcoholic. (R. at 956.) The following chart outlines some of the differences in the circumstances.

10 years before	2011
Occurred in a vacation house. (R. at 651.)	Occurred in family home.
FC ten years old. (R. at 650.) *Child victim	CS3 FC was nineteen years old. (R. at 1154.)
Ronnie Jr. approximately 12 years old. (Pros. Ex. 6, 8:56.)	IT3 Oakley 23 years old. (Pros. Ex. 6.)
FC and Ronnie Jr. lived together in close proximity full-time.	CS3 FC and IT3 Oakley had not seen each other for 6 years and communicated by social media very seldom. (R. at 606, 667, 958.)
FC sleeping. (R. at 650-51.)	CS3 FC awake but inebriated. (R. at 642-44, 645.)
Penile penetration. (R. at 651-52.)	Alleged attempted penile penetration. (R. at 653-54, 712.)
	Digital penetration. (R. at 648, 712.)
	Oral sex (R. at 653, 655, 712.)
	Masturbation with ejaculation. (R. at 687, 712.)
Ronnie Oakley sleepwalking. (R. at 8:56; 8:58.)	IT3 Oakley very intoxicated. (R. at 389, 728-29, 959; Pros. Ex. 6, 8:43.)
FC reacted by telling him to "get the fuck off" and pushing him off of her. (R. at 651, 719.)	CS3 FC testified she did not react to IT3 Oakley's actions verbally or physically. (R. at 656.)
FC reported event to mother six years later. (R. at 744.)	CS3 FC reported to mother the next morning. (R. at 661.)
Ronnie Jr.'s first sexual encounter. (Pros. Ex. 6, 8:58.)	

There is no comparison between the mental and emotional state of a highly intoxicated, adult IT3 Oakley at the time of the charged conduct and ten years before at age twelve. Further, IT3 Oakley reported he had been sleep walking during the childhood event. (Pros. Ex. 6, 8:56.) He was incapable of forming the requisite specific intent and the evidence is not relevant to a later alleged sexual intent. While an expert may find some relevance among these very complex facts, a mere lay-attorney cannot.

c. The evidence unfairly prejudiced IT3 Oakley and there was no probative value.

As discussed above, this evidence is not probative of intent or *mens rea*. The military judge also claimed this evidence showed IT3 Oakley did not have a mistake of fact as to CS3 FC's identity. (Appellate Ex. XXXVIII at 7.) IT3 Oakley's mistake of fact as to her identity was not relevant to any material fact because knowledge of her identify is not an element. The mistake of fact relevant to this case was "as to consent"-not identity.

This evidence took on a life of its own at trial and consumed considerable time. (R. at 604, 650-51, 1101; Pros. Ex. 6, 8:56-9:00.) Further, it distracted the members from the facts of this case, as shown by the questions from members presented to Ms. Moore. (R. at 744-52.)

This Court should set aside the convictions against IT3 Oakley because the military judge improperly admitted this evidence and it unfairly prejudiced IT3 Oakley.

VII.

THE MILITARY JUDGE ERRED BY PERMITTING MS. MOORE TO TESTIFY THAT CS3 FC TOLD HER "RONNIE ATTACKED ME" AS AN EXCITED UTTERANCE.

After the sexual activity, CS3 FC testified she went back to sleep rather than seeking help from anyone else in the house. (R. at 658.) Several hours later, around 0900, CS3 FC woke up in the office to the sunlight. (R. at 659, 713.) The first thoughts that went through her head were, "[j]ust how I'm going to deal with this when I get back to my command on Monday, how I'm going to tell my mom, how this was going to affect the weekend for everyone, the underage drinking went through my head, all of it went through my head." (R. at 659-60.) When Ms. Moore first saw her daughter, CS3 FC was already awake and looked distraught. (R. at 734.) Ms. Moore asked CS3 FC what was wrong and CS3 FC told her to close the door. (R. at 734.) When Ms. Moore complied, CS3 FC told her mother that she wished it were a dream but that IT3 Oakley attacked her the night before, or words to that effect. (R. at 734, 661.) She went on

to describe parts of the night and discuss the situation with her mother. (R. at 735.)

Before trial, the Government moved to pre-admit the statement, "Ronnie attacked me," or words to that effect, as an excited utterance. (Appellate Ex. XXIX; R. at 46, 67-68, 174, 661, 734.)[13] The military judge admitted the statement. (Appellate Ex. XXXVI.)

Principles of Law

Hearsay is an out of court statement, offered into evidence to prove the truth of the matter asserted. Mil. R. Evid. 801(c). Hearsay is generally inadmissible. Mil. R. Evid. 802, MCM, U.S. (2012). Excited utterances are an exception to the generally prohibition. Mil. R. Evid. 803(2), MCM, U.S. (2012). Excited utterances are statements related to a startling event made while the declarant was under the stress of excitement caused by the event or condition. *Id.*

To be admissible as an excited utterance there must be 1) a startling event; 2) the statement must be spontaneous and made

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[13] The military judge seems to confuse the proffered testimony in his ruling. He claims the Government moves to admit "I woke up with him on top of me" instead of "Ronnie attacked me." (Appellate Ex. XXXVI, 1, 9.) CS3 FC, IT3 Oakley, and Ms. Moore used the phrase "woke up with him on top" in relation to the alleged incident discussed in AOE VI. (R. at 55, 69, 77, 651; Pros. Ex. 6, 8:56.) But no one testified that CS3 FC woke up with IT3 Oakley on top of her on 30 April 2011.

while under the excitement of the startling event; and 3) the statement must relate to the startling event. *United States v. Donaldson*, 58 M.J. 477, 482 (C.A.A.F. 2003). To determine whether a statement is an excited utterance, military judges should consider six factors: 1) lapse of time between the event and the statement; 2) whether the statement was made in response to a question; 3) the age of the declarant; 4) the declarant's mental and physical condition at the time of the statement; 5) the circumstances surrounding the event; and 6) the details and subject matter of the statement. *Donaldson*, 58 M.J. at 483.

Discussion

CS3 FC's statement to her mother was not an excited utterance because it was not spontaneous and CS3 FC was not under the stress of a startling event.

CS3 FC testified that she had time to reflect on her situation before speaking to her mother. (R. at 659-60.) She considered the consequences of reporting a sexual assault and made a reasoned decision about how to handle the situation. (*Id.*) Even the military judge's findings of fact suggest as much. Judge O'Neil concluded that CS3 FC thought about her situation enough to make the reasonable decision not to leave the room and seek help. (Appellate Ex. XXXVI at 7.) This decision-making process indicates that CS3 FC had the

opportunity to reflect on her situation. Further, she made the statement in response to a question (R. at 45-46, 65, 734), and had the presence of mind to tell her mother to close the door before she answered the question (R. at 65, 336, 734).

Also CS3 FC was not under the stress of the startling event. The statement came after CS3 FC slept for several hours. IT3 Oakley woke up at 0300 and initiated sexual activity shortly thereafter. (R. at 965-66.) CS3 FC then slept until 0900. (R. at 659.) Then, CS3 FC took time between waking up and speaking with her mother to gather her thoughts.

This testimony from Ms. Moore unfairly prejudiced IT3 Oakley because she inappropriately bolstered CS3 FC's credibility. That credibility was a central issue to the case. The case was a "he said, she said" sexual assault. He said she participated in the sexual activity by opening her legs, grinding against his hand, and moaning. (R. at 969.) She said she was too startled to move or decline the sexual activity. (R. at 629.) CS3 FC's testimony changed significantly from the Article 32 hearing, through the second trial, and into the final trial. (R. at 668-89 (change in time CS3 FC started drinking alcohol); 670 (amount of alcohol consumed); 673 (knowledge of timing of evening's events); 674 (amount of time spent alone with IT3 Oakley that night); 698 (whether she saw IT3 Oakley

approach the recliner); 702 (how long the sexual activity lasted); 706 (whether or not she lifted her head to speak with IT3 Oakley); 714 (whether she threw up)). This hearsay evidence inappropriately bolstered CS3 FC's testimony.

This Court should set aside IT3 Oakley's convictions because it cannot be convinced this evidence did not contribute to the verdict.

VIII.

WHEN A MATERIAL FACT IS NECESSARILY DETERMINED BY A PREVIOUS ACQUITTAL, A SUBSEQUENT PROSECUTION IS BARRED BY ISSUE PRECLUSION AND DOUBLE JEOPARDY. THE MILITARY JUDGE HERE ERRED BY FAILING TO DISMISS SPECIFICATION 1 BECAUSE IN THE FIRST TRIAL THE JURY NECESSARILY ACQUITTED IT3 OAKLEY OF ALL OF THE ELEMENTS OF AGGRAVATED SEXUAL ASSAULT.

The Government charged IT3 Oakley with wrongful sexual contact at the first trial for touching CS3 FC's groin with his hand, without her consent. (Charge Sheet*.) The Government also charged IT3 Oakley with aggravated sexual assault at the first trial for penetrating her genital opening with his finger while she was substantially incapable of declining participation. (Charge Sheet*.) The charges refer to the exact same behavior. Nevertheless, neither the Government, nor the military judge instructed the members on distinctions between the crimes. The members acquitted IT3 Oakley of wrongful sexual

contact but convicted him of aggravated sexual assault. (Appellate Ex. LVIII*.)

When this Court overturned IT3 Oakley's conviction, the Government tried IT3 Oakley again for aggravated sexual assault. Before trial, the defense moved to dismiss the specification for aggravated sexual assault due to issue preclusion and double jeopardy. (Appellate Ex. LVIII.) The military judge denied the motion. (Appellate Ex. III; R. at 220.)

Standard of Review

This Court reviews issue preclusion and whether an offense is a lesser-included offense *de novo*. *United States v. Arriaga*, 70 M.J. 51, 54 (C.A.A.F. 2011).

Principles of Law

The Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." Issue preclusion, also called collateral estoppel, is "embodied in the Fifth Amendment guarantee against double jeopardy." *Ashe v. Swenson*, 397 U.S. 436, 445 (1970). Issue preclusion, "precludes the Government from re-litigating any issue that was necessarily decided by a jury's acquittal in a prior trial." *Yeager v. United States*, 557 U.S. 110, 117-18 (2009); *Ashe*, 397 U.S. at 443-44 (finding trial for armed

robbery precluded where previous trial for armed robbery of a different victim in the same incident acquitted defendant).

To decipher what a jury has necessarily decided, courts should "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Yeager*, 557 U.S. at 119-20. "The inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Id.* (citing *Ashe*, 397 U.S. at 444).

"[A] lesser-included offense is the same offense as the greater for double jeopardy purposes." *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (quotations omitted). "Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense." *Brown v. Ohio*, 432 U.S. 161, 169 (1977) (footnote omitted).

Discussion

In the first trial against IT3 Oakley, the jury rendered an inconsistent verdict, finding that IT3 Oakley was not guilty of wrongful sexual contact, but guilty of aggravated sexual assault for the same conduct. Normally an inconsistent verdict in one

trial is acceptable. But here, a retrial on aggravated sexual assault violates the double jeopardy clause because the issue was already necessarily decided.

a. The verdict in the first trial was inconsistent.

Wrongful sexual contact is a lesser-included offense of aggravated sexual contact. *United States v. Medina*, 68 M.J. 587 (N-M. Ct. Crim. App. 2009) (Beal, J., dissenting in part and concurring in part) (observing "lack of consent" is an implicit element to aggravated sexual assault); *United States v. Wagner*, No. 20111064, 2013 CCA LEXIS 573, 18, 24 (A.C.C.A. July 29, 2013) (finding it is still impossible to prove the greater offense without first proving the lesser); *c.f. United States v. Johanson*, 71 M.J. 688, 693 (C.G. Ct. Crim. App. 2012) (concluding "lack of consent is inherent in substantial incapability of declining participation"). *But see, United States v. Barlow*, No. 37981, 2014 CCA LEXIS 166, 23-24 (A.F. Ct. Crim. App. Mar. 13, 2014) (lack of consent or permission is not an element of any offense under Article 120, UCMJ, except wrongful sexual contact, so wrongful sexual contact can never be an LIO of any other offense under Article 120, UCMJ).

Wrongful sexual contact as charged here, necessarily includes all of the elements of aggravated sexual assault. The sexual act charged in this case is necessarily a sexual contact.

Penetration with fingers is a type of touching with a hand. The vaginal opening is a part of the groin. And lack of consent necessarily includes situations in which a person is unable to consent. As discussed above, these findings of guilty to aggravated sexual assault and not guilty to wrongful sexual contact are inconsistent.

If IT3 Oakley is not guilty of wrongful sexual contact, as the members determined in the first trial, then he cannot possibly, as a matter of both law and fact, be guilty of aggravated sexual assault.

b. Retrial is barred after this inconsistent verdict.

Generally, an inconsistent verdict is not a basis to overturn a conviction because, "[the] most that can be said [about inconsistent verdicts] is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt." *Dunn v. United States,* 284 U.S. 390, 393 (1932); *see also United States v. Lyon,* 35 C.M.R. 279, 285 (C.M.A. 1965); *United States v. Snipes,* 18 M.J. 172, 175, n.4 (C.M.A. 1984); *United States v. Betts,* No. 200300629, 2005 CCA LEXIS 301, *12-14 (N-M. Ct. Crim. App. Sept. 28, 2005); *United States v. Powell,* 469 U.S. 57, 64-65 (1984) (the Government is precluded from appealing or otherwise

upsetting such an acquittal by the Constitution's Double Jeopardy Clause (citing *Green* v. *United States*, 355 U.S. 184, 188 (1957); *Kepner* v. *United States*, 195 U.S. 100, 130, 133 (1904)).

Double jeopardy does not automatically bar a retrial after a conviction unless the verdict is overturned due to insufficient evidence. *Monge v. California*, 524 U.S. 721, 734 (1998); *Price v. Georgia*, 398 U.S. 323, 326-27 (1970) (applying the concept of "continuing jeopardy"). "The general rule is that jeopardy does not fully terminate, and retrial may occur, with respect to a crime for which a person was originally convicted notwithstanding reversal of that conviction on appeal." *Green v. United States*, 355 U.S. 184, 189 (1957). But if the members necessarily decided an issue in the accused's favor, the subsequent prosecution is barred. *Yeager*, 557 U.S. at n.6.

> The defendant's burden is particularly difficult to satisfy when the jury has reached inconsistent verdicts. Such verdicts, whether based on error, confusion or a desire to compromise, give little guidance as to the jury's factual findings.

United States v. Citron, 853 F.2d 1055, 1058 (2d Cir. 1988); *see also Evans v. United States*, 987 A.2d 1138, 1140 (D.C. Ct. App. 2010); *Commonwealth v. Delong*, 879 A.2d 234 (Pa. Super. Ct. 2005).

The question before this Court is what facts did the acquittal at the first trial necessarily determine? *See, e.g.*, *United States v. Cook*, No. 201200518, 2013 CCA LEXIS 1073, *10 (N-M. Ct. Crim. App. Dec. 31, 2013) (finding acquittal was not a *per se* finding that penile penetration had not occurred because the jury could also have found the victim was not substantially incapacitated.). Unlike *Cook*, every element of aggravated sexual assault here is a subset of an element of wrongful sexual contact. The acquittal for wrongful sexual contact necessarily decided the issue of aggravated sexual assault because, as charged, each of the elements of aggravated sexual assault is subsumed by an element of wrongful sexual contact.

It is untenable to accept this inconsistent verdict from two separate fact-finders. This Court should set aside the conviction for aggravated sexual assault with prejudice.

CONCLUSION

This Court should set aside IT3 Oakley's convictions with prejudice.

JENNIFER L. MYERS
Lieutenant, JAGC, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE
Bldg. 58, Ste. 100
Washington, D.C. 20374
Phone (202) 685-7713
Fax (202) 685-7426
jennifer.l.myers@navy.mil

APPENDIX

1. *United States v. Barlow*, No. 37981, 2014 CCA LEXIS 166 (A.F. Ct. Crim. App. Mar. 13, 2014)

2. *United States v. Betts*, No. 200300629, 2005 CCA LEXIS 301 (N-M. Ct. Crim. App. Sept. 28, 2005)

3. *United States v. Cook*, No. 201200518, 2013 CCA LEXIS 1073 (N-M. Ct. Crim. App. Dec. 31, 2013)

4. *United States v. Oakley*, No. 201200299, 2013 CCA LEXIS 245 (N-M. Ct. Crim. App. Mar. 26, 2013)

5. *United States v. Saxman*, No. 200900412, 2010 CCA Lexis 68 (N-M. Ct. Crim. App May 27, 2010)

6. *United States v. Wagner*, No. 20111064, 2013 CCA LEXIS 573, 18 (A.C.C.A. July 29, 2013)

Certificate of Filing and Service

I certify that a copy of the foregoing was delivered to the Court and to Director, Appellate Government Division, and electronically filed on 14 July 2014.

JENNIFER L. MYERS
Lieutenant, JAGC, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
Bldg. 58, Ste. 100
Washington, D.C. 20374
Phone (202) 685-7713
Fax (202) 685-7426
jennifer.l.myers@navy.mil

APPENDIX 1

United States v. Barlow

United States Air Force Court of Criminal Appeals
March 13, 2014, Decided
ACM 37981

Reporter: 2014 CCA LEXIS 166

UNITED STATES v. Staff Sergeant TODD J. BARLOW, United States Air Force

Notice: THIS OPINION IS SUBJECT TO EDITORIAL CORRECTION BEFORE FINAL RELEASE.

Subsequent History: Motion granted by *United States v. Barlow, 2014 CAAF LEXIS 609 (C.A.A.F. June 16, 2014)*

Prior History: [*1] Sentence adjudged 24 June 2011 by GCM convened at Beale Air Force Base, California. Military Judge: Jeffrey A. Ferguson (sitting alone). Approved Sentence: Dishonorable discharge, confinement for 36 months, and reduction to E-1.

Counsel: For the Appellant: Major Matthew T. King; Captain Luke D. Wilson; and James D. Culp, Esquire.

For the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Brian C. Mason; Major John M. Simms; Major Charles G. Warren; and Gerald R. Bruce, Esquire.

Judges: Before ROAN, MARKSTEINER, and WIEDIE, Appellate Military Judges. ROAN, Chief Judge (concurring in part and dissenting in part).

Opinion by: WIEDIE

Opinion

WIEDIE, Judge, with whom MARKSTEINER, SJ., joins: A general court-martial composed of a military judge sitting alone convicted the appellant, contrary to his pleas, of two specifications of maltreatment; two specifications of wrongful sexual contact[1]; one specification of indecent exposure; one specification of forcible sodomy; and one specification of indecent acts, in violation of Articles 93, 120, 125, and 134, UCMJ, *10 U.S.C. §§ 893, 920, 925, 934*. The adjudged sentence consisted of a dishonorable discharge, confinement for 36 months, and reduction to E-1. [*2] With the exception of the automatic forfeitures, the convening authority approved the sentence as adjudged.

On appeal, the appellant argues: (1) His convictions for wrongful sexual contact must be set aside because wrongful sexual contact is not a lesser included offense (LIO) of abusive sexual contact; (2) The evidence is factually and legally insufficient to prove his guilt of wrongful sexual contact, forcible sodomy, and maltreatment; (3) The military judge erred by improperly excluding Mil. R. Evid. 412 evidence concerning Airman First Class (A1C) GG's adulterous relationship with another airman; and (4) He received ineffective assistance of counsel.

Background

In February 2007, A1C KT arrived at her first duty station, Beale Air Force Base (AFB), California, and was assigned to the 9th Security Forces Squadron (SFS). Upon arrival at Beale AFB, she was assigned to the same flight as the appellant.

A1C KT and the appellant were frequently assigned to patrol together, as often as four times a week. As a [*3] Staff Sergeant, the appellant was the senior patrolman when they teamed up and he was in charge of the vehicle. A typical patrol lasted 12 hours and consisted of driving a SFS vehicle around a sector of the base.

During their shifts, the appellant and A1C KT would discuss a number of topics both duty-related and personal. Eventually, the appellant began making comments of a sexual nature to A1C KT. He would comment on the size of A1C KT's breasts and ask her to show them to him. A1C KT did not report his comments; she did not believe anything would be done because she was just an airman and he was a noncommissioned officer (NCO) and also because of the "atmosphere" in the 9th SFS. In the presence of other squadron members, a squadron Captain had referred to A1C KT as "Tits McGee," and another Airman told her, "I just want to f[***] you." According to A1C KT, these comments elicited laughter from other squadron members.

The appellant continued to make comments about A1C KT's breasts and ask to see them. In an attempt to get him to stop "bugging" her, A1C KT decided to show him her breasts. While in their patrol car, she lifted her shirt and bra, exposing her breasts. She immediately attempted

[1] The appellant was found not guilty of two specifications of abusive sexual contact, but guilty of the lesser included offense (LIO) of wrongful sexual contact for each specification.

[*4] to pull down her shirt and bra again, but the appellant pushed her hands back up. He then grabbed her nipples and sucked on her breasts despite the fact she told him "no."

Soon after this incident, A1C KT was tasked to deploy. She attended deployment training in July 2007 and proceeded to Camp Bucca, Iraq. The appellant was also tasked to deploy to Camp Bucca during the same time period.

While deployed, A1C KT had various duties, one of which was to man a guard tower. Guard tower duty consisted of a four-hour shift and was performed alone. When she was alone in the tower, the appellant would often visit and rub her legs and make comments about her body and her chest in particular. The appellant's conduct progressed to the point where he grabbed her hand and placed it on his penis, over his pants, and touched her between the legs over her clothing. On one occasion, he exposed his penis and put her hand on it. He also put his hand down her pants inside her underwear and touched her vulva.

As at Beale AFB, A1C KT did not report the appellant's conduct because of concern about negative consequences if she did. She did, however, ask people to switch tower shifts with her and asked roving patrols [*5] to remain at the tower with her in order to avoid being alone with him.

While A1C KT was manning a tower one evening, the appellant arrived and became even more persistent than he had been other times, repeatedly asking A1C KT to perform oral sex on him. She told him "no" multiple times. The appellant remained at the tower for approximately two hours. Throughout the evening, he kept asking A1C KT to perform oral sex on him. At one point he told her that if she gave him a "blow job" he would "leave her alone forever." Thinking she could get him to leave her alone, A1C KT initially agreed to perform oral sex. The appellant exposed his penis and A1C KT put her mouth on it. As soon as she took the appellant's penis in her mouth, she changed her mind and attempted to pull her head back. To prevent her from pulling away, the appellant put his hands on the back of A1C KT's head and pushed her down on his penis. She continued to try to pull away, and he continued to prevent her from doing so until he ejaculated. When he finally released his grip on A1C KT's head, she fell over backwards because she had been attempting to pull away. After the incident, A1C KT vomited over the side of the tower [*6] and the appellant left.

A1C GG arrived at Beale AFB in 2010. She was 17 years old and, like A1C KT, fresh out of technical school when she was assigned to the 9th SFS. A1C GG's impression of the appellant was that he was an NCO who could have an impact on the career of a young Airman. A1C GG first met the appellant at a squadron booster club meeting. At his request, she got pizza for him during the meeting. Following the meeting, the appellant obtained A1C GG's cell phone number from the unit recall roster or unit board and called her. She did not answer the call. He left a message thanking her for getting him pizza, but also asked why she had not answered her phone.

On 26 August 2010, following their initial meeting, the appellant and A1C GG began exchanging numerous e-mails as well as text messages. On that first day they exchanged 100 e-mails and the appellant steered the dialogue in a direction of a sexual nature, asking A1C GG what type of underwear she was wearing. They also discussed going to lunch or dinner together at some point.

On 27 August 2010, the appellant picked A1C GG up on base and drove to an off-base Burger King. The pair went through the drive-thru and A1C GG paid [*7] for both lunches. On the drive back to base, the appellant pulled into the parking lot of a vacant store. After they parked, he placed a sunscreen in the window of the vehicle. They talked for a little while before the appellant attempted to kiss A1C GG. When she pulled away from him, he pulled her face to his and they kissed for a brief period of time. He then moved his hand to her belt, but she told him, "No, I don't work like that." The appellant responded by undoing his pants and exposing his penis. He asked A1C GG if she liked it and wanted to touch it. She shook her head "no."

The appellant put his penis back in his pants and climbed into the back seat of his vehicle. From the backseat, he reached around A1C GG and touched her breasts over her uniform. She attempted to shift her feet, and when she did so, he pulled her into the back seat. The appellant pulled A1C GG's ABU top down so that it rested at her elbows and fondled her breasts. After the appellant withdrew his hand from her shirt and while A1C GG was attempting to put her ABU top back on, he put his hand down the front of her pants, under her underwear, and touched her vulva.

Following this incident, the appellant drove [*8] back to base and dropped A1C GG off near the squadron. They exchanged numerous e-mails during the rest of the afternoon, in which A1C GG gave the impression that she liked what had happened and wanted more to occur. She later explained she did so because she was afraid of what the appellant would do if she indicated she had a problem with what had happened. An additional 78 e-mails were exchanged between them on Monday, 30 August 2010.

After returning to the squadron following the 27 August 2010 lunch incident, A1C GG encountered her friend and fellow squadron member, Airman (Amn) JC. Amn JC

noticed that A1C GG was shaking and was "wide eyed like she was holding a secret." A1C GG told Amn JC what had transpired in the parking lot on the way back from lunch.

On 28 August 2010, A1C GG also told her fiancé at the time, A1C AK, what had happened. A1C GG and A1C AK had met just before starting tech school. At the time of the conversation, A1C AK was stationed at Incirlik Air Base, Turkey.

On 27 August 2010, A1C GG told Senior Airman (SrA) BM that the appellant sexually assaulted her. SrA BM reported the assault to his chain of command approximately three weeks later. Eventually, the Air Force [*9] Office of Special Investigations (AFOSI) was notified and an investigation was initiated. SrA BM was A1C GG's sponsor when she arrived at Beale AFB. Although there was disagreement as to the exact start date, at some point on or after 29 August 2010, SrA BM and A1C GG became romantically involved despite the fact SrA BM was married to another woman at the time. The affair was discovered during the investigation of the appellant's assault of A1C GG. Both A1C GG and SrA BM were disciplined for the improper relationship. At the time of trial, A1C GG was pregnant with SrA BM's child.

The appellant was brought in for questioning by agents from AFOSI on 22 October 2010. At the outset of the interview, an AFOSI agent read the appellant his Article 31, UCMJ, *10 U.S.C. § 831*, rights. After the rights advisement, the appellant was asked if he wanted a lawyer. He stated he wanted a lawyer but that he was willing to answer questions because he did not understand what was going on. The AFOSI agent sought to clarify with the appellant whether he wanted to stop the questioning and speak with a lawyer or whether he wanted to answer questions. The appellant asked if he would be able to stop the questioning [*10] at any point if he later decided he wanted to consult with an attorney. The AFOSI agent responded that the appellant had the right to stop the questioning at any point. Following this clarification, the appellant stated he did not want a lawyer at that time and was willing to answer questions.

Prior to trial, trial defense counsel requested the Government produce A1C AK as a witness at the appellant's court-martial. Trial defense counsel proffered that A1C AK would testify about inconsistent statements made by A1C GG concerning the sexual assault and his opinion that A1C GG had a bad character for truthfulness. Trial defense counsel did not pursue a motion to compel production of A1C AK when the Government failed to produce him as a witness. Because of issues with A1C AK's travel arrangements, the defense would have had to request a delay of a day or two to have him produced as a witness.

During the preliminary Article 39(a), UCMJ, *10 U.S.C. § 839(a)*, session, the Government sought to add the terminal element to both *Article 134, UCMJ*, specifications (Specifications 1 and 2 of Additional Charge III).[2] Trial defense counsel believed the changes to be major changes, but did not object to the [*11] addition of the language to the two relevant specifications. The appellant was ultimately convicted of Specification 2 of Additional Charge III.

The appellant was initially charged with allegedly committing an indecent act with a third individual, Ms. JI. In an attempt to accommodate the personal schedule of Ms. JI, the Government arranged her travel so she would arrive at a time the Government believed they would be near the end of their case-in-chief. The court-martial started on 22 June 2011 and proceeded more quickly than the Government had anticipated. The Government's last witness finished testifying at approximately 0915 on 23 June 2011. Ms. JI was not scheduled to arrive in the local area until late in the evening on 23 June 2011. The Government asked for a continuance until the next day to await the arrival of Ms. JI, which trial defense counsel opposed. The military judge denied the continuance [*12] request and the Government was forced to rest their case-in-chief. Trial defense counsel immediately made a motion for a finding of not guilty pursuant to Rule for Courts-Martial (R.C.M.) 917 with respect to the specification related to Ms. JI. The military judge granted the defense motion.

Wrongful Sexual Contact as an LIO of Abusive Sexual Contact

The appellant was charged with two specifications of abusive sexual contact for fondling the breasts and touching the vulva of A1C GG by placing her in fear of reprisal by using his rank and military position. He was found not guilty of these *Article 120, UCMJ*, offenses but, with respect to both, was found guilty of the LIO of wrongful sexual contact, also under *Article 120, UCMJ*. The appellant asserts the military judge erred in concluding wrongful sexual contact is an LIO of abusive sexual contact.

"An accused may be found guilty of an offense necessarily included in the offense charged." Article 79, UCMJ, *10*

[2] The Government added the following language to both Specifications of Additional Charge III: "and that under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces."

U.S.C. § 879. Article 79, UCMJ, requires application of the elements test to determine whether one offense is an LIO of a charged offense. United States v. Jones, 68 M.J. 465, 472 (C.A.A.F. 2010). Under the elements test, "the elements **[*13]** of the lesser offense [must be] a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, no instruction [regarding a lesser included offense] is to be given." United States v. Alston, 69 M.J. 214, 216 (C.A.A.F. 2010) (alteration in original) (quoting Schmuck v. United States, 489 U.S. 705, 716, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989)). "The due process principle of fair notice mandates that 'an accused has a right to know what offense and under what legal theory' he will be convicted; an LIO meets this notice requirement if 'it is a subset of the greater offense alleged.'" Jones, 68 M.J. at 468 (quoting *United States v. Medina*, 66 M.J. 21, 26-27 (C.A.A.F. 2008)).

However, "the elements test does not require that the two offenses at issue employ identical statutory language." Alston, 69 M.J. at 216. Instead, after applying the "normal principles of statutory construction," the question is whether the elements of the alleged LIO are a subset of the elements for the charged offense. Id. (quoting Carter v. United States, 530 U.S. 255, 263, 120 S. Ct. 2159, 147 L. Ed. 2d 203 (2000)).

Thus, the first step is to determine the elements of the charged offense and the alleged LIO by applying **[*14]** the principles of statutory construction. The second step is to compare the elements of the two offenses to see if the latter is a subset of the former.

The first specification at issue alleged, under Article 120, UCMJ, that the appellant touched the breasts of A1C GG by placing her in fear of reprisal. The second specification at issue alleged the appellant touched the vulva of A1C GG by placing her in fear of reprisal. The elements of abusive sexual contact by placing in fear are:

> (1) That the accused engaged in sexual contact with another person; and
>
> (2) That the accused did so by placing that other person in fear of reprisal.

The elements of wrongful sexual contact are:

> (1) That the accused had sexual contact with another person;
>
> (2) That the accused did so without that other person's permission; and
>
> (3) That the accused had no legal justification or lawful authorization for that sexual contact.

Applying the elements test in this case, the first element of both offenses is the same. The question then turns to whether "without permission" is included within the second element of abusive sexual contact. As a preliminary matter, we note that Congress clearly intended "permission" to be synonymous **[*15]** with "consent," and thus we will treat the terms as such in our analysis. *See United States v. Thompson*, ACM 37443, 2010 CCA LEXIS 269 (A.F. Ct. Crim. App. 6 May 2010) (unpub. op.).

Applying the common and ordinary understanding of these words, it would appear that an allegation that a victim is compelled to submit to sexual acts out of fear of reprisal includes as a subset that the victim is not consenting. A strong argument can be made that, if an individual only submits to an act out of fear, then it cannot be said that he consented or gave permission to the act in question. In fact, this logic would appear to apply to all three ways in which abusive sexual contact can occur: (1) by use of threat or placing in fear; (2) by causing bodily harm; or (3) upon a person who is substantially incapacitated or substantially incapable of appraising the act, declining participation, or communicating unwillingness.

Notwithstanding the "common sense" appeal of such an argument, it is undercut by the *Manual for Courts-Martial's* treatment of the issue of whether wrongful sexual contact is an LIO of abusive sexual contact. As noted above, the first element of these two offenses essentially mirror each other. If every **[*16]** case that satisfies the second element of abusive sexual contact *ipso facto* results in a conclusion of lack of permission or consent, then one would assume that in all cases wrongful sexual contact would be an LIO of abusive sexual contact. However, paragraph 45(d)(8) of the *Manual* (the "lesser included offenses" section) does not list wrongful sexual contact as an LIO of abusive sexual contact. *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 45.d.(8) (2008 ed.). Instead, paragraph 45(e), which is titled "additional lesser included offenses," states "[d]epending on the factual circumstances in [the] case," wrongful sexual contact "may" be considered an LIO of abusive sexual contact. *MCM*, ¶ 45.e.(8). This treatment of the LIO issue suggests that in some, but not all situations, depending on the facts, the second element of abusive sexual contact can be proven even in the absence of evidence that would satisfy the second element of wrongful sexual contact.

Even more troubling for the "common sense" approach forwarded above is Congress' specific treatment of the issue within the statutory language of Article 120, UCMJ. We must consider what Congress has said on the matter

because [*17] Congress has broad authority to define the elements of offenses under the constitutional power to make rules for the Government and regulation of the armed forces. U.S. CONST. art. I, § 8, cl. 14; *see* Parker v. Levy, 417 U.S. 733, 756, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974); *see also* Weiss v. United States, 510 U.S. 163, 177, 114 S. Ct. 752, 127 L. Ed. 2d 1 (1994). Furthermore, the Supreme Court has "observed that '[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.'" Dixon v. United States, 548 U.S. 1, 7, 126 S. Ct. 2437, 165 L. Ed. 2d 299 (2006) (alteration in original) (quoting Liparota v. United States, 471 U.S. 419, 424, 105 S. Ct. 2084, 85 L. Ed. 2d 434 (1985)).

In analyzing the issue at hand, we must first give all terms used their plain and ordinary meaning. If an ambiguity exists, we must examine the legislative history to resolve the ambiguity. If, after applying the first two steps, doubt still exists as to the provision's intent, we must apply the rule of lenity and resolve the ambiguity in favor of the appellant. *See* Moskal v. United States, 498 U.S. 103, 111 S. Ct. 461, 112 L. Ed. 2d 449 (1990); *see also* United States v. Thomas, 65 M.J. 132, 135 n.2 (C.A.A.F. 2007) (noting rule of statutory strict construction and resolving [*18] any ambiguity in favor of accused); United States v. Hunter, 65 M.J. 399, 401 (C.A.A.F. 2008) ("Ordinary rules of statutory construction apply in interpreting the R.C.M."); United States v. Custis, 65 M.J. 366, 370 (C.A.A.F. 2007) (recognizing that normal rules of statutory construction apply to the *Manual* in general and Military Rules of Evidence in particular); United States v. Lewis, 65 M.J. 85, 88 (C.A.A.F. 2007) (The courts "use well-established rules of statutory construction to construe the *Manual for Courts-Martial*."). If the statute's language is plain, then "[i]t is well established that . . . the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." Lamie v. United States Trustee, 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004) (internal quotation marks omitted); *see also* Lewis, 65 M.J. at 88.

The 2007 amendment to Article 120, UCMJ, omitted "lack of consent" as an element of virtually all sexual misconduct offenses, except the offense of wrongful sexual contact. This change from the previous version of Article 120, UCMJ, brought the UCMJ sexual misconduct provisions into alignment with similar provisions applicable [*19] in the United States District Courts. *See* Analysis of Punitive Articles, *MCM*, A23-15. Specifically, Article 120(r), UCMJ, provides:

> Lack of permission is an element of the offense . . . [of wrongful sexual contact]. Consent and mistake of fact as to consent are not an issue, or an affirmative defense, in a prosecution under *any other subsection*, except they are an affirmative defense for the sexual conduct in issue in a prosecution . . . [for abusive sexual contact].

(emphasis added).

The limited legislative history suggests this revision was intended to focus the finder of fact on the accused's conduct, instead of the victim's conduct or state of mind.[3] The text of Article 120(r), UCMJ, reflects this change in focus very clearly.

We must assume Congress intended and understood the effect [*20] of omitting "lack of consent" as an element of the offense. *See* United States v. Wilson, 66 M.J. 39, 45-46 (C.A.A.F. 2008). According to the plain language of Congress, wrongful sexual contact *requires* proof of an element, i.e. without permission, that abusive sexual contact does not. This additional proof requirement mandates a conclusion that wrongful sexual contact cannot be considered an LIO of abusive sexual contact under the test articulated in Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Without permission or consent cannot be *necessarily* included in the elements of abusive sexual contact when Congress has unambiguously stated that consent is "not an issue" in abusive sexual contact cases, regardless of the common sense appeal of an argument to the contrary. While the scope of the meaning of "not an issue" can be open to some interpretation, even the narrowest reading of the language requires a conclusion that "without consent" or "permission" is not an element of abusive sexual contact.

In a prosecution for abusive sexual contact, the Government does not have to prove the absence of consent in order to secure a conviction. *See* United States v. Neal, 68 M.J. 289 (C.A.A.F. 2010). [*21] Under the structure of the version of Article 120, UCMJ, in effect at the time of the alleged offenses in this case, the absence of consent or permission was not a fact necessary to prove the offense of abusive sexual contact. Evidence that the alleged victim consented would be relevant to the factfinder's

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[3] *See* Analysis of Punitive Articles, *Manual for Courts-Martial, United States*, A23-15 (2008 ed.) (noting amendments based on 18 U.S.C. §§ 2241-45); 151 CONG. REC. H12210 (December 18, 2005) (statement of Rep. Loretta Sanchez); Markup of the Defense Authorization Bill: Hearing before the Military Personnel Subcommittee of the House Armed Services Committee (May 11, 2005) (statement of Rep. John McHugh).

determination of whether the Government proved the element of "by fear" beyond a reasonable doubt, but it was not necessary under the law. Article 120(r), UCMJ, does not preclude introduction of evidence of consent as a "subsidiary fact" pertinent to the prosecution's burden to prove an element of abusive sexual contact beyond a reasonable doubt, but it also does not require the Government to introduce any evidence of lack of consent or permission to prove the elements of the offense beyond a reasonable doubt. *See* Neal, 68 M.J. at 302. In short, under the plain language articulated by Congress, the Government can prove each element of abusive sexual contact beyond a reasonable doubt without introducing any evidence related to lack of permission or consent.

In analyzing whether wrongful sexual contact is an LIO of any other offense in Article 120, UCMJ, our sister courts have reached [*22] conflicting decisions. *See* United States v. Honeycutt, Army 20080589, 2010 CCA LEXIS 104 at *5 (Army Ct. Crim. App. 1 September 2010) (finding wrongful sexual contact was not an LIO of rape by force because "[t]he elements of rape by force do not include any, let alone all, of the elements of wrongful sexual contact"); United States v. Wagner, Army 20111064, 2013 CCA LEXIS 573 at *15 (Army Ct. Crim. App. 29 July 2013) (holding wrongful sexual contact is an LIO of the offense of aggravated sexual assault but not under the particular facts of that case); United States v. Prothro, Army 20110331, 2013 CCA LEXIS 293 at *5-6 (Army Ct. Crim. App. 29 March 2013) ("In this case, wrongful sexual contact does not qualify as a lesser-included offense because that offense requires an element [without the other person's permission] not required for the greater offense of abusive sexual contact caused solely by fear."); United States v. Johanson, 71 M.J. 688, 693 (C.G. Ct. Crim. App. 2012) (concluding wrongful sexual contact is an LIO of abusive sexual contact of a person substantially incapable of declining participation because "[s]urely a lack of consent is inherent in substantial incapability of declining participation"); [*23] and *United States v. Medina*, 68 M.J. 587 (N.M. Ct. Crim. App. 2009) (Beal, J., dissenting in part and concurring in part) (observing that wrongful sexual contact was an LIO of aggravated sexual assault because "the Manual for Courts-Martial itself validates the notion that 'lack of consent' is an implicit element to aggravated sexual assault" in recognizing wrongful sexual contact as a potential lesser included offense in paragraph 45(e)(8)).

This Court has previously found wrongful sexual contact to be an LIO of a different Article 120, UCMJ, charge (aggravated sexual assault). *See United States v. Pitman*, ACM 37453, 2011 CCA LEXIS 93 at *11 (A.F. Ct. Crim. App. 19 May 2011) ("[A]n allegation that a victim is compelled to submit to sexual acts by force clearly includes as a subset that the victim is not consenting."). The Court of Appeals for the Armed Forces has not squarely answered whether wrongful sexual contact can ever be an LIO of any other Article 120, UCMJ, charge. Based on our reading of the plain language of Congress that lack of consent or permission is not an element of any offense under Article 120, UCMJ, except wrongful sexual contact, we conclude today that wrongful sexual contact [*24] can never be an LIO of any other offense under Article 120, UCMJ.[4]

Factual and Legal Sufficiency

The appellant further argues the evidence was factually and legally insufficient to support his conviction of both specifications of wrongful sexual contact with A1C GG[5] as well as forcible sodomy of A1C KT and maltreatment of A1C KT. We review issues of factual and legal sufficiency de novo. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making [*25] allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987), *quoted in* United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." Washington, 57 M.J. at 399.

The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." Turner, 25 M.J. at 324, *quoted in* United States v. Humpherys, 57 M.J. 83, 94 (C.A.A.F. 2002). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable

[4] Our holding applies, of course, to the law in effect at the time of the charged offenses. Since then, Article 120, UCMJ, 10 U.S.C. § 920, has been revised again. *See* Analysis of Punitive Articles, *Manual for Courts-Martial, United States*, A23-15 (2012 ed.) ("The 2012 amendments . . . simplified the structure of the definition and deleted restrictions regarding the use of consent evidence.").

[5] Because of our determination that wrongful sexual contact is not an LIO of abusive sexual contact, we do not need to consider the issue of whether the evidence was factually and legally sufficient to support the wrongful sexual contact convictions.

inference from the evidence of record in favor of the prosecution." United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001) (citing United States v. Rogers, 54 M.J. 244, 246 (C.A.A.F. 2006); United States v. Blocker, 32 M.J. 281, 284 (C.M.A. 1991)). [*26] Our assessment is limited to the evidence produced at trial. United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993).

I. Forcible Sodomy of A1C KT

Although she initially agreed to perform oral sex on the appellant in an attempt to get him to leave her alone, A1C KT almost immediately decided she did not want to continue. She manifested her desire to stop by attempting to pull her head away from the appellant's groin area. The appellant would not allow her to do so and forcibly held her head until he ejaculated. The evidence factually and legally supports a finding of guilty with respect to this offense.

The defense argues the evidence related to the wrongful sexual contact charges involving A1C GG essentially propped up the allegation of forcible sodomy with A1C KT and without that evidence the appellant would not have been convicted of forcible sodomy.

We disagree with the appellant's suggestion that a military judge would have difficulty evaluating the charges separately. A military judge is presumed to know and follow the law. *See United States v. Kinman, 25 M.J. 99, 100-01 (C.M.A. 1987)*. Through training and experience, a military judge sitting as a factfinder is less susceptible to [*27] the dangers of "impermissible spillover" than an inexperienced lay court member. Also, the evidence supporting the forcible sodomy charge in this case was strong. We are confident the military judge based his findings on that evidence and not general notions that the appellant was a bad actor, as demonstrated by other misdeeds. In fact, the military judge acquitted the appellant of abusive sexual contact. We are not persuaded that this is the rare case where the evidence and the nature of the charges have overcome the military judge's ability to avoid the prejudicial use of evidence. *Id.*

As he did at trial, the appellant argues the evidence is insufficient to find him guilty of forcible sodomy because it reveals A1C KT consented to the oral sex that occurred between on or about 1 September 2007 and on or about 30 November 2007. Having weighed the evidence in the record of trial, with allowances for not having personally observed the witnesses, including A1C KT, we are personally convinced of the appellant's guilt beyond a reasonable doubt. Similarly, we find a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.

II. Maltreatment of A1C KT

The court-martial [*28] convicted the appellant of two specifications of maltreatment of a subordinate, in violation of *Article 93, UCMJ*. Both specifications involved A1C KT; one with an alleged situs of Beale AFB and the other with a situs of Iraq. The elements of maltreatment are: (1) that a certain person was subject to the orders of the accused; and (2) the accused was cruel toward, or oppressed, or maltreated that person. *MCM*, Part IV, ¶ 17.b. "The essence of the offense [of maltreatment] is abuse of authority." United States v. Carson, 57 M.J. 410, 415 (C.A.A.F. 2002). Measured from an objective viewpoint in light of the totality of the circumstances, the charged acts must be such that they "reasonably could have caused physical or mental harm or suffering" but the offense does not require proof of "actual physical and mental pain or suffering." *Id.* The appellant argues the evidence is insufficient to show an abuse of authority.

We find the evidence legally and factually sufficient to support the conviction of maltreatment. Under the totality of the circumstances in this case, the appellant abused his authority by making repeated comments about A1C KT's breasts, repeatedly asking to see her breasts, [*29] and touching her breasts without her permission while on patrol at Beale AFB, and by making comments about A1C KT's body, touching her body, and repeatedly requesting oral sex from A1C KT while deployed to Iraq. The appellant's actions reasonably could have caused mental harm or suffering in that A1C KT was clearly concerned by the appellant's actions. After weighing the evidence and making allowances for not having observed the witnesses, we are convinced of the appellant's guilt beyond a reasonable doubt. Likewise, we find a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.

Exclusion of Mil. R. Evid. 412 Evidence

We review the military judge's ruling on whether to exclude evidence pursuant to Mil. R. Evid. 412 for an abuse of discretion. United States v. Roberts, 69 M.J. 23, 26 (C.A.A.F. 2010). Findings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed de novo. *Id.*

Mil. R. Evid. 412 states that evidence offered by the accused to prove the alleged victim's sexual predispositions, or that she engaged in other sexual behavior, is inadmissible except in limited contexts. Mil. R. Evid. 412(a)-(b). The rule [*30] "is intended to 'shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to [sexual offense prosecutions].'" United States v. Gaddis, 70 M.J. 248, 252 (C.A.A.F. 2011) (alteration in original) (quoting Analysis of the Military Rules of

Evidence, *MCM*, A22-35). While there are three exceptions set out in the rule, we are concerned only with the third, which states that the evidence is admissible if "the exclusion of [it] would violate the constitutional rights of the accused." Mil. R. Evid. 412(b)(1)(C).

The exception for constitutionally required evidence in Mil. R. Evid. 412(b)(1)(C) includes the accused's Sixth Amendment[6] right to confrontation. United States v. Banker, 60 M.J. 216, 221 (C.A.A.F. 2004) (citing *Weinstein's Federal Evidence* § 412.03 [4][a] (2d ed. 2003)), *abrogated by* Gaddis, 70 M.J. 248. An accused has a constitutional right "to be confronted by the witnesses against him." U.S. Const. amend. VI. That right necessarily includes the right to cross-examine those witnesses. Davis v. Alaska, 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974) (citing Douglas v. Alabama, 380 U.S. 415, 418, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965)). In particular, the right to cross-examination **[*31]** has traditionally included the right "to impeach, *i.e.*, discredit, the witness." Davis, 415 U.S. at 316, *quoted in* Olden v. Kentucky, 488 U.S. 227, 231, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988).

However, an accused is not simply allowed "cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Delaware v. Fensterer, 474 U.S. 15, 20, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985), *quoted in* Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). Indeed, "'trial judges retain wide latitude' to limit reasonably a criminal defendant's right to cross-examine a witness 'based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" Michigan v. Lucas, 500 U.S. 145, 149, 111 S. Ct. 1743, 114 L. Ed. 2d 205 (1991) (quoting Van Arsdall, 475 U.S. at 679). But no evidentiary rule can deny an accused a fair trial or all opportunities for effective cross-examination. *See* Van Arsdall, 475 U.S. at 679.

Generally, evidence must be admitted within the ambit of Mil. R. Evid. 412(b)(1)(C) when the evidence is relevant and material, and the probative value of the evidence outweighs the dangers of unfair prejudice. *See* Gaddis, 70 M.J. at 255 **[*32]** ("[T]he best reading of the rule is that . . . the probative value of the evidence must be balanced against and outweigh the ordinary countervailing interests reviewed in making a determination as to whether evidence is constitutionally required."). Relevant evidence is any evidence that has "any tendency to make the existence of any fact . . . more probable or less probable than it would be without the evidence." Mil. R. Evid. 401. The evidence must also be material, which is a multi-factored test looking at "the importance of the issue for which the evidence was offered in relation to the other issues in th[e] case; the extent to which this issue is in dispute; and the nature of other evidence in the case pertaining to this issue." United States v. Colon-Angueira, 16 M.J. 20, 26 (C.M.A. 1983) (quoting United States v. Dorsey, 16 M.J. 1, 6 (C.M.A. 1983)). Finally, if evidence is material and relevant, then it must be admitted when the accused can show its probative value outweighs the dangers of any potential unfair prejudice. *See* Mil. R. Evid. 412(c)(3). Those dangers include concerns about "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that **[*33]** is repetitive or only marginally relevant." Van Arsdall, 475 U.S. at 679.

In this case, the defense failed to articulate any reasonable theory tending to show that A1C GG had a motive to fabricate about whether the sexual conduct with the appellant was consensual. It is undisputed that at some point A1C GG had a relationship with SrA BM while he was married to another woman. However, the appellant's assertion that that "a sexual relationship between A1C GG and SrA BM existed before she reported to SrA BM" that she had been sexually assaulted is not supported by the evidence. The earliest possible start date of a sexual relationship supported by the evidence was 29 August 2010,[7] two days after A1C GG told SrA BM the appellant sexually assaulted her. Even taking the facts as argued by the defense, the earliest date such a relationship began was two days after A1C GG told SrA BM about the appellant's conduct. The appellant's argument is that because A1C GG had sex with another person, she had a motive to lie about what occurred with the appellant. If we accepted this rationale, then any sexual intercourse engaged in by an alleged victim either before or after an alleged sexual assault **[*34]** would be admissible. Such an approach would make Mil. R. Evid. 412 a nullity. There must be some other rational connection between the other sexual activity and a motivation to fabricate a sexual assault. The military judge correctly noted the appellant failed to provide any theory showing the questioned evidence was relevant or how the evidence supported any defense theory. This situation is clearly distinguishable from cases where an extramarital affair was deemed admissible when the defense articulated a plausible theory that the alleged

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[6] U.S. Const. amend. VI.

[7] Senior Airman BM's nonjudicial punishment action for the relationship alleged that it started "on or about 29 August 2009." The appellant's reliance on the "on or about 29 August 2010" language as proof that the relationship began before Airman First Class GG disclosed the appellant's conduct incorrectly assumes the relationship had to have begun on the earliest **[*35]** date within the charged timeframe.

victim fabricated a sexual assault allegation to prevent the disintegration of his or her marriage. Personal experience, general knowledge, and an understanding of human conduct and motivation fail to support how the proffered evidence in this case sufficiently supports the appellant's theory.

Evidence of A1C GG's relationship with SrA BM has no direct and substantial link to her credibility. Under the given facts, the existence of the relationship, especially given its timing, did not establish a greater motive for A1C GG to lie about whether her sexual encounter with the appellant was consensual. Because the evidence has no tendency to make a fact that is of consequence to the determination of the case more or less probable than it would be without the evidence, it is neither relevant nor material.

In this case, we conclude the military judge did not abuse his discretion when he excluded this evidence. The record reveals nothing more than speculative assertions and conjecture in this regard, and we conclude the appellant failed to meet his burden in demonstrating relevance. Mil. R. Evid. 412(c)(3); *see also* Roberts, 69 M.J. at 27-28.

Assistance of Counsel

The appellant argues his trial defense counsel's performance amounted to ineffective assistance. Specifically, the appellant claims his counsel were ineffective for failing to: (1) Object to a major change to the charge sheet (the addition of the terminal elements on Specification 2 of Additional [*36] Charge III); (2) File a motion to compel the appearance of a favorable witness after "9 RW/JA failed to have him produced in order to testify live"; (3) Seek the suppression of the appellant's videotaped statements to AFOSI after the appellant told AFOSI he wanted legal counsel and did not want to answer questions; and (4) Request and present evidence at the Mil. R. Evid. 412 hearing that established A1C GG's adulterous relationship with SrA BM began on 29 August 2010. After reviewing the record of trial, we find no merit to this argument.

We review claims of ineffective assistance of counsel de novo, applying the two-pronged test set forth in *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*. *See United States v. Tippit, 65 M.J. 69, 76 (C.A.A.F. 2007)*. Under *Strickland*, an appellant must demonstrate: (1) a deficiency in counsel's performance that is so serious that counsel was not functioning as the counsel guaranteed the defendant by the *Sixth Amendment*; and (2) that the deficient performance prejudiced the defense through errors so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Tippit, 65 M.J. at 76* (quoting *United States v. Moulton, 47 M.J. 227, 229 (C.A.A.F. 1997))* [*37] (internal quotation marks omitted). The deficiency prong requires that an appellant show the performance of counsel fell below an objective standard of reasonableness, according to the prevailing standards of the profession. *Strickland, 466 U.S. at 688*. The prejudice prong requires a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id. at 694*. Evidentiary hearings are required if there is any dispute regarding material facts in competing declarations submitted on appeal which cannot be resolved by the record of trial and appellate filings. *United States v. Ginn, 47 M.J. 236, 248 (C.A.A.F. 1997)*.

Applying these standards, we find that any material conflict in the respective declarations regarding this issue may be resolved by reference to the record and appellate filings without the need for an evidentiary hearing. The comprehensive declarations by trial defense counsel address the alleged deficiencies and provide sound reasons for the decisions now questioned by the appellant.

The trial defense counsel strategy was to keep the case moving in hopes the Government would be unable to secure the presence of a [*38] third alleged victim. This strategy proved successful when the military judge refused a Government request for a one-day continuance to allow for the arrival of Ms. JI and granted the subsequent defense R.C.M. 917 motion. Objecting to the major change proposed by the Government would not have prevented this case from going to trial; it merely would have delayed the case and increased the likelihood that Ms. JI's presence at trial would be secured. Likewise, a successful motion to compel production of A1C AK would have delayed the trial and increased the likelihood Ms. JI testified. Trial defense counsel did a cost-benefit analysis and made a rational decision to forgo the testimony of A1C AK in favor of avoiding the possibility of having to defend against allegations levied by a third alleged victim who, unlike the first two victims, had not discussed her situation with any other alleged victim in the case. Trial defense counsel had a legitimate desire to avoid having the testimony of Ms. JI presented at the appellant's court-martial.

The evidence from A1C AK, on the other hand, was mixed for the defense. Based on the proffered evidence, he would have offered an opinion that A1C GG [*39] had a bad character for truthfulness, but this was clearly offset by the fact that he was the jilted ex-fiancé of A1C GG. It was proffered that A1C AK would have testified that, in his Skype conversation/chat with A1C GG, she provided a description of the events that was inconsistent with her testimony at trial. However, the actual transcripts of the chats he had with A1C GG about the incident were

consistent in some significant aspects with her testimony, and their admission through his testimony would have bolstered the testimony of A1C GG. Based on the clearly mixed value of his testimony, the defense made a strategically sound decision not to file a motion to compel production of A1C AK and delay the trial in order to prevent Ms. JI from arriving before the Government was forced to rest their case-in-chief. Trial defense counsels' affidavit provides information about the strategic and tactical decisions the defense made regarding these issues. These decisions were not unreasonable. The fact this plan did not result in a complete acquittal does not invalidate the defense strategy, and we give great deference to trial defense counsels' judgments in this area. *United States v. Morgan, 37 M.J. 407, 409 (C.M.A. 1993)*; **[*40]** *United States v. Mazza, 67 M.J. 470, 474-75 (C.A.A.F. 2009)*.

The appellant also complains about his trial defense counsels' decision to refrain from challenging the admissibility of his statements to AFOSI. Trial defense counsels' affidavit also provides information about the strategic and tactical decisions the defense made regarding this issue. Trial defense counsel knew in advance of trial they would want to call the appellant as a witness. Once they called the appellant to the stand, many of the statements he made to AFOSI would have been admissible on cross-examination even if they had been suppressed initially by the military judge. Furthermore, and more importantly, the appellant's summary of the actual conversation with the AFOSI about whether he wanted a lawyer misstates what was actually said during the conversation. A review of the facts and the applicable law in this area make it abundantly obvious that any such motion to suppress would have failed. Trial defense counsel recognized the motion would not prevail and they certainly were not ineffective in failing to raise a motion that would have been denied.

Lastly, trial defense counsel were not ineffective for failing to **[*41]** request and present evidence that the sexual relationship between A1C GG and SrA BM began on 29 August 2010. Assuming the appellant could have established the sexual relationship in question began on 29 August 2010, such evidence, as noted above, was not relevant and would not have been admissible during the trial on the merits. As such, the appellant suffered no prejudice.

Sentence Reassessment

Having set aside the appellant's conviction of an offense, we must consider whether we can reassess the sentence or whether we must return the case for a rehearing on sentence. To validly reassess a sentence to purge the effect of error, we must be able to (1) discern the extent of the error's effect on the sentence and (2) conclude with confidence that, absent the error, the panel would have imposed a sentence of at least of a certain magnitude. *United States v. Buber, 62 M.J. 476, 479 (C.A.A.F. 2006)* (citing *United States v. Hawes, 51 M.J. 258, 260 (C.A.A.F. 1999)*; *United States v. Doss, 57 M.J. 182, 185 (C.A.A.F. 2002)*; *United States v. Taylor, 51 M.J. 390, 391 (C.A.A.F. 1999)*). We must also determine the sentence we propose to affirm is "appropriate," as required by Article 66(c), UCMJ, *10 U.S.C. § 866(c)*. **[*42]** "In short, a reassessed sentence must be purged of prejudicial error and also must be 'appropriate' for the offense involved." *United States v. Sales, 22 M.J. 305, 308 (C.M.A. 1986)*. *See also United States v. Winckelmann, 73 M.J. 11, 14-15 (C.A.A.F. 2013)*.

In this case, our action does not reduce the maximum permissible sentence the appellant faced because, based on the conviction for forcible sodomy alone, the appellant faced confinement for life. All other aspects of the maximum permissible sentence remain the same.

On the basis of the error noted, considering the evidence of record, and applying the principles set forth above, we determine that we can discern the effect of the errors and will reassess the sentence. Under the circumstances of this case, we are confident the military judge would have imposed the same sentence even if the appellant was not convicted of the wrongful sexual contact offenses. We also find, after considering the appellant's character, the nature and seriousness of the offenses, and the entire record, that this reassessed sentence is appropriate.

Conclusion

The findings of guilty to Specification 1 of Charge II and the Specification of Additional Charge II **[*43]** are set aside and dismissed. The remaining findings and the sentence, as reassessed, are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, *10 U.S.C. §§ 859(a), 866(c)*.[8,9] Accordingly, the findings as modified, and the sentence as reassessed, are

AFFIRMED.

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[8] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).

Concur by: ROAN (In Part)

Dissent by: ROAN (In Part)

Dissent

ROAN, Chief Judge (concurring in part and dissenting in part):

The appellant was charged with abusive sexual contact by placing A1C GG in fear of reprisal. Under these circumstances, I believe the issue of lack of consent is fairly encompassed within the charged specification and therefore, wrongful sexual contact, with its discrete elements of lack of permission and wrongfulness, is a lesser included offense (LIO). As a result, I dissent from my colleagues' rationale with respect to this issue and would affirm the findings of guilty to Specification 1 of Charge II and the Specification of Additional Charge II. I concur in the remainder of the majority's opinion.

An accused may be found guilty of an offense charged as well as "an offense necessarily included in the offense charged." Article 79, UCMJ, *10 U.S.C. § 879*. "Whether an offense is a lesser included offense is a question of law we review *de novo*." *United States v. Wilkins, 71 M.J. 410, 412 (C.A.A.F. 2012)* (quoting *United States v. Arriaga, 70 M.J. 51, 54 (C.A.A.F. 2011)*). When considering this question, our superior court has looked to the Supreme [*45] Court for guidance and adopted an "elements" test to determine whether one offense is a lesser included offense of another. *United States v. Alston, 69 M.J. 214 (C.A.A.F. 2010)*. "[O]ne offense is not 'necessarily included' in another unless the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, no instruction regarding a lesser included offense is to be given." *Id. at 216* (quoting *Schmuck v. United States, 489 U.S. 705, 716, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989)*) (internal alteration and quotation marks omitted). Stated another way, "'[T]o be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater offense without first having committed the lesser.'" *Schmuck, 489 U.S. at 719* (quoting *Giles v. United States, 144 F.2d 860, 861, 10 Alaska 455 (9th Cir. 1944)*).

Accordingly, an accused may be convicted of an LIO only "in those cases where the indictment contains the elements of both offenses, and as a result gives notice to the defendant that he may be convicted on either charge." *Alston, 69 M.J. at 216* (quoting *Schmuck, 489 U.S. at 718*) (quotation marks omitted). The [*46] charged and lesser offenses do not need to "employ identical statutory language"; rather, "the meaning of the offenses is ascertained by applying the 'normal principles of statutory construction.'" *Id.* (citing *Carter v. United States, 530 U.S. 255, 263, 120 S. Ct. 2159, 147 L. Ed. 2d 203 (2000)*). *See also United States v. Bonner, 70 M.J. 1, 2 (C.A.A.F. 2011)* (holding assault consummated by a battery is an LIO of wrongful sexual contact).

The appellant was charged with abusive sexual contact in violation of *Article 120(h), UCMJ*. The elements of that offense, as applied to this case, are:

> (1) That the accused engaged in sexual contact with another person; and
>
> (2) That the accused did so by placing that other person in fear of reprisal.

Manual for Courts-Martial, United States (*MCM*), Part IV, ¶ 45.b.(8) (2008 ed.).

The elements of wrongful sexual contact, in violation of *Article 120(m), UCMJ*, are:

> (1) That the accused had sexual contact with another person;
>
> (2) That the accused did so without that other person's permission; and
>
> (3) That the accused had no legal justification or lawful authorization for that sexual contact.

MCM, Part IV, ¶ 45.b.(13).

The first element of "sexual contact" is the same in both offenses. Therefore, the [*47] question is whether the element of engaging in sexual contact "by placing that other person in fear of reprisal" necessarily means committing the act "without that . . . person's permission" and without "legal justification or lawful authorization." I believe it does.

When evaluating whether one offense is included within another, we do not conduct a word-for-word comparison of the elements, as the statutory language does not have to be identical. *See Alston, 69 M.J. at 216*. Rather, we apply the normal principles of statutory construction to ascertain the meaning of the offenses. *Id.*

Turning to the second element of abusive sexual contact listed above, that element requires that the accused

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[9] The court-martial order (CMO) incorrectly states the appellant pled guilty to Charge III but not guilty to its Specification, when the appellant pled not guilty to all charges and specifications. [*44] Accordingly, we order promulgation of a corrected CMO.

engaged in sexual contact "by placing that other person in fear." A victim who submits to sexual conduct out of fear has not, by definition, consented to it. As provided by Article 120(t)(14), UCMJ, "The term 'consent' means words or acts indicating a freely given agreement to the sexual conduct at issue by a competent person. . . . Lack of verbal or physical resistance or submission resulting from the accused's . . . placing another person in fear does not constitute consent." The second element [*48] of the charged offense (fear of reprisal), therefore, will always consist of a nonconsensual sexual contact because it is accomplished in a manner that per se excludes consent as a possibility. Accordingly, I would conclude the offense of wrongful sexual contact, which requires only the sexual contact be wrongful and "without that other person's permission," is entirely encompassed by the offense of abusive sexual contact when that contact occurs through fear of reprisal.[10]

I would follow this court's holding in *United States v. Pitman*, ACM 37453, 2011 CCA LEXIS 93 (A.F. Ct. Crim. App. 19 May 2011) (unpub. op.), where we concluded wrongful sexual contact is an LIO of aggravated sexual contact. As we stated in *Pitman*, "[a]pplying the common and ordinary understanding of these words, an allegation that a victim is compelled to submit to sexual acts by force clearly includes as a subset that the victim is not consenting." *Pitman*, unpub. op. at 4. We also observed that "[t]he elements test . . . affirms this interpretation since it would be impossible to prove the force required for the greater offense . . . without also proving the wrongfulness and lack of permission required for the lesser offense." *Id.* The same analysis holds true here. It would be impossible to prove the offense of abusive sexual contact by fear of reprisal without also proving the wrongfulness and lack of permission for the lesser offense. The converse is also not necessarily true; a victim may not consent to sexual contact despite the absence of any imposition of fear.

The appellant relies heavily on his interpretation [*50] of United States v. Jones, 68 M.J. 465 (C.A.A.F. 2010), but that case it distinguishable. In *Jones*, our superior court ruled an indecent act under Article 134, UCMJ, is not an LIO of rape under Article 120, UCMJ, because the two offenses shared "no common ground" and there was "nothing in that charge [that] put Appellant on notice that he also needed to defend against indecent acts." Id. at 473. The due process concerns discussed by the Court in *Jones* in relation to the identification of LIOs are not present in this case. The accused in *Jones* was charged with rape under Article 120, UCMJ, yet was convicted of the LIO of indecent acts under Article 134, UCMJ, with its unique terminal elements. Id. at 466-67. Unlike in *Jones*, the offenses of which this appellant was charged and convicted are part and parcel of the same Article 120, UCMJ, which criminalizes various degrees of sexual misconduct. Moreover, as discussed above, the elements of wrongful sexual contact are entirely encompassed by the elements of abusive sexual contact. The appellant's argument that wrongful sexual contact is not an LIO of abusive sexual contact relies on the inherently contradictory notion that it is possible [*51] to "give permission" to being compelled to submit to sexual contact out of fear.

The appellant also claims he "did not receive fair notice" that wrongful sexual contact is an LIO of abusive sexual contact. But notice was provided by a plain reading of the elements of both offenses, which reveals that abusive sexual contact by placing another in fear is necessarily wrongful and without the victim's consent. Moreover, although not dispositive of the issue, wrongful sexual contact is listed in the *Manual* as a possible LIO of abusive sexual contact. *MCM*, Part IV, ¶ 45.e.(8); *see generally* United States v. Jones, 68 M.J. 465 (C.A.A.F. 2010). Thus, the appellant was certainly on notice he had to defend himself against the Government's correct assertions his actions were done without legal justification and without his victim's permission.

Finally, the record reveals trial defense counsel was aware of this fact and defended against the lesser as well as the greater offense by arguing the sexual conduct was consensual. In opening statement, trial defense counsel began by telling the military judge that he would see "an NCO [*52] who engaged in some consensual conduct with Airmen from within the squadron." Trial defense counsel stated that while the appellant's actions might be "distasteful" because he was married, "that is not what [the appellant] is charged with here. . . . He is charged with a variety of non-consensual acts." Referring specifically to the victim of the abusive sexual contact specifications, Airman First Class (A1C) GG, trial defense counsel stated, "[the appellant] gave [A1C GG] the opportunity to back out of this consensual relationship and she chose not to."

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[10] An act of sexual conduct accomplished by imposing fear is akin to constructive force or parental compulsion, concepts that military courts previously recognized in the context of the offense of rape, prior to the 1 October 2007 amendment to Article 120, UCMJ, which contained both force and lack of consent as an element. *See, e.g.*, United States v. Palmer, 33 M.J. 7 (C.M.A. 1991) (upholding instructions in prosecution for rape that equated consent induced by fear, fright, or coercion to physical force); United States v. Dejonge, 16 M.J. 974 (A.F.C.M.R. 1983) (constructive force exists where sexual intercourse is accomplished under compulsion of parental command); United States v. Edens, 29 M.J. 755 (A.C.M.R. 1989) [*49] (child's acquiescence to sexual acts not consent, but submission to constructive force).

Finding no error, I would approve the findings and sentence.

APPENDIX 2

United States v. Betts

United States Navy-Marine Corps Court of Criminal Appeals
September 28, 2005, Decided
NMCCA 200300629

Reporter: 2005 CCA LEXIS 301; 2005 WL 2467778

UNITED STATES v. Jason J. BETTS, Lance Corporal (E-3), U.S. Marine Corps

Notice: [*1] AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

Subsequent History: Motion granted by *United States v. Betts, 62 M.J. 398, 2005 CAAF LEXIS 1527 (C.A.A.F. 2005)*
Review granted by *United States v. Betts, 63 M.J. 296, 2006 CAAF LEXIS 720 (C.A.A.F. 2006)*
Affirmed by *United States v. Betts, 2006 CAAF LEXIS 1613 (C.A.A.F. Sept. 11, 2006)*

Prior History: Sentence adjudged 31 July 2001. Military Judge: J.S. Brady. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Division, Camp Lejeune, NC.

Case Summary

Procedural Posture
A military judge, sitting as a general court-martial, convicted appellant servicemember of rape, in violation of Unif. Code Mil. Justice (UCMJ) art. 120, *10 U.S.C.S. § 920*, and failure to obey an order, in violation of UCMJ art. 92, *10 U.S.C.S. § 892*, and sentenced the servicemember to a bad-conduct discharge, confinement for 18 months, and reduction to E-1. The convening authority approved the findings and sentence. The servicemember appealed.

Overview
The servicemember was charged with rape, adultery, and failure to obey an order regarding the use of alcohol after a female servicemember told authorities that he gave her alcohol and had sexual intercourse with her without her consent. The military judge found the servicemember guilty of rape and failure to obey an order, but not guilty of adultery, and the servicemember appealed, arguing that the judge reached inconsistent findings which required the court to remand the case or dismiss the inconsistent finding of guilty, and that he was denied his right to a speedy review. The court of criminal appeals held that (1) rape and adultery were different offenses, and the fact that the military judge convicted the servicemember of rape but found that he not guilty of adultery did not require remand for further review; (2) the evidence was sufficient to sustain the servicemember's conviction for rape; and (3) although the delay of just over 20 months which occurred from the date the servicemember was sentenced to the date the record of trial was docketed with the court was facially unreasonable, there was no evidence that the servicemember was prejudiced by the delay.

Outcome
The court of criminal appeals affirmed the findings and sentence approved by the convening authority.

Counsel: LT COLIN A. KISOR, JAGC, USNR, Appellate Defense Counsel.

LT KATHLEEN HELMANN, JAGC, USNR, Appellate Government Counsel.

Judges: BEFORE C.L. CARVER, D.A. WAGNER, J.F. FELTHAM. Judge WAGNER and Judge FELTHAM concur.

Opinion by: C.L. CARVER

Opinion

CARVER, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of failure to obey an order regarding the use of alcohol and rape, in violation of Articles 92 and 120, Uniform Code of Military Justice, *10 U.S.C. §§ 892* and *920*. The appellant was sentenced to a bad-conduct discharge, confinement for 18 months, and reduction to pay grade E-1. There was no pretrial agreement. The convening authority approved the sentence as adjudged, but waived forfeitures for 6 months as recommended by the military judge. [1]

[*2] The appellant claims that (1) the evidence of rape is factually insufficient and inconsistent with an acquittal of adultery and (2) the appellant was denied his right to a speedy review.

[1] The convening authority had previously deferred automatic forfeitures from their inception date until he took his action in this case.

After carefully considering the record of trial, the appellant's assignments of error, the Government's response, and the appellant's reply brief, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. *Arts. 59(a)* and *66(c)*, UCMJ.

Factual Insufficiency

In his first assignment of error, the appellant contends that the facts presented at trial were insufficient to convict him of rape. Further, the appellant claims that his conviction of rape, but acquittal of adultery, was erroneous as a matter of law since there is no obvious rational basis for the inconsistency. We disagree and decline to grant relief.

A. Factual Insufficiency

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable **[*3]** doubt. *Jackson v. Virginia, 443 U.S. 307, 318-19, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)*; *United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)*; *United States v. Reed, 51 M.J. 559, 561-62 (N.M.Crim.Ct.App. 1999)*, *aff'd*, *54 M.J. 37 (C.A.A.F. 2000)*; *see also Art. 66(c)*, UCMJ.

There are only two elements of rape: (1) that the appellant committed an act of sexual intercourse and (2) that the act was done by force and without consent. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, P 45b(1). There is no dispute that the appellant had sexual intercourse with the victim. But, as to the second element, the appellant argues that there is insufficient evidence that the act was without consent.

The appellant and the victim, Lance Corporal (LCpl) C, were part of a Marine Corps unit that deployed to Fort Bragg, North Carolina, for 2 weeks to guard ammunition. The victim was assigned to guard duty. The appellant was a 5-ton truck driver. They did not know each other prior to the deployment. One day during the deployment, LCpl C saw the appellant in the package store. He bought a bottle of gin and asked LCpl C to put it in his 5-ton for him **[*4]** so that he would not get caught with the gin. He knew that he was not supposed to drink alcohol in the field. A day or two later, the appellant offered LCpl C a drink of the gin. She testified that was the first time she drank alcohol, although she had drunk beer before.

Another day or so later, LCpl C spent 4 hours on guard duty, then went to sleep in her gray-on-gray sweats. She woke up for a reaction drill. After the drill, she tried to return to sleep in her tent, but the appellant awakened her, and asked her to come to his tent. The appellant mentioned that he had just called his wife and offered the use of his cell phone to call her boyfriend. She declined. They listened to music. They drank some alcohol. LCpl C had two mouthfuls of gin. She testified that was only the second time she had drunk alcohol.

The appellant asked LCpl C if she objected if he took off his pants. She said no and he took down his pants. They continued to talk. At one point, the appellant leaned over close to her. She asked what he was doing and he apologized. A little later, the appellant leaned across her again and tried to kiss her. He lifted up her sweat shirt and kissed her on her stomach. He said **[*5]** that he did not want his wife or her boyfriend to find out. LCpl C told him that she did not want to have sex with him, that she was a virgin. He said she needed practice. She told him she did not want to have sex. He rubbed his groin area on her and pulled down her sweatpants. She was shocked. She tried to get up, but he moved so that he was more on top of her. She told him at least 3 times that she did not want to have sex with him. But, he did have sex with her and thrust at least twice in her vagina. She felt helpless. She said it hurt. She felt a sharp pain like something tearing. She pulled away from him, pulled up her pants, and returned to her tent. After the sex, she started having flashbacks of being molested as a child.

In her tent, LCpl C started crying and cleaned herself up with baby wipes. The next day, she did not want to talk to anyone about it. She went on guard duty that morning. One of the other Marine guards asked why her eyes were so red. She said that the appellant tried to do something to her, but she got away and nothing happened. The guard told her to report it to the chaplain or to the sergeant, but she did not. Later in the afternoon, she was assigned **[*6]** to a working party to fill sand bags. After that, she retired to her tent. Her non-commissioned officer (NCO) visited her. As he was leaving, she stopped him and started crying. She said that something happened when she was drinking with the appellant. The NCO called in the sergeant, but LCpl C would not initially tell them what happened. Eventually, she said she was raped. She went to the hospital for a rape examination and then gave a statement to a criminal investigative division (CID) agent. Some time later, after the deployment ended, she had nightmares about the incident and tried to commit suicide by overdosing. She saw a psychiatrist and started counseling.

The chief of emergency medicine at Womack Army Medical Center at Fort Bragg examined LCpl C the day she reported the rape. He found no abrasions or contusions on the thighs or skin around the vagina. He saw fresh lacerations of LCpl C's hymen. These were non-bloody

edges that were crisp in nature. The edges are rounded in a patient who is sexually active. The tears were fairly recent, less than 2 weeks old, and were consistent with her being a virgin prior to the incident.

LCpl C admitted that in her first statement to [*7] CID she did not say how the appellant's pants came off. She further admitted that she lied at the pretrial hearing when she testified that she did not know how the appellant got his pants off. She said she was embarrassed about it.

A Navy staff psychiatrist, who was qualified as an expert in rape trauma syndrome (RTS) and post traumatic stress disorder (PTSD), testified that he had examined LCpl C and diagnosed her with PTSD. He said that nightmares, flashbacks, and avoidance are common symptoms of RTS and PTSD. People with RTS and PTSD may have difficulty remembering certain aspects of a traumatic event. It is not uncommon for those suffering RTS and PTSD to delay reporting an offense. And when they do report the event, it is not uncommon for them to confuse the details of the assault. It is not uncommon for a victim to feel that she is to blame. The victim's suicide attempt and other symptoms are consistent with RTS and PTSD.

The appellant waived his rights and was interviewed by a CID agent on the night that the rape was reported. He was advised that he was suspected of raping LCpl C. The appellant said that LCpl C came to his tent to use his cell phone to call her boyfriend. [*8] After she used the phone, they talked for a while and listened to the radio and then she left. He said he never touched LCpl C. But, as the statement was being typed up, he admitted that he had not been truthful, that he and LCpl C "dry humped." She told him she was a virgin and was saving herself for her husband. The dry humping lasted about 13 minutes. He kept his boxer shorts on and she remained fully clothed. After dry humping, they talked for about 3 minutes and then she left. No sex occurred. The appellant was examined by a doctor. He told the doctor that the abrasion on his penis came from his physical training (PT) shorts while he was running.

A forensic biologist testified that he found semen stains in the crotch area of LCpl C's sweatpants and in the vaginal swabs. He testified that his findings are consistent with ejaculation in the vagina, but are not consistent with ejaculation outside the vagina. The location of the stains on the clothing is consistent with ejaculation and drainage from the vaginal canal. He found discoloration on the sanitary napkins that might have been blood. Another forensic biologist testified that she examined the evidence and found that stains [*9] from the baby wipes, sweatpants, sanitary napkin, and underwear matched the appellant's DNA.

Another CID agent interviewed the appellant the day after the first interview. The appellant waived his rights. The agent told the appellant that the Government had physical evidence that did not support his story that no sex occurred. The agent said that the victim's hymen was torn and there was fluid in the vagina. The appellant continued to say that there was no sex. The agent said he did not believe the appellant. The appellant eventually admitted that he had lied in his first statement to CID. He said that LCpl C told him that she was a virgin and wanted to stay that way, but she said that some sexual contact including rubbing his penis against her crotch was okay. During the dry humping, his penis started hurting. So, he grabbed the base of his penis and stuck the tip toward her vagina. His penis slipped through the leg opening of her underwear into her vagina. LCpl C did not say no before then. But, at one point while he was thrusting inside her vagina, she told the appellant to stop because it hurt. He stopped thrusting, but did not pull out right away. He then pulled out and ejaculated [*10] on the sleeping bag.

There were witnesses who testified that LCpl C was truthful and witnesses who testified that she was not. The appellant presented witnesses who testified that he was previously of good character.

After a thorough review of all the evidence, we are convinced beyond a reasonable doubt that the appellant raped LCpl C on the night in question. In particular, the physical evidence corroborates much of LCpl C's testimony that she was a virgin before the incident. The testimony of the psychiatrist persuasively explains her initial reluctance to report the incident, her confusion over some of the details, and her initial denial that she allowed the appellant to take off his pants. On the other hand, the appellant lied several times about his actions that night and only admitted that sexual intercourse occurred after he was advised that there was physical evidence that supported LCpl C.

B. Inconsistent Verdicts

The appellant contends that where there are inconsistent verdicts in a bench trial, we must review the record for any obvious rational basis for the inconsistency. If we do not find such a basis, we must either remand to the military judge for special [*11] findings and then review those findings or dismiss the inconsistent finding of guilty. We disagree.

The appellant asserts that the Court of Military Appeals, in *United States v. Snipes, 18 M.J. 172 (C.M.A. 1984)* adopted a rule requiring that apparently inconsistent findings in bench trials must be reviewed to determine if there is a rational basis for the different verdicts. In support, the appellant cites *United States v. Perry, 22 M.J. 669, 671 (A.C.M.R. 1986)*. In that case, the Army Court of Military Review, relying upon *Snipes*, remanded a record

of trial to the military judge to make special findings to explain apparently inconsistent results. The military judge had found the appellant guilty of assault by touching the private parts of the victim, but not guilty of rape or indecent assault. Upon review of the military judge's special findings, the Army court was dissatisfied with the military judge's rationale and dismissed the finding of guilty of assault.

Here, the military judge convicted the appellant of rape, but acquitted him of adultery. As mentioned above, there are only two elements of rape, the act of sexual intercourse and [*12] that it was done by force and without consent. There are three elements of adultery: (1) that the appellant wrongfully had sexual intercourse with another, (2) that the accused or other person was married to someone else, and (3) that the conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. MCM, Part IV, P 62b.

At trial, the Government presented evidence that, at the time of the sexual intercourse, the appellant was married to another person. The defense did not contest that second element of adultery. Further, the Government concedes that adultery is not multiplicious with rape. The appellant also states that he is not raising the issue of unreasonable multiplication of offenses.

Contrary to the Army court, we conclude that *Snipes* does not require a military judge or a court of appeals to determine if there is a rational basis for inconsistent verdicts. Our superior court specifically rejected the view of the 2nd Circuit that remedial action was required where the judge rendered inconsistent verdicts in bench trials. "[We prefer], instead, to look at the specification upon which a guilty [*13] finding has been made to determine whether it may legally stand." *Snipes, 18 M.J. at 175* (footnote omitted). Further, the court favorably quoted a prior case:

> Furthermore, "(a)n inconsistent verdict is not usually a cause for relief," since "the court-martial may merely have given the accused a 'a break.'" *United States v. Lyon, 15 U.S.C.M.A. 307, 313, 35 C.M.R. 279, 285 (1965)*.

Snipes, 18 M.J. at 175, n.4. Admittedly, the court may have confused matters when it then conducted a review of the facts to conclude that there was a rational basis for the apparently inconsistent verdicts. Nonetheless, we are convinced that such a review is not required. We are supported in that conclusion by subsequent interpretations of *Snipes*.

In *United States v. Riddle, 44 M.J. 282, 287 (C.A.A.F. 1996)*, our superior court cited *Snipes* in concluding that the judge's finding of guilty of attempted conspiracy was not fatally undermined by his acquittal of attempted larceny of the same items. One of our sister courts arrived at a similar conclusion: "Moreover, inconsistent verdicts, whether from judge or jury, provide [*14] no grounds for reversal of a conviction. *See, e.g., United States v. Snipes*, ..." *United States v. Barrow, 42 M.J. 655, 664 (A.F.Cr.Crim.App. 1995)*.

We agree with the Air Force Court of Criminal Appeals. Inconsistent verdicts provide no grounds for reversal. Assuming arguendo, however, that such a review is required, we find a rational explanation in the record. The maximum confinement for adultery is one year, while the maximum confinement for rape is life imprisonment. Thus, it is entirely rational that a military judge, having convicted the appellant of rape, might dismiss adultery as a minor offense.

Post-Trial Delay

In his second assignment of error, the appellant contends that the appellant's statutory and constitutional rights to speedy appellate review were denied and that we, therefore, should set aside the findings of guilty and the sentence. We decline to do so.

We consider four factors in determining if post-trial delay violates the appellant's due process rights: (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to a timely appeal, and (4) prejudice to the appellant. *United States v. Jones, 61 M.J. 80, 83 (C.A.A.F. 2005)* [*15] (citing *Toohey v. United States, 60 M.J. 100, 102 (C.A.A.F. 2004)*). If the length of the delay itself is not unreasonable, there is no need for further inquiry. If, however, we conclude that the length of the delay is "facially unreasonable," we must balance the length of the delay with the other three factors. *Id.* Moreover, in extreme cases, the delay itself may "'give rise to a strong presumption of evidentiary prejudice.'" *Id.* (quoting *Toohey, 60 M.J. at 102*).

Here, there was delay of just over 20 months from the date of sentence to the date that the record of trial was docketed at our court. Although the delay is unexplained, the lengthy 1113-page record of trial obviously justified additional time at every stage in the review process.

There was an additional delay of nearly 18 months from the date of docketing until the appellant's brief was filed with this court. During this time period, the appellate defense counsel filed some 12 motions for enlargement of the time period. All such motions were virtually identical,

stating that due to other caseload commitments, counsel had not begun or had not yet completed review of the record. The [*16] appellant now claims that all of this time should be attributable to the Government because "Appellate counsel caseloads are a result of management and administrative priorities and as such are subject to the administrative control of the Government." Appellant's Brief of 22 Sep 2004 at 10 (quoting *Diaz v. Judge Advocate General of the Navy, 59 M.J. 34, 38 (C.A.A.F. 2003)*). However, the appellate counsel's motions are the only evidence in the record that supports this proposition. We are reluctant to find, on the basis of the enlargement requests alone, that the Government is responsible for that delay. Finally, there was additional delay of about 9 months before the Government's answer and the appellant's reply brief were filed.

Regardless of whether we consider the Government responsible for delay in preparing the appellant's brief, we nonetheless conclude that the overall delay is facially unreasonable, triggering a due process review.

We next look to the third and fourth factors. We find no assertion of the right to a timely appeal until the date of the appellant's brief. Nor do we find any evidence of prejudice. The appellant claims that he suffered prejudice [*17] because he had a meritorious claim that the evidence supporting rape was insufficient and the finding of guilty to rape should be set aside, and the delay in the review of his case meant he unnecessarily served his entire sentence to confinement. However, since we found that the evidence did support the conviction, we conclude that the delay alone does not support a finding of prejudice. We therefore hold that there has been no due process violation due to the post-trial delay.

We are also aware of our authority to grant relief under *Article 66, UCMJ*, even in the absence of specific prejudice, but we decline to do so. *Jones, 61 M.J. at 83*; *United States v. Oestmann, 61 M.J. 103 (C.A.A.F. 2005)*; *Toohey, 60 M.J. at 100*; *Diaz, 59 M.J. at 37*; *United States v. Tardif, 57 M.J. 219, 224 (C.A.A.F. 2002)*.

Conclusion

Accordingly, the findings of guilty and the sentence, as approved by the convening authority, are affirmed.

Judge WAGNER and Judge FELTHAM concur.

APPENDIX 3

United States v. Cook

United States Navy-Marine Corps Court of Criminal Appeals
December 31, 2013, Decided
NMCCA 201200518

Reporter: 2013 CCA LEXIS 1073; 2013 WL 6858960

UNITED STATES OF AMERICA v. MATTHEW H. COOK MIDSHIPMAN FIRST CLASS, U.S. NAVY

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

Subsequent History: Motion granted by *United States v. Cook, 2014 CAAF LEXIS 421 (C.A.A.F., Apr. 14, 2014)* *Motion granted by United States v. Cook, 2014 CAAF LEXIS 483 (C.A.A.F., Apr. 28, 2014)*

Prior History: [*1] Sentence Adjudged: 1 May 2012. Military Judge: CAPT Eric C. Price, JAGC, USN. Convening Authority: Superintendent, U.S. Naval Academy, Annapolis, MD. Staff Judge Advocate's Recommendation: CAPT Robert J. O'Neill, JAGC, USN.

GENERAL COURT-MARTIAL.

Counsel: For Appellant: Capt Jason R. Wareham, USMC.

For Appellee: LT Philip S. Reutlinger, JAGC, USN.

Judges: Before M.D. MODZELEWSKI, F.D. MITCHELL, M.K. JAMISON, Appellate Military Judges. Senior Judge MITCHELL and Judge JAMISON concur.

Opinion by: M.D. MODZELEWSKI

Opinion

OPINION OF THE COURT

MODZELEWSKI, Chief Judge:

A panel of members sitting as a general court-martial convicted the appellant, contrary to his pleas, of one specification of wrongful sexual contact, in violation of Article 120(m), Uniform Code of Military Justice, *10 U.S.C. § 920(m) (2006)*. The members sentenced the appellant to dismissal, and the convening authority approved the findings and sentence as adjudged.

The appellant raises five assignments of error: (I) that the evidence is legally and factually insufficient to sustain the conviction; (II) that the military judge erred in failing to instruct on the impact of voluntary intoxication on a specific intent crime; (III) that it was plain error to allow witnesses [*2] to use the words "victim" and "rape"; (IV) that a witness provided improper human lie detector testimony; and, (V) that the President's comments regarding sexual assault, made after the appellant's trial, amount to apparent unlawful command influence in the appeal process.

After considering the pleadings and the record of trial, we conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. *Arts. 59(a)* and *66(c)*, UCMJ.

I. Factual Summary

During the summer of 2010, the appellant was among a group of first class midshipmen from the U.S. Naval Academy (USNA) who were temporarily assigned on a training detail to the Naval Academy Preparatory School (NAPS) in Newport, R.I. The appellant roomed with a classmate, Midshipman (MIDN) B, in the King Hall barracks. MIDN J, a female, was also assigned to the detail, and was berthed in a room by herself at King Hall. Prior to the summer assignment at NAPS, MIDN J did not know the appellant or his roommate.[1]

Over the course of the summer assignment, MIDN J had one relevant encounter with the appellant prior to the charged incident. After a group of midshipmen returned to the base from an evening out, the appellant asked MIDN J to go to a secluded location. Following a brief conversation, the appellant kissed her; MIDN J initially kissed back, but then told the appellant to stop when he attempted to become more physical. Record at 740-41.

On the final evening of their assignment at NAPS, several of the midshipmen ended up at a local off-base bar. At trial, MIDN J testified that she arrived sometime at the bar between 2100 and 2200 with a group of midshipmen that did not include the appellant, and that she stayed until closing at 0100. Over the course of the evening, MIDN J consumed several beers and several mixed drinks, and

[1] By the time of trial, MIDN J was commissioned as an Ensign in the U.S. Navy, and MIDN B was commissioned as a 2ndLt in the U.S. Marine [*3] Corps. For clarity, we refer to them by their rank at the time of the incident.

then three shots of alcohol near the end of the night. MIDN J testified at trial that she had difficulty standing upon leaving the bar, ate lightly while waiting for a ride, had difficulty walking when back at the barracks, and had to use the hand-rail to navigate the stairs to her room.

At [*4] trial, MIDN B testified that he and the appellant were at the same bar that evening: having arrived at the bar between 2000 and 2100, they too stayed until closing. Both of them were drinking: he recalls being "drunk" and thought the appellant was as well. Record at 683-84. MIDN B did not recall seeing the appellant and MIDN J together at any point at the bar. When MIDN B and the appellant returned to their barracks, they had a brief conversation before MIDN B went to his room and went to sleep.

When MIDN J entered her room, she found the appellant waiting for her. MIDN J testified that the appellant asked her if she had a condom and whether she was on birth control. She testified that she then blacked out, and woke up to find herself unclothed and on the bed. She described feeling and seeing the appellant on top of her, his penis in her vagina, and her head hitting the wall or desk. MIDN J further testified that she tried to get away, but could not do so, and that she has no further recollection until she awoke the following morning. Finding the appellant beside her on the bed, she told him that he needed to be gone from the room when she returned from the bathroom.

At trial, MIDN B [*5] testified that the appellant did not return to their barracks room that evening. When he later recounted the events of the evening to MIDN B, the appellant stated that he went to MIDN J's room, and that they were "romantic" with one another. The appellant told MIDN B that, at some point, MIDN J was no longer interested in being "romantic" and rolled over to sleep. *Id.* at 687-88.

MIDN J did not immediately report the assault, instead delaying the report until she returned to the Naval Academy approximately ten days later for the start of the academic year. In late August 2010, MIDN J initially made a restricted report; the following spring, she changed the report to unrestricted.[2]

II. Background

The appellant was charged with both aggravated sexual assault (substantial incapacitation) and wrongful sexual contact, both in violation of Article 120. [3] Prior to trial, the appellant moved to dismiss the wrongful sexual contact specification [*6] based upon multiplicity and upon unreasonable multiplication of charges (UMC). The military judge denied the motion, with the caveat that he would reconsider the issue of UMC if the appellant were convicted of both specifications. The members, however, acquitted the appellant of the aggravated sexual assault specification.

Further facts are developed below as necessary.

III. Legal and Factual Sufficiency

The test for legal sufficiency is whether any rational trier of fact could have found that the evidence met the essential elements of the charged offenses, viewing the evidence in a light most favorable to the Government. *United States v. Turner, 25 M.J. 324, 324 (C.M.A. 1987)*. The test for factual sufficiency is whether we ourselves are convinced of the appellant's guilt beyond a reasonable doubt, allowing for the fact that we did not personally observe the witnesses. *Id. at 325*.

The appellant first argues [*7] that this court cannot properly conduct a factual sufficiency review because the conviction for wrongful sexual contact is rendered ambiguous by the acquittal of aggravated sexual assault. Said differently, the appellant argues that his acquittal of aggravated sexual assault implicitly acquitted him of penile penetration of MIDN J, which was the only act of touching to which she testified. [4] Therefore, he argues, this court cannot review, or affirm, his conviction for wrongful sexual contact, as we would potentially be affirming a conviction for conduct of which he was acquitted. Relying on *United States v. Stewart, 71 M.J. 38 (C.A.A.F. 2012)*, the appellant contends that such a factual sufficiency review violates the *double jeopardy clause*.

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[2] At trial, a restricted report was defined as one that allowed access to medical and counseling services without a report to law enforcement, and an unrestricted report was defined as one made to law enforcement, precipitating an investigation. Record at 943-44.

[3] The wrongful sexual contact specification alleged that the appellant "engage(d) in sexual contact with [MIDN J], to wit: intentionally touching her genitalia, and such sexual contact was without legal justification or lawful authorization and was without the permission of [MIDN J]."

[4] During the pretrial multiplicity/UMC motion, the Government noted that the evidence may show touching by the hand in addition to penile penetration. As the trial unfolded, MIDN J did not testify to any contact other than the incident described above, in which she testified that she awoke to find the appellant on top of her, felt her head repeatedly hitting the desk, and also felt penile penetration.

We disagree. The facts of *Stewart* are indeed unique [*8] and inapposite here. In *Stewart*, the Government initially charged the accused with one specification of aggravated sexual assault for engaging in a sexual act with a person "who was substantially incapacitated or substantially incapable of declining participation in the sexual act." *Id. at 39*. The military judge severed the single specification into two separate specifications that were identical except that Specification 1 alleged that the victim was "substantially incapacitated" and Specification 2 alleged that she was "substantially incapable of declining participation in the sexual act." *Id. at 42*.

When instructing the members, the military judge in *Stewart* provided exactly the same definition for the two different terms. Moreover, the military judge instructed the members that they could return a finding of guilty for only one specification, and his instructions are fairly read to instruct the members to vote first on Specification 1 before proceeding to Specification 2. The members subsequently returned a verdict of guilty only as to Specification 2, implicitly having made a finding of Not Guilty as to Specification 1. Under the "unique circumstances" of *Stewart*, the Court of [*9] Appeals for the Armed Forces (CAAF) found that "the principles underpinning the *Double Jeopardy Clause* . . . made it impossible for the CCA to conduct a factual sufficiency review of Specification 2 without finding as fact the same facts that the members found *Stewart* not guilty of in Specification 1." *Id. at 43*.

These unique circumstances are not present in this case. Here, the military judge properly instructed the members on the elements of the two specifications under Article 120. He instructed the members that to convict the appellant of aggravated sexual assault, they must find two elements beyond a reasonable doubt: (1) that the appellant engaged in a sexual act with MIDN LJ; and (2) that he did so when MIDN LJ was substantially incapacitated. Record at 1284. He then instructed them that to convict the appellant of wrongful sexual contact, they must find beyond a reasonable doubt that: (1) the appellant engaged in a sexual contact with MIDN LJ by intentionally touching her genitalia; (2) the sexual contact was without permission; and (3) the sexual contact was wrongful, that is, without legal justification or lawful authorization. *Id.* at 1287-88. The instructions by the military [*10] judge as to the two separate offenses were not overlapping, and clearly articulated two distinct offenses for the members to deliberate upon.[5]

We are not persuaded by the appellant's argument that the acquittal on Specification 1 was *per se* a finding by the members that penile penetration had not occurred. A simple reading of the mixed verdict is that the members were not convinced beyond a reasonable doubt that the appellant committed a sexual act with MIDN J when she was substantially incapacitated, but were convinced beyond a reasonable doubt that he engaged in sexual contact with her without her permission and without any type of justification or authorization.

Turning now to the question of legal sufficiency, we are convinced that a [*11] rational trier of fact could have found the elements of the offense beyond a reasonable doubt. First, the evidence at trial was sufficient to support a determination beyond a reasonable doubt that appellant touched MIDN J's genitalia with the intent of arousing or gratifying his own or her sexual desires: the appellant appeared in MIDN J's barracks room asking whether she had a condom or was on birth control, and the circumstances of the subsequent sexual contact leave no doubt that it was both an intentional touching and with a sexual intent. Secondly, the evidence clearly established that there was no legal justification or authorization for the sexual contact, and that MIDN J had not given her permission for this touching.

Moreover, we are convinced that a rational trier of fact had sufficient evidence to be convinced beyond a reasonable doubt either: 1) that the appellant was not under a mistaken belief that MIDN J consented to the touching; or 2) if he was under such a mistaken belief, that belief on his part was unreasonable. After reviewing the record of trial and briefs of the parties, we are ourselves convinced of the appellant's guilt of this offense beyond a reasonable doubt.

IV. [*12] Failure to Instruct On Intoxication vis-à-vis Intent

The appellant contends that the military judge erred in failing to instruct on voluntary intoxication as a defense to

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[5] The argument by trial counsel appears to conflate the two specifications: in arguing the evidence on the wrongful sexual contact charge, the trial counsel twice referenced that MIDN J could not give permission or consent as she was "substantially incapable" or "substantially incapacitate(ed)." Record at 1309-10. However, he also highlighted that MIDN J had been asked whether she had given the appellant permission, and had responded "No." *Id.* at 1310.

the specific intent crime of wrongful sexual contact. [6] We review allegations of instructional error *de novo*. United States v. Hibbard, 58 M.J. 71, 75 (C.A.A.F. 2003).

Shortly after the members found the appellant guilty of wrongful sexual contact, the military judge *sua sponte* raised the issue of whether he had erred in failing to instruct the members on voluntary **[*13]** intoxication and its potential to raise reasonable doubt as to specific intent. Earlier in the trial, the parties had on three occasions discussed whether such a defense might exist or whether such an instruction might be given. Record at 392-94, 1009-10, 1269. When the defense submitted its proposed instructions, however, it had not requested any such instruction, and did not object to the judge's draft instructions when given an opportunity to do so, or to his final instructions.

After raising the issue post-verdict, the military judge allowed the parties to brief and argue their positions on the issue. In response, the defense moved for a mistrial, which motion the military judge ultimately denied, finding that the evidence was insufficient to require an unrequested instruction on intoxication. We agree. Moreover, assuming *arguendo* that the judge erred, we find any such error harmless beyond a reasonable doubt.

The appellant failed to request an instruction that the members should consider the effect of intoxication in deciding whether the appellant touched MIDN J with the intent to gratify or arouse sexual desires. [7] Moreover, he raised no objection when the military judge failed **[*14]** to give any such instruction. His failure to object to the omission of any such instruction forfeited the objection absent plain error, unless the instruction was required. RULE FOR COURTS-MARTIAL 920(f), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). *See also* United States v. Davis, 53 M.J. 202, 205 (C.A.A.F. 2000).

Although voluntary intoxication is not a defense, "evidence of any degree of voluntary intoxication may be introduced for the purpose of raising a reasonable doubt as to the existence of actual knowledge, specific intent, willfulness, or a premeditated design to kill, if actual knowledge, specific intent, willfulness, or premeditated design to kill is an element of the offense." R.C.M. 916(l)(2). However, "(w)hen raising an issue of voluntary intoxication as a defense to a specific intent offense, 'there must be some evidence that the intoxication was of a severity to have had the effect of rendering the appellant incapable of forming the necessary intent,' not just evidence of mere intoxication." United States v. Peterson, 47 M.J. 231, 233 (C.A.A.F. 1997) (quoting United States v. Box, 28 M.J. 584, 585 (A.C.M.R. 1989)). **[*15]** *See also* United States v. Bright, 20 M.J. 661, 664-65 (N.M.C.M.R. 1985) ("Voluntary intoxication alone is not a defense unless it is to such a degree that the mental faculties of an accused have been so impaired that a specific intent cannot be formed.")

At trial, the only direct evidence of the appellant's intoxication came from his roommate, MIDN B, who testified that he and the appellant consumed a number of drinks at the bar on the evening in question, beginning somewhere between 2000 and 2100 and continuing until closing. MIDN B did not recall seeing the appellant consume any mixed drinks. He testified that he himself was "drunk" and thought the appellant was as well. Record at 683-84.

MIDN B's testimony that he believed the accused was drunk was "some evidence" that the appellant was intoxicated at some point during the evening. However, there is no evidence that the appellant's intoxication was of such a level that he was incapable of forming the necessary intent. On the contrary, there is a plethora of evidence that suggests the appellant was perfectly capable of forming the required intent: his cogent conversation with MIDN B back in King Hall, his questions to MIDN J about **[*16]** condoms and birth control, and his recollection of the encounter months later to MIDN B. We find that the record contains some evidence of "mere intoxication" but that there was no evidence that the intoxication was of a severity to have had the effect of rendering the appellant incapable of forming the necessary intent to intentionally touch MIDN J with an intent to arouse of gratify either party's sexual desire.

In our consideration of whether an instruction was required, we also take into account the manner in which this issue was litigated at trial. *See* Hibbard, 58 M.J. at 76. Of note, the defense at no time introduced evidence of the appellant's intoxication "for the purpose of raising a reasonable doubt as to the existence of . . . specific intent

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[6] The parties agreed at trial, and the Government does not contest on appeal, that the offense of wrongful sexual contact is a specific intent offense. Although the elements do not themselves contain an intent requirement, the statutory definition of sexual contact does: "The term 'sexual contact' means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person . . . with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person." Article 120(t)(2), UCMJ (2006). *See also* United States v. Bonner, 70 M.J. 1, 2-3 (C.A.A.F. 2011).

[7] *See* Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9 at 5-12 (2012).

. . . ." R.C.M. 916(l)(2). The only evidence of intoxication came from the Government's witness, MIDN B, upon direct examination. Trial defense counsel did not cross-examine MIDN B, or MIDN J, regarding the appellant's level of intoxication, and did not in any way imply in his closing argument that the appellant's intoxication impacted his ability to form the specific intent required to commit the offense. Although the defense's theory **[*17]** of the case is certainly not dispositive of whether a particular instruction is required, it is appropriate for an appellate court to take into account the absence of such a presentation in assessing the significant of the evidence. Hibbard, 58 M.J. at 76.

We conclude that the appellant has not met his burden in establishing error, in that the military judge was not required *sua sponte* to give the instruction.

Even if the military judge erred, we conclude any such error to be harmless beyond a reasonable doubt. United States v. Lewis, 65 M.J. 85, 87 (C.A.A.F. 2007). Had the military judge given the instruction, the members would have been instructed that they could consider the appellant's voluntary intoxication in determining whether they were convinced beyond a reasonable doubt that he had formed the specific intent to arouse or gratify sexual desires. The only evidence they had been given on the appellant's level of intoxication was that he may have been intoxicated at some point in the evening. On the contrary, they had a wealth of evidence that the appellant touched MIDN J with the requisite sexual intent. He entered MIDN J's room, waited for her to return, and asked her if she **[*18]** had a condom or was on birth control. Most importantly, the contact with her was unquestionably sexual in nature, in fact it was sexual intercourse, leaving scant room for doubt as to whether his intent was to arouse or gratify sexual desires. "Frequently, as here, the conduct of an accused is sufficiently focused and directed so as to amply demonstrate a particular *mens rea* or other state of mind." Peterson, 47 M.J. at 234 (citations omitted). Assuming error *arguendo,* we find beyond a reasonable doubt that any error did not contribute to the appellant's conviction.

V. The Testimony of CAPT C

We turn next to the appellant's contention that the military judge did not properly remedy "human lie detector testimony."

In its case on the merits, the Government called Captain (CAPT) C, who was assigned at the USNA as an instructor and also served as the Sexual Assault Response Coordinator (SARC). CAPT C testified that she interacted with MIDN J both in her capacity as an instructor and in her capacity as the SARC. Under direct examination, CAPT C testified first about her interactions as SARC with MIDN J, explaining the timeline between MIDN J's first restricted report in August 2010 to her **[*19]** subsequent unrestricted report in March 2011. The trial counsel then pivoted the questions to the instructor/student relationship, and elicited from the witness a foundation for her opinion as to MIDN J's character for truthfulness: MIDN J had been a student in her ethics class. CAPT C testified that, as a result of her interactions with MIDN J over the sixteen-week course in the spring of 2009, she had an "excellent" opinion of MIDN J's character for truthfulness. Defense counsel did not object to either line of testimony and, on cross-examination sought primarily to clarify that not all people who report sexual offenses are in fact "victims." Record at 951-52.

Shortly thereafter, the military judge *sua sponte* raised a concern that the witness's opinion evidence may be viewed as "human lie detector" testimony, in light of her duties as SARC. Record at 976. By that term, the military judge appears to have meant that the members may somehow confuse her opinion that MIDN J is a truthful person to arise from her SARC duties, and not her relationship with MIDN J as an instructor, and that the members may believe CAPT C was testifying that she believed the report of sexual assault. In light **[*20]** of the concerns voiced by the military judge, the defense counsel agreed with him that limiting instruction was necessary, but declined to request a mistrial. The military judge reviewed a draft instruction with the parties, and neither party objected.

At the conclusion of CAPT C's testimony, the military judge provided that detailed instruction to the members. He advised them that the witness testified as to two distinct issues. With regard to CAPT C's opinion evidence, the military judge instructed the members:

> Only you, the members of the court, determine the credibility of the witnesses and what the facts of the case are. No witnesses can testify that the alleged victim's account of what occurred is true or credible. To the extent you believe that Captain [C] testified or even implied that the alleged victim, [MIDN J], was a victim of sexual assault or that she believes the alleged victim, . . . or that [MIDN J's] account or complaint was credible, you may not consider this evidence that a crime occurred or that the alleged victim is credible. I repeat, only you, the members of the court determine the credibility of the witnesses and what the facts of this case are.

Record at 1043-44.

In [*21] his later instructions on findings, the military judge again repeated the full instruction. Record at 1295-96.

MILITARY RULE OF EVIDENCE 608(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), provides that a witness may testify as to the reputation or opinion of an individual for truthfulness when the witness's character "for truthfulness has been attacked by opinion or reputation evidence or otherwise." The CAAF has indicated that, "when there is a 'slashing cross-examination,' the term 'or otherwise' has been met." United States v. Toro, 37 M.J. 313, 317 (C.M.A. 1993) (quoting United States v. Everage, 19 M.J. 189, 192 (C.M.A. 1985) (additional citation omitted). Additionally, rehabilitation as to truthfulness has been allowed when the cross-examination of a witness was done "in such a manner as to induce the belief of untruthfulness." Toro, 37 M.J. at 318 (citing United States v. Allard, 19 M.J. 346 (C.M.A. 1985)). We need not decide whether the proper foundation for an opinion was laid or whether there was a slashing cross-examination that allowed for rehabilitation because the defense failed to object. Toro, 37 M.J. at 318. Reviewing for plain error, we find none.

Moving to [*22] the assigned error, trial defense counsel failed to object to the presentation of character evidence through a witness who was also testifying about her SARC duties. The military judge, apparently concerned that this was plain error that may materially prejudice a substantial right of the appellant, exercised his prerogative to take notice of the error and to take corrective action. The appellant now contends that the military judge's remedy was insufficient to cure the error. Appellant's Brief of 17 Jun 2013 at 23. We disagree.

The CAAF has consistently rejected the admissibility of so-called human lie detector testimony. No witness may offer "an opinion as to whether [another] person was truthful in making a specific statement regarding a fact at issue in the case." United States v. Kasper, 58 M.J. 314, 315 (C.A.A.F. 2003) (citations omitted). This prohibition applies both to expert and lay witness testimony. *Id. See also* United States v. Mullins, 69 M.J. 113, 117 (C.A.A.F. 2010) (holding that it was error for the military judge to permit testimony that could lead a trier of fact to infer that there was a 1 in 200 chance that a child victim was lying about being sexually abused).

Because [*23] defense counsel in this case did not object either to the initial testimony or to the military judge's remedial instruction, we test for plain error. United States v. Brooks, 64 M.J. 325, 328 (C.A.A.F. 2007); *see also* MIL. R. EVID. 103(d). To prevail, the appellant must show: "(1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the [appellant]." United States v. Fletcher, 62 M.J. 175, 179 (C.A.A.F. 2005) (citation omitted). In light of the limited nature of CAPT C's testimony and the clear bifurcation between her interactions with MIDN J as SARC and those as instructor, we decline to find plain error in allowing her testimony with regard to MIDN J's character for truthfulness.

Even assuming error *arguendo,* the appellant has failed to show material prejudice to his substantial rights. Prejudice results when there is "undue influence on a jury's role in determining the ultimate facts in the case." United States v. Birdsall, 47 M.J. 404, 411 (C.A.A.F. 1998). We look at the testimony in context to determine if the witness's opinion amounts to prejudicial error. Mullins, 69 M.J. at 117 (citing United States v. Eggen, 51 M.J. 159, 161 (C.A.A.F. 1999)). [*24] Context includes such factors as an immediate instruction, the standard instruction, and the strength of the Government's case. *Id.* The military judge twice instructed the members to keep the two aspects of CAPT C's testimony distinct and separate, and to limit their consideration of her testimony to very narrow parameters. He did so first with a limiting instruction immediately after her testimony, and then again prior to deliberations. Members are presumed to follow the military judge's instructions absent evidence to the contrary. United States v. Rushatz, 31 M.J. 450, 456 (C.M.A. 1990).

We find that the military judge did not err in his allowing CAPT C to testify as to MIDN J's character for truthfulness. And, assuming *arguendo* that there was error in not telling the members simply to completely disregard the opinion testimony, we find that there was no material prejudice to the substantial rights of the appellant in light of the affirmative measures taken by the military judge.

IV. Remaining Assignments of Error

The appellant alleges that remarks by the President of the United States concerning sexual assaults, made a full year after the appellant's trial, constitute apparent unlawful [*25] command influence upon his appeal. We review allegations of unlawful command influence *de novo.* United States v. Wallace, 39 M.J. 284, 286 (C.M.A. 1994).

The appellant has the initial burden of producing sufficient evidence to raise unlawful command influence. United States v. Stombaugh, 40 M.J. 208, 213 (C.M.A. 1994). This threshold is low, but it must be more than "a bare allegation or mere speculation." United States v. Johnston, 39 M.J. 242, 244 (C.M.A. 1994). The appellant must meet this initial burden before the burden shifts to the Government to demonstrate beyond a reasonable doubt either that there was no unlawful command influence or that the proceedings were untainted. United States v.

Biagase, 50 M.J. 143, 150 (C.A.A.F. 1999). Even assuming that the President falls within Article 37's prohibition against the exertion of unlawful command influence, we find nothing more than "a bare allegation" that those remarks could in any way influence the appellate review of this appellant's case. Accordingly, we find that the appellant has failed to meet his initial burden. *Stombaugh, 40 M.J. at 213*.

Finally, we turn to the appellant's contention that the use of the terms "rape" and "victim" **[*26]** eroded the presumption of innocence. As there was no objection at trial, we test for plain error and find none. MIL. R. EVID. 103(a).

Conclusion

The findings and the sentence are affirmed.

Senior Judge MITCHELL and Judge JAMISON concur.

APPENDIX 4

United States v. Oakley

United States Navy-Marine Corps Court of Criminal Appeals
March 26, 2013, Decided
NMCCA 201200299

Reporter: 2013 CCA LEXIS 245; 2013 WL 1200210

UNITED STATES OF AMERICA v. RONNIE G. OAKLEY, JR., INFORMATION SYSTEMS TECHNICIAN THIRD CLASS (E-4), U.S. NAVY

Prior History: [*1] GENERAL COURT-MARTIAL.

Sentence Adjudged: 9 March 2012. Military Judge: CDR Lewis Booker, JAGC, USN. Convening Authority: Commander, Navy Region Northwest, Silverdale, WA. Staff Judge Advocate's Recommendation: LCDR D.E. Rieke, JAGC, USN.

Case Summary

Overview
Service member was convicted of aggravated sexual assault and indecent acts in violation of Unif. Code Mil. Justice art. 120, *10 U.S.C.S. § 920*. The defense objected that the military judge's instruction to the members rendered *§ 920* unconstitutional as applied, and any distinction between the concepts of evidence of consent and the affirmative defense of consent were confusing to the members. Because consent was a defense to all the charged offenses, the error was not harmless beyond a reasonable doubt, and could have contributed to the appellant's convictions.

Outcome
The findings and sentence were set aside, and a rehearing authorized. The instructions to the court members resulted in an unconstitutional burden shift as to the issue of consent, which could have been prejudicial.

Counsel: For Appellant: Col Dwight Sullivan, USMCR; LT Kevin Quencer, JAGC, USN.

For Appellee: Capt Samuel Moore, USMC.

Judges: Before B.L. PAYTON-O'BRIEN, R.Q. WARD, J.R. MCFARLANE, Appellate Military Judges. Senior Judge PAYTON-O'BRIEN and Judge McFARLANE concur.

Opinion by: R.Q. WARD

Opinion

OPINION OF THE COURT

WARD, Judge:

A general court-martial consisting of officer and enlisted members convicted the appellant, contrary to his pleas, of aggravated sexual assault and indecent act in violation of Article 120, Uniform Code of Military Justice, *10 U.S.C. § 920*. [1] The members sentenced the appellant to confinement for three months, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

The appellant raises four assignments of error:

> 1. that the military judge erred when he instructed the members that the defense had the initial burden to prove consent by a preponderance of the evidence and only then would the burden shift to the Government to prove beyond a reasonable doubt that the defense of consent did not exist;
>
> 2. that the military [*3] judge erred by failing to instruct the members on the lesser included offense of assault consummated by a battery;
>
> 3. that the convening authority erred by approving total forfeiture of pay and

[1] The appellant originally was charged with four specifications alleging violations of *Article 120*, UCMJ: two specifications of aggravated sexual [*2] assault under *Article 120(c)*; one specification of wrongful sexual contact under *Article 120(m)*; and one specification of indecent act under *Article 120(k)*. Additionally, the appellant was charged with one specification of attempted aggravated sexual assault under Article 80, UCMJ.

Prior to entry of pleas, the military judge dismissed one specification of aggravated sexual assault for failure to state an offense. Appellate Exhibit X. At the conclusion of evidence, the military judge entered a finding of not guilty to the language "on divers occasions" for each of the three remaining *Article 120* specifications pursuant to RULE FOR COURTS-MARTIAL 917, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Record at 681. The members found the appellant not guilty of wrongful sexual contact and attempted aggravated sexual assault. AE LVIII.

allowances after the appellant was released from confinement; and

4. that the court-martial order incorrectly states the members' findings.

After carefully considering the record of trial, the parties' briefs, and oral argument, [2] we find merit in the appellant's first assigned error, set aside the findings and sentence, and authorize a rehearing. Our action moots the remaining assignments of error.

Factual Background

The appellant's conviction arose from an incident with his 19-year-old stepsister, Culinary Specialist Third Class (CS3) FC on 29 April 2011. That evening, the appellant, CS3 FC, and other members of their family were drinking alcohol together for several hours in the home of the appellant's father and step-mother. [*4] Later that evening, CS3 FC fell asleep on a recliner in the den of the home. Sometime after she fell asleep, the appellant entered the den and digitally penetrated her vagina while he masturbated.

Following these events, agents from the Naval Criminal Investigative Service (NCIS) interrogated the appellant. During the interrogation, the appellant provided both a handwritten and typed statement detailing his recollection of the evening. [3] In his statements, he admitted that he may have digitally penetrated CS3 FC's vagina while she lay sleeping on the recliner; however, he also indicated that he thought she acquiesced when she "opened her legs wider." Prosecution Exhibit 12 at 1.

At trial, CS3 FC testified that the appellant entered the den three separate times while she lay in the recliner sleeping. However, she testified that he sexually assaulted her only during the first and third instances. As to the second, she testified that she awoke to the smell of smoke and observed the appellant sitting in a chair smoking a cigarette. Record at 438. When she asked why he was not smoking out on the "front stoop", the appellant replied "oh, I forgot" and left the [*5] room. *Id.* at 439. She also testified that, although she was under the influence of alcohol, she awoke each time he entered the room and could recall everything he did to her during both sexual assaults. [4]

At the close of evidence, the military judge held an *Article 39(a), UCMJ*, session with counsel to discuss findings instructions. Recognizing the recent holdings of the Court of Appeals for the Armed Forces (CAAF) in *United States v. Prather, 69 M.J. 338 (C.A.A.F. 2011)* and *United States v. Medina*, 69 M.J. 462, 463 (C.A.A.F. 2011), he deemed it was up to "the trial judge to figure out exactly what it is that Congress has intended [in *Article 120, UCMJ*] and try to give effect [*6] to the language of the statute." Record at 684. He explained that he believed Congress intended that the concepts of consent and the affirmative defense of consent be treated differently. *Id.* The military judge summarized this distinction as follows:

> [The] defense has the burden of proving it is more likely than not that [CS3 FC] did or said something that looked like consent. And then it is the government's burden to prove that [CS3 FC] was not competent when she said it or that she was substantially incapacitated or that the consent was not freely given and, therefore, the defense of consent does not exist: two distinctly different concepts . . . ."

Id. He then proposed to instruct the panel accordingly. The defense objected, arguing that his instruction would make *Article 120* unconstitutional as applied and any distinction between the concepts of evidence of consent and the affirmative defense of consent "would be confusing to the members." *Id.* at 686-90. The military judge disagreed and ultimately instructed the members as follows:

> Consent is a defense to all the charged offenses. "Consent" means words or overt acts indicating a freely given agreement to the sexual conduct by a competent [*7] person. An expression of lack of consent through words or conduct means that there is no consent. The Defense must prove consent by a preponderance of the evidence; in other words, you must be convinced that it is more

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[2] On 13 February 2013, we heard oral argument at the George Washington University Law School as part of our Outreach program. We commend both parties on their exceptionally well-written briefs and outstanding oral argument on the unique and complex issues presented by this case.

[3] Prosecution Exhibits 10 and 12.

[4] In light of CS3 FC's testimony, the military judge directed that, for the three Article offenses (aggravated sexual assault, wrongful sexual contact and indecent act), the findings worksheet specify findings for both instances with the "smoking of the cigarette as the focal point" in delineating the two instances. Record at 771-80; AE LVIII. The members found the appellant not guilty of any offense for the first instance and guilty of aggravated sexual assault and indecent act for the latter instance. AE LVIII.

likely than not that [CS3 FC] said or did something that would indicate a freely-given agreement to the sexual conduct by a competent person. The burden, then, is on the government to prove beyond a reasonable doubt that the defense does not exist.

Please note that I say the defense does not exist, and not that consent does not exist because this is an important distinction. The prosecution has the burden to prove beyond a reasonable doubt that the defense of consent does not exist. Therefore, to find the accused guilty of the offenses alleged, you must find that even though [CS3 FC] may have said or done something that sounded or looked like consent, the government proved beyond a reasonable doubt that at the time she said or did those things, she did not give her agreement freely or that she was not competent. You may consider in this regard whether [CS3 FC] was substantially incapable of physically declining participation because she was asleep or unconscious or because [*8] she suffered some mental impairment due to consumption of alcohol, or because she was otherwise physically incapable of declining participation in the sexual conduct.

Id. at 738-39; Appellate Exhibit L at 4. The military judge also instructed on the affirmative defense of mistake of fact as to consent without placing any burden upon the appellant. Rather, he stated that "[t]he prosecution has the burden of proving beyond a reasonable doubt that the mistake of fact as to consent did not exist." Record at 740; AE L at 5.

Discussion

In *Prather*, the CAAF held that burdening the accused with proving the affirmative defense of consent unconstitutionally shifts the burden to the accused to disprove an implied element or a fact essential under *Article 120(c), UCMJ*. [5] *69 M.J. at 339-40*. Under an "as-applied" analysis, the CAAF found *Article 120(c)* unconstitutional whenever an accused raises the affirmative defense of consent because if "an accused proves that the victim consented, he has necessarily proven that the victim had the capacity to consent, which logically results in the accused having disproven an element of the offense of aggravated sexual assault - that the victim was substantially [*9] incapacitated." *Id. at 343*.

At the same time, however, the CAAF recognized that a military judge may craft an instruction curing this unconstitutional burden shift present in *Article 120(c)*. One method may be by instructing the members that "all of the evidence, including the evidence going to [the affirmative defense], must be considered in deciding whether there was a reasonable doubt about the sufficiency of the State's proof of the elements of the crime." *Id. at 344* (brackets in original) (quoting *United States v. Neal, 68 M.J. 289, 299 (C.A.A.F. 2010)* (quoting *Martin v. Ohio, 480 U.S. 228, 234, 107 S. Ct. 1098, 94 L. Ed. 2d 267 (1987)*) (internal quotation marks omitted). Or, a military judge [*10] can omit any burden allocation to the accused. *Medina, 69 M.J. at 463* (holding that an instruction in an *Article 120(c)* case that omitted any burden on the appellant and instead burdened the Government with disproving the affirmative defense of consent, while error, was harmless beyond a reasonable doubt); *see also United States v. Ignacio, 71 M.J. 125 (C.A.A.F. 2012)* (per curiam) (holding that, in a prosecution for abusive sexual contact under *Article 120(h)*, an instruction burdening the Government with disproving the affirmative defense of consent "correctly conveyed the Government's burden to the members.").

The issue presented in this Article 120(c) case is whether a military judge avoids the unconstitutional burden shift present in *Prather* by distinguishing between evidence of consent and the affirmative defense of consent. Despite the military judge's attempt to distinguish between the two concepts, we conclude that the instructions resulted in the same unconstitutional burden shift as occurred in *Prather*.[6] Moreover, under the facts of this case, we conclude that the military judge's error was not harmless beyond a reasonable doubt.

A. The Application of *Prather*

Because the military judge's instructions differ slightly from those present in *Prather*, we first must determine whether the holding in *Prather* even applies to this case. As in *Prather*, the appellant here mounts an as-applied constitutional challenge to *Article 120(c)*, UCMJ, a matter

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[5] In Prather, the *Article 120(c)* offense alleged that the victim was "substantially incapacitated." The CAAF noted in dicta that although "there may exist an abstract distinction between 'substantially incapacitated' and 'substantially incapable,' in the context presented here we see no meaningful constitutional distinction in analyzing the burden shift." 69 M.J. at 343. Although the *120(c)* offense here alleges "substantially incapable," we likewise see no meaningful distinction between that and "substantially incapacitated."

[6] As discussed *infra*, we find the same unconstitutional [*11] burden shift applied to the *120(k), UCMJ*, offense.

which we review *de novo*. United States v. Disney, 62 M.J. 46, 48 (C.A.A.F. 2005). To determine constitutionality in an as-applied context, we focus on, *inter alia*, the "content of instructions, sequence of instructions, and waiver of instructions." Neal, 68 M.J. at 304.

In his instructions, the military judge made several slight deviations from the instructions at issue in *Prather*. Specifically, he omitted the language from Article 120(t)(14)(B)(i) that "[a] person cannot consent to sexual activity if . . . substantially incapable of . . . appraising the nature of the sexual conduct at issue . . . ." In *Prather*, the CAAF held that this language from Article 120(t)(14) logically linked the affirmative defense of consent to the element of substantial incapacitation under Article 120(c). 69 M.J. at 343. The CAAF concluded that "Prather [*12] could not prove consent without first proving a *capacity* to consent on the part of the victim as Article 120(t)(14), UCMJ, provides that 'a person *cannot consent* to sexual activity if . . . substantially incapable . . . .'" *Id.* (emphasis in original).

In the instant case, one could argue that by omitting this language from Article 120(t)(14) in his instructions, the military judge removed the very foundation of *Prather*. However, the military judge did not sever all links to Article 120(t)(14). Of note, he included the definition of consent - "words or overt acts indicating a freely given agreement to the sexual conduct by a *competent* person." Record at 735; Art. 120(t)(14), UCMJ (emphasis added). Thus, to prove CS3 FC consented, the appellant had to first prove that she was "competent" to consent. And in deciding whether CS3 FC was competent, the military judge advised the members that they could consider whether she was "substantially incapable of declining participation [in the sexual conduct]," a fact essential to an element of the crime. Record at 739.

Even with the deviation from the statutory language at issue in *Prather*, we find that the military judge's instructions still placed [*13] the appellant in the same untenable position as Prather. Proving a victim was "competent" to consent is no different qualitatively than proving a victim had capacity to consent. 69 M.J. at 343. We conclude, therefore, that the military judge's removal of this statutory language did not remove this case from the unconstitutional burden shift described in *Prather*.

B. Attempt to Cure the *Prather* Unconstitutional Burden Shift

We turn next to whether the remainder of the military judge's instructions cured this unconstitutional burden shift. We review whether a panel is properly instructed *de novo*. United States v. Ober, 66 M.J. 393, 405 (C.A.A.F. 2008).

The appellant argues that regardless of the military judge's attempt to distinguish between evidence of consent and the affirmative defense of consent, he still unconstitutionally shifted the burden to the appellant of disproving an element of the crime — specifically that CS3 FC was substantially incapable of declining participation in the sexual act. The Government responds that the military judge's explanation distinguishing between evidence of consent and the defense of consent avoided any impermissible burden shift.

We find the military [*14] judge's attempt to distinguish between the concepts was confusing to the members, principally because both concepts relied upon a "competent" victim. And, irrespective of any distinction, we find that his instructions failed to properly convey to the members that *any* evidence of consent, including evidence pertinent to the affirmative defense, must also be considered in deciding whether the prosecution carried its burden of proving each element of the offense beyond a reasonable doubt.

"It is a 'basic rule that instructions must be sufficient to provide necessary guideposts for an "informed deliberation" on the guilt or innocence of the accused.'" United States v. Dearing, 63 M.J. 478, 479 (C.A.A.F. 2006) (quoting United States v. Anderson, 13 C.M.A. 258, 32 C.M.R. 258, 259 (C.M.A. 1962)); *see also* United States v. Buchana, 19 C.M.A. 394, 41 C.M.R. 394, 396-97 (C.M.A. 1970) (holding law officer must provide "lucid signposts" to enable the court members to apply the law to the facts). Any doubt as to how the members may interpret the instructions must be resolved in favor of the accused. United States v. Tackett, 19 C.M.A. 85, 41 C.M.R. 85, 87 (C.M.A. 1969); *see also* United States v. Curry, 38 M.J. 77 (C.M.A. 1993) (finding reversible [*15] error where military judge gave confusing and misleading instruction on defense of accident).

Before attempting to distinguish "evidence of consent" from the "defense of consent," the military judge first explained that the appellant must prove by a preponderance of the evidence that CS3 FC consented. [7] Thus, he required the appellant to prove some form of consent — be it . . . apparent, actual, legal or otherwise — before requiring the Government to carry *any* burden of disproving the defense of consent. Even if his attempted

[7] The military judge explained that "[t]he defense must prove consent by a preponderance of the evidence . . . you must be convinced that it is more likely than not that [CS3 FC] said or did something that would indicate a freely-given agreement to the sexual conduct by a competent person." Record at 738-39.

distinction carried legal significance, [8] the fact remains that both concepts of consent relied upon the same definition of a "competent" person. How to parse evidence of "consent" according to these varying concepts, weigh that evidence against the respective parties' burden, and render an informed verdict was simply too confusing for a panel of laymen. [9]

Even if this distinction carried significance and that significance was evident to the members, we note that the instructions linked any evidence of consent to a "competent" victim. To evaluate whether any evidence indicated consent, the members must first evaluate whether it was indicative **[*17]** of a competent person. In this regard, the military judge advised them that they could consider whether CS3 FC was "substantially incapable of declining participation [in the sexual conduct]," a fact essential to an element of the crime. Record at 739. By linking these factual determinations together, evidence indicating that CS3 FC was competent to consent to the sexual conduct could also tend to negate or disprove whether she was "substantially incapable of declining participation" in that same conduct.

Where proof of an affirmative defense may overlap with the prosecution's burden on an element, "the instructions to the jury must reflect 'sensitivity to th[e] dependent relationship between the two [distinct] factual issues.'" *Neal, 68 M.J. at 299* (quoting *Humanik v. Beyer, 871 F.2d 432, 441 (3d Cir. 1989)*). Such an instruction, absent in this case, must "convey to the jury that all of the evidence, including the evidence going to [the affirmative defense], must be considered in deciding whether there was a reasonable doubt about the sufficiency of the State's proof of the elements of the crime." *Martin, 480 U.S. at 234*; *see also Prather, 69 M.J. at 344*; *Neal, 68 M.J. at 299*. Absent **[*18]** that charge, the instructions create the risk that members may disregard evidence of consent that might otherwise raise a reasonable doubt simply because it falls short of a preponderance.

Therefore, we conclude that the military judge's failure to instruct the panel per *Martin* was error, and that error failed to cure the constitutional infirmity described in *Prather*.

C. Application of *Prather* to the Article 120(k), Indecent Act Specification

Article 120(r), UCMJ, excepts the affirmative defenses of consent and mistake of fact as to consent from all offenses under *Article 120* save those specifically listed. Because *Article 120(k)* is not among those listed, these affirmative defenses do not apply to *Article 120(k)* and lack of consent is ordinarily not an element. [10] At the same time, however, "all the facts and circumstances of a case including the alleged victim's consent, must be considered" to determine whether the conduct is indecent. *United States v. Baker, 57 M.J. 330, 336 (C.A.A.F. 2002)* (citations omitted). [11] Therefore, depending on the factual circumstances of each case, consent or lack thereof may be relevant in establishing whether the conduct is indecent.

In this case, the Government alleged that the act committed was without the consent of CS3 FC. [12] By doing so, the Government added lack of consent as a fact material to an element to be proven beyond a reasonable

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[8] It **[*16]** appears that the nuances of this distinction were not readily clear to the Government which argued in closing that "[t]he defense must show by a preponderance of the evidence - in other words more than 50-percent chance - that [CS3 FC] consented to [the sexual act and indecent conduct]. If they do this, then the government has to show beyond a reasonable doubt that [CS3 FC] did not consent. That's the law. That's what you're going to hear." Record at 701.

[9] "Even if we, as lawyers, can sift through the instructions and deduce what the judge must have meant, the factfinders were not lawyers and cannot be presumed to correctly resurrect the law." *Curry, 38 M.J. at 81*. The nuances of the military judge's attempted distinction of various forms of consent and shifting burdens might be evident to seasoned jurists and military justice practitioners, but we are far less confident they were evident to the members.

[10] The elements of **[*19]** indecent act are: (a) that the accused engaged in certain conduct; and (b) that the conduct was indecent. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), App. 28, ¶ 45 b(11). Lack of consent is only included in the definition of "indecent conduct" in reference to observing or making a recording of another person. *Article 120(t)(12), UCMJ*.

[11] While Baker was decided under a prior version of indecent acts under Article 134, UCMJ, the language of both versions of the statute and the legislative history show that the term "indecent" in *Article 120(t)(12)* is "the same conduct that has been held to be indecent by military appellate courts" in the past. SEX CRIMES AND THE UCMJ: A REPORT FOR THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, 261 (2005).

[12] The specification read as follows:

> In that Information Systems Technician Third Class Ronnie G. Oakley, Jr., U.S. Navy, USS INGRAHAM, on active duty, did, . . . on divers occasions, on or about 30 April 2011, wrongfully commit indecent conduct, to wit: masturbating in the presence of [CS3 FC], U.S. Navy, without the consent of the said [CS3 FC], U.S. Navy.

doubt: that the appellant's conduct was indecent. [13] But the military judge shifted this material fact from the Government's burden and instead placed proof of the inverse, i.e., consent, on the appellant in the form of an affirmative [*20] defense not authorized by law. [14] Ordinarily, "a superfluous, exculpatory instruction that does not shift the burden of proof is harmless, even if the instruction is otherwise erroneous." United States v. Behenna, 71 M.J. 228, 234 (C.A.A.F. 2012) (citation omitted). [15] But this error can hardly be superfluous when it effectively reduced the Government's burden in proving an element of the offense at the expense of the appellant. Cf. United States v. Binegar, 55 M.J. 1, 6 (C.A.A.F. 2001) (holding that in a larceny prosecution where specific intent in issue, an erroneous instruction requiring that mistake of fact be both honest and reasonable was not harmless as it lessened Government's burden in disproving defense and obtaining conviction).

Furthermore, the military judge's instructions placed the appellant in a position very similar to *Prather* — proving that CS3 FC consented to the indecent conduct tends to disprove a fact on which the prosecution bears the burden; that the appellant's conduct was indecent due to its nonconsensual nature. Neal, 68 M.J. at 299. In that regard, the "instructions to the jury must reflect 'sensitivity to th[e] dependent relationship between the two [distinct] factual issues." Id.(quoting Humanik, 871 F.2d at 441). The appellant was entitled to, but did not receive, a *Martin* instruction that the members must consider all evidence of consent, including any relating to the affirmative defense, as to whether the Government proved the elements of indecent act beyond a reasonable doubt.

D. Prejudice Analysis

Having found error, we must now examine that error for prejudice. "If instructional error is found, because there are constitutional dimensions at play, [the error] must be tested for prejudice under the standard of harmless beyond a reasonable doubt." United States v. Wolford, 62 M.J. 418, 420 (C.A.A.F. 2006) [*23] (citation and internal quotation marks omitted). Whether error is harmless beyond a reasonable doubt is a question of law we review *de novo*. *Id.* (citation omitted). In this context, prejudice attaches if "there is a reasonable possibility that the [error] complained of might have contributed to the conviction." United States v. Moran, 65 M.J. 178, 187 (C.A.A.F. 2007) (quoting *Chapman*, 386 U.S. at 24).

Here, the appellant argues that the members may have disregarded evidence of consent that otherwise could have raised a reasonable doubt that CS3 FC was "substantially incapable of declining participation in the sexual act" simply because such evidence fell short of a preponderance. The Government responds that any error was cured by the military judge's mistake of fact as to consent instruction; an instruction that removed any burden allocation to the appellant.

The Government's argument on the surface has some allure. At trial, the military judge instructed the panel that the Government must prove beyond a reasonable doubt that the mistake of fact defense did not exist. [16] Thus, he required the panel to determine beyond a reasonable doubt whether 1) the appellant held an incorrect belief [*24] that CS3 FC consented to the sexual conduct; and 2) a

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Charge Sheet (emphasis added). We view lack of consent as a matter subsidiary to a fact borne [*21] by the prosecution to be proven beyond a reasonable doubt: that the conduct alleged was indecent. Neal, 68 M.J. at 299.

[13] The act alleged was masturbation. The Government alleged two circumstances making that act indecent: CS3 FC's presence and her lack of consent. Arguably, the former circumstance is implied in the latter. We view this latter circumstance as a material fact in determining whether the appellant's conduct was indecent.

[14] For reasons that are unclear in the record, the military judge omitted the phrase "without the consent of the said [CS3 FC], U.S. Navy" when instructing the members on the elements of this offense. Record at 735-36. Although court-martial findings do not expressly incorporate the text of a charge and specification, each finding is a decision whether the Government proved beyond a reasonable doubt the charged offense. United States v. Alexander, 63 M.J. 269, 273 (C.A.A.F. 2006). Regardless of the omission, the indecent act specification submitted to the panel alleged lack of consent, the Government's proof included the same, and the members' guilty finding included no exceptions. Consequently, the appellant stands convicted of indecent conduct committed [*22] without the consent of CS3 FC.

[15] We again review whether this panel was properly instructed *de novo*. Ober, 66 M.J. 393.

[16] Specifically, he instructed that

> Mistake of fact as to consent means the accused held as a result of ignorance or mistake an incorrect belief that the other person engaging in the sexual conduct consented. The ignorance or mistake must have existed in the mind of the accused, and it must have been reasonable under all the circumstances. To be reasonable, the ignorance or mistake must have been based on information or the lack of it that would indicate to a reasonable person that the other person consented. Additionally, the ignorance or mistake cannot be based on the negligent failure to uncover the true facts.

reasonable sober person in the appellant's position would hold the same incorrect belief.

The Government argues that to form an incorrect belief, the appellant would have presumably observed some act or communication by CS3 FC indicating consent. But by rejecting any mistake of fact, the panel implicitly found that a reasonable sober person in the appellant's position observed no such indicia of consent. Concomitantly, if such a person observed no indicia of consent, then no actual consent existed.

As alluring as this argument may be, it overlooks the fact that there are several possible paths that could have led the panel to reject the mistake of fact defense. Perhaps they were firmly convinced that a reasonable sober person would not have believed that CS3 FC consented. Or, irrespective of CS3 FC's conduct, they may have concluded that the appellant himself held no such belief. Finally, the panel may have believed that neither the appellant himself nor a reasonable **[*26]** sober person in his position would have believed that CS3 FC consented.

On the face of this record, we cannot conclude beyond a reasonable doubt which path they chose. It is quite possible that, based on the appellant's NCIS statements and video-recorded interrogation, the panel concluded that the appellant thought CS3 FC was asleep at the time of the sexual conduct. [17] In that case, they could reject the defense with no consideration as to what a reasonable sober person may have believed. Faced with this uncertainty, we cannot conclude that the verdict forecloses the possibility that the panel may have disregarded some evidence of actual consent and convicted on evidence less than beyond a reasonable doubt.

Based on the foregoing, there exists a reasonable possibility that the military judge's erroneous instructions contributed to the appellant's convictions.

Conclusion

Accordingly the findings and the sentence are set aside, and a rehearing **[*27]** is authorized.

Senior Judge PAYTON-O'BRIEN and Judge McFARLANE concur.

. . . .

> The prosecution has the burden of proving beyond a reasonable doubt that the mistake of fact as to consent did not exist. If you are convinced beyond a reasonable doubt at the time of the charged offenses that the accused was not under a mistaken belief that [CS3 FC] consented as to the sexual acts, then the defense does not exist. Even if you conclude that the accused was under a mistaken belief that [CS3 FC] consented to the **[*25]** sexual acts, if you are convinced beyond a reasonable doubt that at the time of the charged offenses the accused's mistake was unreasonable, the defense does not exist.

Record at 739-40. The military judge then explained how voluntary intoxication was not relevant to any mistake of fact by the appellant. *Id.* at 741.

[17] PE 10, 12, and 13. During trial, however, CS3 FC testified that she was awakened when the appellant entered the den, and remained awake and conscious but silent throughout the approximately five minutes that the sexual assault lasted. Record at 440-44.

APPENDIX 5

United States v. Saxman

United States Navy-Marine Corps Court of Criminal Appeals
May 27, 2010, Decided
NMCCA 200900412

Reporter: 2010 CCA LEXIS 68

UNITED STATES OF AMERICA v. COTY J. SAXMAN, PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS

Prior History: [*1] GENERAL COURT-MARTIAL. Sentence Adjudged: 24 April 2009. Military Judge: LtCol Paul Ware, USMC. Convening Authority: Commanding General, 3d Marine Division (-)(REIN), MCBH, Kaneohe Bay, HI. Staff Judge Advocate's Recommendation: LtCol W.H. Ferrell, III, USMC.
United States v. Saxman, 69 M.J. 540, 2010 CCA LEXIS 21 (N-M.C.C.A., Feb. 25, 2010)

Case Summary

Procedural Posture
Appellant servicemember was convicted of knowing possession of four out of 22 digital video files of child pornography, but the servicemember asserted that a failure to identify the four videos precluded appellate review. The servicemember appealed the general court-martial findings and sentence as approved by the convening authority.

Overview
The servicemember contended that appellate review was precluded because the court-martial members found the servicemember guilty by exceptions and substitutions of possessing only four of the charged 22 videos, but did not specify which four videos formed the basis of their guilty finding. The military appellate court agreed, holding that, without knowing of which 18 videos the servicemember stood acquitted, the court could not affirm a conviction for any video without creating a risk that doing so would overturn the members' not-guilty findings. Further, rehearing would almost certainly result in impermissible re-deliberation on findings or other prohibited actions, and thus the prohibition of double jeopardy precluded such a rehearing.

Outcome
The court-martial findings and sentence were set aside, and the charge and specification were dismissed with prejudice.

Counsel: For Appellant: Capt Jeffrey Liebenguth, USMC.

For Appellee: LT Brian Burgtorf, JAGC, USN.

Judges: Before F.D. MITCHELL, J.A. MAKSYM, R.E. BEAL, Appellate Military Judges. Senior Judge MITCHELL and Judge BEAL concur.

Opinion by: J.A. MAKSYM

Opinion

PUBLISHED OPINION OF THE COURT

MAKSYM, Senior Judge:

A general court-martial composed of officer members convicted the appellant, contrary to his pleas, of one specification of knowing possession of child pornography in violation of *18 U.S.C. § 2252A(a)(5)(A)*, as charged under Article 134 of the Uniform Code of Military Justice, *10 U.S.C. § 934*. The appellant was sentenced to a bad-conduct discharge. The convening authority approved the sentence as adjudged.

On appeal, the appellant alleges that this court cannot properly conduct its *Article 66, UCMJ*, review because the members found him guilty by exceptions and substitutions of possessing only four of the charged 22 videos, but did not specify which four videos formed [*2] the basis of their guilty finding. [1]

We have reviewed the record of trial, the pleadings of the parties and heard oral argument on 26 January 2010. We conclude that we cannot conduct a proper Article 66 review in this case. Accordingly, we set aside the findings and sentence and dismiss the charge and its sole specification.

FACTUAL BACKGROUND

On 14 December 2007, Naval Criminal Investigative Service (NCIS) Special Agent (SA) Sean Devinny initiated an undercover operation in order to identify and investigate Hawaii-based servicemembers in possession of child pornography on their personal computers. Record at 216. On that day, SA Devinny opened a peer-to-peer file sharing program on his computer and began inputting search terms indicative of child pornography into the program's search engine. *Id.* at 220. Within moments, the

[1] The appellant withdrew his second assignment of error on 12 January 2010.

program had searched the internet and identified numerous files located on computers throughout the world whose names contained these terms, indicating to SA Devinny that the files likely contained child pornography. *Id.* at 221. Listed next to each file was an internet protocol (IP) address, [*3] a unique number that identified the computer from which each file was being shared. *Id.* at 205, 228.

SA Devinny next sorted through the list of IP addresses and identified an IP address in Hawaii from which a computer was sharing a file of child pornography. *Id.* at 228-29. Using this information, SA Devinny subpoenaed the Internet Service Provider (ISP) which owned the rights to assign the IP address in an attempt to identify the user of the address. *Id.* at 234. The ISP informed SA Devinny that the IP address was assigned to the appellant, who was then living in a barracks room at Marine Corps Base Kaneohe, Hawaii. *Id.* at 234, 236; Prosecution Exhibit 2 at 1.

SA Devinny subsequently sought and was given authorization to search the appellant's barracks room for computer media containing child pornography. *Id.* at 263. Prior to executing the warrant, however, SA Devinny decided to interview the appellant at the NCIS Kaneohe Bay Field Office. *Id.* at 236. During the interview, the appellant admitted that his computer contained images of child pornography, but denied knowing how the images got there. *Id.* at 242. The appellant stated that many different Marines had access to his computer and [*4] implied that others had downloaded child pornography to his computer without his permission or knowledge. *Id.*

Following the interview, SA Devinny and SA Paul Lerza searched the appellant's barracks room, seized the appellant's desktop computer, and entered the computer into evidence. *Id.* at 246, 265, 267. Several weeks later, NCIS sent the computer to the Defense Computer Forensic Laboratory (DCFL) for analysis to determine if the computer's hard drive contained any images of child pornography. PE 2 at 1.

After the computer arrived at DCFL, forensic examiner Michael Donhauser and other DCFL technicians conducted an examination of the computer's hard drive and discovered 22 videos they believed to be child pornography. *Id.* at 295, 330. Once they identified the 22 videos, Mr. Donhauser compared the videos to images in a database compiled by the National Center for Missing and Exploited Children (NCMEC). *Id.* at 481-82. The database contained a collection of pornographic images depicting "known child images," images that have been identified by NCMEC experts as depicting children who are under the age of consent. *Id.* at 481. Utilizing this database, Mr. Donhauser determined that of the 22 [*5] videos on the appellant's hard drive, only four contained videos with "known child images." *Id.* at 483.

The Government preferred charges against the appellant on 16 May 2008. The charge sheet read, in pertinent part:

> In that [the appellant]...did, at Building 7062, on board Marine Corps Base, Kaneohe Bay, Hawaii, on or about December 14, 2007, knowingly possess, on land under the control of the Government of the United States, 22 video files of child pornography in violation of *18 U.S.C. § 2252A(a)(5)(A)*.

Trial commenced almost one year later, on 6 April 2009. During trial, the defense attacked the Government's case from several angles, including by advancing a theory that another Marine with access to the appellant's computer had downloaded child pornography to the computer without the appellant's knowledge.

The military judge instructed the members, after the defense case but prior to closing arguments, as to the elements of the offense:

> In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond a reasonable doubt:
>
> One, that ... the accused knowingly possessed 22 video files of child pornography;
>
> Two, that the accused did so in the special [*6] maritime and territorial jurisdiction of the United States...;
>
> Three, that at the time the accused knew the material he possessed contained an image of child pornography; . . .
>
> Four, that the accused's acts were wrongful; and Five, that at the time Title *18, U.S. Code Section 2252(a)(5)(A) [sic]* was in existence.

Record at 759-60. The military judge then supplemented his recitation of the elements and provided the members with additional information, including, *inter alia*, an instruction that:

> The offense of possession requires the accused to have knowingly possessed material containing an image of child pornography and to have known that the image was child pornography.

Id. at 762-63. Upon a request from trial counsel for a variance instruction and likely recognizing that the evidence raised during trial might lead to an acquittal on some but not all of the images, the military judge then instructed the members on the option of finding guilt by exception and substitution. *Id.* at 766; Appellate Exhibit XXXVI.

> If you have a reasonable doubt that the accused possessed 22 images of child pornography, but you are satisfied beyond a reasonable doubt that he did possess a lesser amount of child **[*7]** pornography, and that all of the other elements have been proved beyond a reasonable doubt, you may still reach a finding of guilty.
>
> Should this occur, you must modify the specification to correctly reflect your findings. You may change the amount described in the Specification and substitute any lesser specific amount as to which you have no reasonable doubt.

Id. at 766. The military judge failed to further instruct the members that if they convicted the appellant by exceptions and substitutions, they needed to identify the specific videos which had formed the basis of their guilty finding.

Closing arguments followed the military judge's instructions. In support of his theory that others had surreptitiously downloaded child pornography to the appellant's computer, civilian defense counsel argued that there was limited evidence, if any, that the appellant had ever viewed the videos DCFL discovered on his hard drive:

> [A]t most only 4 of the 22 [videos] were ever even opened . . . . Four. The other 18 there's no evidence that they were ever opened at all.
>
> . . . .
>
> [Mr. Donhauser] found no evidence that [the appellant] opened up and viewed any of the 22 videos. At most, as he said, 4 of them were **[*8]** opened at all, but he doesn't know by whom or under what circumstances or how much was seen.

Id. at 778 and 784 respectively.

The members began deliberating after closing arguments, but interrupted their deliberations to ask the military judge whether, if they decided to except the number 22 and substitute another figure, they were required to agree on the substituted figure by a simple majority or a 2/3 vote. *Id.* at 793; AE LXVII.

The military judge instructed the members that they were required to examine each video independently and determine whether, by a 2/3 vote, each video met the elements of the offense. Record at 793-94.

> So you're going to have to take all 22 of them and you're going to have to decide, and the vote always has to be [two-thirds] or more for it to meet the element. And if you do 22 and you only have 6 that meets the two-thirds vote, then you would have to modify the specification to reflect the findings of the Court.

Id. at 794. At the conclusion of their deliberations, the president of the court announced that the members had found the appellant "guilty except for the figure '22' substituting the figure '4.'" *Id.* at 797. [2] The military judge accepted this finding **[*9]** without requiring the members to specify exactly which four of the twenty-two video files they convicted the appellant of possessing. It is this finding that the appellant now challenges on appeal.

DISCUSSION

At issue in this case is whether this court can properly conduct its *Article 66, UCMJ*, review when the members did not specify which four of the 22 video files they had found the appellant guilty of possessing. *See United States v. Walters, 58 M.J. 391, 397 (C.A.A.F. 2003)*; *United States v. Smith, 39 M.J. 448, 451 (C.M.A. 1994)*. In order to squarely address this question, we must first discuss the manner in which the Government charged the alleged offense and the military judge's instructions to the members.

The Government's Charging Decision and *18 U.S.C. § 2252A*

With the passage of the Child Pornography Prevention Act of 1996, *18 U.S.C. § 2252A*, Congress took action to address the impact of advances in computer technology on the recording, creation, alteration, production, reproduction, **[*10]** distribution and transmission of visual

[2] The findings worksheet states more accurately the finding: "Guilty except for the figure '22' substituting the figure '4' of the excepted figure **not guilty** of the specification guilty." AE LXVI.

depictions of child pornography. S. REP. NO. 104-358, at 7 (1996). Among other things, the Act for the first time expressly criminalized the possession of child pornography in digital form on a computer disk. The subsection of the act charged by the Government in this case, 18 U.S.C. § 2252A(a)(5)(A), specifically targets any person who:

> [I]n the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country ... knowingly possesses, or knowingly accesses with intent to view, *any book, magazine, periodical, film, videotape, computer disk, or any other material that contains* an image of child pornography. . . . (Emphasis added).

The plain language of the statute is important because, rather than criminalizing the possession of an intangible, electronic file that depicts an individual image of child pornography, we believe the statute criminalizes the possession of a tangible physical object, such as "any book, magazine, periodical, film, videotape, computer disk, or any other material" which contains **[*11]** at least one image of child pornography.

In interpreting a statute, we must first look to the language of the statute. United States v. Guess, 48 M.J. 69, 71 (C.A.A.F. 1998)(citing United States v. Turkette, 452 U.S. 576, 580, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981)). If the statute is unambiguous, in the absence of "'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" Turkette, 452 U.S. at 580 (quoting Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108, 100 S. Ct. 2051, 64 L. Ed. 2d 766 (1980)). The words in a statute should typically be given their "ordinary and natural" meaning. Bailey v. United States, 516 U.S. 137, 145, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995).

We believe the language of 18 U.S.C. § 2252A(a)(5)(A) unambiguously criminalizes the possession of a tangible physical object, such as a computer disk, which contains at least one image of child pornography. Our interpretation of the statute squares with that of other federal courts. *See e.g.* United States v. Overton, 2009 U.S. App. LEXIS 20818 (9th Cir. 2009); United States v. Planck, 493 F.3d 501, 504 (5th Cir. 2007) (discussing propriety of charging one count of possession for each piece of media possessed); United States v. Thompson, 281 F.3d 1088, 1090-91 (10th Cir. 2002)(drawing **[*12]** distinction between properly charging one count of possession for each piece of media but then examining the number of files possessed on that media to determine a sentence).

In this case, the child pornography at issue was found on the hard drive of the appellant's desktop computer. A hard drive is a "computer's internal disk drive using a non-removable storage format. [It is] used for the storage of data, documents and the computer's programs and operating system." [3] Similar to the computer disk described in 18 U.S.C. § 2252A(a)(5)(A), a hard drive is a physical location upon which a computer user stores data in a digital format.

However, instead of charging the appellant with possession of a hard drive containing an image of child pornography, the Government advanced the theory within its specification that the appellant knowingly possessed **"22 video files of child pornography in violation of** 18 U.S.C. § 2252A(a)(5)(A)**."** We note that the specification, as pled in this case, does not expressly state all of the elements of **[*13]** the offense set forth under 18 U.S.C. § 2252A(a)(5)(A). Specifically, the specification fails to expressly allege possession of some *material* that contains *an image* of child pornography.

The Government's theory, reflected in the language of the charge and specification, plays a crucial role in this case as both parties and the military judge relied upon this theory throughout the course of the trial. During closing argument, for example, the Government analogized a digital computer video file to the "film" listed in 18 U.S.C. § 2252A(a)(5)(A) and asked the members to return a finding of guilty on all 22 films. Record at 768; AE LXIII at 2. Conversely, the appellant attacked the Government's theory by arguing that the appellant knowingly possessed a much smaller number of files than 22. Record at 778, 781. Finally, as detailed above, the military judge instructed the members based upon the Government's theory. *Id.* at 759-60.

Appropriately, the judiciary plays no role in the manner in which the Government advances a charge or the language it deploys to express it. However, to be clear, had the Government pled its case differently, the members might well have reached a different and less **[*14]** assailable finding. As charged, the members could have convicted by exceptions and substitutions as to 21 of 22 videos referred to within the specification and our quandary would not be

[3] Harvard University, Berkman Center for Internet and Society, Student Glossary. <http://cyber.law.harvard.edu/readinessguide/glossary.html> (visited 29 Jan 2010).

relieved. The Government chose the verbiage within the specification and formulated a theory around same, and must now be burdened with all of the consequences attendant to its independent charging decision, including the ambiguous findings handed down by the members.

For the purpose of the analysis which follows, we will assume without deciding that a digital video file is the functional equivalent of the tangible physical media listed in *18 U.S.C. § 2252A(a)(5)(A)*.

The Ambiguity Created by the Members' Finding

Article 66, UCMJ, requires a court of criminal appeals to conduct a *de novo* review of the factual and legal sufficiency of each conviction before it. *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)*(citing *United States v. Cole, 31 M.J. 270, 272 (C.M.A. 1990)*). This court may affirm only those findings of guilt that it finds correct in law and fact and determines, on the basis of the entire record, should be approved. *Art. 66, UCMJ*. While the power conferred by *Article 66* upon this [*15] court is an "'awesome, plenary, *de novo* power of review,'" it is not without limits. *See Smith, 39 M.J. at 451* (quoting *Cole, 31 M.J. at 272*). This court, for instance, may not find as facts allegations contained in a specification of which the factfinder has found an accused not guilty. *Smith, 39 M.J. at 451-52* (citing *United States v. Nedeau, 7 C.M.A. 718, 23 C.M.R. 182, 185 (C.M.A. 1957)*; *United States v. Hogan, 20 M.J. 221 (C.M.A. 1985)*).

The Court of Military Appeals (C.M.A.) articulated this principle in *Smith*. In *Smith*, a military judge found the accused not guilty by exceptions and substitutions of some of the factual allegations contained in his charged specification. *Smith, 39 M.J. at 449*. Upon review, the Army Court of Military Review affirmed the accused's conviction, but did so based upon findings of fact which conflicted with the military judge's findings of not guilty. *Id. at 450*. The C.M.A. reversed the conviction, stating that a Court of Military Review may not "find as facts allegations in a specification which a factfinder has found an accused not guilty of," even when evidence in the record may support such a finding. *Id. at 451-52*.

This limiting principle has also recently been [*16] applied in *Walters* and its progeny. *See also, e.g., United States v. Augspurger, 61 M.J. 189 (C.A.A.F. 2005)*; *United States v. Seider, 60 M.J. 36 (C.A.A.F. 2004)*. In *Walters*, the Government charged the accused with one specification of using ecstasy "on divers occasions" between April and July 2000. *58 M.J. at 391-92*. At trial, the Government presented evidence of multiple ecstasy uses. When the members returned their verdict, they found the accused guilty by exceptions and substitutions, finding the accused not guilty of the words "on divers occasions" and substituting therefore and finding the accused guilty of the words "on one occasion." *Id. at 394*. On appeal, Walters asserted that the Air Force Court of Criminal Appeals could not conduct its Article 66 review because the members' ambiguous finding did not indicate of which ecstasy uses the members had acquitted him. The Court of Appeals for the Armed Forces (C.A.A.F.) agreed, stating that the Air Force court "could not conduct a factual sufficiency review of Appellant's conviction because the findings of guilty and not guilty do not disclose the conduct upon which each of them was based." *Id. at 397*.

The Government asks us to analogize [*17] this case to *United States v. Brown*, where a military judge instructed the members on three different theories of indecent assault and the members convicted the accused without specifying upon which of the three theories they had based their guilty finding. *65 M.J. 356, 358 (C.A.A.F. 2007)*. C.A.A.F. ultimately affirmed the *Brown* conviction and concluded that no findings ambiguity existed in the case which precluded Article 66 review. *Id. at 358*. Contrary to the Government's position, we believe *Brown* to be inapposite to the present case because it did not involve a finding of not guilty, the specific feature of this case, *Smith* and *Walters* which makes review under Article 66 impossible.

We believe the Government's charging decision, the military judge's instructions, and the members' not guilty findings from which the court failed to secure clarification, have left us in a situation where we cannot initiate review of this conviction under *Article 66*. Without knowing of which 18 videos the appellant stands acquitted, we cannot now affirm a conviction for *any* video without creating a risk that doing so will overturn the members' not guilty findings.

We have contemplated returning this [*18] case for a hearing in revision pursuant to R.C.M. 1102 at which the members would be individually polled to determine the factual basis for their verdict. Without deciding the legal propriety of such a hearing, we conclude that such a hearing, given the particular facts of this case, would lack both feasibility and practicality. Moreover, such a process would almost certainly result in impermissible redeliberation on findings or other actions expressly prohibited by MILITARY RULE OF EVIDENCE 606(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

CONCLUSION

We conclude that an *Article 66* review in this case is impossible. Accordingly, we set aside the finding of guilt on Specification 1 of the Charge and the sentence. As a

rehearing would subject the appellant to double jeopardy, we dismiss the charge and specification with prejudice. *See* Walters, 58 M.J. at 397.

Senior Judge MITCHELL and Judge BEAL concur.

APPENDIX 6

United States v. Wagner

United States Army Court of Criminal Appeals
July 29, 2013, Decided
ARMY 20111064

Reporter: 2013 CCA LEXIS 573; 2013 WL 3946239

UNITED STATES, Appellee v. Private E1 JASON C. WAGNER United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by *United States v. Wagner, 2013 CAAF LEXIS 1219 (C.A.A.F., Oct. 11, 2013)*
Motion denied by United States v. Wagner, 2014 CAAF LEXIS 291 (C.A.A.F., Mar. 19, 2014)
Review granted by United States v. Wagner, 2014 CAAF LEXIS 364 (C.A.A.F., Apr. 3, 2014)

Prior History: [*1] Headquarters, 25th Infantry Division. Kurt Bohn, Military Judge, Lieutenant Colonel Emily C. Schiffer, Acting Staff Judge Advocate (pretrial) Colonel George R. Smawley, Staff Judge Advocate (post-trial).

Case Summary

Overview
HOLDINGS: [1]-The evidence at a servicemember's trial for aggravated sexual assault did not reasonably raise an issue requiring an instruction on the lesser included offense of wrongful sexual contact, since the element of lack of permission for sexual contact equated with lack of consent and was not raised outside the context of the victim's incapacitation as an element of aggravated sexual assault; [2]-Wrongful sexual contact was a lesser included offense of aggravated sexual assault since in any situation where the penis penetrates the vagina in a sexual assault, one form of sexual contact will also occur, i.e., an intentional touching of the genitalia, and without permission was synonymous with lack of consent.

Outcome
Findings and sentence affirmed.

Counsel: For Appellant: Lieutenant Colonel Imogene M. Jamison, JA; Major Jacob D. Bashore, JA; Captain Stephen J. Rueter, JA (on brief).

For Appellee: Major Robert A. Rodrigues, JA; Major Catherine L. Brantley, JA; Captain Bradley M. Endicott, JA (on brief).

Judges: Before KERN, ALDYKIEWICZ, and MARTIN Appellate Military Judges. Senior Judge KERN and Judge MARTIN concur.

Opinion by: ALDYKIEWICZ

Opinion

MEMORANDUM OPINION

ALDYKIEWICZ, Judge:

A general court-martial composed of officer and enlisted members convicted appellant, contrary to his plea, of aggravated sexual assault in violation of Article 120(c)(2), Uniform Code of Military Justice [hereinafter UCMJ], *10 U.S.C. § 920(c)(2) (2006 & Supp. III 2009), amended by10 U.S.C. § 920 (2012)*. The panel sentenced appellant to a dishonorable discharge and confinement for six years. The convening authority approved the adjudged sentence.

Appellant's case is before this court for review pursuant to *Article 66*, UCMJ. Appellant raises three assignments of error and submits one matter [*2] pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*. We conclude that one of appellant's assigned errors, which alleges the military judge erred by not instructing the panel that wrongful sexual contact and assault consummated by a battery are lesser-included offenses of aggravated sexual assault, warrants discussion but no relief. Appellant's remaining assignments of error, as well as the matter personally raised pursuant to *Grostefon*, are without merit.[1]

I. BACKGROUND

On 30 November 2010, after work, DL joined some co-workers at a local bar. Among those present were DL,

[1] In appellant's two other assignments of error, he alleges that the evidence is legally and factually insufficient and that he was denied an opportunity to request that the convening authority defer and/or waive the automatic forfeitures in his case. However, we have no doubt that appellant engaged in a sexual act with DL without her consent and while she was substantially incapacitated. Therefore, in discharging our duties pursuant to *Article 66*, UCMJ, we conclude the evidence is legally and factually sufficient as to appellant's guilt of the charged aggravated sexual assault. *SeeUCMJ art. 66(c)*; *United States v. Washington*, 57 M.J. 394 (C.A.A.F. 2002). Furthermore, appellant's claim of a "lost opportunity" during [*3] the post-trial phase of his court-martial, *see United States v. Fordyce*, 69 M.J. 501 (Army Ct. Crim. App. 2010) (en banc), fails for the same reason as that announced in *United States v. Axtell*, 72 M.J. 662 , 2013 CCA LEXIS 481 (Army Ct. Crim. App. 2013) (en banc).

DL's co-worker WM, appellant, and appellant's friend RM. After consuming several beers and several shots of alcohol from glasses left behind at the table when DL went to the restroom, DL, WM, RM, and appellant proceeded to another bar where they continued to drink. At the second bar, DL drank another beer and shot. DL never met appellant prior to that evening and her interaction with appellant was minimal. The two barely exchanged greetings with one another, and their interaction did not involve anything of a physical or sexual nature.

Between 0330 hours and 0400 hours that morning, 1 December 2010, DL, WM, RM, and appellant left the second bar for appellant's apartment where they planned to continue drinking. DL, driving her own vehicle, followed WM to appellant's apartment having never been there before that evening. Once at [*4] the apartment complex, DL became separated from her friends, finding appellant's apartment with the help of an evening security guard who was en route to the apartment to tell appellant and his guests to lower their voices as they were making too much noise for that time of the morning. The security guard described DL as smelling of alcohol, having blood shot eyes, and talking loudly.

Present inside appellant's apartment were appellant, appellant's roommate JW, RM, DL, and WM. Once inside the apartment, DL was given another beer. By this time, she was groggy, staggering, and "wanted to sleep so badly that she couldn't bear it anymore." Shortly after her arrival, JW observed DL passed out on the living room floor, her beer spilling onto the new rug JW recently purchased for the apartment. After picking up the beer bottle and cleaning up the spilled beer, JW picked up the passed-out, unconscious, five-foot and eighty-pound DL. JW carried DL to appellant's bedroom, placing her fully clothed on appellant's bed where RM covered her. JW chose appellant's bed rather than his own because "if she was going to throw up or piss on herself it [was] not going to be in [his] bed."

Appellant later [*5] entered his bedroom and proceeded to remove DL's clothing, first removing her pants and then her underwear. He then proceeded to engage in sexual intercourse with DL as she lay there. As she regained consciousness, DL recalled wondering if she was dreaming. As appellant was penetrating her, DL thought, "I need to wake up. I need to wake up. I need to do something. I need to prevent this from happening to me." Notwithstanding these thoughts, she testified she "couldn't function . . . couldn't speak . . . couldn't do anything." She further testified that when appellant's penis first penetrated her vagina, she felt "[p]ain and disgust and hate all at the same time." Then DL's cellular phone rang, affording DL the opportunity to push appellant away from her. She answered the phone and spoke with her stepfather, telling him she would be home soon. Scared and not sure of what to do, DL called WM who was in the living room, approximately ten feet from appellant's bedroom. After her two phone calls went unanswered, DL sent WM a text message that read, "[appellant] is raping me." DL then ran out of appellant's bedroom, naked from the waist down, and collapsed on the living room floor crying. [*6] Seeing her partially naked co-worker, WM covered DL with a blanket and accompanied DL back into appellant's bedroom to locate her clothing.

At approximately 0545 hours, after finding her clothing and getting dressed, DL fled the apartment into the apartment complex parking area in search of her vehicle. As she drove away, she came across a noncommissioned officer, Sergeant MA who saw her in her vehicle crying. When asked if she was okay, DL told Sergeant MA she had been raped. Sergeant MA took DL to the apartment complex's security office where the same security guard she met earlier that morning called the Honolulu Police Department (HPD). Upon HPD's arrival, DL identified appellant as the man who raped her. After identifying appellant, DL was transported to the hospital where she was treated and a rape/sexual assault kit gathered.

A. THE GOVERNMENT'S CASE

In addition to eliciting eyewitness testimony from the victim and others who observed DL on the evening and early morning hours of 30 November 2010, 1 December 2010, the government also offered DNA evidence and medical testimony. Following the assault, Dr. WL performed a sexual assault examination on DL. Doctor WL testified that he [*7] observed lacerations on DL's vagina, an injury that WL described as typically occurring when "something is forced through that opening, very large, very suddenly, or very forcefully." The exam also found semen in DL's vagina. A forensic expert testified that the partial DNA profile from the semen found in DL's vagina was consistent with appellant's DNA profile.

The government also put on testimony that appellant admitted to drugging several females on separate occasions and having sex with them while they were unconscious. Appellant's male friend testified that appellant bragged, "he could have sex with any girl. No one could say no to him because he would just drug them and have sex with them while they were asleep." This same friend testified that he caught appellant putting prescription medication, specifically Adderall, in his drink, one of two drugs appellant confessed to placing in others' drinks, the second being Ambien. The government introduced appellant's prescription drug history which established appellant had access to both Adderall and Ambien. The panel also heard from CW who testified she

awoke to find appellant on top of her while another individual stood nearby appearing [*8] to photograph or video the event with what appeared to be a camera-phone. When she awoke appellant's body straddled hers with appellant's pelvic area on her "private area." According to CW, this occurred during a night of drinking in appellant's apartment in which she felt faint and her limbs felt weak. Although supported by witness testimony, the appellant's admission to previously drugging women in order to have sex with them was unsupported by any toxicology reports. Similarly, there was no toxicology report associated with the assault of DL.

B. THE DEFENSE'S CASE

The defense did not contest the fact that appellant engaged in a sexual act with DL. Instead, the defense attempted to show that the sex with DL was consensual because DL was not incapacitated, challenging her capacity that evening. The entire defense case focused on showing that DL was not substantially incapacitated. In its opening statement, the defense stated, in part: "[B]ottom line up front, December 1, 2010, we believe will show via [sic] consensual sexual encounter between Private Wagner and [DL] . . . ." The defense's opening concluded with: "When you hear all of the evidence, both from the government side and our [*9] side, we believe the evidence will show that any sex between [DL] and Jason Wagner on December 1, was consensual. . . ."

After attempting to establish a motivation to lie by cross-examining DL on her "exclusive" relationship with her boyfriend at the time, the defense challenged DL's alleged incapacitation the early morning hours of 1 December 2010. The defense cross-examined DL on the amount of alcohol she consumed, establishing that: prior to midnight she consumed no alcohol; from midnight until approximately 0200 hours she consumed two beers with two shots of alcohol; and from 0200 hours until approximately 0400 hours she partially consumed one beer with a shot. The defense also established: around midnight DL drove herself from work to the first bar; DL drove herself to appellant's apartment around 0400 hours, about a fifteen-minute drive; DL was able to push appellant off of her when her step-father called her cellular phone; that DL knew what was happening when appellant removed her underwear, testifying "I wasn't fully aware, but I knew it was happening, because I just woke up from my sleep"; and, that DL told her step-father that she was okay and that she would be home before [*10] sunrise. The defense focused on DL's actions during the sexual act, establishing that she was moaning and not screaming as she had earlier told law enforcement agents from both HPD and the Army's Criminal Investigation Command. In addition to highlighting that DL changed her account of events from "screaming" during the sexual assault to "moaning" (moans described by her for the first time at trial as moans of "pain"), the defense introduced limited character evidence from one defense witness indicating she had a character for being untruthful.

After aggressively cross-examining DL on her actions before, during, and after the sexual act, the defense focused on the moaning coming from the bedroom, using one government merits and one defense merits witness to paint a picture of a consensual sexual encounter. Government witness RM, on cross-examination, described the sounds coming from the room as "moaning," characterizing the sounds as someone having sex. Defense witness and DL's co-worker WM described the moaning she heard "like a passionate moaning sound, pleasurable sexual sound." Neither RM nor WM, both of whom were approximately ten feet from the wall to appellant's bedroom, heard [*11] appellant say anything nor did they hear DL cry out or "scream" for help.

In closing argument, appellant's trial defense counsel argued: "[S]he was sleepy but she was awake, she was aware of this touch. She decided not to do anything about it. She decided to ignore it and she decides to continue to lay [sic] in the bed." Counsel's summation focused on DL's lack of credibility, highlighting her motivation to lie to protect her relationship with her boyfriend, concluding with: "In light of the lack of evidence the completely unreliable testimony of [DL] . . . and the numerous reasons to doubt this case, the defense asked [sic] that you find the only verdict that is allowed under the law. And that is one of not guilty. . . ."

C. THE MILITARY JUDGE'S INSTRUCTIONS

Any and all substantive discussions about instructions apparently occurred during Rule for Courts-Martial [hereinafter R.C.M.] 802 sessions. For example, during an *Article 39(a)*, UCMJ session, the military judge noted: "I do want to see counsel in chambers. I'm going to discuss some instruction issues at this time." The court then recessed. When the court reconvened, nothing regarding the chambers discussion(s) on instructions was [*12] captured for the record. Later, during another *Article 39(a)* session and prior to recessing for the evening, the military judge noted: "[W]here we are going is I would like counsel here at 8:30 to prepare to discuss instructions, at least preliminarily." Then, immediately prior to recessing the court, the military judge directed counsel "in chambers for an 802 right now." The following morning, during the *Article 39(a)*, UCMJ session before recalling the members, the military judge, talking to the appellant, stated:

> Yesterday we had a couple of those [802s], we talked about exhibits, and making sure

> everything was lined up right. We talked about scheduling and the flow of the trial, things like that. But there was no discussion until the end of the day. I started working on jury instructions that I am required to give to the members. And we discussed those with you yesterday. Now to talk about the one we had this morning--let's start with the 802 we had from yesterday.

Neither the government nor defense counsel had any additions or corrections to the military judge's R.C.M. 802 session summary. Although the quoted language references "jury instruction" discussions with appellant "yesterday," **[*13]** the substance of any such discussions appears nowhere in the record. The military judge then went on to discuss that morning's R.C.M. 802 session with appellant:

> You [appellant] might have noticed a lengthier session with counsel today off the record and that is why we are late, that is my fault. I am trying to keep up with everyone by getting my jury instructions ready and that involves trying to understand what theories may or may not be appropriate. During that time there was a discussion with your counsel as to what theory of defense--what affirmative defenses that are being raised by you may be appropriate. In that, it was bought (sic) up that they may or may not at that time be raising that if such actions did occur at all they may have been by consent and that indicated to the trial counsel--trial counsel indicated they may want to revisit the ruling of the court regarding evidence I admitted under rule 412, regarding Mrs. [L's] prior conduct with you.
>
> . . .
>
> This is just a lengthy process for me to start working on my jury instructions as we go through. I have these charging conferences we go through regularly so I can keep up with the evidence as it comes in.

Again, neither the **[*14]** government nor defense counsel had any additions or corrections to the military judge's R.C.M. 802 session summary.

At the close of testimony from the defense's last merits witness but prior to the defense resting, the military judge, at yet another *Article 39(a)*, UCMJ session, advised counsel that at 1300 hours he would hold another "charging conference of the jury instruction," once again directing counsel to his chambers for another R.C.M. 802 session before recessing the court. When the court reconvened, the military judge again discussed the R.C.M. 802 session with appellant:

> And at the 802 out of your presence we had as your counsel may have told. I have been simply working through jury instructions and changes and corrections that the parties wanted to make and I will give them a chance to identify them on the record. Regarding jury instructions I have provided the parties a couple of drafts and have a couple of charging conferences with them regarding instructions I intend to offer.

Unfortunately, once again, neither the government counsel, defense counsel, nor the military judge provided any substantive details regarding the instructional discussions held. Additionally, the prior **[*15]** draft instructions referenced in the above excerpt are not a part of the record.

Finally, at the close of evidence, the military judge finalized the instructions he intended on giving, provided copies to both government and defense counsel, and sought objections or modifications thereto, stating in part:

> I have been simply working through jury instruction and changes and corrections that the parties wanted to make and I will give them a chance to identify them on the record.
>
> . . . .
>
> MJ: Defense . . . [h]ave you had the opportunity to review the jury instructions I have provided?
>
> DC: Yes, Your Honor.
>
> MJ: Do you have any objections?
>
> DC: No, Your Honor.
>
> MJ: Do you have any additions?
>
> DC: No, Your Honor.
>
> MJ: Do you have any instructions that you would like to offer that we have talked about that you are not offering or that you want to make a record of?
>
> DC: No, Your Honor.

Like the defense, the government had no objection or proposed additional instructions.

The military judge instructed the panel on the charged offense of aggravated sexual assault by penile-vaginal penetration of a substantially incapacitated victim, UCMJ art. 120(c)(2), as well as the defenses of consent and mistake of fact as to [*16] consent. He further instructed that the government possessed the burden to disprove, beyond a reasonable doubt, both of these defenses. The military judge did not instruct the panel on any lesser-included offenses.

II. LAW

"An accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein." UCMJ art. 79. "A military judge has a sua sponte duty to instruct the members on lesser-included offenses reasonably raised by the evidence." United States v. Upham, 66 M.J. 83, 87 (C.A.A.F. 2008); R.C.M. 920(e)(2). "An instruction on a lesser included offense is proper when an element from the charged offense which distinguishes that offense from the lesser offense is in dispute." R.C.M. 920(e) discussion. *See* United States v. Griffin, 50 M.J. 480 (C.A.A.F. 1999). "[A]ny doubt whether the evidence is sufficient to raise the need to instruct on a lesser-included offense must be resolved in favor of the accused." United States v. Rodwell, 20 M.J. 264, 267 (C.M.A. 1985).

In Schmuck v. United States, 489 U.S. 705, 715-16, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989), the Supreme Court provided the legal framework that must [*17] be applied to determine whether a proposed lesser offense is necessarily included within a greater offense. Construing Federal Rule of Criminal Procedure 31(c),[2] the Supreme Court adopted the elements test: "one offense is not necessarily included in another unless the elements of the lesser offense are a subset of the elements of the charged offense." Id. at 716. The elements test has since been adopted for use in the military. United States v. Jones, 68 M.J. 465 (C.A.A.F. 2010); United States v. Teters, 37 M.J. 370 (C.M.A. 1993). In its simplest form, the elements test compares individual elements of the two offenses at issue, the greater and the proposed lesser, to determine whether every element of the lesser is also an element of the greater. Jones, 68 M.J. at 470 ("If all of the elements of offense X are also elements of offense Y, then X is [a lesser-included offense] of Y. Offense Y is called the greater offense because it contains all of the elements of offense X along with one or more additional elements."). This approach "'permits lesser offense instructions only in those cases where the indictment contains the elements of both offenses,' and as a result 'gives notice to [*18] the defendant that he may be convicted on either charge.'" United States v. Alston, 69 M.J. 214, 216 (C.A.A.F. 2010) (quoting Schmuck, 489 U.S. at 718).

III. DISCUSSION

The record does not sufficiently establish that appellant waived lesser-included offense instructions by pursuing an all-or-nothing strategy. Therefore, appellant was entitled to instructions upon any lesser-included offenses reasonably raised by the evidence. Appellant argues that the military judge erred by failing to instruct the panel on two lesser-included offenses in particular: wrongful sexual contact in violation of Article 120(m), UCMJ, and assault consummated by a battery in violation of Article 128, UCMJ. We agree with appellant that both wrongful sexual contact and assault consummated by a battery are lesser-included offenses of aggravated sexual assault. However, on the facts of this case, we conclude that the evidence did not reasonably raise any lesser-included [*19] offenses, to include wrongful sexual contact and assault consummated by a battery, and therefore, the military judge did not err by failing to provide lesser-included offense instructions. Assuming arguendo that wrongful sexual contact was raised by the evidence, we still conclude that appellant was not prejudiced by the omission of instruction on this offense.

A. STANDARD OF REVIEW

Initially, we are faced with a question as to whether appellant purposefully sought to prevent the panel from considering any lesser-included offenses. "An accused may seek to waive an instruction on lesser included offenses and present an 'all or nothing' defense as a matter of trial tactics." Upham, 66 M.J. at 87 (citing United States v. Pasha, 24 M.J. 87, 91 (C.M.A. 1987)). A valid waiver leaves no error to assess on appeal. United States v. Harcrow, 66 M.J. 154, 156 (C.A.A.F. 2008). However, waiving lesser-included-offense instructions is distinct from merely forfeiting such instructions. "A forfeiture is basically an oversight; a waiver is a deliberate decision not to present a ground for relief that might be available in the law." United States v. Campos, 67 M.J. 330, 331 (C.A.A.F. 2009) (quoting United States v. Cook, 406 F.3d 485, 487 (7th Cir. 2005)). [*20] "[F]or a waiver to be effective it must be clearly established that there was an intentional relinquishment of a known right or privilege." Harcrow, 66 M.J. at 157 (internal quotation omitted).

The record does not establish that the defense affirmatively waived lesser-included-offense instructions. The record is silent with regard to any express decision by

[2] Rule 31(c) provides: "The defendant may be found guilty of an offense necessarily included in the offense charged." Fed. R. Crim. P. 31(c). Rule 31(c) is "almost identical" to Article 79, UCMJ. United States v. Jones, 68 M.J. 465, 469 (C.A.A.F. 2010).

the defense to pursue an all-or-nothing strategy in this case, although an objective review of the record in its entirety supports the conclusion that such an approach was in fact the defense's strategy. The record is silent as to the substance of any lesser-included offense discussions between the military judge and government or defense counsel. The record also fails to reveal the specifics of any such discussions that may have occurred off the record during any of the R.C.M. 802 sessions, or "charging sessions," purportedly touching on instructions. Therefore, we cannot find that appellant intentionally relinquished a known right simply because the defense failed to object to the findings instructions. Stated another way, we decline to find an affirmative waiver when a military judge chooses to apparently handle substantive discussions [*21] on instructions during R.C.M. 802 sessions and then does not thoroughly capture the substance of those discussions on the record.

Having declined to apply waiver in this case, we turn to the merits of appellant's claim. This Court reviews de novo whether an offense is necessarily included in a separate, greater offense. *United States v. Arriaga, 70 M.J. 51, 54 (C.A.A.F. 2011)*. As appellant failed to object to the military judge's instructions, this court reviews for plain error. *United States v. Wilkins, 71 M.J. 410, 412 (C.A.A.F. 2012)*. "Plain error occurs when (1) there is error; (2) the error is plain or obvious; and (3) the error results in material prejudice." *Arriaga, 70 M.J. at 54*.

B. LESSER-INCLUDED OFFENSES

Appellant was charged with aggravated sexual assault in violation of *Article 120(c)(2)*, UCMJ.[3] We hold wrongful sexual contact,[4] and assault consummated by a battery are lesser-included offenses of the charged aggravated sexual assault. However, as explained below, the evidence at trial did not raise factual disputes requiring instructions on these lesser offenses. Therefore, the military judge did not err in omitting these instructions.[5]

1. Wrongful [*24] *Sexual Contact*

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[3] The charged offense of aggravated [*22] sexual assault in violation of *Article 120(c)(2)* was in effect between 1 October 2007 and 27 June 2012 and provides as follows:

> (c) AGGRAVATED SEXUAL ASSAULT.—Any person subject to this chapter who—
>
> (1) causes another person of any age to engage in a sexual act by—
>
> (A) threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping); or
>
> B) causing bodily harm; or
>
> (2) engages in a sexual act with another person of any age if that other person is substantially incapacitated or substantially incapable of—
>
> (A) appraising the nature of the sexual act;
>
> (B) declining participation in the sexual act; or
>
> (C) communicating unwillingness to engage in the sexual act;
>
> is guilty of aggravated sexual assault and shall be punished as a court-martial may direct.

[4] The offense of wrongful sexual contact in violation of *Article 120(m)* was in effect between 1 October 2007 and 27 June 2012 and provides as follows:

> (m) WRONGFUL SEXUAL CONTACT.—Any person subject to this chapter who, without legal justification or lawful authorization, engages in sexual contact with another person without [*23] that other person's permission is guilty of wrongful sexual contact and shall be punished as a court-martial may direct.

[5] Appellant does not argue that the military judge should have instructed upon attempted aggravated sexual assault in violation of Article 80, UCMJ, abusive sexual contact in violation of *Article 120(h)*, UCMJ, or indecent acts in violation of *Article 120(k)*, UCMJ, as lesser-included offenses of aggravated sexual assault in violation of *Article 120(c)(2)*. We conclude the military judge did not err in failing to provide such instruction. The lesser-included offense of attempted aggravated sexual assault was not raised

Applying the elements test, we conclude that wrongful sexual contact is a lesser-included offense of the charged aggravated sexual assault. In performing our analysis, we must compare an offender-focused greater offense with a victim-focused lesser offense. *See generally* United States v. Neal, 68 M.J. 289, 301 (C.A.A.F. 2010) (noting that the removal of consent as an element from Article 120(a) "was intended . . . to change the focus of the criminal process away from an inquiry into the state of mind or acts of the victim to an inquiry into the conduct of the accused" (quoting Russell v. United States, 698 A.2d 1007, 1009 (D.C. 1997))). This is a rare comparison. And while the differences in perspective reveal inevitable differences in wording, it is still impossible to prove the greater offense without first proving the lesser.

Before employing the elements test, we must first decide what elements comprise the offenses being compared. Article 120(c), UCMJ, prescribes several alternative ways in which an accused can be convicted of the greater offense of aggravated sexual assault, only one of which was charged in this case. In general, it is unclear whether "one looks [*25] strictly to the statutory elements or to the elements as charged." Arriaga, 70 M.J. at 55. Cf. United States v. St. John, 72 M.J. 685, 688, 2013 CCA LEXIS 509, *7, (3) (Army Ct. Crim. App. 2013) (holding that for the purposes of a multiplicity analysis, the court must "look at the specification to determine if an offense is necessarily included in another"). However, as to defining the elements of the greater offense, United States v. Alstonprovides sufficient resolution. In *Alston*, our superior court employed the elements test by examining the elements of Article 120(c)(1)(B), UCMJ, without referencing elements of any of the alternative ways in which Article 120(c) could be violated. Alston, 69 M.J. at 216. In other words, the court implicitly treated the alternative statutory elements of the greater offense as components of separate crimes under the statute—crimes that were not charged and did not require comparison. We will use that approach here.

The aggravated sexual assault specification alleges appellant violated Article 120(c)(2), UCMJ:

> In that Private Jason C. Wagner, U.S. Army, did, at or near Schofield Barracks, Hawaii, on or about 1 December 2010, engage in a sexual act, to wit: penetration of [*26] [DL]'s vulva with his penis while [DL] was substantially incapacitated.

This particular offense under Article 120(c)(2) has two elements: (1) that the appellant engaged in a sexual act with another person, and (2) that the other person was substantially incapacitated. The lesser-included offense of wrongful sexual contact has three elements: (1) engaging in a sexual contact with another; (2) doing so without the person's permission; and (3) doing so without legal justification or lawful authorization. UCMJ art. 120(m).

It is immediately apparent that the elements of these offenses differ in number and wording. However, "[t]he elements test does not require that the two offenses at issue employ identical statutory language. Instead, after applying the normal principles of statutory construction, we ask whether the elements of the alleged [lesser-included offense] are a subset of the elements for the charged offense." United States v. Bonner, 70 M.J. 1, 2 (C.A.A.F. 2011) (quoting Alston, 69 M.J. at 216 (quoting Carter v. United States, 530 U.S. 255, 263, 120 S. Ct. 2159, 147 L. Ed. 2d 203 (2000))) (internal quotation marks omitted).

We begin by defining then comparing the first two elements of the greater and lesser offenses. [*27] The greater offense requires a sexual act and the lesser offense requires a sexual contact. The sexual act charged in this case is defined as "contact between the penis and the vulva," which "occurs upon penetration, however slight." UCMJ art. 120(t)(1)(A). "Sexual contact" is defined as, *inter alia*, "the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person . . . with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person." UCMJ art. 120(t)(2). As defined, a sexual contact permits conviction for a broader array of conduct. For example, a sexual contact can occur by touching the breasts, whereas a sexual act, as charged in this case, can only occur upon penile penetration of the vagina. It goes without saying that penile-vaginal penetration does not *necessarily* result in a touching of the breasts.

However, the fact that the lesser offense is broader than the greater offense does not run afoul of the elements test. A lesser offense may be necessarily included in the greater even though the lesser offense "encompasses a wider range" of conduct [*28] than the greater offense (i.e., a broader lesser offense). Arriaga, 70 M.J. at 55. *See*

by the evidence. Secondly, appellant did not contest the fact that he engaged in a sexual act with DL. Therefore, assuming abusive sexual contact is a lesser-included offense, *see* United States v. Wilkins, 71 M.J. 410 (C.A.A.F. 2012), there was no factual dispute warranting instruction on this offense. *See* United States v. Miergrimado, 66 M.J. 34 (C.A.A.F. 2008). Finally, indecent acts is not a lesser-included offense of the charged aggravated sexual assault; it is an alternative offense. United States v. Tunstall, 72 M.J. 191, 195 (C.A.A.F. 2013).

Rutledge v. United States, 517 U.S. 292, 116 S. Ct. 1241, 134 L. Ed. 2d 419 (1996) (finding that conspiracy under 21 U.S.C. § 846 was a lesser-included offense of continuing criminal enterprise under 21 U.S.C. § 848, even though it was possible to violate the lesser without violating the greater); United States v. McCullough, 348 F.3d 620 (7th Cir. 2004); United States v. Alfisi, 308 F.3d 144 (2d Cir. 2002). *See also* Wayne R. LaFave, Criminal Procedure, § 24.8(b) at 1152-54 (4th ed. 2004), *available on* Westlaw at 6 Crim. Proc. § 24.8(e) (3d ed.) ("When the lesser offense is one defined by statute as committed in several different ways, it is a lesser-included offense if the higher offense invariably includes at least one of these alternatives."). The mere fact that it is possible to prove an element of the lesser offense, without also proving an element of the greater offense, does not prevent that lesser-offense element from being a "subset" of the greater-offense element. For that reason, when comparing the conduct proscribed by individual elements, the term "subset" is a misnomer—the lesser-offense element need not be wholly subsumed [*29] within the greater-offense element.[6]

Therefore, the elements test does not require that every sexual contact results in a sexual act, only that every sexual act necessarily results in a sexual contact. We find this to be the case. In any situation where the penis penetrates the vagina, one form of sexual contact will also occur, i.e., an intentional touching of the genitalia. *See* Wilkins, 71 M.J. at 413. Additionally, the intent component of a sexual contact [*30] is also necessarily included within a sexual act. Under the statute, a "sexual act" has two definitions, one of which contains the same sexual intent language as that used in the definition of a "sexual contact." However, where the crime involves penile-vaginal penetration, which is true of this case, the definition of sexual act does not include a corresponding sexual intent. In the case of penile-vaginal penetration, there is no need to specify an explicit intent element—it is beyond cavil that every penile-vaginal penetration includes a corresponding sexual intent. United States v. Demarrias, 876 F.2d 674, 676-77 (8th Cir. 1989) (holding that the intent required for a sexual contact is necessarily included in a sexual act when construing the nearly identical definitions of sexual act and sexual contact in 18 U.S.C. § 2245 (1988) (current version at 18 U.S.C. § 2246 (2006))). *Contra* United States v. Castillo, 140 F.3d 874, 886 (10th Cir. 1998) (holding that the intent required for a sexual contact is not included in a sexual act when construing the nearly identical definitions of sexual act and sexual contact in 18 U.S.C. §§ 2242, 2243 (1994) (current version at § 2246 (2006))); United States v. Sneezer, 900 F.2d 177, 179 (9th Cir. 1990) [*31] (holding that the intent required for a sexual contact is not included in a sexual act when construing the nearly identical definitions of sexual act and sexual contact in 18 U.S.C. § 2245 (1988) (current version at § 2246 (2006))). We therefore conclude the first element of the lesser offense, engaging in a sexual contact, is necessarily included in the first element of the greater offense, engaging in a sexual act.

We also conclude that the second element of the lesser offense, without permission, is necessarily included within the second element of the greater offense, substantial incapacitation. At first glance, the relationship of necessary inclusion between "substantial incapacitation" and "without permission" is not obvious; however, upon reference to the statute, it is clear that such a relationship exists.

First, we conclude "without permission" is synonymous with "lack of consent." We draw this conclusion because (1) permission is not separately defined under Article 120, UCMJ, (2) the crime of wrongful sexual contact is victim-focused, and (3) permission is equated with consent elsewhere in the statute:

> CONSENT AND MISTAKE OF FACT AS TO CONSENT. — Lack of permission is an element [*32] of the offense in subsection (m) (wrongful sexual contact). Consent and mistake of fact as to consent are not an issue, or an affirmative defense, in a prosecution under *any other subsection*, except they are an affirmative defense for the sexual conduct in issue in a prosecution under . . . subsection (c) (aggravated sexual assault). . . .

UCMJ art. 120(r) (emphasis added). This provision specifically references wrongful sexual contact and then states that "consent" is not an issue in "any other subsection." Thus, the statute refers to permission and equates it with consent. In our view, the difference between permission and consent is one engendered by the focus of the crime, i.e., a victim-focused offense versus an offender-focused offense, and not one of substantive import: the offender is said to have acted without consent,

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[6] In fact, when comparing the conduct proscribed by an individual element, it is the conduct proscribed by the greater-offense element that must be wholly subsumed within the lesser. Only where the element of the greater offense fits completely within the broader lesser-offense element, is it true that the lesser offense is necessarily proven in every prosecution of the greater. In other words, the conduct proscribed by the *greater offense* must be a subset, as that term is commonly understood, of the conduct proscribed by the *lesser offense*. Although the greater-offense element punishes a more serious form of conduct, that conduct is nevertheless a subset of the entire universe of conduct that the lesser-offense element proscribes.

whereas the victim is said to have not given permission. In either case, the issue is still whether consent, as defined in the UCMJ, has been disproven.[7]

Drawing upon the definition of consent, we conclude an incapacitated person is unable to give permission to the sexual conduct alleged in this case. In defining consent, the UCMJ provides:

> A person cannot consent to sexual activity if—
>
> . . . .
>
> (B) substantially incapable of—
>
> (i) appraising the nature of the sexual conduct at issue due to—
>
> (I) mental impairment or unconsciousness resulting from consumption of alcohol, drugs, a similar substance, or otherwise; or
>
> (II) mental disease or defect which renders the person unable to understand the nature of the sexual conduct at issue;(ii) physically declining participation in the sexual conduct at issue; or
>
> (iii) physically communicating unwillingness to engage in the sexual conduct at issue.

UCMJ art. 120(t)(14). The greater-offense element of "substantially incapacitated" is not separately defined, but we find the definition provided by the military judge is adequate for resolving the legal issues in this case. The military judge instructed:

> "Substantially incapacitated" means that level of mental impairment due to consumption of [*34] alcohol, drugs, or similar substance; while asleep or unconscious; or for other reasons; which rendered the alleged victim unable to appraise the nature of the sexual conduct at issue, unable to physically communicate unwillingness to engage in the sexual conduct at issue, or otherwise unable to make or communicate competent decisions.

Thus, the instructed-upon definition of "substantial incapacitation" is simply a restatement of the circumstances in which a person is incapable of giving lawful consent. *See UCMJ art. 120(t)(14)*. Consequently, someone who is substantially incapacitated cannot, as a matter of law, consent to a sexual act or a sexual contact.

In light of the foregoing definitions, it is impossible to prove the greater-offense element without also having proven the lesser-offense element. Every time an accused is proven to have engaged in a sexual act with a substantially incapacitated victim, the victim's permission is necessarily disproven. To prove that a person is substantially incapacitated is to prove that he or she is incapable of granting permission. *C.f. United States v. Gavin, 959 F.2d 788, 791-92 (9th Cir. 1992)* ("It is evident that to prove that one caused another [*35] to engage in a sexual contact by placing that other person in fear requires proving that the other person has not given permission for the contact. Those in fear are incapable of granting permission. To prove that a person acted in fear is to prove that the act was without permission."). Stated a different way, "[i]f an accused proves that the victim consented, he has necessarily proven that the victim had the capacity to consent, which logically results in the accused having disproven an element of the offense of aggravated sexual assault—that the victim was substantially incapacitated." *United States v. Prather, 69 M.J. 338, 343 (C.A.A.F. 2011)*. Furthermore, as discussed in detail above, it is unimportant that there may be numerous ways to prove that a sexual contact was done without the victim's permission. The converse need only be true—permission must be necessarily excluded every time a victim is proven to be substantially incapacitated. The statutory provisions provide exactly that.

Similarly, we conclude the third and final element of wrongful sexual contact (without legal justification or lawful authorization) is necessarily included within the greater offense. Accordingly, [*36] we hold wrongful sexual contact in violation of *Article 120(m), UCMJ*, is a lesser-included offense of aggravated sexual assault in violation of *Article 120(c)(2), UCMJ*.

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[7] The military judge apparently reached this conclusion as well, as he instructed the panel that "'[w]ithout permission' means without consent." This comports with the standard instructions contained in the Military [*33] Judge's Benchbook. Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 3-45-11 (1 Jan. 2010).

2. Assault Consummated by a Battery

We further conclude that assault consummated by a battery is a lesser-included offense of the charged aggravated sexual assault. As discussed above, wrongful sexual contact is a lesser-included offense of aggravated sexual assault. Moreover, assault consummated by a battery is a lesser-included offense of wrongful sexual contact. Bonner, 70 M.J. at 3. Therefore, as a matter of law and logic, assault consummated by a battery is also a lesser-included offense of the charged aggravated sexual assault. *See* Jones, 68 M.J. at 472 (noting "the elements test for [lesser-included offenses] has the constitutionally sound consequence of ensuring that one can determine *ex ante*—solely from what one is charged with—all that one may need to defend against").

C. "REASONABLY RAISED" BY THE EVIDENCE

Appellant argues that the panel could have, on the evidence presented, found DL had the capacity to consent, that is, was not substantially incapacitated, but still found appellant's sexual act was without [*37] DL's permission, thus requiring the military judge to instruct the panel on wrongful sexual contact and assault consummated by a battery. On the evidence before the panel in appellant's case, we disagree.

The evidence elicited by both the government and defense throughout the entirety of the case focused on DL's incapacitation or lack thereof. Although the record, as previously noted, is silent on whether the defense elected to make this an "all or nothing" case when discussing instructions with the military judge, the evidence of record makes clear that this case was just that. If the panel accepted the government's theory of incapacitation, the offense at issue is aggravated sexual assault. However, if the panel rejected the evidence of incapacitation, there was no evidence upon which to find that the sexual act, an act conceded by appellant and not in dispute, was nonetheless "without [DL's] permission." In other words, DL's lack of consent was inexorably linked, throughout the entire trial, to her incapacitation. As our superior court noted:

> It is a well-established principle of military law that the military judge must properly instruct members on all lesser included offenses reasonably [*38] raised by the evidence. Indeed, so important is this duty that it arises *sua sponte* under appropriate circumstances, even without a defense request. It is not necessary that the evidence which raises an issue be compelling or convincing beyond a reasonable doubt. Instead, the instructional duty arises whenever "some evidence" is presented to which the fact finders might "attach credit" if they so desire.

United States v. Jackson, 12 M.J. 163, 166-67 (C.M.A. 1981) (quoting United States v. Evans, 17 U.S.C.M.A. 238, 242, 38 C.M.R. 36, 40 (1967)) (internal citations omitted). *See also* United States v. Tunstall, 72 M.J. 191 (C.A.A.F. 2013). On the facts of appellant's case, the element of "without [ ] permission" was not reasonably raised outside the context of DL's incapacitation. Therefore wrongful sexual contact was not reasonably raised by the evidence, and it was not plain error for the military judge to omit instruction on this offense.

For similar reasons, we conclude the military judge did not err by failing to instruct upon assault consummated by a battery as a lesser-included offense. "[A] lesser-offense charge is not proper where, on the evidence presented, the factual issues [*39] to be resolved by the jury are the same as to both the lesser and greater offenses." Sansone v. United States, 380 U.S. 343, 349-50, 85 S. Ct. 1004, 13 L. Ed. 2d 882 (1965). This principle is generally applied in assessing factual disputes between the greater offense and a particular lesser offense. *Id.;* United States v. Miergrimado, 66 M.J. 34 (C.A.A.F. 2008). We hold this principle is also applicable as between lesser offenses themselves. Thus, an instruction upon a less-serious, lesser-included offense is not required where the factual issues to be resolved by the panel are the same as to both that lesser-included offense and a more-serious, lesser-included offense. *See, e.g.,* United States v. Rivera-Alonzo, 584 F.3d 829, 835 (9th Cir. 2009) (holding failure to instruct upon a less-serious, lesser-included offense was not error where there was no dispute between that lesser offense and another instructed upon lesser-included offense).

Applied to this case, it is clear that there was no factual dispute as to the differing elements between wrongful sexual contact and assault consummated by a battery. As defined, the two offenses differ only as to the nature of the act committed: wrongful sexual contact requires a sexual [*40] contact, UCMJ art. 120(m), whereas battery requires a harmful or offensive touching, UCMJ art. 128. In this case, there was no dispute as to the nature of the act performed—appellant conceded at trial that he engaged in sexual intercourse with DL. Thus, not only was assault consummated by a battery not raised by the evidence (for the same reasons wrongful sexual contact was not raised), but even if it was raised by the evidence, it would still have been improper to instruct upon it. Appellant has no right to a compromise verdict or any instruction that is tantamount to a request for jury nullification. *See, e.g.,* United States v. Thomas, 116 F.3d 606, 615 (2nd Cir. 1997) ("[I]n

language originally employed by Judge Learned Hand, the power of juries to 'nullify' or exercise a power of lenity is just that—a power; it is by no means a right or something that a judge should encourage or permit if it is within his authority to prevent."). Accordingly, the military judge properly omitted instruction upon this lesser-included offense.

D. PREJUDICE

Assuming arguendo the evidence reasonably raised wrongful sexual contact as a lesser-included offense, we conclude that appellant was not prejudiced **[*41]** by the military judge's failure to instruct upon it. In a plain error analysis, it is appellant's burden to show that the "error materially prejudices the substantial rights of the [appellant]." *UCMJ art. 59(a)*. An appellant meets this burden by showing a "reasonable probability that, but for [the error claimed], the result of the proceeding would have been different." *United States v. Dominguez Benitez, 542 U.S. 74, 82, 124 S. Ct. 2333, 159 L. Ed. 2d 157 (2004)* (quoting *United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985))* (alteration in original). Where an instruction on a lesser-included offense is omitted, "reversal is required only when an appellate court is convinced that the *evidence* issues are such that a rational jury could *acquit* on the charged crime but *convict* on the lesser crime." *United States v. Wells, 52 M.J. 126, 130 (C.A.A.F. 1999)* (quoting *United States v. Moore, 108 F.3d 270, 272-73 (10th Cir. 1997))* (internal quotation marks and alterations omitted). Stated another way, was there "ample evidence in [the] case from which the members could reasonably find that appellant committed [the] lesser offense . . . but not the greater charged offense [?]." *Wells, 52 M.J. at 132*.

On the facts of this case and for **[*42]** the reasons previously noted, we find a rational trier of fact could not acquit on the charged offense and yet convict on the offense of wrongful sexual contact. Therefore, appellant suffered no prejudice, let alone material prejudice, to a substantial right by any failure to instruct on wrongful sexual contact as a lesser-included offense of the charged offense.

III. CONCLUSION

Upon consideration of the entire record, the submissions of the parties, and the matters personally raised pursuant to *Grostefon*, we hold the findings of guilty and the sentence as approved by the convening authority to be correct in law and fact. Accordingly, the findings of guilty and the sentence are AFFIRMED.

Senior Judge KERN and Judge MARTIN concur.

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
LIND, KRAUSS, and PENLAND
Appellate Military Judges

Staff Sergeant CC,
U.S. Army, Petitioner
v.
Colonel JEFFERY D. LIPPERT,
U.S. Army, Respondent
and
Staff Sergeant MICHAEL D. OSIER,
U.S. Army, Real Party in Interest

ARMY MISC 20140779

ORDER

WHEREAS:

On 15 October 2014, Petitioner filed a "Petition for Extraordinary Relief in the Nature of a Writ of Mandamus," an "Application for Stay of Proceedings," a "Brief in Support of [the] Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and [the] Application for Stay of Proceedings," and a "Motion for Leave of the Court to Appear Pro Hac Vice."

This court has jurisdiction to review this petition. *See* All Writs Act, 28 U.S.C. § 1651(a) (2012); *LRM v. Kastenberg*, 72 M.J. 364 (C.A.A.F. 2013).

NOW THEREFORE, IT IS ORDERED:

1. Petitioner's Motion for Leave of the Court to Appear Pro Hac Vice is GRANTED.

2. The Petition for Extraordinary Relief in the Nature of a Writ of Mandamus is GRANTED IN PART.

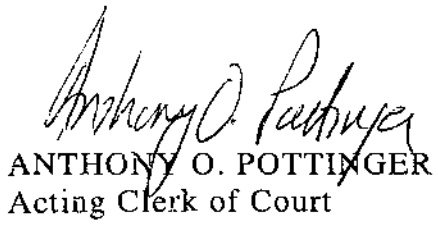
a. The 7 October 2014 Judicial Order for production of Petitioner's mental health records is vacated; and

b. The military judge will comply with Military Rule of Evidence 513(e)(2) prior to deciding whether to order production of Petitioner's mental health records for in camera review.

3. Petitioner's Application for a Stay of Proceedings is DENIED AS MOOT.

DATE: 16 October 2014.

FOR THE COURT:



ANTHONY O. POTTINGER
Acting Clerk of Court

CF:	Petitioner	Real Party in Interest
	Respondent	JALS-CR3
	JALS-DA	JALS-CCR
	JALS-GA	JALS-CCZ

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 3

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
	)	Case No. 201300485
v.	)	
Arvis D. OWENS, Commander (O-5) U.S. Navy Appellant	)	Tried at Region Legal Service Office Naval District Washington, District of Columbia, on June 6, 30 July, September 9-13, and November 5, 2013, by a general court-martial convened by the Commandant, Naval District Washington.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

MATTHEW M. HARRIS
Captain, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7430, fax (202) 685-7687

KEITH B. LOFLAND
Lieutenant Commander, JAGC, USN
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-8384, fax (202) 685-7687

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II. APPELLANT WAS DENIED THE RIGHT TO DISCOVERY UNDER ARTICLE 46, UCMJ, WHEN THE GOVERNMENT FAILED TO PRODUCE EVIDENCE OF SD'S "LEARNING DISABILITY" IN RESPONSE TO A GENERAL REQUEST FOR EVIDENCE IMPACTING SD'S CREDIBILITY. THE ERROR WAS NOT CURED BY THE MILITARY JUDGE'S LATER CONCLUSION THAT THE EVIDENCE WAS NOT RELEVANT AFTER SHE HAD ARTICULATED THE RELEVANCE AND THE DEFENSE SOUGHT TO USE THE EVIDENCE TO ATTACK SD'S CREDIBILITY.

III. APPELLANT WAS DENIED THE RIGHT UNDER THE SIXTH AMENDMENT TO CONFRONT HIS ACCUSER WHEN THE MILITARY JUDGE FIRST CONCLUDED THAT EVIDENCE RELATED TO SD'S LEARNING DISABILITY WAS RELEVANT, PERMITTED THE GOVERNMENT TO QUESTION HER ABOUT IT AT LENGTH, THEN DENIED THE DEFENSE THE OPPORTUNITY TO CROSS-EXAMINE HER ON IT AND INSTRUCTED THE MEMBERS TO DISREGARD IT. EVIDENCE OF SD'S LEARNING DISABILITY, OR LACK THEREOF, WAS RELEVANT TO HER CREDIBILITY.

IV. THE MILITARY JUDGE ERRED IN ADMITTING EVIDENCE THAT SD MADE CERTAIN STATEMENTS TO FRIENDS THAT WERE CONSISTENT WITH HER TRIAL TESTIMONY. THE STATEMENTS WERE NOT "PRIOR CONSISTENT STATEMENTS" UNDER R.C.M. [SIC]? 801(d)(1) BECAUSE THEY WERE NOT MADE PRIOR TO THE TIME APPELLANT ALLEGED THE MOTIVE TO FABRICATE AROSE.

V. THE MILITARY JUDGE COMMITTED PLAIN ERROR WHEN SHE PERMITTED THE TRIAL COUNSEL TO QUESTION APPELLANT ABOUT THE TRUTHFULNESS OF A GOVERNMENT WITNESS,

AND REQUIRED APPELLANT TO LABEL THE GOVERNMENT WITNESS AS A LIAR, IMPLYING THAT IN ORDER TO ACQUIT THE MEMBERS MUST FIRST CONCLUDE THAT A GOVERNMENT WITNESS IS LYING.

VI. THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT A CONVICTION OF VIOLATION OF ARTICLE 92(1), UCMJ, BECAUSE ALTHOUGH THE MILITARY JUDGE TOOK JUDICIAL NOTICE THAT SECNAVINST 5350.16A EXISTED AS A LAWFUL GENERAL REGULATION THAT APPELLANT HAD A DUTY TO OBEY, THE CONTENT OF THE REGULATION ITSELF WAS NEVER ADMITTED INTO EVIDENCE.

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I.

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II.

APPELLANT WAS DENIED THE RIGHT TO DISCOVERY UNDER ARTICLE 46, UCMJ, WHEN THE GOVERNMENT FAILED TO PRODUCE EVIDENCE OF SD'S "LEARNING DISABILITY" IN RESPONSE TO A GENERAL REQUEST FOR EVIDENCE IMPACTING SD'S CREDIBILITY. THE ERROR WAS NOT CURED BY THE MILITARY JUDGE'S LATER CONCLUSION THAT THE EVIDENCE WAS NOT RELEVANT AFTER SHE HAD ARTICULATED THE RELEVANCE AND THE DEFENSE SOUGHT TO USE THE EVIDENCE TO ATTACK SD'S CREDIBILITY.

III.

APPELLANT WAS DENIED THE RIGHT UNDER THE SIXTH AMENDMENT TO CONFRONT HIS ACCUSER WHEN THE MILITARY JUDGE FIRST CONCLUDED THAT EVIDENCE RELATED TO SD'S LEARNING DISABILITY WAS RELEVANT, PERMITTED THE GOVERNMENT TO QUESTION HER ABOUT IT AT LENGTH, THEN DENIED THE DEFENSE THE OPPORTUNITY TO CROSS-EXAMINE HER ON IT AND INSTRUCTED THE MEMBERS TO DISREGARD IT. EVIDENCE OF SD'S LEARNING DISABILITY, OR LACK THEREOF, WAS RELEVANT TO HER CREDIBILITY.

IV.

THE MILITARY JUDGE ERRED IN ADMITTING EVIDENCE THAT SD MADE CERTAIN STATEMENTS TO FRIENDS THAT WERE CONSISTENT WITH HER TRIAL TESTIMONY. THE STATEMENTS WERE NOT "PRIOR CONSISTENT STATEMENTS" UNDER R.C.M. [SIC]?

801(d)(1) BECAUSE THEY WERE NOT MADE PRIOR TO THE TIME APPELLANT ALLEGED THE MOTIVE TO FABRICATE AROSE.

V.

THE MILITARY JUDGE COMMITTED PLAIN ERROR WHEN SHE PERMITTED THE TRIAL COUNSEL TO QUESTION APPELLANT ABOUT THE TRUTHFULNESS OF A GOVERNMENT WITNESS, AND REQUIRED APPELLANT TO LABEL THE GOVERNMENT WITNESS AS A LIAR, IMPLYING THAT IN ORDER TO ACQUIT THE MEMBERS MUST FIRST CONCLUDE THAT A GOVERNMENT WITNESS IS LYING.

VI.

THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT A CONVICTION OF VIOLATION OF ARTICLE 92(1), UCMJ, BECAUSE ALTHOUGH THE MILITARY JUDGE TOOK JUDICIAL NOTICE THAT SECNAVINST 5350.16A EXISTED AS A LAWFUL GENERAL REGULATION THAT APPELLANT HAD A DUTY TO OBEY, THE CONTENT OF THE REGULATION ITSELF WAS NEVER ADMITTED INTO EVIDENCE.

VII.

APPELLANT'S CONVICTION OF VIOLATION OF A LAWFUL GENERAL ORDER UNDER ARTICLE 92, UCMJ, MUST BE SET ASIDE BECAUSE THE SPECIFICATION FAILS TO STATE AN OFFENSE; THE REGULATION IS NOT PUNITIVE.

VIII.

THE MILITARY JUDGE ABUSED HER DISCRETION IN FAILING TO GRANT A MISTRIAL WHEN IT BECAME APPARENT THAT THE MEMBERS WERE NO LONGER CONFIDENT IN THEIR VERDICT.

IX.

THE EVIDENCE IS FACTUALLY INSUFFICIENT TO SUPPORT A CHARGE OF UNLAWFUL SEXUAL CONTACT UNDER ARTICLE 120, UCMJ.

X.

APPELLANT WAS DENIED A MEANINGFUL OPPORTUNITY FOR CLEMENCY WHEN THE MILITARY JUDGE E-MAILED THE MEMBERS TELLING THEM NOT TO COMMUNICATE WITH THE DEFENSE COUNSEL AND SUBSEQUENTLY ISSUED AN ORDER HAVING A "CHILLING EFFECT" ON THE LIKELIHOOD THAT THEY WOULD SUBMIT A CLEMENCY RECOMMENDATION; AND WHEN THE STAFF JUDGE ADVOCATE WITHHELD FROM THE CONVENING AUTHORITY AT LEAST ONE AND POSSIBLY MORE CLEMENCY RECOMMENDATIONS THAT HE HAD RECEIVED FROM THE SENTENCING AUTHORITY.

XI.

APPELLANT IS ENTITLED TO A PROMULGATING ORDER THAT ACCURATELY REFLECTS THE FINDINGS AS AMENDED BY THE MILITARY JUDGE.

Statement of Statutory Jurisdiction

Appellant's approved sentence includes a dismissal. Accordingly, this Court has jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012).

Statement of the Case

A panel of members sitting as a general court-martial convicted Appellant, contrary to his pleas, of violating a lawful general order, abusive sexual contact, and conduct unbecoming an officer, in violation of Articles 92, 120, and 133, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 892, 920, 933 (2012). The Members sentenced Appellant to dismissal. The Convening Authority approved the sentence as adjudged.

Statement of Facts

A. Appellant assaulted SD, a civilian coworker.

1. Appellant worked with SD at the Defense Logistics Agency.

Appellant worked at the Defense Logistics Agency (DLA) with SD. (R. 611.) SD was an administrative assistant recruited through a program for people with learning disabilities. (R. 608.) She was an intern seeking full-time employment. (R. 610.) In 2010, approximately one month after SD was hired, Appellant began working at DLA. (R. 611.)

In SD's division at DLA, which included approximately twenty-five people, Appellant was a junior supervisor. (R. 616.) The two had a normal professional relationship until mid-October 2012. (R. 621.) Then, Appellant called SD into his office and asked her about a recent date on which she had been "stood-up". (R. 625.) Appellant gave SD two hugs to make her feel better. (R. 627.) Appellant then told her that he "had to be good, even though he wanted to be bad" because of the dress she was wearing. (R. 627.) SD withdrew from the situation by telling Appellant that she had to get to her van pool. (R. 627.)

2. Appellant forced SD to rub his erection.

Later that month, Appellant called SD into his office, pulled her into his lap and kissed her. (R. 634-37.) SD attempted to withdraw by telling Appellant that she needed to go

to a meeting. (R. 638.) Appellant told SD that she could not leave until he calmed down, referencing his obvious erection. (R. 639.) Appellant caressed her breasts and kissed her again before allowing her to leave. (R. 642.)

That same afternoon, Appellant went to SD's cubicle and told her to return to his office. (R. 644.) SD felt compelled to follow him. (R. 644.) Appellant locked the door behind her and began kissing her again. (R. 645-46.) Appellant then pulled her to him and began rubbing her vagina over her underwear. (R. 647.) Appellant then began groping and sucking on SD's breasts. (R. 648.) SD told Appellant that she was not sure she could keep quiet and she could not "wrap [her] head around" what was happening. (R. 652.) Appellant then started kissing her again. (R. 652.) He grabbed her hand and used it to rub his erection. (R. 652.) Before SD left his office, Appellant told her, "you know I'm going to fuck you, right?" (R. 653.) Appellant then allowed her to leave, but first told her she could not tell anyone. (R. 654.)

3. <u>SD withdrew from the office and sought out a sexual assault helpline</u>.

Afterward, SD was afraid her job would be in jeopardy if she told anyone. (R. 656.) The following day, SD told the division head that she overslept and could not come in, when in actuality she did not come in because she was afraid of

Appellant. (R. 657.) On the next work day, she told the division head that she needed to take sick leave. (R. 658.) She took leave or telecommuted until the end of October to avoid having to interact with Appellant. (R. 658.) SD's leave requests were unusually terse and concerned her supervisor. (R. 832.) SD told her that something had happened and she was working through it. (R. 835.)

Approximately a week after Appellant assaulted SD, she was contacted by David York, an agent with DLA's Office of the Inspector General. (R. 661.) He contacted SD because she had called human resources and requested information about a sexual assault and sexual harassment hotline. (R. 818.)

4. Appellant acknowledged some of the charged misconduct.

At trial, Appellant acknowledged kissing and groping SD's breasts and buttocks, but claimed that it was consensual. (R. 1035-41.) Appellant also acknowledged telling SD that he was "going to fuck" her. (R. 1059.)

B. The Military Judge limited SD's testimony in response to non-production of medical records.

SD retained an attorney and filed a lawsuit demanding compensation for attorney's fees and medical expenses. (R. 793.) The Military Judge noted it was obvious the Defense had requested medical records in a pretrial request, and that they probably existed. (R. 1253.) Trial Counsel responded that the

records had not been obtained because they were not relevant. (R. 1256.) Trial Counsel specified that SD's medical history had not become relevant until Appellant asked about it, since the United States had not planned to inquire about it. (R. 1256.)

Trial Defense Counsel requested that SD not be allowed to testify about medical matters that might have been contained in the records the Trial Counsel had not obtained. (R. 1257.) He also expressed concern that SD's medical records might disclose that she was taking medication that could alter her demeanor. (R. 1257.) The Military Judge ultimately decided to adopt Trial Defense Counsel's proposed remedy and barred Trial Counsel from presenting evidence aboout any medical treatment in sentencing. (R. 1257-59.) The Military Judge permitted SD to testify about general fear and anxiety, but not about seeking help because of that fear. (R. 1302.) The Military Judge also excluded testimony regarding flashbacks. (R. 1302-03.)

C. <u>The Military Judge instructed the Members to disregard testimony about SD's learning disability</u>.

Trial Defense Counsel objected to SD's anticipated testimony about her learning disability, stating that he had received no discovery documents relating to her disability. (R. 598-99.) Trial Counsel responded that the United States did not have any documents related to her disability and were relying on

her statements. (R. 600.) The Military Judge overruled the objection, explaining that the testimony was relevant and that she would provide a limiting instruction if necessary. (R. 603.) SD testified that she had a learning disability, but was able to get a certificate from her community college. (R. 606.)

Trial Defense Counsel questioned SD about her learning disability during cross-examination. (R. 685.) She agreed with his suggestion that she had difficulty reading quickly. (R. 686.) SD added that sometimes she needed things explained to her more clearly than others. (R. 686.) She also agreed that she had no cognitive disabilities and understood social situations. (R. 689.)

SD was aware of her disability because she had an Individual Academic Plan (IAP) in high school. (R. 688.) The plan was the result of testing done by the school. (R. 688.) The testing was documented in a report that SD had access to. (R. 688.) She had not provided Trial Counsel with the report before trial. (R. 688.)

Trial Defense Counsel decided he did not want a limiting instruction, but said that he would like to see the records related to SD’s disability. (R. 796.) Trial Counsel provided SD’s IAP to the Court the day he received it. (R. 1098-1100; Appellate Ex. LXIX.) The Military Judge found that the document did not contain psychological records, and ordered Trial Counsel

to provide it to Appellant. (R. 1098.) The Military Judge then reconsidered her earlier ruling and decided that both the IAP and SD's testimony about her disability were irrelevant. (R. 1101.) The Military Judge instructed both counsel not to mention it in their argument, and said she would not instruct on it unless one of the parties changed its mind and requested an instruction. (R. 1101.)

During the United States' case in rebuttal, Trial Defense Counsel began to cross-examine SD about her capabilities as described in the IAP. (R. 1149.) The Military Judge decided that the cross-examination was inappropriate as SD had not lied about the results contained in the IAP. (R. 1155.) The Military Judge also decided that the defense discovery request did not include documents like the IAP. (R. 1154.) The Military Judge then confirmed she would cure any issues created by the testimony by instructing the Members to disregard any reference to SD's learning disability. (R. 1156.)

D. The Military Judge admitted statements from SD as prior consistent statements.

During its case in rebuttal, the United States proposed to offer reports SD made to her friends, Allison Sneed and Lindsay Treadwell, to rebut Appellant's assertion that SD fabricated her account. (R. 1086-87.) Trial Defense Counsel objected, claiming that this was improper rebuttal and was also hearsay.

(R. 1087.) The Military Judge decided that Appellant's speculation about SD's fabricated story was evidence that could properly be addressed in rebuttal. (R. 1090.) The Military Judge further concluded that the evidence was admissible as non-hearsay under Mil. R. Evid. 801(d)(1)(B) to rebut the charge that SD had fabricated her story in order to advance her civil lawsuit. (R. 1092.) The United States elicited testimony from SD that she had told her friends about being sexually assaulted in the two days immediately following the assault. (R. 1130.)

E. Trial Counsel asked Appellant whether SD was lying about several points in her testimony.

Trial Counsel asked Appellant if SD was lying when she testified about their interaction. (R. 1014-17; 1083-84.) Appellant testified that SD lied about him calling her to his office. (R. 1014.) He claimed she lied when she said he told her he was going to give her a hug. (R. 1015-16.) He said she lied about his comments about her dress and his desire to "be bad." (R. 1016-17.) Finally, Appellant answered that SD lied when she testified that she had not discussed her future employment at the DLA.

F. The Military Judge took judicial notice of SECNAVINST 5350.16A.

Appellant was charged with violating SECNAVINST 5350.16A, the Secretary of the Navy's Equal Opportunity instruction. The instruction is contained in the Record as Prosecution Exhibit 14

for identification among the Prosecution Exhibits Not Admitted. The Military Judge took judicial notice that the instruction was a lawful general order in existence at the time of Appellant's misconduct and that he had a duty to obey it, (R. 1194), and noted that the instruction was part of the evidence in this case. (R. 878.) Trial Counsel offered the instruction for admission. (R. 878.) However, the Military Judge never said that the instruction was admitted or ordered the words "for identification" to be stricken.

Both Trial Counsel and Trial Defense Counsel discussed the instruction in their closing arguments. (R. 1200-22.) Trial Counsel explained that the "order is, of course, the Navy's Sexual Harassment and Equal Opportunity Instruction." (R. 1200.) Defense Counsel likewise explained that the order prohibits "the type of conduct that is——well, the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating hostile or offensive——or offensive work environment." (R. 1221.) The Military Judge also instructed the Members about the conduct prohibited by the order and reminded them that they would be provided all of the exhibits. (R. 1185-93, 1270.) The Members never returned to ask questions or express confusion about the instruction.

G. The Military Judge denied the mistrial motion.

During the Members' sentencing deliberations, they submitted a question to the Court, explaining that the sentencing evidence had caused some Members to "want to re-vote the finding on [the charge of abusive sexual contact]" and asking if they could "re-vote". (R. 1391.) The Military Judge took a recess to consider the matter, and then explained she was inclined to instruct the Members that they could not reconsider their previous finding, pursuant to R.C.M. 924. (R. 1393.)

Trial Defense Counsel then moved for a mistrial under R.C.M. 915. (R. 1393.) The Military Judge denied the motion, explaining that "[t]he simple fact that they've asked . . . to re-vote . . . is not grounds for a mistrial." (R. 1393.) The judge then instructed the Members that the law did not provide for a re-vote. (R. 1395.)

H. The Military Judge ordered the Members not to disclose their votes.

After trial, Trial Defense Counsel sent an e-mail to the Members soliciting recommendations for clemency based on their question to the Judge about reconsidering their findings on Specification 4 of Charge II. (Appellate Ex. LXXXVII.) Trial Defense Counsel's e-mail included the assertion that "[t]he Manual for Court-Martial is silent on whether Members may reconsider after findings." (*Id*.)

The President of the Panel then e-mailed the Military Judge requesting guidance in responding to Trial Defense Counsel's request. (*Id*.) The Military Judge responded in an e-mail instructing the President to tell the other Members to refrain from contacting any counsel except on the Record, and in open court. (*Id*.) The Military Judge then provided an order to the Members reminding them that a clemency petition from a member should not disclose the member's vote or that of any other member. (Appellate Ex. LXXXVIII.) She further reminded the Members that the prohibition extended to the findings, any request to reconsider findings, and sentence. (*Id*.)

Trial Defense Counsel filed a written objection to the order and later moved for mistrial. (Appellate Ex. XCII; Appellate Ex. LXXXIX.) The Military Judge denied Appellant's motion for mistrial. (Appellate Ex. XCIII.)

I. Trial Defense Counsel offered an e-mail suggesting a Member had made a clemency recommendation.

With his Clemency Request, Appellant enclosed an e-mail message from one of the Members, LCDR Thomas May, which stated that he had e-mailed his recommendation in response to Trial Defense Counsel's request to the Convening Authority's Staff Judge Advocate. (Appellant's Ltr., Encl. 4, Jan. 16, 2014.) Neither the Staff Judge Advocate's Recommendation nor the Court-Martial Order mention any e-mail from CDR May.

J. The Court-Martial Order incorrectly states Appellant was convicted of language dismissed by the Military Judge.

After the Members delivered their findings the Military Judge granted an earlier motion under R.C.M. 917 and excepted the language “that her breasts were nice” from Specification 2 of Charge I. (R. 1289.) The Court-Martial Order incorrectly states that Appellant was found guilty of that language. (Convening Authority’s Action, Jan. 16, 2014.)

Argument

I.

NON-PRODUCTION OF SD'S MEDICAL RECORDS DID NOT AFFECT THE OUTCOME OF APPELLANT'S TRIAL BECAUSE THE PURPOSE APPELLANT ARTICULATED BORE A TENUOUS RELATIONSHIP TO SD'S CREDIBILTY, WHICH WAS THOROUGHLY TESTED IN CROSS-EXAMINATION. MOREOVER, THE MILITARY JUDGE'S REMEDY CURED ANY PREJUDICE.

A. Standard of Review.

This Court reviews a Military Judge's decision regarding a discovery request for abuse of discretion. *United States v. Jones*, 69 M.J. 294, 298 (C.A.A.F. 2011) (citing *United States v. Morris*, 52 M.J. 193, 198 (C.A.A.F. 1999)).

B. Both parties enjoy equal access to compulsory process.

Failure of trial counsel to disclose evidence favorable to the defense on the issue of guilt or sentencing violates an accused's constitutional right to due process. *United States v. Coleman*, 72 M.J. 184, 186 (C.A.A.F. 2013) (citations omitted). This error is reviewed for harmless error, testing whether there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. *Id*. (citation omitted).

A military accused also has the right to obtain favorable evidence under Article 46, UCMJ, as implemented by R.C.M. 701-703. *Id*. Article 46 and its implementing rules provide greater statutory discovery rights to an accused than does his

constitutional right to due process. *Id*. (citing *United States v. Roberts*, 59 M.J. 323, 327 (C.A.A.F. 2004), and *United States v. Hart*, 29 M.J. 407, 409-10 (C.M.A. 1990)).

There are two categories of disclosure error: (1) "cases in which the defense either did not make a discovery request or made only a general request for discovery"; and (2) cases in which the defense made a specific request for the undisclosed information. *Id*. (quoting *Roberts*, 59 M.J. at 326-27). Cases in the first category are tested by the harmless error standard and cases in the second category are tested by the heightened harmless beyond a reasonable doubt standard. *Id*. (citations omitted).

Failing to disclose requested material favorable to the defense is not harmless beyond a reasonable doubt if the undisclosed evidence might have affected the outcome of the trial. *Id*. This determination must be made in light of all evidence in the record. *United States v. Morris*, 52 M.J. 193, 197 (C.A.A.F. 1999) (citing *United States v. Stone*, 40 M.J. 420, 423 (C.M.A. 1994)).

The government is obligated to review its files for exculpatory material. *See United States v. Williams*, 50 M.J. 436, 440-41 (C.A.A.F. 1999). The core files that must be reviewed include the prosecution's files in the case at bar. *Id*. (citing *United States v. Simmons*, 38 M.J. 376 (CMA 1993)).

Beyond those materials, the prosecution has "a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Id*. (citation omitted).

Both parties are also guaranteed equal access to compulsory process. *United States v. Wuterich*, 67 M.J. 63, 77 (C.A.A.F. 2008) (citing R.C.M. 703(a)). The government is obligated to produce by compulsory process evidence requested by the defense that is "relevant and necessary." *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004) (quoting R.C.M. 703(c)(1)). The preferred practice for dealing with compelled discovery of medical records is for the documents to be examined by the Military Judge *in camera* to determine whether to grant access to those records. *United States v. Briggs*, 48 M.J. 143, 145 (C.A.A.F. 1998).

C. Even if the United States had an obligation to subpoena and provide SD's medical records for *in camera* review, the records' absence did not affect the outcome of Appellant's trial.

Appellant's reliance on *United States v. Reece* is misplaced. There, Trial Counsel explicitly rejected a discovery request and subpoena for records held by civilian authorities known to relate to a juvenile victim's history of inpatient treatment for alcohol and drug abuse, as well as foster placement because of "uncontrollable" behavior. *United States*

v. Reece, 25 M.J. 93, 94 (C.M.A. 1987). The Court noted that alcoholism, drug addiction, and psychopathy have high probative value relative to credibility and decided that the Military Judge had abused his discretion in refusing to order production of the documents for *in camera* review. Id. at 95.)

Here, the records in question were never produced and so their contents——and their existence——are unknown. However, disclosure of any medical records would not have impacted Appellant's case. Unlike the records in *Reece*, which clearly contained information that might have a significant bearing on that victim's credibility, nothing in the Record supports that these medical records might contain anything other than SD's pursuit of treatment for the trauma of her experience. Appellant speculated that SD's medical records might reveal that she was on medication that could affect her demeanor. (R. 1257.) He did not assert any other need for the information or other theory as to why the records might be relevant, and the Military Judge's ruling must be read in light of Appellant's intended use for the records.

Appellant thoroughly tested SD's testimony through lengthy cross-examination, including confronting her with inconsistencies between her testimony at trial and at the Article 32 hearing (R. 734), and other statements provided to investigators. (R. 743.) He was also able to introduce the

testimony of SD's coworkers to contradict her description of Appellant and the location of the assault. (R. 898.) Appellant was also able to question SD about her lawsuit. (R. 776.) Indeed, SD only mentioned her medical claims in response to questioning by Trial Defense Counsel. (R. 776.)

Appellant desired SD's medical records only because he hypothesized they might provide an opportunity to augment this existing evidence he used to attack her credibility. (R. 1257.) But the hypothetical consumption of demeanor-altering drugs could not have added any significant weight to such thorough cross-examination. In light of the entire Record, SD's medical record would not have yielded evidence materially affecting the outcome of Appellant's trial.

D. The remedy fashioned by the Military Judge was adequate to eliminate any prejudice resulting from any non-disclosure.

1. Appellant did not object and therefore forfeited any challenge to the remedy.

Forfeiture is the failure to make a timely assertion of a right. *United States v. Sweeney*, 70 M.J. 296, 303 (C.A.A.F. 2011) (citation omitted). Forfeited errors are reviewed for plain error. *See, e.g., United States v. Brooks*, 64 M.J. 325, 328 (C.A.A.F. 2007). Even where non-disclosure of requested documents is error, trial defense counsel's failure to request a continuance and move to compel the documents can waive the issue

absent plain error. *See United Stated v. Avery*, 52 M.J. 496, 498-99 (C.A.A.F. 2000). The Military Judge gave Appellant the opportunity to be heard on this matter and he declined to demand production of the documents, instead requesting that they be excluded in sentencing. (R. 1259.) Accordingly, Appellant's present challenge was forfeited.

2. The Military Judge's remedy, adopted from Trial Defense Counsel, was appropriate.

The selection of the remedy for non-compliance with a rule of discovery is committed to the discretion of the military judge, and his selection of a remedy will not be reversed in the absence of an abuse of discretion. *United States v. Clark, 37 M.J. 1098* (N.M.C.M.R. 1993); *Cf. United States v. Callara*, 21 M.J. 259, 263 (C.M.A. 1986).

Here, In response to the non-disclosure of any medical records, Trial Defense Counsel proposed that the United States be barred from eliciting evidence regarding SD's medical or psychological treatment. (R. 1259.) The Military Judge adopted Appellant's suggested remedy. (R. 1259.) She did this in light of Appellant's aneamic suggestion that he needed them because they might indicate SD was taking drugs that could alter her demeanor in court. Further, after Appellant's conviction on compelling evidence, the United States was deprived of significant evidence in aggravation, providing Appellant a significant benefit in

sentencing. Accordingly, the government's failure to provide any medical records, if they exist, was harmless and the Military Judge did not err in adopting Appellant's remedy.

II.

SD'S INDIVIDUAL ACADEMIC PLAN WAS NOT REQUESTED BY THE DEFENSE AND THE UNITED STATES HAD NO DUTY TO PRODUCE IT. BECAUSE THE MILITARY JUDGE INSTRUCTED THE MEMBERS NOT TO CONSIDER SD'S LEARNING DISABILITY, APPELLANT COULD NOT HAVE BEEN PREJUDICED BY THE NON-DISCLOSURE.

A. Standard of Review.

This Court reviews a Military Judge's decision regarding a discovery request for an abuse of discretion. *United States v. Jones*, 69 M.J. 294, 298 (C.A.A.F. 2011) (citing *United States v. Morris*, 52 M.J. 193, 198 (C.A.A.F. 1999)).

B. Both parties have equal access to compulsory process.

A military accused also has the right to obtain favorable evidence under Article 46, UCMJ, as implemented by R.C.M. 701-703. *Id*. Article 46 and its implementing rules provide greater statutory discovery rights to an accused than does his constitutional right to due process. *Id*. (citing *United States v. Roberts*, 59 M.J. 323, 327 (C.A.A.F. 2004), and *United States v. Hart*, 29 M.J. 407, 409-10 (C.M.A. 1990)).

The government is obligated to review its files for exculpatory material. *See United States v. Williams*, 50 M.J. 436, 440-41 (C.A.A.F. 1999). The core files that must be

reviewed include the prosecution's files in the case at bar. *Id*. (citing *United States v. Simmons*, 38 M.J. 376 (CMA 1993)). Beyond those materials, the prosecution has "a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Id*. (citation omitted). Both parties are also guaranteed equal access to compulsory process. *United States v. Wuterich*, 67 M.J. 63, 77 (C.A.A.F. 2008) (citing R.C.M. 703(a)). The government is obligated to produce by compulsory process evidence requested by the defense that is "relevant and necessary." *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004) (quoting R.C.M. 703(c)(1)).

Where the defense has submitted "a general request for exculpatory evidence or information" but no request for any "particular item" of evidence or information, failure to disclose evidence "is reversible error only 'if the omitted evidence creates a reasonable doubt that did not otherwise exist.'" *United States v. Morris*, 52 M.J. 193, 197 (C.A.A.F. 1999) (quoting *United States v. Eshalomi*, 23 M.J. 12, 22 (1986)). This determination must be made in light of the evidence in the entire record. *Morris*, 52 M.J. at 197 (citing *United States v. Stone*, 40 M.J. 420, 423 (C.M.A. 1994)).

C. SD’s individual academic plan was not requested by the defense.

R.C.M. 703(f)(3) provides that defense requests for evidence shall include a description of the items sufficient to show their relevance and necessity. Appellant requested only SD’s medical and psychiatric records, as well as information bearing on SD’s credibility. (Appellate Ex. LXXI; Appellate Ex. LXXII.) At the time of these requests, Trial Counsel did not possess SD’s individual academic plan (IAP). Trial Counsel was aware of SD’s learning disability because he had interviewed her. (R. 600.) Nothing in Appellant's request provided the specificity necessary for Trial Counsel to seek SD's IAP on behalf of the defense. Accordingly, the United States had no duty to seek that plan or obtain it through compulsory process. As soon as Trial Defense Counsel made clear that he desired the IAP, Trial Counsel took steps to obtain it and provided it to the Defense the day he received it and. (R. 1098.) Therefore there was no discovery violation.

D. SD's individual academic plan was not relevant and did not create any doubt that did not otherwise exist.

“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *United States v. Graner*, 69 M.J. 104, 107 (C.A.A.F. 2010) (citing Mil. R. Evid. 401). The

Military Judge initially decided that SD's academic challenges could be relevant. (R. 600.) However, after viewing the academic plan, the Military Judge decided that it was not relevant. (R. 1099, 1101.)

Trial Defense Counsel asserted that the academic plan was relevant to impeach SD's assertion that she had a learning disability. (R. 29.) Yet, SD’S academic plan revealed that she had below-average reading and math fluency and had difficulty with the abstract. (Appellate Ex. LXIX.) Thus it provided no impeachment material, but corroborrated SD’s appropriately nuanced explanation of her abilities and limitations. (R. 686, 689.)

Further, once the Military Judge determined that SD’s academic problems, as clarified by the plan, were not relevant and instructed the Members to disregard that portion of her testimony, there was nothing to be contradicted by the academic plan. See *United States v. Thompkins*, 58 M.J. 43, 47 (C.A.A.F. 2003) (“Absent evidence to the contrary, court members are presumed to comply with the Military Judge's instructions”). It was therefore not relevant under the theory offered by the Appellant.

Likewise, because it supported SD’s testimony, the IAP could not create any doubt that did not otherwise exist. The document would not have altered the Members’ perception of SD's

testimony in a manner favorable to Appellant. Accordingly, its non-production, even if error, was harmless.

III.

SD'S TESTIMONY ABOUT HER LEARNING DISABILITY WAS NOT RELEVANT UNDER THE THEORY ADVANCED BY APPELLANT. ITS EXCLUSION WAS HARMLESS CONSIDERING THE EXTENSIVE CROSS-EXAMINATION ALLOWED BY THE MILITARY JUDGE.

A. Standard of Review.

This Court reviews a military judge's decision to admit or exclude evidence for an abuse of discretion. *See United States v. Weston*, 67 M.J. 390, 392 (C.A.A.F. 2009). The abuse of discretion standard also applies to alleged violations of the Sixth Amendment Confrontation Clause. *United States v. Moss*, 63 M.J. 233, 236 (C.A.A.F. 2006).

B. Military judges have wide discretion in limiting cross-examination.

An accused has a constitutional right "to be confronted by the witnesses against him." U.S. Const. amend. VI. That right necessarily includes the right to cross-examine those witnesses. *United States v. Ellerbrock*, 70 M.J. 314, 318 (C.A.A.F. 2011) (citing *Davis v. Alaska*, 415 U.S. 308, 315 (1974). In particular, the right to cross-examination has traditionally included the right "'to impeach, *i.e.*, discredit the witness.'" *Id*. (quoting *Olden v. Kentucky*, 488 U.S. 227, 231 (1988)). However, an accused is not simply allowed "'cross-examination

that is effective in whatever way, and to whatever extent, the defense might wish.'" *Id*. (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). Indeed, "'trial judges retain wide latitude' to limit reasonably a criminal defendant's right to cross-examine a witness 'based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" *Id*. (quoting *Michigan v. Lucas*, 500 U.S. 145, 149 (1991)).

C. SD's testimony about her learning disability was not relevant.

Appellant attempted to impeach SD's early statement that she had a learning disability. (R. 1150.) He attempted to point out that the characterization of her academic abilities in her IAP did not support that assertion. (R. 1150.) Trial Defense Counsel argued this this questioning was relevant to because it "goes to credibility." (R. 1150.) Now, for the first time on appeal, Appellant attempts to recast the purpose to which he could have put SD's testimony in light of the United States' efforts to explain her counter-intuitive failure to immediately rebuff and report Appellant's advances. (Appellant's Br. at 41.) Yet that was not the argument before the Military Judge when she made the discretionary decision to exclude SD's testimony about her learning disability.

Still, under either theory, that testimony was not relevant. Having instructed the Members to disregard SD's testimony about her learning disability, there was no cause for Trial Defense Counsel to question her about it to impeach her credibility. Further, Trial Defense Counsel's questions about the IAP did not undermine SD's credibility because the IAP supported SD's explanation of her academic limitations. (Appellate Ex. LXIX.) Finally, the IAP itself reveals that while SD did have academic limitations, they were not so severe as to make her unable to understand and control her interactions with Appellant. Accordingly, the Military Judge did not err in concluding that SD's testimony was irrelevant for that purpose. Serving as gatekeeper, the Military Judge properly used her discretion to exclude this evidence. *See* Mil. R. Evid. 104.

D. Even if error, exclusion of SD's testimony about her learning disability was harmless beyond a reasonable doubt.

When impeachment evidence is improperly excluded, this Court must test for harmlessness. *United States v. Williams*, 40 M.J. 216, 218 (C.M.A. 1994). "Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id*. (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). Whether such an error is harmless in a particular case depends upon several factors, including "the importance of the witness'

testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Id*.

Here, SD's testimony was obviously essential to the United States' case and that factor favors Appellant. However, the other factors articulated in *Williams* all favor the United States. Appellant was permitted lengthy and probing cross-examination. He confronted her with inconsistencies between her testimony at trial and at the Article 32 hearing, (R. 734), and other statements provided to investigators. (R. 743.) He was also able to introduce the testimony of SD's coworkers to contradict her description of Appellant and the location of the assault. (R. 898.) Finally, he questioned her about her motive to fabricate because of a civil lawsuit. (R. 776.) This extensive cross-examination was set against a strong government case in which Appellant admitted much of the underlying misconduct, challenging only the non-consensual nature of his interaction with SD. Accordingly, Appellant's inability to question SD about her lack of a true learning disability did not prejudice his defense.

IV.

SD'S PRIOR CONSISTENT STATEMENTS PRECEEDED THE ALLEGED MOTIVE TO FABRICATE, WHICH AROSE WHEN SHE CONSULTED AN ATTORNEY.

A. Standard of Review.

A military judge's decision to admit or exclude evidence is reviewed for abuse of discretion. *United States v. Allison*, 49 M.J. 54, 57 (C.A.A.F. 1998).

B. A prior consistent statement must precede any improper motive that it is offered to rebut.

A prior consistent statement is not hearsay if it is "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." *United States v. Coleman*, 72 M.J. 184, 188-89 (C.A.A.F. 2013) (citing Mil. R. Evid. 801(d)(1)(B)). A prior statement must precede any motive to fabricate or improper influence that it is offered to rebut. *Id*. Where multiple motives to fabricate or multiple improper influences are asserted, the statement need not precede all such motives or inferences, but only the one it is offered to rebut. *Id*. (citing *United States v. Allison*, 49 M.J. 54, 57 (C.A.A.F. 1998)).

Concerning the fabrication, motive or influence, "the point in time to be ascertained for purposes of rebuttal is the fair implication of the charge, not the arguable underlying event." *United States v. Carrico*, 2013 CCA LEXIS 93 at *5-*6 (N-M. Ct. Crim. App. Feb. 14, 2013) (citing *United States v. Faison*, 49

M.J. 59, 61 (C.A.A.F. 2013)). The determining factor is the language of cross-examination, not when the alleged motive or influence actually occurred as a matter of historical record. *Id.*

C. SD's prior consistent statements were made before the asserted motive to fabricate arose.

The *Faison* Court explained that a victim fired by her boss might be accused of fabricating a charge of assault against that boss. 49 M.J. at 61, n. 2. In that situation, statements about the assault made prior to the firing would be appropriate to rebut the charged motive to fabricate. *Id*.

Here, Trial Defense Counsel suggested that SD falsified her claims of sexual harassment and sexual assault to support her civil lawsuit. (R. 792-93.) To rebut that implication, Trial Counsel elicited testimony from SD that she had told two friends about the assault prior. (R. 1086-87.) The Military Judge found that the alleged motive to fabricate would have arisen when SD consulted an attorney. (R. 1092.)

Appellant misinterprets *Faison* to allow him to control this Court's analysis of SD's statement by asserting for the first time on appeal that the motive to fabricate arose at the time Appellant told her he didn't know what the encounter meant. (Appellant's Br. at 48.) Yet as this Court explained in *Carrico*, the language of cross-examination is determinative.

Here, Trial Defense Counsel's cross-examination was clearly aimed at demonstrating that SD had a motive to fabricate to support her civil suit. Accordingly, the Military Judge did not abuse her discretion in admitting statements that occurred before SD consulted with an attorney and initiated her civil case.

V.

APPELLANT FORFEITED ANY CHALLENGE TO TRIAL COUNSEL'S CROSS-EXAMINATION OF APPELLANT BY FAILING TO OBJECT AT TRIAL. IT WAS NOT PLAIN ERROR TO ALLOW TRIAL COUNSEL TO ASK APPELLANT IF SD WAS LYING BECAUSE APPELLANT SUGGESTED SD WAS UNTHRUTHFUL THROUGHOUT THE TRIAL.

A. Standard of Review.

This Court reviews a military judge's decision to admit or exclude evidence for an abuse of discretion. *See United States v. Weston*, 67 M.J. 390, 392 (C.A.A.F. 2009). However, absent objection, admission of evidence is reviewed for plain error. *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008). To demonstrate that relief is warranted under the plain error doctrine, an appellant must show that: (1) there was error; (2) the error was plain or obvious; and (3) the error was materially prejudicial to his substantial rights. *United States v. Brooks*, 64 M.J. 325, 328 (C.A.A.F. 2007) (citation omitted).

B. Appellant's assertion that SD was lying created no prejudice because Appellant continually suggested that SD was untruthful.

Generally, a witness may not opine that another witness is lying or telling the truth. *United States v. Jenkins*, 54 M.J. 12, 16 (C.A.A.F. 2000) (citing *United States v. Birdsall*, 47 M.J. 404, 410 (1998), and *United States v. Marrie*, 43 M.J. 35, 41 (1995)). Whether or not to believe a witness is a question for the factfinder, who is capable of assessing credibility without another witness's opinion. *Jenkins*, 54 M.J. at 16. The Court of Appeals for the Armed Forces has adopted the principle that a prosecutorial cross-examination that compels an accused to label law enforcement officers as liars is improper. *Id*. (citing *United States v. Richter*, 826 F.2d. 206, 208 (2d. Cir. 1987)). In *Jenkins*, the Court applied that principle to a Chief Warrant Officer who was a government witness but was not a law enforcement agent. *Id*. at 13.

However, even if it was error to call for Appellant to label SD as a liar, that error must be tested for prejudice. *Id*. at 17-18. In *Jenkins*, the Court of Appeals for the Armed Forcesheld that it was not plain error for Trial Counsel to elicit from the accused his opinion that witness was lying where that was the theory offered by Trial Defense Counsel in both opening and closing arguments. *Id*. at 17 (citing *United States v. Cole*, 41 F.3d. 303, 309 (7th Cir. 1994)). Here, just as in

Jenkins, Appellant's theory was that SD was lying about her interactions with Appellant. He suggested that SD was untruthful both in opening and closing arguments, as well as suggesting she was fabricating her story to support a civil suit. (R. 590-92, 1209-20.) Without objection, Trial Counsel merely asked Appellant to clarify that he believed SD was lying during her testimony. (R. 1014-84.) This testimony simply allowed Appellant another opportunity to advance his theory and was therefore could not have produced material prejudice to his substantial rights. Accordingly, admission of Appellant's testimony was not plain error.

VI.

APPELLANT'S CONVICTION FOR VIOLATING ARTICLE 92, UCMJ, IS LEGALLY AND FACTUALLY SUFFICIENT BECAUSE THE MILITARY JUDGE TOOK JUDICIAL NOTICE OF THE INSTRUCTION. HOWEVER, EVEN IF THE CONVICTION IS LEGALLY OR FACTUALLY INSUFFICIENT, THIS COURT SHOULD NOT REVISE APPELLANT'S SENTENCE BECAUSE APPELLANT'S OTHER CONVICTIONS MERIT THE ADJUDGED DISMISSAL.

A. Standard of Review.

This Court has an independent obligation to review each case *de novo* for factual and legal sufficiency. Art. 66, UCMJ, 10 U.S.C. § 866. *See United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

B. Appellant's conviction is legally sufficient.

The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements beyond a reasonable doubt." *United States v. Humphreys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987)). In resolving questions of legal sufficiency, the Court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). The Court's assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

To obtain a conviction for a violation of a lawful general order under Article 92, UCMJ, the Government must prove that (1) there was in effect a certain lawful general order, (2) the accused had a duty to obey it, and (3) the accused violated or failed to obey it. *United States v. Harcrow*, 2006 CCA LEXIS 285 at *7-*8 (N-M. Ct. Crim. App. October 30, 2006). In order to satisfy the first element, the Government may request that the military judge take judicial notice of the instruction or may introduce the instruction into evidence. *Id*.

Here, the Military Judge took judicial notice of the instruction in question and of Appellant's duty to follow it.

(R. 1194.) As she stated, the instruction was then part of the evidence. (R. 878.) While the instruction was not offered as a prosecution exhibit, there is no evidence that the Members were not aware of its contents. Trial Defense Counsel himself reminded the Members that the instruction prohibited conduct that would create a hostile work environment. (R. 1221.) Finally, the Military Judge instructed the Members that to find Appellant guilty, they had to find that his communications created a hostile work environment. (R. 1185.) Indeed, the fact that Appellant was convicted of only one specification indicates that the Members were able to determine exactly which aspects of his conduct violated the instruction. Accordingly, when viewed in the light most favorable to the United States, the evidence is legally sufficient to support Appellant's conviction of violating Article 92.

C. Appellant's conviction is factually sufficient.

The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having personally observed the witnesses, this Court is convinced of an appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325.

Under Article 66, UCMJ, this Court "must assess the evidence in the entire record without regard to the findings reached by the trial court, and it must make its own independent

determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). When exercising its Article 66, UCMJ, powers of review, this Court may be convinced beyond a reasonable doubt of an appellant's guilt even though conflicts in the evidence may exist, and may also accord a witness's credibility greater weight on some topics than on others. *United States v. Lepresti*, 52 M.J. 644, 648 (N-M. Ct. Crim. App. 1999).

In testing for factual sufficiency, this Court is required to "recogniz[e] that the trial court saw and heard the witnesses." *Id.* This is not a *pro forma* legal requirement. Rather, it takes into account that the trier of fact is best situated to assess a witness's credibility while testifying. *See United States v. Madey*, 14 M.J. 651, 653 (A.C.M.R. 1982), *rev. denied*, 15 M.J. 183 (C.M.A. 1983); *see also United States v. Ferguson*, 35 F.3d 327, 333 (7th Cir. 1994), *cert. denied*, 514 U.S. 1100 (1995) (trial court's evaluation of witness credibility "will not be disturbed unless it is completely without foundation."). It also takes into account that, where the court members are properly instructed to consider a witness's credibility, this Court should presume that the members followed the Military Judge's instructions. *See United States v. Collier*, 67 M.J. 347 (C.A.A.F. 2009).

Here, the Military Judge took judicial notice of the instruction. (R. 1194.) Appellant himself acknowledged making some harassing communications to SD. (R. 988.) SD testified unequivocally about the other statements, which are consistent with the escalating sexual advances Appellant made. (R. 634-653.) These remarks, including the acknowledged statement "I'm going to fuck you," are clearly the sorts of communications that create an offensive work environment, as prohibited by the instruction. SECNAVINST 5350.16A. This Court should be satisfied by SD's testimony, partially acknowledged by Appellant, that Appellant committed the charged misconduct.

D. Even if Appellant's conviction is factually or legally insufficient, Appellant's sentence should not be revised.

On occasions where the lower court is convinced that the accused's sentence would have been at least of a certain magnitude, even if no error had occurred at trial, the court may remedy the error by reassessing the sentence itself or by deciding that the error was not prejudicial. *United States v. Cook,* 48 M.J. 434, 438 (C.A.A.F. 1998) (citations omitted). If, in doing so, the court affirms the sentence originally adjudged, the court is required to specifically determine that the original sentence was not affected by the military judge's error at trial. *Id.*

Here, Appellant was convicted of only three specifications, one of violating a lawful general order, one of conduct unbecoming, and one of abusive sexual contact. (R. 1279.) Appellant's conviction of sexual contact was by far the most significant. His only punishment was dismissal. Even had the orders violation conviction not occurred, Appellant's misconduct would still have merited a dismissal. Accordingly, this Court may be satisfied that even if Appellant's Article 92 conviction is erroneous, that error created no prejudice. This Court should not revise Appellant's sentence even if it must overturn the Article 92 conviction.

VII.

SECNAVINST 5350.16A IS EXPRESSLY PUNITIVE AND DOES NOT REQUIRE IMPLEMENTATION BY SUBORDINATES IN ORDER TO HAVE EFFECT.

A. Standard of Review.

Whether a specification states an offense is a question of law we review de novo. *United States v. Rauscher*, 71 M.J. 225, 226 (C.A.A.F. 2012) (citation omitted).

B. SECNAVINST 5350.16A is expressly punitive.

The punitive character of a regulation is determined by examining it in its entirety. *United States v. Tate*, 2013 CCA LEXIS 221 at *7 (N-M. Ct. Crim. App. March 12, 2013). Ordinarily, no single factor is controlling. *Id*. (citing *United States v. Nardell*, 21 C.M.R. 327 (C.M.A. 1972)). In every case,

the question is whether the regulation, by its terms, "regulates conduct of individual members and that its direct application of sanctions for its violation is self-evident." *Id*. (citing *United States v. Blanchard*, 19 M.J. 196, 197 (C.M.A. 1985)). Further, "if the order requires implementation by subordinate commanders to give it effect as a code of conduct, it will not qualify as a general order for the purpose of an Article 92 prosecution." *Id*. (citing *Blanchard*, 19 M.J. at 197).

Here, Paragraph 7 of the instruction explicitly prohibits gender-based discrimination, and says that it is the duty of every Sailor and Marine to ensure that unlawful discrimination does not occur. SECNAVINST 5350.16A, ¶ 7. Appellant's assertion that this paragraph's "focus is on commanders, supervisors, and officers-in-charge", (Appellant's Br. at 62), is simply inaccurate. Further, Paragraph 9 states expressly that paragraph 7's requirements are applicable to "all DON personnel", and any violation is subject to disciplinary action. SECNAVINST 5350.16A, ¶ 9. Accordingly, the only reasonable reading of the instruction is that it regulates the conduct of all individual members of the Department of the Navy and, on its face, directly applies sanctions to those same members.

Appellant's reliance on *United States v. Daniel* is misplaced. There, individual conduct was discussed only in terms of enhancing or detracting from the Department's policy.

United States v. Daniel, 42 M.J. 802, 804 (N-M. Ct. Crim. App. 1995.) Further, in *Daniel* a superseding instruction clearly indiciated that the instruction in question was not punitive. *Id*. Such is not the case here.

C. SECNAVINST 5350.16A does not require implementation by subordinate commanders to give it effect.

Here, the isntruction does demand that the Chief of Naval Operations and Commandant of the Marine Corps implement the Departmental policy within their existing instructions. SECNAVINST 5350.16A, ¶ 11. However, the instruction directly states that it is applicable to all Department of the Navy Personnel and charges every Sailor and Marine with preventing discrimination. SECNAVINST 5350.16A, ¶ 3, 7. Accordingly the instruction carries effect even without the prescribed updates to subordinate instructions. SECNAVINST 5350.16A is therefore punitive and the specification stated an offense.

VIII.

THE MILITARY JUDGE DID NOT ABUSE HER DISCRETION IN DENYING A MISTRIAL BECAUSE THE MEMBERS' QUESTION DID NOT CAST DOUBT ON THE FAIRNESS OF THE PROCEEDINGS.

A. Standard of Review.

A military judge has discretion to "declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings."

United States v. Coleman, 72 M.J. 184, 186 (C.A.A.F. 2013) (citing R.C.M. 915(a)). This Court reviews a military judge's determination on a mistrial for an abuse of discretion. *Id*. (citing *United States v. Ashby*, 68 M.J. 108, 122 (C.A.A.F. 2009)).

B. The Members' question did not case substantial doubt on the fairness of the proceedings.

The power to grant a mistrial should be used with great caution, under urgent circumstances, and for plain and obvious reasons. *United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003) (citation omitted). Declaration of a mistrial is a drastic remedy, and such relief will be granted only to prevent manifest injustice against the accused. *Id*. It is appropriate only whenever circumstances arise that cast substantial doubt upon the fairness or impartiality of the trial. Id. (citing *United States v. Dancy*, 38 M.J. 1, 6 (C.M.A. 1993)).

During the Members' sentencing deliberations, they submitted a question to the Court, explaining that the sentencing evidence had caused some Members to "want to re-vote the finding on Charge II, Specification 4" and asking if they could "re-vote". (R. 1391.) Trial Defense Counsel moved for a mistrial under R.C.M. 915. (R. 1393.) The Military Judge denied the motion, explaining that "[t]he simple fact that

they've asked. . .to re-vote. . .is not grounds for a mistrial." (R. 1393.)

When findings are announced in open Court, those findings are final and not subject to reconsideration. *United States v. Thompson*, 59 M.J. 432, 440 (C.A.A.F. 2004) (citing R.C.M. 922(a), and 924(a)). Nor are the findings subject to proceedings in revision, as Appellant erroneously suggests. *United States v. Augspurger*, 61 M.J. 189, 192 (C.A.A.F. 2005) (citation omitted). Accordingly, there was no error for the Military Judge to refuse to grant a mistrial. The Members' question does not case doubt on the fairness of the proceedings. Rather, it indicates only that at least one Member's confidence in the verdict might have been undermined by some evidence in sentencing. It does not, and cannot, indicate that the Members would have returned a different result if allowed to reconsider their findings.

Sentencing evidence is not appropriate for consideration on the merits, and the Record reflects that Appellant had the opportunity to present his case on the Merits and that the Members deliberated and delivered a finding based on that evidence. Fairness and due process demand nothing more. Accordingly, the Military Judge did not abuse her discretion in refusing to grant a mistrial.

IX.

THE EVIDENCE IS FACTUALLY AND LEGALLY SUFFICIENT TO SUPPORT APPELLANT'S CONVICTION OF ABUSIVE SEXUAL CONTACT. THIS COURT SHOULD BE INDEPENDENTLY CONVINCED OF APPELLANT'S GUILT BY SD'S CONSISTENT TESTIMONY AND BY EVIDENCE OF APPELLANT'S CONSCIOUSNESS OF GUILT.

A. Standard of Review.

This Court has an independent obligation to review each case *de novo* for factual and legal sufficiency. Art. 66, UCMJ, 10 U.S.C. § 866. *See United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

B. Appellant's conviction is legally sufficient.

The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements beyond a reasonable doubt." *United States v. Humphreys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987)). In resolving questions of legal sufficiency, the Court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). The Court's assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

The relevant elements of abusive sexual contact under Article 120, UCMJ, are as follows:

(1) That Appellant came in sexual contact with SD;
(2) That he did so by causing bodily harm;

10 U.S.C. § 920 (2012); Charge Sheet. Bodily harm means any offensive touching of another, however slight, including any nonconsensual sexualact or nonconsensual sexual contact. 10 U.S.C. § 920 (2012). Sexual contact is causing any touch with the intent to arouse or gratify the sexual desire of any person. Manual for Courts-Martial, United States (2012 ed.), IV-69, ¶ 45(g)(2)(B).

Here, SD testified that Appellant grabbed her hand and started rubbing his erection with it. (R. 652.) She testified that she desired to leave during this encounter and attempted to make everything stop. (R. 652.) She testified that she did not participate in the encounter with Appellant, and was terrified. (R. 647-48.) Appellant himself acknowledged that SD rubbed his erection. (R. 987.) He simply challenges whether the evidence demonstrates that the act was non-consensual and therefore offensive. (Appellant’s Br. at 75-77.) Yet, SD consistently testified that she did not consent to any of Appellant's advances. (R. 647-54, 810.) Her decision to withdraw from the office and seek out the inspector general’s hotline also indicate that she was genuinely offended by Appellant's non-

consensual contact. (R. 818.) By contrast, Appellant demonstrated consciousness of his guilt by instructing SD that she could not tell anyone about the encounter, (R. 653), and by incessantly attempting to contact her in her absence despite never having inquired about her when she was gone before. (R. 664.) Taken in the light most favorable to the United States, this clearly establishes that Appellant engaged in sexual contact with SD which was offensive in nature.

C. Appellant's conviction is factually sufficient.

The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having personally observed the witnesses, this Court is convinced of an appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325.

Under Article 66, UCMJ, this Court "must assess the evidence in the entire record without regard to the findings reached by the trial court, and it must make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). When exercising its Article 66, UCMJ, powers of review, this Court may be convinced beyond a reasonable doubt of an appellant's guilt even though conflicts in the evidence may exist, and may also accord a witness's credibility greater weight on some

topics than on others. *United States v. Lepresti*, 52 M.J. 644, 648 (N-M. Ct. Crim. App. 1999).

In testing for factual sufficiency, this Court is required to "recogniz[e] that the trial court saw and heard the witnesses." *Id.* This is not a *pro forma* legal requirement. Rather, it takes into account that the trier of fact is best situated to assess a witness's credibility while testifying. *See United States v. Madey*, 14 M.J. 651, 653 (A.C.M.R. 1982), *rev. denied*, 15 M.J. 183 (C.M.A. 1983); *see also United States v. Ferguson*, 35 F.3d 327, 333 (7th Cir. 1994), *cert. denied*, 514 U.S. 1100 (1995)(trial court's evaluation of witness credibility "will not be disturbed unless it is completely without foundation."). It also takes into account that, where the court members are properly instructed to consider a witness's credibility, this Court should presume that the members followed the Military Judge's instructions. *See United States v. Collier*, 67 M.J. 347 (C.A.A.F. 2009).

As discussed in paragraph B above, there is compelling evidence of Appellant's misconduct, which the Members relied on after weighing his credibility against SD's. This Court should be convinced by SD's testimony and should disregard Appellant's self-serving explanations and attacks on her credibility.

X.

THE MILITARY JUDGE DID NOT ERR IN INSTRUCTING THE MEMBERS NOT TO DISCLOSE THEIR VOTES AS THEY ARE PROHIBITED FROM DOING SO. NOR DID THE MEMBERS' QUESTION CAST DOUBT ON THE FAIRNESS OF THE PROCEEDINGS.

A. The Military Judge did not err in ordering the Members not to disclose their votes.

The military judge "is responsible for the fair and orderly conduct of the proceedings in accordance with law." *United States v. Phare*, 21 U.S.C.M.A. 244 (C.M.A. 1972) (citation omitted). Mil. R. Evid. 606(b) prohibits a member from testifying about the member's mind and emotions regarding findings and sentencing. Likewise, the discussion of R.C.M. 1105(b)(2)(D) states that a clemency recommendation should not disclose the vote or opinion of any member.

After trial, Trial Defense Counsel sent an e-mail to the Members soliciting recommendations for clemency based on their question to the Judge about reconsidering their findings on Specification 4 of Charge II. (Appellate Ex. LXXXVII.) Trial Defense Counsel's e-mail included the erroneous assertion that "[t]he Manual for Court-Martial is silent on whether Members may reconsider after findings." (Id.) The Military Judge provided an order to the Members reminding them that a clemency petition from a member should not disclose the member's vote or that of any other member. (Appellate Ex. LXXXVIII.) She further

reminded the Members that the prohibition extended to the findings, any request to reconsider findings, and sentence. (Id.)

Considering the Manual's admonition in the discussion of R.C.M. 1105, it was entirely appropriate for the Military Judge to remind the Members not to disclose their vote or that of any other Member. Likewise, her order made clear that the Members could provide clemency recommendations, and therefore could not have had the chilling effect that Appellant asserts. (Appellate Ex. LXXXVIII.)

B. Appellant fails to meet his burden to establish a post-trial processing error.

Article 60(d), UCMJ, requires the convening authority to "obtain and consider the written recommendation of his staff judge advocate or legal officer." *United States v. Wellington*, 58 M.J. 420, 427 (C.A.A.F. 2003.) Consistent with this Congressional intent, the President has acknowledged that "the purpose of the recommendation . . . is to assist the convening authority to decide what action to take on the sentence in the exercise of command prerogative." *Id*. (citation omitted). Where the SJAR is served on the defense counsel and accused in accordance with R.C.M. 1106(f)(1), and the defense fails to comment on any matter in the recommendation, R.C.M. 1106(f)(6) provides that any error is waived unless it rises to the level

of plain error. *Id*. Appellant bears the burden of demonstrating that plain error occurred. *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000).

With his Clemency Request, Appellant included an e-mail message from one of the Members, LCDR Thomas May, which stated that he had e-mailed his recommendation in response to Trial Defense Counsel's request to the Convening Authority's Staff Judge Advocate. (Encl. 4 to Appellant's Ltr., Jan. 16, 2014.) Neither the Staff Judge Advocate's Recommendation nor the Court-Martial Order mention any e-mail from CDR May. However, the Convening Authority specifically notes in his Action that he considered the e-mail string containing messages from the Members, indicating that he was aware of LCDR May's e-mail. (Convening Authority's Action, Jan. 16, 2014 (CAA) at 4.)

Yet LCDR May's e-mail to Trial Defense Counsel does not demonstrate that he actually made any recommendation for clemency to the Convening Authority. When set against the Staff Judge Advocate's signed recommendation stating that there was no recommendation for clemency, this e-mail is insufficient to carry Appellant's burden to demonstrate some post-trial processing error.

XI.

APPELLANT IS ENTITLED TO ACCURATE OFFICIAL RECORDS. THIS COURT SHOULD REMEDY THE ERROR IN THE CONVENING AUTHORITY'S ACTION IN ITS DECRETAL PARAGRAPH.

Appellant is entitled to accurate official records of his court-martial. *See United States v. Crumpley*, 49 M.J. 538, 539 (N-M. Ct. Crim. App. 1998). Errors in post-trial documents are tested using a harmless-error standard. *See Crumpley*, 49 M.J. at 539 (*citing Kotteakos v. United States,* 328 U.S. 750, (1946)).

Appellant does not assert prejudice and none is apparent from the Record. This Court can remedy such harmless error by ordering administrative correction in its decretal paragraph. *See Crumpley,* 49 M.J. at 539 (citations omitted); *see also United States v. Brown,* 62 M.J. 602, 604 (N-M. Ct. Crim. App. 2005).

Conclusion

WHEREFORE, the Government respectfully requests that this Court affirm the findings and sentence as adjudged and approved below.

MATTHEW M. HARRIS
Captain, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7430

KEITH B. LOFLAND
Lieutenant Commander, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-8384, fax (202) 685-7687

Certificate of Filing and Service

I certify that the United States filed this brief with the Court, served a copy on Appellate Defense Counsel and electronically filed the brief in CMTIS with the Court pursuant to N-M. Ct. Crim. App. Rule 5.2(b)(1), on September 22, 2014.

MATTHEW M. HARRIS
Captain, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7430, fax (202) 685-7687

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Arvis D. OWENS Commander (O-5) U.S. Navy, Appellant	**APPELLANT'S BRIEF AND ASSIGNMENTS OF ERROR; MOTION FOR LEAVE TO FILE BRIEF IN EXCESS OF PAGE LIMITATION** Case No. 201300485 Tried at Naval District Washington, Washington Navy Yard, DC, on 6 June, 30 July, 9-13 September and 5 November 2013, before a General Court-Martial convened by Commandant, Naval District Washington, Washington Navy Yard, DC

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

William E. Cassara
PO Box 2688
Evans, GA 20809
706-860-5769
bill@williamcassara.com

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Assignments of Error

I.

APPELLANT WAS DENIED THE RIGHT TO DUE PROCESS UNDER THE FIFTH AMENDMENT WHEN THE GOVERNMENT FAILED TO PROVIDE SD'S MEDICAL RECORDS, RELEVANT AND NECESSARY EVIDENCE THAT THE DEFENSE HAD SPECIFICALLY REQUESTED PRIOR TO TRIAL, AND SD TESTIFIED THAT SHE HAD SUFFERED PHYSICAL HARM AS A RESULT OF APPELLANT'S CONDUCT.

II.

APPELLANT WAS DENIED THE RIGHT TO DISCOVERY UNDER ARTICLE 46, UCMJ, WHEN THE GOVERNMENT FAILED TO PRODUCE EVIDENCE OF SD'S "LEARNING DISABILITY" IN RESPONSE TO A GENERAL REQUEST FOR EVIDENCE IMPACTING SD'S CREDIBILITY. THE ERROR WAS NOT CURED BY THE MILITARY JUDGE'S LATER CONCLUSION THAT THE EVIDENCE WAS NOT RELEVANT AFTER SHE HAD ARTICULATED THE RELEVANCE AND THE DEFENSE SOUGHT TO USE THE EVIDENCE TO ATTACK SD'S CREDIBILITY.

III.

APPELLANT WAS DENIED THE RIGHT UNDER THE SIXTH AMENDMENT TO CONFRONT HIS ACCUSER WHEN THE MILITARY JUDGE FIRST CONCLUDED THAT EVIDENCE RELATED TO SD'S LEARNING DISABILITY WAS RELEVANT, PERMITTED THE GOVERNMENT TO QUESTION HER ABOUT IT AT LENGTH, THEN DENIED THE DEFENSE THE OPPORTUNITY TO CROSS-EXAMINE HER ON IT AND INSTRUCTED THE MEMBERS TO DISREGARD IT. EVIDENCE OF SD'S LEARNING DISABILITY, OR LACK THEREOF, WAS RELEVANT TO HER CREDIBILITY.

IV.

THE MILITARY JUDGE ERRED IN ADMITTING EVIDENCE THAT SD MADE CERTAIN STATEMENTS TO FRIENDS THAT WERE CONSISTENT WITH HER TRIAL TESTIMONY. THE STATEMENTS WERE NOT "PRIOR CONSISTENT STATEMENTS" UNDER R.C.M.

801(d)(1) BECAUSE THEY WERE NOT MADE PRIOR TO THE TIME APPELLANT ALLEGED THE MOTIVE TO FABRICATE AROSE.

V.

THE MILITARY JUDGE COMMITTED PLAIN ERROR WHEN SHE PERMITTED THE TRIAL COUNSEL TO QUESTION APPELLANT ABOUT THE TRUTHFULNESS OF A GOVERNMENT WITNESS, AND REQUIRED APPELLANT TO LABEL THE GOVERNMENT WITNESS AS A LIAR, IMPLYING THAT IN ORDER TO ACQUIT THE MEMBERS MUST FIRST CONCLUDE THAT A GOVERNMENT WITNESS IS LYING.

VI.

THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT A CONVICTION OF VIOLATION OF ARTICLE 92(1), UCMJ, BECAUSE ALTHOUGH THE MILITARY JUDGE TOOK JUDICIAL NOTICE THAT SECNAVINST 5350.16A EXISTED AS A LAWFUL GENERAL REGULATION THAT APPELLANT HAD A DUTY TO OBEY, THE CONTENT OF THE REGULATION ITSELF WAS NEVER ADMITTED INTO EVIDENCE.

VII.

APPELLANT'S CONVICTION OF VIOLATION OF A LAWFUL GENERAL ORDER UNDER ARTICLE 92, UCMJ, MUST BE SET ASIDE BECAUSE THE SPECIFICATION FAILS TO STATE AN OFFENSE; THE REGULATION IS NOT PUNITIVE.

VIII.

THE MILITARY JUDGE ABUSED HER DISCRETION IN FAILING TO GRANT A MISTRIAL WHEN IT BECAME APPARENT THAT THE MEMBERS WERE NO LONGER CONFIDENT IN THEIR VERDICT.

IX.

THE EVIDENCE IS FACTUALLY INSUFFICIENT TO SUPPORT A CHARGE OF UNLAWFUL SEXUAL CONTACT UNDER ARTICLE 120, UCMJ.

X.

APPELLANT WAS DENIED A MEANINGFUL OPPORTUNITY FOR CLEMENCY WHEN THE MILITARY JUDGE E-MAILED THE MEMBERS TELLING THEM NOT TO COMMUNICATE WITH THE DEFENSE COUNSEL AND SUBSEQUENTLY ISSUED AN ORDER HAVING A "CHILLING EFFECT" ON THE LIKELIHOOD THAT THEY WOULD SUBMIT A CLEMENCY RECOMMENDATION; AND WHEN THE STAFF JUDGE ADVOCATE WITHHELD FROM THE CONVENING AUTHORITY AT LEAST ONE AND POSSIBLY MORE CLEMENCY RECOMMENDATIONS THAT HE HAD RECEIVED FROM THE SENTENCING AUTHORITY.

XI.

APPELLANT IS ENTITLED TO A PROMULGATING ORDER THAT ACCURATELY REFLECTS THE FINDINGS AS AMENDED BY THE MILITARY JUDGE.

Statement of Statutory Jurisdiction

The statutory basis for jurisdiction of this Court is Article 66(b)(1), UCMJ, 10 U.S.C. § 866(b)(1).

Statement of the Case

Appellant was tried on 6 June, 30 July, 9-13 September and 5 November 2013 at Naval District Washington, Washington Navy Yard, DC, by a general court-martial convened by Commandant, Naval District Washington. Appellant elected trial by members. R. at 28. Appellant pleaded not guilty to all charges and specifications. R. at 29. He was convicted of one specification of a violation of a lawful general order under Article 92, UCMJ (Charge 1, specification 1); one specification of sexual contact by causing bodily harm under Article 120, UCMJ

(Charge II, specification 1); and one specification of conduct unbecoming an officer and a gentleman under Article 133, UCMJ (Charge IV). Appellant was acquitted of one specification of violation of a lawful general order (Charge I, specification 2); six specifications alleging sexual contact by bodily harm (Charge II, specifications 2 through 7); and assault consummated by a battery (Charge IV). R. at 1279. The military judge amended the findings of guilty of specification 1 of Charge II by excepting certain language pursuant to R.C.M. 917. R. at 1289. Appellant was sentenced to a dismissal. R. at 1398. The convening authority approved the adjudged sentence.

Statement of Facts

The facts necessary for the resolution of the issues can be found in the argument below.

Summary of the Argument

I.

Appellant was denied the right to due process under the Fifth Amendment when the government failed to provide SD's medical records, which the defense had made a specific request for. SD testified about physical harm she suffered as a result of Appellant's conduct. The military judge erred in concluding that the medical records were relevant only to sentencing when the members considered SD's testimony regarding her medical problems in reaching their findings.

II.

Appellant was denied discovery in violation of Article 46, UCMJ, and R.C.M. 701. Appellant made a general request for discovery of material affecting the credibility of any witness. The government failed to provide records of SD's "learning disability." Then, in its opening statement, the government compared Appellant (smart, extremely knowledgeable . . . gone to the naval Academy and had done well there) with SD (enrolled in a program for students with learning disabilities), elicited from SD that she "struggled" in school, and elicited from SD that she entered the federal workforce through a program for people with learning disabilities. Appellant was entitled to the discovery, but did not receive it until the trial was well underway. The military judge ultimately ruled that the evidence of SD's learning disability was irrelevant, but only after having announced its relevance several times. The evidence was relevant, admissible, and the failure of the government to turn it over was error.

III.

Appellant was denied his Sixth Amendment right to confront SD about the learning disability. It appeared from the discovery that the defense eventually received that SD did not, in fact, have a learning disability and may have lied about that. The credibility of a witness is a question for the

members, and the defense was denied the right to impeach SD's credibility when the military judge ruled that evidence of her learning disability was irrelevant.

IV.

The military judge erred in admitting evidence of statements SD made to her friends as "prior consistent statements" when the statements were made after the motive to fabricate arose.

V.

The military judge committed plain error when she permitted the trial counsel to question Appellant about the truthfulness of a government witness. The trial counsel repeatedly asked Appellant whether SD was "lying" in her testimony. Requiring Appellant to label a government witness as a liar implies that in order to acquit Appellant, the members must first conclude that the government witness was lying.

VI. and VII.

The evidence is legally insufficient to support a conviction of a violation of Article 92(1), UCMJ, because the content of the regulation at issue was never admitted into evidence, and the regulation itself is not punitive because it is not self-executing and it does not set forth a code of conduct for individuals.

VIII.

The military judge abused her discretion in failing to grant a mistrial when it became apparent that the members were no longer confident in their verdict. Evidence came to light on sentencing that caused some members to want to "re-vote" on the findings of guilty of specification 4 of Charge II. The military judge should have declared a mistrial and permitted the members to vote on the findings anew.

IX.

The evidence is factually insufficient to support a charge of unlawful sexual contact under Article 120, UCMJ. SD had more than one motive to fabricate; she made statements that were inconsistent with her trial testimony and her trial testimony itself was internally inconsistent; her version of events is inherently unbelievable; the evidence that Appellant is a peaceful person was unrebutted; and the government failed to prove that Appellant did not have an honest and reasonable mistake of fact as to consent beyond a reasonable doubt.

X.

Appellant was denied a meaningful opportunity for clemency. The military judge e-mailed the members telling them not to communicate with the defense counsel, and then issued an order having a "chilling effect" on the likelihood that they would make a clemency recommendation. In the order the military judge

focused on the rules that prohibit revealing deliberation and voting, when the defense specifically said that it did not want to know that information, and merely wanted a recommendation for clemency. Furthermore, Appellant was denied a meaningful opportunity for clemency when at least two members indicated a desire to submit a clemency recommendation directly to the convening authority rather than through the defense counsel, and at least one of those members actually submitted a recommendation to the SJA but the SJA apparently never forwarded the recommendation to the CA. While the SJA is not required to state in the SJAR that there are clemency recommendations that were not made "in conjunction with the sentence," there is no authority for the SJA to withhold a clemency recommendation from the CA when he receives one. The SJA breached his duty of candor to the CA by implying that there were no clemency recommendations from the members when in fact there was at least one and possibly more.

XI.

The military judge partially granted a motion for a finding of not guilty under R.C.M. 917, finding insufficient evidence that Appellant made one statement underlying a charge of sexual harassment in violation of Article 92, UCMJ. The promulgating order reflects the language as alleged in the charge sheet. Appellant is entitled to a new promulgating order that

accurately reflects the findings as amended by the military judge.

Argument

I.

APPELLANT WAS DENIED THE RIGHT TO DUE PROCESS UNDER THE FIFTH AMENDMENT WHEN THE GOVERNMENT FAILED TO PROVIDE SD'S MEDICAL RECORDS, RELEVANT AND NECESSARY EVIDENCE THAT THE DEFENSE HAD SPECIFICALLY REQUESTED PRIOR TO TRIAL, AND SD TESTIFIED THAT SHE HAD SUFFERED PHYSICAL HARM AS A RESULT OF APPELLANT'S CONDUCT.

Standard of Review

Ordinarily, a military judge's decision with respect to discovery is reviewed for an abuse of discretion. *See United States v. Branoff*, 38 M.J. 98, 104 (C.M.A. 19993). However, when it becomes apparent at trial the government has failed to provide relevant evidence that was the subject of a specific request for discovery, the question is whether the failure to disclose the evidence is harmless beyond a reasonable doubt. *United States v. Coleman*, 72 M.J. 184, 187 (C.A.A.F. 2013).

Argument

Prior to trial the Article 32, UCMJ, investigation the defense requested, among other things, "any medical records, which exist for SD for any medical treatment, received as a result of any complaints pertaining to this investigation;" "any psychiatric records which exist for SD which predate 4 October

2012, which may bear upon SD's mental capacity on 4 and/or 10 October 2012;" and "any psychiatric records which exist for SD for any treatment received as a result of any mental issues attributed to the alleged misconduct by [Appellant]." Appellate Ex. LXXI, paras. 3.m, 3.o, and 3.q.

The defense made a subsequent discovery request, seeking

> Access to all relevant personnel, medical and mental health records of all potential witnesses who may testify against the Accused at any stage of the case . . . . Please do not make a blanket denial of relevance without reviewing the records of potential witnesses. Relevant records would include anything that might diminish witness credibility or suggest bias, any records reflecting statements by alleged victims related to the charges, and any records of physical or mental health treatment related to the charges.

Appellate Ex. LXXII, para. 6.l. The defense also sought

> Any evidence that any prospective witness has consumed alcohol or drugs prior to witnessing the events that gave rise to his/her testimony. In addition, the defense requests any evidence, including any medical or psychiatric report or evaluation, tending to show that any prospective witness's ability to perceive, remember, communicate, or tell the truth is impaired and any evidence that a witness has ever used narcotics or other controlled substance, or has ever been an alcoholic.

Id., para. 6.m.

It is not clear from the record how the government responded to these requests. That is, it is unclear whether the government told the defense that no such records existed, or merely ignored the defense request. What is clear is that the

defense received nothing responsive to any of the requests described above.

On cross-examination of SD, the defense elicited that SD had a lawyer, and had spoken to her lawyer the day before her testimony. R. at 684. The defense elicited that the lawyer "was not one of these two gentlemen here," an obvious reference to the prosecution team. R. at 685. The defense elicited that SD had filed a lawsuit in this case, that she did not recall how much money was asked for in the lawsuit, although she "had a conversation" with the lawyer about what they needed to ask for. R. at 792. SD testified that her "demand" in the lawsuit was for "[a]ttorney's fees, medical expenses," but denied that she had a specific figure. R. at 793-94. SD said that her attorney filed paperwork through her employer, the Defense Logistics Agency. R. at 797.

On re-cross examination during the government's case in rebuttal, SD admitted that she was undergoing counseling sessions and taking medicine for anxiety, and one of the things that her lawyer included is a claim for infliction of emotional distress. R. at 1145. SD admitted, "I've seen a doctor and I've gotten prescriptions." *Id.*

During an article 39(a), UCMJ, session, the defense told the military judge, "it appears to me that we have another discovery violation. There are medical records that SD has that

were argued in the rebuttal. We have not seen those and I certainly asked for those." R. at 1245. Defense counsel stated, "she said she has seen – she's gotten medications, so there must be some medical records, but . . . ." *Id.*

On the following day the military judge noted, "it seems obvious to the court that there was some – there probably is some medical records. It's obvious to the court that those medical records were requested by the defense." R. at 1253. The military judge then asked the trial counsel to explain what happened with that. R. at 1253. Trial counsel made the same argument that it did with respect to the records regarding the learning disability, discussed below, which was that the records were not in the possession of the government, and they only became relevant when SD testified about it. R. at 1254. The military judge asked trial counsel, "[I]f there's a request for medical records and medical records exist, do–did you–I-did you inform the defense that medical records exist, but you – you're going to object to the dissemination of those medical records based on relevancy grounds?" R. at 1254-55. Trial counsel responded that the "the government's position is that they were not relevant at that time, that's why they were not used. Obviously, they've become relevant through the witness' testimony, but we did not intend to get into that area, so . . . ." R. at 1256. The military judge noted that "the appropriate

response from the government would be to say that these records exist, and then to object to the dissemination based on whatever arguments you have. So, I just don't think it was . . . handled properly." R. at 1256.

Defense counsel stated,

> I don't know the full extent of her injuries, but I would want to know if she's going to--if there's a sentencing case, and I agree that they may not be as relevant on--on--in--on the merits, but I don't know which medication she's on. I mean I don't know what this anxiety medication does, does it change her demeanor, does it make her more calm? So, these are things that--that I think we're entitled to discover. They may not be relevant. You may shut--you may shut that down. On--if there is a sentencing case, I'd want to know if injuries--preexisting injury--if there are preexisting injuries that . . . .

R. at 1257.

After some discussion about an appropriate remedy, the military judge said, "But there's nothing to be reviewed today, so that's the problem . . . I can't make that determination as to whether . . . it should be disseminated. I think it's relevant for the sentencing case certainly, but whether you have a fair opportunity of cross-examining the witness because you don't have discovery, you know, that's the issue." R. at 1258-59. Ultimately the defense agreed that the best way to handle it if the case gets to sentencing would be to limit SD's testimony. R. at 1259.

Prior to the sentencing case the military judge wanted "to hear what the road map is of SD's testimony . . . to make sure that it comports with the court's earlier ruling regarding medical and psychological type of evidence." R. at 1298. The military judge noted that the members are generally permitted to consider all of the evidence that has been admitted at the trial, that this information wasn't objected to, but she could tell the members to disregard it if that is what the defense wants. The defense acceded to the military judge's suggestion that she instruct the members to disregard that particular evidence. R. at 1300.

The defense questioned whether proffered testimony about SD's fear and paranoia would be permitted, given the court's ruling. He stated,

> I'm not sure how to navigate that to – to allow the government to put in their evidence without touching on those issues, which the court has already ruled that we should have had some discovery on. The military judge said that how SD feels at work as a result of this is allowable because it doesn't go into the medical or psychological issues, it's just how she feels about returning to the site of the assault. R. at 1301.

The government stated that SD was "going to describe a generalized fear and anxiety, I mean not in a clinical sense that she's been diagnosed with it, but I'm not sure that she's able to adequately describe how she feels emotionally without using those terms." R. at 1301. The military judge said that

that would be permissible so long as there is no mention of seeking help. R. at 1301-02.

Trial counsel also said that it intended to elicit how SD's views of military officers had changed, "experiencing some nightmares and – and then kind of flashbacks to the – to the incident." R. at 1302. The defense argued, "that would have been part of the medical and mental health reports, I mean we would like to see those." *Id.* The military judge ruled that that is too close to the areas that the defense would not have a fair opportunity to cross-examine on, and told the government not to discuss flashbacks. R. at 1302.

As a matter of due process, the Government must disclose all evidence subject to discovery, including exculpatory information in its possession. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The right to discovery in the military is broader than both the constitutional requirement and that required by practice in federal civilian trials. *United States v. Jackson*, 59 M.J. 330, 334 (C.A.A.F. 2004); *United States v. Kinney*, 56 M.J. 146 (C.A.A.F. 2001). Article 46, UCMJ, provides, "The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations the President may prescribe." 10 U.S.C. § 846, Article 46, UCMJ. R.C.M. 701 states, "each party shall have adequate opportunity to prepare its case and

equal opportunity to interview witnesses and inspect evidence. No party may unreasonably impede the access of another party to a witness or evidence." R.C.M. 701. Where the defense has made a specific request for undisclosed information, the failure to disclose the information is "not harmless beyond a reasonable doubt if the if the undisclosed evidence might have affected the outcome of the trial." *United States v. Coleman*, 72 M.J. at 187 (citing *United States v. Hart*, 29 M.J. 407, 409 (C.M.A. 1990). Failure to disclose specifically requested material favorable to the defense is not harmless beyond a reasonable doubt if the undisclosed evidence might have affected the outcome of the trial. *Id.* Moreover, even applying the less deferential non-constitutional "harmless error" standard, "if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt. *United States v. Eshalomi*, 23 M.J. 12, 22 (C.M.A. 1986).

Specifically with regard to mental health records, in *United States v. Reece*, 25 M.J. 93 (C.M.A. 1987) the Court of Military Appeals set aside the findings and sentence in a case in which the defense had requested the records of two juvenile victims prepared by social service and mental health personnel that had been denied by the state on grounds of privilege. 25 M.J. 93 (C.M.A. 1987). Recognizing the "much more direct and

generally broader means of discovery" of a military accused compared to his civilian counterparts, and that "the only restrictions placed upon the liberal discovery of documentary evidence by the accused are that the evidence must be 'relevant and necessary' to the subject matter of the inquiry, and the request must be reasonable," the Court held,

> Some forms of emotional or mental defects have been held to have high probative value on the issue of credibility. . . . A conservative list of such defects would have to include . . . most or all of the neuroses, . . . alcoholism, drug addiction, and psychopathetic personality. We cannot discount the possibility that the information contained in the state's reports may have had an impact on the defense's trial strategy.

Reece, 25 M.J. at 96.

The evidence in this case was relevant and necessary. It was relevant to SD's credibility, both on findings and on sentencing, and it was necessary to the preparation of the defense case. Appellant acknowledges that he does not know exactly what those records contain, but that is precisely the issue. They may contain evidence that SD was untruthful to the panel. She said she was suffering anxiety as a result of the incident and was prescribed medication for that. What if none of that is true? What if she made statements to her provider that are inconsistent with her in-court testimony? What if her provider thought she was faking it, and noted as much in the records? All these are questions that would have contributed to

a likely acquittal. The erroneous denial of this evidence detrimentally limited Appellant's trial strategy.

Depending on what the records actually revealed, it is likely that the disclosure would have impacted the defense case from the very first day. First, the defense may have sought the help of an expert consultant or an expert witness. Second, Appellant may have made a different forum selection. Third, the defense may have asked different or additional questions during the *voir dire* of the panel and made different determinations regarding challenges. Fourth, Appellant may have made a different election with respect to whether he would testify.

As noted, Appellant does not know what was in the records. But, respectfully, neither does this Court. And neither did the military judge. But SD's testimony that she had been treated specifically as a result of this incident, that she had filed some sort of "paperwork" against the United States in which she was seeking compensation for emotional distress, and that she sought compensation for "medical expenses," should have alerted the military judge of the relevance and necessity of this evidence. In this regard, after finding that a discovery violation had occurred, the remedy she chose was inadequate because she assumed that the discovery violation affected only the sentence and not the findings. Once the military judge determined that the violation had occurred, she should have

stopped the trial and held the proceedings in abeyance until such time as the records could be obtained.

The United States violated Appellant's due process right to discovery and his statutory right under Article 46, UCMJ. The military judge recognized the discovery violation, but chose an inadequate remedy. The findings and sentence must therefore be set aside.

II.

APPELLANT WAS DENIED THE RIGHT TO DISCOVERY UNDER ARTICLE 46, UCMJ, WHEN THE GOVERNMENT FAILED TO PRODUCE EVIDENCE OF SD'S "LEARNING DISABILITY" IN RESPONSE TO A GENERAL REQUEST FOR EVIDENCE IMPACTING SD'S CREDIBILITY. THE ERROR WAS NOT CURED BY THE MILITARY JUDGE'S LATER CONCLUSION THAT THE EVIDENCE WAS NOT RELEVANT AFTER SHE HAD ARTICULATED THE RELEVANCE AND THE DEFENSE SOUGHT TO USE THE EVIDENCE TO ATTACK SD'S CREDIBILITY.

Standard of Review

A military judge's decision with respect to discovery is reviewed for an abuse of discretion. *United States v. Branoff*, 38 M.J. 98, 104 (C.M.A. 1993). When the defense makes a general, as opposed to a specific, request for discovery, the question is whether, in the context of the entire record, the evidence creates reasonable doubt that does not otherwise exist. *Eshalomi*, 23 M.J. at 22.

Argument

The defense filed two requests for discovery in this case. In the first, the defense sought, among other things, "Any information favorable to the defense known to the government, including but to limited to any negative information bearing upon the credibility of SD." Appellate Ex. LXXI, para. 3.v. In the second, the defense requested, among other things, "any evidence, including any medical or psychiatric report or evaluation, tending to show that any prospective witness's ability to perceive, remember, communicate, or tell the truth is impaired." Appellate Ex. LXXII, para. 6.m. The defense received no evidence responsive to these requests.

During the opening statement, trial counsel compared Appellant, a person "smart, extremely knowledgeable about his job, seemingly successful in his career, gone to the Naval Academy and had done well there" with SD, a person who, among other things, "was enrolled in a program for students with learning disabilities." R. at 584. During direct examination of SD, the government started to ask questions relating to SD's high school experiences. The defense objected on grounds of relevance, and the military judge overruled the objection. R. at 597. The government then asked whether SD "face[d] any unique challenges as a student." The defense asked for an Article 39(a), UCMJ, session. R. at 598. The defense counsel stated,

> We have--we are aware that there is some suggestion that SD may have some learning disabilities. She has told investigators that she needs things to be explained more to her. We have never received any discovery on this, besides SD's statements, there's been no reports--medical reports, and I think where trial counsel is going right now is to inquire into that issue, but that has no relevance whatsoever regarding competency, regarding capacity or anything of that nature, it is simply being elicited to prejudice this jury that this is a young lady and, as you heard in their statement, they made a lot about "Oh, she's younger, she didn't go to--she didn't finish college," and now we're going into—they didn't say in opening, but now we're going into "Oh, she's got a learning disability," but I don't know the extent of this disability, we've had no discovery on it, how extensive it is, whether she—they didn't even feed [sic] lack of capacity, so I don't know that this is relevant.

R. at 599-600.

Trial counsel stated,

> we have no discovery on it either, there's nothing — it's not a matter of nondisclosure, the only information we have is what she's told us. Likewise, I don't know the extent of it either. I know that it's a problem that she's faced her entire life, which is what she'll testify to. The defense will have an opportunity to cross-examine her, if they feel it's appropriate. If they don't believe that it's a valid learning disability, but as you can see one of the central issues in this case is going to be her lack of response, as well as some explanation about why she may not have responded, and the government's position is that this learning disability is probably one of the many factors that may explain why she responded or failed to respond in the way that she did.

R. at 600.

The military judge found that the information could be relevant, but said, "As far as whether there's a discovery violation, if there is no — if there is no discovery to provide

or if the government doesn't have any discovery, the court can't find any error with that." Id. She went on, "there's going to be cross-examination on the issue and it will be fair to go into that, once the government brings on this issue of the learning disability." R. at 601.

Defense counsel stated,

> Well, they haven't pled this, I mean they could have pled – put us on notice – we're not on notice of some sort of incapacity. They're going into – they pled apprehension or fear and now we're going into disability, that's not fair notice. I submitted an exhaustive discovery request that covered medical records and we never were provided that. If you go into that now, it's ambush, all right, that's not the theory that the government has charged [Appellant] with.

R. at 601.

The military judge said that she did not know that there would be medical records for a learning disability, but that there could be school records, psychological records, or records of testing done at school. R. at 601. Civilian defense counsel said, "I don't have any of it." *Id.* When the military judge said, "I don't know that the government has it either," defense counsel countered, "They're required to get it if they're going to talk about it and give it to us." *Id.*

Trial counsel said that there would "be actually very little discussion, I have a couple of questions on [the learning disability] and that's it," that "it's not a central theme to

our case," and "it's one of many factors that we intend to suggest is the reason – the way she responded or failed to respond." R. at 601-02. Trial counsel said that the government was not going to argue lack of capacity, and lack of capacity was not a theme of the government's case. R. at 602. The military judge overruled the objection because in her view, the learning disability was "relevant to explain why she responded the way she responded." *Id.*

Civilian defense counsel argued that

> there's got to be a nexus between the learning disability and the lack of response, and we have never had anything discovered on us to suggest that the lack of response is related to a learning disability. What she has said – what she has said is she needs thing explained to her at work or she has to read slower.

R. at 602.

The military judge responded, "It could be the reason why she felt intimidated. I mean if she has a history of feeling intimidated because she's not as smart as other people in the room because she has a learning disability, that's relevant, that's the nexus." *Id.* The defense counsel noted that it would be relevant if that were the case, and his concern was that "these jurors might make it relevant when it's not." R. at 603. He said, "This should have been handled before, if they wanted to go into it. . . if she's got a learning disability, then she was tested, and we're entitled to see those records." R. at 603.

The military judge said that whether she has been tested was something the defense could ask about on cross-examination, and offered to give a limiting instruction if necessary. *Id.* The defense maintained its objection stating, "you can't un-ring the bell once you ring it," but the objection was overruled. R. at 604.

SD returned to the stand to testify, and discussed her learning disability. She said she faced challenges in high school as a result of the disability but was able to graduate "despite that disability." R. at 605. SD testified that she attended college after high school and traveled and worked. R. at 606-608. While attending community college, she participated in the "Workforce Recruitment Program," which is a "program for people with disabilities," and that was how she was able to get into the DLA. R. at 608.

On cross-examination, SD testified that "part of" her disability is a deficiency in her ability to read quickly, meaning she needed a little bit more time to read things. R. at 686. She also said she had a problem comprehending things "to an extent," meaning she "might need things explained further, in more detail." *Id.* SD said she did not "advertise" that she has a learning disability. *Id.* She said she "work[s] ten times harder to compensate further." R. at 687. SD

testified that if she did not understand something, she would ask about it. *Id.*

SD testified that she was tested for the learning disability in high school as part of an Individual Academic Plan. R. at 688. She said the school did the testing, and there was a report. *Id.* SD said she did not share the report with the prosecutors, but she did let them know that there was a report. She said the report still existed, and it would go into the detail of her disability. *Id.*

SD then described the mechanics of the test, said she did not have any cognitive disabilities and had normal social skills. R. at 689. She said she is able to understand what happens around her in social settings, and she is able, for the most part, to understand what's going on at work, specifically the things she is required to understand. *Id.*

During a break in the testimony, the military judge offered to give a limiting instruction with respect to the learning disability, stating, "the only relevance is related to address how she responds to some of the questions and maybe the delays that have occurred." R. at 796. Neither the government nor the defense wanted a limiting instruction, but the defense counsel noted that he would still like to see the records. *Id.* After some discussion, the military judge ordered the trial counsel to

ask the witness to provide whatever documents he has related to the Individual Academic Plan. R. at 798.

SD provided the document to the TC, who provided it to the military judge. The military judge concluded that it appeared to be educational testing, and that it was necessary discovery for the defense, and ordered a copy to be provided. R. at 1098. The defense counsel noted that he had made a discovery request prior to the start of the trial in which he had requested this information. He said, "We're done, our – our case is over, I have not had an opportunity to consult with any type of expert to inquire as to the value, or lack of value, of these records. I still haven't seen them and I just want to put that on the record. The fact that I'm getting it now is interesting, but it doesn't help me." R. at 1099. The military judge stated, "I'm not sure if, in your discovery request, that you asked the government to get educational-type testing that was done in the schools. That's what this is." R. at 1099. Trial counsel said, "There was no such – nothing that specific by any means." *Id.* The military judge concluded, "the court does not view it as having any relevance . . . it is not information that is particularly relevant to these proceedings. It . . . corroborates the alleged victim's statement that she had some sort of learning issue. *Id.*

Trial counsel reiterated that "it was not in the government's possession." R. at 1100. Civilian defense counsel countered that the law does not require it to be in their possession; they're required to ask for it based on the language of the discovery request. *Id.* The military judge stated that she understood both the defense and the government's arguments, but "it just has no value to these proceedings, as I — as I see it, so I just don't see that there's any harm." *Id.*

Civilian defense counsel argued,

> They made it relevant by talking about it. What I suspect is going to be an argument for a lack of competency . . . not in the scientific term, but a lack of ability to — or a lack of parity in education and experience, and now in perhaps intellect or educational — I don't know what they're going to argue, but I'm sure we'll hear it. We heard it on opening.

R. at 1100.

Trial counsel said he did not plan on mentioning the learning disability "specifically." R. at 1101. The military judge ruled that the government could not mention it because it had no relevance to the crimes themselves, and might be relevant only

> to explain why she might have a difficult time reading some of the documents that were presented to her and answering some of the questions that were posed to her. And both sides said they didn't want me to instruct on it, and so I'm not planning on it, unless somebody changes their mind. But I would ask you not to utilize it in your arguments to — to argue that

> that is one of the bases for the conduct unbecoming charge, for example, or really any of the charges.

R. at 1101.

The government recalled SD in its case in rebuttal. The defense sought to ask her about her learning disability and about the testing that was done. R. at 1150. Specifically, he sought to ask whether she was aware of the content of the testing. *Id.* The government objected based on hearsay, relevance, and that the questions were outside the scope of the re-direct examination. The defense argued, "It goes to credibility, it's always relevant." R. at 1150.

The military judge excused the members, and asked the defense to explain the relevance. R. at 1150-51. The defense argued that SD lied about having a learning disability because although the tests reflect that in some areas she tested in the low-average range, her tests nevertheless reflected that she was average. R. at 1152. The military judge said that the defense could not use the document to impeach her on her earlier statements that she had a learning disability because

> that document doesn't do it and those – any questions that stem from that document aren't going to be admissible for that purpose. We made a big stink earlier on in these proceedings about how much her learning disability can come in and how it's relevant, and you didn't want it coming in for any – at all, and then when it did come in, it only comes in for the purpose of – as I talk to you, I can tell – I told you what I would tell the members that it would only be used to – to discern why it may have taken her awhile

> to answer questions and – and things of that nature, so. . . .

R. at 1152. Civilian defense counsel argued,

> I don't see how that . . . even squares with these tests. Now, I may be off, but given the fact that I just got these, I don't have an expert, I'm a lay person reading these tests, and they've already spoken about it, they've said that she's got – she's slow in responding because of these tests, and now you're telling me, after I received the – the report, "Oh, you can't ask about it."

R. at 1152-53.

The military judge said she was ready to strike all of SD's testimony on the learning disability and tell the members it has no bearing on the proceedings. R. at 1153. She said that she did not see that type of information in the defense discovery requests. *Id.* Civilian defense counsel said that it was in paragraph 6.m of his discovery request. Id.; Appellate Ex. LXXII. In the defense's view, the request was for any report that would tend to impact a witness' ability to communicate, that that is what the government has alleged, and that is what was covered by the defense discovery request. R. at 1154. The military judge said, "I don't see it that way at all," and "at this point I'm going to ask the court members to disregard any testimony that was adduced yesterday or today on a learning disability, finding that it's not relevant to these proceedings." *Id.* Civilian defense counsel stated that the way he remembered it,

> is the government talking about, in their opening, a person with a learning disability, and we did not have that report . . . but when it says "average" or "low-average," which is still in the average range, it does not – it doesn't say there's a learning disability and it doesn't say there isn't, it just has . . . .

R. at 1155. The military judge cut him off, saying, "That's right, that's kind of my point." Id. Civilian defense counsel said,

> I didn't say, 'You don't have a learning disability,' I just asked her about the averages. And I used the statement – I used the document because I didn't have that information already prepared. I'm not moving for the document to be admitted, I'm just creating a record at this point, but that is the purpose of my examination of her. And the reason for that was – and I think it goes to credibility because she came in here and testified that she has a learning disability and, based on everything in this document, it doesn't appear to me that she does. I may be wrong, but I don't have an expert to tell me otherwise.

R. at 1155.

The military judge responded,

> I understand. I believe there are probably other documents in the School District. I mean she was a minor. She – when a person's in school, they're – they're a . . . those documents would not be in her possession. They could be in her mother's possession or her guardian's possession, but they're generally not given to minors. I – I just say that.

R. at 1156. The military judge concluded that she would ask the court to disregard any and all references to SD's learning disability. *Id.* She then instructed the members, "You are to disregard completely and not consider in any of your deliberations whatsoever any of the testimony or comments

regarding a learning disability that SD may or may not have. So just completely disregard that and you're not to consider it in any of your findings whatsoever." R. at 1158.

The right to discovery in the military is broader than both the constitutional requirement and that required by practice in federal civilian trials *United States v. Jackson*, 59 M.J. 330, 334 (C.A.A.F. 2004). Article 46, UCMJ, provides, "The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations the President may prescribe." R.C.M. 701 states, "each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence. No party may unreasonably impede the access of another party to a witness or evidence." R.C.M. 703 provides that the defense has the right to obtain evidence, including the benefit of compulsory process. R.C.M. 703(f)(4)(B) provides for the issuing of a subpoena for evidence not under control of the government in accordance with the procedures outlined in R.C.M. 703(e)(2).

A. The evidence in this case was relevant.

As a threshold matter, irrelevant evidence need not be disclosed. Relevant evidence is evidence making the existence of any fact of consequence more probable or less probable than it would be without the evidence. M.R.E. 401.

The military judge first concluded that the evidence of SD's learning disability was relevant "to explain why she responded the way she responded." R. at 602. The "nexus" between SD's lack of response and the learning disability was, according to the military judge, "the reason why she felt intimidated because she's not as smart as other people in the room because she has a learning disability." *Id.* The military judge continued to believe the evidence was relevant "to address how she responds to some of the questions and maybe the delays that have occurred." R. at 796. The military judge believed the learning disability was relevant "to explain why she might have a difficult time reading some of the documents that were presented to her and answering some of the questions that were posed to her." R. at 1101.

Although the defense counsel apparently initially disagreed that the learning disability was relevant, the military judge ruled that it was, and articulated why that was so. Then the defense attempted to exploit that ruling by showing that SD testified that she had a learning disability and may have been untruthful about that. Nothing transpired in the trial between the time that the military judge initially ruled that the evidence was relevant to change its character from relevant to irrelevant. It was relevant to show how SD responded, both to Appellant's conduct, and to how she answered questions posed to

her during the course of the investigation. And, as the defense argued, it was relevant to counter the government's suggestion in its opening statement that Appellant held power over her because of the disparity in their education, and to impeach SD's credibility when she claimed she had a learning disability but might not have.

In this regard, one theory of the defense's case was that SD made up these allegations against Appellant as a means to obtain a settlement from the United States. If SD did not, in fact, have a learning disability, her exploiting the "Workforce Recruitment Program" – a program reserved for people with disabilities – would tend to reflect a pattern of behavior in which SD engaged in mendacious behavior in order to obtain a benefit to which she was not otherwise entitled. And it was *the government* that elicited this testimony from SD, and it was therefore relevant to SD's credibility with respect to her entitlement to this program.

Thus, the military judge erred in ultimately concluding that the evidence was not relevant, particularly after she had articulated its relevance over and over again.

B. The evidence was subject to discovery under Article 46, UCMJ, and R.C.M. 701.

As discussed, one aspect of the government's case was the disparity in education between Appellant and SD. The government

said it was "one of many factors that may explain why she responded or failed to respond in the way that she did." R. at 600. According to SD's testimony, the government was aware of her learning disability, and was aware that it was documented. R. at 688. As noted, military law "provides a much more direct and generally broader means of discovery by an accused than is normally available to him in civilian courts." *United States v. Reece*, 25 M.J. 93, 24 (C.M.A. 1987). The "only restrictions placed upon the liberal discovery of documentary evidence by the accused are that the evidence must be 'relevant and necessary' to the subject matter of the inquiry, and the request must be reasonable." *Id.* (citing R.C.M. 703(f)(1) and (f)(4)(C)).

Initially, Appellant notes that evidence regarding SD's learning disability was discoverable whether the government intended to use it or not, because it is relevant to her ability to perceive, recall, and communicate, and was therefore relevant to her credibility. But once the government decided to compare Appellant's education with SD's and depict SD as a person who "was enrolled in a program for students with learning disabilities," ask SD about whether she "face[d] any unique challenges as a student," and elicit testimony that she was able to get her job in part because of her learning disability, it should have been apparent to the government that such a disability would have to have been documented, and the documents

were responsive to the defense's discovery request. SD testified that the government was, in fact, aware that the learning disability had been documented. The government should have obtained those documents directly from SD (as it eventually did) so the defense could prepare for trial, and, if necessary, obtain expert assistance in determining whether SD did, in fact, have a learning disability. And given that the documents eventually turned over are somewhat vague with respect to whether SD actually does have a learning disability, the government should have subpoenaed any additional documents from SD's high school and community college and provided those to the defense as well. In this regard, Appellant submits that there are likely other documents that were responsive to the request that were not turned over, including, as the military judge noted, "other documents in the School District," plus whatever documents made SD eligible to participate in the Workforce Recruiting Program.

C. Appellant was prejudiced by the failure of the government to provide the evidence to the defense, and the military judge's instruction to disregard the evidence compounded rather than cured the error.

As the defense argued to the military judge, he submitted a discovery request for this type of information, and by the time he actually received it, the defense case was over. R. at 1099. The defense noted that he was unable to consult with an expert

to inquire as to the value of lack of value of the records he received. *Id.* The military judge's instructing the members that they could not consider the learning disability did not cure the discovery violation. Whether SD did or did not have a learning disability was relevant to the proceedings, and whatever documents existed that described the extent or lack of the disability were relevant to that.

Discovery must be both timely and complete. *See United States v. Pomarleau*, 57 M.J. 351, 364 (C.A.A.F. 2009)(holding that a military judge has a duty to regulate the discovery process to ensure the timely administration of justice, and to protect against surprise and attempts to present unreliable evidence to the members). The discovery in this case was neither.

Appellant had a substantial right to discovery under Article 46 and Article 59(a), UCMJ. The government had an obligation to provide the discovery but did not. The military judge compounded rather than cured the error when she delayed in requiring the government to provide the discovery, failed to require the government to obtain other evidence related to SD's learning disability, and ultimately concluded that evidence of the learning disability was not relevant. When the defense makes only a general request for exculpatory evidence or information, the prosecutor's failure to provide the evidence is

reversible only "if the omitted evidence creates a reasonable doubt that did not otherwise exist." *Eshalomi*, 23 M.J. at 22. As noted in the previous assignment of error, this standard is reduced somewhat from the "harmless beyond a reasonable doubt" standard applied in cases of specific requests.

But even under this reduced standard, the government's failure to provide the evidence in this case nevertheless mandates reversal because the evidence creates a reasonable doubt that did not otherwise exist, for all the reasons described herein. The omission must be evaluated in the context of the entire record. *Eshalomi*, at 22. Because the evidence directly related to SD's credibility, the verdict in this case was already of questionable validity, what may have seemed minor to the military judge might have caused reasonable doubt for the members. *Id.*

The findings and sentence must therefore be set aside. WHEREFORE Appellant so prays.

III.

APPELLANT WAS DENIED THE RIGHT UNDER THE SIXTH AMENDMENT TO CONFRONT HIS ACCUSER WHEN THE MILITARY JUDGE FIRST CONCLUDED THAT EVIDENCE RELATED TO SD'S LEARNING DISABILITY WAS RELEVANT, PERMITTED THE GOVERNMENT TO QUESTION HER ABOUT IT AT LENGTH, THEN DENIED THE DEFENSE THE OPPORTUNITY TO CROSS-EXAMINE HER ON IT AND INSTRUCTED THE MEMBERS TO DISREGARD IT. EVIDENCE OF SD'S LEARNING DISABILITY, OR LACK THEREOF, WAS RELEVANT TO HER CREDIBILITY.

Standard of Review

"Where the Sixth Amendment's right to confrontation is allegedly violated by a military judge's evidentiary ruling, the ruling is reviewed for an abuse of discretion . . . [and if] an abuse of discretion is found, the case will be reversed unless the error is harmless beyond a reasonable doubt." *United States v. Moss*, 63 M.J. 233, 236 (C.A.A.F. 2006).

Argument

As discussed in the previous Assignment of Error, the military judge ruled that evidence relating to SD's learning disability was irrelevant, and prevented the defense from inquiring into it further. As noted, although the defense initially thought the evidence was not relevant because it was concerned that the government was going to use the evidence to argue a theory of guilt (lack of capacity) that had not been alleged in the specification, it became apparent through the course of the trial that the evidence was relevant to SD's responses, both to Appellant's conduct and to questions posed to her by investigators. Once the defense obtained the testing documents that tended to reflect that perhaps SD did not, in fact, have a learning disability, the defense sought to impeach her statement that she did.

An accused in a criminal prosecution has the right, under the Sixth Amendment, to confront the witnesses against him. *Delaware v. Van Arsdall,* 475 U.S. 673, 679 (1986); *United States v. Anderson,* 51 M.J. 145 (1999). Included in that right is the right to cross-examination. *Davis v. Alaska*, 415 U.S. 308, 315 (1974)(holding that "Cross examination is the principle means by which the believability of a witness and the truth of his testimony are tested."). Cross-examination is essential for exploring the credibility of a witness and to uncover any bias, prejudice or ulterior motives of a witness. Partiality is "always relevant" to determine the credibility of a witness. *Davis*, 415 U.S. at 316. Exposing a witness' motive for testifying is a "proper and important" component of the constitutional right to cross-examine a witness. *Van Arsdall*, 475 U.S. at 678 . But the right to confrontation is not absolute; a judge may limit cross-examination in order to avoid harassment of a witness or questioning that is "marginally relevant." *Id.* at 679. "When an appellant claims a violation of the Confrontation Clause on the grounds that he was prohibited from conducting an otherwise appropriate cross-examination designed to show a witness's bias, the appellant has the burden of showing that a reasonable jury might have reached a significantly different impression of the witness's credibility if the defense counsel had been able to pursue the

proposed line of cross-examination. *Moss*, 63 M.J. at 236 (citing *Van Arsdall*, 475 U.S. at 680). M.R.E. 608(c) provides that "Bias, prejudice, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced."

As noted previously, the government sought to paint disparate images of Appellant and SD, with Appellant, a Naval Academy graduate, at one end of the educational spectrum, and SD, a person with a learning disability, at the other. Despite the government's later characterization of the relevance as SD's "lack of response," it is obvious from its opening statement to the members that the government wanted the members to consider this learning disability in the context of a power dynamic. The military judge herself concluded that the evidence was relevant, and articulated her reasons at least five different times. She stated that evidence of the learning disability was "relevant to explain why she responded the way she responded." R. at 602. She said, "it could be the reason why she felt intimidated . . . if she has a history of feeling intimidated because she's not as smart as other people in the room because she has a learning disability, that's relevant." *Id.* She said its "relevance is related to address how she responds to some of the questions and maybe the delays that have occurred." R. at 796. She said it "corroborates the alleged victim's statement

that she had some sort of learning issue." R. at 1009. And she said it was relevant "to explain why she might have a difficult time reading some of the documents that were presented to her and answering some of the questions that were posed to her." R. at 1101.

The evidence was relevant for the very reasons the military judge stated. As the government argued, "one of the central issues in this case is going to be her lack of response, as well as some explanation about why she may not have responded." R. at 600. The defense sought to attack this "lack of response" with the same evidence that the government sought to use to explain it, and should have been permitted to do that. It was also relevant to attack SD's credibility in general because SD claimed that she had a learning disability, and in fact enrolled in a program reserved for people with learning disabilities and got her job as a result of that program, when she might not, in fact, have had a learning disability. Whether she was believable on that point was a question for the members.

The military judge never explained why she no longer believed the learning disability evidence to be irrelevant after having explained over and over again that it was. And nothing in the record explains the need for this 180 degree turn. As with the previous issue, the military judge's instruction to the members that they could not consider the evidence of the

learning disability compounded rather than cured the error. The evidence was relevant to SD's credibility, and the defense was entitled to inquire about it.

The error was not harmless beyond a reasonable doubt. SD's credibility was central to the case, inasmuch as the only evidence of these offenses was SD's testimony, and Appellant testified in his own defense and denied the allegations. Appellant was denied his right to confront his accuser when the military judge denied the defense the opportunity to cross-examine SD about it, and order the members to disregard it. The findings and sentence must therefore be set aside.

WHEREFORE Appellant so prays.

IV.

THE MILITARY JUDGE ERRED IN ADMITTING EVIDENCE THAT SD MADE CERTAIN STATEMENTS TO FRIENDS THAT WERE CONSISTENT WITH HER TRIAL TESTIMONY. THE STATEMENTS WERE NOT "PRIOR CONSISTENT STATEMENTS" UNDER R.C.M. 801(d)(1) BECAUSE THEY WERE NOT MADE PRIOR TO THE TIME THE MOTIVE TO FABRICATE WAS ALLEGED TO HAVE ARISEN.

Standard of Review

The military judge's decision to admit or exclude evidence of a prior consistent statement is reviewed for an abuse of discretion. *United States v. Allison*, 49 M.J. 54, 57 (C.A.A.F. 1998).

Argument

On 4 October 2012, the day of the first charged incident, SD testified that she and Appellant had a conversation about a man named John who apparently "stood her up" for a date. SD said that she told Appellant, "I sure know how to pick them." R. at 625-26. On cross-examination of SD, the defense elicited that SD had a lawyer, and had spoken to her lawyer the day before her testimony. R. at 684. The defense elicited that SD had filed a lawsuit in this case, that she did not recall how much money was asked for in the lawsuit, although she "had a conversation" with the lawyer about what they needed to ask for. R. at 792. Appellant testified that at the end of the last encounter on 10 October 2012, as SD was leaving his office she asked, "what does this mean," and Appellant replied, "I don't know." R. at 988, 1060.

The government sought to elicit from SD in its case on rebuttal various statements that she had made as prior consistent statements under M.R.E. 801(d)(1)(B) to rebut a charge of recent fabrication. The defense objected to the evidence as hearsay. R. at 1087. The government argued that the defense's position was that SD was making all this up because of the lawsuit, and it is therefore not hearsay because it is offered to rebut the express or implied charge of recent fabrication. R. at 1088-89. The military judge stated, "I don't believe it's being used or offered for the truth, but for

the fact that it was told to other people it has a non-hearsay purpose for one." R. at 1090.

Civilian defense counsel argued,

> The--the exception contemplates, it's in the words, the "recent fabrication," and then bringing in a prior inconsistent statement. The charge that there was misconduct be--was made before the statement. I mean that--we already have the motive to fabricate. This statement came after that motive had arisen, and it does not apply. The--the recent fabrication is not here. It's the—the exception doesn't contemplate recent fabrication in court. It must look to the facts of when the mat--when the allegations began and when the recent fabrication allegation came up. And--and what we're talking about, that the motive to fabricate would have been at the time she began to tell these alleged people, if there is a motive to fabricate, and so that's what the court must look to. Statements after that don't come in.

R. at 1091.

The military judge noted that the defense had indicated in its arguments and through its questioning that she had a motive to fabricate when she met with her attorney and there was a suggestion of suing. The defense agreed with that. R. at 1091-92. The defense disagreed, however, that any statement made before that would be a consistent statement made before a motivation to fabricate, because "just because she had a motive to fabricate with her attorney doesn't mean that that motive didn't arise before." R. at 1091. The defense contended that "At the time she framed the decision to begin to tell people is when the motive to fabricate would have arisen." R. at 1092. The military judge said, "I disagree." She went on,

> The motive to fabricate would have occurred, according

> to what this court has heard, when she consulted an attorney. I mean she testified that actually the idea of suing the government came up much later, that she was trying to figure out--that she consulted the attorney initially to figure out what her options were in terms of trying to avoid getting fired.

Id.

As a result of the military judge's ruling, SD was permitted to testify, over defense objection, that on the evening of 10 October she called her friend Allison Sneed and told her she had been sexually assaulted by her supervisor. She said she used the words "sexual assault." R. at 1130. She also testified that the next evening she told her friend, Lindsey Treadwell, that she had been assaulted by Appellant, and provided her more detail, including that Appellant shoved his hand between her legs and pulled her sweater up and told her he was going to "f— her." R. at 1130-31.

Military Rule of Evidence 801(c) defines hearsay as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." M.R.E. 801(d)(1)(B) provides that a statement is not hearsay if it is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive."

The Court of Military Appeals held, in *United States v. McCaskey*, 30 M.J. 188, 192 (C.M.A. 1990), that there is a timing requirement before a prior statement can be admitted as evidence:

> In the usual case where a prior consistent statement is offered -- one in which the witness has been charged by the adversary with having recently fabricated the trial testimony or with testifying while under an improper influence or motive -- the prior statement is offered to show that the same story as that given during trial testimony was given earlier by the declarant. However, to be logically relevant to rebut such a charge, the prior statement typically must have been made *before* the point at which the story was fabricated or the improper influence or motive arose. Otherwise, the prior statement normally is mere repetition which, if made while still under the improper influence or after the urge to lie has reared its ugly head, does nothing to "rebut" the charge. Mere repeated telling of the same story is not relevant to whether that story, when told at trial, is true.

(emphasis in original). The CAAF reiterated that for a prior statement to be admitted as substantive evidence, it must "precede any motive to fabricate or improper influence that it is offered to rebut." *Allison*, 49 M.J. at 57. Where multiple motives to fabricate or multiple improper influences are asserted, the statement need not precede all such motives or influences, but only the one it is offered to rebut. *Id.*

In this case, there may have been more than one motive to fabricate – perhaps SD was angry and wanted to get back at Appellant for equivocating, particularly after her failed relationship with "John" and Appellant's non-committal "I don't know" in response to her question "what does this mean?". Perhaps she saw dollar signs. But whatever the motive to fabricate, they all arose between the time she walked out of Appellant's office and the time she started talking about it.

The military judge erred in admitting this evidence.

Initially, Appellant notes that the military judge erred when she first concluded, "I don't believe it's being used or offered for the truth, but for the fact that it was told to other people it has a non-hearsay purpose for one." R. at 1090. There are three problems with this assertion. First, the government never said it was not being offered for the truth. Instead, the government said it was not hearsay because it was being offered to rebut a charge of recent fabrication, bringing it squarely within the confines of M.R.E. 801(d)(1)(B). Second, "the fact that [a statement was made] to other people" must be relevant in some way to make it non-hearsay. In this case the statements were relevant only to bolster SD's credibility in response to a defense charge of recent fabrication. There is simply no authority in law for skirting the Military Rules of Evidence and labeling a statement non-hearsay merely by virtue of the fact that it was made. That would swallow the hearsay rule entirely. Finally, if the statements were admitted for a limited purpose – that is, they were not admitted for their truth – then the military judge had a duty to instruct the members that they could consider the statements only for whatever limited purpose they were admitted, which, of course, she did not. *See generally United States v. Lusk*, 70 M.J. 278 (C.A.A.F. 2011) (holding that limiting instructions are required when evidence is admitted for a limited purpose).

The greater problem with the military judge's ruling is that she completely misapprehended the point in time at which a statement can be admissible to rebut a charge of recent

fabrication under M.R.E. 801(d)(1)(B). The military judge focused on SD's testimony about "when she consulted an attorney" and that "she consulted the attorney initially to figure out what her options were in terms of trying to avoid getting fired." R. at 1092. But the triggering event cannot be determined by SD's testimony; it is determined by Appellant's *allegation* of when the motive to fabricate arose. As the CAAF noted in *United States v. Faison,* 49 M.J. 59, 61 (C.A.A.F. 1998), "The focus . . . is not *when* or even *if* a recent fabrication, improper influence, or improper motive occurred. The rule is concerned with rebutting the express or implied *charge, i.e.*, accusation by a party opponent, that some impropriety occurred." And, the CAAF noted, "Often, the very fact of improper motive, etc., will be vigorously disputed, much less ascertainable as to the precise moment of origination." *Id.* at 61. Therefore, "the point in time to be ascertained for purposes of rebuttal is the fair implication of the charge, not the arguable underlying event." *Id.*

The fair implication of Appellant's charge was that the motive to fabricate arose sometime between the end of the last encounter with Appellant, right before SD left his office when she asked Appellant "what does this mean," and he responded, "I don't know" (R. at 988, 1060), and "the time she framed the decision to begin to tell people" (R. at 1092) – that is, when she first started talking about it. These statements were made after the motive to fabricate arose, and they were therefore inadmissible hearsay not falling within any exception to the

hearsay rule.

The government was permitted, over defense objection, to bolster SD's credibility with inadmissible hearsay, and Appellant was prejudiced as a result. As discussed throughout this submission, this was a he-said-she-said case, and the evidence was anything but overwhelming. Given the number of findings of not guilty, it is obvious that SD's version of events was not universally accepted by the panel. And, as discussed elsewhere, a modicum of evidence presented on sentencing was enough to make some members of the panel want to reconsider their vote, meaning that SD's credibility was not all that strong. It may well have been this evidence that tipped the balance against Appellant. The findings and sentence must therefore be set aside.

WHEREFORE Appellant so prays.

V.

THE MILITARY JUDGE COMMITTED PLAIN ERROR WHEN SHE PERMITTED THE TRIAL COUNSEL TO QUESTION APPELLANT ABOUT THE TRUTHFULNESS OF A GOVERNMENT WITNESS, AND REQUIRED APPELLANT TO LABEL THE GOVERNMENT WITNESS AS A LIAR, IMPLYING THAT IN ORDER TO ACQUIT THE MEMBERS MUST FIRST CONCLUDE THAT A GOVERNMENT WITNESS IS LYING.

Standard of Review

Absent objection, the military judge's decision to admit evidence is reviewed for plain error. *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008).

Argument

During cross-examination of Appellant, trial counsel asked Appellant to state whether SD was lying. Specifically,

> Q. And she testified that you did, in fact, call her to your office. Is that correct?
>
> A. That's what I heard.
>
> Q. Okay. So, is she lying?
>
> A. Yes.

R. at 1014.

> Q. But she testified that you told her that you were going to give her a hug, do you recall that?
>
> A. I do.
>
> Q. Is she lying about that?
>
> A. Yes.

R. at 1015-16.

> Q. When you told SD words to the effect of you wanted to be bad because of the dress she was wearing, what did you mean by that?
>
> A. I never told her that.
>
> Q. Okay. So, you're testifying that--that she lied to the panel about that?
>
> A. Yes, I am.

R. at 1016.

> Q. And when you told her that "it's probably good that you leave so I won't be bad," what did you mean by that?
>
> A. I didn't say that either.
> Q. So, again, you're--you're testifying that she lied to the panel about that?

A. Yes.

R. at 1017.

Q. So, to clarify then, she didn't actually talk to you about that desire to--to stay, or did she?

A. Oh, she did. Sara came to my office in July and asked because, again, she had--I think--I believe she had spoken to Fran, but I--I'm not certain, and she said "Hey, my--my program ends, is there anything, you know, you can look into for me?"

Q. But you heard her testify earlier that she had no such conversation with you?

A. I--I did.

Q. Was she lying about that?

A. Yes.

R. at 1083-84.

The Court of Appeals for the Armed Forces has repeatedly said that, as a general matter, a witness may not opine that another witness is lying or telling the truth. *United States v. Birdsall*, 47 M.J. 404, 410 (1998); *United States v. Marrie*, 43 M.J. 35, 41 (1995). The reason is that "[a]bsent unusual circumstances, opinion testimony on whether or not to believe a particular witness' testimony simply is not deemed helpful to the factfinder, for the factfinders are perfectly capable of observing and assessing a witness' credibility." *United States v. Cameron*, 21 M.J. 59, 63 (1985). The CAAF has held that it is specifically improper to ask the accused whether a government witness is lying. *United States v. Jenkins*, 54 M.J. 12

(C.A.A.F. 2000). Questions that force a defendant to label government witnesses as liars improperly imply that in order to acquit the defendant, the factfinder must necessarily conclude that the government witnesses are liars. *Id.*, citing *United States v. Richter*, 826 F.2d 206, 208 (1987).

Clearly, asking an accused to label government witnesses liars is improper. *Jenkins*, 54 M.J. at 18. *See also United States v. Sills*, 56 M.J. 556, 565 (A.F.Ct.Crim.App. 2001). The only question is whether the questions, and the answers thereto, absent defense objection was harmless. In this case, trial counsel asked Appellant on four separate occasions to label a government witness as a liar.

The Court in Jenkins concluded that the error was harmless in part because the appellant in that case did not "take the bait" and label most of the government witnesses liars, although he did say that some were lying. *Jenkins*, 54 M.J. at 18.

In this case Appellant did "take the bait" and said repeatedly in response to trial counsel's questions that SD was lying. And unlike *Jenkins*, there is no physical evidence corroborating the government's theory of the case; this case was, literally, a he-said-she-said case. Jenkins, at 18.

Finally, as a general matter the military judge is presumed to know and follow the law. *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007). Appellant respectfully submits that

this Court should decline to apply the presumption in this case. As the Court of Military Appeals noted long ago, the military judge bears the primary responsibility for insuring that only admissible evidence finds its way into the trial. *United States v. Rivas*, 3 M.J. 282, 286 (C.M.A. 1977). Although in Appellant's view it has always been improper, this sort of questioning has been explicitly prohibited since the CAAF decided *Jenkins* in the year 2000. The fact that the military judge permitted this line of questioning to continue without interruption suggests that she did not, in fact, know or follow the law. She admitted the evidence, and there is simply no reason for this Court to conclude that the panel did not consider it.

The findings and sentence should therefore be set aside. WHEREFORE Appellant so prays.

VI.

THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT A CONVICTION OF VIOLATION OF ARTICLE 92(1), UCMJ, BECAUSE ALTHOUGH THE MILITARY JUDGE TOOK JUDICIAL NOTICE THAT SECNAVINST 5350.16A EXISTED AS A LAWFUL GENERAL REGULATION THAT APPELLANT HAD A DUTY TO OBEY, THE CONTENT OF THE REGULATION ITSELF WAS NEVER ADMITTED INTO EVIDENCE.

Standard of Review

The legal sufficiency of the evidence is a question of law reviewed de novo. *United States v. Spicer*, 71 M.J. 470, 472 (C.A.A.F. 2013).

Argument

Early in the trial the government submitted a request for judicial notice of SECNAVINST 5350.16A, and specifically requested that the military judge "take judicial notice that SECNAV Instruction 5350.16A is a lawful general order, that it was in existence throughout October of 2012, and that the accused had a duty to obey it during that period of time." Appellate Ex. XXVI. During an 802 session the defense apparently informed the military judge that it did not object to the Court taking judicial notice as requested by the government. R. at 157. It does not appear from the record that the military judge mischaracterized the content of the 802 session with respect to judicial notice. R. at 158.

Later in the trial, prior to the government resting, the parties discussed the exhibits that would be submitted to the members. The military judge said, "Then the other issue was the judicial notice of the instruction. How did you want to deal with that?" R. at 876. Trial counsel responded, "I thought we'd resolved that issue." *Id.* The military judge said, "I did take judicial notice of it, but is it something that you want to

publish to the members or is it just something that you're going to use in the instructions?" *Id.* Trial counsel expressed his preference that "they actually get a copy of the instruction so that they can review it, review the language." R. at 877. Trial counsel said he had "a clean copy of it that could be marked." *Id.* The military judge noted that she had "taken judicial notice of the entire instruction," but informed the government that "you can decide on what part of it you want to be admitted for their review." *Id.* The parties and the military judge then discussed whether any portion of the instruction could be redacted, given the internal references within the instruction. R. at 877-78. The military judge said, "Well, I've taken judicial notice of it already, so . . . it is – the entire instruction is part of the evidence in this case." R. at 878. Trial counsel then stated, "we'll offer this as Prosecution Exhibit 14." *Id.* There was no further discussion regarding whether Prosecution Exhibit (PE) 14 was admitted; the military judge never ruled that PE 14 was admitted into evidence, and on the face of Prosecution Exhibit 14 (filed in the Record under "Prosecution Exhibits not admitted"), it states, "Prosecution Exhibit 14 for identification; Not admitted."

During argument on findings, both the trial counsel and defense counsel referred to the content of the instructions in

their arguments. For example, trial counsel argued to the members, "The lawful general order is, of course, the Navy's Sexual Harassment and Equal Opportunity Instruction. You'll have a copy of this back in your deliberations, and I implore you to look through it carefully." R. at 1200. Civilian defense counsel argued, "The SECNAV Instruction is fairly long, but not as long as some other instructions that you have worked with," and explained why, in the defense's view, Appellant's conduct did not fall within the ambit of the instruction. R. at 1221-22.

When the military judge sent the members to deliberate on findings, she told them, "In your deliberation room you will have all the exhibits that have been admitted into evidence." R. at 1269. She did not list or otherwise identify the individual exhibits. The members were provided with written findings instructions, but those instructions did not discuss the content of the regulation, only that "SECNAVINST 5350.16A is a lawful general order, that it was in existence throughout October 2012, and that the accused had a duty to obey it during that period of time." Appellate Ex. LXXXI.

Evidence is legally sufficient when, considered in the light most favorable to the prosecution, any reasonable fact-finder could have found all the essential elements beyond a reasonable doubt. *Spicer*, 71 M.J. at 472. Article 92(1), UCMJ,

provides criminal sanction for any person subject to the UCMJ who "violates or fails to obey any lawful general order or regulation." 10 U.S.C. § 892(1). The elements of Article 92(1) are, "(a) That there was in effect a certain lawful order or regulation; (b) that the accused had a duty to obey it; and (c) that the accused violated or failed to obey the order or regulation." Manual for Courts-Martial (MCM) Part IV, ¶ 16.b.(1).

No reasonable fact-finder could have found Appellant guilty of violating SECNAVINST 5350.16A, because the content of that regulation was never admitted into evidence. The military judge took notice of the fact that the regulation existed, that it was a lawful general regulation, and that Appellant had a duty to obey it. But beyond that, there was no evidence placed in front of the members from which they could have concluded that his conduct violated the regulation because the content of the regulation itself was not admitted into evidence. At the risk of stating the obvious, the members would have to have seen the regulation and evaluated Appellant's conduct against the regulation's specific prohibitions before they could be convinced beyond a reasonable doubt that the government had proved each of the elements of the offense.

It appears from the arguments of counsel that both the government and the defense believed that the SECNAV Instruction

had been admitted into evidence, and argued to the members accordingly. But, as the military judge instructed in this case, the argument of counsel is not evidence. It may be that the military judge intended to admit the SECNAV Instruction into evidence, but she never actually did. Nowhere in the record does the military judge say that Prosecution Exhibit 14 was "admitted," or that the words "for identification" were stricken. The Prosecution Exhibit itself states that it was "not admitted," and it was filed in the record under the heading of "Prosecution Exhibits Not Admitted," supporting a conclusion that it was never admitted into evidence. Nowhere in the record is there any indication that the text of the SECNAV Instruction was placed before the members.

Because SECNAVINST 5350.16A was not admitted into evidence, the finding of guilty of specification 2 of Charge I and the sentence must be set aside.

WHEREFORE Appellant so prays.

VII.

APPELLANT'S CONVICTION OF VIOLATION OF A LAWFUL GENERAL ORDER UNDER ARTICLE 92, UCMJ, MUST BE SET ASIDE BECAUSE THE SPECIFICATION FAILS TO STATE AN OFFENSE; THE REGULATION IS NOT PUNITIVE.

Standard of Review

Whether a specification states an offense is a question of law reviewed de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006).

Argument

After the close of the government's evidence, the defense made a motion under R.C.M. 917 to dismiss all the specifications. R. at 887. The focus of the motion with respect to specification 2 of Charge I was on the testimony presented about the encounters between SD and Appellant, rather than the punitive nature of the SECNAV instruction. R. at 887-88. The military judge denied the motion, concluding that there was evidence in the record that the words were spoken, that SD felt uncomfortable, and that a reasonable person would also feel uncomfortable. R. at 893-94. After the close of all the evidence, the defense counsel requested that the military judge reconsider the ruling with respect to R.C.M. 917 because the regulation "is not a punitive instruction. . . ." R. at 1121. Civilian defense counsel argued, "I've gone through it, I don't see any paragraph that says it is punitive." R. at 1123. Trial counsel argued that "it's paragraph 9, page 4, accountability enforcement." *Id.* The military judge asked, "Page 4 of the main document, the actual instruction, not the enclosures or . . . ." *Id.* The record reflects that "[All parties review [sic]

the instruction]," then the military judge asks, "Anything else on the 917?", but otherwise did not rule on the defense motion to reconsider. *Id.* The defense counsel stated, "I don't think disciplinary incorporates punitive. I – I recognize your – your decision, I just wanted to put that on the record." *Id.* The military judge made no further comment about defense motion and moved on to other matters. *Id.*

Appellant's conviction for violating a lawful general regulation should be set aside because the regulation in this case is not punitive. The Court of Military Appeals has stated that, in evaluating the punitive or non-punitive nature of a general order,

> No single characteristic of a general order determines whether it applies punitively to members of a command. This Court's decisions have established general standards that such an order must meet before a member of the armed forces without actual notice of its provisions can be punished for violating it. The order in its entirety must demonstrate that rather than providing general guidelines for the conduct of military functions it is basically intended to regulate conduct of individual members and that its direct application of sanctions for its violation is self-evident. If the order requires implementation by subordinate commanders to give it effect as a code of conduct, it will not qualify as a general order for the purpose of an Article 92 prosecution.

United States v. Nardell, 45 C.M.R. 101, 103 (1972); *United States v. Blanchard*, 19 M.J. 196 (C.M.A. 1986); *United States v. Hogsett*, 15 C.M.R. 185 (C.M.A. 1958); *United States v. Baker*, 40 C.M.R. 216 (C.M.A. 1969).

The regulation at issue in this case is not punitive for two reasons: (1) it requires implementation by subordinate commanders to give it effect as a code of conduct, and (2) direct application of sanctions for its violation is not self-evident.

As to the first, paragraph 11 of the Instruction, under the heading "Action," requires "The Chief of Naval Operations (CNO) and Commandant of the Marine Corps" to "[i]mplement these policies within their existing EO instructions." SECNAVINST 5350.16A. Thus, to the extent that the policy described in the regulation can be considered a "code of conduct" (and as discussed below, it cannot), by the Instruction's own terms, the policy requires implementation by the CNO and the Commandant of the Marine Corps to give it effect.

As to the second, direct application of sanctions for violation of the instruction is not self-evident because although the policy purports to "apply to the conduct of all DON military personnel," it's reach does not extend to individual acts of sexual harassment or discrimination. SECNAVINST 5350.16A. Paragraph 9 states, "The policies detailed in paragraph 7 apply to the conduct of all DON military personnel. *Id.* Any violation, attempted violation or solicitation of another to violate these policies is subject to appropriate disciplinary action." *Id.* Paragraph 7 of SECNAVINST 5350.16A

outlines DON policies, and states that unlawful discrimination "is strictly prohibited and will not be tolerated," but its focus is on commanders, supervisors, and officers in charge. *Id.* Thus, while paragraph 7.a states that unlawful discrimination "is strictly prohibited and will not be tolerated," the remainder of paragraph 7 discusses the roles of various people within the Navy with respect to the regulation, but does not set out a code of conduct for individuals.

Paragraph 4 of the Instruction states, "It is the intent of this instruction to provide guidance on EO matters." *Id.* And, as noted, although paragraph 9 purports to provide "accountability" for violation of the regulations prohibitions, it states only that violation "is subject to appropriate disciplinary action" but says nothing about the UCMJ, punishment, or criminal sanction. *Id.*

Compare that with the paragraph 7 of SECNAVINT 5300.26D, Department of the Navy (DON) Policy on Sexual Harassment – the general regulation the Navy could have charged Appellant with violating if it wanted to punish him for sexual harassment[1] – which specifically states, "A violation of these provisions by military personnel is punishable in accordance with the Uniform Code of Military Justice (UCMJ), and is the basis for

[1] Appellant's research reveals 21 reported and unreported cases decided by this Court involving SECNAVINST 5300.26, but not a single case involving SECNAVINST 5350.16.

disciplinary action with respect to civilian employees; and "No individual in the DON shall . . . "[c]ommit sexual harassment . . . " (paragraph 7.a.(1)); and "the full range of administrative and disciplinary actions is available to address sexual harassment. In the case of military personnel, these include informal counseling, comments in fitness reports and evaluations, administrative separation, and punitive measures under the UCMJ." SECNAVINST 5300.26D, paragraph 7.b.

Thus, while it appears that the Navy actually has a policy on sexual harassment that is a lawful general regulation, it is not the one Appellant was charged with violating. In this regard, *United States v. Daniel*, 42 M.J. 802 (N-M.Ct.Crim.App. 1995) is instructive. The issue in *Daniel* was whether SECNAVINST 5300.26A (the original version of the current sexual harassment Instruction 5300.26D) was a lawful general regulation. This Court concluded that it was not. *Id.* at 806. This Court evaluated the instruction as a whole and noted that the "Instruction on its face refers to disciplinary action within only two contexts," including that among the "major changes" to the revised instruction was that it "Makes mandatory corrective action, administrative or disciplinary, on substantiated complaints," and that it obligated the Chief of Naval Operations and the Commandant of the Marine Corps to ensure "that commands take appropriate administrative and

disciplinary measures." *Id.* at 804. The Instruction included an enclosure, which was a two-page document headed, "DEPARTMENT OF THE NAVY POLICY ON SEXUAL HARASSMENT." This Court noted,

> The general tenor of Enclosure (1) was that the policy of the Department of the Navy was to eliminate sexual harassment from the workplace. It defined sexual harassment, gave examples of what constituted sexual harassment, and stated related responsibilities of Department personnel. It mandated an initial orientation and a periodic training program to prevent sexual harassment. It required corrective action on "substantiated acts of or conduct which results in sexual harassment" and on "substantiated complaints". In the case of substantiated acts, such corrective action was to be "administrative or disciplinary"; in the case of substantiated complaints, corrective action was to be "administrative and/or disciplinary action as appropriate." Remedies available to military members included the Navy Grievance Procedures, the Uniform Code of Military Justice, and Request Mast. Complaints to the Inspector General also were authorized.

52 M.J. at 804. This Court noted that "Conspicuously absent from the SECNAVINST and Enclosure (1) were any clear indications that individuals would be criminally liable for conduct considered inimical to the stated departmental policy." *Id.* This Court concluded that SECNAVINST 5300.26A was not a lawful general order because the "stated purpose . . . was to revise Department of the Navy policy on sexual harassment," and "no other purpose is stated or is self-evident." *Id.* at 805. This Court also concluded that the responsibility for implementing the policy "fell upon the CNO or CMC," and it was possible that the "subordinate implementing directives could have been of a

nature to operate as general orders or regulations within the meaning of Article 92. *Id.* This Court noted that " "[w]hile stating that sexual harassment is unacceptable conduct, the Instruction emphasized that managers and supervisors were 'in an especially important position to prevent sexual harassment' through corrective administrative and/or disciplinary action." *Id.* Ultimately, this Court held that it "was not self-evident that such corrective action included subjecting individuals to punitive and criminal sanctions; that it "didn't make clear that its intent was to prosecute individuals under other UCMJ articles; and that "the term 'punitive' did not appear in the Instruction or in Enclosure (1)." *Id.* This Court compared the language in SECNAVINST 5300.26A to that in 5300.26B, and noted that the superseding version of the instruction purports to clearly state to whom the provisions are applicable and whether further implementation is required as a condition to its effectiveness as a criminal law "in language that is conspicuously different from that which appeared" in the older version of instruction.

The "purpose" of SECNAVINST 5350.16A is to "implement the Department of the Navy (DON) policy on Equal Opportunity (EO), Assign related responsibilities, and assign all duties stipulated in reference (a)[DOD Directive 1350.2]." 5350.16A, para. 1. The "intent" of the instruction is "to provide

guidance on EO matters." Like the Instruction in *Daniel*, no other purpose is evident. Like the Instruction in *Daniel*, the responsibility for implementing the policy fell on the CNO and the CMC. Like the Instruction in *Daniel*, "the primary emphasis" is "on orientation and training of individuals and on management of work places so as to eliminate [unlawful discrimination]." Like the instruction in Daniel, individual conduct is addressed "only in terms of its relationship to enhancing or detracting from the departmental policy." Like the Instruction in *Daniel*, SECNAVINST 5350.16A emphasizes the role of "commanders," "supervisors," "commanding officers," "officers in charge," and "individuals in supervisory positions." Like the instruction in *Daniel*, the word "punitive" does not appear in the context of individual conduct in SECNAVINST 5350.16A, although it does appear in the context of whether punitive action can be taken against a complainant where a complaint or appeal is not made in good faith. *See* Enclosure (3) (describing the policy on processing Equal Opportunity Complaints). And like the Instruction in *Daniel*, there were no "clear indications that individuals would be criminally liable for conduct considered inimical to the stated departmental policy."

In short, the SECNAV Instruction that Appellant was convicted of violating is much like the Instruction that this Court held to be non-punitive in nature in *Daniel*. The finding

of guilty under Charge I, specification 2, must therefore be set aside. WHEREFORE Appellant so prays.

VIII.

THE MILITARY JUDGE ABUSED HER DISCRETION IN FAILING TO GRANT A MISTRIAL WHEN IT BECAME APPARENT THAT THE MEMBERS WERE NO LONGER CONFIDENT IN THEIR VERDICT.

Standard of Review

A military judge's denial of a motion for a mistrial will be reviewed for an abuse of discretion. *United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003) (holding that the military judge abused his discretion in failing to grant a mistrial).

Argument

After the members had announced their findings on the record, and during the deliberation on sentencing, the members submitted a written question to the military judge asking, "The evidence provided to support the sentencing has caused some members to want to re-vote the finding on Charge 2, spec 4. Can the panel have a re-vote on Charge 2, Spec. 4?" R. at 1391; Appellate Ex. LXXXVI. The military judge stated that she wanted to recess in order to research the law. CITE. The civilian defense counsel noted that he was aware that the same thing had happened in the Western Judicial Circuit, and suggested that she contact the judges there. R. at 1391-92.

When the court-martial was again in session, the military judge stated that she was inclined to instruct the members that it is not possible at this stage of the proceedings to reconsider findings, that "there is no wiggle room . . . in the rules," and it is "very clear that the timing must be before findings are announced." R. at 1393. She stated she was specifically referring to R.C.M. 924. *Id.* The defense immediately moved for a mistrial "on the Charge that the members have asked for reconsideration on." The military judge denied the motion for a mistrial, stating, "The simple fact that they've asked for – to know if there's a possibility to re-vote on Charge II, Specification 4 is not grounds for a mistrial." *Id.* The military judge informed the members, "The law does not provide for a re-vote once findings are announced in open session, so the answer to the question is no." R. at 1395. R.C.M. 915 (a) authorizes the military judge to declare a mistrial when such action is "manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings." The discussion to R.C.M. 915(a) states that "[t]he power to grant a mistrial should be used with great caution. . . ." The CAAF has explained, "Declaration of a mistrial is a drastic remedy, and such relief will be granted only to prevent manifest injustice against the accused. It is

appropriate only whenever circumstances arise that cast substantial doubt upon the fairness or impartiality of the trial. *Diaz*, 59 M.J. at 90 (quoting *United States v. Dancy*, 38 M.J. 1, 6 (C.M.A. 1993).

Rule for Courts-Martial 924(a) (M.C.M., 2012 ed.), states, "Members may reconsider any finding reached by them before such finding is announced in open session." Prior versions of this rule permitted the members to reconsider findings of guilty at any time before announcement of the sentence. The rule was amended in 1995 to limit the time for reconsideration of a finding of guilty to any time before the finding is announced. *See* Drafters' Analysis of R.C.M. 924, Manual for Courts-Martial (2012 ed.). Thus, it has not always been the case that members could not reconsider findings.

But Rule for Courts-Martial 1102 provides for "post-trial sessions," which may be "proceedings in revision" or "Article 39(a) sessions." R.C.M. 1102(b)(2) discusses Article 39(a), UCMJ, sessions, and provides,

> An Article 39(a) session under this rule may be called, upon motion of either party or sua sponte by the military judge, for the purpose of inquiring into, and, when appropriate, resolving any matter that arises after trial and that substantially affects the legal sufficiency of any findings of guilty or the sentence. The military judge may also call an Article 39(a) session, upon motion of either party or sua sponte, to reconsider any trial ruling that substantially affects the legal sufficiency of any findings of guilty or the sentence. The military

> judge may, sua sponte, at any time prior to authentication of the record of trial, enter a finding of not guilty of one or more offenses charge, or may enter a finding of guilty of a part of a specification as long as a lesser offense charged is alleged in the remaining portion of the specification. Prior to entering such a finding or findings the military judge shall give each party an opportunity to be heard on the matter in a post-trial Article 39(a) session.

R.C.M. 1102(d) provides for when post-trial sessions may be directed, and permits the military judge to direct the session any time before authentication, and permits the convening authority to direct the session any time before initial action, or later if authorized by a reviewing authority.

R.C.M. 1102(e) provides the procedure for post-trial sessions. R.C.M. 1102(e)(1) requires, among other things, that if the trial was before members, any proceeding in revision must also be before members if the subject matter of the proceeding in revision so requires. R.C.M. 1102(e)(2) requires the military judge to "take such action as may be appropriate, including appropriate instructions when members are present." It also provides that the "members may deliberate in closed session, if necessary, to determine what corrective action, if any to take." And it provides,

> prior to the military judge sua sponte entering a finding of not guilty of one or more offenses charged or entering a finding of not guilty of part of a specification as long as a lesser offense charged is alleged in the remaining portion of the specification, the military judge shall give each party an opportunity to be heard on the matter.

R.C.M. 1102(e)(3) provides that "all post-trial sessions, except any deliberations by the members, shall be held in open session."

This Court has recognized that the Rules for Court-Martial must be construed "in connection with other relevant sections of the Rules for Courts-Martial to produce a harmonious whole." *United States v. Smith*, 59 M.J. 604 (N-M.Ct.Crim.App. 2003)(citing 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.05 (6th ed. 2000)(statute should be construed as a whole, each part harmonized in accordance with entire legislative scheme of which it is a part)). In this regard, R.C.M. 924 cannot be read in isolation. While it may not itself provide a remedy where it appears that an improper action occurred at trial but did not reveal itself until the sentencing case, there were other remedies available to the military judge that she should have considered.

As noted, R.C.M. 1102 permits convening an Article 39(a) session "for the purpose of inquiring into, and, when appropriate, resolving any matter which arises after trial and which substantially affects the legal sufficiency of any findings of guilty or the sentence." The Court of Military Appeals has said that when evidence is discovered after trial which would constitute grounds for a new trial under R.C.M.

1210(f), it is appropriate for the military judge to convene and Article 39(a) session in such a circumstance, and would have been empowered to set aside findings of guilty so a rehearing could take place. *United States v. Scaff,* 29 M.J. 60, 66 (C.M.A. 1989).

Admittedly, the record does not reveal precisely what it was that occasioned some members of the panel to want to revote on the findings, but whatever it was, it was presented during the sentencing phase of the case. The defense at trial reasonably presumed that it was SD's testimony on sentencing that led to this issue. SD had testified at trial, specifically in response to a member's question (AE LXXX), that she did not leave for the day after the morning incident on the 10th of October because she was "on a van pool and I'm kind of tied to the building. Unless I make arrangements to have somebody come and get me, I can't leave." R. at 1159. She testified on sentencing that she had to call her mother on a number of occasions, and "occasionally, she had to come and pick me up." R. at 1309, 1312. SD testified that she did not call her mother to come pick her up on October 10th because she "was still in shock," but her mother could have come to pick her up. R. at 1313. There was no other evidence presented during sentencing that reasonably could have made the members want to reconsider their findings with respect to this offense.

During the motion for the mistrial the defense argued,

> We believe 1210 clearly allows you to find out what evidence is out there – what kind of impeaching evidence, and to the extent to this and the government brings this out, is this simply impeachment evidence or is this a new fact that was determinative in the outcome and would've led to a not guilty finding.

R. at 1409. Whether the military judge really needed to "find out what evidence is out there" is actually not necessary to the resolution of this issue. The members certainly knew what it was, and it had been presented during the sentencing portion of the case. In this regard, there was not even a need to present additional evidence.

As the CAAF has noted, a fair trial is "understood as a trial resulting in a verdict worthy of confidence." *United States v. Romano*, 46 M.J. 269, 272 (C.A.A.F. 1997)(quoting *Kyles v. Whitley*, 514 U.S. 419 (1995)). No verdict is "worthy of confidence" when the very members who adjudged it were no longer confident in it after evidence was revealed on sentencing that caused them to question its veracity.

The military judge erred in failing to grant a mistrial with respect to specification 4 of Charge II. The finding of guilty of Charge II and the sentence must be set aside. WHEREFORE Appellant so prays.

IX.

THE EVIDENCE IS FACTUALLY INSUFFICIENT TO SUPPORT A CHARGE OF UNLAWFUL SEXUAL CONTACT UNDER ARTICLE 120, UCMJ.

Standard of Review

Article 66(c), UCMJ, requires the Court of Criminal Appeals to conduct a *de novo* review of the factual sufficiency of the case. *See United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990). This review "involves a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency beyond the admonition in Article 66(c), UCMJ, to take into account the fact that the trial court saw and heard the witnesses." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The court may affirm a conviction only if it concludes, as a matter of factual sufficiency, that the evidence proves appellant's guilt beyond a reasonable doubt. *United States v. Sills*, 56 M.J. 239, 240-41 (C.A.A.F. 2002). In the performance of its Article 66(c) functions, the Court of Criminal Appeals applies neither a presumption of innocence nor a presumption of guilt; it must make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt. *Washington*, 57 M.J. at 400.

Argument

SD testified about a number of incidents that occurred on 10 October 2012, which resulted in four specifications against Appellant under Article 120, UCMJ, and all but one ended in acquittal. The sole remaining specification under Article 120, UCMJ, alleged that Appellant committed sexual contact upon SD by causing bodily harm by causing her hand to touch his penis without her consent.

SD's testimony in support of this specification is fairly sparse. SD said that Appellant

> started kissing me again and I pulled back and he started kissing my neck, and then I told him that I didn't know how quiet I could be, and he said he knew a way to keep me quiet and he started unzipping his pants and I put my hands up and I told him I couldn't wrap my head around this, and then he grabbed my hand and stared rubbing his erection with it.

R. at 652. She said the rubbing lasted a few seconds and she pulled her hand back. *Id.* She stated several more times that he rubbed his erection with her hand, but provided no additional detail. R. at 653, 654, 810.

Appellant testified in his own defense. He described an entirely consensual encounter during which he and SD were kissing and she sat down and rubbed his groin area with her right hand. Appellant described this particular incident in greater detail than SD did. Appellant testified that she "just sat down and she rubbed it." R. at 987. Appellant denied

grabbing her hand and bringing it to his groin. Appellant said that SD never said anything to lead him to conclude that she did not want any touching, but said that when she was rubbing his crotch he took a half step toward her and she said she was not ready for that so he sat down. *Id.* Appellant testified that SD did say that she could not get her head around it and put her hands up in the air. *Id.* Appellant testified that while SD was rubbing his groin in the afternoon of 10 October, she made a comment about its size and he made a comment back. R. at 1035, 1048, 1049. 1052. Appellant testified that SD rubbed his groin area and he took a half step toward her when she did that; she was seated and he was standing. He said she did not unzip his pants; she "had her hand up kind of just rubbing it, and she went vertical, kind of - it was a circular motion then up and down." R. at 1051. Appellant again described his position relative to SD's, and said he was standing up opposite her, she began to rub his groin area, he took a half step toward her, she stopped and put her hands up in the air and said she was not ready for that yet or something to the effect of wrapping her head around that, and Appellant sat down and they started talking again. R. at 1053.

Appellant testified that SD was touching his groin area over his pants and he took a half step towards her. R. at 1055. He denied that he said anything to SD to trigger the comment

about the size. *Id.* After she made that comment he responded with, "Your hands are just small and these pants are kind of tight." He took a half step forward. R. at 1055. SD stopped rubbing his groin and said she wasn't ready for that, which Appellant interpreted to mean that she wasn't ready. He said he "didn't know," but "thought she might do more actually." R. at 1056. At the point Appellant stepped forward, his intention was to see if she wanted to do more, to see if it was something she was open to. *Id.* When SD said, "I'm not ready for that yet," Appellant stepped back and sat down. R. at 1057.

The preceding is the sum and substance of the evidence in support of specification 4 of Charge II. Appellant and SD both testified that SD rubbed Appellant's groin with her hand. The only dispute in their testimony is whether that rubbing was consensual. SD said that it was not, Appellant said that it was, and there were no other witnesses. Therefore, the question for this Court is whether there is reasonable doubt with respect to SD's testimony. Appellant respectfully submits that there is.

Although the foregoing is the substance of the evidence in support of the sole remaining specification under Article 120, UCMJ, it is helpful to understand all of SD's claims and what she said about them because it is relevant to her credibility. SD claimed that there were three encounters with Appellant: one

on the morning of 4 October 2012, one on the morning of 10 October 2012, and one on the afternoon of October 2012. The incident underlying specification 4 of Charge II occurred on the afternoon of 10 October 2012. Specification 1 alleged the morning incident; specification 2 did not specify whether it was the morning or afternoon incident; and specification 3 alleged the afternoon incident. As noted, Appellant was acquitted of all of those. Specification 4 of Charge II does not specify whether it occurred in the morning or the afternoon, but SD testified that it happened in the afternoon. R. at 652.

SD had a number of motives to fabricate the allegations against Appellant. First, she had a financial motive. SD testified that she hired an attorney the week after the incident. R. at 776. She initially said she had filed a lawsuit in the case, although she did not recall how much money she asked for. R. at 792. She said she demanded fees and medical expenses. R. at 793. SD did not have a figure, and said that paperwork was filed by the lawyer through the Defense Logistics Agency. R. at 794. SD testified that one of the things the lawyer included is a claim for infliction of emotional distress. R. at 1145.

SD testified that she removed the words "I reciprocated" in the statement, but never gave a sworn statement to Agent York. R. at 778. She said she worked on that statement with Agent

York for "hours and hours" with her attorney present. *Id.* SD testified that after she had "put all the wording that [she wanted]" into the statement she still would not sign it. R. at 779.

SD testified that she chose the lawyer that she did because he was someone her mother had worked with. R. at 811. SD said that despite her concern that she could lose her job, she did no research to find a federal employment lawyer and instead went to a plaintiff's attorney who filed paperwork on her behalf. R. at 812. SD admitted that the attorney never wrote to the HR department to say that he had a client alleging sexual harassment, and asking them to look into it. *Id.* Nor did the attorney call the Inspector General to say he had a client who was alleging misconduct. R. at 813. SD testified that her lawyer was present when she went over her statement with Special Agent York, and certain words were crossed out of her statement, including that she "reciprocated" the kiss between herself and Appellant. R. at 814-815. SD had a financial motive to fabricate the allegations against Appellant. Needless to say, if Appellant is found guilty of sexual assault or sexual harassment, SD's chances of succeeding in a claim for money damages against the government increase exponentially.

SD also had a revenge motive for fabricating the allegation against Appellant when it became apparent that there would be no

relationship. SD admitted that she had discussed with Appellant a potential date with a man named John. R at 625-26. SD attempted to downplay the significance of any conversation about John, stating first that she never discussed her love life with Appellant. R. at 694. She was forced to admit, however, that she did discuss her short-lived relationship with John, because Appellant knew about John and the only way he could have known is that she told him. R. at 699. SD admitted that she told Appellant that she was disappointed that John stood her up for a date, although she denied that she was actually disappointed. R. at 701. SD admitted that Appellant would not have known that she was going on a date with John except from her, and that Appellant would have reasonably concluded that she was disappointed that she did not get to see John, because she was excited about going out with John and that is why Appellant asked her about it. R. at 702. SD admitted saying to Appellant, "I sure know how to pick them." R. at 727. She characterized that as a "kind of brain-to-mouth filter," and said, "I imagined saying it in my head, but it came out." *Id.*

Appellant testified that during the course of their relationship SD discussed love interests, including more than one person. R. at 964. She would come in and talk about dates she had been on, and whether the dates went well or did not go well. *Id.* SD told Appellant about John in the beginning of

October. He said that SD came to his office on the 4th, and told him she had some concerns about her body image. R. at 965-66. SD said that the events with John didn't go well, and that he had stood her up for another woman. R. at 978. At the end of the conversation SD told Appellant she was hopeful things would work out with John. R. at 973. She also made a number of self-deprecating comments. R. at 979. Appellant said he hugged her because she appeared depressed about being stood up by John. R. at 1027. Appellant testified that at the end of the final encounter on October 10th, as SD was preparing to leave his office, and after they had engaged in overtly sexual behavior, she asked, "What does this mean?" and Appellant responded, "I don't know." R. at 988. Appellant said SD seemed kind of indifferent, and was not sure if she was upset. R. at 1060. Although SD was recalled as a rebuttal witness, she did not rebut Appellant's testimony that she asked "what does this mean" and he responded, "I don't know."

It is obvious from the testimony that SD had some issues with her self-image, had a history of choosing the wrong men, and was angry with herself for "picking" the wrong man again. When he responded "I don't know" to her question "what does this mean?", it would have been readily apparent to SD that she had no future with Appellant.

Appellant respectfully submits that that is when the wheels started to turn in SD's mind. She could absolve herself of any responsibility for choosing the wrong man again by painting herself as a victim, she could exact revenge against Appellant for being that wrong man, and at the same time she could squeeze some money out of the United States, as noted previously.

There is nothing fanciful or ingenious about any of these motives. It is reasonably possible that SD made up the allegations against Appellant for the reasons just described. And since it is reasonably possible, there is reasonable doubt as to his guilt.

There are a number of inconsistencies between the statements SD made previously, and her in-court testimony, as well as internal inconsistencies in her in-court testimony. For example, SD testified on direct examination that that she saw Appellant "again on October 10th," "around 1:30 or so," and that he "took me back to his office." R. at 644-45. She described the incident that happened in the afternoon, and stated that Appellant "pulled me over so my back was facing the door and he was leaning up against that end piece to the desk where the folders are," that her "back was to the door," and in response to the question whether she made any attempt to pull away or resist in any way, SD stated, "He was kissing me at that point and I made an attempt to pull my head back, and he had his hand

on the back of my neck pulling me towards him." R. at 647. When the defense counsel asked her about the amount of force required for her to pull back, she first stated, "[w]hen somebody's got their hand on the back of your neck pushing you forward, there's a great deal of resistance when you're trying to push back." R. at 762. But when the defense attempted to impeach SD with her Article 32, UCMJ testimony, and after she had been provided an opportunity to review her testimony, she testified, "When I resisted and pulled back, he started hissing my neck. I had – his hand was in the morning." R. at 763. SD testified that "in the afternoon he wasn't holding [her] neck." R. at 763. Obviously, SD testified on direct that Appellant was holding her neck in the afternoon, and testified on cross-examination that he was not.

SD testified at the Article 32, UCMJ, hearing that the amount of force required to resist was a "3", but at trial she said it was "more of a 6." R. at 765. SD claimed that the difference in the numbers was because the defense counsel's question was "confusing," although she agreed that "this particular question about in the morning when you say he held your neck that was a pretty clear question," and at the time she said "3." R. at 766.

SD testified that she had never been briefed on sexual harassment or sexual assault in her job, but admitted that she

was given an employee handbook that discussed those things, and agreed that when she said she had never been briefed on it, that wasn't really true. R. at 780. Thus she admitted being less than honest under oath.

SD testified on direct examination with respect to the morning of the 10th of October that when Appellant kissed her she "did not reciprocate." R. at 635. SD admitted that she removed the word "reciprocated" from the statement she had previously given to Agent York. R. at 778. She testified, with respect to the statement she had given Agent York, and how the term "reciprocated" came to be included and then removed from the statement:

> As I recall, he had asked me – I don't understand the working he used as far as "reciprocating," so I had told him that I reciprocated, however, there was no engagement on my end. If somebody sticks their tongue down your throat or you're – you know, if you have somebody approaching you and kissing you, that's how I interpreted it as "reciprocating," not as a consensual manner.

R. at 806-807. SD admitted that she actually told Agent York that she reciprocated (R. at 814), that when she read it on paper with her lawyer present that word got crossed out, and her meaning at trial was that she was "not engaged." R. at 815. SD testified that when she "said 'reciprocated,' my intention that it was a one sided – I was not engaged and he was," and she denied that she always uses words that are common in the English

language and that she does not intend to mean what they mean. R. at 815. This tortured logic places an intolerable strain whatever remaining credibility SD may have had.

SD testified on direct about the incidents on the morning of 10 October 2012. She said after she pulled her sweater down Appellant asked her how long she had been thinking about this, and she told him she had been thinking about it since he had made a comment about her dress the week prior. R. at 649. Trial counsel asked, "What happened after that?" SD responded, "After that he started kissing me again and I went to pull back, so he started kissing my neck, and then I told him that I didn't think I could be quiet, and he said that he knew a way to keep me quiet." R. at 651. SD testified, "He started kissing me again and I pulled back and he started kissing my neck, and then I told him that I didn't know how quiet I could be and he said that he knew a way to keep me quiet . . . ." R. at 652. SD initially denied that after Appellant said, "You know I'm going to f-- you," that it was then that she said, "I don't think I can keep quiet. R. at 730. SD admitted that she testified at the Article 32 that after Appellant made the statement, "You know that I'm going to f— you, right," she responded, "I didn't know how quiet I could be." R. at 734. SD admitted that the transcript of the Article 32 read into the record by the defense counsel was accurate in that regard. She testified that she

recalled saying that at the Article 32, but "it occurred after he was kissing my neck, before he made the comment 'You know I'm going to f-- you, right?'". R. at 770. The timing of SD's claim is relevant to her credibility because it is further evidence that her story changes over time.

SD made a number of statements in her testimony that are simply difficult to believe. Most of these statements involve details of specifications of which Appellant was acquitted. But her apparent willingness to state things that are simply unbelievable cast serious doubt on her credibility as a whole, and should give this Court serious pause in deciding whether there is reasonable doubt as to Appellant's guilt.

For example, SD testified on direct examination that Appellant "pulled me over to a chair in his office . . . and pulled me down on top of him so that I was straddling him." R. at 636. According to SD, he pulled her by her arm, although she could not recall which one; she testified that he grabbed one of her arms. R. at 637. She testified on cross-examination that when Appellant pulled her over, she "would have to open up her legs to be able to straddle him." R. at 745. SD denied that Appellant lifted her skirt, and denied that she lifted her own skirt, but she described the skirt as a "pencil skirt." R. at 745. SD said "my knees went out and my skirt went up" "by itself." *Id.*

As noted, Appellant was acquitted of Charge III, which alleged that Appellant pulled SD onto his lap with unlawful force. The issue before this Court with respect to the remaining specification under Article 120, UCMJ, however, is whether there is reasonable doubt as to Appellant's guilt. This bit about SD's skirt coming up by itself is absurd. And if Appellant did not lift it up, then SD must have, as Appellant testified. R. at 981. And given that SD's testimony on this point is part of the entire narrative, if she is not credible on this point, she is not credible on any point.

Another example of improbability in SD's testimony is the story about what happened between the morning and afternoon incidents on 10 October. SD testified that after the morning incident she "was in shock." R. at 643. She was "flustered," and "tried to compose" herself. *Id.* SD testified that she had an 11:00 o'clock meeting with Fran Walinski, Angie (Fran's Deputy) and Appellant, during which she was to take a photograph of the three of them as part of "Boss Appreciation Day" and as a retirement gift for Ms. Walinski. *Id.* SD testified that Appellant was present for that, but she did not speak with him. R. at 643. SD testified that her demeanor was normal, and she did not seem upset; she said Angie and Fran were talking to Appellant about work incidents, and she "chimed in." She reiterated that she was fine. R. at 792. Ms. Walinski

testified that she recalled that event, and SD did not act unusual, and was talkative and seemed happy and normal, and did not seem like she was in shock, or rigid, or unduly upset. R. at 870-71. Appellant testified that someone named "Tao" was the official photographers, and Tao took three or four photos of him, Fran and Angie, and SD actually took a few photos with her own camera. R. at 986.

Needless to say, someone who was "shocked" and "flustered" by an alleged sexual assault that had occurred just moments before would be neither "normal" nor "fine." But SD was forced to admit that she was, because she knew there were others who would say that she was, notably, Ms. Walinsky.

SD testified that the CFC key workers had received an e-mail about a fundraiser, so she printed out the flyer and put it under Appellant's door to let him know about it because he had shown interest in the same event the previous year. R. at 632. SD said she put the flyer under his door, even though she could have merely forwarded the e-mail. She did not print out the flyer for Fran or Angie. R. at 708. SD denied that she personally handed the flyer to Appellant. R. at 711. Appellant testified that she did. R. at 977.

So why would SD make up a story about putting the flyer under Appellant's door? Because after what happened on 4 October, she needs for it to appear that she was not in

Appellant's office by choice on the morning of 10 October, and said that Appellant called her into his office because she put the flyer under his door, and she felt as if she had no choice but to go to his office when he called her in. R. at 632.

SD testified that on 10 October Appellant locked the door while she was in his office, both in the morning and in the afternoon. R. at 634, 636, 741. She also testified that Appellant blocked her exit both in the morning and afternoon. R. at 741. She made a statement to Special Agent York that he typed up into six type-written pages, and she went over it at length with Special Agent York in her attorney's office. She said, "we went through several drafts, where he typed and then he'd let me look at it and I would make pen and ink changes and then he'd retype it, and this was an all day process." R. at 754. Nowhere in that statement does she say that Appellant ever locked the door behind her. R. at 755. Also, nowhere in this statement does she say anything about Appellant blocking her way. R. at 756. That was "new testimony here today." R. at 758.

It goes without saying that whether an assailant locked a door to a room with a victim inside – either to keep the victim from leaving or to keep others out – is an important detail in the narrative. Yet SD never said anything about any lock or about Appellant's blocking her exit to Special Agent York, and

indeed admitted that this was "new testimony." She offered no explanation for why her story changed.

SD testified that she never told anyone what had happened because she was afraid for her job. She testified that she didn't tell anyone because she "was terrified being that he was my supervisor; I didn't know what would have happened to my job and to myself," and she thought her job was in jeopardy. R. at 656. She reiterated that she didn't report it because she didn't know if her job was in jeopardy. R. at 660. This was apparently true even though the previous day there had been a "Director's call" at which the Director "mentioned sexual assault training coming and that there was a hotline people could call." *Id.* SD admitted that she had been given an employee handbook that included "all sorts of things about how to report misconduct, sexual harassment, the policy, all sorts of those things that [she] said [she] had never been brief on." R. at 780. She admitted that when she said she had never been briefed, that wasn't really true. *Id.*

While it is true that Article 66(c), UCMJ, includes an admonishment that in arriving at its decision with respect to factual sufficiency this Court must take into account that it did not see or hear the witnesses, it is obvious from reading this record that SD is a bright, sophisticated, and intelligent woman. She appears more than capable of distinguishing between

nuanced concepts, and asked for clarification when she was confused. It simply defies belief that she thought her job was in jeopardy or that she did not know she could go to her supervisor, Ms. Walinsky, to complain about Appellant's conduct if she thought there was anything improper about it, particularly since the fact that there was a hotline for reporting sexual harassment had just been mentioned by the Director the previous day. The fact that she did not suggests that she was on board.

Appellant presented evidence under Mil.R.Evid. 405 that he is a peaceful person. Ms. Shawn Gray testified that she had known Appellant for two years, that she had formed an opinion of his character for peacefulness, and that he is a peaceful person. R. at 899, 902. Mr. Thomas Bruns testified that he knew Appellant, that he had formed an opinion about Appellant's character for peacefulness, and that his opinion is that his "character it's very peacefulness." R. at 911. Mr. Stephen Meyer testified that he had formed an opinion about Appellant's character for peacefulness and found him to be peaceable. R. at 921. Ms. Tammy Tuck testified that she had known Appellant since 2010, that she had formed an opinion about Appellant's peacefulness, and that she had never seen him angry. R. at 298. The government presented no evidence to rebut this trait. Appellant's reputation as a peaceful person provides further

reasonable doubt that he would use force against SD as she alleged.

The evidence also suggests that, even if SD did not consent to any of this conduct, Appellant had an honest and reasonable belief that she did. An honest and reasonable mistake of fact as to consent is a complete defense. *See* Article 120(r), UCMJ. SD testified on direct examination that at one point during the afternoon of 10 October Appellant asked her "how long I had been thinking about this." She stated, "I was so disoriented, I think, after everything that had just happened, I couldn't like comprehend his question and I told him since – the comment about my dress the week prior." R. at 649. When asked what she meant by that, SD said, "It was out of fear, that I never thought of him like that, and I still didn't, it was purely a fear-based statement." R. at 650. SD said she "mean[t] with that statement" that she "was not interested in him in a sexual manner at any time." A reasonable person under similar circumstances would interpret SD's statement as sexually charged.

In light of that statement, it was entirely reasonable for Appellant to believe that SD consented to all of this activity. It is unreasonable to conclude that anyone, including Appellant, would interpret that statement to mean "I was not interested in

him in a sexual manner at any time," given that the statement suggests the exact opposite of what SD claimed she meant by it.

SD also testified that when she told Appellant that she didn't think she could be quiet, her "hope was that if he thought that I was going to make noise, it would deter him from continuing for fear that somebody would hear outside his office." R. at 651. SD admitted that she told Special Agent York that she did not want that statement to be taken as a suggestion of consent. R. at 771. SD admitted that when she told Special Agent York what happened, he did not challenge her on why she said it, and she, on her own, said, "I didn't want it to be taken as consent." R. at 772. This testimony is evidence that even the Government's own complaining witness believed her statement could be reasonably understood as an invitation for sex. This Court may apply its experience and knowledge of the ways of the world to conclude that people who engage in consensual sexual activity are sometimes noisy, and SD's statement can reasonably interpreted as an indication of consent because it is an indication that SD is an active participant.

There are other facts in the record that show Appellant had an honest and reasonable belief that SD consented to the activity. Some of these, independently establish reasonable doubt, but within the context of the more fully developed record, they provide an even stronger quantum of proof. Notably,

SD never once said "no" or "stop." She met Appellant's kisses with an open mouth. She never screamed. She never left Appellant's office, despite an obvious ability to do so. After the incident on the morning of the 10th, she did not report Appellant's conduct to anyone, even though she clearly could have. She acted normally at the "photo shoot," so there was no indication that anything was amiss. She returned to Appellant's office when he asked her to, and never went to her supervisor, Fran Walinsky, to tell her there was any problem. All of these things are factors this Court may consider in evaluating whether Appellant honestly and reasonably believed that SD consented to the activity.

And, of course, Appellant testified under oath in his own defense and said that SD did, in fact, consent. This was nothing more than a he-said-she-said case. Appellant never denied touching SD. While their testimony was in many respects the same, SD claimed that the touching was non-consensual and Appellant testified that it was consensual. In evaluating the sufficiency of the evidence, the question is not which of these two witnesses this Court believes more, but whether there is reasonable doubt as to Appellant's guilt. Respectfully, Appellant's testimony by itself raises reasonable doubt. At the risk of stating the obvious, if it is reasonably possible that Appellant is telling the truth – and it is – then there is

reasonable doubt. Concomitantly, if it is reasonably possible that SD is not telling the truth – and it is – then there is reasonable doubt.

Appellant respectfully submits that a close reading of the record and a conscientious application of the reasonable doubt standard shows that there is reasonable doubt as to his guilt, and the findings of guilty of specification 4 of Charge II and the sentence must be set aside.

WHEREFORE Appellant so prays.

X.

APPELLANT WAS DENIED A MEANINGFUL OPPORTUNITY FOR CLEMENCY WHEN THE MILITARY JUDGE E-MAILED THE MEMBERS TELLING THEM NOT TO COMMUNICATE WITH THE DEFENSE COUNSEL AND SUBSEQUENTLY ISSUED AN ORDER HAVING A "CHILLING EFFECT" ON THE LIKELIHOOD THAT THEY WOULD SUBMIT A CLEMENCY RECOMMENDATION; AND WHEN THE STAFF JUDGE ADVOCATE WITHHELD FROM THE CONVENING AUTHORITY AT LEAST ONE AND POSSIBLY MORE CLEMENCY RECOMMENDATIONS THAT HE HAD RECEIVED FROM THE SENTENCING AUTHORITY.

Standard of Review

Errors in post-trial processing are reviewed de novo. *United States v. Kho*, 54 M.J. 63, 64 (C.A.A.F. 2000). Appellant is entitled to relief if he makes "some colorable showing of possible prejudice." *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998).

Argument

During deliberations on sentencing, one member, CDR Miles Ervin, submitted a question to the military judge asking, "The evidence provided to support the sentencing has caused some members to want to re-vote the finding on Charge 2, Spec 4. Can the panel have a re-vote on Charge 2, Spec 4?" Appellate Ex. LXXXVI. The military judge advised the panel that a re-vote was not permissible after findings had been announced in open court. R. at 1395. The members returned to their deliberations on the sentence. *Id.*

Appellant was sentenced on 13 September 2013. On 24 September 2013, Appellant's civilian defense counsel sent an e-mail to the members of Appellant's court-martial explaining that the convening authority "may approve, set aside, or approve some and set aside others of the charges," and "may also grant clemency." Appellate Ex. LXXXVII. He also said that he intended to request that the convening authority set aside the finding of guilty of Specification 4 of Charge II based on the members' request to reconsider, and noted that the request "will receive more favorable consideration if I can demonstrate that my request is based on the wishes of at least 3 of the 7 members," and requested that the members provide a brief e-mail stating their desire to set aside the finding of guilty of that specification. *Id.*

That same day, one member, CAPT Patrick Owens, replied to Mr. Faraj's e-mail, stating, "I understand your request but would prefer to send the information directly to the convening authority vice a simple email through you. If you could provide contact information for the convening authority I will send them a Memorandum for the Record with a courteous [sic] copy to you." *Id.* The record does not show what, if anything, CAPT Owens submitted.

Three days later, on 27 September 2013, the President of the court-martial, CAPT Peter Hall, forwarded Mr. Faraj's e-mail to the military judge, and stated,

> I, and the other members of the Jury, received the below email from the defense attorney in the CDR Arvis Owens Trial. I emailed the other members to hold on for a moment while I checked with legal to see if it was proper for us to respond to Mr. Haytham [sic]. The OPNAV legal guys said that unless the presiding judge prohibited it, then it is permitted. I remember that we could not discuss the votes, and in Mr. Haytham's email he doesn't ask for our vote specifically, but... if we respond it wouldn't be hard to figure it out. What should we do?

Id. The military judge responded to CAPT Hall on 3 October 2013, stating, "Thank you for bringing this to my attention. Further order of the court will be forthcoming via the Trial Counsel. In the meantime, you are directed to refrain from contacting any counsel that is not on the record in open court. Please pass this order along to the other members." *Id.*

On 4 October 2013 another member, CDR Thomas May, informed civilian defense counsel, "I have emailed my recommendation letter to LCDR Pilling." *Id.* LCDR Pilling is the Staff Judge Advocate to the convening authority in Appellant's court-martial. It is not clear from the record when CDR May e-mailed his recommendation to the SJA, but it was on or before 4 October 2013. Appellant has not seen the recommendation and therefore does not know the precise content.

On 3 October 2013 the military judge issued the following order to the members,

> 1. Prior to adjournment in this case, I instructed you as follows:
>
> > To assist you in determining what you may discuss about this case now that it is over, the following guidance is provided. When you took your oath as members, you swore not to discover or disclose the vote or opinion of any particular member of this court, unless required to do so in due course of law. This means that you may not tell anyone about the way you or anyone else on the court voted or what opinion you or they had, unless I or another judge requires you to do so in court. You are each entitled to this privacy. Other than that limitation, you are free to talk about the case to anyone, including me, the attorneys or anyone else. You can also decline to participate in such a discussion if that is your choice.
> >
> > Your deliberations are carried on in the secrecy of the deliberation room to permit the utmost freedom of debate and so that each of you can express your views without fear of being subjected to public scorn or criticism by the accused, the convening authority, or anyone

else. In deciding whether to answer questions about this case, and if so, what to disclose, you should have in mind your own interests and the interests of the other members of the court.

2. It has come to my attention that Defense Counsel, Mr. Haytham Faraj, contacted you via e-mail on 24 September 2013 and stated the following:

> I am contacting you to follow up on the request you made during your sentencing deliberations in the U.S. v. CDR Arvis Owens trial. Some or all of you inquired about the procedure for reconsideration of your vote regarding Specification 4 of Charge II. The judge stated that you may not do so after findings. The Manual for Courts-Martial is silent on whether members may reconsider after findings. Nonetheless, the final decision on all courts-martial convictions is the convening authority. The convening authority may approve, set aside, or approve some and set aside others of the charges. He may also grant clemency. I intend to request that the convening authority set aside the finding of guilty on Specification 4 of Charge II based on your request to reconsider.
>
> My request to the convening authority will receive more favorable consideration if I can demonstrate that my request is based on the wishes of at least 3 of the 7 members. I, therefore, request that you email me a brief email stating that your desire to set aside the finding of guilty on Specification 4 of Charge II. This is not a request for your vote nor are you required to disclose your vote. It is only a request for you to individually -if you did- restate the request you made during the trial regarding that Specification.

2. Mr. Faraj's assertion, "The Manual for Courts-Martial is silent on whether members may reconsider after findings" is an incorrect statement of the law. Rule for Courts-Martial (R.C.M.) 924(a) provides, "Members may reconsider any finding

> reached by them before such finding is announced in open session."
>
> 3. Pursuant R.C.M. 1105(b)(2)(D), it is permissible for the Defense to seek from you and for you to provide a clemency recommendation to the convening authority.
>
> 4. However, pursuant to R.C.M. 923, R.C.M. 1008, Military Rule of Evidence (M.R.E.) 606(b) and the Discussion to R.C.M. 1105(b) (2) (D), a clemency petition from a member should not disclose the vote or opinion of any member expressed in deliberations. This prohibition extends to any member's vote or opinion on the following: findings 1 any request to reconsider findings, and sentence.

Appellate Ex. LXXXVIII.

On 9 October 2013 the defense filed a written objection to the order, and requested an Article 39(a), UCMJ, session. Appellate Ex. XCII. In the objection, the defense argued that the military judge exceeded her authority in issuing a ruling in response to an ex parte question without comment or an opportunity to object from either side. *Id.* The defense argued that it had done nothing improper in reaching out to the members requesting information for clemency, and the broad language of the order would discourage members from participating in the clemency process, or may unduly restrict their ability to express their concern about Appellant's guilt or the punishment he receives. *Id.*

On 3 November 2013 the defense filed a motion for mistrial. Appellate Ex. LXXXIX. In the motion the defense argued that

evidence presented at sentencing was a proper matter for clemency, and by issuing the order in the manner that she did - by basing it on R.C.M. 923, R.C.M. 1008, M.R.E. 606(b), and the Discussion to R.C.M. 1105(b)(2)(D), the military judge "misidentified the defense's attempt to provide the convening authority with post-trial information which could be used to either set aside a finding or to order a new trial as an attempt to impeach the deliberation or finding of the members on the merits." *Id.* The defense argued that it "has not sought to question [the deliberations or the deliberation process], but rather has asked the members to identify the evidence which they received outside the otherwise valid deliberation process which would cause them to have doubt regarding CDR Owens guilt." *Id.*

The defense also argued that the military judge "exceeded the bounds of [her] authority by issuing orders which are not the subject of the Court-Martial." *Id.* The defense argued that "the message sent to the members by the military judge was done when the court was not in session and without comment from ether the defense or government counsel." *Id.* The defense also argued that Mil. R. Evid. 606 "clearly defines the limits of inquiry into the validity of a finding," and while the members are not permitted to disclose their thoughts and opinions during deliberation, Mil. R. Evid. 606 "does not include information gained by the members post-deliberation and it does not prohibit

a member from stating their current opinion as to . . . guilt or innocence, as long as they do not disclose their previous vote." *Id.*

The military judge ordered a post-trial 39(a) session to consider the motion. Mr. Faraj was not present. R. at 1405. During that session she stated,

> Also, I sent separately an email from Mr. Faraj to the members indicating that - and this is an email that was sent to me on October 1st - 4th, excuse me, regarding an email sent to Captain Hall the Senior Member by Mr. Faraj indicating that - Captain - it says Captain, but Commander Owens emailed him back with his preference to communicate directly - that the members communicate directly with the convening authority. I would also like that email to be made part of the record.

The defense argued to the military judge that the defense was not seeking to impeach the findings because the defense was not alleging misconduct. R. at 1408. Instead, the defense wanted see how evidence that came out after deliberations would have affected the findings, but given the breadth of the order the defense thought it safer to have a 39(a) session than to continue to reach out to the members, and the defense was unsure how the order would affect the members' response if the defense continued to ask for clemency recommendations. *Id.*

The defense argued that it had the right to seek clemency, and believed it had a right to see how the new information that came out during the sentencing portion of the trial that

conflicted with the trial testimony impacted the members' current beliefs about Appellant's guilt or innocence. The defense argued that the members' current beliefs do not reveal the vote or deliberation on findings. R. at 1411.

The defense acknowledged a limited power to protect deliberations post-trial, but believed the military judge's order was too broad, and could have a "chilling effect." R. at 1412. The defense specifically took issue with the last sentence of the military judge's order that stated, "Clemency petition from a member should not disclose the vote or opinion of any member expressed in deliberation. R. at 1415. This prohibition extends to any member's vote or opinion on the following: findings or your request to reconsider findings or sentence." Id. In the defense's view, the term "findings" was broad, and the prohibition should have extended only to "vote and deliberation." *Id.* The defense argued, there is no mention in the rule for the request to consider findings and there is no mention in the rule of findings themselves. *Id.*

In the defense's view, this language implied an impeachment of the findings standard, and the defense was not seeking to impeach the findings. The defense was not alleging any sort of member misconduct with respect to the findings. The defense believed that by citing the rules that she did in the order, the

military judge mischaracterized what the defense was trying to accomplish.

The military judge responded that her order did not mischaracterize anything, that the request from the defense to the members "tetered [sic] on asking for a vote," and that the military judge had a sua sponte duty to make sure the law is followed and that is what she did. R. at 1416-17. She then asked what the prejudice was to Appellant. R. at 1417. The defense responded that the prejudice is,

> after reading this I'm not clear what we can talk about and what we can't. There's a broad statement as the prohibition extends to any member's vote or opinion on the following, and it's broad areas, there's no specificity in this order. It only talks about prohibitions, it doesn't talk about empowerment.

R. at 1416. The defense noted that if the military judge had stopped after reminding the members of her initial instructions, the defense would have no objection. R. at 1417. But to continue to discuss rules other than R.C.M. 924(a) undermines the defense's effort and would have a chilling effect on the defense the members and hamper the defense's abilities. *Id.*

The defense contended that if the members were to state their opinions now as to guilt or innocence that it would not disclose their vote. R. at 1423. Defense counsel added that he had considered calling the members and saying, "hey, what evidence was it, you know, was it this? Do you still at this

time, without telling me about your vote earlier, do you still at this time, think he's guilty." R. at 1424. But the defense counsel felt that the breadth of the order prohibited his doing that. *Id.*

The defense counsel denied that asking a member whether he thought Appellant was guilty after the sentencing hearing would necessarily reveal how he voted. *Id.* He noted that he would not know whether a member voted guilty or not guilty in the original proceeding merely by determining whether he believes Appellant is guilty or not guilty right now, and asking that question does not say anything about the members' deliberation or their vote. *Id.* The military judge ruled that the order to the members would remain in effect, and the defense motion for a mistrial was denied. R. at 1425.

On 13 December 2013, the Staff Judge Advocate submitted his recommendation to the convening authority. In the recommendation the SJA stated, "There is no clemency recommendation by the sentencing authority **made in conjunction with the announced sentence**." Staff Judge Advocate's Recommendation, Dec. 31, 2013 (emphasis added).

Appellant submitted matters pursuant to R.C.M. 1105 on 16 January 2014. He submitted these matters personally, "via" his detailed defense counsel. Clemency Matters, Jan. 16, 2014. . Appellant noted in his clemency submission that the military

judge erred in issuing an order "chilling panel members letters for clemency" (the subject of a separate assignment of error), and noted that there were members who had expressed a desire to submit a clemency recommendation, and that it appeared that "one of the members may have e-mailed LCDR Pilling right before the Judge's order." *Id.*

A. Appellant suffered material prejudice to a substantial right when the military judge communicated to the members after the court-martial had adjourned without providing the defense an opportunity to object, and issued an order to the members that had a chilling effect on Appellant's right to request a clemency recommendation from the sentencing authority.

Article 39(c), UCMJ, provides, in relevant part,

> All . . . proceedings, including any . . . consultation of the members of the court with counsel or the military judge, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and . . . the military judge.

The Court of Military Appeals held, in *United States v. Allbee*, 18 C.M.R. 72, 76 (C.M.A. 1955) that when this statutory provision is violated, a rebuttable presumption of prejudice is created. *See also United States v. Thompson*, 47 M.J. 378 (C.A.A.F. 2007).

Also, before issuing any ruling or order, the military judge must provide the parties a reasonable opportunity to present and support their contention on any relevant matter. R.C.M. 801(a)(3), Discussion. This is particularly so given the

finality of the ruling of a military judge. See R.C.M. 801(e)(1)(A).

And once the court-martial has been adjourned, as it had in this case, the authority of the military judge to instruct the members is limited. R.C.M. 1102 provides authority for post-trial sessions, and states that the military judge may direct proceedings in revision or Article 39(a) sessions. Proceedings in revision may be directed "to correct an apparent error, omission, or improper or inconsistent action by the court-martial, which can be rectified by reopening the proceedings without material prejudice to the accused." Article 39(a), UCMJ, sessions may be directed for the purpose of "resolving any matter that arises after trial and that substantially affects the legal sufficiency of any findings of guilty or the sentence," "to reconsider any trial ruling that substantially affects the legal sufficiency of any findings of guilty or the sentence," or "enter a finding of not guilty of one or more offenses charged, or may enter a finding of not guilty of a part of a specification as long as a lesser offense charged is alleged in the remaining portion of the specification.

There is no inherent authority for the military judge to instruct the members of anything outside the confines of R.C.M. 1102. If the military judge wanted to further instruct the members, she should have directed an Article 39(a), UCMJ,

session, stated on the record what her concern was and how she intended to instruct the members, and provided Appellant an opportunity to object to the instruction.

In this regard, the military judge abused her discretion by issuing both the initial e-mail to CAPT Hall directing the members to have no contact with any of the attorneys, and the later written ruling, without providing Appellant any opportunity to respond or object to either.

Appellant was prejudiced by the error. By ordering the members to have no contact with the attorneys outside of open court, the military judge suggested to the members that there was something improper in the defense requesting a clemency recommendation from the members. The military judge compounded the prejudice by issuing the order that she did, because although the order stated that R.C.M. 1105(b)(2)(D) permits the defense to seek a clemency recommendation, that statement is immediately followed by,

> However, pursuant to R.C.M. 923, R.C.M. 1008, Military Rule of Evidence (M.R.E) 606(b) and the Discussion to R.C.M. 1105(b)(2)(D), a clemency petition from a member should not disclose the vote or opinion of any member expressed in deliberations. This prohibition extends to any member's vote or opinion on the following: findings, any request to reconsider findings, and sentence.

Appellate Ex. LXXXVIII. As noted by the defense, it was not seeking to have the members disclose their vote or

discuss their deliberations, soreference to these rules was unnecessarily confusing.

And rather than address the point raised by CAPT Hall in his e-mail to the military judge, that "in Mr. Haytham's [sic] email he doesn't ask for our vote specifically, but . . . if we respond it wouldn't be hard to figure it out," (R. at 1420), the military judge merely states the rules, implying that CAPT Hall's concern was apt, and never explaining that the defense's request for clemency did not run afoul of the rules. Had the military judge given the defense an opportunity to comment on the order, the defense may have convinced her to include language indicating that a recommendation to the convening authority that a finding be set aside is not tantamount to a disclosure of a vote.

It is true that the defense raised all of this in its motion and the military judge refused to rescind the order. But it is impossible to say in hindsight what the military judge would have done had the defense had the opportunity to persuade her at the time when it would have done the Appellant the most good.

It is reasonable for this Court to infer from the record that the military judge's e-mail and subsequent order had an actual chilling effect on some members, and convinced them that they could not submit a clemency recommendation without

violating the Rules. This is particularly true in light of CAPT Hall's comment that "it wouldn't be hard to figure out" how members voted, when the defense was specifically not requesting that information and the military judge never clarified that for the members. As a result, Appellant was denied a meaningful opportunity to request a clemency recommendation from the very people whose recommendations would have carried the most weight.

B. Appellant suffered material prejudice to a substantial right when the Staff Judge Advocate failed to forward to the convening authority a clemency recommendation from one (or possibly more) of the members.

R.C.M. 1105(b)(2)(D) provides for submission by the accused of any clemency recommendation by "any member [or] the military judge," and states that "[t]he defense may ask any person for such a recommendation." Rule for Courts-Martial 1106(d)(3) requires the staff judge advocate, among other things, to provide the convening authority "any recommendation for clemency by the sentencing authority, made in conjunction with the announced sentence." The nonbinding discussion to R.C.M. 1106(d)(3) states, "The recommendation required by this rule need not include information regarding other recommendations for clemency," and references "R.C.M. 1105(b)(2)(D), which pertains to clemency recommendations that may be submitted by the accused to the convening authority."

Appellant attempted to obtain clemency recommendations from the members. At least one member, CAPT Owens, said he preferred to send his recommendation directly to the convening authority. The other member, CDR May, said that he had, in fact, sent a recommendation to LCDR Pilling, the Staff Judge Advocate. The record does not establish whether either of these recommendations were actually presented to, or considered by, the convening authority.

Appellant notes that the military judge apparently misunderstood CAPT Owens' email, and believed it was from Appellant expressing his own preference that the members communicate directly with the convening authority. She said, "an email sent to Captain Hall the Senior Member by Mr. Faraj indicating that - Captain - it says Captain, but Commander Owens emailed him back with his preference to communicate directly - that the members communicate directly with the convening authority." R. at 1406. The military judge asked that this particular e-mail be made part of the record as an Appellate Exhibit, but it never was. *Id.* Appellant submitted it as part of his R.C.M. 1105 submission. The email <u>was</u> from a Captain - CAPT Owens, a member of the panel - expressing his own desire, not that of Appellant, to submit his recommendation directly to the convening authority.

The record does not indicate whether CAPT Owens ever submitted anything to the convening authority, and if he did, whether he submitted it directly to RADM Rich or if he submitted it through LCDR Pilling. CDR May stated that he actually submitted a recommendation through the SJA. The convening authority stated only that he considered "the email string indicating what appears to be messages from members of the court-martial," but otherwise does not state that he considered any clemency recommendations from any members.

It is true, as the SJA stated in the SJAR, that the members made no clemency recommendations "in conjunction with the announced sentence." Staff Judge Advocate's Recommendation, Dec. 31, 2013. It is also true that the discussion to Rule for Courts-Martial 1106(d)(3) states that "[t]he recommendation required by this rule need not include information regarding other recommendations for clemency." But when ***a member*** makes a recommendation for clemency and submits it to the SJA, it is obvious that the member intends the convening authority to consider the recommendation in arriving at the decision on clemency. And while there may be no legal requirement to address the recommendation in the SJAR, Appellant is unaware of any legal authority to for the SJA to act as "gatekeeper" to keep a clemency recommendation from the sentencing authority away from the convening authority.

In *United States v. Bell*, 60 M.J. 682, 685 (N-M.Ct.Crim.App. 2004), this Court held that Article 1156 of the U.S. Navy Regulations provides that "Requests from persons in the naval service should be acted upon promptly. When addressed to higher authority, requests shall be forwarded without delay. The reason should be stated when a request is not approved or recommended." And as this Court also noted in *Bell*, "the SJA is an advisor and **not a decision maker**." *Id* (emphasis added). The member made a recommendation for clemency and sent it to the SJA. The SJA had no authority to withhold that recommendation from the convening authority, and "basic fair play" required the SJA to forward the recommendation. *Id.* at 685.

Under these facts, it is unjust for the government to hide the ball by a strict application of the rule that requires disclosure of clemency recommendations made by the members only if they "accompany the sentence," and not forwarding clemency recommendations that were made at some other time, merely because the ***non-binding*** discussion says it "need not."

Given the posture of this case at the time the SJAR was submitted - that some members had expressed a willingness to submit a clemency recommendation if they could do so either directly to the convening authority or via the SJA; that the military judge had expressly forbidden the members at one point from communicating with defense counsel until further notice

after a request for a clemency recommendation had been made of them by the defense; and that the military judge issued an order which appeared to discourage such recommendations - it was error for the SJA to fail to forward any clemency recommendations he received.

The SJA abandoned his impartial role when he failed to forward the clemency recommendation to the convening authority, and was therefore disqualified. The SJA is supposed to be neutral. *United States v. Taylor*, 60 M.J. 190, 193 (C.A.A.F. 2004). And, he is an advisor, not a decision maker. *Bell*, 60 M.J. at 685. One is left to wonder, then, why the Staff Judge Advocate, an officer of the court with a duty of candor to the convening authority, would take it upon himself to determine that CDR May's (and possibly others') clemency recommendation was something that the convening authority should not see. The only conclusion one can draw is that the SJA did not want the CA to act favorably on the recommendation. The SJA failed in his duty of candor to the CA by hiding behind the "no clemency recommendation accompanying the sentence" language when he had, in fact, received a clemency recommendation from at least one (and possibly more) of the members; that statement implied to the convening authority that there was no clemency recommendation from the sentencing authority when, in fact,

there was a recommendation by at least one member and possibly others.

Based on the foregoing, Appellant was denied any meaningful opportunity for clemency in his case. The record should be returned for a new SJAR and convening authority's action. Given that it appears that the SJA withheld a clemency recommendation from at least one member in violation of his duty of candor to the convening authority, the new SJAR should be conducted by a new SJA. Appellant also respectfully submits that it would be appropriate for any new action be taken by a different convening authority.

WHEREFORE Appellant so prays.

XI.

APPELLANT IS ENTITLED TO A PROMULGATING ORDER THAT ACCURATELY REFLECTS THE FINDINGS AS AMENDED BY THE MILITARY JUDGE.

Standard of Review

Errors in the Promulgating Order are reviewed "under a harmless error standard." *United States v. Crumpley*, 49 M.J. 538, 539 (N.M-C.Ct.Crim.App. 1998).

Argrument

Specification 2 of Charge I alleged that Appellant made various statements to SD, including "that her 'breasts are nice.'" No evidence was presented to the court-martial from which any reasonable panel could conclude that Appellant had

made the statement. The members entered a finding of guilty to this specification, without findings or substitution. R. at 1279. After the close of all the evidence it became apparent that the evidence was insufficient to find that Appellant had made the statement to SD to the effect that her "breasts were nice," and the military judge entered a finding of not guilty to that language pursuant to R.C.M. 917 (R. at 1290) and advised the members that she had excepted the language "that her breasts were nice, or words to that effect" from the finding of guilty, and provided them with a new cleansed charge sheet. R. at 1381.

The Report of the Results of trial reflects the finding of guilty to the specification as amended. However, the Promulgating Order, General Order No. 1-14, states, with respect to Specification 2 of Charge I, that Appellant had been found guilty of the specification, repeats the language of the specification verbatim, and does not say that the military judge entered a finding of not guilty of the "breasts are nice" language.

Rule for Courts-Martial 1114 requires orders promulgating the result of trial and the actions of the convening or higher authorities on the record to be prepared. The purpose of the promulgating order is to "publish[] the result of the court-martial and the convening authority's action . . . ." R.C.M. 1114(a)(2). The promulgating order is required to contain,

among other things, "the findings or other disposition of each charge and specification." R.C.M. 1114(c)(1).

Given that the promulgating order is the official published result of the court-martial, Appellant is entitled to a promulgating order that is accurate in all respects. The military judge entered a finding of not guilty to a portion of specification 1 of Charge II, but the promulgating order fails to reflect that. Appellant is entitled to have his court-martial records correctly reflect the result of the proceeding. Crumpley, 49 M.J. at 539. He respectfully requests this Court return the record of trial to the Judge Advocate General with instructions to issue a new promulgating order.

WHEREFORE Appellant so prays.

Respectfully submitted,

FOR

William E. Cassara
PO Box 2688
Evans, GA 30809
706-860-5769
bill@williamcassara.com

MOTION FOR LEAVE TO FILE BRIEF IN EXCESS OF PAGE LIMITATION

Pursuant to Rule 15.1(e) of this Court's Rules of Practice and Procedure, Appellant respectfully requests leave to file a brief in excess of the page limitation set forth in the Rule. This was a contested case and the record itself is in excess of 2,500 pages. Appellant respectfully submits that a brief in excess of the limitation is necessary to adequately present the issues in this case, given the number and complexity of the factual and legal issues discussed herein.

WHEREFORE Appellant so prays.

Respectfully submitted,

FOR

William E. Cassara
PO Box 2688
Evans, GA 30809
706-860-5769
bill@williamcassara.com

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was delivered to the Court and opposing counsel on 23MAY2014.

FOR

William E. Cassara
PO Box 2688
Evans, GA 30809
706-860-5769
bill@williamcassara.com

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 3

UNITED STATES, Appellee v. Lee E. PARRETT, Machinist Mate First Class (E-6) U.S. Navy Appellant	))))))))))	ANSWER ON BEHALF OF APPELLEE Case No. 201300197 Tried at Naval Air Station, Jacksonville, Florida, March 22, 2013, by special court-martial convened by the Commander, Naval Region Southeast.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Error Assigned

DOES APPELLANT'S APPROVED SENTENCE THAT INCLUDES A BAD-CONDUCT DISCHARGE WARRANT RELIEF UNDER ARTICLE 66(C), UNIFORM CODE OF MILITARY JUSTICE AS THE SENTENCE IS UNJUSTIFIABLY SEVERE?

Statement of Statutory Jurisdiction

Appellant's approved sentence includes a bad conduct discharge. Accordingly, this Court has jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012).

Statement of the Case

A military judge, sitting as a special court-martial, convicted Appellant, pursuant to his pleas, of one specification of indecent conduct in violation of Article 120, UCMJ, 10 U.S.C. §§ 920(k) (2012). The Military Judge sentenced Appellant to one

hundred and ten days confinement, reduction to pay grade E-3, and a bad conduct discharge. The Convening Authority approved the sentence as adjudged, and ordered the sentence executed.[1] (Convening Authority's Action (C.A.A.) 3, May 14, 2013.) In accordance with the pretrial agreement, the remaining four specifications were withdrawn.

Statement of Facts

A. Appellant had open and notorious sex with an incapacitated victim.

Appellant hosted a New Year's Eve party at his home on December 31, 2012. (R. 31; Pros. Ex. 1 at 2.) Attendees included Lieutenant Chaffee; the victim, HF; and BR, a friend of the victim. (R. 32-33, 35; Pros. Ex. 1 at 2.) HF was Lieutenant Chaffee's girlfriend. (R. 33.) After a night of drinking, HF, LT Chaffee, and BR all fell asleep in Appellant's living room on the sofas and chair, within approximately ten feet of each other. (R. 33, 39; Pros. Ex. 1 at 2.)

At some point during the night BR awoke. (R. 34, Pros. Ex. 1, 2.) In the ambient light, BR witnessed Appellant engaged in sexual intercourse with HF, and heard noises consistent with sexual intercourse. (R. 34-35, Pros. Ex. 1 at 2.) HF had been visibly intoxicated prior to passing out on Appellant's couch.

[1] Although Appellant was reduced to E-3, there appears to be a scrivener's error in the Convening Authority's action, directing that the accused be reduced to the pay grade of E-1.

(R. 39.) Appellant, knowing HF was under the influence of alcohol, still decided to have sex with her. (R. 39.) The intercourse took place in the open area of the living room, where others, including HF's boyfriend, were sleeping. (R. 35-36, Pros. Ex. 1 at 2.)

Appellant confessed that having sex with LT Chaffee's girlfriend while he and others were in the same room was grossly vulgar, obscene, repugnant, and repugnant to common propriety. (R. 36, Pros. Ex. 1 at 3.) Potentially all persons in the living room could have witnessed Appellant's misconduct had they awoken, including the victim's own boyfriend. (Pros. Ex. 1 at 2, 3.) Specifically, Appellant acknowledged that, had those people been given the choice, he believes that neither BR nor LT Chaffee would have consented to Appellant having sexual intercourse with HF next to them. (R. 37, Pros. Ex. 1 at 3.) Appellant also acknowledged that he was fully in control of his actions and could have avoided this situation, but instead chose to engage in wrongful indecent conduct. (Pros. Ex. 1 at 3.)

Argument

APPELLANT'S SENTENCE IS APPROPRIATE FOR HIS CRIME AND DOES NOT WARRANT RELIEF UNDER ARTICLE 66(C), UNIFORM CODE OF MILITARY JUSTICE.

A. Sentence appropriateness is reviewed *de novo*.

Sentence appropriateness is reviewed *de novo*. *United States v. Baier*, 60 M.J. 382, 383—84 (C.A.A.F. 2005). Article 66(c) requires that the members of the Court independently determine, in every case within their limited Article 66, UCMJ jurisdiction, the sentence appropriateness of each case affirmed. *Baier,* 60 M.J. at 384-85.

B. Article 66(c), UCMJ, grants this Court authority to review the appropriateness of a sentence, but that authority is not a vehicle to bestow clemency.

The Court should begin its analysis of sentence appropriateness by recognizing that a court-martial is free to impose any sentence it considers fair and just within the limits of punishment prescribed by the Code or the President. *United States v. Turner*, 14 C.M.A. 435, 437 (C.M.A. 1964); *United States v. Dedert*, 54 M.J. 904, 909 (N-M. Ct. Crim. App. 2001); Rule for Courts-Martial (R.C.M.) 1002. Article 66 of the Code assigns to the Court "only the task of determining sentence appropriateness: doing justice." *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); Article 66(c), UCMJ. "Sentence appropriateness involves the judicial function of assuring that

justice is done and that the accused gets the punishment he deserves." *Healy*, 26 M.J. at 395.

Generally, the Court should judge sentence appropriateness by an individualized consideration of the accused on the basis of the nature and seriousness of the offenses and the character of the offender. *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982). When reviewing a sentence, the Court is tasked with determining sentence appropriateness vice bestowing clemency, which is the "command prerogative" of the convening authority. Article 60(c), UCMJ; *Healy*, 26 M.J. at 396; R.C.M. 1107(b).

C. Appellant's approved sentence was a lawful and appropriate punishment for his sexual misconduct.

Appellant faced the maximum punishment at a special court-martial: confinement for a year, forfeiture of two-thirds pay per month for a year, a fine not to exceed two-thirds pay per month for a year, reduction to paygrade E-1, and discharge from the service with a bad conduct discharge. (R. 19.) He knew a bad conduct discharge was a possible consequence of his pleading guilty because his pre-trial agreement indicated that all lawful punishments available at a special court-martial could be approved as adjudged. (Appellate Ex. VI at 1.) Appellant received much less than this maximum when the Military Judge sentenced him to one hundred and ten days confinement, reduction to pay grade E-3, and a bad conduct discharge. (R. 80.)

Appellant's sentence is an appropriate consequence of the vulgar and obscene nature of his crime. He clearly waited until everyone was sufficiently intoxicated, and asleep, and then availed himself of the opportunity to satisfy his sexual desires. Appellant's calculated choice to engage in this conduct out in the open living room where others were lying was predatory, repugnant to common decency and contrary to the good standards of the Navy. The private act of sexual intercourse could have been accomplished in a bedroom within Appellant's residence, but Appellant was too driven by his own desires and depraved morals with respect to sexual relations to consider how his actions might adversely affect the guests resting in his living room. This is bad conduct, and deserves a bad conduct discharge.

D. Appellant's request for relief is just an attempt to entice this Court to engage in an improper act of clemency.

Appellant argues his bad conduct discharge is inappropriately severe because of his clean military record prior to this offense. (Appellant's Br. at 7-8.) Appellant's argument reduces to nothing more than an invitation for this Court to improperly engage in an act of clemency. *See United States v. Lacy*, 50 M.J. 286, 287 (C.A.A.F. 1999) (explaining while reviewing sentence appropriateness is "highly discretionary" it does not authorize appellate courts to engage in acts of clemency). The prerogative of clemency is properly reserved for

the Convening Authority. *United States v. Healy*, 26 M.J. 394, 395—96 (C.M.A. 1988).

Here, Appellant has already submitted matters in clemency to the Convening Authority asking the court to disapprove his bad-conduct discharge. Clemency Request from LT Emily Keiler-Green, JAGC, USN (May 9, 2013). The Convening Authority reviewed the Record of Trial, the Staff Judge Advocate Recommendation, the petition for clemency, the letters requesting clemency for Appellant, and the brig progress report. (C.A.A. at 1-3.) After taking everything into account the Convening Authority decided that Appellant's sexual misconduct warranted a bad conduct discharge and approved the sentence as adjudged. (C.A.A. at 3.) This Court should not usurp the Convening Authority's prerogative by granting sentence relief.

Notwithstanding Appellant's honorable service, a bad-conduct discharge and 110 days confinement is appropriate when balanced against his offense and the overall character of his enlistment. (R. 69; Defense Ex. A.) As Trial Counsel pointed out, Appellant was old enough and smart enough to know better, and his age and experience only further highlight the predatory nature of his crime. (R. 74.) He knew the high standards that the Navy expects, and how to meet those standards when he chose too, but abandoned them to satisfy his sexual desires. (R. 76-77.) Appellant's sentence was commensurate with his crime.

Conclusion

WHEREFORE, the Government respectfully requests that this Court affirm the findings adjudged and approved below.

LINDSAY P. GEISELMAN
Lieutenant, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7686, fax (202) 685-7687

Certificate of Filing and Service

I certify the foregoing was delivered to the Court and a copy was served upon opposing counsel and electronically filed with the Court pursuant to N-M. Ct. Crim. App. Rule 5.2(b)(1) on September 20, 2013.

LINDSAY P. GEISELMAN
Lieutenant, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7686, fax (202) 685-7687

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 3

UNITED STATES, Appellee v. Jacob L. PEASE Information Systems Technician Second Class (E-5) U.S. Navy, Appellant	**APPELLANT'S BRIEF AND ASSIGNMENTS OF ERROR** Case No. 201400165 Tried at the Naval Support Activity, Naples, Italy, 6 August, 27 September, 8 October, and 9 – 13 December 2013 by a General Court-Martial convened by the Commander Navy Region Europe, Africa, Southwest Asia.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

ERIC S. MONTALVO, Esq.
Founding Partner
THE FEDERAL PRACTICE GROUP
1150 Connecticut Avenue, NW
Ste. 900
Washington, D.C. 20036
Tel: (202) 862-4360
Fax: (888) 899-6053
e.montalvo@fedpractice.com

CARRIE E. THEIS
Lieutenant, JAGC, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Bldg. 58, Ste. 100
Washington Navy Yard, DC 20374
(202) 685-7390
Fax (202) 685-7426
Carrie.Theis@navy.mil

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Assignments of Error

I

WHETHER THE MILITARY JUDGE VIOLATED THE APPELLANT'S CONTITUTIONAL RIGHT TO DUE PROCESS WHEN HE IMPROPERLY APPLIED MILITARY RULE OF EVIDENCE 413 TO CHARGED MISCONDUCT.

II

WHETHER THE EVIDENCE IS LEGALLY AND FACTUALLY SUFFICIENT.

III

WHETHER THE MILITARY JUDGE ERRED IN FAILING TO GIVE THE REQUESTED DEFENSE INSTRUCTION ON COMPETENCE.

IV

WHETHER APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS WAS VIOLATED WHEN HE WAS CONVICTED OF VIOLATING ARTICLE 120 WHICH IS CONSTITUTIONALLY VAGUE.

V

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ADMITTING THE TESTIMONY OF DR. WEIS.

Statement of Statutory Jurisdiction

Information Systems Technician Second Class (IT2) Jacob L. Pease's approved general court-martial sentence included a punitive discharge and confinement in excess of one year. Accordingly, his case falls within this Court's jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ). 10 U.S.C. § 866(b)(1) (2012).

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted IT2 Pease, USN, contrary to his pleas, of three specifications of sexual assault, one specification of abusive sexual contact, and two specifications of fraternization in violation of a lawful general order, violations of Articles 120 and 92, UCMJ. (R. at 1290); 10 U.S.C. §§ 920, 892 (2012). IT2 Pease was found not guilty of one specification of sexual assault, a violation of Article 120 UCMJ. (R. at 879); 10 U.S.C. § 920 (2012). IT2 Pease was sentenced to six years of confinement and discharge from the naval service with a dishonorable discharge. (R. at 1588.) The convening authority approved the adjudged sentence and ordered the sentence, except for the dishonorable discharge, executed. (General Court-Martial Convening Order 1-13, Apr. 8 2014.)

Statement of Facts

In December 2012 and January 2013, IT2 Pease was stationed aboard the USS MOUNT WHITNEY, Geata, Italy, in the radio division of the communications department. (R. at 469-70, 578.) IT2 Pease held the collateral billet of 3M Work Center Supervisor. (R. at 470, 578, 671.) The responsibilities of this billet included ensuring the proper maintenance of the division equipment. (R. at 671-72.) As a work center supervisor, IT2 Pease was not in the administrative chain of

command. (R. at 694.) The individuals who were within the administrative and reporting chain of command included the Lead Petty Officer, Information Systems Technician First Class (IT1) Nelson, the Lead Chief Petty Officer, Senior Chief Information Systems Technician (Chief) Gerald Winslow, and the Division Officer, Chief Warrant Officer 4 (CWO4) Glen Bartley. (R. at 469).

Two other individuals within the radio division were Information Systems Technician Third Class (IT3) S.K. and IT2 B.S. (R. at 468, 577.) IT3 S.K. arrived to the USS MOUNT WHITNEY in November 2012. (R. at 468.) At the time of the charged offense, she was the rank of Seaman (SN). (R. at 472.) IT2 B.S. arrived to the ship sometime in the early part of January 2013. (R. at 578-579.) Despite being the same rank as IT2 Pease, she had to requalify in 3M. (R. at 577.) Since she was requalifying, she did not receive any assignments from the 3M Work Center Supervisor, IT2 Pease. (R. at 695.) IT2 B.S. was also considered a work center supervisor. (R. at 980.)

On December 6, 2012, IT3 S.K. went to three local bars with some of the other Sailors in her shop. (R. at 472-482.) They started at a bar called The Dutch, which they arrived at around dinner time. (R. at 472, 474-475.) IT3 S.K. consumed beer and liquor while at the first bar. (R. at 473.) At some point, IT3

S.K. and two others left The Dutch and walked to another bar, Anna's. (R. at 475.)

While on the walk over to Anna's, the group encountered shore patrol. (R. at 435-435, 475.) Shore patrol consisted of senior personnel who would frequent the local establishments at night to ensure that other Sailors were not being disruptive and send Sailors back to the ship, if necessary. (R. at 903-04.) When making the decision to send a Sailor home, shore patrol erred on the side of caution, even though the Sailor may not have been overly intoxicated at that point. (R. at 904-07.) That evening, shore patrol consisted of IT1 Justin Vedder and CWO4 Bartley. (R. at 434, 475.) At that time, CWO4 Bartley, knowing that IT3 S.K. had a reputation for consuming large amounts of alcohol, told her that he did not want to see her out all night. (R. at 475, 932.)

At Anna's, IT3 S.K. consumed beer and liquor. (R. at 478.) IT3 S.K. and the group that she was with continued to go back and forth between Anna's and another bar, Monique's, which are located right next to each other. (R. at 477, 479.) During this time, IT3 S.K. encountered shore patrol again outside of the bars, at which point CWO4 Bartley told IT3 S.K. to return to the ship. Instead of returning to the ship, she went to Monique's and continued to drink. (R. at 479-480). While she was in Monique's sitting with IT2 Pease, shore patrol approached

her a third time. (R. at 442, 480-81.) CWO4 Bartley directed her to return to the ship, and for IT2 Pease to go with her. (R. at 911.) IT3 S.K. told CWO4 Bartley that she did not want to return to the ship, but that she wanted to go back to The Dutch. CWO4 Bartley told her no, and to return to the ship. (R. at 482.) At that time, IT2 Pease and IT3 S.K. walked back to the ship, while shore patrol walked behind them. (R. at 443, 482.) During the walk, neither IT1 Vedder nor CWO4 Bartley recalled IT3 S.K. stumbling, falling, or having to lean on IT2 Pease for support. (R. at 445, 912-13.)

Once back at the ship, IT3 S.K. and IT2 Pease ascended the stairs to the quarterdeck, where they scanned their identification (ID) cards in order to gain access, and proceeded to the smoke deck. (R. at 482, 510-11, 522-23, 914.) While on the smoke deck, IT3 S.K. told IT2 Pease that she thought he was cute and engaged in kissing him. (R. at 512.) The two then proceeded to the Joint Operations Center (JOC) where they had vaginal intercourse on one of the tables. (R. at 513-14.) During the intercourse, IT3 S.K. was leaning back on the table, using her elbows to help prop up her body and to support her body weight. (R. at 516-17.) After the intercourse, she returned to the female berthing, which required descending between two and three flights of stairs. (R. at 521-22). Once

inside female berthing, she maneuvered into her rack, which was the middle of three beds. (R. at 522.)

The following morning she encountered several individuals with whom she could have made a report of sexual assault to; she did not make a report to either individual. (*See* R. at 1006, 1020.) With the first, she stated that she had been messing around with someone in the JOC, and that she needed access to retrieve her ID card. (R. at 526-28, 1004-06.) Later that day, she attended the International Cultural Relations (ICR) trip. (R. at 1015-16). During this trip, she told a fellow Seaman, who coincidentally was one of the individuals she was out with the previous night, that she had intercourse with IT2 Pease, and she wasn't sure if she liked it or not. (R. at 528-29, 1017.) During the trip that day, she was observed as laughing, joking, and giggling. (R. at 1018.) She talked with the Seaman again several days later about having intercourse with IT2 Pease, but never referred to it as a sexual assault. (R. at 530, 1020.) After having intercourse with IT2 Pease, there was no indication that there was a disruption in the workplace or any favoritism shown to IT3 S.K. (R. at 535-36.) Approximately one week after making the report of sexual assault, IT3 S.K. requested an expedited transfer. (R. at 501.)

On the evening of January 24, 2013, which was a Thursday evening, IT2 B.S. and IT3 S.K. were at another Petty Officer's

off-ship apartment, and were consuming alcohol. The next morning, January 25, 2013, the Sailor who owned the apartment failed a fit-for-duty breathalyzer. Additionally, IT2 B.S. had missed the bus the morning of 25 January to an offsite work location; she instead never returned to work that day and "played hooky" by remaining at a laundromat during the remaining working hours. (R. at 617.) Both IT3 S.K. and IT2 B.S. were required to give statements regarding the consumption of alcohol on the night of 24 January. IT3 S.K. gave a statement on January 25, and IT2 B.S. gave a statement on the morning of January 26. (R. at 496, 605.)

On the evening of January 25, 2013, IT2 B.S. and three other Sailors went to The Dutch for dinner. (R. at 580.) While at The Dutch, IT2 B.S. consumed two drinks. (R. at 581.) After the Dutch, the group walked to two other bars, where IT2 B.S. consumed a drink at each location. (R. at 583-84.) After the third bar, she returned to one of the Sailor's apartment to put on some warmer clothes. She met back up with the group, and they proceeded to Anna's. (R. at 584-85.) While at Anna's, she and IT2 Pease were seen sitting with each other, arms interlocked, shoulders touching, conversing. (R. at 989.) From Anna's, the group went "next door" to Monique's were she had two more drinks. (R. at 588-89). During the time that the group was at Monique's, IT2 B.S. went outside and encountered CWO4

Bartley who was conducting shore patrol. (R. at 591). While outside, IT2 B.S. attempted to light a cigarette backwards; IT2 Pease did not see her do so. (R. at 667.)

Based on his understanding that she had a history of consuming large amounts of alcohol, and that she had consumed alcohol that evening, CWO4 Bartley told IT2 B.S. that she needed to return to the ship. (R. at 591-92, 918, 932.) Prior to leaving, she said "Goodnight, COMO" to CWO4 Bartley, a name he was commonly referred to. (R. at 571, 917.) She began walking back with another Sailor, a Seamen, at which time IT2 Pease offered to walk her back to the ship. (R. at 592, 917.) During the walk back, IT2 B.S. had no difficulty walking, and was not stumbling. (R. at 573.) As they passed the ship, she stated that she did not want to return, but would rather stay out and keep "partying." (R. at 593, 619.) IT2 Pease and IT2 B.S. then walked to an apartment approximately a mile from the ship. (R. at 851.) To access the particular apartment, one has to walk down a flight of stairs. (R. at 633, 839.)

Once at the apartment, the two engaged in various forms of intercourse, beginning with anal intercourse. (R. at 594.) IT2 B.S. found this form of intercourse to be painful; she told IT2 Pease to stop, which he did. (R. at 594.) Once IT2 Pease disengaged, IT2 B.S. became ill and vomited on the bedding. (R. at 594-95.) IT2 B.S. then left the bedroom, and went across the

hallway to the restroom to clean herself off. (R. at 596-97.) IT2 Pease went to the restroom to check on her, and the two then returned to the bed. (R. at 597-98.) After some amount of time, IT2 B.S. got out of bed, went into the kitchen, and got a glass of water. She then told IT2 Pease that she knew where she was because she had previously looked at the same apartment to rent. (R. at 637-38.) She then returned to the bed with IT2 Pease. (R. at 638.) A little while later, IT2 B.S. and IT2 Pease engaged in vaginal intercourse; the various positions during this intercourse included IT2 B.S. being on top of IT2 Pease, and "doggie style" in which IT2 B.S. was on her hands and knees facing away from IT2 Pease. (R. at 599, 639-40.) IT2 B.S. stated to Naval Criminal Investigative Services (NCIS) during her interview that she enjoyed the "doggie style" intercourse. (R. at 640, 650). At one point, he bit her nipple; she responded that it hurt and he didn't do it again. (R. at 600, 640-41.)

The next morning, IT2 B.S. was awoken by another one of the Sailors in the radio division; IT2 Pease was no longer in the apartment. (R. at 602-03.) The other Sailor was at the apartment to take her back to the ship. (R. at 603.) When he woke her up, IT2 B.S. asked him if she had any hickies and if she was in trouble. (R. at 603.) She figured he was there to take her back to the ship to talk to CWO4 Bartley, since she had

disregarded his instruction the previous night to return to the ship. (R. at 603.) As they were walking back to the ship, they encountered CWO4 Bartley, who instructed her to go speak with Chief Winslow. (R. at 604.) She did so, but she first went to give a statement regarding the drinking the night of 24 January. (R. at 605-06.)

Present during the conversation with Chief Winslow was Lieutenant Junior Grade (LTJG) Pharr, an individual who viewed herself as the female mentor aboard the ship and had Sailors refer to her as Ms. Pharr. (R. at 785, 497-98.) IT2 B.S. received a verbal counseling from the two about her involvement with alcohol and that she was not making a good first impression on the ship. (R. at 606-07.) At this time, IT2 B.S. did not mention anything regarding a sexual assault. (R. at 607.)

Shortly after this conversation occurred, LTJG Pharr called IT3 S.K. in to speak with her. (R. at 497.) LTJG Pharr told IT3 S.K. that she needed to make more friends, and that some of her current friends, referring to IT2 B.S., would stab her in the back. She then proceeded to tell IT3 S.K. that despite what she may have heard about IT2 B.S.' incident the previous night, nothing had happened and she was now back on the ship. (R. at 497.)

IT3 S.K. then went to talk to IT2 B.S. (R. at 497.) After conversing for a little while, IT2 B.S. told IT3 S.K. that she

had slept with IT2 Pease the previous night. (R. at 499). IT3 S.K. said that she had done nearly the exact same thing approximately one month prior. (R. at 611.) The two then continued to converse and decided that IT2 B.S. would make a report. (R. at 612.) IT3 S.K. then got the Victim Advocate (VA) to speak with IT2 B.S. (R. at 499.) After bringing the VA to speak with IT2 B.S., IT3 S.K. turned to walk away; IT2 B.S. stopped her, and told the VA that IT3 S.K. should probably speak with her as well. (R. at 499-500.) After she made the report, IT2 B.S. told her fiancé about what had occurred. (R. at 622.)

Following these two periods of charged offenses, there was no report of disruption in the workplace or favoritism shown by IT2 Pease towards either IT3 S.K. or IT2 B.S. (R. at 919, 1021-22.)

During various Article 39(a), UCMJ, 10 U.S.C. § 839(a) (2012) sessions prior to the start of trial, several motions were argued to include a defense motion to preclude the government from arguing propensity for the charged misconduct, and a defense motion to dismiss Charge I because the underlying statute, Article 120, UCMJ, 10 U.S.C. § 820 (2012) was vague and thus unconstitutional. (R. at 61–63, 127–41.) During Article 39(a) sessions held both prior to the start of trial and in the course of the government's case in chief, the defense objected

to the introduction of Dr. Weis as an expert on sexual assault victim behavior. (R. at 228-235.)

On the constitutional matter, the military judge denied the motion and stated that:

> [The] issue is going to be raised in some case on appeal and people with bigger brains and people with more time to think about it than I, even though I don't have that many cases, maybe I'm just not willing to go through the mental gymnastics of it . . . At this level, at this trial court level, I am not going to find that Congress passed an unconstitutionally vague statute in this case for the reasons I just stated.

(R. at 142.)

With respect to the defense motion to preclude the government from arguing propensity for the separately charged misconduct under Military Rule of Evidence (M.R.E.) 413, the military judge authorized the government to argue propensity for the charged offense concerning IT2 B.S. based on the evidence for the offense involving IT3 S.K., as well as for the inverse, and instructed the members that they could consider the actions with respect to the two separate females as propensity to commit the other, so long as they found by a preponderance of the evidence that one offense was committed. (R. at 74-81, 188-89, 1169-72.)

During the government's closing argument and rebuttal, the counsel focused the members' attention on the word "competent"

when referencing "consent" and "impairment". (R. at 1187-88, 1190, 1267, 1275.) During deliberations on the merits, the president of the panel, Commander (CDR) Kent, submitted a question asking for a legal definition of "competent". (R. at 1273.) The defense proposed using the definition from Black's Law Dictionary, which was "a basic or minimal ability to do something." (R. at 1273-74, 1276, 1279.) The military judge refused to give a definition. (R. at 1286.) In its request for clemency, the defense submitted an affidavit of CDR Kent. In this affidavit, CDR Kent explicitly stated that had the Black's Law Dictionary definition been provided, the determination of guilt or innocence would likely have been different in the case. (Clemency Request Mar. 14, 2014, Encl. 3.)

On the defense's objection to preclude the expert testimony of Dr. Weis, the defense argued that the testimony was not relevant or helpful to the trier of fact, especially if the members, during voir dire, stated that they believed victims acted in many different ways. (R. at 230-31.) Without being specific, and in a very circumspect way, the military judge moved past the defense's objection. (R. at 237-38.) During voir dire, each member agreed that different individuals will react differently after experiencing a traumatic event, and that victims of sexual assault, specifically, react in different ways. (R. at 279-80.)

Summary of Argument

Assignment of Error I

The military judge allowed propensity to be argued under M.R.E. 413 for the separately charged misconduct involving two separate individuals. This misapplication of the rule violated IT2 Pease's constitutional right to due process. Thus, this Court must set aside the findings of guilt and authorize a rehearing.

Assignment of Error II

The evidence in this case is scant and built on witnesses with significant credibility problems. This Court must overturn IT2 Pease's convictions as they are legally and factually insufficient.

Assignment of Error III

During deliberations, the members requested the trial court to provide a legal definition of the word "competent". The defense proposed the definition from Black's Law Dictionary; the military judge abused his discretion in failing to provide a definition of "competent". The military judge's failure to provide a definition was not harmless beyond a reasonable doubt as it substantially impacted the verdict. Thus, this Court must set aside the findings and issue a rehearing.

Assignment of Error IV

Article 120, UCMJ, with the element of "incapable of consenting due to impairment by an intoxicant," is vague in that it does not define "competent", as used in the definition of "consent". IT2 Pease's constitutional right to Due Process was violated when he was convicted of an offense alleged under an unconstitutional statute. Thus, the findings of guilt as to all specifications of Charge I should be set aside.

Assignment of Error V

The defense objected to the introduction of the expert testimony of Dr. Weis on the grounds of relevancy, probative value, and foundation. During group voir dire, each member agreed that they believed victims of sexual assault react in many different ways. The military judge erred in allowing the irrelevant and non-probative testimony of Dr. Weis after the members said they did not believe victims react in only certain ways. The evidence was then prejudicial in that it bolstered the testimony of IT3 S.K. and IT2 B.S. This Court must set aside the findings of guilt and sentence, and order a new court-martial.

Argument

I

THE MILITARY JUDGE ERRED BY IMPROPERLY APPLIYING MILITARY RULE OF EVIDENCE 413 TO CHARGED MISCONDUCT.

Standard of Review

The interpretation of an M.R.E. provision is reviewed *de novo*. *See e.g. United States v. St. Blanc*, 70 M.J. 424, 427 (C.A.A.F. 2012).

Principles of Law

When an "error raises constitutional implications, [C.A.A.F.] has traditionally tested the error for prejudice using a 'harmless beyond a reasonable doubt' standard." *United States v. MacDonald*, 2014 CAAF LEXIS 868, *24 (C.A.A.F. 2014) (quoting *United States v. Davis*, 73 M.J. 268, 271 (C.A.A.F. 2014); quoting *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006)). "The test for determining if the constitutional error is harmless is 'whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained'.'" *MacDonald*, 2014 CAAF LEXIS 868, at *24 (quoting *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002); quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). "Whether the error is harmless beyond a reasonable doubt is a question of law that [is reviewed] de

novo." *MacDonald*, 2014 CAAF LEXIS 868, at *24 (quoting *United States v. Simmons*, 59 M.J. 485, 489 (C.A.A.F. 2004)).

Discussion

The military judge misinterpreted M.R.E 413 to apply to charged misconduct in the same court-martial. In making his determination, the military judge relied upon *United States v. Wright*, 53 M.J. 476 (C.A.A.F. 2000). He reasoned that since the facts in *Wright* involved evidence of separate charged offenses, that M.R.E. 413 was applicable to charged misconduct. However, *Wright* is inapplicable as it is silent on the constitutionality of propensity argued for charged misconduct. The appellant in *Wright* made a blanket, facial assertion that M.R.E. 413 as a whole is unconstitutional. Therefore, that is what C.A.A.F opined upon in its decision. C.A.A.F. did not address the constitutionality of M.R.E. 413 as applied to charged misconduct.

In fact, Congress did not intend for the rule to apply to separately charged misconduct in the same court-martial. When the legislation for M.R.E. 413 was first proposed, Congressional discussions on the rule focused on the term "uncharged". *See e.g.* 140 Cong. Rec. H8991 (daily ed. Aug. 21, 1994). The Rule was not designed to apply to charged misconduct, which requires evidence beyond a reasonable doubt to convict upon.

The military judge in this case also relied upon this Court's decision in *United States v. Meyers*, 51 M.J. 570 (N-M. Ct. Crim. App. 1999). However, contrary to the military judge's interpretation of the case, this Court did not address the constitutionality of M.R.E. 413 as applied to charged misconduct, but remained within the narrow scope of addressing the military judge's abuse of discretion for failing to apply a spill-over instruction. *Meyers*, 51 M.J. at 581. In fact, this Court recognized that there are "serious constitutional issues raised by application of M. R. E. 413 to separately charged sexual assault offenses alleged against an accused at a single trial where innocence is presumed." *Id.* This Court further recognized that

> it is well established that the fundamental fairness guarantee of the Due Process Clause of the Constitution requires the prosecution to prove each and every element of every offense alleged against an accused by legal and competent evidence beyond a reasonable doubt.

Meyers, 51 M.J. at 578 (citing *Estelle v. McGuire,* 502 U.S. 62, 78 (1991) (O'Connor, J. concurring in part and dissenting in part)). Ultimately, this Court held:

> Even where Mil. R. Evid. 413 evidence is properly admitted, proof of one sexual assault offense still carries no inference that the accused committed another sexual assault offense, it only demonstrates the accused's propensity to commit that type of

> offense which may or may not be relevant and probative in determining whether he actually committed the charged offense.

Meyers, 51 M.J. at 582-83. This Court then required the prophylactic measure of, "at a minimum, and notwithstanding M. R. E. 413," spill-over instructions. *Meyers*, 51 M.J. at 583.

In the present case, the military judge applied a spill-over instruction. However, the instruction did not eradicate the degradation of the presumption of innocence created by allowing for argument of propensity based on separately charged conduct within the same court-martial.

Prior to evidence of another offense being admitted in accordance with M.R.E. 413, "the [military judge] must conclude that the members could find by a preponderance of the evidence that the offenses occurred." *United States v. Solomon*, 72 M.J. 176, 179 (C.A.A.F. 2013) (citing *Wright*, 53 M.J. at 483). Crucial to this preponderance determination is an evaluation of the strength of the evidence. *Wright*, 53 M.J. at 482. Here, the military judge did not hear any testimony, but rather relied on two NCIS statements appended to the government's motion. (R. at 53-70.) By failing to properly evaluate the evidence before agreeing to allow the government to argue propensity, the military judge failed his job as gatekeeper and bypassed the requirements of M.R.E. 413. Moreover, where the 403 balancing test has not been properly employed, this Court cannot after-

the-fact find a lack of prejudice. *See United States v. Burton*, 67 M.J. 150, 153 (C.A.A.F. 2009).

Even if the military judge had properly followed the M.R.E. 403 balancing test, the issue remains that allowing charged offenses to support proof of one another violates the presumption of innocence; it presumes that the accused had already committed the offense by a preponderance of the evidence. To apply the rule to charged misconduct then makes the rule inherently unfair. "The Rule would be fundamentally unfair if it undermines the presumption of innocence and the requirement that the prosecution prove guilt beyond a reasonable doubt." *Wright*, 53 M.J. at 481 (citing *Estelle,* 502 U.S. at 78 (opinion of O'Connor, J.).)

When the military judge authorized the government to argue propensity for the separate charged misconduct under M.R.E. 413, he did so in violation of IT2 Pease's presumption of innocence. Further, by allowing the government to argue propensity, he essentially lowered the standard by which the government had to prove the separate offenses, thereby making it easier for the members to convict on the sexual offenses. Thus, the military judge's misinterpretation of M.R.E. 413's applicability to charged misconduct substantially affected the obtained verdict, resulting in harmful constitutional error.

Request for Relief

IT2 Pease therefore requests that the findings of guilt be set aside, and that the case be remanded for a new hearing.

II

THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT.

Standard of Review

This Court reviews issues of legal and factual sufficiency *de novo*. *United States v. Hays*, 62 M.J. 158, 162 (C.A.A.F. 2005); *see also* Art. 66(c), UCMJ, 10 U.S.C. § 866(c) (2012).

Principles of Law

The test for legal sufficiency is whether, when viewed in the light most favorable to the government, the evidence is such that a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *United States v. Harper*, 22 M.J. 157, 161 (C.M.A. 1986).

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that this Court neither saw nor heard the witnesses at trial, this Court is convinced, beyond a reasonable doubt, of Appellant's guilt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). In conducting this review, this Court may independently judge the credibility of the witnesses at trial, resolve questions of fact, and substitute its judgment for that of the military judge

or the court-martial members. Art. 66(c), UCMJ, 10 U.S.C. § 866(c) (2012); *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990).

Discussion

The government failed to introduce sufficient evidence to sustain a conviction against IT2 Pease for either charge. These deficiencies must lead this Court to the conclusion that there is not enough evidence to sustain IT2 Pease's convictions.

In each specification of Charge I, the Government had to prove that the two named victims were intoxicated to the point that they were "incapable of consenting" to the respective sexual acts or contact, and that IT2 Pease was aware, or should have reasonably been aware, of that condition. *See* MCM, Part IV, ¶ 45(b)(3), (b)(3)(A), and (d).

The evidence introduced with respect to the charged sexual assault of IT3 S.K. was: she was capable of walking on her own; she was capable of ascending and descending various steep and narrow ladder wells of the ship; that just prior to the sexual act she had told IT2 Pease that she thought he was cute and then engaged in kissing him; and, that during the sexual act she had propped her body up with her elbows and was fully supporting her own body weight by doing so.

The evidence introduced with respect to the charged sexual assaults and sexual contact of IT2 B.S. was: she was engaged in

conversation with others and aware of her surroundings; in order to get to the apartment, she had to walk approximately a mile and then descend a set of stairs; she recognized the apartment; and, as she walked by the ship, she told IT2 Pease that she wanted to stay out that night and keep partying. She even testified that this statement was an indication that she was able to decide what she wanted and was able to effectively communicate such to IT2 Pease. (R. at 619, 632.) During the anal intercourse, she was able to tell IT2 Pease that she did not like the sex, and that it hurt. During the vaginal intercourse, she was in various positions to include being on top of him and in "doggie style". Both of these positions clearly require an individual to be able to hold her body in such a way that she is supporting her own body weight. When he bit her nipple, she told him that it hurt. All of these actions were outward manifestations of a person who was fully aware of her surroundings and capable of consenting to the various forms of sexual acts and contact.

The government introduced the testimony of Dr. Bruins, a toxicologist. (*See* R. at 723-64.) He spoke generally of the effects of alcohol, and referenced the Dubowski chart. However, he never calculated the blood alcohol content (BAC) of either IT3 S.K. or IT2 B.S., which would have more accurately and concretely placed the victims at various levels of intoxication.

(R. at 749-50.) Dr. Bruins also testified that at higher BAC levels, an individual can still maintain her basic motor skills, to include walking, talking, and conversing with others. (R. at 746, 47, 751.) However, without a BAC, he was unable to concretely identify to the members the exact level of intoxication of either IT3 S.K. or IT2 B.S.

Both IT3 S.K. and IT2 B.S. had credibility issues and ample reason to fabricate. They had both been associated with prior alcohol related incidents and were flagged by the command. Additionally, IT2 B.S. was in a serious, long-term, romantic commitment. The overwhelming evidence that both IT3 S.K. and IT2 B.S. were capable of consenting, or at the very least that it was not outwardly apparent to others that they were possibly incapable of consenting, coupled with their strong motive to fabricate, leaves significant doubt as to the guilt of IT2 Pease on Charge I.

With respect to the second Charge, there was no evidence introduced at trial that there was any actual or perceived disruption to the work environment within the radio division or any favoritism shown to either female. In fact, the evidence elicited at trial showed that it would have been factually impossible for IT2 Pease to have such an effect as he held no authority within the administrative chain of command, and had absolutely no operational authority over IT2 B.S. Once again,

the lack of evidence presented at trial leaves significant doubt as to the guilt of IT2 Pease on Charge II.

Request for Relief

This Court should reexamine the evidence and conclude that it is insufficient to find IT2 Pease committed any of these acts beyond a reasonable doubt. The findings of guilt in this case must bet set aside.

III

THE MILITARY JUDGE ERRED IN FAILING TO PROVIDE THE DEFENSE'S REQUESTED INSTRUCTION ON THE DEFINITION OF COMPETENT.

Standard of Review

This Court considers the adequacy of a military judge's instructions *de novo*. *United States v. Dearing*, 63 M.J. 478, 487 (C.A.A.F. 2006).

Principles of Law

"Where an instructional error raises constitutional implications, [C.A.A.F.] has traditionally tested the error for prejudice using a 'harmless beyond a reasonable doubt' standard." *MacDonald*, 2014 CAAF LEXIS 868, at *24 (quoting *Davis*, 73 M.J. at 271; quoting *Wolford*, 62 M.J. at 420). "The test for determining if the constitutional error is harmless is 'whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained'.'" *MacDonald*, 2014 CAAF LEXIS 868, at *24 (quoting *McDonald*, 57

M.J. at 20; quoting *Chapman*, 386 U.S. at 24). "Whether the error is harmless beyond a reasonable doubt is a question of law that [is reviewed] *de novo*." *MacDonald*, 2014 CAAF LEXIS 868, at *24 (quoting *v. Simmons*, 59 M.J. at 489).

Discussion

The military judge erred by failing to provide a legal definition for the word "competent", which resulted in a constitutional error that was not harmless beyond a reasonable doubt. During deliberations on the merits, the president of the panel requested a legal definition for the word "competent". (R. 1273.) The word had previously appeared in the military judge's instructions on the elements of the specifications of Charge I. Specifically, he instructed the members, "[t]he term 'consent' means a freely given agreement to the conduct at issue by a competent person." (R. at 1157, 1160.) Additionally, the government's argument in closing and on rebuttal was riddled with the word "competent", and inextricably linked the term "intoxicated" with the term "incompetent". (R. at 1187-88, 1190, 1267, 1275.)

Essentially, since the term "consent" is a part of the elements which the government had to prove, and the term "competent" is a part of the legal definition for "consent", there needed to be a legal definition for "competent" provided to the members in order for them to adequately evaluate the

facts within the parameters of the law. Since the military judge's benchbook lacked a definition, the defense provided the next best alternative, which was the definition from Black's legal dictionary. (*See* R. at 1273–87.) In fact, the military judge himself admitted that when he first read the question, he initially turned to the same source. (R. at 1273-74.) By failing to provide a definition for what has essentially become an element of the statute, the military judge abused his discretion.

The implications of this abuse were then far reaching and severe. Attached to its request for clemency, the defense submitted the affidavit of the president of the panel. In this affidavit, CDR Kent explicitly stated that had the members been provided with the legal definition of competent as stated in Black's Law Dictionary, then there would have been a different outcome on the findings of guilt or innocence. (Clemency Request Mar. 14, 2014, Encl. 3.) For the president of the panel to state that the verdict would have been different had the requested definition been provided erases any reasonable doubt as to whether the military judge's failure to provide the requested definition was harmless.

Request for Relief

This Court should find the military judge erred in failing to provide the requested definition for "consent", set aside the findings of guilt, and provide a rehearing.

IV

ARTICLE 120 IS UNCONSTITUTIONALLY VAGUE.

Standard of Review

The constitutionality of a statute is reviewed *de novo*. *United States v. Goings*, 72 M.J. 202, 205 (C.A.A.F. 2013).

Principles of Law

"A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence of what is prohibited." *United States v. Williams*, 553 U.S. 285, 304 (2008) (citing *Hill v. Colorado*, 530 U.S. 703, 732 (2000)). "Due process requires 'fair notice' that an act is forbidden and subject to criminal sanction." *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003) (citing *United States v. Bivins*, 49 M.J. 238, 330 (C.A.A.F. 1998)). "It also requires fair notice as to the standard applicable to the forbidden conduct." *Id.* (citing *Parker v. Levy*, 417 U.S. 733, 755 (1974). In determining what constitutes fair notice, C.A.A.F. has turned toward the "MCM, federal law, state law, military case law, military custom and usage, and military regulations." *Id.*

Discussion

Article 120, UCMJ, 10 U.S.C. § 820 (2012) is vague in that it does not define "competent" for purposes of the element of "incapable of consenting due to impairment by an intoxicant." This Court recently addressed the constitutionality of Article 120, UCMJ, (2012) with respect to this element. *United States v. Torres*, No. 201300396 (N-M. Ct. Crim. App. Aug. 28, 2014)(Slip op. at 13-14). In *Torres*, this Court denied the appellant's claim that Article 120(b)(3), UCMJ, was unconstitutionally vague. The Court set up its denial with a two-pronged reasoning: (1) that "the requirement to prove actual or constructive knowledge on the part of the appellant further serves to negate the claim of vagueness," and (2) in instances of "'close cases' with regard to the level of intoxication, th[e] argument 'is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt.'" *Torres*, slip op. at 14 (quoting *Williams*, 553 U.S. at 306).

Unfortunately, the predicament that arose in this case with the confusion and lack of definition of the word "competent" prevents this case from falling in line with this Court's reasoning in *Torres*. Invariably, it was the definition of "competent" that this case seemed to turn on. By incorporating "consent" into the elements, Congress has seemingly incorporated

"competent" into the elements, which establishes the need for a concrete defintion.

In distinguishing the current case with *Torres*, the two reasons are taken in turn. With respect to the first reason, the requirement to prove actual or constructive knowledge on the part of the accused actually aggravates the issue that the elements lack the definition of "competent". If the members, a collective of individuals who are routinely told to bring their common sense and worldly wisdom to the deliberation room, were confused as to what constituted a competent person for purposes of determining whether IT3 S.K. or IT2 B.S. were capable of consenting, then surely IT2 Pease, the individual who was supposed to have either actual or constructive knowledge as to whether either victim was "competent" and therefore capable or incapable of consenting, was uninformed as to what constituted a "competent" individual for purposes of engaging in sexual behavior.

With respect to the second reason, that in close cases it will come down to the requirement of reasonable doubt, the issue, once again, is exacerbated by the vagueness and lack of a definition of the word "competent" and thereby not remedied the burden of proof. The present case is arguably not a close call: the government did not provide a BAC level of the witnesses and there was a plethora of evidence presented that both IT3 S.K.

and IT2 B.S. were outwardly exhibiting behavior that could appear to a third person that the individuals were capable of consenting. The members needed, and in fact requested, a definition of "competent" in order to determine, beyond a reasonable doubt, that IT3 S.K. and IT2 B.S. were incapable of consenting and thus find IT2 Pease guilty.

In *Torres*, this Court held that based on the plain reading of the statute, "service members of ordinary intelligence have 'fair notice of what is prohibited'." *Torres*, slip op. at 14 (referencing *Williams*, 553 U.S. at 304). Unfortunately, and in light of the question presented by the members, it does not appear that *any* service member, despite voluminous literature in the military on sexual assault, is on notice of what constitutes a "competent" person for purposes of potentially prohibited sexual activities.

In addition to the two prongs, this Court also reasoned that the statute was not unconstitutionally vague because "[t]he concept of a victim being incapable of consent due to intoxication has long been proscribed criminal conduct within the military." *Torres*, slip op. at 13 (citing *United States v. Grier*, 53 M.J. 30, 33 (C.A.A.F. 2000) (holding no instructional error where military judge instructed the members that if victim is incapable of consenting due to intoxication, "no greater force is required than that necessary to achieve penetration");

United States v. Mathai, 34 M.J. 33, 36 (C.M.A. 1992) (holding that evidence of rape was sufficient where the record established that the victim was unconscious due to alcohol intoxication, "and that [Mathai] reasonably knew or should have known that she had not consented"); MCM, Part IV, ¶45c(1)(b) (2005 ed.)). However, the statute has changed significantly, and multiple times, since the misconduct in these respective cases occurred. It is presumed that when Congress changes words in a statute, there is a significant purpose in doing so, and that the meanings of the words within the statute also change. We can no longer rely on past precedent because the definitions used in the statutes were wholly different, and are now inadequate. Without adequate definitions and meanings assigned to the words of the statute, service members are left without sufficient guidance as to what is prohibited behavior.

Request for Relief

In light of the members' question on the definition of "competent", and the fact that a definition does not exist, it is readily apparent that an average service member is not fully on notice of what acts are within the scope of prohibited behavior. Thus, Article 120, UCMJ, and the element of "incapable of consenting due to impairment by an intoxicant" is vague, and thus unconstitutional. For this reason, the Court should set aside the findings of guilt on Charge I.

V

THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE ADMITTED THE TESTIMONY OF DR. WEIS.

Standard of Review

The question of whether the military judge properly performed the required gatekeeping function of M.R.E. 702 is reviewed *de novo*. *United States v. Flesher*, 70 M.J. 303, 311 (C.A.A.F. 2014).

Principles of Law

Expert testimony is permissible if "it will assist the trier of fact to understand the evidence or determine a fact in issue." M.R.E. 702. "Thus, an expert may testify if his or her testimony is 'helpful.'" *Flesher*, 73 M.J. at 313 (quoting *United States v. Billings*, 61 M.J. 163, 166 (C.A.A.F. 2005)).

In determining the admissibility of expert assistance, it is helpful to have a hearing pursuant to *Daubert v. Merrell Dow Pharm.,* 509 U.S. 579 (1993), to address the six admissibility factors. *United States v. Houser*, 36 M.J. 392 (C.M.A. 1993). The six factors are: (1) the qualifications of the expert, (2) the subject matter of the expert, (3) the basis for the expert testimony, (4) the legal relevance of the evidence, (5) the reliability of the evidence, and (6) whether the probative value of the testimony outweighs other considerations. *Houser*, 36 M.J. at 397.

In reviewing the propriety of the military judge in following M.R.E. 702, the Court "must determine *de novo* whether the military judge 'properly followed the *Daubert* framework.'" *Flesher,* 70 M.J. at 311 (quoting *United States v. Griffin*, 50 M.J. 278, 284 (C.A.A.F. 1999)).

The decision for a witness to testify as an expert witness is reviewed for an abuse of discretion. *Id.* (citing *Billings*, 61 M.J. at 166-67 (C.A.A.F. 2005)). "An 'abuse of discretion' exists where 'reasons or ruling of the' military judge are 'clearly untenable and . . . deprive a party of a substantial right as to amount to a denial of justice.'" *Flesher*, 73 M.J. at 311 (quoting *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987) (alteration in original); quoting *Guggenmos v. Guggenmos*, 359 N.W.2d 87, 90 (Neb. 1984)).

"Under Article 59(a), UCMJ, a 'finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.'" *Flesher*, 73 M.J. at 317-18 (quoting 10 U.S.C. § 859(a) (2012); citing *United States v. Yammine*, 69 M.J. 70, 78 (C.A.A.F. 2010)). "The test for nonconsitutional evidentiary error is whether the error had a substantial influence on the findings." *Flesher*, 73 M.J. at 318 (quoting *United States v. Gunkle,* 55 M.J. 26, 30 (C.A.A.F. 2001)).

"Objections made at trial may not be 'evaded or ignored," and that it is duty of a military judge to 'affirmatively' rule." *Flesher*, 73 M.J. at 311 (quoting *United States v. DeYoung*, 29 M.J. 78, 80 (C.M.A. 1989)).

Discussion

The military judge abused his discretion when he permitted the irrelevant and non-probative testimony of Dr. Weis. Such an abuse of discretion had a substantial influence on the findings.

Just prior to the start of trial, the defense objected on the record to the government's introduction of Dr. Weis' testimony as an expert on counterintuitive behavior. (R. at 228-32.) The defense objected to both relevance and the lack of foundation. (R. at 229-31.) The defense argued that the scope of the testimony would not be relevant, especially if the members, during voir dire, stated that they believe victims of trauma act in a variety of ways. (R. at 230-31.) The defense then argued that the evidence would not be helpful to the trier of fact. (R. at 231.) The defense also argued that any testimony on how the named victims responded could be addressed by asking the two named victims specifically why they did or did not act in a particular way after the charged misconduct. (R. at 232-33.)

The military judge then, in an extremely circumspect way, said that he thought the evidence was commonly admitted and

relevant. (R. at 237-38.) Although he did not outright overrule the defense's objection, the defense later took this to mean that he had denied the objection on the grounds of relevance and helpfulness to the factfinder. (R. at 770.) The military judge had allowed the defense to renew its objection as to foundation at the time of Dr. Weis's testimony. (R. at 237.)

During voir dire, the government asked the members, "Does everyone agree that different people might react in different ways after experiencing a traumatic event?" (R. at 279.) Each member responded in the affirmative. (R. at 280.) The government then asked, "Does anyone think that all victims of sexual assault crimes are affected in in the same way?" (R. at 280.) The members all answered in the negative. (R. at 280.)

During the government's presentation of the case, both IT3 S.K. and IT2 B.S. explained why they acted, or didn't act, in certain ways. IT3 S.K. testified as to why she was laughing and joking the following day, why she said she wasn't sure if she liked the sex, and why she didn't report the incident immediately after it occurred. (R. at 490, 500-02, 528.) IT2 B.S. explained why she got back into bed with IT2 Pease the evening of the incident, why she didn't immediately report the incident to her chain of command when she spoke with certain individuals the following morning, and why she decided to report after speaking with IT3 S.K. (R. at 607, 612, 618-19.)

Prior to the government calling Dr. Weis, the defense renewed its objection to the introduction of the expert testimony, and believed that based on the proffered evidence of the witness, which included references to studies the defense had previously not been able to review, a *Daubert* hearing was necessary. (R. at 770, 773-74.) At that point the military judge did not conduct a *Daubert* hearing or issue a ruling. He instead stated, "There's just a whole lot of speculation going on right now from what I can tell. So we're just going to wait and see what happens." (R. at 774.) After a response from the defense, the military judge continued in saying, "We don't really have a lot of choice, you know? This needed to happen. If we were going to get into this, it needed to happen during the motions so now we're stuck with doing it in the middle of trial, and I don't know what I'm dealing with until I hear his testimony." (R. at 774.)

During Dr. Weis's testimony on the merits, the government elicited testimony that Dr. Weis has dealt with sexual assault victims; Dr. Weis did not specifically detail whether he dealt with alcohol facilitated sexual assault or detail the literature or studies upon which he would be basing his testimony. (*See* R. at 786-89.) Further in his testimony, he discussed delayed reporting as a possible victim response, which had already specifically been addressed by IT3 S.K. (R. at 795-97.) He

also went into the specifics of delayed reporting of an alcohol facilitated sexual assault, for which he had no foundational basis. (R. at 796.) The government then began to elicit testimony as to why IT3 S.K. regretted the intercourse and why she told IT2 Pease that she thought he was cute, at which point the defense objected and sated that the witness was improperly introducing specific evidence. (R. at 797-99.) The military judge overruled the objection. (R. at 808-09.) This was the first time that the military judge affirmatively ruled on the defense's objection to the testimony.

From the first defense objection, the military judge should have conducted a *Daubert* hearing, and weighed the proposed testimony with relevancy and balancing factors of M.R.E. 401 and 403. After the members were voir dired, and stated they believed victims of sexual assault can react in myriad ways, he should have precluded the testimony from ever being introduced. Not only did he allow the testimony, but he failed a second time to conduct a proper *Daubert* hearing, and instead insisted that all parties would just have to "wait and see" as to what evidence would be elicited on the merits.

In *Flesher*, C.A.A.F. found it most disconcerting that the military judge "did not affirmatively address the Defense's request for a *Daubert* hearing." Ultimately, C.A.A.F. held that the military judge in *Flesher* abused his discretion in admitting

the evidence by not properly fleshing out the *Houser* factors, and that the evidence prejudiced the accused because the evidence "seemed to corroborate and ratify [the victim's] version of events." *Flesher*, 73 M.J. at 317-18.

In finding that the military judge abused his discretion, C.A.A.F. found that the military judge did not weigh the probative value of the witnesses' testimony against the prejudicial effect. *Flesher*, 73 M.J. at 316. "A military judge must distinguish between an expert witness whose testimony about behaviors of sexual assault victims that are subject to 'widely held misconceptions' will be helpful to the trier of fact, *Houser*, 36 M.J. at 398, and an expert witness whose testimony will simply mirror the specific facts of the case and serve only to bolster the credibility of the witness." *Flesher*, 73 M.J. at 316-17. C.A.A.F. held that the evidence was not probative and was prejudicial because the victim had explicitly testified on direct examination as to why she did or did not act in certain ways and that evidence provided by the expert on the same points only bolstered the victim's testimony. *Flesher*, 73 M.J. at 317.

In this case, and very similarly to the case of *Flesher*, the military judge did not go into the *Houser* factors of relevance and probative value as weighed against prejudicial effect. Instead, he evaded the defense's objection and allowed the government to explore the behaviors of IT3 S.K. and IT2 B.S.

with Dr. Weis, even though the two had already testified as to why they acted in certain ways. Additionally, he allowed Dr. Weis to testify in spite of the fact that the members had stated in voir dire that they did not hold any belief that victims of sexual assault only react in certain ways. As such, the testimony prejudiced IT2 Pease by improperly bolstering the testimony of IT3 S.K. and IT2 B.S.

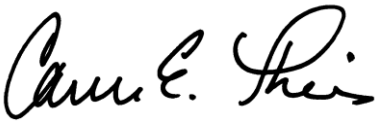
Request for Relief

In light of the fact that the military judge twice avoided ruling on the defense's motion in violation of *DeYoung*, and then improperly permitted the irrelevant, non-probative, and prejudicial testimony of Dr. Weis, this Court should set aside the findings of guilt and sentence.

Conclusion

For these reasons, IT2 Pease requests that the findings on guilt and sentence be set aside and a rehearing be issued.

ERIC S. MONTALVO
ERIC S. MONTALVO, Esq.
Founding Partner
THE FEDERAL PRACTICE GROUP
1150 Connecticut Avenue, NW
Ste. 900
Washington, D.C. 20036
Tel: (202) 862-4360
Fax: (888) 899-6053
e.montalvo@fedpractice.com

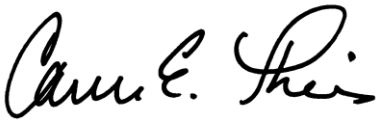


CARRIE E. THEIS
Lieutenant, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris St, SE
Bldg 58, Ste. 100
Washington Navy Yard. D.C. 20374
Tel: (202) 685-7390
Fax: (202) 685-7426
Carrie.theis@navy.mil

Certificate of Filing and Service

I certify that a copy of the foregoing was delivered to the Court and to Director, Appellate Government Division, and electronically filed on 1 October 2014.

ERIC S. MONTALVO
ERIC S. MONTALVO, Esq.
Founding Partner
THE FEDERAL PRACTICE GROUP
1150 Connecticut Avenue, NW
Ste. 900
Washington, D.C. 20036
Tel: (202) 862-4360
Fax: (888) 899-6053
e.montalvo@fedpractice.com



CARRIE E. THEIS
Lieutenant, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris St, SE
Bldg 58, Ste. 100
Washington Navy Yard. D.C. 20374
Tel: (202) 685-7390
Fax: (202) 685-7426
Carrie.Theis@navy.mil

DEPARTMENT OF THE NAVY
GENERAL COURT-MARTIAL
NAVY-MARINE CORPS TRIAL JUDICIARY
EUROPE, AFRICA, SOUTHWEST ASIA JUDICIAL CIRCUIT

U N I T E D S T A T E S **v.** **JACOB L. PEASE** **IT2 USN**	**GOVERNMENT MOTION IN RESPONSE TO DEFENSE MOTION TO DISMISS CHARGE I AS UNCONSTITUTIONALLY VAGUE** **20 September 2013**

1. Nature of the Motion

This motion is filed pursuant to Rule for Courts-Martial 907 in response to the Defense's motion to dismiss of 13 September 2013 because the term "incapable of consenting due to impairment" is unconstitutionally vague.

2. Summary of Facts

The accused is charged with several violations of the Uniform Code of Military Justice (UCMJ), including four specifications of Article 120, Sexual Assault, one specification of Article 120, Abusive Sexual Contact, one specification of Article 128, Assault, two specifications of Article 92, violation of a lawful general order, and one specification of Article 107, false official statement.

The several Article 120 specifications stem from two separate incidents in which the accused is alleged to have sexually assaulted two separate female shipmates. The first alleged victim, ITSN SK, alleges that on the night of 6 December 2012, she drank a very large amount of alcohol and Shore Patrol directed the accused to return her to the ship. While onboard the ship, ITSN SK alleges that the accused took her to the JOC spaces onboard and vaginally penetrated

her with his penis, and she further alleges that she was not in a condition to consent to the sexual penetration.

The second alleged victim, IT2 BS, alleges that on the night of 26 January 2013, she drank a large amount of alcohol and Shore Patrol also directed that another female servicemember, ITSA Wilson, return her to the ship. While on the way, the accused stepped in and volunteered to return IT2 BS to the ship, thereby relieving ITSA Wilson of that responsibility. Instead, the accused and IT2 BS went to the accused's apartment, where IT2 BS alleges waking up to the accused anally penetrating her with his penis and vomiting on the bed. IT2 BS also alleges that the accused orally penetrated her and vaginally penetrated her as well as biting her nipple very hard, and she further alleges that she was not in a condition to consent to the various acts of sexual penetration.

3. Authorities:

Rule for Courts-Martial 907, MANUAL FOR COURTS-MARTIAL (2012 ed.);
United States v. Vaughan, 58 M.J. 29 (C.A.A.F. 2003);
United States v. Cartwright, 2013 CCA LEXIS 735, (A.F.C.C.A., Aug. 15, 2013);
Parker v. Levy, 417 U.S. 733 (1974);
United States v. Mansfield, 33 M.J. 972 (A.F.C.M.R. 1991);
Grayned v. City of Rockford, 408 U.S. 104 (1972);
United States v. Frantz, 1953 CMA LEXIS 1020, (C.M.A., Feb. 6, 1953);
Krichman v. United States, 256 U.S. 363 (1921);
American Communications Assn. v. Douds, 339 U.S. 382 (1950);
Nash v. United States, 229 U.S. 373 (1913);
United States v. Moore, 58 M.J. 466 (C.A.A.F. 2003);
Coates v. Cincinnati, 402 U.S. 611 (1971);
United States v. Brown, 55 M.J. 375 (C.A.A.F. 2001);

4. Discussion

I. **Article 120, Uniform Code of Military Justice, Is Not Unconstitutionally Vague Because It Appropriately Provides Fair Notice of Its Proscribed Conduct**.

A law is void for vagueness "if one could not reasonably understand that his contemplated conduct is proscribed." *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003).

"A basic principle of due process requires 'fair notice' that an act is subject to criminal sanction and about the standard that is applicable to the forbidden conduct." *United States v. Cartwright*, 2013 CCA LEXIS 735, *19 (A.F.C.C.A., Aug. 15, 2013) (citing *Vaughan*, 58 M.J. at 31). What is sufficient from a notice standpoint "is determined in light of the conduct with which a defendant is charged." *Parker v. Levy*, 417 U.S. 733, 757 (1974). Essentially, "[v]oid for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his or her contemplated conduct is proscribed." *Id*. Additionally, "[c]riminal statutes are presumed to be constitutionally valid, and the party attacking the constitutionality of a statute has the burden of proving otherwise." *United States v. Mansfield*, 33 M.J. 972, 989 (A.F.C.M.R. 1991), *aff'd*, 33 M.J. 972 (C.M.A. 1993).

When it comes to criminal statutes, exact certainty as to the proscribed conduct is not required. According to the Supreme Court, "because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Put another way, "[c]ondemned to the use of words, we can never expect mathematical certainly from our language." *Id*. at 110. Even with the most artfully drafted criminal statutes, "[a] certain minimum element of indistinction remains which, in legislation of this entirely defensible character, can never be expunged completely, and must be dealt with on a case-by-case basis." *United States v. Frantz*, 1953 CMA LEXIS 1020, *7 (C.M.A., Feb. 6, 1953); *see also Krichman v. United States*, 256 U.S. 363, 367-68 (1921). Of course, [i]t will always be true that the fertile legal 'imagination can conjure up hypothetical cases in which the meaning of [disputed] terms will be in nice question.'" *Grayned*, 408 U.S. at 111 (citing *American Communications Assn. v. Douds*, 339 U.S. 382, 412 (1950)). Nevertheless,

some ambiguity in criminal statutes is completely justifiable, "for 'the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree.'" *Frantz*, 1953 CMA LEXIS at *7 (citing *Nash v. United States*, 229 U.S. 373, 377 (1913)).

UCMJ Article 120 is not constitutionally void for vagueness. Defense Counsel specifically asserts that the term "incapable of consenting due to impairment" is constitutionally vague and asserts that not only is the statute itself deficient, but that the accused could not have been expected to conform his specific conduct to the law. Both arguments are without merit.

A. The Statutory Language of Article 120, UCMJ, Is Constitutional.

Defense Counsel argues that the term "incapable of consenting due to impairment" is included in the statutory language of the current Article 120 but that no additional amplifying information is provided to explain or define this specific term, and because of this, the statute is unconstitutionally vague. In its motion, Defense Counsel notes that the previous version of Article 120, UCMJ, included the term "substantial incapacitation" and noted that this specific term "was difficult to define with any clarity." *United States v. Moore*, 58 M.J. 466, 469 (C.A.A.F. 2003). Yet, even with some lacking of particular clarity, it is important to note that, as of 15 August 2013, "no appellate court has found Article 120, UCMJ, to be facially unconstitutional." *Cartwright*, 2013 CCA LEXIS at *8.

Thus, correctly stating that the new version of Article 120 "repeats the same problem of the 2007 Article 120 [statute]" first requires an actual constitutional vagueness problem in the 2007 version, which no appellate court has ever determined. Even if Congress did omit one indistinct term and replace it with another, no court has determined that the previous term was unconstitutionally vague. Thus, even though the current statute may not provide a definition of

the specific term at issue, the specific term and the change between the 2007 and 2012 versions of Article 120, UCMJ, do not present an issue of unconstitutional vagueness.

B. The Statute Is Not So Vague That The Accused Could Not Have Appropriately Conformed His Conduct to The Law, And It Does Not Deny Him Due Process.

Defense Counsel also argues that the statute is so vague that the accused could not possibly have been expected to conform his conduct to the law. As stated above, whether a statute is unconstitutionally vague "is determined in light of the conduct with which a defendant is charged." *Parker*, 417 U.S. at 757. Because there is no definition provided in the statute, "[w]e are thus relegated, at best, to the words of the [statute] itself." *Grayned*, 408 U.S. at 110 (quoting *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971)). Additionally, as the Defense states in its motion, other sources may exist to provide notice to the accused of his potentially criminal conduct, including military custom and usage, training, pamphlets, and materials. *See United States v. Brown*, 55 M.J. 375, 384 (C.A.A.F. 2001).

In this case, the accused is alleged to have committed various sexual acts upon two separate alleged victims, both of whom were incapable of consenting due to impairment from alcohol. Specifically, he is charged with committing the sexual acts of vaginal, oral, and anal penetration with one victim and vaginal penetration with a second victim. Additionally, alcohol is a central issue in both these incidents. Both incidents occurred after a night of alcohol consumption at local bars, and in both instances the accused either volunteered or was instructed to escort the alleged victims back to the ship because of the alleged victims' level of intoxication. Instead, the accused engaged in sexual acts with them.

The accused is a 24-year old Second Class Petty Officer in the United States Navy. In his time in the Navy, he has received no less than nine separate trainings on the topic of sexual assault. Additionally, he has received no less than nine separate trainings on the topic of alcohol

and/or drug abuse. (Enclosure 1). It is reasonable to assume that this training, and the training materials used and presented at these trainings, were at least of general "importance in providing notice of the [proscribed conduct]" which involves elements of overindulgence in alcohol and at least risky sexual activity. *Id*. Furthermore, the actual words used in the statute are not overly complicated or technical such that the accused could not have reasonably understood their meaning. (Enclosure 2 – showing the accused's ASVAB score of 96). The Merriam-Webster Dictionary defines "impair" as "to damage or make worse by or as if by diminishing in some material respect." (Enclosure 3). With this rather plain definition, it is reasonable to believe that the accused was able to conform his conduct to the law, especially when the law and conduct at issue is the commission of various acts of penile penetration upon two separate females who had consumed alcohol directly before the sexual acts.

Additionally, the accused is not denied due process from the specific terminology of Article 120, UCMJ. First, as noted above, the accused, and nearly all military members, have received training on both alcohol use and sexual assault. This training is relevant as to the issue of whether the accused was on notice of what conduct is potentially criminal in nature. Second, the accused is not denied due process from the application of the semi-scientific, but more common-sense, qualities of alcohol, because he has been appointed a specifically-requested civilian forensic psychologist who specializes in the effects of alcohol on the body and mind. The use of this expect goes a long way in guaranteeing that the accused will have a fair trial and his counsel will be able to understand, confront, and argue about the appropriate issues and factors present in this case. For these reasons, the accused has not been denied due process.

5. <u>Relief Requested</u>.

The Government respectfully requests that the Defense Motion to Dismiss be denied.

6. Evidence.

Enclosure 1: Training Record of Accused
Enclosure 2: Excerpt of Enlisted Qualification History of Accused
Enclosure 3: Merriam-Webster Dictionary Definition Excerpt

7. Oral Argument.

The Government requests oral argument on this motion.

//s//

Michael F. Whitican
LT, JAGC, USN
Trial Counsel

****

CERTIFICATE OF SERVICE

I hereby certify that a copy of this filing was served on the Detailed Defense Counsel, LT Matthew Sonn, via email on 20 September 2013.

//s//

Michael F. Whitican
LT, JAGC, USN
Trial Counsel

GENERAL COURT-MARTIAL
UNITED STATES NAVY TRIAL JUDICIARY
EURAFSWA JUDICIAL CIRCUIT

UNITED STATES	)	**MOTION TO DISMISS**
	)	**CHARGE I AS**
v.	)	**UNCONSTITUTIONALLY VAGUE**
	)	
JACOB L. PEASE	)	
IT2, USN	)	**13 September 2013**

1. Nature of Motion

This is a Motion to Dismiss Charge I and the 5 Specifications thereunder alleging violations of Violations of Article 120 of the Uniform Code of Military Justice because the term "incapable of consenting due to impairment" is unconstitutionally vague.

2. Statement of Facts

IT2 Pease is charged, in part, with two allegations of sexual assault under Article 120, UCMJ. Specifically, the 5 specifications under Charge I are based upon the theory that the complaining witnesses were "incapable of consenting to the sexual act due to impairment by an intoxicant, and that condition was known or reasonably should have been known by Information Systems Technician Second Class Jacob L. PEASE, U.S. Navy."

Charge I stems from accusations made by two complaining witnesses, ITSN SK and IT2 BS, sailors who served with IT2 Pease onboard the USS MOUNT WHITNEY. ITSN SK alleges that, on the night of 6 December 2012, after a night of drinking alcohol she returned to the USS MOUNT WHITNEY with IT2 Pease, where they flirted, kissed and then engaged in sexual intercourse. IT2 BS alleges that on the night of 25 January 2013, after a night of drinking alcohol, she went to an off-base apartment with IT2 Pease where they engaged in multiple sexual activities, including vaginal, anal, and oral sex. She further alleges that IT2 Pease bit her nipple

during their sexual encounter. Both complaining witnesses claim that they experienced periods of memory loss, but have specific recollections of portions of the sexual encounter. IT2 Pease, in a statement to NCIS, claims that both sexual encounters were consensual, and that the complaining witnesses actively participated in the sexual activity.

3. Discussion.

This case, as is often found in military justice, involves allegations of sexual assault in which alcohol consumption and intoxication are principal factors. The latest iteration of Article 120 of the Uniform Code of Military Justice seeks to proscribe certain forms of sexual conduct, including situations where one participant has consumed alcohol or other intoxicants to the level that they are, statutorily, incapable of consenting to the sexual activity. The statute describes this state as "incapable of consenting due to impairment", but provides no amplifying information or definition as to what this means. For the reasons that follow, this language is unconstitutionally vague, and Charge I should be dismissed with prejudice.

A. Statutory Background.

Since the 1950s Congress has defined military sexual crimes in Article 120 of the Uniform Code of Military Justice (UCMJ). 10 U.S.C.S. § 920 et.seq. In 1992, Congress began to implement amendments to Article 120 that ultimately revamped and expanded the scope of Article 120. The most notable changes to Article 120 came in the 2007 and 2011 Congressional amendments respectively. Specifically, Congress made key modifications to the definition of sexual assault in their 2007 and 2011 amendments to Article 120.

As stated above, in many military sexual assault cases the accusing witness alleges that he or she is impaired by the ingestion of alcohol or drugs. The degree of impairment is a frequent area of dispute during trial. In 2007, Congress completely overhauled the scope of

Article 120 making a "sexual act" illegal if the victim was "substantially incapacitated" or "substantially incapable" of appraising the nature of the sexual act, declining participation in the sexual act, or communicating unwillingness to engage in the sexual act. Subsequent case law demonstrated that "substantially incapacitated" was difficult to define with any clarity. *United States v. Moore*, 58 M.J. 466, 469 (C.A.A.F. 2003).

In 2011, Congress drafted amendments to the 2007 Article 120, which took effect on 28 June 2012. In the 2012 Article 120, Congress attempted to shift the focus to what the accused "knew or reasonably should have known." The 2012 Article 120 also omits the term "substantially incapacitated", and asks whether the complaining witness was "incapable of consent due to impairment."

Unfortunately, the 2012 Article 120 repeats the failure of Congress to clearly define the parameters of sexual assault because it fails to provide the definition of impairment, and when an individual is so impaired that they are incapable of providing consent. Congress essentially omitted one vague term - "substantially incapacitated" - and replaced it with another. The result is that the statute is too vague to provide the accused with notice of the definitions of the law's key elements. Specifically, the law fails to define the requisite level of knowledge necessary for the accused to determine that the complaining witness is incapable of consenting to a sexual act due to impairment. Effectively, the 2012 Article 120 repeats the same problem of the 2007 Article 120 – focusing on the mental state of the complaining witness, and not providing notice to the accused.

B. Article 120 is so vague that IT2 Pease could not possibly have been expected to conform his conduct to the law.

Four of the five specifications of Charge I allege a violation of Article 120(b)(3)[1], which reads in pertinent part (as related to the offenses alleged in this case):

Any person subject to this chapter who-

> *(3) commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to-*
>
> > *(A) impairment by any drug , intoxicant, or other similar substance, and that condition is known or reasonable should be known by the person.*

Based upon the foregoing language, the Government must prove in this case, beyond a reasonable doubt, that:

1. IT2 Pease committed a sexual act[2] upon the complaining witnesses;

2. The complaining witnesses were incapable of consenting due to impairment; and

3. IT2 Pease knew, or should have known, the complaining witnesses were incapable of consenting due to impairment.

The first prong is clear, as the statute provides a clear definition of what constitutes a sexual act[3]. Article 120(g)(1). The statute also defines consent, and provides some specific instances in which a person cannot consent, such as " a sleeping, unconscious, or incompetent person" or a person "under threat or fear." Article 120(g)(8). The section defining consent conspicuously omits "impairment" in the delineation of specific conditions in which, as a matter of law, a person cannot consent. This means that under some circumstances, a person is capable of consent when impaired. The question then, is when does a person reach a level of impairment

[1] The remaining specification alleges a violation of Article 120(d), which is identical in text to Article 120(b) except that it alleges sexual contact and not a sexual act. Therefore, the legal analysis is the same.
[2] Or, in the context Charge I, Specification 5, sexual contact.
[3] Sexual contact is also defined in Article 120(g)(2).

such that they are no longer capable of consent, and any person who commits a sexual act upon them would be criminally liable under Article 120(b)(3) and (d). Unfortunately, there is no definition provided in the text of the statute as to what "incapable of consenting" and/or "impairment" specifically means. Furthermore, the Analysis of Punitive Articles in the Manual for Courts-Martial, a review of Legislative History, and the Military Judge's Benchbook are all silent, and of no utility in helping explain what these critical terms actually mean. These key terms, "incapable of consenting" and "due to impairment", are the very crux of the proscribed conduct, and are impermissibly and unconstitutionally vague such that IT2 Pease could not have read the law's key elements and understood what "incapable of consenting due to impairment" means. This vagueness left IT2 Pease with insufficient notice that his conduct may or may not have been proscribed. *See United States v. Moore*, 58 M.J. 466, 469 (C.A.A.F. 2003).

C. Article 120(b)(3) is so vague as applied to IT2 Pease, he is denied Due Process.

Courts have on a number of occasions examined the question of whether a statute is impermissibly vague. A law will be deemed facially void if it is so unclear that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). A law failing to clearly define the conduct it proscribes "may trap the innocent by not providing fair warning," inevitably leading to impermissible delegation of "basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. Rockford*, 408 U.S. 104, 108-109 (1972). The D.C. Court of Appeals in *United States v. Capital Traction Co.*, 34 App. D.C. 592 (1910), analyzed a statute prohibiting municipal street railway companies from running an insufficient number of cars to accommodate passengers "without crowding." *Id.* The opinion's language, cited

approvingly by the U.S. Supreme Court in *Connally*, is pertinent to this case and helpful to reproduce at length:

> *What shall be the guide to the court or jury in ascertaining what constitutes a crowded car? What may be regarded as a crowded car by one jury may not be so considered by another. What shall constitute a sufficient number of cars in the opinion of one judge may be regarded as insufficient by another*. . . . There is a total absence of any definition of what shall constitute a crowded car. This important element cannot be left to conjecture, or be supplied by either the court or the jury. It is of the very essence of the law itself, and without it the statute is too indefinite and uncertain to support an information or indictment…*The dividing line between what is lawful and unlawful cannot be left to conjecture.* The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, *must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue*. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another. *Id.* at 596, 598 (Emphasis added).

Capital Traction and *Connally* provide basic background on the doctrine of void-for-vagueness. The modern seminal case on the question is *Parker v. Levy*.[4] In *Parker*, the Court states, "void-for-vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." *Id.* at 757.[5] This standard is expanded upon in a series of military cases. In *United States v. Saunders*, C.A.A.F. framed the issue of whether an individual was on sufficient notice as an objective inquiry. 59 M.J. 1, 29 (2003). Later, *United States v. Pope* lists examples of "fair notice" sources to include federal law, state law, military case law, military custom and usage, and

[4] 417 US 733 (1974), citing *U.S. v. Harris*, 347 US 612, 617 (1954).

[5] While *Parker* upheld the statute, the Court explained that the military is subject to a less stringent analysis than our civilian counterparts. But this reasoning stems from the unique military nature of the laws at issue, Articles 133 and 134. The rationale used to justify an unclear statute in Parker cannot be used to compensate for Art. 120's failings. Arts. 133 and 134 are particularly inherent to our military structure and unknown in the civilian world. Not so with laws prohibiting sex crimes. The Government would be hard pressed to articulate a legitimate reason why a servicemember should receive less protection from the dangers of an unconstitutionally vague law than a civilian accused of the same conduct.

military regulations. 63 M.J. 68 (C.A.A.F. 2006). Training, pamphlets, and other materials may also serve as sources of notice by giving context to regulations and articulating differences between permissible and impermissible behavior. *See United States v. Brown*, 55 M.J. 375, 384 (C.A.A.F. 2001).

Here, IT2 Pease had no notice that the complaining witnesses allegedly reached the undefined level of impairment such that their consent was invalidated by alcohol consumption. The statute unrealistically expected him to gauge whether the complaining witnesses were "incapable of consenting due to impairment." Does "incapable of consenting due to impairment" mean that a person is *extremely impaired*? *Mostly* impaired? Above the legal blood alcohol content ("BAC") limit for operating a motor vehicle? When does the switch between capable of consenting and incapable of consenting occur? As an impaired individual's BAC inevitably drops, when does the person revert back to "capable" once again? Who is culpable in a situation where both parties have reached a level of impairment such that neither party was capable of consenting?

Determining whether someone is "incapable of consenting due to impairment" requires either medical training or the ability to make accurate, immediate determinations based on usually incomplete information (such as a potential sexual partner's height, weight, tolerance for alcohol, knowledge of how much alcohol was consumed, and knowledge of when alcohol consumption ceased). Consider the intoxicated complaining witness during a period of "black-out": externally appears capable of consenting, externally appears to actually consent, and it is not determined until later (usually by experts, analyzing facts that weren't necessarily known to the accused) that she was "incapable" of consenting at the time. Indeed, an Article 120(b)(3) or (d) referral all but assures the government and accused will be provided a forensic alcohol

experts to help a panel of members understand the extent to which a person was intoxicated and the effect on their capability to consent. How can we expect that level of analysis of IT2 Pease or any other lay person on the nights in question?

Article 120 is not "so clearly expressed" that IT2 Pease could "intelligently choose, in advance, what course it is lawful for him to pursue". *Capital Traction Co.*, 34 App. D.C. at 598. As a result, IT2 Pease could not have reasonably known whether the complaining witnesses had reached a level of impairment such that they were incapable of providing consent, and Article 120(b)(3) and (d) must be struck down as unconstitutionally vague.

4. Relief Requested

Defense respectfully requests that Charge I and all Specifications thereunder be dismissed, with prejudice, as Art 120(b)(3) and (d) are unconstitutionally vague.

5. Evidence and Burden of Proof.

The burden is upon the defense. No evidence other than that previously submitted with other motions will be relied upon.

6. **Argument**. The Defense desires oral argument.

M. R. SONN
LT, JAGC, USN

****

Certificate of Service

I hereby attest that a copy of the foregoing Motion to Dismiss was served on the Court and opposing counsel by email on 13 September 2013.

M. R. SONN
LT, JAGC, USN

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 3

UNITED STATES, Appellee v. Christopher A. QUICK, Sergeant (E-5) U.S. Marine Corps Appellant	))))))))))))	ANSWER ON BEHALF OF APPELLEE Case No. 201300341 Tried at MCRD, San Diego, California on November 28, 2012; February 11, 26, 2013; March 6, 2013; April 22-17, 29, 2013; by a general court-martial convened by the Commanding General, Third Marine Aircraft Wing, Marine Corps Air Station Miramar.

LINDSAY P. GEISELMAN
Lieutenant, U.S. Navy
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202)685-7678, fax (202)685-7687

DAVID N. ROBERTS
Major, U.S. Marine Corps
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202)685-7059, fax (202)685-7687

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Errors Assigned

I.

PROTECTED SPEECH CANNOT BE CRIMINALIZED AS A MEANS TO CRIMINALIZE UNPROTECTED SPEECH. HERE SGT QUICK WAS CONVICTED OF VIOLATING ARTICLE 120c(a)(1) BECAUSE HE WATCHED A CELL PHONE VIDEO, WHICH WAS MADE WITHOUT HIS KNOWLEDGE, WHICH SHOWED HIM HAVING GROUP SEX THAT HE REASONABLY BELIVED WAS CONSENSUAL. ARTICLE 120c(a)(1) VIOLATES THE FIRST AMENDMENT BECAUSE IT CRIMINALIZES A SUBSTANTIAL AMOUNT OF PROTECTED SPEECH.

II.

DUE PROCESS REQUIRES LAW ENFORCEMENT AND PROSECUTORS TO HAVE RELIABLE STANDARDS OF CRIMINALITY. THE PLAIN LANGUAGE OF ARTICLE 120c(a)(1) DOES NOT REQUIRE THE GOVERNMENT TO PROVE THE ACCUSED HAD KNOLEDGE OF THE ALLEGED VICTIM'S LACK OF CONSENT. SGT QUICK WAS THEREFOR DENIED DUE PROCESS OF LAW BECAUSE ARTICLE 120c(a)(1) REQUIRES PROSECUTORS TO SELECTIVELY APPLY THEIR OWN JUDGMENT AS TO WHO SHOULD BE PROSECUTED RATHER THAN PROSCRIBE CLEAR STANDARDS OF CRIMINALITY.

III.

EVEN IF ARTICLE 120c(a)(1) IS CONSTITUTIONALLY VALID, THE GOVERNMENT WAS STILL REQUIRED TO PROVE, BEYOND A REASONABLE DOUBT, THAT UNDER THE CIRCUMSTANCES, TR HAD A REASONABLE EXPECTATION OF PRIVACY. UPON INVITATION, TR VOLUNTARILY CAME ABOARD MCAS MIRAMAR TO HAVE SEX WITH PFC HEARST, AND THEN WOUND UP HAVING SEX WITH TWO ADDITIONAL MEN WHOM SHE NEVER PREVIOUSLY MET, INCLUDING SGT QUICK, IN SGT QUICK'S BARRACKS ROOM, WITH THE DOOR AND WINDOW OPEN. SGT QUICK'S CONVICTION FOR VIOLATING ARTICLE 120c(a)(1) IS LEGALLY AND FACTUALLY INSUFFICIENT BECAUSE, UNDER THE CIRCUMSTANCES, TR DID NOT HAVE A REASONABLE EXPECTATION OF PRIVACY.

IV.

SGT QUICK WAS CHARGED WITH COMMITTING AND INDECENT ACT FOR PARTICIPATING IN WHAT THE GOVERNMENT CHARGED AS PRIVATE, CONSENSUAL, GROUP SEX. THE CHARGE MADE NO REFERENCE TO ANY OTHER AGGRAVATING FACTOR. AS A RESULT, THE SOLE SPECIFICATION OF CHARGE IV FAILS TO STATE AN OFFENSE BECAUSE IT CRIMINALIZES CONDUCNT ENTITLED TO CONSTITUTIONAL PROTECTION, AND BECAUSE CONGRESS SPECIFICALLY SUPERCEDED [sic] THIS CHARGE IN THE 2012 UCMJ.

V.

DURING BOTH GROUP AND INDIVIDUAL *VOIRE DIRE* GYSGT PRICE MADE STATEMENTS THAT INDICATED HE COULD NOT FAIRLY SIT IN THE JUDGMENT OF SGT QUICK'S CASE. YET, THE MILITARY JUDGE DENIED A CHALLENGE FOR CAUSE AND KEPT GYSGT PRICE ON THE PANEL THAT EVENTUALLY RETURNED SEVERAL CONVICTIONS. CONSEQUENTLY, SGT QUICK WAS DENIED HIS DUE PROCESS RIGHT TO A FAIR AND IMPARTIAL FACT-FINDER AT TRIAL BECAUSE GYSGT PRICE REMAINED A MEMBER, DESPITE HIS ACTUAL AND IMPLIED BIAS.

VI.

SGT QUICK WAS ONE OF FOUR INDIVIDUALS ACCUSED OF COMMITING MISCONDUCT IN RELATION TO THE 1 JULY 2012 INCIDENT INVOLVING TR. SGT QUICK WAS THE ONLY ONE AWARDED A PUNITIVE DISCHARGE. CONSEQUENTLY, HIS SENTENCE WAS OVERLY HARSH IN LIGHT OF THE RESULTS IN THE COMPANION CASES.

Statement of Statutory Jurisdiction

Appellant's approved sentence includes a reduction in rank to E-3, a bad conduct discharge and six months of confinement. (R. 1504.) Accordingly, this Court has jurisdiction pursuant to

Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012).

Statement of the Case

A general court-martial comprised of officer and enlisted members, convicted Appellant, contrary to his pleas, of conspiracy to distribute indecent material, wrongfully viewing indecent material, and indecent conduct, in violation of Articles 81, 120c, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 881, 920c, 934 (2012). The Military Judge sentenced Appellant to thirty years of confinement, reduction to pay grade E-1, and a dishonorable discharge. The Convening Authority approved the sentence adjudged and ordered it executed. (Convening Authority's Action (C.A.A.) at 3, August 21, 2013.) However, the convening authority further ordered Appellant to be reduced to E-1, in accordance with Article 58a, UCMJ. (C.A.A. at 2-3.)

Statement of Facts

A. Appellant and several other Marines had non-consensual sex with TR in a barracks room on board MCAS Miramar.

At the time of the offense, TR was a twenty-one year old student at Miramar Community College and Mesa Community College. (R. 433-34.) TR’s dad was retired from the Navy, so she had a dependent identification card. (R. 434, 444.) She had previously met Cpl Hollis in June 2012 while hanging out with

her childhood friend IG in the barracks in Balboa. (R. 435-37.) They became friendly and had sex, but did not develop a romantic relationship. (R. 437.)

On the afternoon of July 1, Cpl Hollis sent TR a text message, telling her his friend “needed something.” (R. 438.) The last time TR received a message like this was when her friend was in a motorcycle accident, so she thought it was a similar scenario. (R. 438.) Cpl Hollis explained that he wanted her to sleep with one of his friends; she declined, stating that she did not want to do that. (R. 438.) However, she needed a break from her homework, so she changed out of her pajamas into jeans and a t-shirt and decided she would go hang out at the barracks to clear her head. (R. 438-39.) She got directions from Cpl Hollis and drove to the barracks. (R. 445.)

TR met Cpl Hollis and Appellant at the barracks and followed them to Cpl Hollis’ room on the first floor, making small talk along the way. (R. 446.) Cpl Hollis continued to pressure TR to sleep with Appellant. (R. 446.) They teased her that her braided hair signaled that she wanted sexual acts done to her. (R. 447.) TR told them, “No, I don’t want to sleep with anyone, I’m not going to, I don't want to.” (R. 447.) Other individuals entered the room; one was PFCHearst. (R. 447.) TR realized LCpl Hearst was the “friend” that Cpl Hollis wanted her to sleep with. (R. 448.)

TR felt extremely uncomfortable and got up to go to her car, but PFC Hearst stood in her way. (R. 448.) He beckoned her towards his room, saying, “Why don’t you come here.” (R. 449.) She accidentally spilled her beer and stalled cleaning it up, hoping she would have the opportunity to leave the area. (R. 449-50.) PFC Hearst stayed near her, and after the spill was cleaned, led her to his barracks room. (R. 451.) In his room, PFC Hearst took TR’s clothes off. (R. 449.) TR kept saying, “Can we not do this? Can we do something else.” (R. 451.) PFC Hearst pushed her onto the bed and climbed on top of her and began having sex on her. (R. 451-52, 571.) They had closed and locked the door to the outside of the barracks and the blinds were closed at the time. (R. 1260, 1311.) Appellant became annoyed that he was locked out of his own room. (R. 1260, 1269, 1311-12.) While they were having sex, Appellant and another person entered the room. (R. 452-53.) There was a futon in the room; Appellant changed it into a bed and told her, “Just blame it on the alcohol.” (R. 453.)

TR continued to insist that she not want to do this, but the Marines pushed her down on the bed and grabbed her braids, manipulating her head so she could give Appellant oral sex. (R. 453-54.) Somebody else was having sex with TR from behind at the same time. (R. 454.) TR was unaware of who was penetrating her vagina from behind, but knew that person eventually left and

was replaced by someone else, who exchanged words with Appellant and then penetrated her anus from behind. (R. 454.) TR kept saying, “No, please. Just don’t,” but Appellant and his friends just laughed. (R. 454, 457, 590.) Appellant testified at trial that he heard her say that she couldn’t “do this if people are going to be watching and making videos.” (R. 1267, 1315.)

B. Cpl Hollis recorded a video on his iPhone from outside the barracks room window that captured Appellant and TR having sex.

At some point a man named Joel Montez came in the room. (R. 455-56.) While he and Appellant tried to have sex with her in different positions, TR became aware of someone trying to take pictures or videos, first in the room and then through the window. (R. 456.) TR saw shadows and could hear people in the hallway, hiding and laughing. (R. 456, 590.) At this point TR had her hand on Appellant’s penis because this was the only way she could push it away somewhat while being forced to provide oral sex. (R. 458.) TR felt someone watching her and looked up to see a light shining through the window, the blinds move, and Cpl Hollis holding his phone. (R. 458, 591-92.) TR was horrified: here was her friend, “capturing the worst moments of her life with a camera.” (R. 459.) TR reacted, yelled out, then grabbed a pillow and curled up in a ball, crying. (R. 459, 590-91.)

Seeing this reaction, the Marines temporarily stopped

having sex on TR. (R. 459.) When she realized this was her opportunity to escape, she got up and ran, but tripped and fell into a wall. (R. 459.) Montez brought TR back into the room with Appellant and resumed having sex with her in other positions, despite her crying and begging them to stop. (R. 459-60.) At this point, the doors and windows had been closed, but, according to Appellant, TR was uneasy that someone was watching. (R. 1313.) Finally, Appellant stopped and TR grabbed her clothes, got dressed and went back into Cpl Hollis' room. (R. 460-61.)

Appellant and PFC Hearst noticed TR had been crying. (R. 1313.) Appellant figured it was in response to the video. (R. 1313.) Cpl Hollis showed TR his phone, saying, "It's deleted." (R. 461.) TR knew it was saved somewhere and unable to sit in the room anymore, ran out and called her friend. (R. 461.) Sometime thereafter, Appellant left his room, and went to Cpl Hollis' room and watched the video of the group sex on Cpl Hollis' cell phone. (R. 1270-71). Cpl Hollis sent it to Appellant through a text message. (Pros. Ex. 3; R. 1061-62.) NCIS confirmed this by locating the video of TR engaged in sex acts on Appellant's phone. (R. 1066.) Appellant viewed the video later on that night. (R. 1289.) This video was entered into evidence at trial and played before the Members. (R. 1293-96; Pros. Ex. 5.)

C. Appellant pled not guilty at a contested court-martial tried by members.

1. Voir Dire.

After group and individual *voir dire* Gunnery Sergeant (GySgt) P was challenged for cause by the Trial Defense Counsel. (R. 360.) Prior to the challenge GySgt Price answered over 140 questions during group *voir dire*. (R. 205-36.) He answered fourteen individual *voir dire* questions by Trial Counsel (R. 311-13.) and more than seventy individual questions by Trial Defense Counsel. (R. 314-23.) GySgt P also completed a Court-Martial Member questionnaire. (Appellate Ex. XXII at 48-53.) During group *voir dire*, GySgt P volunteered additional information to update his questionnaire. (R. 209.)

GySgt P indicated that he had not formed any opinion about Appellant's guilt or innocence (R. 204.) That he did not know anything about Appellant's case. (R. 212.) That he did not have any personal prejudices or feelings which would influence his deliberations and how he weighed the credibility of the witnesses. (R. 214-15.) That he would wait in making any decision until all evidence is heard. (R. 229.)

GySgt P stated he attended the Heritage Brief at Miramar. (R. 319.) He stated that he understood that the UCMJ requires him to exercise his own independent judgment when evaluating evidence in the case. (R. 218.) That he presumed Appellant to

be innocent. (R. 221.) GySgt P indicated that if the tables were turned and he was the accused, he would be satisfied to have his guilt or innocence determined by someone like himself. (R. 223.) He stated that he did not recall any discussion at the Heritage Brief about courts-martial and that after hearing the Heritage Brief he did not feel like he should give a certain punishment. (R. 319.) He stated that he believed the purpose of the Heritage Brief was "that as staff NCOs and higher, we were failing at reading the warning signs of certain problem that are coming out, *i.e.*, the drinking and driving, sexual assaults and just conduct unbecoming of the Marines that we need to crack down on, watch our Marines a little bit closer." (R. 319.) He added that he did not think his command or anyone else desired a particular result when he serves as a court-martial member. (R. 320.)

GySgt P stated that he expected that a victim would be emotional during her testimony. (R. 226.) When asked to explain, GySgt P indicated that his past experience persons who have experienced traumatic occurrences, like being in Fallujah, Iraq, get emotional when recalling it. (R. 311.) But he also acknowledged that he has seen people with an opposite reaction, where they show no emotion. (R. 312.) That he can imagine a situation where someone who is lying becomes emotional and that consensual sex can cause physical injuries. (R. 318.)

GySgt P did not ask himself what Appellant did when he walked into the courtroom that morning. (R. 230.) GySgt P did feel that Appellant must have done something or he would not be in court that day. (R. 230.) When asked why he thought Appellant must have done something, GySgt P indicated:

> It all comes down to the information and the facts that are presented in the case and just being able to hear it because I don't——I don't know anything about it, so it's just depending on what——if it's come to this level on a general court-martial there's something that the government has information an all that to bring it to this level, sir.

(R. 312-13.) GySgt P indicated that being at a general court-martial doesn't mean that the allegations are true and a general court-martial could be convened because of a false allegation. (R. 317.) GySgt P elaborated that Appellant is presumed innocent and the mere fact that Appellant is in court is no indication he is guilty of anything. (R. 230.) And that he must give Appellant the benefit of all reasonable doubt. (R. 230.)

GySgt P indicated that he does not believe that most sexual assault allegations are true. (R. 234.) During individual *voir dire* by Trial Defense Counsel, GySgt P indicated that he has seen people accused of something they did not do, of someone who was falsely accused of a crime, and that it is possible for a "women to lie about being sexually assaulted." (R. 314.) That he attended require Sexual Assault Prevention training where he

was informed that seventy-two to seventy-five percent of allegations of sexual assault were true. (R. 316.) He stated that in his experience he personally believes it is closer to fifty percent. (R. 316.) He formed that opinion by talking to other Marines about cases to which he had heard about after they had concluded. (R. 316.)

That he is comfortable with the notion that accused are innocent until proven guilty by reliable evidence. (R. 230.) That the Appellant has no duty to prove his innocence and that the burden never shifts to Appellant. (R. 230-31.) That he does not feel it should be the other way around and require an accused to prove his innocence. (R. 231.) That he could still find Appellant not guilty even if the Appellant did not present any evidence. (R. 231.) That at the end of the case, if he did not convinced one way or another, that he would resolve the case in favor of Appellant. (R. 231.) That he thought there are reasons why an innocent person accused of a crime may decide not to testify. (R. 232.) That he believes himself to be a person with a free, fair, and non-prejudicial mind. (R. 233.) He stated he thinks that the presumption of innocence means that Appellant does not have anything to prove, but the government must prove the case beyond a reasonable doubt. (R. 320.) That "[e]verybody has the right to plead their case and they're innocent until other facts are given that shows that they are

not." (R. 320.) That he is comfortable voting not guilty if he is not firmly convinced that Appellant is guilty. (R. 321.)

2. Challenge and Ruling.

Trial Defense Counsel challenged GySgt P for cause asserting that he has actual bias because he said "he has been told that through his training that 72 to 75 percent of . . . sexual assault allegations are true." (R. 360.) He also highlighted GySgt P's response that everyone has the right to plead their case. (R. 360.) The Military Judge found that GySgt P said he would follow all instructions and GySgt P believed that there was about an even chance that an allegation of sexual assault would be true. (R. 361.)

D. The Military Judge raised the issue that indecent conduct was improperly charged as a novel specification under Article 134.

On April 26, 2013, during an R.C.M. 802 conference the Military Judge raised the issue that indecent conduct was improperly charged as a novel specification under Article 134. (R. 1126-27.) The Military Judge stated,

> [T]he issue that the court thinks may exist is that when we have a chargeable offense that is enumerated, in this case under Article 120, then Congress takes the step to remove it from Article 120, is the government preempted or barred from charging it on 134 now? Because Congress looked at that and then decided to remove it.

(R. 1127.) The Military Judge noted that the Government's quick response was that it wasn't an intentional act by Congress. (R.

1127.) Therefore, the Government felt the Military Judge's position would not apply. (R. 1127.) Nothing was included on the Record about Trial Defense's position during the 802 Conference regarding this issue.

Later in the trial, Trial Defense Counsel moved to dismiss the Article 92 offense pursuant to R.C.M. 917. (R. 1218.) The Military Judge denied this motion. (R. 1219, 1230-31.) However, the Military Judge discussed the Article 134 indecent conduct charge further with Trial and Defense Counsels, but no 917 motion was raised regarding it. (R. 1226-27.)

E. The Military Judge's instructions on findings.

The Military Judge instructed Members, giving them a hard copy to read and follow along with as he instructed. (R. 1361.) Included in his instructions were the elements of indecent act and the definition of indecent conduct. (R. 1370) The Military Judge informed the Members that "wrongful" meant without legal justification or lawful excuse. (R. 1370.) Regarding the charge for viewing an indecent visual recording, the Military Judge stated:

> In order to find him guilty of this offense, you must be convinced by legal and competent evidence beyond a reasonable doubt:
>
> One, that on or about 1 July 2012, on board Marine Corps Air Station Miramar, California, the accused knowingly and wrongfully viewed a visual recording of the private area of [TR]. Two, that the accused did so without the consent of Ms. Reed. Three, that under

> the circumstances at the time of the charged offense, [TR] had a reasonable expectation of privacy. And, four, that the accused's conduct was wrongful.
>
> An act is done "knowingly" when it is done intentionally and on purpose. An act done as the result of a mistake or accident is not done "knowingly." The term "private area" means the naked or underwear- clad genitalia, anus, buttocks, or female areola or nipple.
>
> The term "under circumstances in which that person had a reasonable expectation of privacy" or "reasonable expectation of privacy" means circumstances in which a reasonable person would believe that a private area of the person would not be visible to the public.

(R. 1371.)

F. Appellant was found guilty of indecent viewing and sentenced.

Prior to sentencing, the Military Judge instructed the Members on sentencing, including on the maximum punishment, the types of punishment, and effect of Article 58a and 58b, UCMJ. The Members were also provided a written copy of those instructions. (R. 1493-1497; Appellate Ex. LI). Appellant was convicted contrary to his pleas, at a general court-martial composed of officer and enlisted members of conspiracy to distribute the indecent video of the tryst (orgy), of viewing the video, and of indecent conduct. (R. 1442). The Members sentenced Appellant to confinement for six months, reduction in rate to E-3, and to a bad-conduct discharge. (R. 1504.)

Forty minutes after the court-martial was adjourned, the Military Judge convened a post-trial Article 39(a), UCMJ,

session to address a post-trial question raised during the Members' debriefing about Appellant's sentence. (R. 1507). During the post-trial debriefing, the Members informed the Military Judge that they did not intend to trigger the collateral effect of automatic forfeitures under Article 58b, UCMJ. (R. 1507-1517). Following discussion with the parties, the Military Judge recalled the Members and reinstructed the members as to the effect of Article 58b, UCMJ and also gave the clemency instruction on suspension of sentences. The Military Judge further advised the Members that they could make a written clemency recommendation to the Convening Authority to indicate their intent as to automatic forfeitures and to request that the Convening Authority defer automatic forfeitures. (R. 1517-1520.)

Summary of Argument

I-II.

Article 120c(a)(1) is not overbroad or unconstitutionally vague. Article 120c(a)(1) holds a servicemember criminally responsible for an act of viewing an illegally created video recording. This act is not expressive conduct and is not protected by the First Amendment. Assuming, *arguendo*, that the conduct amounted to protected speech, the United States had a legitimate military interest in regulating it, and accomplished this with a narrowly tailored statute. Since any reasonable

service member would understand that taking a video of someone having sex in a place where they have a reasonable expectation of privacy and without consent is something that is criminal, the statute is not vague.

III.

Appellant's conviction for Article 120c(a)(1) is legally and factually sufficient. When considering the evidence in a light most favorable to the United States, a reasonable trier of fact could have found Appellant guilty of indecent viewing beyond a reasonable doubt. TR had a reasonable expectation of privacy in the barracks, and did not consent to Appellant taking her picture with his cell phone. Witness testimony and photographic evidence should convince this Court, in undergoing their independent review, that there is no compelling reason that the convictions reached by a rational trier of fact should be disturbed.

IV.

Appellant's conviction for indecent act under Article 134 was properly charged as a novel specification because this conduct cannot be captured by Article 120. This charge is not unconstitutional as applied, in light of *Lawrence,* because group sex is not private consensual sexual activity between adults. Furthermore, the charge did not violate *Marcum*, because it was charged as being to the prejudice of good order and discipline

in the armed forces and of a nature to bring discredit upon the armed forces.

V.

The Military Judge did not abuse his discretion in denying the challenge of GySgt P was able to adequately explain statements he made about the accused “pleading his case” and his admission of his attendance at required sexual assault training were fully rehabilitated on the Record. GySgt P explained that he did not accept the sexual assault statistics from his training as correct, and did not feel the Appellant needed to present any evidence. There was no behavior during the trial that warranted *sua sponte* dismissal of the Member due to actual or implied bias or impartiality.

VI.

Appellant’s sentence is lawful and appropriate. Committing indecent acts with junior ranking Marines by having group sex with a female college student in the barracks is a serious offense that greatly calls into question Appellant’s character. Continuing TR’s victimization through by viewing a non-consensual sex video only adds to Appellant’s culpability. Any disparity between his sentence and that of is co-actors is rationally explained by the fact that Appellant was convicted of three separate and serious crimes with which none of his co-actors were identically implicated in, nor convicted. The

Members were properly instructed at to the appropriate punishments both verbally and with written copy for review during their deliberations, and properly adjudged a sentence.

Argument

I.

ARTICLE 120c(a)(1) IS NOT FACIALLY UNCONSTITUTIONAL BECAUSE IT DOES NOT CRIMINALIZE PROTECTED SPEECH BY PENALIZING THOSE WHO WRONGFULLY VIEW A VIDEO TAKEN OF SOMEONE WITHOUT THEIR CONSENT WHERE THE PERSON HAD A REASONABLE EXPECTATION OF PRIVACY.

A. This issue is reviewed *de novo*.

The constitutionality of a statute is reviewed *de novo.* *United States v. Disney*, 62 M.J. 46, 48 (C.A.A.F. 2005). The question of whether a statute is constitutional may be addressed either in the context of how the statute is applied in a particular case or through a facial challenge to the statute. *United States v. Marcum*, 60 M.J. 198, 206 (C.A.A.F. 2004). "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Facial challenges are best when infrequent and are especially to be discouraged. *Sabri v. United States*, 541 U.S. 600, 608 (2004).

B. Appellant's possession and communal viewing of an obscene video are not actions of speech or expression protected by the First Amendment.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. This protection permits the expression of ideas, even the expression of ideas the vast majority of society finds offensive or distasteful. *United States v. Wilcox*, 66 M.J. 442, 446 (C.A.A.F. 2008); *see Virginia v. Black*, 538 U.S. 343, 358 (2003). The First Amendment also protects certain communicative conduct. *Spence v. Washington*, 418 U.S. 405, 411 (1974). Even outside the military context, however, obscene material is unprotected by the First Amendment. *United States v. Bowersox*, 72 M.J. 71, 75 (C.A.A.F. 2013).

It is well-established, however, that First Amendment protection is far less comprehensive in the military context, given the different character of the military community and mission. *Wilcox*, 66 M.J. at 446. (citing *Parker v. Levy*, 417 U.S. 733, 758 (1974).

> While speech that would be impervious to criminal sanction in the civilian world may be proscribed in the military, C.A.A.F recognizes that when assessing a criminal violation implicating the First Amendment: the proper balance must be struck between the essential needs of the armed services and the right to speak out as a free American. Necessarily, we must be sensitive to protection of the principle of free thought——not free thought for those who agree with us but freedom for the thought that we hate.

Id. at 447. (citations and internal quotation marks omitted).

In *Bowersox*, the Court clearly defined the limits of First Amendment protections in a case where, as here, an appellant shared the viewing of obscene material with another servicemember in the barracks. 72 M.J. at 72-73. There, the Court acknowledged the general principle that "a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." *Id*. at 75 (quoting *Stanley v. Georgia*, 394 U.S. 557, 568 (1969)). But the Court noted that the Supreme Court subsequently held that *Stanley* did not create a right to purchase or possess obscene materials, but rather depended on "the right to privacy in the home." *Id*. (citing *United States v. 12 200-Ft. Reels of Super 8mm Film*, 413 U.S. 123, 126 (1973)). Because a servicemember's expectation of privacy is diminished in his shared barracks room, compared to a civilian in his private home, however, the Court held that the First Amendment did not protect the appellant's actions, sharing obscene child pornography in the barracks room with his roommate. *Id*.

By the same token, Appellant's actions here are not protected by the First Amendment. Appellant took part in non-consensual group sex with TR, and this activity was surreptitiously videorecorded in what TR described as "the worst moments of my life." (R. 459.) Then, Appellant relived the

encounter by viewing this obscenity with his confederate, Cpl Hollis, who then sent Appellant the video on a text message. (R. 1060-61, 1270-71.) As in *Bowersox*, this obscenity is not protected by the First Amendment, and Appellant's conviction for viewing it should be affirmed.

C. Article 120c is not overbroad, facially or as applied to Appellant.

A criminal statute or regulation is overbroad if, in addition to prohibiting conduct which is properly subject to governmental control, it also proscribes activities which are constitutionally protected or otherwise innocent. *Grayned v. City of Rockford*, 408 U.S. 104 (1972). A statute may be invalidated on the basis of overbreadth, but only if the overbreadth is substantial. *New York v. Ferber*, 458 U.S. 747, 769 (1982). However, the overbreadth doctrine should be used with hesitation, and then "only as a last resort." *Id*. (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)). There must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court for it to be facially challenged on overbreadth grounds. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984). The mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.

Broadrick, 413 U.S. at 630 (Brennan, J., dissenting). To prevail on such a constitutional challenge, an appellant must demonstrate that the overbreadth is not only "real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id*. at 615.

1. Obscenity is not protected by the First Amendment, and Congress's efforts to proscribe it in the military have generally passed constitutional muster.

As noted in section I.A, *supra*, obscenity is not protected by the First Amendment. *See United States v. Williams*, 553 U.S. 285, 288 (2008); *Miller v. California*, 413 U.S. 15 (1973). In *Miller*, the Court confined the permissible scope of regulation of obscene material "to works which depict or describe sexual conduct." 413 U.S. at 24. The *Miller* Court further required that such "conduct must be specifically defined by applicable state law," and "must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Id*.

It has been well observed that such utterances are not an essential part of any exposition of ideas, and are of such slight social value that any benefit that may be derived from them is clearly outweighed by the social interest in order and

morality. *Ferber*, 458 U.S. at 754. (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)). In *Ferber*, the Supreme Court held that child pornography was not protected speech:

> When a definable class of material, such as that covered by the New York statute, bears so heavily and pervasively on the welfare of children engaged in its production, the balance of competing interests is clearly struck, and it is permissible to consider these materials as without the First Amendment's protection.

458 U.S. 747 (1982).

This Court rejected a similar overbreadth challenge to Article 120c's antecedent in *United States v. Rheel*, No. 201100108, 2011 CCA LEXIS 370 (N-M. Ct. Crim. App. Dec. 20, 2011), *pet. for review denied*, 2012 CAAF LEXIS 349 (C.A.A.F. Mar. 23, 2012). There, this Court held that Article 120(k) "does not merely prohibit rude or controversial speech, rather it prohibits certain conduct." *Id*. at *10.

The same reasoning rings true here. Article 120c prohibits a very specifically-defined quantum of conduct: viewing the private area of another person alone is not enough; rather, under the statute's terms, the viewing must be knowing and wrongful, must occur without the other person's consent, and under circumstances in which that other person has a reasonable expectation of privacy. 10 U.S.C. § 920c (2012), *as amended by* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 541, 125 Stat. 1298 (2011). An absence of any of

these elements would necessarily defeat the offense; consequently, any such viewing with legal justification, or with the consent of the other person would not be impacted by the statute. Further, no one would be made a felon simply by viewing the freely-exposed private area of another in a public space——so servicemember patrons of even the most avant-garde performance art need not fear prosecution. On the contrary, the type of "expression" prohibited by the statute is that which is produced in a clandestine manner, without the consent of the subject whose sexual organs or other "private area" is displayed, and is subsequently viewed wrongfully and knowingly. There is no serious argument that such material has any artistic, political, scientific, or literary value. *Cf*. *Miller*, 453 U.S. at 24.

Construed in this manner, this statute is clearly intended to reach circumstances such as those in *United States v. Weston*, 66 M.J. 544 (N-M. Ct. Crim. App. 2008), *aff'd*, 67 M.J. 390 (C.A.A.F. 2009), where the appellant, a Marine court reporter, "placed a micro-surveillance camera in a hollowed-out electric razor and placed the razor in the work-place bathroom shared by the appellant, the victim, and a military judge. The camera . . . transmitted a live video signal to a receiver attached to a video cassette recorder (VCR) located on the appellant's desk." 66 M.J. at 547. The only difference between the facts of *Weston*

and those at bar are due to nine years of advancement in technology, and the corresponding ease by which videos may be made and transmitted from one user to another. If anything, this passage of time and advancement in technology only strengthens the Government's interest in stemming the production and trafficking of such material.

2. Appellant's hypotheticals are unavailing.

Appellant raises a hypothetical case in which a servicemember could be prosecuted under this statute merely for viewing "his celebrity crushes nude, engaged in sex acts, [as well as] non-celebrity women who were also nude and engaged in sex acts." (Appellant's Br. at 25.) Leaving aside the question of standing, this parade of horribles is thwarted by the statutory requirements that the viewing of the video be made without the other person's consent, and under circumstances in which the other person has a reasonable expectation of privacy. It is well-settled that public figures' expectation of privacy is generally diminished. *See generally Curtis Pub. Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Nation Magazine v. United States Customs Service,* 71 F.3d 885, 894 n.9 (D.C. Cir. 1995). Consequently, the statute's requirement to demonstrate that the victim had a reasonable expectation of privacy would likely thwart any attempts to prosecute servicemembers merely

for viewing photos of naked celebrities.

It is a closer question whether the viewing of websites containing “non-celebrity,” private civilians recorded surreptitiously in the nude could subject a servicemember to criminal liability. In essence, Appellant’s hypothetical raises the question of whether Article 120c criminalizes the viewing of so-called “revenge porn,” an emerging online industry based on shaming or harassing unwitting victims that has also been targeted by legislative action in Hawaii and California. *See* Lorelei Laird, *Striking Back at Revenge Porn*, 99 A.B.A. Journal 44 (November 2013).

Such a case probably could be prosecuted under the terms of Article 120c, where the United States could demonstrate that the video was made without the victim’s consent, and that the accused knowingly viewed the video without the victim’s consent. It is admittedly unclear whether such a prosecution would pass constitutional muster: “[T]argeted revenge porn legislation occupies a tricky space: imprecisely drafted revenge porn legislation protects many victims but risks criminalizing protected expression.” Amanda Levandowski, Note, *Using Copyright to Combat Revenge Porn*, 3 N.Y.U. J. of Intellectual Property & Entertainment Law 422, 433 (Spring 2014).

Similar statutes prohibiting “upskirting” or other photography of a person’s private areas have passed constitutional

muster, however, where the photography is non-consensual and the victim would have a reasonable expectation of privacy in not being secretly photographed. *See Commonwealth v. Robertson*, 467 Mass. 371, 379-380 (Mass. 2014); *State v. Boyd*, 137 Wn. App. 910, 922 (Wash. Ct. App. 2007); *see also* N.Y. Penal Law § 250.45(4); Fla. Stat. § 810.145(2)(c) (2013). The viability of such a prosecution would likely hinge on the manner in which the statute was interpreted and instructed upon by the Military Judge. *See generally United States v. Medina*, 69 M.J. 462, 464 (C.A.A.F. 2011). But such a prosecution would likely pass constitutional muster, so long as the victim's lack of consent was demonstrated, and the recording thus remained an act of exploitation rather than a work of art.

But this Court need not decide that hypothetical case now. The mere fact that Appellant may conceive of some impermissible applications of Article 120c is not sufficient to render it susceptible to an overbreadth challenge. *Broadrick*, 413 U.S. at 630 (Brennan, J., dissenting). The facts here are clear: Appellant participated in the non-consensual act that Cpl Hollis videorecorded without TR's consent; Appellant knew the recording was made without TR's consent; and Appellant shared and watched the video in a military barracks with another Marine, Cpl Hollis. There is no First Amendment interest at stake here, nor would there be in the vast majority of conceivable prosecutions

under this statute. Appellant's overbreadth challenge correspondingly fails.

D. Even if the video in question is not obscene and merits First Amendment protection, *arguendo*, the statute is narrowly tailored to legitimate Government interests.

1. The statute protects real victims from real exploitation.

In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (U.S. 2002), the Supreme Court struck down a provision of the Child Pornography Protection Act (CPPA), holding that statutory language criminalizing visual depiction that "appeared to be" of a minor engaged in sexually explicit conduct was facially overbroad. 535 U.S. at 257.

As written the CPPA prohibited speech that recorded no crime and created no victims by its production. *Id.* While the Government asserted that the images can lead to actual instances of child abuse, the Court found the causal link to be contingent and indirect, stating "virtual child pornography is not 'intrinsically related' to the sexual abuse of children. *Id.* at 249. Additionally, the language of the statute potentially criminalized works of literary and educational value. *Id.* at 246-47.

No such concerns apply here. Unlike *Ashcroft,* Article 120c is extremely narrow and tailored to apply only to specific individuals. Most notably, Article 120c applies to the viewing

of the private area of an actual person. 10 U.S.C. 920c (2012). This is not a negligible distinction, and the type of exploitation TR suffered here is not unique:

> [A]ccording to one survey, one in ten former partners threaten to post sexually explicit images of their exes online and an estimated sixty percent of those follow through. The victims featured on revenge porn websites frequently receive solicitations over social media, lose their jobs, or live in fear that friends, lovers or employers will discover the images.

Levandowski, *supra*, at 424.

Further, unlike *Ashcroft*, the criminalized viewing of such a video bears a direct link to another criminal act of non-consensual video-taping of an actual person, as there is no other kind of material that this statute would encompass. *See* Article 120c(a)(2). Like *Ferber,* the speech is the record of abuse. There is no potential for this statute to include literary works or virtual replications of pornography because a lack of consent on the part of the victim whose private areas were viewed is a part of the statute. Therefore there is a strong causal link between the Government interest in protecting victims against surreptitious videotaping of their private areas, not only by criminalizing the recording of abuse, but criminalizing those who prolong the abuse by viewing it.

2. <u>The statute promotes the legitimate Government interest in maintaining an effective military</u>.

"[T]he right of free speech in the armed services is not

unlimited and must be brought into balance with the paramount consideration of providing an effective fighting force for the defense of our Country." *United States v. Brown*, 45 M.J. 389, 396 (C.A.A.F. 1996).

> The primary mission of the armed forces is to defend our national interests by preparing for and, when necessary, waging war, using coercive and lethal force. Responsibility for the awesome machinery of war requires a degree of training, discipline, and unit cohesion that has no parallel in civilian society.
>
> The armed forces must develop traits of character, patterns of behavior, and standards of performance during peacetime in order to ensure the effective application and control of force in combat. Members of the armed forces are subject to disciplinary rules and military orders, twenty-four hours a day, regardless of whether they are actually performing a military duty.

United States v. Brown, 45 M.J. 389, 396-397 (C.A.A.F. 1996). (citation omitted). No one questions that deference must be given to military authorities' determination that military needs justify particular restrictions on the First Amendment, and that military commanders may enact regulations and take administrative actions that place burdens on, or exact administrative consequences for, speech, expression, and the exercise of religion that would not pass constitutional muster in the civilian context. *Wilcox*, 66 M.J. at 448*; see*, *e.g.*, *Goldman v. Weinberger*, 475 U.S. 503, 510 (1986) (a letter of reprimand issued for failure to obey a lawful order forbidding the wearing of a yarmulke while in uniform did not violate the

First Amendment based on deference to military authorities' determination of military need for uniformity); *Brown v. Glines*, 444 U.S. 348, 354-58(1980) (Air Force regulation prohibiting distribution of petitions on base without permission did not violate the First Amendment). The interest in maintaining good order and discipline has few counterparts in the civilian community. Thus, Courts will "not overturn a conviction unless it is clearly apparent that, in the face of a First Amendment claim, the military lacks a legitimate interest in proscribing the defendant's conduct." *Brown*, 45 M.J. at 396 (citing *Avrech v. Secretary of the Navy*, 520 F.2d 100, 103 (D.C. Cir. 1975)).

It is undisputed that military necessity can be a compelling government interest warranting the limitation of the right of freedom of speech. *United States v. Wilson*, 33 M.J. 797, 799 (C.M.A. 1991). This includes the military necessity of maintaining discipline and order, and certainly extends to maintaining the safety of visitors to a military base.

Read in this context, Article 120c(a)(1) only covers a very narrow and specific action, and a conviction will only be secured against a person who views the private area of another, without that person's consent and under circumstances "where a reasonable person would believe they could disrobe in privacy, without being concerned that an image of their private area was being captured." Article 120c(c)(3), UCMJ. This statute allows

the United States to protect against the exploitation and revictimization of sexual assault survivors that can wreak havoc on team morale and unit cohesion. This compelling Government interest outweighs any arguable imposition on a servicemember's freedom of speech.

II.

ARTICLE 120c(a)(1) IS NOT UNCONSTITUTIONALLY VAGUE BECAUSE A PERSON WOULD REASONABLY KNOW HIS PROSCRIBED CONDUCT WAS CRIMINAL.

A. This issue is reviewed *de novo*.

The constitutionality of a statute is reviewed *de novo*. *United States v. Disney*, 62 M.J. 46, 48 (C.A.A.F. 2005).

B. Article 120c(a)(1) is not unconstitutionally vague.

To determine whether a statute is unconstitutionally vague, the test is whether a person would reasonably know that the charged conduct was criminal:

> Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged.

Parker v. Levy, 417 U.S. 733, 757 (U.S. 1974) (quotations omitted). Due process requires that a person have fair notice that an act is criminal before being prosecuted for it. *United States v. Saunders*, 59 M.J. 1, 6 (C.A.A.F. 2003). "Fair notice"

that an act is criminal may come from multiple potential sources including: "federal law, state law, military case law, military custom and usage, and military regulations." *Id.* A court need not decide whether custom and regulation, state law, or military case law alone would meet the requirements for due process notice, when it finds that addressed together, the servicemember should reasonably have understood that his or her conduct was subject to military criminal sanction. *United States v. Vaughan*, 58 M.J. 29, 33 (C.A.A.F. 2003).

Article 120c(a)(1), UCMJ, refers to the knowing and wrongfully viewing of the private area of another person, where they did not consent and where they had a reasonable expectation of privacy. Article 120c, UCMJ. The term "wrongful" is well known and has enduring history as part of the UCMJ's statutory scheme. "Wrongfully" is a word of criminality, and words of criminality speak to *mens rea* and the lack of a defense or justification, not to the elements of an offense. *United States v. Fosler*, 70 M.J. 225, 230-231 (C.A.A.F. 2011); *see United States v. King*, 34 M.J. 95, 97 (C.M.A. 1992). As the Military Judge advised the members several times, "wrongful" means "without legal justification or lawful excuse." (R. 1370.) "Private area" and "Reasonable expectation of privacy" are also defined in the statute, leaving little question as to the types of act that qualify as criminal under Article 120c.

When compared with Article 125, a statute that has been challenged many times for appearing to criminalize all acts of sodomy, but has not been found to be void for vagueness due to Presidential narrowing and CAAF's "saving construction," the bald language of Article 120c is much more specific as to acts of criminality. *See United States v. Castellano*, 2013 CAAF LEXIS 568, at *3-4, *16-17. No extrinsic factors are necessary to prevent the encroachment of constitutional rights. Similarly, Articles 133 and 134, UCMJ, are written by Congress in even broader terms and would seem to provide even less notice than Article 120c regarding what is criminal. But those Congressional statutes were held not to be unconstitutionally vague by the Supreme Court in *Parker* because the accused, charged "with design to promote disloyalty and disaffection among the troops, publicly utter[ing certain] statements to divers enlisted personnel at divers times," could "have had no reasonable doubt" that his were both "unbecoming an officer and a gentlemen" and "to the prejudice of good order and discipline in the armed forces." *Parker*, 417 U.S. at 757.

Additionally, "[t]he charge sheet itself gives content to that general language, thus providing the required notice of what an accused must defend against. *United States v. Jones*, 68 M.J. 465, 472 (C.A.A.F. 2010).

In *Rheel*, this Court analyzed and rejected a vagueness

challenge to Article 120c's antecedent. 2011 CCA LEXIS 370 at *7-*9. As in *Rheel*, the statutory scheme of Article 120c clearly elucidates a standard of conduct proscribed by the statute. *Id*. (citing *Parker*, 417 U.S. at 755). There is no notice issue, and consequently, no due process issue.

III.

APPELLANT'S CONVICTION FOR INDECENT VIEWING IS FACTUALLY AND LEGALLY SUFFICIENT. CONSIDERING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE UNITED STATES, A REASONABLE FACT-FINDER COULD HAVE FOUND ALL THE ELEMENTS BEYOND A REASONABLE DOUBT. FURTHER, THIS COURT SHOULD BE INDEPENDENTLY CONVINCED OF APPELLANT'S GUILT ON THIS CHARGE BEYOND A REASONABLE DOUBT, BASED UPON THE TESTIMONY OF THE VICTIM THAT SHE DID NOT CONSENT TO THE RECORDING OF HER NAKED IMAGE WHILE HAVING SEX WITH SEVERAL INDIVIDUALS IN A MIRAMAR BARRACKS ROOM.

A. These issues are reviewed *de novo*.

This Court has an independent obligation to review each case *de novo* for factual and legal sufficiency. Article 66, UCMJ, 10 U.S.C. § 866. See *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

1. The test for legal sufficiency.

The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). In reviewing a claim of

legal insufficiency, courts give "due deference" to the finder-of-fact. *United States v. Bright*, 20 M.J. 661, 664 (N.M.C.M.R. 1985). The Court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). The Court's assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

2. The test for factual sufficiency.

The test for factual sufficiency requires an independent review and asks whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this Court is convinced of Appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. In undertaking this review, the Court engages in a "fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency beyond the admonition in Article 66(c), UCMJ, to take into account the fact that the trial court saw and heard the witnesses." *Beatty*, 64 M.J. at 458; *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). This Court "applies neither the presumption of innocence nor a presumption of guilt," and must "make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt."

Washington, 57 M.J. at 399.

Reasonable doubt does not mean that the evidence must be free from conflict. *United States v. Rankin*, 63 M.J. 552, 557 (N-M. Ct. Crim. App. 2006), *aff'd*, 64 M.J. 348 (C.A.A.F. 2007). Further, this Court may accept or reject some or all of a witness' testimony. *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979).

B. The evidence is legally sufficient because when viewing the testimony of the victim in a light most favorable to the United States, a reasonable fact-finder could have found each element of indecent viewing beyond a reasonable doubt.

1. Evidence was presented to support all four elements of indecent viewing.

A servicemember is guilty of indecent viewing if, without legal justification or lawful authorization, he "knowingly and wrongfully views the private area of another person, without that other person's consent and under circumstances in which that other person has a reasonable expectation of privacy." Article 120c(a)(1), UCMJ. Although the President has not provided elements pursuant to his authority under Article 36, the Military Judge advised the Members that conviction of indecent viewing requires the Government to prove beyond a reasonable doubt:

> One, that on or about 1 July 2012, on board Marine Corps Air Station Miramar, California, the accused knowingly and wrongfully viewed a visual recording of the private area of Ms. [TR].

> Two, that the accused did so without the consent of Ms. [TR].
> Three, that under the circumstances at the time of the charged offense, Ms. [TR] had a reasonable expectation of privacy.
> And, four, that the accused's conduct was wrongful.

(R. 1371.)

Evidence was presented to support all three elements of indecent viewing. TR testified that while she in a barracks room, engaged in sex acts with two males, she felt someone watching her and looked up to see a light shining through the window and Travis holding his phone. (R. 458.) TR was shocked and yelled, "You!" (R. 459.) She realized PFC Hearst was "capturing the worst moments of her life with a camera." (R. 459.) The video, portraying TR participating in oral sex and intercourse, was admitted into evidence at trial. (Pros. Ex. 5; R. 927). This evidence shows she did not consent to anyone taking pictures of her in various stages of undress or sexual activity. Accordingly, viewing the testimony of the victim in a light most favorable to the United States, a reasonable fact-finder could have found each element of indecent conduct beyond a reasonable doubt.

2. <u>The viewing occurred under circumstances in which TR had a reasonable expectation of privacy</u>.

Article 120c defines the term "under circumstances in which that other person has a reasonable expectation of privacy," in pertinent part, as "circumstances in which a reasonable person

would believe that a private area of the person would not be visible to the public." Art. 120c(c)(3)(B).

If the sexual activity here was non-consensual, then that determination is dispositive on the question of whether TR had a reasonable expectation of privacy in her person. She testified that she did not consent to having her clothes removed and to being sexually objectified for hours by multiple Marines. Not only was her privacy violated, but so was her entire sense of person. Any reasonable person would believe that he or she would not be subject to such criminal exploitation on a military base. Consequently, if the sex was non-consensual, then the Court's inquiry on this prong is complete.

Even if TR did consent to the sex, however, or at least to some of the sex acts that were accomplished on her, she nevertheless had a reasonable expectation that she would not be surreptitiously recorded while engaging in the act. Even Appellant testified at trial that he heard TR say that she couldn't "do this if people are going to be watching and making videos." (R. 1267, 1315.) The Record is clear that TR did not want a permanent record to be made of this event, and no evidence adduced at trial suggested that any of the participants planned ahead of time to videotape the event, let alone agreed to it while engaged in the act.

Because she is a civilian, TR's constitutional privacy

interests are not coextensive with those of a military member. *See Bowersox*, 72 M.J. at 74 (C.A.A.F. 2013). Consequently, while servicemembers living in a shared barracks room may not enjoy the same expectations of privacy, civilians do not shed such protections merely by entering a military installation. So, even if the entire sexual encounter *were* consensual, TR's expectation of privacy in the consensual act was "no less than [that of] a tenant of a house, or the occupant of a room in a boarding house." *Stoner v. California,* 376 U.S. 483, 490 (1964). A person can reasonably expect to have privacy in a room provided by another. *United States v. Domenech,* 623 F.3d 325, 328 (6th Cir. 2010) (citing *United States v. Lyons,* 706 F.2d 321, 324 (D.C. Cir. 1983)). In a word, TR's stated expectation that she would not be recorded was reasonable.

C. <u>This Court should be independently convinced of Appellant's guilt of indecent act beyond a reasonable doubt</u>.

Under Article 66, UCMJ, this Court "must assess the evidence in the entire record without regard to the findings reached by the trial court, and it must make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Washington,* 57 M.J. 394, 399 (C.A.A.F. 2002). When exercising this authority, this Court may be convinced beyond a reasonable doubt of an appellant's guilt even though conflicts

in the evidence may exist, and may also accord a witness's credibility greater weight on some topics than on others. *United States v. Lepresti*, 52 M.J. 644, 648 (N-M. Ct. Crim. App. 1999).

In testing for factual sufficiency, this Court is required to "recogniz[e] that the trial court saw and heard the witnesses." *Id.* This is not a *pro forma* legal requirement. Rather, it takes into account that the trier of fact is best situated to assess a witness's credibility while testifying. See *United States v. Madey*, 14 M.J. 651, 653 (A.C.M.R. 1982), *rev. denied*, 15 M.J. 183 (C.M.A. 1983); see also *United States v. Ferguson*, 35 F.3d 327, 333 (7th Cir. 1994), *cert. denied*, 514 U.S. 1100 (1995)(trial court's evaluation of witness credibility "will not be disturbed unless it is completely without foundation.").

The Members heard TR's testimony, considered her demeanor, and evaluated the matters relating to her credibility; the Members also had the opportunity to hear Appellant's sworn testimony at trial, as well, and to evaluate his credibility. Even a year removed, TR's account of her ritual humiliation at the hands of Appellant and his confederates rings poignant and true. Weighing this testimony, as discussed above, in conjunction with the video evidence of Pros. Ex. 5, the Members concluded that the United States had met its burden and found

Appellant guilty beyond a reasonable doubt of indecent viewing. This Court should be independently convinced of Appellant's guilt as well, and affirm Appellant's convictions.

IV.

APPELLANT'S CONVICTION FOR INDECENT ACT UNDER ARTICLE 134 IS NOT UNCONSTITUTIONAL AS APPLIED BECAUSE GROUP SEX IS NOT PRIVATE, CONSENSUAL ACTIVITY PROTECTED UNDER *LAWRENCE.*

A. Standard of Review.

The conclusion of whether a statute is unconstitutional "as applied" is reviewed *de novo.* *United States v. Ali*, 71 M.J. 256, 265 (C.A.A.F. 2012). Unlike a facial challenge, an as-applied challenge involves a fact-specific inquiry. *Id.* Therefore, if an appellant argues that a statute is unconstitutional as applied to him, but did not raise that challenge at trial, this Court reviews the issue for plain error. *United States v. Goings*, 72 M.J. 202, 204-05 (C.A.A.F. 2013). This Court will only grant relief where (1) there was error, (2) the error was plain and obvious, and (3) the error materially prejudiced a substantial right of the accused. *United States v. Sweeney*, 70 M.J. 296, 304 (C.A.A.F. 2011). Under plain error review, to show that a statute is unconstitutional as applied, an appellant "must point to particular facts in the record that plainly demonstrate why his interests should overcome Congress' and the President's

determinations that his conduct be proscribed." *Goings*, 72 M.J. at 205.

B. Appellant's argument based on *Lawrence* and *Marcum* was rejected in *Goings*.

In *Lawrence v. Texas*, the Supreme Court recognized a constitutionally protected liberty interest in private sexual activity between consenting adults. *Lawrence*, 539 U.S. 558, 578 (2003). In *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004), the Court of Appeals for the Armed Forces applied *Lawrence* in the military context and upheld the constitutionality of Article 125, UCMJ. The Court determined that the constitutionality of Article 125, UCMJ, must be analyzed as applied in each case. *Id.* at 206. The analysis of each case consists of three questions:

> First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*? . . . Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?

Id. at 206-07. The term "*Marcum* factor" came to refer to any factor that removes the sexual conduct from the scope of *Lawrence's* protected interest, including those "additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest." *United*

States v. Castellano, 72 M.J. 217, 218 (C.A.A.F. 2013) (citing *Marcum*, 60 M.J. at 207).

The commission of sexual acts in the presence of a third party is sufficiently "open and notorious" to constitute an indecent act, punishable under Article 134, UCMJ. *Goings*, 72 M.J. at 206; *see United States v. Izquierdo*, 51 M.J. 421,422-23 (C.A.A.F. 1999). When evaluating a conviction for indecent acts under Article 134, CAAF found that the offense of indecent acts with another did not reach the "wholly private moral conduct of an individual," and treated "open and notorious" sexual acts as outside the private sphere. *Castellano*, 72 M.J. at 222. (citing *United States v. Berry*, 6 C.M.A. 609, 614 (1956)). This Court should not decide this issue contrary to this established precedent.

C. Congressional enactment of Article 120c did not pre-empt or "supersede" the Article 134 offense of Indecent Acts.

Article 134, UCMJ, applies to offenses "not specifically mentioned in [Chapter 47 of Title 10, UCMJ]." Article 134, UCMJ, 10 U.S.C. § 934 (2012). Pursuant to his Article 36, UCMJ, authority, the President expounded upon this language, stating:

> The preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80 through 132. For example, larceny is covered in Article 121, and if an element of that offense is lacking——for example, intent——there can be no larceny or larceny-type offense, either under Article 121 or, because of preemption, under Article 134. Article 134 cannot be

> used to create a new kind of larceny offense, one without the required intent, where Congress has already set the minimum requirements for such an offense in Article 121.

Manual for Courts-Martial, United States (2012 ed.), Part IV, ¶ 60.c(5)(a). Case law interprets this doctrine very narrowly: "[S]imply because the offense charged under Article 134, UCMJ, embraces all but one element of an offense under another article does not trigger operation of the preemption doctrine. . . . [I]t must be shown that Congress intended the other punitive article to cover a class of offenses in a complete way." *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979). To meet this threshold, Congress must indicate through direct legislative language or express legislative history that particular actions or facts are limited to the express language of an enumerated article, and may not be charged under Article 134, UCMJ. *United States v. Anderson*, 68 M.J. 378, 387 (C.A.A.F. 2010)(citations omitted).

Appellant has not demonstrated, and nothing in the Record or case law suggests, that by amending Article 120 in 2012, Congress intended to preempt the use of Article 134 to criminalize open and notorious sexual acts as a general disorder or neglect prejudicial to good order and discipline in the armed forces, or as conduct of a nature to bring discredit upon the armed forces. Here, Appellant was charged with committing a

very specific act, and specifically alleged violation of the terminal element of Article 134:

> Specification: In that [Appellant] . . . did, on board Marine Corps Air Station Miramar, California, on or about 1 July 2012, wrongfully commit indecent conduct, to wit: engaged in oral intercourse with [TR] while Mr. Joel J. Montez engaged in vaginal and anal intercourse with the said [TR], which conduct was to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

(Charge Sheet, Nov. 27, 2012.) This specification is clearly aimed at the specific circumstances under which Appellant took advantage of TR on July 1, 2012, and required the prosecution to prove that this conduct met the requirements of Article 134's terminal element. Contrary to Appellant's argument, there is no suggestion that Congress intended somehow to legalize group sex——and even if it did, there is certainly no suggestion that Congress intended to de-criminalize the type of grossly exploitative acts alleged in this specification when it amended Article 120.

It is true, as Appellant points out, (Appellant's Br. at 59.); that in 2007 Congress created Article 120(k), defining indecent acts, in 2007, and that the enumerated Article 134 offense of Indecent Conduct was correspondingly eliminated. Executive Order 13447, 72 Fed. Reg. 56179 (Oct. 2, 2007). *See* Manual for Courts-Martial, United States (2012 ed.) at A28-17. After its enactment, Article 120(k) was used to prosecute

persons who were involved in sex acts in the presence of a third party were convicted of committing an indecent act. *See United States v. Elhelou*, No. 13-0235, 2014 CAAF LEXIS 189 (C.A.A.F. June 19, 2013); *United States v. Parrett*, No. 2013 CCA LEXIS 1018 (N-M. Ct. Crim. App. 2013); *United States v. Anderson*, 2013 CCA LEXIS 517 (N-M. Ct. Crim. App. 2013).

But even after Article 120(k) was enacted, Article 133 and 134 were used to charge indecent conduct not articulated by Article 120(k), like situations involving videotaping of sex or nudity. In *Goings*, for example, the appellant was charged with Article 134, indecent acts for of "allowing [a third party] to be present and video record on a video cassette tape [appellant] engaging in sexual intercourse with [a] female." 72 M.J. at 206*; see also United States v. Conliffe*, 67 M.J. 127, 131 (C.A.A.F. 2009)(prosecution under Article 133 for surreptitious videotaping). Similarly, after Congress's subsequent modifications to the Code in 2012, nothing prevents the United States from prosecuting indecent conduct of the type specified here under Article 134.

In essence, Appellant was convicted of a novel specification of Article 134. This prosecution under Article 134 was not expressly preempted by Congressional action, and the prosecution was required to prove not only "group sex," as Appellant suggests, but group sex that was prejudicial to good

order and discipline and of a nature to bring credit upon the armed forces. Based on the egregious facts here, the prosecution met that burden, and this Court should affirm Appellant's conviction.

V.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING THE CHALLENGE FOR CAUSE OF GUNNERY SERGEANT P AND THERE WAS NO BEHAVIOR DURING THE TRIAL THAT WARRANTED SUA SPONTE DISMISSAL OF THE MEMBER.

A. Standard of review.

A military judge's decision whether to grant a challenge for cause based on actual bias is reviewed for an abuse of discretion. *United States v. Leonard*, 63 M.J. 398, 402 (C.A.A.F. 2006) (citations omitted). Implied bias is reviewed under the same standard so long as the military judge articulates and applies the liberal grant mandate. *See United States v. Clay*, 64 M.J. 274, 277 (C.A.A.F. 2007); *United States v. Bagstad*, 68 M.J. 460, 462 (C.A.A.F. 2010) (citations omitted). "Although [the court] review[s] issues of implied bias for abuse of discretion, the objective nature of the inquiry dictates that [the court] accord 'a somewhat less deferential standard' . . . ." *Townsend*, 65 M.J. at 463 (quoting *United States v. Armstrong*, 54 M.J. 51, 54 (C.A.A.F. 2000)). "A military judge who addresses implied bias by applying the liberal grant mandate on the record will receive

more deference on review than one that does not." *Clay,* 64 M.J. at 277.

B. The Record demonstrates no actual bias on the part of GySgt P.

"The test for actual bias is whether any bias is such that it will not yield to the evidence presented and the judge's instructions." *United States v. Terry*, 64 M.J. 295, 302 (C.A.A.F. 2007) (internal quotations omitted). As the existence of actual bias is a question of fact appellate courts provide the military judge with significant latitude in determining whether it is present in a prospective member. *Id*. The military judge is specially situated in making this determination because he was physically present during voir dire and watched the challenged member's demeanor. *Id*.

Here, as the Military Judge articulated, GySgt P demonstrated no actual bias. (R. 364-65.) As the Military Judge explained in discussing the issue with Trial Defense Counsel, "you kept asking him about reasonable doubt" including multiple variations of it in an effort to get them to provide legally incorrect answers. (R. 360.) The Military Judge continued noting that often, even trained attorneys have difficulty clearly explaining certain legal terminology and Trial Defense Counsel was "quizzing them on, on the spot, in front of a group of people." (R. 361.)

Trial Defense Counsel noted that his SAPR trainers informed him that over seventy percent of sexual assault allegations were true and that our system affords any accused to plead his case. (R. 360.) The Military Judge correctly noted that GySgt P did not accept, and therefore was not tainted by, the opinion of the SAPR trainers, in fact he believed that is was equally likely that an alleged victim of sexual assault would be making a false allegation as they would be making a true allegation. (R. 364.) That GySgt P disregarded what certain trainers had told him regarding truth of allegations of sexual assault and came to his own, extremely defense-friendly conclusions are clearly indicative of his impartiality.

The Military Judge, who had the opportunity to observe GySgt P's demeanor and body language during the voir dire, noted numerous other responses that demonstrated the impartiality and lack of bias. (R. 364-65.) Accordingly there is no basis on which to find actual bias and the Judge did not abuse his discretion.

C. <u>The Record demonstrates no implied bias</u>.

Implied bias is an objective test; "[I]mplied bias exists when, regardless of an individual member's disclaimer of bias, 'most people in the same position as the court member would be prejudiced.'" *Id*. at 458; *see also Moreno*, 63 M.J. at 171. The burden of persuasion rests with the party making the challenge.

R.C.M. 912(f)(3); *see also United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002).

Here, the Military Judge evaluated the Defense challenge for implied bias and applied the liberal grant mandate. (R. 365). The Military Judge articulated several instances of where GySgt P demonstrated sincere impartiality, even in the face of legalistic questions designed to trip him up. Viewed objectively, despite GySgt P's lack of actual bias, this Court should find most people in the same position as GySgt P would not be prejudiced. There is no evidence which to find a clear abuse of discretion by the military judge in applying the liberal grant mandate and no objective reason to question GySgt P's fairness and impartiality. The Military Judge did not err in denying Appellant's challenge against GySgt P for implied bias.

VI.

APPELLANT'S SENTENCE IS LAWFUL AND APPROPRIATE, AND IS NOT DISPARATELY SEVERE TO THAT OF HIS CO-ACTORS. EVEN ASSUMING THE SENTENCES ARE HIGHLY DISPARATE, A RATIONAL BASIS EXISTS FOR THE DISPARITY.

A. This issue is reviewed *de novo*.

Sentence appropriateness is reviewed de novo. *United States v. Baier,* 60 M.J. 382, 383-84 (C.A.A.F. 2005). Article 66(c) requires that the members of the Court independently determine, in every case within their limited Article 66, UCMJ

jurisdiction, the sentence appropriateness of each case affirmed. *Baier,* 60 M.J. at 384-85. The Court should begin its analysis of sentence appropriateness by recognizing that a court-martial is free to impose any sentence it considers fair and just within the limits of punishment prescribed by the Code or the President. *United States v. Turner*, 14 C.M.A. 435, 437 (C.M.A. 1964); *United States v. Dedert*, 54 M.J. 904, 909 (N-M. Ct. Crim. App. 2001); Rule for Courts-Martial (R.C.M.) 1002. Article 66 of the Code assigns to the Court "only the task of determining sentence appropriateness: doing justice." *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); Article 66(c), UCMJ. "Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *Healy*, 26 M.J. at 395.

The Court should judge sentence appropriateness by an individualized consideration of the accused on the basis of the nature and seriousness of the offenses and the character of the offender. *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982). The appropriateness of a sentence generally should be determined without reference or comparison to sentences in other cases. *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985). This court is not required to engage in comparison of specific cases "'except in those rare instances in which sentence appropriateness can be fairly determined only by reference to

disparate sentences adjudged in closely related cases.'" *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001)(quoting *Ballard*, 20 M.J. at 283). In claims of sentence disparity, "[a]djudged sentences are used because there are several intervening and independent factors between trial and appeal——including discretionary grants of clemency and limits from pretrial agreements——that might properly crate the disparity in what are otherwise closely related cases." *United States v. Roach*, 69 M.J. 17, 21 (C.A.A.F. 2010). However, "when the CCA is exercising its power over sentence appropriateness generally, it may consider both adjudged and approved sentences." *Id.*

B. Appellant bears the burden of proving a closely related case's sentence is highly disparate with his sentence.

When arguing a claim of severe sentence disparity, Appellant bears the burden of showing that the cases are closely related and that the sentences are highly disparate. Once such a showing is made, the burden shifts to the Government to show a rational basis for the disparity. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999). Cases may be considered closely related if they involve "service members involved in a common or parallel scheme." *Id*. Where cases are found to be closely related, the sentence disparity test is "not limited to a narrow comparison of the relative numerical values of the sentences at issue." *Id*. at 289. Ultimately, some sentence disparity in

closely related cases is acceptable and does not independently invalidate an otherwise legal sentence, "provided each military accused is sentenced as an individual." *United States v. Durant*, 55 M.J. 258, 260 (C.A.A.F. 2001). This is especially true considering that sentences are to be adjudged based upon an individualized consideration of an accused's prior disciplinary record, performance record and overall military character. *United States v. Swan*, 43 M.J. 788, 793 (N-M. Ct. Crim. App. 1995). Because of the potential for significant character differences between co-conspirators, relief for sentence disparity will only be granted when it is so severe as to exceed "relative uniformity," or when it rises to the level of an "obvious miscarriage of justice or an abuse of discretion." *Swan*, 43 M.J. at 793. Moreover, co-conspirators are not entitled to equal sentences. *Durant*, 55 M.J. at 260.

C. Appellant fails to demonstrate that the sentences were highly disparate.

Appellant asserts that there is significant disparity in the punishment he received as compared to the punishment meted out in his co-actors' cases. (Appellant's Br. at 66-69.) Specifically, Appellant argues that: (1) his receipt of a punitive discharge was a massive departure from the outcomes in the companion cases; and (2) that the Members did not understand the impact of the punitive discharge, and therefore punished him

more severely than they intended. *Id*. These arguments have no merit.

Appellant was convicted of three separate offenses arising from his participation in the group sexual encounter: (1) conspiracy with Cpl Hollis to distribute the indecent video recording of the sexual encounter with TR; (2) viewing the video of it without her consent and under circumstances in which she had a reasonable expectation of privacy; and (3) committing an indecent act, for his participation in the group sexual encounter. None of Appellant's co-actors were implicated in all three of these crimes, nor were they were convicted of identical charges. Accepting Appellant's argument at face value, (Appellant's Br. at 67-68),[1] their participation was limited to individual parts of the criminal scheme: PFC Hearst was convicted of adultery with TR, but did not conspire to distribute, nor view the video of the group sexual encounter; meanwhile, Cpl Hollis was convicted of his video-recording of the group sexual encounter, and conspiracy to distribute the video, but did not participate in the group sexual encounter. (*Id*.) Finally, Mr. Montez was a civilian at the time of the

[1] None of these cases are under Article 66, UCMJ, review, and neither the specific facts articulated in their Records nor the matters considered in adjudging appropriate sentences. The facts pertaining to Cpl Hollis, PFC Hearst, and Mr. Montez were argued by Appellant in clemency as well as here on appeal, and have not been independently verified. (*See* Defense Clemency Submission at 2-3, July 25, 2013.)

incident and beyond the jurisdiction of military courts; and at any rate did not participate in creating or distributing the video. Thus, although Appellant and the others were engaged in the same incident, Appellant was implicated in more misconduct and was convicted of more crimes than each of his co-actors.

Read in this context, the disparity between Appellant's sentence and his co-actors and Appellant is not significant. Cpl Hollis pled guilty at a general court-martial to conspiracy to distribute the video, and to making the video, for which the military judge sentenced him to six months confinement, reduction in pay-grade to E-2, and total forfeitures of all pay and allowances.

In contrast, Appellant was convicted contrary to his pleas at a general court-martial, of those same charges and also the additional offense of indecent conduct by engaging in oral intercourse with TR while Mr. Montez had vaginal intercourse. Consequently, at his court-martial, Appellant faced a higher maximum punishment than Cpl Hollis; the maximum punishment Appellant faced based upon the three charges of which he was convicted was confinement for fifteen years, forfeiture of all pay and allowances, a fine, reduction to pay-grade E-1, and a dishonorable discharge. (R. 1494.) After hearing all the evidence, the members adjudged what they believed was an appropriate sentence, which was significantly less severe than

the maximum sentence allowed by law: six months confinement, reduction in pay-grade to E-3, and a bad-conduct discharge. (R. 1504.) In light of the foregoing, Appellant's sentence is reasonable, and the differences between the two sentences were not highly disparate. Appellant's sentence should be affirmed.

Appellant also claims disparity with respect to the disposition of PFC Hearst's case, because "[t]he Government allowed him to plead guilty to adultery at a summary court-martial, where a punitive discharge is not even an authorized punishment" and with respect to the disposition of Mr. Montez' case because he was not prosecuted by the federal civilian prosecutor. (Appellant's Br. at 68.) However, varying forums selected for disposing of criminal allegations of a group of closely related accused supplies a rational basis for potential disparities. As this court noted:

> Discretion that is exercised in the area of the selection of the appropriate forum for disposition of charges is a part of prosecutorial discretion. Convening authorities are accorded broad discretion in deciding whether a case should be dismissed, handled administratively (such as through an Article 15, UCMJ, proceeding), or by court-martial. Decisions on how to process a case are not considered *de novo* at the reviewing court level. Ordinarily, leniency towards one accused does not necessarily flow to another, nor should it. Disparity that results from a convening authority's inexperience or even bad judgment does not necessarily entitle a service person to some form of appellate relief.

United States v. Pratt, No. 94 01689, 1995 CCA LEXIS 390, at *3 (N.M. Ct. Crim App., Aug. 30, 1995) (citing *United States v. Kelly*, 40 M.J. 558, 570 (N-M. Ct. Crim. App. 1994)). Inasmuch as the crimes committed by Appellant were different from those committed by his co-actors, the cases warranted different forums and different sentences. The disposition of the charges against Appellant was not highly disparate.

D. Even if the Court finds the sentence to be highly disparate, a rational basis exists to explain Appellant's sentence in comparison to his co-actors.

Even assuming *arguendo*, the sentences were highly disparate, there is nonetheless a rational basis for the disparity: Appellant was implicated in and convicted of three separate and serious crimes with which none of his co-actors were identically implicated in, nor convicted. Thus, Appellant case is distinguishable from his co-actors. Moreover, Appellant was more criminally culpable in the entire criminal scheme because he was a noncommissioned officer (NCO), a Sergeant of Marines, while his co-conspirators in that enterprise were junior Marines. By virtue of his higher rank, he had supervisory authority over them. Therefore, Appellant's level of culpability for the offenses is much greater. Contrary to Appellant's argument that the other cases were so similar as to warrant similar punishment, the additional facts that uniquely relate to Appellant reasonably account for any sentence

disparity between the three conspirators.

E. The Members were properly instructed as to punishments, and properly adjudged Appellant's sentence.

The Military Judge instructed the Members on sentencing, including on the maximum punishment, the types of punishment, and effect of Article 58a and 58b, UCMJ, in accordance with the Military Judge's Benchbook. (R. 1493-1497.) The Members were also given a written copy of those instructions. (R. 1493; Appellate Ex. LI.). In addition, the Military Judge specifically addressed the consequences of Article 58a, UCMJ as they would impact Appellant, saying:

> The defense counsel as well as Sergeant Quick have made reference to availability or lack thereof of monetary support for Sergeant Quick's mother. Again, by operation of law, if you adjudge a sentence that includes a punitive discharge and confinement or confinement in excess of six months, then Sergeant quick will forfeit all pay and allowances due during any period of confinement served. And I will note, as all members watched me as I said that, that's not contained in the sentencing instructions you have in front of you.

(R. 1496-97).

Thus, despite the fact that, after announcement of the sentence in open court, the Members raised a question as to the impact of automatic forfeitures by operation of law under Article 58b, UCMJ, the Record is clear that the Members were properly instructed as to sentencing, and that the Members intended to sentence Appellant to a reduction in pay-grade to E-

3, confinement for six months, and a bad-conduct discharge.

F. This Court should not disturb the Convening Authority's prerogative to extend clemency.

When reviewing a sentence, the Court is tasked with determining sentence appropriateness v1ce bestowing clemency, which is the "command prerogative" of the Convening Authority. Article 60(c), UCMJ; *Healy*, 26 M.J. at 396; R.C.M. 1107(b). Here, Appellant's argument reduces down to the simple complaint that other Marines involved in the criminal misconduct were punished less harshly. That is true, but it does not entitle Appellant to relief. Appellant committed additional separate serious crimes, and his culpability is more onerous, than his co-actors. Appellant's claims, therefore, amount to a plea for clemency before this Court. This Court should deny Appellant's claim, and affirm the sentence approved by the Convening Authority. The Appellant is not entitled to relief.

Conclusion

WHEREFORE, the Government respectfully requests that this Court affirm the findings and sentence as adjudged and approved below.

LINDSAY P. GEISELMAN
Lieutenant, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7678, fax (202) 685-7687

MARY P. MCALEVY
Commander, JAGC, USNR
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7678, fax (202) 685-7687

DAVID N. ROBERTS
Major, U.S. Marine Corps
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7430, fax (202) 685-7687

Certificate of Filing and Service

I certify the foregoing was delivered to the Court and a copy served upon opposing counsel on June 10, 2014.

DAVID N. ROBERTS
Major, U.S. Marine Corps
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7059, fax (202) 685-7687

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 3

UNITED STATES, Appellee v. Christopher A. QUICK Sergeant (E-5) U.S. Marine Corps, Appellant	**BRIEF AND ASSIGNMENTS OF ERROR** NMCCA No. 201300341 Tried at MCRD San Diego, California, on 28 November 2012, 11 and 26 February 2013, 6 March 2013, 22-27 and 29 April 2013, by a General Court-Martial convened by the Commanding General, 3d Marine Aircraft Wing.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

DAVID A. PETERS
Captain, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
Building 58, Suite 100
Washington Navy Yard, D.C. 20374
(202) 685-7088
Fax (202) 685-7426

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Issues Presented

I.

THE FIRST AMENDMENT BARS THE GOVERNMENT FROM DICTATING WHAT THE PUBLIC SEES, READS, SPEAKS, OR HEARS. THE AMENDMENT EVEN PROHIBITS THE GOVERNMENT FROM PUNISHING UNPROTECTED SPEECH IF A SUBSTANTIAL AMOUNT OF PROTECTED SPEECH IS PROHIBITED OR CHILLED IN THE PROCESS. HERE, SGT QUICK WAS CONVICTED OF VIOLATING ARTICLE 120c(a)(1) BECAUSE HE WATCHED A VIDEO OF HIMSELF ENGAGED IN SEX THAT HE REASONABLY BELIEVED WAS CONSENSUAL. DOES ARTICLE 120c(a)(1) VIOLATE THE FIRST AMENDMENT?

II.

AN OVERLY BROAD CRIMINAL STATUTE VIOLATES DUE PROCESS IF IT FAILS TO GIVE PROSECUTORS AND LAW ENFORCEMENT RELIABLE STANDARDS OF CRIMINALITY. SGT QUICK WATCHED A VIDEO THAT SHOWED HIS PRIVATE AREAS AND WAS MADE WITHOUT HIS CONSENT. BUT THE GOVERNMENT PROSECUTED HIM BECAUSE THE VIDEO ALSO SHOWED TR'S PRIVATE AREAS. DOES HIS CONVICTION VIOLATE DUE PROCESS?

III.

ARTICLE 120c(a)(1) REQUIRES THE GOVERNMENT TO PROVE THE ACCUSED VIEWED THE PRIVATE AREAS OF ANOTHER UNDER CIRCUMSTANCES IN WHICH A REASONABLE PERSON WOULD BELIEVE THEY COULD DISROBE PRIVATELY AND AWAY FROM THE EYES OF THE PUBLIC. HERE, THE CIRCUMSTANCES OF SGT QUICK VIEWING TR'S PRIVATE AREA WAS WHEN SHE ENGAGED IN SEX WITH SGT QUICK AND ANOTHER MAN IN SGT QUICK'S BARRACKS ROOM, WITH BOTH THE DOOR AND WINDOW OPEN. CAN SGT QUICK'S CONVICTION STAND?

IV.

IN 2012, CONGRESS PASSED A NEW VERSION OF THE UNIFORM CODE OF MILITARY JUSTICE WHEREIN IT DID NOT INTEND TO PROSCRIBE CONSENSUAL, PRIVATE, GROUP SEX. WITHOUT ALLEGING ANY AGGRAVATING FACTORS, THE GOVERNMENT CHARGED SGT QUICK WITH COMMITTING AN INDECENT ACT BECAUSE HE PARTICIPATED IN SEX THAT INCLUDED ANOTHER MAN AND TR. DOES THIS CHARGE FAIL TO STATE AN OFFENSE IN LIGHT OF *LAWRENCE V. TEXAS*, AND WAS THE OFFENSE SUPERSEDED BY THE 2012 AMENDMENT TO THE UCMJ?

V.

AN ACCUSED HAS A RIGHT TO AN IMPARTIAL MEMBERS PANEL. DURING *VOIR DIRE*, ONE OF THE MEMBERS SAID HE BELIEVED THE COMMANDANT OF THE MARINE CORPS EXPECTED HIM TO CRACK DOWN ON MARINES FOR "CONDUCT UNBECOMING OF MARINES," AND THAT THE ACCUSED'S PRESENCE AT COURT-MARTIAL MEANT HE MUST HAVE DONE SOMETHING WRONG. THE MILITARY JUDGE DENIED A CHALLENGE FOR CAUSE AGAINST THIS MEMBER. WAS SGT QUICK DENIED HIS RIGHT TO AN IMPARTIAL MEMBERS PANEL?

VI.

SGT QUICK, PFC HEARST, AND JOEL MONTEZ WERE ALL ACCUSED OF RAPING TR. CPL HOLLIS WAS ACCUSED OF MAKING AND DISTRIBUTING AN INDECENT RECORDING OF TR. ULTIMATELY, CPL HOLLIS DID NOT RECEIVE A PUNITIVE DISCHARGE, PFC HEARST WAS ALLOWED TO PLEAD GUILTY TO ADULTERY AT SUMMARY COURT-MARTIAL, AND JOEL MONTEZ WAS NOT EVEN PROSECUTED. WAS SGT QUICK'S SENTENCE, WHICH INCLUDED A PUNITIVE DISCHARGE, OVERLY SEVERE IN LIGHT OF THE RESULTS OF COMPANION CASES?

Statement of Statutory Jurisdiction

Appellant received a general court-martial sentence that included a punitive discharge. Accordingly, this Court has jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ).[1]

Statement of the Case

Contrary to his pleas, a General Court-Martial comprised of officer and enlisted members convicted Sgt Quick of conspiring to distribute indecent material, wrongfully viewing indecent material, and indecent conduct, in violation of Articles 81, 120c, and 134, UCMJ.[2] The members sentenced Sgt Quick to reduction to pay-grade E-3, confinement for six months, and a bad-conduct discharge.[3] The convening authority approved the adjudged sentence and, except for the punitive discharge, ordered it executed.[4] However, the convening authority noted that as a matter of law, Sgt Quick was required to be reduced to pay-grade E-1. He further ordered Sgt Quick to be reduced in accordance with Article 58a, UCMJ.[5]

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[1] 10 U.S.C. § 866(b)(1) (2012).
[2] R. at 1441-42; 10 U.S.C. § 881, 920c, 934 (2012).
[3] R. at 1504.
[4] Convening Authority's Action, Aug. 21, 2013.
[5] Convening Authority's Action, Aug. 21, 2013; *see* 10 U.S.C. § 858a.

Statement of Facts

1. The Incident

On 1 July 2012, PFC Hearst told several of his friends that he had not had sex in a nearly four months.[6] Cpl Hollis claimed to know a girl, TR, who would have sex with him that day.[7] Cpl Hollis also believed TR would agree to have group sex.[8] He text messaged TR and asked her to come to the barracks at MCAS Miramar, California, to have sex with PFC Hearst. She agreed, and using her dependent ID card, came aboard the air station to meet up with Cpl Hollis to have sex with his friend.[9]

Cpl Hollis met TR at the barracks and escorted her to his room where they waited for PFC Hearst.[10] There he introduced TR to Sgt Quick. After approximately thirty minutes, PFC Hearst arrived and TR followed him next door to Sgt Quick's room to have sex.[11] As they left, Sgt Quick said "I'll be in a minute to watch."[12] TR responded, "**Well if you watch, you have to join in.**"[13]

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[6] R. at 439, 533, 747, 898.
[7] R. at 748, 899.
[8] R. at 981-82, 1255.
[9] R. at 444, 531, 533, 538, 900.
[10] R. at 749, 901.
[11] R. at 752, 850.
[12] R. at 466, 547-49, 1258.
[13] R. at 466, 547-49, 903-04, 908-09, 955, 1258 (emphasis added).

Once inside Sgt Quick's room, TR and PFC Hearst disrobed, PFC Hearst put on a condom, and they had sex.[14] Eventually, Sgt Quick went to his room to confirm that PFC Hearst and TR were actually having sex.[15] Once he saw that they were, Sgt Quick asked TR for oral sex.[16] She agreed and performed as requested while PFC Hearst continued to have sex with her from behind until he "caught a cramp."[17]

Shortly thereafter both Joel Montez and Cpl Hollis entered the room.[18] Mr. Montez disrobed, positioned himself behind TR, and began having sex with her while she continued to perform oral sex on Sgt Quick.[19] While engaged in group sex, they were directly in front of an open, exterior window, with the door to the room "dead-bolted open."[20] Having already personally witnessed TR engaged in sex with three people -- PFC Hearst, Sgt Quick, and Joel Montez -- Cpl Hollis went to the open exterior window of Sgt Quick's room and made a cell phone video of Sgt Quick, Joel Montez, and TR engaged in group sex.[21] Cpl Hollis

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[14] R. at 451, 562-71, 751-53, 910-11.
[15] R. at 1259-60.
[16] R. at 452, 582-83, 755.
[17] R. at 755, 1262.
[18] R. at 756, 1264-65.
[19] R. at 758, 918.
[20] R. at 919, 957, 965, 984.
[21] R. at 923-25, 957, 965, 984.

testified that he could easily hear them having sex as he approached the window.[22]

The video was eleven seconds long.[23] It clearly showed TR performing oral sex on Sgt Quick while Joel Montez was having sex with her from behind.[24] Approximately six seconds into the video, TR appeared to notice Cpl Hollis while she was still sexually engaged.[25] Without resistance from either Sgt Quick or Joel Montez, TR stood up and realized Cpl Hollis was recording her having sex. At that point, she became upset and yelled "You!"[26] Eventually, Sgt Quick returned to his friends in Cpl Hollis's room and asked to see the video. Cpl Hollis obliged, and Sgt Quick watched it.[27]

2. *Voir Dire*

Sgt Quick elected to be tried by a panel with enlisted representation. The convening authority selected GySgt Price as a potential member. During group *voir dire* with the military judge, GySgt Price indicated he attended the Commandant's Heritage Brief at MCAS Miramar in April 2012.[28] He said he expected a victim to be emotional when testifying.[29] During

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[22] R. 965-66.
[23] Pros. Ex. 5.
[24] *Id.*
[25] *Id.*
[26] *Id.*; R. at 967.
[27] *Id.*; R. at 967, 1289.
[28] R. at 218.
[29] R. at 311.

individual *voir dire* he claimed to understand victims can also display more withdrawn demeanors.[30]

During group *voir dire* with defense counsel, GySgt Price agreed that Sgt Quick's presence in court meant he must have done something wrong.[31] He also told the court that during SAPR training he was taught that approximately seventy-two to seventy-five percent of sexual assault allegations were true,[32] and that in his experience, at least half of all sexual assault allegations were true.[33]

Finally, GySgt Price was asked to speak in more detail about his impression of the Commandant's Heritage Brief. He explained that, to him, the message was "that as staff NCOs and higher we are failing at reading the warning signs of certain problems that are coming out; i.e. drinking and driving, **sexual assault and just conduct unbecoming of the Marines that we need to crack down on**, watch our Marines closer."[34] During the majority of his individual *voir dire* with the trial defense counsel, his answers were decidedly more limited and curt than his answers to the Government.

Trial defense counsel challenged GySgt Price for cause, citing his assertion that fifty percent of sexual assault

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[30] R. at 312.
[31] R. at 312.
[32] R. at 316.
[33] *Id.*
[34] R. at 319 (emphasis added).

allegations are true and his belief that the accused's presence at court-martial meant he must be guilty of something.[35] The military judge denied this challenge.[36] Sgt Quick's trial defense counsel used her sole peremptory challenge on an even more egregiously prejudiced member.[37] As a result, GySgt Price remained on the panel and sat in judgment of Sgt Quick.

3. Instructions

The military judge instructed the members on the law they would need to apply in reaching their verdict.[38] While discussing Charge IV -- indecent conduct in violation of Article 134 -- the military judge instructed the members on the definition of "wrongfully" and "indecent act."[39] According to the military judge "wrongfully" meant "without legal justification or lawful excuse."[40] "Indecent act" meant "that form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with relation to sexual relations."[41]

While instructing the members on the Additional Charge -- viewing an indecent recording of TR in violation of Article 120c

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[35] R. at 360-62.
[36] R. at 365.
[37] *Id.*
[38] R. at 1369.
[39] R. at 1370; Appellate Ex. XLVII, at 9.
[40] *Id.*
[41] *Id.*

-- the military judge advised the members on the elements the Government needed to prove.

> (1) That, on or about July 1, 2012, on board Marine Corps Air Station Miramar, California, the accused knowingly and wrongfully viewed a visual recording of the private area of [TR]; (2) That, the accused did so without the consent of [TR]; (3) That, under the circumstances at the time of the charged offense, TR had a reasonable expectation of privacy; and (4) That, the accused's conduct was wrongful.[42]

He instructed them that an act is done "knowingly" when "it is done intentionally and on purpose."[43] He also instructed them that a "reasonable expectation of privacy" meant "circumstances in which a reasonable person would believe that a private area of the person would not be visible to the public."[44] He also referred the members to his earlier definition of "wrongful."[45]

4. Verdict and Companion Cases

Sgt Quick was ultimately acquitted of fraternization and rape but convicted of conspiring to distribute Cpl Hollis's video, indecent acts for engaging in group sex with TR and Mr. Montez, and viewing an indecent video of TR (the same made by Cpl Hollis).[46] The members sentenced Sgt Quick to reduction to pay-grade E-3, confinement for six months, and a bad-conduct

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[42] R. at 1370-71; Appellate Ex. XLVII, at 10.
[43] R. at 1371.
[44] R. at 1371; Appellate Ex. XLVII, at 11.
[45] *Id.*
[46] R. at 1442.

discharge.[47] This sentence was vastly divergent from those awarded in the companion cases.

Cpl Hollis pleaded guilty to violating Article 81 by conspiring to distribute his video of Sgt Quick, TR, and Mr. Montez, and Article 120c for distributing the same video.[48] A military judge reduced Cpl Hollis to pay grade E-2, sentenced him to six months of confinement, and ordered him to forfeit all pay and allowances, **but he did not award a punitive discharge.**[49]

PFC Hearst was allowed to plead guilty to adultery at summary court-martial, even though TR had accused him of rape.[50] Finally, Joel Montez was not even prosecuted once the United States Attorney had occasion to see Cpl Hollis's video.[51]

The members learned their sentence required Sgt Quick to forfeit all pay and allowances because they awarded a punitive discharge. They did not intend to deprive Sgt Quick economically.[52] In a letter submitted as part of Sgt Quick's request for clemency, the members asked the convening authority to disapprove Sgt Quick's automatic forfeitures.[53] The convening authority considered the results of Cpl Hollis's case, and Sgt

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[47] R. at 1504.
[48] Clemency Request, July 25, 2013, at 2.
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*, encl. 1.
[53] *Id.*

Quick's R.C.M. 1105 materials.[54] He did not specifically consider PFC Hearst's case or the United States Attorney's decision not to prosecute Mr. Montez.[55] He did not grant Sgt Quick clemency, and citing Article 58(a), UCMJ, he further reduced Sgt Quick to pay-grade E-1.[56]

Summary of Argument

I.

Sgt Quick was convicted of violating Article 120c(a)(1) because he watched a cell phone video that showed him engaged in what he believed was consensual group sex with TR. Article 120c(a)(1) violates the First Amendment because it is a content-based restriction affecting a substantial amount of protected speech.

Accordingly, this Court should set aside his conviction under the sole specification of the Additional Charge.

II.

Sgt Quick engaged in what reasonably appears to be consensual group sex with TR and Joel Montez, during which he clearly saw TR's private areas. However, without Sgt Quick's knowledge or consent, Cpl Hollis made a cell phone video of this group sex. Sgt Quick was later convicted of violating Article 120c(a)(1) for watching Cpl Hollis's video because it showed

[54] Convening Authority's Action, Aug. 21, 2013.
[55] *Id.*
[56] *Id.*

TR's private areas. As a result, Sgt Quick was denied the due process of law because Article 120c(a)(1) does not provide clear standards of criminality for prosecutors and law enforcement.

Accordingly, this Court should set aside Sgt Quick's conviction under the sole specification of the Additional Charge.

III.

To be convicted under Article 120c(a)(1), the Government must prove, beyond a reasonable doubt, an accused knowingly and wrongfully viewed the private areas of another, without that person's consent, and under circumstances where a reasonable person would believe they had a reasonable expectation of privacy.

On 1 July 2012, TR agreed to have sex with three men she had never met, in Sgt Quick's barracks room, with the door open, in front of an open window. Sgt Quick's conviction under Article 120c(a)(1) is legally and factually insufficient because TR did not have a reasonable expectation of privacy under the circumstances.

Accordingly, this Court should set aside Sgt Quick's conviction under the sole specification of the Additional Charge.

IV.

Under the 2012 Uniform Code of Military Justice, consensual, private, group-sex is not an offense under either Article 134 or 120c. Additionally, the United States Court of Appeals for the Armed Forces has never held that private, consensual, group sex should be subject to criminal liability under Article 134.

Sgt Quick was charged with committing indecent conduct under Article 134 for his mere participation in group sex. Sgt Quick's conviction for indecent conduct under Article 134 is legally insufficient because the charge unlawfully criminalizes protected conduct. Additionally, the charge was superseded by the 2012 Uniform Code of Military Justice.

Accordingly, this Court should set aside Sgt Quick's conviction under the sole specification of Charge IV.

V.

Sgt Quick was entitled to an impartial panel at trial. During *voir dire*, GySgt Price made several statements that showed he could not act impartially in judging the facts of Sgt Quick's case. Unfortunately, and above defense objection, he remained on the panel that eventually convicted and sentenced Sgt Quick. As a result, the public cannot trust Sgt Quick was tried by an impartial panel.

Accordingly, this Court should set aside the findings and sentence and remand this case for a new trial on the merits.

VI.

Sgt Quick, Joel Montez, and PFC Hearst were all originally accused of raping TR. Additionally, Cpl Hollis was accused of making and distributing an indecent recording of TR and conspiring to distribute it.

Ultimately, Cpl Hollis pleaded guilty at General Court-Martial to conspiracy and distribution of indecent material. A military judge did not award him a punitive discharge. The convening authority allowed PFC Hearst to plead guilty at Summary Court-Martial to adultery, and Joel Montez was not prosecuted by civilian authorities.

By contrast, Sgt Quick was acquitted of rape and convicted of conspiracy to distribute indecent material, viewing indecent material, and an indecent act at a general court-martial. The members sentenced him to reduction to pay-grade E-3, confinement for six months, and a bad-conduct discharge.

During post-trial processing, the members learned that the punitive discharge they adjudged carried the unintended consequence of automatic forfeitures. They wrote to the convening authority asking him to disapprove those forfeitures. The convening authority not only refused to grant clemency, he further reduced Sgt Quick to pay-grade E-1 in accordance with

Article 58(a). Sgt Quick's bad-conduct discharge is overly harsh in light of his convictions and the results of the companion cases.

Accordingly, this Court should set aside Sgt Quick's bad-conduct discharge.

Argument

I.

PROTECTED SPEECH CANNOT BE CRIMINALIZED AS A MEANS TO CRIMINALIZE UNPROTECTED SPEECH. HERE, SGT QUICK WAS CONVICTED OF VIOLATING ARTICLE 120c(a)(1) BECAUSE HE WATCHED A CELL PHONE VIDEO, WHICH WAS MADE WITHOUT HIS KNOWLEDGE, WHICH SHOWED HIM HAVING GROUP SEX THAT HE REASONABLY BELIEVED WAS CONSENSUAL. ARTICLE 120c(a)(1) VIOLATES THE FIRST AMENDMENT BECAUSE IT CRIMINALIZES A SUBSTANTIAL AMOUNT OF PROTECTED SPEECH.

Standard of Review

In *United States v. Disney*, the United States Court of Appeals for the Armed Forces (CAAF) held "The constitutionality of an act of Congress is a question of law we review *de novo*."[57] There, the appellant pleaded guilty to an assimilated offense under Article 134 incorporating 18 U.S.C. § 842(h).[58] The only

[57] 62 M.J. 46, 48 (C.A.A.F. 2005) (citing *United States v. Wright*, 53 M.J. 476, 478 (C.A.A.F. 2000) (holding the constitutionality of a statute is a question of law reviewed *de novo*. In that case Mil. R. Evid. 413 was challenged under both Due Process and Equal Protection Clauses of the Fifth Amendment) (citing *United States v. Brown*, 25 F.3d 307, 308 (6th Cir. 1994)); *see Benning v. Georgia*, 391 F.3d 1299, 1303 (11th Cir. 2004).

[58] *Disney*, 62 M.J. at 47.

issue the appellant specifically reserved for appeal was an evidentiary question that was considered and rejected by the Navy-Marine Corps Court of Criminal Appeals (NMCCA).[59] The CAAF did not grant review of the preserved issue but, nevertheless, granted *de novo* review of the constitutionality of the challenged statute. Consequently, this Court should also apply *de novo* review because Sgt Quick is also challenging the constitutional validity of an act of Congress.

Principles of Law

The First Amendment holds that "Congress shall make no law . . . abridging the freedom of speech . . . ."[60] This is generally understood as a prohibition on the government's ability to dictate what individuals may "**see, read, speak, or hear**."[61] This protection is not absolute and there are many ways in which it may be permissibly abridged.[62] But that does not,

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[59] *Id.*
[60] U.S. Const. amend I.
[61] *Ashcroft v. Free Speech Coalition*, 535 U.S. 235, 244 (2002) (emphasis added); *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978) ("The fact that society may find speech offensive is not a sufficient reason for suppressing it").
[62] *See, e.g.*, *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995) (holding neutrality is respected when the government employs neutral criteria and evenhanded policies in extending benefits to recipients whose viewpoints are broad and diverse); *Keller v. State Bar of California*, 496 U.S. 1 (1990) (holding there is no First Amendment violation inherent in a mandatory bar association using member payments to regulate the profession of law); *see also* James B. Lake, *Lawyers, Please Check Your First Amendment*

however, justify passage of law that would criminalize a substantial amount of protected speech in order to also criminalize unprotected speech.[63]

In *Ashcroft v. Free Speech Coalition*, the Supreme Court was asked to decide a facial challenge to the constitutionality of the Child Pornography Protection Act of 1996 (CPPA).[64] The Court held the CPPA offended the First Amendment because of its tendency to criminalize otherwise constitutionally protected material. "The Government may not suppress lawful speech as a means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse."[65] The Court further reasoned that "The possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted."[66]

The Supreme Court extended its holding in *Ashcroft* to other First Amendment over-breadth cases. In *United States v. Stevens*, the Court was asked to decide whether a federal statute that

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Rights at the Bar: The Problem of State Mandated Bar Dues and Compelled Speech, 50 Wash. & Lee L. Rev. 1833 (1993).

[63] *Ashcroft*, 535 U.S. at 244.

[64] *Id.* at 234.

[65] *Id.* at 255.

[66] *Id.* (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973) (holding statutes restricting the freedom of speech must be narrowly drawn and reflect a specific legislative judgment that a particular mode of expression must give way to other compelling societal needs) (citing *Herndon v. Lowry*, 301 U.S. 242, 258 (1937)).

outlawed the production and distribution of depictions of animal cruelty violated the First Amendment as overbroad.[67] The Court rejected the Government's argument that such depictions lacked expressive value and were, therefore, subject to criminalization.[68] It reasoned that the Government had no power to restrict expression simply based on its message or content[69] and held that such statutes could be facially challenged and invalidated as overbroad if "a substantial number of its applications are unconstitutional judged in relation to the statute's plainly legitimate sweep."[70] The Court's over-breadth analysis was resolved by strictly construing the challenged law, which the Court reasoned was overly expansive.[71]

In *Brown v. Entertainment Merchants Association*, the Supreme Court relied heavily on its ruling in *Stevens* to affirm the lowers courts' decision to overturn, as overbroad, a California statute that regulated the distribution of violent video games.[72] The Court reasoned that while a state has the

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[67] *United States v. Stevens*, 559 U.S. 460 (2010).
[68] *Id.* at 469.
[69] *Id.* (citing *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002)).
[70] *Stevens*, 559 U.S. at 473 (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008)).
[71] *Id.* at 474 (citing *United States v. Williams*, 535 U.S. 285, 293 (2008) (holding the mere possibility of the impermissible application of the law is not enough to prevail under an over-breadth challenge)).
[72] *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729, 2734 (2011) (holding that *Stevens* stands, in part, for the

authority to protect children from harm, "that does not include a free-floating power to restrict the ideas to which children may be exposed."[73] Because the challenged statute restricted protected speech, the Court applied a strict scrutiny analysis requiring "a compelling government interest . . . narrowly drawn to serve that interest."[74] Ultimately the Court held that because the state could not show a direct link between the proscribed harm and the desired effect of the statute, the law could not be saved.

The CAAF has not yet considered *Ashcroft* outside the context of Article 134, child pornography offenses. Nevertheless, those decisions contain important dicta concerning unconstitutional over-breadth under the First Amendment. The CAAF addressed the *Ashcroft* holding in *United States v. Barberi*.[75] There, the CAAF set aside a conviction under Article 134, incorporating the CPPA, because the general verdict of guilt included a theory that was subject to First Amendment

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proposition that a legislature cannot create new categories of unprotected speech simply because it believes that speech is too harmful to be accepted).

[73] *Brown*, 131 S. Ct. at 2736; *see also* Carmen Naso, *Sext Appeals: Re-assessing the Exclusion of Self-Created From First Amendment Protection*, 7 Crim. L. Brief 4 (2011) [hereinafter *Sext*].

[74] *Brown*, 131 S. Ct. at 2738 (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992) (holding content based regulations are presumptively invalid); *see United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818 (2000) ("It is rare that a regulation restricting speech because of its content will ever be permissible.").

[75] *United States v. Barberi*, 71 M.J. 127, 130 (C.A.A.F. 2012).

protection.[76] The CAAF noted that speech subject to constitutional protection in the civilian world may, nonetheless, be subject to criminal liability in the military **if** charged as prejudicial to good order and discipline or of a nature that tends to discredit the armed services.[77]

Discussion

This Court should set aside Sgt Quick's conviction under Article 120c(a)(1) because the statute criminalizes the viewing of a substantial amount of constitutionally protected speech. There are ample and likely circumstances wherein a similarly situated service-member will face unwarranted criminal liability by knowingly viewing material which, without that service-member's knowledge, was recorded without consent. Thus, on its face this statute seeks to limit the consumption of potentially unprotected speech by criminalizing the viewing of protected speech. This offends even the limited First Amendment

[76] *Id.* (citing *Aschroft*, 535 U.S. at 245-46).
[77] *Id.* at 131 (citing *Parker v. Levy*, 417 U.S. 733, 759 (1974) (holding that speech entitled to constitutional protection in the civilian world may not be so entitled in the military because in the latter, restrictions to speech exist for reasons that may not exist in the former); *United States v. Brisbane*, 63 M.J. 106, 116 (C.A.A.F. 2006) (holding that in light of *Ashcroft*, the Court must look to the entire record to determine whether the possession of constitutionally protected material is prejudicial to good order and discipline or of a nature to discredit the armed services) (citing *United States v. Mason*, 60 M.J. 15, 19 (C.A.A.F. 2004)).

protections recognized in the military and this Court should act to safeguard Sgt Quick's rights.

A. Article 120c(a)(1) is unconstitutionally overbroad because it unnecessarily restricts a substantial amount of constitutionally protected speech.

1. Article 120c(a)(1) impacts free speech rights because it is not tethered to proof of a service nexus and because "knowingly" only modifies knowledge of the act, not knowledge of consent.

Sgt Quick was convicted of violating Article 120c(a)(1) for watching a cell phone video, made by Cpl Hollis, which showed TR's private areas during what reasonably appeared to be consensual group sex.[78] While a service-member may be subject to criminal liability for knowingly filming pornography, such liability is based on the tendency of that action to be prejudicial to good order and discipline or service discrediting.[79] Even possession, viewing, receipt, distribution, and production of child pornography require proof of a service nexus.[80]

By contrast, Article 120c(a)(1) subjects a service-member to criminal liability for merely viewing modes of expression that depict the private areas of another without requiring the Government to show any evidence of a service nexus. Proof of the

[78] The members acquitted Sgt Quick of rape as charged under Article 120. R. at 1442.
[79] *See United States v. Goings*, 72 M.J. 202 (C.A.A.F. 2012) (holding that filming sex is an aggravating factor sufficient to implicate liability under clause 1 and 2 of Article 134).
[80] 10 U.S.C. § 934 (2012).

connection between the alleged misconduct and good order and discipline or service esteem was central to the Supreme Court's theory in *Parker v. Levy* that the Government has a legitimate interest in penalizing expression in the military that is not otherwise regulated in the civilian world.[81] This theory of liability was reaffirmed in dicta as recently as 2012 in *Barberi*.[82]

Since the Government is not required to show proof of a service nexus, this Court must consider the constitutionality of Article 120c(a)(1) by construing the statute's plain effect.[83] If that effect restricts protected speech, then this Court must apply a strict scrutiny analysis.[84]

The military judge rightly instructed the members the Government was required to prove that Sgt Quick **knowingly** and wrongfully **viewed a visual recording** of the private area of TR, without her consent and under circumstances in which she had a reasonable expectation of privacy.[85] The military judge then instructed the members that "knowingly" referred to whether the act -- the viewing of the visual recording -- was "done intentionally and on purpose."[86] Because "knowingly" only

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[81] 417 U.S. at 459.
[82] 71 M.J. at 131.
[83] *Stevens*, 559 U.S. at 474.
[84] *Brown*, 121 S. Ct. 2738.
[85] R. at 1370-71; Appellate Ex. XLVII, at 10
[86] R. at 1371.

modifies the intent that animates the viewing, and does not describe the accused's knowledge of the alleged victim's consent, the Government cannot argue that, despite the absence of the service nexus, the scope of the law is limited by the consent element because Article 120c(a)(1) is reduced to a strict liability offense.[87] A service-member will thus be liable under Article 120c(a)(1) anytime he or she views the private areas of another, regardless of their relationship to the alleged victim, if that person later claims they did not consent to the viewing. This is accomplished because the Government is not required to prove the accused knew the victim did not consent.

At this point, a hypothetical is helpful. Consider LCpl Smith, a typical lance corporal in his barracks room, surfing the Internet. Like many of his peers, LCpl Smith is a fan of Kim Kardashian, Paris Hilton, Pamela Anderson, Farrah Abraham, Kate Middleton -- the Duchess of Cambridge -- and Kendra Wilkinson.[88] Earlier that day, his fire team leader tells him that he recently saw each of these women on the Internet in sex tapes or otherwise disrobed. Now, back in his room, he decides to search

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[87] *See Colautti v. Franklin*, 439 U.S. 379, 395 (1979) (holding legislative imprecision creates the peril of strict liability criminal offenses; a result which legislatures should assiduously avoid).

[88] Each of these women has been the subject of scandal involving sex tapes or naked pictures that were either released to the public without their knowledge or surreptitiously recorded.

for them and finds a website with links to all manner of amateur pornography, including the sex tapes his fire-team leader and he had just discussed. Not knowing these tapes were stolen or surreptitiously recorded, and that their content was never intended for his eyes, he watches them all. He sees his celebrity crushes nude, engaged in sex acts, but also non-celebrity women who were also nude and engaged in sex acts -- a form of pornography known as pseudo-voyeurism.[89] The next day, he talks to his friend in another squad about this website and its content. Unfortunately for LCpl Smith, his Company Commander overhears this conversation. His Company Commander recently attended a mandatory PME about revisions to the UCMJ including the new Article 120c. He tells his battalion commander about the possible criminal acts going on in his barracks. The battalion commander initiates judicial proceedings, which result in LCpl Smith being convicted at court-martial for knowingly and wrongfully viewing visual recordings of the private areas of several women, without their consent, and under circumstances in which they believed they had a reasonable expectation of privacy.

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[89] Clay Calvert and Justin Brown, *Video Voyeurism, Privacy, and the Internet: Exposing Peeping Toms in Cyberspace*, 18 Cardozo Arts & Ent. L. J. 469, 485 (2000) (describing pseudo-voyeurism as a type of constitutionally protected pornography where the individual depicted feigns ignorance of the fact they are being observed).

It is thus clear that Article 120c(a)(1) will, by its plain language, chill consumption of constitutionally protected speech[90] without requiring the Government to prove that such viewing was done without consent or has any nexus to the good order and discipline or esteem of the armed services. Generally, citizens, including service-members, have a constitutionally recognized right to consume pornography, so long as it is not child pornography.[91] "Adults have a constitutionally protected right to possess even obscene speech, unless it involves depictions of children. The audience that consumes images of

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[90] *See Butler v. Michigan*, 352 U.S. 380, 383-84 (1957) (holding that a Michigan statute prohibiting, wholesale, the display or distribution of pornographic material as a means to safeguard children was unconstitutionally overbroad. Adults cannot be restricted from possessing material, such as pornography, simply because it is unfit for children); *A Book Named "John Clelland's Memoirs of a Woman of Pleasure," et al. v. Attorney General of Massachusetts*, 383 U.S. 413, 420 (1966) (holding that material cannot be restricted as obscene unless it is utterly without redeeming social value. Social value may exist even if the proscribed material tends to appeal to the prurient interest); *Ginsburg v. New York*, 390 U.S. 629, 641 (1968) (holding that the state holds an interest in protecting children from pornographic material that it would not similarly hold vis-à-vis adults); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (holding the state cannot restrict an individual's ability to possess and view pornography); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (2002) (holding that a federal law restricting the dissemination of pornography on the internet was overly broad under the First Amendment because it went too far in restricting protected speech merely in the name of protecting children).

[91] *See Stanley*, 394 U.S. at 564; *see also Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) ("The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, **the right to receive**, **the right to read**, and freedom of inquiry, freedom of thought, and freedom to teach.") (emphasis added).

voyeuristic pornography thus holds a First Amendment interest in receiving non-obscene and non-child-pornographic images."[92] The hypothetical scenario offered above is neither fanciful, nor unlikely. It is an entirely natural and foreseeable consequence of this statute's plain sweep and language.

Sgt Quick watched a visual recording that he did not create, of group sex **in which he was a participant**.[93] That video is strikingly similar to many forms of pornography that are afforded constitutional protection and are readily available on the Internet.[94] Without requiring the Government to offer any proof of Sgt Quick's knowledge of TR's consent to that viewing, this statute criminalizes both protected and unprotected speech alike. As the Supreme Court held in *Ashcroft*, this result exceeds permissible legislative action.[95]

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[92] *Video Voyeurism supra* at 509 (citing *Stanley*, 394 U.S. at 564; *Griswold*, 381 U.S. at 482); *see also Ashcroft*, 535 U.S. at 253 ("First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because **speech is the beginning of thought**.") (emphasis added).
[93] Pros. Ex. 5.
[94] Rodney Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 Texas L. Rev. 777, 793 (1993) ("Vast quantities of the speech in the modern American marketplace consist of symbol, image, and fantasy. For example, the billion-dollar marketplace for pornographic speech (by which I mean speech that appeals to the prurient interest in sex but fails to meet the stringent First Amendment definition of 'obscenity') is largely a trade in sexual fantasy").
[95] *Aschroft*, 535 U.S. at 245-46.

2. Article 120c(a)(1) is invalid because it restricts the consumption of protected speech and cannot survive a strict scrutiny analysis.

Because Article 120c(a)(1) restricts consumption of protected speech, this Court must apply a strict scrutiny analysis to ensure the measure is narrowly tailored to address a compelling government interest.[96] This is a high burden that is rarely met when the statute is content driven.[97]

The Government cannot satisfy this exacting standard here because Article 120c(a)(1) is a content-based restriction whose plain language is not sufficiently narrow. Presumptively, in order to prevent certain varieties of unprotected voyeurism,[98] Article 120c(a)(1) exceeds the scope of its purpose by effectively restricting consumption of protected pornographic material, without requiring the Government to prove either a service nexus[99] or the accused's knowledge of the alleged victim's lack of consent.[100]

While the state may have an interest in protecting citizens from unwanted exposure, that end can be accomplished in a less expansive way. Take, for example, a recent California law

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[96] *Brown*, 121 S. Ct. at 2738; *R.A.V.*, 505 U.S. at 395; *Playboy*, 529 U.S. at 818.
[97] *Id.*
[98] *Video Voyeurism*, supra at 474-87 (discussing the legal complexity associated with the phenomena of voyeurism and pseudo-voyeurism).
[99] *Parker*, 417 U.S. at 759.
[100] R. at 1371; Appellate Ex. XLVII, at 10.

targeting "peeping toms" and "revenge porn."[101] While California Penal Code § 647(j)(1) similarly criminalizes the viewing of another in a state of undress, it requires proof of the defendant's intent to invade the privacy of the alleged victim.[102] Requiring such proof clearly signals to the fact-finder that not only did the defendant know he or she was looking at the private areas of another, but that they also knew that person had an expectation of privacy, which the defendant specifically disregarded. That burden does not exist in the plain language of Article 120(c)(a)(1). Thus, while Congress may have a legitimate interest at stake, it can be satisfied in a less restrictive way that protects the fundamental First Amendment rights of service-members to consume protected speech. Because this statute is a content-based restriction on speech that is not narrowly tailored, it cannot stand.

Conclusion

This Court should set aside Sgt Quick's conviction for the sole specification of the Additional Charge because Article 120c(a)(1) violates the First Amendment by criminalizing the consumption of a substantial amount of protected speech. This is a natural and likely result of the plain language of the statute because "knowingly" only modifies the accused's knowledge of the

[101] Cal. Penal Code § 647(j).
[102] *Id.*

act, not knowledge of the alleged victim's consent to the viewing. Thus the law criminalizes a service-member who watches many types of protected pornographic material. This is an impermissible restriction on protected speech, especially in light of the fact that the statute is not tethered to proof of an adverse effect on good order and discipline or service esteem. Consequently, Article 120c(a)(1) is unconstitutionally overbroad, and this Court should set aside Sgt Quick's conviction.

II.

DUE PROCESS REQUIRES LAW ENFORCEMENT AND PROSECUTORS TO HAVE RELIABLE STANDARDS OF CRIMINALITY. THE PLAIN LANGUAGE OF ARTICLE 120c(a)(1) DOES NOT REQUIRE THE GOVERNMENT TO PROVE THE ACCUSED HAD KNOWLEDGE OF THE ALLEGED VICTIM'S LACK OF CONSENT. SGT QUICK WAS THEREFORE DENIED DUE PROCESS OF LAW BECAUSE ARTICLE 120c(a)(1) REQUIRES PROSECUTORS TO SELECTIVELY APPLY THEIR OWN JUDGMENT AS TO WHO SHOULD BE PROSECUTED RATHER THAN PRESCRIBE CLEAR STANDARDS OF CRIMINALITY.

Standard of Review

"The constitutionality of an act of Congress is a question of law we review *de novo*."[103]

Principles of Law

The Fifth Amendment requires that "No person shall be . . . deprived of life, liberty, or property, without due process of

[103] *Disney*, 62 M.J. at 48.

law . . . ."[104] Congress has wide latitude to enact legislation, including criminal law.[105] However the due process of law is frustrated if Congress enacts vague laws. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."[106]

In *Grayned v. City of Rockford*, the Supreme Court denied a facial challenge to an anti-noise ordinance. However, it took the opportunity to express its judgment that legislative vagueness is equally burdensome to both individual citizens and law enforcement alike, and is particularly perilous when the proscribed conduct involves First Amendment freedoms.

> Vague laws offend several important values. First . . . [v]ague laws trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute abuts upon sensitive areas of First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider

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[104] U.S. Const. amend V.
[105] U.S. Const. art. I, § 8, cl. 18.
[106] *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *United States v. Vaughn*, 58 M.J. 29, 31 (C.A.A.F. 2003) (holding that due process guaranteed by the Fifth Amendment requires fair notice that an act is forbidden and subject to criminal liability); *see also Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

> of the unlawful zone than if the boundaries of the forbidden areas are clearly marked.[107]

Again, in *Parker v. Levy*, the Supreme Court reiterated the principle that vague laws are particularly harmful when they reach First Amendment interests and, that in such cases, law enforcement needs precise standards of criminality.

> We have already said of the vagueness doctrine 'The doctrine incorporates notions of fair notice or warning. Moreover, it requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent arbitrary and discriminatory enforcement. Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater deal of specificity than in other contexts.'[108]

Later in *City of Chicago v. Morales*, the Supreme Court held that a statute failing to establish reasonably clear standards of criminality is still subject to a facial challenge even if it

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[107] *Grayned*, 408 U.S. at 108-09 (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (holding a statute is void for vagueness if it fails to give people of ordinary intelligence fair notice of the prohibited conduct and where it encourages arbitrary arrests and convictions) (citations omitted); *see also Grayned*, 408 U.S. at 109 n.5 ("Where First Amendment interests are affected, a precise statute 'evicing a legislative judgment that certain specific conduct be . . . proscribed,' assures us that the legislature has focused on the First Amendment interests and determined that other governmental policies compel regulation.") (citations omitted) (quoting *Edwards v. South Carolina*, 372 U.S. 229, 236 (1963) (holding the Fourteenth Amendment prevents states from criminalizing peaceful expression of unpopular views).

[108] *Parker*, 417 U.S. at 752 (citing *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974) (holding that there is a denial of due process where inherently vague statutory language permits selective law enforcement).

is unclear how much it will impact constitutionally protected speech. "[E]ven if an enactment fails to reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against arbitrary deprivation of liberty."[109] Criminal statutes, in particular, must be clearly drafted to avoid the specter of abuse. "Where the legislature fails to establish such minimal guidelines, a criminal statute may permit a 'standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections.'"[110]

The CAAF has most commonly addressed legislative vagueness as it relates to notice. For example, in *United States v. Moore*, the CAAF denied the appellant's claim that an order to refrain from speaking with civilian employees at the galley was too vague to comport with due process of law. It held that the void for vagueness doctrine required proof the appellant did not have actual knowledge of proscribed conduct such that he could avoid criminal liability.[111]

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[109] *City of Chicago v. Morales*, 527 U.S. 41, 53 (1999) (emphasis added) (citing *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (holding valid enactment of legislation requires the establishment of minimal guidelines to govern law enforcement).
[110] *Kolender*, 527 U.S. at 53 (quoting *Smith*, 415 U.S. at 575).
[111] *United States v. Moore*, 58 M.J. 466, 469 (C.A.A.F. 2003).

In *United States v. Pope*, the CAAF reiterated the "notice test" from *Moore* and held the appellant was fairly notified of the content of a regulation prohibiting sexual harassment. However, in dissent, Judge Erdmann claimed the operative language of the challenged instruction failed to provide clear guidance to those responsible for its enforcement. "[T]here is no guidance AETCI 36-2002 as to what standard is to be applied by those who enforce the instruction. . . With no standards to rely upon, those who initiate criminal sanctions for violation of AETCI 36-2002 must necessarily do so in an arbitrary manner."[112] Judge Erdmann concluded by claiming that (1) the appellant lacked notice of the regulation's proscription, and (2) that "those charged with enforcement of the regulation have no guidance to ensure uniform enforcement . . . ."[113] The CAAF has never repudiated the holdings of *Grayned* or *Morales*.

Discussion

A. This Court should set aside Sgt Quick's conviction under the sole specification of the Additional Charge because Article 120c(a)(1) is unconstitutionally vague.

1. Article 120c(a)(1) does not provide those responsible for its enforcement sufficiently clear standards to avoid arbitrary application because it does not require the Government to prove specific intent to invade the victim's privacy.

[112] *United States v. Pope*, 63 M.J. 68, 79 (C.A.A.F. 2006) (Erdmann, J., dissenting) (citing *Morales*, 527 U.S. at 52).
[113] *Id.* at 79-80.

As the military judge instructed, Article 120c(a)(1)'s elements do not require the Government to prove the accused's knowledge of the alleged victim's consent to the viewing of their private areas.[114] As a result, the plain language of the statute allows the Government to charge a service-member any time he or she knows they are viewing the private areas of another, even as an incident to watching protected material, so long as the Government is able to present evidence that the alleged victim did not consent to being observed by that accused service-member.

While the Government may argue this is an unlikely result, it cannot show the plain language of the Code prevents an over-zealous trial counsel or convening authority from pursuing such a course. Consequently, the law serves to do nothing more than cast a wide net of proscribed conduct and leave it to those enforcing the law to determine liability, presumably based on their own subjective morality. This is the specific harm described by the "void for vagueness" doctrine. "The Constitution does not permit a legislature to 'set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained,

[114] R. at 1370-71; Appellate Ex. XLVII.

and who should be set at large.'"[115] Here, that harm is created by the statute's combined absence of a service nexus and the lack of a specific scienter on the part of the accused to invade the privacy of the alleged victim. "Because of the absence of a scienter requirement . . . the statute is little more than 'a trap for those who act in good faith.'"[116]

Without these boundaries, the Government is free to prosecute an un-restrained amount of conduct typically deserving of constitutional protection. This abuse can come in different forms: the charges may stand alone, or as was likely the case in Sgt Quick's court-martial, as a contingency of proof to ensure the accused does not walk away without some manner of conviction.[117] This is especially dangerous because the

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[115] *Morales*, 527 U.S. at 60 (citing *United States v. Reese*, 92 U.S. 214, 221 (1876)).

[116] *See Colautti*, 439 U.S. at 395 (citations omitted) (quoting *United States v. Ragen*, 314 U.S. 513, 524 (1942)); *see also Screws v. United States*, 325 U.S. 91, 101-102 (1945) ("The requirement of a **specific intent** to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. . . .") (emphasis added); *see e.g. State v. Stevenson*, 613 N.W. 2d 90 (2000) (holding a Wisconsin video voyeurism statute was unconstitutionally overbroad in light of the First Amendment because of an imprecise *scienter* element. "'Precision must be the touchstone of legislation' that implicates the fundamental freedoms underpinning the First Amendment." *Id.* at 100 (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 514 (1964))).

[117] The Article 120c(a)(1) violation Sgt Quick faced was not preferred until Nov. 5, 2012, nearly four months after the original charges. Presumably the Government added the charge in the face of the realization that its evidence going to the

proscribed misconduct reaches recognized First Amendment freedoms that, for many, implicate strongly held moral convictions.[118] Consequently, the potential for abuse is considerable and, under the language of the statute, easily accomplished. Such abuse occurred in Sgt Quick's case and this Court should act to ensure it cannot occur again.

2. Article 120c(a)(1) does not provide fair notice to people of ordinary intelligence because it proscribes conduct ordinarily subject to constitutional protection.

Similar to the argument that Article 120c(a)(1) does not provide clear standards of liability for prosecutors to follow, it does not give individual service-members fair notice such that they can avoid committing misconduct. This, once again, occurs because the statute does not require proof of either a specific intent to invade the privacy of the alleged victim or a connection to a service nexus. Consequently, these legislative shortcomings deprive ordinary service-members the ability to look to the plain language of the statute to discern between criminal voyeurism -- the "peeping tom" -- and the legal consumption of protected speech.[119] Thus, as a natural and

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gravamen of the offenses -- the rape -- was, and later proved to be, perilously weak.

[118] *See Grayned*, 408 U.S. at 108-09; *see Edwards*, 327 U.S. at 336; *see Parker*, 417 U.S. at 752; *see Cohen v. California*, 405 U.S. 15, 25 (1971) ("it is often true that one man's vulgarity is another's lyric.").

[119] *See Pope*, 63 M.J. at 73 ("This Court recognizes that possible sources of 'fair notice' include: federal law, state law,

foreseeable consequence, service-members will refrain from consuming material protected under the First Amendment because of its similarity to Article 120c(a)(1)'s prohibitions.[120] This is precisely the harm envisioned by the Supreme Court in *Grayned* when it discussed the risk of legislative vagueness when it reaches a First Amendment interest.[121] This is a grave misstep, and this Court should act to require appropriate legislative precision by overturning Sgt Quick's conviction.

Conclusion

Sgt Quick's due process rights were violated because Article 120c(a)(1) is void for vagueness. It fails to establish standards governing enforcement and it does not give service-members fair notice of the proscribed conduct. As a result, the statute is ripe for arbitrary and biased enforcement and it will have the inexorable chilling effect on First Amendment interests. Accordingly, this Court should set aside Sgt Quick's conviction under Article 120c(a)(1).

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military case law, military custom and usage, and **military regulations**. Training, pamphlets, and other materials may also serve as sources of notice because they may give context to regulations and explain the differences between permissible and impermissible behavior.") (emphasis added) (citing *Vaughn*, 58 M.J. at 31; *United States v. Brown*, 55 M.J. 375, 383-84 (C.A.A.F. 2001).

[120] *See Ashcroft*, 535 U.S. at 235.

[121] *Grayned*, 408 U.S. at 108-09.

III.

EVEN IF ARTICLE 120c(a)(1) IS CONSTITUTIONALLY VALID, THE GOVERNMENT WAS STILL REQUIRED TO PROVE, BEYOND A REASONABLE DOUBT, THAT UNDER THE CIRCUMSTANCES, TR HAD A REASONABLE EXPECTATION OF PRIVACY. UPON INVITATION, TR VOLUNTARILY CAME ABOARD MCAS MIRAMAR TO HAVE SEX WITH PFC HEARST, AND THEN WOUND UP HAVING SEX WITH TWO ADDITIONAL MEN WHOM SHE NEVER PREVIOUSLY MET, INCLUDING SGT QUICK, IN SGT QUICK'S BARRACKS ROOM, WITH THE DOOR AND WINDOW OPEN. SGT QUICK'S CONVICTION FOR VIOLATING ARTICLE 120c(a)(1) IS LEGALLY AND FACTUALLY INSUFFICIENT BECAUSE, UNDER THE CIRCUMSTANCES, TR DID NOT HAVE A REASONABLE EXPECTATION OF PRIVACY.

Standard of Review

This Court reviews issues of legal and factual sufficiency *de novo*.[122]

Principles of Law

The test for legal sufficiency is whether, when viewed in the light most favorable to the government, the evidence is such that a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt.[123]

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that this Court neither saw nor heard the witnesses at trial, this Court is convinced, beyond a reasonable doubt, of Appellant's

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[122] *United States v. Hays*, 62 M.J. 158, 162 (C.A.A.F. 2005); *see also* Art. 66(c), UCMJ, 10 U.S.C. § 866(c).
[123] *United States v. Harper*, 22 M.J. 157, 161 (C.M.A. 1986).

guilt.[124] In conducting this review, this Court may independently judge the credibility of the witnesses at trial, resolve questions of fact, and substitute its judgment for that of the trier of fact.[125]

Article 120c defines a reasonable expectation of privacy as:

> [C]ircumstances in which a reasonable person would believe that he or she could disrobe in privacy, without being concerned that an image of a private area of the person was being captured; or circumstances in which a reasonable person would believe that a private area of the person would not be visible to the public.[126]

The Supreme Court discussed the reasonable expectation of privacy within the context of the Fourth Amendment's prohibition on unreasonable searches and seizures in *Katz v. United States*.[127] There, the Court overruled an earlier decision in *Olmstead v. United States* and held that a person has a reasonable expectation of privacy in their telephone conversations and that law enforcement is required to seek a warrant to invade that privacy.[128] In so deciding, the Court commented on both the meaning of privacy, and when citizens should reasonably expect to have it. Writing for the majority,

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[124] *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).
[125] Art. 66(c), UCMJ; *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990).
[126] Manual for Courts-Martial, 10 U.S.C. § 920c(d)(3)(A)-(B).
[127] U.S. Const. amend IV; 389 U.S. 347, 354 (1967).
[128] *Katz*, 389 U.S. at 354.

Justice Stewart asserted that "What a person knowingly exposes to the public . . . is not the subject of Fourth Amendment protection."[129] In a concurring opinion, Justice Harlan described what has become the modern test: "there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[130] Justice Harlan's test was cited by the CAAF as recently as 2006 in *United States v. Conklin*.[131]

Departing from the Fourth Amendment, the CAAF took up the issue of privacy in the realm of sexual misconduct recently in 2012 in *United States v. Goings*.[132] The Court was asked to decide whether the Supreme Court's decision in *Lawrence v. Texas*[133] required it to set aside the appellant's conviction for committing indecent acts with another in violation of Article

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[129] *Id.* at 351 (citing *Lewis v. United States*, 385 U.S. 206, 210 (1966) (holding that while a citizen's home is normally subject to Fourth Amendment protection, that protection is eroded, and may be subject to exposure to an undercover law enforcement officer, where the home is converted into a commercial center for illegal activity); *United States v. Lee*, 274 U.S. 559, 563 (1927) (holding the Coast Guard's right to search and seize American vessels at sea does not create a right to search without probable cause)).

[130] *Id.* at 362 (Harlan, J., concurring).

[131] 63 M.J. 333, 337 (C.A.A.F. 2006) (holding a service-member had a reasonable expectation of privacy with regard to files stored on his hard-drive).

[132] 72 M.J. at 202.

[133] 539 U.S. 558 (2003) (holding the state does not have a legitimate interest in proscribing the **consensual sexual activity among adults**).

134.[134] In that case, German police searched the appellant's off-base apartment in response to an allegation of sexual assault and found a camcorder and several films depicting the appellant engaged in consensual sex acts, including intercourse.[135] The tapes were made by an unidentified third party and both appellant and his partner were aware they were being filmed.[136]

Despite the holding in *Lawrence*, the CAAF upheld the conviction. It reiterated the *Parker* standard, which held that certain conduct that, while permissible in civilian life, is nevertheless proscribed in the military because of its nexus to good order and discipline and service esteem.[137] Since Article 134 allowed Congress to permissibly infringe on protected *Lawrence* liberty interests, the Court reasoned it could do so in the appellant's case because

> The commission of sexual acts in the presence of a third person -- not participating in the sex -- was held to be sufficiently 'open and notorious' to constitute an indecent act, punishable under Article 134, UCMJ, and we do not doubt that permitting the filming of those same acts is also sufficient.[138]

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[134] *Goings*, 72 M.J. at 203.
[135] *Id.*
[136] *Id.*
[137] *Id.* at 205 (citing *Parker*, 417 U.S. at 758).
[138] *Id.* at 206 (citing *United States v. Izquierdo*, 51 M.J. 421, 422-23 (C.A.A.F. 1999) (holding that when a service-member intentionally engages in sexual acts in the presence of others, his conduct is sufficiently open and notorious to be considered indecent); *United States v. Berry*, 6 U.S.C.M.A. 609, 614 (1956) (holding that while Article 134 is not intended to regulate private morality, sex before an audience is sufficiently open and notorious to form the basis for liability)). *Goings*,

Discussion

This Court should set aside Sgt Quick's conviction under Article 120c(a)(1) because, under the circumstances, TR did not have a reasonable expectation of privacy.

As a matter of law, TR did not have a reasonable expectation of privacy that Sgt Quick could have invaded when he watched Cpl Hollis' video because the video was made under circumstances that society does not recognize as private, and that TR did not appear to subjectively believe were private. Furthermore, that video showed what reasonably appeared to be consensual group sex, in which Sgt Quick was a participant.

TR met Cpl Hollis outside his barrack's room at MCAS Miramar after he invited her over to have sex with his friend, PFC Hearst.[139] A short while later, TR acknowledged she was both open to others watching her have sex, and to participating in group sex.[140] Ultimately, she had sex with three men -- with PFC Hearst individually, with PFC Hearst and Sgt Quick at the same time, with Sgt Quick and Joel Montez at the same time, and with Sgt Quick individually.[141] At various points on 1 July 2012, Cpl Hollis and Sgt Quick both watched TR engaged in sex acts. Moreover, this sex occurred in Sgt Quick's barracks room -- a

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Izquierdo, and *Berry* consistently identified sex in the presence of an audience, not polyamory, as the genesis of indecency for purpose of liability under Article 134.

[139] R. at 444, 531, 533, 538, 900.

[140] R. at 466, 547-49, 903-04, 908-09, 955, 1258.

[141] R. at 451, 562-71, 751-53, 755-58, 910-11, 918, 1262.

room in which TR had never been before 1 July 2012 -- with both the door and window open.[142] Cpl Hollis testified that he independently decided to make the recording, without Sgt Quick's prior knowledge or consent.[143] He also testified that while he approached the open exterior window to make his video, he could easily hear TR engaged in sex.[144]

Society does not recognize a reasonable expectation of privacy inherent to the circumstances in which this sex, and the subsequent recording, occurred.[145] In *Goings*, the CAAF resolutely held that sex in the presence of others was sufficiently open and notorious to permit criminal liability under Article 134.[146] While TR is not subject to the UCMJ, it is logically inconsistent for this Court to find the underlying act to be open and notorious for service-members, but then also hold that TR -- who reasonably appears to be a willing participant in the act[147] -- had a reasonable expectation of privacy while it transpired.

Under Article 120c, a reasonable expectation of privacy only exists if a person believes they can disrobe without concern that an image of their nudity will be captured, or that

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[142] R. at 919, 957, 965, 984.
[143] R. at 923-925, 957, 965, 984.
[144] R. at 965-66.
[145] *See Katz*, 389 U.S. at 362 (Harlan, J., concurring).
[146] *Id.* at 206.
[147] *See* Pros. Ex. 5.

their nudity will be free from public view.[148] TR cannot reasonably be said to have either expectation in this case. TR had sex with multiple partners, in a place already subject to an inherently limited expectation of privacy,[149] under circumstances where she clearly knew she was being observed by others. Moreover, that this sex occurred with both an open door and window, apparently without her objection, suggests she was aware her conduct was available for public consumption. As the majority held in *Katz*, individuals have a diminished expectation of privacy in that which they make public.[150]

This basic rule has been consistently reaffirmed. For example, a Federal Court in California held a plaintiff did not have a reasonable expectation of privacy in a photograph showing her kissing a man in a restroom when she also kissed him in public places such as a street corner or bar.[151] Also, in a civil case alleging invasion of privacy, the United States Court of Appeals for the Fifth Circuit upheld a lower Court's decision to grant a motion for summary judgment, holding a challenged

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[148] 10 U.S.C. § 920c(d)(3)(A)-(B).
[149] *Conklin*, 63 M.J. at 337 (holding "the threshold of a barracks . . . does not provide the same sanctuary as a private home." (quoting *United States v. McCarthy*, 38 M.J. 398, 403 (C.M.A. 1993))).
[150] *Katz*, 389 U.S. at 351.
[151] *Daly v. Viacom, Inc.*, 238 F. Supp. 1118, 1124 (N.D. Cal. 2002) (holding "There can be no privacy with respect to a matter that is already public or which has previously become part of the public domain") (quoting *Sipple v. Chronicle Publ'g Co.*, 154 Cal. App. 3d 1040, 1045 (1984)).

broadcast "provided the public with nothing more than could have been seen from a public street. Consequently, no invasion of privacy occurred."[152]

The same logic animating these decisions should guide this Court's judgment here. TR engaged in open and notorious group sex with multiple partners under circumstances where a reasonable person could not expect to be free from public view, or the possibility of recording. The fact that she may have been upset once she realized Cpl Hollis recorded her having sex is irrelevant to the Court's analysis as to whether her subjective expectation of privacy was reasonable under the circumstances.[153] Moreover, this video also showed Sgt Quick.[154] Given the facts of this case, it is also illogical for this Court to hold that TR had a heightened expectation of privacy that precluded Sgt Quick from examining a video, **made without his knowledge or consent**, that similarly depicted his likeness in an intimate setting. Under that logic, Sgt Quick is just as a much a victim here as TR.

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[152] *Wehling v. Columbia Broadcasting System*, 721 F.2d 506, 509 (1983).

[153] *See Coulter v. Bank of America*, 28 Cal. App. 4th 923, 929 (1994) (holding "The test of confidentiality is **objective** . . . **subjective intent is irrelevant**.") (citations omitted) (emphasis added).

[154] Pros. Ex. 5.

Consequently, since TR did not have a reasonable expectation of privacy under the circumstances, this Court cannot sustain Sgt Quick's conviction under Article 120c(a)(1).

Conclusion

This Court should set aside Sgt Quick's conviction under the sole specification of the Additional Charge because, under the circumstances, TR did not have a reasonable expectation of privacy.

Whether a reasonable expectation of privacy exists is subject to both a subjective, circumstantial analysis, and an objective, societal, standard. TR had what reasonably appeared to be consensual group sex with three different men. This sex all occurred in Sgt Quick's barracks room, with the door and window open, as people regularly came in and out of the room.

Objectively, TR could not have had a reasonable expectation of privacy because society does not recognize these circumstances to be inherently private. Sex in the knowing presence of others has been consistently characterized as open and notorious for service-members when charged under Article 134. Furthermore, these facts show that TR could not have possessed the reasonable, subjective, expectation that she was free from public view during sex. As such, Sgt Quick's conviction cannot sustain because the Government cannot prove this element beyond a reasonable doubt.

IV.

SGT QUICK WAS CHARGED WITH COMMITTING AN INDECENT ACT FOR PARTICIPATING IN WHAT THE GOVERNMENT CHARGED AS PRIVATE, CONSENSUAL, GROUP SEX. THE CHARGE MADE NO REFERENCE TO ANY OTHER AGGRAVATING FACTOR. AS A RESULT, THE SOLE SPECIFICATION OF CHARGE IV FAILS TO STATE AN OFFENSE BECAUSE IT CRIMINALIZES CONDUCT ENTITLED TO CONSTITUTIONAL PROTECTION, AND BECAUSE CONGRESS SPECIFICALLY SUPERSEDED THIS CHARGE IN THE 2012 UCMJ.

Standard of Review

Sgt Quick's defense did not object to the constitutionality of Charge IV at trial. However because this assignment of error alleges a constitutional violation, there is a presumption favoring forfeiture instead of waiver.[155] As such, the appropriate standard of review for the constitutionality of the charge is plain error.[156] However, "Interpretations of a statute and its legislative history are questions of law we review *de novo*."[157]

Principles of Law

In *Lawrence v. Texas*, the Supreme Court was asked to decide whether a Texas law criminalizing consensual sodomy between persons of the same sex violated the Due Process Clause of the

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[155] *Goings*, 72 M.J. at 205 (citing *United States v. Sweeney*, 70 M.J. 296, 303-04 (C.A.A.F. 2011)).
[156] *Id.* (citing *Sweeney*, 70 M.J. at 304) ("Under plain error review, this Court will grant relief only where (1) there was error, (2) the error was plain and obvious, and (3) the error materially prejudiced a substantial right of the accused").
[157] *United States v. Martinelli*, 62 M.J. 52, 56 (2005).

Fourteenth Amendment.[158] The Government maintained that the case should be governed by the Court's ruling in *Bowers v. Hardwick* which upheld the states' ability to proscribe homosexual sodomy.[159] Citing the substantive reach of the due process clause, the Court turned away from its holding in *Bowers*. It reasoned that *Bowers* failed "to appreciate the extent of the liberty at stake,"[160] and that neither the federal Government, nor the states, had a legitimate interest in proscribing the private, consensual, sexual activities of adult citizens.[161] The Court largely based its holding on its expanded understanding of the conduct and behavior protected by the due process clauses of the Fifth and Fourteenth Amendments.[162]

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[158] 539 U.S. at 564.
[159] *Id.* at 566 (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding the Fourteenth Amendment does not create a fundamental right for homosexual citizens to engage in consensual sodomy)).
[160] *Id.* at 567.
[161] *Id.* at 574 (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (holding citizens deserve autonomy in making decisions regarding marriage, procreation, contraception, and family relationships); *Romer v. Evans*, 517 U.S. 620 (1996) (holding a class-based legislation directed solely homosexuals violated the equal protection clause of the Fourteenth Amendment. The Supreme Court specifically declined to decide *Lawrence* on equal protection grounds, as it did in *Romer*, because it did not want to create the possibility of legislative prohibitions to consensual sexual conduct that applied equally to both same-sex and traditional couples. *See* 539 U.S. at 574-75)).
[162] *Id.* at 578 ("Had those who drew and ratified the Due Process Clauses of the Fifth or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and

Before 2007, Article 134 included, as a specifically enumerated offense, indecent acts with another.[163] In 2007, Congress created Article 120(k), indecent acts, which incorporated the specific conduct previously covered under Article 134.[164] On 28 June 2012, Congress's newest expression of the UCMJ came into effect. Therein, it replaced Article 120(k) with Article 120c, labelled "Other sexual misconduct."[165] In the analysis section for the new Article 120c, Congress explained the following regarding the 2012 amendment. "The new Article 120c encompasses offenses contained in the 2007 version of Article 120(k) . . . and **is intended to criminalize non-consensual sexual misconduct that ordinarily subjects an accused to sex offender registration.**"[166] The analysis further discussed the meaning of the new Article 120c as it relates to the old 120(k).

> This offense clarifies the Indecent Act offense previously covered by the 2007 version of Article 120(k). The new Article 120c(a) makes clear that both viewing and recording are offenses and explicitly creates an offense for distribution of any recording

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later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedoms").

[163] Manual for Courts-Martial, Part IV, ¶ 90 (2006) (hereinafter MCM 2005).

[164] Manual for Courts-Martial, Part IV, ¶ 45(k) (2008) (hereinafter MCM 2008).

[165] *See* 10 U.S.C. § 920c.

[166] Manual for Courts-Martial, United States, Article 120c (analysis) A23-16 (2012) (emphasis added).

made in violation of the statute, which was not clearly prohibited under the 2007 version of Article 120(k).[167]

Discussion

This Court should set aside Sgt Quick's conviction for indecent conduct under Article 134 because that charge both fails to state an offense, and was superseded by Congress in the latest version of the UCMJ.

Sgt Quick was convicted under the sole specification of Charge IV for committing indecent conduct by engaging in oral sex with TR while Joel Montez also engaged in both vaginal and anal intercourse with TR.[168] The government did not allege that this conduct took place in the presence of anyone besides those who were a party to, what the Government charged as, otherwise private, consensual, group sex.[169] As a result, this charge seeks to criminalize a protected liberty interest because it does not allege indecency in the form of a public spectacle, or as capable of travelling in interstate commerce. Furthermore, in the 2012 UCMJ, Congress clearly manifested its intent to no longer criminalize private, consensual, group sex in the military. That version of the Code governed Sgt Quick's case. Consequently, Sgt Quick's conviction under Article 134 must be set aside.

1. Sgt Quick cannot be held criminally liable under Article 134 because the charge alleges conduct that is protected under

[167] *Id.* at A23-17.
[168] *See* Charge Sheet, Nov. 5, 2012.
[169] *See id.* The Government did not allege lack of consent as an element of the charge.

the substantive reach of the Fifth Amendment's Due Process clause, in light of *Lawrence v. Texas*.

As charged, the Government convicted Sgt Quick for merely participating in consensual three-way sex. *Lawrence* stands firmly for the proposition that private, consensual, sexual conduct cannot be criminalized.[170] It is certainly true the Federal Government has an interest in proscribing certain activity, including sex, in the military that is not similarly prohibited in the civilian world.[171] However, the alleged misconduct in this case is not controlled by that interest.

In *Goings*, the appellant was charged with committing indecent acts with another under Article 134. That charge read

> In that SSG Ivan D. Goings . . . did . . . wrongfully commit an indecent act with another male and a female by allowing the other male to be present and video record on a video cassette tape the said SSG Ivan D. Goings engaging in sexual intercourse with the female.[172]

There the Court reasoned that the indecency was inherent to the filming and the presence of an audience. "No one disagrees that wholly private and consensual sexual activity, without more,

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[170] 539 U.S. at 578.

[171] *See Parker*, 417 U.S. at 758; *see also* Walter T. Cox, III, *Consensual Sex Crimes in the Armed Forces: A Primer for the Uninformed*, 14 Duke J. Gender L. & Pol'y 791, 803 (2007) (arguing that "While it is true that the military is a separate and distinct society, this is no justification for punishing military members for conduct that a **modern society** does not deem criminal unless that conduct is indeed disruptive of the needs to maintain good order and discipline in that society") (emphasis added).

[172] *Goings*, 72 M.J. at 204.

falls within Lawrence. But that does not answer the altogether different question whether permitting a third party **to observe and memorialize** one's sexual activity on videotape is categorically protected . . . ."[173]

In *Izquierdo*, an earlier case which formed the basis for the CAAF's decision in *Goings*, the appellant was acquitted of rape, but convicted of committing indecent acts with another under Article 134, UCMJ, as a lesser included offense.[174] There, the appellant had sex in his barracks room while his roommates were present. The presence of these two other people -- who were not participants in the sex -- formed the basis for liability.[175] The CAAF largely based this theory on its predecessor's decision in *United States v. Berry* -- a pre-*Lawrence* decision -- where that court also held liability under Article 134 for indecent acts with another was a result of the public nature of the sex.[176]

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[173] *Id.* at 207 (emphasis added).
[174] 51 M.J at 422.
[175] *Id.* at 423.
[176] *Id.* at 422-23 (citing *Berry* 6 U.S.C.M.A. at 614). *Berry* was a pre-*Lawrence* decision wherein the accused was charged with a now defunct specification -- wrongful fornication, in violation of Article 134, UCMJ. *See United States v. Berry*, 18 C.M.R. 347, 349 (1955). The *Izquierdo* Court also based its holding on several other pre-*Lawrence* decisions from the CMA. *See United States v. Hickson*, 22 M.J. 146, 150 (C.M.A. 1986) (holding that while adultery and public sex is proscribable under Article 134, private consensual sexual activity between unmarried persons cannot be criminalized); *United States v. Scoby*, 5 M.J. 160, 163 (C.M.A. 1978) (holding Article 125 prohibits every kind of

Here, the Government did not allege Sgt Quick participated in a public, lascivious display -- as it argued in *Izquierdo*. Nor did it specifically allege the act was performed before an audience, or that it was memorialized with a recording device -- as was the case in *Goings*. The sole specification of Charge IV simply alleged that Sgt Quick's conduct was indecent purely because he participated in particular sexual activity. Since the Government has failed to allege facts that are recognized as "open and notorious"[177] for the purpose of Article 134 liability, then the conduct is a protected liberty interest under *Lawrence*.[178]

There is no legitimate Government interest in proscribing private, consensual, sexual activity without alleging the existence of some aggravating factor. Since the Government failed to specifically allege facts to bring this conduct outside activities protected by *Lawrence*, this Court should set aside Sgt Quick's conviction under the sole specification of Charge IV.

2. *United States v. Marcum* cannot preserve this conviction because the charge does not allege aggravating factors for the members to consider during deliberations and the military judge never instructed on the *Marcum* factors.

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unnatural copulation, even that which occurs between consenting parties. *Contra United States v. Marcum*, 72 M.J. 198 (C.A.A.F. 2004)).

[177] *See Goings*, 72 M.J. at 206 (citing *Izquierdo* 51 M.J. at 422-23).

[178] 539 U.S. at 578.

The Government may argue the CAAF's holding in *United States v. Marcum* resuscitates this conviction. However, careful analysis of that case and its progeny show Charge IV is still defective.

In *United States v. Marcum*, the CAAF was asked to decide a facial challenge to Article 125 in light of the Supreme Court's holding in *Lawrence*.[179] There the appellant was charged with committing consensual and non-consensual sodomy with other male members of his command. The Court reasoned that despite the holding in *Lawrence*, the question of whether consensual homosexual sodomy could be criminalized in the military was still unresolved.[180] Instead of approaching the issue as a facial challenge to Article 125 the CAAF addressed the potential *Lawrence* interest at stake within the context of the necessities of military life.[181] Consequently, the CAAF articulated three questions it was required to answer.

> First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*? Third, are the additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?[182]

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[179] 60 M.J. at 200.
[180] *Id.* at 206.
[181] *Id.*
[182] *Id.* at 206-07 (citing *Lawrence*, 539 U.S. at 578).

After assuming a *Lawrence* interest was at stake, the CAAF then analyzed whether there was a reason for proscription that fell outside the *Lawrence* holding. It found that the command relationship between the participants implicated a significant military interest in maintaining good order and discipline.[183] As a result, the Court found the conduct fell outside *Lawrence's* protections and affirmed the conviction.[184]

Last year in *United States v. Castellano*, the CAAF was asked to decide whether the existence of the "*Marcum* factors" was an issue of law determined by the military judge, or a factual determination to be decided by the members.[185] There, a military judge instructed the members, above defense objection, that consensual sodomy was a lesser included offense to sodomy by force and without consent, but he gave no instruction on the *Marcum* factors for the members to consider during their deliberations.[186] He made separate findings outside the presence

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[183] *Id.* at 207-08 (citing *United States v. McCreight*, 43 M.J. 483, 485 (C.A.A.F. 1996) (holding fraternization can be criminalized under the appropriate punitive article of the UCMJ); *United States v. Brown*, 45 M.J. 389, 397 (C.A.A.F. 1996) (holding that while service-members have a liberty interest in certain sexual activity, that interest is subject to the need for discipline and obedience in the military)).
[184] *Id.* at 208.
[185] 72 M.J. 217, 218 (C.A.A.F. 2013).
[186] *Id.* at 219-20.

of the members that there were sufficient facts to implicate the *Marcum* factors.[187]

The Government argued, as it did before the NMCCA, that the factors were matters of law to be determined by the military judge because they are not elements of the charged offense.[188] The CAAF disagreed and found that while only Congress can create elements for criminal offenses, it had the ability to delegate to the President the authority to provide aggravating factors for sentencing.[189] By extension, it also reasoned that (1) the Government was required to allege the "*Marcum* factors" in the specification, (2) that the military judge was required to instruct the members upon them, and (3) that they were factual issues to be determined by the members.[190]

Here, the sole specification of Charge IV does not allege any fact beyond Sgt Quick's participation in group sex that would make his conduct open and notorious, and thereby prejudicial to good order and discipline or service discrediting. Thus, as alleged, the charge proscribes a *Lawrence*

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[187] *Id.* at 220.
[188] *Id.*
[189] *Id.* at 221-22 (citing *Liparota v. United States*, 471 U.S. 419, 424 (1985); *Loving v. United States*, 517 U.S. 748, 768 (1996) (holding Congress has the power to delegate authority to the President prescribe aggravating factors for punishment); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (holding that any fact that increases the severity of a crime beyond the statutory maximum punishment must be submitted to a jury, and proven beyond a reasonable doubt)).
[190] *Id.* (citations omitted).

liberty interest. Therefore, the conviction can only be preserved if *Marcum* is applicable. While there is no direct precedent for applying *Marcum* outside the context Article 125 offenses,[191] this Court is free to consider extending that holding to this type of Article 134 offense. However, if *Marcum* applies, then so must *Castellano*. As such, the aggravating factor must be pled in the specification and instructed to the members;[192] neither of which occurred here. Since these necessary predicates were not satisfied, *Marcum* cannot now be a life-line to an otherwise defective charge.

The Government may still claim the aggravating factors can be implied from the other charges alleged. This too is error. Sgt Quick was also charged with conspiracy to distribute indecent material, violation of the general order against fraternization with PFC Hearst, three specifications of rape by force, and wrongfully viewing indecent material. None of those charges implicate a service necessity articulated in *Marcum* that is applicable to facts alleged in the sole specification of

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[191] The CAAF in *Goings* did not directly apply the *Marcum* factors to the challenged Article 134 offense but it did cite *Marcum* for the proposition that, without some heightened evidentiary showing, *Lawrence* protects the liberty interests of service-members. *See Goings*, 72 M.J. at 206 (citing *Marcum*, 60 M.J. at 207) (holding that in the context of an as-applied challenge under Lawrence, requiring consideration of whether there are "additional factors relevant solely in the military environment that affect the nature and reach of the Lawrence liberty interest").

[192] *Marcum*, 60 M.J. at 207-08; *Castellano*, 72 M.J. at 221-22.

Charge IV. However, even if this Court believes the charge for fraternization implicates recognized *Marcum* factors, it should also consider two important facts. First, Sgt Quick was acquitted of that charge. Second, the charge alleged he had an unduly familiar relationship with PFC Hearst, who was nowhere mentioned in the sole specification of Charge IV.

Furthermore, the military judge issued the "spillover" instruction.[193] Therein, he told the members that evidence of Sgt Quick's guilt as to one specification could not be used to find him guilty of another unless the elements of the two offenses overlapped, and that evidence was specifically probative to that common element.[194] This instruction precluded the members from implying the existence of *Marcum* aggravators from the other charges. Therefore, the sole specification of Charge IV was still defective.

Since no precedent holds that group sex is *per se* "open and notorious" to bring it within the scope of Article 134, the Government has failed to state an offense in the sole specification of Charge IV.

3. This Court should set aside Sgt Quick's conviction under Article 134 because Congress did not intend to criminalize private, consensual, group sex under the 2012 UCMJ.

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[193] Appellate Ex. XLVII, at 15.
[194] *Id.*

If more is needed to guide this Court's reasoning, consider this; Congress made its intent clear in the plain and unambiguous language in the newest version of the UCMJ that it did not intend to subject service-members to criminal liability under Article 134 for engaging in private, consensual, group sex. In 2007, Congress eliminated indecent acts with another as a specifically enumerated offense under Article 134 by creating Article 120(k), indecent acts. Now, in the latest version of the UCMJ, Congress incorporated Article 120(k) into Article 120c. In the analysis section, it unambiguously stated its intent with regard to conduct that might have previously been governed by Article 120(k). Article 120c was created to criminalize **non-consensual**, sexual **misconduct** that ordinarily requires **sex offender registration**.[195] Participation in private, consensual, group sex cannot possibly satisfy this intent because it is (1) consensual and (2) a protected liberty interest under *Lawrence*, and therefore not subject sex offender registration.

Of course, neither the language nor intent of Article 120c forecloses the Government's ability to fashion a specification under Article 134 to criminalize conduct that affects good order and discipline or service esteem. But without a specific pleading that implicates a service nexus, or possibly a

[195] Manual for Courts-Martial, United States, Article 120c (analysis) A23-16 (2012) (emphasis added).

specifically alleged *Marcum* factor that is also instructed to the members, such a charge cannot sustain.

Here, the Government alleged that a specific sexual activity constituted indecent conduct without also specifically alleging facts currently recognized as prejudicial to good order and discipline or service discrediting. This is plain and obvious error that affects a constitutionally protected liberty interest, and offends Congress's intent. This Court should correct it by setting aside Sgt Quick's conviction under Article 134.

Conclusion

The sole specification of Charge IV alleged that Sgt Quick's participation in a specific sexual activity, without any other aggravating facts, was, by itself indecent conduct, and thereby prejudicial to good order and discipline and service discrediting. This is error because it exceeds existing precedent, criminalizes a protected *Lawrence* liberty interest, and is exactly the opposite of Congress's intent in the new UCMJ. Consequently, this Court should set aside Sgt Quick's conviction under the sole specification of Charge IV.

V.

DURING BOTH GROUP AND INDIVIDUAL *VOIR DIRE*, GYSGT PRICE MADE STATEMENTS THAT INDICATED HE COULD NOT FAIRLY SIT IN JUDGMENT OF SGT QUICK'S CASE. YET, THE MILITARY JUDGE DENIED A DEFENSE CHALLENGE FOR CAUSE AND KEPT GYSGT PRICE ON THE PANEL THAT EVENTUALLY RETURNED SEVERAL CONVICTIONS. CONSEQUENTLY, SGT QUICK WAS DENIED HIS DUE PROCESS RIGHT TO A FAIR AND IMPARTIAL FACT-FINDER AT TRIAL BECAUSE GYSGT PRICE REMAINED A MEMBER, DESPITE HIS ACTUAL AND IMPLIED BIAS.

Standard of Review

A military judge's ruling on a challenge for cause premised on actual bias is reviewed for an abuse of discretion.[196] A ruling on a challenge based on implied bias is reviewed with less deference than abuse of discretion, but with more deference than *de novo* review.[197]

Principles of Law

An accused at court-martial has a due process right to an impartial, unbiased panel.[198] To ensure substantive fairness, as well as the objective appearance of fairness, military judges should liberally grant challenges for cause brought by the

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[196] *United States v. Napolitano*, 53 M.J. 162, 166 (C.A.A.F. 2000).
[197] *United States v. Bagstad*, 68 M.J. 460, 462 (C.A.A.F. 2009).
[198] *United States v. Nash*, 71 M.J. 83, 88 (C.A.A.F. 2011) (citing *United States v. Mack*, 41 M.J. 51, 54 (C.M.A. 1994); *United States v. Terry*, 64 M.J. 295, 301 (C.A.A.F. 2007) (holding the right to a fair, impartial panel in military justice is a right provided by the Constitution, federal law, regulation, and appellate case law).

accused.[199] Challenges for actual or implied bias are evaluated based on the totality of the factual circumstances.[200]

In weighing challenges for actual bias, military judges are afforded deference because the Court recognizes the military judge had the opportunity to observe the member and assess their credibility during *voir dire*.[201] Challenges made for implied bias, however, are afforded considerably less deference, though not quite *de novo* review.[202] This is because implied bias is judged based on the more objective public perception of fairness.[203] When applying this standard, the Court asks whether the risk is too high that "the public will perceive that the accused received something less than a court of fair, impartial members."[204]

Discussion

This Court should set aside the findings and sentence in Sgt Quick's case because GySgt Price, a court-martial member, made statements during *voir dire* that showed both an actual and

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[199] *United States v. James*, 61 M.J. 132, 139 (C.A.A.F. 2005); *United States v. Briggs*, 64 M.J. 285, 287 (C.A.A.F. 2007) (holding the liberal grant mandate recognizes the military judge is responsible for ensuring the subjective and objective fairness of the fact-finders).

[200] *United States v. Bragg*, 66 M.J. 325, 327 (C.A.A.F. 2008).

[201] *United States v. Albaaj*, 65 M.J. 167, 171 (C.A.A.F. 2007); *see also United States v. Lake*, 36 M.J. 317, 323 (C.M.A. 1993) (holding the Court will not accept reticence by potential members).

[202] *Bagstad*, 68 M.J. at 462.

[203] *Briggs*, 64 M.J. at 286.

[204] *United States v. Townsend*, 65 M.J. 460, 463 (C.A.A.F. 2008).

implied bias, and the public cannot trust Sgt Quick received his due process right to an impartial fact-finder at court-martial.

GySgt Price made several statements during group and individual *voir dire* that showed he could not impartially judge the facts in Sgt Quick's case. GySgt Price attended the Commandant's Heritage Brief at MCAS Miramar in 2012.[205] When asked what he took away from it he responded "that as staff NCOs and higher we are failing at reading the warning signs of certain problems that are coming out; i.e. drinking and driving, **sexual assault and just conduct unbecoming of the Marines that we need to crack down on**, watch our Marines closer."[206] Additionally, he indicated he attended SAPR training and was told that up to seventy-five percent of sexual assaults allegations were true. Exercising his own discretion though, he told the Court he believed the real percentage was closer to half.[207] Perhaps most egregiously, GySgt Price indicated that he believed Sgt Quick's mere presence at a court-martial meant he must have done something wrong.[208]

The Government attempted to rehabilitate this member by asking him relatively simple questions that suggested the appropriate response. For example, after paraphrasing GySgt Price's response that the Government had at least some evidence

[205] R. at 218.
[206] R. at 319 (emphasis added).
[207] R. at 316.
[208] R. at 230.

against Sgt Quick, trial counsel asked GySgt Price if he believed that the mere possession of that evidence meant Sgt Quick was guilty. "Now, does that give you any indication of whether or not he's actually guilty of what the government's charging him with?"[209] As one might expect, GySgt Price answered no.

These statements are indicative of both an actual and implied bias that the military judge should have resolved in favor of the defense. He clearly indicated that he believed the Commandant expected him to "crack-down" on misconduct, even behavior defined as nebulously as "unbecoming of a Marine." Furthermore, he was equally unambiguous in discussing his belief that Sgt Quick's mere presence in a court-martial meant that he must be guilty of something.

The CAAF has consistently warned against the danger of accepting blanket, perfunctory, assertions of members who claim to be free from influence or bias.[210] Even as recently as November 2013, Captain Jeffery Fischer, JAGC, U.S. Navy, an appellate judge on the NMCCA, acknowledged during oral argument

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[209] R. at 312.

[210] *See United States v. Rosser*, 6 M.J. 267, 273 (C.M.A. 1979) (holding a military judge inappropriate relied on the blanket assertion of a member that he was not influenced by the statements of his military superior) (citing *United States v. Adamiak*, 4 U.S.C.M.A. 412, 419 (1954) (holding a question is not concluded by a member's statement that he was free from influence)).

in *United States v. Easterly* that members are particularly adept at giving, what he sardonically called, "the right answer" during *voir dire.*[211] That is precisely what happened here.

After giving several answers that directly evidenced his inability to judge the facts impartially, the Government invited GySgt Price to rehabilitate himself by giving perfunctory "cleansing" responses that did little to probe his actual bias. Moreover, when questioned individually by defense counsel he limited himself, almost exclusively, to "Yes, Ma'am, No Ma'am" responses. The military judge abused his discretion by not removing him from the panel upon request. However, even if this Court is deferential to the military judge's decision on the more subjective analysis of actual bias, the objective public cannot trust, based on GySgt Price's answers, that he was impartial in weighing the facts. This flies in the face of Sgt Quick's fundamental due process right to a fair trial. Accordingly, the Court should set aside the findings and sentence, and remand this case for a new trial on the merits.

Conclusion

Sgt Quick had a fundamental right to an impartial panel. That right was violated when the military judge abused his discretion and allowed GySgt Price to remain a member despite

[211] Oral Argument at 50:22, *United States v. Easterly*, N-M. Ct. Crim. App. 201300067 (Nov. 26, 2013).

his troubling responses during both group and individual *voir dire*. Those responses showed GySgt Price had both an actual bias and implied bias. The public cannot trust Sgt Quick was tried and convicted by an impartial court-martial. Consequently, this Court should set aside the findings and sentence and remand this case for a new trial on the merits.

VI.

SGT QUICK WAS ONE OF FOUR INDIVIDUALS ACCUSED OF COMMITTING MISCONDUCT IN RELATION TO THE 1 JULY 2012 INCIDENT INVOLVING TR. SGT QUICK WAS THE ONLY ONE AWARDED A PUNITIVE DISCHARGE. CONSEQUENTLY, HIS SENTENCE WAS OVERLY HARSH IN LIGHT OF THE RESULTS IN THE COMPANION CASES.

Principles of Law

Article 66(c) affords this Court the broad authority to review for sentence appropriateness.[212] Embedded within that authority is the ability to ensure uniformity and evenhandedness on sentencing for similar offenses. "The power to review a case for sentence appropriateness, which reflects the unique history and attributes of the military justice system, includes, but is not limited to considerations of uniformity and evenhandedness of sentencing decisions."[213] Sentence disparity analysis is not often warranted and should only occur "in those rare instances

[212] 10 U.S.C. § 866(c); *see also United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001).
[213] *Id.* (citing *United States v. Lacy*, 50 M.J. 286, 287-88 (C.A.A.F. 1999)).

in which sentence appropriateness can be fairly determined only in reference to disparate sentences adjudged in closely related cases."[214] As such, an appellant bears the burden of showing a case is closely related and that the sentences are "highly disparate."[215] If the appellant meets this burden, the Government is then required to show the rational basis for the disparity.[216]

Discussion

This Court should set aside Sgt Quick's bad-conduct discharge because his sentence is overly severe in light of the outcomes in companion cases and, at this point, it is the only meaningful relief this Court can grant.

1. Sgt Quick's bad-conduct discharge represents a massive departure from the outcomes in the companion cases.

Sgt Quick was convicted of three offenses: conspiracy to distribute indecent material, viewing indecent material, and indecent conduct. Two of these convictions emanated from the production of a cell phone video by Cpl Hollis, without Sgt Quick's prior knowledge or consent. The third was merely for his participation in, what the Government charged as, a private, consensual sexual act.

Cpl Hollis pleaded guilty at general court-martial before a military judge. It was Cpl Hollis who actually made the video and showed it to his friends. He was reduced to pay grade E-2 and confined for six months, but retained at court-martial.

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[214] *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985).
[215] *Lacy*, 50 M.J. at 288.
[216] *Id.*

PFC Hearst was also accused of raping TR. Additionally, testimony was elicited at Sgt Quick's trial that PFC Hearst also participated in group sex under similar circumstances as Sgt Quick. The Government allowed him to plead guilty to adultery at summary court-martial, where a punitive discharge is not even an authorized punishment. Finally, Joel Montez, who was a civilian on 1 July 2012, was not even prosecuted by the U.S. Attorney in San Diego, even though TR also accused him rape.

2. The members did not understand the impact of their bad-conduct discharge, and therefore punished Sgt Quick more severely than they intended.

While the military judge instructed the members on the impact of a bad-conduct discharge, his explanation was bare-boned.[217] It made no mention of the sentencing consequences that would inexorably occur in the event they awarded such a discharge.[218] The sentence the members adjudged is *prima facie* evidence they did not understand how their sentence would function as a matter of law. They sentenced him to reduction to

[217] R. at 1497.

[218] While Sgt Quick has not raised instructional error on sentencing as a separate assignment of error, the facts of this case suggest members will benefit from a more complete explanation of the sentencing impacts of punitive discharges pursuant to Articles 58(a) and 58(b). *See United States v. McNutt*, 62 M.J. 16, 19 (C.A.A.F. 2005) (holding there is no bright line rule that prohibits military judges from instructing on the collateral impact of sentencing and that military judges should instruct on matters of general knowledge or concern) (citing *United States v. Duncan*, 53 M.J. 494, 499 (C.A.A.F. 2000)).

pay-grade E-3, confinement for six months, and a bad-conduct discharge. The members' decision to award a bad-conduct discharge necessitated, as a matter of law, Sgt Quick's reduction to pay-grade E-1[219]; two ranks lower than the members obviously intended. Furthermore, under Article 58b, that punitive discharge also required Sgt Quick to forfeit all pay and allowances.[220] The members clearly did not intend to punish Sgt Quick financially because they did not adjudge forfeitures. When they learned about the impact of this portion of their sentence, they each signed a letter to the convening authority, asking him for clemency. Ultimately, their pleas were ignored and Sgt Quick was both further reduced and deprived of money that could have been used to help his family.

Conclusion

Sgt Quick received a sentence that included a punitive discharge. This sentence was far more severe than those suffered by co-accuseds in companion cases. Furthermore, the members clearly did not understand the impact their decision to award a bad-conduct discharge would have on the rest of their sentence. Consequently, this sentence was a grave departure from the results in related cases, it exceeded the scope of the members' intentions, and was unfair under the circumstances. This Court

[219] *See* 10 U.S.C. § 858a (2012).
[220] *See* 10 U.S.C. § 858b (2012).

CERTIFICATE OF FILING AND SERVICE

I certify that the original and the appropriate number of copies of the forgoing were hand-delivered to the Court on 27JAN14, that a copy was hand-delivered to Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, and that a copy was posted on CMITS on 27JAN14.

DAVID A. PETERS
Captain, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
Building 58, Suite 100
Washington Navy Yard, D.C. 20374
(202) 685-7088
Fax (202) 685-7426

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
	)	Case No. 201400027
v.	)	
Eric D. RAINES, Lance Corporal (E-3) U.S. Marine Corps, Appellant	)	Tried at Marine Corps Base Hawaii, Kaneohe Bay, Hawaii on May 3, 2013, July 18 and 23, 2013 and August 26-29, 2013, by a general court-martial convened by Commanding General, 3d Marine Division

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Errors Assigned

I.

IS THE FORCIBLE SODOMY CONVICTION LEGALLY AND FACTUALLY SUFFICIENT?

II.

38 C.F.R. § 3.12(c)(2) BARS THOSE VETERANS WHO WERE DISCHARGED FROM A GENERAL COURT-MARTIAL FROM RECEIVING BENEFITS FROM THE DEPARTMENT OF VETERANS AFFAIRS ("VA"). APPELLANT'S SENTENCING CASE FOCUSED ON HIS POST TRAUMATIC STRESS DISORDER. DURING SENTENCE DELIBERATIONS, THE MEMBERS ASKED THE MILITARY JUDGE WHAT REHABILITATIVE SERVICES WERE AVAILABLE TO APPELLANT IF PUNITIVELY DISCHARGED. DID THE MILITARY JUDGE ERR WHEN HE INSTRUCTED THAT APPELLANT COULD PETITIION THE VA FOR REHABILITATIVE SERVICES?

III.

TO VIOLATE ARTICLE 120, UCMJ, FOR VIDEOTAPING THE SEXUAL ACTS OF ANOTHER WITHOUT THEIR CONSENT, THE SUBJECT OF THE VIDEO MUST HAVE A REASONABLE EXPECTATION OF PRIVACY WHEN THEY ARE RECORDED. DID THE SUBJECTS OF THE VIDEO RECORDINGS POSSESS A REASONABLE EXPECTATION OF PRIVACY IN APPELLANT'S OPEN STUDIO APARTMENT WHERE THE SUBJECTS ENTERED FOR THE SPECIFIC PURPOSE OF A SEXUAL ENCOUNTER, DID NOT OTHERWISE HAVE A SIGNIFICANT RELATIONSHIP WITH APPELLANT, HAD NO CUSTODY OR CONTROL OVER THE PROPERTY, RECEIVED NO ASSURANCES THAT THE PROPERTY WAS NOT MONITORED, AND THE CAMERA WAS OBSERVABLE THROUGH A GLASS DOOR CABINET AT THE FOOT OF THE BED?

Statement of Statutory Jurisdiction

Appellant's approved sentence includes a bad-conduct discharge. Accordingly, this Court has jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2006).

Statement of the Case

A general court-martial composed of members with enlisted representation convicted Appellant, contrary to his pleas, of three specifications of indecent conduct, in violation of Article 120, UCMJ, one specification of other sexual misconduct (recording the private area of another without that person's consent), in violation of Article 120c, UCMJ, and one specification of forcible sodomy, in violation of Article 125, UCMJ, 10 U.S.C. §§ 920, 920c, 925 (2012), respectively. Prior to trial by general court-martial, Appellant entered pleas of

guilty to two specifications of failure to obey a lawful general regulation for using an analogue controlled substance and synthetic THC, in violation of Article 92, UCMJ, 10 U.S.C. § 892 (2012). The Members sentenced Appellant to forfeiture of all pay and allowances, reduction to pay grade E-1, confinement for twenty-four months, and a bad-conduct discharge. The Convening Authority approved the sentence as adjudged and, except for the discharge, ordered the sentence executed.

Statement of Facts

From about May to July of 2012, on numerous occasions, Appellant surreptitiously videotaped various sexual encounters he had with multiple women using a webcam that was strategically placed to focus on his bed. One of these women was A.D., who testified that she began a sexual relationship with Appellant, but had no idea that he was secretly videotaping their consensual sexual encounters. (R. 294-95.) When the relationship soured, Appellant sent A.D. a text message saying, "Would telling you that I recorded us having anal sex get you to stop ignoring me and treating me like shit?" (R. 300; Pros Ex. 8.)

Another such woman was J.S. She also testified that Appellant had videotaped a sexual encounter between the two of them. (R. 307.) She was adamant that she was unaware that Appellant was videotaping them have sex. (R. 308.)

Around the same time, Appellant was also filming himself having sex with another female, J.G., who testified that she was unaware that Appellant was recording the two of them engaged in sexual activity. (R. 335.) She explained that she had never seen the recording equipment, and Appellant had never told her that he was recording them. (R. 335.) Finally, she testified that she felt stressed out and upset when she learned that Appellant had recorded these videos. (R. 336.)

A. Forcible Sodomy of A.B.

Another of these women was A.B., who met Appellant on a beach in Oahu, Hawaii in late May 2012. (R. 237.) A.B. was alone at the beach when she met Appellant and his two friends, who introduced themselves to A.B., eventually inviting her back to their apartment for a barbeque. (R. 237-38.) At the barbeque, A.B. consumed approximately five mixed drinks over the course of several hours. (R. 239.) A.B. was not a regular consumer of alcohol, and she quickly became intoxicated. (R. 239.) During this period of time, Appellant arrived at the house, having gone back to his own apartment to take a shower. (R. 239.) A.B. self-admittedly "came-on" to Appellant, pushing him up against a wall and kissing him. (R. 239.) Sometime thereafter, the pair left the party to go to Appellant's apartment, intent on having sex. (R. 240.) Although A.B.'s memory of the events of that night was spotty, she recalled

engaging in consensual sex with Appellant. (R. 240.) A.B.'s first memory of their sexual encounter was awakening with a pain in her rectum. (R. 241.) She testified that upon waking up, Appellant flipped her over and began having vaginal sex with her. (R. 241.) Over the course of thirty more minutes, the couple engaged in various sex acts, some of which A.B. remembered. (R. 242.) Sometime later that night, A.B. returned home. (R. 255-56.) Over the course of several weeks, the pair continued texting, however, when A.B. advised Appellant that she only wished to remain friends, he began threatening her with revenge. (Pros. Ex. 14.)

On June 16, 2012, Appellant texted A.B. a still photo of the two of them having sex. (Pros. Ex. 14 at 8.) Until this point, A.B. had no idea that Appellant had videotaped their sexual encounter. (R. 242.) Upon seeing the text message, A.B. immediately contacted the police. (R. 245.) Sometime later, at the police station, A.B. viewed the videotape. (R. 245.) In viewing the first thirteen minutes of the video, A.B. learned that Appellant had been penetrating her anus while she was unconscious. (Pros. Ex. 6). A.B. testified that she would not have consented to anal sex with Appellant. (R. 243.) She also testified that she had no memory of Appellant engaging in anal sex with her that night beyond the pain in her rectum. (R. 246.)

B. Military Judge's Instructions on Collateral Consequences

Following the sentencing arguments of both sides, the Military Judge instructed the Members on matters of punishment. (R. 500-507.) Regarding punitive discharge, the Military Judge stated:

> This court may adjudge a punitive discharge in the form of either a dishonorable discharge or a bad-conduct discharge. Such a punitive discharge deprives one substantially of all benefits administered by the Department of Veterans Affairs and the Department of the Navy.

(R. 503.)After being sent to deliberate on punishment, the Members asked the following question: "What rehabilitative services are available to a combat veteran who receives a punitive discharge?" (R. 510.)

Regarding an 802 session held outside the presence of the Members, the Military Judge said,

> In discussing this with counsel, we have concluded that a servicemember who receives a punitive discharge is not necessarily entitled to treatment or rehabilitative services, however, may petition the Department of Veteran's Affairs for such treatment. And both parties during the 802 expressed the fact that they had no objection to that instruction or answer that I provide to the members.

(R. 510.)

Although both parties agreed to this instruction, the defense initially asked the Military Judge to reread the aforementioned instruction given before deliberations. (R.

510.) The Military Judge again set forth the instruction he planned to give the members, which fairly encapsulated his earlier instruction. (R. 510.) Both parties advised that they had no objection to the instruction as read by the Military Judge. (R. 510.)

Summary of Argument

I.

Appellant's conviction for forcible sodomy is legally and factually sufficient because forcible sodomy includes those situations where a victim is unable to consent due to intoxication. In that situation, the only force required is that necessary to achieve penetration, however slight. The videotape evidence depicts sufficient acts from which the jury could reasonably conclude that Appellant was penetrating A.B.'s anus, however slight.

II.

The instruction given by the Military Judge in response to the Member's question regarding rehabilitative services available following a punitive discharge was not error. But even if it was error, the error was not plain, and Appellant was not materially prejudiced. Both parties agreed to the instruction as given by the Military Judge. Thus, the instruction given is examined for plain error. Any error was not plain because the instruction correctly advised the Members

that a punitive discharge would deprive Appellant of rehabilitative services through the VA. Although the Military Judge, and all parties for that matter, mistakenly believed Appellant could petition the VA for reinstatement, rather than BCNR, any error did not result in material prejudice to Appellant's substantial rights.

III.

The women videotaped by Appellant had a reasonable expectation of privacy when they had sex with Appellant in his apartment. While having sex with Appellant, these women didn't know that he was secretly recording their sexual activities and that third persons would eventually view these sex acts. The fact that the women could have noticed the recording equipment is irrelevant. They all testified that they were not aware of it and did not know that they were being videotaped.

Argument

I.

APPELLANT'S CONVICTION FOR FORCIBLE SODOMY IS LEGALLY AND FACTUALLY SUFFICIENT BECAUSE FORCIBLE SODOMY INCLUDES SITUATIONS WHERE A VICTIM CANNOT CONSENT DUE TO INCAPACITY.

A. <u>These issues are reviewed *de novo*.</u>

This Court reviews claims of legal and factual insufficiency *de novo*. Article 66(c), UCMJ; *United States v. Beatty*, 64 M.J. 456, 459 (C.A.A.F. 2007).

B. Considering the evidence admitted at trial in a light most favorable to the prosecution, a reasonable fact-finder could have found each element beyond a reasonable doubt.

The test for legal sufficiency is whether, considering the evidence admitted at trial in a light most favorable to the prosecution, a reasonable fact-finder could have found all the elements beyond a reasonable doubt. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000 (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Testing for factual sufficiency, this Court asks whether, after weighing the evidence in the record of trial, this Court is independently convinced of Appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

In testing for factual sufficiency, this Court is required to "recogniz[e] that the trial court saw and heard the witnesses." *Id.* This is not a *pro forma* legal requirement. Rather, it takes into account that the trier of fact is best situated to assess a witness's credibility while testifying. *See United States v. Madey*, 14 M.J. 651, 653 (A.C.M.R. 1982), *rev. denied*, 15 M.J. 183 (C.M.A. 1983); *see also United States v. Ferguson*, 35 F.3d 327, 333 (7th Cir. 1994), *cert. denied*, 514 U.S. 1100 (1995)(trial court's evaluation of witness credibility "will not be disturbed unless it is completely without foundation."). It also takes into account that, where the court

members are properly instructed to consider a witness's credibility, this Court should presume that the members followed the Military Judge's instructions. *See United States v. Collier*, 67 M.J. 347 (C.A.A.F. 2009).

1. Forcible sodomy includes constructive force situations where a victim is unable to consent to the sexual activity due to incapacity from intoxication.

While the sole element of Article 125 is that Appellant engaged in unnatural carnal copulation[1] with another person or with an animal, the President has established that if Sodomy is committed by force and without the consent of another person, the maximum punishment is increased from confinement for five years to confinement for life. MCM, Part IV. ¶ 51.e. Therefore, this aggravating factor must also be submitted to the fact-finder and proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Even if the punishment were not increased, "by force and without consent" is an additional factor, in the absence of which, sodomy may not be criminalized, so it must be found by the trier of fact. *Castellano*, 2013 CAAF LEXIS 568 at *5. Therefore, the two elements of Article 125 in this case are that Appellant engaged in sodomy (in this case anal penetration) and that such sodomy

[1] Defined as "tak[ing] into that person's mouth or anus the sexual organ of another person or of an animal; or to place that person's sexual organ in the mouth or anus of another person or of an animal …" Article 125, UCMJ, 10 U.S.C. § 925 (2012).

was by force and without consent. "Penetration, however slight, is sufficient to complete the offense." Article 125, UCMJ, 10 U.S.C. § 925 (2012).

Under UCMJ, Article 125, a well-developed common-law doctrine of constructive force covers situations where the victim was not able to freely consent to sexual activity due to incapacity.[2] Thus, by force and without consent, as used in this context, includes constructive force situations where a victim is unable to consent because of severe intoxication.

2. Appellant committed sodomy by force and without the consent of the victim.

In this case, there was more than sufficient evidence for the Members to conclude that A.B. was too intoxicated to consent to anal sex. During the first thirteen minutes of the video, A.B. is face down in Appellant's bed with her head turned to the right and her feet positioned inward. (Pros. Ex. 6.) For over thirteen minutes, she is nearly motionless. *Id.* Characterizing A.B. as "passive," Appellant points out every slight movement made by A.B. during this entire thirteen minutes, which, notably, is only two or three very slight movements over the

[2] *See e.g. United States v. Quintanilla*, 56 M.J. 37, 81-82 (C.A.A.F. 2001) (affirming conviction of forcible sodomy based on victim's tender years and incapacity due to sleepiness); *United States v. Traylor*, 40 M.J. 248 (C.M.A. 1994) (victim was unaware that the accused was penetrating her and, thus, could not consent); *United States v. Mathai*, 34 M.J. 33 (C.M.A. 1992) (rape is by force and without consent when victim was unable to resist due to intoxication).

course of thirteen minutes. (Def. Brief at 7, 18.) While this level of animation is sufficient to establish that she wasn't dead, such minor movements over the course of thirteen minutes do little to demonstrate that she willingly participated in sexual activity.[3] To the contrary, the general lack of movement by A.B. and her virtually unchanged horizontal position while Appellant licked, lubricated, and penetrated her rectum with his fingers, and eventually his penis, reveal that she was not cooperating in the process. She was, by any objective account, completely unconscious and unaware of what Appellant was doing to her.[4] It was only when Appellant changed the angle of his penis, clearly in an effort to penetrate deeper into A.B.'s anus that she awoke from the discomfort, looking disoriented and confused. (Pros Ex. 6 at 13:00-13:35.)

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[3] Her lack of movement while being continually licked, rubbed, and prodded in the anus also suggests that she was heavily intoxicated at the time. At trial, the Government called an expert toxicologist who, using the estimated number of drinks and A.B.'s age, gender, weight, and height calculated a high Blood Alcohol Content (BAC) range of between .077 to .259. (R. 282-83.) Depending on several factors, including the alcohol level in each drink, the expert testified that a women matching A.B.'s physical characteristics might experience a "black out," and/or period of unconsciousness. (R. 283-85.)

[4] At one point during the video, Appellant penetrates A.B.'s anus with his finger. Surprisingly, she does not move in response. (Pros. Ex. 6 at 05:20.)

C. Appellant's arguments fail given the depth of the real and circumstantial evidence presented by the United States at trial.

Appellant's argument that the Government failed to prove beyond a reasonable doubt that penetration occurred because the video doesn't actually depict Appellant's penis inside A.B.'s anus is misplaced, highlighting the inconsequential. By arguing this, Appellant ignores the long held principle of American jurisprudence allowing proof by circumstantial evidence. For over five minutes, Appellant spreads A.B.'s buttocks and licks and lubricates her anus, eventually straddling her, slowly thrusting forward and backward. (Pros. Ex. 6 at 00:00-10:30.) His actions in preparing this area of her body for penetration are powerful circumstantial evidence of his intent.

Furthermore, his actions in slowly thrusting forward and back reveal that he did so. And as Appellant changed the angle of his penis, A.B. woke up, evidencing a deeper and more painful level of penetration. (Pros. Ex. 6 at 13:00-13:45.) A.B.'s testimony confirmed as much, when she testified that she awoke to a pain in her rectum, a matter she later discusses with Appellant, saying, "Why do you like anal so much? It feels like you're stabbing me in the ass with a knife." (Pros Ex. 6 at 54:00.) Although Appellant is correct that the video does not depict the actual penetration of his penis inside her anus, all of the circumstantial evidence supports that he did. In viewing

the video, and taking into account all of the evidence, both direct and circumstantial, the Members reasonably concluded that Appellate had penetrated A.B.'s anus with his penis.

Appellant's mistake of fact argument is equally unpersuasive. An accused can establish a mistake of fact defense where he can show that he had a reasonable and honest, if mistaken, belief that the victim consented. R.C.M. 916(j). Although not specifically invoked, here, Appellant appears to challenge the factual sufficiency of his conviction on the grounds that he had a reasonable mistake of fact. The test for factual sufficiency is set forth above.

Appellant makes much of the fact that the video begins sometime after A.B. and Appellant arrive at the apartment, A.B. having already taken off her clothes and changed into Appellant's boxer shorts and t-shirt. (Appellant's Br. at 18.) From that, Appellant concludes that sex had already taken place. (Appellant's Br. at 20.) However, at the time Appellant turned on the video recorder, A.B. was already face down and motionless on his bed. (Pros. Ex. 6.) Thus, a more likely conclusion is that A.B. changed and passed out on Appellant's bed, and only then did Appellant turn on the video to record himself sodomizing her.[5] Appellant characterizes A.B. as forward and

[5] The facts of this case reveal that Appellant threatened at least two different women with placing the videos he had

sexually aggressive for actions she self-admittedly took earlier that day, arguing that she was the sexual aggressor. (R. 19, 20.) But the video begins with a much different perspective. It shows a woman virtually motionless for over thirteen minutes despite continued and repeated anal probing. (Pros. Ex. 6.) It was not unreasonable for the jury to have concluded that this type of sexual contact is of a variety that most reasonable persons would find uncomfortable, or least so out of the ordinary that it would warrant more than two slight movements throughout the duration of its course. The most logical conclusion is the one reached by the Members, namely, that A.B. was so intoxicated that she was unaware of what was being done to her. In the light most favorable to the United States, this Court can be convinced beyond a reasonable doubt that a reasonable fact finder would have considered the same evidence and came to the same conclusion regarding Appellant's guilt.

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secretly recorded of them having anal sex on the Internet. (R. 300, 310; Pros Ex. 9.) Arguably, Appellant threatened this because he knew that this type of sex act was particularly degrading and humiliating to the women.

II.

THE INSTRUCTION GIVEN BY THE MILITARY JUDGE WAS NOT PLAIN ERROR BECAUSE IT PROPERLY ADVISED THE MEMBERS OF THE COLLATERAL CONSEQUENCE OF A LOSS OF VA BENEFITS UPON AWARD OF A PUNITIVE DISCHARGE.

A. Standard of Review.

Whether a jury was properly instructed is a question of law reviewed de novo. *United States v. Pope*, 69 M.J. 328, 333 (C.A.A.F. 2011)(citing *United States v. Schroder*, 65 M.J. 49, 54 (C.A.A.F.2007). Failure to object to an instruction given or omitted waives the objection absent plain error. *Id.* (citing Rule for Courts-Martial (R.C.M.) 920(f)). "The plain error standard is met when: (1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights." *Id.* (citing *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F.2008)).

B. Only in limited circumstances should courts concern themselves with the collateral consequences of appropriate punishments.

In general, "courts-martial [are] to concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of the penalty under consideration." *United States v. McNutt*, 62 M.J. 16, 19 (C.A.A.F. 2005) (quoting *United States v. Griffin*, 25 M.J. 423, 424 (C.M.A. 1988)). When military judges are asked by members about possible collateral consequences of a

particular sentence, the "appropriate reply ordinarily is to reaffirm the idea that collateral consequences are not germane." *Id.* (quoting *Griffin*, 25 M.J. at 424). "[P]roper punishment should be determined on the basis of the nature and seriousness of the offense and the character of the offender, not on many variables not susceptible of proof." *Id.* (citing *United States v. Mamaluy*, 10 C.M.R. 176, 180 (C.M.A. 1959).

C. Only where a factual predicate exists and a party requests instructions on collateral consequences should courts provide those instructions.

In certain circumstances, it may be appropriate for the military judge to instruct on collateral matters. *Id.* (citing *United States v. Boyd*, 55 M.J. 217, 221 (C.A.A.F. 2001) (stating the threshold to consider an instruction on a collateral sentencing issue is whether an evidentiary predicate exists upon which to justify that instruction)). In *Boyd*, the Court of Appeals for the Armed Forces established a rule requiring instructions about the effect of a punitive discharge on military retirement where there was an evidentiary predicate and a party requests it. 55 M.J. at 221. However, the *Boyd* Court determined that even though the military judge in that case had failed to provide an instruction about retirement benefits, there had been no prejudice to the appellant because the factual predicate was so minimal. *Id.* The appellant had offered no evidence of the

value of his retirement and had not mentioned a hope of retirement in his unsworn statements. *Id.*

Moreover, a military judge must also exercise correct principles of applicable law and properly tailor instructions based on the particular facts and circumstances of the case. *United States v. Greaves*, 46 M.J. 133, 138-39 (C.A.A.F. 1997). The *Greaves* court emphasized that the members had questions about the effect of a punitive discharge and that the appellant was "perilously close" to retirement eligibility. *Id.* The *Greaves* court compared the circumstances in that appellant's case to those in *United States v. Henderson*, 29 M.J. 221 (C.A.A.F. 1989), where the Court of Appeals for the Armed Forces found no error because appellant was not close to retirement, the members did not have questions about the effects of a punitive discharge, defense counsel did not object to the judge's instructions, and defense counsel was able to argue the loss of benefits during his sentencing argument. *Greaves*, 46 M.J. at 138 (citing *Henderson*, 29 M.J. at 233).

The Court of Appeals for the Armed Forces' ruling in *Henderson* was partially overruled by its decision in *Boyle* for cases analyzing instructions related to the effect of a punitive discharge on retirement benefits. See *Boyle*, 55 M.J. at 221.

D. The Military Judge's instructions to the Members were accurate and appropriate.

The Military Judge instructed the Members on two separate occasions that a punitive discharge would deprive Appellant of "substantially all" benefits administered by both the Department of the Navy and Department of Veterans' Affairs. (R. 503, 510-11.) He further stressed to the Members that Appellant would not be entitled to rehabilitative services noting that "he may nonetheless petition or ask for those services." (R. 511.) These instructions were more than adequate to impress on the Members the near certainty that a punitive discharge would result in Appellant losing all rehabilitative services through the VA. Accordingly, even assuming *arguendo* that the Military Judge's instruction contained error, Appellant has not demonstrated that this error was plain and resulted in, or even contributed to, the bad-conduct discharge he received.

E. The Appellant suffered no material prejudice to substantial rights.

Appellant suffered no material prejudice because the critical fact, that a punitive discharge would deprive Appellant of "substantially all" rehabilitative services through the VA, was known to the Members at the time they awarded a punitive discharge. While Appellant is correct that the Military Judge, and all parties for that matter, mistakenly believed that application for reinstatement would be through the VA, the fact

remains that an affirmative step would have to be taken by Appellant in order to obtain these services and the Members were aware of this. Appellant fails to explain how or why the outcome would be different had the Military Judge instead instructed the Members, as Appellant now argues in hindsight, that he could petition the Board of Correction for Naval Records rather than the VA for reinstatement of benefits. In a hyper-technical manner, Appellant raises a distinction without a difference regarding administrative processes which the Members were likely uninfluenced by in awarding a punitive discharge.

III.

THE WOMEN SECRETLY VIDEOTAPED BY APPELLANT HAD A REASONABLE EXPECTATION OF PRIVACY IN THE SEXUAL ACTS ENGAGED IN WITH APPELLANT.[6]

A servicemember is guilty of indecent viewing if, without legal justification or lawful authorization, he "knowingly and wrongfully views the private area of another person, without that other person's consent and under circumstances in which that other person has a reasonable expectation of privacy." Article 120c(a)(1), UCMJ. Although the President has not provided elements pursuant to his authority under Article 36, the Military Judge advised the Members that conviction of

[6] This issue was not briefed by Appellant, having been raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982.)

indecent viewing requires the Government to prove beyond a reasonable doubt:

> one, between on or about ... and on or about ... , on the island of Oahu, Hawaii, the accused engaged in certain wrongful conduct, to wit: the videotaping of ... while she was engaged in a sexual act without her consent and contrary to her reasonable expectation of privacy. And, two, that the conduct was indecent.

(R. 402.)

Article 120c defines the term "under circumstances in which that other person has a reasonable expectation of privacy," in pertinent part, as "circumstances in which a reasonable person would believe that a private area of the person would not be visible to the public." Art. 120c(c)(3)(B).

The Supreme Court has stated that "the protection of a person's general right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States." *United States v. Katz*, 389 U.S. 347 (1967). In California, the site of Appellant's misconduct, and in many other states, a common law right to privacy exists.[7]

Information is private when well-established social norms recognize the need to maximize individual control over its

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[7] The phrase "and privacy" was added to California Constitution, article I, section 1 by an initiative adopted by the voters on November 7, 1972 (the Privacy Initiative or Amendment). *Hill v. National Collegiate Athletic Assn.*, 7 Cal. 4th 1, 15 (1994).

dissemination to prevent unjustified embarrassment or indignity. *Hill v. National Collegiate Athletic Assn.*, 7 Cal. 4th 1, 35 (Cal. 1994). California has made clear that the mere fact that a person can be seen by someone does not automatically mean that he or she can legally be forced to be subject to being seen by everyone. *Sanders v. American Broadcasting Companies*, 20 Cal. 4th 907, 916 (Cal. 1999). On this basis, Courts have acknowledged the intrusive effect for tort purposes of hidden cameras and video recorders in settings that otherwise seem private. *Hernandez v. Hillsides, Inc.*, 47 Cal. 4th 272, 291-292 (Cal. 2009).

Moreover, the invasion must be done "in a manner highly offensive to a reasonable person," thereby emphasizing the importance of the objective context of the invasion, including: (1) the likelihood of serious harm, particularly to the emotional sensibilities of the victim; and (2) the presence or absence of countervailing interests based on competing social norms which may render defendant's conduct inoffensive. *Hill*, 7 Cal. 4th at 25-26. To determine "'offensiveness'", courts consider, among other things: "the degree of the intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded." *Hill*, 7 Cal. 4th at 26 (Cal. 1994) (quoting *Miller v. National Broadcasting Co.*, 187 Cal. App. 3d 1463, 1483-1484 (Cal. App. 2d Dist. 1986)).

These privacy interests in California thus inform the analysis of these victims "reasonable expectations of privacy" for the purposes of the instant statute: ~~nude video images taken without consent and for the purposes of leverage or extortion constitute a violation of her reasonable expectation of privacy~~.

All four of the women videotaped, A.B., A.D., J.S., and J.G., testified that they were completely unaware that their sexual activities with Appellant were being videotaped. (R. 242, 294-95, 308, 335.) Although these women consented to sex with Appellant, they did not consent to these acts being viewed by others. Sadly, even with swift police intervention, in this case alone, dozens of people have viewed the videos. This is undoubtedly a source of shame and embarrassment for these women, a fact Appellant was keenly aware of when he threatened them with publication of the videos on the Internet.[8] Appellant suggests that the women didn't have a reasonable expectation of privacy because they should have seen the cameras or noticed that they were there. But, if Appellant is correct that the recording equipment was open and notorious, why not inform the women that they were being recorded? In fact, all of them stated emphatically that Appellant never even hinted that their

[8] Some states have begun criminalizing so-called "revenge porn," an emerging online industry based on shaming or harassing unwitting victims that has been targeted by legislative action in Hawaii and California. *See* Lorelei Laird, *Striking Back at Revenge Porn*, 99 A.B.A. Journal 44 (November 2013).

intimacies were being recorded. (R. 242, 294-95, 308, 335.) Of course, Appellant didn't want them to know because, at least in the case of these three women, they wouldn't have gone through with it.

Here, each of the women videotaped by Appellant was a civilian with a reasonable expectation of privacy in the apartment of Appellant. A person can reasonably expect to have privacy in a room provided by another. *United States v. Domenech,* 623 F.3d 325, 328 (6th Cir. 2010) (citing *United States v. Lyons,* 706 F.2d 321, 324 (D.C. Cir. 1983)). Accordingly, they each had a reasonable expectation of privacy in Appellant's apartment.

Conclusion

WHEREFORE, the Government respectfully requests that this Court affirm the findings and sentence as adjudged and approved below.

CRISTA D. KRAICS
Major, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-8378, fax (202) 685-7687

Signing for

GREGORY R. DIMLER
Commander, U.S. Navy
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
Greg.Dimler@usdoj.gov
(202) 685-7396, fax (202) 685-7687

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CRISTA D. KRAICS
Major, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-8378, fax (202) 685-7687

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES, Appellee v. Eric D. Raines Lance Corporal (E-3) U.S. Marine Corps, Appellant	**APPELLANT'S BRIEF AND ASSIGNMENTS OF ERROR** Case No. 201400027 Tried at Marine Corps Base Hawaii, Kaneohe Bay, Hawaii on 3 May 2013, 18 and 23 July 2013, and 26-29 August, 2013 before a general court-martial convened by Commanding General, 3d Marine Division.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Jason R. Wareham
Captain, USMC
Appellate Defense Division
1254 Charles Morris Street SE
Building 58, Suite 100
Washington Navy Yard, D.C.
20374
Office: (202) 685-7394
Fax: (202) 685-7426
jason.wareham@navy.mil
Appellate Defense Counsel

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Assignments of Error

I.

IS THE FORCIBLE SODOMY CONVICTION LEGALLY AND FACTUALLY SUFFICIENT?

II.

38 C.F.R. § 3.12(c)(2) BARS THOSE VETERANS WHO WERE DISCHARGED FROM A GENERAL COURT-MARTIAL FROM RECEIVING BENEFITS FROM THE DEPARTMENT OF VETERANS AFFAIRS ("VA"). APPELLANT'S SENTENCING CASE FOCUSED ON HIS POST TRAUMATIC STRESS DISORDER. DURING SENTENCE DELIBERATIONS, THE MEMBERS ASKED THE MILITARY JUDGE WHAT REHABILITATIVE SERVICES WERE AVAILABLE TO APPELLANT IF PUNITIVELY DISCHARGED. DID THE MILITARY JUDGE ERR WHEN HE INSTRUCTED THAT APPELLANT COULD PETITION THE VA FOR REHABILITATIVE SERVICES?

III.

TO VIOLATE ARTICLE 120, UCMJ, FOR VIDEOTAPING THE SEXUAL ACTS OF ANOTHER WITHOUT THEIR CONSENT, THE SUBJECT OF THE VIDEO MUST HAVE A REASONABLE EXPECTATION OF PRIVACY WHEN THEY ARE RECORDED. DID THE SUBJECTS OF THE VIDEO RECORDINGS POSSESS A REASONABLE EXPECTATION OF PRIVACY IN APPELLANT'S OPEN STUDIO APARTMENT WHERE THE SUBJECTS ENTERED FOR THE SPECIFIC PURPOSE OF A SEXUAL ENCOUNTER, DID NOT OTHERWISE HAVE A SIGNIFICANT RELATIONSHIP WITH APPELLANT, HAD NO CUSTODY OR CONTROL OVER THE PROPERTY, RECEIVED NO ASSURANCES THAT THE PROPERTY WAS NOT MONITORED, AND THE CAMERA WAS OBSERVABLE THROUGH A GLASS DOOR CABINET AT THE FOOT OF THE BED?[1]

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[1] Submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Statement of Statutory Jurisdiction

Appellant's approved sentence included a bad-conduct discharge. Accordingly, this Court has jurisdiction under Article 66, Uniform Code of Military Justice (UCMJ).[2]

Statement of the Case

A military judge, in a mixed-plea case, sitting as a general court-martial, convicted Appellant, pursuant to his pleas, of two specifications of violating Article 92, UCMJ, 10 U.S.C. § 892 (2012). Members with enlisted representation, sitting as a general court-martial, convicted Appellant, contrary to his pleas, of three specifications of violating Article 120, UCMJ (2008) (Indecent Acts), 10 U.S.C. § 920 (2006), one specification of violating Article 120C, UCMJ (2012), 10 U.S.C. § 920C (2012) (Indecent Acts), and one specification of violating Article 125, UCMJ, 10 U.S.C. § 925 (2012) (Forcible Sodomy).[3] The members sentenced him to reduction to pay-grade E-1, total forfeitures, a bad-conduct discharge and confinement for twenty-four months.[4] The convening

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[2] 10 U.S.C. § 866(b)(1) (2012).

[3] General Court-Martial Order No. 07-2013.

[4] *Id.*

authority approved the sentence and, but for the limitations imposed by applicable regulations, ordered it executed.[5]

Statement of Facts

The Videotaping

In 2012, Appellant, deciding that he would like to record the goings on in and around his apartment, installed digital cameras he connected to his computer.[6] He placed one camera outside his studio apartment door.[7] The other he placed in a glass-door entertainment center located at the foot of his bed.[8] This camera focused primarily on Appellant's bed.[9] Using this camera, Appellant recorded activity occurring on his bed, much of it sexual and without the subjects' knowledge.[10]

A.B.'s Testimony

One person recorded in sexual congress with Appellant was A.B. A.B. and Appellant met on the beach in May, 2012, while each were with friends.[11] At the beach, Appellant and A.B. did

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[5] *Id.*

[6] R. at 312.

[7] *Id.*; Pros. Ex. 15.

[8] Pros. Ex. 2.

[9] Pros. Exs. 6, 8, 10, 11, 13.

[10] *Id.*

[11] R. at 237.

Appellant chose the former.

A.B. claimed she remembered arriving and entering Appellant's apartment, yet she testified that she could not remember what happened immediately upon arrival.[21] She stated she recalled nothing else until she awoke next to Appellant on his bed with a pain in her rectum.[22] Upon turning over, A.B. commenced an approximate hour of admittedly consensual sexual intercourse with Appellant, complete with oral and attempts at anal sex.[23] Much of this tryst was recorded by Appellant.[24] A.B., on direct, claimed she remembered much of the following sex but her memory was spotty.[25] She further claimed she would not have been ok with anal sex that evening.[26] Additionally, on direct examination, A.B. claimed she had no memory of Appellant engaging in anal sex with her.[27] Despite her testimony on direct examination regarding not being "ok", her testimony changed on cross-examination. A.B., when pressed, remembered her and

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[21] R. at 240-41.

[22] *Id.*

[23] Pros. Ex. 6; R. at 255.

[24] Pros. Ex. 6; R. at 255.

[25] R. at 241-42.

[26] *Id.*

[27] R. at 246.

Appellant discussing and trying anal sex.[28] In fact, the video evidence showed A.B. and Appellant try anal sex several additional times that evening.[29] She further recalled on cross the two discussing easier ways to have anal sex in the future.[30] Despite the multiple attempts, A.B. also testified on direct and cross that she either did not recall Appellant ever penetrating her anus or believes he did not.[31]

The A.B. Video Recording

Despite A.B.'s claimed memory lapses, the video recording shows that at some point A.B. became undressed and put on Appellant's shirt and boxers.[32] The video starts with A.B. facedown wearing Appellant's boxers.[33] She immediately shifts her feet and legs.[34] Appellant enters the scene and begins to kiss and undress A.B. and their sexual episode begins.[35] As detailed in Appellant's clemency submission, the following is a

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[28] R. at 254.

[29] Pros. Ex. 6.

[30] R. at 254-55.

[31] R. at 254.

[32] R. 252-53.

[33] Pros. Ex. 6.

[34] *Id.*

[35] *Id.*

list of significant actions by timestamp during the remaining hour-long video.

10:06 - A.B. moans.

10:26 - A.B. adjusts, moves on bed.

10:54 to 13:25- Unclear whether Appellant has penetrated A.B.

13:10 - A.B.'s foot moves again.

13:25 - A.B.'s shoulder's lift, moaning.[36]

13:30 - A.B. looks back behind her and yelps.

14:00 - Puts her arms behind her head.

16:05 - A.B. appears to look at camera.

16:30 - Helps take her own shirt off.

18:15 - A.B. looks at the camera again.

19:00 - Gets on her knees by herself.

20:18 - Moaning similar to moan at 10:06.

20:35 - Looks through legs at camera.

21:50 - Appellant licks A.B.'s anus while she is on hands and knees unassisted.

22:00 - Appellant attempts anal penetration (without success).

23:05 - Appellant lubes A.B.'s anus.

23:55 - Appellant attempts to penetrate again, A.B. has same reaction as earlier attempt.

25:00 - Small talk about anal sex.

26:00- Continues to rub Appellant' legs and arms.

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[36] It was the actions depicted up until this 13:30 time stamp that serves as the basis for the Forcible Sodomy charge as the Government contends A.B. was asleep. *See* R. at 16.

27:00 - Lots of moaning, same moans as 10:06.

29:30 - Grabs his penis and begins to perform oral sex.

30:51 - Analingus again.

32:00 - Grabs Appellant' legs and continues to moan.

33:15 - Rubs Appellant' back, lots of excited moans.

36:50 - Analingus again.

38:20 - Appellant attempts consensual anal penetration again.

39:30 - Conversation about anal.

47:45 - She giggles.

48:38 to 54:48- "Why do you like anal so much? It feels like you're stabbing me in the ass with a knife."

--Sits up, watches him, talks to him, asks questions, puts different pair of boxers on.

54:48 - Sex and oral sex, again.

55:10 - "I'm so sore."

56:09 - Pushes him back, performs oral sex on him.

1:08 - A.B. took her shorts off.

1:09 - They kiss.

1:09:30 - A.B. wiping herself down and cleaning herself off.[37]

The Relationship Ends

Following this first sexual encounter, the two continued their relationship for about two weeks. At some point thereafter the relationship ended. Appellant, upset at A.B.,

[37] Appellant's Clemency Request, encl. 4.

sent her a text message including a photo that appeared to be her and Appellant having sex. Alarmed by this photo, A.B. reported it to the local Hawaii police.[38] The Hawaii police report accuses Appellant of videotaping A.B. without her consent.[39] The police report is silent regarding Forcible Sodomy.[40] Despite the issues with the charge, the members convicted Appellant of the Forcible Sodomy charge.[41] Upon this finding, the defense made a motion pursuant to Rules for Court-Martial 917 and 1102 for a finding of not guilty.[42] The military judge denied the motion.[43]

The Sentencing Case

Appellant's sentencing case centered on his post-traumatic stress disorder.[44] The defense presented the testimony of Appellant's treating physician, Lieutenant Commander (LCDR)

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[38] Appellate Ex. XXII.

[39] *Id.*

[40] *Id.*

[41] R. at 421.

[42] R. at 426.

[43] R. at 427.

[44] R. at 458.

Blair.[45] LCDR Blair described Appellant's extensive PTSD.[46] Appellant suffered from paranoia, hyper vigilance, isolation, anxiety, sleep problems, depression, thoughts of self-harm and guilt.[47] Because of his severe symptoms, on several occasions Appellant was almost hospitalized for his ideations of self-harm.[48] LCDR Blair concluded his testimony by opining that Appellant's prognosis for recovery was poor but possible.[49] He testified that Appellant had a chance at recovery if he could find a very good therapist and overcome his paranoia to form a trusting, therapeutic relationship.[50] Appellant echoed much of LCDR Blair's testimony in his unsworn statement.

Appellant described for the members being part of one of the first units to clear Marjah in Helmand Afghanistan.[51] He spoke about his route clearance patrol.[52] He spoke of his close contact with an eighty pound improvised explosive device

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[45] R. at 457-65.

[46] *Id.*

[47] R. at 458.

[48] R. at 459.

[49] R. at 465.

[50] *Id.*

[51] R. at 479.

[52] *Id.*

("IED").[53] He told the members about being knocked unconscious, awakening to find his friend, the corpsman, bleeding from head to toe, and looking into his other friend's eyes to see one was missing.[54] He spoke of his friends, young Marines, he watched die and the feeling of not being able to stop it.[55] Despite these experiences, Appellant sought to return to the fight.[56] He deployed again.[57] It was following the second deployment that Appellant's life reached bottom.[58] He described how his billet as part of the Commander's Personal Security Detachment ("PSD") instilled paranoia and hyper vigilance.[59] Appellant concluded with talking about making changes since hitting rock bottom.[60] His final remarks spoke of his support system and his desire to improve his life.[61]

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[53] R. at 480.

[54] *Id.*

[55] *Id.*

[56] R. at 480-81.

[57] *Id.*

[58] R. at 482-83.

[59] *Id.*

[60] R. at 485-86.

[61] R. at 486.

The members then received argument of counsel.[62] The Government requested a sentence of fifteen to twenty years of confinement and a dishonorable discharge.[63] The defense argued against a discharge and requested instead confinement for four to six months.[64] Approximately an hour after deliberations had begun, the members asked the military judge: "What rehabilitative services are available to a combat veteran who receives a punitive discharge?"[65] The military judge, without objection of counsel, advised: "a punitive discharge deprives one of substantially all benefits administered by the Department of Veterans Affairs. A combat veteran may nonetheless, however, petition the Department of Veterans Affairs for rehabilitative services. He is not, *per se*, entitled to the services."[66] The members then took only twenty minutes before awarding Appellant reduction to pay-grade E-1, total forfeitures, confinement for twenty-four months, and a bad-conduct discharge.[67]

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[62] R. at 489.

[63] R. at 490.

[64] R. at 498.

[65] R. at 510.

[66] R. at 510-11.

[67] R. at 511.

Summary of Argument

I.

The evidence is not factually or legally sufficient to support a conviction of forcible sodomy. The evidence presented at trial, in totality, does not overcome the Government's burden of beyond reasonable doubt on the elements of penetration and/or consent. Even if these elements are found minimally supported, the defense of mistake of fact exists. The best evidence, the illicit video, does not sufficiently show the actions of the parties to convict. The video itself is unclear regarding A.B.'s mental state. The video shows nothing conclusive of penetration. A fair viewing of the video shows indications by A.B. that would give a person a reasonable belief she was consenting to Appellant's acts. Additionally, A.B.'s testimony cannot be relied upon due to its internal confliction, her omission of a forcible sodomy allegation from prior police report, and her continued sexual conduct with Appellant.

II.

Under the Department of Veterans Affairs federal code, no service member who receives a punitive discharge may receive VA benefits. The members' question showed their concern for the impact a punitive discharge would have on Appellant's treatment. The military judge's instruction following their question was

misleading. It left the members with the impression that Appellant could still be eligible for VA benefits. Laboring under this error, the members awarded a punitive discharge. The Court should set aside the findings and sentence.

Argument

I.

THE EVIDENCE PRESENTED TO SUPPORT THE FORCIBLE SODOMY CHARGE IS NOT PROOF BEYOND REASONABLE DOUBT OF THE ELEMENTS OF PENETRATION, NON-CONSENT, OR AN ABSENCE OF MISTAKE OF FACT.

Standard of Review

This Court, when examining the factual sufficiency of a charge, must itself be convinced of the Appellant's guilt beyond a reasonable doubt.[68] "The test for legal sufficiency requires this court to review the evidence in the light most favorable to the Government; in doing so, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the evidence is legally sufficient."[69]

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[68] *United States v. Lucas*, No. 201100372, 2012 WL 3728017 (N-M. Ct. Crim. App. Aug. 28, 2012) (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

[69] *United States v. Reed*, 51 M.J. 559 (N-M. Ct. Crim. App. 1999) *aff'd*, 54 M.J. 37 (C.A.A.F. 2000).

Discussion

To be guilty of forcible anal sodomy an accused must penetrate, however slight, the anus of another by force and without consent.[70] If the victim is asleep or otherwise unable to consent at the time of the sodomy, no more force is necessary than that required for penetration.[71] Each of these elements must be proven beyond a reasonable doubt.[72] An affirmative defense is raised to a crime when an accused presents some evidence of its existence without regard for its source or credibility.[73] Once raised, an affirmative defense must be overcome by the prosecution by proof it does not exist beyond a reasonable doubt.[74] When evaluating both force and consent, the courts look to the totality of the circumstances.[75]

Given the evidence raised in this case, the Government cannot support its conviction beyond a reasonable doubt.

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[70] Article 125, UCMJ, 10 U.S.C. § 925 (2012).

[71] *United States v. Brown*, No. 201300020, slip op. at *5, (N-M. Ct. Crim. App. Oct. 31, 2013), *review denied*, 73 M.J. 258 (C.A.A.F. 2014), *reconsideration denied*, 14-0226/NA, 2014 WL 1759791 (C.A.A.F. Apr. 2, 2014).

[72] *United States v. Prather*, 69 M.J. 338, 342 (C.A.A.F. 2011) (citing *In re Winship*, 397 U.S. 358, 364 (1970)).

[73] *United States v. Stanley*, 71 M.J. 60 (C.A.A.F. 2011).

[74] Rules for Courts-Martial ("R.C.M.") 916 (b)(1), Manual for Courts-Martial, United States (2012).

[75] *United States v. Bright*, 66 M.J. 359, 363 (C.A.A.F. 2008). *See also United States v. Webster*, 40 M.J. 384, 386 (C.M.A. 1994).

The evidence is deficient in two specific ways: 1) the evidence does not show lack of consent beyond a reasonable doubt; and 2) there is not proof beyond a reasonable doubt that Appellant penetrated A.B.'s anus. In most cases of this ilk, the courts must take the parties at their word. Yet, the existence of a video record in this case lends to the best evaluation beyond mere testimony.

Consent

There is little evidence in the record to support the absence of A.B.'s consent. In evaluating the totality of the circumstances, this Court should begin its analysis at the house party. It was at the party that A.B. made advances to Appellant--a person she met hours prior. She grabbed him and pushed him against the wall. She kissed him. She discussed having sex with him. She gave him the ultimatum of taking her to bed at his place or not at all. This enthusiasm apparently continued once they arrived at his apartment given her change of dress upon the start of the video. A fair inference can be drawn in favor of Appellant from her wearing his boxers and t-shirt at the start of the video. It is reasonable that the two engaged in sexual activity upon entering Appellant's apartment, before the recording began. It is also reasonable that A.B. slipped into Appellant's boxers and t-shirt after the first sexual encounter ended. All of these events counter the Government's assertions that Appellant acted without A.B.'s consent. Given the facts and inferences leading up to the

video, A.B. is either innocently confused or misleading the court out of animus.[76]

A fair viewing of the video itself also erodes the non-consent element. Appellant approaches A.B. slowly. Instead of a rushed, forceful, approach to A.B., Appellant comes on to her progressively. He begins with massaging her clothed buttocks. He then slowly removes her shorts and begins to kiss and rub her bare buttocks. After continuing these actions for a time, he straddles her legs and begins to move his hips forward and backwards. Appellant continues this motion until she turns around and they commence more vigorous sexual acts. These acts included oral and further attempts at anal sex as well as a lighthearted conversation regarding their failed attempts at the end--contradicting A.B.'s testimony that she never would have been open to anal sex that night. Appellant's actions are not the actions of a person seeking forcible advantage over A.B.

While not definitively obvious, there exists, at a minimum, a reasonable ambiguity surrounding consent. Just as with the force element, this ambiguity must weigh in favor of Appellant. Ambiguity is reasonable doubt. Reasonable doubt in this case exits when a reasonable observer combines all of the actions leading up to the video and little in the video negates it.

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[76] A.B.'s animus towards Appellant is apparent in both her testimony and the handwritten police report previously cited; notably missing any reference to forcible sodomy.

Penetration

In the video, the viewer sees quickly that he comes late to the events forming the basis of the sodomy charge. By the time the recording begins, A.B. already changed out of her clothes and into Appellant's boxers and t-shirt. While certainly passive,[77] there are occasional movements and sounds emanating from A.B. as Appellant makes his advances. Notably, Appellant does not immediately straddle A.B. but rather appears to engage in actions commonly described as foreplay; actions he made no attempt to hide and seems to draw occasional passive, yet amorous, reactions from A.B.

The video then shows Appellant straddle the facedown A.B. and begin making rubbing movements back and forth. Despite his movements, the viewer cannot see conclusively from the camera's vantage point during that first thirteen minutes whether Appellant penetrates A.B. Additionally, A.B.'s own testimony lends little support for the element of penetration. A.B. never testified conclusively that Appellant penetrated her anus. Rather, A.B. testified on direct she did not recall Appellant penetrating her, and admits later she does not believe he did. Her clearest testimony is a description that she awoke due to pain in her rectum. However, given the internal confliction of

[77] Appellant would note that A.B.'s passive sexual nature is replete throughout the hour long video. This hour includes more than fifty minutes of uncharged sexual acts A.B. admits were consensual. Her passive nature in the beginning of the video does not, alone, indicate incapacity given her following subdued behavior.

her own testimony and the lack of clear evidence on the video, this single statement does not satisfy the Government's burden. At best, the evidence, taken together, is a mere inference of penetration. This factual obscurity must weigh in favor of Appellant given the high standard for conviction.

Even if the evidence is sufficient, the affirmative defense of mistake of fact cannot be overcome beyond a reasonable doubt.

For all the same facts and circumstances found in the previous sections, the Government cannot succeed against the affirmative defense of mistake of fact as to consent. To succeed on a mistake of fact defense an accused must show that he had a reasonable and honest, if mistaken, belief that the victim consented.[78] This same standard applies to whether there was a mistake of fact concerning an individual's capacity to consent.[79]

Viewing the aforementioned facts from the Appellant's perspective, an honest yet reasonable mistake emerges. Appellant was at a party with a bunch of people he didn't know. He was simply hanging out. He hadn't targeted A.B. He was not feeding her drinks. He hadn't been present for her intoxication as he went home to change clothes during the first part of the party. To the contrary, A.B. had targeted him. Appellant is approached by a woman who pins him to the wall and kisses him

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[78] *United States v. Carr*, 18 M.J. 297, 301 (C.M.A. 1984); R.C.M. 916(j).

[79] *United States v. Thomas*, 45 M.J. 661, 665 (A. Ct. Crim. App. 1997).

unbidden. This same girl demands that he take her to his place with the expectation of sex. They likely do have sex. They are resting, following their first encounter. He naturally concludes that she may be the type of forward woman who would want to indulge in acts beyond plain intercourse. Admittedly, he turns on the camera at that point for his own purposes. Appellant begins to come on to A.B., an unnecessary step the last time. Presuming she will voice any concerns regarding his sexual venturing, he advances towards anal focused activities. A.B. occasionally moves and makes sounds emboldening his actions, as she seems to condone them. He is unable to penetrate (even assuming what is viewed on the video amounts to penetration) and she turns over. He continues the sexual encounter without further incident.

When viewing the testimony and video through the filter of Appellant's eyes, it is easy to see how a reasonable person could interpret the events of the night in the way he did. Appellant reasonably believed that the sexual encounter with A.B. was continuing since she remained in his bed, wearing his boxers. Further, he did not have the facts regarding her state of intoxication nor did she seem bothered by his advancing sexual attentions. The Government fails to meet its burden because this perfectly reasonable explanation for Appellant's actions cannot be disproved beyond reasonable doubt. Without evidence to counter this plausible view, the Government cannot properly negate Appellant's affirmative defense. The Court should--no matter its position on the positive elements--apply

the affirmative defense of mistake of fact to Appellant's case and find that it survives against the Government's case.

One final fact generally weighing against conviction in this case is A.B.'s actions following that evening. A.B. continued a relationship with Appellant for a number of weeks thereafter. She texted him. She had more intercourse and sodomy with him. This allegation only came forward after she became angry with him over recording her. The allegation of sodomy didn't even come forth in her first report. There was nothing stopping her once she decided to report Appellant's surreptitious recording. Yet, there is no mention of the most serious charge Appellant faced. This follow-on conduct and ultimate omission from her crime report weighs generally against a finding a guilt in this case.

The totality of the circumstances of this case shows at best confusion between A.B. and Appellant. Confusion is not malice. Confusion is not guilt. This Court should find that under these specific circumstances the Article 125 fails upon its elements or upon the affirmative defense. Appellant asks this Court to set aside his conviction for violating Article 125 and enter a finding of not guilty.

II.

THE MILITARY JUDGE INCORRECTLY INSTRUCTED THE PANEL ABOUT HOW A DISCHARGE WOULD AFFECT APPELLANT'S TREATMENT. THIS ERROR DIRECTLY IMPACTED APPELLANT'S SENTENCE TO A PUNITIVE DISCHARGE.

Standard of Review

A military judge is required to give appropriate sentencing instructions.[80] Whether a panel is properly instructed is reviewed *de novo*.[81] Failure to object to an instruction waives review of the error absent plain error.[82] Under plain error, the Appellant has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused.[83]

Discussion

The Judge's Instruction was Plain Error

Neither the Government nor the defense objected to the Military Judge's instruction answering the panel's question. Therefore, this Court must analyze the military judge's answer regarding rehabilitation services for plain error. The first and second prong of the analysis easily weighs in favor of Appellant. The military judge's instruction that Appellant was

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[80] *United States v. Sunzeri*, No. 200202248, slip op. at *4, (N-M. Ct. Crim. App. Mar. 16, 2006).

[81] *United States v. Payne*, 73 M.J. 19, 22 (C.A.A.F. 2014).

[82] *Id.*

[83] *Id.* at 23.

somehow eligible to petition the VA for treatment was error.[84] An error is plain if it is contrary to law.[85]

> Benefits are not payable when a claimant was discharged by reason of the sentence of a general court-martial, unless the claimant was insane at the time of the commission of the offense that led to the court-martial, or unless the claimant receives an upgraded discharge from a board for the correction of military records.[86]

This bar to benefits also includes those seeking treatment for PTSD.[87]

The military judge's instruction incorrectly informed the members that Appellant possessed an opportunity for treatment through the VA. This instruction was wrong given the statutes, regulations, and decisions that establish an absolute bar to rehabilitative services from the VA. In the absence of action from the Board of Corrections for Naval Records, Appellant has no opportunity, whatsoever, to obtain treatment from the VA. The military judge's instruction that left open the possibility

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[84] 38 C.F.R. § 3.12(c)(2); *United States v. Seymour*, No. 201300125, slip op. at 3 n.5 (N-M. Ct. Crim. App. Nov. 7, 2013).

[85] *United States v. Joseph*, 716 F.3d 1273, 1280 (9th Cir. 2013) (citing *United States v. Ameline*, 409 F.3d 1073, 1078 (9th Cir. 2005) (*en banc*); *Johnson v. United States*, 520 U.S. 461, 468 (1997)).

[86] *Hayes v. Brown*, 7 Vet.App. 420, 423 (1995) (internal citations omitted); *Helige v. Principi*, 4 Vet.App. 32, 34 (1993)).

[87] (TITLE REDACTED BY AGENCY), 11-11 803, Bd. Vet. App. 1404198, 2014 WL 1027850 (Jan. 30, 2014).

evaluation to which Appellant is entitled.[90] Had the members been given the correct information, there is a reasonable likelihood Appellant would have been spared a punitive discharge, or at least received a recommendation for a suspension. The members' question indicates they were consciously trying to fashion a sentence that would aid this particular Appellant; a sentence that would allow Appellant to receive the treatment for his PTSD that he needed. Given the military judge's plain error, Appellant did not receive the particularized consideration he is due. Without this particularized consideration, Appellant did not receive a full and fair evaluation of his sentencing evidence.

An appropriate sentence for Appellant would provide for his PTSD treatment.

Given the standard cited *supra* in *Baier*, a fair and just sentence particularized to Appellant would not include a punitive discharge. Normally, a punitive discharge for charges in a case such as this one would be likely. However, in Appellant's case, his need for PTSD treatment outweighs the norm. Appellant gave his utmost in service to the Marine Corps.

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[90] *United States v. Baier*, 60 M.J. 382, 383 (C.A.A.F. 2005) ("An appropriate sentence results from an individualized consideration of the particular accused on the basis of the nature and seriousness of the offense and the character of the offender.") (internal quotations omitted).

Appellant's harrowing service injured him as soundly as if he had received a gunshot wound. But, in contrast to a physical wound, it cannot be healed by a surgeon or bandage. Surely, if Appellant's wound had been the result of physical combat wounds, Appellant would not have been discharged, or even faced court-martial, until his wounds healed. However, because Appellant's malady is internal, he does not receive this consideration. Instead, he faces the full punitive measure of the law while still attempting to heal himself. The punitive discharge leaves Appellant abandoned without necessary care. Appellant's ~~service~~, deployment history, and legitimate PTSD diagnosis should outweigh his specific crimes in this case.

Appellant did not receive a fair and complete sentence evaluation due to the military judge's incorrect instruction. Appellant acknowledges there is more than one remedy available to this Court to correct this error. The simplest and most appropriate remedy would be to set aside the punitive discharge and impose the sentence likely intended by the members without the error. However, if this Court is not willing to discern the members' intent, Appellant asks that this court set aside the punitive discharge and remand the case for a new sentencing hearing with correct instructions regarding VA treatment.

Jason R. Wareham
Captain, USMC
Appellate Defense Division
1254 Charles Morris Street SE
Building 58, Suite 100
Washington Navy Yard, D.C. 20374
Office: (202) 685-7394
Fax: (202) 685-7426
jason.wareham@navy.mil
Appellate Defense Counsel

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the forgoing were hand-delivered to the Court on 23 June 2014, that a copy was hand-delivered to Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, and that a copy was posted on CMITS on 23 June 2014.

Jason R. Wareham
Captain, USMC
Appellate Defense Division
1254 Charles Morris Street SE
Building 58, Suite 100
Washington Navy Yard, D.C.
20374
Office: (202) 685-7394
Fax: (202) 685-7426
jason.wareham@navy.mil
Appellate Defense Counsel

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES, Appellee v. Xavier E. RAMIREZ-EMPUNO, Sergeant (E-5) U.S. Marine Corps Appellant	)))))))))))))))	ANSWER ON BEHALF OF APPELLEE Case No. 201300190 Tried at Marine Corps Air Station Beaufort and Marine Corps Recruit Depot (MCRD) Parris Island, South Carolina, on October 2, 2012, December 10, 2012, and January 14-18, 2013, by general court-martial convened by Commanding General, MCRD Parris Island/Eastern Recruiting Region

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Assignment of Error

THE GOVERNMENT CONCEDES THAT THE FACTS OF THIS CASE RAISE EVIDENCE OF A REASONABLE MISTAKE OF FACT AS TO THE VICTIM'S CONSENT. SPECIFICALLY, SGT LS FLIRTED WITH APPELLANT, CONSENSUALLY KISSED HIM MOMENTS PRIOR, AND NEVER CLEARLY OBJECTED TO PARTICIPATING IN SEXUAL CONTACT. THUS, APPELLANT'S CONVICTIONS FOR AGGRAVATED SEXUAL ASSAULT AND CONTACT ARE FACTUALLY AND LEGALLY INSUFFICIENT.

Statement of Statutory Jurisdiction

Appellant's approved sentence includes a dishonorable discharge. Accordingly, this Court has jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012).

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, pursuant to his pleas, of three specifications of disobeying a lawful general order, one specification of assault consummated by a battery, one specification of adultery, and one specification of obstruction of justice, in violation of Articles 92, 128, and 134, UCMJ, 10 U.S.C. §§ 892, 928, and 934 (2012). Contrary to his pleas, he was also convicted by the Members of one specification of aggravated sexual assault and one specification of aggravated sexual contact, in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2012). The Members sentenced Appellant to eight years confinement, reduction to pay grade E-1, and a dishonorable discharge. The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed. As a matter of clemency the Convening Authority waived the automatic forfeiture of pay and allowances until September 2, 2013, Appellant's End of Active Obligated Service.

Statement of Facts

A. Appellant pled guilty to assault consummated by a battery, adultery, obstruction of justice, and several orders violations.

Appellant had been on active duty with the United States

Marine Corps for approximately seven years and was a recruiter in New York City. (Charge Sheet, Sept. 5, 2012.) Appellant was married and the father of two young boys. (R. 92; Def. Ex. B at 8.)

From August 2010 to November 2011, Appellant sent numerous text messages to Ms. R., Ms. M, and Ms. F., who were female members of the recruit station's delayed entry program pool or a prospective recruit applicant. (R. 70, 76, 81-82.) Appellant also contacted these females in person, on the telephone, and through social media websites. (R. 70, 76, 81-82.) Some contact did focus on official Marine Corps recruiting matters, other contacts, however, involved Appellant seeking a personal and intimate relationship with the women. (R. 70, 76, 81-82.) At the time of these contacts a general order had been issued and was in effect that prohibited such contact between a recruiter and prospective enlistees or members of the delayed entry program. (R. 70, 76, 81-82.)

With respect to Appellant's actions with Ms. M., in the recruiting station he grabbed her by the waist, and tried to kiss her. (R. 86-88, 857.) Ms. M. did not consent to Appellant's touching or his attempt to kiss her. (R. 86-88.) At the time of the touching, Appellant was showing Ms. M. where the recruiting station bathroom was located. (R. 86-88.) As a

result of Appellant's actions, the victim lost interest in joining the Marine Corps. (R. 859.)

Appellant, a married man, had sexual intercourse with Ms. F. inside the Manhattan recruiting station. (R. 91.) Ms. F. was in the delayed entry program. (R. 93-94.) The sexual intercourse took place upon a sofa in the Gunnery Sergeant's office. (R. 91-92.) Ms. F. was relieved when she went to boot camp because she would never have to see Appellant again. (R. 865.) At boot camp, however, Ms. F. found out that she had been impregnated. (R. 865.) Ms. F. had to leave boot camp and eventually had an abortion. (R. 865.)

While the command was investigating Appellant, Appellant contacted Ms. F. to persuade her not to talk to the Naval Criminal Investigative Service investigators or to show up at his court-martial. (R. 94-98.) Appellant obstructed justice to attempt to avoid criminal prosecution for his offenses by soliciting the non-cooperation from Ms. F. (R. 98-104.)

B. Appellant was also convicted by Members of Aggravated Sexual Assault and Aggravated Sexual Contact.

Contrary to his pleas, Appellant was convicted of an aggravated sexual assault and aggravated sexual contact upon Sgt LS. (R. 827.) Sgt LS, a female, was leading a team of public affairs specialists covering Fleet Week in New York City. (R. 525-28.) Appellant was assigned as one of the drivers for the

event. (R. 514-15.) Throughout the event the public affairs specialists and their assigned designated drivers interacted on duty as well as socialized after hours. (R. 605.)

Sgt LS first met Appellant on May 27, 2013, when he drove her to an official event. (R. 529.) After hours Sgt LS, Appellant, and other Marines socialized at the Empire Club. (R. 531.) Sgt LS consumed two alcoholic drinks. (R. 605.) Sgt LS and Appellant were mutually flirtatious and, while at the club, Appellant grabbed her buttocks. (R. 521, 535, 609, 755.) Without saying anything to Appellant, Sgt LS moved so Appellant's hand was no longer touching her. (R. 535.) Shortly thereafter Appellant put his hand on her crotch, touching her vagina outside her clothing. (R. 535.) Again, Sgt LS moved to avoid the touching. (R. 535.)

After this touching, the group went to a new club and decided to assemble on the sidewalk outside the Empire Club. (R. 537.) Sgt LS and Appellant took the elevator down to street level; no other person was in the elevator with them. (R. 538.) On the elevator ride down, Appellant leaned in and tried to kiss Sgt LS. (R. 538.) Sgt LS pushed Appellant away and told him that she "can't do this." (R. 538.) On the walk to the next club, Appellant asked Sgt LS if she wanted him to leave her alone. (R. 539.) Sgt LS replied "yes" and told Appellant that

he was “dangerous.” (R. 539.) No additional interaction occurred that evening between Sgt LS and Appellant. (R. 539-40.) Sgt LS believed Appellant understood that she did not desire any intimate activity with him. (R. 540.)

May 29, 2013, was the last day Sgt LS was in New York City for Fleet Week. (R. 541.) The public affairs crew worked in the lobby and restaurant of their hotel. (R. 542-43.) Sgt LS sat at a table with Appellant and another driver; there they had a cocktail and ate food. (R. 543-44.) Appellant was talking about going out that evening. (R. 544.) He informed Sgt LS and the other driver that he planned to go out and find a female companion for sex. (R. 544.) He informed Sgt LS that he previously had sexual relations with married women and he talked about how the other married women felt about it since he was also married. (R. 544.) Sgt LS was shocked to learn Appellant was married as he never wore a wedding ring and never mentioned his wife or children. (R. 543-45.)

Sgt LS’s roommate finished her work early and informed Sgt LS that she was going out with friends for the evening. (R. 546.) Sgt LS instructed her roommate to make sure she was back by 0300. (R. 546.) This occurred in front of Appellant. Appellant and the other driver also left to go out to clubs. (R. 547.) Sgt LS retired to her hotel room to pack for her

early morning flight. (R. 549.)

At approximately midnight, Appellant called Sgt LS's room phone. (R. 554.) Appellant asked if he could stop by. (R. 554.) Sgt LS indicated that she would not open the door. (R. 555.) Ten to fifteen minutes later Appellant knocked on Sgt LS's hotel door, and to not be rude she opened the door. (R. 556, 674.) As soon as the door was opened Appellant pushed Sgt LS up against a wall and starting kissing her. (R. 556.) Sgt LS initially kissed him back. (R. 557.) After a couple of seconds, however, Sgt LS pushed Appellant away and said, "I can't do this." (R. 557.) Sgt LS walked away from the Appellant toward her bed where she had been packing. (R. 557.) Appellant followed her and grabbed her from behind and began kissing her neck. (R. 557.) Appellant turned Sgt LS toward him and began kissing her again. (R. 557.) Sgt LS initially kissed him back, but "quickly pulled away" and again said, "I can't do this." (R. 557.)

After pushing Appellant away for the second time, Appellant "came toward——in front of [Sgt LS] and [Appellant] quickly undid [her] pants and he pulled down [her] underwear and [her] pants at the same time." (R. 558.) Appellant pulled Sgt LS's underwear and pants down to just above her knees and pushed her down on her roommate's bed. (R. 558-59.) Appellant then placed

his head between Sgt LS's legs, with the back of his neck up against her partially lowered pants, and began licking her clitoris. (R. 559.) Sgt LS struggled to get away but every time she attempted to pull away Appellant stayed with her. (R. 559.) Sgt LS could feel the pressure of her fingers on the bed because as she was struggling to move she was supporting her weight with her hands. (R. 560.) Sgt LS indicated that Appellant eventually quit and stood up. (R. 560.) She testified that that she did not know "if it was so uncomfortable [with her] pulling and it hitting his neck. . .[or whether she had] pulled hard enough or not, but he did end up finally getting up from in between my legs and pants." (R. 559-60.) When Appellant stood up Sgt LS then said, "you have to stop. I can't do this." (R. 560.) Appellant asked why. (R. 560.) Sgt LS replied that she loved her husband and her husband makes her happy. (R. 560.)

Sgt LS stood up from the bed and pulled her pants up. (R. 560.) Appellant asked Sgt LS what she was doing. (R. 560.) She responded by telling him that she could not do this. (R. 560.) Appellant pulled Sgt LS to him and stuck his right hand down her pants. (R. 560.) In doing so he touched her vagina with his finger, penetrated it, then commenced "fingering" her. (R. 560.) While doing so Appellant said, "[y]ou like that,

don’t you?” (R. 560.) Sgt LS pushed Appellant away, and when she did Appellant asked, “[b]ut I made your pussy wet, didn’t I?” (R. 560.) She replied, “well, that’s not fair . . . yes, I think you’re hot, but I’m not——I don’t want to do this.” (R. 560.) Appellant asked her why she opened the door. (R. 560.) Sgt LS replied that she did not think he would be this aggressive. (R. 560.) Appellant, on his way out, said, “[n]ext time if you want it, you should just do it, just let it go.” (R. 561.)

Sgt LS watched Appellant waiting for an elevator through her security peephole. (R. 563.) When the elevator arrived, Appellant did not board, but walked back outside Sgt LS’s doorway. (R. 563.) After a couple of seconds, Sgt LS opened the door part of the way and told Appellant, “[n]o, you have to leave.” ((R. 563.) Appellant departed the hotel. (R. 563-64.)

Hotel lobby and elevator bank security camera tapes were introduced into evidence. (Pros. Ex. 2) The tapes show Appellant entering the hotel lobby in his uniform, cover in his hands shortly after midnight. (Pros. Ex. 2) The tapes show Appellant departing the hotel approximately twenty minutes later, still in uniform, walking through the lobby with his cover on his head. (Prosecution Ex. 2)

C. Appellant’s trial.

The United States called four witnesses: Sgt LS; Appellant’s co-driver; and two witnesses to lay a foundation for the hotel hallway surveillance videos. (R. 511, 525, 735, 739.) In its case-in-chief the Defense recalled Appellant’s co-driver and called the victim’s roommate as witnesses. (R. 751, 763.)

Appellant’s attorneys focused their case upon three main themes. First, they tried to raise a reasonable doubt as to the force and bodily harm elements by attacking the Victim’s credibility; second, they raised the defense of consent; and third, they raised the defense of mistake of fact as to consent. (R. 803-16.)

After the United States rested, Appellant made a motion for a finding of not guilty arguing that intent was lacking and that there was a reasonable mistake of fact. (R. 748.) The Military Judge denied the motion indicating that there was evidence introduced, viewed in the light most favorable to the United States, for each element of the contested offenses. (R. 749.)

The United States requested that the Military Judge instruct the Members as to the defense of mistake of fact. (R. 162.) The Military Judge prepared instructions and allowed all parties to review them. (R. 778; App. Ex. XLIII.) The Defense Counsel did not object to the instructions. (R. 779.) The

Military Judge instructed the Members in accordance with his proposed instructions. (R. 780-96; App. Ex. XLIII.)

Argument

APPELLANT'S CONVICTIONS FOR AGGRAVATED SEXUAL ASSAULT AND CONTACT ARE LEGALLY AND FACTUALLY SUFFICIENT. CONSIDERING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PROSECUTION, A REASONABLE FACT-FINDER COULD HAVE FOUND ALL THE ELEMENTS BEYOND A REASONABLE DOUBT. FURTHER, THIS COURT SHOULD BE INDEPENDENTLY CONVINCED OF APPELLANT'S GUILT ON THESE CHARGES BEYOND A REASONABLE DOUBT, BASED UPON THE UNCONTROVERTED TESTIMONY OF THE VICTIM THAT APPELLANT RUSHED TO COMPLETE A SEXUAL ACT AND SEXUAL CONTACT UPON SGT LS BEFORE SHE WAS GIVEN ANY OPPORTUNITY TO MANIFEST CONSENT. MOREOVER, APPELLANT'S MISTAKES OF FACT AS TO CONSENT, IF ANY, WERE NOT REASONABLE UNDER THE FACTS AND CIRCUMSTANCES.[1]

A. <u>These issues are reviewed *de novo*</u>.

This Court reviews claims of legal and factual insufficiency *de novo*. Article 66(c), UCMJ; *United States v. Beatty*, 64 M.J. 456, 459 (C.A.A.F. 2007).

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[1] Appellant's assertion that the United States conceded the facts raise evidence of a reasonable mistake of fact, coupled with his argument suggests the United States conceded that the defense was proven at trial. At trial the United States simply acknowledged that given the low standard for when a defense is reasonably raised an instruction on that defense would be appropriate. (R. 162; Appellate Ex. XI at 23.) A defense is reasonably raised when there is some evidence to which the court members may attach credit if they so desire; and any doubt whether an instruction should be given should be resolved in favor of the accused. *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000).

The elements of aggravated sexual assault, with facts pertinent to this case, are:

(1) That the accused caused another person [Sgt LS], who is of any age, to engage in a sexual act [inserting his finger into Sgt LS's vagina]; and

(2) That the accused did so by causing bodily harm to another person [touching Sgt LS's vagina with his finger].

(R. 781; Manual for Courts-Martial, United States (2012 ed.), appendix 28, para. 45(b)(3)(b).)

The elements of aggravated sexual contact, with facts pertinent to this case, are:

(1) That the accused in engaged in a sexual contact with another person [licking Sgt LS's clitoris with his tongue]; and

(2) That the accused did so by using force against that other person [using strength sufficient that Sgt LS could not escape sexual contact].

(R. 784; Manual for Courts-Martial, United States (2012 ed.), appendix 28, para. 45(b)(5)(a).)

B. <u>Considering the evidence admitted at trial in a light most favorable to the prosecution, a reasonable fact-finder could have found each element beyond a reasonable doubt. And this Court should be independently convinced of Apellant's guilt beyond a reasonable doubt</u>.

The test for legal sufficiency is whether, considering the evidence admitted at trial in a light most favorable to the prosecution, a reasonable fact-finder could have found all the elements beyond a reasonable doubt. *United States v. Reed*, 54

M.J. 37, 41 (C.A.A.F. 2000 (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Testing for factual sufficiency, this Court asks whether, after weighing the evidence in the record of trial, this Court is independently convinced of Appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

In testing for factual sufficiency, this Court is required to "recogniz[e] that the trial court saw and heard the witnesses." *Id.* This is not a *pro forma* legal requirement. Rather, it takes into account that the trier of fact is best situated to assess a witness's credibility while testifying. *See United States v. Madey*, 14 M.J. 651, 653 (A.C.M.R. 1982), *rev. denied*, 15 M.J. 183 (C.M.A. 1983); *see also United States v. Ferguson*, 35 F.3d 327, 333 (7th Cir. 1994), *cert. denied*, 514 U.S. 1100 (1995)(trial court's evaluation of witness credibility "will not be disturbed unless it is completely without foundation."). It also takes into account that, where the court members are properly instructed to consider a witness's credibility, this Court should presume that the members followed the Military Judge's instructions. *See United States v. Collier*, 67 M.J. 347 (C.A.A.F. 2009).

Here, Appellant contests only the factual and legal sufficiency of Specifications 1 and 2 of Charge II, alleging

aggravated sexual assault and aggravated sexual contact, respectively. In order to prove that these offenses occurred, the prosecution had to prove the following elements:

Charge II, Specification 1 (aggravated sexual assault)

(1) That the accused caused another person [Sgt LS], who is of any age, to engage in a sexual act [inserting his finger into Sgt LS's vagina]; and

(2) That the accused did so by causing *bodily harm* to another person [touching Sgt LS's vagina with his finger].

(R. 781, Manual for Courts-Martial, United States (2012 ed.), Part IV, para. 45(b)(3)(b).)

Charge II, Specification 2 (aggravated sexual contact)

(1) That the accused engaged in sexual contact with another person [licking Sgt LS's clitoris with his tongue]; and

(2) That the accused did so by using *force* against that other person [using strength sufficient that Sgt LS could not escape the sexual contact].

(R. 784; Manual for Courts-Martial, United States (2012 ed.), Part IV, para. 45 (b)(5)(a)). Appellant's only contentionsare that the elements of force and bodily harm were not sufficiently met. (Appellant's Br. at 6-7.)

1. <u>The elements alleging a sexual act and sexual contact were undisputed</u>.

Testimony was introduced that Appellant licked Sgt LS's clitoris and inserted his finger into her vagina. (R. 559-60.) This testimony was uncontroverted. Appellant's presentation of

the facts and theory of the case, at trial, did not contest whether the sexual act and the sexual contact occurred. Thus, viewing the evidence and all reasonable inferences that may be drawn from the evidence in a light most favorable to the prosecution, a reasonable fact-finder could have found beyond a reasonable doubt that the sexual act and the sexual contact occurred.

Moreover, based upon the evidence presented at trial and after making allowances that the Court did not see and hear the witnesses, this Court should be independently satisfied beyond a reasonable doubt that the Appellant did lick Sgt LS's clitoris and touch her vagina with his finger. The sexual act and sexual contact elements are factually and legally sufficient.

2. Appellant used force to facilitate the sexual contact and caused bodily harm to facilitate the sexual act.

a. The elements are legally sufficient.

Evidence was introduced that Appellant pushed the Victim down on the bed after he lowered her jeans and underwear. (R. 558.) Evidence was also introduced that Appellant quickly placed his head in between the Victim's legs and partially lowered jeans. (R. 559.) Evidence demonstrated that because the jeans were only partially lowered the jeans acted to prevent the victim from escaping Appellant's tongue. (R. 559-60.) Each

time the victim attempted to move away her jeans pulled Appellant's head with the rest of her body. (R. 559-60.)

Evidence was introduced that despite Sgt LS's best efforts to wriggle free, she was unable to move her body, and specifically her clitoris, away from Appellant's tongue. (R. 559-60.) Sgt LS testified about remembering her fingers pushing into the bed as she attempted to use leverage to get away from Appellant. (R. 560.) The Victim indicated that she did not know "if it was so uncomfortable [with her] pulling and it hitting his neck . . .[or whether she had] pulled hard enough or not, but he did end up finally getting up from in between my legs and pants." (R. 559-60.) Sgt LS further testified that she did not consent to having her clitoris licked by Appellant, but through strength, power, and restraint applied by Appellant, as well as the circumstances of his position of his head relative to her legs and partially removed pants, she was unable to avoid and escape his attack. (R. 558-60.)

Evidence was introduced that Appellant pulled Sgt LS towards him and shoved his hand down her pants. (R. 560.) She did not consent, and further withheld her consent when his finger touched and went inside her vagina. (R. 560.) Thus, viewing the evidence, and all reasonable inferences that may be drawn from the evidence, in a light most favorable to the

prosecution, a reasonable fact-finder could have found beyond a reasonable doubt that the Appellant used force to facilitate the sexual contact and caused bodily harm to facilitate the sexual act. Thus, similar to the Military Judge's ruling when he denied Appellant's motion, the force and bodily harm elements are legally sufficient. (R. 749.)

b. The elements are factually sufficient.

As to factual sufficiency, the Military Judge provided instructions to the Members to guide them in assessing evidence including evidence which may have some conflict. (R. 780-97.) The Military Judge provided instructions regarding credibility of the victim. (R. 789-91.) The Military Judge highlighted how prior inconsistent statements of the Victim might bear upon the credibility of her in-court testimony. (R. 790-91.) The Members were instructed that they have the "duty to determine the believability of the witnesses." (R. 789.) They were instructed to consider the witness's intelligence, sincerity, conduct in court, friendships, prejudices, and character for truthfulness. (R. 789.) They were further instructed to consider the extent that each witness is supported or contradicted by the evidence, the relationship each witness may have with either side, and how each witness might be affected by the verdict. (R. 789.) The Military Judge told them to utilize

their common sense and their knowledge of human nature and the ways of the world. Ultimately they were instructed that the "final determination as to the weight or significance of the evidence and the credibility of the witnesses in the case rests solely upon you, the members of the court." (R. 790.)

While the evidence of the force and bodily harm may not be free from all conflict, the trier of fact is best situated to assess a witness's credibility and to resolve any factual conflict. *See United States v. Madey*, 14 M.J. 651, 653 (A.C.M.R. 1982), *rev. denied*, 15 M.J. 183 (C.M.A. 1983). After being properly instructed, the Members concluded that the United States had met it burden and found Appellant guilty beyond a reasonable doubt. Inasmuch as the Military Judge instructed upon affirmative defenses and the appropriate standards, the findings necessarily include that the United States disproved the affirmative defense of consent and mistake of fact as to consent beyond a reasonable doubt. The Members ultimately concluded that the Victim was credible beyond a reasonable doubt; that decision should not be "disturbed unless it is completely without foundation." *United States v. Ferguson*, 35 F.3d 327, 333 (7th Cir. 1994), *cert. denied*, 514 U.S. 1100 (1995). Here, where the Members were properly instructed to consider a witness's credibility, this Court should presume that

the Members followed the Military Judge's instructions. *See United States v. Collier*, 67 M.J. 347 (C.A.A.F. 2009).

To the degree that the evidence may have contained conflict, the members resolved that conflict in favor of the United States after hearing all the evidence and, as instructed, observing the conduct of the witnesses in court. Thus, when proof of the elements beyond a reasonable doubt involved assessing credibility and weight to be given to conflicting evidence, this Court must recognize that the trier of fact was properly instructed and uniquely situated to make those decisions. This Court, making allowances that it did not see and hear the witnesses, should be satisfied beyond a reasonable doubt that Appellant applied force to facilitate the sexual contact and caused bodily harm to cause the sexual act. The force and bodily harm elements are factually sufficient.

3. <u>When evaluated in the light most favorable to the United States the evidence and logical inferences drawn thereform illustrate Appellant's criminal acts were the result of Sgt LS not consenting and that any mistake of fact was unreasonable</u>.

The evidence introduced at trial demonstrates Appellant was a resourceful and persistent philanderer. The evidence shows that Appellant initially used probing tactics with his Victim before finally resorting to a "bull-rush" during his last opportunity to gratify his sexual desires. (R. 521-61.)

Appellant's first attempt with Sgt LS occurred at a club where he tried personal conversation and flirtatious behavior. (R. 521, 535.) After receiving some positive feedback, Appellant stepped up his approach by touching her buttocks. (R. 535.) While accounts differ as to whether Sgt LS immediately moved away or allowed his hand to linger, Appellant continued to up the ante by trying to feel her vagina. (R. 535.)

Appellant later probed further. He attempted to kiss Sgt LS while they were alone in an elevator. (R. 538.) This time Appellant's advance was met with resistance as she indicated that she would not kiss him. (R. 539.) Her rebuke was strong because it prompted Appellant to ask Sgt LS whether she wanted him to leave her alone. (R. 539.) Her response was clear: she wanted to be left alone. (R. 539.) But in so doing she told Appellant that he was "dangerous." (R. 539.) In his mind, however, this appearingly small sign of attraction caused Appellant to believe he still had an opportunity with Sgt LS to satiate his libido. As such, Appellant planned his next advance.

On the last night Sgt LS was in town, Appellant sat with her while she worked and ate dinner. (R. 543-44.) Appellant began to openly discuss his desire to have sexual intercourse that evening. (R. 544.) He spoke about his previous

extramarital affairs with other married women and that he was also married. (R. 544.) Appellant was probing Sgt LS's amenability to a sexual relationship with him. Appellant hoped that by finally revealing to the Victim that he was also married she would change her mind.

Sometime near midnight, receiving no invitation from the Sgt LS, Appellant made one last effort to satisfy his sexual appetite. Appellant called Sgt LS while she was packing to leave and informed her that he would like to come over. (R. 554.) She told him that she will not open the door. (R. 555.) Appellant, under the belief that Sgt LS surely desired to be sexually active with him, disregarded her statement and, approximately fifteen minutes later, knocked at her door. (R. 556.) Being hospitable, Sgt LS opened the door and Appellant was immediately upon her. (R. 557.)

Sgt LS readily admitted to previously flirting with Appellant and finding him attractive. (R. 557.) She also readily admitted to initially kissing him back after he burst upon her. (R. 557.) However, Sgt LS later stopped the kiss and told Appellant that she could not continue. (R. 557.) Sgt LS walked away from Appellant and attempted to return to packing her clothes. (R. 557.)

Ignoring her desire to cease any activity, Appellant grabbed her from behind and began kissing her on the neck. (R. 557.) Appellant turned Sgt LS around and began to kiss her again. (R. 557.) She again readily admitted to kissing him back for a few seconds, but she testified that she stopped kissing him and again told him that she could not continue. (R. 557.)

In the Appellant's mind, he knew she did not want to continue, but he thought if he can just stimulate her sexually she will ultimately relent to his charisma and machismo. So, despite her protestations, he forcibly pulled her jeans and panties down, then pushed her onto the bed. (R. 558-59.) Blowing through the repeated "stop signals" to even engage in kissing him, Appellant forced his head between her legs and forcibly performed cunnilingus upon her. (R. 559.) Sgt LS made repeated attempts to escape the aggravated sexual contact, but Appellant did not stop until the Victim's repeated physical efforts to resist became uncomfortable to his neck. (R. 559-60.) She then told him that he had to stop, that she could not do this and that she loved her husband. (R. 560.)

Sgt LS stood up and pulled her pants up. (R. 560.) Appellant re-approached, grabbed her and shoved his hand down her pants. (R. 560.) He used his finger to touch and enter her

vagina. (R. 560.) He said to her that he knew that she liked it, but again, she pushed him away. (R. 560.)

Appellant's motive for why he would forcibly stimulate the Victim's clitoris with his tongue and digitally penetrate her vagina is readily apparent. He was trying to get the Victim to consent when, at the time, she had repeatedly manifested her lack of consent. His statement, "[b]ut I made your pussy wet, didn't I," illuminates his motive. (R. 560.) He projected his own desires upon Sgt LS and believed that forcibly stimulating her physically would jump-start her libido to the degree that she would not resist him. Under his self-centered belief that sexual stimulation would get the Victim's "no" to change to "yes," he sexually assaulted her. Thus it is clear that his assaults were nothing more than failed efforts to achieve her willing participation.

To the degree that Appellant misperceived Sgt LS's initial feedback and believed she consented to the forced cunnilingus and non-consensual digital fingering of her vagina, his mistake was unreasonable under the circumstances as the Members, after receiving appropriate instruction, so found. It is wholly unreasonable to believe that a woman who will not even consent to continuing to kiss you would be willing to engage in cunnilingus and digital fingering of her vagina. His belief

that she consented to forcible sexual acts was not reasonable. The convictions for aggravated sexual assault and aggravated sexual contact are, therefore, legally and factually sufficient.

Conclusion

WHEREFORE, the Government respectfully requests that this Court affirm the findings and sentence as adjudged and approved below.

JAMES E. CARSTEN
Commander, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard DC 20374
james.carsten@navy.mil

Certificate of Filing and Service

I certify the foregoing was delivered to the Court and a copy was served upon opposing counsel and electronically filed with the Court pursuant to N-M. Ct. Crim. App. Rule 5.2(b)(1) on November 20, 2013.

JAMES E. CARSTEN
Commander, JAGC, USN

Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard DC 20374
james.carsten@navy.mil

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before the Court *En Banc*

UNITED STATES, Appellee v. Jonathan D. REDMON, Information Systems Technician Second Class Petty Officer (E-5) United States Navy Appellant	**APPELLANT'S MOTION FOR EN BANC RECONSIDERATION OF PANEL 3 DECISION** Case No. 201300077

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

In accordance with Rules 17 and 19(b)(2) of this Court's Rules for Practice and Procedure, IT2 Redmon respectfully requests this Court reconsider *en banc* Panel 3's 26 June 2014 decision in this case. Counsel for IT2 Redmon received Panel 3's decision on 26 June 2014 and no other court has acquired jurisdiction over this case.

Specifically, IT2 Redmon requests this Court review, *en banc*, assignments of error I and II. There are three significant reasons reconsideration is warranted. First, assignment of error I deserves reconsideration because Panel 3 committed clear error by citing and adopting Appellate Exhibit XVIII, a supposed military judge's findings of fact and conclusions of law, in order to find that IT2 Redmon did not

meet his burden to show a *prima facie* case for selective prosecution.[1] The military judge, however, did not make any findings of fact or conclusions of law on the issue of selective prosecution. Rather, Appellate Exhibit XVIII is clearly the government's proposed findings of fact and conclusions of law that the military judge never adopted. (*See* Appellate Ex. XVIII; R. 65-72.) The crux of the Panel's analysis is based on this clearly erroneous view of the record and cannot stand.

Second, Panel 3's opinion with regard to the first assignment of error misstates the burden that an appellant must meet to establish a *prima facie* case of selective prosecution. Panel 3 describes the *prima facie* evidence burden as "heavy" and then requires IT2 Redmon to present direct evidence of the convening authority's intent. Simply put, the law does not require this. Instead, an appellant need merely show the facts raised by the defense raise reasonable doubts about the prosecution's purpose.

Third, reconsideration is required because Panel 3 failed to analyze IT2 Redmon's second assignment of error, which alleged that applying Article 120(c), UCMJ, to him violated his right to equal protection under the law. IT2 Redmon respectfully requests this Court, *en banc*, reconsider the

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[1] *United States v. Redmon*, No. 201300077, 2014 CCA LEXIS 369, at *7 (N-M. Ct. Crim. App. June 26, 2014).

panel's decision and afford IT2 Redmon his right to review under Article 66, UCMJ.

Issues for Reconsideration

I.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED TRIAL DEFENSE COUNSEL'S MOTION FOR DISMISSAL BASED ON SELECTIVE PROSECUTION?

II.

WHETHER THE APPLICATION OF ARTICLE 120(C) TO IT2 REDMON VIOLATES HIS RIGHT TO EQUAL PROTECTION UNDER THE LAW?

Statement of the Case

A general court-martial with enlisted representation convicted IT2 Redmon, contrary to his pleas, of one specification of aggravated sexual assault and one specification of adultery in violation of Articles 120 and 134, UCMJ.[2] The members sentenced IT2 Redmon to sixty days of confinement, total forfeitures of pay and allowances, to be reduced to pay-grade E-1, and to be dishonorably discharged.[3] On 8 February 2013, the convening authority approved the sentence as adjudged and, with the exception of the dishonorable discharge, ordered the sentence executed.[4]

On 22 July 2013, IT2 Redmon submitted this case to Panel 3 of this Court with five assignments of error. The Government

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[2] R. at 1522; 10 U.S.C. §§ 920, 934 (2012).
[3] R. at 1620.
[4] General Court-Martial Order Number 1D-12, Feb. 8, 2013.

responded to IT2 Redmon's brief on 18 November 2013. IT2 Redmon then filed a reply brief on 22 November 2013. Panel 3 issued its opinion on 26 June 2014.

Statement of Facts

On 20 January 2012, IT2 M.H. planned to a hold a going-away party for IT2 Redmon with their close group of friends.[5] Although not within the initial group of invitees, IT3 B.S. asked IT2 Redmon if she could also show up to the party.[6] IT3 B.S. knew IT2 Redmon from work but also knew him more than professionally, as they would often engage in personal conversations at social functions after work.[7] They were not dating--IT2 Redmon was married and IT3 B.S. was in a long-distance dating relationship with J.B. in January of 2012.[8]

The night of the party, IT3 B.S. went to dinner with a few friends where she had two or three glasses of wine.[9] She then went back to her apartment for an hour, had a shot of Southern Comfort, and then walked with a friend, ITSN S.C., to the party.[10] At the party she had three or four beers, a couple sips of mixed drinks, and a few swigs of Wild Turkey Bourbon Whiskey (Wild Turkey).[11]

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[5] R. at 1296.
[6] R. at 524.
[7] R. at 528-30.
[8] R. at 639-40.
[9] R. at 523.
[10] R. at 536-37, 540.
[11] R. at 543, 545-46, 1344.

IT2 Redmon also drank that evening and consumed copious amounts of alcohol throughout the night. He had at least three strong mixed drinks, several beers, and multiple shots of Wild Turkey from a bottle he was carrying around.[12]

During the party, IT2 Redmon and IT3 B.S. interacted some, and, according to one witness, were kissing and hugging for approximately ten seconds at one point.[13] After, IT2 Redmon was part of a group who walked back to IT3 B.S.'s house. IT3 B.S. remembered who walked her back and that she thought it was funny that she was having trouble walking.[14] Then while talking and laughing, she used three different keys to open three different locks and walked unassisted up a spiral staircase to get into her apartment.[15] She was able to recall she got undressed and entered the shower.[16] Significantly, she recalled a forty minute period where she rebuffed the attempts of others to get her out of the shower.[17] She expressed her wishes verbally--by telling them she wanted to stay--and physically--by turning the shower back on when others turned it off.[18] She then vomited and, as

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[12] R. at 795-96, 1064, 1028.
[13] R. at 1212.
[14] R. at 577-78, 1272.
[15] R. at 624-25, 1272.
[16] R. at 576-80, 675.
[17] *Id.*
[18] *Id*.

she recalled, finally got out of the shower before being helped into some clothes to sleep in.[19]

The next thing IT3 B.S. recalled was waking up and reaching down with her right hand to feel IT3 Redmon's erect penis, and using her left hand to feel her vagina.[20] She then remembered feeling pressure, which she believed to be penetration.[21] Several hours later, IT2 B.S. got up, got dressed and became emotional.[22] IT2 Redmon, confused, then left the house.[23]

Later that morning, IT3 B.S. went to the hospital with her friend and received a sexual assault forensic exam from LT D.A. LT D.A. did not note any injuries on IT3 B.S. and could not conclude from her examination that penetration occurred.[24] IT3 B.S.'s blood was drawn to determine the level of alcohol still left in her blood. Ultimately, this draw was not helpful in determining IT3 B.S.'s blood alcohol level (BAC) because the alcohol had dissipated.[25]

After going to the hospital, IT3 B.S. worked with NCIS to record two telephone conversations between IT2 Redmon and herself. During those wire intercepts, IT2 Redmon consistently

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[19] R. at 576-80, 675.
[20] R. at 581.
[21] R. at 581.
[22] R. at 636-37.
[23] R. at 1169-70.
[24] R. at 949.
[25] R. at 843-44.

denied remembering any details about the sexual encounter.[26] He surmised that sex must have occurred, but he had no memory of it.[27] That has happened to IT2 Redmon before. IT2 Redmon previously blacked out from drinking, engaged in sexual intercourse with his wife, and later woke up without any memory of the sexual intercourse.[28] Two weeks after the incident, IT2 Redmon reported to his command that he was sexually assaulted by IT3 B.S. and requested a military protective order from her.[29]

The command declined to take any criminal action against IT3 B.S. Trial defense counsel brought a motion for dismissal based on selective prosecution.[30] The military judge denied the motion and found that the defense did not meet the initial threshold of showing that similarly situated individuals were treated differently.[31]

At trial, the government called Colonel Tim Lyons, USA, who estimated that at the time of the alleged intercourse, IT3 B.S.'s BAC range was .19-.22.[32] The defense's expert, Dr. Kim Fromme, using the same formula as Colonel Lyons, estimated IT3 B.S.'s BAC to be .14-.17 at the time of the incident.[33] Dr. Fromme's range is lower because, in her calculation, full shots

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[26] R. at 1062, 1064, 1066, 1169-70.
[27] R. at 1169-70.
[28] R. at 1178.
[29] R. at 1179, 1190-91.
[30] R. at 67; Appellate Ex. XV.
[31] R. at 72-73, 75.
[32] R. at 854.
[33] R. at 1343-45.

of Wild Turkey were not the correct measurement. Instead, Dr. Fromme used the standard, statistical amount of alcohol females typically ingest when taking drinks from a bottle for her calculation.[34] Both experts testified that based on her BAC range and reports of missing memory, IT3 Schinter was in a blackout versus pass out stage of drinking.[35] Dr. Fromme, using the same methodology, estimated IT2 Redmon's BAC to be .19-.21 at the time of the alleged sex, consistent with the level of intoxication that causes blackout.[36]

Argument

I.

THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED TRIAL DEFENSE COUNSEL'S MOTION FOR DISMISSAL BASED ON SELECTIVE PROSECUTION.

IT2 Redmond requests *en banc* reconsideration of Panel 3's decision on assignment of error I for two reasons. First, this Panel gives great deference to, what it calls, the military judge's "well-supported" findings of fact and conclusions of law.[37] But since the military judge did not make any findings of fact or conclusions law, very little deference should have been afforded to his conclusions.[38] Appellate Exhibit XVIII, the purported military judge's findings of fact and conclusions of

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[34] R. at 1343-45.
[35] R. at 840-41, 1334-38.
[36] R. at 1352-53.
[37] *Redmon*, 2014 CCA LEXIS 369, at *6, *7.
[38] *United States v. Bins*, 43 M.J. 79, 85-86 (C.A.A.F. 1996).

law cited in Panel 3's opinion, clearly did not come from the military judge. The exhibit is signed by the trial counsel and dated before counsel argued this issue before the military judge.[39] The panel analyzed this issue using fact not contained in the record. What is worse, it gave great deference to the military judge based on that erroneous fact. Accordingly, the panel's opinion was significantly influenced by a wrong fact. IT2 Redmon is entitled to a review of the facts in his record under the appropriate standard of review of the military judge's decision. That reviewed is best completed by the Court *en banc*.

Secondly, reconsideration of assignment of error I is required because Panel 3's opinion incorrectly describes IT2 Redmon's burden to make a *prima facie* case as a "heavy burden," and then unjustifiably employs this harsher standard.[40] Rather, the evidence required to establish a *prima facie* case is not heavy. The law only requires an appellant show "slight" evidence or the "appearance" of evidence that tends to show (1) others similarly situated have not been prosecuted; and (2) that the decision to prosecute was based solely on impermissible grounds, such as race, religion or other arbitrary classification.[41]

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[39] Appellate Ex. XVIII; R. at 12.
[40] *Redmon*, 2014 CCA LEXIS 369, at *6-7.
[41] *United States v. Garwood*, 16 M.J. 863, 872 (N.M.C.M.R. 1983); Black's Law Dictionary 15c (9th ed. 2009).

Here, IT2 Redmon made a *prima facie* case for selective prosecution. He demonstrated that he and IT3 B.S. were both similarly situated because the evidence presented showed that they both engaged in sexual intercourse with a person who was in the blackout stage of drinking.[42] According to Col Tim Lyons, the government's own expert, two people with the same BAC are similarly impaired.[43] IT3 B.S.'s BAC at the time of the incident ranged from .14-.22[44] and IT2 Redmon's BAC was between .19-.21.[45] Both alleged the other sexually assaulted them. They both could have been charged with violating the same statute, Article 120c, UCMJ, for aggravated sexual assault, and their violation was of the same "magnitude" because it was the same incident. In short, they are no different.

Moreover, individuals from the same criminal transaction are not excluded from comparison when considering whether an individual has been subject to selective prosecution.[46] Instead, logic and the case law cited above dictates that those involved

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[42] This point assumes that the Court agrees that there is enough evidence to conclude that penetration occurred, a point IT2 Redmon does not concede.

[43] R. at 840-41.

[44] That range was due to calculating the amount of Wild Turkey as a full shot or as the amount of an average swig.

[45] R. at 843-44, 854, 1343-45, 1352-53.

[46] *United States v. Bradley*, 30 M.J. 308, 311 (C.M.A. 1990) (Those participating in the same crime were not excluded from comparison but for the divergent roles each played in the crime) (citing *Jarrett v. United States*, 822 F.2d 1438, 1444 (7th Cir. 1987)); *see also United States v. McKinley*, 48 M.J. 280, 282 (C.A.A.F. 1998).

in the same criminal transaction can provide a compelling comparison. IT2 Redmon met the test articulated by the Supreme Court to establish a *prima facie* case for selective prosecution. He showed an identifiable person who did the same thing, demonstrated the other person was not prosecuted, and presented a notable, constitutionally significant difference in the two prosecutions, mainly gender.[47] Panel 3 erred when it failed to find that IT2 Redmon demonstrated a *prima facie* case for selective prosecution. But there is more.

In addition to the direct comparison between IT3 B.S. and IT2 Redmon, the defense advanced other evidence that, in substantial incapacitation cases, men are prosecuted while women are not.[48] Furthermore, the convening authority refused to meet with the defense to discuss the matter of why he chose IT2 Redmon over IT3 B.S. to prosecute.[49] The military judge did not require the convening authority to testify or even require the Government put on an argument or evidence. Despite the clear record of railroading of the defense's ability to present

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[47] *See Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886); *see also Frontiero v. Richardson*, 411 U.S. 677, 690-91 (1973) (plurality opinion) (gender is a suspect classification).

[48] Investigating Officer's Report, May 14, 2012, at 2 (Naval Criminal Investigative Service (NCIS) Special Agent Everson said in her twenty-five some years of experience, she had *never* heard of a case where a female was charged with sexually assaulting a male); Appellate Ex. XV at 8 (the defense also attempted to meet with other NCIS agents to see if they had ever prosecuted a female for raping a male, but NCIS refused to meet with them.)

[49] *Id*.

evidence, Panel 3 failed to address the basic facts underlying the assignment of error when considering the issue and used the wrong "heavy burden" standard to countenance the Government and military judge to hamstringing the defense from developing evidence. Based on Panel 3's reasoning, an accused can never meet the *prima facie* standard as long as the convening authority refuses to meet with the defense beforehand. Of course, there is evidence other than a convening authority's admissions that can prove his intent. The case law says as much.

For example, in *United States v. Hagen*, the Court of Military Appeals pointed out the difficulty in obtaining direct evidence of the convening authority's intent and held it is appropriate for the prosecuting authority to be called to the stand where facts are presented that "are sufficient to raise reasonable doubt about the prosecutor's purpose."[50] IT2 Redmon noted this burden in his brief.[51] Panel 3 chose to ignore this tenant of law. Instead, it applied a "heavy burden" of producing direct evidence of the convening authority's intent rather than the *prima facie* standard of "slight." This was an incorrect interpretation of the law and unfair to IT2 Redmon because, despite defense counsel's efforts, the convening authority would not meet with them. The burden should have shifted to the government. The panel completed this error by

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[50] *United States v. Hagen*, 25 M.J. 78, 85 (C.M.A. 1987).
[51] Appellant's Br. 13.

creating an erroneously high standard. This error requires the Court's review *en banc.*

Conclusion

Panel 3 relied on an event in the record that did not occur and conducted its reasoning based on an erroneous view of the law when examining whether a *prima facie* case had been raised. Article 66, UCMJ, demands more. Accordingly, IT2 Redmon respectfully requests the Court reconsider this decision *en banc*, set aside the findings as to Charge I and remand the case for a rehearing on sentence.

II.

THE APPLICATION OF ARTICLE 120(C) TO IT2 REDMON VIOLATES HIS RIGHT TO EQUAL PROTECTION UNDER THE LAW.

IT2 Redmond also requests *en banc* reconsideration of the panel's decision on assignment of error II. The panel erroneously concluded that by settling the first assignment of error, it also answered IT2 Redmon's second assigned error. The Panel, however, never explained how two people with similar blood alcohol levels engaged in the same sexual transaction can be labeled both the victim and the perpetrator at the same time. The crux of assignment of error I, the purported reasons the convening authority chose to prosecute one person but not the other, are separate and distinct from IT2 Redmon's second assigned error. IT2 Redmon's second assignment of error alleged

a violation of equal protection focused plainly on the elements of Article 120(c) and how, due to blood alcohol level, if one person met the definition of substantially incapacitated that the other person must have met it as well. Some factors pertinent to the selective prosecution analysis, such as the speed with which B.S. reported as compared to IT2 Redmon, are of no moment in this Court's analysis about how the element of whether the incapacitation element can be met by identical facts. IT3 B.S. and IT2 Redmon had nearly identical BAC levels, with IT2 Redmon's being possibly worse.[52] No evidence in the record disputes this. Col Tim Lyons, the government's own forensic toxicologist, plainly testified that two people with the same BAC are similarly impaired.[53] The panel failed to address the issue. Indeed, the panel's analysis of issue I never mentions the fact that the two had nearly identical BAC levels despite that fact being the linchpin of IT2 Redmon's assignment of error. The panel decision fails to confront IT2 Redmon's assigned error and denied him Article 66, UCMJ, review.

Conclusion

IT2 Redmon respectfully requests the Court reconsider this decision *en banc*, set aside the findings as to Charge I and authorize a rehearing on sentence.

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[52] R. at 854, 1344, 1352.
[53] R. at 840-41.

CARRIE E. THEIS
Lieutenant, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris St, SE
Bldg 58, Ste. 100
Washington Navy Yard. D.C. 20374
Tel: (202) 685-7390
Fax: (202) 685-7426
Carrie.Theis@navy.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was delivered to the Navy-Marine Corps Court of Criminal Appeals, and that a copy was served on Appellate Government Division, and Deputy Assistant Judge Advocate General (Military Justice-Code 40), on 8 July 2014.

CARRIE E. THEIS
Lieutenant, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris St, SE
Bldg 58, Ste. 100
Washington Navy Yard. D.C. 20374
Tel: (202) 685-7390
Fax: (202) 685-7426
Carrie.Theis@navy.mil

UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
F.D. MITCHELL, J.A. FISCHER, M.K. JAMISON
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JONATHAN D. REDMON
INFORMATION SYSTEMS TECHNICIAN SECOND CLASS (E-5),
U.S. NAVY

NMCCA 201300077
GENERAL COURT-MARTIAL

Sentence Adjudged: 22 October 2012.
Military Judge: CAPT T.M. Carlos, JAGC, USN.
Convening Authority: Commander, Navy Region Europe, Africa, Southwest Asia, Naples, Italy.
Staff Judge Advocate's Recommendation: CDR J.A. Link, JAGC, USN.
For Appellant: LT Carrie E. Theis, JAGC, USN.
For Appellee: Maj Paul M. Ervasti, USMC; Maj David N. Roberts, USMC.

26 June 2014

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

MITCHELL, Chief Judge:

A panel of members with enlisted representation sitting as a general court-martial convicted the appellant, contrary to his pleas, of aggravated sexual assault and adultery in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934. The appellant was sentenced to 60 days confinement, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The convening

authority (CA) approved the sentence as adjudged, and except for the dishonorable discharge, ordered it executed.

In his five assignments of error, the appellant avers: (1) that the military judge abused his discretion by denying the defense motion to dismiss for selective prosecution; (2) that the application of Article 120(c), UCMJ, in this case violated his right to equal protection under the law; (3) that the element of substantial incapacitation is unconstitutionally vague as applied in the appellant's case; (4) that the evidence presented at trial was neither factually nor legally sufficient to support the conviction for a violation of Article 120(c), UCMJ; and, (5) that the military judge abused his discretion when he denied defense's motion to dismiss for unlawful command influence.

After careful examination of the record of trial and the pleadings of the parties, we are satisfied that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

Background

On 20 January 2012, Information Systems Technician Third Class (IT3) S[1] attended a farewell party for the appellant hosted by Information Systems Technician Second Class (IT2) MH. Earlier that evening, IT3 S went to dinner with a few friends during which she consumed multiple glasses of wine. She then went back to her apartment where she consumed another alcoholic drink and shortly thereafter walked to the party with a shipmate, Information Systems Technician Seaman (ITSN) SC. At the party, IT3 S continued drinking alcoholic beverages to include several beers, strong mixed drinks, "swigs" of Wild Turkey Bourbon Whiskey, and a significant quantity of a drink called FUBAR juice, which was described as a very intoxicating mix of alcohol. Record at 1226. The appellant was also drinking that night and consumed much of the same type of alcohol IT3 S did at the party. Although the appellant was married, his wife and children had already left Italy for the United States and their next duty station.

The party ended somewhere around 0300 and IT3 S was intoxicated to the extent that she had difficulty walking. The

[1] At the time of the sexual assault, the victim was an IT3 - she has since been promoted to IT2. For purposes of this opinion, we refer to her as IT3, the pay grade she held at the time of the sexual assault.

appellant and others helped IT3 S back to her apartment, a 10-minute walk away. Once in her apartment, IT3 S undressed and sat on the floor of the shower with the water running over her for approximately 45 minutes. After ITSN SC experienced difficulty extracting IT3 S from the shower, the appellant assisted him in retrieving her from the shower and helping dress her. During the course of dressing her, IT3 S began to vomit in the toilet. After the appellant and ITSN SC managed to clothe IT3 S in sweatpants and a top they laid her down on a futon in the living room to go to sleep. The appellant later lay down next to her.

IT2 KA, who shared the apartment with IT3 S, stayed in the apartment that night with her boyfriend, IT3 LC, but left that morning at 0530 as she had to be at work by 0600. IT3 LC testified that before they left, he looked in on the appellant and IT3 S. He indicated that they were clothed and positioned on the futon as if they were “spooning,” but he otherwise didn’t see anything that gave him pause for concern as they both appeared to be asleep.

IT3 S indicated that after she fell asleep, the next thing she remembers is waking up, naked from the waist down, and the appellant on top of her, penetrating her vagina with his penis. IT3 S began to cry, pushed appellant aside, put on a pair of sweatpants, and went to sleep in her bed. Shortly thereafter, the appellant left and caught a ride with a friend, IT2 B, back to the appellant’s barracks room. While in the appellant’s barracks room, IT2 B noticed what appeared to be semen on the appellant’s boxers when he changed clothes. Additional pertinent facts are provided as necessary to discuss the appellant’s assignments of error.

Selective Prosecution and a Violation of Equal Rights

On 21 January 2012, hours after the incident, IT3 S made an unrestricted report of sexual assault at the U.S. Naval Hospital, Naples, Italy and underwent a sexual assault forensic exam (SAFE). On 25 January 2012, the appellant was informed that he was suspected of violating Article 120, UCMJ, and apprised of his rights pursuant to Article 31(b), UCMJ, by the Naval Criminal Investigative Service (NCIS) Special Agent investigating the sexual assault allegation. On 10 February 2012, the appellant, via memorandum, advised his commanding officer that he wished to exercise his rights under Article 31(b), as explained to him by the NCIS investigating agent, and that he felt that he was the victim of sexual assault in this

case. Appellate Exhibit XV, enclosure (6). IT3 S was not charged with sexual assault notwithstanding the appellant's allegation.

At trial, the defense moved to dismiss the charges against the appellant alleging that the CA engaged in selective prosecution. He argued that even though the evidence demonstrated that the appellant and IT3 S had approximately the same level of intoxication and that neither of them remembered the sexual encounter, it was the appellant who was the victim of sexual assault in this case and yet the CA was unwilling to prosecute IT3 S because she was female. This motion was denied by the military judge. Record at 75 and AE XVIII.

In his initial assignment of error, the appellant contends that the military judge erred by not dismissing the charges against him due to the CA engaging in selective prosecution. Closely related, in his second assignment of error the appellant contends the CA's decision to prosecute him and not IT3 S violated his right to equal protection under the Due Process Clause of the Fifth Amendment to the Constitution. We disagree with both contentions.

The Law

CAs have broad discretion in determining whom to prosecute *United States v. Brown,* 40 M.J. 625, 629 (N.M.C.M.R. 1994); *United States v. Kelly,* 40 M.J. 558, 570 (N.M.C.M.R. 1994). Unless presented with evidence to the contrary, we presume that CAs act without bias. The appellant has the burden of rebutting this presumption. To raise the issue of selective or discriminatory prosecution, an appellant bears the heavy burden of establishing, at least *prima facie:* (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the Government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. *United States v. Garwood*, 20 M.J. 148, 154 (C.M.A. 1985). An appellant must show more than a mere possibility of selective prosecution; he must show discriminatory intent. *United States v. Brown*, 41 M.J. 504, 511 Army Ct.Crim.App. 1994). In reviewing rulings by a military judge on a motion to dismiss for selective prosecution, we review the findings of fact under a "clearly erroneous" standard, while we review the conclusions of law *de*

novo. *See United States v. Johnson*, 54 M.J. 32, 34 (C.A.A.F. 2000).

Discussion

In denying the defense's motion to dismiss for selective prosecution, the military judge made detailed findings of fact, well-supported by the record, and we therefore adopt them as our own. *See* AE XVIII. The military judge found as a matter of law that the appellant failed to establish a *prima facie* showing of selective prosecution utilizing the *Garwood* test. We agree.

The evidence adduced from the NCIS investigation and provided to the CA indicated that when the party ended, the appellant had to assist IT3 S in getting home by carrying her part of the way. After they arrived at her apartment, the appellant assisted in getting her out of the shower and watched her vomit in the toilet. The appellant then assisted in getting her clothed and laid down next to her after he helped put her to bed. Prior to laying down with IT3 S, the appellant made comments to others like "I am fine" and that IT3 S was "like [his] little sister," suggesting that IT3 S would be safe with him. IT3 S awoke up to find the appellant on top of her penetrating her vagina with his penis. Mere hours after the sexual assault, IT3 S reported it to the U.S. Naval Hospital, Naples. It was weeks later, and only after being informed by NCIS that he was suspected of sexual assault, that the appellant claimed that he was the victim in this case.

We do not find that the appellant and IT3 S are "similarly situated" and that the appellant has been "singled out" for prosecution in this case. We additionally do not find evidence of bad faith on the part of the CA in bringing the appellant to trial. The information provided to the CA, to include the Article 32 Investigating Officer's report, the NCIS Investigative Report, and the staff judge advocate's Article 34 Advice memorandum, quite to the contrary, all suggest that the appellant was not the victim but rather the perpetrator of this sexual assault, and that the appropriate forum in which to dispose of the appellant's charges was at a general court-martial. We find this assignment of error to be without merit and therefore decline to grant relief.

We similarly find the appellant's second assignment of error alleging a Fifth Amendment violation to be without merit and not worthy of further comment.

Constitutional Challenge to Article 120 as Applied

In his third assignment of error, the appellant contends that the element of "substantial incapacitation" is unconstitutionally vague as applied to the appellant. The appellant specifically avers that Article 120 (c), UCMJ, is unconstitutionally vague because "[t]he law cannot be understood by the common man or those who prosecute it" and it is unclear "what factors satisfy the element of substantial incapacitation" in this case. Appellant's Brief of 22 Jul 2013 at 20.

The Law

A basic principle of due process requires "fair notice" that an act is subject to criminal sanction and the standard that is applicable to the forbidden conduct. *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003). A law is "void for vagueness" if "'one could not reasonably understand that his contemplated conduct is proscribed.'" *Id*. (quoting *Parker v. Levy*, 417 U.S. 733, 757 (1974)). The sufficiency of statutory notice is determined in the light of the conduct with which a defendant is charged. *Levy*, 417 U.S. at 757. "Criminal statutes are presumed constitutionally valid, and the party attacking the constitutionality of a statute has the burden of proving otherwise." *United States v. Mansfield*, 33 M.J. 972, 989 (A.F.C.M.R. 1991) (citation omitted), *aff'd*, 38 M.J. 415 (C.M.A. 1993).

Standard of Review

We review whether a statute is unconstitutional as applied *de novo*. *United States v. Ali*, 71 M.J. 256, 265 (C.A.A.F. 2012). However, at trial, the appellant did not object to the constitutionality of Article 120(c), UCMJ, as applied to his case. Since the error the appellant is alleging is constitutional, and in light of the Court of Appeals for the Armed Forces presumption against waiver of constitutional rights and the requirement that waiver "'clearly establish[] . . . an intentional relinquishment of a known right or privilege,'" we consider the alleged error forfeited and not waived. *United States v. Sweeney,* 70 M.J. 296, 303-04 (C.A.A.F. 2011) (quoting *United States v. Harcrow*, 66 M.J. 154, 157 (C.A.A.F. 2008). We therefore test for plain error. *Id*. at 304.

Under plain error review, we will grant relief only where: (1) there was error, (2) the error was plain and obvious, and (3) the error materially prejudiced a substantial right of the appellant. *Id*. To determine if "a statute is 'unconstitutional

as applied,' we conduct a fact-specific inquiry." *Id*. (footnote and citations omitted).

Analysis and Discussion

The appellant was charged with violating Article 120(c), UCMJ, specifically alleging that he had sexual intercourse with IT3 S, who was substantially incapacitated. Aggravated sexual assault, under Article 120(c)(2), is committed when a person "engages in a sexual act with another person of any age if that other person is substantially incapacitated or substantially incapable of: (A) appraising the nature of the sexual act; (B) declining participation in the sexual act; or (C) communicating unwillingness to engage in the sexual act . . . ."

After consultation with its expert, the defense was informed that, based upon the amount and types of alcohol IT3 S and other witnesses indicated that she consumed, the expert was of the opinion that IT3 S was in a "blacked out" vice "passed out" stage of intoxication at the time of the sex act. While the defense expert could definitively state that a person in a "passed out" stage of intoxication would be "substantially incapacitated" and not capable of consent, she could not so definitively state such when the person was in a "blacked out" stage. After receiving this information, the defense served the Government with a motion for appropriate relief in the form of a bill of particulars requesting the Government to define what the term "substantially incapacitated" meant in regards to the appellant's charged misconduct. AE XXXV. After the Government counsel denied this request, the defense filed the same motion with the court and it was ultimately denied by the military judge. Record at 322. The appellant now contends that he was denied due process of law as guaranteed by the Fifth Amendment because he was not given fair notice that his misconduct was forbidden due to the vagueness of the statute. We disagree.

At an Article 39(a), UCMJ, session to hear the defense's motion for appropriate relief, the defense indicated that the defense team was in possession of the military judge's proposed member's instructions that included the definition of substantial incapacitation. The military judge stated:

> I mean you have the definition of substantially incapacitated, right, that I've given out and it's been a standard of my instructions on for every single one of the substantially incapacitated case (sic) . . . . It's a level of mental impairment due to the

> consumption of alcohol while asleep or unconscious which rendered the alleged victim unable to appraise the nature of the sexual conduct at issue, unable to physically communicate unwillingness to engage in the sexual conduct or otherwise unable to make or communicate a competent decision.

Record at 321-22.

That definition was contained in the Judge's Benchbook prior to his trial and the military judge advised the defense he intended to give that instruction to the members. After this disclosure by the military judge, the defense did not state that it was surprised or unprepared to defend against this possibility, nor did the defense team request additional time to prepare. The appellant clearly knew and understood the legal theory on which he was prosecuted: that he had committed a sex act (sexual intercourse) upon IT3 S and that he did so while she was substantially incapacitated — while she was asleep or unconscious.

Under these circumstances, the appellant's due process rights were not violated because he was on notice of what he needed to defend against throughout his court-martial. *United States v. Wilkins*, 71 M.J. 410, 414 (C.A.A.F. 2012). Accordingly, we find no error by the trial court and conclude that this assignment of error is without merit.

Legal and Factual Sufficiency

In his fourth assignment of error, the appellant avers that the finding of guilty on the charge of sexual assault is legally and factually insufficient. We disagree.

The Law

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Crim.Ct.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ. The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this

court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c).

Analysis

There are two elements to the offense of aggravated sexual assault that the Government was required to prove beyond a reasonable doubt: (1) that the accused engaged in a sexual act with the IT3 S; and (2) that IT3 S was substantially incapacitated. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), Appendix 28, ¶ 45b(3)(c).

There is little dispute, if any, as to whether the appellant engaged in a sex act with IT3 S. IT3 S testified that after she went to sleep, she was awakened by the appellant on top of her with his penis inside of her vagina. The SAFE revealed the presence of semen in IT3 S's vagina which matched the deoxyribonucleic acid (DNA) of the appellant. While the appellant claims he does not remember the event, he stated during an NCIS recorded phone call with IT3 S that a sexual act must have occurred as both of them were naked from the waist down. The only element in issue is whether IT3 S was substantially incapacitated.

In presenting its case in chief, the Government called multiple witnesses who described the different types and quantities of alcoholic beverages they saw IT3 S consume as well as the fact that, as a result of her heavy drinking, her speech was slurred; she was having difficulty walking; and she was incoherent and vomiting. The Government also called Colonel (COL) Timothy Lyons, U.S. Army, Chief of Forensic Toxicology Division, Armed Forces Medical Examiner, who the military judge recognized as an expert in the field of forensic toxicology. After listening to the witnesses and based on the amount and types of alcohol they said IT3 S consumed, COL Lyons stated that he would have put her blood alcohol content (BAC) between .19 and .22. Record at 854. When questioned as to the incapacitation of IT3 S, the following colloquy occurred between the trial counsel and the Government's forensic expert:

> TC: Am I correct in saying that when it comes to actually establishing whether someone was, as we would say in the legal world, substantially incapacitated, you can't categorically say that for any particular case?
> A: It's not a toxicology question. That's a legal question.

> TC: Precisely, sir, but what is it that you can do in cases like this?
> A: And I hinted to it – I mean ---let me clarify that. If an individual has a BAC that I think would put them in a range where they're unconscious or were unresponsive, then I would be safe in saying "I don't think that individual had the capacity to consent." Okay? That I am willing to do. However, in a case like this where the BAC is lower than that, all I can state scientifically, is that the BAC that I estimated is consistent with the witness statements that I heard in court yesterday as far as her condition mentally and physically and that my BAC is the manifestations or the symptoms that I would associate with the BAC I estimated are in line or consistent with the statements that I heard and that this individual that I would expect to be impaired and incapacitated and have trouble, you know, with memory definitely, potentially incoherent, potentially confused of her surroundings and that's basically what I gleaned from the statements that I heard yesterday. So that's what I am willing to say.

Record at 869-70.

Additionally, the objective evidence adduced at trial also shows that IT3 S was significantly more affected by alcohol that night than the appellant and that semen matching the DNA of the appellant was found in IT3 S's vagina. As appellant indicated that he called a friend and left IT3 S's apartment at approximately 0600 or 0615, the sexual assault therefore occurred shortly after IT3 LC and IT2 KA left the appellant alone in the apartment with IT3 S.

Given these facts that were before the members, we have little difficulty finding that the members had a factual basis to find the appellant guilty beyond a reasonable doubt. On balance, and with due regard for the fact that we did not observe the witnesses, we too are convinced of the appellant's guilt beyond a reasonable doubt. We find this assignment of error to be without merit.

Unlawful Command Influence

In his final assignment of error, the appellant contends that the military judge erred in denying the defense's motion to dismiss the case due to unlawful command influence.

The Law

"Congress and this court are concerned not only with eliminating actual unlawful command influence, but also with 'eliminating even the appearance of unlawful command influence at courts-martial.'" *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006) (quoting *United States v. Rosser*, 6 M.J. 267, 271 (C.M.A. 1979)). An accused has the initial burden of raising the issue of unlawful command influence. *United States v. Stombaugh*, 40 M.J. 208, 213 (C.M.A. 1994). The defense must "show facts that, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings." *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999) (citations omitted). The quantum of evidence necessary to raise the specter of unlawful command influence is "'some evidence.'" *Biagase*, 50 M.J. at 150 (quoting *United States v. Ayala*, 43 M.J. 296, 300 (C.A.A.F. 1995)). The burden of disproving the existence of unlawful command influence or proving that it will not affect the proceeding does not shift until the defense meets its burden of production.

Analysis and Discussion

Allegations of unlawful command influence are reviewed *de novo*. *United States v. Harvey*, 64 M.J. 13, 19 (C.A.A.F. 2006); *United States v. Villareal*, 52 M.J. 27, 30 (C.A.A.F. 1999); *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994). We necessarily begin our analysis by determining whether the defense met its initial burden of providing "some evidence" necessary to make a colorable showing of unlawful command influence.

In the appellant's case, the charges were preferred on 10 April 2012; the defense received the request for counsel and the charge sheet at 1711 hours that same day. The appellant's defense counsel were detailed on 11 April with the Article 32 hearing scheduled for 19 April 2012. The defense requested a continuance and the Article 32 was rescheduled for 30 April 2012. The appellant filed a timely motion with the trial court arguing that his commanding officer exerted unlawful command influence over the judicial process by so quickly convening an Article 32 Investigation thus creating the appearance of unlawful command influence. *See* AE XIX. After considering the motion, the military judge concluded that the defense had

presented insufficient evidence of unlawful command influence to warrant shifting the burden of proof to the Government on the issue and, alternatively, he was convinced beyond a reasonable doubt that the charges against the appellant were free from actual or apparent unlawful command influence. AE XXII.

We too conclude that the appellant has failed to meet its initial burden to provide "some evidence" of facts which, if true, constitute unlawful command influence. His claims regarding the special court-martial CA's quest to have the Article 32 completed in an expeditious manner does not give rise to unlawful command influence. Mere speculation that unlawful command influence occurred because of a specific set of circumstances is not sufficient. *United States v. Ashby*, 68 M.J. 108, 128 (C.A.A.F. 2009). The appellant has failed to show that his commanding officer's interest in conducting the Article 32 in an expeditious manner was anything other than proper, official, and command prerogative.

Conclusion

The findings and the sentence are affirmed as approved by the CA.

Judge FISCHER and Judge JAMISON concur.

For the Court

R.H. TROIDL
Clerk of Court

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Jonathan D. REDMON Information Systems Technician Second Class (E-5) United States Navy, Appellant	SUPPLEMENT TO PETITION FOR GRANT OF REIVEW Crim.App. Dkt. No. 201300077 USCA Dkt. No. _____/NA

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

CARRIE E. THEIS
Lieutenant, JAGC, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate Review
Activity
1254 Charles Morris Street, SE
Bldg. 58, Ste. 100
Washington Navy Yard, DC 20374
(202) 685-7390
Fax (202) 685-7426
Carrie.Theis@navy.mil
Bar no. 35815

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Issues Presented

I.

WHETHER IT2 REDMON WAS AFFORDED ARTICLE 66, UCMJ, REVIEW WHERE THE LOWER COURT BASED ITS REASONING ON FACTS NOT CONTAINED IN THE RECORD, GROSSLY MISCHARACTERIZED THE CONTENTS OF AN EXHIBIT AND FAILED TO APPLY THE CORRECT STANDARD OF REVIEW.

II.

WHETHER THE LOWER COURT ERRED IN DETERMINING THAT IT2 REDMON WAS NOT SELECTIVELY PROSECUTED.

III.

WHETHER IT2 REDMON'S SEXUAL ASSAULT CONVICTION VIOLATES HIS EQUAL PROTECTION RIGHTS WHERE THE EXPERT EVIDENCE AT TRIAL SHOWED THAT HE AND THE ALLEGED VICTIM HAD THE SAME BLOOD ALCOHOL LEVEL AT THE TIME OF THE SEXUAL ACT.

Introduction

In reviewing courts-martial convictions, Article 66, Uniform Code of Military Justice (UCMJ), requires intermediate courts of criminal appeal to affirm only "such findings of guilty and the sentence . . . [that] on the basis of the entire record, should be approved." 10 U.S.C. § 866(c). Here, the lower court failed to fulfill the mandate of Article 66. It decided an assignment of error by relying on and "adopting . . . as our own" purportedly "well-supported" and "detailed" findings of fact by the military judge that, in fact, do not exist in the record. *United States v. Redmon*, 2014 CCA LEXIS 369, at *6, *7

(Jun. 26, 2014). The court erroneously relied on an appellate exhibit prepared by the government in reaching this conclusion. The lower court did not rule on the motion IT2 Redmon's motion to reconsider, which pointed out the error. Rather, it issued a "corrected" opinion that only omitted the reference to the non-existent military judge's findings of fact. *United States v. Redmon*, 2014 CCA LEXIS 369 (Jul. 16, 2014). By failing to reconsider its opinion, the lower court did not apply the proper degree of deference to the military judge's rulings as we was owed less deference since he did not, in fact, make findings on the record as the lower court initially believed. Worse yet, the document the lower court relied on was created before the motion was argued or evidence was presented- and the military judge did not make the government present any evidence!!! There could not have been any findings of fact regarding IT3 B.S.'s intoxication level because none was presented. As a result, the lower court's review was so careless that it substantially undermines the integrity of the Article 66 review afforded IT2 Redmon. This is error and IT2 Redmon calls on this Court to use its supervisory power to intervene to ensure IT2 Redmon receives the statutory review to which he is entitled.

This Court could also correct the lower court's error by granting review on the important issue of selective prosecution. Before making a charging decision, the convening authority was

made aware that both IT2 Redmon and the alleged victim in this case, IT3 B.S., had made an allegation to the Naval Criminal Investigative service that they had sexual intercourse with one another while substantially incapacitated. IT2 Redmon made this allegation before he knew he was under investigation. One person, IT2 Redmon—a man—was charged with a crime and the other, IT3 B.S.—a woman—was labeled a victim.

At trial, the trial defense counsel brought a motion to dismiss for selective prosecution based on gender. Although trial defense counsel showed that the two were similarly situated and introduced evidence that there had never been any prosecution of females for this crime, the military judge failed to find that IT2 Redmon presented a *prima facie* case for selective prosecution. The lower court compounded this error by employing the wrong standard for determining whether IT2 Redmon had, in fact, presented a *prima facie* case. IT2 Redmon calls on this court to fix the lower court's incorrect application of precedent.

Finally, the lower court erred in deciding IT2 Redmon's second assignment of error, a charge that his prosecution violated his right to equal protection of the law. At trial, the experts testified that IT2 Redmon and IT2 B.S., the alleged victim, had virtually the same blood alcohol levels when they engaged in sexual intercourse. The experts testified that

similar levels of intoxication cause similar levels of impairment. The lower court committed error by failing to confront a salient, constitutional concern of equal protection of law in that those with similar levels of impairment are labelled as both perpetrator and victim. This is a problem likely to repeat itself in countless other cases and worthy of review. IT2 Redmon prays this Court will step in to afford him proper review.

Statement of Statutory Jurisdiction

Because the convening authority approved a sentence that included a punitive discharge, the U.S. Navy-Marine Corps Court of Criminal Appeals (NMCCA) had jurisdiction under Article 66(b)(1), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(1). IT2 Redmon invokes this Court's jurisdiction under Article 67, UCMJ, 10 U.S.C. § 867.

Statement of the Case

A general court-martial with enlisted representation convicted IT2 Redmon, contrary to his pleas, of one specification of aggravated sexual assault and one specification of adultery in violation of Articles 120 and 134, UCMJ. (R. at 1522); 10 U.S.C. §§ 920, 934 (2012). The members sentenced IT2 Redmon to sixty days of confinement, total forfeiture of pay and allowances, reduction to pay-grade E-1, and a dishonorable discharged. (R. at 1620.) On February 8, 2013, the convening

authority approved the sentence as adjudged and, with the exception of the dishonorable discharge, ordered the sentence executed. (General Court-Martial Order Number 1D-12, Feb. 8, 2013.) The lower court affirmed the findings and sentence in an authored opinion issued on June 26, 2014. (App. 1.) On July 8, 2014, IT2 Redmon filed a motion for reconsideration, and on July 16, 2014, the lower court denied reconsideration and issued a corrected opinion. (App. 2.)

Statement of Facts

On January 20, 2012, IT2 M.H. planned to a host a going-away party for IT2 Redmon with their close group of friends. (R. at 1296.) Although not within the initial group of invitees, IT3 B.S. asked IT2 Redmon if she could also come to the party. (R. at 524.) IT3 B.S. knew IT2 Redmon from work, but also knew him more than professionally, as they would often engage in personal conversations at social functions after work. (R. at 528-30.) They were not dating; IT2 Redmon was married and IT3 B.S. was in a long-distance dating relationship with J.B. in January of 2012. (R. at 639-40.)

The night of the party, IT3 B.S. went to dinner with a few friends where she had two or three glasses of wine. (R. at 523.) She then went back to her apartment for an hour, had a shot of Southern Comfort, and then walked with a friend to the party. (R. at 536-37, 540.) At the party she had three or four

beers, a couple sips of mixed drinks, and a few swigs of Wild Turkey Bourbon Whiskey (Wild Turkey). (R. at 543, 545-46, 1344.)

IT2 Redmon also drank that evening and consumed copious amounts of alcohol throughout the night. He had at least three strong mixed drinks, several beers, and multiple shots of Wild Turkey from a bottle he was carrying around. (R. at 795-96, 1064, 1028.)

During the party, IT2 Redmon and IT3 B.S. spent time talking alone, and, according to one witness, were kissing and hugging for approximately ten seconds at one point. (R. at 1212.) Later in the night, IT2 Redmon was part of a group who walked back to IT3 B.S.'s house. IT3 B.S. remembered who walked her back and that IT3 B.S. thought it was funny that she was having trouble walking. (R. at 577-78, 1272.) Then while talking and laughing, IT3 B.S. used three different keys to open three different locks and walked unassisted up a spiral staircase to get into her apartment. (R. at 624-25, 1272.) She recalled that she got undressed and entered the shower. (R. at 576-80, 675.) Significantly, she recalled a forty-minute period where she rebuffed the attempts of others to get her out of the shower. (*Id*.) She expressed her wishes verbally--by telling them she wanted to stay--and physically--by turning the shower back on when others turned it off. (*Id*.) She then vomited and,

as she recalled, finally got out of the shower before being helped into some clothes to sleep in. (R. at 576-80, 675.)

The next thing IT3 B.S. recalled was waking up and reaching down with her right hand to feel IT3 Redmon's erect penis, and using her left hand to feel her vagina. (R. at 581.) She then remembered feeling pressure, which she believed to be penetration. (R. at 581.) After several hours of sleeping in a spooning position with IT2 Redmon, IT2 B.S. got up, got dressed and became emotional. (R. at 636-37, 686-87.) IT2 Redmon, confused, then left the house. (R. at 1169-70.)

Later that morning, IT3 B.S. went to the hospital with her friend and received a sexual assault forensic exam from LT D.A. LT D.A. did not note any injuries on IT3 B.S. and could not conclude from her examination that penetration occurred. (R. at 949.) IT3 B.S.'s blood was drawn to determine the level of alcohol still left in her blood. Ultimately, this draw was not helpful in determining IT3 B.S.'s blood alcohol level (BAC) because the alcohol had dissipated. (R. at 843-44.)

After going to the hospital, IT3 B.S. worked with NCIS to record two telephone conversations between IT2 Redmon and herself. During those wire intercepts, IT2 Redmon consistently stated he was drunk too and denied being able to recall any details about the sexual encounter. (R. at 1062, 1064, 1066, 1169-70.) IT2 Redmon offered these details of his incapacity

during a pretext phone call before he even knew he was being accused of sexual assault. He surmised that sex must have occurred, but maintained that he had no memory of it. (R. at 1169-70.) That has happened to IT2 Redmon before. IT2 Redmon previously blacked out from drinking, engaged in sexual intercourse with his wife, and later woke up without any memory of the sexual intercourse. (R. at 1178.) Two weeks after the incident, IT2 Redmon reported to his command that he was sexually assaulted by IT3 B.S. and requested a military protective order from her. (R. at 1179, 1190-91.)

The command declined to take any criminal action against IT3 B.S. Trial defense counsel brought a motion for dismissal based on selective prosecution. (R. at 67; Appellate Ex. XV.) Along with presenting evidence that IT2 Redmon had been drinking that night and had no memory of the sexual activity, trial defense counsel also presented evidence that there had not been a single prosecution of a female for this very crime. (Investigating Officer's Ex. 3, 4; Investigating Officer's Report at 2.) The government did not present any evidence. (R. at 70-73.) The military judge denied the motion and found that the defense did not meet the initial threshold of showing that similarly situated individuals were treated differently. (R. at 72-73, 75.)

At trial, the government called Colonel Tim Lyons, USA, who estimated that at the time of the alleged intercourse, IT3 B.S.'s blood alcohol content (BAC) range was .19-.22. (R. at 854.) The defense's expert, Dr. Kim Fromme, using the same formula as Colonel Lyons, estimated IT3 B.S.'s BAC to be .14-.17 at the time of the incident. (R. at 1343-45.) Dr. Fromme's range is lower because, in her calculation, full shots of Wild Turkey were not the correct measurement. Instead, Dr. Fromme used the standard, statistical amount of alcohol females typically ingest when taking drinks from a bottle for her calculation. (*Id*.) Both experts testified that based on her BAC range and reports of missing memory, IT3 B.S. was in a blackout versus pass-out stage of drinking. (R. at 840-41, 1334-38.) Dr. Fromme, using the same methodology, estimated IT2 Redmon's BAC to be .19-.21 at the time of the alleged sex, consistent with IT3 B.S.'s level of intoxication. (R. at 1352-53.) According to the expert testimony, BAC controls the level of mental impairment: those with similar BACs are similarly mentally impaired. (R. at 840-41.)

IT2 Redmon filed his appellate brief in this case on 23 July, 2013. More than a year later, the lower court issued its decision, affirming the findings and sentence. The lower court began its analysis of the selective prosecution and violation of equal protection issues by emphasizing that "the military judge

made detailed findings of fact, well-supported by the record, and we therefore adopt them as our own. *See* AE XVIII." *United States v. Redmon*, 2014 CCA LEXIS 369, at *6, *7 (Jun. 26, 2014). But no findings of fact existed. The "findings of fact" that the lower court adopted were actually taken from Appellate Exhibit XVIII, which is the trial counsel's proposed findings of fact and conclusions of law; the military judge did not adopt them. (*See* Appellate Ex. XVIII; R. 65-72.) Indeed, the government did not put on any evidence that the military judge could have used to develop findings of fact and conclusions of law. Indeed, the lower court's opinion does not contain any citations to the record supporting their findings of fact on the issue-likely because those facts came from the contested portion of the trial, well after the motion was raised.

IT2 Redmon filed a motion to reconsider, pointing out the error. But the lower court did not rule on the motion. Rather, it issued a "corrected" opinion that merely omitted the reference to the non-existent military judge's finding of fact. *United States v. Redmon*, 2014 CCA LEXIS 369 (Jul. 16, 2014).

Reasons for Granting Review

I.

THIS COURT SHOULD GRANT REVIEW BECAUSE THE LOWER COURT FAILED TO FULFILL ITS ARTICLE 66, UCMJ, RESPONSIBILITIES BY NOT BASING ITS REASONING ON A CORRECT UNDERSTANDING OF THE RECORD, GROSSLY MISCHARACTERIZING THE

CONTENTS OF AN EXHIBIT, AND FAILING TO APPLY THE CORRECT STANDARD OF REVIEW.

Article 66, UCMJ, requires the lower court to review cases referred to it and "affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Art. 66(c), UCMJ, 10 U.S.C. § 866(c) (2012). In conducting this review, military courts of criminal appeal "are intended to not only uphold the law, but provide a source of structural integrity to ensure the protection of service members' rights within a system of military discipline and justice where commanders themselves retain awesome and plenary responsibility." *United States v. Jenkins*, 60 M.J. 27, 29 (C.A.A.F. 2004). This "independent," "awesome, plenary, and de novo review" is a substantial right of appellants. *Id*. at 29-30 (internal quotation marks and citation omitted).

"[T]his Court has judicial functions distinct from its authority to review for error . . . under Article 67." *United States v. Jackson*, 5 M.J. 223, 226 (C.M.A. 1978). It has the additional responsibility of guaranteeing, "through [its] supervisory powers, a military judicial system that reflects justice and fundamental fairness." *Id*.; *see also* United States Court of Appeals for the Armed Forces Rules of Practice and

Procedure, Rule 5 (the scope of review "includ[es] the exercise of its supervisory powers over the administration of the UCMJ.").

The lower court's original opinion demonstrates that it resolved IT2 Redmon's first and second assignments of error based on a clearly erroneous view of the record; it "adopt[ed] . . . as our own" "detailed findings of fact, well-supported by the record" that did not exist. The "findings of fact" that the lower court adopted were the government's proposed findings of fact and conclusions of law. (*See* Appellate Ex. XVIII; R. 65-72.) Indeed, the document itself is signed only by the trial counsel and it is dated before counsel even argued the motion. (Appellate Ex. XVIII.)

The absence of findings of fact on the record results in appellate courts giving less deference to a military judge's rulings. *United States v. Flesher*, 73 M.J. 303, 2014 CAAF LEXIS 702 at *21-22 (C.A.A.F. July 8, 2014); *see also United States v. Bins*, 43 M.J. 79, 85-86 (C.A.A.F. 1996). Because the IT2 Redmon's military judge did not make findings of fact, his rulings were due less deference than the lower court gave them.

Once notified of its significantly incorrect view of the record, the lower did not acknowledge and fix its error by reconsidering its opinion using the correct level of deference. Rather it issued a "corrected" opinion that omitted the

reference to the findings of fact without changing a single other thing in the opinion. (*Compare* App. 1 *with* App. 2.) The lower court's actions have resulted in two problems, both demonstrating that it violated IT2 Redmon's substantial right to Article 66 review.

First, the lower court did not apply the correct level of deference to the military judge's rulings as discussed. A review of the military judge's rulings with less deference would have resulted in the lower court looking at the issue with fresh eyes and seeing that IT2 Redmon did not know he was under investigation and reported that he was too drunk to remember or consent to sex in contrast to the government not putting on evidence of IT3 B.S.'s intoxication.

Second, the lower court's review was so careless that it substantially undermines the integrity of its Article 66 review and of its opinion. Appellate Exhibit XVIII–-the document the lower court erroneously believed contained the military judge's findings of fact–-is signed only by the trial counsel and it is dated before counsel argued the motion. (Appellate Ex. XVIII.) So not only did the lower court not review the record closely enough to notice that the military judge did not make findings of fact, it did not even review the document that it found contained "detailed" and "well-supported" findings of fact closely enough to notice that the government never introduced

evidence of those facts. As a result, it cannot be concluded that IT2 Redmon received the "awesome, plenary, and de novo review to which he was entitled by law." *Jenkins*, 60 M.J. at 30 (finding that appellant did not receive Art. 66 review despite the fact that he received some relief because "the fact that Appellant received some of what he was entitled to does not mean he received all to which he was entitled") (internal quotation marks and citation omitted).

The lower court failed to fulfill its statutory duty and IT2 Redmon prays this Court employs its supervisory power to act where the lower court has proven unwilling.

II.

THE LOWER COURT FAILED TO FOLLOW BINDING PRECEDENT AND USED THE WRONG STANDARD TO JUDGE IT2 REDMON'S MOTION FOR DISMISSAL BASED ON SELECTIVE PROSECUTION.

This Court should grant review in this case because the lower court decided a question of law in way that conflicts with precedent of this Court and the Supreme Court of the United States and this Court. C.A.A.F. R. 21(b)(i)-(ii).

The lower court failed to follow Supreme Court precedent and applied a higher threshold burden of proof to IT2 Redmon.

In order to establish a prima facie case for selective protection an accused must demonstrate that (1) others similarly situated have not been prosecuted; and (2) that the decision to prosecute was based solely on impermissible grounds, such as

race, religion, or other arbitrary classification. *United States v. Garwood*, 20 M.J. 148, 154 (C.M.A. 1985).

Finding a *prima facie* case for selective prosecution, however, does not require direct evidence of the bad faith. Rather, as the Supreme Court held in *United States v. Armstrong*, the law only requires an appellant to allege "'some evidence tending to show the essential elements of' a selective-prosecution claim." 517 U.S. 456, 470 (1st Cir. 1990) (citing *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974)). The Supreme Court describes this test as the production of "some evidence that similarly situated defendants . . . could have been prosecuted, but were not. . ." *Armstrong*, 517 U.S. at 469 (citations omitted.)

In its opinion, the lower court relies on a Court of Military Appeals case decided five years before the Supreme Court decided *Armstrong* and incorrectly describes IT2 Redmon's burden to make a *prima facie* case as a "heavy burden," requiring him to show direct evidence of discriminatory intent that was "invidious or in bad faith." *Redmon*, 2014 CCA LEXIS 369, at *6-7 (citing *Garwood*, 20 M.J. at 154). This is clearly incorrect. As the Supreme Court held in *Armstrong*, the evidence required to establish a *prima facie* case is the "some evidence" standard, which is not a "heavy burden" as the lower court incorrectly described. The Court of Military Appeals (CMA) made clear in

United States v. Hagen that the standard is low. In that case, the CMA described the burden as requiring the defendant to present facts that "are sufficient to raise reasonable doubt about the prosecutor's purpose." *United States v. Hagen*, 25 M.J. 78, 85 (C.M.A. 1987).

IT2 Redmon met this burden. IT3 B.S. was a person who had committed an act of sexual assault on IT3 Redmon and was not prosecuted for it and IT2 Redmon showed it! He showed that he and IT3 B.S. had a similar level of intoxication and similar memory loss. These facts point to the most salient factor of criminality under Article 120(c), UCMJ: the lack of capacity to consent. 10 U.S.C. § 920(c). It is helpful to compare the evidence available regarding the intoxication of the two individuals:

IT2 Redmon	***IT3 B.S.***
Witnesses observed hugging and kissing between IT3 B.S. and IT2 Redmon at the party; Investigating Officer's Report at 10-11.	Witnesses observed hugging and kissing between IT3 B.S. and IT2 Redmon at the party; R. at 806, 1211-12, 1217-18, 1229-30.
During the party, IT2 Redmon was drunk, repeating himself and speaking incoherently at times. Investigating Officer's Report at 6, 9.	Walked to her room without assistance up a spiral staircase and use three keys to get into her place; *Id.* at 576, 635-36.
IT2 Redmon was stumbling around the party, dropped the bottle of Wild Turkey he was holding, and exhibited an aggressive behavior out of the ordinary for him.	Showered for forty minutes and rebuffed the attempts of many to get her out of the shower, including turning the shower back on when it was turned off. *Id.* at 576-80, 675.

Investigating Officer's Report at 9, 11.	
IT2 Redmon could not recall how he got from the party to IT3 B.S.'s house. *Id*. at 4.	Became sick that evening; *Id.* at 580, 744.
Little to no memory of the evening; *Id.* at 8.	Fragmentary memory loss throughout the evening, but recalls parts of the sexual activity; *Id.* at 574-83; Investigating Officer's Report at 8.
Others recall IT2 Redmon stating he was "fine" and that IT3 B.S. was like his "little sister." IT2 Redmon does not recall making these comments. (R. at 703, 747, 756.)	IT3 B.S. calls for IT2 Redmon to help her several times during her shower. Investigating Officer's Report at 5.
No recollection of sexual intercourse. *Id*.; Investigating Officer's Exhibit 3, 4.	Remembers intercourse, feeling penetration and erect penis prior to penetration; *Id.* at 634-36; 638-39.
IT2 Redmon asked for a pair of pants to sleep in *Id*. at 6.	Chose shorts from wardrobe and put them on; *Id.* at 636-37.
Slept spooning IT3 B.S. R. at 686-87.	Slept spooning IT2 Redmon. R. at 686-87.
IT2 Redmon still had a drunken stumble the next morning when he was observed by a friend. Investigating Officer's Report at 9.	Awoke with no difficulty; *Id.* at 634-38.
IT2 Redmon woke up disoriented and unsure what happened that night. Reported the sexual assault twenty days after the incident because he did not have a clear recollection of the evening. *Id*. at 2.	Upset about the sexual encounter and reports being sexually assaulted that day.

The investigating officer noted the possible selective prosecution claim despite the fact that the Article 32 by its nature was not designed to answer such a question. In his report, the Investigating Officer specifically states that "I

make no *per se* assessment of Redmon's claim he was assaulted by IT3 [B.S], as it is a separate complaint **not within the scope of my appointing letter**." (Investigating Officer's Report at 15 (emphasis added)).

In addition to the direct comparison between IT3 B.S. and IT2 Redmon, the defense advanced other evidence that, in substantial incapacitation cases, men are prosecuted while women are not. (Investigating Officer's Report, May 14, 2012, at 2 (Naval Criminal Investigative Service (NCIS) Special Agent Everson said in her twenty-five some years of experience, she had *never* heard of a case where a female was charged with sexually assaulting a male)). Furthermore, the government did not offer any reason for the choice to prosecute one and not the other. Indeed, the convening authority refused to meet with the defense to discuss the matter of why he chose IT2 Redmon over IT3 B.S. to prosecute. (Appellate Ex. XV.)

Given the clear and apparent effect of alcohol on both, the convening authority's decision to prosecute the man and call the woman the victim, and the evidence presented by the defense that the convening authority had never prosecuted a woman for violating 120(c), IT2 Redmon made a *prima facie* case for selective prosecution based on the impermissible classification of gender.

First, IT2 B.S. herself was a proper comparison as individuals from the same criminal transaction are not excluded from comparison when considering whether an individual has been subject to selective prosecution. *United States v. Bradley*, 30 M.J. 308, 311 (C.M.A. 1990) (noting those participating in the same crime were not excluded from comparison but for the divergent roles each played in the crime) (citing *Jarrett v. United States*, 822 F.2d 1438, 1444 (7th Cir. 1987)); *see also United States v. McKinley*, 48 M.J. 280, 282 (C.A.A.F. 1998).

Second, the only notable difference between the two, gender, is a protected class. *United States v. Virginia*, 518 U.S. 515, 524 (1996) (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S 718, 724 (1982); *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973)). The lower court noted that IT2 Redmon only reported after being investigated by NCIS, but this statement ignores the pretext phone call between him and IT3 B.S. where he states he was too drunk to remember or consent to the sex. Furthermore, the difference in reporting times is insignificant. In sexual assault cases, delayed reporting is common among victims. Patricia L. Fanflik, *Victim Responses to Sexual Assault: Counterintuitive or Simply Adaptive?* 8-12, (National District Attorneys Association) (2007) (available at http://www.ndaa.org/pdf/pub_victim_responses_sexual_assault.pdf) In alcohol-fueled sexual assaults, there is typically, as here,

a lack of memory. This leads to confusion over what happened. A person who lacks a memory can be unsure of the criminal nature of the transaction. A victim often wrongly assumes responsibility on their part, which can lead to delayed reporting because of “self-blame.” *Id*. at 11. Looking at IT2 Redmon’s answers during the pretext phone call immediately after the incident, it is easy to see how his behaviors parallel this confusion and self-blame that many victims of sexual assault experience.

IT2 Redmon met the test articulated by the Supreme Court to establish a *prima facie* case for selective prosecution. He showed an identifiable person who did the same thing, demonstrated the other person was not prosecuted, and presented a notable, constitutionally significant difference in the two prosecutions, namely gender. In finding that the two were not similarly situated, the lower court willfully ignored the facts presented by IT2 Redmon regarding his intoxication and the facts that showed IT3 B.S. had markers of capacity before and during the alleged assault. The lower court erred when it failed to find that IT2 Redmon demonstrated a *prima facie* case for selective prosecution and in doing so, degraded the Supreme Court’s precedent. That--taken alone--warrants this Court’s review. But there is another reason for review.

III.

THE LOWER COURT ERRED IN DETERMINING THAT IT2 REDMON'S CONVICTION DOES NOT VIOLATE HIS RIGHT TO EQUAL PROTECTION OF THE LAW.

This Court should employ its supervisory power and grant review in this case because the lower court failed to fully address IT2 Redmon's claim that his conviction violated the equal protection clause and erred when it determined that his conviction does not violate the Equal Protection Clause.

"The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike.'" *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (citation omitted). Through reverse incorporation, the Fifth Amendment imposes this obligation on the federal government. *See Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). Here, IT2 Redmon and IT3 B.S. were not treated equally under the law despite being in the same situation and having similar BAC levels. (R. at 854, 1344, 1352.) The crime of Aggravated Sexual Assault punishes a person that engages in a sexual act with another person who, because of various reasons, is substantially incapacitated. BAC controls the level of mental impairment: those with the same BACs are similarly mentally impaired. (R. at 840-41.) It is the coupling of the sexual act with the legal incapacitation (here, from alcohol) that creates the offense. Article 120(c); 10 U.S.C. § 920 (2012).

Selective prosecution claims are evaluated using equal protection standards. *See Oyler v. Boles*, 368 U.S. 448, 456 (1962). But the lower court failed to confront the equal protection issue raised by IT2 Redmon when they summarily dismissed his second assignment of error in light of not finding in his favor on the first issue of selective prosecution.

IT2 Redmon's claim of an equal protection violation is separate and distinct from his selective prosecution claim. Indeed, the equal protection claim is based primarily on the expert testimony produced at trial regarding the element of substantial incapacitation. This testimony was not available to the convening authority when he made the decision to prosecute. IT3 B.S. and IT2 Redmon had nearly identical BAC levels, with IT2 Redmon's being possibly worse. (R. at 854, 1344, 1352.) No evidence in the record disputes this. Colonel Tim Lyons, the government's own forensic toxicologist, plainly testified that two people with the same BAC are similarly impaired. (R. at 840-41.) However, the lower court's analysis of IT2 Redmon's selective prosecution claim never mentions the fact that the two had nearly identical BAC levels despite that fact being the linchpin of IT2 Redmon's second assignment of error. The analysis of the selective prosecution issue simply does not address the separate and distinct equal protection problem. Where the lower court has effectively denied IT2 Redmon Article

66, UCMJ, review, this Court must step in and afford IT2 Redmon the appellate review guaranteed by the UCMJ.

Conclusion

The lower court failed to properly review the record and fully and properly evaluate IT2 Redmon's claims. This Court should exercise its supervisory power and grant review in order to give IT2 Redmon his rightly deserved appellate review.

CARRIE E. THEIS
Lieutenant, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris St, SE
Bldg 58, Ste. 100
Washington Navy Yard. D.C. 20374
Tel: (202) 685-7390
Carrie.Theis@navy.mil

Appendix

1. *United States v. Redmon*, No. 201300280, 2014 CCA LEXIS 328 (N-M. Ct. Crim. App. June 26, 2014)

2. *United States v. Redmon*, No. 201300280, 2014 CCA LEXIS 328 (N-M. Ct. Crim. App. July 8, 2014)

3. Issues raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

4. Unpublished cases: *United States v. Lamb*, No. 20100044, 2010 CCA LEXIS 334 (N-M. Ct. Crim. App. Sept. 21, 2010); *United States v. Peterson*, No. 200900688, 2010 CCA LEXIS 336 (N-M. Ct. Crim. App. Sept. 21, 2010)

5. Patricia L. Fanflik, *Victim Responses to Sexual Assault: Counterintuitive or Simply Adaptive?* 8-12, (National District Attorneys Association) (2007

Certificate of Filing and Service

I certify that the foregoing was delivered to this Court, the Appellate Government Division, and to the Administrative Support Division, Navy-Marine Corps Appellate Review Activity on August 29, 2014.

CARRIE E. THEIS
Lieutenant, USN
Appellate Defense Counsel
CAAF Bar No. 35815
Navy Marine Corps
Appellate Review Activity
1254 Charles Morris Street SE
Suite 100
Washington, D.C. 20374-5124
(202)685-7390

Certificate of Compliance

This supplement complies with the page limitations of Rule 21(b) because it contains less than 9,000 words. Using Microsoft Word version 2003 with 12-point-Courier-New font, this supplement contains 5,821 words.

CARRIE E. THEIS
Lieutenant, JAG Corps, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE
BLDG 58, Suite 100
Washington Navy Yard, DC 20374
P:(202) 685-7390
F:(202) 685-7426
carrie.theis@navy.mil
Bar no. 35815

APPENDIX 1

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS WASHINGTON, D.C.

Before
F.D. MITCHELL, J.A. FISCHER, M.K. JAMISON
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JONATHAN D. REDMON
INFORMATION SYSTEMS TECHNICIAN SECOND CLASS (E-5), U.S. NAVY

NMCCA 201300077
GENERAL COURT-MARTIAL

Sentence Adjudged: 22 October 2012.
Military Judge: CAPT T.M. Carlos, JAGC, USN.
Convening Authority: Commander, Navy Region Europe, Africa, Southwest Asia, Naples, Italy.
Staff Judge Advocate's Recommendation: CDR J.A. Link, JAGC, USN.
For Appellant: LT Carrie E. Theis, JAGC, USN.
For Appellee: Maj Paul M. Ervasti, USMC; Maj David N. Roberts, USMC.

26 June 2014

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

MITCHELL, Chief Judge:

A panel of members with enlisted representation sitting as a general court-martial convicted the appellant, contrary to his pleas, of aggravated sexual assault and adultery in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934. The appellant was sentenced to 60 days confinement, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The convening

authority (CA) approved the sentence as adjudged, and except for the dishonorable discharge, ordered it executed.

In his five assignments of error, the appellant avers: (1) that the military judge abused his discretion by denying the defense motion to dismiss for selective prosecution; (2) that the application of Article 120(c), UCMJ, in this case violated his right to equal protection under the law; (3) that the element of substantial incapacitation is unconstitutionally vague as applied in the appellant's case; (4) that the evidence presented at trial was neither factually nor legally sufficient to support the conviction for a violation of Article 120(c), UCMJ; and, (5) that the military judge abused his discretion when he denied defense's motion to dismiss for unlawful command influence.

After careful examination of the record of trial and the pleadings of the parties, we are satisfied that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

Background

On 20 January 2012, Information Systems Technician Third Class (IT3) S[1] attended a farewell party for the appellant hosted by Information Systems Technician Second Class (IT2) MH. Earlier that evening, IT3 S went to dinner with a few friends during which she consumed multiple glasses of wine. She then went back to her apartment where she consumed another alcoholic drink and shortly thereafter walked to the party with a shipmate, Information Systems Technician Seaman (ITSN) SC. At the party, IT3 S continued drinking alcoholic beverages to include several beers, strong mixed drinks, "swigs" of Wild Turkey Bourbon Whiskey, and a significant quantity of a drink called FUBAR juice, which was described as a very intoxicating mix of alcohol. Record at 1226. The appellant was also drinking that night and consumed much of the same type of alcohol IT3 S did at the party. Although the appellant was married, his wife and children had already left Italy for the United States and their next duty station.

The party ended somewhere around 0300 and IT3 S was intoxicated to the extent that she had difficulty walking. The

[1] At the time of the sexual assault, the victim was an IT3 - she has since been promoted to IT2. For purposes of this opinion, we refer to her as IT3, the pay grade she held at the time of the sexual assault.

appellant and others helped IT3 S back to her apartment, a 10-minute walk away. Once in her apartment, IT3 S undressed and sat on the floor of the shower with the water running over her for approximately 45 minutes. After ITSN SC experienced difficulty extracting IT3 S from the shower, the appellant assisted him in retrieving her from the shower and helping dress her. During the course of dressing her, IT3 S began to vomit in the toilet. After the appellant and ITSN SC managed to clothe IT3 S in sweatpants and a top they laid her down on a futon in the living room to go to sleep. The appellant later lay down next to her.

IT2 KA, who shared the apartment with IT3 S, stayed in the apartment that night with her boyfriend, IT3 LC, but left that morning at 0530 as she had to be at work by 0600. IT3 LC testified that before they left, he looked in on the appellant and IT3 S. He indicated that they were clothed and positioned on the futon as if they were "spooning," but he otherwise didn't see anything that gave him pause for concern as they both appeared to be asleep.

IT3 S indicated that after she fell asleep, the next thing she remembers is waking up, naked from the waist down, and the appellant on top of her, penetrating her vagina with his penis. IT3 S began to cry, pushed appellant aside, put on a pair of sweatpants, and went to sleep in her bed. Shortly thereafter, the appellant left and caught a ride with a friend, IT2 B, back to the appellant's barracks room. While in the appellant's barracks room, IT2 B noticed what appeared to be semen on the appellant's boxers when he changed clothes. Additional pertinent facts are provided as necessary to discuss the appellant's assignments of error.

Selective Prosecution and a Violation of Equal Rights

On 21 January 2012, hours after the incident, IT3 S made an unrestricted report of sexual assault at the U.S. Naval Hospital, Naples, Italy and underwent a sexual assault forensic exam (SAFE). On 25 January 2012, the appellant was informed that he was suspected of violating Article 120, UCMJ, and apprised of his rights pursuant to Article 31(b), UCMJ, by the Naval Criminal Investigative Service (NCIS) Special Agent investigating the sexual assault allegation. On 10 February 2012, the appellant, via memorandum, advised his commanding officer that he wished to exercise his rights under Article 31(b), as explained to him by the NCIS investigating agent, and that he felt that he was the victim of sexual assault in this

case. Appellate Exhibit XV, enclosure (6). IT3 S was not charged with sexual assault notwithstanding the appellant's allegation.

At trial, the defense moved to dismiss the charges against the appellant alleging that the CA engaged in selective prosecution. He argued that even though the evidence demonstrated that the appellant and IT3 S had approximately the same level of intoxication and that neither of them remembered the sexual encounter, it was the appellant who was the victim of sexual assault in this case and yet the CA was unwilling to prosecute IT3 S because she was female. This motion was denied by the military judge. Record at 75 and AE XVIII.

In his initial assignment of error, the appellant contends that the military judge erred by not dismissing the charges against him due to the CA engaging in selective prosecution. Closely related, in his second assignment of error the appellant contends the CA's decision to prosecute him and not IT3 S violated his right to equal protection under the Due Process Clause of the Fifth Amendment to the Constitution. We disagree with both contentions.

The Law

CAs have broad discretion in determining whom to prosecute *United States v. Brown,* 40 M.J. 625, 629 (N.M.C.M.R. 1994); *United States v. Kelly,* 40 M.J. 558, 570 (N.M.C.M.R. 1994). Unless presented with evidence to the contrary, we presume that CAs act without bias. The appellant has the burden of rebutting this presumption. To raise the issue of selective or discriminatory prosecution, an appellant bears the heavy burden of establishing, at least *prima facie:* (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the Government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. *United States v. Garwood*, 20 M.J. 148, 154 (C.M.A. 1985). An appellant must show more than a mere possibility of selective prosecution; he must show discriminatory intent. *United States v. Brown*, 41 M.J. 504, 511 Army Ct.Crim.App. 1994). In reviewing rulings by a military judge on a motion to dismiss for selective prosecution, we review the findings of fact under a "clearly erroneous" standard, while we review the conclusions of law *de*

novo. *See United States v. Johnson*, 54 M.J. 32, 34 (C.A.A.F. 2000).

Discussion

In denying the defense's motion to dismiss for selective prosecution, the military judge made detailed findings of fact, well-supported by the record, and we therefore adopt them as our own. *See* AE XVIII. The military judge found as a matter of law that the appellant failed to establish a *prima facie* showing of selective prosecution utilizing the *Garwood* test. We agree.

The evidence adduced from the NCIS investigation and provided to the CA indicated that when the party ended, the appellant had to assist IT3 S in getting home by carrying her part of the way. After they arrived at her apartment, the appellant assisted in getting her out of the shower and watched her vomit in the toilet. The appellant then assisted in getting her clothed and laid down next to her after he helped put her to bed. Prior to laying down with IT3 S, the appellant made comments to others like "I am fine" and that IT3 S was "like [his] little sister," suggesting that IT3 S would be safe with him. IT3 S awoke up to find the appellant on top of her penetrating her vagina with his penis. Mere hours after the sexual assault, IT3 S reported it to the U.S. Naval Hospital, Naples. It was weeks later, and only after being informed by NCIS that he was suspected of sexual assault, that the appellant claimed that he was the victim in this case.

We do not find that the appellant and IT3 S are "similarly situated" and that the appellant has been "singled out" for prosecution in this case. We additionally do not find evidence of bad faith on the part of the CA in bringing the appellant to trial. The information provided to the CA, to include the Article 32 Investigating Officer's report, the NCIS Investigative Report, and the staff judge advocate's Article 34 Advice memorandum, quite to the contrary, all suggest that the appellant was not the victim but rather the perpetrator of this sexual assault, and that the appropriate forum in which to dispose of the appellant's charges was at a general court-martial. We find this assignment of error to be without merit and therefore decline to grant relief.

We similarly find the appellant's second assignment of error alleging a Fifth Amendment violation to be without merit and not worthy of further comment.

Constitutional Challenge to Article 120 as Applied

In his third assignment of error, the appellant contends that the element of "substantial incapacitation" is unconstitutionally vague as applied to the appellant. The appellant specifically avers that Article 120 (c), UCMJ, is unconstitutionally vague because "[t]he law cannot be understood by the common man or those who prosecute it" and it is unclear "what factors satisfy the element of substantial incapacitation" in this case. Appellant's Brief of 22 Jul 2013 at 20.

The Law

A basic principle of due process requires "fair notice" that an act is subject to criminal sanction and the standard that is applicable to the forbidden conduct. *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003). A law is "void for vagueness" if "'one could not reasonably understand that his contemplated conduct is proscribed.'" *Id*. (quoting *Parker v. Levy*, 417 U.S. 733, 757 (1974)). The sufficiency of statutory notice is determined in the light of the conduct with which a defendant is charged. *Levy*, 417 U.S. at 757. "Criminal statutes are presumed constitutionally valid, and the party attacking the constitutionality of a statute has the burden of proving otherwise." *United States v. Mansfield*, 33 M.J. 972, 989 (A.F.C.M.R. 1991) (citation omitted), *aff'd*, 38 M.J. 415 (C.M.A. 1993).

Standard of Review

We review whether a statute is unconstitutional as applied *de novo*. *United States v. Ali*, 71 M.J. 256, 265 (C.A.A.F. 2012). However, at trial, the appellant did not object to the constitutionality of Article 120(c), UCMJ, as applied to his case. Since the error the appellant is alleging is constitutional, and in light of the Court of Appeals for the Armed Forces presumption against waiver of constitutional rights and the requirement that waiver "'clearly establish[] . . . an intentional relinquishment of a known right or privilege,'" we consider the alleged error forfeited and not waived. *United States v. Sweeney,* 70 M.J. 296, 303-04 (C.A.A.F. 2011) (quoting *United States v. Harcrow*, 66 M.J. 154, 157 (C.A.A.F. 2008). We therefore test for plain error. *Id*. at 304.

Under plain error review, we will grant relief only where: (1) there was error, (2) the error was plain and obvious, and (3) the error materially prejudiced a substantial right of the appellant. *Id*. To determine if "a statute is 'unconstitutional

as applied,' we conduct a fact-specific inquiry." *Id*. (footnote and citations omitted).

Analysis and Discussion

The appellant was charged with violating Article 120(c), UCMJ, specifically alleging that he had sexual intercourse with IT3 S, who was substantially incapacitated. Aggravated sexual assault, under Article 120(c)(2), is committed when a person "engages in a sexual act with another person of any age if that other person is substantially incapacitated or substantially incapable of: (A) appraising the nature of the sexual act; (B) declining participation in the sexual act; or (C) communicating unwillingness to engage in the sexual act . . . ."

After consultation with its expert, the defense was informed that, based upon the amount and types of alcohol IT3 S and other witnesses indicated that she consumed, the expert was of the opinion that IT3 S was in a "blacked out" vice "passed out" stage of intoxication at the time of the sex act. While the defense expert could definitively state that a person in a "passed out" stage of intoxication would be "substantially incapacitated" and not capable of consent, she could not so definitively state such when the person was in a "blacked out" stage. After receiving this information, the defense served the Government with a motion for appropriate relief in the form of a bill of particulars requesting the Government to define what the term "substantially incapacitated" meant in regards to the appellant's charged misconduct. AE XXXV. After the Government counsel denied this request, the defense filed the same motion with the court and it was ultimately denied by the military judge. Record at 322. The appellant now contends that he was denied due process of law as guaranteed by the Fifth Amendment because he was not given fair notice that his misconduct was forbidden due to the vagueness of the statute. We disagree.

At an Article 39(a), UCMJ, session to hear the defense's motion for appropriate relief, the defense indicated that the defense team was in possession of the military judge's proposed member's instructions that included the definition of substantial incapacitation. The military judge stated:

> I mean you have the definition of substantially incapacitated, right, that I've given out and it's been a standard of my instructions on for every single one of the substantially incapacitated case (sic) . . . . It's a level of mental impairment due to the

> consumption of alcohol while asleep or unconscious which rendered the alleged victim unable to appraise the nature of the sexual conduct at issue, unable to physically communicate unwillingness to engage in the sexual conduct or otherwise unable to make or communicate a competent decision.

Record at 321-22.

That definition was contained in the Judge's Benchbook prior to his trial and the military judge advised the defense he intended to give that instruction to the members. After this disclosure by the military judge, the defense did not state that it was surprised or unprepared to defend against this possibility, nor did the defense team request additional time to prepare. The appellant clearly knew and understood the legal theory on which he was prosecuted: that he had committed a sex act (sexual intercourse) upon IT3 S and that he did so while she was substantially incapacitated — while she was asleep or unconscious.

Under these circumstances, the appellant's due process rights were not violated because he was on notice of what he needed to defend against throughout his court-martial. *United States v. Wilkins*, 71 M.J. 410, 414 (C.A.A.F. 2012). Accordingly, we find no error by the trial court and conclude that this assignment of error is without merit.

Legal and Factual Sufficiency

In his fourth assignment of error, the appellant avers that the finding of guilty on the charge of sexual assault is legally and factually insufficient. We disagree.

<u>The Law</u>

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Crim.Ct.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ. The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this

court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c).

Analysis

There are two elements to the offense of aggravated sexual assault that the Government was required to prove beyond a reasonable doubt: (1) that the accused engaged in a sexual act with the IT3 S; and (2) that IT3 S was substantially incapacitated. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), Appendix 28, ¶ 45b(3)(c).

There is little dispute, if any, as to whether the appellant engaged in a sex act with IT3 S. IT3 S testified that after she went to sleep, she was awakened by the appellant on top of her with his penis inside of her vagina. The SAFE revealed the presence of semen in IT3 S's vagina which matched the deoxyribonucleic acid (DNA) of the appellant. While the appellant claims he does not remember the event, he stated during an NCIS recorded phone call with IT3 S that a sexual act must have occurred as both of them were naked from the waist down. The only element in issue is whether IT3 S was substantially incapacitated.

In presenting its case in chief, the Government called multiple witnesses who described the different types and quantities of alcoholic beverages they saw IT3 S consume as well as the fact that, as a result of her heavy drinking, her speech was slurred; she was having difficulty walking; and she was incoherent and vomiting. The Government also called Colonel (COL) Timothy Lyons, U.S. Army, Chief of Forensic Toxicology Division, Armed Forces Medical Examiner, who the military judge recognized as an expert in the field of forensic toxicology. After listening to the witnesses and based on the amount and types of alcohol they said IT3 S consumed, COL Lyons stated that he would have put her blood alcohol content (BAC) between .19 and .22. Record at 854. When questioned as to the incapacitation of IT3 S, the following colloquy occurred between the trial counsel and the Government's forensic expert:

> TC: Am I correct in saying that when it comes to actually establishing whether someone was, as we would say in the legal world, substantially incapacitated, you can't categorically say that for any particular case?
> A: It's not a toxicology question. That's a legal question.

> TC: Precisely, sir, but what is it that you can do in cases like this?
> A: And I hinted to it – I mean ---let me clarify that. If an individual has a BAC that I think would put them in a range where they're unconscious or were unresponsive, then I would be safe in saying "I don't think that individual had the capacity to consent." Okay? That I am willing to do. However, in a case like this where the BAC is lower than that, all I can state scientifically, is that the BAC that I estimated is consistent with the witness statements that I heard in court yesterday as far as her condition mentally and physically and that my BAC is the manifestations or the symptoms that I would associate with the BAC I estimated are in line or consistent with the statements that I heard and that this individual that I would expect to be impaired and incapacitated and have trouble, you know, with memory definitely, potentially incoherent, potentially confused of her surroundings and that's basically what I gleaned from the statements that I heard yesterday. So that's what I am willing to say.

Record at 869-70.

Additionally, the objective evidence adduced at trial also shows that IT3 S was significantly more affected by alcohol that night than the appellant and that semen matching the DNA of the appellant was found in IT3 S's vagina. As appellant indicated that he called a friend and left IT3 S's apartment at approximately 0600 or 0615, the sexual assault therefore occurred shortly after IT3 LC and IT2 KA left the appellant alone in the apartment with IT3 S.

Given these facts that were before the members, we have little difficulty finding that the members had a factual basis to find the appellant guilty beyond a reasonable doubt. On balance, and with due regard for the fact that we did not observe the witnesses, we too are convinced of the appellant's guilt beyond a reasonable doubt. We find this assignment of error to be without merit.

Unlawful Command Influence

In his final assignment of error, the appellant contends that the military judge erred in denying the defense's motion to dismiss the case due to unlawful command influence.

The Law

"Congress and this court are concerned not only with eliminating actual unlawful command influence, but also with 'eliminating even the appearance of unlawful command influence at courts-martial.'" *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006) (quoting *United States v. Rosser*, 6 M.J. 267, 271 (C.M.A. 1979)). An accused has the initial burden of raising the issue of unlawful command influence. *United States v. Stombaugh*, 40 M.J. 208, 213 (C.M.A. 1994). The defense must "show facts that, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings." *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999) (citations omitted). The quantum of evidence necessary to raise the specter of unlawful command influence is "'some evidence.'" *Biagase*, 50 M.J. at 150 (quoting *United States v. Ayala*, 43 M.J. 296, 300 (C.A.A.F. 1995)). The burden of disproving the existence of unlawful command influence or proving that it will not affect the proceeding does not shift until the defense meets its burden of production.

Analysis and Discussion

Allegations of unlawful command influence are reviewed *de novo*. *United States v. Harvey*, 64 M.J. 13, 19 (C.A.A.F. 2006); *United States v. Villareal*, 52 M.J. 27, 30 (C.A.A.F. 1999); *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994). We necessarily begin our analysis by determining whether the defense met its initial burden of providing "some evidence" necessary to make a colorable showing of unlawful command influence.

In the appellant's case, the charges were preferred on 10 April 2012; the defense received the request for counsel and the charge sheet at 1711 hours that same day. The appellant's defense counsel were detailed on 11 April with the Article 32 hearing scheduled for 19 April 2012. The defense requested a continuance and the Article 32 was rescheduled for 30 April 2012. The appellant filed a timely motion with the trial court arguing that his commanding officer exerted unlawful command influence over the judicial process by so quickly convening an Article 32 Investigation thus creating the appearance of unlawful command influence. *See* AE XIX. After considering the motion, the military judge concluded that the defense had

presented insufficient evidence of unlawful command influence to warrant shifting the burden of proof to the Government on the issue and, alternatively, he was convinced beyond a reasonable doubt that the charges against the appellant were free from actual or apparent unlawful command influence. AE XXII.

We too conclude that the appellant has failed to meet its initial burden to provide "some evidence" of facts which, if true, constitute unlawful command influence. His claims regarding the special court-martial CA's quest to have the Article 32 completed in an expeditious manner does not give rise to unlawful command influence. Mere speculation that unlawful command influence occurred because of a specific set of circumstances is not sufficient. *United States v. Ashby*, 68 M.J. 108, 128 (C.A.A.F. 2009). The appellant has failed to show that his commanding officer's interest in conducting the Article 32 in an expeditious manner was anything other than proper, official, and command prerogative.

Conclusion

The findings and the sentence are affirmed as approved by the CA.

Judge FISCHER and Judge JAMISON concur.

For the Court

R.H. TROIDL
Clerk of Court

APPENDIX 2

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS WASHINGTON, D.C.

Before
F.D. MITCHELL, J.A. FISCHER, M.K. JAMISON
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JONATHAN D. REDMON
INFORMATION SYSTEMS TECHNICIAN SECOND CLASS (E-5), U.S. NAVY

NMCCA 201300077
GENERAL COURT-MARTIAL

Sentence Adjudged: 22 October 2012.
Military Judge: CAPT T.M. Carlos, JAGC, USN.
Convening Authority: Commander, Navy Region Europe, Africa, Southwest Asia, Naples, Italy.
Staff Judge Advocate's Recommendation: CDR J.A. Link, JAGC, USN.
For Appellant: LT Carrie E. Theis, JAGC, USN.
For Appellee: Maj Paul M. Ervasti, USMC; Maj David N. Roberts, USMC.

26 June 2014

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

MITCHELL, Chief Judge:

A panel of members with enlisted representation sitting as a general court-martial convicted the appellant, contrary to his pleas, of aggravated sexual assault and adultery in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934. The appellant was sentenced to 60 days confinement, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The convening

authority (CA) approved the sentence as adjudged, and except for the dishonorable discharge, ordered it executed.

In his five assignments of error, the appellant avers: (1) that the military judge abused his discretion by denying the defense motion to dismiss for selective prosecution; (2) that the application of Article 120(c), UCMJ, in this case violated his right to equal protection under the law; (3) that the element of substantial incapacitation is unconstitutionally vague as applied in the appellant's case; (4) that the evidence presented at trial was neither factually nor legally sufficient to support the conviction for a violation of Article 120(c), UCMJ; and, (5) that the military judge abused his discretion when he denied defense's motion to dismiss for unlawful command influence.

After careful examination of the record of trial and the pleadings of the parties, we are satisfied that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

Background

On 20 January 2012, Information Systems Technician Third Class (IT3) S[1] attended a farewell party for the appellant hosted by Information Systems Technician Second Class (IT2) MH. Earlier that evening, IT3 S went to dinner with a few friends during which she consumed multiple glasses of wine. She then went back to her apartment where she consumed another alcoholic drink and shortly thereafter walked to the party with a shipmate, Information Systems Technician Seaman (ITSN) SC. At the party, IT3 S continued drinking alcoholic beverages to include several beers, strong mixed drinks, "swigs" of Wild Turkey Bourbon Whiskey, and a significant quantity of a drink called FUBAR juice, which was described as a very intoxicating mix of alcohol. Record at 1226. The appellant was also drinking that night and consumed much of the same type of alcohol IT3 S did at the party. Although the appellant was married, his wife and children had already left Italy for the United States and their next duty station.

The party ended somewhere around 0300 and IT3 S was intoxicated to the extent that she had difficulty walking. The

[1] At the time of the sexual assault, the victim was an IT3 - she has since been promoted to IT2. For purposes of this opinion, we refer to her as IT3, the pay grade she held at the time of the sexual assault.

appellant and others helped IT3 S back to her apartment, a 10-minute walk away. Once in her apartment, IT3 S undressed and sat on the floor of the shower with the water running over her for approximately 45 minutes. After ITSN SC experienced difficulty extracting IT3 S from the shower, the appellant assisted him in retrieving her from the shower and helping dress her. During the course of dressing her, IT3 S began to vomit in the toilet. After the appellant and ITSN SC managed to clothe IT3 S in sweatpants and a top they laid her down on a futon in the living room to go to sleep. The appellant later lay down next to her.

IT2 KA, who shared the apartment with IT3 S, stayed in the apartment that night with her boyfriend, IT3 LC, but left that morning at 0530 as she had to be at work by 0600. IT3 LC testified that before they left, he looked in on the appellant and IT3 S. He indicated that they were clothed and positioned on the futon as if they were "spooning," but he otherwise didn't see anything that gave him pause for concern as they both appeared to be asleep.

IT3 S indicated that after she fell asleep, the next thing she remembers is waking up, naked from the waist down, and the appellant on top of her, penetrating her vagina with his penis. IT3 S began to cry, pushed appellant aside, put on a pair of sweatpants, and went to sleep in her bed. Shortly thereafter, the appellant left and caught a ride with a friend, IT2 B, back to the appellant's barracks room. While in the appellant's barracks room, IT2 B noticed what appeared to be semen on the appellant's boxers when he changed clothes. Additional pertinent facts are provided as necessary to discuss the appellant's assignments of error.

Selective Prosecution and a Violation of Equal Rights

On 21 January 2012, hours after the incident, IT3 S made an unrestricted report of sexual assault at the U.S. Naval Hospital, Naples, Italy and underwent a sexual assault forensic exam (SAFE). On 25 January 2012, the appellant was informed that he was suspected of violating Article 120, UCMJ, and apprised of his rights pursuant to Article 31(b), UCMJ, by the Naval Criminal Investigative Service (NCIS) Special Agent investigating the sexual assault allegation. On 10 February 2012, the appellant, via memorandum, advised his commanding officer that he wished to exercise his rights under Article 31(b), as explained to him by the NCIS investigating agent, and that he felt that he was the victim of sexual assault in this

case. Appellate Exhibit XV, enclosure (6). IT3 S was not charged with sexual assault notwithstanding the appellant's allegation.

At trial, the defense moved to dismiss the charges against the appellant alleging that the CA engaged in selective prosecution. He argued that even though the evidence demonstrated that the appellant and IT3 S had approximately the same level of intoxication and that neither of them remembered the sexual encounter, it was the appellant who was the victim of sexual assault in this case and yet the CA was unwilling to prosecute IT3 S because she was female. This motion was denied by the military judge. Record at 75.

In his initial assignment of error, the appellant contends that the military judge erred by not dismissing the charges against him due to the CA engaging in selective prosecution. Closely related, in his second assignment of error the appellant contends the CA's decision to prosecute him and not IT3 S violated his right to equal protection under the Due Process Clause of the Fifth Amendment to the Constitution. We disagree with both contentions.

The Law

CAs have broad discretion in determining whom to prosecute *United States v. Brown,* 40 M.J. 625, 629 (N.M.C.M.R. 1994); *United States v. Kelly,* 40 M.J. 558, 570 (N.M.C.M.R. 1994). Unless presented with evidence to the contrary, we presume that CAs act without bias. The appellant has the burden of rebutting this presumption. To raise the issue of selective or discriminatory prosecution, an appellant bears the heavy burden of establishing, at least *prima facie:* (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the Government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. *United States v. Garwood*, 20 M.J. 148, 154 (C.M.A. 1985). An appellant must show more than a mere possibility of selective prosecution; he must show discriminatory intent. *United States v. Brown*, 41 M.J. 504, 511 (Army Ct.Crim.App. 1994). In reviewing rulings by a military judge on a motion to dismiss for selective prosecution, we review the findings of fact under a "clearly erroneous" standard, while we review the conclusions of law *de*

novo. *See United States v. Johnson*, 54 M.J. 32, 34 (C.A.A.F. 2000).

Discussion

In denying the defense's motion to dismiss for selective prosecution, the military judge found as a matter of law that the appellant failed to establish a *prima facie* showing utilizing the *Garwood* test. We agree.

The evidence adduced from the NCIS investigation and provided to the CA indicated that when the party ended, the appellant had to assist IT3 S in getting home by carrying her part of the way. After they arrived at her apartment, the appellant assisted in getting her out of the shower and watched her vomit in the toilet. The appellant then assisted in getting her clothed and laid down next to her after he helped put her to bed. Prior to lying down with IT3 S, the appellant made comments to others like "I am fine" and that IT3 S was "like [his] little sister," suggesting that IT3 S would be safe with him. IT3 S awoke up to find the appellant on top of her penetrating her vagina with his penis. Mere hours after the sexual assault, IT3 S reported it to the U.S. Naval Hospital, Naples. It was weeks later, and only after being informed by NCIS that he was suspected of sexual assault, that the appellant claimed that he was the victim in this case.

We do not find that the appellant and IT3 S are "similarly situated" and that the appellant has been "singled out" for prosecution in this case. We additionally do not find evidence of bad faith on the part of the CA in bringing the appellant to trial. The information provided to the CA, to include the Article 32 Investigating Officer's report, the NCIS Investigative Report, and the staff judge advocate's Article 34 Advice memorandum, quite to the contrary, all suggest that the appellant was not the victim but rather the perpetrator of this sexual assault, and that the appropriate forum in which to dispose of the appellant's charges was at a general court-martial. We find this assignment of error to be without merit and therefore decline to grant relief.

We similarly find the appellant's second assignment of error alleging a Fifth Amendment violation to be without merit and not worthy of further comment.

Constitutional Challenge to Article 120 as Applied

In his third assignment of error, the appellant contends that the element of "substantial incapacitation" is unconstitutionally vague as applied to the appellant. The appellant specifically avers that Article 120 (c), UCMJ, is unconstitutionally vague because "[t]he law cannot be understood by the common man or those who prosecute it" and it is unclear "what factors satisfy the element of substantial incapacitation" in this case. Appellant's Brief of 22 Jul 2013 at 20.

The Law

A basic principle of due process requires "fair notice" that an act is subject to criminal sanction and the standard that is applicable to the forbidden conduct. *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003). A law is "void for vagueness" if "'one could not reasonably understand that his contemplated conduct is proscribed.'" *Id*. (quoting *Parker v. Levy*, 417 U.S. 733, 757 (1974)). The sufficiency of statutory notice is determined in the light of the conduct with which a defendant is charged. *Levy*, 417 U.S. at 757. "Criminal statutes are presumed constitutionally valid, and the party attacking the constitutionality of a statute has the burden of proving otherwise." *United States v. Mansfield*, 33 M.J. 972, 989 (A.F.C.M.R. 1991) (citation omitted), *aff'd*, 38 M.J. 415 (C.M.A. 1993).

Standard of Review

We review whether a statute is unconstitutional as applied *de novo*. *United States v. Ali*, 71 M.J. 256, 265 (C.A.A.F. 2012). However, at trial, the appellant did not object to the constitutionality of Article 120(c), UCMJ, as applied to his case. Since the error the appellant is alleging is constitutional, and in light of the Court of Appeals for the Armed Forces presumption against waiver of constitutional rights and the requirement that waiver "'clearly establish[] . . . an intentional relinquishment of a known right or privilege,'" we consider the alleged error forfeited and not waived. *United States v. Sweeney,* 70 M.J. 296, 303-04 (C.A.A.F. 2011) (quoting *United States v. Harcrow*, 66 M.J. 154, 157 (C.A.A.F. 2008). We therefore test for plain error. *Id*. at 304.

Under plain error review, we will grant relief only where: (1) there was error, (2) the error was plain and obvious, and (3) the error materially prejudiced a substantial right of the appellant. *Id*. To determine if "a statute is 'unconstitutional

as applied,' we conduct a fact-specific inquiry." *Id*. (footnote and citations omitted).

Analysis and Discussion

The appellant was charged with violating Article 120(c), UCMJ, specifically alleging that he had sexual intercourse with IT3 S, who was substantially incapacitated. Aggravated sexual assault, under Article 120(c)(2), is committed when a person "engages in a sexual act with another person of any age if that other person is substantially incapacitated or substantially incapable of: (A) appraising the nature of the sexual act; (B) declining participation in the sexual act; or (C) communicating unwillingness to engage in the sexual act . . . ."

After consultation with its expert, the defense was informed that, based upon the amount and types of alcohol IT3 S and other witnesses indicated that she consumed, the expert was of the opinion that IT3 S was in a "blacked out" vice "passed out" stage of intoxication at the time of the sex act. While the defense expert could definitively state that a person in a "passed out" stage of intoxication would be "substantially incapacitated" and not capable of consent, she could not so definitively state such when the person was in a "blacked out" stage. After receiving this information, the defense served the Government with a motion for appropriate relief in the form of a bill of particulars requesting the Government to define what the term "substantially incapacitated" meant in regards to the appellant's charged misconduct. AE XXXV. After the Government counsel denied this request, the defense filed the same motion with the court and it was ultimately denied by the military judge. Record at 322. The appellant now contends that he was denied due process of law as guaranteed by the Fifth Amendment because he was not given fair notice that his misconduct was forbidden due to the vagueness of the statute. We disagree.

At an Article 39(a), UCMJ, session to hear the defense's motion for appropriate relief, the defense indicated that the defense team was in possession of the military judge's proposed member's instructions that included the definition of substantial incapacitation. The military judge stated:

> I mean you have the definition of substantially incapacitated, right, that I've given out and it's been a standard of my instructions on for every single one of the substantially incapacitated case (sic) . . . . It's a level of mental impairment due to the

> consumption of alcohol while asleep or unconscious which rendered the alleged victim unable to appraise the nature of the sexual conduct at issue, unable to physically communicate unwillingness to engage in the sexual conduct or otherwise unable to make or communicate a competent decision.

Id. at 321-22.

That definition was contained in the Judge's Benchbook prior to his trial and the military judge advised the defense he intended to give that instruction to the members. After this disclosure by the military judge, the defense did not state that it was surprised or unprepared to defend against this possibility, nor did the defense team request additional time to prepare. The appellant clearly knew and understood the legal theory on which he was prosecuted: that he had committed a sex act (sexual intercourse) upon IT3 S and that he did so while she was substantially incapacitated — while she was asleep or unconscious.

Under these circumstances, the appellant's due process rights were not violated because he was on notice of what he needed to defend against throughout his court-martial. *United States v. Wilkins*, 71 M.J. 410, 414 (C.A.A.F. 2012). Accordingly, we find no error by the trial court and conclude that this assignment of error is without merit.

Legal and Factual Sufficiency

In his fourth assignment of error, the appellant avers that the finding of guilty on the charge of sexual assault is legally and factually insufficient. We disagree.

<u>The Law</u>

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Crim.Ct.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ. The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this

court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c).

Analysis

There are two elements to the offense of aggravated sexual assault that the Government was required to prove beyond a reasonable doubt: (1) that the accused engaged in a sexual act with the IT3 S; and (2) that IT3 S was substantially incapacitated. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), Appendix 28, ¶ 45b(3)(c).

There is little dispute, if any, as to whether the appellant engaged in a sex act with IT3 S. IT3 S testified that after she went to sleep, she was awakened by the appellant on top of her with his penis inside of her vagina. The SAFE revealed the presence of semen in IT3 S's vagina which matched the deoxyribonucleic acid (DNA) of the appellant. While the appellant claims he does not remember the event, he stated during an NCIS recorded phone call with IT3 S that a sexual act must have occurred as both of them were naked from the waist down. The only element in issue is whether IT3 S was substantially incapacitated.

In presenting its case in chief, the Government called multiple witnesses who described the different types and quantities of alcoholic beverages they saw IT3 S consume as well as the fact that, as a result of her heavy drinking, her speech was slurred; she was having difficulty walking; and she was incoherent and vomiting. The Government also called Colonel (COL) Timothy Lyons, U.S. Army, Chief of Forensic Toxicology Division, Armed Forces Medical Examiner, who the military judge recognized as an expert in the field of forensic toxicology. After listening to the witnesses and based on the amount and types of alcohol they said IT3 S consumed, COL Lyons stated that he would have put her blood alcohol content (BAC) between .19 and .22. Record at 854. When questioned as to the incapacitation of IT3 S, the following colloquy occurred between the trial counsel and the Government's forensic expert:

> TC: Am I correct in saying that when it comes to actually establishing whether someone was, as we would say in the legal world, substantially incapacitated, you can't categorically say that for any particular case?
> A: It's not a toxicology question. That's a legal question.

> TC: Precisely, sir, but what is it that you can do in cases like this?
> A: And I hinted to it – I mean ---let me clarify that. If an individual has a BAC that I think would put them in a range where they're unconscious or were unresponsive, then I would be safe in saying "I don't think that individual had the capacity to consent." Okay? That I am willing to do. However, in a case like this where the BAC is lower than that, all I can state scientifically, is that the BAC that I estimated is consistent with the witness statements that I heard in court yesterday as far as her condition mentally and physically and that my BAC is the manifestations or the symptoms that I would associate with the BAC I estimated are in line or consistent with the statements that I heard and that this individual that I would expect to be impaired and incapacitated and have trouble, you know, with memory definitely, potentially incoherent, potentially confused of her surroundings and that's basically what I gleaned from the statements that I heard yesterday. So that's what I am willing to say.

Id. at 869-70.

Additionally, the objective evidence adduced at trial also shows that IT3 S was significantly more affected by alcohol that night than the appellant and that semen matching the DNA of the appellant was found in IT3 S's vagina. As appellant indicated that he called a friend and left IT3 S's apartment at approximately 0600 or 0615, the sexual assault therefore occurred shortly after IT3 LC and IT2 KA left the appellant alone in the apartment with IT3 S.

Given these facts that were before the members, we have little difficulty finding that the members had a factual basis to find the appellant guilty beyond a reasonable doubt. On balance, and with due regard for the fact that we did not observe the witnesses, we too are convinced of the appellant's guilt beyond a reasonable doubt. We find this assignment of error to be without merit.

Unlawful Command Influence

In his final assignment of error, the appellant contends that the military judge erred in denying the defense's motion to dismiss the case due to unlawful command influence.

The Law

"Congress and this court are concerned not only with eliminating actual unlawful command influence, but also with 'eliminating even the appearance of unlawful command influence at courts-martial.'" *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006) (quoting *United States v. Rosser*, 6 M.J. 267, 271 (C.M.A. 1979)). An accused has the initial burden of raising the issue of unlawful command influence. *United States v. Stombaugh*, 40 M.J. 208, 213 (C.M.A. 1994). The defense must "show facts that, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings." *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999) (citations omitted). The quantum of evidence necessary to raise the specter of unlawful command influence is "'some evidence.'" *Biagase*, 50 M.J. at 150 (quoting *United States v. Ayala*, 43 M.J. 296, 300 (C.A.A.F. 1995)). The burden of disproving the existence of unlawful command influence or proving that it will not affect the proceeding does not shift until the defense meets its burden of production.

Analysis and Discussion

Allegations of unlawful command influence are reviewed *de novo*. *United States v. Harvey*, 64 M.J. 13, 19 (C.A.A.F. 2006); *United States v. Villareal*, 52 M.J. 27, 30 (C.A.A.F. 1999); *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994). We necessarily begin our analysis by determining whether the defense met its initial burden of providing "some evidence" necessary to make a colorable showing of unlawful command influence.

In the appellant's case, the charges were preferred on 10 April 2012; the defense received the request for counsel and the charge sheet at 1711 hours that same day. The appellant's defense counsel were detailed on 11 April with the Article 32 hearing scheduled for 19 April 2012. The defense requested a continuance and the Article 32 was rescheduled for 30 April 2012. The appellant filed a timely motion with the trial court arguing that his commanding officer exerted unlawful command influence over the judicial process by so quickly convening an Article 32 Investigation thus creating the appearance of unlawful command influence. *See* AE XIX. After considering the motion, the military judge concluded that the defense had presented insufficient evidence of unlawful command influence to

warrant shifting the burden of proof to the Government on the issue and, alternatively, he was convinced beyond a reasonable doubt that the charges against the appellant were free from actual or apparent unlawful command influence. AE XXII.

We too conclude that the appellant has failed to meet its initial burden to provide "some evidence" of facts which, if true, constitute unlawful command influence. His claims regarding the special court-martial CA's quest to have the Article 32 completed in an expeditious manner does not give rise to unlawful command influence. Mere speculation that unlawful command influence occurred because of a specific set of circumstances is not sufficient. *United States v. Ashby*, 68 M.J. 108, 128 (C.A.A.F. 2009). The appellant has failed to show that his commanding officer's interest in conducting the Article 32 in an expeditious manner was anything other than proper, official, and command prerogative.

Conclusion

The findings and the sentence are affirmed as approved by the CA.

Judge FISCHER and Judge JAMISON concur.

For the Court

R.H. TROIDL
Clerk of Court

APPENDIX 3

SUBMISSION UNDER *UNITED STATES V. GROSTEFON*

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Appellant, by and through counsel, respectfully requests that this Court consider the following matter:

IV.

WHETHER THE LOWER COURT CREATED A CONFLICTING PRECEDENT WITHIN THE SAME PANEL OF THE COURT BY DETERMINING THAT IT2 REDMON'S CONVICTION FOR VIOLATING ARTICLE 120 IS LEGALLY SUFFICIENT.

Statement of Facts

IT2 Redmon adopts the same statement of facts as found in the supplement to the petition.

The lower court has created conflicting precedent.

The NMCCA decided the cases of *Lamb* and *Peterson* just a few years ago.[1] In those cases, very similar facts to IT2 Redmon's were determined to be factually and legally insufficient to support the conviction. As demonstrated below, by not finding IT2 Redmon's conviction to be similarly legally and factually insufficient, the lower court has created conflicting precedent.

Standard of Review

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[1] *United States v. Lamb*, No. 20100044, 2010 CCA LEXIS 334 (N-M. Ct. Crim. App. Sept. 21, 2010); *United States v. Peterson*, No. 200900688, 2010 CCA LEXIS 336 (N-M. Ct. Crim. App. Sept. 21, 2010)

This Court reviews issues of legal and factual sufficiency *de novo*.[2]

Principles of Law

The test for legal sufficiency is whether, when viewed in the light most favorable to the government, the evidence is such that a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt.[3]

Discussion

The lower court's case law suggests that, where the victim only suffers a memory lapse because of being in a blackout stage of drinking, the case will be overturned due to legal and factual insufficiency. In *United States v. Lamb* and *United States v. Peterson*, two companion cases, a female Marine Private First Class (PFC) was invited to drink with two male Marines, PFC Lamb and Private (Pvt) Peterson.[4] Both male Marines had sex with her.[5] The next morning, the victim stated that she passed out and was then sexually assaulted by both PFC Lamb and Pvt Peterson.[6] Her blood draw showed that she could only have

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[2] *United States v. Hays*, 62 M.J. 158, 162 (C.A.A.F. 2005); *see also* Art. 66(c), UCMJ, 10 U.S.C. § 866(c).
[3] *United States v. Harper*, 22 M.J. 157, 161 (C.M.A. 1986).
[4] *Lamb*, No. 20100044, 2010 CCA LEXIS 334; *Peterson*, No. 200900688, 2010 CCA LEXIS 336.
[5] *Lamb*, 2010 CCA LEXIS 334, at *3.
[6] *Id.* at *6.

blacked out--her level of intoxication was not high enough for her to have passed out.[7]

The similarities between *Lamb* and *Peterson* to this case are striking. These similarities were concisely produced in chart form and were included in IT2 Redmon's clemency submission. They are reproduced below:

U.S. v. Lamb, U.S. v. Peterson	***U.S. v. Redmon***
Victim has no detectable BAC, estimated to be at .1 to .15; *Lamb*, at *5.	Victim has no detectable BAC, estimated to be at .14-.22; R. at 854, 1344.
Difficulty putting on her shirt and shoes; *Id.* at *3.	Chose shorts from wardrobe and put them on; *Id.* at 636-37.
Awoke with no difficulty; *Id.* at *6.	Awoke with no difficulty; *Id.* at 634-38.
Became sick that evening; *Id.*	Became sick that evening; *Id.* at 580, 744.
Walked to her room without assistance; *Id.*	Walked to her room without assistance; *Id.* at 576, 635-36.
Little to no memory of the evening; *Id.*	Fragmentary memory loss throughout the evening; *Id.* at 574-83.
No recollection of sexual intercourse. *Id.*	Remembers intercourse, feeling penetration and erect penis prior to penetration; *Id.* at 634-36; 638-39.
Flirting and statements from the accused that she consented. *Id.*	Witnesses observed hugging and kissing; *Id*. at 806, 1211-12, 1217-18, 1229-30.

Beyond the similarities of the three cases, the testimony of the two experts in this case demonstrate that the BAC levels are the most significant and scientifically based method of

[7] *Id.* at *5.

determining incapacitation.[8] The BAC of IT3 B.S. in this case is not sufficient to determine that she was substantially incapacitated. As explained by both experts, impairment from drinking runs along a continuum: from (1) mild impairment to (2) blacking out to (3) not remembering parts of the evening to (4) passing out.[9] According to Dr. Fromme, a clinical psychologist with expertise in alcohol and its effects on cognition and behavior, a blackout from drinking has been observed as low as a BAC level of .07 and the most common blackout BAC level being .2.[10] While in a blackout stage "the individual is still fully functioning," and they are capable of engaging in complex as well as mundane behaviors but they simply have no memory from those actions.[11] A person may carry on a conversation, drive or in some reported cases, perform surgery.[12] It bears repeating that the significance of the action a person undertakes has no effect on what you remember from a blackout state, as an individual is just as likely not to remember brushing their teeth as they are having sex.[13] A person observing another in a blackout state would not be able to tell that the person was in a blackout state and research shows that people are very bad at

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[8] R. at 840-41.
[9] R. at 858-60, 1334-37.
[10] R. at 1338.
[11] R. at 1334-35.
[12] R. at 1867, 336.
[13] R. at 1335.

judging someone's level of intoxication.[14] Vomiting is not a good indicator of intoxication levels, as that most often occurs from mixing types of liquor, as Dr. Fromme believes happened in this case.[15]

Unlike the blackout stage, in the pass-out stage, typically around .3 BAC, you cannot spontaneously regain consciousness and form memories.[16] It is only in this pass-out, non-responsive state, that Colonel Lyons, the Government's expert, would be willing to say a person does not have the capacity to consent.[17] IT3 B.S. was not in a pass-out state. Her BAC was estimated to be as low as .14 and as high as .22 at the time of the sexual encounter.[18] Dr. Fromme's lower estimates of BAC levels are likely more reliable than Colonel Lyons because she used the average amount of liquid a female takes into her mouth to calculate how much Wild Turkey IT3 B.S. consumed. By contrast, Colonel Lyons attributed full shot glass amounts to IT3 B.S. despite the testimony that IT3 B.S. took her "shots" straight from the bottle.[19] IT3 B.S. was able walk back to her house, use three different keys to open three different locks, and walk up

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[14] R. at 874, 1336-37.
[15] R. at 1346.
[16] R. at 859-60, 1335.
[17] R. at 869,879.
[18] R. at 854, 1344.
[19] R. at 1343-48.

a spiral staircase to get into her place.[20] She got undressed, got in the shower, and manifested her ability to decline consent by rebuffing the sustained attempts of others to get her out of the shower.[21] IT3 B.S. then vomited, likely from mixing alcohol, and chose some clothes to sleep in.[22] Consistent with the expert opinions, IT3 B.S., in this blackout state could still make decisions, like the decision to stay in the shower for forty minutes. IT3 B.S. could still express her desires and decline unwanted offers, even in the face of others trying to get her to do something else.

The law asks whether a person had the capacity to consent; IT3 B.S. had capacity to consent. The fact that IT3 B.S. only remembers part of the encounter only goes to the effect of the alcohol on her memory, not on her ability to decide or communicate what she wanted at the time. Furthermore, the fact that she had some memories of the event suggests that she was not asleep during the event.[23]

There are sexual encounters that result in trauma and produce victims, yet at the same time do not rise of constituting a crime under a rape or sexual assault charge. This is one of those circumstances. The next day, confronted

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[20] R. at 624-25, 577-78, 1272.
[21] R. at 576-80, 675.
[22] R. at 636-37, 678.
[23] R. at 1348-49.

with the possible consequences that her choice the night before could have on her relationship with J.B., IT3 B.S. believed herself to be a victim of a crime, when all the evidence truly showed was that she wished she had made a different choice, not that she was incapacitated.

Conclusion

This Court should require the lower court to be consistent and find that IT2 Redmon’s conviction is legally insufficient.

UNITED STATES OF AMERICA v. ROBERT E. LAMB, PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS

NMCCA 201000044 GENERAL

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

2010 CCA LEXIS 334

September 21, 2010, Decided

NOTICE: AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

SUBSEQUENT HISTORY: Related proceeding at United States v. Peterson, 2010 CCA LEXIS 336 (N-M.C.C.A., Sept. 21, 2010)

PRIOR HISTORY: [*1]

COURT-MARTIAL. Sentence Adjudged: 19 June 2009. Military Judge: LtCol Peter Rubin, USMC. Convening Authority: Commanding General, Marine Air Ground Task Force Training Command, Marine Corps Air Ground Combat Center, Twentynine Palms, CA. Staff Judge Advocate's Recommendation: LtCol R.J. Ashbacher, USMC.

COUNSEL: For Appellant: Capt Bow Bottomly, USMC.

For Appellee: Capt Robert Eckert, Jr., USMC; LT Brian Burgtorf, JAGC, USN.

JUDGES: CARBERRY, S.J., delivered the opinion of the court in which BOOKER, S.J., PRICE, J., PERLAK, J., and FILBERT, J., concur. MAKSYM, S.J., filed an opinion concurring in the result joined by REISMEIER, C.J., MITCHELL, S.J., and PAYTON-O'BRIEN, J.. BEAL, J., filed an opinion concurring in the result.

OPINION BY: CARBERRY

OPINION

OPINION OF THE COURT

CARBERRY, Senior Judge:

A general court-martial with enlisted representation convicted the appellant, contrary to his plea, of one specification of aggravated sexual assault by engaging in a sexual act with a person who was substantially incapacitated, in violation of Article 120(c), Uniform Code of Military Justice, 10 U.S.C. § 920(c). Pursuant to his plea, the military judge convicted the appellant of one specification of violation of a lawful general order, [*2] in violation of Article 92, UCMJ, 10 U.S.C. § 892. The appellant was sentenced to a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

The appellant asserts two assignments of error. First, he asserts that the evidence is factually insufficient to support a finding of guilt as to Charge II, aggravated sexual assault. Second, the appellant asserts that the statutory scheme of Article 120 violates his right to due process by placing the burden on the accused to disprove an element of the Government's case.

For the reasons set out below, we affirm only the findings of guilt for Charge I and its specification. We set aside the finding of guilty for Charge II, its specification,

and the sentence. Charge II and its specification are dismissed. A rehearing on sentence is authorized.

Background

On 26 November 2008, Private (Pvt) Peterson invited Private First Class (PFC) R to his barracks room to "hang out" and drink with him and the appellant. Record at 367. That evening, at approximately 1715, PFC R arrived at Pvt Peterson's barracks room and began drinking. *Id*. at 370. Over the course of the next approximately 2 hours, PFC R testified that she consumed two [*3] or three shots of Jack Daniels and six or seven shots or "mouthfuls" of Jaegermeister, listened to music, played with iTunes, and spoke telephonically with several friends. *Id*. at 203, 214, 370-73, 376-77, 395-96. Those friends testified that PFC R sounded giddy and intoxicated. *Id*. at 203-04, 207-09, 215, 217. At approximately 1940, PFC R was discovered asleep in Pvt Peterson's bed and escorted by the duty noncommissioned officer (Duty NCO) to her barracks room. *Id*. at 247-49, 256-58, 379. Although the Duty NCO noted that PFC R was moving slowly and having a little difficulty putting on her shirt and shoes, he testified that PFC R awoke without difficulty, put on her shoes while standing without stumbling and walked to her room without assistance. *Id*. at 247-48, 256-58, 266. At 1945, PFC R sent a text message to her ex-boyfriend indicating she was raped. *Id*. at 310-14, 380; PE-3. At 0253 on 27 November 2008, PFC R's blood was drawn as part of a sexual assault examination. Record at 294-95; PE-4 at 10. The toxicology results indicated the absence of any drugs and a blood alcohol concentration (BAC) below the threshold level for detection (<.02). Record at 415, 422-23.

PFC R has little [*4] to no memory of the events that took place between 1800 and 1940, when she was awakened by the Duty NCO, and has no recollection of the appellant engaging in any sexual contact with her. *Id*. at 378, 402.

Principles of Law

When we examine the factual sufficiency of the evidence, we must ourselves be convinced beyond a reasonable doubt of the appellant's guilt. We conduct our review with the understanding that we did not personally observe the witnesses. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

At trial, the Government was required to prove: (1) that the accused engaged in a sexual act with PFC R; and (2) that PFC R was substantially incapacitated. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 45b(3)(c). Substantially incapacitated means a level of mental impairment due to consumption of alcohol; while asleep or unconscious; or for other reasons; which rendered the alleged victim unable to appraise the nature of the sexual conduct at issue, unable to physically communicate unwillingness to engage in the sexual conduct at issue, or otherwise unable to make or communicate competent decisions. Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9 at [*5] 505-06 (01 Jan 2010).

Discussion

Only the second element, PFC R's incapacitation, is in issue. PFC R's level of intoxication is critical to addressing this element.

In support of the theory that PFC R was not substantially incapacitated, the appellant called Lieutenant Colonel LTC) Timothy Lyons, U.S. Army. The military judge recognized LTC Lyons as an expert in the field of forensic toxicology. Record at 415. LTC Lyons testified that the blood drawn during the sexual assault examination, when tested for alcohol, was below the threshold level for BAC detection (<.02). *Id*. at 415, 422-23. After comparing PFC R's testimony as to how much she drank to the toxicology report, LTC Lyons testified that PFC R's testimony was inconsistent with the laboratory results as he would have expected a reasonably high BAC level at 0253 if she had consumed the amount of alcohol she testified to. *Id*. at 421. Using both average and above average rates for alcohol elimination, LTC Lyons opined that PFC R's BAC was between .10 and .15 at the time of the alleged assault and that blacking out below a .18 is observed only in 10% of the population. *Id*. at 424-25. LTC Lyons went on to testify that passing out at [*6] BAC below .20 is not possible. *Id*. at 429. Finally, LTC Lyons testified that PFC R's ability to awaken so quickly and walk without exhibiting signs of intoxication was inconsistent with her account of the amount of alcohol she said she drank. *Id*. at 421-22. While it is possible that PFC R suffered an inability to record memory and exercise good judgment due to her alcohol consumption, LTC Lyons concluded that, based on her BAC at 0253, she did not ingest enough alcohol to enter a sedated or passed out state. *Id*. at 423.

Notwithstanding the fact that PFC R suffered memory loss due to her alcohol consumption, became sick and went to sleep after the sexual contact the appellant, we have reasonable doubt as to whether she was substantially incapacitated. In light of the testimony of LTC Lyons and the Duty NCO, and the appellant's videotaped statement to the Naval Criminal Investigative Service, in which the appellant describes PFC R as flirtatious and a willing and active participant in the sexual contact, we are not convinced beyond a reasonable doubt that PFC R was substantially incapacitated at the time of the sexual act. Accordingly, we set aside the finding of guilty as to Charge II.

Assignment [*7] **of Error II**

Our decision to set aside the finding of guilt on the Article 120 offense renders the second assignment of error moot.

Sentence Rehearing

Due to our action on findings, we next consider whether we can reassess the sentence. A "'dramatic change in the penalty landscape' gravitates away from the ability to reassess" a sentence. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006)(quoting *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003)). Based on the orders violation and aggravated sexual assault together, the members imposed a sentence of a bad-conduct discharge. All that remains is the orders violation. The maximum punishment for the Article 120 offense was confinement for 30 years, forfeiture of all pay and allowances, and a dishonorable discharge. MCM, Part IV, ¶ 45f(2). The maximum punishment for the orders violation was confinement for 2 years, forfeiture of all pay and allowances, and a dishonorable discharge. *Id*. at ¶ 16e(1). Our action on findings dramatically changes the penalty landscape and we cannot reliably determine what sentence the court-martial would have imposed. *Buber*, 62 M.J. at 479-80. The "only fair course of action" is to have the accused [*8] resentenced at the trial level. *Id*. at 480.

Conclusion

We affirm the findings of guilty for Charge I and its specification. The findings of guilt for Charge II and its specification are set aside. Charge II and its specification are dismissed. The sentence is set aside and the record is returned to the Judge Advocate General of the Navy for transmission to an appropriate CA who may order a rehearing on the sentence. In the event that a rehearing on the sentence is impracticable, a sentence of no punishment may be approved. Art. 66(d), UCMJ.

Senior Judge BOOKER, Judge PRICE, Judge PERLAK, and Judge FILBERT concur.

CONCUR BY: MAKSYM; BEAL

CONCUR

MAKSYM, Senior Judge (concurring in the result):

While I concur with the majority by way of remedy, I write separately relative to the dismissal of the aggravated sexual assault charge due to factual insufficiency. This was an extremely close case, the result of which is mandated by the absence of evidence. This court is bound by the record that lies before it. It cannot speculate beyond the four corners of that record. *United States v. Holt*, 58 M.J. 227, 232 (C.A.A.F. 2003).

The prosecution bears the burden of proof. In this case, for whatever reason, the Government [*9] did not call an expert witness to rebut the uncontroverted expert testimony advanced by the defense relative to the amount of alcohol consumed by and the impact of alcohol on the alleged victim, nor did they elicit sufficient concessions from the expert to undermine the conclusions he offered the court. Moreover, while I viewed with great import the testimony of Private (Pvt) Hansen -- arguably the most important Government witness when faced with the reality that the alleged victim recalls so very little about her ordeal -- his testimony was problematic. Pvt Hansen testified that he entered the barracks room in question and observed the alleged victim lying stripped on the bed, partially covered by a blanket, armed with "a thousand yard stare". According to Pvt Hansen, she was not blinking and presented absolutely no movement. Pvt Hansen testified that he became so concerned that he shook the alleged victim by the jaw, and after realizing no response, checked her pulse. He testified that the appellant and Private First Class Peterson appeared nervous and were perspiring. He then freely admitted that he left the room, but rather than reporting the incident at once, waited 20 minutes [*10] to report the incident to anyone. In fact, he testified that he smoked a cigarette, chatted with his sister on the phone, and, after leaving what he described as a near-catatonic victim alone with two suspicious characters for 20 minutes, only then did

he place an anonymous note at the duty desk requesting that someone look into what was happening in the barracks room in question.

However, Pvt Hansens' observations of a victim who could not be readily awakened were contradicted by the testimony of the duty noncommissioned officer in the barracks who testified that the victim was awakened by a "normal" shake one might use to arouse a sleeping person, that she seemed "wobbly" but coherent, and was able to put her shoes on from a standing position.

I also note that the Government failed to call Pvt Cates as a witness minus any apparent explanation. Pvt Cates was in the room during the alleged assaults and was apparently blithely typing on his computer. He was, in fact, the person who told Pvt Hansen that there was sex occurring in the room in question. Yet he is not called by either party to tell us what he knew.

I am mindful that during my review of the record, I must recognize that the [*11] trial court saw and heard the witnesses. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). However, this record presents a rare factual scenario where I can accept the testimony of all of the witnesses at face value yet still find a reasonable doubt as to guilt. The victim recalls little to nothing, and understandably considers the events as sexual assault. The victim was clearly drinking, and was obviously intoxicated. Pvt Hansen viewed the victim in a non-responsive state. Shortly thereafter, the duty noncommissioned officer in the barracks easily awakened the victim and viewed her in a coherent state. Scientific testimony suggested that the victim may have suffered a blackout, but was unlikely intoxicated to the point of losing substantial capacity. On these facts, there is a reasonable doubt as to whether, at the time of the alleged sexual assault and indecent act, the victim was substantially incapacitated, or intoxicated to a lesser extent but clearly in a blackout state. Without testimony from an expert to testify to the contrary or some corroboration as to whether, at the time of the assault, the victim was in a state described by Pvt Hansen or in one described by the [*12] duty noncommissioned officer in the barracks, I am left in doubt.

Finally, from a statutory perspective, the United States must prevail upon the court by way of proof in illustrating beyond any reasonable doubt that the alleged victim was substantially incapacitated by alcohol or any other substance during the very short time frame in question. Article 120(c), Uniform Code of Military Justice, 10 U.S.C. § 920(c). I would note that military jurisprudence relative to the application of what does and does not constitute substantial incapacitation is far from well-developed. The Government's position is badly compromised by the absence of conventional and expert testimony.

I suspect that the court is presented with more than merely an alleged victim in this case. Concluding that there is a reasonable doubt is not the same as concluding no crime occurred. However, while I may have grave suspicion as to the existence of heinous crime, suspicion does not satisfy the Government's heavy burden of proof beyond any reasonable doubt.

Chief Judge REISMEIER, Senior Judge MITCHELL, and Judge PAYTON-O'BRIEN joining

BEAL, Judge (concurring in the result):

I would set aside the conviction for aggravated [*13] sexual assault alleged under Charge II for the reasons stated in my dissent to *United States v. Medina*, 68 M.J. 587, 596 (N.M.Ct.Crim.App. 2009), *rev. granted*, ___ M.J. ___ (C.A.A.F. Mar. 30, 2010). I concur with the majority opinion in all other respects.

UNITED STATES OF AMERICA v. KOREY L. PETERSON PRIVATE (E-1), U.S. MARINE CORPS

NMCCA 200900688

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

2010 CCA LEXIS 336

September 21, 2010, Decided

NOTICE: AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

SUBSEQUENT HISTORY: Appeal after remand at United States v. Peterson, 2011 CCA LEXIS 732 (N-M.C.C.A., Feb. 22, 2011)

PRIOR HISTORY: [*1]
GENERAL COURT-MARTIAL. Sentence Adjudged: 2 July 2009. Military Judge: Col John Ewers, USMC. Convening Authority: Commanding General, Marine Air Ground Task Force Training Command, Marine Corps Air Ground Combat Center, Twentynine Palms, CA. Staff Judge Advocate's Recommendation: LtCol R.J. Ashbacher, USMC.
United States v. Lamb, 2010 CCA LEXIS 334 (N-M.C.C.A., Sept. 21, 2010)

COUNSEL: For Appellant: LT Michael Maffei, JAGC, USN.

For Appellee: LT Brian Burgtorf, JAGC, USN.

JUDGES: BOOKER, S.J., delivered the opinion of the court in which CARBERRY, S.J., PRICE, J., PERLAK, J., and FLYNN, J., concur. MAKSYM, S.J., filed an opinion concurring in the result joined by REISMEIER, C.J., MITCHELL, S.J., and PAYTON-O'BRIEN, J.. BEAL, J., filed an opinion concurring in the result.

OPINION BY: BOOKER

OPINION

OPINION OF THE COURT

BOOKER, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, contrary to his pleas, of drug distribution, aggravated sexual assault on a substantially incapacitated person, and committing an indecent act with that same person, violations, respectively, of Articles 112a, 120(c), and 120(k), Uniform Code of Military Justice, 10 U.S.C. §§ 912a, 920(c), and 920(k). The military judge convicted the appellant, consistent with his pleas, of violating [*2] a general order, Article 92, UCMJ, 10 U.S.C. § 892. The military judge also found the appellant not guilty of two charged conspiracies in violation of Article 81, UCMJ, 10 U.S.C. § 881. The approved sentence extended to confinement for 28 months, forfeiture of all pay and allowances, and a bad-conduct discharge from the U.S. Marine Corps.

The appellant alleges the following errors: that Article 120, UCMJ, is unconstitutional in certain particulars; that he was denied his right to conflict-free counsel; that his defense team rendered ineffective assistance; that the evidence is factually insufficient to support the conviction for aggravated sexual assault; and that the evidence is factually insufficient to support the conviction for committing an indecent act. We have

determined that error materially prejudicial to the substantial rights of the appellant did occur, and we therefore grant relief. Our resolution of some errors will obviate discussion of the others.

Discussion

When we examine the factual sufficiency of the evidence, we must ourselves be convinced beyond a reasonable doubt of the appellant's guilt. We conduct our review with the understanding that we did not personally observe [*3] the witnesses. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

In order to convict the appellant of the aggravated sexual assault alleged in Specification 1 of Charge II, the Government was required to prove that the victim, Private First Class (PFC) KR, was substantially incapacitated at the time of the incident. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 45a(c).

From the record, we can discern that the appellant engaged in sexual intercourse with PFC KR, that around the time of intercourse PFC KR had consumed some quantity of alcoholic beverages and displayed some indicia of impairment, and that PFC KR has imperfect memories of the sexual activity that occurred that night. A statement made by the appellant to the Naval Criminal Investigative Service, admitted against him as Prosecution Exhibits 8 and 9 (respectively a video recording and a transcription of the conversation on the recording), recounts multiple conversations with PFC KR immediately preceding the sexual intercourse in which, in the appellant's estimation, she indicated a clear understanding of the act and a clear willingness to engage in it. He does note, and this is consistent with other [*4] witnesses' testimony, that PFC KR was nauseated from the alcohol, but nausea does not suggest incapacity. She was carrying on voice and text communications on her mobile phone before and after the sexual encounter, and while her colloquists described her as giddy and intoxicated, none said that she was incapacitated, although one witness did say he found PFC KR in the appellant's barracks room lying on a bed and apparently immobilized, a "thousand yard stare" on her face.

The duty noncommissioned officer in the barracks testified that he escorted PFC KR from the appellant's barracks room back to her own, less than 30 minutes after the encounter, but that she did not require any assistance in making the trip. A forensic toxicologist testified that a blood sample collected some six hours after the incident showed an undetectable level of alcohol, and urine collected showed no evidence of drugs. The presence of alcohol in the urine meant, in the expert's opinion, only that PFC KR had consumed alcohol at some point. When given a hypothetical question of the correlation between the alcohol level in the blood and the amount supposed to have been consumed by PFC KR, the expert stated he would [*5] have expected to see a level "much higher than our cutoff" for "undetectable".

Mindful that the military judge saw and heard the witnesses and acknowledging this is a close case, we are not ourselves convinced beyond a reasonable doubt that PFC KR was substantially incapacitated. We will set aside the finding of guilty to Specification 1 of Additional Charge II and dismiss that specification in our decretal paragraph.

In order to convict the appellant of committing an indecent act, the Government was required to show that the appellant engaged in certain conduct and that the conduct was indecent. MCM, Part IV, ¶ 45a(k). "Indecent conduct" is defined as a form of immorality relating to sexual impurity . . . [that] includes . . . making . . . reproduced visual material, without another person's consent . . . of that other person while engaged in a sexual act . . . . *Id.* at ¶ 45a(t)(12). The record is devoid of any evidence showing lack of consent on the part of PFC KR to her appearance in the photos allegedly showing her and the appellant engaged in sexual intercourse, photos which we note were not introduced at trial and which, according to the only witness to see them, did not show participants' [*6] faces. As we are not convinced of the appellant's guilt of this offense, we will set aside the finding of guilty to Specification 2 of Additional Charge II and dismiss that specification in our decretal paragraph as well.

Conclusion

The guilty findings to Additional Charge II and its underlying specifications are set aside, and that charge and its underlying specifications are dismissed. Our action with respect to Additional Charge II and its two specifications renders moot the appellant's first three assignments of error. The remaining findings of guilty are affirmed. The sentence is set aside.

A rehearing on sentence may be ordered with respect

to the two offenses of which the appellant now stands convicted. The record of trial is returned to the Judge Advocate General for transmission to an appropriate convening authority for the rehearing on sentence. After that rehearing, the record will be returned to this court. *Boudreaux v. United States Navy-Marine Corps Court of Military Review*, 28 M.J. 181 (C.M.A. 1989).

Senior Judge CARBERRY, Judge PRICE, Judge PERLAK, and Judge FLYNN concur.

CONCUR BY: MAKSYM; BEAL

CONCUR

MAKSYM, Senior Judge (concurring in the result):

While I concur with the majority by way [*7] of remedy, I write separately relative to the dismissal of the aggravated sexual assault charge due to factual insufficiency. This was an extremely close case, the result of which is mandated by the absence of evidence. This court is bound by the record that lies before it. It cannot speculate beyond the four corners of that record. *United States v. Holt*, 58 M.J. 227, 232 (C.A.A.F. 2003).

The prosecution bears the burden of proof. In this case, for whatever reason, the Government did not call an expert witness to rebut the uncontroverted expert testimony advanced by the defense relative to the amount of alcohol consumed by and the impact of alcohol on the alleged victim, nor did they elicit sufficient concessions from the expert to undermine the conclusions he offered the court. Moreover, while I viewed with great import the testimony of Private (Pvt) Hansen -- arguably the most important Government witness when faced with the reality that the alleged victim recalls so very little about her ordeal -- his testimony was problematic. Pvt Hansen testified that he entered the barracks room in question and observed the alleged victim lying stripped on the bed, partially covered by a blanket, [*8] armed with "a thousand yard stare". According to Pvt Hansen, she was not blinking and presented absolutely no movement. Pvt Hansen testified that he became so concerned that he shook the alleged victim by the jaw, and after realizing no response, checked her pulse. He testified that the appellant and Private First Class Lamb appeared nervous and were perspiring. He then freely admitted that he left the room, but rather than reporting the incident at once, waited 20 minutes to report the incident to anyone. In fact, he testified that he smoked a cigarette, chatted with his sister on the phone, and, after leaving what he described as a near-catatonic victim alone with two suspicious characters for 20 minutes, only then did he place an anonymous note at the duty desk requesting that someone look into what was happening in the barracks room in question.

On its face, Pvt Hansen's testimony was both compelling and problematic. However, on cross-examination Pvt Hansen's credibility and indeed his capacity to testify is fatally undermined when he admits that he had used illegal narcotics on the date in question. The transcript of the cross-examination of this witness is somewhat incongruous [*9] in that Pvt Hansen admits to drug use on the date in question only to be asked a contextually strange follow up question:

> DC: Were you on drugs that night?
> W: Yes.
>
> DC: But [you] have done drugs?
> W: Yes.

Record at 211.

Contextually, this exchange is very unusual. I note that there is no effort to rehabilitate the witness on re-direct examination relative to drug abuse on the date of the alleged assault and no inquiry regarding this issue by the military judge. While I suspect this may represent a stenographer's error, this is an authenticated record and the court may not speculate beyond the four corners of same.

However, even if Pvt Hansen was not then under the influence, his observations of a victim who could not be readily awakened were contradicted by the testimony of the duty noncommissioned officer in the barracks who testified that the victim was awakened by a "normal" shake one might use to arouse a sleeping person, that she seemed "wobbly" but coherent, and was able to put her shoes on from a standing position.

I also note that the Government failed to call Pvt Cates as a witness minus any apparent explanation. Pvt Cates was in the room during the alleged assaults and was apparently [*10] blithely typing on his computer. He was, in fact, the person who told Pvt Hansen that there was sex occurring in the room in question. Yet he is not called by either party to tell us what he knew.

I am mindful that during my review of the record, I must recognize that the trial court saw and heard the witnesses. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). However, this record presents a rare factual scenario where I can accept the testimony of all of the witnesses at face value yet still find a reasonable doubt as to guilt. The victim recalls little to nothing, and understandably considers the events as rape. The victim was clearly drinking, and was obviously intoxicated. Pvt Hansen viewed the victim in a non-responsive state. Shortly thereafter, the duty noncommissioned officer in the barracks easily awakened the victim and viewed her in a coherent state. Scientific testimony suggested that the victim may have suffered a blackout, but was unlikely intoxicated to the point of losing substantial capacity. On these facts, there is a reasonable doubt as to whether, at the time of the alleged sexual assault and indecent act, the victim was substantially incapacitated, or intoxicated [*11] to a lesser extent but clearly in a blackout state. Without testimony from an expert to testify to the contrary or some corroboration as to whether, at the time of the assault, the victim was in a state described by Pvt Hansen or in one described by the duty noncommissioned officer in the barracks, I am left in doubt.

Finally, from a statutory perspective, the United States must prevail upon the court by way of proof in illustrating beyond any reasonable doubt that the alleged victim was substantially incapacitated by alcohol or any other substance during the very short time frame in question. Article 120(c), Uniform Code of Military Justice, 10 U.S.C. § 920(c). I would note that military jurisprudence relative to the application of what does and does not constitute substantial incapacitation is far from well-developed. The Government's position is badly compromised by the absence of conventional and expert testimony.

I suspect that the court is presented with more than merely an alleged victim in this case. Concluding that there is a reasonable doubt is not the same as concluding no crime occurred. However, while I may have grave suspicion as to the existence of heinous crime, suspicion [*12] does not satisfy the Government's heavy burden of proof beyond any reasonable doubt.

Chief Judge REISMEIER, Senior Judge MITCHELL, and Judge PAYTON-O'BRIEN joining

BEAL, Judge (concurring in the result):

I would set aside the conviction for aggravated sexual assault alleged under Charge II for the reasons stated in my dissent to *United States v. Medina*, 68 M.J. 587, 596 (N.M.Ct.Crim.App. 2009), *rev. granted*, M.J. (C.A.A.F. Mar. 30, 2010). I concur with the majority opinion in all other respects.

APPENDIX 5

SPECIAL TOPICS SERIES

American Prosecutors
Research Institute

Victim Responses to Sexual Assault:
Counterintuitive or Simply Adaptive?

Office on
Violence Against Women

National District Attorneys Association
American Prosecutors Research Institute
99 Canal Center Plaza, Suite 510
Alexandria, VA 22314
www.ndaa.org

Thomas J. Charron
President

Roger Floren
Chief of Staff

Jennifer Gentile Long
Director, National Center for the Prosecution of Violence Against Women

David LaBahn
Director, NDAA Research and Development Division

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SPECIAL TOPICS SERIES

Victim Responses to Sexual Assault:
Counterintuitive or Simply Adaptive?

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Patricia L. Fanflik

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INTRODUCTION

Rape and other forms of sexual victimization are considered among the most severe and underreported crimes in the United States (Layman, Gidycz, & Lynn, 1996; Lee, Pomeroy, & Rheinboldt, 2005; Sable, Danis, Mavzy, & Gallagher, 2006). The occurrence of rape is a pervasive social problem with lasting effects for victims (Castello, Coomer, Stillwell, & Cate, 2006; Jimenez & Abreu, 2003; Lonsway & Fitzgerald, 1994; McMullin & White, 2006). Griffin (1971) distinguished rape as the "all-American crime," positing "forcible rape is the most frequently committed violent crime in America…" (p. 27). Unfortunately, there is statistical evidence to suggest that most rapes in the United States go unpunished (Sinclair & Bourne, 1998). According to the National Violence Against Women Survey, 17.6 percent of adult women experienced a coupleted or attempted rape during a lifetime (Tjaden & Thoennes, 2000). As victims often do not report sexual assaults, there is no accurate method to identify the number of rapes or other sexual offenses occurring each year (McGregor, 2005). Among the first to examine victim behavior following an assault, Burt (1980) contends that the underreporting of these crimes is not surprising given that victims are often re-victimized when they are forced to endure the investigation of allegations and subsequent prosecution of the perpetrator. Societal attitudes toward sexual violence and victims of sexual assault may also influence not only reporting of such crimes but may have an impact on victims' psychological states after the sexual assaults (Lee et al., 2005; Withey, 2007).

Despite legal reform, educational efforts, and the increased public attention sexual violence has garnered in the last three decades, little is known regarding the initial and possible lasting effects rape and other forms of sexual violence can have on a woman's psychological adjustment to the experience (Sable et al., 2006; Wyatt, Notgrass, & Newcomb, 1990). There is research to suggest that the effects of sexual violence differ from other violent crimes in terms of psychological impact on a victim and societal reactions to the event (Frese, Moya, & Megias, 2004; Meyer & Taylor, 1986; Starzynski, Ullman, Filipas, & Townsend, 2005). Sexual victimization, "unlike other crimes, involves not only victimization but also attitudes toward sex-role behavior and sexuality. Therefore, … attitudes

toward traditional sex roles might influence … perceptions and attitudes about the crime of rape" (Olsen-Fulero & Fulero, 1997, p. 407). The victim's personal characteristics coupled with multiple external factors make it virtually impossible to predict how an individual might react following a sexual assault. As such, this monograph will explore different psychological (e.g., depression, anger, or anxiety) and behavioral responses (e.g., not fighting back during a rape, continuing to date an assailant, or not reporting the sexual assault until months later) to sexual violence and why these responses appear to be "counterintuitive" to the general public. The term "counterintuitive" is used to explain how a juror may perceive a victim's behavior and not the behavior itself. For local and state prosecutors involved in sexual assault cases, it is important to remember that labeling these certain victim behaviors for members of a jury as "counterintuitive" reinforces the notion that there is an appropriate or "normal" way to behave after a sexual assault and that anything outside the realm of a presupposed reaction is somehow inappropriate or abnormal.

Coping with Sexual Victimization

Sexual assault victims frequently experience negative and often long-term psychological and physical consequences following the event (Castello et al., 2006; Kaltman, Krupnick, Stockton, Hooper, & Green, 2005; White Kress, Trippany, & Nolan, 2003; Littleton & Radecki Breitkopf, 2006; Meyer & Taylor, 1986; Sturza & Campbell, 2005). McGregor (2005) contends that women often try to cope with sexual assault without assistance out of fear that the criminal justice system will not believe the victim or blame the victim for the assault (i.e., she was responsible for what happened and therefore could have controlled it). In the last three decades, an emphasis on legal reform has helped to reduce psychological and system barriers that traditionally discouraged victims of sexual assault from reporting (Sable et al., 2006). Public education focusing on rape awareness assisted victims by highlighting the perpetrator's behavior and not the behavior of the victim. The movement in supporting victims of sexual victimization was also strengthened by legal reform to extend the definitions of rape and sexual assault. In most states, sexual victimization laws are now gender and relationship neutral (Sable et al., 2006). Despite changes in public attitudes and legal reform, victims still face obstacles in coming forward to report crimes of sexual victimization. Gaines (1997) notes, it is easier to augment or change laws than it is to change prejudices. Studies exploring the dynamics surrounding sexual assault victims suggest that "something unique about how society perceives sexual assault may lead people to make negative responses to women disclosing these experiences" (Starzynski et al., 2005, p. 418). The intensity of psychological trauma for a victim may vary according to how society reacts to the victim (Lee et al., 2005). As a result, victims often strive to cope with the experience of sexual victimization without legal, medical, or mental health support (Wyatt, et al., 1990).

Although many victims report distinctive psychological post-rape responses such as heightened fear, avoidance, re-experiencing the traumatic event, and anxious arousal, not all victims will have these specific post-rape reactions. Of those that do experience these reactions the frequency and duration may vary considerably from victim to victim (Foa & Riggs, 1995;

Frazier, 1990; Valentiner, Foa, Riggs, Gershuny, 1996; Wyatt, et al., 1990). However, White Kress and colleagues (2003) argue that it is important to identify and assess the severity of reactions to sexual victimization as this process can ultimately assist in determining an appropriate intervention path toward recovery for victims. As a result, Levin (2004) compiled a list of common physical and emotional responses to trauma. These physical and emotional reactions include:

Physical Reactions

- Aches and pains like head, back, and/or stomach aches
- Sudden sweating and/or heart palpitations (fluttering)
- Changes in sleep patterns, appetite, interest in sex
- Constipation or diarrhea
- Easily startled by noises or unexpected touch
- More susceptible to colds or illnesses
- Increased use in alcohol or other drugs and/or overeating

Emotional Reactions

- Shock and/or disbelief
- Fear and/or anxiety
- Grief, disorientation, denial
- Hyper-alertness or vigilance
- Irritability, restlessness, outbursts of anger or rage
- Emotional mood swings (e.g., crying then laughing)
- Worrying or ruminating (i.e., intrusive thoughts of the trauma)
- Nightmares
- Flashbacks (i.e., feeling as if the trauma is currently happening)
- Feelings of helplessness, panic, feeling out of control
- Increased need to control everyday experiences
- Minimizing the experience
- Attempts to avoid anything associated with the trauma
- Tendency to isolate oneself
- Feelings of detachment
- Concern with burdening others with problems
- Emotional numbing or restricted range of feelings

- Difficulty trusting and/or feelings of betrayal
- Difficulty concentrating or remeunbering
- Feelings of self-blame and/or guilt
- Shame
- Diminished interest in everyday activities or depression
- Unpleasant past memories resurfacing
- Loss of a sense of order or fairness in the world; expectation of doom and fear of the future

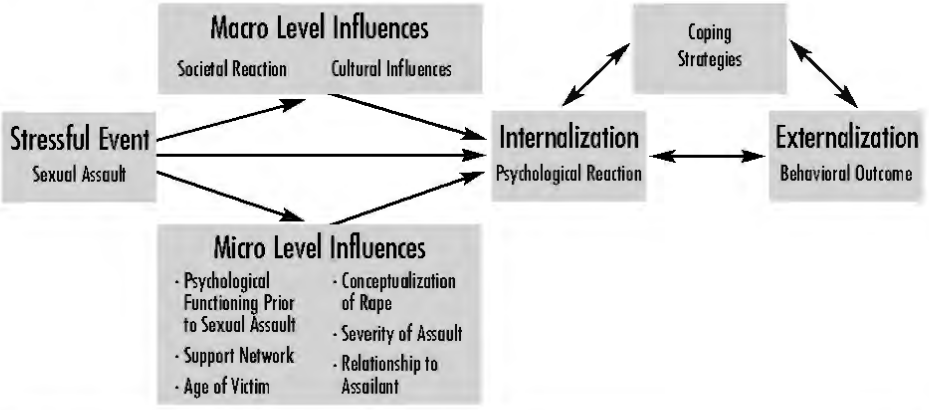
Although it is important to identify common reactions to a traumatic event, "there is tremendous variability in the extent to which women are affected" (Frazier, 2000, p. 204). Different psychological responses manifest different behavioral patterns or coping strategies for each survivor of sexual assault. In addition, external factors such as victim social support network, severity of the assault, or a victim's relationship to the assailant may also have an impact on a victiun's psychological functioning after a sexual assault (Littleton & Radecki Breitkopf, 2006; Wyatt, et al., 1990). A complex combination of individual characteristics and external factors influence how a woman will react to sexual victimization.

Explaining Variability in Victim Responses

Littleton and colleagues (2006) report that sexual assault victims engage in "fairly extensive coping efforts in managing the assault" (p. 770). Yet, there is a paucity of research that explores what factors curtail or intensify the most traumatic aspects of sexual victimization (Koss & Burkhart, 1989). Given the number of potential influences on a victim's response following a sexual assault, no comprehensive model of coping among sexual assault victims exists (Littleton & Radecki Breitkopf, 2006). Frazier and Burnett (1994) surmise that the most common coping strategies for victims are difficult to assess because researchers define and measure "coping" differently across studies.

Factors such as past life experiences, developmental level, spiritual beliefs, social support systems, content and intensity of the event and genetic predisposition may all influence a victim's reaction to sexual assault (James & Gilliland, 2001; Regehr, Cadell, & Jansen, 1999 as cited in White Kress et al., 2003). In addition, Starzynski and colleagues (2005) found that "women who felt their lives were in danger often developed more severe psychological symptomology like post-traumatic stress disorder…" (p. 429). Figure 1 below represents the multiple factors that can effect how a sexual assault survivor may react or cope with the victimization.

Figure 1: Internal and External Factors that Impact Coping Strategies of Sexual Assault Survivors



Macro Level Influences on Coping

Once the sexual assault has occurred, multiple micro and macro level factors influence the victim's psychological reactions (e.g., depression, anxiety, and/or anger) and thus impact the victim's coping strategy. Research conducted in the sociology of emotions offers a unique perspective on why some women cope with sexual victimization in seemingly adaptive ways while others do not. Macro level influences on a sexual assault victim denote factors outside the individual that include such things as societal or cultural reactions to sexual victimization. It may be difficult to imagine that societal reactions to a sexual assault victim may have an impact on how well that particular survivor will adjust psychologically following the rape (Castello et al., 2006; Lee et al, 2005; Ullman & Filipas, 2001). According to Turner and Stets (2005), authors of the book entitled *Sociology of Emotions,* one psycho-social approach to emotions and subsequent behavior is based on the idea that cultural norms and social interactions guide human behavior. In other words, individuals react to situations and other individuals based on cultural ideas and normative expectation of what is anticipated in a particular instance. For example, behavior at a funeral tends to be more sorrowful than at a wedding. With this example, behavior is dictated by what is socially or culturally accepted or appropriate for the particular situation. Turner and Stets conclude, "when emotions reveal conformity [all individuals reacting in the same manner], action is given moral character, which, in turn, reinforces the structure not only of the local situation, but also of society as a whole" (p. 48, brackets added). Individuals learn how to behave through social interactions with family members and other individuals in society. When individual behavior does not match culturally determined ideas of how one is supposed to act, individuals are often not looked upon favorably and even shunned. This is often the case with sexual assault survivors. Victims are often caught between societal expectations regarding the attack and personal feelings in an attempt to cope with the experience.

In general, society expects victims to display certain behaviors following the attack (e.g., report the attack, stop dating the assailant). Local and state prosecutors know far too well that victim behavior does not always

"make sense" or conform to these expectations. In describing this phenomenon, Gentile Long (n.d.) explains, "certain behaviors are counterintuitive to the type of behavior the public would expect from a 'real victim' and, without explanation, [these behaviors] are easily transformed into reasons to doubt the victim's account of the assault" (p. 2, brackets added). In other words, when societal expectations regarding the attack are not met, the victim's behavior is often re-examined to fit within another scenario that makes more sense. For example, there is research to suggest that women, for various reasons, often delay in reporting sexual victimization. This victim behavior is frequently misconstrued and interpreted as the victim is not being truthful and is lying about the attack.

To change feelings regarding an event in which an individual must fit within normative expectations, individuals often engage in emotion management. To alter feelings, Thoits (1985, 1990 as cited in Turner & Stets, 2005) insists that individuals often manipulate inner experiences in order to feel differently regarding an event. In attempting to alter one's emotions, Thoits hypothesized that:

> individuals often seek to manage their emotions. The emotion management that ensues, or what she alternatively labels as coping, is an attempt to bring one's subjective emotional experience into line with normative requirements of the situation…To feel the way one *should* feel in a situation, people can manipulate the situation behaviorally or cognitively. In behavioral manipulation, one directly changes an undesired emotional state either through approach strategies (take direct action or confront the situation) or avoidance strategies (leave the situation, use drugs or alcohol)…Cognitive manipulation involves responding mentally in the situation by changing the *meaning* of the situation to better coincide with how one should feel (reinterpret the situation, psychologically withdraw)…. (p. 52 & 53)

As there is nothing normative about being sexually victimized, there cannot be a "normal" reaction to such a traumatic event. Victims are caught between societal expectations and personal feelings in an attempt to cope with the experience. Victims typically try to normalize the situation because it is outside the realm of "normal" understanding. White Kress

and colleagues (2003) describe what some victims endure following a sexual assault when trying to ascribe meaning to the event.

> The person is unable to effectively answer questions regarding how and why the event happened and what meaning and implications the event has for a person's life. This disequilibriuu causes the person to experience a sense of crisis that lasts as long as the person needs to organize and develop a coherent meaning system in relation to the assault. (p. 125)

It is during this time of disequilibrium that a victim's reactions may not make senses to most individuals. In attempting to understand victim reactions, research conducted by Burgess and Holmstrom (1974), Petter and Whitehill (1998) suggest that victims of sexual assault may progress through two distinct phases, each phase varies in degree of severity based on the individual victim: "Phase 1, representing the *acute phase* and initial reactions to the traumatic event, and Phase 2 [or the] *reorganization phase*, involving the psychological adjustment, integration, and ultimate recovery from the traumatic event" (as cited in White Kress et al., 2003, p.125, brackets added). In attempting to adjust or find meaning in the traumatic event, victim behavior may vary considerably from person to person. In addition, responses may also be varied when compared across different racial and ethnic minority groups.

Micro Level Influences on Coping

Micro level influences on a victim's coping strategies represent factors internal to the individual. For example, adjusting to a sexual assault may be affected by a victim's level of mental health functioning or perception of self prior to the assault. Gamper (2004) explains that overt behavior results from individual attitudes or beliefs held about one's self. Specifically, "it is generally accepted that an individual's self-perception [assessment of the self] often provides the catalyst from which overt behavior ensues" (p.133, brackets added). Additionally, there is research to suggest that victims who experienced prior mental health problems (Frazier, 2003) and prior victimization such as child physical and/or sexual abuse (Nishith, Mechanic, & Resick, 2000) experienced more severe

post-rape responses. In fact, Kaltman et al., (2005) concluded that victims who experienced a sexual assault during adolescence or a re-victimization were at greatest risk for developing psychopathology, poor social adjustment, and engaging in risky sexual behaviors.

Attribution of blame for the sexual assault is also an internal mechanism many victims contemplate after the assault. Starzynski and collegues (2005) state, "women respond in a variety of ways to sexual assault experiences including how they attribute blame for the assault and how they cope with its aftermath" (p. 418 & 419). It is not uncommon for victims to blame themselves for the assault and not the perpetrator. Janoff-Bulman (1979), asserts that self-blaming strategies should be separated into two distinct categories, *behavioral* and *characterological self-blame*. She contends that *behavioral self-blame* can result when a victim assigns personal responsibility for her sexual victimization to her own modifiable behaviors (e.g., not being more cautious while walking at night, excessive drinking). In characterological self-blame, the victim focuses on personal character flaws as the reason for her assault (e.g., I am too gullible or I should have known better). Janoff-Bulman believed that behavioral self-blame was associated with more adaptive post-rape coping strategies then victim coping based on characterological self-blame. However, Meyer and Taylor (1986) challenged this notion and found evidence to suggest that no form of self-blame led to adaptive responses to sexual victimization. In fact, "behavioral self-blame was associated with sexual dissatisfaction and symptoms of depression, whereas characterological self-blame was associated with high levels of fear and symptoms of depression" (p. 1232). Frazier (2000) also argues that all types of attribution (i.e., self-blame, as well as external-blame focusing on why the assault occurred) are associated with higher levels of problematic behaviors. Additionally, Frese and colleagues (2004) postulate that trauma-related guilt was associated with post-traumatic stress disorder, depression, negative self-esteem, feelings of shame, social anxiety, and suicidal ideation.

An additional micro level factor that may influence victim coping strategies is a supportive social network. Unfortunately, "negative social reactions to initial disclosure may discourage subsequent disclosures and further traumatize the survivor" (Starzynski et al., 2005, p. 418). Although

social support network may also be a macro level influence, social network in this example represents the effects of interpersonal relationships (e.g., family or friends) and how these relationships can assist in the disclosure of the sexual assault in terms of helping the victim come to terms with the magnitude of what has occurred. Wyatt and colleagues (1990) posit that supportive care from families and/or friends may "facilitate the victim's understanding of her sexual assault. If victims do not disclose their assault to anyone, support systems are prevented from helping survivors deal with the trauma" (p. 156). These researchers also determined that age of the victim might also contribute to difficulty in coping with the sexual assault. In this study there was evidence to suggest that women aged 27-36 whose victimization was recent were most at-risk for pervasive effects regarding post-rape adjustment. Specifically, women in this age group engaged in self-blame that perpetuated non-disclosure. Unfortunately, this pattern of non-disclosure could make it difficult for women who do not seek formal or professional assistance to cope with sexual assault and rely exclusively on family and friends.

A victim's acknowledgement of the sexual assault may also be a micro level factor that influences coping. Specifically, how a victim defines the sexual assault experience can be critical in coping and recovering (Littleton et al., 2006; Littleton & Radecki Breitkopf, 2006). For example, many victims of acquaintance or date rape do not conceptualize or acknowledge the assault as "rape" and therefore do not report the crime to the police (Layman, Gidycz, & Lynn, 1996; McGregor, 2005; Warshaw, 1988, 1994). Koss (1985) examined this phenomenon to assess what factors differentiate acknowledged rape victims from unacknowledged rape victims. In this study, Koss defined an *unacknowledged rape* victim as "a woman who experienced sexual assault that would legally qualify as rape but who does not conceptualize herself as a rape victim" (p. 195). A majority of unacknowledged rape victims were acquainted with and had previous sexual contact with the assailant. Unacknowledged rape victims often do not label the sexual assault as "rape" but use much more benign labels (e.g., just a miscommunication) to describe the experience (Littleton et al., 2006). It is therefore understandable why a woman who defines her experience as rape would consider the event a more serious stressor than would a victim that did not (Littleton et al., 2006).

Similar to Koss (1985), Layman et al., (1996) concluded that acknowledged rape victims were more likely to classify their assaults as being more forceful in that these victims resisted more and made refusal of sexual advances clear to the perpetrator. Acknowledged rape victims were also more likely to press charges against the assailant and had higher levels of post-traumatic stress disorder and stress related to the rape. Moreover, Layman and colleagues concluded that a majority of rape victims maintained a relationship with their attacker and some continued to have sex with the perpetrator after the event. In fact, a large percentage of unacknowledged rape victims continued to have sex with the perpetrator, which supports the notion that not defining the sexual assault as rape may lead to future victimization (Layman et al., 1996). Research conducted by McMullin and White (2006) also concluded that women who experienced less physical injury as a result of the rape were less likely to acknowledge the experience as rape. They also found that women were more likely to label the event as rape when they reported not drinking prior to the experience. The idea of unacknowledged versus acknowledged rape victims could help to explain why some victius engage is seemingly counterintuitive behaviors and others do not. For example, for most individuals, it would not make sense to continue in a relationship with the perpetrator. For unacknowledged rape victims, this behavior seems reasonable because the victim does not conceptualize the sexual offense as such. Unfortunately, there is limited empirical data that compares coping strategies of unacknowledged and acknowledged rape victims (Littleton et al., 2006).

Internalization/Externalization: Psychological/Behavioral Reactions and the Effects on Coping

Internalizing all aspects of the sexual assault in context with multiple micro and macro level influences on the victim ultimately impacts a victim's coping following the assault. Psychological reactions to sexual victimization can be long-term, resulting in what many refer to as post-traumatic stress disorder. However, it is important to note that not all victims of sexual assault will reach the criteria to be clinically diagnosed as suffering from post-traumatic stress disorder and susceptibility may be contingent on the multiple factors already discussed (White Kress et al.,

2003). Internalization of the sexual assault, including how the victim interprets the experience, leads to different psychological symptoms (i.e., depression, anxiety, denial, or no reaction) which then manifests into different behaviors (i.e., promiscuity, excessive drinking, seeking professional assistance, working with other victims) for each survivor of sexual assault. Starzynski and colleagues (2005) contend that the combination of micro and macro level influences along with post-assault responses (psychological and behavioral) may each predict the kinds of support resources women seek in order to cope with the experience.

Coping Strategies after Sexual Victimization

Most individuals engage in coping strategies as a result of a stressful event. According to Holahan and Moos (1990), coping strategies seem to have greater significance for individuals in situations of high stress. Meyer and Taylor (1986) define coping behaviors as psychological and behavioral activities that a survivor may employ to "master, reduce, or recover from characteristic symptoms of emotional distress that may develop after rape" (p.1226). Moreover, Frazier and Burnett (1994) define coping as "constantly changing cognitive and behavioral efforts to manage specific external and/or internal demands that are appraised as taxing or exceeding the resources of the person" (Lazarus & Folkman, 1984, p. 141 as cited in Frazier & Burnett, 1994). Psychological and behavioral reactions that lead to a victim's coping strategy are not mutually exclusive but part of a fluid dynamic that interacts and changes depending on the demand of the situation. Different stressful situations require different coping strategies for successful resolution (Valentiner, et al., 1996). This is especially important to note as victim reactions are often scrutinized because of the variability in behaviors. For example, a victim might appear very attentive and cognizant at one point in time and then appear apprehensive or preoccupied at another, leading some observers to question the credibility of the victim. Additionally, Valentiner and colleagues (1996) examined responses to sexual victimization to determine what factors influence the process of coping. These authors contend that, "coping behaviors affect mental health outcomes [and] distress often increases coping efforts" (p. 458, brackets added). However their research could not determine the direction of causality between coping and psychological

adjustment. Based on their study, the relationship between psychological adjustment and coping appears to be cyclical in nature. Specifically, psychological adjustment to the sexual assault impacts a victim's coping strategy and conversely the coping strategy has an impact on a victim's psychological functioning.

Burgess and Holmstrom (1979) were among the first to examine coping behaviors among rape victims. They argued that women who consciously use coping strategies recovered more quickly from sexual victimization than victims who did not actively engage in coping strategies. Burgess and Holmstrom arranged coping behaviors into discrete categories that include:

> *Explanation* (identifying a reason why the rape occurred), *minimization* (telling oneself that the rape was not really so terrifying), *suppression* (making a conscious effort to avoid thinking about the rape), *action* (keeping busy changing jobs, or moving), and *stress reduction* (using specific techniques such as meditation). Maladaptive coping patterns included decreased activity (not going out of the house), withdrawal from people, and substance abuse. (p. 1226, as cited in Meyer & Taylor, 1986)

Although there are multiple coping strategies (e.g., numbing, arousal, and intrusion) highlighted in the research literature, Littleton and Radecki Breitkopf (2006) conclude that there are two primary strategies individuals engage in when faced with a stressful experience: approach and avoidance coping. These researchers describe the two distinct coping strategies as follows:

> *Approach coping* is chosen when the individual appraises the stressor as one for which she has sufficient coping resources and involves active strategies that are either focused on the problem at hand or the emotional reaction to the stressor. In contrast, when an individual appraises a stressor as one for which she does not have sufficient coping resources, she is likely to employ *avoidance strategies*, such as denying that the stressor exists, avoiding thinking about the stressor, and fantasizing. Extensive reliance on avoidance strategies has several negative effects. (p. 106, italicize added)

The results of their study add to the growing discussion regarding victim coping strategies. For example, they found evidence to suggest that victims who blame themselves for the rape are more vulnerable to maladaptive avoidance coping. Self-blaming cognitions appear more difficult to resolve, thus leading victims to rely on suppression or other avoidance strategies. In addition, victims experiencing less severe forms of physical force during the assault used more avoidance coping than those victims that did not experience any force at all. These researchers concluded that even mild forms of physical violence overwhelmed victims' coping resources and led victims to engage in more avoidance strategies. Based on the literature in victim coping strategies, it would appear as if the type of coping strategy employed by a victim following an assault may influence recovery and overall mental health functioning (Frazier & Burnett, 1994).

Rape Myth Acceptance

The idea of rape myths and how this concept impacts victims of sexual victimization could have been discussed under "Macro Level Influences" on victim coping. However, due to the enormity of this concept and potential detrimental effects for victims, this topic warrants a separate chapter for discussion. It has been postulated that a societal belief in rape myths perpetuates sexual victimization against women (Bohner, Jarvis, Eyssel, & Siebler, 2005). Rape myths were first suggested by Burt (1980) as "prejudicial, stereotyped, or false beliefs about rape, rape victims, and rapists" (p. 217). Some rape myths Burt identified included "only bad girls get raped," "women ask for it," and "rapists are sex-starved, insane, or both" (p. 217). In addition, Burt conceptualized rape myth acceptance as the amount of stereotypic ideas individuals possess regarding rape such as women often falsely accuse men of rape, rape is not harmful, women want or enjoy rape, or women cause or deserve rape by inappropriate or risky behavior (Burt, 1980 as cited in Frese et al., 2004). The common myth that only "certain women" are raped is unfounded and suggests that a particular kind of woman is "safe" and excluded from sexual victimization (Boeschen, Sales, & Koss, 1998). Koss (1985) also explored rape myths and examined situational factors that appear to differentiate women who experience various levels of victimization. These factors include, "the relationship of the victim and offender," "…violence of the assault," "the resistance of the victim," "emotional response of the victim," and "sexual history of the victim" (p. 201). Specifically, Ben-David and Schneider (2005) highlight several of the more common rape myths that are summarized in the following table.

Rape Myth	Reality
Rape is primarily sexually motivated	Rape combines elements of power, anger, and sexuality
Rapists are primarily strangers	Most perpetrators are known to the victim
The victim did something to cause the rape	No behavior warrants a victim being raped; under no circumstance should a victim be blamed for her victimization
Victims experience less psychological trauma when raped by an acquaintance	There are no differences in victim psychological symptoms between acquaintance and stranger rape

According to Lonsway and Fitzgerald (1994), although Burt's definition of rape myths is descriptive, it lacks sufficient clarity for research purposes. A clear more comprehensive definition needed to be developed and used consistently in order to create a measurement tool to assess the validity of this concept. As a result, Lonsway and Fitzgerald defined rape myths as "attitudes and beliefs that are generally false but are widely and persistently held, and that serve to deny and justify male sexual aggression against women" (p. 134). Although rape myths have no factual basis in reality, many individuals in society still apply these antiquated fictitious ideas to victims of sexual victimization (Ben-David & Schneider, 2005; Lonsway & Fitzgerald, 1994; Sinclair & Bourne, 1998; Peterson & Muehlenhard, 2004; Withey, 2007).

Women alleging rape are typically looked upon with some degree of skepticism based on rape myths (Boeschen et al., 1998). In general, those "individuals subscribing to rape myth tend to believe that aggressors are not responsible for their actions and/or the victims are to blame for their predicament" (Sawyer, Thompson, & Chicorelli, 2002, p. 20). A preponderance of research suggests that men are more accepting of rape myths than are women (Lonsway & Fitzgerald, 1994). In fact, examining rape myth acceptance among intercollegiate student athletes, Sawyer and colleagues (2002) found that male athletes were significantly more likely than females to demonstrate a greater acceptance of rape myths. In their research, respondents, especially male athletes, reported that 50 percent of rapes were invented by women or that women often lied about being sexually victimized.

There is research to suggest that some women can also be susceptible to rape myth acceptance. Peterson and Muehlenhard (2004) conducted a study to investigate the role of rape myth acceptance in unacknowledged rapes. Participants in the study were mostly women who had reported on a questionnaire an experience that met the legal definition of rape. Interestingly, respondents "who believed that women who are sexually teasing deserve to be raped and who view their own behavior as sexually teasing were less likely than other participants to label their experiences as rape." In addition, "participants who believed that it is not really rape if a women does not fight back and who did not fight back [during their

own experiences] were less likely than other participants to label their experiences as rape" (p. 140, brackets added). From the qualitative data collected, participants were reluctant to label their experiences as rape because "'he thought I wanted to [have sex] by the way I was acting.'" Another participant wrote, "'I didn't fight with him'" (p. 140). Peterson and Muehlenhard also found that the type of sex women experienced related to rape acknowledgement. For example,

> several participants explicitly rejected the label [of] rape because there was no penile penetration…one participant that reported nonconsensual penetration with a finger wrote "Rape is too strong because it wasn't actually intercourse, but it definitely was penetration." Another wrote "I wouldn't say that I was raped because he only used his finger." It is interesting that some participants did not count penile penetration as sex because of the brevity…one participant wrote "he didn't force me to totally have sex. He inserted his penis into me once or twice but nothing else." …[Another] wrote "I don't think it was rape because [the penetration] was such a short period of time and he finally did stop." (p. 140 & 141, first and second brackets added)

Challenging rape myths is critical for both victims and society in general. Burkhart and Fromuth (1996) assert that unchallenged rape myths perpetuate feelings of guilt, shame and self-blaming tendencies for victims. Existing rape myths contribute to the meaning victims attach to their sexual victimization. Adamant refusal to accept these myths may help victims to assign their own meaning to the experience instead of society's stereotypical ideas regarding rape.

It is important for local and state prosecutors to have some knowledge regarding the concept of rape myth acceptance as these myths can be shared by jurors and other professionals in the prosecution process (Withey, 2007). In exploring juror judgment in rape cases, Olsen-Fulero and Fulero (1997) contend:

> … the juror in a rape trial is faced with the dilemma of determining the relative responsibility and veracity of the victim and the defendant. Because the facts of the case would rarely make such

> judgments obvious, jurors must draw inferential conclusions about personal characteristics, events, and intentions. (p. 402)

Jury members are obviously a sample of a larger population and thus likely to reflect some stereotypical beliefs and attitudes regarding rape (Andrais, 1992). LaFree (1989) found that stereotypical myths regarding rape were correlated with a verdict more reliably than any objective evidence presented. Unfortunately, when a rape does not meet the stereotypical scenario or definition (i.e., deranged stranger, sudden violent attack at night, wielding a weapon, and penile/vaginal penetration), these rapes are often looked upon with more skepticism (Andrias, 1992; LaFree, 1989). Rape myth acceptance within juries is pervasive and appears to contribute to persistently low conviction rates (Sinclair & Bourne, 1998). Vidmar and Schuller (1989) suggest that there may be a number of areas where expert testimony could help jurors decipher information regarding victims of sexual victimization. For example, the average juror may have inadequate knowledge that predisposes him or her to be skeptical of complainant testimony in a trial involving a consent defense. Additionally, jurors may need further education regarding social and psychological contexts in which acquaintance rape may occur.

Conclusion

Sexual victimization is a pervasive social problem with devastating effects for victims and society in general. Although there have been great strides in the movement toward assisting victims of sexual assault, victims still face multiple barriers when coming forward to report victimization. Not only must the victim endure the actual sexual offense, unlike other crimes, victims are often re-victimized and are forced to endure societal reactions that often place blame for the crime on the victim. Sadly, a victim's psychological functioning following the assault may be intensified by societal reactions to her disclosure of rape. No individual can predict how a victim will respond to sexual victimization as multiple internal and external factors influence the victim's response. Although many victims report distinctive psychological post-rape responses these specific post-rape reactions vary in frequency and duration from victim to victim. Internalization of the sexual assault including how the victim interprets the experience leads to different psychological symptoms such as depression, anxiety, denial, or no reaction which then manifests into different behaviors for each survivor of sexual assault. It is important to repeat that the term "counterintuitive" refers to a juror's perception of a victim's behavior, not the behavior itself. Labeling a victim's response as "counterintuitive" strengthens the myth that all victims should react in the same manner or that there is a "normal" or "intuitive" way to react to sexual victimization. A victim's reaction may appear counterintuitive to the average person but her reaction is based on that particular victim's experiences. Although some coping strategies are more adaptive than others, all responses are justified in the mind of that particular victim. Research suggests that societal belief in rape myths perpetuates female sexual victimization. As a result, it is imperative for state and local prosecutors to be aware of rape myths and how juries may be influenced by these myths. A systemic approach to improving knowledge and altering attitudes regarding sexual offenses is needed. Specifically, education needs to focus on a woman's right to consent regardless of her behavior and the overall eradication of stereotypical beliefs regarding sexual victimization, victims, and perpetrators.

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About the Author

Patricia L. Fanflik is Deputy Director of the Office of Research and Evaluation (OR&E) at the American Prosecutors Research Institute (APRI). She has more than 10 years of applied research experience in the social sciences. Her areas of specialization include the criminal justice system and mental health, social psychology and deviance. Ms. Fanflik's research has included large-scale surveys, experimental and quasi-experimental investigations, and qualitative case studies. She provides technical assistance to prosecutors and other professionals in the field interested in prosecution or crime-related issues. Research projects she is currently involved in include a national community prosecution initiative, aggression and lethal violence encountered by prosecutors, victim responses to sexual assault, prosecutor involvement in reentry programs for formally incarcerated persons, and vicarious trauma experienced by prosecutors. Moreover, Ms Fanflik's experience also includes specialized training as an individual and family therapist. She is currently a Ph.D. student in Family Studies at the University of Maryland. She has been invited as a guest lecturer to discuss the interface of law and psychology and the importance of research in the criminal justice system. She has co-authored a number of peer-reviewed articles in leading social science journals (e.g., *Deviant Behavior & Sociological Focus*), and she has presented her work at several regional and national conferences across the country.

National District Attorneys Association
American Prosecutors Research Institute
99 Canal Center Plaza, Suite 510
Alexandria, Virginia 22314
Phone: (703) 549-9222
Fax: (703) 836-3195
http://www.ndaa.org

NATIONAL DISTRICT ATTORNEYS
ASSOCIATION

UNITED STATES NAVY
WESTERN PACIFIC JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES	
	DEFENSE MOTION TO DISMISS AS UNCONSTITUTIONALLY VAGUE
JEFFREY D. SAGER **AOAN/E-3** **U. S. Navy**	**Date: 28 MAR 2014**

a) <u>Nature of Motion</u>.

Pursuant to Rules for Courts-Martial (R.C.M.) 1102(b)(2), 907(b)(2) and the 6th Amendment, the defense moves to dismiss the lone charge AOAN Sager was convicted of in this case as the charge as pled is unconstitutionally vague.

b) <u>Summary of Facts</u>.

a. AOAN Sager was charged with first committing manual stimulation of the victims penis while the victim was either "asleep, unconscious, or otherwise unaware" the sexual act was occurring.

b. He was also charged with a second offense of orally stimulating the penis of the alleged victim while he was "incapable of consenting due to impairment."

c. At trial, detailed defense counsel requested a specialized findings work sheet in order to assist the members in reaching their verdict.

d. The members were tasked with clearly defining the theory in which they found the accused guilty, and notated this selection by deletion of all charges in which AOAN Sager was not guilty.

e. From this findings worksheet, it is clear that the members acquitted AOAN Sager of oral stimulation based on incapacity due to impairment; acquitted him of manual stimulation of the alleged victims penis while was asleep; acquitted him of manual stimulation of the alleged victims penis while he was unconscious, and convicted him of manual stimulation of the alleged victims penis while he was "otherwise unaware" the act was occurring.

f. The members were tasked with determining whether AOAN Sager knew that the alleged victim was incapable, asleep, unconscious, or otherwise unaware, or reasonable should have known the same.

g. The members found that AOAN reasonably should have known that the alleged victim was "otherwise unaware" the sexual act was occurring.

3. Discussion.

A. Basis for consideration

Pursuant to R.C.M. 1102(b)(2), an Article 39(a) session may be called upon motion of either party or the military judge for the purpose of "inquiring into, and when appropriate, resolving any matter that arises after trial and that substantially affects the legal sufficiency of any findings of guilty or the sentence." Here, the member's findings cast substantial doubt upon the legal sufficiency of the proceedings, as they apparently lowered the burden of proof required to be established by the government to support a conviction, and found AOAN Sager guilty of unconstitutionally vague statute, as outlined in further sections of this motion. As such, the military judge may review this issue at the trial level, without reserving the issue for appellate review.

B. <u>Article 120(b)(2) is unconstitutionally vague.</u>

The Sixth Amendment to the Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation[.]" Fairness requires appropriate notice that the act would be criminal. The Due Process Clause of the Fifth Amendment also demands that a statute not be so vague or overbroad that one cannot determine its meaning. See, e.g., *Osborne v. Ohio*, 495 U.S. 103, 109 L. Ed. 2d 98, 110 S. Ct. 1691 (1990); *Lanzetta v. New Jersey*, 306 U.S. 451, 83 L. Ed. 888, 59 S. Ct. 618 (1939); *Parker v. Levy*, 417 U.S. 733, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (1974); *United States v. Boyett*, 42 M.J. 150 (1995); *United States v. Brown*, 45 M.J. 389 (1996); *United States v. Specialist Five Sweeny, III*, 48 C.M.R. 476 (1974); *United States v. Dear*, 40 M.J. 196 (CMA 1994).

This case, as is often found in military justice, involves allegations of sexual assault in which alcohol consumption and intoxication are principal factors. The latest iteration of Article 120 of the Uniform Code of Military Justice seeks to proscribe certain forms of sexual conduct, including situations where one participant has consumed alcohol or other intoxicants to the level that they are, statutorily, incapable of consenting to the sexual activity. The statute describes this state as “incapable of consenting due to impairment”, but provides no amplifying information or definition as to what this means. Congress further has further determined that an individual is guilty of sexual assault if that person “commits a sexual act upon another person when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware.” For the reasons that follow, this language is unconstitutionally vague, and the Additional charge should be dismissed with prejudice.

i. Statutory Background.

Since the 1950s Congress has defined military sexual crimes in Article 120 of the Uniform Code of Military Justice (UCMJ). 10 U.S.C.S. § 920 et.seq. In 1992, Congress began to implement amendments to Article 120 that ultimately revamped and expanded the scope of Article 120. The most notable changes to Article 120 came in the 2007 and 2011 Congressional amendments respectively. Specifically, Congress made key modifications to the definition of sexual assault in their 2007 and 2011 amendments to Article 120.

As stated above, in many military sexual assault cases the accusing witness alleges that he or she is impaired by the ingestion of alcohol or drugs. The degree of impairment is a frequent area of dispute during trial. In 2007, Congress completely overhauled the scope of Article 120 making a “sexual act” illegal if the victim was "substantially incapacitated" or "substantially incapable" of appraising the nature of the sexual act, declining participation in the sexual act, or communicating unwillingness to engage in the sexual act. Subsequent case law demonstrated that "substantially incapacitated" was difficult to define with any clarity. United States v. Moore, 58 M.J. 466, 469 (C.A.A.F. 2003).

In 2011, Congress drafted amendments to the 2007 Article 120, which took effect on 28 June 2012. In the 2012 Article 120, Congress attempted to shift the focus to what the accused "knew or reasonably should have known." The 2012 Article 120 also omits the term “substantially incapacitated”, and asks whether the complaining witness was “incapable of consent due to impairment.”

Further, Congress has added an additional “theory” of prosecution to the Code, by stating that a person who is “asleep, unconscious, or otherwise unaware” may not consent to sexual activity. As in the case of “impairment”, Congress has not defined the term “otherwise unaware”,

and has simply stated as a point of clarification that a “sleeping, unconscious, or incompetent person cannot consent to sexual activity.”

Unfortunately, the 2012 Article 120 repeats the failure of Congress to clearly define the parameters of sexual assault because it fails to provide the definition of impairment or “otherwise unaware”. Congress essentially omitted one vague term - "substantially incapacitated" - and replaced it with another. The result is that the statute is too vague to provide the accused with notice of the definitions of the law’s key elements. Specifically, the law fails to define the requisite level of knowledge necessary for the accused to determine that the complaining witness is incapable of consenting to a sexual act due to being “otherwise unaware” that the sexual act is occurring. Effectively, the 2012 Article 120 repeats the same problem of the 2007 Article 120 – focusing on the mental state of the complaining witness, and not providing notice to the accused.

ii. Article 120 is so vague that AOAN Sager could not possibly have been expected to conform his conduct to the law.

Pursuant to Article 120(b)(2) Any person subject to this chapter who-

(3) commits a sexual act upon another person when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring, is guilty of Sexual Assault.

Based upon the foregoing language, the Government must have proven in this case, beyond a reasonable doubt, that:

1. AOAN Sager committed a sexual act upon the alleged victim;
2. AOAN Sager knew, or reasonably should have known, the alleged victim was
    a. Asleep
    b. Unconscious

c. Otherwise unaware.

The first prong is clear, as the statute provides a clear definition of what constitutes a sexual act . Article 120(g)(1). The statute also defines consent, and provides some specific instances in which a person cannot consent, such as " a sleeping, unconscious, or incompetent person" or a person "under threat or fear." Article 120(g)(8). The section defining consent conspicuously omits "otherwise unaware" in the delineation of specific conditions in which, as a matter of law, a person cannot consent. The question then, is when does a person reach a level of "otherwise unaware" such that they are no longer capable of consent, and any person who commits a sexual act upon them would be criminally liable under Article 120(b)(2). Unfortunately, there is no definition provided in the text of the statute as to what "otherwise unaware" specifically means. Furthermore, the Analysis of Punitive Articles in the Manual for Courts-Martial, a review of Legislative History, and the Military Judge's Benchbook are all silent, and of no utility in helping explain what these critical terms actually mean. These key terms are the very crux of the proscribed conduct, and are impermissibly and unconstitutionally vague such that AOAN Sager could not have read the law's key elements and understood what "otherwise unaware" means. This vagueness left AOAN Sager with insufficient notice that his conduct may or may not have been proscribed. See United States v. Moore, 58 M.J. 466, 469 (C.A.A.F. 2003).

iii. Article 120(b)(3) is so vague as applied to AOAN Sager, he is denied Due Process.

Courts have on a number of occasions examined the question of whether a statute is impermissibly vague. A law will be deemed facially void if it is so unclear that persons "of common intelligence must necessarily guess at its meaning and differ as to its application."

Connally v. General Construction Co., 269 U.S. 385, 391 (1926). A law failing to clearly define the conduct it proscribes "may trap the innocent by not providing fair warning," inevitably leading to impermissible delegation of "basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. Rockford*, 408 U.S. 104, 108-109 (1972). The D.C. Court of Appeals in *United States v. Capital Traction Co*., 34 App. D.C. 592 (1910), analyzed a statute prohibiting municipal street railway companies from running an insufficient number of cars to accommodate passengers "without crowding." Id. The opinion's language, cited approvingly by the U.S. Supreme Court in *Connally*, is pertinent to this case and helpful to reproduce at length:

What shall be the guide to the court or jury in ascertaining what constitutes a crowded car? What may be regarded as a crowded car by one jury may not be so considered by another. What shall constitute a sufficient number of cars in the opinion of one judge may be regarded as insufficient by another. . . . There is a total absence of any definition of what shall constitute a crowded car. This important element cannot be left to conjecture, or be supplied by either the court or the jury. It is of the very essence of the law itself, and without it the statute is too indefinite and uncertain to support an information or indictment…The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not

admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another. Id. at 596, 598 (Emphasis added).

Capital Traction and *Connally* provide basic background on the doctrine of void-for-vagueness. The modern seminal case on the question is *Parker v. Levy*. In *Parker*, the Court states, "void-for-vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." Id. at 757. This standard is expanded upon in a series of military cases. In *United States v. Saunders*, C.A.A.F. framed the issue of whether an individual was on sufficient notice as an objective inquiry. 59 M.J. 1, 29 (2003). Later, *United States v. Pope* lists examples of "fair notice" sources to include federal law, state law, military case law, military custom and usage, and military regulations. 63 M.J. 68 (C.A.A.F. 2006). Training, pamphlets, and other materials may also serve as sources of notice by giving context to regulations and articulating differences between permissible and impermissible behavior. See *United States v. Brown*, 55 M.J. 375, 384 (C.A.A.F. 2001).

Here, AOAN Sager had no notice that the alleged victim was otherwise unaware that the sexual conduct was occurring. Further, the members agreed that he did not a*ctually* know that the alleged victim was otherwise unaware, only that he *reasonably should have known*. The statute unrealistically expected him to gauge whether the complaining was otherwise unaware, and even if he didn't, whether he reasonably should have known he was otherwise unaware. Put in context with the facts of this case, the ambiguity of "otherwise unaware" is compounded by the fact that the members determined the alleged victim was neither incapable of consenting due to impairment, asleep, or unconscious. In effect, they lowered the burden by finding that the alleged victim was "otherwise unaware", which was never defined.

Article 120(2) is not "so clearly expressed" that AOAN Sager could "intelligently choose, in advance, what course it is lawful for him to pursue". *Capital Traction Co*., 34 App. D.C. at 598. As a result, AOAN Sager could not have reasonably known whether the complaining witnesses had become "otherwise unaware" such that he was incapable of providing consent, and Article 120(b)(2) must be struck down as unconstitutionally vague.

4. <u>Relief Requested</u>.

The defense respectfully requests that this court appoint Mr. Kenneth Lord as a defense investigator in this case. His professional consulting fee is $50.00 per hour. He has estimated he will need 10 hours of funding for a total of $500.00.

5. <u>Evidence Presented</u>.

The Defense supplies the following enclosures as exhibits in this case:

1. Results of Trial

c) <u>Oral Argument</u>.

The defense requests oral argument on this motion if opposed.

CHRIS DEERWESTER
LCDR, JAGC, U.S. Navy
Detailed Defense Counsel

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Certificate of Service

I hereby attest that a copy of the foregoing motion was served on the court and opposing counsel by email on 28 March 14

CHRIS DEERWESTER
LCDR, JAGC, U.S. Navy
Detailed Defense Counsel

UNITED STATES NAVY
WESTERN PACIFIC JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES v. JEFFREY D. SAGER AOAN/E-3 USN	GOVERNMENT SUPPLEMENTAL RESPONSE TO DEFENSE MOTION TO DISMISS AS UNCONSTITUTIONALLY VAGUE Date: 6 May 2014

1. Nature of Motion.

Without waiving its objection under R.C.M. 1102(b)(2) to the Court's consideration of the Defense's improper post-trial motion, the Government respectfully submits this supplemental response addressing the substance of the Defense's claim that the specification of which AOAN Sager was convicted was unconstitutionally vague.

2. Summary of Facts.

a. The Government adopts the facts previously stated in its initial motion response of 4 April 2014.

3. Discussion.

Article 120(d) of the Uniform Code of Military Justice, in conjunction with Article 120(b), prohibits the commission of a sexual contact on a person when the Accused knew or reasonably should have known that the other person was asleep, unconscious, or otherwise unaware that the sexual contact was occurring. This statute provides comprehensible guidelines on the proscribed conduct and is not unconstitutionally vague.

A. The prohibition on committing a sexual contact on a person "otherwise unaware" that it is occurring is not unconstitutionally vague.

The United States Supreme Court has established two theories under which a criminal statute may be invalidated due to vagueness: First, a statute may be so vague and broad that it vests so much discretion in police and prosecutors that it encourages arbitrary and discriminatory enforcement. Second, a statute may be so vague as to fail to place the Accused on notice that his conduct is prohibited. See Parker v. Levy, 417 U.S. 733, 752 (1974). Neither of these rationales applies to the statute under which the Accused was convicted, so the Defense motion to dismiss must be denied.

i) Article 120 does not vest unconstitutional enforcement discretion in law enforcement agents or prosecutors.

In Kolender v. Lawson, 461 U.S. 352 (1983), the Supreme Court stated that the most important aspect of vagueness doctrine is its role in governing law enforcement and preventing arbitrary and discriminatory enforcement of vague laws. Id. at 357-58. In Kolender, the Court invalidated a California statute requiring any individual stopped by the police to produce a reliable and credible identification. Similarly, in City of Chicago v. Morales, 527 U.S. 41 (1999), the Court struck down a Chicago ordinance authorizing police to arrest a group of two or more people in a public place "with no apparent purpose" if they failed to disperse when ordered to do so. Id. at 47. In both cases, the statutes in question gave the police broad authority to arrest individuals whom they encountered on the streets with virtually no limits on their discretion.

Article 120 vests no such unfettered discretion in military law enforcement. Unlike police enforcing a requirement to carry identification or an anti-loitering ordinance, law

enforcement agents investigating an allegation of sexual assault do so only in response to a report of the commission of a crime. Whether this report comes from a victim of such a crime or a witness, law enforcement agents are limited in their ability to enforce Article 120 by the information provided to them. Thus, unlike the laws at issue in Kolender and Morales, Article 120 cannot be held to be so vague as to vest unconstitutional enforcement discretion in law enforcement agents.

ii) AOAN Sager was on notice that his conduct was prohibited.

Potentially more applicable to this case is the second aspect of vagueness doctrine: that the statute which AOAN Sager was convicted of violating was so vague that he was not placed on notice that his conduct was illegal. However, this avenue of attack must fail as well. The plain language of Article 120 is sufficiently clear to place any reasonably person on notice of what conduct is proscribed by the prohibition on committing a sexual contact on a person "otherwise unaware" that it was occurring.

Courts assess vagueness in relation to the charged conduct and determine whether the statute sufficiently warned the specific Accused that his conduct was prohibited. Parker, 417 U.S. at 757; United States v. Nat'l Dairy Prods. Corp., 372 U.S. 29, 33 (1963); United States v. Pope, 63 M.J. 68, 79 (C.A.A.F. 2006) (Erdmann, J., dissenting). Unless the statute implicates expressive activity protected by the First Amendment, facial challenges are not entertained. Nat'l Dairy Prods. Corp., 372 U.S. at 36.

In conducting this assessment, courts apply varying levels of deference to Congress depending on the subject matter and applicability of the statute in question. Judicial deference is at its zenith when considering vagueness in statutes that affect First Amendment activity. See Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989). In contrast, courts grant much greater

leeway to congressional imprecision in regulatory statutes governing business activities. Papachristou v. Jacksonville, 405 U.S. 156, 162 (1972). Likewise, the Supreme Court has stated that judicial deference is at its apogee when reviewing congressional action to govern the armed forces. Rostker v. Goldberg, 453 U.S. 57, 70 (1981). "For the reasons which differentiate military society from civilian society, we think Congress is permitted to legislate both with greater breadth and greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter." Parker, 417 U.S. at 756. Thus, the Court mandates that courts apply the less stringent vagueness standard applicable to economic regulations when assessing whether a statute governing the armed forces is so vague as to fail to place an Accused on notice. Id. Applying this deferential standard, the "otherwise unaware that the sexual [contact] is occurring" clause of Article 120 is not so vague that AOAN Sager had no notice of the illegality of his conduct.

The Defense premises much of its argument on the lack of a statutory definition of "otherwise unaware." However, in the absence of a statutory definition or ambiguity, it is well-settled that the plain language of the statutory text adopted by Congress must prevail. United States v. Kearns, 73 M.J. 177, 181 (2014). Here, each of the words in the operative clause is a common word the meaning of which an ordinary individual would understand. Congress is under no mandate to explicitly define every word used in criminal statutes. In fact, the Supreme Court has repeatedly upheld statutes against vagueness challenges when the words used in the statutes were commonly understood. See, e.g., Hill v. Colorado, 530 U.S. 703, 732 (2000) (holding that a statute using the terms "oral protest," "education," and "counseling" was not unconstitutionally vague because "[t]he likelihood that anyone would not understand any of those common words seems quite remote"); Boos v. Barry, 485 U.S. 312, 332 (1988) ("The

statute communicates its reach in words of common understanding, and it accordingly withstands petitioners' vagueness challenge."); Cameron v. Johnson, 390 U.S. 611, 616 (1968) (upholding a statute using the terms "obstruct" and "reasonably interfere" because it "delineates its reach in words of common understanding").

Moreover, despite the Defense's focus on the two words "otherwise unaware," they are actually part of a longer clause that clarifies their meaning: Article 120 criminalizes the commission of a sexual contact on a person who is "asleep, unconscious, or otherwise unaware that the sexual [contact] is occurring." In this context, any possible confusion about what the phrase means is removed: Article 120 prohibits the commission of a sexual contact on a person who does not know it is happening. Cf. Boos, 485 U.S. at 332 (upholding prohibition on congregating near embassies when the police reasonably believe the congregation poses a threat to the "peace" of the embassy because the context of the statute made the meaning of "peace" understood). Congress chose to enumerate two circumstances in which the victim would not know the contact was occurring – that the victim was asleep or unconscious – and to include a broader provision to encompass other situations in which the victim is unaware that the contact is occurring. These situations could include a victim who is in a coma, in a stupor, in shock, falling asleep, waking up, having a seizure, hallucinating, dazed from a head injury, etc. Any attempt by Congress to create an exhaustive list of such circumstances would inevitably fail.

In an analogous situation, the Court of Appeals for the Armed Forces considered a vagueness challenge to a conviction under Article 92 for violating an Air Force Instruction that prohibited "inappropriate conduct and unprofessional relationships" between recruiters and recruits. United States v. Pope, 63 M.J. 68, 71 (2006). This prohibition was followed by an illustrative, but not exhaustive, list of examples of prohibited conduct. Id. The Appellant was

convicted of violating the instruction in an unenumerated way. Id. In rejecting the vagueness claim, CAAF stated: "Given the evolving and innumerable ways in which sexually offensive conduct may occur in the recruiting context, the Air Force was not required, as a matter of law, to expressly set forth all conceivable instances of impermissible conduct." Id. at 74. The Appellant's claim that he had not been on notice of the illegality of his conduct was especially weak in light of training courses he had attended elaborating on the types of impermissible conduct toward recruits. Id. at 73. Based on the text of the regulation and the circumstances of the Appeallant's training, CAAF found that he had been on notice and rejected the vagueness challenge.

Here, as in Pope, the criminal prohibition at issue provides an illustrative list of two examples of situations in which a victim would be unaware that a sexual contact was occurring and includes a general provision to encompass other similar circumstances. Also like Pope, the sexual misconduct committed by AOAN Sager has been the topic of repeated training programs directed at all personnel in the Navy. In light of the commonly understandable meaning of the "otherwise unaware" clause and the context in which Navy training placed it, AOAN Sager's claim that he did not know his conduct was illegal must fail.

The Defense attempts to obfuscate the plain meaning of the "otherwise unaware" clause by comparing it to past iterations of Article 120's use of the term "substantially incapacitated" and to the current version's use of the term "impaired" in another section. But the Defense motion itself acknowledges that in the 2012 amendments to Article 120, Congress added a new theory of sexual assault based on the victim's lack of awareness of the sexual act or sexual contact rather than on the victim's inability to consent. Even if the terms "impaired" and "incapacitated" were vague, they are completely irrelevant to the present issue since AOAN

Sager was convicted of committing a sexual contact while the victim was "otherwise unaware" that the contact was occurring. The Defense may disagree with Congress's decision to define sexual crimes in this way, but the "otherwise unaware" clause was duly passed into law and was in effect at the time AOAN Sager committed the offense of which he was convicted. The statutory language uses common words that an ordinary person would understand. Thus, the statute was not unconstitutionally vague and AOAN Sager was on notice that his course of conduct was criminal.

B. The members did not lower the burden of proof.

The Defense claims, but does not support, that the members impermissibly lowered the burden of proof by convicting AOAN Sager of committing a sexual contact on AOAN T.K. while AOAN Sager reasonably should have known that AOAN T.K. was "otherwise unaware" of the sexual contact. There is no basis for this claim.

The Military Judge provided clear and thorough instructions on the meaning of the "Beyond a Reasonable Doubt" standard of proof. After hearing these instructions and deliberating, the members found AOAN Sager not guilty of one specification and guilty of the other. For the specification of which they convicted AOAN Sager, using a findings worksheet that the Defense assisted in drafting, the members explicitly circled that they had found that he reasonably should have known that AOAN T.K. was otherwise unaware of the sexual activity. Absent any evidence that the members lowered the burden of proof, the court must presume that the members followed the Military Judge's instructions. United States v. Jenkins, 54 M.J. 12, 20 (C.A.A.F. 2000). The elements that the members found described AOAN Sager's conduct constitute the offense of Abusive Sexual Contact under Article 120 of the UCMJ as duly enacted by Congress. If the Defense disagrees with this formulation of the crime of Abusive Sexual

Contact, its proper recourse is through the political process, not an unsupported claim that the members acted improperly.

4. Relief Requested.

The Government respectfully requests that the Court deny the Defense's motion to dismiss.

5. Oral Argument.

The Government requests oral argument at 0600 on 13 May 2014 (JST).

6. Evidence.

None

L. B. Fassett
LT, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I certify a copy of this Response was served on the Court and detailed Defense Counsel on 6 May 2014.

L. B. Fassett
LT, JAGC, USN
Trial Counsel

This matter comes before the Court upon the accused's motion to dismiss the charge upon which he was convicted well after findings and sentence had been returned by the members. The accused was convicted of one specification of a violation of Article 120 of the Uniform Code of Military Justice which specifically alleged that the accused manually stimulated the male victim's penis while said victim was "otherwise unaware" that the act was taking place.

It is uncontroverted that the defense chose not to challenge the validity of Article 120 as yet again amended by recent Congressional action during the pretrial stages of this litigation. Indeed, amidst concerted motion practice the issue at bar was never raised. After trial, the accused posed the question before the Court which, in essence constitutes a facial challenge to the Constitutional standing of the much amended Article 120. Whilst this jurist has been second to none in his criticism of Congress's decision to subject this particular statute to repeated change, the Constitutional implications of which would obviously raise grave concerns, including burden shifting issues, none of those former maladies caused by past statutory alterations lay before the Court. In sharp contrast to the broader Constitutional maladies properly addressed by military appellate courts, the issue before this Court could not be more simple. In essence, the defense is asking this Court to set aside a conviction for sexual assault based upon a Constitutionally based plenary attack asserting that this particular section of the much revised statute is fatally vague. For the reasons set forth below, the defense motion to dismiss is respectfully denied and the convictionshall stand.

Pursuant to R.C.M. 1102(b)(2) a post-trial Article 39(a) session was convened and oral argument was received by the Court. The sole contention advanced by the defense is that Article 120 (b)(2) upon which the accused stands convicted of a single specification is unconstitutionally vague. Specifically, the defense asserts that the conviction in this case implicates violations of the Sixth Amendment. More specifically the defense asserts that because the members did not specifically articulate if they had determined that the victim was unconscious due to ingestion of alcohol, but rather, that he was otherwise unaware, that confusion is showered upon their findings. We do not agree.

From a judicial perspective, review in this case is all rather simplistic. In order to prevail, the defense must establish that the language of the statute, and by implication the call of the specification, must be so vague as to render the accused disarmed of adequate notice of the substance of the allegation. *United States v. Moore*, 58 M.J. 466,

469 (C.A.A.F. 2003).

The facts of this case were exhaustively litigated. It became clear that the victim had ingested alcohol to the point of intoxication at some level and that he was in need of sleep. The facts did not leave the members with absolute proof of either intoxication or of incapacitation due to sleep but minus that exactitude, left the members and the Court with one unassailable fact - the victim did not consent because he was either asleep or intoxicated to the point where he could not tender consent. Clearly, the theory advanced by the Government at trial embodied the pretrial notice they tendered to the accused in the wording of the specification – that the victim could not manifest assent to the accused's advancements. Likewise, the defense's skillful advocacy and case preparation and presentation illustrated that the intent of the Government's authorship within the specification was clearly discerned by the defense team. It is true that the Government places great emphasis upon the traditional deference given by Courts to the Executive branch in managing and commanding the Armed Forces. *Rostker v. Goldberg,* 453 U.S. 57, 70 (1981). The Government should be most careful in presuming any conventional analysis of Article 120 as amended ever so many times by the people's elected representatives. In normal circumstances the Government's position could be adopted without hesitation but relative to Article 120 Congress has not exercised their authority with overwhelming clarity. A cursory visit to recent appellate precedent involving the most recent iteration of this much amended provision but one, reveals a less than glorious history. *United States v. Prather*, 69 M.J. 338 (C.A.A.F. 2011). Having said that, this Court will not presume to disturb the findings of properly seated members in a case where the language deployed by Congress is not obviously opaque. The findings of the Members shall not be disturbed and the defense motion is respectfully DENIED. **IT IS SO ORDERED**.

Done this 25th day of August 2014.

JOHN A. MAKSYM
Military Judge

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 3

UNITED STATES, Appellee v. Christopher J. SCHALEGER, Electronics Technician Petty Officer Second Class (E-5) U.S. Navy Appellant	)))))))))))	ANSWER ON BEHALF OF APPELLEE Case No. 201300247 Tried at Region Legal Service Office NW Detachment, Naval Station Everett, Washington, on December 16, 2013, by a general court-martial convened by Commander, Navy Region Northwest, Everett, Washington.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Errors Assigned

I.

DID THE NAVY AND MARINE CORPS COURT OF CRIMINAL APPEALS UNLAWFULLY PUNISH ET2 SCHALEGER BY PUBLISHING HIS NAME AND THE FACTS OF HIS CASE AS THE RESULT OF AN INTERLOCUTORY APPEAL IN SUCH A MANNER THAT WAS WIDELY SEARCHABLE AND THAT PRESUMED HIS GUILT?[1]

Statement of Statutory Jurisdiction

Appellant's approved sentence included both a bad conduct discharge and more than one year of confinement. Accordingly, this Court has jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012).

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[1] Submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Statement of the Case

A military judge sitting as a general court-martial, convicted Appellant, pursuant to his plea, of one specification of sexual assault, in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2012). The Military Judge sentenced Appellant to confinement for three years, reduction to pay grade E-1, and a bad conduct discharge. The Convening Authority approved the sentence as adjudged. In accordance with a Pretrial Agreement, the Convening Authority suspended all confinement in excess of thirteen months for the period of confinement plus six months thereafter. The Convening Authority ordered the sentence, except for the bad conduct discharge, executed.

Statement of Facts

A. Appellant's underlying misconduct.

Appellant had dinner and alcoholic beverages with a woman married to a fellow active duty Navy member. (R. 72, 77.) After consuming several drinks she elected to stay the night at Appellant's residence and fell asleep in Appellant's bed. (R. 75.) After she fell asleep in his bed, Appellant inserted his penis into her vagina. (R. 76.) Appellant knew she was asleep when he penetrated her without her consent. (R. 75-76, 79.)

B. Petition for a writ of mandamus.

The Military Judge entered a ruling that the maximum punishment for violation of Article 120 was the jurisdictional

maximum of a summary court-martial. The United States filed a petition seeking a writ of mandamus from this Court. (Petition for Extraordinary Relief in the Nature of a Writ of Mandamus, Jun. 21, 2013.) This Court granted the writ in a published opinion finding the authorized punishments included confinement for thirty years and a dishonorable discharge. *United States v. Schaleger*, 72 M.J. 787, 807 (N-M. Ct. Crim. App. 2013).

C. Guilty plea.

Pursuant to a Pretrial Agreement, Appellant entered into a stipulation of fact and entered an unconditional guilty plea. (R. 57, 67; Pros. Ex. 1; Appellate Ex. XXVII.) Appellant repeatedly indicated he understood the rights he was giving up by entering a guilty plea. (R. 60, 62-63.)

Argument

I.

APPELLANT'S UNCONDITIONAL GUILTY PLEA WAIVED ANY SUBSEQUENT CHALLENGE TO LEGAL ISSUES STEMMING FROM PUBLICATION OF THIS COURT'S OPINION ONLINE.

A. Appellant entered an unconditional guilty plea.

Except for pleas that are made expressly conditional and accepted by the military judge as such, all guilty pleas are implicitly unconditional. *United States v. Lee*, 73 M.J. 166, 170 (C.A.A.F. 2014); R.C.M. 910(a)(2). Here Appellant entered an unconditional guilty plea. (R. 57; Appellate Ex. XXVIII.)

Nothing in the Record supports that Appellant's plea was offered conditionally with the consent of the Trial Counsel, or was accepted as a conditional guilty plea by the Military Judge. *See* R.C.M. 910(a)(2) (explaining procedural requirements for a plea to qualify as conditional).

Appellant entered an unconditional guilty plea. *See Lee*, 73 M.J. at 170.

B. Any challenge to publication of the opinion granting the writ of mandamus, or to pretrial punishment, was waived by entry of an unconditional guilty plea.

"An unconditional plea of guilty waives all nonjurisdictional defects at earlier stages of the proceedings." *Lee*, 73 M.J. at 170 (quoting *United States v. Bradley*, 68 M.J. 279, 281 (C.A.A.F. 2010)); *see also* R.C.M. 905(e). An unconditional guilty plea waives even complaints of "deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Lee*, 73 M.J. at 170 (quoting *Blackledge v. Perry*, 417 U.S. 21, 30 (1974)); *see also Tollett v. Henderson*, 411 U.S. 258, 267 (1973).

Now on appeal Appellant alleges he was subjected to unlawful pretrial punishment and denied the presumption of innocence by publication of this Court's opinion on the United States' petition for a writ of mandamus. (Appellant's Br. at 4, Aug. 18, 2014.) Even assuming *arguendo* what Appellant alleges somehow amounted to a violation of a constitutional right, it

occurred prior to his entry of an unconditional guilty plea. (R. 57.) The entry of which waives even all constitutional violations that preceded it. *Lee*, 73 M.J. at 170. As in *Lee*, where the appellant alleged a violation of his constitutional right to due process, here any purported violation of a constitutional right occurred prior to the plea, and was therefore waived by entry of that unconditional guilty plea. *Lee*, 73 M.J. at 170.

Conclusion

WHEREFORE, the United States respectfully requests that this Court affirm the findings and sentence as adjudged and approved below.

IAN D. MACLEAN
LT, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7433, fax (202) 685-7687

Certificate of Filing and Service

I certify the foregoing was delivered to the Court and served upon opposing counsel on September 29, 2014.

IAN D. MACLEAN
LT, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard DC 20374
(202) 685-7433, fax (202) 685-7687

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 3

UNITED STATES, Appellee v. Christopher SCHALEGER Electronics Technician Second Class (E-5) U.S. Navy, Appellant	**BRIEF AND ASSIGNMENTS OF ERROR** Case No. 201300247 General Court-Martial convened by Commander Navy Region Northwest tried at Region Legal Service Office Det Naval Station Everett, Washington and Det Naval Base Kitsap Bremerton, Washington on 22 May, 10 October, and 16 December 2013.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Issue Presented

DID THE NAVY AND MARINE CORPS COURT OF CRIMINAL APPEALS UNLAWFULLY PUNISH ET2 SCHALEGER BY PUBLISHING HIS NAME AND THE FACTS OF HIS CASE AS THE RESULT OF AN INTERLOCUTORY APPEAL IN SUCH A MANNER THAT WAS WIDELY SEARCHABLE AND THAT PRESUMED HIS GUILT?[1]

Statement of Statutory Jurisdiction

Appellant's approved general court-martial sentence includes a bad-conduct discharge. (General Court-Martial Order No. (hereinafter GCMO) 04-14, Mar. 20, 2014.) Accordingly, this

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[1] This assignment of error is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Court has jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ). 10 U.S.C. § 866 (2006).

Statement of the Case

A military judge sitting as a general court-martial convicted Electronics Technician Second Class (ET2) Christopher J. Schaleger, U.S. Navy, consistent with his pleas, of one specification of sexual assault, in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2012). (R. at 102.) The military judge sentenced ET2 Schaleger to reduction to paygrade E-1, three years of confinement, and a bad-conduct discharge. (R. at 162.) Due to the limitations required by the pretrial agreement, the Convening Authority (CA) approved the sentence as adjudged, and except for the punitive discharge and any confinement in excess of thirteen months, ordered the sentence executed. (GCMO No. 04-14, 2.)

Statement of Facts

Prior to trial, the Government filed a motion to determine the maximum sentence available for violations of Article 120, UCMJ, which the National Defense Authorization Act for Fiscal Year 2012 had recently updated. (Appellate Ex. II.) The military judge ruled the maximum punishment available are those punishments available at a summary court-martial because the Commander-in-Chief had yet to assign a different maximum

punishment and the language of the statute provided for punishment "as court-martial may direct," which statement is ambiguous. (Appellate Ex. V.) The Government appealed this decision to this Court under a writ of mandamus and ET2 Schaleger responded as the real-party-in-interest. *United States v. Booker*, 72 M.J. 787, 790 (N-M. Ct. Crim. App. Sept. 20, 2013). This Court found in favor of the Government in a published opinion. *Id*. at 808. That opinion used ET2 Schaleger's name and has been posted on this Court's website since 20 September 2013. *United States v. Booker*, no. 201300247, Navy-Marine Corps Court of Criminal Appeals Opinion Archive, Sept. 20, 2013 *available at* http://www.jag.navy.mil/courts/documents/archive/2013/SCHALEGER201300247.OP.pdf (last accessed Aug. 5, 2014).

Three months after the publication, on 16 December 2013, ET2 Schaleger pleaded guilty to sexual assault in front of a military judge. (R. at 57.)

Summary of Argument

The NMCCA unlawfully punished ET2 Schaleger prior to his trial by publishing its opinion on an interlocutory matter using his name and rank. This opinion is available to the general public and searchable with common search engines like Google and

was thus available prior to his trial. This Court denied ET2 Schaleger the presumption of innocence due to this publicity. Further, this publication was unlawful pretrial punishment.

Argument

THIS COURT UNLAWFULLY PUNISHED ET2 SCHALEGER BEFORE TRIAL BY PUBLISHING HIS NAME AND THE FACTS OF HIS CASE IN AN INTERLOCUTORY MATTER IN SUCH A MANNER THAT WAS WIDELY SEARCHABLE AND SUCH THAT HE LOST THE PRESUMPTION OF INNOCENCE.[2]

Standard of Review

Unlawful pretrial punishment is a mixed question of law and fact this Court reviews *de novo*. *Thompson v. Keohane*, 516 U.S. 99, 113 (1995); *United States v. McCarthy*, 47 M.J. 162, 164-65 (C.A.A.F. 1997). Whether some purpose or intent to punish existed is a question of fact reviewed for an abuse of discretion. *McCarthy*, 47 M.J. at 165. The ultimate question of whether the appellant is entitled to sentence credit for an Article 13, UCMJ violation is reviewed *de novo*. *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002).

Principles of Law

In *United States v. Allen*, the CMA established a "day-for-day" credit for pretrial confinement. 17 M.J. 126 (C.M.A.

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[2] This assignment of error is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

1984). In *United States v. Suzuki*, the CMA further addressed confinement credit, affirming administrative credit or other meaningful relief for illegal pretrial punishment. 14 M.J. 491 (C.M.A. 1983), *aff'd in part, rev'd in part on other grds,* 20 M.J. 248 (C.M.A. 1985). An appellant may raise an issue of pretrial punishment for the first time on appeal. *See United States v. Mason*, 19 M.J. 274, 274 (C.M.A. 1985); *Allen*, 17 M.J. 129; *United States v. Smith*, 20 M.J. 528, 532 (A.C.M.R. 1985).

Discussion

The second result in a search for "Chris Schaleger" in the popular search engine, Google yields a link directly to the NMCCA's decision in the Government's petition for extraordinary writ of mandamus. Appendix 1. The third includes an analysis of the opinion on CAAFLOG.com and further down on the first page is the CAAF's daily journal announcement of the case. *Id*. The only result above the holding of the extraordinary writ is an article in the Navy Times announcing the findings of the court martial from three months later. *Id*.

All of the filings related to the extraordinary writ were available prior to ET2 Schaleger's court martial. This type of publication breaches his expectation of privacy, damages his reputation, and impeded his presumption of innocence.

Conclusion

This Court should dismiss the charges against ET2 Schalager with prejudice or at least disapprove the punitive discharge awarded at trial.

JENNIFER L. MYERS
Lieutenant, JAGC, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE
Bldg. 58, Ste. 100
Washington, D.C. 20374
Phone (202) 685-7713
Fax (202) 685-7426
jennifer.l.myers@navy.mil

Appendix

1. Search of "Chris Schaleger", Google, *available at* https://www.google.com/search?q=chris+schaleger&hl=en&gbv=2&prmd=ivns&ei=gM_gU7vBAuHMsQTq4oCYDA&start=0&sa=N (last accessed Aug. 5, 2014.)

Certificate of Filing and Service

I certify that a copy of the foregoing was delivered to the Court and to Director, Appellate Government Division, and electronically filed on 18 August 2014.

JENNIFER L. MYERS
Lieutenant, JAGC, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
Bldg. 58, Ste. 100
Washington, D.C. 20374
Phone (202) 685-7713
Fax (202) 685-7426
jennifer.l.myers@navy.mil

DEPARTMENT OF THE NAVY
GENERAL COURT-MARTIAL
NAVY AND MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT

U N I T E D S T A T E S v. CHRISTOPHER J. SCHALEGER ET2 / E-5 UNITED STATES NAVY	DEFENSE RESPONSE TO GOVERNMENT MOTION CONCERNING MAXIMUM PUNISHMENT FOR SPECIFICATIONS CHARGED UNDER ARTICLE 120 23 May 2013

1. **Nature of Motion.** The United States filed a motion with the Court on 17 May 2013 and a supplemental motion on 24 May 2013, requesting a ruling regarding the maximum punishment for offenses at issue in this case. Specifically, the United States requested a ruling with respect to specifications charged under Article 120(b) of the Uniform Code of Military Justice (U.C.M.J.), which allege acts that occurred between 28 June 2012 and 15 May 2013. The United States argued that the maximum punishment for each specification at issue should be dishonorable discharge from the Naval service, forfeiture of all pay and allowances, and confinement for 30 years. The defense opposes the Government's motion and argues that a court-martial may not impose a greater sentence than that which is authorized at summary court-martial for either specification at issue. In the alternative, the defense

argues that the maximum punishment that a court-martial may impose is that which would be available for an offense charged under Article 128(a)—assault consummated by a battery.

2. **Summary of Facts.**

a. The National Defense Authorization Act for Fiscal Year 2006 included significant overhauls to Article 120, U.C.M.J. Included in the 2006 amendments were interim maximum punishments that could be imposed upon a person convicted under the 2006 version of Article 120. *See* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 109-163 § 552(b), 119 Stat. 3263 (2006). The interim punishments Congress wrote into the 2006 statute remained in effect until the President exercised his power under Article 56, U.C.M.J., to specify punishments for offenses that lack a statutory penalty.

b. The National Defense Authorization Act for Fiscal Year 2012 included changes to existing sexual offenses and their respective elements under Article 120, U.C.M.J. Unlike the 2006 amendments, however, the 2012 Act did not impose interim maximum punishments in the event that the President delayed in exercising his powers under Article 56[1]. With respect to punishment that may be imposed upon persons convicted under the offenses enumerated in Article 120, the

[1] Congress also refrained from directing cases charged under the 2012 version of Article 120 to a specific court-martial and also elected not to impose its own maximum punishment. *Contra* Article 106, U.C.M.J. (directing trial by general court-martial or military commission and a mandatory punishment of death).

statute merely explained that those persons "shall be punished as a court-martial may direct." These amendments—signed into law on 31 December 2011—took effect on 28 June 2012.

c. On 31 January 2013, the United States preferred charges against ET2 Schaleger, alleging two specifications under Article 120(b) for conduct that occurred on or about 7 December 2012. Those specifications were then investigated under Article 32, U.C.M.J., and subsequently referred to general court-martial on 14 May 2013.

d. On 15 May 2013, the President signed Executive Order 13643—Amendments to the Manual for Courts-Martial, United States. That Order imposed the following maximum punishment for each of the two specifications that the United States had already referred against ET2 Schaleger under Article 120: dishonorable discharge from the Naval service, forfeiture of all pay and allowances, and confinement for 30 years.

3. **Discussion.**

a. In this case, the maximum authorized punishment is the jurisdictional limit of a summary court-martial.

(1) Applying the recent executive order to offenses that occurred between 28 June 2012 and 14 May 2013 would violate the United States Constitution's expressed proscription of *ex post facto* laws under Article I, Section 9. Declining to avail itself of powers exercised when making prior amendments to Article 120 and

enacting other articles under the U.C.M.J., Congress's most recent iteration of Article 120 is an ambiguous statute with respect to maximum punishment. As such, this Court should invoke the rule of lenity and read the statute in the light most favorable to ET2 Schaleger. Such a reading leads one to the conclusion that the maximum punishment is that which can be imposed by a summary court-martial.

(2) Alternatively, the Court may invoke Rule for Courts-Martial 1003(c)(1)(B)(i) because—absent maximum punishment—the charged offense of sexual assault is not listed under Part IV of the current edition of the Manual for Courts-Martial. Assault consummated by a battery under Article 128 of the Uniform Code of Military Justice is listed under Part IV and is related to, and/or a lesser offense of, the charged sexual assault offense. Under R.C.M. 1003(c)(1)(B)(i), therefore, the maximum sentence authorized for the two specifications is that which may be imposed for commission of assault consummated by a battery: bad conduct discharge, forfeiture of all pay and allowances, and confinement for up to 6 months.

b. Because the language regarding maximum punishment under the 2012 version of Article 120 is ambiguous, the maximum punishment for each charged specification is that which could be imposed by a summary court-martial.

(1) The maximum punishment for offenses charged under Article 120 that allege conduct occurring between 28 June 2012 and 14 May 2013 is the jurisdictional limit of a summary court-martial. The rule of lenity provides that criminal statutes are to be strictly construed, with any ambiguity resolved in favor of an accused. *See, e.g., United States v. Thomas*, 65 M.J. 132, 135 n.2 (C.A.A.F. 2007). When engaging in statutory interpretation and applying a statute, courts must avoid reading a statute in isolation and instead consider the context of the overall statutory scheme. *See, e.g., Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). Here, the National Defense Authorization Act for Fiscal Year 2012 must be interpreted in the context of Congress's overall statutory scheme. One must consider, therefore, Congress's overhaul of Article 120 in the National Defense Authorization Act for Fiscal Year 2006 as well as other criminal statutes that Congress has included in the U.C.M.J. Contrary to its 2006 amendments to Article 120, Congress elected not to include interim punishments in its 2012 iteration. Congress also decided not to explicitly state a maximum punishment or limit disposition of

offenses charged under Article 120 to a specific court-martial with established jurisdictional limits on punishment as it did with Article 106—directing trial by general court-martial or military commission and a mandatory punishment of death.

(2) When Congress enacted the statute at issue in this case, it chose to neither impose interim maximum punishment nor direct a statutory maximum punishment nor to direct disposition of applicable cases at a specific court-martial with known jurisdictional limits. Instead, Congress left determination of maximum punishment to the convening authority during the referral process and thereafter to the judiciary. One must guess at what Congress intended when it left determination of maximum punishment open to interpretation. Considering the overall statutory scheme, the statutory language that a person convicted under the 2012 version of Article 120 "shall be punished as a court-martial may direct" is inherently ambiguous. Because it is ambiguous this Court should invoke the rule of lenity to resolve such ambiguity when determining the language's meaning. The maximum punishment that may be imposed when the ambiguous language is interpreted in the light most favorable to ET2 Schaleger is that which is within the jurisdictional limit of a summary court-martial.

c. Applying Executive Order 13643 to offenses that occurred between 28 June 2012 and 14 May 2013 violates the expressed proscription of *ex post facto* laws under Article I, Section 9 of the United States Constitution. "An increase in the maximum sentence to confinement authorized for a crime would clearly be *ex post facto* legislation." *United States v. Gorski*, 47 M.J. 370, 373 (C.A.A.F. 1997). As discussed *supra*, the ambiguous language with respect to maximum punishment that exists in the 2012 Article 120 statute requires that the maximum punishment available is that which may be imposed by a summary court-martial. Such a statutory interpretation is appropriate for offenses that occurred between 28 June 2012 and 14 May 2013. Applying Executive Order 13643 to offenses that occurred in the interim between the statute's effective date and the date on which the order was issued would clearly be *ex post facto* legislation.

d. If the Court does not find the maximum punishment language to be ambiguous, the Court should apply R.C.M. 1003(c)(1)(B) to determine a maximum punishment for the two charged specifications of sexual assault.

(1) R.C.M. 1003(b) lists the only possible punishments that a non-capital court-martial may adjudge: a reprimand, forfeiture of pay and allowances, a fine, reduction in pay grade, restriction to specified limits, hard labor without confinement, confinement,

and/or punitive discharge. In addition to other limits found in the M.C.M.[2], R.C.M. 1003(c)(1) places maximum limits on those punishments based on the offense committed.

(2) Maximum punishment limits based on offenses are separated into two categories: limits for offenses that are listed in Part IV and limits for offenses that are not listed in Part IV. See R.C.M. 1003(c)(1). R.C.M. 1003(c)(1)(A)(i) contemplates that "the maximum limits for the authorized punishments . . . are set forth for *each*[3] offense listed in Part IV of this Manual." (emphasis added). The use of the word "each" in R.C.M. 1003(c)(1)(A)(i) suggests that an offense without maximum authorized punishment is not considered a listed offense.

(3) There is further guidance in the Discussion section that precedes the punitive articles in Part IV of the M.C.M.:

> Other than Articles 77 and 79, the punitive articles of the code are discussed using the following sequence: a. Text of the article; b. Elements of the offense or offenses; c. Explanation; d. Lesser included offenses; e. Maximum punishment; [and] f. Sample specifications.

Under Part IV of the 2012 edition of the M.C.M., Articles 120, 120(b), and 120(c) only include the text of the statute. Those

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[2] *See* R.C.M. 201(f) and 1301(d) (jurisdictional limits of a court-martial); R.C.M. 1003(c)(2) (limits based on the rank of the accused).

[3] "Each: A distributive adjective pronoun, which denotes every one of the persons or things mentioned; every one of two or more persons or things; composing the whole, separately considered." *Black's Law Dictionary* 507 (6th ed. 1990).

Articles do not include elements of the offense or offenses, an explanation section, stated lesser included offenses, authorized maximum punishment, or sample specifications. It is also worth noting that the quoted Discussion section was modified to reflect case law from 2012 prior to its insertion into the 2012 M.C.M. Modifications were *not* inserted, however, to specifically exclude Article 120 from the stated punitive article format, an example of which can be found in language that discusses Articles 77 and 79[4].

(4) One should conclude—based on the recognized meaning of the word "each," as used in R.C.M. 1003(c)(1)(A) and the Discussion section that precedes Part IV of the M.C.M.—that if an offense is "listed" in Part IV, then so too are elements of the offense or offenses, an explanation section, stated lesser included offenses, authorized maximum punishment, and sample specifications. To the contrary, when an offense does not contain elements of the offense or offenses, an explanation section, stated lesser included offenses, authorized maximum punishment, or sample specifications, that offense is not "listed," under the language of R.C.M. 1003(c)(1)[5].

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[4] Listings for Articles 77 and 79 in Part IV of the M.C.M. contain neither sample specifications nor maximum punishments, but unlike Article 120, they "are not chargeable offenses." M.C.M. Part IV (Discussion).

[5] Though the Rules for Courts-Martial are neither statutes, nor are they promulgated by a legislative body, any ambiguity therein should be resolved in favor of the accused. *Cf. United States v. Thomas*, 65 M.J. 132, 135 (C.A.A.F. 2007)(citation omitted).

(5) In this case, the charged specifications allege that ET2 Schaleger violated Article 120. Though a section labeled "Article 120" can be found in Part IV of the current M.C.M., that section lacks several of the subsections intended to appear within every "punitive article of the code," as indicated in the Discussion section that precedes Part IV of the M.C.M. Among four other subsections, the portion labeled "Article 120" is missing a subsection discussing maximum authorized punishment. Such a scenario directly contradicts the language the Discussion section preceding Part IV as well as the language in R.C.M. 1003(c)(1)(A), which contemplates that maximum authorized punishments accompany *each* listed offense. For these reasons, the section labeled "Article 120" in the current edition of the M.C.M. is not a "listed offense," as described in R.C.M. 1003(c)(1)(A).

(6) Because the charged offense under Article 120 is not listed in Part IV of the M.C.M. using conclusions drawn from R.C.M. 1003(c)(1)(A) and the Discussion section preceding Part IV, one must then examine whether R.C.M. 1003(c)(1)(B) applies to the present case. Specifically, subsection (i) of the stated Rule directs:

> For an offense not listed in Part IV of [the M.C.M.] which is included in or closely related to an offense listed therein the maximum punishment shall be that of the offense listed.

The inquiry is to determine whether Part IV lists an offense that is included in, or related to, the charged offense of sexual assault. If so, then the appropriate maximum punishment that should be attributed to the unlisted charged offenses is that which can be attributable to the lesser or related offense that *is* listed in Part IV. Here, there exists a lesser and/or related offense to the alleged sexual assault. The most appropriate listed offense to use as a guidepost is assault consummated by a battery under Article 128.

(a) The United States alleges two specifications of sexual assault—a violation of Article 120(b) of the U.C.M.J. The elements of specification 1 are: (1) that ET2 Schaleger committed a sexual act upon another person; and (2) that ET2 Schaleger knew or reasonably should have known that the other person was asleep. The elements of specification 2 are: (1) that ET2 Schaleger committed a sexual act upon another person; and (2) that ET2 Schaleger knew or reasonably should have known that the other person was incapable of consenting due to impairment by an intoxicant.

(b) The elements of assault consummated by a battery are: (1) "that the accused did bodily harm to a certain person;" and (2) "that the bodily harm was done with unlawful force or violence." Article 128(b)(2), U.C.M.J. Bodily harm under Article 128 means committing any offensive touching of another, however slight, and unlawful force or violence means that the accused wrongfully caused

the contact, in that no legally cognizable reason existed that would excuse or justify the contact. *See United States v. Bonner*, 70 M.J. 1, 6 (C.A.A.F. 2011) (citations omitted). The maximum imposable punishment for assault consummated by a battery is "[b]ad conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months." M.C.M., Part IV para. 54e.(2).

(7) Because Part IV of the M.C.M. enumerates no maximum punishment for the alleged sexual assault, the maximum punishment for the charged conduct should be that of assault consummated by a battery under Article 128. Specifications 1 and 2 put ET2 Schaleger on notice that he needed to defend against an accusation of bodily harm, specifically a nonconsensual sexual act upon the complaining witness. Under Article 128, the accused would similarly have to defend against an accusation of bodily harm, specifically an offensive touching of the complaining witness for which no legally cognizable reason existed that would excuse or justify the contact, i.e. consent. In effect, charging the conduct at issue under either Article 120 or Article 128 would require the accused to defend against a nonconsensual offensive touching of the complaining witness. One could easily substitute the conduct alleged in specifications 1 and 2 as the basis for a specification alleging assault consummated by a battery. For these reasons, the appropriate maximum punishment that a court-martial may impose for

violation of specification 2 is bad conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

e. It would be an error to extend the maximum authorized punishment for the charged offense to a court-martial's jurisdictional limit when the President has issued guidance for determining the maximum punishment for offenses not listed in Part IV of the M.C.M.

(1) Citing R.C.M. 1003(c)(1)(A), the United States argues that the maximum punishments listed in Part IV of the M.C.M. "only apply to those offenses listed in Part IV of the MCM and are set at the maximum limit established in Part IV." Government Brief para. d(iv), dated 17 May 2013. On this basis, the United States argues that—since no maximum authorized punishment is included in Part IV for Article 120 offenses—the maximum punishment in this case extends to "the range of lawful punishments available to the court-martial." *Id.* at para. d(v). Such an argument, however, disregards subsection (B) of the very same rule and instead suggests a procedure for which there are no supportive grounds. Nowhere in R.C.M. 1003 is a court-martial instructed to defer to its jurisdictional limit in the absence of an enumerated maximum authorized punishment. Rather, the Rule provides several steps for narrowing the authorized punishment for a charged offense within a court-martial's jurisdictional limits. Most notably, the maximum authorized punishment is narrowed within a court-martial's

jurisdictional limits when the charged offense is without an enumerated maximum punishment but is related to an offense for which a maximum punishment is listed in Part IV of the M.C.M.

(2) In fact—as R.C.M. 1003(c)(1)(B)(i) tells us—the maximum punishments enumerated in Part IV of the M.C.M. extend to "[i]ncluded or related offenses" with respect to listed offenses. In addition, R.C.M. 1003(c)(1)(B)(ii) offers further guidance when Part IV of the M.C.M. is without an offense that is related to, or lesser than, the charged offense. Therefore, the Government's argument is only applicable when several factors have been met: (1) the charged offense is not listed in Part IV of the M.C.M.; (2) Part IV of the M.C.M. does not contain maximum authorized punishment for an offense that is lesser than, or related to, the charged offense; (3) the United States Code does not authorize a punishment for the charged offense; and (4) the custom of the service does not authorize a punishment for the charged offense. *See* R.C.M. 1003(c)(1)(B)(i)-(ii).

(3) In this case, the United States cannot demonstrate that all of these factors have been met. As discussed *supra*, there exists at least one offense—assault consummated by a battery—that is included in, and/or related to, the charged offense of sexual assault. Further, Part IV of the M.C.M. states the maximum authorized punishment for commission of assault consummated by a battery. As such, the maximum imposable punishments for assault

consummated by a battery are also the most appropriate guideposts with respect to the conduct the Government alleges in this case.

(4) To open ET2 Schaleger up to any punishment available within the court-martial's jurisdictional limit would be to disregard guidance that the President issued in R.C.M. 1003(c)(1)(B)(i). Because assault consummated by a battery is an offense listed in Part IV of the M.C.M., and because it is related to, and/or a lesser offense of, the alleged abusive sexual contact, it would be an error to instead defer to the court-martial's jurisdictional limit for maximum authorized punishment.

f. <u>Neither the United States Code nor the custom of the service authorizes a punishment in this case.</u>

(1) In the absence of an enumerated punishment authorized by the President or a lesser or related offense listed in Part IV of the M.C.M., a charged offense is punishable by a sentence authorized by the United States Code or the custom of the service. R.C.M. 1003(c)(1)(B)(ii). In the present case, however, the Court need not turn to the United States Code or the custom of the service because the M.C.M. lists a lesser or related offense in Part IV.

(2) R.C.M. 1003(c)(1)(B)(ii) does not authorize—for application in a court-martial—a sentence applicable to criminal statutes found in the United States Code that are similar to offenses charged at court-martial. *See United States v. Beaty*, 70

M.J. 39, 42 n.7 (C.A.A.F. 2011)("[w]e observe that the closely related language [in R.C.M. 1003(c)(1)(B)(i)] . . . refers to offenses that are closely related to offenses listed in the M.C.M. –not offenses in the United States Code)(internal quotations and citations omitted). Following the court's guidance, one should not look to related criminal conduct enumerated in the United States Code in an effort to determine a maximum authorized sentence for conduct charged under the U.C.M.J. Here, the M.C.M. M.C.M. lists a lesser or related offense in Part IV—assault consummated by a battery. Turning to the Code is an inappropriate and unnecessary solution to a problem that does not exist. R.C.M. 1003(c)(1)(B)(ii) provides us an ample guide to determine a maximum authorized sentence for the charged conduct, and that approach is to consider lesser and/or related offenses that are listed in the M.C.M.

(3) Similar to the United States Code, the custom of the service does not authorize a sentence in this case. Our service has operated under three different versions of Article 120 of the U.C.M.J. and two different commanders in chief since fiscal year 2006. Based on this, it is impossible to determine what the custom of the service has been with respect to sexual assault offenses and their respective authorized punishments. Rather, it has been customary within the service to interpret and apply the various statutes thrust upon our service over the past seven years. Our

service has not had adequate time and/or continuity in the law to establish a custom with respect to punishments authorized under Article 120. Observing maximum authorized punishment promulgated with respect to prior versions of the law or by prior commanders in chief are of no use. If the prior methods for dealing with the charged conduct were adequate guideposts, Congress would not have rewritten the statute, and the President would have instantly applied prior authorized punishments to the current version of Article 120. Neither is the case. For these reasons, the custom of the service has not authorized a punishment in this case.

g. <u>In this case, the maximum authorized punishment is the jurisdictional limit of a summary court-martial.</u>

(1) Because the statutory language with respect to maximum punishment under the 2012 version of Article 120 is ambiguous, the Court should turn to the Rule of Lenity when interpreting the language. In so doing, the maximum punishment for each specification at issue is that which interprets the ambiguous language in the light most favorable to ET2 Schaleger. And such a reading would cap the punishment that may be imposed upon ET2 Schaleger at the jurisdictional limit of a summary court-martial.

(2) Alternatively, should the Court find the maximum punishment language at issue to be clear, the Court should turn to R.C.M. 1003 to determine the maximum punishment applicable to this case. Because application of Executive Order 13643 to the alleged

conduct in this case violates the Constitution's proscription of *ex post facto* legislation, the punitive Article 120 as applied to the alleged conduct was without the necessary subsections to constitute a listed offense under Part IV of the M.C.M., as interpreted by R.C.M. 1003(c)(1)(A). Assault consummated by a battery under Article 128 of the U.C.M.J. is related to, and a lesser offense of, the charged offense. Therefore, if the Court elects not to interpret the statute at issue using the Rule of Lenity, the defense respectfully requests that the Court invoke guidance issued under R.C.M. 1003(c)(1)(B)(i) and find that the maximum sentence authorized for the offense charged in specification 2 is bad conduct discharge, forfeitures of all pay and allowances, and confinement for up to 6 months.

4. **Relief Requested.** The defense respectfully requests that the Court impose the jurisdictional limit of a summary court-martial as the maximum authorized punishment for each specification charged under Article 120 in this case.

5. Argument. The defense does not request oral argument.

6. Burden of Persuasion. As the moving party, the United States bears the burden of persuasion on any factual issue the resolution of which is necessary to decide this motion.

//s//
N. D. LINSTROTH
LT, JAGC, USN
Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served electronically upon Trial Counsel and the Court on 27 May 2013.

//s//
N. D. LINSTROTH
LT, JAGC, USN
Defense Counsel

TABLE OF CASES

1. *United States v. Thomas*, 65 M.J. 132 (C.A.A.F. 2007)
2. *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803 (1989)
3. *United States v. Gorski*, 47 M.J. 370 (C.A.A.F. 1997)
4. *United States v. Bonner*, 70 M.J. 1 (C.A.A.F. 2011)
5. *United States v. Beaty*, 70 M.J. 39 (C.A.A.F. 2011)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Christopher J. SCHALEGER, Electronics Technician Petty Officer Second Class (E-5) U.S. Navy Appellant	))))))))))	GOVERNMENT WRIT-APPEAL ANSWER Crim.App. Misc. Dkt. No. 201300247 USCA Misc Dkt. No. 14-8002/NA

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

Preamble

COMES NOW THE UNITED STATES and respectfully requests that this Court deny Appellant's Writ Appeal Petition.

I

History of the Case

The United States preferred charges on January 31, 2013, and the Convening Authority referred two specifications of Article 120 to a general court-martial on February 14, 2013, alleging Appellant committed sexual acts on an incapacitated victim. The United States filed a Motion In Limine to determine the maximum punishment for offenses alleged to have been committed under Article 120(b)(2) and 120(b)(3)(A). (Appellee's Mot., May 17, 2013.) On May 24, 2013, the United States filed a supplement to this motion. (Appellee's Sup. Mot., May 24, 2013.) On May 28, 2013, the Military Judge ruled that the maximum

punishment for each Article 120 offenses at the time of this offense was the Summary Court-Martial maximum. *United States v. Schaleger* (W. Cir. N-M. Trial Judiciary, May 28, 2013) (order setting maximum punishment). The Military Judge issued a supplemental ruling two days later. *United States v. Schaleger* (W. Cir. N-M. Trial Judiciary, May 30, 2013) (order concluding matter was ripe and May 28 ruling was prudentially issued).

The United States filed a Petition at the Navy-Marine Corps Court of Criminal Appeals on June 21, 2013, seeking a stay of proceedings and a Writ of Mandamus ordering the Military Judge to apply a thirty-year maximum for each of the charged violations. (Appellee's Pet. for Extraordinary Relief, June 21, 2013.) The Navy-Marine Corps Court of Criminal Appeals granted the stay on June 24, 2013, and granted the Petition, set the maximum punishment at, *inter alia,* a dishonorable discharge and thirty years of confinement, and returned the Record to the Judge Advocate General for return to the Convening Authority. *United States v. Schaleger,* No. 201300247, 2013 CCA LEXIS 771 (N-M. Ct. Crim. App. Sep. 20, 2013).

Appellant then filed a Motion to Stay Proceedings and a Writ-Appeal Petition at this Court. (Appellant's Mot. to Stay, Oct. 10, 2013; Appellant's Writ-Appeal Pet., Oct. 10, 2013).

Jurisdictional Statement

This Court has jurisdiction to determine whether it has jurisdiction to act on Appellant's Writ Appeal and to issue all writs necessary or appropriate in aid of its existing statutory jurisdiction. 28 U.S.C. § 1651(a).

II

Relief Sought

Appellee seeks an Order denying Appellant's Writ-Apeal Petition.

III

Issue Presented

> DID THE LOWER COURT ERR WHEN IT ISSUED A WRIT OF MANDAMUS DIRECTING A MILITARY JUDGE TO APPLY A MAXIMUM PUNISHMENT OF CONFINEMENT FOR THIRTY YEARS AND A DISHONORABLE DISCHARGE FOR AN OFFENSE THAT, AT THE TIME OF REFERRAL, ONLY AUTHORIZED PUNISHMENT "AS A COURT-MARTIAL MAY DIRECT?"

IV

Statement of Facts

A. The underlying crimes.

The charged conduct involves events on or about December 7, 2012. (Pet'r Mot., May 17, 2013.) Mrs. MG alleges that sometime during that night, Appellant pulled her shorts and underwear to the side and engaged in sexual intercourse with her while she was asleep. (*Id*. at 2.) On January 31, 2013, a single charge with two specifications of sexual assault under

Article 120(b) was preferred against Appellant, and later referred to General Court-Martial. (Charge Sheet, Feb. 14, 2013).

B. The President signs Executive Order 13447 in 2007, directing the addition of the prior version of Article 120 to Part IV of the Manual for Courts-Martial, and providing a maximum confinement of thirty years.

On September 28, 2007, the President signed Executive Order 13447, directing the addition of the following offense into Part IV of the Manual:

> *45. Article 120——Rape, sexual assault, and other sexual misconduct*
>
> *a. Text...*
>
> (c) *Aggravated sexual assault.* Any person subject to this chapter who——...
>
> (2) engages in a sexual act with another person of any age if that person is substantially incapacitated or substantially incapable of——
>
> (A) appraising the nature of the sexual act;
> (B) declining participation in the sexual act; or
> (C) communicating unwillingness to engage in the sexual act;
>
> is guilty of aggravated sexual assault and shall be punished as a court-martial may direct.

Exec. Order No. 13447, 72 Fed. Reg. 190, 10-11 (Oct. 2, 2007). This language is identical to the underlying statute at the time, 10 U.S.C. 920 (2006).

The President also directed that a maximum punishment for this crime be inserted into Part IV, including: “Dishonorable

discharge, forfeiture of all pay and allowances, and confinement for 30 years" Exec. Order No. 13447, 35.

C. Congress amends Article 120 in the 2012 National Defense Authorization Act for offenses on or after June 28, 2012.

The National Defense Authorization Act for Fiscal Year 2012, Pub.L.No. 112-81, 125 Stat. 1298, 1404-07 (2011), amended Article 120, UCMJ, including the crime of sexual assault on an incapacitated person. Appellant, whose alleged offenses occurred in December 2012, was charged under the "new" Article 120 statute, made applicable to all offenses committed on or after June 28, 2012:

> *§ 920. Art. 120. Rape and sexual assault generally.* (b) *Sexual Assault.* Any person subject to this chapter who—— . . .
>
> (2) commits a sexual act upon another person when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring; or
>
> (3) commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to——
>
> (A) impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person . . .

10 U.S.C. § 920 (2012).

D. The President's May 2013 Executive Order set a maximum punishment for the "new" Article 120.

Even though the President issued a new Manual for Courts-Martial in early 2012, it was not until May of 2013 that he

issued a change to Part IV of the Manual regarding Article 120. Manual for Courts-Martial (2012 ed), Part. IV, ¶45. *See also Schaleger,* 2013 CCA LEXIS 711, at *40-43.

On May 15, 2013, the President signed Executive Order 13643, which amended the Manual for Courts-Martial. Exec. Order No. 13,643, 78 Fed. Reg. 98 (May 15, 2013.) The Executive Order directed amendment, *inter alia,* of paragraph 45 of Part IV of the Manual, by providing the following maximum punishment for the Article 120 offenses: "e. *Maximum punishment...* (2) *Sexual assault.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years." *Id.* at 47. To date, the President has not amended those subparagraphs in Article 120 containing the "explanation," "elements," or "sample specifications."

E. <u>The United States' Motion *In Limine*</u>.

As Appellant faces charges under Article 120(b)(2) and 120(b)(3)(A) which occurred after June 28, 2012, but prior to Executive Order 13643, the United States filed a Motion *In Limine* to resolve the appropriate maximum punishment. (Pet'r Mot., May 17, 2013.) On May 24, 2013, the United States filed a Supplement to this Motion. (Pet'r Sup. Mot., May 24, 2013.)

On May 28, 2013, the Military Judge ruled that the proper maximum punishment in this case was the Summary Court-Martial maximum punishment:

> Because the smallest punitive burden is found at a summary court-martial, as a matter of due process it is only those punishments authorized for that forum (confinement for 1 month, hard labor without confinement or 45 days, restriction for 2 months, forfeiture of 2/3 pay per month for one month) that may be imposed upon ET2(SS) Schaleger if he is convicted of either of the offenses alleged or of any lesser included offense under the authority of Article 79, UCMJ, 10 U.S.C. § 879.

Schaleger, at 10 (N-M. Trial Jud., May 28, 2013). The Military Judge further ruled that application of the 2013 Executive Order to this case violated the *ex post facto* clause, as it increased punishment above the summary court-martial maximum. *Id*. On May 30, 2013, the Military Judge supplemented this ruling, holding that this matter was ripe for decision and that his May 28, 2013, Order was "properly and prudentially issued." *Schaleger,* at 2 (N-M. Trial Jud., May 30, 2013.)

V

Reasons Why The Writ Appeal Should Be Denied

THE LOWER COURT DID NOT ABUSE ITS DISCRETION GRANTING THE WRIT, AS THE MILITARY JUDGE'S RULING WAS A JUDICIAL USURPATION OF POWER FOR THREE REASONS: (1) AN UNRESCINDED 2007 EXECUTIVE ORDER BOTH INSERTED IN PART IV, AND PRESCRIBED A MAXIMUM CONFINEMENT OF THIRTY YEARS, FOR A "CLOSELY RELATED OFFENSE" OF ARTICLE 120(B); (2) AN ANALOGOUS OFFENSE EXISTED IN THE UNITED STATES CODE; AND (3) THE JUDGE MISAPPLIED LENITY IN LIGHT OF PUNISHMENTS AVAILABLE UNDER R.C.M. 1003(C)(1)(B).

The issuance of an extraordinary writ is in large part a matter of discretion of the court to which the petition is

addressed. *See Roche v. Evaporated Milk Ass'n*, 319 U.S. 21 (1943); *Schlagenhauf v. Holder*, 379 U.S. 104, 112 n.8 (1964); *Parr v. United States,* 351 U.S. 513, 520 (1956). Here, Appellee first requested a writ from the Navy-Marine Corps Court of Criminal Appeals, which agreed and issued the writ, and Appellant now appeals the lower court's decision.

A petitioner bears the burden of showing that they have a clear and indisputable right to the extraordinary relief that they have requested. *La Buy v. Howes Leather Co., 352 U.S. 249, 314 (1957)*. To merit relief under the powers granted this Court by the All Writs Act, appellants must demonstrate that the complained of actions were more than mere error, but rather demonstrate a clear abuse of discretion or constitute a usurpation of judicial power. *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945); *Bankers Life & Casualty Co.*, 346 U.S. at 383. In the context of writs of mandamus and prohibition, military courts have read this rule to require appellants to establish a ruling or action that is contrary to statute, settled case law, or valid regulation. *See, e.g., Dettinger v. United States*, 7 M.J. 216, 224 (C.M.A. 1979); *McKinney v. Jarvis*, 46 M.J. 870 (Army Ct. Crim. App. 1997).

A. A writ of mandamus is appropriate where, as here, a trial court exceeds its sentencing authority.

Extraordinary writs may not be employed as a substitute for relief obtainable during the ordinary course of appellate review, even though hardship may ensue from delay. "[W]hatever may be done without the writ may not be done with it." *Bankers Life*, 346 U.S. at 383; *see also United States v. Snyder*, 18 C.M.A. 480, 483 (C.M.A. 1969); *United States v. Frischholz*, 16 C.M.A. 150 (C.M.A. 1966) (petitions for extraordinary relief not substitutes for normal appellate process). The All Writs Act "is a residual source of authority to issue writs that are not otherwise covered by statute." *Pennsylvania Bureau of Correction v. U.S. Marshals*, 474 U.S. 34, 42-43 (1985).

Here, no other statutory route to appeal exists: sentencing decisions do not explicitly fall within the scope of Article 62, UCMJ. Art. 62, UCMJ, 10 U.S.C. § 862 (2012). *Cf. United States v. Dean,* 752 F.2d 535 (11th Cir 1985) (sentencing orders are "in no material way even related to the types of orders set out in [18 U.S.C. §] 3731). But a ruling on sentence such as this one is a possible basis for extraordinary relief. The Fifth Circuit has held that mandamus is an appropriate remedy for the government when a trial court exceeds its sentencing authority. *See Dean,* 752 F.2d at 545; *United States v. Denson,* 603 F.2d 1143, 1146-47 (5th Cir. 1979) (*en banc*) ("Absent the

availability of mandamus, the limitation imposed by congress on the sentencing latitude accorded the trial court would go unheeded"). The First, Third, and Eleventh Circuits, at minimum, concur.[1] So should this Court. *Cf. L.R.M. v. Kastenberg,* 72 M.J. 363, 367 (C.A.A.F. 2013) (subject matter jurisdiction on a writ requires "the harm alleged must have had 'the potential to directly affect the findings and sentence.'") (citations omitted).

Appellant's claim that Legislative or Executive action is an alternate avenue of relief must fail for two reasons. (*See* Appellant's Br. at 8.) First, only if it is true that the Code and the R.C.M. provide no route to determine a maximum punishment, no "gap in the law" exists; but only an appellate court can overturn this Judge's determination. As the Military Judge seems to acknowledge when he finds that the prior Article

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[1] *United States v. Patterson*, 882 F.2d 595, 596 (1st Cir. 1989) (government had no right to appeal sentence under 18 U.S.C. § 3731, but court used mandamus authority to reverse on merits and order resentencing); *Government of Virgin Islands v. Douglas*, 812 F.2d 822, 832 (3rd Cir. 1987) (noting that challenges to a district court judge's power to impose a particular sentence falls within scope of mandamus power); *United States v. Martinez*, 857 F.2d 122, 127 (3rd Cir. 1988) (sentencing decisions subject to mandamus include "[w]hether a district court has jurisdiction to reduce a sentence . . . and whether the district court possessed authority to impose a particular sentence") (citations and internal quotation marks omitted); *United States v. Dean,* 752 F.2d 535, 537 (11th Cir. 1985) (mandamus proper remedy "when the government alleges the district court has acted beyond the scope of its lawful authority in reducing the sentence of a convicted criminal defendant").

120 was still, by Executive Order, in Part IV of the Manual, no "gap in the law" exists here. As demonstrated, *infra,* application of R.C.M. 1003 provides such a maximum punishment.

Second, nothing requires the President to face the binary choice of immediately amending the Manual, or face a summary court-martial maximum. The Petition was necessary only because the Military Judge did not apply the plain language of R.C.M. 1003, but rather judicially expanded the application of *United States v. Beaty,* 70 M.J. 39 (C.A.A.F. 2011), as well as the longstanding Article 134 "general disorder" doctrine, to encompass Congress' enumerated offenses, and found ambiguity in statutory language none have previously found ambiguous. *Schaleger,* at 6 (W. Cir. N-M. Trial Jud., May 28, 2013) (order).

B. The 2007 version of Article 120 is "closely related," and 18 U.S.C. § 2242(2)(A-B) is analogous. The lower court was within its discretion to find that refusing to apply these in favor of expanding *Beaty* and restricting R.C.M. 1003 was a judicial usurpation of power.

1. The 2007 Executive Order, containing nearly identical elements and likewise imposing a thirty years' confinement limitation, provides a closely related offense. To find otherwise is contrary to the law, ignores the Military Judge's own conclusion that the 2007 Order was never rescinded, and fails to apply the plain language of R.C.M. 1003.

"For an offense not listed in Part IV of this Manual which is . . . closely related to an offense listed therein the maximum punishment shall be that of the offense listed." R.C.M.

1003(c)(1)(B)(i). The “closely related” language refers to offenses that are closely related to offenses listed in the Manual for Courts-Martial. *United States v. Leonard*, 64 M.J. 381, 383 (C.A.A.F. 2007).

Under the Military Judge’s own reasoning, Part IV of the Manual still contains the old Article 120, inserted by Executive Order, which applies to offenses from 2007 to 2012. When the 2011 National Defense Authorization Act became law, including the current 10 U.S.C. § 920, the President did not concurrently sign an Executive Order prescribing Presidential elements or punishments for that crime. However, nor did the President rescind Executive Order 13447, signed in 2007, which set the maximum punishment for the prior version of sexual assault on an incapacitated person, Article 120(c)(2), 10 U.S.C. § 920 (c)(2)(2006), at thirty years’ confinement, *inter alia*.

The *new* statutory text was, without Executive Order, inserted verbatim into Part IV, and *two* prior versions of “Article 120”——one for crimes prior to 2007, and one for crimes from 2007 through 2012——were moved by the Joint Service Committee into Appendices 27 and 28, respectively, in the 2012 Manual for Courts-Martial. *See Schaleger,* 2013 CCA LEXIS 771, at *42-43 (finding this action *ultra vires* and ineffective to make the insertion of the *new* Article 120 an offense “listed in Part IV”).

But as demonstrated here, the elements of Article 120(c)(2), 10 U.S.C. § 920 (c)(2)(2006), and the current 10 U.S.C. § 920(b)(2) and (b)(3)(A), are very similar, and nearly identical:

Statute	10 U.S.C. § 920(c)(2) (2007)	10 U.S.C. § 920(b) (2012)
Title	"Aggravated Sexual Assault"	"Sexual Assault"
First Element	"Any person subject to this chapter who... (2) engages in a sexual act with another person..."	"Any person subject to this chapter who ... commits a sexual act upon another person..."
Second Element	"...[who] is substantially incapacitated or substantially incapable of (A) appraising the nature of the sexual act; (B) declining participation in the sexual act; or (C) communicating unwillingness to engage in the sexual act..."	"... [(2)] when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring; or . . . [3] when the other person is incapable of consenting to the sexual act due to——... impairment by any drug, intoxicant, or other similar substance , and that condition is known or reasonably should be known by the person..."

Both crimes' titles include the words "Sexual Assault." Both crimes actually punish a "sexual act" committed on another person who is unconscious or whose consciousness is impaired by a foreign substance. The statutes are slightly different: two 2012 statutes require additional proof, respectively, that the accused "knows or reasonably should have known that the other person" was incapacitated, or that the impairment due to a foreign substance be a "condition . . . known or reasonably

should be known by" the accused. 10 U.S.C. § 920(b)(2); (b)(3)(A) (2012). Because the new statute contains an additional element, the older statute——which bears a thirty year sentence——is, by definition, a "lesser included offense" of the new Article 120, with which Appellant was charged. *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010).

No Executive Order has removed the older version of Article 120 from the Manual. *Schaleger,* 2013 CCA LEXIS 771, at *42-43. Both under this reasoning, and under the Military Judge's own holding that Executive Order and full rulemaking is required to alter the Manual, the older version of Article 120 still appears in Part IV of the Manual. *Schaleger,* at 4-5 (W. Cir. N-M. Trial Jud., May 28, 2013) (order).

Moreover, the "social cost" of both crimes is identical and supports that the 2006 version of Article 120 is a "closely related" offense. In *United States v. Ramsey,* 40 M.J. 71, 76 (C.M.A. 1994), the Court of Military Appeals ruled that a military judge "failed to follow the clear mandate of R.C.M. 1003(c)(1)(B)(i)" when he chose Article 134, rather than the enumerated Article 115, Malingering, as the most "closely related" offense to a novel charge for the purposes of assessing the maximum sentence. The *Ramsey* court looked to several factors, including the "social cost," the "damage to the military," and the President's listing of the novel offense as a

possible “lesser included” offense, despite the fact that the novel offense actually appeared in no paragraph of the Manual, and had no Presidentially-prescribed elements or punishment. *Id.* at 75.

Here, under the “social cost” analysis of *Ramsey,* the *actus reus* and offense of both the prior and current Article 120 are nearly identical. Also as in *Ramsey,* a still-listed offense and punishment provide a “closely related” offense and thus punishment for a crime until May 2013 not “listed” by Executive Order in Part IV. Indeed the new statute with which Appellant is charged simply replaces a prior version of the “same” statute, and adds the element of “knew or reasonably should have known.” Nothing restricts the application of the Rule except for the Military Judge’s ruling. Appellant’s claim that the lower court’s ruling is “unprecedented” misses the irony that the Military Judge’s ruling, which expands the “general offense”/ *Beaty* doctrine and restricts R.C.M. 1003’s applicability to Article 134 offenses, was itself unprecedented. Indeed, the Military Judge’s restriction of R.C.M. 1003 is an action clearly contrary to the President’s rule and settled law.

Thus because the old Executive Order placing the old Article 120 and punishment has not been rescinded, and the offense are virtually identical and involve the same “social cost,” then the Military Judge failed to apply the settled law

of R.C.M. 1003 and usurped his power in failing to find that the maximum should be the "closely related" offense's punishment that includes, *inter alia,* thirty years and a dishonorable discharge.

a. Appellant's claim that R.C.M. 1003(c)(1)(B) cannot be applied outside Article 134 ignores the plain language of the Rule and this Court's precedent.

The Military Judge, and Appellant, are simply wrong that R.C.M. 1003(c)(1)(B)(i) cannot be applied outside the Article 134 context. (Appellate Ex. V at 5; Appellant's Br. 13-14.) The Military Judge apparently means that he can find only cases where "novel Article 134" offenses, with no set maximum, are examined under that Rule.

First, nothing in the plain language of R.C.M. 1003(c)(1)(B) restricts its application to Article 134 offenses, and plain language is how we must read the Rules for Courts-Martial. *See United States v. Mitchell,* 58 M.J. 446, 449 (C.A.A.F. 2003). Rather, the language of the Rule applies to every instance where an offense is not "listed in Part IV." So too, Appellant reads too much into Chief Judge Baker's concurrence in *United States v. Leonard,* 64 M.J. 381, 384 (C.A.A.F. 2007). (Appellant's Br. 13-14.) There, then-Judge Baker pointed out that R.C.M. 1003(c)(1)(B) is a procedural rule that further limits the statutory "discretion of [the] court" language. That *Leonard*

happened to involve an Article 134 offense is merely a result of the fact that a court reviews the case before it.

But Judge Baker's point appears equally applicable here: a court's sentencing discretion is *not* defined solely by the Code's statutes governing sentencing. Rather, whenever the President has not set a maximum sentence, any given court's discretion is further procedurally limited, when closely related or analogous offenses exist, to the process the President has detailed in R.C.M. 1003(c)(1)(B). *Leonard,* 64 M.J. at 385.

Notably, the "at the discretion of the court" language is a close analog to the "as a court-martial may direct" language that occurs throughout the Code and in Article 133, and as with Article 134 and Judge Baker's reasoning in *Leonard*, the seemingly broad discretion given to courts by language appearing in nearly all of the enumerated Articles is similarly limited by R.C.M. 1003(c)(1)(B). That procedure is precisely the one the Government asks that the Military Judge be constrained to apply here.

Second, the Rule has been applied in a variety of circumstances without finding ambiguity and limiting confinement to thirty days, resulting in some cases in a ruling that no offense "closely related" exists and the "simple disorder" punishment of four months inures. *Beaty,* 70 M.J. at 45. And, the Rule has been applied to find enumerated offenses to be the

most "closely related" offense to an unlisted Article 134 offense, resulting in punishments of many years, *e.g., Ramsey, 40 M.J.* at 76. The parsimonious application of R.C.M. 1003, and novel extension of a "simple disorder" doctrine to enumerated offenses——not the plain language application of R.C.M. 1003——is the unprecedented ruling that merits correction by mandamus.

2. 18 U.S.C. § 2242(2)(A-B), punishable with life imprisonment, is essentially the same as the new Article 120, containing identical elements but for Article 120's additional *scienter* element.

"An offense not listed in Part IV and not included in or closely related to any offense listed therein is punishable as authorized by the United States Code, or as authorized by a custom of the service." R.C.M. 1003(c)(1)(B)(ii). This provision of R.C.M. 1003 is different from the "closely related" provision of R.C.M. 1003(c)(1)(B)(i), and has a different standard. *Beaty*, 70 M.J. at 42 n.7.

To determine whether the United States Code may be used for the maximum punishment of an offense neither listed in Part IV nor closely related to one listed in Part IV, courts look to "whether the offense as charged is 'essentially the same,' as that proscribed by the federal statute." *United States v. Leonard*, 64 M.J. 381, 384 (C.A.A.F. 2007).

18 U.S.C. § 2242(2)(A-B) (2012), criminalizes sexual abuse when an individual (1) engages in a sexual act with another

person, and the other person is (2) incapable of appraising the nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act. A sleeping victim satisfies the second element: "A reasonable jury may conclude that a person who is asleep when a sexual act begins is physically unable to decline participation in that act." *United States v. Wilcox*, 487 F.3d 1163, 1169 (8th Cir. 2007); *see also United States v. Barrett*, 937 F.2d 1346, 1347-48 (8th Cir. 1991). The Title 18 offense is punishable by "any term of years or for life." 18 U.S.C. § 2242.

Similarly here, Specification 1 alleges that Appellant engaged in a (1) sexual act with a victim (2) who he knew or should have known was asleep. Specification 2 alleges that Appellant engaged in a (1) sexual act with a victim (2) who he knew or should have known was incapable of consenting due to the impairment of alcohol. But for the heightened *scienter* requirement in the Article 120 offense, otherwise these elements contain the same "conduct and *mens rea* proscribed by directly analogous federal criminal statute[]" and are "essentially the same." *Leonard*, 64 M.J. at 384.

Because the elements are essentially the same, even if the 2007 Executive Order is not a "closely related" offense, surely the United States Code can be read to provide a punishment for an offense that is "essentially the same" as aggravated sexual

assault in this case. As there is a directly analogous provision under United States Code, application of punishment of a dishonorable discharge, forfeiture of all pay and allowances, and confinement for thirty years, in light of the Title 18 maximum of life imprisonment, does not present *ex post facto* challenges to the case at bar.

The Military Judge's failure to find either a closely related or United States Code analog by applying either the 2007 Executive Order or the Title 18 offense to the terms of R.C.M. 1003 reflects a judicial usurpation of power and is inconsistent with an established statutory and regulatory scheme. The lower court was within its discretion in granting the Writ.

3. Likewise, longstanding custom of the service suggests that punishment of at least thirty years is available under R.C.M. 1003(c)(1)(B).

As the lower court concluded, for "more than 60 years of practice . . . the alleged misconduct was punishable by a dishonorable discharge and at least 30 years of confinement..." *Schaleger,* 2013 CCA LEXIS 771, at *61-62. The alleged conduct, penetration of the vagina of an incapacitated person, has been punishable by court-martial since at least 1951. *Id.* at *60-61. Even if this Court disagrees that a "closely related" offense exists, or analogous offense in Title 18 exists, then by custom of the service and operation of R.C.M. 1003(c)(1)(B), the lower court was within its discretion to find the Military Judge

usurped his power failing to find a custom of the service supported a punishment identical to that in the current Executive Order.

C. Appellant's request to judicially expand the ambit of *Beaty* and the "simple disorder" doctrine should be rejected. The Military Judge's reading of *Beaty* misapplies an application of lenity where life imprisonment and the "simple disorder" doctrine provide conflicting possible maximum punishments, to this case involving an enumerated offense where the jurisdictional maximum has never been artificially limited in the absence of Presidential limitations.

In 2011, the *Beaty* court held that where application of R.C.M. 1003(c)(1) turned up "no result" in an Article 134 context, the "simple disorder" doctrine applies, setting a maximum punishment of four months' confinement and forfeiture of two-thirds pay per month for four months. The *Beaty* court only resorted to the "simple disorder" punishment after finding that the offense was (1) not listed in the Manual, (2) not closely related to any other offense in Part IV, (3) not provided for in the United States Code, (4) not authorized by a "custom of the service," *and most critically,* after noting that it would "violate the rule of lenity by permitting the imposition of greater punishment for the possession of what 'appears to be' child pornography, an action which Congress now deems, in accord with Supreme Court precedent, not criminal, than Congress saw fit to impose for the possession of actual child pornography." *Beaty,* 70 M.J. at 44.

But this is not a “simple disorder” case. And, Appellant’s charged actions, if true, are still indisputably criminal under civilian and military Federal laws, and precedent. The “simple disorder” doctrine is a longstanding military doctrine specifically limiting otherwise unlisted Article 134 offenses to, *inter alia,* four months’ confinement, in accord with a punishment once listed in the Table of Maximum Punishments. *Beaty,* 70 M.J. at 45 (citations omitted).

The Military Judge’s ruling, and Appellant, would have this Court expand *Beaty* and the “simple disorder” doctrine beyond Article 134. This is unjustified, and is itself contrary to settled law. First, though based on a now-nonexistent Presidentially-prescribed Table of Maximum Punishments and although the judicial doctrine was apparently never appealed by the Government, the “simple disorder” doctrine is, explicitly limited to novel Article 134 offenses with no discernible punishment after application of R.C.M. 1003(c)(1)(B). Not so with the plain language of R.C.M. 1003(c)(1)(B). And, *Beaty* dealt with an even more limited situation: a novel Article 134 offense that could not be prosecuted in civilian courts.

Second, Appellant is correct: Article 134 *is* different. But the “simple disorder” doctrine is appropriate in the Article 134 setting because Article 134 is *sui generis* and has additional requirements under *Parker v. Levy,* 417 U.S. 733

(1974): without charging the President's elements, and without the "tradition and custom," servicemembers neither have notice that an offense is criminal, nor can they prepare a defense. For enumerated offenses, in contrast, Congressional elements are all that is needed to criminalize an offense. Here, Article 120 is in effect, and its elements were charged: nothing justifies applying a "simple disorder"-like maximum on an enumerated offense.

The United States does not contest the "simple disorder" doctrine. But, for enumerated offenses, passed by Congress and to which the "simple disorder" doctrine has never applied, the jurisdictional maximum of courts-martial remains the maximum punishment, in addition to any restrictions——"if any"——contained in R.C.M. 1002 and 1003(c)(1)(B). Expansion of an even more restrictive "simple disorder" doctrine to enumerated offenses which require no Presidential "elements" and which require no *Parker v. Levy* analysis pointing to custom and usage, is a gross usurpation of power and contrary to settled law.

D. Finding ambiguity in the words "as a court-martial may direct" is contrary to settled law. The language appears in nearly every enumerated article, and it is unclear that Presidential rulemaking could resolve this ambiguity, if it existed.

Where criminal statutes are ambiguous, any ambiguity should be strictly resolved in favor of lenity. *Hughey v. United*

States, 495 U.S. 411, 422 (1990) (citation and quotations omitted); *Rewis v. United States,* 401 U.S. 808, 812 (1971).

In the context of regulatory statutes, where a legislative prescription is not free from ambiguity, the agency administrator must choose between conflicting reasonable interpretations; such choice may be due *Chevron* deference. *Holly Farms Corp. v. NLRB,* 517 U.S. 392 (1996); *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.,* 467 U.S. 837 (1984). However, it is unclear whether agency interpretations of *criminal* statutes are due such deference. *See NLDB v. Okla. Fixture Co.,* 332 F.3d 1284, 1287 n.4 (10th Cir. 2003) (listing legal scholarship opining on splits of authority either way). And, military courts have generally declined to apply *Chevron* to the military context. *See, e.g., United States v. Bartlett,* 66 M.J. 426, 427 (C.A.A.F. 2008).

If the Military Judge is correct that Congress' language "as a court-martial may direct" is ambiguous, *Schaleger,* at 9 (W. Cir. N-M. Trial Jud., May 28, 2013) (order), and that the jurisdictional maximum cannot be imposed presuming Congress, the President, and R.C.M. 1003, do not operate to limit that punishment, then it seems that only a *Chevron*-type deference could save that ambiguity. *Cf. Sash v. Zenk,* 428 F.3d 132, 135-36 (2nd Cir. 2005) (agency interpretations of substantive

criminal law may not be binding on either scope of criminal liability, or the penalty applicable to criminal judgment).

If the Military Judge's read is correct, nearly every statutory crime in the Code, from Article 78 through Article 120 and Article 133, may be ambiguous as it contains the following open-ended language regarding punishment: "shall be punished as a court-martial may direct." 10 U.S.C. §§ 978 et seq.

The better read, contrary to the Military Judge's understanding, is that "as a court-martial may direct" is not ambiguous and it does not purport to assign a maximum punishment: rather, it offers three possible maximum punishments in every given case, in reference to the counterpart Articles 18, 19, and 20, which set jurisdictional maximums depending on to which venue the court-martial is referred.

So too, that language reflects that nothing in the Congressionally-enacted Code *requires* the President to limit the maximum punishment for a given enumerated crime. This fact is mirrored in the open-ended language of R.C.M. 1003, which governs how maximum punishment limitations are determined for "Offenses listed in Part IV":

> (i) *Maximum punishment*. The maximum limit for the authorized punishments of confinement, forfeitures and punitive discharge *(if any)* are set forth for each offense listed in Part IV of this Manual.

R.C.M. 1003(c)(1)(A)(i) (emphasis added). This further mirrors Congress' open-ended language that authorizes any punishment *unless* the President creates further limitations: "general courts-martial . . . may, under such limitations as the President *may* prescribe, adjudge any punishment not forbidden by [the Code]." Arts. 18, 56, UCMJ; 10 U.S.C. §§ 818, 856 (2012).

Unlike the "simple disorders" Article 134 situation and the otherwise non-criminal offense circumstance specific to *Beaty*, enumerated offenses are presumed to be subject to sentence limitations at the President's discretion: but he or she may decline to lower maximum punishments below the limitations of R.C.M. 1003(b) and the statutory jurisdictional limitations set forth in Articles 18, 19, and 20, 10 U.S.C. §§ 818, 819, and 820 (2012). The United States is unaware of any precedent supporting that——outside the limited circumstances of similar language in *Beaty* and the "simple disorder" doctrine, and after application of R.C.M. 1003(c)(1)(B)——the "as a court-martial may direct" has been held to be ambiguous or susceptible to application of lenity. Except for "simple disorder" offenses in the Article 134 "at the discretion of the court" context, until now, "as a court-martial may direct" has meant just that: the jurisdictional limit of the court-martial at hand.

Further, no court, not even *Beaty,* found that "as a court-martial may direct" or the similar Article 134 language is

ambiguous as to the *maximum* punishment available. *Beaty,* rather, applied lenity and picked the "simple disorder" punishment over the jurisdictional maximum only because of, *inter alia,* uncertainty over which punishment was available. No court has applied a *Beaty*-like maximum to enumerated offenses. Were "as a court-martial may direct" in fact ambiguous, absent application of some *Chevron*-type deference, it seemingly would be ambiguous without regard to whether the President further restricted punishment. Indeed, the ambiguity in that language would *precede* application of R.C.M. 1003(c)(1)(B), and require a summary court-martial maximum in all crimes.

But the Military Judge's ruling has other implications. It suggests that when R.C.M. 1003(c) fails to produce a result, "as a court-martial may direct" requires that the court-martial maximum does not apply——but rather that a new judicially-created gloss on *Beaty* require that every offense be punished with a summary court-martial maximum. As argued *supra,* this is a needless expansion of the "simple disorder" doctrine.

The Military Judge's holding, if the law, would require ignoring Executive Orders still in force, ignoring virtually identical provisions from Title 18, and finding ambiguity in statutory language never before found ambiguous, and imposing a "summary court-martial" cap on punishments. This result, clearly contrary to settled law, should be rejected.

Conclusion

The United States respectfully requests that this Court deny Appellant's Writ-Appeal Petition.

BRIAN K. KELLER
Deputy Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682
Bar no. 31714

STEPHEN C. NEWMAN
Colonel, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7059, fax (202) 685-7687
Bar no. 35491

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BRIAN K. KELLER
Deputy Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682
Bar no. 31714

DEPARTMENT OF THE NAVY
NAVY AND MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

U N I T E D S T A T E S v. CHRISTOPHER J. SCHALEGER ET2 / E-5 United States Navy	)))))))))	17 May 2013 MOTION TO DETERMINE THE MAXIMUM PUNISHMENT FOR ARTICLE 120 OFFENSES

1. **Nature of Motion**. Pursuant to Rule for Court-Martial 905(b), the Government requests the Court determine the maximum punishment for the offenses charged under the 2012 edition of Article 120 of the Uniform Code of Military Justice (UCMJ).

2. **Summary of Facts**.

a. On 7 December 2012, ET2 Christopher Schaleger, USN, hereinafter, the Accused, and Mrs. M.G. were together at the Accused's home making dinner and watching television. Both the Accused and Mrs. M.G. drank multiple alcoholic beverages and became intoxicated.

b. The Accused and Mrs. M.G. went to sleep in the Accused's bed. At some point during the night, the Accused pulled Mrs. M.G.'s shorts and underwear to the side and engaged in sexual intercourse with her while she was asleep. Mrs. M.G. did not resist or say anything to the Accused because she was asleep.

When she woke up, the Accused stopped thrusting his penis inside of her vagina. At this time, Mrs. M.G. rolled off the Accused and left his house.

c. On 17 December 2012, Mrs. M.G. reported the incident to the Fleet and Family Support Center in the form of a restricted report. Mrs. M.G. later converted her restricted report to an unrestricted report on 26 December 2012 and began participating in an NCIS investigation.

d. On 31 January 2013, two Specifications of sexual assault were preferred against the Accused.

e. On 1 May 2013, an Article 32 investigation was conducted at Naval Station Everett. In his report dated 8 May 2013, the Investigating Officer recommended the Charge and its Specifications be tried by a General Court-Martial.

f. On 14 May 2013, both Specifications under the sole Charge were referred to a General Court-Martial by Commander, Navy Region Northwest.

g. The Accused is charged with committing a sexual act upon Mrs. M.G. to wit: penetration of her vulva by his penis, when the Accused knew or should have known Mrs. M.G. was asleep. The Accused is also charged with committing a sexual act upon Mrs. M.G. to wit: penetration of her vulva by his penis, when Mrs. M.G. was incapable of consenting due to an impairment by an intoxicant.

4. List of authorities.

a. Rule for Courts-Martial 1003

b. Article 18, Uniform Code of Military Justice

c. Article 56, Uniform Code of Military Justice

d. Article 120, Uniform Code of Military Justice

e. Article 120b, Uniform Code of Military Justice

f. 18 USC § 2244

g. *Loving v. United States*, 517 U.S. 748 (1996)

h. *United States v. Curtis*, 32 M.J. 252 (C.M.A. 1991)

i. *Taylor v. Garaffa*, 57 M.J. 645 (N.M.C.C.A. 2002)

j. *United States v. Gorski*, 47 M.J. 370 (CAAF 1997)

4. Discussion.

In this case, the maximum punishment for each Specification under the Charge should be a dishonorable discharge, forfeitures of all pay and allowances, and confinement for 30 years. This is the maximum punishment recently established by the President in an Executive Order published on 15 May 2013.

Alternatively, if the Court determines that the Executive order is considered *ex post facto* law, the maximum punishment should include a dishonorable discharge, forfeitures of all pay and allowances, and confinement for life without the possibility of parole, which is the jurisdictional maximum punishment at a general court-martial. Or, this Court could find under the custom of the service that the maximum punishment is either the

maximum punishment established in the 2008 Edition of the Manual for Courts-Martial or the maximum punishment provided in the Executive Order issued on 15 May 2013. Both indicate the maximum punishment for a closely related offense is a dishonorable discharge, forfeitures of all pay and allowances, and confinement for 30 years.

a. Law regarding courts-martial maximum punishments.

Congress has the power to delegate to the President the establishment of penalties at courts-martial. *Loving v. United States*, 517 U.S. 748, 769 (1996). Congress delegated this power through Articles 18 and 56 of the UCMJ. *Id.* Article 56 provides that "the punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense," while Article 18 states that a general court-martial "may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by [the Code], including the penalty of death when specifically authorized by" the Code.

These Articles, when taken together, reveal that Congress legislated that the President shall set the maximum punishments imposable in trials by courts-martial. *United States v. Curtis*, 32 M.J. 252, 261 (C.M.A. 1991). Finally, the 2012 statute revising Article 120, (hereinafter, Article 120) contains the direction that servicemembers found guilty of the offense "shall

be punished as a court-martial may direct."

b. Current state of the law.

As the Court is aware, on 15 May 2013, the President signed an Executive Order that amended the Manual for Courts-Martial and established the maximum punishment for Article 120 offenses that were committed after 28 June 2012. In this amended version, the maximum punishment for a sexual assault is: "dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years". This amendment puts in writing a maximum punishment that is within the allowable punishment at a general court-martial.

c. The President has established Part IV of the MCM for Article 120 offenses committed after 28 June 2012.

Although this amendment to the Manual for Courts-Martial occurred after the commission of the offense charged in the present case, it is the Government's position that it is not an *ex post facto* law because it does not increase the maximum punishment for this Accused. Rather, it is to the benefit of the Accused because it lowers the maximum punishment from that which is allowed at a general court-martial: a dishonorable discharge, forfeitures of all pay and allowances, and confinement for life without the possibility of parole.

The test for determining whether a law is *ex post facto*, was addressed in *United States v. Gorski*, 47 M.J. 370 (CAAF

1997). It states the test as follows:

> 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*.

United States v. Gorski, 47 M.J. at 373 (emphasis in original). "An increase in the maximum sentence to confinement authorized for a crime would clearly be *ex post facto* legislation." *Id.* "Legislation must give 'fair warning' of its effect so that people can rely on the law's meaning." *Id.* (quoting *Weaver v. Graham*, 450 U.S. 24, 28 (1981)). The Executive Order issued on 15 May 2013 created an Amendment to the 2012 MCM that does not increase the maximum sentence for the Accused; it lowers it. Therefore, the Accused was given fair warning of the maximum punishment for these offenses preferred against him.

In *Taylor v. Garaffa*, 57 M.J. 645 (N.M.C.C.A. 2002), a similar Executive Order was addressed that increased the jurisdictional maximum sentence at a Special Court-Martial. The Court concluded that the application of that Executive Order did not violate the enhanced-punishment prohibition in the

Constitution's *ex post facto* clause. The court stated that the Petitioner, like the Accused in the present case, was already subject to the punitive consequences provided in the Amendment. Therefore, the Executive Order did not violate the *ex post facto* clause.

Based on the above mentioned cases, the Amendment to the 2012 edition of the MCM is not in violation of the *ex post facto* clause because it does not increase the maximum punishment for the Accused. Prior to the Amendment, the maximum punishment for the offenses the Accused is charged with committing was a dishonorable discharge, forfeitures of all pay and allowances, and confinement for life without the possibility of parole. This Amendment significantly lowers that maximum punishment. Therefore, the Accused had notice of the maximum punishment prior to this amendment and he is not harmed by this amendment.

d. Alternatively, if the Court finds the Amendment to be an *ex post facto* law and therefore inapplicable to the present case, the maximum punishment for this offense should be the jurisdictional maximum at a general court-martial.

If the Court determines that the recent amendment to the 2012 edition of the MCM is not applicable to the present case, the following analysis should be applied to determine the maximum punishment. Rule for Courts-Martial (R.C.M.) 1003(b) lists the only possible punishments that a non-capital court-martial may adjudge: a reprimand, forfeiture of pay and

allowances, a fine, reduction in pay grade, restriction to specified limits, hard labor without confinement, confinement, and/or punitive discharge. In addition to other limits found in the MCM,[1] R.C.M. 1003(c)(1) places maximum limits on those punishments based on the offense committed.

Maximum punishment limits based on offenses are separated in two categories: limits for offenses that are listed in Part IV and limits for offenses that are not listed in Part IV. See R.C.M. 1003(c)(1). Under R.C.M. 1003(c)(1)(A)(i), if an offense is listed in Part IV, then the maximum punishment that can be adjudged at court-martial is that listed in Part IV. R.C.M. 1003(c)(1)(A)(ii) provides that the maximum punishment for offenses not listed in Part IV may be that of an "included or closely related offense" list in Part IV or, if an offense is not listed in Part IV and not included or closely related to an offense listed in Part IV, shall be the punishment authorized by the United States Code, or as authorized by the custom of the service.

In this case, Article 120 *is* listed in Part IV of the MCM, found at paragraph 45. Because Article 120 is listed in Part IV, a plain reading of R.C.M. 1003(c)(1)(B) makes both subparagraphs (i) and (ii) of that Rule inapplicable. As a

[1] See R.C.M. 201(f) and 1301(d) (jurisdictional limits of a court-martial); R.C.M. 1003(c)(2) (limits based on the rank of the accused).

result, the maximum punishment that a court-martial can adjudge should be based on the inclusion of Article 120 in Part IV.

R.C.M. 1003(b) lists the possible punishments that may be adjudged at court-martial. Following that list of possible punishments, R.C.M. 1003(c)(1)(A) provides the "maximum" limit to three types of punishments: confinement, forfeitures, and punitive discharge. According to R.C.M. 1003(c)(1)(A), these maximum limits only apply to those offenses listed in Part IV of the MCM and are set at the maximum limit established in Part IV.

In this case, the Accused is charged with two Specifications in violation of Article 120, Sexual Assault. This offense is listed in Part IV of the MCM. However, specific maximum punishment was not included in Part IV prior to the Amendment issued in the Executive Order on 15 May 2013. The listed offense of Sexual Assault in Part IV states the punishment is "as a court-martial may direct." Thus the offense is not punishable by death because Congress did not authorize death within the statute itself. Therefore, the language, "shall be punished as a court-martial may direct" should be interpreted to mean that there is no applicable offense-based maximum punishment that can be adjudged, leaving the range of lawful punishments available to the court-martial.

Given that, R.C.M. 1003(c)(1)(A) does not provide a maximum punishment that may be adjudged at court-martial, the maximum

punishment for an offense under Article 120 should be the maximum allowable by a general courts-martial under Article 18, which is a dishonorable discharge, forfeitures of all pay and allowances, and confinement for life without the possibility of parole.

e. Alternatively, the Court could find each Specification under the Charge to be punishable as authorized by the custom of the service.

Although not consistent with a literal interpretation of the MCM, the Court could hold that Article 120 is not "listed" within Part IV for the purposes of R.C.M 1003(c)(1). Such a holding would be predicated on a requirement that to be listed in Part IV, an offense must contain all necessary sub-paragraphs, to include elements, sample specifications, and maximum punishments at the time the offense was committed. Without these additional sub-paragraphs, according to this interpretation, an offense is not "listed" in Part IV, therefore triggering the requirements of R.C.M 1003(c)(1)(B).

Assuming that R.C.M 1003(c)(1)(B) is applied to the Charge and its two Specifications, the Court must first look to whether Article 120 is included in or closely related to an offense that is listed in Part IV, as per R.C.M 1003(c)(1)(B)(i). Given that all relevant sexually-based offenses have now been incorporated in Article 120, there remain no other closely related offenses listed in Part IV.

Because there is no other closely related offense similar to Article 120 in Part IV, the next step is to look to R.C.M 1003(c)(1)(B)(ii) to determine whether Article 120 is punishable by the United States Code or by the custom of the service. In this case, the most analogous section of the United States Code to Article 120, Sexual Assault, is sexual abuse as defined within 18 U.S.C. § 2242.[2] However, the language in U.S.C. is somewhat different from language in Article 120(b)(2) and Article 120(b)(3)(a). Specifically, the language in the United States Code does not address situations where the Accused knew or should have known the person was asleep. In addition, the language in the United States Code does not provide for situations where the alleged victim is impaired by drug, intoxicant, or some other similar substance. As a result, the United States Code is not similar enough to utilize in this situation.

What is left, therefore, is to see whether Article 120 can be punishable by the custom of the service as permitted under R.C.M 1003(c)(1)(B)(ii). The language of the Charge and its two Specifications are actual criminal offenses that have been criminalized under the UCMJ for decades. The custom of the service is to punish sexual assault offenses.

[2] 18 U.S.C. § 2242 ("Whoever, ... knowingly ... engages in a sexual act with another person if that other person is--(A) incapable of appraising the nature of the conduct; or (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act ...")

In 2010, the custom was to punish sexual assaults like the one charged in the present case under Article 120 of the UCMJ as "aggravated sexual assault". In 2010, the maximum punishment was 30 years confinement and a dishonorable discharge.

In 2005, the custom was to punish sexual assaults like this one charged here under Article 120 of the UCMJ as "rape". The maximum punishment for "rape" was death, a dishonorable discharge, or confinement for life.

In 1984, Article 120 of the UCMJ lists "rape" as a punitive article. The definition of rape is similar to the definition of sexual assault as charged in the present case. The maximum punishment was listed as death or confinement for life.

Additionally, the Court could look to the Executive Order issued on 15 May 2013 to determine the custom of service. As discussed previously, this Executive Order amended Part IV of the 2012 MCM and provided the maximum punishment for sexual assault as a dishonorable discharge, forfeitures of all pay and allowances, and confinement for 30 years. This amendment clearly shows the custom of service and the appropriate maximum punishment for an offense not listed in Part IV.

4. **Relief Requested**. The Government respectfully requests the maximum punishment for an offense under Article 120 should be what is provided in the Executive Order issuing amendments to the MCM on 15 May 2013. This would set the maximum punishment

for the offense charge at a dishonorable discharge, forfeitures of all pay and allowances, and confinement for 30 years. This punishment is to the benefit of the Accused because it decreased the punitive consequences from what is available at a general court-martial.

5. **Oral Argument**. The Government does not request oral argument.

J. L. WILT
LT, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief was served on defense counsel and the Court on the 17th day of May 2013.

J. L. WILT
LT, JAGC, USN
Trial Counsel

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

UNITED STATES, Petitioner v. Lewis T. BOOKER, JR, Commander U.S. Navy (in his official capacity as Military Judge) Respondent Christopher J. SHALEGER, Electronics Technician Petty Officer Second Class (E-5) U.S. Navy Real Party in Interest	)	REPLY TO REAL PARTY IN INTEREST'S OPPOSITION TO PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF MANDAMUS Case No. 201300247

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

COMES NOW THE UNITED STATES pursuant to this Court's order to show cause and respectfully replies to the Real Party in Interest's opposition to the petition for extraordinary relief.[1]

[1] While the counsel for ET2 Schaleger identifies her brief as a "Respondent's Opposition," the Respondent in this matter is Judge Booker. This Court instead identified ET2 Schaleger as the Real Party in Interest, and ordered assignment of Counsel for ET2 Schaleger. (Order to Appoint Counsel, Jun. 27, 2013.) As such the United States will refer to Counsel's brief as "Real Party in Interest Br. at XX," and to ET2 Schaleger as the "Real Party in Interest."

I

Jurisdictional Statement

A. The All Writs Act is party neutral. The government may petition for a writ under the act.

The All Writs Act provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (2006). The Real Party in Interest, ET2 Schaleger, argues that because Article 62, UCMJ, allows the Government to appeal certain trial rulings, the Government may therefore not use the All Writs Act in situations not covered by Article 62. (Real Party in Interest Br. at 4-6.)

This Court should reject that interpretation because it is inconsistent with the plain text of the All Writs Act, Congressional intent, and decisions by other courts.

First, nothing in the text of the All Writs Act limits a court to issuing a writ when requested by a criminal defendant, but not when requested by the Government. ET2 Schaleger's argument would restrict this Court's authority to issue a writ to only those circumstances where a writ is requested by an accused. Congress could have written the statute in that manner, but because they chose not to this Court should not rewrite the statute by judicial action.

Second, other service courts that have addressed the issue have rejected ET2 Schaleger's argument. *See United States v. Mahoney*, 36 M.J. 679, 684 (A.F.C.M.R. 1992) ("The authority of this Court to grant the government extraordinary relief from a ruling or action of a military judge is well established."); *see also United States v. Reinert*, No. 20071195, 2008 CCA LEXIS 526 (A. Ct. Crim. App., Aug. 7, 2008). Although the Army case is unpublished, it contains a lengthy consideration and rejection of ET2 Schaleger's argument that the government may not petition for extraordinary relief. *Id.* at *13-27.

Federal courts agree that the United States may petition for a writ under the All Writs Act. "Article 62 was intended by Congress to be interpreted and applied in the same manner as the [federal] Criminal Appeals Act, 18 U.S.C. § 3731." *United States v. Brooks*, 42 M.J. 484, 486 (C.A.A.F. 1995). Yet in spite of the existence of that statute, Federal courts routinely allow writ petitions by the United States in situations where appeal under 18 U.S.C. § 3731 is not possible. For example, the Second and Third Circuits have permitted the government to obtain writs of mandamus when a proposed criminal jury instruction clearly violated the law and risked prejudicing the government at trial with jeopardy attached, when the United States had no other avenue of appeal. *United States v. Pabon-*

Cruz, 391 F.3d 86, 91-92 (2d Cir. 2004); *United States v. Wexler*, 31 F.3d 117, 121 (3d Cir. 1994).

So has the Fifth Circuit. *In re United States*, 397 F.3d 274 (5th Cir. 2005). That Court has also allowed the United States to use the All Writs Act to appeal a judge's discovery order and an order to proceed to trial with a non-death penalty certified jury. *United States v. Jarman*, 687 F.3d 269, 270 (5th Cir. 2012) (if a trial judge were to order the United States to violate the Adam Walsh Act by giving child pornography to the defense, such an order "might well be amenable to mandamus relief."); *United States v. Williams*, 400 F.3d 277, 280-81 (5th Cir. 2005) (trial judge's order for trial to commence with a non-death penalty certified jury).

Finally, prior to the 1983 version of Article 62, the Court of Military Appeals considered a similar argument by the defense and rejected it. *Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979). In 1979, the prior version of Article 62 did not permit interlocutory appeals by the Government. *United States v. Ware*, 1 M.J. 282 (C.M.A. 1976). But the Court of Military Appeals in *Dettinger* rejected the Petitioner's restrictive reading of the All Writs Act on two bases. First, it held that "the Uniform Code discloses no legislative purpose to forbid the military appellate courts from considering an application for extraordinary relief from a trial judge's action only because

the petitioner is the Government." 7 M.J. at 222. Second, it noted that the right of the Government to seek extraordinary relief for dismissal of charges would be restricted only where the Uniform Code explicitly provided an internal statutory route of appeal to the Government for dismissal of charges. *Id.* As the court notes, "When review by appeal is allowed, 'the need for the writs has vanished.'" *Id.* (citations omitted). Thus, the court concluded, because Article 62 in 1979 did *not* permit interlocutory appeal of a dismissal of charges, that issue could be reviewed via extraordinary writ sought by the Government. *Id.*

Similarly today, all parties agree that the current version of Article 62 does *not* permit interlocutory review of the current issue. Thus, the Government may seek extraordinary relief because the basis for the Government's petition for a writ of mandamus falls *outside* the authorized grounds of appeal in Article 62. And even more recently, in *LRM v. Kastenberg,* No. 13-5006 (C.A.A.F. July 18, 2013), the Court of Appeals for the Armed Forces affirmed the ability of victim advocates to seek extraordinary relief at the Courts of Criminal Appeals, despite the lack of any statutory reference to victim advocates in the Uniform code and the fact that the victim advocate was a nonparty to the court-martial.

The All Writs act was "no doubt enacted by Congress in order to meet cases of this nature when there is no specific

process provided by statute." *John Gund Brewing Co. v. United States*, 204 F. 17, 20 (8th Cir. 1913). ET2 Schaleger and the United States agree that an Article 62 appeal is not possible in this case. But that fact does not foreclose a writ of mandamus. To the contrary, it is precisely why extraordinary relief is necessary.

B. The requested writ of mandamus is in aid of this Court's jurisdiction.

A writ is in aid of a court's jurisdiction when an action by a lower court may thwart an appellate court's prospective jurisdiction. *National Farmers' Organization, Inc. v. Oliver*, 530 F.2d 815, 816 (8th Cir. 1976) (citing *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21 (1943)); *Chandler v. Judicial Council of Tenth Cir.*, 398 U.S. 74, 112 (1970) (Harlan, J., concurring) (explaining statute empowers court to issue extraordinary writ to lower federal court).

Here, ET2 Schaleger asserts that the requested writ of mandamus is not in aid of this Court's jurisdiction, but rather seeks to expand it. (Real Party in Interest Br. at 7.) But this Court's jurisdiction includes the mandate to review the findings and sentences approved by a Convening Authority at certain courts-martial and determine if they should be approved as correct in law and fact. Article 66, UCMJ. The requested writ does not deal with something that is only remotely related

to the courts-martial process, such as whether a service member remains on the military's administrative rolls, *see, e.g. Clinton v. Goldsmith*, 526 U.S. 529 (1999); whether third parties have access to court documents, *see, e.g. Center for Constitutional Rights v. United States*, 72 M.J. 126 (C.A.A.F. 2013); or the issuance of administrative guidance on the calculation of good-time confinement credit, *see, e.g. United States v. Kobzev*, No. 201100059 (N-M. Ct. Crim. App. Jun. 22, 2011) (order). Rather, the requested relief here deals directly with the sentence that may be awarded at court-martial——an issue firmly within this Court's jurisdiction. Therefore, the writ is in aid of this Court's jurisdiction.

II
Reasons Why the Writ Should Issue

A. A Writ of Mandamus is the only adequate means to attain relief, and the right to its issuance is clear and indisputable.

For reasons more fully described in the underlying petition, the United States avers that inaction by this Court will necessarily divest this Court of its authority to review the matter pursuant to Article 66, UCMJ. (Pet'r Br. at 11—12.) Furthermore, the actions of the Military Judge not only reflect a judicial usurpation of power, but clearly reflect action that is contrary to both the statute he attempted to apply and the regulation that implements it. (*Id.* at 12-13.) The Real Party

in Interest cites no authority to support the proposition that this serious case involving two specifications of sexual assault is not serious enough to invoke this Court's extraordinary writ jurisdiction. Indeed, the Government is aware of other court-martial rulings on an identical issue by the same judge, similarly restricting punishment in sexual assault cases to a summary court-martial maximum. *United States v. ET3(SS) Fabian D. Medina* (N-M. Trial Jud., W. Cir., Jul. 3, 2013) (order).

B. The Military Judge clearly erred in holding that Presidential Rulemaking is required before a statute takes effect.

1. Counsel for the Real Party in interest conflates Congressional authority to legislate with Presidential rulemaking authority. 10 U.S.C. § 920 is in Part IV of the Manual for Courts-Martial. The statute is not "fundamentally flawed."

ET2 Schaleger implies that legislative power over military law is split between the President and Congress. However under our Constitution, "Congress has 'plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline.'" *United States v. Dowty*, 48 M.J. 102, 106 (C.A.A.F. 1998) (citing *Weiss v. United States,* 510 U.S. 163, 177; *see* U.S. Const., Art. I, § 8, cl. 14. Congress has sole authority to create the enumerated offenses found in the UCMJ. *United States v. Fosler*, 70 M.J. 225, 231

(C.A.A.F. 2011); *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010); (Pet'r Br. at 16.)

Congress does, however, "share" that power with the President, but only insofar as Congress has delegated rulemaking authority to the President. Article 36, UCMJ, 10 U.S.C. §836. In the context of ET2 Schaleger's case, Congress has the authority to further clarify a statute by including interim punishments, but that does not impose upon them an obligation to impose interim punishments. *See* PL 109–163, January 6, 2006, 119 Stat 3136 (National Defense Authorization Act for Fiscal Year 2006); *Cf*. PL 112-239, January 2, 2013, 126 Stat 1632 (National Defense Authorization Act for Fiscal Year 2013).

Absent Congressional limitation, the President's authority within that box is clear. While he may prescribe additional elements, he cannot create, modify or amend the text of a statute. *Fosler*, 70 M.J. 225. Similarly his listing of offenses in the discussion section is persuasive authority but not binding. *Jones*, 68 M.J. 465. As a result of Article 36, UCMJ, while Congress retains exclusive authority to legislate, Congress and the President share responsibility over military discipline.

Here counsel for the Real Party in Interest appears to conflate the distinct but related authority to legislate with authority over military discipline in an attempt to persuade

this Court that, in the absence of an Executive Order, the amended Statute is "fundamentally flawed." (Real Party in Interest Br. at 8, 13.) In this regard ET2 Schaleger mimics the "fully-fledged" test of the Military Judge. But the absence of an Executive Order from the President is of no effect vis-à-vis the effective date of a statute. *See United States v. Pritt*, 54 M.J. 47, 50 (C.A.A.F. 2000) (citing *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991)) (explaining principle that a statute takes effect upon enactment). As such, and given Congress' legislative power, there can be no doubt that the Amended statute was effective at the time of the alleged offenses. It is not "fatally flawed," and to adopt the trial court's phraseology, was "fully-fledged" 180 days after enactment. *See* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112—81, 125 Stat. 1298 (Dec. 31, 2011) (proscribing that the amended statute becomes effective 180 days after enactment)[2].

2. <u>Taken to its logical conclusion the "fully-fledged" test leads to an absurd result.</u>

Furthermore this "fully-fledged" test is entirely unsupported in the law and leads to an absurd result. For all the reasons previously briefed this unusual test should be set aside in favor of a determination that 10 U.S.C. § 920 is in

[2] As 2012 was a leap year, this means the amended statute became effective on June 29, 2012.

Part IV of the 2012 Manual, and that either the May 15, 2013, Executive Order or the plain language of R.C. M. 1003 clearly identifies the correct maximum punishment. (Pet'r Br. at 13—17.) But even so, consider the consequences of the notion that, in the absence of an Executive Order, a Congressionally-approved and Presidentially effected Statute is not "fully fledged."

Congress significantly amended Article 120, UCMJ in 2006. National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109—163, 119 Stat. 3136 (Jan. 6, 2006). In doing so they directed the President to establish punishments, but in the interim interrupted his previously established regulatory scheme. On September 28, 2007, the President issued his Executive Order, establishing a new regulatory framework for the amended statute and laying out the punishments therefore. Exec. Order No. 13447, 72 FR 56179 (Sep. 28, 2007). Because Congress established interim punishments until the President could act, under these circumstances the "fully-fledged" test would be satisfied.

Congress next amended Article 120, UCMJ in 2011. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112—81, 125 Stat. 1298 (2011). This time Congress did so without providing interim punishments. The President did not issue an Executive Order until May 15, 2013. Exec. Order No. 13643, 3 C.F.R. Executive Order 13643 (May 15, 2013). Applying the "fully-fledged" test, and since Congress did not impose interim

punishments, there was no regulatory scheme in place during this period, leading to an ambiguity and application of lenity.

Yet Congress again amended Article 120 on December 21, 2012, modifying punctuation in the statute. National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112—239, 126 Stat. 1632 (Jan. 2, 2013). Once again Congress did not provide interim punishments. While the timing of the President's Executive Order seems to cover both statutory amendments, consider the effect of the "fully-fledged" test had the President issued his Executive Order prior to January 2, 2013. Application of that test would mean we are once again in an interregnum period merely because Congress removed a period from the statute and did not provide interim punishments. In fact, adoption of the "fully-fledged" test would necessarily mean that, each time Congress amended a punitive article, in the absence of established punishments (e.g. life without the possibility of parole or death for Article 118 murder), or Congressionally established interim punishments, ambiguity would ensue and lenity apply. This cannot be the law.

Presidential rulemaking authority runs parallel to, and is contingent on, the plenary authority of Congress over military justice matters. When Congress amends a punitive article, they may interrupt the President's rulemaking authority with interim punishments, but they don't have to. When they do not, the

previous regulatory scheme as established by the President remains in effect. To suggest that each time Congress amends one of the punitive articles either they must provide interim punishments or the President must publish an executive order is simply absurd. The Statute was in effect at the time of alleged offenses in this case, a regulatory scheme established, and it is not "fundamentally flawed." As such the Military Judge erred and his order should be set aside.

C. The Military Judge erred in his application of lenity over the plain language of Article 36, UCMJ, and R.C.M. 1003.

At its core, the position of both the Military Judge and ET2 Schaleger may fairly be understood to assert that Congressional and Presidential silence as to punishment creates and ambiguity. But as noted in Petitioners underlying brief, the President's 2007 Executive Order associated with the 2006-amended version of Article 120, UCMJ, remained extant until the President issued Executive Order 13643 on May 15, 2013. (Pet'r Br. at 34.) As such the Military Judge erred by moving too quickly past the plain language of Article 36, UCMJ, and R.C.M. 1003 to apply the rule of lenity.

Silence does not create an ambiguity. Interpretation of a statute must be made consistent with legislative intent and the surrounding statutory scheme. *United States v. Bass*, 404 U.S. 336, 351 (1971) (citing *United States v. Bramblett*, 348 U.S. 503,

510, (1955) (canons of clear statement and strict construction do “not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature”); *United States v. Wiltberger,* 18 U.S. (5 Wheat.) 76, 95 (1820) (interpretation must give effect to the intent of the legislature); *United States v. McClain*, 545 F.2d 988, 996 (5th Cir. 1977) (“(T)he intention of the law-maker must govern in the construction of penal, as well [as] other statutes”.)(internal quotations omitted).

Judge Booker correctly notes that “Congress created the revised Article 120 in the context of the Uniform Code of Military Justice, Chapter 47 of title 10, and that Chapter's provisions include the three different courts-martial.” (Appellate Exibit V at 9.) But as is more fully articulated in Petitioner’s underlying brief, Congress is under no obligation to specify either a forum or punishment. In fact it is common for Congress to be silent on such matters.

Furthermore this is only part of the context surrounding the amendment. What Judge Booker and ET2 Schaleger both leave out of the analysis is Article 36 and R.C.M. 1003. Having delegated their rulemaking authority, Congressional silence as to punishment does not create ambiguity; it instead leaves punishment to the regulatory scheme established by the President. This includes Article 36 and R.C.M. 1003. As such the Military

Judge erred when he moved too quickly past these regulatory schemes to lenity, and for the reasons set forth in Petitioner's underlying brief his order should be set aside.

Moreover, the Real Party in Interest's argument leads to an absurd result. Most of the statutory, that is Congressional, test found in the Code's enumerated explicitly state that the crime "shall be punished as a court-martial may direct." *See, e.g.,* 10 U.S.C. § 881 et seq. Again, *United States v. Beaty,* 70 M.J. 39, 45 (C.A.A.F. 2011), only holds that the "Article 134 simple disorder" maximum applies where the application of R.C.M. 1003(c) *entirely fails* to produce any Presidentially-prescribed maximum for the charged crime, Presidentially-prescribed maximum for a closely related offense, analogous Federal crime, or custom of the service. But the Real Party in Interest's argument would have us apply a Summary Court-Martial maximum *despite* the existence of the current Executive Order *and* its predecessor Executive Order. And, this argument appears to suggest that because the statutory language "as a court-martial may direct" is ambiguous, a Summary Court-Martial maximum is required——if true, this "statutory ambiguity" would require a Summary Court-Martial maximum for *every* enumerated crime. And this simply cannot be the case.

The Real Party in Interest, like the Military Judge, misapplies the rule of lenity. The rule of lenity does not

apply first. Rather, it "is generally inapplicable unless, after a court has seized on every thing from which aid can be derived, it is still left with an ambiguity." *United States v. Hudspeth*, 208 F.3d 537, 539 (6th Cir. 2000) (citations, alterations, and internal quotation marks omitted). Moreover, a statute or Sentencing Guideline is not "'ambiguous' for purposes of lenity merely because it [is] possible to articulate a construction more narrow than that urged by the Government." *Moskal v. United States*, 498 U.S. 103, 108 (1990) (emphasis in original); *see also Taylor v. United States*, 495 U.S. 575, 596 (1990) (explaining that the rule of lenity "cannot dictate an implausible interpretation of a statute"). Here, the Real Party in Interest's argument is just that: implausible.

D. <u>The Real Party in Interest misstates the law with regard to lesser included offenses. Assault Consummated by a Battery is a lesser included offense of Aggravated Sexual Assault</u>.

In his brief the Real Party in Interest asserts that, because "sexual assault" is not a lesser included offense of "battery", and since the elements are different, they are not "closely related." (Real Party in Interest Br. at 20-22.) The Real Party in Interest states: "To argue that sexual assault is "essentially the same" as any other kind of battery is to ignore the plain language of the elements of both offenses." (Real

Party in Interest Br. at 21.) This misstates both Petitioner's argument and the law.

First, Petitioner does not posit that Aggravated Sexual Assault is a lesser included offense of Assault Consummated by a Battery. Petitioner instead puts forth the proposition that Assault Consummated by a Battery is a lesser included offense of Aggravated Sexual Assault. (Pet'r Br. at 28.)

Second, the overwhelming weight of the law supports this proposition. *See, e.g., United States v. Johanson*, 71 M.J. 688, 693 (C. G. Ct. Crim. App. 2012) ("Wrongful sexual contact and assault consummated by battery appear to be possible lesser offenses included in abusive sexual contact of a person substantially incapable of declining participation." (citing to *United States v. Bonner,* 70 M.J. 1 (C.A.A.F. 2011)) *Cf.* Manual for Courts-Martial, A28-9 (explicitly listing battery as a lesser-included of the predecessor Article 120(c)(2)); *Bonner,* 70 M.J. at 3 (C.A.A.F. 2011) (assault consummated by a battery is a lesser-included offense, and nearly identical, to Article 120(m), Wrongful Sexual Contact)*; United States v. Carr*, 65 M.J. 39, 40 (C.A.A.F. 2007) (finding battery to be a lesser-included offense of the then-existing Article 134 offense of "indecent assault). *And* bodily harm is a lesser included offense of the force used in sexual assault. *See United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010).

Without dispute, even Assault Consummated by a Battery under Article 128 is a more closely related offense listed in Part IV, than the Summary Court-Martial maximum employed by the Military Judge. As such the Military Judge erred and his order should be set aside.

E. The *Ex Post Facto* clause has no application to this case.

The Real Party in Interest asserts in his brief that, since the United States never argued for application of life without the possibility of parole as a punishment, we have been "disingenuous" in our argument relative to the Ex Post Facto clause. Counsel for ET2 Schaleger is correct when she states that the United States does not seek to apply life without the possibility of parole in ET2 Schaleger's case. But we do so expressly *because* doing so would violate the Ex Post Facto Clause, not in spite of it. In the absence of the Executive Order 13643 of May 15, 2013, the United States may present a different argument, but its publication makes further discussion on the point moot. For all the remaining reasons set forth in the underlying brief, Petitioner asserts that the Ex Post Facto clause has no application to this case. (Pet'r Br. at 17—19.)

III

Conclusion

WHEREFORE the United States respectfully requests that this Court set aside the Trial Court's ruling of May 28, 2013, and apply the maximum punishment found in Executive Order 13643 of May 15, 2013. In the alternative, should this Court find the Executive Order inapplicable, the United States asks this Court to apply the "closely analogous offense" doctrine and apply the former Article 120's maximum or, less appropriately, the lesser-included offense of Article 128's maximum. More apposite than Article 128 if the offense is not "listed" and the prior Executive Order cannot apply, the United States Code provides an offense that is "essentially the same."

STEPHEN C. NEWMAN
Colonel, U.S. Marine Corps
Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202)685-7059, fax (202)685-7687

Certificate of Filing and Service

I certify that pursuant to Navy—Marine Corps Court of Criminal Appeals Rule 5.2(b)(3), the foregoing original and one copy was delivered to the Court, with a copies served upon:

Lewis T. BOOKER, Jr.
Commander (O-5), U.S. Navy
Military Judge
365 S Barclay
Building 433
Bremerton, WA 98314
(360) 476-6466
lewis.booker@navy.mil

by email *and* via hand delivery on LT Jennifer Myers, JAGC, USN, in Appellate Defense Division, OJAG Code 45, on July 19, 2013. And an electronic copy was uploaded to CMTIS on July 19, 2013.

IAN D. MACLEAN
LT, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202)685-7686, fax (202)685-7687

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

UNITED STATES,	)	
	)	**RESPONDENT'S OPPOSITION TO**
v.	)	**GOVERNMENT'S PETITION FOR**
	)	**EXTRAORDINARY RELIEF IN THE NATURE**
	)	**OF A WRIT OF MANDAMUS**
Lewis T. BOOKER, JR.	)	**Case No. 201300247**
CDR, JAGC, USN,	)	
	)	
Respondent,	)	
	)	
Christopher J. SCHALEGER	)	
ET2, USN,	)	
	)	
Real Party in Interest,	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

JENNIFER L. MYERS
Lieutenant, JAGC, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
Bldg. 58, Ste. 100
Washington, D.C. 20374
Phone (202) 685-7713
Fax (202) 685-7426
jennifer.l.myers@navy.mil

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COMES NOW the real party in interest, ET2 Christopher J. Schaleger, United States Navy, who, by and through his undersigned counsel, and pursuant to this Court's order of 24 June 2013 opposes the Government's petition for extraordinary relief.

Statement of the Case

ET2 Schaleger stands accused of two specifications of sexual assault, in violation of Article 120(b)(2) and Article 120(b)(3)(A), UCMJ, 10 U.S.C. § 920 (2012). The conduct at issue allegedly occurred on 7 December 2012. (Charge Sheet.) On 31 January 2013, the Government preferred charges against ET2 Schaleger. (Charge Sheet.) Following an Article 32 hearing, the Convening Authority referred the charge and specifications to a general court-martial on 14 May 2013. (Charge Sheet.) On 15 May 2013, the President amended the MCM and prescribed a maximum punishment of 30 years confinement for each of the offenses alleged in this case.

On 17 May 2013, the Trial Counsel submitted a motion in limine to determine the maximum punishment for the specifications. (Appellate Ex. II; Appellate Ex. III) The military judge noted that, although Congress enacted the new Article 120, UCMJ, through the National Defense Authorization

Act on 28 June 2012, 10 U.S.C. § 920 (2012), the President failed to assign maximum punishments to offenses under the new Article 120 until 15 May 2013, two days after this case was referred to a general court-martial. Congress used ambiguous language to describe what it felt should be the maximum punishment, stating only that a person convicted of sexual assault shall "be punished *as a court-martial* may direct." Art. 120, UCMJ. Emphasis added. It did not say what type of court-martial (as it did, for example, in Art. 106, UCMJ), and it provided no further guidance as to punishment. The military judge therefore applied the Rule of Lenity, which states that ambiguities in criminal statutes must be resolved in favor of the defendant. He then ruled that, applying this rule to the phrase "*as a court-martial* may direct," the maximum punishment available is the jurisdictional maximum available at summary courts-martial, because *summary* court-martial is the most favorable resolution to the defendant of the ambiguous terminology used by Congress in this statute.

The Government responded by filing its petition for extraordinary relief, where it seeks a writ of mandamus to compel the military judge to change his ruling. The Government also requested a stay of the proceedings. (Govt Petition for Extraordinary Relief in the Nature of a Writ of Mandamus.)

On 24 June 2013, this Court granted the Government's

request for a stay and ordered ET2 Schaleger to show cause as to why the petition should not be granted. (NMCCA Court Order of 24 June 2013.) This opposition is in response to that order.

Relief Requested

ET2 Schaleger respectfully requests that this Court find that it lacks jurisdiction to act on the Government appeal. If this Court does find, however, that it has jurisdiction to respond to the Government's petition for extraordinary relief, ET2 Schaleger respectfully requests that this Court find that the Government has failed to meet the high burden required to merit "extraordinary relief" at this interlocutory stage of the case.

Jurisdiction

This Court does not have jurisdiction to hear the Government's interlocutory appeal. The burden of establishing that a court has jurisdiction, "rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). In this case, that is the Government. The Government asks this Court to use its power under the All Writs Act, 28 U.S.C. § 1651(a) (2006), to issue extraordinary writ because if the maximum sentence available in this case extends to a punitive discharge or confinement for 1 year, this Court "will have jurisdiction pursuant to Article 66, UCMJ," and

the “appeal may be later perfected.” (Government’s Brief.)

“[P]rosecution appeals are not favored and are available only upon specific statutory authorization.” *United States v. Wuterich*, 67 M.J. 63, 70 (C.A.A.F. 2008), *cert. denied*, 130 S. Ct. 52 (2009); *accord United States v. Bradford*, 68 M.J. 371 (C.A.A.F. 2010). Congress has limited the Government’s right to an interlocutory appeal to only those instances covered by Article 62, UCMJ. Thus, Article 62’s jurisdictional limits must be strictly observed.

The Government can appeal interlocutory rulings of a military judge only where: 1) there has been an order or ruling of the military judge which terminates the proceedings with respect to a charge or specification; 2) where an order or ruling excludes evidence that is substantial proof of a fact material in the proceeding; or 3) in certain circumstances involving classified information. Art. 62, UCMJ. None of these circumstances apply to the case against ET2 Schaleger. The Government’s request to expand the jurisdiction of this Court to hear Government appeals by invoking Article 66, UCMJ, through the All Writs Act should fail.

Article 66 does not provide a means for a Government interlocutory appeal. “In a case referred to it, the Court of Criminal Appeals *may* act only with respect to the findings and sentence as approved by the convening authority.” Article 66,

UCMJ (emphasis added). Article 66 is strictly a tool of the Defense and is never available as a weapon of the Government. An appellant can also bar this Court's jurisdiction under Article 66 by waiver. Article 61(c), UCMJ. Therefore, this Court does not necessarily have jurisdiction under Article 66, and would never have jurisdiction under Article 66 to hear a Government appeal. The Government is seeking a windfall by attempting to invoke Article 66, to the great prejudice of ET2 Schaleger.

This Court may issue a writ of mandamus under the All Writs Act, where necessary or appropriate "in aid of jurisdiction" and where agreeable to the usages and principles of law, 28 U.S.C. § 1651(a) (2006). *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999). However, the All Writs Act does not provide independent statutory authorization for this prosecution appeal because, as the Supreme Court has emphasized, "the Act does not enlarge [] jurisdiction." *Goldsmith*, 526 U.S. at 534-35; *see also* 28 U.S.C. § 1651(a) (2006). This Court does not have the authority to hear this issue within its existing jurisdiction, and the All Writs Act cannot create that additional authority.

As the CAAF recently reiterated, Article I Courts, including military appellate courts, "must exercise their jurisdiction in strict compliance with authorizing statutes." *Center for Constitutional Rights v. United States*, 72 M.J. 126,

128 (C.A.A.F. 2013). Here, a writ would not be in aid of this Court's jurisdiction, but rather a writ would expand this Court's jurisdiction to hear Government Appeals and would usurp the limitations placed on such appeals in Article 62 by Congress. *See Goldsmith*, 526 U.S. at 534-35. As jurisdiction is a threshold legal issue, *Loving v. United States*, 62 M.J. 235, 237, 239 (C.A.A.F. 2005), the analysis of this case should end here.

Issue Presented

AT THE TIME OF THE ALLEGED CRIME, CONGRESS AUTHORIZED THE PUNISHMENT OF PERSONS GUILTY OF SEXUAL ASSAULT "AS A COURT-MARTIAL MAY DIRECT." THERE WAS NO ADDITIONAL GUIDANCE. SHOULD THIS COURT PREVENT THE MILITARY JUDGE FROM APPLYING THE RULE OF LENITY TO THIS AMBIGUOUS STATEMENT OF LAW?

Statement of Facts

Congress drastically amended Article 120, Uniform Code of Military Justice (UCMJ) with the National Defense Authorization Act for Fiscal Year 2012. Pub. L. No. 112-81, 125, 125 Stat. 1298 (2011). The amendments included the addition of new punitive articles like Article 120, 120a, 120b, and 120c and applied to crimes committed on or after 28 June 2012. Manual for Courts Martial, United States, (MCM), pt. IV, ¶ 45, Note at 68. However, Congress did not include subparagraphs that would normally address elements, explanation, lesser included offenses, maximum punishments, and sample specifications for any

of the new provisions. MCM, pt. IV, ¶ 45, Note at 70. Such additional materials are generated under the President's authority to prescribe rules pursuant to Article 36, UCMJ. *Id*. However, the new provisions stated that persons convicted under these new articles "shall be punished as a court-martial may direct." MCM, pt. IV, ¶ 45a.(b).

The President issued Executive Order (EO) 13643- Amendments to the Manual for Courts-Martial, United States, on 15 May 2013. Exec. Order No. 13643, 78 Fed. Reg. 98 (May 21, 2013). That EO assigned the maximum punishment of dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years for the crimes of which ET2 Schaleger is accused. *Id*. at *47. The alleged sexual assault in this case occurred on 7 December 2012, and charges were referred to a general court-martial on 13 May 2013, two days before the President signed EO 13643. (Charge Sheet.)

Legislative power over military law is split between Congress and the President.

"[M]ilitary discipline is an area of concurrent authority between Congress and the President." *United States v. Jones*, 68 M.J. 465, 477 (C.A.A.F. 2010) (Baker, J., dissenting). Congress creates law, including the Uniform Code of Military Justice (UCMJ). U.S. Const. Art. 8 ("Congress shall have the power . . . make rules for the government and regulation of the land and

naval forces”). Congress amends the articles of the UCMJ and Title 10 of the United States Code (USC) through the annual National Defense Authorization Acts (NDAA). See e.g., NDAA 2012, Pub. L. No. 112-81, 125 Stat. 1405, § 541 (b) (2011).

Congress has delegated some of its legislative power with regards to the military to the President, due to his role as commander-in-chief. Article 36, UCMJ, provides the President with the power to make pre- and post-trial rules, including modes of proof, while Article 56,[1] UCMJ, permits the President to prescribe maximum punishments. As a result of these articles, the President promulgates a Preamble (part I), the Rules for Courts-Martial (R.C.M.) (part II), the Military Rule of Evidence (M.R.E.) (part III), the punitive articles (part IV), and Nonjudicial Punishment Procedure (part V) in the Manual for Courts-Martial (MCM). Chris Kennebeck, *The Joint Service Committee on Military Justice (JSC)- Part 1*, National Institute of Military Justice Blog- CAAFLOG, (June 19, 2012), http://www.caaflog.com/2012/06/19/the-joint-service-committee-

[1] Article 56, UCMJ, states: “The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense.”

on-military-justice-jsc-part-i/ (hereinafter Kennebeck, *Part 1*); MCM, pt. 1, ¶ 4.[2]

"To amend Parts I-V of the MCM requires an [Executive Order (EO)]." Chris Kennebeck, *The Joint Service Committee on Military Justice (JSC)- Part 2*, National Institute of Military Justice Blog- CAAFLOG, (June 26, 2012), http://www.caaflog.com/2012/06/26/the-joint-service-committee-on-military-justice-jsc-part-ii/ (hereinafter Kennebeck, *Part 2*). However, "[t]he MCM is intended to be an all-in-one reference for the deployed attorney far from civilization, and its design is reflective of that goal." Kennebeck, *Part 1*. Therefore, much of the language in the MCM is guidance, rather than law. See MCM, pt. I, ¶ 4, Discussion (referencing supplementary materials published by DOD and DHS which accompany the MCM).

The Secretary of Defense, is required to review the MCM annually and provide recommendations for amendments to the President. Kennebeck, *Part 1*. He accomplishes this requirement through the Joint Services Committee (JSC), which collects proposals and developes recommendations pursuant to DOD Directive 5500.17, Role and Responsibilities of the Joint Service Committee (JSC). If approved by the majority of the

[2] LtCol Kennebeck is Policy Branch Chief, Criminal Law Division, Office of the Judge Advocate General of the Army and Executive Secretary of the Joint Service Committee on Military Justice.

voting group, these proposals are added to the JSC's "annual Review," which eventually becomes the EO. Kennebeck, *Part 1*.

Like all statutes passed by Congress, each NDAA "take[s] effect on the date of its enactment[,]" *United States v. Pritt*, 54 M.J. 47, 50 (C.A.A.F. 2000)(citing *Gozlon-Peretz v. U.S.*, 498 U.S. 395, 404 (1991), regardless of whether the President has revised the MCM. To prevent a gap in the law, Congress has the option to issue interim punishments, as it did when it revised the UCMJ – including Article 120 – in 2006. *See* NDAA 2006, Pub. L. No. 109-163 § 552(b), 119 Stat. 3263 (2006). Congress chose not to include such a safe-guard in the latest revisions. Congress also had the option of designating the forum at which Article 120 cases should be tried. *See e.g.,* Article 106, UCMJ (2012) (requiring trial by general court-martial and punishment of death). But Congress chose not to designate forum or punishment in the 2012 version of Article 120, UCMJ.

To be clear, Congress has not delegated its legislative powers to the JSC. However, the 2008 MCM became so outdated that the JSC published the 2012 MCM, despite the fact that the President had not enacted an Executive Order to set a maximum punishment for the 2012 version of Article 120, UCMJ. *See* MCM, pt. IV at 70 (2012 ed.); Kennebeck, *Part 1*. The 2012 MCM included only the language from the UCMJ in part IV and did not included elements or a regular maximum punishment paragraph,

because none existed. See MCM, pt. IV at 70 (2012 ed.) Kennebeck, *Part 1*.[3]

The Court should not issue this Writ because the Government has not met its very high burden.

I. Extraordinary Writs

The petitioner must show three conditions before a court may provide extraordinary relief in the form of a writ of mandamus: (1) the party seeking the writ must have "no other adequate means to attain the relief"; (2) the party seeking the relief must show that the "right to issuance of the relief is clear and indisputable"; and (3) "even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Lawanson v. United States*, 201200187, 2012 CCA LEXIS 345, 13-14 (N-M. Ct. Crim. App. Aug. 31, 2012) (citing *Cheney v. United States Dist. Court,* 542 U.S. 367, 380-81, (2004)).

a) An extraordinary writ is not appropriate in this case because it does not rise to the magnitude required.

A writ of mandamus is a "drastic remedy . . . [which] should be invoked only in truly extraordinary situations." *United States v. LaBella*, 15 M.J. 228, 229 (C.M.A. 1983); *United States v. Thomas*, 33 M.J. 768 (N.M.C.M.R. 1991). "[I]t is clear

[3] As explained in the title to part IV, "Statutory text of each Article is in bold" for each paragraph of part IV.

that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy." *Will v. United States*, 389 U.S. 90, 95 (1967).

This is not such an extraordinary case that an extraordinary writ would be appropriate. CDR Booker, is one military judge, and his opinion of this particular issue could only impact a very few number of cases. EO 13643 closed the gap left in the law by NDAA 2012. Judge Booker's ruling would only impact Article 120 offenses that occurred between 28 June 2012 and 13 May 2013, and come before his court. His rulings are not binding on any other court. This is not the type of extraordinary case envisioned by an Extraordinary Writ.

b) The Government is not entitled to this relief, or any other, because it had the opportunity to amend the ambiguous law, and chose not to.

The NDAA 2012 is fundamentally flawed because it failed to establish interim maximum punishments for the amended Article 120 offenses. The first factor to consider under *Cheney* is whether there is path for relief other than the extraordinary writ. In this case, the Government had every opportunity to clear up any ambiguities in the law. But it chose not to do so. It is inappropriate for the Government to now ask this Court to

retro-actively clear up the ambiguity in a light unfavorable to ET2 Schaleger by means of an extraordinary writ.

The Government, and practitioners around the world, knew of the lack of a set maximum punishment in Article 120, UCMJ, from its 2012 inception. The military judge's Benchbook, published by the United States Army, attempted to offer guidance for practitioners, stating:

> As of 28 June 2012, the President had not prescribed a maximum punishment for this offense. Until the President prescribes a maximum punishment, the maximum punishment should be determined in accordance with RCM 1003(c)(1)(B). Pursuant to RCM 1003(c)(1)(B)(i), the military judge should consider whether the offense is "included in or closely related to an offense listed" in paragraph 45 of the MCM Part IV.

U.S. Dep't of Army, Pam. 27-9, Military Judge's Benchbook, ¶ 3-45-12 (Jan. 1, 2010) (C11-11). The JSC was also aware of this flaw. It included the following text in Part IV of the MCM under Article 120:

> The subparagraph[] that would normally address. . . maximum punishments. . . [is] generated under the President's authority to prescribe rules pursuant to Article 36. At the time of publishing this MCM, the President had not prescribed such rules for this version of Article 120. Practitioners should refer to the appropriate statutory language and, the extent practicable, use appendix 28 as a guide.

MCM, pt. IV, ¶ 45 note at 70.

Still, the President failed to act to remediate the flaw until 13 May 2013. The NDAA 2012 was published for public comment on December 31, 2011. For eighteen months, the

Government knew of the lack of maximum punishment and took no action to resolve the issue. This Court should not now entertain its request for a retroactive resolution.

c) The Government has failed to establish that there is a "right to issuance of the relief [that]is clear and indisputable;" The military judge's ruling is logically and legally correct, but even if it were incorrect, it would be a far from indisputable conclusion.

The Government bears the burden to show that it has a "clear and indisputable right" to the requested relief because the military judge made a ruling that is contrary to statute, settled case law, or valid regulation. *Cheney,* 542 U.S. at 380-81; *see e.g.*, *United States v. Ponder,* 54 M.J. 613, 616 (N-M. Ct. Crim. App. 2000); *United States v. Dettinger,* 7 M.J. 216 (C.M.A. 1979). It has failed to carry this burden because, the military judge's ruling is within his discretion and it is correct.

The plain language of the statute is ambiguous and the rule of lenity requires resolution in favor of the defendant: Here, that means the imposition of summary court-martial punishments. R.C.M. 1003 (c)(1)(B) was intended for Article 134 offenses and provides an imperfect framework. However, sexual assault is not included in any offenses within the UCMJ, other than those in Article 120, and there are no other closely related offenses. Additionally, the only provision of the USC applicable to this

case is 10 U.S.C. § 920. That statute contains the same ambiguous language as Article 120, UCMJ.

1. The plain language of the statute is ambiguous; therefore, summary court-martial punishments are the appropriate maximum punishment.

All punishments authorized by the President at courts-martial are found in Rule for Courts Martial (R.C.M.) 1003(b). R.C.M. 1003(c) limits those punishments based on the offenses committed and the status or rank of the accused. *United States v. Beaty*, 70 M.J. 39, 42 (C.A.A.F. 2011). These rules, however, do not cure the ambiguity of Article 120.

R.C.M. 1003(c)(1)(A) states "The maximum limits for the authorized punishments of confinement, forfeitures, and punitive discharge (if any) are set forth for each offense listed in Part IV of this Manual." Article 120, is physically listed in paragraph 45 of part IV of the 2012 MCM.[4] However, those provisions promised by R.C.M. 1003(c)(1)(A) are missing for the reasons discussed above. Instead, the text states that those guilty of sexual assault "shall be punished as a court-martial may direct."

[4] As discussed supra, the law contained in Parts I-V of the MCM is the purview of the President. However, the JSC republished the MCM without action from the President. There is an argument that Article 120 was not "listed in Part IV" because the President did not act. Whether or not it is listed the result is the same and the ambiguity is not cured as discussed below.

The Court of Appeals for the Armed Forces (CAAF) has "long adhered to the principle that criminal statutes are to be strictly construed, and any ambiguity resolved in favor of the accused." *United States v. Thomas*, 65 M.J. 132, 135 (C.A.A.F. 2007). *But see, Wiltberger,* 18 U.S. at 95 (finding a Court should not so strictly interpret a statute, as to negate the clear intention of the legislature.). When interpreting a statute and giving it effect, it is not enough to read it in isolation. Rather, the statute must be read in the context of the overall statutory scheme. *See, e.g., Davis v. Mich. Dep't of Treasury,* 489 U.S. 803, 809 (1989). Congress created the revised Article 120 in the context of Articles, 18, 19, and 20 of the UCMJ, which authorize three different types of courts-martial with three different levels of punitive authority. Art. 18, UCMJ; Art. 19, UCMJ; Art. 20, UCMJ. Congress could have limited dispositions under Article 120 to a specific forum but it declined to do so. Additionally, Congress could have issued interim maximum punishments, but it also failed to do that.

The military judge was left to determine a maximum punishment based on the ambiguous statement that a person guilty of sexual assault "shall be punished as court martial may direct." The rule of lenity requires that the intent of Congress be interpreted in favor of ET2 Schaleger. Therefore, the maximum punishment for ET2 Schaleger's alleged crimes is

capped at the jurisdiction maximum for the most favorable type of court-martial to him – a summary court-martial. The military judge did not err.

2. Even if this Court finds that Article 120 is not included in Part IV of the 2012 MCM, R.C.M. 1003(c)(1)(B) cannot cure the ambiguity.

Even if this Court finds that Article 120 was not listed in part IV, the Rule of Lenity, still requires the imposition of summary court martial punishments because it is the least prejudicial to ET2 Schaleger of all the options available. *See generally, Wiltberger*, 18 U.S. 76. R.C.M. 1003(c)(1)(B) cannot cure the ambiguity, because the rule was designed for crimes charged under clauses 1-3 of Article 134, UCMJ, which the President did not include in the MCM. *United States v. Leonard,* 64 M.J. 381, 384 (C.A.A.F. 2007) (Baker, J., concurring). There is no precedent for applying R.C.M. 1003(c)(1)(B) to determine a maximum sentence of a crime outside of Article 134. Article 134 expressly gives the court the discretion to set maximum punishments when the President has not provided a specific maximum. 10 U.S.C. 934 (2006). The military judges, however, are constrained by R.C.M. 1003(b) and (c). *Leonard,* 64 M.J. at 384. This policy reflects the need for good order and discipline within the military justice system and promotes flexibility. This statutory scheme does not contemplate

military judges retro-actively fixing ambiguous statutes created by Congress.

Other than the plain language of the rule, nothing expressly prohibits the application of these rules to this case. However, the application of R.C.M. 1003(c)(B)(ii) to this case, leads in a circle back to the original question before this Court- how to interpret the ambiguous statute. "For offenses not listed in part IV of the MCM which are included in or closely related to an offense listed in part IV," the maximum sentence shall be that of the listed offense. R.C.M. 1003(c)(2)(i). If an offense is not listed in part IV and R.C.M. 1003(c)(2)(i) does not apply, but it is punishable by the United States Code (USC) or the customs of service, those punishments are authorized. R.C.M. 1003(c)(2)(ii). None of these options is instructive.

A. Sexual assault is neither "included in", nor is it "closely related" to another article of the UCMJ.

Sexual assault is not a lesser included offense for any punitive article outside of Article 120. Additionally, no offenses are closely related as contemplated by R.C.M. 1003(c)(1). In *United States v. Ramsey,* the Government charged the appellant with Article 115, malingering, but then permitted the appellant to plead guilty to a lesser included offense under

Article 134, to reflect a lesser degree of culpability. 40 M.J. 71, 71 (C.M.A. 1994). The military judge found that the Article 134 offense was “included in” or “closely related to” Article 115 but refused to apply the maximum punishment of Article 115 which was 10 years. *Id.* at 73-74. The Court of Military Review found that the military judge erred by refusing to apply the maximum sentence of Article 115 in compliance with R.C.M. 1003(c)(1)(B)(i), but found no prejudice to the appellant. *Id.* at 76.

This case is very different from *Ramsey* in that it does not involve a specification under Article 134, and sexual assault is not a lesser included offense of any other article of the UMCJ. The Army Court of Military Review in *Ramsay* considered the elements of the offenses as well as the gravamen of the offenses. 35 M.J. 733, 736 (C.M.R. 1992). It found that the elements were very similar, as it was created from Article 115, and that the gravamen, or social cost, of the offenses were the same because both left a military unit shorthanded. *Id.*

The Government argues that assault consummated by a battery is “included in” or “closely related to” sexual assault. First, sexual assault is not a lesser included offense of battery. Second, the elements are quite different. They are:

Specification 1	**Specification 2**	**Assault Consummated by a Battery**
1) that ET2 Schaleger committed a sexual act upon another person and	1) that ET2 Schaleger committed a sexual act upon another person; and	1) that the accused did bodily harm to a certain person
2) that ET2 Schaleger knew or reasonably should have known that the other person was asleep.	2) that ET2 Schaleger knew or reasonably should have known that the other person was incapable of consenting due to impairment by an intoxicant	2) that the bodily harm was done with unlawful force or violence. Art. 128(b)(2), UCMJ.

To argue that a sexual assault is “essentially the same” as any other kind of battery is to ignore the plain language of the elements of both offenses. Article 120(b) is sexual in nature and requires knowledge. Article 128 requires “force or violence” which is contrary to the gravamen of Article 120(b). The essence of incapacitation is that force and violence are not required, and that the victims are extremely vulnerable. Indeed, if there were force or violence, the sexual assault could be charged under a different subsection of Article 120. Additionally, Congress intended sexual offenses to be treated

differently than battery offenses. The distinction is clear in the regular media coverage and continuous legislative amendments related to sexual assault. Sexual assaults are also considered more taboo by society at large. For these reasons sexual assault is neither included in nor closely related to assault consummated by a battery.

If this Court determines that Article 128 is closely related to Article 120(b), the analysis should end here because R.C.M. 1003(c)(1)(B)(ii) applies only when R.C.M. 1003(c)(1)(B)(i) does not.

B. 10 U.S.C. 920(b) is directly analogous to Article 120.

Under R.C.M. 1003(c)(1)(B)(ii) courts may consider analogous Federal statutes and their punishments or customs of service. The Government essentially argues that there are two options under the U.S.C.: 18 U.S.C. 2242(2)(A-B) (2012), or 10 U.S.C. § 920 (2006). As the military judge's ruling pointed out, this ignores the most relevant option. (Judge Booker's Ruling of 28 May 2010.) 10 U.S.C. § 920 (2012) is directly on point, and identical to Article 120, UCMJ. It also states that persons guilty of sexual assault, "shall be punished as court martial may direct." 10 U.S.C. § 920 (2012). By its terms, R.C.M. 1003(c)(2)(B)(ii) requires this Court to rely on 10 U.S.C. § 920 and again, contemplate the gap created by Congress.

The other options posited by the Government are untenable. The NDAA 2012 so greatly amended 10 U.S.C. § 920 (2006) that its terms no longer exist in the U.S.C. and therefore, cannot be applied in this case. *See generally, Beaty*, 70 M.J. at 44. (finding 18 U.S.C. § 2252a not analogous to an article 134 offense for possession of "what appeared to be child pornography", because the elements were not the same, and because that conduct was no longer chargeable under title 18).

18 U.S.C. 2242(2)(A-B) is strikingly similar to 10 U.S.C. § 920 (2006) and suffers from the same predicament. Congress intentionally amended title 10 so that it did not parallel 18 U.S.C., presumably because it did not promote the needs of the military. As a result of the amendments, the elements of the offenses are very different. In *United States v. Leonard*, the Court of Appeals for the Armed Forces (CAAF) held that using the maximum punishment directed by federal statute is only appropriate where there is a "directly analogous federal statute" that tracks every element of the criminal conduct and the *mens rea*. *Leonard*, 64 M.J. at 384. This holding is instructive here. The elements are:

Specification 1	**Specification 2**	**18 U.S.C. 2242(2)(A-B)**
1) that ET2 Schaleger committed a sexual act upon another person and	1) that ET2 Schaleger committed a sexual act upon another person; and	1) an individual engages in a sexual act with another person; and
2) that ET2 Schaleger knew or reasonably should have known that the other person was asleep.	2) that ET2 Schaleger knew or reasonably should have known that the other person was incapable of consenting due to impairment by an intoxicant	2) the other person is incapable of appraising the nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act.

Title 10 requires knowledge or constructive knowledge while Title 18 does not. The mens rea are different. These statutes are not “essentially the same.” The “directly analogous federal statute” in this case is 10 U.S.C. § 920. Finally, there is no consistent “custom of service” with regard to sexual assault. The maximum punishment has changed more than once in recent years.

Sexual assault is not included in or closely related to any other article of the UCMJ. There is no custom of service that dictates punishment in this case. The ambiguity remains

and the military judge was required to directly address the gap left by Congress.

II. The Ex Post Facto clause prevents the application of the maximum punishments provided in EO 13643.

"[A]ny statute which . . . makes more burdensome the punishment for a crime, after its commission . . . is prohibited as ex post facto. *Beazall v. Ohio*, 269 U.S. 167, 169-70 (1925); *United States v. Gorski*, 47 M.J. 370, 373 (C.A.A.F. 1997). "The Supreme Court has held that 'it is the effect, not the form, of the law that' makes it ex post facto and that legislation must 'give fair warning' of its effect so that people can rely on the law's meaning." *Gorski*, 47 M.J. at 373-74 (citing *Weaver v. Graham,* 450 U.S. 24, 28, 31 (1981)).

At the time of the alleged crime in this case, the maximum punishment under the ambiguous Article 120 was the maximum available at summary court-martial. This Court cannot impose a maximum sentence of 30 years confinement in accordance with EO 13643 because it would impermissibly increase the punishment.

The Governments argument that ET2 Schaleger would benefit from the imposition of EO 13643, necessarily incorporates the argument that life without parole was the appropriate punishment before the imposition of EO 13643. The Government's argument against ex post facto is disingenuous because its brief never

requests imposition of life without parole. Additionally, where the offense is not listed in the MCM, not included in or closely related, and not a custom of service, it cannot "be read to mean that the maximum sentence is the jurisdictional maximum of general court martial." *Beaty*, 70 M.J. at 44. As such, the maximum punishment for sexual assault under Article 120, UCMJ, (2012), has never been life without the possibility of parole. This Court cannot impose EO 13643, because that would impermissibly increase the maximum punishments available.

III. Where the legislative and executive branches fail to act, it is within the discretion of the judiciary to supply a maximum punishment, but not to the detriment of the accused.

"It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison,* 5 U.S. 137 (1803). *See also, Decker v. Northwest Envtl. Def. Ctr.,* 133 S. Ct. 1326, 1340-41 (2013) ("the purpose of interpretation is to determine the fair meaning of the rule--to "say what the law is."; "whatever [Congress] leaves vague in the statute will be worked out *by someone else*. . . So Congress's incentive is to speak as clearly as possible on the matters it regards as important.").

Intervening to reverse a military judge's exercise of discretion is proper only when it is apparent that the judge's

decision amounts to a "judicial usurpation of power." *Labella*, 15 M.J. at 229. Even gross negligence alone is not enough. *Id.* This Court cannot issue a writ to "control the decision of the trial court," it can only confine the lower court to the sphere of its discretionary power. *Will*, 389 U.S. at 104 (quoting *Bankers Life & Cas. Co. v. Holland,* 346 U.S. 379, 382 (1953)).

Article 134 expressly gives the court discretion to determine a maximum sentence where the President has not assigned one. *United States v. Jackson,* 17 U.S.C.M.A. 580, 583 (C.M.A. 1968). Here, the discretion of Judge Booker is not expressly given by statute, but given none the less. Congress delegated part of its legislative power to the Commander in Chief to assign maximum punishments for the UCMJ. Both Congress and the President failed to act with regard to assigning maximum punishments to Article 120 offenses that occurred between 28 June 2012 and 13 May 2013. Where the legislature and the Executive have left the statute ambiguous, it is within the discretion of the judiciary, to fill the gaps. While this Court may not agree with the specific rulings of Judge Booker, these rulings are within his discretion and not a usurpation of power.

If this Court determines that it has jurisdiction in this case, it should affirm Judge Booker's ruling.

JENNIFER L. MYERS
Lieutenant, JAGC, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
Bldg. 58, Ste. 100
Washington, D.C. 20374
Phone (202) 685-7713
Fax (202) 685-7426
jennifer.l.myers@navy.mil

Appendix

Lawanson v. United States, 2012 CCA LEXIS 345, 13-14 (N-M. Ct. Crim. App. Aug. 31, 2012)

Exhibits

A- Charge Sheet dated 14 May 2013.

B- CDR Lewis T. Booker, Ruling ICO U.S. v Schaleger of 28 May 2013.

C- Government Motion to Determine the Maximum Punishment for Article 120 Offenses of 17 May 2013.

D- Government Supplemental Motion to Determine the Maximum Punishment for Article 120 Offenses of 24 May 2013.

E- Defense Response to Government Motion Concerning Maximum Punishment for Specifications Charged Under Article 120 on 23 May 2013.

Certificate of Filing and Service

I certify that a copy of the foregoing was delivered to the Court and to Director, Appellate Government Division, and electronically filed on 12 July 2013.

JENNIFER L. MYERS
Lieutenant, JAGC, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
Bldg. 58, Ste. 100
Washington, D.C. 20374
Phone (202) 685-7713
Fax (202) 685-7426
jennifer.l.myers@navy.mil

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

In Re UNITED STATES, Petitioner Appellee v. Lewis T. BOOKER, JR, Commander, U.S. Navy (in his official capacity as Military Judge), Respondent Christopher J. SCHALEGER, ET2, U.S. Navy, Real Party in Interest Appellant	)	WRIT-APPEAL PETITION FOR REVIEW OF NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS DECISION ON APPLICATION FOR EXTRAORDINARY RELIEF Crim.App.Misc. Dkt. No. 20130247 USCA Misc. Dkt. No. _____/NA

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

JENNIFER L. MYERS
Lieutenant, JAGC, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
Bldg. 58, Ste. 100
Washington, D.C. 20374
Phone (202) 685-7713
Fax (202) 685-7426
jennifer.l.myers@navy.mil
CAAF Bar Number: 3595

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Preamble

Appellant, Electronics Technician Second Class (ET2) Christopher J. Schaleger, U.S. Navy, hereby requests this Court reinstate the military judge's ruling on sentence limitation and set aside the Navy-Marine Corps Court of Criminal Appeals' decision on Appellee's Writ of Mandamus Petition. A Writ of Mandamus should not issue here. Further, Appellant requests this Court stay all proceedings pending resolution of this Writ Appeal Petition, as addressed in Appellant's motion to stay the proceedings in *United States v. Schaleger*.

I

History of the Case

ET2 Schaleger stands accused of two specifications of sexual assault, in violation of Articles 120(b)(2) and 120(b)(3)(A), UCMJ. 10 U.S.C. § 920 (2012). The Convening Authority referred the charge and specifications to a general court-martial on May 14, 2013, alleging that ET2 Schaleger penetrated KL's vagina with his penis while she was either asleep or incapable of consenting due to impairment by an intoxicant. (Charge Sheet.)

On May 17, 2013, the trial counsel submitted a motion *in limine* to determine the maximum punishment for the specifications. (Appellate Ex. II.) He did so because the

President failed to assign maximum punishments to these offenses until May 15, 2013— the day after this case was referred to a general court-martial. (Appellate Ex. V, at 2.) The 2012 version of Article 120 stated only that a person convicted of sexual assault "shall be punished as a court-martial may direct." 10 U.S.C. § 920 (2012).

To fill this gap, the military judge first looked to Rule for Courts-Martial (R.C.M.) 1003(c)(1) and found that Article 120 was not included in Part IV of the Manual for Courts-Martial (MCM or Manual) as required by section (A), and that section (B) only applied to Article 134 offenses. (Appellate Ex. V, at 5.) He then found that the statutory language was ambiguous because it did not identify which type of court-martial should determine the maximum punishments. (Appellate Ex. V, at 9.) Given the ambiguity, the military judge applied the rule of lenity and found that ET2 Schaleger's maximum punishment should be the jurisdictional maximum for a summary court-martial as determined by Article 20, UCMJ, 10 U.S.C. § 920 (2012).

The Government appealed the military judge's ruling by seeking a writ of mandamus from the U.S. Navy-Marine Court of Criminal Appeals (NMCCA). *United States v. Booker*, No. 201300247, 2013 CCA LEXIS 771 (N-M. Ct. Crim. App. Sept. 20, 2013). In an unprecedented decision, the NMCCA issued the writ, applying R.C.M. 1003(c)(1)(B) to a punitive article other than

Article 134 for the first time. *Booker*, 2013 CCA LEXIS 771, at *22. The court also found that "the custom of the service" provides a maximum punishment of thirty years of confinement and a dishonorable discharge, and that the U.S. Code provides an analogous statute. *Id*. at *32.

ET2 Schaleger appeals this decision.

II

Relief Sought

ET2 Schaleger respectfully requests this Court (1) stay the proceedings; (2) set aside the NMCCA's ruling of September 20, 2013; and (3) reinstate the military judge's ruling of May 28, 2013.

III

Issue Presented

DID THE LOWER COURT ERR WHEN IT ISSUED A WRIT OF MANDAMUS DIRECTING A MILITARY JUDGE TO APPLY A MAXIMUM PUNISHMENT OF CONFINEMENT FOR THIRTY YEARS AND A DISHONORABLE DISCHARGE FOR AN OFFENSE THAT, AT THE TIME OF REFERRAL, ONLY AUTHORIZED PUNISHMENT "AS A COURT-MARTIAL MAY DIRECT?"

IV

Statement of the Facts

Congress drastically amended Article 120, UCMJ, with the National Defense Authorization Act (NDAA) for Fiscal Year 2012. Pub. L. No. 112-81, 125, 125 Stat. 1298 (2011). The amendments

included the addition of new punitive articles like Article 120, 120a, 120b, and 120c that applied to crimes committed on or after June 28, 2012. Manual for Courts Martial, United States, (MCM), Pt. IV, ¶ 45, Note at 68 (2012). The new provisions stated persons convicted under these new articles "shall be punished as a court-martial may direct." MCM, pt. IV, ¶ 45a.(b).

Congress did not include the subparagraphs that would normally address elements, explanations, lesser included offenses, sample specifications, and maximum punishments for any of the new provisions. MCM, pt. IV, ¶ 45, Note at 70. The President promulgates those materials under his authority to prescribe rules pursuant to Article 36, UCMJ.[1] *Id.*

President Obama issued Executive Order (EO) 13643-Amendments to the Manual for Courts-Martial, United States, on May 15, 2013. Exec. Order No. 13643, 78 Fed. Reg. 98 (May 21, 2013). EO 13643 assigned a maximum punishment of dishonorable discharge, forfeiture of all pay and allowances, and confinement for thirty years for the crimes of which ET2 Schaleger is accused. *Id*. at *47.

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[1] Article 36, UCMJ, provides, "[p]retrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence. . . ." 10 U.S.C. § 836 (2012)

The alleged sexual assault in this case occurred on December 7, 2012. (Charge Sheet.) The Government charged the offenses under the revised Article 120, UCMJ, and referred the charges to a general court-martial on May 14, 2013, the day before the President signed EO 13643. (Charge Sheet.) The following timeline illustrates these events:

May 22, 2013	***ET2 Schaleger is arraigned***
May 15, 2013	***President Promulgates Punishment***
May 14, 2013	***Charges Referred Against Appellant***
Dec. 7, 2012	***Alleged Assault Occurs***
June 28, 2012	***Revised Article 120 Takes Effect***
Dec. 31, 2011	***Congress Amends Article 120***

V

Reasons Why Writ Should Not Issue

A petitioner must satisfy three conditions before a court may provide extraordinary relief in the form of a writ of mandamus: (1) the party seeking the writ must have “no other adequate means to attain the relief;” (2) the party seeking the relief must show that the “right to issuance of the relief is clear and indisputable;” and (3) “even if the first two prerequisites have been met, the issuing court, in the exercise

of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Hasan v. Gross*, 71 M.J. 416, 418 (C.A.A.F. 2012) (citing *Cheney v. United States Dist. Court*, 542 U.S. 367, 380-81 (2004)).

The NMCCA erred in issuing the writ because the Government failed to carry its burden.

The Government is not entitled to relief because it had eighteen months to assign maximum punishments and it failed to do so.

It was error for the NMCCA to retroactively legislate maximum punishments to the prejudice of ET2 Schaleger by means of an extraordinary writ because the Government had very clear avenues of relief. For eighteen months it chose not to avail itself of those remedies.

To begin, the Government, and practitioners around the world, knew of the lack of a set maximum punishment in Article 120, UCMJ, from its 2011 inception. The NDAA 2012 was published for public comment on December 31, 2011. NDAA 2012, Pub. L. No. 112-81, 125 Stat. 1405, § 541 (b) (2011). The Joint Services Committee on Military Justice, which advises the United States Secretary of Defense on military justice matters, knew of this flaw. It included the following text in Part IV of the MCM under Article 120:

> The subparagraph[] that would normally address . . . maximum punishments . . . [is] generated under the

> President's authority to prescribe rules pursuant to Article 36. At the time of publishing this MCM, the President had not prescribed such rules for this version of Article 120. Practitioners should refer to the appropriate statutory language and, the extent practicable, use appendix 28 as a guide.

MCM, Pt. IV, ¶ 45 note at 70; *see also* U.S. Dep't of Army, Pam. 27-9, Military Judge's Benchbook, ¶ 3-45-12 (Jan. 1, 2010) (C11-11) (recognizing deficiency and attempting to offer guidance).

To prevent this gap in the law, Congress had the option to include interim punishments, as it did when it revised the UCMJ – including Article 120 – in 2006. *See* NDAA 2006, Pub. L. No. 109-163 § 552(b), 119 Stat. 3263 (2006). This time, Congress chose not to include such a safeguard.

Congress also had the option of designating the forum or a mandatory sentence for Article 120 offenses. *See, e.g.*, Article 106, UCMJ, 10 U.S.C. 906 (2012) (requiring trial by general court-martial and punishment of death). But Congress chose not to designate a forum or a mandatory punishment in the 2012 version of Article 120, UCMJ. For eighteen months, the Government knew of the absent maximum punishment and took no action to resolve the issue. The Government is not entitled to a writ of mandamus because it had other avenues of relief it chose not to pursue.

NMCCA erred in issuing the writ because the Government failed to establish that it had a clear and indisputable right to the writ of mandamus.

The Government bears the burden to show that it has a "clear and indisputable right" to the requested relief. Because the Government did not show that the military judge made a ruling that is contrary to statute, settled case law, or valid regulation, *Cheney*, 542 U.S. at 380-81, this Court should set aside the NMCCA's decision.

The Government is not entitled to a writ of mandamus because: (1) R.C.M. 1003 does not provide a maximum sentence for Article 120, UCMJ, and (2) the NDAA is ambiguous. Where a statute is ambiguous and no other statute provides clarity, the Court must apply the rule of lenity. That is what the military judge did here. He acted within his authority by finding that the maximum punishment for this offense was the jurisdictional maximum sentence for a summary court-martial.

a. Congress and the President share authority over the military.

"[M]ilitary discipline is an area of concurrent authority between Congress and the President." *United States v. Jones*, 68 M.J. 465, 477 (C.A.A.F. 2010) (Baker, C.J., dissenting). The Constitution grants power to Congress to "make rules for the government and regulation of the land and naval forces[.]" U.S.

Const. art. I, § 8, cl. 14. Congress exercises that power when it amends the articles of the UCMJ and Title 10 of the United States Code through the annual NDAA. *See, e.g.*, NDAA 2012, Pub. L. No. 112-81, 125 Stat. 1405, § 541 (b).

But Congress delegated some of this power to the President, due to his role as Commander-in-Chief. U.S. Const. art. II, § 2. Article 36, UCMJ, for example, provides the President with the power to make pre- and post-trial rules, including modes of proof, while Article 56, UCMJ, permits the President to prescribe maximum punishments. As a result of these articles, the President promulgates the MCM, which includes: a Preamble (Part I), the Rules for Courts-Martial (R.C.M.) (Part II), the Military Rules of Evidence (M.R.E.) (Part III), the Punitive Articles (Part IV), and Nonjudicial Punishment Procedure (Part V). MCM, Pt. I, ¶ 4.

Relevant here, Article 56, UCMJ, states, "[t]he punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense." The President defined all acceptable punishments in R.C.M 1003(a). MCM, Pt. II. The President then limited the use of those punishments based on "offenses," "rank of the accused," "reserve status," and "status as a person serving with or accompanying an armed force in the field." R.C.M. 1003(c), MCM, Pt. II.

Section (1) of R.C.M. 1003, “Based on Offenses,” is at issue here. It provides guidance on how to determine the maximum sentence for each offense based on whether the offense is “listed in Part IV” of the Manual or “not listed in Part IV” of the Manual.

b. The new Article 120 is not “included in” Part IV of the Manual for Courts-Martial.

R.C.M. 1003(c)(1)(A) states, “[t]he maximum limits for the authorized punishments of confinement, forfeitures and punitive discharge (if any) are set forth for each offense listed in Part IV of this Manual.” In 2012, the Joint Services Committee (JSC) released a new edition of the Manual, without the authority of an executive order. The JSC included the text of the revised Article 120 but did not add additional materials usually drafted by the President. Because Article 120 did not list these punishments, Article 120 was not “included in” Part IV.

Further, Parts I-V of the Manual can only be amended by an Executive Order. MCM, Pt. I, ¶ 4; Chris Kennebeck,[2] The Joint Service Committee on Military Justice (JSC)- Part 2, National Institute of Military Justice Blog- CAAFlog, (June 26, 2012), http://www.caaflog.com/2012/06/26/the-joint-service-committee-on-military-justice-jsc-part-ii/. Those EOs are drafted with

[2] LtCol Kennebeck is Policy Branch Chief, Criminal Law Division, Office of the Judge Advocate General of the Army and Executive Secretary of the Joint Service Committee on Military Justice.

the advice of the Secretary of Defense (SECDEF), who is required to review the MCM annually and provide recommendations for amendments to the President. MCM, Pt. I, ¶ 4; Chris Kennebeck, *The Joint Service Committee on Military Justice* (JSC)- Part 1, National Institute of Military Justice Blog- CAAFlog, (June 19, 2012), http://www.caaflog.com/2012/06/19/the-joint-service-committee-on-military-justice-jsc-part-i/ (hereinafter Kennebeck, Part 1). SECDEF accomplishes this requirement through the JSC, which collects proposals and develops recommendations pursuant to DOD Directive 5500.17, Role and Responsibilities of the Joint Service Committee. MCM, Pt. I, ¶ 4. If approved by the majority of the voting group, these proposals are added to the JSC's "annual review," which eventually becomes the EO. Kennebeck, Part 1.

"The MCM is intended to be an all-in-one reference for the deployed attorney far from civilization, and its design is reflective of that goal." Kennebeck, Part 1. Because of its broad scope, much of the language in the Manual is guidance, rather than law, meant to provide support and extra information to the forward deployed judge advocates. *See* MCM, Pt. I, ¶ 4, Discussion (referencing supplementary materials published by DOD and DHS which accompany the MCM).

To be clear, Congress has not delegated its legislative powers to the JSC. However, the 2008 Manual became so outdated

that the JSC published the 2012 Manual, despite the fact that the President had not enacted an EO. *See* MCM, Pt. IV, ¶ 45 n.2 (2012 ed.); Kennebeck, Part 1. Like all statutes passed by Congress, each NDAA "take[s] effect on the date of its enactment," regardless of whether the President has revised the MCM. *United States v. Pritt*, 54 M.J. 47, 50 (C.A.A.F. 2000) (citing *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991)). So the JSC included only the language from the UCMJ in Part IV and did not include elements or a regular maximum punishment paragraph, because none existed. *See* MCM, Pt. IV, at 70 (2012 ed.); Kennebeck, Part 1.[3]

Because the JSC was not authorized to revise Part IV of the Manual, Article 120, UCMJ, was not included in Part IV as contemplated by R.C.M. 1003.

c. R.C.M. 1003(c)(1)(B) applies only to offenses charged under Article 134, UCMJ, because of the language used in the statute and because Article 134 is treated differently.

R.C.M. 1003(c)(1)(B) does not apply to offenses outside of Article 134, UCMJ. Indeed, concurring in *United States v. Leonard*, then-Judge Baker suggested as much. 64 M.J. 381, 384 (C.A.A.F. 2007) (Baker, J., concurring) (noting the language of Article 134 — "punished at the discretion of the court" – "must

[3] As explained in the title to Part IV, "Statutory text of each Article is in bold" for each paragraph of Part IV.

be read in light of the President's adoption of R.C.M. 1003(c)(1)(B)."). That is because Article 134 is fundamentally different than other articles in the code. So it is treated differently. In *Parker v. Levy*, 417 U.S. 733, 756 (1974), the Supreme Court addressed the special needs of the military and affirmed the use of Article 92 and Article 134, to maintain good order and discipline. But this unique statutory/regulatory scheme — required under the idiosyncratic Article 134 — does not contemplate military judges retroactively fixing ambiguous statutes created by Congress.

The language of R.C.M. 1003(c)(1)(B) and Article 134 mirror each other. R.C.M. 1003(c)(1)(B) states,

> [f]or offenses not listed in Part IV of this Manual which is included in or closely related to an offense listed therein the maximum punishment shall be that of the offense listed. . . . An offense not listed in Part IV and not included in or closely related to any offense listed therein is punishable as authorized by the United States Code, or as authorized by the custom of service.

MCM, Pt. II. Article 134 contemplates charging a "breach of custom of the service" under Clause 1. 10 U.S.C. § 834(c)(2)(B). And Article 134, UCMJ, distinguishes cases based on whether they are listed or not listed in the Manual. The R.C.M. calls them "Offenses not listed Part IV." And, Article 134(a) states:

> Though *not specifically mentioned in this chapter*, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

MCM, Pt. IV.

The Article 134 section of the Military Judge's Benchbook is also instructive. It encourages military judges to give different instructions based on offenses "that are not specifically listed in the MCM," and "[t]hose Article 134 offenses that are specifically listed in the MCM." 1-3 Dep't of Army Pamphlet 3-60-1 (citing 3-60-2A, -61-1 through 3-113-1). The Article 134 section of the Military Judge's Benchbook also defers to R.C.M. 1003(c)(1)(B) to determine a maximum sentence for those offenses not specifically listed and for federal statutes charged under Article 134. 1-3 Military Judges' Benchbook 3-60-2A, 3-60-2B.

The NMCCA's ruling is unprecedented. It exploits a provision intended for Article 134 offenses. Research fails to uncover any case applying R.C.M. 1003(c)(1)(B) to a matter not involving an Article 134 offense. (Judge Booker's ruling, at 5, 7.) Given this dearth of precedent, the Government cannot show

it has a clear and indisputable right to the writ. But there is more.

d. If R.C.M. 1003(c)(1)(B) is applied to Article 120, UCMJ, offenses, sections (i) and (ii) do not provide a maximum sentence.

The application of R.C.M. 1003(c)(1)(B) to Article 120 is error. If this Court disagrees, R.C.M. 1003(c)(1)(B) still does not provide a maximum punishment here.

1. Aggravated sexual assault is not "included in" or closely related to any offense listed in Part IV of the Manual for Courts-Martial.

Sexual assault is not a lesser included offense for any punitive article outside of Article 120. Additionally, no offenses within Part IV are closely related to aggravated sexual assault. This Court has considered the standard of "closely related" in other cases. To determine if offenses are closely related, this Court should consider the elements of the offenses and the gravamen, or social cost, of the offenses. *United States v. Ramsey*, 35 M.J. 733, 736 (C.M.A. 1992).

In *United States v. MacDonald*, 39 M.J. 173 (C.M.A. 1994), this Court found that an Article 134 offense for inducing female recruits to disrobe and videotaping them without their knowledge was more closely related to indecent act than to disorderly conduct (voyeurism). There, this Court considered the elements of each offense and relied on the fact that the appellant caused

the women to undress. *Id*. at 175. That constituted conduct "with another person," as required by indecent acts. *Id.* This Court then held that indecent act was more closely related in that case. *Id*.

In *United States v. Bivins*, 49 M.J. 328 (C.A.A.F. 1998), this Court considered the maximum punishment for an Article 134 offense where a person married someone who was already married. There, "bigamy" in Article 134 contemplated that the accused would be married to another person, rather than the accused's spouse being married. *Id*. at 329. Without applying R.C.M. 1003(c)(1)(B), this Court decided that the charged offense was permissible either under Article 134 or under Article 77. *Id*. at 332.

Here, the NMCCA erred in finding that the military judge should have considered the maximum punishments for the 2006 version of Article 120. Even though those provisions technically remained in Part IV, the NDAA 2012 so greatly amended 10 U.S.C. § 920 (2006) that its terms no longer exist in the United States Code. Therefore, it cannot be applied in this case, whether or not it had been physically excised from Part IV of the Manual. *See generally*, *United States v. Beaty*, 70 M.J. 39, 44 (C.A.A.F. 2011) (finding 18 U.S.C. § 2252a not analogous to an article 134 offense for possession of "what appeared to be child pornography," because the elements were not the same, and

because that conduct was no longer chargeable under Title 18 of the U.S. Code).

The NMCCA also considered assault consummated by a battery under Article 128 and sodomy under Article 125. But the elements of the offenses are quite different from Article 120. The different elements of assault consummated by a battery are illustrated here:

Specification 1	**Specification 2**	**Assault Consummated by a Battery**
1) ET2 Schaleger committed a sexual act upon another person; and	1) ET2 Schaleger committed a sexual act upon another person; and	1) the accused did bodily harm to a certain person; and
2) ET2 Schaleger knew or reasonably should have known that the other person was asleep. (Charge Sheet.)	2) ET2 Schaleger knew or reasonably should have known that the other person was incapable of consenting due to impairment by an intoxicant. (Charge Sheet.)	2) the bodily harm was done with unlawful force or violence. Art. 128(b)(2), UCMJ.

Article 120(b) is sexual in nature and requires knowledge or constructive knowledge. Article 128 requires “force or violence” which is contrary to the gravamen of Article 120(b). By definition, if incapacitation is the theory advanced, then force and violence are not required. Indeed, if there was force or violence, the sexual assault would be charged under a different subsection of Article 120. Additionally, Congress intended sexual offenses to be treated different than battery

offenses. The distinction is clear in the regular media coverage and continuous legislative amendments related to sexual assault and Article 120. Society considers sexual assaults to be more taboo than garden variety assault. For these reasons, sexual assault is neither included in nor closely related to assault consummated by a battery.

Sodomy requires only that the accused engage in unnatural carnal copulation with another person. Art. 125, UCMJ, 10 U.S.C. 925 (2012). Unnatural carnal copulation includes specific "sexual acts"- the penetration of a person's mouth or anus with another person's sexual organ. MCM, Pt. IV, ¶ 51.c. In this respect it is similar to Article 120. But, sodomy regulates consensual conduct and therefore cannot be called an assault of any kind. In *United States v. Marcum*, this Court also suggested that the gravamen of the offense of sodomy is prejudice to good order and discipline in the armed forces. 60 M.J. 198 (C.A.A.F. 2004). This is also quite distinct from sexual assault, in which there is a named victim.

2. 10 U.S.C. § 920 codifies Article 120, UCMJ, and is directly analogous to aggravated sexual assault.

Under R.C.M. 1003(c)(1)(B)(ii), courts may consider analogous Federal statutes and their punishments or customs of the service if the crime is not included in or closely related to a crime listed in Part IV. The NMCCA adopted the

Government's argument that 18 U.S.C. 2242(2)(A-B) (2012) is analogous to the charges in this case. But R.C.M. 1003(c)(1)(B)(ii) requires analysis under a different standard than "closely related." Courts require that the statues be "essentially the same" and require the same elements and the same *mens rea*. *Leonard*, 64 M.J. at 384.

As the military judge's ruling noted, the NMCCA's use of 18 U.S.C. 2242 (2)(A-B) ignores the most relevant option. (Judge Booker's Ruling, May 28, 2010.) 10 U.S.C. § 920 (2012) is not just essentially the same, but it is exactly the same as Article 120, UCMJ. By its plain terms, R.C.M. 1003(c)(2)(B)(ii) requires this Court to rely on 10 U.S.C. § 920 and contemplate the gap created by Congress and the President. The court-martial here ruled that the punishment be set at the jurisdictional maximum for a summary court-martial. Given the President's failure to act, the Government does not have a clear and indisputable right to anything else.

While, 18 U.S.C. § 2242(2)(A-B) is strikingly similar to 10 U.S.C. § 920 (2006), it suffers from the same predicament as the earlier statute. Congress intentionally amended Title 10 so that it did not parallel 18 U.S.C. § 2242(2)(A-B), presumably because it did not promote the needs of the military. As a result of the amendments, the elements of the offenses are too different to be considered closely related.

In *United States v. Leonard*, this Court held that using the maximum punishment directed by federal statute is only appropriate where there is a "directly analogous federal statute," that is, it tracks every element of the criminal conduct and the *mens rea*. 64 M.J. at 384. This holding is instructive here.

The elements of the charged offenses and 18 U.S.C. § 2242(2)(A-B) are:

Specification 1	**Specification 2**	**18 U.S.C. § 2242(2)(A-B)**
1) ET2 Schaleger committed a sexual act upon another person; and	1) ET2 Schaleger committed a sexual act upon another person; and	1) an individual engages in a sexual act with another person; and
2) ET2 Schaleger knew or reasonably should have known that the other person was asleep.	2) ET2 Schaleger knew or reasonably should have known that the other person was incapable of consenting due to impairment by an intoxicant	2) the other person is incapable of appraising the nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act.

Title 10 requires knowledge or constructive knowledge while Title 18 does not. The *mentes reae* are different. These statutes therefore are not "essentially the same." The

"directly analogous federal statute" in this case is 10 U.S.C. § 920, just as Judge Booker ruled.

3. The NMCCA erred by finding thirty years of confinement and a dishonorable discharge to be a punishment dictated by "custom of the service" because Article 120 has gone through dramatic changes.

The NMCCA relied also relied on "custom of the service." But there is no consistent "custom of the service" with regard to the crime charged in this case.

Clause 1 of Article 134, UCMJ, states that a custom is a common usage that has attained the force of law. "Customs of the service are 'sometimes called common law of the Army' and signify 'generally a right or law not written, but established by long usage.'" Eugene R. Fidell, *et al*., *Military Justice: Cases and Materials*, Pt. IV, notes and questions 6 (2d ed. 2012) (citing Jason A. Moss, *Officer's Manual* 227 (1917)). "A custom's validity is established by a number of factors, including 1) habitual or long-established practice; 2) continuance without interruption; 3) continuance without dispute; 4) reasonableness; 5) certainty; 6) compulsoriness; 7) inherent consistency between customs." Fidell, *supra*, at 6 (citing *Martin v. Mott*, 25 U.S. 19, 35 (1827)).

Military courts have considered customs of the service, but not in cases like this one. In *United States v. Pratt*, the appellant was accused of failing to initiate a search for a

vessel in distress, which was his duty as the officer in charge of a lifeboat station. 34 C.M.R. 731, 733 (C.G.B.R. 1963). The Coast Guard Board of Review found that there is a custom of the service, that "you have a duty to go, you don't have a duty to come back," in reference to duties to mariners in distress. *Id*. at 734. In *United States v. Wilson*, 33 M.J. 797, 798 n.1 (A.C.M.R. 1991), the Court of Military Review found that respect of the nation's flag is a custom of the service. And, more recently in *United States v. Simmons*, 63 M.J. 89 (C.A.A.F. 2006), this Court found that Marines and Sailors have a duty to break-up fights as a custom of the service.

The Manual recognizes that many of the service customs are recorded in service instructions and can be charged under Article 92, UCMJ. Art. 134(c)(2)(b). The Manual also recognizes that customs can be codified but, where they are contradicted by statute, the custom is no longer valid. Art. 134(c)(2)(b).

Here, there is no custom of the service to define a maximum punishment for sexual assault. Sexual Assault and Rape have undergone numerous and extensive revisions in the Uniform Code of Military Justice's sixty-year history. In the 2005 Manual, the crime in this case was called rape and in the 2008 edition it was called aggravated sexual assault, under Article 120. MCM, Pt. IV, ¶ 45.c.(b) (2005); MCM, Pt. IV, ¶ 45.c(2) (2008).

Until October 2007, it carried a maximum punishment of death, which directly contradicts the NMCCA's opinion that the custom of the service is thirty years and a dishonorable discharge. Art. 120(e), UCMJ, 10 U.S.C. 920 (2005); MCM, Pt. IV, ¶ 45.e.(1) (2005). More than just the name and maximum punishments, the statutes themselves have changed over the years.

Thus, the NMCCA erred in finding that there is a custom to assign a maximum punishment of thirty years confinement and a dishonorable discharge to the crime charged here.

e. Because Congress and the President failed to establish a maximum sentence for Article 120, UCMJ, and the wording of the statute is ambiguous, the rule of lenity must apply.

"As a court-martial may direct" is ambiguous because it does not specify which type of court-martial, and the punishments available at general, special, and summary courts-martial are very different. Art. 18, 19, 20, UCMJ. Where the offense is not listed in the MCM, not included in or closely related, and not a custom of the service, it cannot "be read to mean that the maximum sentence is the jurisdictional maximum of a general court martial." *Beaty*, 70 M.J. at 44.

This Court has "long adhered to the principle that criminal statutes are to be strictly construed, and any ambiguity resolved in favor of the accused." *United States v. Thomas*, 65 M.J. 132, 135 (C.A.A.F. 2007). When interpreting a statute and

giving it effect, it is not enough to read it in isolation. Rather, the statute must be read in the context of the overall statutory scheme. *See, e.g.*, *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). Congress created the revised Article 120 in the context of Articles, 18, 19, and 20 of the UCMJ, which authorize three different types of courts-martial with three different levels of punitive authority. Arts. 18, 19, 20, UCMJ. Congress could have limited dispositions under Article 120 to a specific forum, as it did with Article 106, but it declined to do so. Additionally, Congress could have issued interim maximum punishments, but it also failed to do that. The President did not act until two days after referral of charges in this case.

The military judge was left to determine a maximum punishment based on the ambiguous statement that a person guilty of sexual assault "shall be punished as a court-martial may direct." The rule of lenity requires that the intent of Congress be interpreted in favor of ET2 Schaleger. Therefore, the maximum punishment for ET2 Schaleger's alleged crimes is the jurisdiction maximum for the most favorable type of court-martial to him – a summary court-martial. The military judge did not err. And more importantly, the Government has no clear and indisputable right to a writ that directs anything else.

f. The maximum punishments provided by EO 13643 cannot be applied to this case because they are harsher and it would violate the Ex Post Facto clause.

"[A]ny statute which . . . makes more burdensome the punishment for a crime, after its commission . . . is prohibited as ex post facto." *Beazall v. Ohio*, 269 U.S. 167, 169-70 (1925) (citing U.S. Const. art. I, § 9; *United States v. Gorski*, 47 M.J. 370, 373 (C.A.A.F. 1997). EO 13643 has the force of a statute in the military context; its provisions were enacted through Articles 36 and 56 of the UCMJ. At the time of the alleged offense, the maximum punishment under the ambiguous Article 120 was the maximum available at summary court-martial. This Court cannot impose a maximum sentence of thirty years confinement in accordance with EO 13643 because it would impermissibly increase the punishment.

It was error for the NMCCA to issue the writ of mandamus because the military judge acted within his discretion when Congress and the President failed to act.

"It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137 (1803). "[T]he purpose of interpretation is to determine the fair meaning of the rule--to 'say what the law is;' whatever [Congress] leaves vague in the statute will be worked out *by someone else*. . . . So Congress's incentive is to speak as clearly as possible on the matters it regards as important."

Decker v. Northwest Envtl. Def. Ctr., 133 S. Ct. 1326, 1340-41 (2013). Here, the military judge was that "someone else." Intervening to reverse a military judge's exercise of discretion is proper only when it is apparent that the judge's decision amounts to a "judicial usurpation of power." *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983). Even gross negligence does not constitute usurpation of power. *Id.* The NMCCA cannot issue a writ to "control the decision of the trial court," it can only confine the lower court to the sphere of its discretionary power. *United States v. Will*, 389 U.S. 90, 104 (1967) (quoting *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382 (1953)). Here, Judge Booker was within his sphere of power when he made his sentence ruling.

Both Congress and the President failed to act with regard to assigning maximum punishments to Article 120 offenses that occurred between June 28, 2012, and May 15, 2013. Where the Legislature and the Executive have left the statute ambiguous, it is within the discretion of the Judiciary to fill the gaps. While this Court may not agree with the specific rulings of Judge Booker, these rulings are within his discretion and not a usurpation of power. The NMCCA erred by issuing the writ of mandamus. This Court should set that decision aside and reinstate Judge Booker's ruling.

Conclusion

A writ of mandamus is an extraordinary remedy that requires an extraordinary showing. Appellee cannot shoulder this heavy burden; rather, it only showed disagreement. This case merits no extraordinary relief, as the ruling of the military judge was clearly not a judicial usurpation of power.

JENNIFER L. MYERS
Lieutenant, JAGC, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
Bldg. 58, Ste. 100
Washington, D.C. 20374
Phone (202) 685-7713
Fax (202) 685-7426
jennifer.l.myers@navy.mil
CAAF Bar Number: 3595

Appendix

1. *United States v. Booker*, No. 201300247, 2013 CCA LEXIS 771 (N-M. Ct. Crim. App. Sept. 20, 2013)
2. Charge Sheet referred May 14, 2013
3. Judge Booker’s Ruling dated May 28, 2013
4. Judge Booker’s Supplemental Ruling dated May 30, 2013
5. Petition for Extraordinary Relief in the Nature of a Writ of Mandamus
6. Respondent’s [sic] Opposition to the Government’s Petition
7. Reply to Real Party in Interest’s Opposition

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to the trial judge, and to the appellee on October 10, 2013. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 7,006 words. This brief complies with the typeface and type style requirement of Rule 37 because this brief has been prepared in a monospaced typeface using Microsoft Word Version 2012 with 10 characters per inch and Courier New style.

JENNIFER L. MYERS
Lieutenant, JAGC, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
Bldg. 58, Ste. 100
Washington, D.C. 20374
Phone (202) 685-7713
Fax (202) 685-7426
jennifer.l.myers@navy.mil
CAAF Bar Number: 3595

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS WASHINGTON, D.C.

Before
M.D. MODZELEWSKI, E.C. PRICE, C.K. JOYCE
Appellate Military Judges

UNITED STATES OF AMERICA
(Petitioner)

v.

COMMANDER LEWIS T. BOOKER, JR., JAGC, USN
MILITARY JUDGE
(Respondent)

CHRISTOPHER SCHALEGER
ELECTRONICS TECHNICIAN SECOND CLASS (E-5), USN
(Real Party in Interest)

NMCCA 201300247
Review of Petition for Extraordinary Relief in the Nature of a Writ of *Mandamus*

Military Judge: CDR Lewis T. Booker, JAGC, USN.
Convening Authority: Commander, Navy Region Northwest, Silverdale, WA.
For Petitioner: Col Stephen Newman, USMC; Mr. Brian Keller, Esq.; LT Ian D. MacLean, JAGC, USN.
For Real Party in Interest: LT Jennifer Myers, JAGC, USN.

20 September 2013

PUBLISHED OPINION OF THE COURT

PRICE, Judge:

I. Introduction

Petty Officer Schaleger was charged with two specifications of sexual assault in violation of the recently amended Articles

120(b)(2) and 120(b)(3)(A), Uniform Code of Military Justice, 10 U.S.C §§ 920(b)(2) and 920(b)(3)(A) (2012).[1] On 28 May 2013, the military judge ruled that the maximum punishment authorized for each specification alleging sexual assault was the jurisdictional limitation of a summary court-martial to include confinement for one month and no punitive discharge.

In its Petition for Extraordinary Relief, the Government requests that this court issue a writ of *mandamus* setting aside the military judge's ruling and directing him to apply the correct maximum authorized punishment for each specification of sexual assault to include 30 years confinement and a dishonorable discharge.

II. Background

Petty Officer Schaleger, the Real Party in Interest (Real Party), allegedly sexually assaulted a named victim by penetrating her vulva with his penis when he either "knew or reasonably should have known" that she was "asleep" (Specification 1), or was "incapable of consenting due to impairment by an intoxicant" (Specification 2). The sexual assault allegedly occurred on 7 December 2012 and was charged in violation of the amended Articles 120(b)(2) and 120(b)(3)(A), which apply to offenses committed on or after 28 June 2012. The Charge and two specifications were preferred on 31 January 2013, referred for trial by general court-martial on 14 May 2013, and Petty Officer Schaleger was arraigned on the alleged offenses on 22 May 2013. Trial was expected to commence on or after 16 July 2013.

The amendments to Article 120 applicable to offenses committed on or after 28 June 2012 did not specify the maximum punishments for the offenses, but authorized punishment "as a court-martial may direct." Arts. 120(b)(2) and 120(b)(3)(A), UCMJ. On 15 May 2013, the President amended Paragraph 45 of Part IV of the Manual for Courts-Martial, establishing the maximum punishment authorized for sexual assault to include a dishonorable discharge and confinement for 30 years. Executive Order 13643 of 15 May 2013. On 17 May 2013, the Government filed a Motion *in Limine* requesting that the military judge determine the maximum authorized punishment for the two alleged

[1] The Fiscal Year 2012 National Defense Authorization Act (NDAA) amended Article 120, UCMJ, including the offense of sexual assault and is applicable to offenses committed on or after 28 June 2012. *See* NDAA for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298, 1404-07 (2011) (codified as amended at 10 U.S.C. § 920).

sexual assault specifications included "a dishonorable discharge" and either "confinement for 30 years" or "confinement for life without the possibility of parole." Appellate Exhibit II at 3.

In a written ruling of 28 May 2013, the military judge stated that "[b]ecause the 2011 amendments did not specify punishments, and because the President has only within the last two weeks set out limitations, one must look to other sources for determining available punishments." AE V at 4. In addressing these other sources, he ruled that:

> Upon consideration of the revision to the substantive portion of the Uniform Code of Military Justice, the parties' arguments, the Executive Order purporting to effect the 2011 amendments to the UCMJ, and case law, it is the court's determination that the maximum imposable punishment for each offense alleged, and for each lesser included offense, is the jurisdictional limitation of a summary court-martial: confinement for 1 month, restriction for 2 months, hard labor without confinement for 45 days, and forfeiture of 2/3 pay per month for 1 month. . . .
>
> . . . .
>
> Applying the Rule of Lenity leads to the conclusion that, while a service member may be convicted of the offenses established by the 2011 amendments, thus giving effect to the intent of the legislature to criminalize sexual offenses, the maximum punishment that can be imposed is the statutory limit imposed on a summary court-martial. . . . irrespective of forum.

Id. at 1 and 9.

On 21 June 2013, the Government filed its Petition for Extraordinary Relief in the Nature of a Writ of *Mandamus* and Motion to Stay the Trial Proceedings. In his "Opposition," the Real Party, Petty Officer Schaleger, argued that we lack jurisdiction to act upon the Government's petition under Articles 62 and 66, UCMJ, and, in the alternative, that the Government failed to meet the high burden required to merit "extraordinary relief." Opposition to the Government's Petition for Extraordinary Relief of 12 Jul 2013 at 4. In its Reply, the Government argued that issuance of the requested relief would be

in "aid of" our jurisdiction and authorized under the All Writs Act. Government's Reply of 19 Jul 2013 at 5-6.

III. All Writs Act

"[A]ll courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) [hereinafter "All Writs Act"]; *see also United States v. Denedo*, 556 U.S. 904, 911 (2009); RULE FOR COURTS-MARTIAL 1203(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), Discussion. "'[M]ilitary courts, like Article III tribunals, are empowered to issue extraordinary writs under the All Writs Act.'" *LRM v. Kastenberg*, 72 M.J. 364, 367 (C.A.A.F. 2013) (quoting *Denedo*, 556 U.S. at 911). The All Writs Act does not serve as "an independent grant of jurisdiction, nor does it expand a court's existing jurisdiction." *Id.* (citing *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999)). "Rather, the All Writs Act requires two determinations: (1) whether the requested writ is 'in aid of' the court's existing jurisdiction; and (2) whether the requested writ is 'necessary or appropriate.'" *Id.* (quoting *Denedo*, 66 M.J. at 119).

A writ of mandamus is "a drastic instrument which should be invoked only in truly extraordinary situations." *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983) (*per curiam*) (citations omitted). "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Association*, 319 U.S. 21, 26 (1943) (citations omitted). Only exceptional circumstances amounting to a "clear abuse of discretion or usurpation of judicial power," *Bankers Life & Casualty Co.* v. *Holland,* 346 U.S. 379, 383 (1953) (citation and internal quotation marks omitted), "justify the invocation of this extraordinary remedy, *Will v. United States*, 389 U.S. 90, 95 (1967) (citation omitted)." "To prevail on [a] writ of mandamus, [the Petitioner] must show that: (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances." *Hasan v. Gross*, 71 M.J. 416, 418 (C.A.A.F. 2012) (citing *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004)).

IV. Jurisdiction

We must first determine whether our jurisdiction extends to the review of a Government petition for extraordinary relief under the All Writs Act. As a preliminary matter, both the Government and the Real Party agree that the military judge's ruling on the maximum punishment authorized for the charged sexual assault specifications is not subject to appeal by the United States under Article 62, UCMJ (Article 62).

The Real Party contends that we have no authority to entertain the Government's petition as "Congress has limited the Government's right to an interlocutory appeal to only those instances covered by Article 62, UCMJ." Opposition at 5. He asserts that we do not have jurisdiction over this petition under Article 66, and that the issuance of a writ of *mandamus* "would usurp the limitations placed on [interlocutory] appeals in Article 62 by Congress." *Id.* at 7.

The Government responds with three separate arguments: first, that "nothing in the text of the All Writs Act" limits our authority to issue a writ when requested by the Government; second, that other service courts have rejected the Real Party's argument; and third, that Article III Federal "courts agree that the United States may petition for a writ under the All Writs Act." Reply at 2-3. We agree.

A. Do service Courts of Criminal Appeals have the authority to entertain Government petitions for extraordinary relief?

For the reasons discussed below, we conclude that we have jurisdiction under the All Writs Act to entertain this petition for extraordinary relief filed by the United States for an issue not subject to appeal by the Government under Article 62.

In 1979, the Court of Military Appeals addressed essentially the same jurisdictional question presented here, at a time when the extant version of Article 62 did not permit interlocutory appeal by the Government. *See Dettinger v. United States*, 7 M.J. 216, 217 (C.M.A. 1979) (citing Article 62(a), UCMJ) (Article 62 did not authorize Government appeal of a "trial judge's order dismissing a charge[.]"). The court concluded "that in an appropriate case the Government may, by application for extraordinary relief, subject a dismissal of charges by a trial judge to the scrutiny of the Court of Military Review." *Id.* at 222.

The court noted "that the Uniform Code discloses no legislative purpose to forbid the military appellate courts from considering an application for extraordinary relief from a trial judge's action only because the petitioner is the Government." *Id*. The court also noted that it was "convinced of the absence of merit in the petitioners' thesis that lacking authority to hear appeals on behalf of the Government, a Court of Military Review lacks inherent power to hear petitions for extraordinary relief on behalf of the Government." *Id*. (internal quotation marks omitted).

In 1983, Article 62 was amended to allow Government interlocutory appeal of military judge orders or rulings "which terminate[d] the proceedings with respect to a charge or specification or which exclude[d] evidence that is substantial proof of a fact material in the proceeding." *See* The Military Justice Act of 1983, Pub. L. No. 98-209 (1983). Article 62 now enumerates particular actions by a military judge that "the United States may appeal."[2] This plain, unambiguous language clearly conveys Congress's intent to limit the Government's right to interlocutory appeal under Article 62 itself to these enumerated bases. *See Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) ("when the statute's language is plain, the sole function of the courts--at least where the disposition required by the text is not absurd--is to enforce it according to its terms.") (citation and internal quotation marks omitted).

Article 62 is silent as to what effect, if any, this specified right to interlocutory appeal has on service court authority to hear petitions for extraordinary relief on behalf of the Government under Article 66 or otherwise. The legislative history of the various revisions to Article 62

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[2] § 862. Art. 62. Appeal by the United States

(a) (1) In a trial by court-martial in which a military judge presides and in which a punitive discharge may be adjudged, the United States may appeal the following (other than an order or ruling that is, or that amounts to, a finding of not guilty with respect to the charge or specification):

(A) An order or ruling of the military judge which terminates the proceedings with respect to a charge or specification.

(B) An order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding.

(C) An order or ruling which directs the disclosure of classified information.

(D) An order or ruling which imposes sanctions for nondisclosure of classified information.

(E) A refusal of the military judge to issue a protective order sought by the United States to prevent the disclosure of classified information.

(F) A refusal by the military judge to enforce an order described in subparagraph (E) that has previously been issued by appropriate authority."

includes no reference to extraordinary writs, and thus provides no additional insight into Congress's intent *vis-à-vis* our authority to hear petitions for extraordinary relief on behalf of the Government. Similarly, the language of the All Writs Act and its legislative history provide no insight into the answer to this question.

Nevertheless, the Court of Appeals for the Armed Forces (CAAF) has acknowledged service court authority to hear Government petitions for extraordinary relief beyond the enumerated bases of Article 62. In 1996, thirteen years after Article 62 was amended to permit interlocutory appeals by the United States, the CAAF acknowledged our authority to hear such Government petitions for extraordinary relief. *United States v. Curtin*, 44 M.J. 439, 440 (C.A.A.F. 1996). In *Curtin*, the Air Force court denied, for lack of jurisdiction, a Government petition for extraordinary relief seeking an order directing a military judge to exercise jurisdiction and consider challenges to subpoenas issued to a bank records custodian. The CAAF concluded that the Air Force court "erred in upholding the military judge's ruling that he had no jurisdiction to rule on the challenges to the subpoenas[.]" *Id.* The CAAF's "conclusions and findings were predicated on," *inter alia*, its holding in *Dettinger,* "[r]elying on the All Writs Act . . . that the Government may file a petition for extraordinary relief with the appropriate [Court of Criminal Appeals]." *Id.*

Again in 1998, the CAAF acknowledged the "well established" exercise of military court jurisdiction under the All Writs Act including "a petition for extraordinary relief filed by the Government with the Court of Criminal Appeals under the All Writs Act." *United States v. Dowty*, 48 M.J. 102, 106-07 (C.A.A.F. 1998) (citing *Dettinger*, 7 M.J. at 219 and *Curtin*, 44 M.J. at 439). In a July 2013 opinion, the CAAF again cited *Curtin* in support of its "jurisdiction over the certificate submitted by the [Air Force Judge Advocate General] pursuant to Article 67(a)(2) . . . ." *Kastenberg*, 72 M.J. at 367. Despite the Real Party's contention that we lack authority to entertain the writ, he cites no post-*Dettinger* CAAF decision holding, or otherwise suggesting, that service courts lack the authority to hear Government petitions for extraordinary relief.

In addition to the cases cited above, two CAAF judges have specifically referenced service court authority to entertain Government writs. First, in *United States v. True*, Chief Judge Everett expressed disagreement with the court's exercise of jurisdiction under Article 62 when a military judge abated

proceedings after the Government declined to fund court-ordered investigative assistance. 28 M.J. 1, 6 (C.M.A. 1989) (Everett, C.J., dissenting). He then noted that "the Government is not left without remedy in cases such as this. Both our Court and the Court of Military Review are within the purview of the All Writs Act . . . and so, if the military judge usurped authority, the Government may seek extraordinary relief in the nature of a writ of prohibition." *Id.* (citing *Dettinger*) (internal citations omitted). More recently, Judge Effron noted, "[t]he only means available for the Government to appeal the [military judge's sentence credit determination] would be via an extraordinary writ." *United States v. Ruppel*, 49 M.J. 247, 254 (C.A.A.F. 1998) (concurring in part and in the result).

Further, two of our sister courts have ruled on this issue. In a published 1992 opinion, the Air Force Court of Military Review ruled that it had the power "to grant the relief the government requests" (i.e. to issue a writ of prohibition against the military judge and to declare his post-trial session and rulings null and void). *United States v. Mahoney,* 36 M.J. 679, 684-85 (A.F.C.M.R. 1992). The Air Force court concluded that its "authority . . . to grant the government extraordinary relief from a ruling or action of a military judge is well established." *Id.* (citing *Dettinger*, 7 M.J. at 220 and the All Writs Act) (additional citations omitted).[3]

In an unpublished opinion, the Army Court of Criminal Appeals addressed whether "the UCMJ provide[d] . . . jurisdiction under the All Writs Act to review an interlocutory appeal on behalf of the government when Article 62 . . . does not otherwise permit such review?" *United States v. Reinert,* Nos. 20071195 and 20071343, 2008 CCA LEXIS 526 at *2 (Army Ct.Crim.App. 7 Aug 2008). After analyzing, *inter alia*, Government appeals under Article 62, the All Writs Act and relevant case law, the Army Court "conclude[d] the All Writs Act empowers us to issue a writ of prohibition in aid of our jurisdiction over a pending court-martial, even if the case does not fall strictly within the jurisdiction conferred by Articles

[3] In a recent unpublished Order, the Air Force Court of Criminal Appeals suggested the answer to this question may be subject to further review without citation to its published opinion in *Mahoney*. *See United States v. Eller,* No. 2013-5, 2013 CCA LEXIS 512, (A.F.Ct.Crim.App. 21 Jun 2013) (Order) ("We need not decide whether the Government may secure, via a petition for mandamus, an interlocutory appellate review of a trial court's order that does not fall within those matters specifically contemplated by Article 62, UCMJ, 10 U.S.C. § 862, because assuming *arguendo* that such review were proper, the petitioner would not prevail.").

62, 66, 69, 73, UCMJ." *Id*. at *27. The court articulated "significant concerns for the viability of government interlocutory appeals under the All Writs Act, particularly after *Goldsmith*, [but concluded it was] bound to follow [CAAF] precedent[.]" *Id*. at *23.

Notably, the same question exists in the Article III federal courts *vis-à-vis* Government petitions for extraordinary relief and appeal by the United States under 18 U.S.C. § 3731. This is particularly informative as Article 62 was modeled after the statutory basis for "appeal by the United States" in the Article III Courts, 18 U.S.C. § 3731.[4] *See United States v. Brooks,* 42 M.J. 484, 486 (C.A.A.F. 1995) ("Article 62 was intended by Congress to be interpreted and applied in the same manner as the Criminal Appeals Act, 18 U.S.C. § 3731." (citation omitted)). Like Article 62, that provision is silent as to what impact, if any, the prescribed appellate procedure has upon the authority of an Article III court to review and act upon petitions for extraordinary relief filed by the Government that are not specifically authorized by 18 U.S.C. § 3731.

The Supreme Court has not specifically addressed this issue. However, in *Will*, the Court vacated a writ of *mandamus* issued by the Court of Appeals for the Seventh Circuit at the request of the Government, but not for want of jurisdiction. The writ issued by the Circuit Court directed a District Court judge to vacate an order requiring the Government to provide certain information to the defendant, but the Supreme Court found the record insufficient to warrant the extraordinary remedy of a writ of *mandamus*. 389 U.S. at 107. In *Will*, the Court discussed the Government's limited right to interlocutory appeal under 18 U.S.C. § 3731, and the jurisprudential reasons for those limitations. *Id*. at 96-97 (citations omitted). The Court acknowledged that "[m]andamus . . . may never be employed as a substitute for appeal in derogation of these clear policies." *Id*. at 97. But, particularly relevant to our

[4] 18 USCS § 3731. Appeal by United States. "In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment . . . . from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding . . . . from a decision or order, entered by a district court of the United States granting the release of a person charged with or convicted of an offense . . . . The provisions of this section shall be liberally construed to effectuate its purposes."

analysis, the Court also acknowledged that *mandamus* had been "invoked successfully where the action of the trial court totally deprived the Government of its right to initiate a prosecution, *Ex parte United States*, 287 U.S. 241 (1932), and where the court overreached its judicial power to deny the Government the rightful fruits of a valid conviction [confinement in accordance with the applicable law], *Ex parte United States*, 242 U.S. 27 (1916)." *Id.* at 97-98.

We also find the opinions of various Circuit Courts of Appeals distinguishing the right of the United States to "appeal" under 18 U.S.C. § 3731, and the authority of the Government to seek extraordinary relief persuasive. *See United States v. Vinyard*, 539 F.3d 589, 590 (7th Cir. 2008) ("We conclude that appellate jurisdiction under 18 U.S.C. § 3731 is problematic [due to unusual court orders] since the district court did not issue any of the orders described by [18 U.S.C. § 3731]. . . . [T]his is one of those rare cases in which a writ of *mandamus* should issue."); *United States v. Denson*, 603 F.2d 1143, 1145 (5th Cir. 1979) (*en banc*) (stating where trial court exceeded authority in suspending execution of the sentence and placing the defendants on probation, "we hold that, when the writ of mandamus is sought from an appellate court to confine a trial court to a lawful exercise of its prescribed authority, the court should issue the writ almost as a matter of course.").[5]

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[5] *See generally United States v. Patterson*, 882 F.2d 595, 596 (1st Cir. 1989) ("We now hold that the government did not have a right to appeal the sentence of the district court [under 18 U.S.C. § 3731], but under our mandamus authority reverse on the merits and order resentencing."); *Government of Virgin Islands v. Douglas*, 812 F.2d 822, 832 (3rd Cir. 1987) (declining to issue writ of mandamus where statute in question did not mandate imposition of consecutive sentences but acknowledged "[c]hallenges of a district court judge's power to impose a particular sentence fall within the narrow range of cases in which mandamus may be appropriate."); *United States v. Martinez*, 857 F.2d 122, 127 (3rd Cir. 1988) ("Whether a district court has jurisdiction to reduce a sentence . . . and whether the district court possessed authority to impose a particular sentence . . both fall within the narrow range of cases in which mandamus may be appropriate.") (citations and internal quotation marks omitted); *United States v. Prescon Corp.*, 695 F.2d 1236, 1242 (10th Cir. 1982) (noting that the court should "not issue a writ of mandamus if other remedies are available. . . . [a]s we hold that the Government's appeal is well taken pursuant to 18 U.S.C.A. § 3731 and 28 U.S.C.A. § 1291, we will deny the petition for writ of mandamus."); *United States v. Dean*, 752 F.2d 535, 537 (11th Cir 1985) (concluding "when the government alleges that the district court has acted beyond the scope of its lawful authority in reducing the sentence of a convicted criminal defendant . . . mandamus, not [government] appeal [under 18 U.S.C. § 3731], is the government's proper remedy[.]").

In the absence of explicit statutory limitation, or other clear evidence of Congress's intent to limit our authority over petitions for extraordinary relief by the Government, we are not persuaded by the Real Party's argument that exercising jurisdiction over this petition usurps "the limitations placed on [interlocutory] appeals in Article 62 by Congress." Opposition at 7.

Clearly, Article 62 provides the Government an express right to interlocutory appeal and expedited appellate review of a discrete number of specified trial court legal determinations. This limited right to Government appeal is consistent with an accused's Constitutional right to a speedy trial and policies behind the "double jeopardy prohibition," and consistent with the disfavored nature of Government appeals and the "narrow categories of orders" appealable by the United States in Article III federal courts. *Will*, 389 U.S. at 96-98.

On the other hand, the All Writs Act empowers service Courts of Criminal Appeals to issue all writs "in aid of their respective jurisdiction." If the requested writ is in "aid of [service court] jurisdiction," the universe of potential matters subject to this extraordinary authority necessarily includes a broader, less defined and less definable universe of issues. *See Carlisle v. United States*, 517 U.S. 416, 429 (1996) ("The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute.") (citation and internal quotation marks omitted). This lack of definability underpins the "traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche*, 319 U.S. at 26 (citations omitted). Stated another way, it is infeasible to define, in advance, the universe of "exceptional circumstances" that may amount to a judicial "usurpation of power," or "clear abuse of discretion," thus warranting extraordinary relief. *Bankers Life & Casualty Co.,* 346 U.S. at 383.

Reading the All Writs Act and Article 62 in *pari materia*,[6] and consistent with *Dettinger* and *Curtin,* we conclude that

[6] It is generally assumed that "[o]ther statutes dealing with the same subject as the one being construed – commonly referred to as statutes in *pari materia* – comprise another form of extrinsic aid useful in deciding questions of interpretation [and] should be construed together." *See* 2B NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION §§ 51.01 (5th ed. 1992); *see also United States v. Lillyblad*, 56 M.J. 636, 639 (N.M.Ct.Crim.App. 2001).

nothing in Article 62 precludes this court "from considering an application for extraordinary relief from a trial judge's action only because the petitioner is the Government." *Dettinger*, 7 M.J. at 221-22. For the reasons discussed above, we also conclude that we have the authority under the All Writs Act "to hear petitions for extraordinary relief on behalf of the Government" for issues not subject to appeal by the United States under Article 62.[7] *See Goldsmith*, 526 U.S. at 537 ("The All Writs Act invests a court with a power essentially equitable and, as such, not generally available to provide alternatives to other, adequate remedies at law.") (citations omitted); *see also* R.C.M. 1203(b), Discussion, Manual for Courts-Martial (1984, 1995, 1998, 2002, 2005, 2008, and 2012 eds.) ("Any party may petition a Court of [Criminal Appeals] for extraordinary relief.").

Of course, the potential scope of appellate review upon a Government petition for extraordinary relief is tempered by requirements that the relief requested be "in aid" of the reviewing court's jurisdiction, not otherwise subject to review, and subject to the high burden borne by the moving party to establish a clear and indisputable right to issuance of the writ and that "issuance of the writ is appropriate under the circumstances." *Hasan*, 71 M.J. at 418 (citing *Cheney*, 542 U.S. at 380-81). Having found no limit in Article 62 on our authority to entertain the subject writ, we will next determine whether to do so would be in aid of our jurisdiction.

B. <u>Is issuance of the writ "in aid of" our jurisdiction?</u>

For the following reasons we conclude that review of this writ is "in aid" of our jurisdiction under Articles 66(b) and 69(d), UCMJ, and does not constitute an expansion of our existing jurisdiction.

First, the Government's request that we set aside the military judge's ruling on the maximum authorized punishment for this general court-martial seeks "'to modify an action that was

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[7] To be clear, this conclusion does not address whether service Courts of Criminal Appeals may entertain Government petitions for extraordinary relief on matters subject to appeal by the United States under Article 62, UCMJ. *See Goldsmith*, 526 U.S. at 537 (citing 19 *Moore's Federal Practice* § 201.40 ("[A] writ may not be used . . . when another method of review will suffice")); *see also Dettinger*, 7 M.J. at 222 (quoting Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure:* Jurisdiction § 3936 at 268) ("a right to appeal would make unnecessary proceedings for extraordinary relief. When review by appeal is allowed, `the need for the writs has vanished.'").

taken within the subject matter jurisdiction of the military justice system.'" *Kastenberg*, 72 M.J. at 368 (quoting *Denedo*, 66 M.J. at 120). The military judge's ruling directly affects the "sentence" that "could be imposed in a court-martial proceeding" and is thus within our jurisdiction. *See Goldsmith*, 526 U.S. at 535 ("Air Force's action to drop respondent from the rolls was an executive action, not a 'finding' or '*sentence*,' § 867(c), *that was (or could have been) imposed in a court-martial proceeding*, [thus beyond the CAAF's jurisdiction under the All Writs Act][.]") (emphasis added) (footnote omitted). Indeed, the potential impact on sentence is manifest, where the military judge's ruling precludes award of a punitive discharge and limits potential confinement to 30 days for two specifications alleging sexual penetration of a female, sleeping or otherwise incapable of consenting due to impairment, conduct historically punishable by confinement for 30 years or more and a punitive discharge.[8] *See also Kastenberg*, 72 M.J. at 368 ("To establish subject-matter jurisdiction, the harm alleged must have had 'the potential to directly affect the findings and sentence.'") (quoting *Ctr. For Constitutional Rights v. United States*, 72 M.J. 126, 129 (C.A.A.F. 2013)); *Kreutzer v. United States*, 60 M.J. 453 (C.A.A.F. 2005) (issuing writ of *mandamus* directing removal of Petitioner from death row after death sentence was set aside by Court of Criminal Appeals, holding "that continued confinement on death row as an unsentenced person [wa]s in violation of law and regulation [and within their] statutory jurisdiction.").

Second, the military judge's determination that the maximum punishment authorized is that awardable at summary court-martial, if undisturbed, thwarts potential automatic review by this court under Article 66, UCMJ, as any punishment awarded consistent with that ruling would not qualify for automatic review.[9] A determination that such a ruling is not reviewable by

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[8] Death was an authorized punishment for the charged conduct as "rape" until the 2006 revision of Article 120, UCMJ, recast the charged conduct as "aggravated sexual assault" punishable by confinement for 30 years. Art. 120, UCMJ; *see generally* MCM (1951-2005 eds.); b*ut see Coker v. Georgia*, 433 U.S. 584, 592 (1977) (holding that the death penalty is "grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." (footnote omitted)).

[9] Except when the right to appellate review has been waived or withdrawn, "[t]he Judge Advocate General shall refer to a Court of Criminal Appeals the record in each case of trial by court-martial-- (1) in which the sentence, as approved, extends to death, dismissal . . . dishonorable or bad-conduct discharge, or confinement for one year or more[.]" Art. 66(b), UCMJ.

this court would result in a jurisdictional paradox, namely that a trial court ruling depriving an appellate court of jurisdiction is unreviewable by that appellate court. Such a paradox is both illogical and unsupported in law. *See Roche*, 319 U.S. at 25 (stating appellate court authority to issue writs of *mandamus* "is not confined to the issuance of writs in aid of jurisdiction already acquired by appeal but extends to [cases within] its appellate jurisdiction although no appeal has been perfected. Otherwise the appellate jurisdiction could be defeated and the purpose of the statute authorizing the writ thwarted by unauthorized action of the district court obstructing the appeal." (citation omitted)).

Finally, we conclude that review of this writ is "in aid" of our jurisdiction as we could also acquire appellate jurisdiction over this case if the Judge Advocate General exercised her authority under Article 69(d), UCMJ, to forward the record of trial to us for review following a finding of guilty.[10] *Id.*

V. Issuance of the Writ of *Mandamus* – Necessary or Appropriate?

A writ of *mandamus* is "a drastic instrument which should be invoked only in truly extraordinary situations." *Labella*, 15 M.J. at 229. "To justify reversal of a discretionary decision by mandamus, the judicial decision . . . must amount to a judicial usurpation of power . . . or be characteristic of an erroneous practice which is likely to recur." *Id.* (internal citations and quotation marks omitted). "To prevail on a writ of mandamus, [the Petitioner] must show that: (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances." *Hasan*, 71 M.J. at 418 (citing *Cheney*, 542 U.S. at 380-81). With these principles in mind, we turn to a discussion of the Government's petition.

A. <u>Any "other adequate means to attain relief" requested?</u>

Issuance of a writ of mandamus is the only available means for the Government to attain the relief requested – (e.g., set

[10] "(a) The record of trial in each general court-martial that is not otherwise reviewed under [Article 66] shall be examined in the office of the Judge Advocate General if there is a finding of guilty . . . . (d) A Court of Criminal Appeals may review, [under Article 66, UCMJ] . . . any court-martial case which . . . . is sent to the Court of Criminal Appeals by order of the Judge Advocate General[.]" Arts. 69(a) and (d), UCMJ.

aside of the military judge's ruling on the maximum authorized punishment and authorization of greater maximum punishment). As previously discussed, the Government and Real Party agree that the military judge's ruling is not subject to interlocutory appeal by the United States under Article 62.

Likewise, the relief requested by the Government is not attainable on direct review of any potential findings and sentence approved by a convening authority under Articles 66 or 69, UCMJ.

The Judge Advocate General's authority under Article 69 to "modify or set aside the findings or sentence or both," if "found unsupported in law" provides no authority to authorize a rehearing where greater punishment could be imposed. Arts. 69(a) and (b), UCMJ. Assuming the Judge Advocate General exercised her authority under Article 69(d), UCMJ, and forwarded the record of trial to this court for review under Article 66, we would not be empowered to effectuate the requested relief, as "[we] may act only with respect to the findings and sentence as approved by the convening authority." Art. 66(c), UCMJ. The Government has no right to direct appeal of the sentence adjudged and approved under these circumstances. Indeed, such action would offend fundamental Constitutional Due Process and Double Jeopardy protections. U.S. CONST. amend. V.

We therefore conclude there are "no other adequate means to attain [the] relief" requested. *Hasan*, 71 M.J. at 418 (citation omitted).

B. <u>Is the right to issuance of the writ "clear and indisputable"?</u>

The Government asserts that its right to issuance of a writ of mandamus is "clear and indisputable," citing four reasons for concluding the military judge usurped his judicial authority by "ruling . . . contrary to both the statute he attempted to apply and the regulation that implements that statute." Petition at 12. First, the Government argues that the sexual assaults alleged are "listed in Part IV" of the 2012 edition of the Manual for Courts-Martial; that application of R.C.M. 1003 provides the correct maximum authorized punishment; and that the *Ex Post Facto* clause is inapplicable to the Executive Order issued 15 May 2013 as that order reduced the maximum authorized punishment. Second, the Government asserts that if the sexual assaults alleged are "not listed in Part IV" of the 2012 edition of the Manual, then the former Article 120(c)(2), UCMJ, or

Article 128, UCMJ (assault consummated by a battery), qualify as a closely related offense "listed in Part IV" of the Manual and provide the maximum punishment authorized, under R.C.M. 1003(c)(1)(B)(i), for the offenses charged. Third, if we are not persuaded by the first and second arguments, the Government argues that under R.C.M. 1003(c)(1)(B)(ii) the maximum punishment may be derived from 18 U.S.C. 2242(2)(A-B) (2012), a provision that is "essentially the same" as the offense charged or "custom of the service." And fourth, the Government argues that the military judge erroneously applied the Rule of Lenity.[11]

The Real Party replies that the Government is not entitled to the requested relief because: (1) the President failed to prescribe maximum punishments for the charged offenses until 15 May 2013, almost 11 months after the effective date of those offenses; (2) the Government failed to establish a clear and indisputable right to relief because the military judge acted within his discretion in interpreting an ambiguous statute; or (3) even if the court finds the military judge's ruling incorrect, such a conclusion would be "far from indisputable."

We conclude that the Government has established a right to the requested relief that is "clear and indisputable." *Hasan*, 71 M.J. at 418. The military judge misapplied the President's mandated offense-based limits on punishments to the charged sexual assaults and rendered a ruling on the authorized punishment that was clearly contrary to statute, settled case law, and the Rules for Courts-Martial. For the reasons discussed below, application of the President's mandated offense-based limits on punishments to the offenses charged leads to the inevitable conclusion that the Petitioner has a "clear and indisputable" right to the requested relief.

Discussion

The Constitution invests in Congress the authority "[t]o make Rules for the Government and Regulation of the land and naval Forces," including the power to define criminal

[11] *United States v. Thomas*, 65 M.J. 132, 135 (C.A.A.F. 2007) (noting military courts have "long adhered to the principle that criminal statutes are to be strictly construed, and any ambiguity resolved in favor of the accused . . . [when] the legislative intent is ambiguous, we resolve ambiguity in favor of the accused.") (citation omitted); *see also United States v. Baker*, 14 M.J. 361, 374 (C.M.A. 1983) ("This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based upon no more than a guess as to what Congress intended." (citation omitted)).

punishments, as well as to delegate that authority to the President. *Loving v. United States*, 517 U.S. 748, 759, 767-68 (1996) (citing U.S. Constitution at Art. I, § 8, cl. 14) (additional citations omitted). Congress exercised those powers by declaring that "general courts-martial . . . may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by [the UCMJ], including the penalty of death when specifically authorized by [the UCMJ]," and "[t]he punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense." Arts. 18 and 56, UCMJ. Exercising this delegated authority, the President promulgated Rules for Courts-Martial which provide:

> Rule 1002. Sentence determination. Subject to limitations in this Manual, the sentence to be adjudged is a matter within the discretion of the court-martial; except when a mandatory minimum sentence is prescribed by the code, a court-martial may adjudge any punishment authorized in this Manual . . . .
>
> Rule 1003. Punishments
> (a) *In general*. Subject to the limitations in this Manual, the punishments authorized in this rule may be adjudged in the case of any person found guilty of an offense by a court-martial.
>
> (b) *Authorized punishments*. Subject to the limitations in this Manual, a court-martial may adjudge only the following punishments: [including reprimand, forfeiture of pay and allowances, reduction in pay grade, confinement and punitive separation].

Consistent with the authority delegated by Congress in Article 56, UCMJ, the President specified "[l]imits on punishments" "[b]ased on offenses." R.C.M. 1003(c)(1). In so doing, the President established a binary analytical framework for offense-based limits on punishments: that framework employs mutually exclusive criteria, dependent upon whether the offenses are "listed" or "not listed" "in Part IV [of the Manual for Courts-Martial]." R.C.M. 1003(c)(1)(A)-(B).

1. Offenses listed in Part IV of the Manual for Courts-Martial

For "*Offenses listed in Part IV* [of the Manual for Courts-Martial] . . . [t]he maximum limits for the authorized

punishments of confinement, forfeitures and punitive discharge (if any) are set forth for each offense listed in Part IV of this Manual. These limitations are for each separate offense, not for each charge." R.C.M. 1003(c)(1)(A). In his ruling, the military judge acknowledged that the 2012 edition of the Manual for Courts-Martial includes the statutory text of the charged offense in Part IV, but found R.C.M. 1003(c)(1)(A) inapplicable. He concluded that:

> because the rulemaking process (including modes of proof, explanations, and the like, areas commended to the President under a separate provision, Article 36) has only recently been completed [sic][12] and an Executive Order issued, those amendments have just now become a full-fledged part of the MANUAL FOR COURTS-MARTIAL. *The current version of the Article 120 is thus not an offense listed in Part IV of the MANUAL, so the guidance of R.C.M. 1003(c)(1)(A) does not apply*.

AE V at 5 (emphasis added).

The Government acknowledges that the amended Article 120's statutory text was inserted in the 2012 Manual by the JSC, not pursuant to Executive Order. Petition at 14-16 (comparing Exec. Order No. 10,214 (designated Manual for Courts-Martial, 1951 ed.) with the 2005, 2008, and 2012 editions of the Manual.) (Appendix 2 is editorially revised)). However, the Government asserts that the military judge's conclusion that Presidential rule-making is required to insert the statutory text into Part IV of the Manual is unsupported by precedent, and that the Joint Service Committee on Military Justice (JSC) did not err by inserting the statutory text of Article 120 into Part IV of the 2012 Manual. Hence, the Government argues that Article 120 was an offense listed in Part IV of the Manual within the meaning of R.C.M. 1003(c)(1)(A). Petition at 13-17.

We find no "clear abuse of discretion" by the military judge with respect to this portion of his ruling. We also reject the Government's assertion that the JSC's inclusion of the revised Article 120's statutory text in the 2012 Manual, without Presidential approval, renders that offense "*listed in Part IV*" of the Manual, within the meaning of R.C.M. 1003(c)(1)(A), the Presidentially-prescribed process for

[12] The limits on punishment are the only conforming changes ordered, to date, by the President. *See* Executive Order 13643 of 15 May 2013.

determining offense-based limits on punishment for the following reasons.

First, the "plain language" of the Manual's Preamble[13] (Preamble) and the relevant Department of Defense Directive unambiguously indicate that only the President may amend the Manual, and defines the JSC's advisory role in identifying and making amendments. Preamble at ¶ 4; Department of Defense Directive 5500.17; *see also United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2007) ("We use well-established principles of statutory construction to construe provisions in the *Manual for Courts-Martial*." (citations omitted)). The Manual for Courts-Martial consists of the "Preamble, the Rules for Courts-Martial, the Military Rules of Evidence, the Punitive Articles, and Nonjudicial Punishment Procedures (Part I-V)." Preamble at ¶ 4. Amendments to Parts I-V of the Manual "will be identified by publishing the relevant Executive order containing those amendments in its entirety in a Manual appendix." MCM (2008 ed.), Preamble at 4, Discussion. The CAAF has also ruled that "[t]he authority to revise the Manual, an Executive Order, is vested in a single individual, the President." *United States v. Tualla*, 52 M.J. 228, 231 (C.A.A.F. 2000).

Neither the Preamble, nor the implementing DoD Directive, explicitly empower or otherwise imply that the JSC has independent authority to issue substantive amendments to Part IV of the Manual. *See* Preamble; DoD Directive 5500.17. On the contrary, both authorities acknowledge the JSC's responsibility to review the Manual and propose amendments to the Department of Defense for "consideration by the President." Executive Order 12473, which prescribed the 1984 Manual and which is cited in every Executive Order amending the Manual since, also acknowledges the advisory role of the JSC in reviewing the Manual and, via the Secretary of Defense, "recommend[ing] to the President any appropriate amendments."

A key issue in controversy is what constitutes being "listed in Part IV" of the Manual. The parties cite no case law or other authority prescribing how an "offense" is "listed in Part IV," and we find no definitive answer to this question. It is not in dispute that the statutory language of the amended Article 120 appears in Paragraph 45, Part IV of the 2012 Manual, or that the statutorily decreed effective dates of those amendments encompass the charged sexual assaults. Nor is it in

[13] Paragraph 4 of the Preamble has remained essentially unchanged since the 1984 edition of the Manual.

dispute that the Real Party is subject to trial and potential punishment for violating the amended Articles 120(b)(2) and 120(b)(3)(A), UCMJ. We note that inclusion of the statutory text of the amended Article 120 in the Manual for Courts-Martial has no effect upon the legal efficacy of trial or potential punishment for any violation of that law after its effective date. The key question here is whether the JSC's insertion of the statutory text in Part IV of the 2012 edition of the Manual renders the offense "listed in Part IV" of that Manual for purposes of effectuating a Presidentially-enumerated offense-based limit on punishment. We find the Government's suggestion that the JSC is empowered to make substantive, binding changes to the Manual, including "list[ing]" an offense in Part IV without Presidential approval or an Executive order, to be unsupported by the plain language of the Manual and DoD Directive, and contrary to case law. *Tualla*, 52 M.J. at 231.

Second, the text included as Paragraph 45 in Part IV of the 2012 Manual does not include "[t]he maximum limits for the authorized punishments of confinement, forfeitures and punitive discharge" contrary to the plain language of R.C.M. 1003(c)(1)(A)(i). The rule addressing offense-based limits on punishments states that those matters "are set forth for each offense listed in Part IV of this Manual." R.C.M. 1003(c)(1)(A)(i). Standing alone, this inconsistency could be viewed as an administrative oversight; however, the Government's concession that the JSC inserted the statutory text of the revised Article 120 into the Manual is supported by the "[n]ote" following the statutory text in the 2012 Manual which acknowledges that the President had not prescribed the conforming changes at the time the Manual was published.[14] Notably, the limits on punishment are the only conforming changes ordered, to date, by the President. *See* Executive Order 13643. Clearly, the 2012 Manual includes amendments directed by Executive Order (*see* 2012 Manual at Appendix 25; Executive Order 13468 of 24 Jul 2008; Executive Order 13552 of 31 Aug 2010, and Executive Order 13593 of 13 Dec 2011). However, with the exception of the 15 May 2013 Executive Order, there is no evidence before this court that the sole authority empowered to

[14] "The subparagraphs that would normally address elements, explanation, lesser included offenses, maximum punishments, and sample specifications are generated under the President's authority to prescribe rules pursuant to Article 36. At the time of publishing this MCM, the President had not prescribed such rules for this version of Article 120. Practitioners should refer to the appropriate statutory language and, to the extent practicable, use Appendix 28 [Punitive Articles Applicable to Sexual Offenses committed during the period 1 October 2007 through 27 June 2012] as a guide." MCM (2012 ed.), Part IV, ¶ 45, at IV-70, Note.

revise Part IV of the Manual, the President, exercised his authority to do so with respect to paragraph 45 of Part IV of the 2012 Manual. *See Tualla*, 52 M.J. at 231. Instead, the Government acknowledges that the President did not amend that paragraph, and the drafters' "note" supports that acknowledgement.

We conclude that, prior to 15 May 2013, the revised Article 120 was not an "*Offense[] listed in Part IV*" of the Manual within the meaning of the Presidentially-prescribed process for determining offense-based limits on punishment. R.C.M. 1003(c)(1)(A). Only the President may amend Part IV of the Manual, and prior to 15 May 2013, he had not done so with respect to the revised Article 120. Executive Order 13643. Therefore, the appropriate offense-based criteria for determining the authorized punishment prior to that date, was for an "*Offense[] not listed in Part IV*" of the Manual. R.C.M. 1003(c)(1)(B).[15] For the reasons discussed further below, Constitutional *ex post facto* prohibitions are not implicated as Executive Order 13643, which established maximum punishments for the offenses alleged effective 15 May 2013, did not increase the punishments previously authorized for those offenses through application of R.C.M. 1003(c)(1)(B). *Cf. Collins v. Youngblood*, 497 U.S. 37, 41-42 (1990) ("the constitutional prohibition on *ex post facto* laws applies only to penal statutes which disadvantage the offender affected by them . . . . [including] [e]very law that *changes the punishment*, and inflicts a *greater punishment*[.]" (citation omitted)).

2. Offenses not listed in Part IV of the Manual for Courts-Martial

Having determined that, prior to May 15, 2013, the charged offenses were "not listed" in Part IV of the 2012 Manual for purposes of R.C.M. 1003(c)(1)(A), we now turn to the separate provisions of R.C.M. 1003(c)(1)(B)(i)-(ii). In doing so, we conclude that the maximum authorized punishment for the alleged sexual assaults includes a dishonorable discharge and 30 years confinement.

[15] We need not determine whether Executive Order 13643, which declared maximum punishments for the charged offenses but included no other conforming changes, rendered the offenses "listed" in Part IV of the Manual. The maximum punishment authorized at arraignment was fixed by Executive Order 13643, and was the same regardless whether the offense is "listed" or "not listed" in Part IV of the Manual on or after 15 May 2013. *See* "Maximum Punishment" at *infra.*

For offenses "not listed in Part IV" of the Manual, the President established two related, but alternative bases in R.C.M. 1003(c)(1)(B) for determining offense-based limits on punishment dependent upon whether the charged offense:[16] (1) is closely related to or necessarily included in an offense listed in Part IV of the Manual, and, if neither, then (2) whether the charged offense is punishable as authorized by the United States Code or as authorized by custom of the service. After brief discussion of each provision of R.C.M. 1003(c)(1)(B)(i) and (ii), the military judge concluded that those provisions did not resolve the issue of maximum authorized punishment. AE V at 3-6. The Government argues that if the sexual assaults alleged are "not listed in Part IV" of the 2012 Manual, then the authorized maximum punishment includes confinement for 30 years and a dishonorable discharge, regardless whether R.C.M. 1003(c)(1)(B)(i) or (ii) controls. The Government also asserts that the military judge's ruling on the authorized maximum punishment was "a judicial usurpation of power" rendering their right to issuance of the requested writ "clear and indisputable."

We agree that the military judge erroneously interpreted and applied R.C.M. 1003(c)(1)(B)(i)-(ii) and usurped his judicial authority by concluding that the maximum sentence authorized for each sexual assault included no punitive discharge and confinement for one month.

a. R.C.M. 1003(c)(1)(B)(i): Included or related offenses

The military judge acknowledged the merit of referring to the limits on punishment in "the predecessor [offense of aggravated sexual assault] to the current Article 120 [sexual assault] [listed] in Part IV of the Manual . . . . [given] some similarities in [the] elements and definitions[;] but found such reference "inappropriate" because at the time of the misconduct alleged "the activity was not a violation of the 2006 version of Article 120." AE V at 4-5. He also acknowledged that "one could conclude that because a sexual act with an unconscious or

[16] "For an offense not listed in Part IV of this Manual which is included in or closely related to an offense listed therein the maximum punishment shall be that of the offense listed[.]" R.C.M. 1003(c)(1)(B)(i). The "closely related" language of this rule applies only to offenses listed in Part IV of the Manual. *United States v. Beaty*, 70 M.J. 39, 42 (C.A.A.F. 2011) (citation omitted). An offense neither "included in or closely related to an offense listed [in Part IV of the Manual] is punishable as authorized by the United States Code, or as authorized by custom of the service." R.C.M. 1003(c)(1)(B)(ii)).

intoxicated person is related to an offense that is listed in the pre-15 May 2013 Part IV of the MANUAL, then the maximum punishment for the previously extant offense should apply[,]" but apparently rejected that conclusion because "no case interpreting Rule 1003(c)(1)(B) has ever applied its provisions to Articles 80 through 132 of the [UCMJ]." *Id.* at 5.[17] As a preliminary matter neither the Government nor the Real Party assert that the charged offenses are "included in" any offense listed in Part IV of the Manual for purposes of R.C.M. 1003(c)(1)(B)(i).

Assuming, as did the military judge and the Government, that the predecessor offense to those charged, "aggravated sexual assault" remains listed in Part IV of the Manual in the absence of Presidential direction removing it therefrom, we agree with the Government that "aggravated sexual assault," applicable to misconduct committed during the period 1 October 2007 through 27 June 2012 is "closely related" to the charged sexual assaults. In fact, the charged offenses are a revised version of "aggravated sexual assault," intended to resolve "confusion" over use of the term "aggravated" in the 2007 version and to clarify "previously confusing language from the 2007 version regarding the state of the victim's consciousness[.]" MCM (2012 ed.), Analysis of Punitive Articles, ¶ 45, A23-15. Comparison of the statutory elements further illustrates the close relationship between these two offenses.[18]

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[17] The plain language of R.C.M. 1003 (c)(1)(B) includes no limits on its applicability to offenses under Articles 133, 134, or otherwise. *See Lewis*, 65 M.J. at 88 ("The plain language [of the Rule] will control, unless use of the plain language would lead to an absurd result.") (citations omitted).

[18] "10 U.S.C. § 920(c)(2) (2007). Aggravated Sexual Assault. Any person subject to this chapter who . . . (2) engages in a sexual act with another person . . . [who] is substantially incapacitated or substantially incapable of –(A) appraising the nature of the sexual act; (B) declining participation in the sexual act; or (C) communicating unwillingness to engage in the sexual act; is guilty of aggravated sexual assault and shall be punished as a court-martial may direct."

10 U.S.C. 920(b) (2012), "Sexual assault. Any person subject to this chapter who . . . (2) commits a sexual act upon another person when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring; or (3) commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to-- (A) impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person . . . is guilty of sexual assault and shall be punished as a court-martial may direct."

Both statutes define "sexual act" as including "contact between the penis and the vulva . . . and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight." Compare 10 U.S.C.S. § 920(t)(1)(A) (2008) and 10 U.S.C.S. § 920(g)(1)(A) (2012). Both statutes also require: (1) commission of a sexual act upon another person, (2) who is incapacitated or incapable of consenting or declining participation in that sexual act.[19] The maximum punishment authorized for "aggravated sexual assault" under the previous version of Article 120 includes a dishonorable discharge and confinement for 30 years, the same limits on punishment imposed by the President for the charged offenses by Executive Order on 15 May 2013.

Though not charged here, sodomy, an offense listed in Part IV of the Manual, is also "closely-related" to conduct now punishable as sexual assault in violation of Article 120(b). *Compare* Arts. 120(b) and 125, UCMJ; *see also* Manual for Courts-Martial (2012 ed.), Analysis of Punitive Articles, ¶ 45, App. 23, at A23-15 ("The FY12 NDAA failed to repeal Article 125, thus criminalizing forcible sodomy offenses under both Article 120 and Article 125.").[20] The revised offense of "sexual assault" also criminalizes conduct (contact between the penis . . . and anus or mouth . . . occurs upon penetration, however slight) punishable as sodomy in violation of Article 125, UCMJ. *Compare* Articles 120(b) and 120(g)(1)(A)-(B) and Article 125, UCMJ. Forcible sodomy, in violation of Article 125, is punishable by dishonorable discharge and confinement for life without the possibility of parole. MCM, Part IV, ¶ 51e (2012 ed.).

The military judge's conclusion that aggravated sexual assault in violation of the 2007 version of Article 120(c) is not closely related to the alleged misconduct is inconsistent

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[19] The most significant distinction in the offenses is that the amended Article 120(b)(2) or (3) include a *scienter* or knowledge element not present in the aggravated sexual assault offense, Article 120(c). Specifically that the "[accused] knows or reasonably should know" the victim "is asleep, unconscious, or otherwise unaware that the sexual act is occurring, or "that [the incapacity to consent to a sexual act due to impairment] is known or reasonably should be known by the [accused]."

[20] We find the Government's alternative argument that Article 128, assault consummated by a battery is a closely related offense to the charged sexual assaults inapposite. Assault consummated by a battery in violation of Article 128, UCMJ, likely qualifies as a lesser included offense of sexual assault in violation of Article 120 under the statutory elements test, *see United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010); however, the greater offense, the alleged sexual assault is not "included in" the assault consummated by a battery. R.C.M. 1003(c)(1)(B)(i).

with his assumption that that offense remained listed in Part IV of the Manual, and the plain language of R.C.M. 1003(c)(1)(B)(i). The rule requires only that the comparison offense be listed in Part IV of the Manual and "closely related," not that the alleged conduct be punishable in violation of that "closely related offense," as implied by the military judge's ruling. R.C.M. 1003(c)(1)(B)(i); *Beaty*, 70 M.J. at 42. Again assuming, as did the military judge, that the predecessor offense to those charged, "aggravated sexual assault" remains listed in Part IV of the Manual, then the military judge's erroneous judicial action exceeded the recognized boundaries of judicial authority and constituted a "usurpation of judicial power." *Bankers Life & Casualty Co.,* 346 U.S. at 383.

b. R.C.M. 1003(c)(1)(B)(ii): Punishable as authorized by the U.S. Code

Assuming, as did the military judge, that the charged offenses are not listed in Part IV of the Manual, and assuming *arguendo*, that the offenses are not included in or closely related to an offense listed therein, we next turn to R.C.M. 1003(c)(1)(B)(ii). "An offense not listed in Part IV and not included in or closely related to any offense listed therein is punishable as authorized by the United States Code[.]" R.C.M. 1003(c)(1)(B)(ii). The military judge "*reject[ed] the suggestion* to look to other, analogous, statutes for guidance as provided in R.C.M. 1003 (c)(1)(B)(ii)." AE V at 6 (emphasis added). He commented that "[t]he plain language of the Rule directs consulting "the United States Code" for similar offenses if there is no punishment provided for a Part IV offense. Title 10 is indisputably part of the United States Code, and it provides for no punishments in these new Article 120 offenses." *Id*.

Citing R.C.M. 1003(c)(1)(B)(ii), the Government argues that the maximum punishment may be derived from 18 U.S.C. 2242(2)(A-B)(2012), a separate criminal statute that is "essentially the same" as the charged offenses. Petition at 31-32. We agree.

We find the military judge's conclusion that the President's reference to the U.S. Code for determining the authorized maximum punishment was limited to Title 10 was a "clearly erroneous" application of a Presidentially-enumerated rule for determining maximum punishment by reference to the United States Code. In "reject[ing]" the President's "suggestion to look to other, analogous, statutes," we conclude

that the military judge ignored the plain language of the rule, erroneously treated application of a non-discretionary rule as discretionary, ignored judicial precedent, and clearly exceeded the scope of his judicial authority for the following reasons.

First, application of R.C.M. 1003(c)(1)(B)(ii) is not discretionary, as implied by the military judge's use of the word "suggestion," but is mandated by the President. The President declared that "[a]n offense not listed in Part IV and not included in or closely related to any offense listed therein *is punishable* as authorized by the United States Code[.]" R.C.M. 1003 (c)(1)(B)(ii) (emphasis added). The rule affirmatively declares that if the specified conditions-precedent are satisfied, the offense "is punishable as authorized by the United States Code." The military judge offers no support for his construction of this unambiguous mandate as a "suggestion" to look at other portions of the U.S. Code, and we have found none.

Second, the text of the rule includes no restriction to offenses punishable under Title 10, but instead contemplates consideration of offenses under other Titles of the Code. In fact, the rule explicitly equates periods of authorized confinement to military-specific punishments, an equation essential to determination of authorized court-martial punishments for non-military offenses under the United States Code. This conclusion is further supported by the Manual's analysis. "Subsection[](1)(B) [is] based on paragraph 127c(1) of MCM, 1969(Rev.)." MCM (2008 and 2012 eds.), Analysis of R.C.M. 1003(c), App 21,at A21-74 and A21-75 respectively. The cited section of the 1969 and 1951 Manuals explicitly reference "Title 18" and unambiguously reflect that this mandate applies to the entire U.S. Code, not just Title 10 and the Uniform Code of Military Justice. *See also* MCM, 1969 (Rev.), ¶ 127c(1) and MCM, 1951, ¶ 127c ("Offenses not listed in the table, and not included within an offense listed, or not closely related to either, remain punishable as authorized by the United States Code (see, generally, Title 18) or the Code of the District of Columbia[.]").

The unambiguous sweep of this regulation to include United States Code provisions outside Title 10 is also apparent in case law. *See United States v. Leonard*, 64 M.J. 381, 383 (C.A.A.F. 2007) (finding no abuse of discretion in setting the maximum punishment for a specification and charge of possession of visual depictions of minors engaging in sexually explicit activity by reference to the maximum punishment authorized by 18

U.S.C. § 2252(a)(2)); *see also United States v. Jackson*, 38 C.M.R. 378, 381 (C.M.A. 1968) and *United States v. Williams*, 17 M.J. 207, 216-17 (C.M.A. 1984) (upholding sentence for kidnapping under clauses 1 or 2 of Article 134 by referencing the maximum sentence for a violation of the federal kidnapping statute).

Applying the mandate of R.C.M. 1003 (c)(1)(B)(ii), we conclude that "Sexual abuse" punishable under 18 U.S.C. § 2242(2)(A)-(B) is "essentially the same" or "directly analogous" to the charged sexual assaults. *Leonard*, 64 M.J. at 384. "Sexual abuse" is punishable by confinement up to "life," and provides a limitation on the punishment authorized for the alleged sexual assaults.

Comparison of the statutory elements illustrates the similarities between the offenses; indeed the acts alleged as sexual assault in the charged offense describe acts punishable as "sexual abuse" under 18 U.S.C. § 2242(2)(A)-(B).[21] Both statutes define "sexual act" as including "contact between the penis and the vulva or anus or mouth, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight[.]" 10 U.S.C.S. § 920(g)(1)(A); *compare with* 18 U.S.C.S. § 2246(2)(A). Both statutes require: (1) knowing engagement of a sexual act with another person, (2) who is incapacitated or incapable of consenting or declining participation in that sexual act.[22]

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[21] "18 U.S.C. § 2242 (2012). Sexual abuse. Whoever . . . knowingly . . . (2) engages in a sexual act with another person if that other person is -- (A) incapable of appraising the nature of the conduct; or (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act . . . shall be . . . imprisoned for any term of years or for life."

"10 U.S.C. 920(b) (2012), "Sexual assault. Any person subject to this chapter who . . . (2) commits a sexual act upon another person when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring; or (3) commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to-- (A) impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person . . . is guilty of sexual assault and shall be punished as a court-martial may direct."

[22] The only distinction of note between the offenses is that the amended Article 120(b) requires more explicit knowledge. The Title 18 offense requires the accused "knowingly . . . engage in a sexual act," while the revised Article 120(b)2 requires that the accused "knows or reasonably should know of" the victim's incapacity or inability to consent to the sexual act.

This similarity is not coincidental. The Fiscal Year 2006 National Defense Authorization Act (NDAA) "brought UCMJ sexual misconduct provisions into alignment with similar provisions applicable in the United States District Courts." *United States v. Neal*, 67 M.J. 675, 679 (N.M.Ct.Crim.App. 2009) (citing MCM (2008 ed.), Analysis of Punitive Articles, A23-15, and 18 U.S.C. §§ 2241 and 2244), *aff'd*, 68 M.J. 289 (C.A.A.F. 2010), *cert denied*, 131 S. Ct. 121 (2010). More relevant here, "Aggravated Sexual Assault," the predecessor offense to the "Sexual Assault" alleged, "[was] generally based on the Sexual Abuse Act of 1986, 18 U.S.C. Sections 2241-2245." MCM (2008 ed.), Analysis of Punitive Articles, ¶ 45f, A23-15.

The military judge's flawed interpretation of this Presidentially-mandated rule was clearly erroneous and inconsistent with the plain language of the rule, case-law, and canons of statutory construction. Such an erroneous judicial action exceeds the recognized boundaries of judicial authority and constitutes a "usurpation of judicial power." *Bankers Life & Casualty Co.,* 346 U.S. at 383.

c. R.C.M. 1003(c)(1)(B)(ii): Custom of the Service

"An offense not listed in Part IV and not included in or closely related to any offense listed therein is punishable . . . as authorized by the custom of the service." R.C.M. 1003(c)(1)(B)(ii).

The military judge acknowledged "that past statutes and customs may support a cry for 'substantial punishment' that approaches the jurisdictional maximum of a general court-martial," but then commented "[u]nfortunately . . . the 'custom of the service' language appears in a portion of [R.C.M.] 1003(c)(1)(B)(ii) that is inapplicable to the [charged offenses]." AE V at 6 (citation omitted). He further commented that the Government has "likewise failed to present evidence of any 'custom of the service' specific to the newly enacted legislation." *Id.* (citation omitted).

The phrase "custom of the service" for purposes of determining maximum punishment is not explicitly defined in the UCMJ or the Manual. The 1951 and 1969 Manuals included reference to "custom of the service" in the context of punishment as a limitation on forms of punishment. Chapter *XXV*, paragraph 125 (MCM, 1951 and 1969 ed.) ("Courts-martial shall not impose any punishment not sanctioned by custom of the service, such as carrying a loaded knapsack, shaving the head, placarding, pillorying, placing in stocks, or tying up by the

thumbs.”). The Manual has long-defined that phrase, in the context of a breach of custom of the service, as follows:

> In its legal sense, “custom” means more than a method of procedure or a mode of conduct or behavior which is merely of frequent or usual occurrence. Custom arises out of long established practices which by common usage have attained the force of law in the military or other community affected by them.

MCM (2008 and 2012 eds.), Part. IV, ¶ 60c(2)(b); *see also Beaty*, 70 M.J. at 49-50 (Baker, J., dissenting).

We find ample evidence to conclude that punishment of the charged conduct constitutes a “custom of the service,” under both the plain language of the phrase and as long defined in the Manual. Penile penetration of the sexual organ of a female: (1) incapable of consenting due to impairment by an intoxicant (known by or reasonably should have been known by the accused), and/or (2) sleeping (then known or reasonably should have been known by the accused) has been punishable by court-martial since at least 1951. The alleged conduct was punishable as “Rape” from 1951 until 30 September 2007, and defined as such in every Manual issued from 1951 until the substantial revision of military sexual misconduct provisions in 2006. MCM, 1951 and 1969 (Revised ed.), Chapter XXVIII, ¶ 199a, Discussion; MCM (1984, 1995, 1998, 2002, 2005 eds.), Part IV, Paragraph 45c(1)(b) (“[I]f to the accused’s knowledge the [victim] is of unsound mind or unconscious to an extent rendering [him or][23] her incapable of giving consent, the act is rape.”). As discussed above, this conduct was punishable as “aggravated sexual assault” from 01 October 2007 through 27 June 2012, and since 28 June 2012 as “sexual assault.”

Assuming *arguendo*, that the predecessor Article 120 offenses are no longer listed in Part IV of the Manual and thus do not qualify as listed offenses closely-related the charged offenses for purposes of R.C.M. 1003(c)(1)(B)(i), we conclude that those versions of Article 120 evidence a custom of the service. Specifically, that more than 60 years of practice during which the alleged misconduct was punishable by a dishonorable discharge and at least 30 years of confinement reasonably constitutes “long established practices which by common usage have attained the force of law in the military.”

[23] The words “him or” first appeared in the 1995 Manual and appeared in each subsequent revision through the 2005 Manual.

MCM (2008 and 2012 eds.), Part IV, ¶ 60c(2)(b); *see also Beaty*, 70 M.J. at 49-50 (Baker, J., dissenting). Notably, the conduct charged here was punishable as "rape" and by "death or such other punishment as a court-martial may direct"[24] until the 2006 revision recast this conduct as "aggravated sexual assault" punishable by confinement for 30 years. Art. 120, UCMJ; *see generally* MCM (1951-2005 eds.).

3. Maximum Authorized Punishment

By applying the various offense-based limits on punishment mandated in R.C.M. 1003(c)(1)(B), we conclude that at the time the offenses were allegedly committed, the authorized punishment included a dishonorable discharge and confinement for at least 30 years. Moreover, effective 15 May 2013, one week prior to the Real Party's arraignment, the President exercised his authority to limit punishments and declared that the maximum punishment authorized for each offense was a "[d]ishonorable discharge . . . and confinement for 30 years." Executive Order 13643 of 15 May 2013. This exercise of Presidential authority to limit punishment after the effective date of the statute does not implicate Constitutional prohibitions on *ex post facto* laws as this action did not "disadvantage the [Real Party] affected by them [by authorizing infliction of] a *greater punishment." Youngblood*, 497 U.S. at 41-42 (citation omitted). Therefore, the maximum authorized punishment for each alleged offense includes 30 years confinement and a dishonorable discharge. Since there is no ambiguity in the maximum authorized punishment, application of the Rule of Lenity is unnecessary.

C. Is issuance of the writ appropriate under the circumstances?

In assessing this question, we are aware that the circumstances present here have not been addressed in any decision revealed in the parties' pleadings or by this court. We are also mindful that publication of the statutory text of the amended Article 120 in Part IV of the 2012 Manual, in apparent anticipation of Presidential action, may have complicated judicial application of the Presidentially-prescribed rules for determining offense-based limits on punishments.

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[24] *But see Coker*, 433 U.S. at 592 (the death penalty is "grossly disproportionate and excessive punishment for the crime of rape [of an adult woman] and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." (footnote omitted)).

Nevertheless, the military judge's analysis and ruling clearly deviated from the President's unambiguous, standing guidance for determining offense-based limits on punishment for offenses not listed in Part IV of the Manual. The military judge's ruling "overreached [his] judicial power to deny the Government the rightful fruits of a valid conviction," *Will*, 389 U.S. at 97-98 (citation omitted), confinement in accordance with a law enacted by Congress exercising its Constitutional authority "to define crimes and fix punishments," and the President's exercise of Congressionally-delegated authority to define limits on punishment, *Ex parte United States*, 242 U.S at 42. *See also Roche*, 319 U.S. at 31 (issuance of the writ justified by persistent disregard of the Rules of Civil Procedure by Court) (citations omitted).

Additionally, to the extent that confusion over the punishment authorized for offenses charged under the amended Article 120 exists in the trial judiciary, the likelihood of recurrence weighs in favor of issuing the requested writ.[25] At least one military jurist has ruled that the maximum punishment authorized for a sexual assault that allegedly occurred after 27 June 2012 and before 15 May 2013 does not include a punitive discharge or confinement for more than one month, while this court has concluded that a dishonorable discharge and confinement for 30 years are authorized punishments. *Accord United States v. Ramsey*, 40 M.J. 71, 76 (C.M.A. 1994) ("the military judge not only lacked authority for his ruling on reconsideration in which he arbitrarily picked some lesser figure than the 10 years authorized for [a lesser-included offense] malingering in a hostile fire pay zone; but also he failed to follow the clear mandate of R.C.M. 1003(c)(1)(B)(i)." (citation omitted)).

We see no reason to allow such an error to persist in a matter as fundamental to the proper administration of justice as the maximum punishment authorized for an alleged offense. *See Ex parte United States,* 242 U.S. at 51-52 ("since its exercise in the very nature of things amounts to a refusal by the judicial power to perform a duty resting upon it and, as a consequence thereof, to an interference with both the legislative and executive authority as fixed by the Constitution."). Issuance of the requested writ is necessary

[25] On 16 August 2013, the Government filed a Petition for Extraordinary Relief in the Nature of a Writ of Mandamus seeking essentially the same relief in another case charged under the amended Article 120, UCMJ. *United States (Petitioner) v. Lewis T. Booker, Jr, CDR, JAGC, U.S. Navy (Military Judge) (Respondent), Fabian D. Medina, Electronics Technician Petty Officer Third Class, U.S. Navy (Real Party in Interest).*

and appropriate under these circumstances. *Hasan*, 71 M.J. at 418.

VI. Conclusion

The military judge's ruling that the maximum imposable punishment for each sexual offense alleged is the jurisdictional limitation of a summary court-martial was contrary to the relevant statutes, case law, and valid, Presidentially-prescribed Rules for Courts-Martial. We have concluded that the authorized maximum punishment for each alleged sexual assault offense includes a dishonorable discharge and confinement for 30 years. The military judge's erroneous interpretation and application of the President's unambiguous rules for determining the authorized maximum punishment exceeded the recognized boundaries of judicial authority, was a "clear abuse of discretion," and constitutes a "usurpation of judicial authority." *Bankers Life & Casualty Co.*, 346 U.S. at 383; *see also Cheney*, 542 U.S. at 380; R.C.M. 1002, 1003. This error "is likely to recur" in the prosecution of offenses defined in the amended Article 120, UCMJ, which allegedly occurred on or after 28 June 2012 and before 15 May 2013. *Labella*, 15 M.J. at 229 (citations and internal quotation marks omitted omitted).

The Petitioner has established that there is no other adequate means to attain the relief requested, that the right to issuance of the writ is clear and indisputable, and that the drastic remedy of issuance of a writ of mandamus is necessary and appropriate under these extraordinary circumstances. See *Hasan*, 71 M.J. at 418.

The Order of the Military Judge of 28 May 2013, as supplemented by his order of 30 May 2013, is set aside. The maximum punishment authorized for each specification of the Charge alleging violation of Article 120(b), UCMJ, includes a dishonorable discharge, confinement for 30 years, and other punishments authorized by R.C.M. 1003. The Stay of Proceedings ordered by this Court on 24 June 2013 is lifted, and the record is returned to the Judge Advocate General for transmittal to the convening authority for action consistent with this opinion.

Chief Judge MODZELEWSKI and Judge JOYCE concur.

For the Court

R.H. TROIDL
Clerk of Court

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2. SSN	3. RANK/RATE	4. PAY GRADE
SCHALEGER, Christopher J.	622-28-3580	ET2	E-5

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE a. INITIAL DATE	b. TERM
Trident Training Facility	31 Oct 2008	6 Yrs + 12 Mons

7. PAY PER MONTH a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL	8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
$2893.50	$0.00	$2893.50	None	N/A

II. CHARGES AND SPECIFICATIONS

10. CHARGE I VIOLATION OF THE UCMJ, ARTICLE 120

Specification 1: In that Electronics Technician Petty Officer Second Class Christopher J. Schaleger, U.S. Navy, Trident Training Facility, Bangor, Washington, on active duty, did, at or near Bremerton, Washington, on or about 7 December 2012, commit a sexual act upon Mrs. Madeline J. Gibson, to wit: penetration of her vulva by his penis, when the said Electronics Technician Petty Officer Second Class Christopher J. Schaleger, U.S. Navy, knew or reasonably should have known that the said Mrs. Madeline J. Gibson was asleep.

Specification 2: In that Electronics Technician Petty Officer Second Class Christopher J. Schaleger, U.S. Navy, Trident Training Facility, Bangor, Washington, on active duty, did, at or near Bremerton, Washington, on or about 7 December 2012, commit a sexual act upon Mrs. Madeline J. Gibson, to wit: penetration of her vulva by his penis, when the said Mrs. Madeline J. Gibson was incapable of consenting due to impairment by an intoxicant, and that condition was known or reasonably should have been known by the said Electronics Technician Petty Officer Second Class Christopher J. Schaleger, U.S. Navy.

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI)	b. GRADE	c. ORGANIZATION OF ACCUSER
Agosto, Victoria	LN2(SW/AW)	Region Legal Service Office Northwest

d. SIGNATURE OF ACCUSER	
Victoria Agosto, LN2, USN	31 JANUARY 2013

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 31 day of January, 20 13, and signed the foregoing charges and specifications under oath that he/~~she~~ is a person subject to the Uniform Code of Military Justice and that he/~~she~~ either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/~~her~~ knowledge and belief.

J. L. WILT *Typed Name of Officer*	Region Legal Service Office Northwest *Organization of Officer*
LT, JAGC, USN *Grade and Service*	Judge Advocate *Official Capacity to Administer Oaths (See R.C.M. 307(b)–must be commissioned officer)*

Signature

DD FORM 458 S/N 0102-LF-000-4580

ORIGINAL

Appendix 2

12. On 31 January ,20 13 , the accused was informed of the charges against him/~~her~~ and of the name~~(s)~~ of the accuser~~(s)~~ known to me. (*See R.C.M. 308(a)*). (*See R.C.M. 308 if notification cannot be made.*)

V. Agosto
Typed Name of ~~Immediate Commander~~ Legalman

Region Legal Service Officer Northwest
Organization of ~~Immediate Commander~~ Legalman

LN2(SW/AW), USN
Grade

Victoria Agosto
Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at 1000 hours, January 31, 20 13 at TRIDENT Training Facility, Bangor, Washington
Designation of Command or Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

~~FOR THE~~ Commanding Officer
Official Capacity of Officer Signing

R.A. Wortman
Typed Name of Officer

Captain, USN
Grade

Signature

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE
NAVY REGION NORTHWEST	SILVERDALE, WASHINGTON	14 May 13

Referred for trial to the GENERAL court-martial convened by my General Court-Martial Order 01-13

14 , February 20 13 ,subject to the following instructions:[2]

By _____ of _____
Command or Order

M. K. RICH
Typed Name of Officer

COMMANDER
Official Capacity of Officer Signing

Rear Admiral
Grade

Signature

15. On 16 MAY ,20 13 , I (caused to be) served a copy hereof on (each of) the above named accused.

J. L. WILT
Typed Name of Trial Counsel

LT, JAGC, USN
Grade or Rank of Trial Counsel

Jennifer L. Wilt
Signature

FOOTNOTES
1 – When an appropriate commander signs personally, inapplicable words are stricken.
2 – See R.C.M. 601(e) concerning instructions. If none, so state.

DD Form 458 Reverse

ORIGINAL

DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES V. ET2(SS) CHRISTOPHER J. SCHALEGER, USN

The Government alleges that, in December 2012, ET2(SS) Schaleger committed sexual acts upon a female by inserting his penis into her vulva. It is not entirely clear from the charge sheet or the Government's motion *in limine*, but the two distinct Specifications may simply state different theories of prosecution for a single sexual act, Specification 1 alleging that the woman was asleep, Specification 2 that she was intoxicated and therefore incapable of consenting. The two Specifications were referred for trial by General Court-Martial and the accused was arraigned on 22 May 2013. On 15 May 2013, the President signed Executive Order 13643, amending Part IV of the Manual for Courts-Martial, United States, to incorporate legislative changes to the UCMJ and to fix punishments.

The Government's motion *in limine* requests that the court determine the maximum punishment before proceeding to trial. Upon consideration of the revisions to the substantive portion of the Uniform Code of Military Justice, the parties' arguments, the Executive Order purporting to effect the 2011 amendments to the UCMJ, and case law, it is the court's determination that the maximum imposable punishment for each offense alleged, and for each lesser included offense, is the jurisdictional limitation of a summary court-martial: confinement for 1 month, restriction for 2 months, hard labor without confinement for 45 days, and forfeiture of 2/3 pay per month for 1 month. The restraint-type punishments, moreover, may not be combined.

This order is necessarily limited to the two Specifications contained within the Charge, namely, violations of Articles 120(b)(2) and 120(b)(3)(A). Further, because of the nature of a court-martial, this order has no precedential effect; it may, however, be persuasive before other courts-martial and on other aspects of the 2011 amendments.

<u>2011 Amendments to Article 120</u>

When the National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2011), became law, it included amendments to Article 120, Uniform Code of Military Justice. Those amendments set out new elements of offenses

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involving sexual acts, and further established elements for new offenses involving video recording and acts with children. *See id.* §§ 541 *et seqq.*, 125 Stat. 1404 *et seqq.* While the NDAA did not repeal existing law, it did so heavily modify the elements and definitions of the offenses that the effect was the same.

All the new articles (120, 120a, 120b, and 120c) include the vague penalty provision common to most other punitive articles of the UCMJ, that the offender shall be punished "as a court-martial may direct". By contrast, the previous major overhaul to the statutes involving sexual offenses included interim punishments in anticipation of a delay between the effective date of the legislation and the determination and publication of limits. *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163 § 552(b), 119 Stat. 3263 (2006).

To resolve the issue of the maximum punishment that can be imposed upon ET2(SS) Schaleger for his offenses if convicted, it is necessary to consider the complementary nature of Congressional and Presidential power regarding the "rules for government and regulation of the land and naval forces." It is also necessary to consider what effect the prohibition on *ex post facto* laws may have.

There are two extremes to be considered for punishment for the offenses defined by the 2011 amendments. One could take an expansive approach and argue that any punishment not prohibited by the Code could apply; in other words, any offense in the 2011 amendments to the Code could subject the offender to imprisonment for life without the possibility of parole and all the accessory punishments. This is the approach necessarily taken by the Government when it argues that the recent Executive Order does not constitute an *ex post facto* law, although the bulk of the Government's argument is that punishments for the now superseded Article 120 should apply. The other extreme is that, because the President has not specified limits, the limit is "no punishment".

The court's decision is informed to some degree by a basic tenet of administrative law, which is that "an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments, [and] [w]hen a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a

reasonable choice within a gap left open by Congress, the challenge must fail." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 864-65 (1984). The question is what a court is to make of the Executive's decision not to exercise the authority granted by Article 56 to fill the gap created by the 2011 amendments until adoption of Executive Order 13643 on 15 May 2013, 78 Fed. Reg. 29559.

Punishment under the UCMJ

In the usual course of business, the President exercises his authority under Article 56 to specify punishments for those offenses that do not have a statutory penalty, and those punishments are set out in Executive Orders that usually coincide with the effective date of the statutes. His determinations for individual offenses are set out in Part IV of the MANUAL FOR COURTS-MARTIAL after going through the administrative rulemaking process of section 553 of title 5, *United States Code*. *See generally* Department of Defense Instruction 5500.17 of 03 May 2003, Enclosure (2). In certain limited cases, the President may bypass the rulemaking process, *see id.*, but only he has the authority to amend Parts I through V of the Manual, and he does so by Executive Order. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), Part I, ¶ 4 Discussion.

Prior editions of the MANUAL FOR COURTS-MARTIAL placed punishments for the most part in a Table of Maximum Punishments. *See, e.g.*, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1969), ¶ 127. Prior editions also noted statutorily prohibited punishments (those punishments forbidden in Article 55) and punishments prohibited by custom of the service. 1969 MANUAL, ¶ 125. Today's MANUAL maintains the Table of Maximum Punishments as Appendix 12.

Statutory Expressions of Punishments

The Uniform Code of Military Justice is unique among criminal statutes in that most of the Articles in the Code are silent as to punishment. The typical penalty language provides that the offender "shall be punished as a court-martial may direct". In the imposition of punishments, courts-martial are subject to three general limitations. Courts may not impose punishments prohibited by the Code (for example, the punishments forbidden by Article 55, among them flogging and tattooing). Courts may not exceed the jurisdictional limits of the three types of court-martial (general, special, and summary) contained within Articles 18 through 20 of the Code. Courts may not exceed limitations imposed by the President for various

offenses. *United States v. Varnadore*, 26 C.M.R. 251, 253 (C.M.A. 1958).

While most penalty provisions in the UCMJ are "as a court-martial may direct," some offenses contained within the UCMJ do specify limits on punishments, among them Spying in violation of Article 106 (mandatory death), Misbehavior of a Sentinel in violation of Article 113 (death or other punishment in time of war, any punishment but death if not in time of war), and Premeditated or Felony Murder in violation of Article 118(1) and 118(4), respectively (death or mandatory life).

In contrast, every statute in the United States Criminal Code (title 18) and offenses scattered throughout the rest of the United States Code (*e.g.*, 16 U.S.C. § 1540; 17 U.S.C. § 506; 21 U.S.C. § 848; 22 U.S.C. § 2778; 26 U.S.C. § 7201; 31 U.S.C. § 5324; 36 U.S.C. § 509; 38 U.S.C. § 6102) set out a statutory limit on punishment. Similarly, State criminal codes specify punishments, whether within a specific criminal provision or by classification as a particular degree of misdemeanor or felony. Also, as noted above, the 2006 revisions to Article 120 in the Uniform Code of Military Justice did contain interim punishments pending Executive determination.

Regulatory Basis for Punishment

Because the 2011 amendments did not specify punishments, and because the President has only within the last two weeks set out limitations, one must look to other sources for determining available punishments. The MANUAL FOR COURTS-MARTIAL does have some guidance on sentences that may be imposed at any court-martial, and that guidance appears in Rule for Courts-Martial 1003.

The Rule begins by stating that "[s]ubject to the limitations in this Manual, the punishments authorized in this rule may be adjudged in the case of any person found guilty of an offense by a court-martial". R.C.M. 1003(a), MCM, Part II. Subdivision (b) of the Rule describes the various penalties. Critically, subdivision (c) discusses limitations on punishments. The President through the rulemaking process has previously determined that there are two categories of offenses whose punishments are subject to the limitations in subdivision (c), those that are listed within Part IV of the MANUAL and those that are not listed within Part IV of the MANUAL.

One could argue, as the Government does, that because the predecessor to the current Article 120 is listed in Part IV of

the MANUAL, then those limits should apply. The Government's argument has some appeal because it provides some certainty to courts-martial hearing the new Article 120 cases and it generally results in punishments less than the jurisdictional maximum of a general court-martial. Referring to the predecessor of Article 120 is inappropriate, however, because, at the time that the alleged crime occurred, in December 2012, the activity was not a violation of the 2006 version of Article 120. Granted, there are some similarities in elements and definitions, but the fact of the matter is that for all offenses that occurred after the effective date of the 2011 amendments, the 2006 provisions cannot apply.

It bears repeating that the President only recently included the 2011 amendments to the punitive articles in Part IV of the MANUAL, and that he only recently specified any maximum punishments. The Department of Defense, acting through the Joint Service Committee on Military Justice, began the rulemaking process by advising the public of proposed changes and calling for comments. 77 Fed. Reg. 64854 (2012). The 2012 version of the MANUAL does include, in Part IV, the statutory text of the 2011 amendments, but because the rulemaking process (including modes of proof, explanations, and the like, areas commended to the President under a separate provision, Article 36) has only recently been completed and an Executive Order issued, those amendments have just now become a full-fledged part of the MANUAL FOR COURTS-MARTIAL. The current version of Article 120 is thus not an offense listed in Part IV of the MANUAL, so the guidance of R.C.M. 1003(c)(1)(A) does not apply.

Turning to R.C.M. 1003(c)(1)(B), one could conclude that because a sexual act with an unconscious or intoxicated person is related to an offense that is listed in the pre-15 May 2013 Part IV of the MANUAL, then the maximum punishment for the previously extant offense should apply. The difficulty with this approach is that no case interpreting Rule 1003(c)(1)(B) has ever applied its provisions to Articles 80 through 132 of the Uniform Code of Military Justice; instead, the Rule has been used only in those cases where offenses have been laid under Clause 1 or Clause 2 of the General Article and have not been included in the MANUAL as "various circumstances in which the elements of Article 134 could be met," *United States v. Jones*, 68 M.J. 465, 471 (C.A.A.F. 2010), or in prosecutions under Clause 3 of the General Article for noncapital crimes and offenses, whether violations of other portions of the United States Code or violations of state law that are prosecuted under the Federal Assimilative Crimes Act, 18 U.S.C. § 13. *See, e.g.,*

United States v. Beaty, 70 M.J. 39 (C.A.A.F. 2011); *United States v. Leonard*, 64 M.J. 381 (C.A.A.F. 2007); *United States v. Bivins*, 49 M.J. 328 (C.A.A.F. 1998).

The Government is correct that past statutes and customs may support a cry for "substantial punishment" that approaches the jurisdictional maximum of a general court-martial. *See Beaty*, 70 M.J. at 49 (Baker, J., dissenting). Unfortunately, however, the "custom of the service" language appears in a portion of the Rules for Courts-Martial, 1003(c)(1)(B)(ii), that is inapplicable to the statutory offense with which ET2(SS) Schaleger is charged. The Government has likewise failed to present evidence of any "custom of the service" specific to the newly enacted legislation. *See Beaty*, 70 M.J. at 44 (absence of a custom "cannot mean" that the maximum of life without parole applies). Further, the term of art "custom of the service" has historically been applied as one of limitation, not expansion, on punishments. *E.g.*, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1969), ¶ 125.

As a final note on the regulatory scheme, I reject the suggestion to look to other, analogous, statutes for guidance as provided in R.C.M. 1003(c)(1)(B)(ii). The plain language of the Rule directs consulting "the United States Code" for similar offenses if there is no punishment provided for a Part IV offense. Title 10 is indisputably part of the United States Code, and it provides for no punishments in these new Article 120 offenses.

The Government's suggestion is consonant with the Defense's proposed alternative middle ground, which is to adopt the punishment of battery for the offenses contained within the 2011 amendments. The difficulty with the Defense's position in this regard is that an arguably closely related statute -- battery in violation of Article 128, 10 U.S.C. § 928 -- also does not provide a definitive punishment; the punishment is provided by the President using his Article 56 authority. The Government's position is even more tenuous, as the constitutional basis for title 10 -- Congressional authority to write laws for the regulation of the government of the land and naval forces complemented by the President's authority as Commander in Chief -- is different from the constitutional or other legal basis of other titles of the Code. *Compare, e.g.*, 18 U.S.C. § 1001 (frustration of a federal purpose) *with* 18 U.S.C. § 2422 (use of a means of interstate commerce to effect the crime). These constitutional bases are also reflected in jurisprudence over the ages recognizing a military society that is distinct from

civilian society. *See, e.g., Parker v. Levy*, 417 U.S. 733, 743 (1974). While it is gratuitous perhaps to restate the point, neither the parties' briefs nor my own research reveals any instance in which the "other analogous statute" authority has been used outside the General Article context.

Ex Post Facto concerns

There is a case to be made that, because the President's Executive Order is not legislation, the constitutional *ex post facto* prohibition does not apply. The prohibition in fact is found in the "legislative" portion of the constitution. U.S. Const. art. I, § 9, cl. 3. *See also United States v. Gorski*, 47 M.J. 370, 373 (C.A.A.F. 1997)(opinion apparently limited to the effect of legislation). Considering, however, the manner in which the UCMJ is drafted and implemented, and because of the separation of powers conferred by the Constitution in military and naval criminal matters, this strict textual argument must fail. Even if the *ex post facto* clause does not by its terms apply, the concept of the judicial interpretation that any law that aggravates an offense is harsh and oppressive, *see Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925), does, and accordingly due process, if nothing else, requires limiting the punishment.

Congress may not normally delegate legislative authority to the Executive branch, as to do so would violate the "finely wrought" constitutional provisions, especially the Presentment Clause, U.S. Const. Art. I § 7, cl. 2. *See Clinton v. City of New York*, 524 U.S. 417, 421 (1998). In some limited cases, however, where the Executive is in control, as in foreign relations, Congress may constitutionally allow some discretion in shaping the contours of its legislation. *Id.* at 445 n.38 (citing *Field v. Clark*, 143 U.S. 649 [1892], upholding portions of the Tariff Act allowing the President to "suspend" various aspects of the Act in appropriate cases). Congress has in fact delegated some authority to the Executive in cases of controlled substances. *See* 21 U.S.C. § 811. Certainly any prosecution for a substance added to the various schedules of controlled substances is subject to the *Ex Post Facto* clause.

So, too, should a delegation to the Executive to decide punishments at courts-martial, recognizing the President's role as Commander in Chief of the Armed Forces, be considered a valid exercise of the legislative power, thus bringing such a determination into the fold of Article I authority for the purposes of *ex post facto* scrutiny. Congress is in all cases "the constitutionally recognized source of authority over the

military system of justice." *Chappell v. Wallace*, 462 U.S. 296, 304 (1983). *Accord Jones*, 68 M.J. at 468. The President is the Commander in Chief of the Armed Forces. U.S. Const. Art. II § 2. "The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive branches." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973).

The Government argues that, because the potential maximum punishment was confinement for life without parole and all accessory punishments, then the Executive Order of 15 May 2013 works to the benefit of all service members and does not therefore constitute an *ex post facto* law. For the reasons discussed throughout this order, the Government's argument begins at the incorrect starting point. Accordingly, any punishment exceeding that which could be imposed by a summary court-martial is prohibited as *ex post facto*. *See, e.g., Beazell*, 269 U.S. at 169-70 (1925)(law is so well settled that citation is not necessary to support the proposition that making punishment more burdensome than previously violates the clause).

As a final point in its argument that the amendments are not *ex post facto*, the Government invokes *Taylor v. Garaffa*, 57 M.J. 645 (N.M.C.C.A. 2002). *Taylor* involved a challenge to the increase of the jurisdictional limit on punishments that could be imposed at a special court-martial. Before the amendments to Article 19, the maximum confinement that could be imposed at a special court-martial was 6 months, irrespective of any greater maximum punishment authorized for the offense; the amendments increased the limit to confinement for a year. *Taylor*, 57 M.J. at 647-48.

Taylor's legal footing, however, was vastly different from ET2(SS) Schaleger's case. Sergeant Taylor would always have been subject to the maximum punishment for his offense of wrongful cocaine use -- confinement for 5 years, a dishonorable discharge, and other punishments -- had his case been referred for trial by a general court-martial. The legislation did not increase the punishment for that particular offense, merely the ceiling on the forum to which it had been referred. *See Taylor*, 57 M.J. at 651 (citing *Duncan v. Missouri*, 152 U.S. 377, 382-83 [1894] for the proposition that creating a new forum did not constitute a prohibited *ex post facto* law).

The Rule of Lenity

The Rule of Lenity provides that criminal statutes are to be strictly construed, with any ambiguity resolved in favor of an accused. *See, e.g., United States v. Thomas*, 65 M.J. 132, 135 n.2 (C.A.A.F. 2007). *But see United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820)(interpretation must give effect to the intent of the legislature).

When interpreting a statute and giving it effect, it is not enough to read it in isolation. Rather, the statute must be read in the context of the overall statutory scheme. *See, e.g., Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). Congress created the revised Article 120 in the context of the Uniform Code of Military Justice, Chapter 47 of title 10, and that Chapter's provisions include the three different courts-martial. Congress could have limited disposition of these types of offenses as it did in Article 106 (all allegations of Spying shall be referred to a general court-martial), but it chose not to do so. Indeed, as further evidence of Congress's understanding of its authority to specify fora and mandatory minimum punishments, one need look only as far as the draft National Defense Authorization Act for Fiscal Year 2014 proposed by the House Subcommittee on Military Personnel, H.R. Rep. No. 1960, 113th Cong., 1st Sess. 13 (2013)(providing that all sexual misconduct cases shall carry a mandatory minimum punishment of dismissal for officers or dishonorable discharge for enlisted members, punishments available only at a general court-martial). Congress could have enacted interim punishments as it did with the 2006 provisions, but it chose not to do so. *See also Gorski*, 47 M.J. at 372 n.1 (setting out "severance" language to permit the legislation to survive a challenge against retrospective application). Instead, it left referral and punishment to convening authority and court-martial discretion.

Applying the Rule of Lenity leads to the conclusion that, while a service member may be convicted of the offenses established by the 2011 amendments, thus giving effect to the intent of the legislature to criminalize sexual offenses, the maximum punishment that can be imposed is the statutory limit imposed on a summary court-martial. This maximum punishment (confinement for 1 month, hard labor without confinement for 45 days, restriction to limits for 2 months, forfeiture of 2/3 pay per month for 1 month) may be imposed irrespective of forum. This maximum criminal penalty is, in the area of sexual offenses, augmented by a civil disability created by a requirement to register as a sex offender and to comply with

conditions of varying degrees of severity from state to state. *See generally* Chapter 151 of title 42, *United States Code*. The legislature's interests are thus protected.

The Rule of Lenity extends to any conviction of ET2(SS) Schaleger of a lesser included offense under the authority of Article 79, UCMJ, 10 U.S.C. § 879. While Article 79's language addresses offenses that are "necessarily included" within a charged offense, in the military justice arena that statute has always been understood to mean "lesser included offense." *See generally United States v. Jones*, 68 M.J. at 467. The universal view in the cases, moreover, is that "lesser" describes not only the quantity or quality of elements, but also punishment. *See, e.g., Carter v. United States*, 530 U.S. 255, 260 n.2 (2000). It is here that due process dictates that the maximum punishment be limited to that of a summary court-martial.

CONCLUSION

Because the smallest punitive burden is found at a summary court-martial, as a matter of due process it is only those punishments authorized for that forum (confinement for 1 month, hard labor without confinement for 45 days, restriction for 2 months, forfeiture of 2/3 pay per month for one month) that may be imposed upon ET2(SS) Schaleger if he is convicted of either of the offenses alleged or of any lesser included offense under the authority of Article 79, UCMJ, 10 U.S.C. § 879.

So ordered.

LEWIS T. BOOKER, JR.
CDR, JAGC, USN
Military Judge
28 May 2013

DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES V. ET2(SS) CHRISTOPHER J. SCHALEGER, USN

This serves as a supplement to the Order in this case issued on 28 May 2013. That Order decided, in response to a Government motion *in limine*, that the maximum punishment that could be imposed for a violation of Article 120(b)(2) or 120(b)(3)(A), UCMJ, 10 U.S.C. § 920, as created by the National Defense Authorization Act for Fiscal Year 2012, was the jurisdictional maximum punishment for a summary court-martial as stated in Article 20, UCMJ, 10 U.S.C. § 820. The accused has been arraigned on the charge referred to court-martial, but he has not been convicted of any offense, nor has he been sentenced for any offense.

Courts of the United States (28 U.S.C. § 451) do not issue advisory opinions, as there is no "case or controversy" before the courts. U.S. Const. Art. III § 2. Courts created by an Act of Congress under Article I of the Constitution, including those in the military justice system, are not bound by the Article III proscription, but they generally observe the prudential limitation. *See United States v. Chisholm*, 59 M.J. 151, 152 (C.A.A.F. 2003).

In ET2(SS) Schaleger's case, there is in fact a "case or controversy" independent of the Government's motion *in limine*. Charges have been referred for trial, and the parties are at liberty to negotiate a pretrial agreement as provided in Rule for Courts-Martial 705. That negotiation is only reasonable, however, if the parties understand the stakes. *See, e.g., United States v. Perron*, 58 M.J. 72, 78 (C.A.A.F. 2003). Questions of punishment arise during the voir dire process and must be resolved to ensure that members fully understand the accused's punitive exposure. If there is a conviction, members will need to be instructed properly on the maximum permissible sentence. R.C.M. 1005.

This case is ripe from the Government's perspective because, if the Order incorrectly states the maximum punishment, the Government has no recourse to seek a greater punishment than that imposed by the court-martial. This case is all the more ripe for decision if, in fact, the 28 May 2013 Order states the correct punishment. If one were to instruct on a maximum

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punishment advocated by the Government, for example (in this case, confinement for 30 years, dishonorable discharge, forfeiture of all pay and allowances, reduction to pay grade E-1), and if the accused served more than 1 month in confinement, then he would be illegally confined. The normal post-trial and appellate review processes provided by Articles 60, 64, 66, and 67, are insufficiently nimble to prevent this illegal confinement, and while deferment of sentence or a writ of *habeas corpus* might be beneficial, once again the risk to the accused is palpable. Accordingly, it is my conclusion that this matter is ripe for decision and that the 28 May 2013 Order was properly and prudentially issued.

LEWIS T. BOOKER, JR.
CDR, JAGC, USN
Military Judge
30 May 2013

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

UNITED STATES, Petitioner	)	GOVERNMENT PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF MANDAMUS
v.	)	Case No. _____
Lewis T. BOOKER, JR, Commander U.S. Navy (in his official capacity as Military Judge) Respondent	)	
Christopher J. SHALEGER, Electronics Technician Petty Officer Second Class (E-5) U.S. Navy Real Party in Interest	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

STEPHEN C. NEWMAN
Colonel, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7059, fax (202) 685-7687

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Preamble

COMES NOW THE UNITED STATES and respectfully requests that this Court issue a stay of the trial proceedings in the general court-martial of *United States v. Johnson* and grant Petitioner's Writ of Mandamus Petition, set aside the Trial Court's ruling of May 28, 2013, and direct the Military Judge to apply the correct maximum authorized punishment.

I

History of the Case

The Government preferred charges against ET2 Schaleger on January 31, 2013, alleging two specifications under the amended version of Article 120. After a pretrial investigation and receiving advice from his Staff Judge Advocate, the Convening Authority referred charges against the Accused under Article 120(b)(2) and 120(b)(3)(A), UCMJ, 10 U.S.C. § 920 (2012), to a General Court-Martial on May 14, 2013.

The United States filed a Motion *In Limine* to determine the maximum punishment for offenses alleged to have been committed under Article 120(b)(2) and 120(b)(3)(A). (Pet'r Mot., May 17, 2013.) On May 24, 2013, the United States filed a supplement to this motion. (Pet'r Sup. Mot., May 24, 2013.) On May 28, 2013, the Military Judge ruled that the maximum punishment for each Article 120 offenses at the time of this offense was the Summary Courts-Martial maximum. (*Id.*)

II

Jurisdictional Statement

This Court has jurisdiction to issue all writs necessary or appropriate in aid of its existing statutory jurisdiction. 28 U.S.C. § 1651(a); *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999); *Loving v. United States*, 62 M.J. 235, 239 (C.A.A.F. 2005). That jurisdiction "extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected." *FTC v. Dean Foods Co.*, 384 U.S. 597, 603-04 (1966); *see also Gale v. United States*, 17 C.M.A 40, 42-43 (C.M.A. 1967).

The United States avers that the maximum allowable sentence for a violation of Article 120(b)(2) or 120(b)(3)(A), UCMJ, 10 U.S.C. § 920, is thirty years' confinement. Thus, upon completion of the sentencing proceedings below, this Court will have jurisdiction pursuant to Art. 66, UCMJ, to review this case. Because an appeal may later be perfected, this Court has jurisdiction to entertain the Petition.

III

Specific Relief Sought

The United States respectfully requests that this Court order the Trial Court to stay the proceedings, set aside the Trial Court's ruling of May 28, 2013, and apply the maximum punishments found in Executive Order 13643 of May 15, 2013.

Should this Court find application of Executive Order 13643 impermissible, the United States asks this Court to apply the previous Executive Order found in Part IV of the Manual for Courts-Martial to determine the maximum punishment. Finally, this Court may look to the United States Code for an offense that is "essentially the same," and apply the maximum found there. The Military Judge's failure to apply any of these results is in clear contravention of the plain language of R.C.M. 1003, and should be set aside, and this case remanded so that trial may proceed apace.

IV

Issue Presented

R.C.M. 1003 PROVIDES THE FRAMEWORK FOR DETERMINING AN OFFENSE'S MAXIMUM PUNISHMENT. APPLYING R.C.M. 1003, THE MAXIMUM PUNISHMENT FOR THE CHARGED OFFENSES AT THE TIME THEY WERE COMMITTED WAS LIFE WITHOUT THE POSSIBILITY OF PAROLE, AND THE MAXIMUM PUNISHMENT FOR EACH OF THESE OFFENSES UNDER EXECUTIVE ORDER 13643 IS THIRTY YEARS' CONFINEMENT. DID THE MILITARY JUDGE COMMIT A JUDICIAL USURPATION OF POWER BY HOLDING THAT EXECUTIVE ORDER 13643 IMPERMISSIBLY INCREASED THE ACCUSED'S PUNITIVE EXPOSURE AND THEREFORE LIMITING THE MAXIMUM PUNISHMENT IN THIS CASE TO THE MAXIMUM AVAILABLE AT A SUMMARY COURT-MARTIAL?

V

Statement of Facts

A. <u>The underlying crimes</u>.

The conduct alleged on the charge sheet relates to events

that began on December 7, 2012. (Pet'r Mot., May 17, 2013.) On that day ET2 Schaleger and Mrs. MG were together at the Accused's home making dinner and watching television. (*Id*. at 1.) Both the Accused and Mrs. MG drank multiple alcoholic beverages and became intoxicated. (*Id*. at 1.) Subsequently ET2 Schaleger and Mrs. MG retired to ET2 Schaleger's bed and went to sleep. (*Id*. at 1.) Mrs. MG alleges that sometime during the night ET2 Schaleger pulled Mrs. MG's shorts and underwear to the side and engaged in sexual intercourse with her while she was asleep. (*Id*. at 2.) When she woke up, the Accused stopped thrusting his penis inside of her vagina. (Pet'r Mot. at 2, May 17, 2013.) The Accused then left his house. (*Id*. at 2.) Mrs. MG reported this incident on December 17, 2012, to the Fleet and Family Support Center in the form of a restricted report, later modifying it to an unrestricted report on December 26, 2012. (*Id*. at 2.) An NCIS investigation ensued. (*Id*. at 2.)

On January 31, 2013, a single charge with two specifications of sexual assault was preferred against ET2 Schaleger. ET2 Schaleger stands charged of committing a sexual act upon Mrs. MG, to wit: penetration of her vulva by his penis, when he knew or should have known Mrs. MG was asleep. (Charge Sheet.) ET2 Schaleger is also charged in the alternative, to wit: penetration of Mrs. MG's vulva by his penis, when she was incapable of consenting due to impairment by an intoxicant.

(Charge Sheet.)

B. The President signs Executive Order 13447 in 2007, directing the addition of Appellant's crime to Part IV of the Manual for Courts-Martial, and providing a maximum confinement of thirty years.

On September 28, 2007, the President signed Executive Order 13447, directing the addition of the following offense into Part IV of the Manual:

> *45. Article 120——Rape, sexual assault, and other sexual misconduct*
> *a. Text...*
> (c) *Aggravated sexual assault.* Any person subject to this chapter who——...
> (2) engages in a sexual act with another person of any age if that person is substantially incapacitated or substantially incapable of——
> (A) appraising the nature of the sexual act;
> (B) declining participation in the sexual act; or
> (C) communicating unwillingness to engage in the sexual act;
> is guilty of aggravated sexual assault and shall be punished as a court-martial may direct.

Exec. Order No. 13447, 72 Fed. Reg. 190, 10-11 (Oct. 2, 2007). This language is identical to the underlying statute at the time, 10 U.S.C. 920 (2006).

The President prescribed the following elements for this type of "Aggravated Sexual Assault":

> (c) *Aggravated sexual assault upon a person substantially incapacitated or substantially incapable of appraising the act; declining participation, or communicating unwillingness:*
> (i) That the accused engaged in a sexual act with another person, who is of any age; and
> (Note: add one of the following elements)
> (ii) That the other person was substantially incapacitated;

> (iii) That the other person was substantially incapable of appraising the nature of the sexual act;
> (iv) That the other person was substantially incapable of declining participation in the sexual act; or
> (v) That the other person was substantially incapable of communicating unwillingness to engage in the sexual act.

Exec. Order No. 13447, 10-11.

The President provided a maximum punishment for this crime of Aggravated Sexual Assault with a substantially incapacitated person of "Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years" Exec. Order No. 13447, 35.

C. Article 120 in the 2012 National Defense Authorization Act for offenses on or after June 28, 2012.

The National Defense Authorization Act for Fiscal Year 2012, Pub.L.No. 112-81, 125 Stat. 1298, 1404-07 (2011), amended Article 120, UCMJ, including the crime of sexual assault on an incapacitated person. The Accused was charged under the following statute, applicable to all offenses committed on or after June 28, 2012:

> *§ 920. Art. 120. Rape and sexual assault generally.*
> (b) *Sexual Assault.* Any person subject to this chapter who—— . . .
> (2) commits a sexual act upon another person when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring; or
> (3) commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to——
> (A) impairment by any drug, intoxicant, or

> other similar substance, and that condition is known or reasonably should be known by the person . . .

10 U.S.C. § 920 (2012).

D. Publication of the 2012 Manual for Courts-Martial in or around January, 2012.

The Manual for Courts-Martial is reviewed annually and revised by the Joint Service Committee on Military Justice. Department of Defense Directive 5500.17 (May 3, 2003). In or around January of 2012, the Joint Service Committee published, in Paragraph 45(a) of Part IV of the 2012 Manual for Courts-Martial, the verbatim text of the 2012 statute Accused was charged with. Manual for Courts-Martial (2012 ed), Part. IV, ¶45.

However, Part IV of the 2012 Manual for Article 120 does not also contain subparagraphs that list maximum punishments. Rather, it contains the following caveat in brackets following the statutory text of the Article 120 that the Accused was charged under:

> Note: The subparagraphs that would normally address elements, explanation, lesser included offenses, maximum punishments, and sample specifications are generated under the President's authority to prescribe rules pursuant to Article 36. At the time of publishing this MCM, the President had not prescribed such rules for this version of Article 120. Practitioners should refer to the appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide.

Manual for Courts-Martial, Pt IV, ¶45.

E. The President's May 2013 Executive Order adding elements and setting a maximum punishment for Article 120.

On May 15, 2013, the President signed Executive Order 13643, which amended the Manual for Courts-Martial. Exec. Order No. 13,643, 78 Fed. Reg. 98 (May 15, 2013.) This Executive Order directed the amendment, *inter alia,* of paragraph 45 of Part IV of the Manual, providing the following maximum punishment for the Article 120 offenses the Accused was charged with: "e. *Maximum punishment...* (2) *Sexual assault.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years." *Id.* at 47. To date, however, the President has not directed the amendment of those subparagraphs in Article 120 containing the Presidential glosses of "explanation," "elements," or "sample specifications."

F. The United States' Motion *In Limine*.

As the Accused's crimes occurred after June 28, 2012, but prior to Executive Order 13643, the United States filed a Motion *In Limine* to resolve the maximum punishment for the Accused's Article 120(b)(2) and 120(b)(3)(A) offenses. (Pet'r Mot., May 17, 2013.) On May 24, 2013, the United States filed a Supplement to this Motion. (Pet'r Sup. Mot., May 24, 2013.)

On May 28, 2013, the Military Judge ruled that the maximum punishment for offenses that took place under the amended statute but prior to the new Executive Order was the Summary

Court-Martial maximum punishment:

> Because the smallest punitive burden is found at a summary court-martial, as a matter of due process it is only those punishments authorized for that forum (confinement for 1 month, hard labor without confinement or 45 days, restriction for 2 months, forfeiture of 2/3 pay per month for one month) that may be imposed upon ET2(SS) Schaleger if he is convicted of either of the offenses alleged or of any lesser included offense under the authority of Article 79, UCMJ, 10 U.S.C. § 879.

(Appellate Ex. V at 10.) Since the Military Judge ruled that the maximum punishment at the time of this offense was the Summary Courts-Martial maximum, the Military Judge further ruled that application of the Executive Order violated the *ex post facto* clause. (*Id.*) On May 30, 2013, the Military Judge supplemented this ruling, holding that this matter was ripe for decision and that his May 28, 2013, Order was "properly and prudentially issued." (Appellate Ex. VI at 2.)

VI

Reasons Why The Writ Should Issue

R.C.M. 1003 PROVIDES THE PROCESS FOR DETERMINING AN OFFENSE'S MAXIMUM POSSIBLE PUNISHMENT. THE MILITARY JUDGE CLEARLY ERRED IN FINDING THE NEW EXECUTIVE ORDER *EX POST FACTO,* AND EVEN IF IT WAS, HE FAILED TO APPLY THE "CLOSELY RELATED" PRIOR EXECUTIVE ORDER FOR ARTICLE 120. EVEN IF NOTHING PROVIDES THE APPROPRIATE PUNISHMENT FOR AGGRAVATED SEXUAL ASSAULT IN THE MANUAL, THE UNITED STATES CODE SURELY DOES. THE MILITARY JUDGE'S RULING AMOUNTS TO A JUDICIAL USURPATION OF POWER AND A WRIT IS APPROPRIATE UNDER THESE CIRCUMSTANCES.

The issuance of an extraordinary writ is a "drastic" remedy that should be granted "only in truly extraordinary situations." *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983); *see Gray v. Mahoney*, 39 M.J. 299, 304 (C.M.A. 1994). To prevail on a writ, a petitioner must show that: (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances. *Hasan v. Gross*, 71 M.J. 416, 418 (C.A.A.F. 2012) (citing *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004)). In the context of writs of mandamus, military courts have read this rule to require Petitioner to establish a ruling or action that is contrary to statute, settled case law, or valid regulation. *See, e.g., Dettinger*, 7 M.J. at 224; *McKinney v. Jarvis*, 46 M.J. 870 (A. Ct. Crim. App. 1997).

The burden is on Petitioner to show that the "right to issuance of the writ is clear and indisputable." *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953) (quoting *United States v. Duell*, 172 U.S. 576, 582 (1899)). "[I]t is clear that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy."[1] *Will v. United States*, 389 U.S. 90, 95 (1967) (citation omitted).

A. <u>There is no other means by which the United States may obtain relief</u>.

In the absence of action by this Court there will be no appellate review, as Military Judge's application of the summary court-martial jurisdictional maximum punishment will result in a record that will not be reviewable under Article 66, UCMJ. Moreover, even if this case reached appellate review, the Military Judge's decision to improperly limit the maximum

[1] "Thus the writ has been invoked where unwarranted judicial action threatened 'to embarrass the executive arm of the Government in conducting foreign relations,' *Ex parte Peru*, 318 U.S. 578, 588 (1943), where it was the only means of forestalling intrusion by the federal judiciary on a delicate area of federal-state relations, *Maryland v. Soper*, 270 U.S. 9 (1926), where it was necessary to confine a lower court to the terms of an appellate tribunal's mandate, *United States v. United States District Court*, 334 U.S. 258 (1948), and where a district judge displayed a persistent disregard of the Rules of Civil Procedure promulgated by [the Supreme] Court, *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957); *see McCullough v. Cosgrave*, 309 U.S. 634 (1940); *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701, 706, 707 (1927) (dictum)." *Will*, 389 U.S. at 95-96.

punishment would be irrevocable and not amenable to correction in the ordinary course of appellate review. *Cf. Cobbledick v. United States*, 309 U.S. 323, 325 (1940).

B. The right to issuance of the writ is clear and indisputable.

After application of a prudential doctrine in the rule of lenity, the Military Judge determined that the maximum authorized punishment for a sexual assault is no more than that available to a Summary Court-Martial. This not only reflects a judicial usurpation of power, but his ruling clearly reflects action that is contrary to both the statute he attempted to apply and the regulation that implements the statute. There are four reasons why this is the case. Each, taken on its own, is a judicial usurpation of power and reflects action contrary to statute and regulation.

While nothing requires that the analysis of R.C.M. 1003(c) be conducted in any specific order, this brief begins by demonstrating how this offense is "listed in Part IV." *See, e.g., United States v. Leonard*, 64 M.J. 381, 383–84 (C.A.A.F. 2007) (looking first to 1003(c)(1)(B)(ii) before looking to whether a closely related offense exists in Part IV).

C. 10 U.S.C. § 920 is in Part IV of the 2012 Manual. Thus the May 15, 2013, Executive Order, or the plain language of R.C.M. 1003, clearly provides the correct maximum punishment.

1. The Military Judge clearly erred in holding that Presidential Rulemaking is required to insert Congress' bald statutory text into the Manual in order to give it effect under R.C.M. 1003. No precedent supports that conclusion.

R.C.M. 1003(c)(1)(A) governs how maximum punishment is determined for "Offenses listed in Part IV":

> (i) *Maximum punishment*. The maximum limit for the authorized punishments of confinement, forfeitures and punitive discharge *(if any)* are set forth for each offense listed in Part IV of this Manual.

R.C.M. 1003(c)(1)(A)(i) (emphasis added). The first question is then whether 10 U.S.C. § 920 is an "offense listed in Part IV of this Manual." The Military Judge concludes it was not, at the time of the Accused's offenses: "because the rulemaking process (including modes of proof, explanations, and the like...) has only recently been completed and an Executive Order issued, [Article 120 has only] just now become a full-fledged part of the Manual for Courts-Martial." (*Appellate Ex. V.* at 5.)

But this "full fledged" test is created out of whole cloth, and the conclusion has no legal basis——and should be reversed. First, the Manual does not say that every change to the Manual must be made via Executive Order——rather, it only says that (a) any *amendments* made by Executive Order must be named in a certain way, and (b) that the Joint Service Committee is

responsible for proposing *amendments*. Manual for Courts-Martial, Part I, para 4.

Second, there are parts of the Manual that the President simply never "amends," but are changed nonetheless. The President never amends, for example, Appendix 2 of the Manual for Court-Martial to include Congress' new statutes——the new statutory text is simply incorporated into each Manual at the unilateral decision of the Joint Service Committee. Ever since the first Manual for Courts-Martial, Appendix 2 has been updated both with and without Executive Order——sometimes an Executive Order inserts the current text of the United States Code——and other times, the publishers of the Manual simply update Appendix 2 to reflect the current statutory language of the Uniform Code, without "amendment" or Executive Order. *Compare, e.g.,* Exec. Order No. 10,214, 16 Fed. Reg. 1,303 (Feb. 10, 1951), *with* Manual for Courts-Martial (2005 ed.), (2008 ed., (2012 ed.) (Appendix 2 is editorially revised).

This makes sense: the Code is Congressionally-created. It contains the crimes that can be charged at court-martial as of their effective date, as Congressional enactments: "A charge states the *article of the code . . .* which the accused is alleged to have violated." R.C.M. 307(c)(1). Likewise, Appendices to the Manual reflecting the pre-2007 and 2007-2012 versions of Article 120 were added to the 2012 Manual

unilaterally by the Joint Service Committee, as doubtless other parts were as well.

Third, not only have the Manuals for Courts-Martial not always included the statutory text in the "Punitive Articles" section of the Manual, but Presidential rulemaking is simply unnecessary——as with other non-amendment Executive branch "changes" to the Manual——to insert Congress' verbatim statutory text into Part IV. Prior to 1984, the Manual never included the statutory text in the "Punitive Articles" section. In 1984 and with the creation of Part IV of the Manual for Courts-Martial, the statutory text was inserted——verbatim. But no Executive rulemaking is required to effect that.

Part IV is entitled "Punitive Articles." Manual for Courts-Martial, IV-1. The immediate subtitle to this Chapter reads: "(Statutory text of each Article is in bold)." *Id.* The Discussion further indicates that each paragraph of Part IV mirrors its source in the United States Code: "Part IV of the Manual addresses the punitive articles, 10 U.S.C. §§ 877-934." *Id.*

The first subparagraph of each paragraph of Part IV is, and has long been, no more than a verbatim recital of the statutory source. The Discussion indicates that "the punitive articles of the code are discussed using the following sequence: (a) Text of the article." *Id.* And, each paragraph begins with: "a. *Text*

of statute." *Id.* at IV-1 – IV-135. While often this statutory language is added to "subparagraph a" through an Executive Orders amending the Manual for Courts-Martial, this is not always the case: the 2012 Manual for Courts-Martial included the verbatim "Text of statute" of 10 U.S.C. § 920 (2012), but that language has not been added through Executive Order. But no one contests that the statute appears properly in the Appendix, can be charged under R.C.M. 307, nor that the bald statutory language appears in Part IV.

Fourth, the insertion of Congress' verbatim statute into the 2012 edition of the Manual without "Presidential rulemaking" reflects clearly the constitutional division of labor between the President and Congress, which the Military Judge cites to but does not apply: Congress alone creates the enumerated crimes and substantive criminal law, that is, the statutory offenses. U.S. Const. art I, § 8, cl 14; *United States v. Fosler*, 70 M.J. 225, 231 (C.A.A.F. 2011); *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010) ("it is for Congress to define criminal offenses and their constituent parts."). While the President may pass more restrictive and narrowing Presidential "glosses" on Congress' statutory elements that typically appear in later subparagraphs of Part IV, such as the Presidential "elements," the President has no power to create the text of each statute—— Congress alone creates the enumerated crimes of the Uniform

Code. *Cf. United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010)

Fifth, Congress' criminal statutes need no "enacting legislation" to take effect. Every statute passed by Congress, unless otherwise specified, "takes effect on the date of its enactment." *See United States v. Pritt*, 54 M.J. 47, 50 (C.A.A.F. 2000) (citing *Gozlon–Peretz v. United States*, 498 U.S. 395, 404 (1991), for the principle that a statute takes effect upon enactment).

The Military Judge's holding that Article 120 is not "fully fledged" as part of Part IV thus ignores not only this division of powers and past practice, but is clearly contrary to settled law. The President cannot create or define military crimes—— only Congress can. The "fully fledged" test is contrary to settled law and must be reversed. The Joint Service Committee did not err in inserting Congress' new statutory text of Article 120 into Part IV of the 2012 Manual, hence Article 120 was an offense "listed in Part IV."

2. The *Ex Post Facto* Clause has no application to this case, where the new Executive Order reduced the maximum punishment from life without parole prior to May 15, 2013, to, *inter alia,* thirty years and a dishonorable discharge.

The *Ex Post Facto* Clause has no application to the case at bar. *See* U.S. Const. art. I, §9, Cl. 3. Applying the Ex Post Facto Clause to the similar Federal Sentencing Guidelines

context, the Supreme Court has weighed in: "Although the Constitution's Ex Post Facto Clause . . . prohibits applying a new Act's higher penalties to pre-Act conduct, it does not prohibit applying lower penalties . . . [T]herefore, when the [Sentencing] Commission adopts new, lower Guidelines amendments, those amendments become effective to offenders who committed an offense prior to the adoption of the new amendments but are sentenced thereafter." *Dorsey v. United States,* 132 S. Ct. 2321 (2012). "The prohibition against *ex post facto* laws has from the outset been viewed as concerned with punishment." *United States v. Gorski*, 47 M.J. 370, 373 (C.A.A.F. 1997) (citations omitted). Article I, § 9 is only violated if the punitive exposure of the accused is increased. *Id*.

Similarly here, no matter whether this Court finds that 10 U.S.C. § 920 is "listed in" Part IV, or not listed in Part IV, *all* of the options result in a sentence that is equal to or less than life without parole. There is no application of the plain language of R.C.M. 1003 that implicates the Ex Post Facto Clause. Quite simply, applying the plain text of the Code and the Rules, the punitive exposure of the accused is decreased from life without the possibility of parole to a term of thirty years' confinement (unless, of course, this Court finds that the offense is *not* in Part IV, *is only* closely related to Article 128, and that the new Executive Order thus *increases* the

punishment to thirty years). Thus the Military Judge's application of the *ex post facto* clause reflects a judicial usurpation of power.

By the plain language of the Rules, if the President has not otherwise limited the maximum punishments authorized for an offense found in Part IV of the Manual, then the maximum authorized punishment is that found in R.C.M. 1003(b), which includes life without the possibility of parole. *Nothing* requires the President to set a lesser punishment, as the Military Judge suggests. But as the President signed the Executive Order, which limits the confinement to thirty years' for each specification, this benefits the accused and does not violate the *ex post facto* clause. This is consistent with the practice in Federal District Courts applying the Sentencing Guidelines——where the statutory offense is committed prior to the Executive Order limiting punishment, and the sentencing occurs after the Executive Order, the Order's limit applies. As such the actions by the Trial Court in this case reflect a judicial usurpation of power and are contrary to an established statutory and regulatory scheme, and the writ should therefore issue.

3. If the new Executive Order is an *"ex post facto"* law, then the President has set no maximum punishment for the 2012 version of 10 U.S.C. § 920. Thus, the maximum sentence limitations of R.C.M. 1003(b) apply, and the statutory maximum of life without parole applies to Article 120 offenses occurring from June 28, 2012, through May 15, 2013.

Because the Military Judge held that "rulemaking" was required to place Congress' statute in the Manual, the Military Judge erred by never ruling on whether the jurisdictional maximum was an appropriate punishment. (Appellate Ex. V. at 4.) Rather than ruling that the R.C.M. 1003(b) maximums apply absent further "if any" restrictions imposed by the President, the Military Judge simply rules that Aggravated Sexual Assault is tantamount to a novel Article 134 offense, contrary to the dictates of the Rules, *Ramsay,* and decades of precedent, and defaults to a summary court-martial maximum. But as Article 120 is "listed in Part IV," whether R.C.M. 1003 (a) and (b), the Executive Order, and the jurisdictional maximum applies are necessary rulings——and the Military Judge clearly erred in not applying what he calls the "guidance" of R.C.M. 1003(c)(1)(A). In fact, R.C.M. 1003(c)(1)(A) governs this case, if 10 U.S.C. § 920 is in Part IV of the Manual.

Congress prescribes that an individual "shall be punished as a court-martial may direct." Congress separately passed Article 56, which delegates to the President the power to set

the maximum punishment for each offense. *United States v. Turner*, 30 M.J. 1276, 1280 (N-M.C.M.R. 1990) (discussing delegation of authority and statutory restriction on President). The President, acting under the authority granted to him in Article 56, UCMJ, further defined limits for punishments available at trial by court-martial in R.C.M. 1003:

> (a) *In general*. Subject to the limitations in this Manual, the punishments authorized in this rule may be adjudged in the case of any person found guilty of an offense by a court-martial.

R.C.M. 1003(b) identifies those punishments that "may be adjudged." These punishments include: (1) reprimand; (2) forfeiture of pay and allowance; (3) a fine; (4) a reduction in pay grade; (5) restriction to specified limits; (6) hard labor without confinement; (7) confinement; (8) punitive separation, including dismissal for officers, and a dishonorable or bad-conduct discharge for Warrant Officers not commissioned and enlisted personnel; (9) death; and (10) punishments authorized under the law of war. R.C.M. 1003(b)(1)-(10).

But for the enumerated offenses, the President *is never* required to create maximum punishments aside from those found under R.C.M. 1003(b)——R.C.M. 1003(c)(1)(A) explicitly refers to "maximum limits for the authorized punishments . . . (if any)..." As the statutory text of the offenses of 10 U.S.C. § 920(b)(2) and § 920 (b)(3)(A) are Part IV of the 2012 Manual,

life without parole is the maximum punishment. MCM, Pt. IV, ¶45b, 45c; R.C.M. 1003(b). This is not a case of a novel and military-specific Article 134 offense. Thus the Military Judge clearly erred in finding an "ex post facto" problem, as the May Executive Order lowered the maximum punishment for Article 120 offenses under the new statute. And, the Military Judge clearly erred in bypassing this step of the analysis, presuming that 10 U.S.C. § 920 is an offense that does *not* appear in Part IV, and finding that the maximum is that of a summary court-martial.

Notably, not only did the Military Judge never reach the issue of what punishment could be adjudged if 10 U.S.C. § 920 was indeed in Part IV, but the cases the Military Judge cites to, including *United States v. Beaty,* 70 M.J. 39 (2011), are entirely inapplicable. This is not a case where R.C.M. 1003 produces *no* result, as in *Beaty*——rather, this is a case where each subsection of R.C.M. 1003 produces a *clear* result, depending on whether the offense is said to appear, or not appear, within Part IV of the Manual. Nor should this Court extend the longstanding "general offense" or "simple disorder" doctrine specific to military-specific Article 134 "novel offenses" to the enumerated offenses.

D. If this Court concludes that offenses become "listed in Part IV" only by explicit Executive Order, then under the R.C.M. 1003(c)(1)(B) analysis, 10 U.S.C. § 920 is closely related to offenses that are in Part IV by Executive Order.

1. 10 U.S.C. § 920 is closely related to the former Article 120(c)(2), which was added to the Manual was never removed from Part IV by Executive Order, and applies to offenses committed from 2007-2012. That offense bears a maximum of thirty years confinement.

"For an offense not listed in Part IV of this Manual which is . . . closely related to an offense listed therein the maximum punishment shall be that of the offense listed." R.C.M. 1003(c)(1)(B)(i). The "closely related" language refers to offenses that are closely related to offenses listed in the Manual for Courts-Martial. *United States v. Leonard*, 64 M.J. 381, 383 (C.A.A.F. 2007).

After dismissing out of hand the argument that Congress' offense properly appeared within Part IV of the Manual due to perceived deficiencies in "rulemaking," the Military Judge then just as summarily failed to look to Executive Order, submitted for public comment and signed by the President, for the previous version of Article 120 as a "closely related offense." Instead, the Military Judge sweepingly rejects the Government's appeal to the clear steps of R.C.M. 1003(c) as a "cry for 'substantial punishment'," "reject[s] the suggestion to look to other, analogous statutes," and refuses to apply the "closely related"

requirements set for by the President because he finds “no case” interpreting the “closely related” language *vis a vis* the enumerated articles. These are not good reasons to avoid the plain language application of R.C.M. 1003(c)(1)(B)(i).

First, the Military Judge is simply wrong that R.C.M. 1003(c)(1)(B)(i) has not been applied outside the Article 134 context. (Appellate Ex. V at 5.) The Military Judge apparently means that he can only find cases where “novel Article 134” offenses, with no set maximum, are examined under that Rule. But the Rule has clearly been applied in many circumstances, resulting in some cases in a ruling that no offense “closely related” exists and the “simple disorder” punishment of four months inures, *United States v. Beaty,* 70 M.J. 39, 45 (C.A.A.F. 2011), and others where *enumerated* offenses have been found to be the most “closely related” offense, resulting in punishments of many years, *e.g., United States v. Ramsey, 40 M.J. 71, 76* (C.M.A. 1994). Nothing restricts the application of the Rule. Indeed, the Military Judge’s restriction of R.C.M. 1003 is an action clearly contrary to the President’s rule and settled law.

In *Ramsey,* the Court of Military Appeals ruled that a military judge “failed to follow the clear mandate of R.C.M. 1003(c)(1)(B)(i)” when he chose Article 134, rather than the enumerated Article 115, Malingering, as the most “closely related” offense to a novel charge for the purposes of assessing

the maximum sentence. 40 M.J. at 76. The court looked to several factors, including the "social cost," the "damage to the military," and the President's listing of the novel offense as a possible "lesser included" offense, despite the fact that the novel offense actually appeared in no paragraph of the Manual, and had no Presidentially-prescribed elements or punishment. *Id.* at 75. Granted, under today's *Fosler/Jones* precedent for the purposes of *charging,* the offenses would not be a "lesser included" offenses under the *Schmuck* analysis. Nevertheless, for the purposes of sentencing, courts have indeed applied R.C.M. 1003(c)(1)(B)(i) to the enumerated offenses, finding enumerated offenses to be "closely related" to the charged offense. *Ramsey,* 40 M.J. at 75. If 10 U.S.C. § 920 is not "listed" in Part IV, no law, other than this Judge's ruling, prevents the application of the "closely related" doctrine in this case to reach a sensible sentence maximum.

Under the Military Judge's reasoning, Part IV of the Manual still contains the old Article 120, inserted by Executive Order, which applies to offenses from 2007 to 2012. When the 2011 National Defense Authorization Act became law, including the current 10 U.S.C. § 920, the President did not concurrently sign an Executive Order prescribing Presidential elements or punishments for that crime. However, nor did the President rescind Executive Order 13447, signed in 2007, which set the

maximum punishment for the prior version of sexual assault on an incapacitated person, Article 120(c)(2), 10 U.S.C. § 920 (c)(2)(2006), at thirty years' confinement, *inter alia*.

Although not done by explicit Executive Order, the *new* statutory text was inserted verbatim into Part IV, and *two* prior versions of "Article 120"——one for crimes prior to 2007, and one for crimes from 2007 through 2012——were moved by the Joint Service Committee into Appendices 27 and 28, respectively, in the 2012 Manual for Courts-Martial.

But as demonstrated in the Statement of Facts, *supra,* the elements of Article 120(c)(2), 10 U.S.C. § 920 (c)(2)(2006), and the current 10 U.S.C. § 920(b)(2) and (b)(3)(A), are very similar, and nearly identical. Both crimes' titles include the words "Sexual Assault." Both crimes actually punish a "sexual act" committed on another person who is unconscious or whose consciousness is impaired by a foreign substance. The statutes are slightly different: two 2012 statutes require additional proof, respectively, that the accused "knows or reasonably should have known that the other person" was incapacitated, or that the impairment due to a foreign substance be a "condition . . . known or reasonably should be known by" the accused. 10 U.S.C. § 920(b)(2); (b)(3)(A). Because the new statute contains an additional element, the older statute——which bears a thirty year sentence——is, by definition, a "lesser included offense" of

the current Article 120. *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010).

No Executive Order has rescinded the older version of Article 120. Under the Military Judge's holding that Executive Order and full rulemaking is required, the older version of Article 120 thus still appears in Part IV of the Manual. And, the elements, title, and *actus reus* of the offense are virtually identical. Thus because the old Executive Order placing the old Article 120 and punishment has not been rescinded (and indeed the old Article 120 appears physically in Appendix 28 of the current Manual), because the "social cost" under *Ramsey,* the *actus reus,* and the offense are virtually identical, if this Court disagrees that the current 10 U.S.C. § 920 is in Part IV, then the maximum should be the "closely related" offense's punishment that includes, *inter alia,* thirty years and a dishonorable discharge.

2. <u>Even if not closely related to the former Article 120, the Military Judge erroneously defaults to a summary court-martial: 10 U.S.C. § 920 is also closely related offense to Article 128, Assault</u>.

Although the Executive Order, current and prior, provide a clearly applicable sentence under the Rule, the United States Code, *see infra,* also supplies a virtually identical offense, elements, and is "essentially the same," and thus likewise supplies the correct maximum punishment. *See Ramsey*, 40 M.J. at

76; United States v. Leonard, 64 M.J. 381, 384 (C.A.A.F. 2007).

Again, there is no particular order in which R.C.M. 1003 must be applied. Yet before moving to the United States Code, it is worth noting that even Article 128, Assault, is still a more rational choice than the Military Judge's resort to a "summary court-martial" punishment. A simple comparison of the elements of Article 128, Assault consummated by a battery, and 10 U.S.C. § 920, Aggravated Sexual Assault, demonstrates that the former is a lesser-included offense of the latter. Art. 120, 128, UCMJ; *see, e.g., United States v. Johanson*, 71 M.J. 688, 693 (C. G. Ct. Crim. App. 2012) ("Wrongful sexual contact and assault consummated by battery appear to be possible lesser offenses included in abusive sexual contact of a person substantially incapable of declining participation." (citing to *United States v. Bonner,* 70 M.J. 1 (C.A.A.F. 2011)) *Cf.* Manual for Courts-Martial, A28-9 (explicitly listing battery as a lesser-included of the predecessor Article 120(c)(2)); *Bonner,* 70 M.J. at 3 (C.A.A.F. 2011) (assault consummated by a battery is a lesser-included offense, and nearly identical, to Article 120(m), Wrongful Sexual Contact)*; United States v. Carr*, 65 M.J. 39, 40 (C.A.A.F. 2007) (finding battery to be a lesser-included offense of the then-existing Article 134 offense of "indecent assault). *And* bodily harm is a lesser included offense of the force used in sexual assault. *See United States v. Alston*, 69

M.J. 214, 216 (C.A.A.F. 2010).

Without dispute, even Assault Consummated by a Battery under Article 128 is a more closely analogous offense listed in Part IV, than the Summary Court-Martial maximum employed by the Military Judge. Indeed, that choice seems less rational and more an attempt to punish the Executive for not rescinding and replacing the Executive Order more speedily.

The new 10 U.S.C. § 920 is closely related to Article 128, Assault, and Article 128 is an offense that appears——physically, and perhaps also via Executive Order——in Part IV. Employing the *Ramsey* court's "social cost" analysis, the social cost and harm of assault include an offensive touching. *See Ramsey,* 40 M.J. 71, 75. As demonstrated by media attention to sexual assaults both in society at large and in the military, by reference to the civilian parts of the United States Code, *infra,* and the immediately preceding section, the social cost of a sexual assault is almost universally deemed even more serious than "assault consummated by a battery," and is punished more severely. Thus the social cost of simple assault is far less—but still more similar than a "general summary court-martial." The Military Judge clearly stepped outside of reasonable action when, looking for "closely related" offenses, he found none and employed a still lesser punishment than even that appearing in Article 128, Assault. *See Ramsey,* 40 M.J. at 75-76.

Whereas the new Article 120 requires additional proof of "knew or should have known," and is thus more serious than the previous Article 120, simple assault is far less serious still than even this previous Article 120——simple assault lacks *both* the elements of "sexual" assault, and also the assault on an "incapacitated" person. And, the maximum punishment reflects this lesser seriousness: simple assault bears a maximum punishment of bad-conduct discharge, forfeiture of all pay and allowances, and confinement for six months. But as in *Ramsey* where Article 115 Malingering, with a maximum of ten years' confinement, was more closely related than the one year of the Paragraph 81, Part IV, Article 134 charge, so too here, even the far less serious charge of Assault, is more closely related to this case's serious charge of sexual assault on an incapacitated person, than a "simple disorder" Article 134 offense, levied typically against military-specific offenses capable of supporting the Article 134 terminal element.

Granted the distinction between six months' confinement and the thirty days' confinement employed by the Military Judge is not *de minimus*. But given the similarities between Assault Consummated by a Battery and the instant charge, the Military Judge's resort to lenity in the face of clear and more appropriate alternatives, *see infra* and *supra,* depending on whether the offense is "listed in Part IV" or not, is a clear

judicial usurpation of power and violative of the President's clear regulatory scheme. Battery provides the possibility of a punitive discharge. Because Assault is a lesser-included offense of aggravated sexual assault, the fact that both increased confinement and a punitive discharge remain available for Battery all support that even Battery is a more appropriate result than a "summary court-martial" maximum. But far more apposite than the Battery which has a far less serious "social cost" under the *Ramsey* analysis, the United States Code provides an offense that is "essentially the same" and provides an appropriate punishment——and which the Military Judge erred in failing to apply.

E. <u>If this Court concludes both that 10 U.S.C. § 920 is not "listed in Part IV" and also that prior Executive Order does not provide a "closely related offense," then under R.C.M. 1003(c)(1)(B)(ii), the maximum punishment may be derived from a provision of the United States Code that is "essentially the same," or a custom of the service</u>.

"An offense not listed in Part IV and not included in or closely related to any offense listed therein is punishable as authorized by the United States Code, or as authorized by a custom of the service." R.C.M. 1003(c)(1)(B)(ii). This provision of R.C.M. 1003 is entirely different than the "closely related" provision of R.C.M. 1003(c)(1)(B)(i), and has a different standard. *United States v. Beaty*, 70 M.J. 39, 42 n.7 (C.A.A.F. 2011). To determine whether the United States Code

may be used for the maximum punishment of an offense neither listed in Part IV nor closely related to one listed in Part IV, courts look to "whether the offense as charged is 'essentially the same,' as that proscribed by the federal statute." *United States v. Leonard*, 64 M.J. 381, 384 (C.A.A.F. 2007).

The Military Judge erroneously refused to apply the Rule, claiming that the fact that *Leonard* involved an Article 134 charge operated to restrict the application of R.C.M. 1003(c)(1)(B)(ii) to Article 134 offenses. (Appellate Ex. V at 5.) This makes little sense given both the plain language of the Rule, but also military court's treatment of Article 134, for pleading and proof purposes, virtually identically to any other criminal statute. *See, e.g., United States v. Fosler,* 70 M.J. 225 (C.A.A.F. 2011), *United States v. Humphries,* 71 M.J. 209 (C.A.A.F. 2012). Following the plain language of the Rule, as we must, nothing restricts the R.C.M. 1003(c)(1)(B)(ii)'s application to the Article 134 context. If an offense is "not listed in Part IV" and is not "closely related" to an offense therein, then the Rule applies. The Military Judge's refusal to apply any of R.C.M. 1003's plain language readings is perplexing.

18 U.S.C. § 2242(2)(A-B) (2012), criminalizes sexual abuse when an individual (1) engages in a sexual act with another person, and the other person is (2) incapable of appraising the

nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act. A sleeping victim satisfies the second element: "A reasonable jury may conclude that a person who is asleep when a sexual act begins is physically unable to decline participation in that act." *United States v. Wilcox*, 487 F.3d 1163, 1169 (8th Cir. 2007); *see also United States v. Barrett*, 937 F.2d 1346, 1347-48 (8th Cir. 1991).

Similarly here, Specification 1 alleges that the accused engaged in a (1) sexual act with a victim (2) who he knew or should have known was asleep. Specification 2 alleges that the accused engaged in a (1) sexual act with a victim (2) who he knew or should have known was incapable of consenting due to the impairment of alcohol. These elements contain the same "conduct and *mens rea* proscribed by directly analogous federal criminal statute[]" and are otherwise "essentially the same." *Leonard*, 64 M.J. at 384.

The elements are the same. If 10 U.S.C. § 920 is not "listed" in Part IV, and the prior Executive Order for the nearly identical offense ordering that prior offense to be placed in Part IV does not supply a "closely related" offense, then surely the United States Code can be read to provide a punishment for an offense that is "essentially the same" as aggravated sexual assault in this case. As there is a directly

analogous provision under United States Code, application of the punishment of a dishonorable discharge, forfeiture of all pay and allowances, and confinement for thirty years, would not present *ex post facto* challenges to the case at bar.

The Military Judge should have applied the Federal statute's maximum confinement: imprisonment "for any term of years or for life" as a maximum punishment for this offense, and then as a matter of lenity reduced it to that found under either of the two previous analyses. His failure to do so reflects a judicial usurpation of power and is inconsistent with an established statutory and regulatory scheme, and a Writ should therefore issue.

F. <u>The Rule of Lenity is inapplicable. The Military Judge's application of the Rule of Lenity derives directly from his failure to apply the plain language of R.C.M. 1003, and should be overturned</u>.

The Military Judge rejects all the iterations of R.C.M. 1003. Each of the options above is a possible result by application of the plain language of R.C.M. 1003. But the Military Judge instead holds that the "rule of lenity" requires that a summary court-martial maximum punishment be applied.

This is incorrect for several reasons. First, the new Executive Order is not "Ex Post Facto," the prior Article 120 was extant until May 15, 2013, and is "closely related," and a provision of the U.S. Code provides an "essentially the same"

offense for punishment purposes——the rule of lenity is hardly needed. Unlike *United States v. Beaty,* 70 M.J. 39 (C.A.A.F. 2011), where the application of R.C.M. 1003(c)(1) turned up "no result," here clear results inure, depending on whether this Court agrees the offense is listed, or not, in Part IV.

The *Beaty* court *only* resorted to the simple disorder punishment, after finding that the offense was (1) not in the annual, (2) not closely related to any other offense in Part IV, (3) not provided for in the United States Code, (4) not authorized by a "custom of the service," *and most critically,* after noting that it would "violate the rule of lenity by permitting the imposition of greater punishment for the possession of what 'appears to be' child pornography, an action which Congress now deems, in accord with Supreme Court precedent, not criminal, than Congress saw fit to impose for the possession of actual child pornography." *Beaty,* 70 M.J. at 44.

In contrast here, the offense not only has a new maximum after May 15, 2013, but that maximum is the same as the predecessor statute's maximum——and the new statute is closely related to that statute. Likewise, aggravated sexual assault on an incapacitated person is *not* now de-criminalized or protected by precedent or Congress. The Military Judge's application of lenity makes no sense.

Furthermore, even if the most closely related offense were Article 128——which it is not——the Military Judge rejects Assault, and highlights his misapplication of the rule of lenity in this case. He justifies his resort to lenity with the "lesser included offense" doctrine, but entirely rejects the lesser-included offense of Article 128, Assault, which exceeds the perplexingly chosen "summary court-martial" maximum. For this reason too, the misapplication of law requires that this ruling be set aside, and this extraordinary writ granted.

VII

Conclusion

WHEREFORE the United States respectfully requests that this Court immediately order the Trial Court to stay the proceedings, set aside the Trial Court's ruling of May 28, 2013, and apply the maximum punishment found in Executive Order 13643 of May 15, 2013. In the alternative, should this Court find the Executive Order inapplicable, the United States asks this Court to apply the "closely analogous offense" doctrine and apply the former Article 120's maximum or, less appropriately, the lesser-included offense of Article 128's maximum. More apposite than Article 128 if the offense is not "listed" and the prior Executive Order cannot apply, the United States Code provides an

offense that is “essentially the same.”

BRIAN K. KELLER
Deputy Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202)685-7682, fax -7687
Bar no. 31714

Signing for

STEPHEN C. NEWMAN
Colonel, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7059, fax (202) 685-7687
Bar no. 35491

VIII

Respondent’s Address, Telephone, and Email Address

Lewis T. BOOKER, Jr.
Commander (O-5), U.S. Navy
Military Judge
365 S Barclay
Building 433
Bremerton, WA 98314
(360) 476-6466
lewis.booker@navy.mil

Appendix

1. Military Judge's ruling, May 29, 2013
2. Military Judge's Supplemental Ruling, May 30, 2013
3. Government Motion, May 17, 2013
4. Defense Response, May 23, 2013
5. Government Supplemental Motion, May 24, 2013
6. Charge Sheet and convening order

Certificate of Filing and Service

I certify that the foregoing original and seven copies were delivered to the Court, with copies served upon:

Lewis T. BOOKER, Jr.
Commander (O-5), U.S. Navy
Military Judge
365 S Barclay
Building 433
Bremerton, WA 98314
(360) 476-6466
lewis.booker@navy.mil

by email on June 21, 2013, *and* that a copy of the foregoing was hand delivered to the Appellate Defense Division on June 21, 2013.

IAN D. MACLEAN
LT, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202)685-7686, fax (202)685-7687

DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES V. ET2(SS) CHRISTOPHER J. SCHALEGER, USN

The Government alleges that, in December 2012, ET2(SS) Schaleger committed sexual acts upon a female by inserting his penis into her vulva. It is not entirely clear from the charge sheet or the Government's motion *in limine*, but the two distinct Specifications may simply state different theories of prosecution for a single sexual act, Specification 1 alleging that the woman was asleep, Specification 2 that she was intoxicated and therefore incapable of consenting. The two Specifications were referred for trial by General Court-Martial and the accused was arraigned on 22 May 2013. On 15 May 2013, the President signed Executive Order 13643, amending Part IV of the Manual for Courts-Martial, United States, to incorporate legislative changes to the UCMJ and to fix punishments.

The Government's motion *in limine* requests that the court determine the maximum punishment before proceeding to trial. Upon consideration of the revisions to the substantive portion of the Uniform Code of Military Justice, the parties' arguments, the Executive Order purporting to effect the 2011 amendments to the UCMJ, and case law, it is the court's determination that the maximum imposable punishment for each offense alleged, and for each lesser included offense, is the jurisdictional limitation of a summary court-martial: confinement for 1 month, restriction for 2 months, hard labor without confinement for 45 days, and forfeiture of 2/3 pay per month for 1 month. The restraint-type punishments, moreover, may not be combined.

This order is necessarily limited to the two Specifications contained within the Charge, namely, violations of Articles 120(b)(2) and 120(b)(3)(A). Further, because of the nature of a court-martial, this order has no precedential effect; it may, however, be persuasive before other courts-martial and on other aspects of the 2011 amendments.

2011 Amendments to Article 120

When the National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2011), became law, it included amendments to Article 120, Uniform Code of Military Justice. Those amendments set out new elements of offenses

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ENCLOSURE (1)

involving sexual acts, and further established elements for new offenses involving video recording and acts with children. *See id.* §§ 541 *et seqq.*, 125 Stat. 1404 *et seqq.* While the NDAA did not repeal existing law, it did so heavily modify the elements and definitions of the offenses that the effect was the same.

All the new articles (120, 120a, 120b, and 120c) include the vague penalty provision common to most other punitive articles of the UCMJ, that the offender shall be punished "as a court-martial may direct". By contrast, the previous major overhaul to the statutes involving sexual offenses included interim punishments in anticipation of a delay between the effective date of the legislation and the determination and publication of limits. *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163 § 552(b), 119 Stat. 3263 (2006).

To resolve the issue of the maximum punishment that can be imposed upon ET2(SS) Schaleger for his offenses if convicted, it is necessary to consider the complementary nature of Congressional and Presidential power regarding the "rules for government and regulation of the land and naval forces." It is also necessary to consider what effect the prohibition on *ex post facto* laws may have.

There are two extremes to be considered for punishment for the offenses defined by the 2011 amendments. One could take an expansive approach and argue that any punishment not prohibited by the Code could apply; in other words, any offense in the 2011 amendments to the Code could subject the offender to imprisonment for life without the possibility of parole and all the accessory punishments. This is the approach necessarily taken by the Government when it argues that the recent Executive Order does not constitute an *ex post facto* law, although the bulk of the Government's argument is that punishments for the now superseded Article 120 should apply. The other extreme is that, because the President has not specified limits, the limit is "no punishment".

The court's decision is informed to some degree by a basic tenet of administrative law, which is that "an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments, [and] [w]hen a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a

reasonable choice within a gap left open by Congress, the challenge must fail." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 864-65 (1984). The question is what a court is to make of the Executive's decision not to exercise the authority granted by Article 56 to fill the gap created by the 2011 amendments until adoption of Executive Order 13643 on 15 May 2013, 78 Fed. Reg. 29559.

Punishment under the UCMJ

In the usual course of business, the President exercises his authority under Article 56 to specify punishments for those offenses that do not have a statutory penalty, and those punishments are set out in Executive Orders that usually coincide with the effective date of the statutes. His determinations for individual offenses are set out in Part IV of the MANUAL FOR COURTS-MARTIAL after going through the administrative rulemaking process of section 553 of title 5, *United States Code*. *See generally* Department of Defense Instruction 5500.17 of 03 May 2003, Enclosure (2). In certain limited cases, the President may bypass the rulemaking process, *see id.*, but only he has the authority to amend Parts I through V of the Manual, and he does so by Executive Order. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), Part I, ¶ 4 Discussion.

Prior editions of the MANUAL FOR COURTS-MARTIAL placed punishments for the most part in a Table of Maximum Punishments. *See, e.g.*, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1969), ¶ 127. Prior editions also noted statutorily prohibited punishments (those punishments forbidden in Article 55) and punishments prohibited by custom of the service. 1969 MANUAL, ¶ 125. Today's MANUAL maintains the Table of Maximum Punishments as Appendix 12.

Statutory Expressions of Punishments

The Uniform Code of Military Justice is unique among criminal statutes in that most of the Articles in the Code are silent as to punishment. The typical penalty language provides that the offender "shall be punished as a court-martial may direct". In the imposition of punishments, courts-martial are subject to three general limitations. Courts may not impose punishments prohibited by the Code (for example, the punishments forbidden by Article 55, among them flogging and tattooing). Courts may not exceed the jurisdictional limits of the three types of court-martial (general, special, and summary) contained within Articles 18 through 20 of the Code. Courts may not exceed limitations imposed by the President for various

offenses. *United States v. Varnadore*, 26 C.M.R. 251, 253 (C.M.A. 1958).

While most penalty provisions in the UCMJ are "as a court-martial may direct," some offenses contained within the UCMJ do specify limits on punishments, among them Spying in violation of Article 106 (mandatory death), Misbehavior of a Sentinel in violation of Article 113 (death or other punishment in time of war, any punishment but death if not in time of war), and Premeditated or Felony Murder in violation of Article 118(1) and 118(4), respectively (death or mandatory life).

In contrast, every statute in the United States Criminal Code (title 18) and offenses scattered throughout the rest of the United States Code (*e.g.*, 16 U.S.C. § 1540; 17 U.S.C. § 506; 21 U.S.C. § 848; 22 U.S.C. § 2778; 26 U.S.C. § 7201; 31 U.S.C. § 5324; 36 U.S.C. § 509; 38 U.S.C. § 6102) set out a statutory limit on punishment. Similarly, State criminal codes specify punishments, whether within a specific criminal provision or by classification as a particular degree of misdemeanor or felony. Also, as noted above, the 2006 revisions to Article 120 in the Uniform Code of Military Justice did contain interim punishments pending Executive determination.

Regulatory Basis for Punishment

Because the 2011 amendments did not specify punishments, and because the President has only within the last two weeks set out limitations, one must look to other sources for determining available punishments. The MANUAL FOR COURTS-MARTIAL does have some guidance on sentences that may be imposed at any court-martial, and that guidance appears in Rule for Courts-Martial 1003.

The Rule begins by stating that "[s]ubject to the limitations in this Manual, the punishments authorized in this rule may be adjudged in the case of any person found guilty of an offense by a court-martial". R.C.M. 1003(a), MCM, Part II. Subdivision (b) of the Rule describes the various penalties. Critically, subdivision (c) discusses limitations on punishments. The President through the rulemaking process has previously determined that there are two categories of offenses whose punishments are subject to the limitations in subdivision (c), those that are listed within Part IV of the MANUAL and those that are not listed within Part IV of the MANUAL.

One could argue, as the Government does, that because the predecessor to the current Article 120 is listed in Part IV of

the MANUAL, then those limits should apply. The Government's argument has some appeal because it provides some certainty to courts-martial hearing the new Article 120 cases and it generally results in punishments less than the jurisdictional maximum of a general court-martial. Referring to the predecessor of Article 120 is inappropriate, however, because, at the time that the alleged crime occurred, in December 2012, the activity was not a violation of the 2006 version of Article 120. Granted, there are some similarities in elements and definitions, but the fact of the matter is that for all offenses that occurred after the effective date of the 2011 amendments, the 2006 provisions cannot apply.

It bears repeating that the President only recently included the 2011 amendments to the punitive articles in Part IV of the MANUAL, and that he only recently specified any maximum punishments. The Department of Defense, acting through the Joint Service Committee on Military Justice, began the rulemaking process by advising the public of proposed changes and calling for comments. 77 Fed. Reg. 64854 (2012). The 2012 version of the MANUAL does include, in Part IV, the statutory text of the 2011 amendments, but because the rulemaking process (including modes of proof, explanations, and the like, areas commended to the President under a separate provision, Article 36) has only recently been completed and an Executive Order issued, those amendments have just now become a full-fledged part of the MANUAL FOR COURTS-MARTIAL. The current version of Article 120 is thus not an offense listed in Part IV of the MANUAL, so the guidance of R.C.M. 1003(c)(1)(A) does not apply.

Turning to R.C.M. 1003(c)(1)(B), one could conclude that because a sexual act with an unconscious or intoxicated person is related to an offense that is listed in the pre-15 May 2013 Part IV of the MANUAL, then the maximum punishment for the previously extant offense should apply. The difficulty with this approach is that no case interpreting Rule 1003(c)(1)(B) has ever applied its provisions to Articles 80 through 132 of the Uniform Code of Military Justice; instead, the Rule has been used only in those cases where offenses have been laid under Clause 1 or Clause 2 of the General Article and have not been included in the MANUAL as "various circumstances in which the elements of Article 134 could be met," *United States v. Jones*, 68 M.J. 465, 471 (C.A.A.F. 2010), or in prosecutions under Clause 3 of the General Article for noncapital crimes and offenses, whether violations of other portions of the United States Code or violations of state law that are prosecuted under the Federal Assimilative Crimes Act, 18 U.S.C. § 13. *See, e.g.*,

United States v. Beaty, 70 M.J. 39 (C.A.A.F. 2011); *United States v. Leonard*, 64 M.J. 381 (C.A.A.F. 2007); *United States v. Bivins*, 49 M.J. 328 (C.A.A.F. 1998).

The Government is correct that past statutes and customs may support a cry for "substantial punishment" that approaches the jurisdictional maximum of a general court-martial. *See Beaty*, 70 M.J. at 49 (Baker, J., dissenting). Unfortunately, however, the "custom of the service" language appears in a portion of the Rules for Courts-Martial, 1003(c)(1)(B)(ii), that is inapplicable to the statutory offense with which ET2(SS) Schaleger is charged. The Government has likewise failed to present evidence of any "custom of the service" specific to the newly enacted legislation. *See Beaty*, 70 M.J. at 44 (absence of a custom "cannot mean" that the maximum of life without parole applies). Further, the term of art "custom of the service" has historically been applied as one of limitation, not expansion, on punishments. *E.g.*, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1969), ¶ 125.

As a final note on the regulatory scheme, I reject the suggestion to look to other, analogous, statutes for guidance as provided in R.C.M. 1003(c)(1)(B)(ii). The plain language of the Rule directs consulting "the United States Code" for similar offenses if there is no punishment provided for a Part IV offense. Title 10 is indisputably part of the United States Code, and it provides for no punishments in these new Article 120 offenses.

The Government's suggestion is consonant with the Defense's proposed alternative middle ground, which is to adopt the punishment of battery for the offenses contained within the 2011 amendments. The difficulty with the Defense's position in this regard is that an arguably closely related statute -- battery in violation of Article 128, 10 U.S.C. § 928 -- also does not provide a definitive punishment; the punishment is provided by the President using his Article 56 authority. The Government's position is even more tenuous, as the constitutional basis for title 10 -- Congressional authority to write laws for the regulation of the government of the land and naval forces complemented by the President's authority as Commander in Chief -- is different from the constitutional or other legal basis of other titles of the Code. *Compare, e.g.*, 18 U.S.C. § 1001 (frustration of a federal purpose) *with* 18 U.S.C. § 2422 (use of a means of interstate commerce to effect the crime). These constitutional bases are also reflected in jurisprudence over the ages recognizing a military society that is distinct from

civilian society. *See, e.g., Parker* v. *Levy*, 417 U.S. 733, 743 (1974). While it is gratuitous perhaps to restate the point, neither the parties' briefs nor my own research reveals any instance in which the "other analogous statute" authority has been used outside the General Article context.

Ex Post Facto concerns

There is a case to be made that, because the President's Executive Order is not legislation, the constitutional *ex post facto* prohibition does not apply. The prohibition in fact is found in the "legislative" portion of the constitution. U.S. Const. art. I, § 9, cl. 3. *See also United States* v. *Gorski*, 47 M.J. 370, 373 (C.A.A.F. 1997)(opinion apparently limited to the effect of legislation). Considering, however, the manner in which the UCMJ is drafted and implemented, and because of the separation of powers conferred by the Constitution in military and naval criminal matters, this strict textual argument must fail. Even if the *ex post facto* clause does not by its terms apply, the concept of the judicial interpretation that any law that aggravates an offense is harsh and oppressive, *see Beazell* v. *Ohio*, 269 U.S. 167, 169-70 (1925), does, and accordingly due process, if nothing else, requires limiting the punishment.

Congress may not normally delegate legislative authority to the Executive branch, as to do so would violate the "finely wrought" constitutional provisions, especially the Presentment Clause, U.S. Const. Art. I § 7, cl. 2. *See Clinton* v. *City of New York*, 524 U.S. 417, 421 (1998). In some limited cases, however, where the Executive is in control, as in foreign relations, Congress may constitutionally allow some discretion in shaping the contours of its legislation. *Id.* at 445 n.38 (citing *Field* v. *Clark*, 143 U.S. 649 [1892], upholding portions of the Tariff Act allowing the President to "suspend" various aspects of the Act in appropriate cases). Congress has in fact delegated some authority to the Executive in cases of controlled substances. *See* 21 U.S.C. § 811. Certainly any prosecution for a substance added to the various schedules of controlled substances is subject to the *Ex Post Facto* clause.

So, too, should a delegation to the Executive to decide punishments at courts-martial, recognizing the President's role as Commander in Chief of the Armed Forces, be considered a valid exercise of the legislative power, thus bringing such a determination into the fold of Article I authority for the purposes of *ex post facto* scrutiny. Congress is in all cases "the constitutionally recognized source of authority over the

The Rule of Lenity

The Rule of Lenity provides that criminal statutes are to be strictly construed, with any ambiguity resolved in favor of an accused. *See, e.g., United States v. Thomas*, 65 M.J. 132, 135 n.2 (C.A.A.F. 2007). *But see United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820)(interpretation must give effect to the intent of the legislature).

When interpreting a statute and giving it effect, it is not enough to read it in isolation. Rather, the statute must be read in the context of the overall statutory scheme. *See, e.g., Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). Congress created the revised Article 120 in the context of the Uniform Code of Military Justice, Chapter 47 of title 10, and that Chapter's provisions include the three different courts-martial. Congress could have limited disposition of these types of offenses as it did in Article 106 (all allegations of Spying shall be referred to a general court-martial), but it chose not to do so. Indeed, as further evidence of Congress's understanding of its authority to specify fora and mandatory minimum punishments, one need look only as far as the draft National Defense Authorization Act for Fiscal Year 2014 proposed by the House Subcommittee on Military Personnel, H.R. Rep. No. 1960, 113th Cong., 1st Sess. 13 (2013)(providing that all sexual misconduct cases shall carry a mandatory minimum punishment of dismissal for officers or dishonorable discharge for enlisted members, punishments available only at a general court-martial). Congress could have enacted interim punishments as it did with the 2006 provisions, but it chose not to do so. *See also Gorski*, 47 M.J. at 372 n.1 (setting out "severance" language to permit the legislation to survive a challenge against retrospective application). Instead, it left referral and punishment to convening authority and court-martial discretion.

Applying the Rule of Lenity leads to the conclusion that, while a service member may be convicted of the offenses established by the 2011 amendments, thus giving effect to the intent of the legislature to criminalize sexual offenses, the maximum punishment that can be imposed is the statutory limit imposed on a summary court-martial. This maximum punishment (confinement for 1 month, hard labor without confinement for 45 days, restriction to limits for 2 months, forfeiture of 2/3 pay per month for 1 month) may be imposed irrespective of forum. This maximum criminal penalty is, in the area of sexual offenses, augmented by a civil disability created by a requirement to register as a sex offender and to comply with

conditions of varying degrees of severity from state to state. *See generally* Chapter 151 of title 42, *United States Code*. The legislature's interests are thus protected.

The Rule of Lenity extends to any conviction of ET2(SS) Schaleger of a lesser included offense under the authority of Article 79, UCMJ, 10 U.S.C. § 879. While Article 79's language addresses offenses that are "necessarily included" within a charged offense, in the military justice arena that statute has always been understood to mean "lesser included offense." *See generally United States v. Jones*, 68 M.J. at 467. The universal view in the cases, moreover, is that "lesser" describes not only the quantity or quality of elements, but also punishment. *See, e.g., Carter v. United States*, 530 U.S. 255, 260 n.2 (2000). It is here that due process dictates that the maximum punishment be limited to that of a summary court-martial.

CONCLUSION

Because the smallest punitive burden is found at a summary court-martial, as a matter of due process it is only those punishments authorized for that forum (confinement for 1 month, hard labor without confinement for 45 days, restriction for 2 months, forfeiture of 2/3 pay per month for one month) that may be imposed upon ET2(SS) Schaleger if he is convicted of either of the offenses alleged or of any lesser included offense under the authority of Article 79, UCMJ, 10 U.S.C. § 879.

So ordered.

LEWIS T. BOOKER, JR.
CDR, JAGC, USN
Military Judge
28 May 2013

DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES V. ET2(SS) CHRISTOPHER J. SCHALEGER, USN

This serves as a supplement to the Order in this case issued on 28 May 2013. That Order decided, in response to a Government motion *in limine*, that the maximum punishment that could be imposed for a violation of Article 120(b)(2) or 120(b)(3)(A), UCMJ, 10 U.S.C. § 920, as created by the National Defense Authorization Act for Fiscal Year 2012, was the jurisdictional maximum punishment for a summary court-martial as stated in Article 20, UCMJ, 10 U.S.C. § 820. The accused has been arraigned on the charge referred to court-martial, but he has not been convicted of any offense, nor has he been sentenced for any offense.

Courts of the United States (28 U.S.C. § 451) do not issue advisory opinions, as there is no "case or controversy" before the courts. U.S. Const. Art. III § 2. Courts created by an Act of Congress under Article I of the Constitution, including those in the military justice system, are not bound by the Article III proscription, but they generally observe the prudential limitation. *See United States v. Chisholm*, 59 M.J. 151, 152 (C.A.A.F. 2003).

In ET2(SS) Schaleger's case, there is in fact a "case or controversy" independent of the Government's motion *in limine*. Charges have been referred for trial, and the parties are at liberty to negotiate a pretrial agreement as provided in Rule for Courts-Martial 705. That negotiation is only reasonable, however, if the parties understand the stakes. *See, e.g., United States v. Perron*, 58 M.J. 72, 78 (C.A.A.F. 2003). Questions of punishment arise during the voir dire process and must be resolved to ensure that members fully understand the accused's punitive exposure. If there is a conviction, members will need to be instructed properly on the maximum permissible sentence. R.C.M. 1005.

This case is ripe from the Government's perspective because, if the Order incorrectly states the maximum punishment, the Government has no recourse to seek a greater punishment than that imposed by the court-martial. This case is all the more ripe for decision if, in fact, the 28 May 2013 Order states the correct punishment. If one were to instruct on a maximum

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ENCLOSURE (2)

punishment advocated by the Government, for example (in this case, confinement for 30 years, dishonorable discharge, forfeiture of all pay and allowances, reduction to pay grade E-1), and if the accused served more than 1 month in confinement, then he would be illegally confined. The normal post-trial and appellate review processes provided by Articles 60, 64, 66, and 67, are insufficiently nimble to prevent this illegal confinement, and while deferment of sentence or a writ of *habeas corpus* might be beneficial, once again the risk to the accused is palpable. Accordingly, it is my conclusion that this matter is ripe for decision and that the 28 May 2013 Order was properly and prudentially issued.

LEWIS T. BOOKER, JR.
CDR, JAGC, USN
Military Judge
30 May 2013

DEPARTMENT OF THE NAVY
NAVY AND MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES	)	17 May 2013
v.	)	
CHRISTOPHER J. SCHALEGER ET2 / E-5 United States Navy	)	MOTION TO DETERMINE THE MAXIMUM PUNISHMENT FOR ARTICLE 120 OFFENSES

1. **Nature of Motion**. Pursuant to Rule for Court-Martial 905(b), the Government requests the Court determine the maximum punishment for the offenses charged under the 2012 edition of Article 120 of the Uniform Code of Military Justice (UCMJ).

2. **Summary of Facts**.

a. On 7 December 2012, ET2 Christopher Schaleger, USN, hereinafter, the Accused, and Mrs. M.G. were together at the Accused's home making dinner and watching television. Both the Accused and Mrs. M.G. drank multiple alcoholic beverages and became intoxicated.

b. The Accused and Mrs. M.G. went to sleep in the Accused's bed. At some point during the night, the Accused pulled Mrs. M.G.'s shorts and underwear to the side and engaged in sexual intercourse with her while she was asleep. Mrs. M.G. did not resist or say anything to the Accused because she was asleep.

ENCLOSURE (3)

4. List of authorities.

a. Rule for Courts-Martial 1003

b. Article 18, Uniform Code of Military Justice

c. Article 56, Uniform Code of Military Justice

d. Article 120, Uniform Code of Military Justice

e. Article 120b, Uniform Code of Military Justice

f. 18 USC § 2244

g. *Loving v. United States*, 517 U.S. 748 (1996)

h. *United States v. Curtis*, 32 M.J. 252 (C.M.A. 1991)

i. *Taylor v. Garaffa*, 57 M.J. 645 (N.M.C.C.A. 2002)

j. *United States v. Gorski*, 47 M.J. 370 (CAAF 1997)

4. Discussion.

In this case, the maximum punishment for each Specification under the Charge should be a dishonorable discharge, forfeitures of all pay and allowances, and confinement for 30 years. This is the maximum punishment recently established by the President in an Executive Order published on 15 May 2013.

Alternatively, if the Court determines that the Executive order is considered *ex post facto* law, the maximum punishment should include a dishonorable discharge, forfeitures of all pay and allowances, and confinement for life without the possibility of parole, which is the jurisdictional maximum punishment at a general court-martial. Or, this Court could find under the custom of the service that the maximum punishment is either the

maximum punishment established in the 2008 Edition of the Manual for Courts-Martial or the maximum punishment provided in the Executive Order issued on 15 May 2013. Both indicate the maximum punishment for a closely related offense is a dishonorable discharge, forfeitures of all pay and allowances, and confinement for 30 years.

a. Law regarding courts-martial maximum punishments.

Congress has the power to delegate to the President the establishment of penalties at courts-martial. *Loving v. United States*, 517 U.S. 748, 769 (1996). Congress delegated this power through Articles 18 and 56 of the UCMJ. *Id.* Article 56 provides that "the punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense," while Article 18 states that a general court-martial "may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by [the Code], including the penalty of death when specifically authorized by" the Code.

These Articles, when taken together, reveal that Congress legislated that the President shall set the maximum punishments imposable in trials by courts-martial. *United States v. Curtis*, 32 M.J. 252, 261 (C.M.A. 1991). Finally, the 2012 statute revising Article 120, (hereinafter, Article 120) contains the direction that servicemembers found guilty of the offense "shall

be punished as a court-martial may direct."

b. Current state of the law.

As the Court is aware, on 15 May 2013, the President signed an Executive Order that amended the Manual for Courts-Martial and established the maximum punishment for Article 120 offenses that were committed after 28 June 2012. In this amended version, the maximum punishment for a sexual assault is: "dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years". This amendment puts in writing a maximum punishment that is within the allowable punishment at a general court-martial.

c. The President has established Part IV of the MCM for Article 120 offenses committed after 28 June 2012.

Although this amendment to the Manual for Courts-Martial occurred after the commission of the offense charged in the present case, it is the Government's position that it is not an *ex post facto* law because it does not increase the maximum punishment for this Accused. Rather, it is to the benefit of the Accused because it lowers the maximum punishment from that which is allowed at a general court-martial: a dishonorable discharge, forfeitures of all pay and allowances, and confinement for life without the possibility of parole.

The test for determining whether a law is *ex post facto*, was addressed in *United States v. Gorski*, 47 M.J. 370 (CAAF

Constitution's *ex post facto* clause. The court stated that the Petitioner, like the Accused in the present case, was already subject to the punitive consequences provided in the Amendment. Therefore, the Executive Order did not violate the *ex post facto* clause.

Based on the above mentioned cases, the Amendment to the 2012 edition of the MCM is not in violation of the *ex post facto* clause because it does not increase the maximum punishment for the Accused. Prior to the Amendment, the maximum punishment for the offenses the Accused is charged with committing was a dishonorable discharge, forfeitures of all pay and allowances, and confinement for life without the possibility of parole. This Amendment significantly lowers that maximum punishment. Therefore, the Accused had notice of the maximum punishment prior to this amendment and he is not harmed by this amendment.

d. Alternatively, if the Court finds the Amendment to be an *ex post facto* law and therefore inapplicable to the present case, the maximum punishment for this offense should be the jurisdictional maximum at a general court-martial.

If the Court determines that the recent amendment to the 2012 edition of the MCM is not applicable to the present case, the following analysis should be applied to determine the maximum punishment. Rule for Courts-Martial (R.C.M.) 1003(b) lists the only possible punishments that a non-capital court-martial may adjudge: a reprimand, forfeiture of pay and

allowances, a fine, reduction in pay grade, restriction to specified limits, hard labor without confinement, confinement, and/or punitive discharge. In addition to other limits found in the MCM,[1] R.C.M. 1003(c)(1) places maximum limits on those punishments based on the offense committed.

Maximum punishment limits based on offenses are separated in two categories: limits for offenses that are listed in Part IV and limits for offenses that are not listed in Part IV. See R.C.M. 1003(c)(1). Under R.C.M. 1003(c)(1)(A)(i), if an offense is listed in Part IV, then the maximum punishment that can be adjudged at court-martial is that listed in Part IV. R.C.M. 1003(c)(1)(A)(ii) provides that the maximum punishment for offenses not listed in Part IV may be that of an "included or closely related offense" list in Part IV or, if an offense is not listed in Part IV and not included or closely related to an offense listed in Part IV, shall be the punishment authorized by the United States Code, or as authorized by the custom of the service.

In this case, Article 120 *is* listed in Part IV of the MCM, found at paragraph 45. Because Article 120 is listed in Part IV, a plain reading of R.C.M. 1003(c)(1)(B) makes both subparagraphs (i) and (ii) of that Rule inapplicable. As a

[1] See R.C.M. 201(f) and 1301(d) (jurisdictional limits of a court-martial); R.C.M. 1003(c)(2) (limits based on the rank of the accused).

result, the maximum punishment that a court-martial can adjudge should be based on the inclusion of Article 120 in Part IV.

R.C.M. 1003(b) lists the possible punishments that may be adjudged at court-martial. Following that list of possible punishments, R.C.M. 1003(c)(1)(A) provides the "maximum" limit to three types of punishments: confinement, forfeitures, and punitive discharge. According to R.C.M. 1003(c)(1)(A), these maximum limits only apply to those offenses listed in Part IV of the MCM and are set at the maximum limit established in Part IV.

In this case, the Accused is charged with two Specifications in violation of Article 120, Sexual Assault. This offense is listed in Part IV of the MCM. However, specific maximum punishment was not included in Part IV prior to the Amendment issued in the Executive Order on 15 May 2013. The listed offense of Sexual Assault in Part IV states the punishment is "as a court-martial may direct." Thus the offense is not punishable by death because Congress did not authorize death within the statute itself. Therefore, the language, "shall be punished as a court-martial may direct" should be interpreted to mean that there is no applicable offense-based maximum punishment that can be adjudged, leaving the range of lawful punishments available to the court-martial.

Given that, R.C.M. 1003(c)(1)(A) does not provide a maximum punishment that may be adjudged at court-martial, the maximum

punishment for an offense under Article 120 should be the maximum allowable by a general courts-martial under Article 18, which is a dishonorable discharge, forfeitures of all pay and allowances, and confinement for life without the possibility of parole.

e. Alternatively, the Court could find each Specification under the Charge to be punishable as authorized by the custom of the service.

Although not consistent with a literal interpretation of the MCM, the Court could hold that Article 120 is not "listed" within Part IV for the purposes of R.C.M 1003(c)(1). Such a holding would be predicated on a requirement that to be listed in Part IV, an offense must contain all necessary sub-paragraphs, to include elements, sample specifications, and maximum punishments at the time the offense was committed. Without these additional sub-paragraphs, according to this interpretation, an offense is not "listed" in Part IV, therefore triggering the requirements of R.C.M 1003(c)(1)(B).

Assuming that R.C.M 1003(c)(1)(B) is applied to the Charge and its two Specifications, the Court must first look to whether Article 120 is included in or closely related to an offense that is listed in Part IV, as per R.C.M 1003(c)(1)(B)(i). Given that all relevant sexually-based offenses have now been incorporated in Article 120, there remain no other closely related offenses listed in Part IV.

Because there is no other closely related offense similar to Article 120 in Part IV, the next step is to look to R.C.M 1003(c)(1)(B)(ii) to determine whether Article 120 is punishable by the United States Code or by the custom of the service. In this case, the most analogous section of the United States Code to Article 120, Sexual Assault, is sexual abuse as defined within 18 U.S.C. § 2242.[2] However, the language in U.S.C. is somewhat different from language in Article 120(b)(2) and Article 120(b)(3)(a). Specifically, the language in the United States Code does not address situations where the Accused knew or should have known the person was asleep. In addition, the language in the United States Code does not provide for situations where the alleged victim is impaired by drug, intoxicant, or some other similar substance. As a result, the United States Code is not similar enough to utilize in this situation.

What is left, therefore, is to see whether Article 120 can be punishable by the custom of the service as permitted under R.C.M 1003(c)(1)(B)(ii). The language of the Charge and its two Specifications are actual criminal offenses that have been criminalized under the UCMJ for decades. The custom of the service is to punish sexual assault offenses.

[2] 18 U.S.C. § 2242 ("Whoever, ... knowingly ... engages in a sexual act with another person if that other person is-- (A) incapable of appraising the nature of the conduct; or (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act ...")

In 2010, the custom was to punish sexual assaults like the one charged in the present case under Article 120 of the UCMJ as "aggravated sexual assault". In 2010, the maximum punishment was 30 years confinement and a dishonorable discharge.

In 2005, the custom was to punish sexual assaults like this one charged here under Article 120 of the UCMJ as "rape". The maximum punishment for "rape" was death, a dishonorable discharge, or confinement for life.

In 1984, Article 120 of the UCMJ lists "rape" as a punitive article. The definition of rape is similar to the definition of sexual assault as charged in the present case. The maximum punishment was listed as death or confinement for life.

Additionally, the Court could look to the Executive Order issued on 15 May 2013 to determine the custom of service. As discussed previously, this Executive Order amended Part IV of the 2012 MCM and provided the maximum punishment for sexual assault as a dishonorable discharge, forfeitures of all pay and allowances, and confinement for 30 years. This amendment clearly shows the custom of service and the appropriate maximum punishment for an offense not listed in Part IV.

4. **Relief Requested**. The Government respectfully requests the maximum punishment for an offense under Article 120 should be what is provided in the Executive Order issuing amendments to the MCM on 15 May 2013. This would set the maximum punishment

DEPARTMENT OF THE NAVY
GENERAL COURT-MARTIAL
NAVY AND MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT

U N I T E D S T A T E S v. CHRISTOPHER J. SCHALEGER ET2 / E-5 UNITED STATES NAVY	DEFENSE RESPONSE TO GOVERNMENT MOTION CONCERNING MAXIMUM PUNISHMENT FOR SPECIFICATIONS CHARGED UNDER ARTICLE 120 23 May 2013

1. **Nature of Motion.** The United States filed a motion with the Court on 17 May 2013 and a supplemental motion on 24 May 2013, requesting a ruling regarding the maximum punishment for offenses at issue in this case. Specifically, the United States requested a ruling with respect to specifications charged under Article 120(b) of the Uniform Code of Military Justice (U.C.M.J.), which allege acts that occurred between 28 June 2012 and 15 May 2013. The United States argued that the maximum punishment for each specification at issue should be dishonorable discharge from the Naval service, forfeiture of all pay and allowances, and confinement for 30 years. The defense opposes the Government's motion and argues that a court-martial may not impose a greater sentence than that which is authorized at summary court-martial for either specification at issue. In the alternative, the defense

ENCLOSURE (4)

argues that the maximum punishment that a court-martial may impose is that which would be available for an offense charged under Article 128(a)—assault consummated by a battery.

2. **Summary of Facts.**

a. The National Defense Authorization Act for Fiscal Year 2006 included significant overhauls to Article 120, U.C.M.J. Included in the 2006 amendments were interim maximum punishments that could be imposed upon a person convicted under the 2006 version of Article 120. *See* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 109-163 § 552(b), 119 Stat. 3263 (2006). The interim punishments Congress wrote into the 2006 statute remained in effect until the President exercised his power under Article 56, U.C.M.J., to specify punishments for offenses that lack a statutory penalty.

b. The National Defense Authorization Act for Fiscal Year 2012 included changes to existing sexual offenses and their respective elements under Article 120, U.C.M.J. Unlike the 2006 amendments, however, the 2012 Act did not impose interim maximum punishments in the event that the President delayed in exercising his powers under Article 56[1]. With respect to punishment that may be imposed upon persons convicted under the offenses enumerated in Article 120, the

[1] Congress also refrained from directing cases charged under the 2012 version of Article 120 to a specific court-martial and also elected not to impose its own maximum punishment. *Contra* Article 106, U.C.M.J. (directing trial by general court-martial or military commission and a mandatory punishment of death).

statute merely explained that those persons "shall be punished as a court-martial may direct." These amendments—signed into law on 31 December 2011—took effect on 28 June 2012.

c. On 31 January 2013, the United States preferred charges against ET2 Schaleger, alleging two specifications under Article 120(b) for conduct that occurred on or about 7 December 2012. Those specifications were then investigated under Article 32, U.C.M.J., and subsequently referred to general court-martial on 14 May 2013.

d. On 15 May 2013, the President signed Executive Order 13643—Amendments to the Manual for Courts-Martial, United States. That Order imposed the following maximum punishment for each of the two specifications that the United States had already referred against ET2 Schaleger under Article 120: dishonorable discharge from the Naval service, forfeiture of all pay and allowances, and confinement for 30 years.

3. **Discussion.**

a. In this case, the maximum authorized punishment is the jurisdictional limit of a summary court-martial.

(1) Applying the recent executive order to offenses that occurred between 28 June 2012 and 14 May 2013 would violate the United States Constitution's expressed proscription of *ex post facto* laws under Article I, Section 9. Declining to avail itself of powers exercised when making prior amendments to Article 120 and

enacting other articles under the U.C.M.J., Congress's most recent iteration of Article 120 is an ambiguous statute with respect to maximum punishment. As such, this Court should invoke the rule of lenity and read the statute in the light most favorable to ET2 Schaleger. Such a reading leads one to the conclusion that the maximum punishment is that which can be imposed by a summary court-martial.

(2) Alternatively, the Court may invoke Rule for Courts-Martial 1003(c)(1)(B)(i) because—absent maximum punishment—the charged offense of sexual assault is not listed under Part IV of the current edition of the Manual for Courts-Martial. Assault consummated by a battery under Article 128 of the Uniform Code of Military Justice is listed under Part IV and is related to, and/or a lesser offense of, the charged sexual assault offense. Under R.C.M. 1003(c)(1)(B)(i), therefore, the maximum sentence authorized for the two specifications is that which may be imposed for commission of assault consummated by a battery: bad conduct discharge, forfeiture of all pay and allowances, and confinement for up to 6 months.

b. Because the language regarding maximum punishment under the 2012 version of Article 120 is ambiguous, the maximum punishment for each charged specification is that which could be imposed by a summary court-martial.

(1) The maximum punishment for offenses charged under Article 120 that allege conduct occurring between 28 June 2012 and 14 May 2013 is the jurisdictional limit of a summary court-martial. The rule of lenity provides that criminal statutes are to be strictly construed, with any ambiguity resolved in favor of an accused. *See, e.g., United States v. Thomas*, 65 M.J. 132, 135 n.2 (C.A.A.F. 2007). When engaging in statutory interpretation and applying a statute, courts must avoid reading a statute in isolation and instead consider the context of the overall statutory scheme. *See, e.g., Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). Here, the National Defense Authorization Act for Fiscal Year 2012 must be interpreted in the context of Congress's overall statutory scheme. One must consider, therefore, Congress's overhaul of Article 120 in the National Defense Authorization Act for Fiscal Year 2006 as well as other criminal statutes that Congress has included in the U.C.M.J. Contrary to its 2006 amendments to Article 120, Congress elected not to include interim punishments in its 2012 iteration. Congress also decided not to explicitly state a maximum punishment or limit disposition of

offenses charged under Article 120 to a specific court-martial with established jurisdictional limits on punishment as it did with Article 106—directing trial by general court-martial or military commission and a mandatory punishment of death.

(2) When Congress enacted the statute at issue in this case, it chose to neither impose interim maximum punishment nor direct a statutory maximum punishment nor to direct disposition of applicable cases at a specific court-martial with known jurisdictional limits. Instead, Congress left determination of maximum punishment to the convening authority during the referral process and thereafter to the judiciary. One must guess at what Congress intended when it left determination of maximum punishment open to interpretation. Considering the overall statutory scheme, the statutory language that a person convicted under the 2012 version of Article 120 "shall be punished as a court-martial may direct" is inherently ambiguous. Because it is ambiguous this Court should invoke the rule of lenity to resolve such ambiguity when determining the language's meaning. The maximum punishment that may be imposed when the ambiguous language is interpreted in the light most favorable to ET2 Schaleger is that which is within the jurisdictional limit of a summary court-martial.

c. Applying Executive Order 13643 to offenses that occurred between 28 June 2012 and 14 May 2013 violates the expressed proscription of *ex post facto* laws under Article I, Section 9 of the United States Constitution. "An increase in the maximum sentence to confinement authorized for a crime would clearly be *ex post facto* legislation." *United States v. Gorski*, 47 M.J. 370, 373 (C.A.A.F. 1997). As discussed *supra*, the ambiguous language with respect to maximum punishment that exists in the 2012 Article 120 statute requires that the maximum punishment available is that which may be imposed by a summary court-martial. Such a statutory interpretation is appropriate for offenses that occurred between 28 June 2012 and 14 May 2013. Applying Executive Order 13643 to offenses that occurred in the interim between the statute's effective date and the date on which the order was issued would clearly be *ex post facto* legislation.

d. If the Court does not find the maximum punishment language to be ambiguous, the Court should apply R.C.M. 1003(c)(1)(B) to determine a maximum punishment for the two charged specifications of sexual assault.

(1) R.C.M. 1003(b) lists the only possible punishments that a non-capital court-martial may adjudge: a reprimand, forfeiture of pay and allowances, a fine, reduction in pay grade, restriction to specified limits, hard labor without confinement, confinement,

and/or punitive discharge. In addition to other limits found in the M.C.M.[2], R.C.M. 1003(c)(1) places maximum limits on those punishments based on the offense committed.

(2) Maximum punishment limits based on offenses are separated into two categories: limits for offenses that are listed in Part IV and limits for offenses that are not listed in Part IV. See R.C.M. 1003(c)(1). R.C.M. 1003(c)(1)(A)(i) contemplates that "the maximum limits for the authorized punishments . . . are set forth for *each*[3] offense listed in Part IV of this Manual." (emphasis added). The use of the word "each" in R.C.M. 1003(c)(1)(A)(i) suggests that an offense without maximum authorized punishment is not considered a listed offense.

(3) There is further guidance in the Discussion section that precedes the punitive articles in Part IV of the M.C.M.:

> Other than Articles 77 and 79, the punitive articles of the code are discussed using the following sequence: a. Text of the article; b. Elements of the offense or offenses; c. Explanation; d. Lesser included offenses; e. Maximum punishment; [and] f. Sample specifications.

Under Part IV of the 2012 edition of the M.C.M., Articles 120, 120(b), and 120(c) only include the text of the statute. Those

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[2] *See* R.C.M. 201(f) and 1301(d) (jurisdictional limits of a court-martial); R.C.M. 1003(c)(2) (limits based on the rank of the accused).

[3] "Each: A distributive adjective pronoun, which denotes every one of the persons or things mentioned; every one of two or more persons or things; composing the whole, separately considered." *Black's Law Dictionary* 507 (6th ed. 1990).

Articles do not include elements of the offense or offenses, an explanation section, stated lesser included offenses, authorized maximum punishment, or sample specifications. It is also worth noting that the quoted Discussion section was modified to reflect case law from 2012 prior to its insertion into the 2012 M.C.M. Modifications were *not* inserted, however, to specifically exclude Article 120 from the stated punitive article format, an example of which can be found in language that discusses Articles 77 and 79[4].

(4) One should conclude—based on the recognized meaning of the word "each," as used in R.C.M. 1003(c)(1)(A) and the Discussion section that precedes Part IV of the M.C.M.—that if an offense is "listed" in Part IV, then so too are elements of the offense or offenses, an explanation section, stated lesser included offenses, authorized maximum punishment, and sample specifications. To the contrary, when an offense does not contain elements of the offense or offenses, an explanation section, stated lesser included offenses, authorized maximum punishment, or sample specifications, that offense is not "listed," under the language of R.C.M. 1003(c)(1)[5].

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[4] Listings for Articles 77 and 79 in Part IV of the M.C.M. contain neither sample specifications nor maximum punishments, but unlike Article 120, they "are not chargeable offenses." M.C.M. Part IV (Discussion).

[5] Though the Rules for Courts-Martial are neither statutes, nor are they promulgated by a legislative body, any ambiguity therein should be resolved in favor of the accused. *Cf. United States v. Thomas*, 65 M.J. 132, 135 (C.A.A.F. 2007)(citation omitted).

(5) In this case, the charged specifications allege that ET2 Schaleger violated Article 120. Though a section labeled "Article 120" can be found in Part IV of the current M.C.M., that section lacks several of the subsections intended to appear within every "punitive article of the code," as indicated in the Discussion section that precedes Part IV of the M.C.M. Among four other subsections, the portion labeled "Article 120" is missing a subsection discussing maximum authorized punishment. Such a scenario directly contradicts the language the Discussion section preceding Part IV as well as the language in R.C.M. 1003(c)(1)(A), which contemplates that maximum authorized punishments accompany *each* listed offense. For these reasons, the section labeled "Article 120" in the current edition of the M.C.M. is not a "listed offense," as described in R.C.M. 1003(c)(1)(A).

(6) Because the charged offense under Article 120 is not listed in Part IV of the M.C.M. using conclusions drawn from R.C.M. 1003(c)(1)(A) and the Discussion section preceding Part IV, one must then examine whether R.C.M. 1003(c)(1)(B) applies to the present case. Specifically, subsection (i) of the stated Rule directs:

> For an offense not listed in Part IV of [the M.C.M.] which is included in or closely related to an offense listed therein the maximum punishment shall be that of the offense listed.

The inquiry is to determine whether Part IV lists an offense that is included in, or related to, the charged offense of sexual assault. If so, then the appropriate maximum punishment that should be attributed to the unlisted charged offenses is that which can be attributable to the lesser or related offense that *is* listed in Part IV. Here, there exists a lesser and/or related offense to the alleged sexual assault. The most appropriate listed offense to use as a guidepost is assault consummated by a battery under Article 128.

(a) The United States alleges two specifications of sexual assault—a violation of Article 120(b) of the U.C.M.J. The elements of specification 1 are: (1) that ET2 Schaleger committed a sexual act upon another person; and (2) that ET2 Schaleger knew or reasonably should have known that the other person was asleep. The elements of specification 2 are: (1) that ET2 Schaleger committed a sexual act upon another person; and (2) that ET2 Schaleger knew or reasonably should have known that the other person was incapable of consenting due to impairment by an intoxicant.

(b) The elements of assault consummated by a battery are: (1) "that the accused did bodily harm to a certain person;" and (2) "that the bodily harm was done with unlawful force or violence." Article 128(b)(2), U.C.M.J. Bodily harm under Article 128 means committing any offensive touching of another, however slight, and unlawful force or violence means that the accused wrongfully caused

the contact, in that no legally cognizable reason existed that would excuse or justify the contact. *See United States v. Bonner*, 70 M.J. 1, 6 (C.A.A.F. 2011) (citations omitted). The maximum imposable punishment for assault consummated by a battery is "[b]ad conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months." M.C.M., Part IV para. 54e.(2).

(7) Because Part IV of the M.C.M. enumerates no maximum punishment for the alleged sexual assault, the maximum punishment for the charged conduct should be that of assault consummated by a battery under Article 128. Specifications 1 and 2 put ET2 Schaleger on notice that he needed to defend against an accusation of bodily harm, specifically a nonconsensual sexual act upon the complaining witness. Under Article 128, the accused would similarly have to defend against an accusation of bodily harm, specifically an offensive touching of the complaining witness for which no legally cognizable reason existed that would excuse or justify the contact, i.e. consent. In effect, charging the conduct at issue under either Article 120 or Article 128 would require the accused to defend against a nonconsensual offensive touching of the complaining witness. One could easily substitute the conduct alleged in specifications 1 and 2 as the basis for a specification alleging assault consummated by a battery. For these reasons, the appropriate maximum punishment that a court-martial may impose for

violation of specification 2 is bad conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

e. It would be an error to extend the maximum authorized punishment for the charged offense to a court-martial's jurisdictional limit when the President has issued guidance for determining the maximum punishment for offenses not listed in Part IV of the M.C.M.

(1) Citing R.C.M. 1003(c)(1)(A), the United States argues that the maximum punishments listed in Part IV of the M.C.M. "only apply to those offenses listed in Part IV of the MCM and are set at the maximum limit established in Part IV." Government Brief para. d(iv), dated 17 May 2013. On this basis, the United States argues that—since no maximum authorized punishment is included in Part IV for Article 120 offenses—the maximum punishment in this case extends to "the range of lawful punishments available to the court-martial." *Id.* at para. d(v). Such an argument, however, disregards subsection (B) of the very same rule and instead suggests a procedure for which there are no supportive grounds. Nowhere in R.C.M. 1003 is a court-martial instructed to defer to its jurisdictional limit in the absence of an enumerated maximum authorized punishment. Rather, the Rule provides several steps for narrowing the authorized punishment for a charged offense within a court-martial's jurisdictional limits. Most notably, the maximum authorized punishment is narrowed within a court-martial's

jurisdictional limits when the charged offense is without an enumerated maximum punishment but is related to an offense for which a maximum punishment is listed in Part IV of the M.C.M.

(2) In fact—as R.C.M. 1003(c)(1)(B)(i) tells us—the maximum punishments enumerated in Part IV of the M.C.M. extend to "[i]ncluded or related offenses" with respect to listed offenses. In addition, R.C.M. 1003(c)(1)(B)(ii) offers further guidance when Part IV of the M.C.M. is without an offense that is related to, or lesser than, the charged offense. Therefore, the Government's argument is only applicable when several factors have been met: (1) the charged offense is not listed in Part IV of the M.C.M.; (2) Part IV of the M.C.M. does not contain maximum authorized punishment for an offense that is lesser than, or related to, the charged offense; (3) the United States Code does not authorize a punishment for the charged offense; and (4) the custom of the service does not authorize a punishment for the charged offense. *See* R.C.M. 1003(c)(1)(B)(i)-(ii).

(3) In this case, the United States cannot demonstrate that all of these factors have been met. As discussed *supra*, there exists at least one offense—assault consummated by a battery—that is included in, and/or related to, the charged offense of sexual assault. Further, Part IV of the M.C.M. states the maximum authorized punishment for commission of assault consummated by a battery. As such, the maximum imposable punishments for assault

consummated by a battery are also the most appropriate guideposts with respect to the conduct the Government alleges in this case.

(4) To open ET2 Schaleger up to any punishment available within the court-martial's jurisdictional limit would be to disregard guidance that the President issued in R.C.M. 1003(c)(1)(B)(i). Because assault consummated by a battery is an offense listed in Part IV of the M.C.M., and because it is related to, and/or a lesser offense of, the alleged abusive sexual contact, it would be an error to instead defer to the court-martial's jurisdictional limit for maximum authorized punishment.

f. Neither the United States Code nor the custom of the service authorizes a punishment in this case.

(1) In the absence of an enumerated punishment authorized by the President or a lesser or related offense listed in Part IV of the M.C.M., a charged offense is punishable by a sentence authorized by the United States Code or the custom of the service. R.C.M. 1003(c)(1)(B)(ii). In the present case, however, the Court need not turn to the United States Code or the custom of the service because the M.C.M. lists a lesser or related offense in Part IV.

(2) R.C.M. 1003(c)(1)(B)(ii) does not authorize—for application in a court-martial—a sentence applicable to criminal statutes found in the United States Code that are similar to offenses charged at court-martial. *See United States v. Beaty*, 70

M.J. 39, 42 n.7 (C.A.A.F. 2011)("[w]e observe that the closely related language [in R.C.M. 1003(c)(1)(B)(i)] . . . refers to offenses that are closely related to offenses listed in the M.C.M. -not offenses in the United States Code)(internal quotations and citations omitted). Following the court's guidance, one should not look to related criminal conduct enumerated in the United States Code in an effort to determine a maximum authorized sentence for conduct charged under the U.C.M.J. Here, the M.C.M. M.C.M. lists a lesser or related offense in Part IV—assault consummated by a battery. Turning to the Code is an inappropriate and unnecessary solution to a problem that does not exist. R.C.M. 1003(c)(1)(B)(ii) provides us an ample guide to determine a maximum authorized sentence for the charged conduct, and that approach is to consider lesser and/or related offenses that are listed in the M.C.M.

(3) Similar to the United States Code, the custom of the service does not authorize a sentence in this case. Our service has operated under three different versions of Article 120 of the U.C.M.J. and two different commanders in chief since fiscal year 2006. Based on this, it is impossible to determine what the custom of the service has been with respect to sexual assault offenses and their respective authorized punishments. Rather, it has been customary within the service to interpret and apply the various statutes thrust upon our service over the past seven years. Our

service has not had adequate time and/or continuity in the law to establish a custom with respect to punishments authorized under Article 120. Observing maximum authorized punishment promulgated with respect to prior versions of the law or by prior commanders in chief are of no use. If the prior methods for dealing with the charged conduct were adequate guideposts, Congress would not have rewritten the statute, and the President would have instantly applied prior authorized punishments to the current version of Article 120. Neither is the case. For these reasons, the custom of the service has not authorized a punishment in this case.

g. In this case, the maximum authorized punishment is the jurisdictional limit of a summary court-martial.

(1) Because the statutory language with respect to maximum punishment under the 2012 version of Article 120 is ambiguous, the Court should turn to the Rule of Lenity when interpreting the language. In so doing, the maximum punishment for each specification at issue is that which interprets the ambiguous language in the light most favorable to ET2 Schaleger. And such a reading would cap the punishment that may be imposed upon ET2 Schaleger at the jurisdictional limit of a summary court-martial.

(2) Alternatively, should the Court find the maximum punishment language at issue to be clear, the Court should turn to R.C.M. 1003 to determine the maximum punishment applicable to this case. Because application of Executive Order 13643 to the alleged

conduct in this case violates the Constitution's proscription of *ex post facto* legislation, the punitive Article 120 as applied to the alleged conduct was without the necessary subsections to constitute a listed offense under Part IV of the M.C.M., as interpreted by R.C.M. 1003(c)(1)(A). Assault consummated by a battery under Article 128 of the U.C.M.J. is related to, and a lesser offense of, the charged offense. Therefore, if the Court elects not to interpret the statute at issue using the Rule of Lenity, the defense respectfully requests that the Court invoke guidance issued under R.C.M. 1003(c)(1)(B)(i) and find that the maximum sentence authorized for the offense charged in specification 2 is bad conduct discharge, forfeitures of all pay and allowances, and confinement for up to 6 months.

4. **Relief Requested.** The defense respectfully requests that the Court impose the jurisdictional limit of a summary court-martial as the maximum authorized punishment for each specification charged under Article 120 in this case.

5. Argument. The defense does not request oral argument.

6. Burden of Persuasion. As the moving party, the United States bears the burden of persuasion on any factual issue the resolution of which is necessary to decide this motion.

//s//
N. D. LINSTROTH
LT, JAGC, USN
Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served electronically upon Trial Counsel and the Court on 27 May 2013.

//s//
N. D. LINSTROTH
LT, JAGC, USN
Defense Counsel

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1. *United States v. Thomas*, 65 M.J. 132 (C.A.A.F. 2007)
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4. *United States v. Bonner*, 70 M.J. 1 (C.A.A.F. 2011)
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DEPARTMENT OF THE NAVY
NAVY AND MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

U N I T E D S T A T E S	)	24 May 2013
v.	)	
CHRISTOPHER J. SCHALEGER ET2 / E-5 United States Navy	)	SUPPLEMENTAL MOTION TO DETERMINE THE MAXIMUM PUNISHMENT FOR ARTICLE 120 OFFENSES

1. **Nature of Supplemental Motion**. Pursuant to Rule for Court-Martial 905(b), the Government requests the Court determine the maximum punishment for the offenses charged under the 2012 edition of Article 120 of the Uniform Code of Military Justice (UCMJ). This supplemental motion provides the Court with further analysis if the Military Judge concludes that the Executive Order issued on 15 May 2013 is an *ex post facto* law.

2. **Summary of Facts**.

The Government does not wish to present any additional facts for the purpose of this supplemental motion.

3. **List of authorities.**

a. Article 120, Uniform Code of Military Justice

b. Rule for Courts-Martial 1003(c)(1)(B)(ii)

c. *United States v. Leonard*, 64 M.J. 381, 383-84 (C.A.A.F. 2007)

ENCLOSURE (5)

d. *United States v. Beaty*, 70 M.J. 39, 43 (C.A.A.F. 2011)

e. 18 U.S.C. § 2242(2)(A-B) (2012)

f. *United States v. Wilcox*, 487 F.3d 1163, 1169 (8th Cir. 2007)

g. *United States v. Barrett*, 937 F.2d 1346, 1347-48 (8th Cir. 1991)

4. <u>Discussion</u>.

In this case, the maximum punishment for each Specification under the Charge should be a dishonorable discharge, forfeitures of all pay and allowances, and confinement for 30 years. This is the maximum punishment recently established by the President in an Executive Order published on 15 May 2013.

Alternatively, if the Court determines that the Executive Order is considered *ex post facto* law, the maximum punishment should include a dishonorable discharge, forfeitures of all pay and allowances, and confinement for life without the possibility of parole, which is the jurisdictional maximum punishment at a general court-martial. If the Court determines that Article 120 offenses committed after 28 June 2012 are not considered *listed* offenses, the next most appropriate reference is the United States Code. Pursuant to the United States Code, the maximum punishment for an offense analogous to the charged offense in this case is: imprisonment "for any term of years or for life" as a maximum punishment for this offense.

a. The Military Judge could look to the United States Code to determine the maximum punishment because 18 U.S.C. § 2242(2)(A-B) (2012) is an analogous offense.

If the Military Judge finds that Article 120 is not listed in Part IV, the Military Judge should look to the maximum punishment "as authorized by United States Code" in accordance with R.C.M. 1003(c)(1)(B)(ii). If there is an analogous offense under the United States Code, then the maximum punishment for that offense should be used to provide the maximum punishment for the charged offenses here. *Cf. United States v. Leonard*, 64 M.J. 381, 383-84 (C.A.A.F. 2007) (discussing application of this provision). Here, there is an analogous offense under the United States Code.

To be sure, the appellate courts generally analyze R.C.M. 1003(c)(1)(B)(ii)'s authorization to look to the United States Code in the Article 134 context. *See, e.g., Leonard*, 64 M.J. at 383-84; *see also United States v. Beaty*, 70 M.J. 39, 43 (C.A.A.F. 2011). But this is a practical result of military sentencing rather than a matter of legal import. Neither R.C.M. 1003(c)(1)(B)(ii) nor the appellate courts' analysis limits this provision to Article 134 offenses.

18 U.S.C. § 2242(2)(A-B) (2012), criminalizes sexual abuse when an individual (1) engages in a sexual act with another person, and the other person is (2) incapable of appraising the

☐ ORIGINAL

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2. SSN	3. RANK/RATE	4. PAY GRADE
SCHALEGER, Christopher J.	[redacted]	ET2	E-5

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE a. INITIAL DATE	b. TERM
Trident Training Facility	31 Oct 2008	6 Yrs + 12 Mons

7. PAY PER MONTH a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL	8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
$2893.50	$0.00	$2893.50	None	N/A

II. CHARGES AND SPECIFICATIONS

10. CHARGE I VIOLATION OF THE UCMJ, ARTICLE 120

Specification 1: In that Electronics Technician Petty Officer Second Class Christopher J. Schaleger, U.S. Navy, Trident Training Facility, Bangor, Washington, on active duty, did, at or near Bremerton, Washington, on or about 7 December 2012, commit a sexual act upon Mrs. [redacted], to wit: penetration of her vulva by his penis, when the said Electronics Technician Petty Officer Second Class Christopher J. Schaleger, U.S. Navy, knew or reasonably should have known that the said Mrs. Madeline J. Gibson was asleep.

Specification 2: In that Electronics Technician Petty Officer Second Class Christopher J. Schaleger, U.S. Navy, Trident Training Facility, Bangor, Washington, on active duty, did, at or near Bremerton, Washington, on or about 7 December 2012, commit a sexual act upon [redacted], to wit: penetration of her vulva by his penis, when the said [redacted] was incapable of consenting due to impairment by an intoxicant, and that condition was known or reasonably should have been known by the said Electronics Technician Petty Officer Second Class Christopher J. Schaleger, U.S. Navy.

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI)	b. GRADE	c. ORGANIZATION OF ACCUSER
Agosto, Victoria	LN2(SW/AW)	Region Legal Service Office Northwest

d. SIGNATURE OF ACCUSER: Victoria Agosto, LN2, USN — 31 JANUARY 2013

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 31 day of January, 20 13, and signed the foregoing charges and specifications under oath that he/~~she~~ is a person subject to the Uniform Code of Military Justice and that he/~~she~~ either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/~~her~~ knowledge and belief.

J. L. WILT *Typed Name of Officer*	Region Legal Service Office Northwest *Organization of Officer*
LT, JAGC, USN *Grade and Service*	Judge Advocate *Official Capacity to Administer Oaths (See R.C.M. 307(b)—must be commissioned officer)*

Jennifer Wilt
Signature

DD FORM 458 S/N 0102-LF-000-4580

☐ ORIGINAL

ENCLOSURE (6)

DEPARTMENT OF THE NAVY
NAVY REGION NORTHWEST
1100 HUNLEY ROAD
SILVERDALE, WASHINGTON 98315-1100

14 Feb 13

GENERAL COURT-MARTIAL CONVENING ORDER 01-13

Pursuant to authority contained in paragraph 0120a, Judge Advocate General of the Navy Instruction 5800.7F of 26 June 2012, a general court-martial is hereby convened with the following members:

MEMBERS

Commander Johannes M. Bailey, NC, U.S. Navy;
Commander Lewis W. Callaway, U.S. Navy;
Commander Joseph M. Turk, U.S. Navy;
Lieutenant Commander Bryce D. Butler, U.S. Navy;
Lieutenant Commander Jeffrey E. Green, U.S. Navy;
Lieutenant Commander Blaine A. Laurion, U.S. Navy;
Lieutenant Matthew P.P. Bauer, U.S. Navy;
Lieutenant Brian L. Bitner, U.S. Navy;
Lieutenant Justin M. Kaper, U.S. Navy;
Lieutenant Junior Grade Robert J. Campbell-Martin, U.S. Navy;
Ensign James H. Taylor III, U.S. Navy, and
Chief Warrant Officer (2) Justin L. Sidwell, U.S. Navy.

S. M. HOGAN
Captain, U.S. Navy
Commander, Navy Region Northwest
Acting

CERTIFIED TO BE A TRUE COPY

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

UNITED STATES,	)	
	)	**RESPONDENT'S OPPOSITION TO**
v.	)	**GOVERNMENT'S PETITION FOR**
	)	**EXTRAORDINARY RELIEF IN THE NATURE**
	)	**OF A WRIT OF MANDAMUS**
Lewis T. BOOKER, JR.	)	**Case No. 201300247**
CDR, JAGC, USN,	)	
	)	
Respondent,	)	
	)	
Christopher J. SCHALEGER	)	
ET2, USN,	)	
	)	
Real Party in Interest,	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

JENNIFER L. MYERS
Lieutenant, JAGC, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate Review
Activity
1254 Charles Morris Street SE
Bldg. 58, Ste. 100
Washington, D.C. 20374
Phone (202) 685-7713
Fax (202) 685-7426
jennifer.l.myers@navy.mil

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AT THE TIME OF THE ALLEGED CRIME, CONGRESS AUTHORIZED THE PUNISHMENT OF PERSONS GUILTY OF SEXUAL ASSAULT “AS A COURT-MARTIAL MAY DIRECT.” THERE WAS NO ADDITIONAL GUIDANCE. SHOULD THIS COURT PREVENT THE MILITARY JUDGE FROM APPLYING THE RULE OF LENITY TO THIS AMBIGUOUS STATEMENT OF LAW? 7

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Legislative power over military law is split between Congress and the President. 8

The Court should not issue this Writ because the Government has not met its very high burden. 12

I. Extraordinary Writs 12

a) An extraordinary writ is not appropriate in this case because it does not rise to the magnitude required. 12

b) The Government is not entitled to this relief, or any other, because it had the opportunity to amend the ambiguous law, and chose not to. 13

c) The Government has failed to establish that there is a "right to issuance of the relief [that]is clear and indisputable;" The military judge’s ruling is logically and legally correct, but even if it were incorrect, it would be a far from indisputable conclusion. 15

II. The Ex Post Facto clause prevents the application of the maximum punishments provided in EO 13643. 25

III. Where the legislative and executive branches fail to act, it is within the discretion of the judiciary to supply a maximum punishment, but not to the detriment of the accused. 26

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Chris Kennebeck, *The Joint Service Committee on Military Justice (JSC)- Part 2*, National Institute of Military Justice Blog-CAAFLOG, (June 26, 2012), http://www.caaflog.com/2012/06/26/the-joint-service-committee-on-military-justice-jsc-part-ii/ 14
U.S. Dep’t of Army, Pam. 27-9, Military Judge’s Benchbook, ¶ 3-45-12 (Jan. 1, 2010) (C11-11)..... 18

COMES NOW the real party in interest, ET2 Christopher J. Schaleger, United States Navy, who, by and through his undersigned counsel, and pursuant to this Court's order of 24 June 2013 opposes the Government's petition for extraordinary relief.

Statement of the Case

ET2 Schaleger stands accused of two specifications of sexual assault, in violation of Article 120(b)(2) and Article 120(b)(3)(A), UCMJ, 10 U.S.C. § 920 (2012). The conduct at issue allegedly occurred on 7 December 2012. (Charge Sheet.) On 31 January 2013, the Government preferred charges against ET2 Schaleger. (Charge Sheet.) Following an Article 32 hearing, the Convening Authority referred the charge and specifications to a general court-martial on 14 May 2013. (Charge Sheet.) On 15 May 2013, the President amended the MCM and prescribed a maximum punishment of 30 years confinement for each of the offenses alleged in this case.

On 17 May 2013, the Trial Counsel submitted a motion in limine to determine the maximum punishment for the specifications. (Appellate Ex. II; Appellate Ex. III) The military judge noted that, although Congress enacted the new Article 120, UCMJ, through the National Defense Authorization

Act on 28 June 2012, 10 U.S.C. § 920 (2012), the President failed to assign maximum punishments to offenses under the new Article 120 until 15 May 2013, two days after this case was referred to a general court-martial. Congress used ambiguous language to describe what it felt should be the maximum punishment, stating only that a person convicted of sexual assault shall "be punished *as a court-martial* may direct." Art. 120, UCMJ. Emphasis added. It did not say what type of court-martial (as it did, for example, in Art. 106, UCMJ), and it provided no further guidance as to punishment. The military judge therefore applied the Rule of Lenity, which states that ambiguities in criminal statutes must be resolved in favor of the defendant. He then ruled that, applying this rule to the phrase "*as a court-martial* may direct," the maximum punishment available is the jurisdictional maximum available at summary courts-martial, because *summary* court-martial is the most favorable resolution to the defendant of the ambiguous terminology used by Congress in this statute.

The Government responded by filing its petition for extraordinary relief, where it seeks a writ of mandamus to compel the military judge to change his ruling. The Government also requested a stay of the proceedings. (Govt Petition for Extraordinary Relief in the Nature of a Writ of Mandamus.)

On 24 June 2013, this Court granted the Government's

request for a stay and ordered ET2 Schaleger to show cause as to why the petition should not be granted. (NMCCA Court Order of 24 June 2013.) This opposition is in response to that order.

Relief Requested

ET2 Schaleger respectfully requests that this Court find that it lacks jurisdiction to act on the Government appeal. If this Court does find, however, that it has jurisdiction to respond to the Government's petition for extraordinary relief, ET2 Schaleger respectfully requests that this Court find that the Government has failed to meet the high burden required to merit "extraordinary relief" at this interlocutory stage of the case.

Jurisdiction

This Court does not have jurisdiction to hear the Government's interlocutory appeal. The burden of establishing that a court has jurisdiction, "rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). In this case, that is the Government. The Government asks this Court to use its power under the All Writs Act, 28 U.S.C. § 1651(a) (2006), to issue extraordinary writ because if the maximum sentence available in this case extends to a punitive discharge or confinement for 1 year, this Court "will have jurisdiction pursuant to Article 66, UCMJ," and

the "appeal may be later perfected." (Government's Brief.)

"[P]rosecution appeals are not favored and are available only upon specific statutory authorization." *United States v. Wuterich*, 67 M.J. 63, 70 (C.A.A.F. 2008), *cert. denied*, 130 S. Ct. 52 (2009); *accord United States v. Bradford*, 68 M.J. 371 (C.A.A.F. 2010). Congress has limited the Government's right to an interlocutory appeal to only those instances covered by Article 62, UCMJ. Thus, Article 62's jurisdictional limits must be strictly observed.

The Government can appeal interlocutory rulings of a military judge only where: 1) there has been an order or ruling of the military judge which terminates the proceedings with respect to a charge or specification; 2) where an order or ruling excludes evidence that is substantial proof of a fact material in the proceeding; or 3) in certain circumstances involving classified information. Art. 62, UCMJ. None of these circumstances apply to the case against ET2 Schaleger. The Government's request to expand the jurisdiction of this Court to hear Government appeals by invoking Article 66, UCMJ, through the All Writs Act should fail.

Article 66 does not provide a means for a Government interlocutory appeal. "In a case referred to it, the Court of Criminal Appeals *may* act only with respect to the findings and sentence as approved by the convening authority." Article 66,

UCMJ (emphasis added). Article 66 is strictly a tool of the Defense and is never available as a weapon of the Government. An appellant can also bar this Court's jurisdiction under Article 66 by waiver. Article 61(c), UCMJ. Therefore, this Court does not necessarily have jurisdiction under Article 66, and would never have jurisdiction under Article 66 to hear a Government appeal. The Government is seeking a windfall by attempting to invoke Article 66, to the great prejudice of ET2 Schaleger.

This Court may issue a writ of mandamus under the All Writs Act, where necessary or appropriate "in aid of jurisdiction" and where agreeable to the usages and principles of law, 28 U.S.C. § 1651(a) (2006). *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999). However, the All Writs Act does not provide independent statutory authorization for this prosecution appeal because, as the Supreme Court has emphasized, "the Act does not enlarge [] jurisdiction." *Goldsmith*, 526 U.S. at 534-35; *see also* 28 U.S.C. § 1651(a) (2006). This Court does not have the authority to hear this issue within its existing jurisdiction, and the All Writs Act cannot create that additional authority.

As the CAAF recently reiterated, Article I Courts, including military appellate courts, "must exercise their jurisdiction in strict compliance with authorizing statutes." *Center for Constitutional Rights v. United States*, 72 M.J. 126,

128 (C.A.A.F. 2013). Here, a writ would not be in aid of this Court's jurisdiction, but rather a writ would expand this Court's jurisdiction to hear Government Appeals and would usurp the limitations placed on such appeals in Article 62 by Congress. *See Goldsmith*, 526 U.S. at 534-35. As jurisdiction is a threshold legal issue, *Loving v. United States*, 62 M.J. 235, 237, 239 (C.A.A.F. 2005), the analysis of this case should end here.

Issue Presented

AT THE TIME OF THE ALLEGED CRIME, CONGRESS AUTHORIZED THE PUNISHMENT OF PERSONS GUILTY OF SEXUAL ASSAULT "AS A COURT-MARTIAL MAY DIRECT." THERE WAS NO ADDITIONAL GUIDANCE. SHOULD THIS COURT PREVENT THE MILITARY JUDGE FROM APPLYING THE RULE OF LENITY TO THIS AMBIGUOUS STATEMENT OF LAW?

Statement of Facts

Congress drastically amended Article 120, Uniform Code of Military Justice (UCMJ) with the National Defense Authorization Act for Fiscal Year 2012. Pub. L. No. 112-81, 125, 125 Stat. 1298 (2011). The amendments included the addition of new punitive articles like Article 120, 120a, 120b, and 120c and applied to crimes committed on or after 28 June 2012. Manual for Courts Martial, United States, (MCM), pt. IV, ¶ 45, Note at 68. However, Congress did not include subparagraphs that would normally address elements, explanation, lesser included offenses, maximum punishments, and sample specifications for any

of the new provisions. MCM, pt. IV, ¶ 45, Note at 70. Such additional materials are generated under the President's authority to prescribe rules pursuant to Article 36, UCMJ. *Id*. However, the new provisions stated that persons convicted under these new articles "shall be punished as a court-martial may direct." MCM, pt. IV, ¶ 45a.(b).

The President issued Executive Order (EO) 13643- Amendments to the Manual for Courts-Martial, United States, on 15 May 2013. Exec. Order No. 13643, 78 Fed. Reg. 98 (May 21, 2013). That EO assigned the maximum punishment of dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years for the crimes of which ET2 Schaleger is accused. *Id*. at *47. The alleged sexual assault in this case occurred on 7 December 2012, and charges were referred to a general court-martial on 13 May 2013, two days before the President signed EO 13643. (Charge Sheet.)

Legislative power over military law is split between Congress and the President.

"[M]ilitary discipline is an area of concurrent authority between Congress and the President." *United States v. Jones*, 68 M.J. 465, 477 (C.A.A.F. 2010) (Baker, J., dissenting). Congress creates law, including the Uniform Code of Military Justice (UCMJ). U.S. Const. Art. 8 ("Congress shall have the power . . . make rules for the government and regulation of the land and

naval forces”). Congress amends the articles of the UCMJ and Title 10 of the United States Code (USC) through the annual National Defense Authorization Acts (NDAA). See e.g., NDAA 2012, Pub. L. No. 112-81, 125 Stat. 1405, § 541 (b) (2011).

Congress has delegated some of its legislative power with regards to the military to the President, due to his role as commander-in-chief. Article 36, UCMJ, provides the President with the power to make pre- and post-trial rules, including modes of proof, while Article 56,[1] UCMJ, permits the President to prescribe maximum punishments. As a result of these articles, the President promulgates a Preamble (part I), the Rules for Courts-Martial (R.C.M.) (part II), the Military Rule of Evidence (M.R.E.) (part III), the punitive articles (part IV), and Nonjudicial Punishment Procedure (part V) in the Manual for Courts-Martial (MCM). Chris Kennebeck, *The Joint Service Committee on Military Justice (JSC)- Part 1*, National Institute of Military Justice Blog- CAAFLOG, (June 19, 2012), http://www.caaflog.com/2012/06/19/the-joint-service-committee-

[1] Article 56, UCMJ, states: “The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense.”

on-military-justice-jsc-part-i/ (hereinafter Kennebeck, *Part 1*); MCM, pt. 1, ¶ 4.[2]

"To amend Parts I-V of the MCM requires an [Executive Order (EO)]." Chris Kennebeck, *The Joint Service Committee on Military Justice (JSC)- Part 2*, National Institute of Military Justice Blog- CAAFLOG, (June 26, 2012), http://www.caaflog.com/2012/06/26/the-joint-service-committee-on-military-justice-jsc-part-ii/ (hereinafter Kennebeck, *Part 2*). However, "[t]he MCM is intended to be an all-in-one reference for the deployed attorney far from civilization, and its design is reflective of that goal." Kennebeck, *Part 1*. Therefore, much of the language in the MCM is guidance, rather than law. See MCM, pt. I, ¶ 4, Discussion (referencing supplementary materials published by DOD and DHS which accompany the MCM).

The Secretary of Defense, is required to review the MCM annually and provide recommendations for amendments to the President. Kennebeck, *Part 1*. He accomplishes this requirement through the Joint Services Committee (JSC), which collects proposals and developes recommendations pursuant to DOD Directive 5500.17, Role and Responsibilities of the Joint Service Committee (JSC). If approved by the majority of the

[2] LtCol Kennebeck is Policy Branch Chief, Criminal Law Division, Office of the Judge Advocate General of the Army and Executive Secretary of the Joint Service Committee on Military Justice.

voting group, these proposals are added to the JSC's "annual Review," which eventually becomes the EO. Kennebeck, *Part 1*.

Like all statutes passed by Congress, each NDAA "take[s] effect on the date of its enactment[,]" *United States v. Pritt*, 54 M.J. 47, 50 (C.A.A.F. 2000)(citing *Gozlon-Peretz v. U.S.*, 498 U.S. 395, 404 (1991), regardless of whether the President has revised the MCM. To prevent a gap in the law, Congress has the option to issue interim punishments, as it did when it revised the UCMJ – including Article 120 – in 2006. *See* NDAA 2006, Pub. L. No. 109-163 § 552(b), 119 Stat. 3263 (2006). Congress chose not to include such a safe-guard in the latest revisions. Congress also had the option of designating the forum at which Article 120 cases should be tried. *See e.g.,* Article 106, UCMJ (2012) (requiring trial by general court-martial and punishment of death). But Congress chose not to designate forum or punishment in the 2012 version of Article 120, UCMJ.

To be clear, Congress has not delegated its legislative powers to the JSC. However, the 2008 MCM became so outdated that the JSC published the 2012 MCM, despite the fact that the President had not enacted an Executive Order to set a maximum punishment for the 2012 version of Article 120, UCMJ. *See* MCM, pt. IV at 70 (2012 ed.); Kennebeck, *Part 1*. The 2012 MCM included only the language from the UCMJ in part IV and did not included elements or a regular maximum punishment paragraph,

because none existed. See MCM, pt. IV at 70 (2012 ed.) Kennebeck, *Part 1*.[3]

The Court should not issue this Writ because the Government has not met its very high burden.

I. Extraordinary Writs

The petitioner must show three conditions before a court may provide extraordinary relief in the form of a writ of mandamus: (1) the party seeking the writ must have "no other adequate means to attain the relief"; (2) the party seeking the relief must show that the "right to issuance of the relief is clear and indisputable"; and (3) "even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Lawanson v. United States*, 201200187, 2012 CCA LEXIS 345, 13-14 (N-M. Ct. Crim. App. Aug. 31, 2012) (citing *Cheney v. United States Dist. Court,* 542 U.S. 367, 380-81, (2004)).

a) An extraordinary writ is not appropriate in this case because it does not rise to the magnitude required.

A writ of mandamus is a "drastic remedy . . . [which] should be invoked only in truly extraordinary situations." *United States v. LaBella*, 15 M.J. 228, 229 (C.M.A. 1983); *United States v. Thomas*, 33 M.J. 768 (N.M.C.M.R. 1991). "[I]t is clear

[3] As explained in the title to part IV, "Statutory text of each Article is in bold" for each paragraph of part IV.

that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy." *Will v. United States*, 389 U.S. 90, 95 (1967).

This is not such an extraordinary case that an extraordinary writ would be appropriate. CDR Booker, is one military judge, and his opinion of this particular issue could only impact a very few number of cases. EO 13643 closed the gap left in the law by NDAA 2012. Judge Booker's ruling would only impact Article 120 offenses that occurred between 28 June 2012 and 13 May 2013, and come before his court. His rulings are not binding on any other court. This is not the type of extraordinary case envisioned by an Extraordinary Writ.

b) The Government is not entitled to this relief, or any other, because it had the opportunity to amend the ambiguous law, and chose not to.

The NDAA 2012 is fundamentally flawed because it failed to establish interim maximum punishments for the amended Article 120 offenses. The first factor to consider under *Cheney* is whether there is path for relief other than the extraordinary writ. In this case, the Government had every opportunity to clear up any ambiguities in the law. But it chose not to do so. It is inappropriate for the Government to now ask this Court to

retro-actively clear up the ambiguity in a light unfavorable to ET2 Schaleger by means of an extraordinary writ.

The Government, and practitioners around the world, knew of the lack of a set maximum punishment in Article 120, UCMJ, from its 2012 inception. The military judge's Benchbook, published by the United States Army, attempted to offer guidance for practitioners, stating:

> As of 28 June 2012, the President had not prescribed a maximum punishment for this offense. Until the President prescribes a maximum punishment, the maximum punishment should be determined in accordance with RCM 1003(c)(1)(B). Pursuant to RCM 1003(c)(1)(B)(i), the military judge should consider whether the offense is "included in or closely related to an offense listed" in paragraph 45 of the MCM Part IV.

U.S. Dep't of Army, Pam. 27-9, Military Judge's Benchbook, ¶ 3-45-12 (Jan. 1, 2010) (C11-11). The JSC was also aware of this flaw. It included the following text in Part IV of the MCM under Article 120:

> The subparagraph[] that would normally address. . . maximum punishments. . . [is] generated under the President's authority to prescribe rules pursuant to Article 36. At the time of publishing this MCM, the President had not prescribed such rules for this version of Article 120. Practitioners should refer to the appropriate statutory language and, the extent practicable, use appendix 28 as a guide.

MCM, pt. IV, ¶ 45 note at 70.

Still, the President failed to act to remediate the flaw until 13 May 2013. The NDAA 2012 was published for public comment on December 31, 2011. For eighteen months, the

Government knew of the lack of maximum punishment and took no action to resolve the issue. This Court should not now entertain its request for a retroactive resolution.

c) The Government has failed to establish that there is a "right to issuance of the relief [that]is clear and indisputable;" The military judge's ruling is logically and legally correct, but even if it were incorrect, it would be a far from indisputable conclusion.

The Government bears the burden to show that it has a "clear and indisputable right" to the requested relief because the military judge made a ruling that is contrary to statute, settled case law, or valid regulation. *Cheney,* 542 U.S. at 380-81; *see e.g.*, *United States v. Ponder,* 54 M.J. 613, 616 (N-M. Ct. Crim. App. 2000); *United States v. Dettinger,* 7 M.J. 216 (C.M.A. 1979). It has failed to carry this burden because, the military judge's ruling is within his discretion and it is correct.

The plain language of the statute is ambiguous and the rule of lenity requires resolution in favor of the defendant: Here, that means the imposition of summary court-martial punishments. R.C.M. 1003 (c)(1)(B) was intended for Article 134 offenses and provides an imperfect framework. However, sexual assault is not included in any offenses within the UCMJ, other than those in Article 120, and there are no other closely related offenses. Additionally, the only provision of the USC applicable to this

case is 10 U.S.C. § 920. That statute contains the same ambiguous language as Article 120, UCMJ.

1. The plain language of the statute is ambiguous; therefore, summary court-martial punishments are the appropriate maximum punishment.

All punishments authorized by the President at courts-martial are found in Rule for Courts Martial (R.C.M.) 1003(b). R.C.M. 1003(c) limits those punishments based on the offenses committed and the status or rank of the accused. *United States v. Beaty*, 70 M.J. 39, 42 (C.A.A.F. 2011). These rules, however, do not cure the ambiguity of Article 120.

R.C.M. 1003(c)(1)(A) states "The maximum limits for the authorized punishments of confinement, forfeitures, and punitive discharge (if any) are set forth for each offense listed in Part IV of this Manual." Article 120, is physically listed in paragraph 45 of part IV of the 2012 MCM.[4] However, those provisions promised by R.C.M. 1003(c)(1)(A) are missing for the reasons discussed above. Instead, the text states that those guilty of sexual assault "shall be punished as a court-martial may direct."

[4] As discussed supra, the law contained in Parts I-V of the MCM is the purview of the President. However, the JSC republished the MCM without action from the President. There is an argument that Article 120 was not "listed in Part IV" because the President did not act. Whether or not it is listed the result is the same and the ambiguity is not cured as discussed below.

The Court of Appeals for the Armed Forces (CAAF) has "long adhered to the principle that criminal statutes are to be strictly construed, and any ambiguity resolved in favor of the accused." *United States v. Thomas*, 65 M.J. 132, 135 (C.A.A.F. 2007). *But see, Wiltberger,* 18 U.S. at 95 (finding a Court should not so strictly interpret a statute, as to negate the clear intention of the legislature.). When interpreting a statute and giving it effect, it is not enough to read it in isolation. Rather, the statute must be read in the context of the overall statutory scheme. *See, e.g., Davis v. Mich. Dep't of Treasury,* 489 U.S. 803, 809 (1989). Congress created the revised Article 120 in the context of Articles, 18, 19, and 20 of the UCMJ, which authorize three different types of courts-martial with three different levels of punitive authority. Art. 18, UCMJ; Art. 19, UCMJ; Art. 20, UCMJ. Congress could have limited dispositions under Article 120 to a specific forum but it declined to do so. Additionally, Congress could have issued interim maximum punishments, but it also failed to do that.

The military judge was left to determine a maximum punishment based on the ambiguous statement that a person guilty of sexual assault "shall be punished as court martial may direct." The rule of lenity requires that the intent of Congress be interpreted in favor of ET2 Schaleger. Therefore, the maximum punishment for ET2 Schaleger's alleged crimes is

capped at the jurisdiction maximum for the most favorable type of court-martial to him – a summary court-martial. The military judge did not err.

2. Even if this Court finds that Article 120 is not included in Part IV of the 2012 MCM, R.C.M. 1003(c)(1)(B) cannot cure the ambiguity.

Even if this Court finds that Article 120 was not listed in part IV, the Rule of Lenity, still requires the imposition of summary court martial punishments because it is the least prejudicial to ET2 Schaleger of all the options available. *See generally, Wiltberger*, 18 U.S. 76. R.C.M. 1003(c)(1)(B) cannot cure the ambiguity, because the rule was designed for crimes charged under clauses 1-3 of Article 134, UCMJ, which the President did not include in the MCM. *United States v. Leonard,* 64 M.J. 381, 384 (C.A.A.F. 2007) (Baker, J., concurring). There is no precedent for applying R.C.M. 1003(c)(1)(B) to determine a maximum sentence of a crime outside of Article 134. Article 134 expressly gives the court the discretion to set maximum punishments when the President has not provided a specific maximum. 10 U.S.C. 934 (2006). The military judges, however, are constrained by R.C.M. 1003(b) and (c). *Leonard,* 64 M.J. at 384. This policy reflects the need for good order and discipline within the military justice system and promotes flexibility. This statutory scheme does not contemplate

military judges retro-actively fixing ambiguous statutes created by Congress.

Other than the plain language of the rule, nothing expressly prohibits the application of these rules to this case. However, the application of R.C.M. 1003(c)(B)(ii) to this case, leads in a circle back to the original question before this Court- how to interpret the ambiguous statute. "For offenses not listed in part IV of the MCM which are included in or closely related to an offense listed in part IV," the maximum sentence shall be that of the listed offense. R.C.M. 1003(c)(2)(i). If an offense is not listed in part IV and R.C.M. 1003(c)(2)(i) does not apply, but it is punishable by the United States Code (USC) or the customs of service, those punishments are authorized. R.C.M. 1003(c)(2)(ii). None of these options is instructive.

A. Sexual assault is neither "included in", nor is it "closely related" to another article of the UCMJ.

Sexual assault is not a lesser included offense for any punitive article outside of Article 120. Additionally, no offenses are closely related as contemplated by R.C.M. 1003(c)(1). In *United States v. Ramsey,* the Government charged the appellant with Article 115, malingering, but then permitted the appellant to plead guilty to a lesser included offense under

Article 134, to reflect a lesser degree of culpability. 40 M.J. 71, 71 (C.M.A. 1994). The military judge found that the Article 134 offense was “included in” or “closely related to” Article 115 but refused to apply the maximum punishment of Article 115 which was 10 years. *Id.* at 73-74. The Court of Military Review found that the military judge erred by refusing to apply the maximum sentence of Article 115 in compliance with R.C.M. 1003(c)(1)(B)(i), but found no prejudice to the appellant. *Id.* at 76.

This case is very different from *Ramsey* in that it does not involve a specification under Article 134, and sexual assault is not a lesser included offense of any other article of the UMCJ. The Army Court of Military Review in *Ramsay* considered the elements of the offenses as well as the gravamen of the offenses. 35 M.J. 733, 736 (C.M.R. 1992). It found that the elements were very similar, as it was created from Article 115, and that the gravamen, or social cost, of the offenses were the same because both left a military unit shorthanded. *Id.*

The Government argues that assault consummated by a battery is “included in” or “closely related to” sexual assault. First, sexual assault is not a lesser included offense of battery. Second, the elements are quite different. They are:

Specification 1	**Specification 2**	**Assault Consummated by a Battery**
1) that ET2 Schaleger committed a sexual act upon another person and	1) that ET2 Schaleger committed a sexual act upon another person; and	1) that the accused did bodily harm to a certain person
2) that ET2 Schaleger knew or reasonably should have known that the other person was asleep.	2) that ET2 Schaleger knew or reasonably should have known that the other person was incapable of consenting due to impairment by an intoxicant	2) that the bodily harm was done with unlawful force or violence. Art. 128(b)(2), UCMJ.

To argue that a sexual assault is “essentially the same” as any other kind of battery is to ignore the plain language of the elements of both offenses. Article 120(b) is sexual in nature and requires knowledge. Article 128 requires “force or violence” which is contrary to the gravamen of Article 120(b). The essence of incapacitation is that force and violence are not required, and that the victims are extremely vulnerable. Indeed, if there were force or violence, the sexual assault could be charged under a different subsection of Article 120. Additionally, Congress intended sexual offenses to be treated

differently than battery offenses. The distinction is clear in the regular media coverage and continuous legislative amendments related to sexual assault. Sexual assaults are also considered more taboo by society at large. For these reasons sexual assault is neither included in nor closely related to assault consummated by a battery.

If this Court determines that Article 128 is closely related to Article 120(b), the analysis should end here because R.C.M. 1003(c)(1)(B)(ii) applies only when R.C.M. 1003(c)(1)(B)(i) does not.

B. 10 U.S.C. 920(b) is directly analogous to Article 120.

Under R.C.M. 1003(c)(1)(B)(ii) courts may consider analogous Federal statutes and their punishments or customs of service. The Government essentially argues that there are two options under the U.S.C.: 18 U.S.C. 2242(2)(A-B) (2012), or 10 U.S.C. § 920 (2006). As the military judge's ruling pointed out, this ignores the most relevant option. (Judge Booker's Ruling of 28 May 2010.) 10 U.S.C. § 920 (2012) is directly on point, and identical to Article 120, UCMJ. It also states that persons guilty of sexual assault, "shall be punished as court martial may direct." 10 U.S.C. § 920 (2012). By its terms, R.C.M. 1003(c)(2)(B)(ii) requires this Court to rely on 10 U.S.C. § 920 and again, contemplate the gap created by Congress.

The other options posited by the Government are untenable. The NDAA 2012 so greatly amended 10 U.S.C. § 920 (2006) that its terms no longer exist in the U.S.C. and therefore, cannot be applied in this case. *See generally, Beaty*, 70 M.J. at 44. (finding 18 U.S.C. § 2252a not analogous to an article 134 offense for possession of "what appeared to be child pornography", because the elements were not the same, and because that conduct was no longer chargeable under title 18).

18 U.S.C. 2242(2)(A-B) is strikingly similar to 10 U.S.C. § 920 (2006) and suffers from the same predicament. Congress intentionally amended title 10 so that it did not parallel 18 U.S.C., presumably because it did not promote the needs of the military. As a result of the amendments, the elements of the offenses are very different. In *United States v. Leonard*, the Court of Appeals for the Armed Forces (CAAF) held that using the maximum punishment directed by federal statute is only appropriate where there is a "directly analogous federal statute" that tracks every element of the criminal conduct and the *mens rea*. *Leonard*, 64 M.J. at 384. This holding is instructive here. The elements are:

Specification 1	**Specification 2**	**18 U.S.C. 2242(2)(A-B)**
1) that ET2 Schaleger committed a sexual act upon another person and	1) that ET2 Schaleger committed a sexual act upon another person; and	1) an individual engages in a sexual act with another person; and
2) that ET2 Schaleger knew or reasonably should have known that the other person was asleep.	2) that ET2 Schaleger knew or reasonably should have known that the other person was incapable of consenting due to impairment by an intoxicant	2) the other person is incapable of appraising the nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act.

Title 10 requires knowledge or constructive knowledge while Title 18 does not. The mens rea are different. These statutes are not “essentially the same.” The “directly analogous federal statute” in this case is 10 U.S.C. § 920. Finally, there is no consistent “custom of service” with regard to sexual assault. The maximum punishment has changed more than once in recent years.

Sexual assault is not included in or closely related to any other article of the UCMJ. There is no custom of service that dictates punishment in this case. The ambiguity remains

and the military judge was required to directly address the gap left by Congress.

II. The Ex Post Facto clause prevents the application of the maximum punishments provided in EO 13643.

"[A]ny statute which . . . makes more burdensome the punishment for a crime, after its commission . . . is prohibited as ex post facto. *Beazall v. Ohio*, 269 U.S. 167, 169-70 (1925); *United States v. Gorski*, 47 M.J. 370, 373 (C.A.A.F. 1997). "The Supreme Court has held that 'it is the effect, not the form, of the law that' makes it ex post facto and that legislation must 'give fair warning' of its effect so that people can rely on the law's meaning." *Gorski*, 47 M.J. at 373-74 (citing *Weaver v. Graham,* 450 U.S. 24, 28, 31 (1981)).

At the time of the alleged crime in this case, the maximum punishment under the ambiguous Article 120 was the maximum available at summary court-martial. This Court cannot impose a maximum sentence of 30 years confinement in accordance with EO 13643 because it would impermissibly increase the punishment.

The Governments argument that ET2 Schaleger would benefit from the imposition of EO 13643, necessarily incorporates the argument that life without parole was the appropriate punishment before the imposition of EO 13643. The Government's argument against ex post facto is disingenuous because its brief never

requests imposition of life without parole. Additionally, where the offense is not listed in the MCM, not included in or closely related, and not a custom of service, it cannot "be read to mean that the maximum sentence is the jurisdictional maximum of general court martial." *Beaty*, 70 M.J. at 44. As such, the maximum punishment for sexual assault under Article 120, UCMJ, (2012), has never been life without the possibility of parole. This Court cannot impose EO 13643, because that would impermissibly increase the maximum punishments available.

III. Where the legislative and executive branches fail to act, it is within the discretion of the judiciary to supply a maximum punishment, but not to the detriment of the accused.

"It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison,* 5 U.S. 137 (1803). *See also, Decker v. Northwest Envtl. Def. Ctr.,* 133 S. Ct. 1326, 1340-41 (2013) ("the purpose of interpretation is to determine the fair meaning of the rule--to "say what the law is."; "whatever [Congress] leaves vague in the statute will be worked out *by someone else*. . . So Congress's incentive is to speak as clearly as possible on the matters it regards as important.").

Intervening to reverse a military judge's exercise of discretion is proper only when it is apparent that the judge's

decision amounts to a "judicial usurpation of power." *Labella*, 15 M.J. at 229. Even gross negligence alone is not enough. *Id.* This Court cannot issue a writ to "control the decision of the trial court," it can only confine the lower court to the sphere of its discretionary power. *Will*, 389 U.S. at 104 (quoting *Bankers Life & Cas. Co. v. Holland,* 346 U.S. 379, 382 (1953)).

Article 134 expressly gives the court discretion to determine a maximum sentence where the President has not assigned one. *United States v. Jackson,* 17 U.S.C.M.A. 580, 583 (C.M.A. 1968). Here, the discretion of Judge Booker is not expressly given by statute, but given none the less. Congress delegated part of its legislative power to the Commander in Chief to assign maximum punishments for the UCMJ. Both Congress and the President failed to act with regard to assigning maximum punishments to Article 120 offenses that occurred between 28 June 2012 and 13 May 2013. Where the legislature and the Executive have left the statute ambiguous, it is within the discretion of the judiciary, to fill the gaps. While this Court may not agree with the specific rulings of Judge Booker, these rulings are within his discretion and not a usurpation of power.

If this Court determines that it has jurisdiction in this case, it should affirm Judge Booker's ruling.

JENNIFER L. MYERS
Lieutenant, JAGC, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
Bldg. 58, Ste. 100
Washington, D.C. 20374
Phone (202) 685-7713
Fax (202) 685-7426
jennifer.l.myers@navy.mil

Appendix

Lawanson v. United States, 2012 CCA LEXIS 345, 13-14 (N-M. Ct. Crim. App. Aug. 31, 2012)

Exhibits

A- Charge Sheet dated 14 May 2013.

B- CDR Lewis T. Booker, Ruling ICO U.S. v Schaleger of 28 May 2013.

C- Government Motion to Determine the Maximum Punishment for Article 120 Offenses of 17 May 2013.

D- Government Supplemental Motion to Determine the Maximum Punishment for Article 120 Offenses of 24 May 2013.

E- Defense Response to Government Motion Concerning Maximum Punishment for Specifications Charged Under Article 120 on 23 May 2013.

Certificate of Filing and Service

I certify that a copy of the foregoing was delivered to the Court and to Director, Appellate Government Division, and electronically filed on 12 July 2013.

JENNIFER L. MYERS
Lieutenant, JAGC, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
Bldg. 58, Ste. 100
Washington, D.C. 20374
Phone (202) 685-7713
Fax (202) 685-7426
jennifer.l.myers@navy.mil

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As of: July 12, 2013 2:09 PM EDT

Lawanson v. United States

United States Navy-marine Corps Court of Criminal Appeals
August 31, 2012, Decided
NMCCA 201200187

Reporter: 2012 CCA LEXIS 345

SAHEED A. LAWANSON ENGINEMAN THIRD CLASS (E-4), U.S. NAVY v. UNITED STATES OF AMERICA

Notice: AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

Subsequent History: Later proceeding at *United States v. Lawanson, 2012 CAAF LEXIS 1010 (C.A.A.F., Sept. 5, 2012)*
Appeal denied by United States v. Lawanson, 2012 CAAF LEXIS 1174 (C.A.A.F., Oct. 26, 2012)

Prior History: [*1] Military Judge: CDR Aaron C. Rugh, JAGC, USN. Convening Authority: Commanding Officer, Naval Submarine Base New London, Groton, CT.

Core Terms

military, enlistment, armed forces, interview, military authorities, separation date, terminal leave, personnel, pay grade, court-martial, delivery, commanding officer, endorsement, reenlisted, judge's conclusion, active service, unsupported, check-out, sentence, sailor, sheet

Case Summary

Overview
Servicemember who was charged with rape and aggravated sexual assault, in violation of UCMJ art. 120, *10 U.S.C.S. § 920*, was entitled to a writ of mandamus dismissing the charges because he was discharged from the U.S. Navy before the charges were preferred and the Navy lacked personal jurisdiction over him under UCMJ art. 2(a)(1), *10 U.S.C.S. § 802(a)(1)*. The record did not support the military judge's conclusion that a DD 214 the servicemember was issued was invalid because the Navy did not comply with Naval Mil. Pers. Manual art. 1160-120 when it issued that form.

Outcome
Petition granted. Charges and specifications dismissed.

Counsel: For Petitioner: LT Kevin Quencer, JAGC, USN.

For Respondent: Maj Crista Kraics, USMC.

Judges: Before J.R. PERLAK, B.L. PAYTON-O'BRIEN, R.Q. WARD, Appellate Military Judges. Chief Judge PERLAK and Senior Judge PAYTON-O'BRIEN concur.

Opinion by: R.Q. WARD

Opinion

Review of Petition for Extraordinary Relief in the Nature of a Writ of *Mandamus*

OPINION OF THE COURT

WARD, Judge:

The petitioner stands accused at a general court-martial of rape and aggravated sexual assault, violations of Article 120, Uniform Code of Military Justice, *10 U.S.C. § 920*. Prior to trial, he moved to dismiss all charges and specifications for lack of personal jurisdiction based on his discharge and resulting DD 214. Following the motion hearing, the military judge denied the motion, ruling that the Navy did not validly discharge the petitioner and, even if his discharge was valid, that the petitioner constructively reenlisted prior to court-martial jurisdiction attaching. The petitioner now seeks a Writ of *Mandamus* from this court dismissing the charges and specifications for lack of personal jurisdiction.[1]

After carefully considering the parties' pleadings, the portions of the record produced, and oral argument, we

[1] On 2 May [*2] 2012, we stayed the court-martial proceedings and ordered the United States ("respondent") to produce portions of the record and show cause as to why we should not grant the petitioner's requested relief. After the respondent filed an answer and the petitioner filed his reply, we heard oral argument.

agree with the petitioner that he was validly discharged on 1 February 2012 and that he did not constructively enlist following his discharge. Accordingly, we grant his requested relief for a Writ of *Mandamus* dismissing all charges and specifications.

Factual Background

On 2 February 2004, the petitioner enlisted in the Navy for a period of four years. He reenlisted on 28 February 2008 for four more years, which adjusted his End of Active Obligated Service (EAOS) date to 28 February 2012. For reasons unclear in the record, he was later reduced in rank (RIR) one pay grade to E-4 with 22 July 2009 as the effective date of his reduced pay grade. His RIR did not affect his EAOS, but it did change his High-Year Tenure date (HYT) to 1 February 2012.

In May of 2011, the petitioner began [*3] preparations for his separation. He initially completed a pre-separation counseling checklist in which he listed his date of separation as 28 February 2012. In July 2011, he went to Personnel Support Detachment New London (PSD) for his pre-separation counseling interview. During this interview, PSD informed him that his separation date was his HYT date of 1 February 2012 since that date preceded his EAOS of 28 February 2012. The PSD representative then issued him separation travel orders with a date of separation of 1 February 2012.

In September of 2011, "NG" reported to Naval Criminal Investigative Service (NCIS) that the petitioner had raped her in his barracks room on board Naval Submarine Base (NAVSUBASE) New London. Although NG only knew the petitioner by a nickname, NCIS initiated an investigation which, by mid-October, identified the petitioner as NG's alleged assailant. NCIS agents notified the NAVSUBASE staff judge advocate (SJA), LT F, and the NAVSUBASE commanding officer, CAPT D, both of the investigation and the petitioner as the subject.

In October, while the NCIS investigation continued, LT F received a PSD spreadsheet listing the petitioner's date of separation as 1 February [*4] 2012. LT F checked with the NAVSUBASE admin officer, Mr. W, who informed LT F that the petitioner's date of separation was actually 28 February 2012 according to the Enlisted Distribution and Verification Report (EDVR). LT F did not contact PSD to investigate the discrepancy with the petitioner's separation date.

On 30 October 2011, the petitioner submitted a special request chit for terminal leave. The chit listed a terminal leave period from 29 November 2011 to 2 February 2012 and a date of separation of 1 February 2012. Senior Chief Petty Officer (SCPO) W, the petitioner's division chief petty officer, called the NAVSUBASE command master chief (CMC), CMC V, to advise him of the petitioner's terminal leave request. At the time, CMC V was aware of the pending NCIS investigation but was unaware of the specific allegations. The petitioner's department head, LT C, approved the request and later contacted the SJA, LT F, to advise that he had granted the petitioner's terminal leave request.

Between late October and mid-November 2011, the petitioner completed his check-out from NAVSUBASE. On the check-out sheet in the space for the CMC appear the initials "TV" and a notation that all enlisted [*5] personnel require check-out by the CMC. CMC V later testified that he was authorized to check out all NAVSUBASE personnel in grade E-6 or below and the initials on the petitioner's check-out sheet appear to be his own. Appellate Exhibit III at 27; Record at 76-77. On 16 November 2011, the appellant received his final evaluation, signed by LT C, with a period ending date of 1 February 2012. SCPO W forwarded a copy of the evaluation to CMC V for his review.

On 18 November 2011, the petitioner went to PSD and received his copy of his DD 214. The DD 214 lists the following: a separation date of 1 February 2012; the separation authority as MILPERSMAN[2] 1910-104, the separation code as JBK and the reason for separation as "completion of required active service".[3] AE IV at 65. Personnel Specialist Second Class (PS2) D signed in block 22a, "Official Authorized to Sign" and next to his signature is the abbreviation "BY DIR" indicating by direction authority.

In December 2011, NCIS contacted the NAVSUBASE SJA, LT F, for assistance in arranging an interview with the petitioner. After consulting with CMC V and LT F, CAPT D ordered the petitioner recalled from terminal leave in order to facilitate the interview. CMC V called the petitioner and informed him that he was recalled to base. Following his recall, the petitioner was reassigned to the 1st Lieutenant's Division. He remained working there and did not depart again for terminal leave. On 15 December 2011, NCIS Special Agents NOC and PM interviewed the petitioner at the local NCIS office at NAVSUBASE.

By mid-January 2012, the only investigative item remaining was NCIS' final interview of the petitioner. The SJA, LT F, was under the impression that CAPT D had al-

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[2] Naval Military Personnel Manual, Art. 1910-104 (Ch-11, 20 Jun 2005).

[3] MILPERSMAN, Art. 1910-104, grants commanding officers separation authority for separation by reason of expiration of active obligated service. The Separation Program Designator [*6] (SPD) "JBK" designates involuntary discharge with no board entitlement and is also used in cases where the member is separated due to HYT. MILPERSMAN, Art. 1160-120, ¶ 9 (Ch-37, 29 Oct 2011).

ready decided to place the petitioner on legal hold, prefer charges, and direct an Article 32 investigation. However, in mid-January CAPT D was still undecided and wanted to wait until after this final interview. As he later explained at the motion [*7] session:

> the NCIS investigation had not been 'finalized' and . . . everything we had up until then was leaving me at just a 50-50 on whether he was guilty so I didn't know if anything else --or not guilty but worthy of preferring charges and if there was anything else out there. So, the investigation was still ongoing.

Record at 23-24.

Later during his testimony, CAPT D again explained that it was his intent to wait until the investigation was complete before issuing a legal hold letter because "we didn't have a complete investigation . . . [and] I wanted to see if there was anything out there, have all the facts." *Id.* at 26. In the meantime, LT F drafted a charge sheet, legal hold letter, and a letter directing an Article 32 investigation for CAPT D's signature. He also thought that the command had until 28 February 2012 to place the petitioner on legal hold.

On 1 February 2012, PSD electronically submitted a separations pay worksheet to the Defense Finance and Accounting Services (DFAS) for approval. That same day, DFAS verified the calculation and authorized PSD to pay the petitioner his final pay settlement. The following day, 2 February, PSD "pushed the button" and electronically released [*8] the funds to the petitioner's bank account. The petitioner's final settlement did not include payment for the unused days of terminal leave after his recall in December, since no one informed PSD of this recall prior to 2 February 2012.

On the morning of 1 February 2012, NCIS interviewed the petitioner. During the interview, the petitioner admitted to having sexual intercourse with NG in his barracks room, but asserted that the intercourse was consensual. Later that day, LT F obtained a copy of the petitioner's NCIS statement and placed it, along with a draft copy of a charge sheet, legal hold letter, and letter directing an Article 32 investigation in CAPT D's office for his review. The following morning, 2 February, CAPT D approved the package and LT F preferred the charges against the petitioner, signed a legal hold letter, and directed his assistant to deliver the letter to PSD. Later that morning, LT F's assistant returned and informed LT F that PSD would not accept the legal hold letter as the petitioner had been discharged on 1 February 2012. LT F, CAPT D, the NAVSUBASE executive officer, CDR P, and CMC V then met to discuss the situation. Ultimately, LT F asked CMC V to contact [*9] the petitioner, "sit [him] down" and "get a feel for which direction [the petitioner] was looking at." *Id.* at 86.

On the morning of 2 February 2012, the petitioner did not muster for work. He was called on his cell phone and directed to report to the SJA's office for a meeting. Id. at 81-82, 89, 167-72, 249.[4] Upon arrival at the SJA's office, the petitioner first met with LT F's assistant, who informed him of the preferred charges. The petitioner next met with CMC V, LT F, and Chief Master-at Arms (MAC) C, the leading chief petty officer (LCPO) of the 1st Lieutenant's Division. CMC V explained to the petitioner that if the case against him was handled by the local authorities, it could become costly for him to retain civilian counsel. He also explained that there was some confusion over the petitioner's discharge and legal hold situation, but that in his opinion, it was in the petitioner's best interest to remain at NAVSUBASE and face the charges. Throughout this 45 minute meeting, the petitioner remained mostly quiet and asked few questions. Afterward, the petitioner commented to MAC C that he thought he had been discharged the day prior, to which MAC C responded that he "needed to [*10] talk to his lawyer." *Id.* at 164.

At the motion hearing, CMC V testified how he explained his concerns to the petitioner during this meeting and the military judge queried him as follows:

> MJ: [*11] All right. Now it was during that meeting that you talked about his options?
>
> WIT: Yeah, I just kind of sat down and explained to him, again, I started with what I told him was my personal opinion and what was in the best interest for him and just kind of played out some scenarios for him. . . .
>
> MJ: You played out some scenarios. Explain that to me.
>
> WIT: Well, I told him, because he was not placed on legal hold at this time, there was still some questions about how do we get him on legal hold, can we put him on legal hold

---

[4] There was conflicting testimony at the motion session as to who called the petitioner and directed him to come to a meeting in the SJA's office and when this phone call was made. CMC V testified that he called the petitioner either on the 2nd or 3rd of February, either mid-morning or afternoon. He also testified that it was either later that day or the following day when he met with the petitioner in the SJA's office along with LT F and Chief Master-at-Arms (MAC) C. *Id.* at 89-91. In contrast, MAC C testified that he called the petitioner on his cell phone on the afternoon of the 1st and told him to report to the SJA's office the following day. *Id.* at 163-66. The petitioner testified that he received a call from MAC C on the 2nd and MAC C told him to report to the SJA's office that day. *Id.* at 248-49. As no one was aware that the petitioner had been discharged until the morning of the 2nd, we find that either CMC V or MAC C called the petitioner on the 2nd and this meeting occurred later that day.

and there was some concerns from not only the JAG but [MAC C] and myself that hold on here, he's been discharged from the Navy. Is he going to come to work tomorrow?

MJ: Did you share these concerns with him? Did you tell him there was some confusion about his legal hold?

WIT: I did, yes, sir, absolutely at this meeting and that's when I discussed with him that I felt it was in his best interest to try to resolve everything while he was currently here and not to leave in the event that he did have to be called back out of pocket, all the expenses that were going to happen on that.

MJ: You mean expenses of moving back to ---

WIT: Yes, sir, like what he had talked about is **[*12]** hey, you know, he was looking to get a job I believe it was in Chicago. He had relatives in Virginia. He had relatives in Rhode Island. That it was in his best interest to stay here and try to resolve everything while he was still on the base so he wasn't having to pay for all these expenses.

MJ: All right, so let me try to restate this to make sure that I understand. Correct me if I am incorrect. You really provided him two different options. Option one, because of the confusion over whether or not he was discharged he could go home but he might be recalled back here at some future point to face trial or two, your recommended course of action for him that he stay here so that he could resolve things here and not get in danger of incurring additional costs or moving everything back home and then having to come back, is that accurate?

WIT: Yes, sir.

Id. at 92-93.

On Monday, 6 February 2012, CAPT D, in a letter to the Director, PSD New London, requested that the petitioner be retained on active duty for legal hold. His letter then advised that since the petitioner's pay account was never closed, he remained on active duty and the DD 214 previously issued was erroneous. AE IV at 118. On the **[*13]** 7th of February, the Director, PSD New London, wrote to Commander, Navy Personnel Command, requesting that the petitioner's previously issued DD 214 be voided as it was prepared, issued, and distributed in error. AE IV at 120.[5]

Authority to Issue Extraordinary Writs

HN1 The All Writs Act, *28 U.S.C. § 1651(a)*, grants all courts established by Act of Congress the power to issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law. As a court created by Act of Congress, this court has the authority to issue the writ requested in this case. *United States v. Dowty*, 48 M.J. 102, 106 (C.A.A.F. 1998); *Dettinger v. United States*, 7 M.J. 216, 219 (C.M.A. 1979).

Principles of Law for Consideration of Extraordinary Writs

HN2 The petitioner has the burden of showing that he has a clear **[*14]** and indisputable right to the requested extraordinary relief. *Ponder v. Stone*, 54 M.J. 613, 616 (N.M.Ct.Crim.App. 2000); *Aviz v. Carver*, 36 M.J. 1026, 1028 (N.M.C.M.R. 1993). *See also* *Will v. United States*, 389 U.S. 90, 96, 88 S. Ct. 269, 19 L. Ed. 2d 305 (1967).

The Supreme Court has held that three conditions must be met before a court may provide extraordinary relief in the form of a writ of mandamus: (1) the party seeking the writ must have "no other adequate means to attain the relief"; (2) the party seeking the relief must show that the "right to issuance of the relief is clear and indisputable"; and (3) "even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Cheney v. United States Dist. Court*, 542 U.S. 367, 380-81, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004) (citations and internal quotation marks omitted).

We find that the petitioner has met the first and second conditions and we are satisfied that the writ is appropriate under these circumstances. *See Smith v. Vanderbush*, 47 M.J. 56 (C.A.A.F. 1997).

The Validity of Petitioner's Discharge

HN3 We review questions of personal jurisdiction de novo and accept the military judge's findings **[*15]** of historical facts unless they are clearly erroneous or unsupported in the record. *United States v. Melanson*, 53 M.J. 1, 2 (C.A.A.F. 2000). Having reviewed the military judge's findings of fact, except as noted below, we do not find them clearly erroneous or unsupported in the record and we adopt them accordingly.

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[5] The Director, PSD New London, did not testify at the motion hearing. However, both the head of PSD's separations and retirement section and the assistant director at PSD New London testified that this letter was submitted only at the direction of higher headquarters and that the DD 214 was not prepared, issued, or distributed in error. Record at 126, 155.

HN4 Under Article 2(a)(1), UCMJ, "[m]embers of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment" are subject to court-martial jurisdiction. However, "[i]t is black letter law that *in personam* jurisdiction over a military person is lost upon his discharge from the service, absent same saving circumstance or statutory authorization." United States v. Howard, 20 M.J. 353, 354 (C.M.A. 1985) (footnote omitted).

Whether someone has been validly discharged is governed by 10 U.S.C. § 1168(a). United States v. Hart, 66 M.J. 273, 275-76 (C.A.A.F. 2008); Howard, 20 M.J. at 354. In applying this statute, we must determine whether three elements have been satisfied 1) there was delivery of a valid discharge certificate; 2) final accounting of pay was made; and 3) the petitioner underwent the "clearing" process required **[*16]** under appropriate service regulations to separate him from military service. United States v. King, 27 M.J. 327, 329 (C.M.A. 1989). The military judge ruled that there was no delivery of a valid discharge. AE X at 4. He also concluded that the Government failed to carry its burden as to the second and third *King* requirement. *Id.* at 8 n.12. It was undisputed both at trial and before us now that the petitioner completed the necessary administrative steps for separation. We do not find any indication to the contrary in the record, and we therefore adopt the military judge's conclusion that the petitioner completed the clearing process required for separation. Consequently, we will only address the first and second *King* elements.

The Validity of the DD 214

HN5 A DD 214 is valid when it is issued by a competent discharge authority and complies with applicable service regulations. United States v. Wilson, 53 M.J. 327, 333 (C.A.A.F. 2000). On this point, the military judge concluded that the DD 214 was invalid because: 1) the discharge authority did not intend for the petitioner to be discharged, and 2) the DD 214 did not comply with the provisions of MILPERSMAN Article 1160-120. AE X at 5-6. We **[*17]** disagree on both points and instead conclude that the petitioner received a valid DD 214.

To address the military judge's first conclusion, we must determine who is a "competent discharge authority". As a commanding officer and a special court-martial convening authority, CAPT D was a separation authority for Sailors separating by reason of reaching their EAOS. This authority included those separated due to HYT. However, as his command was serviced by a PSD, the authority for actually issuing the DD 214 was delegated to PSD. See Bureau of Naval Personnel Instruction 1900.8D, ¶ 5(b) (11 Jun 2010). Under that authority, the Director, PSD New London, properly delegated by direction authority to PS2 D to sign and deliver the petitioner's DD 214. Id. at ¶ 5(a); Record at 118.

This is not to say that PSD could unilaterally discharge any member. The actual authority to direct separation and the underlying basis for separation rested with the cognizant commander. If CAPT D intended to place the petitioner on legal hold, PSD received no notice of any such intent. To the contrary, everything PSD received indicated that the commanding officer fully intended that the petitioner be separated. First, **[*18]** the petitioner brought a completed check-out sheet from NAVSUBASE with all appropriate sections completed. Second, no one from the NAVSUBASE staff notified PSD that the petitioner was under investigation or may be placed on legal hold prior to his separation. Although members of the NAVSUBASE staff may have assumed a different separation date based on the EDVR, they had ample notice that PSD was operating under a different date. Last, the petitioner fit all necessary criteria for separation at HYT. Consequently, we conclude that PSD was a competent discharge authority and issued the petitioner's DD 214 with the imputed authority of the commanding officer. We find no evidence that the commanding officer suspended, revoked, or otherwise affected PSD's authority to issue the petitioner a self-executing DD 214 with an effective date of 1 February 2012.

We also find that the military judge's conclusion that CAPT D fully intended to place the petitioner on legal hold prior to 1 February 2012 unsupported in the record. While that may have been LT F's assumption and he prepared the paperwork accordingly, CAPT D testified that he had not made up his mind as he wanted to wait until the final **[*19]** NCIS interview of the petitioner so as to "have all the facts." Record at 26. Only after he reviewed the final interview did CAPT D direct LT F to issue the legal hold letter, prefer charges, and appoint an Article 32 investigation. Simply put, the record fails to support the conclusion that CAPT D, prior to the effective date of the petitioner's self-executing DD 214, intended that the petitioner be placed on legal hold.

We also disagree with the military judge's conclusion that the petitioner's DD 214 was issued contrary to applicable service regulations. The military judge concluded that PSD failed to comply with MILPERSMAN Article 1160-120 in using the petitioner's HYT date as the date of separation. Paragraph (9)(c)(1)-(2) of this Article states:

> *HN6* (1) Personnel reduced in rate are *authorized* to complete an enlistment properly entered into prior to reduction even if the enlistment expires after HYT gates of the new pay grade. Members in this category must separate at current expiration of [EAOS] if the new HYT gate is met or exceeded, unless they are granted a HYT waiver or are subsequently advanced or reinstated. . . .
>
> (2) Members who elect not to remain on active duty until their **[*20]** normal EAOS may request early separation, if desired, from NAVPERSCOM (PERS-8354) via their

CO.

(Emphasis added).

HN7 In subparagraph (1), the first sentence is permissive; a member can, but is not required, to serve beyond the HYT date until the end of his or her enlistment. Second, if a member chooses to serve past the HYT date until the end of enlistment, he or she must separate at EAOS unless granted a waiver, advanced in pay grade, or reinstated to the previous pay grade from which reduced. This second sentence is mandatory. Subsection (2) then requires command endorsement and NAVPERS approval for those facing HYT who desire "early separation". But subsection (2) does not define the phrase "early separation". Relying on his own interpretation of this sentence, the military judge concluded that the lack of a command endorsement and NAVPERS approval for the petitioner's separation at HYT invalidated his DD 214. AE X at 7.

We do not agree with this conclusion for several reasons. First, we find this interpretation unsupported by the record as it runs counter to the only testimony offered at trial.[6] Second, at trial the defense submitted in evidence 33 pages of emails between various members **[*21]** of the NAVSUBASE command staff, PSD New London, the Region Legal Service Office handling the prosecution of the case, and officials at the Navy Personnel Command. AE III at 36-72. These emails all pertain to the steps taken by PSD and the validity of the petitioner's discharge at his HYT date. However, these emails are devoid of any reference to a missing command endorsement and NAVPERS approval. Last, this interpretation raises the illogical scenario where a Sailor needs no endorsement or approval to serve past HYT until the end of an enlistment; but if opting instead to separate at HYT, a date that Navy policy already mandates separation, that same Sailor must obtain command endorsement and NAVPERS approval. Instead, we conclude that ***HN8*** subparagraph (2) applies to Sailors who, reduced in rank and facing HYT, decide to seek early separation before reaching their HYT date. While we disagree with the military judge on this point, we do note that PSD apparently failed to explain or present the petitioner with the option to serve past his HYT date for an additional 28 days until his EAOS. However, under the facts of this case, we do not find this error significant.[7]

In summary, while the commanding officer **[*23]** may have contemplated placing the petitioner on legal hold, the record before us indicates that no such intent was presented to PSD prior to the effective date of the petitioner's self-executing DD 214. Additionally, we conclude that PSD issued the petitioner's DD 214 in compliance with appropriate service regulations. Accordingly, the petitioner received a valid discharge certificate. We now turn to the second *King* element.

The Petitioner's Final Accounting of Pay

HN9 A member has not been validly discharged until "his final pay or a substantial part of that pay, are ready for delivery to him . . . ." *10 U.S.C. § 1168(a)*; *see also* *Hart*, 66 M.J. at 275.

Since the law only requires that a substantial portion of final pay is made ready for delivery, we find unpersuasive the Government's argument that a miscalculation in payment due to the unused days of terminal leave invalidates the petitioner's discharge. While this may impact the final calculation of pay due to the petitioner, it does not change the fact that a substantial portion of the petitioner's final pay was made ready for delivery on 1 February 2012 and only awaiting PSD's "push of the button." Accordingly, we agree with the military **[*24]** judge's conclusion that this second element of the *King* test is met.

Having concluded now that all three *King* elements are satisfied and the petitioner was validly discharged on 1 February 2012, we turn to the question of whether he constructively reenlisted thereafter.

Constructive Reenlistment

HN10 To determine whether a member constructively reenlisted, "[t]he threshold question is whether the person is "serving with an armed force." *United States v. Fry*, 70

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[6] In his ruling, the military **[*22]** judge did not explain how he reconciled his interpretation with the contrary testimony of the two PSD witnesses, both of whom testified that PSD followed all applicable regulations.

[7] We highly doubt that if the PSD representative had correctly presented the petitioner with the option of separating on either 1 February or 28 February 2012, he would have chosen the latter date. Regardless, her error is a far cry from the error committed in *United States v. Wilson*, 53 M.J. 327 (C.A.A.F. 2000), the case relied upon by the Government. See Government Answer of 24 May 2012 at 14. In *Wilson*, not only did the official who signed the DD 214 lack any authority to do so, but he also misinterpreted the applicable regulation by issuing a complete discharge from military service instead of simply removing the appellant from unit rolls as the regulation required. *Wilson*, 53 M.J. at 333. There is no dispute that PSD New London, specifically PS2 D, had the authority to issue the DD 214 or that separation at HYT was authorized under the MILPERSMAN. The only discrepancy is that no one presented the petitioner with the option of serving past his HYT date until his EAOS.

M.J. 465, 469 (C.A.A.F. 2012).[8] If that can be established, we then look to the four-part test laid out in *Article 2(c) of the UCMJ* which provides:

> Notwithstanding any other provision of law, a person serving with an armed force who -
>
> (1) submitted voluntarily to military authority;
>
> (2) met the mental competence and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submission to military authority;
>
> (3) received military pay or allowances; and
>
> (4) performed military duties;
>
> is subject to this chapter until such person's active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned.

HN11 Serving with the armed forces is a case-specific analysis of the individual circumstances of the person's relationship with the military and "means a relationship that is more direct than simply accompanying the armed forces in the field." *United States v. Phillips*, 58 M.J. 217, 220 (C.A.A.F. 2003) (citations omitted). Under the facts and circumstances of this case, we find that the petitioner was serving with the armed forces. Following 1 February 2012, he reported for duty, regularly performed military duties, received military pay and allowances, and met the mental competence and minimum age qualifications. The only question is whether he voluntarily submitted to military authority.

HN12 The legislative history of *Article 2(c)* indicates that the primary purpose of the amendment was to "ensure that court-martial jurisdiction would not be defeated by assertions that military status was tainted by recruiter misconduct." *Id.* at 219 (citing S. Rep. No. 96-197, at 121-22 (1979)). The Senate report observed that this section is "intended only to reach those persons whose intent is to perform as members of the active **[*26]** armed services." *Id.* at 219 (quoting S. Rep. No. 96-197 at 122-23). A voluntary decision is one that is done "by design or intention" or "unconstrained by interference." *Fry*, 70 M.J. at 469 (quoting Black's Law Dictionary at 1710-11 (9th ed. 2009)) (internal quotation marks omitted). We determine whether a decision is voluntary by looking at the totality of the circumstances, including the individual's mental state. *Id.*

Looking at the totality of the circumstances, we conclude that the petitioner did not voluntarily submit to military authority. First, he did nothing proactively to demonstrate any intent or desire to continue active service. He neither signed a new enlistment contract or extension of service, nor unilaterally sought to void his DD 214 or avoid its effect. Rather, all actions which may tie him to continued service were done in submission to overt military authority. For example, he did not report to work on 2 February 2012, instead the CMC or his LCPO called him on his cell phone and directed him to report to the SJA's office. Once there, the petitioner was first informed of formal charges brought against him and that he was placed on legal hold--an unmistakable message **[*27]** that the Navy was attempting to extend his active service, with or without his assent. Next, the CMC, in the presence of the SJA and the petitioner's LCPO, attempted to explain the ramifications of the Navy's attempt to retain him on active duty for prosecution. The CMC repeatedly encouraged him to remain present at NAVSUBASE and face the charges.[9] To characterize the petitioner's submission to military authority as wholly voluntary[10] under these circumstances ignores the inherent inequities present with an accused service member receiving legal advice from direct representatives of the party-opponent--the same party-opponent seeking to prosecute him.[11]

Even viewing CMC V's testimony in the best light, we conclude that the petitioner did not voluntarily submit to military authority. Aside from the inconsistencies and vagaries in CMC V's testimony, the setting in which this conversation took place and the respective interests amongst the parties, we note that the petitioner's testimony directly contradicted CMC V's version of this conversation. Furthermore, although LT F and MAC C both testified at the hearing, the Government chose not to corroborate CMC V's description of this conversation

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[8] As this question is also one of jurisdiction, we apply the same standard **[*25]** of review as before when we addressed the validity of the petitioner's discharge.

[9] CMC V described how he twice told the petitioner during this conversation that "it was in [the petitioner's] best interest" to remain at NAVSUBASE and face the charges. Record at 92.

[10] AE X at 10.

[11] No one advised or afforded the petitioner an opportunity to consult counsel before this conversation where CMC V, in the presence of the convening authority's legal advisor, ostensibly advised the petitioner on his options regarding his discharge and the command's efforts to retain him for prosecution. Similarly, no one reduced this advice **[*28]** to writing or asked the petitioner to memorialize his decision in writing. Had this conversation devolved into the subject of the underlying offenses, the Government would have likely violated MILITARY RULE OF EVIDENCE 305(d)(1)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) (accused must be advised of right to counsel prior to post-preferral questioning about the subject offenses). *See United States v. Wattenbarger*, 21 M.J. 41, 43 (C.M.A. 1985).

during their testimony.[12] In essence, the military judge's conclusion rests solely on a two-word affirmative response from CMC V to the military judge's summarization of his testimony.

In summary, we conclude that the Government failed to carry its burden of demonstrating that the petitioner voluntarily submitted to military authority. We hold that the petitioner was validly discharged on 1 February 2012 and he did not constructively reenlist thereafter. The Petition for Extraordinary Relief in the Nature of a Writ of *Mandamus* is granted. The charges and specifications are dismissed.

Chief Judge PERLAK and Senior Judge PAYTON-O'BRIEN concur.

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[12] Neither **[*29]** the Government, trial defense counsel, nor the military judge questioned LT F or MAC C about what was discussed during this meeting.

ORIGINAL

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2. SSN	3. RANK/RATE	4. PAY GRADE
SCHALEGER, Christopher J.	622-28-3580	ET2	E-5

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE a. INITIAL DATE	b. TERM
Trident Training Facility	31 Oct 2008	6 Yrs + 12 Mons

7. PAY PER MONTH a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL	8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
$2893.50	$0.00	$2893.50	None	N/A

II. CHARGES AND SPECIFICATIONS

10. CHARGE I VIOLATION OF THE UCMJ, ARTICLE 120

Specification 1: In that Electronics Technician Petty Officer Second Class Christopher J. Schaleger, U.S. Navy, Trident Training Facility, Bangor, Washington, on active duty, did, at or near Bremerton, Washington, on or about 7 December 2012, commit a sexual act upon Mrs. Madeline J. Gibson, to wit: penetration of her vulva by his penis, when the said Electronics Technician Petty Officer Second Class Christopher J. Schaleger, U.S. Navy, knew or reasonably should have known that the said Mrs. Madeline J. Gibson was asleep.

Specification 2: In that Electronics Technician Petty Officer Second Class Christopher J. Schaleger, U.S. Navy, Trident Training Facility, Bangor, Washington, on active duty, did, at or near Bremerton, Washington, on or about 7 December 2012, commit a sexual act upon Mrs. Madeline J. Gibson, to wit: penetration of her vulva by his penis, when the said Mrs. Madeline J. Gibson was incapable of consenting due to impairment by an intoxicant, and that condition was known or reasonably should have been known by the said Electronics Technician Petty Officer Second Class Christopher J. Schaleger, U.S. Navy.

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI)	b. GRADE	c. ORGANIZATION OF ACCUSER
Agosto, Victoria	LN2(SW/AW)	Region Legal Service Office Northwest

d. SIGNATURE OF ACCUSER: Victoria Agosto, LN2, USN — 31 JANUARY 2013

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 31 day of January, 20 13, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

J. L. WILT *Typed Name of Officer*	Region Legal Service Office Northwest *Organization of Officer*
LT, JAGC, USN *Grade and Service*	Judge Advocate *Official Capacity to Administer Oaths (See R.C.M. 307(b)—must be commissioned officer)*

Signature

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ORIGINAL

A

ORIGINAL

12. On 31 January ,20 13 , the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me. (*See R.C.M. 308(a)*). (*See R.C.M. 308 if notification cannot be made.*)

V. Agosto
Typed Name of ~~Immediate Commander~~ Legalman

Region Legal Service Officer Northwest
Organization of ~~Immediate Commander~~ Legalman

LN2(SW/AW), USN
Grade

Victoria A. Agosto
Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at 1000 hours, January 31, 20 13 at TRIDENT Training Facility, Bangor, Washington
Designation of Command or Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

~~FOR THE~~[1] Commanding Officer
Official Capacity of Officer Signing

R. A. Wortman
Typed Name of Officer

Captain, USN
Grade

Signature

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE
NAVY REGION NORTHWEST	SILVERDALE, WASHINGTON	14 May 13

Referred for trial to the GENERAL court-martial convened by my General Court-Martial Order 01-13

14 , February 20 13 ,subject to the following instructions:[2]

By _____ of _____
Command or Order

M. K. RICH
Typed Name of Officer

COMMANDER
Official Capacity of Officer Signing

Rear Admiral
Grade

Signature

15. On 16 MAY ,20 13 , I (caused to be) served a copy hereof on (each of) the above named accused.

J. L. WILT
Typed Name of Trial Counsel

LT, JAGC, USN
Grade or Rank of Trial Counsel

Signature

FOOTNOTES
1 – When an appropriate commander signs personally, inapplicable words are stricken.
2 – See R.C.M. 601(e) concerning instructions. If none, so state.

DD Form 458 Reverse

ORIGINAL

DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES V. ET2(SS) CHRISTOPHER J. SCHALEGER, USN

The Government alleges that, in December 2012, ET2(SS) Schaleger committed sexual acts upon a female by inserting his penis into her vulva. It is not entirely clear from the charge sheet or the Government's motion *in limine*, but the two distinct Specifications may simply state different theories of prosecution for a single sexual act, Specification 1 alleging that the woman was asleep, Specification 2 that she was intoxicated and therefore incapable of consenting. The two Specifications were referred for trial by General Court-Martial and the accused was arraigned on 22 May 2013. On 15 May 2013, the President signed Executive Order 13643, amending Part IV of the Manual for Courts-Martial, United States, to incorporate legislative changes to the UCMJ and to fix punishments.

The Government's motion *in limine* requests that the court determine the maximum punishment before proceeding to trial. Upon consideration of the revisions to the substantive portion of the Uniform Code of Military Justice, the parties' arguments, the Executive Order purporting to effect the 2011 amendments to the UCMJ, and case law, it is the court's determination that the maximum imposable punishment for each offense alleged, and for each lesser included offense, is the jurisdictional limitation of a summary court-martial: confinement for 1 month, restriction for 2 months, hard labor without confinement for 45 days, and forfeiture of 2/3 pay per month for 1 month. The restraint-type punishments, moreover, may not be combined.

This order is necessarily limited to the two Specifications contained within the Charge, namely, violations of Articles 120(b)(2) and 120(b)(3)(A). Further, because of the nature of a court-martial, this order has no precedential effect; it may, however, be persuasive before other courts-martial and on other aspects of the 2011 amendments.

2011 Amendments to Article 120

When the National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2011), became law, it included amendments to Article 120, Uniform Code of Military Justice. Those amendments set out new elements of offenses

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involving sexual acts, and further established elements for new offenses involving video recording and acts with children. *See id.* §§ 541 *et seqq.*, 125 Stat. 1404 *et seqq.* While the NDAA did not repeal existing law, it did so heavily modify the elements and definitions of the offenses that the effect was the same.

All the new articles (120, 120a, 120b, and 120c) include the vague penalty provision common to most other punitive articles of the UCMJ, that the offender shall be punished "as a court-martial may direct". By contrast, the previous major overhaul to the statutes involving sexual offenses included interim punishments in anticipation of a delay between the effective date of the legislation and the determination and publication of limits. *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163 § 552(b), 119 Stat. 3263 (2006).

To resolve the issue of the maximum punishment that can be imposed upon ET2(SS) Schaleger for his offenses if convicted, it is necessary to consider the complementary nature of Congressional and Presidential power regarding the "rules for government and regulation of the land and naval forces." It is also necessary to consider what effect the prohibition on *ex post facto* laws may have.

There are two extremes to be considered for punishment for the offenses defined by the 2011 amendments. One could take an expansive approach and argue that any punishment not prohibited by the Code could apply; in other words, any offense in the 2011 amendments to the Code could subject the offender to imprisonment for life without the possibility of parole and all the accessory punishments. This is the approach necessarily taken by the Government when it argues that the recent Executive Order does not constitute an *ex post facto* law, although the bulk of the Government's argument is that punishments for the now superseded Article 120 should apply. The other extreme is that, because the President has not specified limits, the limit is "no punishment".

The court's decision is informed to some degree by a basic tenet of administrative law, which is that "an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments, [and] [w]hen a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a

reasonable choice within a gap left open by Congress, the challenge must fail." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 864-65 (1984). The question is what a court is to make of the Executive's decision not to exercise the authority granted by Article 56 to fill the gap created by the 2011 amendments until adoption of Executive Order 13643 on 15 May 2013, 78 Fed. Reg. 29559.

Punishment under the UCMJ

In the usual course of business, the President exercises his authority under Article 56 to specify punishments for those offenses that do not have a statutory penalty, and those punishments are set out in Executive Orders that usually coincide with the effective date of the statutes. His determinations for individual offenses are set out in Part IV of the MANUAL FOR COURTS-MARTIAL after going through the administrative rulemaking process of section 553 of title 5, *United States Code*. *See generally* Department of Defense Instruction 5500.17 of 03 May 2003, Enclosure (2). In certain limited cases, the President may bypass the rulemaking process, *see id.*, but only he has the authority to amend Parts I through V of the Manual, and he does so by Executive Order. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), Part I, ¶ 4 Discussion.

Prior editions of the MANUAL FOR COURTS-MARTIAL placed punishments for the most part in a Table of Maximum Punishments. *See, e.g.*, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1969), ¶ 127. Prior editions also noted statutorily prohibited punishments (those punishments forbidden in Article 55) and punishments prohibited by custom of the service. 1969 MANUAL, ¶ 125. Today's MANUAL maintains the Table of Maximum Punishments as Appendix 12.

Statutory Expressions of Punishments

The Uniform Code of Military Justice is unique among criminal statutes in that most of the Articles in the Code are silent as to punishment. The typical penalty language provides that the offender "shall be punished as a court-martial may direct". In the imposition of punishments, courts-martial are subject to three general limitations. Courts may not impose punishments prohibited by the Code (for example, the punishments forbidden by Article 55, among them flogging and tattooing). Courts may not exceed the jurisdictional limits of the three types of court-martial (general, special, and summary) contained within Articles 18 through 20 of the Code. Courts may not exceed limitations imposed by the President for various

offenses. *United States v. Varnadore*, 26 C.M.R. 251, 253 (C.M.A. 1958).

While most penalty provisions in the UCMJ are "as a court-martial may direct," some offenses contained within the UCMJ do specify limits on punishments, among them Spying in violation of Article 106 (mandatory death), Misbehavior of a Sentinel in violation of Article 113 (death or other punishment in time of war, any punishment but death if not in time of war), and Premeditated or Felony Murder in violation of Article 118(1) and 118(4), respectively (death or mandatory life).

In contrast, every statute in the United States Criminal Code (title 18) and offenses scattered throughout the rest of the United States Code (*e.g.*, 16 U.S.C. § 1540; 17 U.S.C. § 506; 21 U.S.C. § 848; 22 U.S.C. § 2778; 26 U.S.C. § 7201; 31 U.S.C. § 5324; 36 U.S.C. § 509; 38 U.S.C. § 6102) set out a statutory limit on punishment. Similarly, State criminal codes specify punishments, whether within a specific criminal provision or by classification as a particular degree of misdemeanor or felony. Also, as noted above, the 2006 revisions to Article 120 in the Uniform Code of Military Justice did contain interim punishments pending Executive determination.

Regulatory Basis for Punishment

Because the 2011 amendments did not specify punishments, and because the President has only within the last two weeks set out limitations, one must look to other sources for determining available punishments. The MANUAL FOR COURTS-MARTIAL does have some guidance on sentences that may be imposed at any court-martial, and that guidance appears in Rule for Courts-Martial 1003.

The Rule begins by stating that "[s]ubject to the limitations in this Manual, the punishments authorized in this rule may be adjudged in the case of any person found guilty of an offense by a court-martial". R.C.M. 1003(a), MCM, Part II. Subdivision (b) of the Rule describes the various penalties. Critically, subdivision (c) discusses limitations on punishments. The President through the rulemaking process has previously determined that there are two categories of offenses whose punishments are subject to the limitations in subdivision (c), those that are listed within Part IV of the MANUAL and those that are not listed within Part IV of the MANUAL.

One could argue, as the Government does, that because the predecessor to the current Article 120 is listed in Part IV of

the MANUAL, then those limits should apply. The Government's argument has some appeal because it provides some certainty to courts-martial hearing the new Article 120 cases and it generally results in punishments less than the jurisdictional maximum of a general court-martial. Referring to the predecessor of Article 120 is inappropriate, however, because, at the time that the alleged crime occurred, in December 2012, the activity was not a violation of the 2006 version of Article 120. Granted, there are some similarities in elements and definitions, but the fact of the matter is that for all offenses that occurred after the effective date of the 2011 amendments, the 2006 provisions cannot apply.

It bears repeating that the President only recently included the 2011 amendments to the punitive articles in Part IV of the MANUAL, and that he only recently specified any maximum punishments. The Department of Defense, acting through the Joint Service Committee on Military Justice, began the rulemaking process by advising the public of proposed changes and calling for comments. 77 Fed. Reg. 64854 (2012). The 2012 version of the MANUAL does include, in Part IV, the statutory text of the 2011 amendments, but because the rulemaking process (including modes of proof, explanations, and the like, areas commended to the President under a separate provision, Article 36) has only recently been completed and an Executive Order issued, those amendments have just now become a full-fledged part of the MANUAL FOR COURTS-MARTIAL. The current version of Article 120 is thus not an offense listed in Part IV of the MANUAL, so the guidance of R.C.M. 1003(c)(1)(A) does not apply.

Turning to R.C.M. 1003(c)(1)(B), one could conclude that because a sexual act with an unconscious or intoxicated person is related to an offense that is listed in the pre-15 May 2013 Part IV of the MANUAL, then the maximum punishment for the previously extant offense should apply. The difficulty with this approach is that no case interpreting Rule 1003(c)(1)(B) has ever applied its provisions to Articles 80 through 132 of the Uniform Code of Military Justice; instead, the Rule has been used only in those cases where offenses have been laid under Clause 1 or Clause 2 of the General Article and have not been included in the MANUAL as "various circumstances in which the elements of Article 134 could be met," *United States v. Jones*, 68 M.J. 465, 471 (C.A.A.F. 2010), or in prosecutions under Clause 3 of the General Article for noncapital crimes and offenses, whether violations of other portions of the United States Code or violations of state law that are prosecuted under the Federal Assimilative Crimes Act, 18 U.S.C. § 13. *See, e.g.*,

United States v. Beaty, 70 M.J. 39 (C.A.A.F. 2011); *United States v. Leonard*, 64 M.J. 381 (C.A.A.F. 2007); *United States v. Bivins*, 49 M.J. 328 (C.A.A.F. 1998).

The Government is correct that past statutes and customs may support a cry for "substantial punishment" that approaches the jurisdictional maximum of a general court-martial. *See Beaty*, 70 M.J. at 49 (Baker, J., dissenting). Unfortunately, however, the "custom of the service" language appears in a portion of the Rules for Courts-Martial, 1003(c)(1)(B)(ii), that is inapplicable to the statutory offense with which ET2(SS) Schaleger is charged. The Government has likewise failed to present evidence of any "custom of the service" specific to the newly enacted legislation. *See Beaty*, 70 M.J. at 44 (absence of a custom "cannot mean" that the maximum of life without parole applies). Further, the term of art "custom of the service" has historically been applied as one of limitation, not expansion, on punishments. *E.g.*, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1969), ¶ 125.

As a final note on the regulatory scheme, I reject the suggestion to look to other, analogous, statutes for guidance as provided in R.C.M. 1003(c)(1)(B)(ii). The plain language of the Rule directs consulting "the United States Code" for similar offenses if there is no punishment provided for a Part IV offense. Title 10 is indisputably part of the United States Code, and it provides for no punishments in these new Article 120 offenses.

The Government's suggestion is consonant with the Defense's proposed alternative middle ground, which is to adopt the punishment of battery for the offenses contained within the 2011 amendments. The difficulty with the Defense's position in this regard is that an arguably closely related statute -- battery in violation of Article 128, 10 U.S.C. § 928 -- also does not provide a definitive punishment; the punishment is provided by the President using his Article 56 authority. The Government's position is even more tenuous, as the constitutional basis for title 10 -- Congressional authority to write laws for the regulation of the government of the land and naval forces complemented by the President's authority as Commander in Chief -- is different from the constitutional or other legal basis of other titles of the Code. *Compare, e.g.*, 18 U.S.C. § 1001 (frustration of a federal purpose) *with* 18 U.S.C. § 2422 (use of a means of interstate commerce to effect the crime). These constitutional bases are also reflected in jurisprudence over the ages recognizing a military society that is distinct from

civilian society. *See, e.g., Parker v. Levy*, 417 U.S. 733, 743 (1974). While it is gratuitous perhaps to restate the point, neither the parties' briefs nor my own research reveals any instance in which the "other analogous statute" authority has been used outside the General Article context.

Ex Post Facto concerns

There is a case to be made that, because the President's Executive Order is not legislation, the constitutional *ex post facto* prohibition does not apply. The prohibition in fact is found in the "legislative" portion of the constitution. U.S. Const. art. I, § 9, cl. 3. *See also United States v. Gorski*, 47 M.J. 370, 373 (C.A.A.F. 1997)(opinion apparently limited to the effect of legislation). Considering, however, the manner in which the UCMJ is drafted and implemented, and because of the separation of powers conferred by the Constitution in military and naval criminal matters, this strict textual argument must fail. Even if the *ex post facto* clause does not by its terms apply, the concept of the judicial interpretation that any law that aggravates an offense is harsh and oppressive, *see Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925), does, and accordingly due process, if nothing else, requires limiting the punishment.

Congress may not normally delegate legislative authority to the Executive branch, as to do so would violate the "finely wrought" constitutional provisions, especially the Presentment Clause, U.S. Const. Art. I § 7, cl. 2. *See Clinton v. City of New York*, 524 U.S. 417, 421 (1998). In some limited cases, however, where the Executive is in control, as in foreign relations, Congress may constitutionally allow some discretion in shaping the contours of its legislation. *Id.* at 445 n.38 (citing *Field v. Clark*, 143 U.S. 649 [1892], upholding portions of the Tariff Act allowing the President to "suspend" various aspects of the Act in appropriate cases). Congress has in fact delegated some authority to the Executive in cases of controlled substances. *See* 21 U.S.C. § 811. Certainly any prosecution for a substance added to the various schedules of controlled substances is subject to the *Ex Post Facto* clause.

So, too, should a delegation to the Executive to decide punishments at courts-martial, recognizing the President's role as Commander in Chief of the Armed Forces, be considered a valid exercise of the legislative power, thus bringing such a determination into the fold of Article I authority for the purposes of *ex post facto* scrutiny. Congress is in all cases "the constitutionally recognized source of authority over the

military system of justice." *Chappell v. Wallace*, 462 U.S. 296, 304 (1983). *Accord Jones*, 68 M.J. at 468. The President is the Commander in Chief of the Armed Forces. U.S. Const. Art. II § 2. "The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive branches." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973).

The Government argues that, because the potential maximum punishment was confinement for life without parole and all accessory punishments, then the Executive Order of 15 May 2013 works to the benefit of all service members and does not therefore constitute an *ex post facto* law. For the reasons discussed throughout this order, the Government's argument begins at the incorrect starting point. Accordingly, any punishment exceeding that which could be imposed by a summary court-martial is prohibited as *ex post facto*. *See, e.g., Beazell*, 269 U.S. at 169-70 (1925)(law is so well settled that citation is not necessary to support the proposition that making punishment more burdensome than previously violates the clause).

As a final point in its argument that the amendments are not *ex post facto*, the Government invokes *Taylor v. Garaffa*, 57 M.J. 645 (N.M.C.C.A. 2002). *Taylor* involved a challenge to the increase of the jurisdictional limit on punishments that could be imposed at a special court-martial. Before the amendments to Article 19, the maximum confinement that could be imposed at a special court-martial was 6 months, irrespective of any greater maximum punishment authorized for the offense; the amendments increased the limit to confinement for a year. *Taylor*, 57 M.J. at 647-48.

Taylor's legal footing, however, was vastly different from ET2(SS) Schaleger's case. Sergeant Taylor would always have been subject to the maximum punishment for his offense of wrongful cocaine use -- confinement for 5 years, a dishonorable discharge, and other punishments -- had his case been referred for trial by a general court-martial. The legislation did not increase the punishment for that particular offense, merely the ceiling on the forum to which it had been referred. *See Taylor*, 57 M.J. at 651 (citing *Duncan v. Missouri*, 152 U.S. 377, 382-83 [1894] for the proposition that creating a new forum did not constitute a prohibited *ex post facto* law).

The Rule of Lenity

The Rule of Lenity provides that criminal statutes are to be strictly construed, with any ambiguity resolved in favor of an accused. *See, e.g., United States v. Thomas*, 65 M.J. 132, 135 n.2 (C.A.A.F. 2007). *But see United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820)(interpretation must give effect to the intent of the legislature).

When interpreting a statute and giving it effect, it is not enough to read it in isolation. Rather, the statute must be read in the context of the overall statutory scheme. *See, e.g., Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). Congress created the revised Article 120 in the context of the Uniform Code of Military Justice, Chapter 47 of title 10, and that Chapter's provisions include the three different courts-martial. Congress could have limited disposition of these types of offenses as it did in Article 106 (all allegations of Spying shall be referred to a general court-martial), but it chose not to do so. Indeed, as further evidence of Congress's understanding of its authority to specify fora and mandatory minimum punishments, one need look only as far as the draft National Defense Authorization Act for Fiscal Year 2014 proposed by the House Subcommittee on Military Personnel, H.R. Rep. No. 1960, 113th Cong., 1st Sess. 13 (2013)(providing that all sexual misconduct cases shall carry a mandatory minimum punishment of dismissal for officers or dishonorable discharge for enlisted members, punishments available only at a general court-martial). Congress could have enacted interim punishments as it did with the 2006 provisions, but it chose not to do so. *See also Gorski*, 47 M.J. at 372 n.1 (setting out "severance" language to permit the legislation to survive a challenge against retrospective application). Instead, it left referral and punishment to convening authority and court-martial discretion.

Applying the Rule of Lenity leads to the conclusion that, while a service member may be convicted of the offenses established by the 2011 amendments, thus giving effect to the intent of the legislature to criminalize sexual offenses, the maximum punishment that can be imposed is the statutory limit imposed on a summary court-martial. This maximum punishment (confinement for 1 month, hard labor without confinement for 45 days, restriction to limits for 2 months, forfeiture of 2/3 pay per month for 1 month) may be imposed irrespective of forum. This maximum criminal penalty is, in the area of sexual offenses, augmented by a civil disability created by a requirement to register as a sex offender and to comply with

conditions of varying degrees of severity from state to state. *See generally* Chapter 151 of title 42, *United States Code*. The legislature's interests are thus protected.

The Rule of Lenity extends to any conviction of ET2(SS) Schaleger of a lesser included offense under the authority of Article 79, UCMJ, 10 U.S.C. § 879. While Article 79's language addresses offenses that are "necessarily included" within a charged offense, in the military justice arena that statute has always been understood to mean "lesser included offense." *See generally United States v. Jones*, 68 M.J. at 467. The universal view in the cases, moreover, is that "lesser" describes not only the quantity or quality of elements, but also punishment. *See, e.g., Carter v. United States*, 530 U.S. 255, 260 n.2 (2000). It is here that due process dictates that the maximum punishment be limited to that of a summary court-martial.

CONCLUSION

Because the smallest punitive burden is found at a summary court-martial, as a matter of due process it is only those punishments authorized for that forum (confinement for 1 month, hard labor without confinement for 45 days, restriction for 2 months, forfeiture of 2/3 pay per month for one month) that may be imposed upon ET2(SS) Schaleger if he is convicted of either of the offenses alleged or of any lesser included offense under the authority of Article 79, UCMJ, 10 U.S.C. § 879.

So ordered.

LEWIS T. BOOKER, JR.
CDR, JAGC, USN
Military Judge
28 May 2013

DEPARTMENT OF THE NAVY
NAVY AND MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES v. CHRISTOPHER J. SCHALEGER ET2 / E-5 United States Navy	)	17 May 2013 MOTION TO DETERMINE THE MAXIMUM PUNISHMENT FOR ARTICLE 120 OFFENSES

1. **Nature of Motion**. Pursuant to Rule for Court-Martial 905(b), the Government requests the Court determine the maximum punishment for the offenses charged under the 2012 edition of Article 120 of the Uniform Code of Military Justice (UCMJ).

2. **Summary of Facts**.

a. On 7 December 2012, ET2 Christopher Schaleger, USN, hereinafter, the Accused, and Mrs. M.G. were together at the Accused's home making dinner and watching television. Both the Accused and Mrs. M.G. drank multiple alcoholic beverages and became intoxicated.

b. The Accused and Mrs. M.G. went to sleep in the Accused's bed. At some point during the night, the Accused pulled Mrs. M.G.'s shorts and underwear to the side and engaged in sexual intercourse with her while she was asleep. Mrs. M.G. did not resist or say anything to the Accused because she was asleep.

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When she woke up, the Accused stopped thrusting his penis inside of her vagina. At this time, Mrs. M.G. rolled off the Accused and left his house.

c. On 17 December 2012, Mrs. M.G. reported the incident to the Fleet and Family Support Center in the form of a restricted report. Mrs. M.G. later converted her restricted report to an unrestricted report on 26 December 2012 and began participating in an NCIS investigation.

d. On 31 January 2013, two Specifications of sexual assault were preferred against the Accused.

e. On 1 May 2013, an Article 32 investigation was conducted at Naval Station Everett. In his report dated 8 May 2013, the Investigating Officer recommended the Charge and its Specifications be tried by a General Court-Martial.

f. On 14 May 2013, both Specifications under the sole Charge were referred to a General Court-Martial by Commander, Navy Region Northwest.

g. The Accused is charged with committing a sexual act upon Mrs. M.G. to wit: penetration of her vulva by his penis, when the Accused knew or should have known Mrs. M.G. was asleep. The Accused is also charged with committing a sexual act upon Mrs. M.G. to wit: penetration of her vulva by his penis, when Mrs. M.G. was incapable of consenting due to an impairment by an intoxicant.

4. List of authorities.

a. Rule for Courts-Martial 1003

b. Article 18, Uniform Code of Military Justice

c. Article 56, Uniform Code of Military Justice

d. Article 120, Uniform Code of Military Justice

e. Article 120b, Uniform Code of Military Justice

f. 18 USC § 2244

g. *Loving v. United States*, 517 U.S. 748 (1996)

h. *United States v. Curtis*, 32 M.J. 252 (C.M.A. 1991)

i. *Taylor v. Garaffa*, 57 M.J. 645 (N.M.C.C.A. 2002)

j. *United States v. Gorski*, 47 M.J. 370 (CAAF 1997)

4. Discussion.

In this case, the maximum punishment for each Specification under the Charge should be a dishonorable discharge, forfeitures of all pay and allowances, and confinement for 30 years. This is the maximum punishment recently established by the President in an Executive Order published on 15 May 2013.

Alternatively, if the Court determines that the Executive order is considered *ex post facto* law, the maximum punishment should include a dishonorable discharge, forfeitures of all pay and allowances, and confinement for life without the possibility of parole, which is the jurisdictional maximum punishment at a general court-martial. Or, this Court could find under the custom of the service that the maximum punishment is either the

maximum punishment established in the 2008 Edition of the Manual for Courts-Martial or the maximum punishment provided in the Executive Order issued on 15 May 2013. Both indicate the maximum punishment for a closely related offense is a dishonorable discharge, forfeitures of all pay and allowances, and confinement for 30 years.

a. Law regarding courts-martial maximum punishments.

Congress has the power to delegate to the President the establishment of penalties at courts-martial. *Loving v. United States*, 517 U.S. 748, 769 (1996). Congress delegated this power through Articles 18 and 56 of the UCMJ. *Id.* Article 56 provides that "the punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense," while Article 18 states that a general court-martial "may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by [the Code], including the penalty of death when specifically authorized by" the Code.

These Articles, when taken together, reveal that Congress legislated that the President shall set the maximum punishments imposable in trials by courts-martial. *United States v. Curtis*, 32 M.J. 252, 261 (C.M.A. 1991). Finally, the 2012 statute revising Article 120, (hereinafter, Article 120) contains the direction that servicemembers found guilty of the offense "shall

be punished as a court-martial may direct."

b. Current state of the law.

As the Court is aware, on 15 May 2013, the President signed an Executive Order that amended the Manual for Courts-Martial and established the maximum punishment for Article 120 offenses that were committed after 28 June 2012. In this amended version, the maximum punishment for a sexual assault is: "dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years". This amendment puts in writing a maximum punishment that is within the allowable punishment at a general court-martial.

c. The President has established Part IV of the MCM for Article 120 offenses committed after 28 June 2012.

Although this amendment to the Manual for Courts-Martial occurred after the commission of the offense charged in the present case, it is the Government's position that it is not an *ex post facto* law because it does not increase the maximum punishment for this Accused. Rather, it is to the benefit of the Accused because it lowers the maximum punishment from that which is allowed at a general court-martial: a dishonorable discharge, forfeitures of all pay and allowances, and confinement for life without the possibility of parole.

The test for determining whether a law is *ex post facto*, was addressed in *United States v. Gorski*, 47 M.J. 370 (CAAF

1997). It states the test as follows:

> 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*.

United States v. *Gorski*, 47 M.J. at 373 (emphasis in original). "An increase in the maximum sentence to confinement authorized for a crime would clearly be *ex post facto* legislation." *Id.* "Legislation must give 'fair warning' of its effect so that people can rely on the law's meaning." *Id.* (quoting *Weaver* v. *Graham*, 450 U.S. 24, 28 (1981)). The Executive Order issued on 15 May 2013 created an Amendment to the 2012 MCM that does not increase the maximum sentence for the Accused; it lowers it. Therefore, the Accused was given fair warning of the maximum punishment for these offenses preferred against him.

In *Taylor* v. *Garaffa*, 57 M.J. 645 (N.M.C.C.A. 2002), a similar Executive Order was addressed that increased the jurisdictional maximum sentence at a Special Court-Martial. The Court concluded that the application of that Executive Order did not violate the enhanced-punishment prohibition in the

Constitution's *ex post facto* clause. The court stated that the Petitioner, like the Accused in the present case, was already subject to the punitive consequences provided in the Amendment. Therefore, the Executive Order did not violate the *ex post facto* clause.

Based on the above mentioned cases, the Amendment to the 2012 edition of the MCM is not in violation of the *ex post facto* clause because it does not increase the maximum punishment for the Accused. Prior to the Amendment, the maximum punishment for the offenses the Accused is charged with committing was a dishonorable discharge, forfeitures of all pay and allowances, and confinement for life without the possibility of parole. This Amendment significantly lowers that maximum punishment. Therefore, the Accused had notice of the maximum punishment prior to this amendment and he is not harmed by this amendment.

d. Alternatively, if the Court finds the Amendment to be an *ex post facto* law and therefore inapplicable to the present case, the maximum punishment for this offense should be the jurisdictional maximum at a general court-martial.

If the Court determines that the recent amendment to the 2012 edition of the MCM is not applicable to the present case, the following analysis should be applied to determine the maximum punishment. Rule for Courts-Martial (R.C.M.) 1003(b) lists the only possible punishments that a non-capital court-martial may adjudge: a reprimand, forfeiture of pay and

allowances, a fine, reduction in pay grade, restriction to specified limits, hard labor without confinement, confinement, and/or punitive discharge. In addition to other limits found in the MCM,[1] R.C.M. 1003(c)(1) places maximum limits on those punishments based on the offense committed.

Maximum punishment limits based on offenses are separated in two categories: limits for offenses that are listed in Part IV and limits for offenses that are not listed in Part IV. See R.C.M. 1003(c)(1). Under R.C.M. 1003(c)(1)(A)(i), if an offense is listed in Part IV, then the maximum punishment that can be adjudged at court-martial is that listed in Part IV. R.C.M. 1003(c)(1)(A)(ii) provides that the maximum punishment for offenses not listed in Part IV may be that of an "included or closely related offense" list in Part IV or, if an offense is not listed in Part IV and not included or closely related to an offense listed in Part IV, shall be the punishment authorized by the United States Code, or as authorized by the custom of the service.

In this case, Article 120 *is* listed in Part IV of the MCM, found at paragraph 45. Because Article 120 is listed in Part IV, a plain reading of R.C.M. 1003(c)(1)(B) makes both subparagraphs (i) and (ii) of that Rule inapplicable. As a

[1] See R.C.M. 201(f) and 1301(d) (jurisdictional limits of a court-martial); R.C.M. 1003(c)(2) (limits based on the rank of the accused).

result, the maximum punishment that a court-martial can adjudge should be based on the inclusion of Article 120 in Part IV.

R.C.M. 1003(b) lists the possible punishments that may be adjudged at court-martial. Following that list of possible punishments, R.C.M. 1003(c)(1)(A) provides the "maximum" limit to three types of punishments: confinement, forfeitures, and punitive discharge. According to R.C.M. 1003(c)(1)(A), these maximum limits only apply to those offenses listed in Part IV of the MCM and are set at the maximum limit established in Part IV.

In this case, the Accused is charged with two Specifications in violation of Article 120, Sexual Assault. This offense is listed in Part IV of the MCM. However, specific maximum punishment was not included in Part IV prior to the Amendment issued in the Executive Order on 15 May 2013. The listed offense of Sexual Assault in Part IV states the punishment is "as a court-martial may direct." Thus the offense is not punishable by death because Congress did not authorize death within the statute itself. Therefore, the language, "shall be punished as a court-martial may direct" should be interpreted to mean that there is no applicable offense-based maximum punishment that can be adjudged, leaving the range of lawful punishments available to the court-martial.

Given that, R.C.M. 1003(c)(1)(A) does not provide a maximum punishment that may be adjudged at court-martial, the maximum

punishment for an offense under Article 120 should be the maximum allowable by a general courts-martial under Article 18, which is a dishonorable discharge, forfeitures of all pay and allowances, and confinement for life without the possibility of parole.

e. Alternatively, the Court could find each Specification under the Charge to be punishable as authorized by the custom of the service.

Although not consistent with a literal interpretation of the MCM, the Court could hold that Article 120 is not "listed" within Part IV for the purposes of R.C.M 1003(c)(1). Such a holding would be predicated on a requirement that to be listed in Part IV, an offense must contain all necessary sub-paragraphs, to include elements, sample specifications, and maximum punishments at the time the offense was committed. Without these additional sub-paragraphs, according to this interpretation, an offense is not "listed" in Part IV, therefore triggering the requirements of R.C.M 1003(c)(1)(B).

Assuming that R.C.M 1003(c)(1)(B) is applied to the Charge and its two Specifications, the Court must first look to whether Article 120 is included in or closely related to an offense that is listed in Part IV, as per R.C.M 1003(c)(1)(B)(i). Given that all relevant sexually-based offenses have now been incorporated in Article 120, there remain no other closely related offenses listed in Part IV.

Because there is no other closely related offense similar to Article 120 in Part IV, the next step is to look to R.C.M 1003(c)(1)(B)(ii) to determine whether Article 120 is punishable by the United States Code or by the custom of the service. In this case, the most analogous section of the United States Code to Article 120, Sexual Assault, is sexual abuse as defined within 18 U.S.C. § 2242.[2] However, the language in U.S.C. is somewhat different from language in Article 120(b)(2) and Article 120(b)(3)(a). Specifically, the language in the United States Code does not address situations where the Accused knew or should have known the person was asleep. In addition, the language in the United States Code does not provide for situations where the alleged victim is impaired by drug, intoxicant, or some other similar substance. As a result, the United States Code is not similar enough to utilize in this situation.

What is left, therefore, is to see whether Article 120 can be punishable by the custom of the service as permitted under R.C.M 1003(c)(1)(B)(ii). The language of the Charge and its two Specifications are actual criminal offenses that have been criminalized under the UCMJ for decades. The custom of the service is to punish sexual assault offenses.

[2] 18 U.S.C. § 2242 ("Whoever, ... knowingly ... engages in a sexual act with another person if that other person is--(A) incapable of appraising the nature of the conduct; or (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act ...")

In 2010, the custom was to punish sexual assaults like the one charged in the present case under Article 120 of the UCMJ as "aggravated sexual assault". In 2010, the maximum punishment was 30 years confinement and a dishonorable discharge.

In 2005, the custom was to punish sexual assaults like this one charged here under Article 120 of the UCMJ as "rape". The maximum punishment for "rape" was death, a dishonorable discharge, or confinement for life.

In 1984, Article 120 of the UCMJ lists "rape" as a punitive article. The definition of rape is similar to the definition of sexual assault as charged in the present case. The maximum punishment was listed as death or confinement for life.

Additionally, the Court could look to the Executive Order issued on 15 May 2013 to determine the custom of service. As discussed previously, this Executive Order amended Part IV of the 2012 MCM and provided the maximum punishment for sexual assault as a dishonorable discharge, forfeitures of all pay and allowances, and confinement for 30 years. This amendment clearly shows the custom of service and the appropriate maximum punishment for an offense not listed in Part IV.

4. **Relief Requested**. The Government respectfully requests the maximum punishment for an offense under Article 120 should be what is provided in the Executive Order issuing amendments to the MCM on 15 May 2013. This would set the maximum punishment

for the offense charge at a dishonorable discharge, forfeitures of all pay and allowances, and confinement for 30 years. This punishment is to the benefit of the Accused because it decreased the punitive consequences from what is available at a general court-martial.

5. **Oral Argument**. The Government does not request oral argument.

J. L. WILT
LT, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief was served on defense counsel and the Court on the 17th day of May 2013.

J. L. WILT
LT, JAGC, USN
Trial Counsel

DEPARTMENT OF THE NAVY
NAVY AND MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

U N I T E D S T A T E S	)	24 May 2013
v.	)	
CHRISTOPHER J. SCHALEGER ET2 / E-5 United States Navy	)	SUPPLEMENTAL MOTION TO DETERMINE THE MAXIMUM PUNISHMENT FOR ARTICLE 120 OFFENSES

1. **Nature of Supplemental Motion**. Pursuant to Rule for Court-Martial 905(b), the Government requests the Court determine the maximum punishment for the offenses charged under the 2012 edition of Article 120 of the Uniform Code of Military Justice (UCMJ). This supplemental motion provides the Court with further analysis if the Military Judge concludes that the Executive Order issued on 15 May 2013 is an *ex post facto* law.

2. **Summary of Facts**.

The Government does not wish to present any additional facts for the purpose of this supplemental motion.

3. **List of authorities.**

a. Article 120, Uniform Code of Military Justice

b. Rule for Courts-Martial 1003(c)(1)(B)(ii)

c. *United States v. Leonard*, 64 M.J. 381, 383-84 (C.A.A.F. 2007)

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d. *United States v. Beaty*, 70 M.J. 39, 43 (C.A.A.F. 2011)

e. 18 U.S.C. § 2242(2)(A-B) (2012)

f. *United States v. Wilcox*, 487 F.3d 1163, 1169 (8th Cir. 2007)

g. *United States v. Barrett*, 937 F.2d 1346, 1347-48 (8th Cir. 1991)

4. Discussion.

In this case, the maximum punishment for each Specification under the Charge should be a dishonorable discharge, forfeitures of all pay and allowances, and confinement for 30 years. This is the maximum punishment recently established by the President in an Executive Order published on 15 May 2013.

Alternatively, if the Court determines that the Executive Order is considered *ex post facto* law, the maximum punishment should include a dishonorable discharge, forfeitures of all pay and allowances, and confinement for life without the possibility of parole, which is the jurisdictional maximum punishment at a general court-martial. If the Court determines that Article 120 offenses committed after 28 June 2012 are not considered *listed* offenses, the next most appropriate reference is the United States Code. Pursuant to the United States Code, the maximum punishment for an offense analogous to the charged offense in this case is: imprisonment "for any term of years or for life" as a maximum punishment for this offense.

a. The Military Judge could look to the United States Code to determine the maximum punishment because 18 U.S.C. § 2242(2)(A-B) (2012) is an analogous offense.

If the Military Judge finds that Article 120 is not listed in Part IV, the Military Judge should look to the maximum punishment "as authorized by United States Code" in accordance with R.C.M. 1003(c)(1)(B)(ii). If there is an analogous offense under the United States Code, then the maximum punishment for that offense should be used to provide the maximum punishment for the charged offenses here. *Cf. United States v. Leonard*, 64 M.J. 381, 383-84 (C.A.A.F. 2007) (discussing application of this provision). Here, there is an analogous offense under the United States Code.

To be sure, the appellate courts generally analyze R.C.M. 1003(c)(1)(B)(ii)'s authorization to look to the United States Code in the Article 134 context. *See, e.g.*, *Leonard*, 64 M.J. at 383-84; *see also United States v. Beaty*, 70 M.J. 39, 43 (C.A.A.F. 2011). But this is a practical result of military sentencing rather than a matter of legal import. Neither R.C.M. 1003(c)(1)(B)(ii) nor the appellate courts' analysis limits this provision to Article 134 offenses.

18 U.S.C. § 2242(2)(A-B) (2012), criminalizes sexual abuse when an individual (1) engages in a sexual act with another person, and the other person is (2) incapable of appraising the

nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act. A sleeping victim satisfies the second element: "A reasonable jury may conclude that a person who is asleep when a sexual act begins is physically unable to decline participation in that act." *United States v. Wilcox*, 487 F.3d 1163, 1169 (8th Cir. 2007); *see also United States v. Barrett*, 937 F.2d 1346, 1347-48 (8th Cir. 1991).

Similarly here, Specification 1 alleges that the accused engaged in a (1) sexual act with a victim (2) who he knew or should have known was asleep. Specification 2 alleges that the accused engaged in a (1) sexual act with a victim (2) who he knew or should have known was incapable of consenting due to the impairment of alcohol. These elements contain the same "conduct and *mens rea* proscribed by directly analogous federal criminal statute[]" and are otherwise "essentially the same." *Leonard*, 64 M.J. at 384.

Moreover, the fact that it could be possible to allege an offense under Article 120 that does not meet the elements under the United States Code is not relevant. Here, the elements are the same. Since there is a directly analogous provision under United States Code, the Military Judge should apply the federal statute's maximum confinement: imprisonment "for any term of years or for life" as a maximum punishment for this offense.

5. **Relief Requested.** The Government respectfully requests the Military Judge find that the maximum punishment for this case be the maximum punishment established in the Executive Order on 15 May 2013.

6. **Oral Argument**. The Government does not request oral argument.

/s/
J. L. WILT
LT, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief was served on defense counsel and the Court on the 24th day of May 2013.

/s/
J. L. WILT
LT, JAGC, USN
Trial Counsel

DEPARTMENT OF THE NAVY
GENERAL COURT-MARTIAL
NAVY AND MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT

UNITED STATES v. CHRISTOPHER J. SCHALEGER ET2 / E-5 UNITED STATES NAVY	)	DEFENSE RESPONSE TO GOVERNMENT MOTION CONCERNING MAXIMUM PUNISHMENT FOR SPECIFICATIONS CHARGED UNDER ARTICLE 120 23 May 2013

1. **Nature of Motion.** The United States filed a motion with the Court on 17 May 2013 and a supplemental motion on 24 May 2013, requesting a ruling regarding the maximum punishment for offenses at issue in this case. Specifically, the United States requested a ruling with respect to specifications charged under Article 120(b) of the Uniform Code of Military Justice (U.C.M.J.), which allege acts that occurred between 28 June 2012 and 15 May 2013. The United States argued that the maximum punishment for each specification at issue should be dishonorable discharge from the Naval service, forfeiture of all pay and allowances, and confinement for 30 years. The defense opposes the Government's motion and argues that a court-martial may not impose a greater sentence than that which is authorized at summary court-martial for either specification at issue. In the alternative, the defense

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argues that the maximum punishment that a court-martial may impose is that which would be available for an offense charged under Article 128(a)—assault consummated by a battery.

2. **Summary of Facts.**

a. The National Defense Authorization Act for Fiscal Year 2006 included significant overhauls to Article 120, U.C.M.J. Included in the 2006 amendments were interim maximum punishments that could be imposed upon a person convicted under the 2006 version of Article 120. *See* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 109-163 § 552(b), 119 Stat. 3263 (2006). The interim punishments Congress wrote into the 2006 statute remained in effect until the President exercised his power under Article 56, U.C.M.J., to specify punishments for offenses that lack a statutory penalty.

b. The National Defense Authorization Act for Fiscal Year 2012 included changes to existing sexual offenses and their respective elements under Article 120, U.C.M.J. Unlike the 2006 amendments, however, the 2012 Act did not impose interim maximum punishments in the event that the President delayed in exercising his powers under Article 56[1]. With respect to punishment that may be imposed upon persons convicted under the offenses enumerated in Article 120, the

[1] Congress also refrained from directing cases charged under the 2012 version of Article 120 to a specific court-martial and also elected not to impose its own maximum punishment. *Contra* Article 106, U.C.M.J. (directing trial by general court-martial or military commission and a mandatory punishment of death).

statute merely explained that those persons "shall be punished as a court-martial may direct." These amendments—signed into law on 31 December 2011—took effect on 28 June 2012.

c. On 31 January 2013, the United States preferred charges against ET2 Schaleger, alleging two specifications under Article 120(b) for conduct that occurred on or about 7 December 2012. Those specifications were then investigated under Article 32, U.C.M.J., and subsequently referred to general court-martial on 14 May 2013.

d. On 15 May 2013, the President signed Executive Order 13643—Amendments to the Manual for Courts-Martial, United States. That Order imposed the following maximum punishment for each of the two specifications that the United States had already referred against ET2 Schaleger under Article 120: dishonorable discharge from the Naval service, forfeiture of all pay and allowances, and confinement for 30 years.

3. **Discussion.**

a. In this case, the maximum authorized punishment is the jurisdictional limit of a summary court-martial.

(1) Applying the recent executive order to offenses that occurred between 28 June 2012 and 14 May 2013 would violate the United States Constitution's expressed proscription of *ex post facto* laws under Article I, Section 9. Declining to avail itself of powers exercised when making prior amendments to Article 120 and

enacting other articles under the U.C.M.J., Congress's most recent iteration of Article 120 is an ambiguous statute with respect to maximum punishment. As such, this Court should invoke the rule of lenity and read the statute in the light most favorable to ET2 Schaleger. Such a reading leads one to the conclusion that the maximum punishment is that which can be imposed by a summary court-martial.

(2) Alternatively, the Court may invoke Rule for Courts-Martial 1003(c)(1)(B)(i) because—absent maximum punishment—the charged offense of sexual assault is not listed under Part IV of the current edition of the Manual for Courts-Martial. Assault consummated by a battery under Article 128 of the Uniform Code of Military Justice is listed under Part IV and is related to, and/or a lesser offense of, the charged sexual assault offense. Under R.C.M. 1003(c)(1)(B)(i), therefore, the maximum sentence authorized for the two specifications is that which may be imposed for commission of assault consummated by a battery: bad conduct discharge, forfeiture of all pay and allowances, and confinement for up to 6 months.

b. Because the language regarding maximum punishment under the 2012 version of Article 120 is ambiguous, the maximum punishment for each charged specification is that which could be imposed by a summary court-martial.

(1) The maximum punishment for offenses charged under Article 120 that allege conduct occurring between 28 June 2012 and 14 May 2013 is the jurisdictional limit of a summary court-martial. The rule of lenity provides that criminal statutes are to be strictly construed, with any ambiguity resolved in favor of an accused. *See, e.g., United States v. Thomas*, 65 M.J. 132, 135 n.2 (C.A.A.F. 2007). When engaging in statutory interpretation and applying a statute, courts must avoid reading a statute in isolation and instead consider the context of the overall statutory scheme. *See, e.g., Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). Here, the National Defense Authorization Act for Fiscal Year 2012 must be interpreted in the context of Congress's overall statutory scheme. One must consider, therefore, Congress's overhaul of Article 120 in the National Defense Authorization Act for Fiscal Year 2006 as well as other criminal statutes that Congress has included in the U.C.M.J. Contrary to its 2006 amendments to Article 120, Congress elected not to include interim punishments in its 2012 iteration. Congress also decided not to explicitly state a maximum punishment or limit disposition of

offenses charged under Article 120 to a specific court-martial with established jurisdictional limits on punishment as it did with Article 106-directing trial by general court-martial or military commission and a mandatory punishment of death.

(2) When Congress enacted the statute at issue in this case, it chose to neither impose interim maximum punishment nor direct a statutory maximum punishment nor to direct disposition of applicable cases at a specific court-martial with known jurisdictional limits. Instead, Congress left determination of maximum punishment to the convening authority during the referral process and thereafter to the judiciary. One must guess at what Congress intended when it left determination of maximum punishment open to interpretation. Considering the overall statutory scheme, the statutory language that a person convicted under the 2012 version of Article 120 "shall be punished as a court-martial may direct" is inherently ambiguous. Because it is ambiguous this Court should invoke the rule of lenity to resolve such ambiguity when determining the language's meaning. The maximum punishment that may be imposed when the ambiguous language is interpreted in the light most favorable to ET2 Schaleger is that which is within the jurisdictional limit of a summary court-martial.

c. Applying Executive Order 13643 to offenses that occurred between 28 June 2012 and 14 May 2013 violates the expressed proscription of *ex post facto* laws under Article I, Section 9 of the United States Constitution. "An increase in the maximum sentence to confinement authorized for a crime would clearly be *ex post facto* legislation." *United States v. Gorski*, 47 M.J. 370, 373 (C.A.A.F. 1997). As discussed *supra*, the ambiguous language with respect to maximum punishment that exists in the 2012 Article 120 statute requires that the maximum punishment available is that which may be imposed by a summary court-martial. Such a statutory interpretation is appropriate for offenses that occurred between 28 June 2012 and 14 May 2013. Applying Executive Order 13643 to offenses that occurred in the interim between the statute's effective date and the date on which the order was issued would clearly be *ex post facto* legislation.

d. If the Court does not find the maximum punishment language to be ambiguous, the Court should apply R.C.M. 1003(c)(1)(B) to determine a maximum punishment for the two charged specifications of sexual assault.

(1) R.C.M. 1003(b) lists the only possible punishments that a non-capital court-martial may adjudge: a reprimand, forfeiture of pay and allowances, a fine, reduction in pay grade, restriction to specified limits, hard labor without confinement, confinement,

and/or punitive discharge. In addition to other limits found in the M.C.M.[2], R.C.M. 1003(c)(1) places maximum limits on those punishments based on the offense committed.

(2) Maximum punishment limits based on offenses are separated into two categories: limits for offenses that are listed in Part IV and limits for offenses that are not listed in Part IV. See R.C.M. 1003(c)(1). R.C.M. 1003(c)(1)(A)(i) contemplates that "the maximum limits for the authorized punishments . . . are set forth for *each*[3] offense listed in Part IV of this Manual." (emphasis added). The use of the word "each" in R.C.M. 1003(c)(1)(A)(i) suggests that an offense without maximum authorized punishment is not considered a listed offense.

(3) There is further guidance in the Discussion section that precedes the punitive articles in Part IV of the M.C.M.:

> Other than Articles 77 and 79, the punitive articles of the code are discussed using the following sequence: a. Text of the article; b. Elements of the offense or offenses; c. Explanation; d. Lesser included offenses; e. Maximum punishment; [and] f. Sample specifications.

Under Part IV of the 2012 edition of the M.C.M., Articles 120, 120(b), and 120(c) only include the text of the statute. Those

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[2] *See* R.C.M. 201(f) and 1301(d) (jurisdictional limits of a court-martial); R.C.M. 1003(c)(2) (limits based on the rank of the accused).

[3] "Each: A distributive adjective pronoun, which denotes every one of the persons or things mentioned; every one of two or more persons or things; composing the whole, separately considered." *Black's Law Dictionary* 507 (6th ed. 1990).

Articles do not include elements of the offense or offenses, an explanation section, stated lesser included offenses, authorized maximum punishment, or sample specifications. It is also worth noting that the quoted Discussion section was modified to reflect case law from 2012 prior to its insertion into the 2012 M.C.M. Modifications were *not* inserted, however, to specifically exclude Article 120 from the stated punitive article format, an example of which can be found in language that discusses Articles 77 and 79[4].

(4) One should conclude—based on the recognized meaning of the word "each," as used in R.C.M. 1003(c)(1)(A) and the Discussion section that precedes Part IV of the M.C.M.—that if an offense is "listed" in Part IV, then so too are elements of the offense or offenses, an explanation section, stated lesser included offenses, authorized maximum punishment, and sample specifications. To the contrary, when an offense does not contain elements of the offense or offenses, an explanation section, stated lesser included offenses, authorized maximum punishment, or sample specifications, that offense is not "listed," under the language of R.C.M. 1003(c)(1)[5].

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[4] Listings for Articles 77 and 79 in Part IV of the M.C.M. contain neither sample specifications nor maximum punishments, but unlike Article 120, they "are not chargeable offenses." M.C.M. Part IV (Discussion).

[5] Though the Rules for Courts-Martial are neither statutes, nor are they promulgated by a legislative body, any ambiguity therein should be resolved in favor of the accused. *Cf. United States v. Thomas*, 65 M.J. 132, 135 (C.A.A.F. 2007)(citation omitted).

(5) In this case, the charged specifications allege that ET2 Schaleger violated Article 120. Though a section labeled "Article 120" can be found in Part IV of the current M.C.M., that section lacks several of the subsections intended to appear within every "punitive article of the code," as indicated in the Discussion section that precedes Part IV of the M.C.M. Among four other subsections, the portion labeled "Article 120" is missing a subsection discussing maximum authorized punishment. Such a scenario directly contradicts the language the Discussion section preceding Part IV as well as the language in R.C.M. 1003(c)(1)(A), which contemplates that maximum authorized punishments accompany *each* listed offense. For these reasons, the section labeled "Article 120" in the current edition of the M.C.M. is not a "listed offense," as described in R.C.M. 1003(c)(1)(A).

(6) Because the charged offense under Article 120 is not listed in Part IV of the M.C.M. using conclusions drawn from R.C.M. 1003(c)(1)(A) and the Discussion section preceding Part IV, one must then examine whether R.C.M. 1003(c)(1)(B) applies to the present case. Specifically, subsection (i) of the stated Rule directs:

> For an offense not listed in Part IV of [the M.C.M.] which is included in or closely related to an offense listed therein the maximum punishment shall be that of the offense listed.

The inquiry is to determine whether Part IV lists an offense that is included in, or related to, the charged offense of sexual assault. If so, then the appropriate maximum punishment that should be attributed to the unlisted charged offenses is that which can be attributable to the lesser or related offense that *is* listed in Part IV. Here, there exists a lesser and/or related offense to the alleged sexual assault. The most appropriate listed offense to use as a guidepost is assault consummated by a battery under Article 128.

(a) The United States alleges two specifications of sexual assault—a violation of Article 120(b) of the U.C.M.J. The elements of specification 1 are: (1) that ET2 Schaleger committed a sexual act upon another person; and (2) that ET2 Schaleger knew or reasonably should have known that the other person was asleep. The elements of specification 2 are: (1) that ET2 Schaleger committed a sexual act upon another person; and (2) that ET2 Schaleger knew or reasonably should have known that the other person was incapable of consenting due to impairment by an intoxicant.

(b) The elements of assault consummated by a battery are: (1) "that the accused did bodily harm to a certain person;" and (2) "that the bodily harm was done with unlawful force or violence." Article 128(b)(2), U.C.M.J. Bodily harm under Article 128 means committing any offensive touching of another, however slight, and unlawful force or violence means that the accused wrongfully caused

the contact, in that no legally cognizable reason existed that would excuse or justify the contact. *See United States v. Bonner*, 70 M.J. 1, 6 (C.A.A.F. 2011) (citations omitted). The maximum imposable punishment for assault consummated by a battery is "[b]ad conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months." M.C.M., Part IV para. 54e.(2).

(7) Because Part IV of the M.C.M. enumerates no maximum punishment for the alleged sexual assault, the maximum punishment for the charged conduct should be that of assault consummated by a battery under Article 128. Specifications 1 and 2 put ET2 Schaleger on notice that he needed to defend against an accusation of bodily harm, specifically a nonconsensual sexual act upon the complaining witness. Under Article 128, the accused would similarly have to defend against an accusation of bodily harm, specifically an offensive touching of the complaining witness for which no legally cognizable reason existed that would excuse or justify the contact, i.e. consent. In effect, charging the conduct at issue under either Article 120 or Article 128 would require the accused to defend against a nonconsensual offensive touching of the complaining witness. One could easily substitute the conduct alleged in specifications 1 and 2 as the basis for a specification alleging assault consummated by a battery. For these reasons, the appropriate maximum punishment that a court-martial may impose for

violation of specification 2 is bad conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

e. It would be an error to extend the maximum authorized punishment for the charged offense to a court-martial's jurisdictional limit when the President has issued guidance for determining the maximum punishment for offenses not listed in Part IV of the M.C.M.

(1) Citing R.C.M. 1003(c)(1)(A), the United States argues that the maximum punishments listed in Part IV of the M.C.M. "only apply to those offenses listed in Part IV of the MCM and are set at the maximum limit established in Part IV." Government Brief para. d(iv), dated 17 May 2013. On this basis, the United States argues that—since no maximum authorized punishment is included in Part IV for Article 120 offenses—the maximum punishment in this case extends to "the range of lawful punishments available to the court-martial." *Id.* at para. d(v). Such an argument, however, disregards subsection (B) of the very same rule and instead suggests a procedure for which there are no supportive grounds. Nowhere in R.C.M. 1003 is a court-martial instructed to defer to its jurisdictional limit in the absence of an enumerated maximum authorized punishment. Rather, the Rule provides several steps for narrowing the authorized punishment for a charged offense within a court-martial's jurisdictional limits. Most notably, the maximum authorized punishment is narrowed within a court-martial's

jurisdictional limits when the charged offense is without an enumerated maximum punishment but is related to an offense for which a maximum punishment is listed in Part IV of the M.C.M.

(2) In fact—as R.C.M. 1003(c)(1)(B)(i) tells us—the maximum punishments enumerated in Part IV of the M.C.M. extend to "[i]ncluded or related offenses" with respect to listed offenses. In addition, R.C.M. 1003(c)(1)(B)(ii) offers further guidance when Part IV of the M.C.M. is without an offense that is related to, or lesser than, the charged offense. Therefore, the Government's argument is only applicable when several factors have been met: (1) the charged offense is not listed in Part IV of the M.C.M.; (2) Part IV of the M.C.M. does not contain maximum authorized punishment for an offense that is lesser than, or related to, the charged offense; (3) the United States Code does not authorize a punishment for the charged offense; and (4) the custom of the service does not authorize a punishment for the charged offense. *See* R.C.M. 1003(c)(1)(B)(i)-(ii).

(3) In this case, the United States cannot demonstrate that all of these factors have been met. As discussed *supra*, there exists at least one offense—assault consummated by a battery—that is included in, and/or related to, the charged offense of sexual assault. Further, Part IV of the M.C.M. states the maximum authorized punishment for commission of assault consummated by a battery. As such, the maximum imposable punishments for assault

consummated by a battery are also the most appropriate guideposts with respect to the conduct the Government alleges in this case.

(4) To open ET2 Schaleger up to any punishment available within the court-martial's jurisdictional limit would be to disregard guidance that the President issued in R.C.M. 1003(c)(1)(B)(i). Because assault consummated by a battery is an offense listed in Part IV of the M.C.M., and because it is related to, and/or a lesser offense of, the alleged abusive sexual contact, it would be an error to instead defer to the court-martial's jurisdictional limit for maximum authorized punishment.

f. Neither the United States Code nor the custom of the service authorizes a punishment in this case.

(1) In the absence of an enumerated punishment authorized by the President or a lesser or related offense listed in Part IV of the M.C.M., a charged offense is punishable by a sentence authorized by the United States Code or the custom of the service. R.C.M. 1003(c)(1)(B)(ii). In the present case, however, the Court need not turn to the United States Code or the custom of the service because the M.C.M. lists a lesser or related offense in Part IV.

(2) R.C.M. 1003(c)(1)(B)(ii) does not authorize—for application in a court-martial—a sentence applicable to criminal statutes found in the United States Code that are similar to offenses charged at court-martial. *See United States v. Beaty*, 70

1 M.J. 39, 42 n.7 (C.A.A.F. 2011)("[w]e observe that the closely
2 related language [in R.C.M. 1003(c)(1)(B)(i)] . . . refers to
3 offenses that are closely related to offenses listed in the M.C.M.
4 -not offenses in the United States Code)(internal quotations and
5 citations omitted). Following the court's guidance, one should not
6 look to related criminal conduct enumerated in the United States
7 Code in an effort to determine a maximum authorized sentence for
8 conduct charged under the U.C.M.J. Here, the M.C.M. M.C.M. lists a
9 lesser or related offense in Part IV-assault consummated by a
10 battery. Turning to the Code is an inappropriate and unnecessary
11 solution to a problem that does not exist. R.C.M.
12 1003(c)(1)(B)(ii) provides us an ample guide to determine a maximum
13 authorized sentence for the charged conduct, and that approach is
14 to consider lesser and/or related offenses that are listed in the
15 M.C.M.
16 (3) Similar to the United States Code, the custom of the
17 service does not authorize a sentence in this case. Our service
18 has operated under three different versions of Article 120 of the
19 U.C.M.J. and two different commanders in chief since fiscal year
20 2006. Based on this, it is impossible to determine what the custom
21 of the service has been with respect to sexual assault offenses and
22 their respective authorized punishments. Rather, it has been
23 customary within the service to interpret and apply the various
24 statutes thrust upon our service over the past seven years. Our

service has not had adequate time and/or continuity in the law to establish a custom with respect to punishments authorized under Article 120. Observing maximum authorized punishment promulgated with respect to prior versions of the law or by prior commanders in chief are of no use. If the prior methods for dealing with the charged conduct were adequate guideposts, Congress would not have rewritten the statute, and the President would have instantly applied prior authorized punishments to the current version of Article 120. Neither is the case. For these reasons, the custom of the service has not authorized a punishment in this case.

g. <u>In this case, the maximum authorized punishment is the jurisdictional limit of a summary court-martial.</u>

(1) Because the statutory language with respect to maximum punishment under the 2012 version of Article 120 is ambiguous, the Court should turn to the Rule of Lenity when interpreting the language. In so doing, the maximum punishment for each specification at issue is that which interprets the ambiguous language in the light most favorable to ET2 Schaleger. And such a reading would cap the punishment that may be imposed upon ET2 Schaleger at the jurisdictional limit of a summary court-martial.

(2) Alternatively, should the Court find the maximum punishment language at issue to be clear, the Court should turn to R.C.M. 1003 to determine the maximum punishment applicable to this case. Because application of Executive Order 13643 to the alleged

conduct in this case violates the Constitution's proscription of *ex post facto* legislation, the punitive Article 120 as applied to the alleged conduct was without the necessary subsections to constitute a listed offense under Part IV of the M.C.M., as interpreted by R.C.M. 1003(c)(1)(A). Assault consummated by a battery under Article 128 of the U.C.M.J. is related to, and a lesser offense of, the charged offense. Therefore, if the Court elects not to interpret the statute at issue using the Rule of Lenity, the defense respectfully requests that the Court invoke guidance issued under R.C.M. 1003(c)(1)(B)(i) and find that the maximum sentence authorized for the offense charged in specification 2 is bad conduct discharge, forfeitures of all pay and allowances, and confinement for up to 6 months.

4. **Relief Requested.** The defense respectfully requests that the Court impose the jurisdictional limit of a summary court-martial as the maximum authorized punishment for each specification charged under Article 120 in this case.

5. **Argument.** The defense does not request oral argument.

6. **Burden of Persuasion.** As the moving party, the United States bears the burden of persuasion on any factual issue the resolution of which is necessary to decide this motion.

//s//
N. D. LINSTROTH
LT, JAGC, USN
Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served electronically upon Trial Counsel and the Court on 27 May 2013.

//s//
N. D. LINSTROTH
LT, JAGC, USN
Defense Counsel

TABLE OF CASES

1. *United States v. Thomas*, 65 M.J. 132 (C.A.A.F. 2007)
2. *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803 (1989)
3. *United States v. Gorski*, 47 M.J. 370 (C.A.A.F. 1997)
4. *United States v. Bonner*, 70 M.J. 1 (C.A.A.F. 2011)
5. *United States v. Beaty*, 70 M.J. 39 (C.A.A.F. 2011)

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

UNITED STATES, Petitioner v. Lewis T. BOOKER, JR, Commander U.S. Navy (in his official capacity as Military Judge) Respondent Christopher J. SHALEGER, Electronics Technician Petty Officer Second Class (E-5) U.S. Navy Real Party in Interest	)))))))))))))))))	REPLY TO REAL PARTY IN INTEREST'S OPPOSITION TO PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF MANDAMUS Case No. 201300247

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

COMES NOW THE UNITED STATES pursuant to this Court's order to show cause and respectfully replies to the Real Party in Interest's opposition to the petition for extraordinary relief.[1]

[1] While the counsel for ET2 Schaleger identifies her brief as a "Respondent's Opposition," the Respondent in this matter is Judge Booker. This Court instead identified ET2 Schaleger as the Real Party in Interest, and ordered assignment of Counsel for ET2 Schaleger. (Order to Appoint Counsel, Jun. 27, 2013.) As such the United States will refer to Counsel's brief as "Real Party in Interest Br. at XX," and to ET2 Schaleger as the "Real Party in Interest."

I

Jurisdictional Statement

A. The All Writs Act is party neutral. The government may petition for a writ under the act.

The All Writs Act provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (2006). The Real Party in Interest, ET2 Schaleger, argues that because Article 62, UCMJ, allows the Government to appeal certain trial rulings, the Government may therefore not use the All Writs Act in situations not covered by Article 62. (Real Party in Interest Br. at 4-6.)

This Court should reject that interpretation because it is inconsistent with the plain text of the All Writs Act, Congressional intent, and decisions by other courts.

First, nothing in the text of the All Writs Act limits a court to issuing a writ when requested by a criminal defendant, but not when requested by the Government. ET2 Schaleger's argument would restrict this Court's authority to issue a writ to only those circumstances where a writ is requested by an accused. Congress could have written the statute in that manner, but because they chose not to this Court should not rewrite the statute by judicial action.

Second, other service courts that have addressed the issue have rejected ET2 Schaleger's argument. *See United States v. Mahoney*, 36 M.J. 679, 684 (A.F.C.M.R. 1992) ("The authority of this Court to grant the government extraordinary relief from a ruling or action of a military judge is well established."); *see also United States v. Reinert*, No. 20071195, 2008 CCA LEXIS 526 (A. Ct. Crim. App., Aug. 7, 2008). Although the Army case is unpublished, it contains a lengthy consideration and rejection of ET2 Schaleger's argument that the government may not petition for extraordinary relief. *Id.* at *13-27.

Federal courts agree that the United States may petition for a writ under the All Writs Act. "Article 62 was intended by Congress to be interpreted and applied in the same manner as the [federal] Criminal Appeals Act, 18 U.S.C. § 3731." *United States v. Brooks*, 42 M.J. 484, 486 (C.A.A.F. 1995). Yet in spite of the existence of that statute, Federal courts routinely allow writ petitions by the United States in situations where appeal under 18 U.S.C. § 3731 is not possible. For example, the Second and Third Circuits have permitted the government to obtain writs of mandamus when a proposed criminal jury instruction clearly violated the law and risked prejudicing the government at trial with jeopardy attached, when the United States had no other avenue of appeal. *United States v. Pabon-*

Cruz, 391 F.3d 86, 91-92 (2d Cir. 2004); *United States v. Wexler*, 31 F.3d 117, 121 (3d Cir. 1994).

So has the Fifth Circuit. *In re United States*, 397 F.3d 274 (5th Cir. 2005). That Court has also allowed the United States to use the All Writs Act to appeal a judge's discovery order and an order to proceed to trial with a non-death penalty certified jury. *United States v. Jarman*, 687 F.3d 269, 270 (5th Cir. 2012) (if a trial judge were to order the United States to violate the Adam Walsh Act by giving child pornography to the defense, such an order "might well be amenable to mandamus relief."); *United States v. Williams*, 400 F.3d 277, 280-81 (5th Cir. 2005) (trial judge's order for trial to commence with a non-death penalty certified jury).

Finally, prior to the 1983 version of Article 62, the Court of Military Appeals considered a similar argument by the defense and rejected it. *Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979). In 1979, the prior version of Article 62 did not permit interlocutory appeals by the Government. *United States v. Ware*, 1 M.J. 282 (C.M.A. 1976). But the Court of Military Appeals in *Dettinger* rejected the Petitioner's restrictive reading of the All Writs Act on two bases. First, it held that "the Uniform Code discloses no legislative purpose to forbid the military appellate courts from considering an application for extraordinary relief from a trial judge's action only because

the petitioner is the Government." 7 M.J. at 222. Second, it noted that the right of the Government to seek extraordinary relief for dismissal of charges would be restricted only where the Uniform Code explicitly provided an internal statutory route of appeal to the Government for dismissal of charges. *Id.* As the court notes, "When review by appeal is allowed, 'the need for the writs has vanished.'" *Id.* (citations omitted). Thus, the court concluded, because Article 62 in 1979 did *not* permit interlocutory appeal of a dismissal of charges, that issue could be reviewed via extraordinary writ sought by the Government. *Id.*

Similarly today, all parties agree that the current version of Article 62 does *not* permit interlocutory review of the current issue. Thus, the Government may seek extraordinary relief because the basis for the Government's petition for a writ of mandamus falls *outside* the authorized grounds of appeal in Article 62. And even more recently, in *LRM v. Kastenberg,* No. 13-5006 (C.A.A.F. July 18, 2013), the Court of Appeals for the Armed Forces affirmed the ability of victim advocates to seek extraordinary relief at the Courts of Criminal Appeals, despite the lack of any statutory reference to victim advocates in the Uniform code and the fact that the victim advocate was a nonparty to the court-martial.

The All Writs act was "no doubt enacted by Congress in order to meet cases of this nature when there is no specific

process provided by statute." *John Gund Brewing Co. v. United States*, 204 F. 17, 20 (8th Cir. 1913). ET2 Schaleger and the United States agree that an Article 62 appeal is not possible in this case. But that fact does not foreclose a writ of mandamus. To the contrary, it is precisely why extraordinary relief is necessary.

B. The requested writ of mandamus is in aid of this Court's jurisdiction.

A writ is in aid of a court's jurisdiction when an action by a lower court may thwart an appellate court's prospective jurisdiction. *National Farmers' Organization, Inc. v. Oliver*, 530 F.2d 815, 816 (8th Cir. 1976) (citing *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21 (1943)); *Chandler v. Judicial Council of Tenth Cir.*, 398 U.S. 74, 112 (1970) (Harlan, J., concurring) (explaining statute empowers court to issue extraordinary writ to lower federal court).

Here, ET2 Schaleger asserts that the requested writ of mandamus is not in aid of this Court's jurisdiction, but rather seeks to expand it. (Real Party in Interest Br. at 7.) But this Court's jurisdiction includes the mandate to review the findings and sentences approved by a Convening Authority at certain courts-martial and determine if they should be approved as correct in law and fact. Article 66, UCMJ. The requested writ does not deal with something that is only remotely related

to the courts-martial process, such as whether a service member remains on the military's administrative rolls, *see, e.g. Clinton v. Goldsmith*, 526 U.S. 529 (1999); whether third parties have access to court documents, *see, e.g. Center for Constitutional Rights v. United States*, 72 M.J. 126 (C.A.A.F. 2013); or the issuance of administrative guidance on the calculation of good-time confinement credit, *see, e.g. United States v. Kobzev*, No. 201100059 (N-M. Ct. Crim. App. Jun. 22, 2011) (order). Rather, the requested relief here deals directly with the sentence that may be awarded at court-martial——an issue firmly within this Court's jurisdiction. Therefore, the writ is in aid of this Court's jurisdiction.

II
Reasons Why the Writ Should Issue

A. A Writ of Mandamus is the only adequate means to attain relief, and the right to its issuance is clear and indisputable.

For reasons more fully described in the underlying petition, the United States avers that inaction by this Court will necessarily divest this Court of its authority to review the matter pursuant to Article 66, UCMJ. (Pet'r Br. at 11—12.) Furthermore, the actions of the Military Judge not only reflect a judicial usurpation of power, but clearly reflect action that is contrary to both the statute he attempted to apply and the regulation that implements it. (*Id.* at 12-13.) The Real Party

in Interest cites no authority to support the proposition that this serious case involving two specifications of sexual assault is not serious enough to invoke this Court's extraordinary writ jurisdiction. Indeed, the Government is aware of other court-martial rulings on an identical issue by the same judge, similarly restricting punishment in sexual assault cases to a summary court-martial maximum. *United States v. ET3(SS) Fabian D. Medina* (N-M. Trial Jud., W. Cir., Jul. 3, 2013) (order).

B. The Military Judge clearly erred in holding that Presidential Rulemaking is required before a statute takes effect.

1. Counsel for the Real Party in interest conflates Congressional authority to legislate with Presidential rulemaking authority. 10 U.S.C. § 920 is in Part IV of the Manual for Courts-Martial. The statute is not "fundamentally flawed."

ET2 Schaleger implies that legislative power over military law is split between the President and Congress. However under our Constitution, "Congress has 'plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline.'" *United States v. Dowty*, 48 M.J. 102, 106 (C.A.A.F. 1998) (citing *Weiss v. United States,* 510 U.S. 163, 177; *see* U.S. Const., Art. I, § 8, cl. 14. Congress has sole authority to create the enumerated offenses found in the UCMJ. *United States v. Fosler*, 70 M.J. 225, 231

(C.A.A.F. 2011); *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010); (Pet'r Br. at 16.)

Congress does, however, "share" that power with the President, but only insofar as Congress has delegated rulemaking authority to the President. Article 36, UCMJ, 10 U.S.C. §836. In the context of ET2 Schaleger's case, Congress has the authority to further clarify a statute by including interim punishments, but that does not impose upon them an obligation to impose interim punishments. *See* PL 109–163, January 6, 2006, 119 Stat 3136 (National Defense Authorization Act for Fiscal Year 2006); *Cf*. PL 112-239, January 2, 2013, 126 Stat 1632 (National Defense Authorization Act for Fiscal Year 2013).

Absent Congressional limitation, the President's authority within that box is clear. While he may prescribe additional elements, he cannot create, modify or amend the text of a statute. *Fosler*, 70 M.J. 225. Similarly his listing of offenses in the discussion section is persuasive authority but not binding. *Jones*, 68 M.J. 465. As a result of Article 36, UCMJ, while Congress retains exclusive authority to legislate, Congress and the President share responsibility over military discipline.

Here counsel for the Real Party in Interest appears to conflate the distinct but related authority to legislate with authority over military discipline in an attempt to persuade

this Court that, in the absence of an Executive Order, the amended Statute is "fundamentally flawed." (Real Party in Interest Br. at 8, 13.) In this regard ET2 Schaleger mimics the "fully-fledged" test of the Military Judge. But the absence of an Executive Order from the President is of no effect vis-à-vis the effective date of a statute. *See United States v. Pritt*, 54 M.J. 47, 50 (C.A.A.F. 2000) (citing *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991)) (explaining principle that a statute takes effect upon enactment). As such, and given Congress' legislative power, there can be no doubt that the Amended statute was effective at the time of the alleged offenses. It is not "fatally flawed," and to adopt the trial court's phraseology, was "fully-fledged" 180 days after enactment. *See* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112—81, 125 Stat. 1298 (Dec. 31, 2011) (proscribing that the amended statute becomes effective 180 days after enactment)[2].

2. <u>Taken to its logical conclusion the "fully-fledged" test leads to an absurd result.</u>

Furthermore this "fully-fledged" test is entirely unsupported in the law and leads to an absurd result. For all the reasons previously briefed this unusual test should be set aside in favor of a determination that 10 U.S.C. § 920 is in

[2] As 2012 was a leap year, this means the amended statute became effective on June 29, 2012.

Part IV of the 2012 Manual, and that either the May 15, 2013, Executive Order or the plain language of R.C. M. 1003 clearly identifies the correct maximum punishment. (Pet'r Br. at 13—17.) But even so, consider the consequences of the notion that, in the absence of an Executive Order, a Congressionally-approved and Presidentially effected Statute is not "fully fledged."

Congress significantly amended Article 120, UCMJ in 2006. National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109—163, 119 Stat. 3136 (Jan. 6, 2006). In doing so they directed the President to establish punishments, but in the interim interrupted his previously established regulatory scheme. On September 28, 2007, the President issued his Executive Order, establishing a new regulatory framework for the amended statute and laying out the punishments therefore. Exec. Order No. 13447, 72 FR 56179 (Sep. 28, 2007). Because Congress established interim punishments until the President could act, under these circumstances the "fully-fledged" test would be satisfied.

Congress next amended Article 120, UCMJ in 2011. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112—81, 125 Stat. 1298 (2011). This time Congress did so without providing interim punishments. The President did not issue an Executive Order until May 15, 2013. Exec. Order No. 13643, 3 C.F.R. Executive Order 13643 (May 15, 2013). Applying the "fully-fledged" test, and since Congress did not impose interim

punishments, there was no regulatory scheme in place during this period, leading to an ambiguity and application of lenity.

Yet Congress again amended Article 120 on December 21, 2012, modifying punctuation in the statute. National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112—239, 126 Stat. 1632 (Jan. 2, 2013). Once again Congress did not provide interim punishments. While the timing of the President's Executive Order seems to cover both statutory amendments, consider the effect of the "fully-fledged" test had the President issued his Executive Order prior to January 2, 2013. Application of that test would mean we are once again in an interregnum period merely because Congress removed a period from the statute and did not provide interim punishments. In fact, adoption of the "fully-fledged" test would necessarily mean that, each time Congress amended a punitive article, in the absence of established punishments (e.g. life without the possibility of parole or death for Article 118 murder), or Congressionally established interim punishments, ambiguity would ensue and lenity apply. This cannot be the law.

Presidential rulemaking authority runs parallel to, and is contingent on, the plenary authority of Congress over military justice matters. When Congress amends a punitive article, they may interrupt the President's rulemaking authority with interim punishments, but they don't have to. When they do not, the

previous regulatory scheme as established by the President remains in effect. To suggest that each time Congress amends one of the punitive articles either they must provide interim punishments or the President must publish an executive order is simply absurd. The Statute was in effect at the time of alleged offenses in this case, a regulatory scheme established, and it is not "fundamentally flawed." As such the Military Judge erred and his order should be set aside.

C. The Military Judge erred in his application of lenity over the plain language of Article 36, UCMJ, and R.C.M. 1003.

At its core, the position of both the Military Judge and ET2 Schaleger may fairly be understood to assert that Congressional and Presidential silence as to punishment creates and ambiguity. But as noted in Petitioners underlying brief, the President's 2007 Executive Order associated with the 2006-amended version of Article 120, UCMJ, remained extant until the President issued Executive Order 13643 on May 15, 2013. (Pet'r Br. at 34.) As such the Military Judge erred by moving too quickly past the plain language of Article 36, UCMJ, and R.C.M. 1003 to apply the rule of lenity.

Silence does not create an ambiguity. Interpretation of a statute must be made consistent with legislative intent and the surrounding statutory scheme. *United States v. Bass*, 404 U.S. 336, 351 (1971) (citing *United States v. Bramblett*, 348 U.S. 503,

510, (1955) (canons of clear statement and strict construction do “not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature”); *United States v. Wiltberger,* 18 U.S. (5 Wheat.) 76, 95 (1820) (interpretation must give effect to the intent of the legislature); *United States v. McClain*, 545 F.2d 988, 996 (5th Cir. 1977) (“(T)he intention of the law-maker must govern in the construction of penal, as well [as] other statutes”.)(internal quotations omitted).

Judge Booker correctly notes that “Congress created the revised Article 120 in the context of the Uniform Code of Military Justice, Chapter 47 of title 10, and that Chapter's provisions include the three different courts-martial.” (Appellate Exibit V at 9.) But as is more fully articulated in Petitioner’s underlying brief, Congress is under no obligation to specify either a forum or punishment. In fact it is common for Congress to be silent on such matters.

Furthermore this is only part of the context surrounding the amendment. What Judge Booker and ET2 Schaleger both leave out of the analysis is Article 36 and R.C.M. 1003. Having delegated their rulemaking authority, Congressional silence as to punishment does not create ambiguity; it instead leaves punishment to the regulatory scheme established by the President. This includes Article 36 and R.C.M. 1003. As such the Military

Judge erred when he moved too quickly past these regulatory schemes to lenity, and for the reasons set forth in Petitioner's underlying brief his order should be set aside.

Moreover, the Real Party in Interest's argument leads to an absurd result. Most of the statutory, that is Congressional, test found in the Code's enumerated explicitly state that the crime "shall be punished as a court-martial may direct." *See, e.g.,* 10 U.S.C. § 881 et seq. Again, *United States v. Beaty,* 70 M.J. 39, 45 (C.A.A.F. 2011), only holds that the "Article 134 simple disorder" maximum applies where the application of R.C.M. 1003(c) *entirely fails* to produce any Presidentially-prescribed maximum for the charged crime, Presidentially-prescribed maximum for a closely related offense, analogous Federal crime, or custom of the service. But the Real Party in Interest's argument would have us apply a Summary Court-Martial maximum *despite* the existence of the current Executive Order *and* its predecessor Executive Order. And, this argument appears to suggest that because the statutory language "as a court-martial may direct" is ambiguous, a Summary Court-Martial maximum is required——if true, this "statutory ambiguity" would require a Summary Court-Martial maximum for *every* enumerated crime. And this simply cannot be the case.

The Real Party in Interest, like the Military Judge, misapplies the rule of lenity. The rule of lenity does not

apply first. Rather, it "is generally inapplicable unless, after a court has seized on every thing from which aid can be derived, it is still left with an ambiguity." *United States v. Hudspeth*, 208 F.3d 537, 539 (6th Cir. 2000) (citations, alterations, and internal quotation marks omitted). Moreover, a statute or Sentencing Guideline is not "'ambiguous' for purposes of lenity merely because it [is] possible to articulate a construction more narrow than that urged by the Government." *Moskal v. United States*, 498 U.S. 103, 108 (1990) (emphasis in original); *see also Taylor v. United States*, 495 U.S. 575, 596 (1990) (explaining that the rule of lenity "cannot dictate an implausible interpretation of a statute"). Here, the Real Party in Interest's argument is just that: implausible.

D. The Real Party in Interest misstates the law with regard to lesser included offenses. Assault Consummated by a Battery is a lesser included offense of Aggravated Sexual Assault.

In his brief the Real Party in Interest asserts that, because "sexual assault" is not a lesser included offense of "battery", and since the elements are different, they are not "closely related." (Real Party in Interest Br. at 20-22.) The Real Party in Interest states: "To argue that sexual assault is "essentially the same" as any other kind of battery is to ignore the plain language of the elements of both offenses." (Real

Party in Interest Br. at 21.) This misstates both Petitioner's argument and the law.

First, Petitioner does not posit that Aggravated Sexual Assault is a lesser included offense of Assault Consummated by a Battery. Petitioner instead puts forth the proposition that Assault Consummated by a Battery is a lesser included offense of Aggravated Sexual Assault. (Pet'r Br. at 28.)

Second, the overwhelming weight of the law supports this proposition. *See, e.g., United States v. Johanson*, 71 M.J. 688, 693 (C. G. Ct. Crim. App. 2012) ("Wrongful sexual contact and assault consummated by battery appear to be possible lesser offenses included in abusive sexual contact of a person substantially incapable of declining participation." (citing to *United States v. Bonner,* 70 M.J. 1 (C.A.A.F. 2011)) *Cf.* Manual for Courts-Martial, A28-9 (explicitly listing battery as a lesser-included of the predecessor Article 120(c)(2)); *Bonner,* 70 M.J. at 3 (C.A.A.F. 2011) (assault consummated by a battery is a lesser-included offense, and nearly identical, to Article 120(m), Wrongful Sexual Contact)*; United States v. Carr*, 65 M.J. 39, 40 (C.A.A.F. 2007) (finding battery to be a lesser-included offense of the then-existing Article 134 offense of "indecent assault). *And* bodily harm is a lesser included offense of the force used in sexual assault. *See United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010).

Without dispute, even Assault Consummated by a Battery under Article 128 is a more closely related offense listed in Part IV, than the Summary Court-Martial maximum employed by the Military Judge. As such the Military Judge erred and his order should be set aside.

E. The *Ex Post Facto* clause has no application to this case.

The Real Party in Interest asserts in his brief that, since the United States never argued for application of life without the possibility of parole as a punishment, we have been "disingenuous" in our argument relative to the Ex Post Facto clause. Counsel for ET2 Schaleger is correct when she states that the United States does not seek to apply life without the possibility of parole in ET2 Schaleger's case. But we do so expressly *because* doing so would violate the Ex Post Facto Clause, not in spite of it. In the absence of the Executive Order 13643 of May 15, 2013, the United States may present a different argument, but its publication makes further discussion on the point moot. For all the remaining reasons set forth in the underlying brief, Petitioner asserts that the Ex Post Facto clause has no application to this case. (Pet'r Br. at 17—19.)

III

Conclusion

WHEREFORE the United States respectfully requests that this Court set aside the Trial Court's ruling of May 28, 2013, and apply the maximum punishment found in Executive Order 13643 of May 15, 2013. In the alternative, should this Court find the Executive Order inapplicable, the United States asks this Court to apply the "closely analogous offense" doctrine and apply the former Article 120's maximum or, less appropriately, the lesser-included offense of Article 128's maximum. More apposite than Article 128 if the offense is not "listed" and the prior Executive Order cannot apply, the United States Code provides an offense that is "essentially the same."

STEPHEN C. NEWMAN
Colonel, U.S. Marine Corps
Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202)685-7059, fax (202)685-7687

Certificate of Filing and Service

I certify that pursuant to Navy—Marine Corps Court of Criminal Appeals Rule 5.2(b)(3), the foregoing original and one copy was delivered to the Court, with a copies served upon:

Lewis T. BOOKER, Jr.
Commander (O-5), U.S. Navy
Military Judge
365 S Barclay
Building 433
Bremerton, WA 98314
(360) 476-6466
lewis.booker@navy.mil

by email *and* via hand delivery on LT Jennifer Myers, JAGC, USN, in Appellate Defense Division, OJAG Code 45, on July 19, 2013. And an electronic copy was uploaded to CMTIS on July 19, 2013.

IAN D. MACLEAN
LT, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202)685-7686, fax (202)685-7687

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

In Re UNITED STATES, Petitioner Appellee v. Lewis T. BOOKER, JR, Commander, U.S. Navy (in his official capacity as Military Judge), Respondent Christopher J. SCHALEGER, ET2, (E-5) U.S. Navy, Real Party in Interest Appellant	)	REPLY TO GOVERNMENT WRIT-APPEAL ANSWER Crim.App.Misc. Dkt. No. 20130247 USCA Misc. Dkt. No. 14-8002/NA

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

In reply to the Government Writ-Appeal Answer, Electronics Technician Second Class Christopher Schaleger offers the following arguments.

a. The Navy-Marine Corps Court of Criminal Appeals erred by finding that Article 120, UCMJ (2007), was listed in Part IV of the Manual and was closely related to Article 120, UCMJ (2012).

As discussed in the Writ-Appeal Petition, Article 120, UCMJ (2007), may have been physically located in Part IV of the Manual. But Congress superseded that statute with the National Defense Authorization Act of 2012. Congressional

legislative action trumps the legislative power of the President with regard to the military, because Congress granted the President that authority. *See* Art. 56, UCMJ (2012). For these reasons, the Navy-Marine Corps Court of Criminal Appeals erred in finding the 2007 statute to be a provision included in part IV of the Manual and closely related to the statute at issue here. *United States v. Booker*, No. 201300247, 2013 CCA Lexis 771 at *23 (N-M. Ct. Crim. App. 2013).

b. The NMCCA erred by finding that 18 U.S.C. 2242(2)(A-B) was essentially the same as Article 120, UMCJ (2012).

Even if R.C.M. 1003(c)(1)(B) were applicable to offenses outside of Article 134, 18 U.S.C. 2242(2)(A-B) is not "essentially the same" as the new Article 120, because it does not require the same intent. "Essentially the same" is a more stringent requirement than "closely related." "Essentially the same" requires the same elements and the same mens rea.

c. The Government's newly created "general disorder doctrine" fails to attribute the appropriate precedential weight to this Court's decision in *United States v. Beatty.*

The Government suggests that ET2 Shaleger requested this Court apply the general disorders traditional maximum punishment of four months of confinement, 2/3 pay per month for four months to his case. (Government Writ-Appeal

Answer 21.) That is not the case. ET2 Schaleger recognizes that Article 120 is distinct from Article 134. The Government tortures the reasoning of *Beatty* to develop what it terms the "general disorder doctrine," where there is no such doctrine.

The rule of *Beatty* is simple and it involves lenity. Where Congress has not assigned a maximum punishment and R.C.M. 1003(c)(1) does not provide a maximum punishment, the jurisdictional maximum of a general court-martial cannot be applied if there is another lesser punishment available. Applying the Government's reasoning that the jurisdictional maximum is always available if Congress fails to assign a maximum punishment and R.C.M. 1003(c)(1) does not contravene this Court's reasoning in *Beatty*. (See Government Writ-Appeal Answer 23.)

The Government essentially argues that *Beatty* has no precedential value outside of novel Article 134 charges. In support of this proposition, the Government's response identified a separate ambiguity in R.C.M. 1003(c)(1)(B)(i). That provision states:

> Offenses listed in Part IV:
> (i) *Maximum punishment.* The maximum limit for the authorized punishments of confinement, forfeitures and punitive discharge (if any) are set forth for each offense listed in Part IV of this Manual.

Part II, MCM (2012).

The Government claims that "if any" modifies "maximum limit" and therefore means that some crimes listed in Part IV may not have a maximum limit other than the jurisdictional maximum punishments. (Government Writ-Appeal Answer 25.) This argument ignores the fact that none of the articles listed in Part IV fail to list a maximum limit, even where death, total forfeitures, and dishonorable discharge, are in fact authorized.

"[I]f any" actually modifies "punitive discharge."[1] This statement acknowledges that some crimes listed in Part IV may not authorize a punitive discharge. *See, e.g.,* Art. 86, 91, 92, 108, 116, 117, 121, 128, and 134, UCMJ (2012). Pursuant to the rule of lenity, this ambiguity must be interpreted in ET2 Schaleger's favor.

d. The Government's reliance on "*Chevron* deference" is misplaced.

The Government suggests that the deference standard established by the United States Supreme Court in *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), either applies to this case or should. This logic is flawed.

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[1] This provision could also extend to "the authorized punishments" more generally. But the maximum authorized punishments under the UCMJ all permit forfeitures. Additionally, all of the punishments permit confinement except for Article 106, UCMJ, for which confinement is "not applicable" because it carries a mandatory punishment of death.

Chevron requires a two-step approach when a court examines "an agency's construction of the statute which it administers." *Id*. at 843.[2] *Chevron* does not apply to this case because no agency administered or interpreted the language "as a court-martial may direct." Further, ET2 Schaleger does not challenge the President's authority to promulgate R.C.M. 1003(c)(1), but rather the NMCCA's judicial interpretation of those provisions. Therefore, there is no "agency construction" for a court to examine. In *Chevron,* the Supreme Court stated in the absence of an administrative interpretation it would be necessary for the court to "simply impose its own construction on the statute." *Id*. at 843. Judicial interpretation is at issue in this case, not agency interpretation.[3]

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[2] First, the court must determine whether Congress has directly spoken to the precise question at issue. *Chevron*, 467 U.S. at 843. Only if the statute is silent or ambiguous, should the court then determine whether the agency's answer is based on a permissible construction of the statute. *Id*.

[3] While *Chevron* does not apply to this case, ET2 Schaleger takes issue with the Government's citation to *United States v. Bartlett,* 66 M.J. 426 (C.A.A.F. 2008). (Government Writ-Appeal Answer 24.) The Government cites *Bartlett* for the proposition that "military courts have generally declined to apply Chevron to the military context." (*Id*.) This Court did not decline to apply *Chevron* to the military context in *Bartlett*. Rather, this Court found that the Department of the Army was not entitled to deference when it precluded medical professionals, chaplains, inspectors general, and veterinarians from serving as members in

e. ET2 Schaleger's argument will not create the absurd result of all articles of the UCMJ being punished only by the summary court-martial jurisdictional maximums.

The Government also argues that a determination by this Court that "as a court-martial may direct" is ambiguous, would mean that all of the articles of the UCMJ are ambiguous and would each require a maximum sentence of a summary court-martial. (Government Writ-Appeal Answer 27.) This distorts ET2 Shaleger's argument and fails to consider R.C.M. 1003(c)(1) altogether. "As a court-martial may direct" is ambiguous. Congress delegated the power to assign maximum punishments to the President. "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron*, 467 U.S. at 843. While there is no agency action in this case, authority delegated to the President by Congress operates in the same manner. Congress intentionally left a gap in the law for the President to fill. That gap is an ambiguity. It is the Congress' responsibility to provide temporary maximum punishments until the President acts.

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courts-martial. *Bartlett*, 66 M.J. at 427. This Court found that the Army instruction at issue directly conflicted with Article 25, UCMJ, which provided very specific guidance regarding court-martial membership. *Id.* at 429.

To fill the gap left by Congress, the President assigns maximum punishments to the enumerated offenses as contemplated by R.C.M. 1003(c)(1)(A). R.C.M. 1003(c)(1)(B) provides a framework for determining a maximum punishment for most of the crimes charged under Article 134, but not listed in Part IV. However, before an enumerated article can be included in Part IV of the Manual, the President must consider the implications of that article on the other portions of the Manual, including the Rules for Courts-Martial. Congress should have enacted provisions directing maximum punishments until the President could issue an executive order, but it chose not to do so. Where R.C.M. 1003(c)(1) does not resolve the ambiguity, the rule of lenity must be applied.

JENNIFER L. MYERS
Lieutenant, JAGC, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
Bldg. 58, Ste. 100
Washington, D.C. 20374
Phone (202) 685-7713
Fax (202) 685-7426
jennifer.l.myers@navy.mil

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to the trial judge, and to the appellee on October 28, 2013. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 1,559 words. This brief complies with the typeface and type style requirement of Rule 37 because this brief has been prepared in a monospaced typeface using Microsoft Word Version 2010 with 10 characters per inch and Courier New style.

JENNIFER L. MYERS
Lieutenant, JAGC, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
Bldg. 58, Ste. 100
Washington, D.C. 20374
Phone (202) 685-7713
Fax (202) 685-7426
jennifer.l.myers@navy.mil

UNITED STATES NAVY
WESTERN PACIFIC JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES **v.** [redacted] **SH2/E-5** **U.S. Navy**	**DEFENSE MOTION FOR APPROPRIATE RELIEF: MAXIMUM PUNISHMENT UNDER UCMJ ART. 120** **Date: 10 May 2013**

1. **Nature of Motion.** Pursuant to Rule for Courts-Martial 906(b)(3) the defense moves this court to hold the maximum punishment for the sole Charge and its specifications thereunder are that of a 'general disorder, meaning fourth months of confinement at hard labor and forfeitures of two-thirds pay per month for four months.

2. **Summary of Facts**.

a. SH2 [redacted] has been charged with six violations of the Uniform Code of Military Justice article 120.[1]

3. Discussion.

a. Only Congress or the President may set the maximum punishments for offenses under the UCMJ, and Courts have no power to do so.

Congress has the power to delegate to the President the establishment of penalties at courts-martial.[2] Congress delegated this power through Article 18 and 56 of the UCMJ.[3] Article 56 provides that "the punishment which a court-martial may direct for an offense may not exceed

[1] See enclosure (1) referred charge sheet dtd 8 Mar 13.
[2] *Loving v. United States*, 517 U.S. 748, 769 (1996).
[3] *Id.*

such limits as the President may prescribe for that offense," while Article 18 states that a general court-martial "may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by [the UCMJ]."

It has been long held by military courts that only the President, or Congress, may establish the maximum punishment authorized for offenses of the UCMJ. The predecessor to the Army Court of Criminal Appeals held in case, where neither the President nor Congress had provided a maximum punishment for an offense listed in the UCMJ, it was not for that court to "usurp their function and power by doing so."[4] This was again stated by the Court of Military Appeals when they noted that the court had "no authority to fix penalties and courts-martial are bound by the limits set by the President."[5]

These Articles reveal that Congress had decided that the President shall set the maximum punishments imposable in trials by court-martial.[6] This has further been echoed by the courts noting that it is the function of the President and not the court to establish the maximum penalties that may be imposed in trials by courts-martial.

b. Congress has deferred to the President to determine the maximum punishment for violations of Art. 120, UCMJ, and only the President has the power set them.

As the court is aware, Part IV of the 2012 Manual for Courts-Martial (MCM) did not include a listing of the elements, sample specifications, or maximum punishments for Article 120, 120a, 120b, or 120c. In addition, the President has taken action regarding some aspects of the 2012 MCM, namely promulgating changes to MIL R. EVID. 504, 513, 514, and 609, along with amendments to Article 89 and creating the elements, sample specification, lesser include offenses, and maximum punishments for paragraph 64b of Part IV of the MCM (Article 134 –

[4] *United States v. Lang*, 21 C.M.R. 425, 426 (A.B.R. 1956).
[5] *United States v. Cramer*, 8 U.S.C.M.A. 221, 223 (C.M.A. 1957).
[6] *United States v. Curtis*, 32 M.J. 252, 261 (C.M.A. 1991).

child pornography).[7] The President has decided not to promulgate an executive order assigning the maximum punishments under Article 120, 120a, 120b or 120c.

c. Because Article 120 is listed in Part IV of the MCM, only R.C.M. 1003(c)(1)(A) applies.

RULE FOR COURT-MARTIAL (R.C.M.) 1003[8] details the various punishments available at a court-martial and guides practitioners in determining their limits. R.C.M. 1003(b) lists the categories of punishments that are available at court-martial, those categories are: reprimand, forfeiture of pay and allowances, a fine; reduction in pay grade, restriction to specified limits, hard labor without confinement, confinement, punitive separation, death, and punishments under the law of war.[9] R.C.M. 1003(b) states that these punishment are "[s]ubject to the limitations in [the MCM]."[10] Those limits are discussed in R.C.M. 1003(c).

R.C.M. 1003(c) establishes limits to the punishments that may be imposed at court-martial. Under R.C.M. 1003(c) offenses are either limited based on the offense itself or based on the rank of the accused. For purposes of this motion the accused's rank does not affect the maximum punishment that may be adjudged in this case. R.C.M. 1003(c)(1) separates the limitations of punishments based on offenses into two categories: those offenses listed in Part IV and those offenses not listed in Part IV. The maximum punishment that can be adjudged for offenses listed in Part IV of the MCM is that which is listed in Part IV.[11] However if an offense is not listed in Part IV of the MCM then the court must determine if the offense is either "included in or related to" an offense listed in Part IV of the MCM.[12] If the offense is included

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[7] *See* Exec. Order 13593, 76 C.F.R. 242 (Dec. 16, 2011).
[8] MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.).
[9] R.C.M. 1003(b)(1)-(10). In the case at hand death and punishment under the law of war are not available punishments.
[10] R.C.M. 1003(b).
[11] R.C.M. 1003(c)(1)(a).
[12] R.C.M. 1003(c)(1)(b).

in, or related to, an offense listed in Part IV then the maximum punishment is the same as that of the listed offense. If an offense is not included in or related to a listed offense then the offense shall be punished by the United States Code or custom of the service.[13]

In this case, Art. 120, UCMJ, is listed in Part IV of the MCM, and is found in paragraph 45. Because it is listed in Part IV of the MCM, a plain reading of R.C.M. 1003(c)(1)(B) should make both subparagraphs (i) and (ii) of that Rule inapplicable. As a result, the maximum punishment that a court-martial may adjudge should not be determined by looking at whether Art. 120, UCMJ, is "included in or closely related to" a listed offense or whether the offense is punishable by the United States Code or the custom of the service. While this may be at odds with the guidance of the Military Judge's Benchbook[14], however the text of R.C.M. 1003(c)(1)(B) and the fact that Art. 120, UCMJ, is a listed offense in Part IV of the MCM is straightforward.

d. <u>In the absence of a maximum punishment promulgated by the President and listed in Part IV, the maximum punishment for Article 120 is limited to that of a general disorder.</u>

As discussed above, R.C.M. 1003(b) lists the possible punishments that may be adjudged at a court-martial. R.C.M. 1003(c) states that the maximum punishment for offenses listed in Part IV of the MCM, is the maximum set by Part IV of the MCM. Since Art. 120, UCMJ, is listed in Part IV (paragraph 45) of the MCM we are bound to use the maximum punishment that is assigned by the President. However, since Article 120 has no maximum punishment limit set in Part IV, the situation before this court, while rare, is not unheard of in military jurisprudence. In *United States v. Lang*, the United States Army Board of Review[15] was faced with a similar situation. In *Lang*, Sergeant Lang was charged with a violation of Article 80, however the

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[13] *Id.*
[14] See DA-PAM 27-9 Approved Change 11-11 and DA PAM 27-9 Approved changed 11-13
[15] Predecessor to the Army Court of Criminal Appeals.

appellate court determined that he should have been charged under Article 134 for solicitation.[16] The court then had to address the applicable maximum penalty available for solicitation, and much as we have today, the MCM at the time did not list a maximum penalty for the offense.[17] The court held that while

> [i]t would appear this Board of Review that the solicitation of certain heinous or felony type crimes would be more than a mere disorder and morally call for more severe punishment. However, neither Congress nor the President has provided a specific maximum punishment for an Article 134 solicitation and it is not for this Board of Review to usurp their function and power by doing so.[18]

As such, the court found that where there is no maximum penalty listed in Part IV of the MCM for an offense listed in Part IV, the court could not create one. In this case, despite how unappealing this may be, the President has not provided for a specific penalty for Art. 120, UCMJ and this court cannot create one. Thus, despite the fact that this crime may be more heinous and morally call for a more severe punishment, it is not this courts place to make that determination. As such, as in *Lang*, the maximum penalty that can be adjudicated is that of a mere general disorder, meaning four months of confinement at hard labor and forfeitures of two-thirds pay per month for four months.

e. <u>The 2012 Version of Article 120, UCMJ, is ambiguous and The Rule of Lenity Requires that ambiguity in Art. 120, UCMJ, be resolved in SH2 Johnson's favor</u>.

The current version of Article 120, UCMJ, is ambiguous with respect to the maximum punishment. Currently, the statute only contains a vague penalty provision that is included in nearly all other punitive articles, namely that the accused shall be punished "as a court-martial may direct." Congress elected not to include interim punishments, unlike previous overhauls to

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[16] *Lang*, 21 C.M.R. at 426.
[17] *Id.*
[18] *Id* at 427.

the UCMJ articles involving sexual offenses.[19] Further, despite taking action on some aspects of the 2012 amendments to the UCMJ, the President has elected to take no action with regard to Art. 120, UCMJ.[20] Because of the silence of the President and Congress's failure to provide interim guidance, Art. 120, UCMJ has been left unclear and ambiguous.

The Rule of Lenity provides that criminal statutes are to be strictly construed, with any ambiguity resolved in favor of an accused.[21] This rule has been universally adopted throughout the United States and the Military Justice system. Further this rule has been applied recently to a case in the Western Judicial Circuit when attempting to determine what the maximum punishment available is under Art. 120, UCMJ.[22] When deciding how to implement a statue, in this case Art. 120, UCMJ, we must consider it in context of the overall statutory scheme.[23] Congress created Art. 120, UCMJ, in the context of the entire Uniform Code of Military Justice, Chapter 47 of title 10, and that chapter provides for three different courts-martial. In drafting this statute Congress could have limited disposition of these types of offenses as it has done with Article 106, UCMJ,[24] but elected not to do so. Further, as noted above, Congress could have enacted interim punishments as it did when it amended Art. 120, UCMJ in 2006, but again Congress did *not* do so. As such, given the ambiguity in Art. 120, UCMJ, all questions regarding the punitive exposure of SH2 Johnson should be resolved in his favor.

Congressional intent, as demonstrated by the absence of any comment on punishments in the text of 10 U.S.C. 920 or legislative history, was to leave the determination of maximum

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[19] *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163 §552(b), 119 Stat. 3263 (2006).
[20] *See* Exec. Order 13593, 76 C.F.R. 242 (Dec. 16, 2011).
[21] *See, e.g., United States v. Thomas*, 65 M.J. 132, 135 n.2 (C.A.A.F. 2007).
[22] *See* Enclosure (2).
[23] *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989).
[24] Spying must be tried at a General Court-Martial.

punishments to the President, and the President has chosen not to establish them. In resolving the ambiguity of Art. 120, UCMJ, there are two extremes for available punishment. The first extreme is that any punishment *not* prohibited by the UCMJ could apply. Thus, SH2 [redacted] could be subject to life imprisonment without the possibility of parole because there is no applicable offense-based limit on the punishment that can be adjudged. The other end of the spectrum is that, because the President has not acted, there is no punishment available. As argued above, the maximum punishment available is that of a 'general disorder', or four months of confinement at hard labor and forfeitures of two-thirds pay per month for four months. This assertion was based on applicable case law where the court held that without a specified maximum punishment the available punishment is that of a general disorder.[25] In other words it is fundamentally unfair that SH2 [redacted] be placed into a clear disadvantage due to Congressional and Presidential inaction. Judicial creation of a maximum punishment for life without parole violates both the Rule of Lenity and due process.

f. Alternatively, if the Court finds that R.C.M. 1003(c)(1)(B) should apply there are not any closely related federal statutes nor do these offenses qualify as 'customs of the service'.

If the court concludes that because the offenses do not contain the necessary sub paragraphs, to include elements, sample specifications, and max punishments then the offenses are not listed in Part IV and R.C.M. 1003(c)(1)(B) should apply. If so, then court must first determine if the non-listed offense (UCMJ art 120) is included in or closely related to an offense listed in Part IV, as per R.C.M. 1003(c)(1)(B)(i). However, all the sexual offenses are now incorporated under UCMJ Articles 120, 120a, 120b, and 120c. Thus, there are not any closely related listed offenses under the UCMJ.

[25] *See United States v. Lang*, 21 C.M.R. 425 (A.B.R. 1956).

The next step under R.C.M. 1003(c)(1)(B)(ii) would be to determine whether articles 120 are punishable under the United States Code or by the breach of the custom of service. In this case, the most analogous sections of the United States Code to UMCJ Articles 120 (abusive sexual contact) is 18 USC § 2244((a)(2). However, those statutes use a definition of "sexual contact" that is substantially different from the newest revisions to Article 120.[26]

Finally, the court will have to determine whether or not UCMJ article 120 can be punishable by the 'custom of the service' as set forth in R.C.M. 1003(c)(1)(B)(iii). However, this rule has been used only in cases where offenses have been charged under the General Article either as clause 1, 2, or 3 offenses.[27] Therefore, it may be a stretch to say the crimes of sexual assault and abusive sexual contact may be punished as breaches in 'customs of the service'.

g. <u>In the alternative, the court could follow the guidance of the drafters' note contained in Article 120 and use the 2007-2012 Article 120 as a guide.</u>

Although not consistent with the RULES FOR COURT-MARTIAL or precedent set by appellate case law, the court could elect to follow the guidance provided by the drafters of the MCM. In the MCM the drafters left a note stating that "[p]ractitioners should refer to the appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide."[28] Appendix 28 of the 2012 MCM contains the complete text of the 2007-2012 version of Article 120, including maximum punishments.

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[26] *Cf.* 18 USC § 2246(3) ("the term sexual contact" means intentional touching, either directly or through the clothing, of the genatalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person:") with Article 120(g)(2)("the Term 'sexual contact' means (A) touching, or causing another to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with the intent to abuse, humiliate, or degrade any person; or (b) *any touching, or causing another to touch, either directly or through the clothing, any part of any person, if done with an intent to arouse or to gratify the sexual desire of any person. Touching may be accomplished by any part of the body."* (emphasis added)

[27] The Federal assimilative Crimes Act, 18 U.S.C. § 13. *See*, e.g., *United States v. Beauty*, 70 M.J. 39 (C.A.A.F. 2011).

[28] MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), Part IV, ¶ 45.

In looking back at the 2007-2012 Article 120, this court must examine the elements of charge and specification against SH2 [redacted] and determine how it would have been charged under the previous version of Art. 120, UCMJ. Abusive sexual contact upon a person substantially incapactitated was defined as "Any person subject to this chapter who-(a) engages in a sexual contact with another person-...(b) that the accused caused sexual contact with another person and (c) that the person was substantially incapacitated"[29] Under the 2007-2012 version of Art. 120, UCMJ, the maximum punishment for Abusive Sexual contact included "dishonorable discharge, forfeitures of all pay and allowances, and confinement for 7 years."[30] However, because these offenses occurred after the 2011 amendments to the MCM, the 2006 provisions cannot apply.

4. **Relief Requested.**

Pursuant to Rules for Courts-Martial 906(b)(3) the defense moves this court to hold the maximum punishment for Charge II and its specifications thereunder are that of a 'general disorder', meaning fourth months of confinement at hard labor and forfeitures of two-thirds pay per month for four months.

5. **Oral Argument.**

The defense requests oral argument if the motion is opposed

6. **Burden of Proof.**

The Defense has the burden of proof on any factual issues is by a preponderance of the evidence per R.C.M. 905(c)(1).

7. **Evidence.**

Defense counsel submits the following documents as evidence.

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[29] MCM, App. 28, at A28-8.
[30] MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), App. 28, at A28-11.

1. Referred Charge Sheet dtd 8 Nov 11

2. Western Judicial Circuit ruling dtd 21 Feb 13

JACKSON A. STEPHENS
LT, JAGC U.S. Navy
Detailed Defense Counsel

I hereby certify that I served this motion on Trial Counsel on 10 May 13 via email.

JACKSON A. STEPHENS
LT, JAGC U.S. Navy
Detailed Defense Counsel

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2. SSN	3. RANK/RATE	4. PAY GRADE
[redacted]	[redacted]	SH2	E-5

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE a. INITIAL DATE	b. TERM
USS RUSSELL (DDG 59) DOB: [redacted]	[redacted]	

7. PAY PER MONTH a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL	8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
[redacted]			NONE.	N/A

II. CHARGES AND SPECIFICATIONS

10. CHARGE: VIOLATION OF THE UCMJ, ARTICLE

(SEE ATTACHMENT)

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI)	b. GRADE	c. ORGANIZATION OF ACCUSER
Smith, Harry, W	LNC	Region Legal Service Office Hawaii

d. SIGNATURE OF ACCUSER	e. DATE
LNC (SW)	12 DEC 12

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 12th day of December, 2012, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

Craig C. Morris
Typed Name of Officer

Region Legal Service Office Hawaii
Organization of Officer

LT, JAGC, USN
Grade and Service

Judge Advocate
Official Capacity to Administer Oaths
(See R.C.M. 307(b)—must be commissioned officer)

Signature

DD FORM 458
0102-LF-000-4580

S/N

ORIGINAL

12. On 13 December 20 12, the accused was informed of the charges against him and of the name(s) of the accuser(s) known to me. *(See R.C.M. 308(a)). (See R.C.M. 308 if notification cannot be made.)*

C. BUSHNELL
Typed Name of Immediate Commander

Destroyer Squadron THREE ONE
Organization of Immediate Commander

CAPT, USN
Grade

Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at 1453 Hours, 13 DEC 20 12 at Commander, Destroyer Squadron THREE ONE
Designation of Command or Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

FOR THE[1] Commander
Acting
Official Capacity of Officer Signing

C. BUSHNELL
Typed Name of Officer

CAPT, USN
Grade

Signature

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE
NAVY REGION HAWAII	HAWAII	08 MAR 13

Referred for trial to the General Court-martial convened by General Court-Martial Convening Order Number 1-13 dated 8 February 13.

_____, _____ ~~20~~ ____, ~~subject to the following instructions~~[2] _____

_____ ~~By~~ _____ ~~of~~ _____
Command or Order

F. L. PONDS
Typed Name of Officer

COMMANDER
Official Capacity of Officer Signing

O-7
Grade

Signature

15. On 15 MARCH, 20 13, I [caused to be] served a copy hereof on ~~(each of)~~ the above named accused.

CRAIG C. MORRIS
Typed Name of Trial Counsel

LT, JAGC, USN
Grade or Rank of Trial Counsel

Signature

FOOTNOTES
1 – When an appropriate commander signs personally, inapplicable words are stricken.
2 – See R.C.M. 601(e) concerning instructions. If none, so state.

DD Form 458 Reverse

ORIGINAL

ATTACHMENT TO DD FORM 458 (page 1 of 1)
ICO SH2[redacted] USN

Charge: Violation of the Uniform Code of Military Justice, Article 120.

Specification 1 (Sexual assault): In that Ship's Serviceman Second Class [redacted] U.S. Navy, USS RUSSELL, on active duty, did, on the island of Oahu, Hawaii, on or about 9 September 2012, commit a sexual act upon Sonar Technician Second Class [redacted] U.S. Navy, to wit: use his finger to penetrate the anus of STG2 [redacted] when the accused knew or reasonably should have known that STG2 [redacted] was asleep.

Specification 2 (Sexual assault): In that Ship's Serviceman Second Class [redacted] U.S. Navy, USS RUSSELL, on active duty, did, on the island of Oahu, Hawaii, on or about 9 September 2012, commit a sexual act upon Sonar Technician Second Class [redacted] U.S. Navy, to wit: use his finger to penetrate the anus of STG2 [redacted] when STG2 [redacted] was incapable of consenting to the sexual act due to impairment by ~~drug~~ an, intoxicant, ~~or other similar substance~~, and that condition was known or reasonably should have been known by the accused. cwc 4 Mar 13'

Specification 3 (Sexual assault): In that Ship's Serviceman Second Class [redacted] U.S. Navy, USS RUSSELL, on active duty, did, on the island of Oahu, Hawaii, on or about 9 September 2012, commit a sexual act upon Sonar Technician Second Class [redacted] U.S. Navy, to wit: causing the penis of STG2 [redacted] to penetrate the mouth of the accused, when the accused knew or reasonably should have known that STG2 [redacted] was asleep.

Specification 4 (Sexual assault): In that Ship's Serviceman Second Class [redacted] U.S. Navy, USS RUSSELL, on active duty, did, on the island of Oahu, Hawaii, on or about 9 September 2012, commit a sexual act upon Sonar Technician Second Class [redacted] U.S. Navy, to wit: causing the penis of STG2 [redacted] to penetrate the mouth of the accused, when STG2 [redacted] was incapable of consenting to the sexual act due to impairment by ~~drug~~ an, intoxicant, ~~or other similar substance~~, and that condition was known or reasonably should have been known by the accused. cwc 4 Mar 13' cwc 4 Mar 13'

Specification 5 (Abusive sexual contact): In that Ship's Serviceman Second Class [redacted] U.S. Navy, USS RUSSELL, on active duty, did, on the island of Oahu, Hawaii, on or about 9 September 2012, commit sexual contact upon Sonar Technician Second Class [redacted] U.S. Navy, to wit: use his finger to touch near and around the anus of STG2 [redacted] when the accused knew or reasonably should have known that STG2 [redacted] was asleep.

Specification 6 (Abusive sexual contact): In that Ship's Serviceman Second Class [redacted] U.S. Navy, USS RUSSELL, on active duty, did, on the island of Oahu, Hawaii, on or about 9 September 2012, commit sexual contact upon Sonar Technician Second Class [redacted] U.S. Navy, to wit: use his finger to touch near and around the anus of STG2 [redacted] when STG2 [redacted] was incapable of consenting to the sexual contact due to impairment by ~~drug~~ an, intoxicant, ~~or other similar substance,~~ and that condition was known or reasonably should have been known by the accused. cwc 4 Mar 13' cwc 4 Mar 13'

ORIGINAL

DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
SPECIAL COURT-MARTIAL

UNITED STATES V. EM3(SS) TRAVIS L. SHADE, USN

The accused has offered to plead guilty to a violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928, as "a lesser included offense" of a violation of Article 120, UCMJ. The Rules for Courts-Martial permit such pleas, *see* R.C.M. 910, MANUAL FOR COURTS-MARTIAL, UNITED STATES, Part II (2012 ed.). Additionally, Article 79 permits an accused to be convicted of any crime "necessarily included" within a charged offense. The accused's proffered plea raises questions of what constitute "lesser included offenses" under the Code.

To determine whether it was proper for a military judge to entertain this plea and to find it provident, the parties were directed to provide written arguments, citing constitutional, statutory, and regulatory materials as appropriate, in support of the military judge's accepting the proffered guilty plea. The parties were also directed to specify what they believe to be the maximum imposable punishment in the case. In the unique setting of this case, the answer is that battery is a lesser included offense of the charged offense only if the punishment is limited to that which could be imposed by a summary court-martial, and a plea is provident only with that understanding.

INCLUDED OFFENSES AND ELEMENTS TEST

The Court of Appeals for the Armed Forces has made it clear that the "eminently straightforward" elements test is the sole method for determining whether an offense is necessarily included within another. *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010). This approach affords the accused notice, from the beginning, of what he must defend against. For the purposes of the elements test and its attendant notions of due process, this opinion will address only the second Specification under the Charge, as that is the offense to which the accused has offered his "LIO" plea. In the particular context of EM3(SS) Shade's case, however, this "straightforward" test of aligning and comparing elements, *see id.* at 471, is complicated by the many cases that define what is a *lesser* included offense.

Specification 2 of the Charge alleges that the accused "did . . . engage in sexual contact by causing bodily harm upon MM2

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[P], to wit: touching the said MM2 [P]'s penis with his hand." Presumably, the plea to the LIO will excise the "sexual contact" language and will offer a more generic "target" -- the victim's body -- of the touching.

The statutory elements of the charged offense are (1) commission of sexual contact upon another person (2) by causing bodily harm to that person. 10 U.S.C. § 920(d). "Sexual contact" includes touching another's genitalia with an intent to abuse, humiliate, or degrade any person. "Bodily harm" means any offensive touching of another, however slight, including any nonconsensual sexual contact. 10 U.S.C. § 920(g)(2) and (3). The elements of a battery are doing bodily harm with unlawful force or violence, 10 U.S.C. § 928, and the "unlawful force or violence" requirement has been interpreted to mean any nonconsensual touching. *United States v. Johnson*, 54 M.J. 67, 69 n.3 (C.A.A.F. 2000). It appears, then, that battery is in fact an offense "necessarily included" within the charged offense, as it is not possible to commit the offense of abusive sexual contact without, in the process, committing a battery. *See Giles v. United States*, 144 F.2d 860, 861 (9th Cir. 1944), *cited in Schmuck v. United States*, 489 U.S. 705, 720 (1988).

"NECESSARILY INCLUDED" IMPLICATES PUNISHMENT

While Article 79's language addresses offenses that are "necessarily included" within a charged offense, the case law within the military justice arena has always read that statute to mean "lesser included offense." *See generally Jones*, 68 M.J. at 467. The universal view in the cases, moreover, is that "lesser" describes not only the quantity or quality of elements, but also punishment. *See, e.g., Carter v. United States*, 530 U.S. 255, 260 n.2 (2000). It is here that due process dictates that the maximum punishment be limited to that of a summary court-martial.

<u>2011 Amendments to Article 120</u>

When the National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2011), became law, it included amendments to Article 120, Uniform Code of Military Justice. Those amendments set out new elements of offenses involving sexual acts, and further established elements for new offenses involving video recording and acts with children. *See id.* §§ 541 *et seqq.*, 125 Stat. 1404 *et seqq.* All the new articles (120, 120b, and 120c) included the vague penalty provision common to most other punitive articles, namely, that

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the offender shall be punished "as a court-martial may direct". By contrast, the previous major overhaul to the statutes involving sexual offenses included interim punishments in anticipation of a delay between the effective date of the legislation and the determination and publication of limits. *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163 § 552(b), 119 Stat. 3263 (2006).

There are two extremes to be considered for punishment for the offenses defined by the 2011 amendments. One could take an expansive approach and argue that any punishment not prohibited by the Code could apply; in other words, any offense in the 2011 amendments to the Code could subject the offender to imprisonment for life without the possibility of parole and all the accessory punishments. The other extreme is that, because the President has not specified limits, the limit is "no punishment". In this regard, the court's decision is informed to some degree by a basic tenet of administrative law, which is that "an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments [and] [w]hen a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 864-65 (1984). The question is what a court is to make of the Executive's decision, so far, not to exercise the authority granted by Article 56 to fill the gap created by the 2011 amendments.

Fixing a Punishment

In the usual course of business, the President exercises his authority under Article 56 to specify punishments for those offenses that do not have a statutory penalty, and those punishments are set out in Executive Orders that usually coincide with the effective date of the statutes. His determinations for individual offenses are set out in Part IV of the MANUAL FOR COURTS-MARTIAL (and Appendix 12) after going through the administrative rulemaking process of section 553 of title 5, United States Code. *See generally* Department of Defense Instruction 5500.17 of 03 May 2003, Enclosure (2). In certain limited cases, the President may bypass the rulemaking process, *see id.*, but only he has the authority to amend Parts I through

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V of the Manual, and he does so by Executive Order. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), Part I, ¶ 4 Discussion.

Prior editions of the MANUAL FOR COURTS-MARTIAL placed punishments for the most part in a Table of Maximum Punishments. *See, e.g.*, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1969), ¶ 127. Prior editions also noted statutorily prohibited punishments (those punishments forbidden in Article 55) and punishments prohibited by custom of the service. 1969 MANUAL, ¶ 125. Today's MANUAL maintains the Table of Maximum Punishments as Appendix 12.

Statutory Expressions of Punishments

The Uniform Code of Military Justice is unique among criminal statutes in that most of the Articles in the Code are silent as to punishment. The typical penalty language provides that the offender "shall be punished as a court-martial may direct". In the imposition of punishments, courts-martial are subject to three general limitations. Courts may not impose punishments prohibited by the Code (for example, the punishments forbidden by Article 55). Courts may not exceed the jurisdictional limits of the courts-martial contained within Articles 18 through 20 of the Code. Courts may not exceed limitations imposed by the President for various offenses. *United States v. Varnadore*, 26 C.M.R. 251, 253 (C.M.A. 1958).

While most penalty provisions in the UCMJ are "as a court-martial may direct," some offenses contained within the UCMJ do specify limits on punishments, among them Spying in violation of Article 106 (mandatory death), Misbehavior of a Sentinel in violation of Article 113 (death or other punishment in time of war, any punishment but death if not in time of war), and Premeditated or Felony Murder in violation of Article 118(1) and 118(4), respectively (death or mandatory life).

In contrast, every statute in the United States Criminal Code (title 18) and offenses scattered throughout the rest of the United States Code (*e.g.*, 16 U.S.C. § 1540; 17 U.S.C. § 506; 21 U.S.C. § 848; 22 U.S.C. § 2778; 26 U.S.C. § 7201; 31 U.S.C. § 5324; 36 U.S.C. § 509; 38 U.S.C. § 6102) set out a statutory limit on punishment. Also, as noted above, the 2006 provisions in the Uniform Code of Military Justice did contain interim punishments pending Executive determination.

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Regulatory Basis for Punishment

Because the 2011 amendments did not specify punishments, and because the President has not yet published limitations, one must look to other sources for determining available punishments, all, again, with an aim of determining whether a battery can be a lesser included offense of the 2011 offense of abusive sexual contact. The MANUAL FOR COURTS-MARTIAL does have some guidance on sentences that may be imposed at any court-martial, and that guidance appears in Rule for Courts-Martial 1003.

The Rule begins by stating that "[s]ubject to the limitations in this Manual, the punishments authorized in this rule may be adjudged in the case of any person found guilty of an offense by a court-martial". R.C.M. 1003(a), MCM, Part II. Subdivision (b) of the Rule describes the various penalties. Critically, subdivision (c) discusses limitations on punishments. The President through the rulemaking process has determined that there are two categories of offenses whose punishments are subject to the limitations in subdivision (c), those that are listed within Part IV of the Manual and those that are not listed within Part IV of the Manual.

One could argue that because the predecessor to the current Article 120 is listed in Part IV of the MANUAL, then those limits should apply. Referring to the predecessor of Article 120 is inappropriate because, at the time that the alleged crime occurred, in October 2012, the activity was not a violation of the 2006 version of Article 120. Granted, there are some similarities in elements and definitions, but the fact of the matter is that for all offenses that occurred after the effective date of the 2011 amendments, the 2006 provisions cannot apply.

It bears repeating that the President has not yet included the 2011 amendments to the punitive articles in Part IV of the MANUAL, nor has he specified any maximum punishments. The Department of Defense, acting through the Joint Service Committee on Military Justice, has begun the rulemaking process by advising the public of proposed changes and calling for comments. 77 Fed. Reg. 64854 (2012). The 2012 version of the MANUAL does include, in Part IV, the statutory text of the 2011 amendments, but because the rulemaking process (including modes of proof, explanations, and the like, areas commended to the President under a separate provision, Article 36) has not been completed and no Executive Order has yet been issued, those amendments are not yet part of the MANUAL FOR COURTS-MARTIAL. The

current version of Article 120 is thus not an offense listed in Part IV of the MANUAL, so the guidance of R.C.M. 1003(c)(1)(A) does not apply.

Turning to R.C.M. 1003(c)(1)(B), one could conclude that because abusive sexual contact, as defined by the 2011 amendments, is related to battery, an offense that is listed in Part IV of the MANUAL, then the maximum punishment for a battery should apply. The difficulty with this approach is that no case interpreting Rule 1003(c)(1)(B) has ever applied its provisions to Articles 80 through 132 of the Uniform Code of Military Justice; instead, the Rule has been used only in those cases where offenses have been laid under Clause 1 or Clause 2 of the General Article and have not been included in the MANUAL as "various circumstances in which the elements of Article 134 could be met," *Jones*, 68 M.J. at 471, or in prosecutions under Clause 3 of the General Article for noncapital crimes and offenses, whether violations of other portions of the United States Code or violations of state law that are prosecuted under the Federal Assimilative Crimes Act, 18 U.S.C. § 13. *See, e.g., United States v. Beaty*, 70 M.J. 39 (C.A.A.F. 2011); *United States v. Leonard*, 64 M.J. 381 (C.A.A.F. 2007); *United States v. Bivins*, 49 M.J. 328 (C.A.A.F. 1998).

<u>The Rule of Lenity and a Provident Plea</u>

Completing this journey to determine whether the battery to which EM3(SS) Shade has offered to plead guilty is a lesser included offense of a sexual offense set out in the 2011 amendments, the most defensible answer, from a legal standpoint, is to apply the Rule of Lenity and conclude that, if the punishment is limited, the offense is a lesser included offense. This understanding of "lesser included offense" further advances the constitutional due process concern, in a plea agreement context, that the accused fully understand the stakes of his plea. *Cf. Brady v. United States*, 397 U.S. 742, 748 n.6 (1970)(accused must have awareness of likely consequences for plea to be considered voluntary).

The Rule of Lenity provides that criminal statutes are to be strictly construed, with any ambiguity resolved in favor of an accused. *See, e.g., United States v. Thomas*, 65 M.J. 132, 135 n.2 (C.A.A.F. 2007). *But see United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820)(interpretation must give effect to the intent of the legislature). Applying the Rule leads to the conclusion that, while a service member may be convicted of the battery, thus giving effect to the intent of the legislature

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to criminalize sexual offenses and all included offenses, the maximum punishment that can be imposed is the statutory limit imposed on a summary court-martial.

When interpreting a statute and giving it effect, it is not enough to read it in isolation. Rather, the statute must be read in the context of the overall statutory scheme. *See, e.g., Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). Congress created the revised Article 120 in the context of the Uniform Code of Military Justice, Chapter 47 of title 10, and that Chapter's provisions include the three different courts-martial. Congress could have limited disposition of these types of offenses as it did in Article 106 (all allegations of Spying shall be referred to a general court-martial), but it chose not to do so. It could have enacted interim punishments as it did with the 2006 provisions, but it chose not to do so. Instead, it left referral and punishment to convening authority and court-martial discretion.

CONCLUSION

Because the smallest punitive burden is found at a summary court-martial, as a matter of due process it is only that punishment that may be imposed upon EM3(SS) Shade at a special court-martial where he is pleading guilty to a lesser included offense of a crime whose punishment has not yet been set by legislation or Executive action. This case involves a pretrial agreement, though, and while a penal statute will be read in the light most favorable to the accused, there is another party to take into account, namely, the United States. A plea based on a mutual misunderstanding of a material term of a pretrial agreement is improvident. *United States v. Perron*, 58 M.J. 72, 78 (C.A.A.F. 2003). The parties are therefore at liberty not to perform under a pretrial agreement, but so long as EM3(SS) Shade understands the effect of this ruling, he is free to enter a guilty plea as contemplated and not rely upon the maximum sentence limitation previously negotiated. The Government is likewise free to try to prove its case after EM3(SS) Shade enters his plea.

So ordered.

LEWIS T. BOOKER, JR.
CDR, JAGC, USN
Military Judge
21 February 2013

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UNITED STATES NAVY
WESTERN PACIFIC JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES **v.** [redacted] **SH2/E-5** **U.S. Navy**	**DEFENSE MOTION TO DISMISSED BASED ON MULTIPLICITY AND UNREASONABLE MULTIPLICATION OF CHARGES** **Date: 10 May 13**

1. NATURE OF MOTION

This is a motion to dismiss specifications 5 and 6 for multiplicity with specifications 1 and 2 respectively. Additionally, specifications 1 through 4 are an unreasonable multiplication of charges. The Government will likely argue that all specifications are necessary for contingencies of proof. Nevertheless, the Defense recommends that all but specifications 1 and 3 be dismissed, or that a cleansed charge sheet and findings worksheet reflect that SH2 [redacted] *cannot* be convicted of specifications 1 and 2, specifications 3 and 4, specifications 1 and 5, or specifications 2 and 6.

2. SUMMARY STATEMENT OF FACTS

STG2 [redacted] the complaining witness, alleges that in the early morning hours of 9 September 2012, he awoke to find the Accused performing oral sex on him and digitally penetrating his anus. This lasted only about 5 minutes or less, at which point, there was a knock on the door and SH2 [redacted] rolled onto the floor.

The Government has referred one charge against SH2 [redacted] in this case with four specifications of sexual assault and two specifications of abusive sexual contact. In Specification 1, STG2 [redacted] is alleged to have been asleep when his anus was penetrated. In Specification 2, he is alleged to have been impaired by an intoxicant when his anus was penetrated. In specification 3, STG2 [redacted] is alleged to be asleep when SH2 [redacted] fellated him, and in specification 4, he is alleged to be impaired by an intoxicant. In specification 5, the government alleges SH2 [redacted] used his finger to touch near or around STG2 [redacted] s anus while he was asleep, and in specification 6, he is alleged to have used his finger to touch near or around STG2 [redacted] s anus while [redacted] was impaired by an intoxicant.

At the Article 32 investigation of this case, the alleged victim testified that he was asleep, not substantially incapacitated, and that the accused actually penetrated his anus. Consequently, the Article 32 officer recommended only going forward on specification 1 and 3.

3. DISCUSSION

The prohibition against multiplicity stems from the Constitutional and Congressional restrictions against double jeopardy. Id. [citing Blockburger v. United States, 284 U.S. 299 (1932) and United States v. Teters, 37 M.J. 370 (C.M.A. 1993)]. The concept of multiplicity is grounded in the double jeopardy clause. *United States v. Lloyd*, 46 M.J. 19, 21-22 (C.A.A.F. 1997); *United States v. Teters*, 37 M.J. 370, 373 (C.M.A. 1993). "[A]n accused may not be punished twice for what is, in effect, one offense." RULE FOR COURTS-MARTIAL 1003(b)(10), Discussion, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed (R.C.M.). Absent congressional intent to permit separate punishments, "[a] specification is multiplicious with another if it alleges the same offense, or an offense necessarily included in the other. In Teters, Court of Military Appeals adopted the Blockburger "strict elemental approach" for multiplicity.

The court held that when making a multiplicity determination, it must be determined if Congress intended an accused to be convicted under two different statutes for the same course of conduct. Teters, 31 M.J. at 375. Congress's intent can be determined in either of two ways. It can be determined by the express language of the statute involved, or it can be inferred from the elements of the violated statutes and their relationship to each other. Id. at 376.

A specification may also be multiplicious with another if they describe substantially the same misconduct in two different ways." R.C.M. 907(b)(3), Discussion; *United States v. Britton*, 47 M.J. 195, 197 (C.A.A.F. 1997). To determine whether a specification is facially duplicative, the record of trial should be examined for "facts apparent on the face of the record." *Lloyd*, 46 M.J. at 23-24; *see e.g., Britton*, 47 M.J. at 198-99 (finding an assault specification and a rape specification to be facially duplicative because the former "merely describes the force used to commit the rape"); *United States v. Akes*, No. 98-01284, slip op. at 6 (N.M.Ct.Crim.App. 31 Mar 2000) (unpublished decision) (finding maltreatment and indecent assault charges facially duplicative where the specifications for both charges involved the same victim, the same place, the same time-frame, and the same *actus reus*).

As opposed to the Fifth Amendment underpinnings of multiplicity, unreasonable multiplication of charges protects against "those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion." Quiroz, 55 M.J. at 337; See also, R.C.M. 307(c)(4) *discussion*. In addition to making it clear that multiplicity and unreasonable multiplication are distinct concepts, the court provided a new framework for addressing the issue of unreasonable multiplication of charges. "[W]e hope to provide a framework for analysis that is workable and understandable to military practitioners and judges. The goals are clarity, fundamental fairness, and protecting the reputation of the military justice system." *United*

States v. Quiroz, 53 M.J. at 603. Accordingly, while both multiplicity and unreasonable multiplication of charges guard against bringing multiple charges for the same course of conduct, unreasonable multiplication of charges "has long provided courts-martial...with a traditional legal standard — reasonableness — to address the consequences of an abuse of prosecutorial discretion." Id. at 338. As such, there can be cases where the court could find that Congress would permit multiple charges encompassing the same course of conduct, yet could still apply a "reasonableness" standard to determine whether there was prosecutorial overreaching. See, United States v. Pauling, 60 M.J. 91, 96 (C.A.A.F. 2004) *concurring opinion.* The Quiroz court carved out a five-part guide to be applied in cases where there might exist an unreasonable multiplication of charges:

> 1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specification?;
>
> 2) Is each charge and specification aimed at distinctly criminal acts?;
>
> 3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?;
>
> 4) Does the number of charges and specification unfairly increase the appellant's punitive exposure?; and
>
> 5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?"

Id.

The forgoing legal principles will be applied to the facts of the case at bar in the following fashion: First, it will be shown that the charged offenses were part of the same alleged

course of conduct. This step is a required hurdle for both a multiplicity and unreasonable multiplication of charges. Second, it will be shown that several charges are multiplicious. Third, it will be argued that even if the charges are not multiplicious, they do in fact constitute an unreasonable multiplication of charges per Quiroz.

The alleged conduct is a continuous event closely related in time and purpose. Assuming the allegations are true, SH2[redacted]s charged six different ways for the exact same course of conduct. The government has alleged the same sexual contact in both specifications 5 and 6 as are alleged in specification 1 and 2.

a. SPECIFICATION 5 AND 6 ARE MULTIPLICIOUS WITH SPECIFICATIONS 1 AND 2 RESPECTIVELY.

Specification 5 dismissed as being multiplicious with specification 1 according to the "strict elemental" test per Teters.. A prima facia sexual assault charge (Specifications 1 or 2) requires that the 1) accused commits a sexual act on another person when 2) the other person is asleep. A sexual act is the penetration, however slight, of the anus of another by any part of the body with an intent to arouse or gratify the sexual desire of any person. A prima facie abusive sexual contact charge (specification 5 or 6) requires the accused to have engaged in or caused "sexual contact" with another if to do so would have been a violation of sexual assault had the contact been a sexual act. "Sexual contact" is defined as the "intentional touching, either directly or through the clothing, of the genitalia, anus, groin, or breast inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person." As assault consummated by a battery is a lesser-included offense of aggravated assault, so to is abusive sexual contact a lesser-included offense of sexual assault. The only difference between specification 1 and 2 and specifications 5 and 6 is whether

SH2 [redacted] penetrated the anus of STG2 [redacted] or if he merely touched near and around it. In no case should a both an offense and a lesser included offense thereof be separately charged, (discussion to R.C.M. 307(c)(4).).

b. SPECIFICATIONS 2, 4, 5, AND 6 ARE AN UNREASONABLE MULTIPLICATION OF CHARGES.

Specifications 2, 4, 5, and 6, should be dismissed on the grounds that it is an unreasonable multiplication of charges. The five-part (non-exclusive) test enunciated in Quiroz can be utilized after the court decides that the Teters multiplicity argument is not applicable. Quiroz, 55 M.J. at 338; and Pauling, 60 M.J. at 96. The first element of the Quiroz test (whether the issue was raised at trial) has been met with this motion.

Is each charge and specification aimed at distinctly separate criminal acts? In the instant case, the charges are aimed at the exact same criminal acts. All specifications stem from the allegation that SH2 [redacted] performed oral sex and digitally penetrated the anus of STG2 [redacted] while he was unconscious. These same two acts are charged 6 different ways on the referred charge sheet.

Does the number of charges and specifications misrepresent or exaggerate the [accused's] criminality? If the accused is sentenced separately for each specification, then an exaggeration of the criminality would occur. The allegations occurred during a single course of conduct. By charging the same conduct in alternative ways would exaggerate the criminality of the accused actions in the mind of the finder of fact. Even if the accused is not sentenced based on a finding of all specifications, the criminality of the alleged offenses at the beginning of trial is greatly exaggerated. Here SH2 [redacted] would be placed in a position in which the members will see 6 specifications on the charge sheet at the beginning of the merits phase of the trial, which will

unfairly exaggerate the circumstances before the court. In fact, there are just two acts the government is charge: oral sex and digital penetration of the anus. However, the government, for purposes of contingencies of proof, has alleged each one twice (so that members could find the alleged victim was either asleep or intoxicated), and then charged the first two again, in case the members don't find that STG2 [redacted]'s anus was actually penetrated (either while he was asleep or while he was intoxicated).

Does the number of charges and specifications unreasonably increase the [accused's] punitive exposure? In this case, if SH2 is sentenced based on findings of guilt on all six specifications, his punitive exposure is severely increased.

Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges? Prosecutors are given wide discretion when making charging decisions. In situations where there might be sufficient doubt as to the facts or the law, there might be a basis for several charges arising from a single transaction. RCM 307(c)(4) *discussion* (M.C.M. 2002). This would allow for prosecutors to plan for exigencies of proof. RCM 907(b)(3)(B) (M.C.M. 2002). In this case, the facts and law have been fully fleshed out and investigated. At and Article 32 investigation in the instant case, STG2 [redacted] testified that his anus actually was penetrated while he was asleep. Consequently, there should be no need for specifications 5 and 6. There is no contingency of proof in this case: either the members believe the victim, or you do not. The Investigating Officer recommended dismissal of all specifications except specification 1 and 3. (Enclosure 1). This is not a scenario in which several different theories are presented, and a wide charging philosophy is necessary to protect against different fact scenarios. The government is clear in their theory, and the victim has only given one description of the offense. Such a charging decision in this case constitutes prosecutorial overreaching.

4. RELIEF REQUESTED

Defense respectfully requests that specifications 5 and 6 be dismissed for multiplicity with specifications 1 and 2, and that all but specifications 1 and 3 be dismissed as an unreasonable multiplication of charges.

5. ORAL ARGUMENT

The Defense requests that the motion be heard at oral argument.

6. EVIDENCE

Enclosure 1: Article 32 Investigating Officer's Report (enclosures omitted)

JACKSON A. STEPHENS
LT, JAGC, U.S. Navy
Detailed Defense Counsel

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Certificate of Service

I hereby attest that a copy of the foregoing motion was served on the court and opposing counsel by email on 10 May 13.

JACKSON A. STEPHENS
LT, JAGC, U.S. Navy
Detailed Defense Counsel

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES, Appellee, v. Kannon S. SHIELDS, Lance Corporal (E-3) U.S. Navy, Appellant.	**APPELLANT'S BRIEF AND ASSIGNMENT OF ERROR** Case No. 201400025 Tried at Camp Foster, Marine Corps Base Camp Smedley Butler, Okinawa, Japan On 1 October 2013 by a General Court-Martial Convened by the Commanding General, 1st Marine Aircraft Wing.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Assignment of Error

IS APPELLANT'S SENTENCE INAPPROPRIATELY SEVERE IN LIGHT OF HIS YOUTH AND THE UNIQUE FACTS OF THIS CASE?[1]

Statement of Statutory Jurisdiction

Appellant's approved court-martial sentence includes a punitive discharge. Accordingly, his case falls within this Court's Article 66(b)(1), Uniform Code of Military Justice (UCMJ) jurisdiction.[2]

Statement of the Case

A general court-martial, consisting of a military judge alone, tried Appellant on 10 October 2013. Consistent with his

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[1] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[2] 10 U.S.C. § 866(b)(1) (2012).

pleas, the military judge found Appellant guilty of one specification of Article 120(b), UCMJ[3] by engaging in a sexual act with a child between the age of 12-16 years, and one specification of Article 134, UCMJ[4] for possession of child pornography.[5] The military judge sentenced Appellant to forfeit all pay and allowances, to be reduced to pay-grade E-1, to be confined for ten years, and a dishonorable discharge.[6]

The convening authority acted on 6 January 2014 and approved the sentence as adjudged, except, pursuant to a pre-trial agreement, he suspended confinement in excess of 24 months for the period of time severed plus 12 months.[7]

Statement of Facts

Appellant enlisted in the Marine Corps just after his eighteenth birthday.[8] Appellant had just turned 20 years old. The victim, CP, was 15 years old when they met and had sexual intercourse.[9] His relationship with CP resulted in his plea of guilty to indecent act with a child under the age of 16. Appellant downloaded images of child pornography on his iPhone and Sprint HTC,[10] which resulted in his plea of guilty to one

[3] 10 U.S.C. § 920 (2012).
[4] 10 U.S.C. § 934 (2012).
[5] R. at 68.
[6] R. at 90.
[7] General Court-Martial Order Number 04-2013 of 06 JAN 2014.
[8] Prosecution Ex. 4 at 2.
[9] Prosecution Ex. 3 at 2,
[10] Prosecution Ex. 3 at 2.

specification of possessing child pornography. Appellant was 19 years old on the date he was found to possess child pornography.

Additional facts necessary to support this brief are detailed below.

Summary of Argument

The approved sentence in Appellant's case warrants sentence relief because the approved dishonorable discharge is too severe in view of Appellant's youth and the specific facts of this case.

Assignment of Error

APPELLANT'S SENTENCE IS INAPPROPRIATELY SEVERE IN LIGHT OF APPELLANT'S YOUTH AND UNIQUE FACTS OF THIS CASE.

Standard of Review

Under Article 66(c), UCMJ this Court reviews sentence appropriateness de novo.[11]

Discussion

This Court's power and duty under Article 66(c), UCMJ is separate and distinct from the Court's power and duty to review a sentence for legality.[12] Under Article 66(c), UCMJ, a Court of Criminal Appeals must determine whether it finds the approved

[11] Art. 66(c), UCMJ; *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002) (citing *United States v. Powell*, 49 M.J. 460, 462 (C.A.A.F. 1998)).
[12] Art. 59(a), UCMJ; *Tardif*, 57 M.J. at 224.

sentence appropriate.[13] Article 66(c)'s sentence appropriateness provision is a "sweeping Congressional mandate to ensure a 'fair and just punishment for every accused.'"[14] In exercising its sentence appropriateness power, a Court of Criminal Appeals may consider the entire record of trial, including allied papers, along with its wisdom, experience, and expertise in ensuring uniformity and evenhandedness of courts-martial sentences.[15] "Sentence appropriateness should be judged by 'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'"[16]

Appellant concedes that sexual intercourse with a 15-year-old and possession child pornography constitutes serious misconduct. However, a dishonorable discharge is an unjustly severe punishment in view of Appellant's young age at the time of his offenses. Additionally, in regards to the sexual act with a minor, the fact that the age difference between Appellant and CP was not very great should be considered a mitigating factor. Appellant also asks this Court to consider the fact that the CP, although incapable of giving legal consent because

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[13] Art. 66(c), UCMJ; *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005).
[14] *Baier*, 60 M.J. at 384 (quoting *United States v. Bauerbach*, 55 M.J. 501, 504 (Army Ct.Crim.App. 2001)).
[15] *United States v. Hutchison*, 57 M.J. 231, 234 (C.A.A.F. 2002); *See United States v. Durant*, 55 M.J. 258, 261 (C.A.A.F. 2001).
[16] *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) citing *United States v. Mamaluy*, 10 U.S.C.M.A. 102, 106-07, 27 C.M.R. 176, 180-81 (1959).

of her age, did factually consent. The Court of Appeals for the Armed Forces has repeatedly recognized this distinction. "A child under the age of 16 may factually consent to certain sexual activity, [even though] this Court has never recognized the ability of a child to legally consent to sexual intercourse."[17] In reversing the conviction of a 22-year-old Airman's guilty plea to indecent acts with a 13-year-old girl, C.A.A.F. stated:

> [T]here is no magic line of demarcation between decent acts and indecent acts based precisely on the age of the sex partner… This Court also has never held that all sexual conduct between a service person and a person under the age of 16 is indecent because the alleged victim is legally incapable of consenting to sexual acts. Finally, this Court has never held that the factual consent of the alleged victim was irrelevant to determining whether a service person is guilty of indecent acts with a child.[18]

In this case, Appellant is not asking this Court to set aside his conviction for engaging in a sexual act with a child. He asks that when this Court gives its individualized consideration on the basis of the nature and seriousness of the offenses to which Appellant plead guilty, this Court consider the following as mitigating facts: his young age at the time he committed the offenses, the relatively small difference in age between Appellant and CP, the fact that CP was 15, close to the age of legal consent at the time of the sexual activity, and

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[17] *United States v. Baker*, 57 M.J. 330, 335-336 (C.A.A.F. 2002); *United States v. Banker*, 60 M.J. 216, 220 (C.A.A.F. 2004).
[18] *United States v. Baker*, 57 M.J. 330, 335-336 (C.A.A.F. 2002).

that CP factually consented to the sexual activity. In light of these mitigating facts, and consistent with Article 66(c), UCMJ, a fair and just punishment in this case does not include a dishonorable discharge.

Conclusion

Appellant recognizes that the seriousness of the crimes of which he was convicted. Appellant does not ask this Court for clemency, but rather a fair balancing of the seriousness of his offenses, and the fact that he was only 19 years old at the time of the offenses. Appellant therefore asks this Court to approve a bad-conduct discharge in lieu of a dishonorable discharge.

STEPHEN WHITE
CAPTAIN, JAGC, USN
Appellate Defense Division
10207 FM 1625
Austin, TX 78747
(512) 796-8393

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Shields* was filed electronically in CMTIS, and was delivered to the Court and to opposing Appellate Government Counsel on 6 February 2014.

STEPHEN WHITE
CAPTAIN, JAGC, USN
Appellate Defense Division
10207 FM 1625
Austin, TX 78747
(512) 796-8393

DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN PACIFIC JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES v. MICHAEL SIPE LANCE CORPORAL U.S. MARINE CORPS	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION RE: DEFENSE MOTION TO DISMISS 15 May 2014

Statement of the Case

The defense, pursuant to RCM 907, has filed a motion to dismiss Charge II and the sole specification thereunder on two grounds: 1) that Congress intended Article 120b of the UCMJ to deal with child-sex crimes to the exclusion of other statutes and therefore prosecution for the same crimes under Article 125 is preempted, and 2) in the alternative, that the statutory scheme which allows disparate treatment at trial and beyond for Marines accused of violations of Article 125 and Article 120b violates the Due Process and Equal Protection guarantees of the 5th Amendment. The Government opposes the motion and requests that it be denied. An Article 39a session was held 12 May 2014, at the Legal Service Center, Camp Foster, Okinawa, Japan, wherein the parties presented evidence and made argument.

Issues:

1) Whether the sole specification of Charge II and the sole specification of Charge III constitute an unreasonable multiplication of charges.

2) If not, whether the statutory scheme set forth in Article 125, UCMJ, violates due process by specifically excluding mistake of fact as to age as a defense to a violation involving a child when such a defense is allowed under identical facts if charged under Article 120b;

3) Whether Article 120b governs sex crimes involving children, to the exclusion of other Articles that might apply; and

4) Whether laws which arbitrarily grant a defense in one case and deny it in another — based on identical conduct and identical government interests — violate basic protections of Due Process and Equal Protection.

Findings of Fact:

In reaching my findings, I read the pleadings and their attachments and considered all legal and competent evidence presented by the Government and defense in the record and the reasonable inferences to be drawn therefrom. In doing so, the Court finds by a preponderance of the evidence as follows:

1. The accused is charged—in relevant part--with a violation of Article 125 of the Uniform Code of Military Justice (UCMJ) for engaging in oral sex with Ms. A.P. At the time of the alleged acts, Ms. A.P. was approximately 15 years-old.
2. Ms. A.P. and the accused met through a social networking application on their cellular telephones.
3. After sending messages to each other for several weeks, the accused and Ms. A.P decided to meet at a coffee shop in American Village near Camp Lester.
4. After meeting at the coffee shop, the accused and Ms. A.P. decided to go to the on-base hotel, the Westpac Lodge, where they allegedly engaged in the acts of which the accused now stands accused under Article 120b by inserting his penis into the vagina of Miss A.P.

and digitally penetrating the vagina of Miss A.P., and under Article 125 by inserting his penis into the mouth of Miss A.P. and inserting his tongue and/or mouth into the vagina of Miss A.P.

5. There is no evidence to suggest, and the government does not argue, that Ms. A.P. was in any way coerced or pressured into performing sexual acts with or upon the accused.

Principles of Law

"What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." R.C.M. 307(c)(4)(discussion). *U.S. v. Quiroz*, 57 M.J. 583, 585-86 (N.M.Ct.Crim.App. 2002), lists the following non-exclusive factors a court may consider in evaluating whether charges were unreasonably multiplied: 1) whether the accused objected at trial that there was an unreasonable multiplication of charges and/or specifications; 2) whether the charges and specifications are aimed at distinctly separate criminal acts; 3) whether the number of charges and specifications misrepresent or exaggerate the accused's criminality; 4) whether the number of charges and specifications unreasonably increase the accused's punitive exposure; and 5) whether there is any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

This case also presents the court with the arduous task of synthesizing various portions of the Uniform Code of Military Justice (UCMJ) and attempting to divine a way forward regarding how sexual crimes are charged and prosecuted in the military context. In doing so, the court must rely on Congressional purpose as evidenced by the statutes at issue, as well as inveterate rules of statutory construction.

Article 125 provides criminal sanctions for sodomy.[1] To incur criminal sanctions, as it applies in this case, a military member must (1) engage in unnatural carnal copulation (2) with a certain other person, in this case a child who had attained the age of 12 but was under the age of 16. *See* Article 125. The requirement that the government prove the alleged victim's age is not a part of the statute itself, but rather is an aggravating factor promulgated by executive order which the government must plead and prove at trial. Article 125, like Article 120b, treats as a "sexual act" any penetration of one person's mouth or vagina by another person's tongue or penis. *Compare* Article 125 ("Explanation: It is unnatural carnal copulation for a person to take into that person's mouth or anus the sexual organ of another person . . . or to place that person's sexual organ in the mouth or anus of another person . . .") *with* Article 120(g)(1)(b) ("The term 'sexual act' means . . . the penetration, however slight, of the . . . mouth of another by any part of the body or by any object, with an intent to . . . arouse or gratify the sexual desire of any person.").

The iteration of Article 120 which was in effect at the time of the alleged misconduct also proscribed sexual acts with a minor who had attained the age of 12 but was under the age of 16. *See* Article 120b (effective as of 28 June 2012). Article 120b defines as "sexual assault of a child" conduct by a service member which results in (1) the commission of a sexual act (2) upon a child who has attained 12 years of age. *See id.* When Congress modified Article 120 in the National Defense Authorization Act for Fiscal Year 2012, it included explicitly the defense of "reasonable mistake of fact as to age" with regard to sexual activity with minors above the age of 12 but under the age of 16.

[1] The National Defense Authorization Act for Fiscal Year 2014 (NDAA, FY 14) repealed Art 125 as it applied to consensual sodomy between adults. *See* H.R.3304; § 1707.

> In a prosecution under this section, it need not be proven that the accused knew that the other person engaging in the sexual act or lewd act had not attained the age of 16 years, but it is a defense in a prosecution under subsection (b) (sexual assault of a child) or subsection (c) (sexual abuse of a child), which the accused must prove by a preponderance of the evidence, that the accused reasonably believed that the child had attained the age of 16 years, if the child had in fact attained at least the age of 12 years.

Article 120b(d)(2). The text of Article 125 lists no such defense nor does it reference children. The Court of Appeals for the Armed Forces (CAAF) first addressed the issue of whether the courts should imply a defense of "mistake of fact as to age" into Article 125 in dicta in the case of *United States v. Zachary*, 63 M.J. 438 (CAAF 2006). In *Zachary*, the court was confronted with whether to infer the defense of mistake of fact in a prosecution for indecent acts with a child under Article 134. In discussing Congress' intent in drafting the offense under Article 134, and the Executive's gloss on the statute contained in Rules for Courts-Martial (R.C.M.) 916, the court concluded that neither intended age to be a strict liability element to the crime of indecent acts with a child. *Id.* at 442. The court went on to recognize, albeit in dicta, that a mistake as to age was also a "clearly delineated defense for the crimes of sodomy and carnal knowledge" as they related to minors. *Id.*. The court buttressed its conclusion by stating that "it is illogical and unjust to recognize mistake of fact as to age as a complete defense to a carnal knowledge offense under Article 120(d), UCMJ, but not to recognize the same defense to [a] lesser included offense." *Id.* at 443.

Although *Zachary* discussed the issue of mistake of fact as to age regarding sodomy in *dicta*, the court squarely addressed the issue in *United States v. Wilson*, 66 M.J. 39 (CAAF 2008). Compared to the court's confidence in announcing that a "mistake of fact" defense existed regarding the charge of sodomy in *Zachary*, the *Wilson* court was now equally confident in changing its mind. In refusing to infer the defense of mistake of fact for the charge of

sodomy, the court examined congressional intent, presidential action, and state law. *See Wilson* at 40-47. The court in *Wilson* read Congress' tortured treatment of Article 120, and *laissez faire* treatment of Article 125, as indicating Congress' intent not to extend the defense of mistake of fact as to age to Article 125. *See id.* at 45-47. Congress' treatment of Article 120 since *Wilson* was decided in 2008 has certainly made congressional intent even harder to fathom.[2] This case raises two issues which the *Wilson* court *could not* have addressed in its ruling: (1) whether Article 120b preempts prosecutions under Article 125 in cases where both statutes apply equally, and (2) whether the disparate treatment of similarly situated individuals under Articles 120b and 125 violates the Due Process protections of the 5th Amendment.

The 2012 edition of the Manual for Courts-Martial (M.C.M.) does address preemption albeit in the context of Article 134.

> The preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80 through 132. For example, larceny is covered in Article 121, and if an element of that offense is lacking – for example, intent – there can be no larceny or larceny-type offense, either under Article 121 or, because of preemption, under Article 134. Article 134 cannot be used to create a new kind of larceny offense, one without the required intent, where Congress has already set the minimum requirements for such an offense in Article 121.

M.C.M. at IV-102.

When construing multiple, interrelated statutes, it is a commonplace of statutory construction that the specific governs the general. *See, e.g.* RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 132 S.Ct. 2065 (2012)(*quoting* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384)(this "is particularly true where . . . 'Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.'"). This canon of

[2] Article 120 was substantially rewritten in 2011 (effective on 28 June 2012), and was further modified by the NDAA, FY 14. *See supra*, note 1, § 1705.

APPELLATE EXHIBIT IV
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judicial construction applies equally to the context of criminal statutes. *See, e.g.*, US v. Carter, 696 F.3d 229, 232 (2012)(*quoting RadLAX Gateway Hotel, supra*).

Analysis

The facts presented at the motions hearing were largely undisputed by both the trial counsel and defense. Applying the *Quiroz* test to the facts at hand, as to the first factor, the defense is objecting that there is an unreasonable multiplication of specifications, though it is couched in terms of denial of due process and equal protection. As to the second factor, this weighs against the government. The two specifications both relate to the same misconduct… sexual assault of a child, but alleged using different Articles. Specification 1 of Charge I addresses the accused's inserting of his penis into and digitally penetrating the vagina of the alleged victim, while the specification of Charge II presumably alleges the accused's inserting of his penis into the mouth of the alleged victim and inserting his tongue and/or mouth into the vagina of the alleged victim. It is undisputed that the acts all occurred on the same dates during the same periods of the sexual interactions "on board Camp Foster, Okinawa, Japan."

As to the third factor, the number of specifications does misrepresent or exaggerate the accused's criminality in the instant case. Specification 1 of Charge I could simply include the second manner in which the government is alleging in the specification of Charge II – that the accused also placed his penis into the mouth of the alleged victim and inserted his tongue and/or mouth into the vagina of the alleged victim.

As to the fourth factor, the charges do unfairly or unreasonably increase the accused's punitive exposure. The accused's punitive exposure is increased by having the two Charges listed. As such, he is exposed if found guilty to the potential of 50 years confinement vice 30

years for a single specification of Article 120b alleging genital-genital, digital-genital, and oral-genital penetration.

Lastly, as to the fifth factor, the defense contends that there is prosecutorial overreaching or abuse in the present case. Indeed, the Government's charging strategy in this case causes the court to question the reasoning for its charging strategy, if not to foreclose the possibility of the defense exercising the mistake of fact as to age defense. In this case and as outlined above, all of the *Quiroz* factors weigh in favor of the accused.

Assuming *arguendo* that there was not an unreasonable multiplication of charges present in this case, Congress enacted broad revisions to Article 120 through the National Defense Authorization Act for Fiscal Year 2012. As part of this comprehensive legislation, Congress carved the former Article 120 into several different sections based on the conduct being addressed. Article 120 now deals with crimes involving sexual contact—in the colloquial sense of the word "contact." *See* Article 120 (Rape and Sexual Assault Generally, MCM, 2012 ed.). Article 120b deals exclusively with "sexual contact" crimes involving minors. *See* Article 120b (Rape and Sexual Assault of a Child, MCM, 2012 ed.). The apparent intent behind dividing Article 120 in this manner is that adult sexual crimes fall under Article 120, while sexual crimes involving children fall under Article 120b. Congress addressed the remaining panoply of sex-related crimes in Articles 120a and 120c—for instance: stalking, voyeurism, pandering, and indecent exposure.

With respect to Congress' statutory scheme, the relevant 2012 amendments to the UCMJ create different levels of severity with respect to child sex crimes, clearly define the types of sexual conduct being prohibited, and explicitly include certain defenses based on the child's age and the reasonable beliefs of the service member regarding such age. *See id.* Whatever else

might be said about the "new" Article 120, it is undisputed that Article 120b deals exclusively with child sex crimes in a way that is considerably more specific than any remaining portion of the UCMJ. By contrast, Article 125—enacted roughly sixty years prior—deals with child sex crimes in only the most general of fashions. With respect to minors, clarification regarding the application of Article 125 to child sex crimes was added only afterwards by the President. *See* Article 125 (Manual for Courts-Martial, 2012 ed.).

While not precisely on point, the Article 134 preemption provision clearly recognizes that the preemption doctrine applies under the UCMJ. It also provides a reasonable analogy for the circumstances at hand...the specific – Article 120b – overrides the general – Article 125 – as it relates to sex offenses against children. This logical result can also be gleaned from the maximum confinement listed for the same conduct involving a child who has attained 12 years, but is under 16: under Article 120b, sexual assault of a child includes 30 years confinement, while Article 125 caps at 20 years. Support is found in the affirmative defenses that are provided by Congress for sexual offenses related to children under Article 120b that are not found under 125. Presumably, this is due to the fact that Congress intended 120b to be the exclusive domain of sexual offenses related to children. Without envisioning that the President would later include elements covering children through Executive Order, Congress did not include the affirmative defenses under Article 125. The President's subsequent action does not negate the congressional intent to limit prosecution of sex offenses involving children to Article 120b.

In addition, allowing the Government to proceed unfettered with allegations of 120b and 125 for sexual offenses involving children will lead to more confusion for the triers of fact. One must consider the options that the finder of fact has relating to findings by exceptions and/or substitutions. As alleged in the case at hand, the Government alleges penetration of the vagina

by the penis and digital penetration of the vagina for the 120b offense and simply "sodomy" for the 125 offense, which presumably covers the penetration of the alleged victim's mouth by the penis and penetration of the alleged victim's vagina by the tongue and/or mouth of the accused. The members could, theoretically, except from the 120b specification "vagina" in the first instance and substitute "mouth" without changing the nature or identity of the offense. It would still be a "sexual assault of a child." Or, the fact finders could leave "vagina" in the specification and insert "and mouth," again without changing the nature or identity of the offense. The members could also insert the words "insert his tongue and/or mouth inside her vagina" without changing the nature or identity of the offense.

Further, any defense counsel could convince the members that because the defense of mistake of fact as to age does not apply to the 125 offense, that the members should only consider the evidence in the context of 120b…to include such findings by exceptions and substitutions. Arguably, such defense comments could border on jury nullification that would require a limiting instruction, but not necessarily so. Associated with this focus, defense will drive home that the defense has proven by a preponderance of the evidence the defense of mistake of fact as to age. Of course, focusing the members attention on the 120b offense comes with the risk the members may not accept the defense. If the defense fails, the accused would be subjected to a greater period of confinement of 30 years vice 20 years for the 125 offense…assuming the members did find the accused not guilty of sodomy based on the defense argument outlined above.

Finally, and as previously discussed above, this latter point raises the issue of unreasonable multiplication of charges[3] and the case law flowing from that concept, including

[3] R.C.M. 307(c)(4) – "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person."

Quiroz. The accused's conduct with the alleged victim during the divers occasions of sexual activity can properly be covered with one specification of sexual assault of a child for placing his penis in both the alleged victim's vagina and mouth, digital penetration of her vagina, and inserting his tongue and/or mouth inside her vagina vice multiple specifications alleging violations of two different Articles. In light of the canons of judicial construction and the undisputed intent of Congress to enable simplified prosecutions of sexual assaults of children, this court agrees that Congress intended for sexual crimes involving children to be exclusively prosecuted pursuant to Article 120b.

Assuming *arguendo* that Congress may provide prosecutors with a choice of which law to enforce in cases such as the present one, this court must then evaluate whether such a statutory scheme violates the accused's rights to Due Process and Equal Protection of the law. For military courts, this appears to be a novel question. The 5th Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law . . . ." As with the 14th Amendment, the 5th Amendment guarantees equal protection under federal law. *See generally* Bolling v. Sharpe, 347 U.S. 497 (1954).

Articles 120b and 125, as applied in this case, prohibit oral sex between a service member and a minor when the minor is between the ages of 12 and 16 years-old. The statutes exercise jurisdiction over the same group of potential accuseds and attempt to protect the same group of potential victims. The court is mindful that prosecutors are given discretion when selecting charges to bring against an accused—for instance, an alleged sexual assault may be the genesis for charges under Articles 93, 120, 128, or 134. Discretion is allowed in such cases because the fact finder might apply the facts to the law differently than the prosecutors, and

judicial economy allows the government to present the fact finder with options in these "contingency of proof" cases.

In this case, however, Articles 120b and 125 – as applied – do not raise the issue of contingencies of proof. Both articles as applied require *identical proof* to satisfy *identical elements*—simply put, the government must prove (1) that oral sex occurred, and (2) that one of the participants was under the age of 16. For this same reason, neither statute can be described as a lesser included offense of the other. *Compare id.* Despite these similarities, Congress has chosen to make "mistake of fact as to age" a complete defense to acts charged under Article 120b while forbidding such a defense under Article 125 for the very same conduct. Congress has essentially divided the service members affected by this legislation in two groups: those prosecuted for oral sex with minors under Article 120b, and those prosecuted for the same acts under Article 125. Assuming the facts of a case support it, the service members prosecuted under Article 120b may raise a "mistake of fact as to age" defense and then potentially be found not guilty. That same service member, under the same facts, as in the case at hand, would face up to 20 years in prison and a dishonorable discharge if the government brought charges under Article 125 vice Article 120b. Indeed, as the government has done here, the trier of fact...based on the evidence presented, could find the accused not guilty of Article 120b due to the defense of mistake of fact as to age, but all other things being equal, still find the accused guilty of Article 125 simply because the defense does not exist.

Because fundamental rights to due process and equal protection of the law are at issue, the government must show a rational basis for treating similarly situated people differently. That is, the government must show some distinction justifying the recognition of a defense under Article 120b and simultaneous denial under Article 125 for what is identical criminal conduct.

Because the court could find no military case law directly on point, the court turns to case law from other federal jurisdictions for guidance. The case of *Doe v. Jindal*, 851 F.Supp.2d 995, is instructive. In *Jindal*, the plaintiffs brought a class-action suit alleging that two Louisiana state criminal statutes denied them Due Process and Equal Protection in violation of the 14th amendment. The laws in question – one statute was titled "Crimes Against Nature by Solicitation" and the other was a prostitution statute – prohibited the solicitation of oral sex for compensation. *Id.* at 995-1000. The court noted that the two statutes each criminalized identical conduct and addressed identical government interests. *Id.* at 1006. The only significant difference between the statutes was that people convicted under the "Crimes Against Nature by Solicitation" statute were required to register as sex offenders while those convicted under the prostitution statute were not. Because the state could articulate no rational basis for the disparity of treatment between the two groups, the court held the disparity in treatment between the two groups was a result of an unconstitutional legislative scheme. *Id.* at 1006-09.

Although the challenge in *Jindal* was founded in 42 USC 1983 (Civil Rights Act), the Due Process and Equal Protection analysis is the same for this case. Here, the government can articulate no rational basis for treating people charged under Article 120b differently from those charged under Article 125. The government interests served by these statutes, as well as the elements of proof and theories of liability, are identical, yet, the disparity in treatment that results is significant...one group is denied the right to a defense for which the other group may avail itself. Regardless of whether Congress intended this state of affairs, it may not do so in the face of the relevant constitutional protections pursuant to the 5th Amendment.

Conclusions of Law:

Applying the facts to the law as stated above, the court concludes as follows:

1) Specification 1 of Charge I and the sole specification of Charge II constitute an unreasonable multiplication of charges.

2) To the extent that they may be deemed to not constitute an unreasonable multiplication of charges, the statutory scheme set forth in Article 125, UCMJ, violates due process by specifically excluding mistake of fact as to age as a defense to a violation involving a child when such a defense is allowed under identical facts if charged under Article 120b.

3) The court must interpret Article 120b and the related statutes in a way that gives effect to each, and which avoids constitutional implications where possible. Therefore, if the charges at issue are deemed to not constitute an unreasonable multiplication of charges,. this court concludes that Article 120b governs sex crimes involving children to the exclusion of other sex crime statutes which might apply.

4) This court will not permit the enforcement of laws deemed to not constitute an unreasonable multiplication of charges which arbitrarily grant a defense in one case and deny it in another—based on identical conduct and identical government interests—because to do otherwise violates fundamental fairness protections of due process and equal protection of the law.

Decision:

The defense motion to dismiss Charge II and its sole specification is **GRANTED**. However, to accommodate and capture the alleged conduct of the accused at issue in the sole specification of Charge II, the Government may incorporate that conduct into specification 1 of Charge I via pen-change by inserting the words "and mouth, inserting his tongue and/or mouth inside her vagina," before the words, "and digitally."

So ordered this 15th day of May 2014.

E. H. ROBINSON, JR.
Lieutenant Colonel
U. S. Marine Corps
Military Judge

WESTERN PACIFIC JUDICIAL CIRCUIT
UNITED STATES MARINE CORPS
GENERAL COURT-MARTIAL

UNITED STATES	)	**DEFENSE MOTION FOR APPROPRIATE RELIEF (Motion to Dismsis)**
v.	)	
MICHAEL S. SIPE **LANCE CORPORAL** **U.S. MARINE CORPS**	)	**25 Apr 2014**

1. **Nature of the Motion**: Pursuant to Rule for Courts Martial 907, Manual for Courts-Martial, the defense respectfully moves the Court to dismiss Charge II (1) because it is preempted by the enactment of Article 120b, and (2) because a statutory scheme which permits prosecution under both Articles 120b and 125 violates the Due Process protections of the 5th Amendment.

2. **Summary of the Facts:**

a. Lance Corporal Manual (LCpl) Sipe, U.S. Marine Corps, is charged with violations of the Uniform Code of Military Justice, specifically, violations of Article 120b and 125. This motion focuses on Charge II, which alleges a violation of Article 125.

b. Ms. A.P., the 15 year-old dependent of a military service member, is the complaining witness in regards to all charges against Lance Corporal Sipe.

c. Ms. A.P. and LCpl Sipe met in the summer of 2013 through a social networking application on their cellular telephones. During their conversations, Ms. A.P. that she was 18 years old, had just graduated from high school on Okinawa, and was preparing to begin her first year of college in the fall of 2013. After sending messages to each other for several weeks, LCpl

Sipe and Ms. A.P decided to meet up at a coffee shop a few miles from Marine Corps Base Camp Foster.

d. After meeting at the coffee shop, LCpl Sipe and Ms. A.P. decided to go to the on-base hotel. At the hotel, LCpl Sipe and Ms. A.P. allegedly engaged in the acts of which LCpl Sipe now stands accused. Ms. A.P., like the government, does not allege that any of the acts in question were without her *actual* consent. The government's theory is that Ms. A.P. was unable legally to consent due to her age.

3. <u>Discussion:</u>

I. Background

Article 125 provides criminal sanctions for sodomy.[1] To incur criminal sanctions, in relevant part, a military member must (1) engage in unnatural carnal copulation with a certain other person, (2) with a child who had attained the age of 12 but was under the age of 16. *See* Article 125. Article 125, like Article 120b, treats as a "sexual act" any penetration of the one person's mouth or vagina by another person's tongue or penis. *Compare* Article 125 ("Explanation: It is unnatural carnal copulation for a person to take into that person's mouth or anus the sexual organ of another person . . . or to place that person's sexual organ in the mouth or anus of another person . . .") *with* Article 120(g)(1)(b) ("The term 'sexual act' means . . . the penetration, however slight, of the . . . mouth of another by any part of the body or by any object, with an intent to . . . arouse or gratify the sexual desire of any person.").

[1] The National Defense Authorization Act for Fiscal Year 2014 repealed Art 125 as it applied to consensual sodomy between adults. *See* H.R.3304; § 1707.

The iteration of Article 120 which was in effect at the time of the alleged misconduct also proscribed sexual acts with a minor who had attained the age of 12 but was under the age of 16. *See* Article 120b (as effective on 28 June 2012). Article 120b defines as "sexual assault of a child" conduct by a service member which results in (1) the commission of a sexual act (2) upon a child who has attained 12 years of age. *See id.* When Congress modified Article 120 in the National Defense Authorization Act for Fiscal Year 2012, it included explicitly the defense of "reasonable mistake of fact as to age" with regard to sexual activity with minors above the age of 12 but under the age of 16.

> In a prosecution under this section, it need not be proven that the accused knew that the other person engaging in the sexual act or lewd act had not attained the age of 16 years, but it is a defense in a prosecution under subsection (b) (sexual assault of a child) or subsection (c) (sexual abuse of a child), which the accused must prove by a preponderance of the evidence, that the accused reasonably believed that the child had attained the age of 16 years, if the child had in fact attained at least the age of 12 years.

Article 120b(d)(2).

The issue of whether the courts should read into Article 125 a defense regarding mistake of fact as to age was first raised in dicta in the case of US v. Zachary, 63 M.J. 438 (CAAF 2006). In *Zachary*, the court was confronted with whether to infer the defense of mistake of fact in a prosecution for indecent acts with a child under Article 134. In discussing Congress' intent in drafting the offense under Article 134, and the Executive's gloss on the statute contained in Rules for Courts-Martial Rule 916, the court concluded that neither intended age to be a strict liability element to the crime of indecent acts with a child. *Id.* at 442. The court went on to recognize, albeit in dicta, that a mistake as to age was also a "clearly delineated defense for the crimes of sodomy and carnal knowledge" as they related to minors. *Id.* The court buttressed its

conclusion by stating that "it is illogical and unjust to recognize mistake of fact as to age as a complete defense to a carnal knowledge offense under Article 120(d), UCMJ, but not to recognize the same defense to [a] lesser included offense." *Id.* at 443.

Although *Zachary* discussed the issue of mistake of fact as to age regarding sodomy in *dicta*, the court squarely addressed the issue in US v. Wilson, 66 M.J. 39 (CAAF 2008). There, Private Wilson, (US Army) was convicted, among other things, of sodomy with a minor. Compared to how confidently the court announced that a "mistake of fact" defense existed regarding the charge of sodomy in *Zachary*, the court was now equally confident in changing its mind. In refusing to infer the defense of mistake of fact for the charge of sodomy, the court examined congressional intent, presidential action, and state law. *See Wilson* at 40-47. From the court's recitation of state law, it appears that the states are nearly equally-divided regarding whether the offense of sodomy with a minor includes some type of particular *mens rea* element. *See id.* at 43-44. For that reason, this motion does not address the comparisons between Articles 120b and 125 with state law.

The court in *Wilson* read Congress' tortured treatment of Article 120, and *laissez faire* treatment of Article 125, as indicating Congress' intent not to extend the defense of mistake of fact as to age to Article 125. *See id.* at 45-47. Congress' treatment of Article 120 since *Wilson* was decided in 2008 has certainly made congressional intent even harder to fathom.[2] The defense position is that the court in *Zachary* and the dissenters in *Wilson* were correct, notwithstanding the *Wilson* majority. What is clear, however, is that the *Wilson* court failed to address two issues: (1) whether Article 120b preempts prosecutions under Article 125 where

[2] As the court is doubtless aware, Article 120 was substantially rewritten in 2011 (effective on 28 June 2012), and was further modified by the National Defense Authorization Act. *See supra*, note 1, § 1705.

both statutes apply, and (2) whether the disparate treatment of similarly situated individuals under Articles 120b and 125 violates the Due Process protections of the 5th Amendment.

II Analysis

1. Prosecutions under Article 125 are Preempted by the enactment of Article 120b

It is an inveterate rule of statutory construction that legislation which remedies specific problems with specific solutions is controlling where more general legislation covers the same problems. This is particularly true where Congress has enacted a comprehensive scheme addressing the issue. *See, e.g.* RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 132 S.Ct. 2065 (2012)(citations omitted). This canon of judicial construction applies equally to the context of criminal statutes. *See, e.g.*, US v. Carter, 696 F.3d 229, 232 (2012)(*quoting RadLAX Gateway Hotel, supra*). In the present case, Congress enacted broad revisions to Article 120 through the National Defense Authorization Act for Fiscal Year 2012. As part of this comprehensive legislation, Congress carved out Article 120b specifically to address the problem of sexual crimes by service members upon children. *See* Article 120b(a)-(c). In it, Congress creates different levels of severity with respect to child sex crimes, clearly defines the types of sexual conduct being prohibited, and explicitly includes certain defenses based on the child's age and the reasonable beliefs of the service member regarding such age. *See id.* Article 125—enacted roughly sixty years prior—is general by comparison and relatively undetailed. With respect to minors, clarification regarding the application of Article 125 to child sex crimes was added only afterwards and then by the President. *See* Article 125 (Manual for Courts-Martial, 2012 ed.).

Allowing the government to enforce Articles 120b and 125 in the present manner renders at least one article a nullity. As addressed above, the court's responsibility is to interpret the law

and to harmonize a statutory scheme which overlaps in certain areas. As applied in this case, Articles 120b and 125 are identical in scope and effect. For that matter, even Article 120—if each article is to be strictly applied—covers the charged conduct as well. Is the court to believe that Congress intended *each* of the three articles to address identical conduct? If the court does not interpret these statutes as complementary, rather than merely redundant, then the court cannot abide by even basic rules of statutory construction: interpret the laws in ways that avoid nullifying a congressional act, and avoid interpretations which raise constitutional issues. The only way to satisfy long-held judicial custom and uphold the current statutory scheme is to rule that Article 120b—to the exclusion of the other articles which might apply—governs in cases where the alleged victim is a minor.

2. Granting Prosecutors Unfettered Discretion to Charge Under Either Article 120b or Article 125 violates the 5th Amendment's Due Process Protections

The 5th Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law . . . ." As with the 14th Amendment, the 5th Amendment guarantees equal protection under federal law. *See generally* Bolling v. Sharpe, 347 U.S. 497 (1954). Articles 120b and 125 as applied in this case operate to proscribe oral sex between a service member and a minor between the ages of 12 and 16 years old. The statutes exercise jurisdiction over the same group of potential accuseds, and attempt to protect the same group of potential victims from the same misconduct. Likewise, neither statute can be describe as either an alternate theory of proof or a lesser included offense of the other given that they require *identical* elements of proof before criminal liability may be imposed. *Compare id.* Despite these similarities, Congress has chosen to make mistake of fact as to age a complete defense to acts charged under Article 120b while forbidding such a defense under Article 125 for the same

conduct.[3] Although prosecutors are generally given discretion when choosing which statutes to enforce by means of criminal prosecution, the 5th Amendment's Due Process and Equal Protection safeguards place limits on such discretion. In Doe v. Jindal, 851 F.Supp.2d 995, several people who had been prosecuted for soliciting oral sex for compensation alleged the two state criminal statues at issue—and the government's arbitrary classification resulting therefrom—were arbitrary and not rationally related to any legitimate government interest and therefore unconstitutional. One statute was titled as Crimes Against Nature by Solicitation and the other was a Prostitution statute. *Id.* at 995-1000. The two statutes each criminalized soliciting oral sex for compensation, and addressed identical government interests. *Id.* at 1006. The only significant difference was that people convicted under the Crimes Against Nature by Solicitation statute were required to register as sex offenders while those convicted under the Prostitution statute were not. Because the state could articulate no rational basis whatsoever for the disparity of treatment between the two groups, the court held the disparity was a result of an unconstitutional legislative scheme. *Id.* at 1006-09.

In the present case, the government can articulate no rational basis for treating people charged under Article 120b differently from those charged under Article 125. The government interests served by these statutes, as well as the elements of proof and theories of liability, are identical. Regardless of whether Congress intended this state of affairs, it may not do so in the face of the relevant constitutional protections pursuant to the 5th Amendment.

4. **Relief Requested:** The defense respectfully requests that Charge II and the sole specification thereunder be dismissed.

[3] In Article 120b, Congress also extends the "mistake of fact as to age" defense to arguably more aggravated acts than mere oral sex—vaginal or anal intercourse. *See id.*

5. **Burden of Proof:** Pursuant to RCM 905(c)(1), the burden of proof is preponderance of the evidence. Pursuant to RCM 905(c)(2), the burden of persuasion is on the moving party.

6. **Argument:** The defense requests oral argument.

Jeffrey Little
Captain, U.S. Marine Corps
Detailed Defense Counsel

UNITED STATES MARINE CORPS
WESTERN JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY
GENERAL COURT MARTIAL

UNITED STATES **v.** **SIPE, MICHAEL S.** **LANCE CORPORAL** **U. S. MARINE CORPS**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS** **2 May 2014**

1. **Nature of Motion.**

The government respectfully requests that you DENY the defense motion to dismiss Charge II.

2. **Summary of Facts.**

a. Lance Corporal (LCpl) Michael Sipe, U.S. Marine Corps, is charged with violating Article 120b and Article 125 for the alleged sexual acts he committed upon Ms. A.P.

b. At the time of the alleged misconduct (5 to 7 July 2013), Ms. A.P. was 15 years old.

c. The government has chosen to allege a violation of Article 120b to capture the accused's alleged insertion of his penis and fingers into Ms. A.P.

d. The government has also chosen to allege a violation of Article 125 to capture the accused's acts of oral sex with Ms. A.P.

3. **Discussion.**

The government is permitted to allege violations of constitutional criminal statutes. Here, the government has alleged a violation of Article 125, UCMJ. This allegation is constitutional as applied to the accused since it sodomy with a child is not a constitutional liberty interest. *See U.S. v. Marcum*, 60 M.J. 198 (CAAF 2004); *U.S. v. Wilson*, 66 M.J. 39 (CAAF 2008). Additionally, the accused has submitted no evidence of an Equal Protection violation or evidence

of selective prosecution. Finally, the doctrine of federal preemption does not apply. Thus, the accused has stated no legal basis upon which this court should dismiss Charge II.

(a) Article 125 is a Constitutional Criminal Statute

Article 125 is a valid, constitutional statute that the government may elect to prosecute service member misconduct. *Marcum*, 60 M.J. 198. The constitutionality of Article 125 has already been addressed by CAAF and acts of sodomy with a 15 year old child not constitutionally protected behavior. *U.S. v. Bare*, 65 M.J. 35 (CAAF 2007); *Marcum*, 60 M.J. 198; *See Lawrence v. Texas*, 539 U.S. 558, (2003). Therefore the government may allege acts of sodomy with a child as a violation of Article 125.

Additionally, there is no mistake of fact defense as to age available for Article 125. *Wilson*, 66 M.J. at 40. *Wilson* is the controlling law on this issue. Congress passed Article 125 and despite multiple changes to military sex crimes since 1996, Congress has *never* made the defense of mistake of fact available to Article 125. *Wilson*, 66 M.J. at 45.

Congress' continued attention to military sex crimes evinces an obvious Congressional intent that is easy to fathom – the lack of mistake of act as to age is not an available defense to Article 125. In 1996, Congress chose to make that defense available to certain Article 120 offenses, but chose not to extend it to Article 125. *Wilson*, 66 M.J. 39, 45. Most recently, in the 2014 National Defense Authorization Act, Congress amended military sex laws, specifically amended Article 125 and created other provisions related to Article 125. Public Law 113-66 (Dec 2013); H.R. 3304 § 1707. In that act, Congress enacted various changes to general sex crimes in general such as: 1) removing the statute of limitations, 2) the procedure for interviewing sex crime victims, and 3) changing the rules for victim testimony at Article 32 hearings. *Id.* Additionally, Congress specifically touched Article 125 in several ways: 1) added a mandatory

minimum sentence of a Dishonorable Discharge for forcible sodomy convictions; 2) removed consensual sodomy; 3) re-wrote the statute entirely, 4) barred service in the military for those convicted of forcible sodomy, 5) mandated a review of a convening authority's decision not to refer an allegation of forcible sodomy under Article 125 to trial, and 6) spoke to their preference that such offenses should be dealt with at a court-martial vice alternative disposition. Public Law 113–66, § 1705; 1707; 1711; 1744; and 1752. Article 125 is not an antiquated statute accidentally left on the books. Congress is clearly aware that Article 125 is there based on their frequent and recent attention to military sex crimes and Article 125. Considering such active Congressional involvement and CAAF's holding in *Wilson*, this court should not be persuaded by the accused's plea to read a mistake of fact defense into Article 125.

(b) Without Evidence of Disparate Treatment, the Court should not find a Due Process Violation

No evidence has been presented to this court that shows the government has treated the accused differently from any other group, thus the court should not find a Due Process violation. An equal protection claim requires the accused to show: 1) that he has been treated differently by the state from others similarly situated, and 2) that there is no rational basis for the difference in the treatment. *E.g. McDonald v. Village of Winnetka*, 371 F.3d 992, 993 (7th Cir. 2004); *Doe v. Jindal*, 851 F.Supp.2d 995, 1006 (E.D. La 2012).

Here, unlike the plaintiff in *Doe*, the accused has presented *no evidence* to show that he is being treated differently than another group of similarly situated individuals. Furthermore, the accused's own motion makes no assertion that there has been any different treatment of the accused or similarly situated individuals. Instead the accused merely asserts that "the government can articulate no rational basis for treating people charged under Article 120b

differently from those under Article 125." However, this is the second prong of the analysis. The accused's motion, however, simply fails to make any effort to establish the first prong.

Since the first prong of the test is deficient there is no need to conduct a rational basis analysis and the claim must fail. *E.g. McDonald*, 371 F.3d at 993 (motion to dismiss granted since plaintiff failed to identify someone similarly situated but treated differently); *Muhammad v. Lynaugh*, 966 F.2d 901, 903 (5th Cir. 1992) (finding an equal protection claim non-meritorious since the plaintiff failed to establish different treatment of similarly treated individuals).

Additionally, this is not a case of selective prosecution; another equal protection claim that the accused may have alluded to in his motion. However, since this is a criminal vice civil case it is appropriate to conduct that analysis as well. To support a claim of selective prosecution, the accused bears the *heavy* burden that "1) others similarly situated have not been prosecuted for similar conduct and 2) that the government's decision to prosecute was based on impermissible grounds, such as race, religion, or other arbitrary classification." *U.S. v. Garwood*, 16 M.J. 863 (CMR 1983); *U.S. v. El-Amin*, 38 M.J. 563 (CMR 1993); *U.S. v. Hagen*, 25 M.J. 78 (CMR 1987). In the face of a selective prosecution claim "there is a general presumption that criminal charges and prosecutions are undertaken in good faith and with nondiscriminatory motivation." *Garwood*, 16 M.J. at 23, (citing *U.S. v. Falk*, 479 F.2d 616 (7th Cir. 1973)).

Here, again, the accused has offered no evidence that similarly situated have been not been prosecuted for similar conduct. Even assuming there was, there is no evidence that the government has acted in any discriminatory fashion. As long as the government does not single out for prosecution one particular group for impermissible reasons, there is no valid selective prosecution claim. The accused has simply failed to offer any evidence to establish an equal protection claim. Therefore, his claim should be denied.

(c) The Federal Preemption Doctrine does not apply

The accused alleges in his motion two possible separate theories of "preemption." First, by using the term preemption the accused may be attempting to invoke the theory under which a state law is preempted by a superior federal statute. *E.g. Altria Group v. Good*, 555 U.S. 70 (2008). Second, the accused argues a canon of statutory construction should be applied to find that Article 125 is preempted, perhaps characterizing this as a separate form of preemption. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S.Ct. 2065 (2012); *U.S. v. Carter*, 696 F. 3d 229 (2nd Cir 2012).

The doctrine of federal preemption does not apply in this case. That concept is only applicable to determining whether a state statute is preempted by a federal statute pursuant to the supremacy clause of the U.S. Constitution. *E.g. Altria Group*, 555 U.S. 70. Here, since Article 120b and Article 125 are federal statutes, the preemption doctrine is not applicable.

On the other hand, the accused argues that Article 125 is "preempted" because Congress has passed a similar statute under a more comprehensive scheme. To support this argument, the accused invokes the canon of statutory construction that a more specific statutory provision controls a more general one when there is a contradiction between the two. In support of this argument he cites *RadLAX Gateway Hotel, LLC*, 132 S.Ct. 2065 and *Carter*, 696 F.3d 229. However, even if this canon of construction applies and allowed the court to completely invalidate a statute, the cases cited are factually distinguishable and do not apply.

RadLAX involved debtors filing for bankruptcy under 11 U.S.C. § 1129(b)(2)(A) (Chapter 11). That statute gives debtors three options for selling off assets in order to pay off creditors: 1) the creditor retains liens on the debtor's property and received deferred cash payments, 2) debtor sells the property free of the creditor's lien, but that the creditor may bid on the property at

auction and that if the holder of the lien makes the purchase, the holder may offset the claimed debt against the purchase price (credit-bidding), or 3) the bankruptcy plan provides the creditor with the "indubitable equity" of the claim. *RadLAX*, 132 S.Ct. at 2070.

The practice captured under clause two was created to "to protect a creditor against the risk that its collateral will be sold at a depressed price. It enables the creditor to purchase the collateral for what it considers the fair market price (up to the amount of its security interest) without committing additional cash to protect the loan." *Id.* at footnote 2. Bottom line, this is a very specific provision that lets creditors protect their collateral by specifically allowing them to offset the purchase cost of debtor's assets with the amount owed by the debtor. This provision protects creditors by keeping the collateral property's value from being deflated during a selloff.

The third clause however, is a more general and vague rule. It merely promises creditor the "indubitable equivalent" of their claim. Under the defendant's theory, in a bankruptcy filed under this clause, collateral might still sold at auction, but creditors have no right to credit-bid as authorized under clause two.

The court used the general/specific canon of construction and reasoned that "clause (ii) is a detailed provision that spells out the requirements for selling collateral free of liens, while clause (iii) is a broadly worded provision that says nothing about such a sale. The general/specific canon explains that the "general language" of clause (iii), 'although broad enough to include it, will not be held to apply to a matter specifically dealt with' in clause (ii)." *Id.* at 2071-2072. The court held that RadLAX could not use clause three when the more specific clause two provision controlled the type of sell off envisioned. They interpreted clause three as a residual provision that only covers bankruptcy plans *not already specifically* dealt with under clause one and two. *Id.* at 2070.

RadLAX is inapplicable to the case before the court. In *RadLAX* there was a specific clause covering a specific type of bankruptcy filing. The court merely reasoned that the general provision in the statute did not apply to the type of filing covered in the more specific provision. Their reasoning does not stand for the proposition that the general provision is completely preempted and invalidated by the specific provision. Instead, they only reasoned that those provisions still applied, just under different types of bankruptcy filings.

Here, the defense is arguing that the "specific" provision of Article 120b completely preempts" the government from using the "general" provision of Article 125. First, as discussed above, *RadLAX*, does not stand for the proposition that a specific provision completely invalidates other provisions. Second, this is not a matter of interpreting a "general" provision that is governed by a "specific" one. These are two separate statutes that specifically criminalize the same conduct in different ways. Article 120b specifically includes a mistake of fact defense; Article 125 specifically does not include the defense. This does not make one general and one specific. They are just different statutes with different defenses available. Thus, this canon of construction is inapplicable and does not offer the remedy of preempting Article 125.

Additionally, the court also stated in *RadLAX*: "Of course the general/specific canon is not an absolute rule, but is merely a strong indication of statutory meaning that can be overcome by textual indications that point in the other direction." *Id.* at 2072. Thus, the canon need not be applied when there is a clear indication of statutory intent. Here, there are clear textual indications in the UCMJ that point away from the defense position. Congress has been actively updating military sex crime statutes since 2008, altering both Article 120 and Article 125. If Congress intended Article 125 to be nullified or preempted they would have done so. Congress

intended to leave Article 125 "on the books." That choice evinces an intent that the court should not be inclined to invalidate without on point controlling authority.

The accused also cites *Carter* for the proposition that this canon of construction applies to criminal cases. *Carter* dealt with a statutory mandatory minimum provision under individual criminal codes and a generalized sentencing concept under 18 U.S.C. § 3553(a). *Carter*, 696 F.3d at 230. The generalized concept under § 3553(a) was called a "parsimony" provision "which provides that a sentencing court 'shall impose a sentence sufficient, but not greater than necessary, to comply with [appropriate sentencing objectives].'" *Id.* at 231. Essentially, this was a general rule that applied to all criminal sentencing. However, 18 U.S.C. § 3551 states: "[e]xcept as otherwise specifically provided, a defendant . . . shall be sentenced in accordance with the provisions of this chapter so as to achieve" the sentencing objectives listed in § 3553(a)(2)(the parsimony provision). *Id. at* 233.

As envisioned in the statutory language of the "parsimony" provision, some federal criminal statutes have mandatory minimums. In *Carter*, 21 U.S.C. § 841(b)(1)(B) codified a minimum ten-year sentence for certain violations. *Carter* argued that the mandatory minimum violated the more general "parsimony" provision.

Carter's argument was rejected. The "parsimony" provision only applied "except as otherwise specifically provided." *Id.* Thus, the "general" provision already had a statutory disclaimer that a more specific statute might apply (via each individual criminal statute) which allows the more specific statute to trump the general provision.

The accused cites *Carter* for the proposition that the general/specific canon of construction applies to criminal statutes. However, that is not the holding of *Carter*. The court in *Carter* did not apply the general/specific canon. There was no need to since § 3551 clearly stated that more

specific statutes would apply. § 3551 just codified the general/specific principle into the sentencing statute. Since the court relied on the language of § 3551, an application of the general/specific canon of interpretation was unnecessary to the court's holding. Since the canon was not applied, *Carter* does not hold that the canon applies to criminal statues and is therefore irrelevant to this case.

The accused ultimately cites no authority to support his position that Article 125 has been preempted or nullified and again, fails to meet his burden. Neither case he cites provides authority for this court to find Article 125 is no longer a valid, applicable statute.

(d) Conclusion

The accused fails to meet his burden on the motion. There has been no evidence submitted to establish an equal protection claim and there is no controlling authority cited that allows the court to simply nullify or preempt a constitutional statute. Therefore, this court should DENY the defense motion to dismiss Charge II.

4. **Relief Requested.**

The government respectfully requests that the court deny the defense motion to dismiss Charge II and its specification.

5. **Burden of Proof.**

"Except as otherwise provided in this Manual the burden of persuasion on any factual issue the resolution of which is necessary to decide a motion shall be on the moving party." RULE FOR COURTS-MARTIAL 905(c)(2)(A), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.). The defense bears the burden of persuasion by a preponderance of the evidence.

6. **Argument.**

The government respectfully requests oral argument.

Forrest W. Hoover
Major, U.S. Marine Corps
Trial Counsel

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Certificate of Service

I hereby attest that a copy of the foregoing motion was served on the court and opposing counsel on 2 May 2014.

Forrest W. Hoover
Major, U.S. Marine Corps
Trial Counsel

DEPARTMENT OF THE NAVY
SPECIAL COURT-MARTIAL
NAVY AND MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT

U N I T E D S T A T E S v. NATHAN J. TABBITAS AD3 / E-4 UNITED STATES NAVY	)	DEFENSE PLEADING CONCERNING MAXIMUM PUNISHMENT FOR SPECIFICATIONS CHARGED UNDER ARTICLE 120 02 August 2013

1. **Nature of Motion.** During AD3 Tabbitas's arraignment on 29 July 2013, the Court requested pleadings from the parties regarding the maximum punishment with respect to specifications charged under Article 120 of the Uniform Code of Military Justice (UCMJ), which allege acts that occurred between 28 June 2012 and 15 May 2013. The defense argues that a court-martial may not impose a sentence greater than that which is authorized at summary court-martial for either specification under charge I. In the alternative, the defense argues that the maximum punishment that a court-martial may impose for each specification under charge I is that which would be available for an offense charged under Article 128(a)—assault consummated by a battery.

2. **Summary of Facts.**

a. The National Defense Authorization Act for Fiscal Year 2006 included significant overhauls to Article 120, UCMJ. Included in the 2006 amendments were interim maximum punishments that could be imposed upon a person convicted under the 2006 version of Article 120. *See* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 109-163 § 552(b), 119 Stat. 3263 (2006). The interim punishments Congress wrote into the 2006 statute remained in effect until the President exercised his power under Article 56, UCMJ, to specify punishments for offenses that lack a statutory penalty.

b. The National Defense Authorization Act for Fiscal Year 2012 included changes to existing sexual offenses and their respective elements under Article 120, UCMJ. Unlike the 2006 amendments, however, the 2012 Act did not impose interim maximum punishments in the event that the President delayed in exercising his powers under Article 56[1]. With respect to punishment that may be imposed upon persons convicted under the offenses enumerated in Article 120, the statute merely explained that those persons "shall be punished as a court-martial may direct." These amendments - signed into law on 31 December 2011 - took effect on 28 June 2012.

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[1] Congress also refrained from directing cases charged under the 2012 version of Article 120 to a specific court-martial and also elected not to impose its own maximum punishment. *Contra* Article 106, UCMJ (directing trial by general court-martial or military commission and a mandatory punishment of death).

c. On 15 April 2013, the United States preferred charges against AD3 Tabbitas, alleging one specification under Article 120(a) and one under Article 120(b) for conduct that occurred on or about 19 October 2012.

d. On 15 May 2013, the President signed Executive Order 13643—Amendments to the Manual for Courts-Martial, United States. That Order imposed the following maximum punishment for the two specifications that the United States has referred against AD3 Tabbitas under charge I. For the specification alleging conduct under Article 120(a), the President authorized the following maximum sentence: dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole. With respect to the specification under Article 120(b), the President authorized the following maximum punishment: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years.

e. The charges and specifications were investigated under Article 32, UCMJ. Following investigation, they were referred to the captioned special court-martial on 29 July 2013.

3. **Discussion.**

a. In this case, the maximum authorized punishment is the jurisdictional limit of a summary court-martial.

(1) Applying the recent executive order to offenses that occurred between 28 June 2012 and 14 May 2013 would violate the

United States Constitution's expressed proscription of *ex post facto* laws under Article I, Section 9. Declining to avail itself of powers exercised when making prior amendments to Article 120 and enacting other articles under the UCMJ, Congress's most recent iteration of Article 120 is ambiguous with respect to maximum punishment. As such, this Court should invoke the Rule of Lenity and read the statute in the light most favorable to AD3 Tabbitas. Such a reading leads to the conclusion that the maximum punishment is that which can be imposed by a summary court-martial.

(2) Alternatively, the Court may invoke Rule for Courts-Martial 1003(c)(1)(B)(i) because - absent maximum punishment, among other things - the rape specification and the sexual assault specification were not listed under Part IV of the Manual for Courts-Martial when the offense occurred or when charges were preferred. Assault consummated by a battery under Article 128 of the UCMJ is listed under Part IV and is related to specifications 1 and 2 of charge I. Under R.C.M. 1003(c)(1)(B)(i), therefore, the maximum sentence authorized for those two specifications is that which may be imposed for commission of assault consummated by a battery: bad conduct discharge, forfeiture of all pay and allowances, and confinement for up to 6 months.[2]

[2] Charge II alleges an act of forcible sodomy under Article 125, UCMJ. As such, the maximum punishment for all charges and specifications in this case is the statutory limit of the special court-martial.

b. Because the language regarding maximum punishment under the 2012 version of Article 120 is ambiguous, the maximum punishment for specifications 1 and 2 of charge I is that which could be imposed by a summary court-martial.

(1) The maximum punishment for offenses charged under Article 120 that allege conduct occurring between 28 June 2012 and 14 May 2013 is the jurisdictional limit of a summary court-martial. The Rule of Lenity provides that criminal statutes are to be strictly construed, with any ambiguity resolved in favor of an accused. *See, e.g., United States v. Thomas*, 65 M.J. 132, 135 n.2 (C.A.A.F. 2007). When engaging in statutory interpretation and applying a statute, courts must avoid reading a statute in isolation and instead consider the context of the overall statutory scheme. *See, e.g., Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). Here, the National Defense Authorization Act for Fiscal Year 2012 must be interpreted in the context of Congress's overall statutory scheme. One must consider, therefore, Congress's overhaul of Article 120 in the National Defense Authorization Act for Fiscal Year 2006 as well as other criminal statutes that Congress has included in the UCMJ. Contrary to its 2006 amendments to Article 120, Congress elected not to include interim punishments in its 2012 iteration. Congress also decided not to explicitly state a maximum punishment or limit disposition of offenses charged under Article 120 to a specific court-martial with established

jurisdictional limits on punishment as it did with Article 106 - directing trial by general court-martial or military commission and a mandatory punishment of death.

(2) When Congress enacted the statute at issue in this case, it chose to neither impose interim maximum punishment as it did in 2006, nor direct a statutory maximum punishment, nor to direct disposition of applicable cases at a specific court-martial with known jurisdictional limits. Instead, Congress left determination of maximum punishment to the convening authority during the referral process, and thereafter, to the judiciary. One must guess at what Congress intended when it left determination of maximum punishment open to interpretation. Considering the overall statutory scheme, the statutory language that a person convicted under the 2012 version of Article 120 “shall be punished as a court-martial may direct” is inherently ambiguous. Because it is ambiguous, this Court should invoke the Rule of Lenity to resolve the ambiguity when determining the language’s meaning. Considering the statute in the light most favorable to AD3 Tabbitas, one must find that the maximum punishment in this case is that which is within the jurisdictional limit of a summary court-martial.

c. Applying Executive Order 13643 to offenses that occurred between 28 June 2012 and 14 May 2013 violates the expressed proscription of *ex post facto* laws under Article I, Section 9 of the United States Constitution.

(1) "An increase in the maximum sentence to confinement authorized for a crime would clearly be *ex post facto* legislation." *United States v. Gorski*, 47 M.J. 370, 373 (C.A.A.F. 1997). As discussed *supra*, the ambiguous language with respect to maximum punishment that exists in the 2012 Article 120 statute requires that the maximum authorized punishment for specifications 1 and 2 of charge I is that which may be imposed by a summary court-martial. Such a statutory interpretation is appropriate for offenses charged under Article 120 that occurred between 28 June 2012 and 14 May 2013.

(2) In *United States v. Kebodeaux*, the Court held that Congress maintained authority under the Necessary and Proper Clause to impose additional civil registration requirements upon sex offenders who had already served their criminal sentences. 570 U.S. ___ (2013). Paramount to the Court's ruling was the fact that these offenders were already subject to federal registration requirements under preceding legislation. *See Id*. *Kebodeaux* is not analogous to the case at bar. Several factors differentiate AD3 Tabbitas's case from *Kebodeaux*.

(3) First, *Kebodeaux* dealt with civil requirements, not punitive measures. Though sex offender registration is a consequence when a person is convicted of a sex offense, it is not a penalty that is imposed at sentencing. The issue here is a punitive one, as the question before the Court asks what punishment AD3 Tabbitas faces if convicted.

(4) Second, *Kebodeaux* was subject to federal sex offender registration requirements both when he was convicted and when Congress enacted changes to existing legislation. Because he was already subject to civil registration requirements, merely altering some of those requirements fell within the scope authorized under the Necessary and Proper clause, which allows Congress to pass legislation to bring uniformity to a "patchwork" of existing federal and state requirements. *Id*. (quoting *Reynolds v. United States*, 565 U.S. ___ (2012)). The *Kebodeaux* Court began its ruling with an assumption that the civil requirements did not violate *ex post facto*, so it would be errant to analogize the Court's analysis of the Necessary and Proper Clause to the *ex post facto* issue in this case.

(5) Applying Executive Order 13643 to Article 120, UCMJ, offenses that occurred between the statute's effective date and the date on which the order was issued would clearly violate the Constitution's proscription of *ex post facto* legislation. *Cf*. *Peugh v. United States*, 569 U.S. ___ (2013)(holding that it was an *ex*

post facto violation to sentence a defendant under sentencing guidelines that were promulgated after the date on which the offense occurred when the new guidelines resulted in a higher sentence than that which would have been imposed under the preceding sentencing guidelines). Unlike civil requirements considered in *Kebodeaux*, *Peugh* involved punitive measures. Though Congress maintained authority to adjust already-imposed civil restrictions under the Necessary and Proper Clause, the proscription of *ex post facto* legislation precluded the Government from increasing punishment after the date of the offense.

d. <u>If the Court does not find the maximum punishment language to be ambiguous, the Court should apply R.C.M. 1003(c)(1)(B) to determine a maximum punishment for the charged specifications.</u>

(1) R.C.M. 1003(b) lists the only possible punishments that a non-capital court-martial may adjudge: a reprimand, forfeiture of pay and allowances, a fine, reduction in pay grade, restriction to specified limits, hard labor without confinement, confinement, and/or punitive discharge. In addition to other limits found in the M.C.M.[3], R.C.M. 1003(c)(1) places maximum limits on those punishments based on the offense committed.

(2) Maximum punishment limits based on offenses are separated into two categories: limits for offenses that are listed

[3] *See* R.C.M. 201(f) and 1301(d) (jurisdictional limits of a court-martial); R.C.M. 1003(c)(2) (limits based on the rank of the accused).

in Part IV and limits for offenses that are not listed in Part IV. See R.C.M. 1003(c)(1). R.C.M. 1003(c)(1)(A)(i) contemplates that "the maximum limits for the authorized punishments . . . are set forth for *each*[4] offense listed in Part IV of this Manual." (emphasis added). The use of the word "each" in R.C.M. 1003(c)(1)(A)(i) suggests that an offense without maximum authorized punishment is not considered a listed offense.

(3) There is further guidance in the Discussion section that precedes the punitive articles in Part IV of the M.C.M.:

> Other than Articles 77 and 79, the punitive articles of the code are discussed using the following sequence: a. Text of the article; b. Elements of the offense or offenses; c. Explanation; d. Lesser included offenses; e. Maximum punishment; [and] f. Sample specifications.

Under Part IV of the 2012 edition of the M.C.M., Articles 120, 120b, and 120c only include the text of the statute. Those Articles do not include elements of the offense or offenses, an explanation section, stated lesser included offenses, authorized maximum punishment, or sample specifications. It is also worth noting that the quoted Discussion section was modified to reflect case law from 2012 prior to its insertion into the 2012 M.C.M. Modifications were *not* inserted, however, to specifically exclude

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[4] "Each: A distributive adjective pronoun, which denotes every one of the persons or things mentioned; every one of two or more persons or things; composing the whole, separately considered." *Black's Law Dictionary* 507 (6th ed. 1990).

Article 120 from the stated punitive article format, an example of which can be found in language that discusses Articles 77 and 79[5].

(4) One should conclude - based on the recognized meaning of the word "each," as used in R.C.M. 1003(c)(1)(A) and the Discussion section that precedes Part IV of the M.C.M. - that if an offense is "listed" in Part IV, then so too are elements of the offense or offenses, an explanation section, stated lesser included offenses, authorized maximum punishment, and sample specifications. To the contrary, when an offense does not contain elements of the offense or offenses, an explanation section, stated lesser included offenses, authorized maximum punishment, or sample specifications, that offense is not "listed," under the language of R.C.M. 1003(c)(1)[6].

(5) In this case, charge I alleges that AD3 Tabbitas violated Article 120 with acts articulated in two specifications. Though a section labeled "Article 120" can be found in Part IV of the current M.C.M., that section lacks several of the subsections intended to appear within every "punitive article of the code," as indicated in the Discussion section that precedes Part IV of the

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[5] Listings for Articles 77 and 79 in Part IV of the M.C.M. contain neither sample specifications nor maximum punishments, but unlike Article 120, they "are not chargeable offenses." M.C.M. Part IV (Discussion).

[6] Though the Rules for Courts-Martial are neither statutes, nor are they promulgated by a legislative body, any ambiguity therein should be resolved in favor of the accused. *Cf*. *United States v. Thomas*, 65 M.J. 132, 135 (C.A.A.F. 2007)(citation omitted).

M.C.M. Among four other subsections, the portion labeled "Article 120" is missing a subsection discussing maximum authorized punishment. Such a scenario directly contradicts the language the Discussion section preceding Part IV as well as the language in R.C.M. 1003(c)(1)(A), which contemplates that maximum authorized punishments accompany *each* listed offense. For these reasons, the section labeled "Article 120" in the current edition of the M.C.M. is not a "listed offense," as described in R.C.M. 1003(c)(1)(A).

(6) Because the charged offense under Article 120 is not listed in Part IV of the M.C.M. using conclusions drawn from R.C.M. 1003(c)(1)(A) and the Discussion section preceding Part IV, one must then examine whether R.C.M. 1003(c)(1)(B) applies to the present case. Specifically, subsection (i) of the stated Rule directs:

> For an offense not listed in Part IV of [the M.C.M.] which is included in or closely related to an offense listed therein the maximum punishment shall be that of the offense listed.

The inquiry is to determine whether Part IV lists an offense that is includes, or is related to, the charged specifications of rape and sexual assault. If so, then the appropriate maximum punishment that should be attributed to the unlisted offenses is that which can be attributable to the related offense that *is* listed in Part IV. Here, there exists a related offense to the alleged rape and

sexual assault. The most appropriate listed offense to use as a guidepost is assault consummated by a battery under Article 128.

(a) The United States alleges one specification of rape by force in violation of Article 120(a) and one specification of sexual assault in violation of Article 120(b). The elements of specification 1 are: (1) that AD3 Tabbitas committed a sexual act upon another person; and (2) that AD3 Tabbitas used unlawful force against that other person. The elements of specification 2 are: (1) that AD3 Tabbitas committed a sexual act upon another person; and (2) that the sexual act caused bodily harm to that person.

(b) The elements of assault consummated by a battery are: (1) "that the accused did bodily harm to a certain person;" and (2) "that the bodily harm was done with unlawful force or violence." Article 128(b)(2), UCMJ. Bodily harm under Article 128 means committing any offensive touching of another, however slight, and unlawful force or violence means that the accused wrongfully caused the contact, in that no legally cognizable reason existed that would excuse or justify the contact. *See United States v. Bonner*, 70 M.J. 1, 6 (C.A.A.F. 2011) (citations omitted). The maximum imposable punishment for assault consummated by a battery is "[b]ad conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months." M.C.M., Part IV para. 54e.(2).

(7) Because Part IV of the M.C.M. enumerates no maximum punishment for the alleged rape and sexual assault, the maximum

punishment for each specification should be that of assault consummated by a battery under Article 128. Specification 1 puts AD3 Tabbitas on notice that he must defend against an accusation of an act accomplished by using unlawful force. Specification 2 puts AD3 Tabbitas on notice that he must to defend against an accusation of an act that resulted in bodily harm. Under Article 128, an accused would similarly have to defend against an accusation of using unlawful force to commit bodily harm, specifically an offensive touching of the complaining witness for which no legally cognizable reason existed that would excuse or justify the contact, i.e. consent. In effect, charging the conduct at issue under either Article 120 or Article 128 would require the accused to defend against a nonconsensual offensive touching of the complaining witness using unlawful force. One could easily substitute the conduct alleged in specifications 1 and 2 of charge I as the basis for specifications alleging assault consummated by a battery. For these reasons, the absolute maximum punishment that a court-martial may impose for specifications 1 and 2 of charge I is bad conduct discharge, forfeiture of 2/3 pay per month for 6 months, and confinement for 6 months because these specifications are before a special court-martial.

e. <u>It would be an error to extend the maximum authorized punishment for specifications 1 and 2 of charge I to the maximum of all authorized punishments when the President has issued regulatory</u>

guidance for determining the maximum punishment for offenses not listed in Part IV of the M.C.M.

(1) Nowhere in R.C.M. 1003 is a court-martial instructed to defer to its jurisdictional limit in the absence of an enumerated maximum authorized punishment. Rather, the Rule provides several steps for narrowing the authorized punishment for a charged offense within a court-martial's jurisdictional limits. Most notably, the maximum authorized punishment is narrowed within a court-martial's jurisdictional limits when the charged offense is without an enumerated maximum punishment but is related to an offense for which a maximum punishment is listed in Part IV of the M.C.M.

(2) In fact - as R.C.M. 1003(c)(1)(B)(i) tells us - the maximum punishments enumerated in Part IV of the M.C.M. extend to "[i]ncluded or related offenses" with respect to listed offenses. In addition, R.C.M. 1003(c)(1)(B)(ii) offers further guidance when Part IV of the M.C.M. is without an offense that is related to the charged offense. Therefore, deferring to the limit of all authorized punishment is only applicable when several factors have been met: (1) the charged offense is not listed in Part IV of the M.C.M.; (2) Part IV of the M.C.M. does not contain maximum authorized punishment for an offense that is related to the charged offense; (3) the United States Code does not authorize a punishment for the charged offense; and (4) the custom of the service does not

authorize a punishment for the charged offense. *See* R.C.M. 1003(c)(1)(B)(i)-(ii).

(3) In this case, the United States cannot demonstrate that all of these factors have been met. As discussed *supra*, there exists at least one offense - assault consummated by a battery - that is includes, or is related to, the specifications 1 and 2 under charge I. Further, Part IV of the M.C.M. states the maximum authorized punishment for commission of assault consummated by a battery. As such, the maximum imposable punishments for assault consummated by a battery at a special court-martial are also the most appropriate guideposts with respect to the conduct the Government alleges in specifications 1 and 2 of charge I.

(4) To open AD3 Tabbitas up to any punishment available within the court-martial's jurisdictional limit would be to disregard guidance that the President issued in R.C.M. 1003(c)(1)(B)(i). Because assault consummated by a battery is an offense listed in Part IV of the M.C.M., and because it includes, or is related to, the specifications 1 and 2 under charge I, it would be an error to instead defer to the court-martial's jurisdictional limit for maximum authorized punishment with respect to those specifications.

f. <u>It would be an error to base maximum punishment in this case off a different offense enumerated in the United States Code</u>

because Part IV of the Manual already contains a closely related offense.

(1) In the absence of an enumerated punishment authorized by the President or a related offense listed in Part IV of the M.C.M., a charged offense is punishable by a sentence authorized by the United States Code or the custom of the service. R.C.M. 1003(c)(1)(B)(ii). In the present case, however, the Court need not turn to the United States Code or the custom of the service because the M.C.M. lists a related offense in Part IV.

(2) R.C.M. 1003(c)(1)(B)(ii) does not authorize - for application in a court-martial - a sentence applicable to criminal statutes found in the United States Code that are similar to offenses charged at court-martial. *See United States v. Beaty*, 70 M.J. 39, 42 n.7 (C.A.A.F. 2011)("[w]e observe that the closely related language [in R.C.M. 1003(c)(1)(B)(i)] . . . refers to offenses that are closely related to offenses listed in the M.C.M. – not offenses in the United States Code)(internal quotations and citations omitted). Following the court's guidance, one should not look to related criminal conduct enumerated in the United States Code in an effort to determine a maximum authorized sentence for conduct charged under the UCMJ. Here, the M.C.M. lists a related offense in Part IV - assault consummated by a battery. Turning to the Code is an inappropriate and unnecessary solution to a problem that does not exist. R.C.M. 1003(c)(1)(B)(ii) provides an ample

guide to determine a maximum authorized sentence for the charged conduct, and that approach is to consider related offenses that are listed in the M.C.M.

g. The custom of the service does not authorize a punishment in this case. Similar to the United States Code, the custom of the service is an inappropriate guidepost for determining a maximum sentence in this case. Our service has operated under three different versions of Article 120 of the UCMJ and two different commanders in chief since fiscal year 2006. Based on this, it is impossible to determine what the custom of the service has been with respect to the maximum punishment for the specifications at issue. Our service has not had adequate time and/or continuity in the law to establish a custom with respect to punishments authorized under Article 120. Observing maximum authorized punishment promulgated with respect to prior versions of the law or by prior commanders in chief are of no use. If the prior methods for dealing with the charged conduct were adequate guideposts, Congress would not have rewritten the statute, and the President would have instantly applied prior authorized punishments to the current version of Article 120. Neither is the case. For these reasons, the custom of the service has not authorized a punishment in this case.

h. In this case, the maximum authorized punishment is the jurisdictional limit of a summary court-martial.

(1) Because the statutory language with respect to maximum punishment under the 2012 version of Article 120 is ambiguous, the Court should turn to the Rule of Lenity when interpreting the language. In so doing, the maximum punishment for each specification under charge I is that which comes from viewing ambiguous statutory language in the light most favorable to AD3 Tabbitas. And such a reading would cap the punishment that may be imposed upon AD3 Tabbitas for each specification under charge I at the jurisdictional limit of a summary court-martial.

(2) Alternatively, should the Court find the maximum punishment language at issue to be unambiguous, the Court should turn to R.C.M. 1003 to determine the maximum punishment applicable to this case. Article 120 - as applied to the alleged conduct - was without the necessary subsections to constitute a listed offense under Part IV of the M.C.M., as interpreted by R.C.M. 1003(c)(1)(A). Assault consummated by a battery under Article 128 of the UCMJ is related to specifications 1 and 2 of charge I. Therefore, if the Court elects not to interpret the statute at issue using the Rule of Lenity, the defense respectfully requests that the Court invoke guidance issued under R.C.M. 1003(c)(1)(B)(i) and find that the maximum sentence authorized for specifications 1

and 2 of charge I is bad conduct discharge, forfeitures of 2/3 pay per month for 6 months, and confinement for up to 6 months.

(3) Last, the Court should not look to Executive Order 13643 to determine the maximum authorized punishment for specifications 1 and 2 of charge I. Whether the maximum authorized punishment is drawn from the Rule of Lenity or assault consummated by a battery under Article 128, Executive Order 13643 increases the maximum punishment after the alleged conduct occurred. Applying Executive Order 13643 to the alleged conduct in this case, therefore, violates the Constitution's proscription of *ex post facto* legislation.

4. **Relief Requested.** The defense respectfully requests that the Court impose the jurisdictional limit of a summary court-martial as the maximum authorized punishment for each specifications 1 and 2 of charge I.

5. Argument. The defense does not request oral argument.

6. Burden of Persuasion. The United States bears the burden of persuasion on any factual issue the resolution of which is necessary to decide this motion.

//s//	//s//
N. D. LINSTROTH	S. H. CARPENTER
LT, JAGC, USN	CIVILIAN
Defense Counsel	Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served electronically upon Trial Counsel and the Court on 2 August 2013.

//s//
N. D. LINSTROTH
LT, JAGC, USN
Defense Counsel

TABLE OF CASES

1. *United States v. Thomas*, 65 M.J. 132 (C.A.A.F. 2007)
2. *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803 (1989)
3. *United States v. Gorski*, 47 M.J. 370 (C.A.A.F. 1997)
4. *United States v. Bonner*, 70 M.J. 1 (C.A.A.F. 2011)
5. *United States v. Beaty*, 70 M.J. 39 (C.A.A.F. 2011)
6. *United States v.* Kebodeaux, 570 U.S. ___ (2013)
7. *Peugh v. United States*, 569 U.S. ___ (2013)

DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
SPECIAL COURT-MARTIAL

UNITED STATES V. AD3 NATHAN TABBITAS, USN

The accused has been arraigned on a Charge alleging two separate violations of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. He has also been arraigned on a charge of forcible sodomy under Article 125. Based on the Government's factual assertions in a motion to determine the maximum permissible punishment, the Article 120 allegations relate to what appears to be a single act of sexual intercourse that occurred on or about 19 October 2012. Trial on the merits has not yet begun.

For purposes of deciding the Government's motion *in limine*, I will assume that there has been a finding of NOT GUILTY to any offense or lesser offense under Article 125. I will further assume that the finder of fact has found AD3 Tabbitas GUILTY of one, and only one, violation of Article 120.

THE ALLEGATIONS AND THE GOVERNMENT'S MOTION

The Government alleges that AD3 Tabbitas committed sexual acts upon a female by inserting his penis into her vulva. Specification 1 of Charge I alleges that the act was accomplished by unlawful force, making it a violation of Article 120(a)(1). Specification 2 of Charge I alleges that the act was accomplished by causing bodily harm, making it a violation of Article 120(b)(1)(B). The two Charges and their underlying Specifications were referred for trial by Special Court-Martial on 29 July 2013 and the accused was arraigned the same day, having waived his three-day waiting period under Article 35. The Government's motion *in limine* requests that the court determine the maximum punishment before proceeding to trial.

To resolve the issue of the maximum punishment that can be imposed upon AD3 Tabbitas for his offenses if convicted, it is necessary to consider the complementary nature of Congressional and Presidential power regarding the "rules for government and regulation of the land and naval forces." It is also necessary to consider what effect the prohibition on *ex post facto* laws may have. It is finally necessary to determine what punishment is permissible if neither the Congress nor the President speaks

AE III

definitively before a statute under Chapter 47 of title 10, U.S Code, takes effect.

On 15 May 2013, the President signed Executive Order 13643, amending Part IV of the MANUAL FOR COURTS-MARTIAL, UNITED STATES, to incorporate legislative changes to the UCMJ and to fix punishments. The legislative changes apply to offenses that occur on or after 28 June 2012. Upon consideration of the revisions to the substantive portion of the Uniform Code of Military Justice, the parties' arguments, the Executive Order purporting to effect the 2011 amendments to the UCMJ, and case law, it is the court's determination that the maximum imposable punishment for each offense alleged, and for each offense necessarily included (*see* Article 79, UCMJ), is the punishment that can be imposed by a summary court-martial: confinement for 1 month, restriction for 2 months, hard labor without confinement for 45 days, and forfeiture of 2/3 pay per month for 1 month. The restraint-type punishments, moreover, may not be combined for any single offense.

Ripeness

Courts of the United States (28 U.S.C. § 451) do not issue advisory opinions, as there is no "case or controversy" before the courts. U.S. Const. Art. III § 2. *See Flast v. Cohen*, 392 U.S. 83, 95 (1968)(issue must be capable of resolution through the judicial, as opposed to political, system). Courts created by an Act of Congress under Article I of the Constitution, including courts-martial, are not bound by the Article III stricture, but they generally observe the prudential limitation. *See United States v. Chisholm*, 59 M.J. 151, 152 (C.A.A.F. 2003).

In AD3 Tabbitas's case, there is in fact a "case or controversy" independent of the Government's motion *in limine*. A charge has been referred for trial, and the parties are at liberty to negotiate a pretrial agreement as provided in Rule for Courts-Martial 705. That negotiation is only reasonable, however, if the parties understand the stakes. *See, e.g., United States v. Perron*, 58 M.J. 72, 78 (C.A.A.F. 2003). Questions of punishment arise during the voir dire process and must be resolved to ensure that members fully understand the accused's punitive exposure. If there is a conviction, members will need to be instructed properly on the maximum permissible sentence. R.C.M. 1005.

This case is ripe from the Government's perspective because, if the maximum punishment is incorrectly determined,

the Government has no recourse to seek a greater punishment than that imposed by the court-martial (unlike in the United States District Court, for example, where an appeal may be taken to the United States Court of Appeals for departure from a sentencing guideline range that represents an abuse of discretion). This case is ripe from the accused's perspective as well, because if a panel were to award a punishment based on the maximum advocated by the Government, and the actual permissible punishment is well below those limits, then he would be illegally confined if he served more than a minimal amount of confinement, and the only "meaningful relief" available could be disapproval of the findings and adjudged sentence. The normal post-trial and appellate review processes provided by Articles 60, 64, 66, and 67 are insufficiently nimble to prevent this illegal confinement, and while deferment of sentence or a writ of *habeas corpus* might be beneficial, once again the risk to the accused is palpable. Accordingly, this matter is ripe for decision.

2011 Amendments to Article 120

When the National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2011), became law, it included amendments to Article 120, Uniform Code of Military Justice. Those amendments set out new offenses involving sexual acts, and further established new offenses involving video recording and acts with children. *See id.* §§ 541 *et seqq.*, 125 Stat. 1404 *et seqq*. While the NDAA did not repeal existing law, it did so heavily modify the elements and definitions of the offenses that the effect was the same as a repeal. As previously noted, the amendments relate to offenses occurring on or after 28 June 2012.

All the new articles (120, 120a, 120b, and 120c) include the vague penalty provision common to most other punitive articles of the UCMJ, which is that the offender shall be punished "as a court-martial may direct." By contrast, the previous major overhaul to the statutes involving sexual offenses included interim punishments in anticipation of a delay between the effective date of the legislation and the determination and publication of limits. *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163 § 552(b), 119 Stat. 3263 (2006).

There are two extremes to be considered for punishment for the offenses defined by the 2011 amendments. One could take an expansive approach and argue that any punishment not prohibited

by the Code could apply; in other words, any offense in the 2011 amendments to the Code could subject the offender to imprisonment for life without the possibility of parole and all the accessory punishments. This is the approach necessarily taken by the Government when it argues that the recent Executive Order does not constitute an *ex post facto* law, although the bulk of the Government's argument is that punishments for the now superseded Article 120 should apply. The other extreme is that, because the President has not specified limits, the limit is "no punishment".

The court's decision is informed to some degree by a basic tenet of administrative law, which is that "an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments, [and] [w]hen a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 864-65 (1984). The question is what a court is to make of the Executive's decision not to exercise the authority granted by Article 56 to fill the gap created by the 2011 amendments until adoption of Executive Order 13643 on 15 May 2013, 78 Fed. Reg. 29559. If Executive inaction is actually "agency policy," then the answer is clearly that the wisdom of not specifying punishments may not be successfully challenged, and that the Executive is saddled with the choice -- no substantial punishment for offenses that occurred between the effective date of the statute and the date of the Executive Order -- that it has made.

PUNISHMENT UNDER THE UCMJ

In the usual course of business, the President exercises his authority under Article 56 to specify punishments for those offenses that do not have a statutory penalty, and those punishments are set out in Executive Orders that usually coincide with the effective date of the statutes. The language of the Article shows that Congress clearly intends complementary action by the President, as punishments "may not exceed such limits as the President may prescribe." 10 U.S.C. § 856. Congress's provision of interim punishments in the 2006 NDAA clearly reflected an awareness of this authority and a concern about a possible lag in its exercise.

The President's determinations for individual offenses are set out in Part IV of the MANUAL FOR COURTS-MARTIAL after going through an administrative rulemaking process similar to that set out in section 553 of title 5, *United States Code*. *See generally* Department of Defense Instruction 5500.17 of 03 May 2003, Enclosure (2). In certain limited cases, the President may bypass the rulemaking process, *see id.*, but only he has the authority to amend Parts I through V of the Manual, and he does so by Executive Order. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), Part I, ¶ 4 Discussion (noting, among other things, that the Joint Service Committee adds Discussion, Analysis, and other non-rule materials to the MANUAL).

Prior editions of the MANUAL FOR COURTS-MARTIAL placed punishments for the most part in a Table of Maximum Punishments. *See, e.g.*, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1969), ¶ 127. Prior editions also noted statutorily prohibited punishments (those punishments forbidden in Article 55) and punishments prohibited by custom of the service. 1969 MANUAL, ¶ 125. Today's MANUAL maintains the Table of Maximum Punishments as Appendix 12. Today's MANUAL also lists, in Part IV, the maximum punishment available for individual offenses.

Statutory Expressions of Punishments

The Uniform Code of Military Justice is unique among criminal statutes in that most of the Articles in the Code are silent as to punishment. Indeed, court-martial sentencing is unique in that it is the finder of fact who sentences, and in practical effect all sentence pronouncements are "advisory" given the procedure of Article 60.

The typical penalty language provides that the offender "shall be punished as a court-martial may direct." In the imposition of punishments, courts-martial are subject to three general limitations. Courts may not impose punishments prohibited by the Code (for example, the punishments forbidden by Article 55, among them flogging and tattooing). Courts may not exceed the jurisdictional limits of the three types of court-martial (general, special, and summary) contained within Articles 18 through 20 of the Code. Courts may not exceed limitations imposed by the President for various offenses. *United States v. Varnadore*, 26 C.M.R. 251, 253 (C.M.A. 1958).

While most penalty provisions in the UCMJ are "as a court-martial may direct," some offenses contained within the UCMJ do specify limits on punishments, usually in the nature of

mandatory punishments, among them Spying in violation of Article 106 (mandatory death), Misbehavior of a Sentinel in violation of Article 113 (death or other punishment in time of war, any punishment but death if not in time of war), and Premeditated or Felony Murder in violation of Article 118(1) and 118(4), respectively (death or mandatory life).

In contrast, every statute in the United States Criminal Code (title 18) and offenses scattered throughout the rest of the United States Code (*e.g.*, 16 U.S.C. § 1540; 17 U.S.C. § 506; 21 U.S.C. § 848; 22 U.S.C. § 2778; 26 U.S.C. § 7201; 31 U.S.C. § 5324; 36 U.S.C. § 509; 38 U.S.C. § 6102) set out a statutory limit on punishment. Some specify mandatory minimum punishments as well. Similarly, State criminal codes specify punishments, whether within a specific criminal provision or by classification as a particular degree of misdemeanor or felony. Also, as noted above, the 2006 revisions to Article 120 in the Uniform Code of Military Justice did contain interim punishments pending Executive determination.

Regulatory Basis for Punishment

Because the 2011 amendments did not specify punishments, and because the President has only within the last two months set out limitations, one must look to other sources for determining available punishments. The MANUAL FOR COURTS-MARTIAL does have some guidance on sentences that may be imposed at any court-martial, and that guidance appears in Rule for Courts-Martial 1003.

The Rule begins by stating that "[s]ubject to the limitations in this Manual, the punishments authorized in this rule may be adjudged in the case of any person found guilty of an offense by a court-martial". R.C.M. 1003(a), MCM, Part II. Subdivision (b) of the Rule describes the various penalties. Critically, subdivision (c) discusses limitations on punishments. The President through the rulemaking process that created R.C.M. 1003 has previously determined that there are two categories of offenses whose punishments are subject to the limitations in subdivision (c), those that are listed within Part IV of the MANUAL and those that are not listed within Part IV of the MANUAL.

One could argue, as the Government does, that because the predecessor to the current Article 120 is listed in Part IV of the MANUAL, then those limits should apply. The Government's argument has some appeal because it provides some certainty to

courts-martial hearing the new Article 120 cases and it generally results in punishments less than the jurisdictional maximum of a general court-martial. Referring to the predecessor of Article 120 is inappropriate, however, because, at the time that the alleged crime occurred, in December 2012, the activity was not a violation of the 2006 version of Article 120. Granted, there are some similarities in elements and definitions, but the fact of the matter is that for all offenses that occurred after the effective date of the 2011 amendments, the 2006 provisions cannot apply.

It bears repeating that the President only recently included the 2011 amendments to the punitive articles in Part IV of the MANUAL, and that he only recently specified any maximum punishments. The Department of Defense, acting through the Joint Service Committee on Military Justice, began the rulemaking process by advising the public of proposed changes and calling for comments. 77 Fed. Reg. 64854 (2012). The 2012 version of the MANUAL does include, in Part IV, the statutory text of the 2011 amendments, but because the rulemaking process (including modes of proof, explanations, and the like, areas commended to the President under a separate provision, Article 36) has only recently been completed and an Executive Order issued, those amendments have just now become a full-fledged part of the MANUAL FOR COURTS-MARTIAL. (The inclusion of the offenses in the MANUAL is no mere ministerial act, moreover; it represents a determination by the President, under his statutory rulemaking authority in Article 36, that the jurisdiction of courts-martial should be exercised in a certain fashion and with certain modes of proof.) The current version of Article 120 is thus not an offense listed in Part IV of the MANUAL, so the guidance of R.C.M. 1003(c)(1)(A) does not apply.

Turning to R.C.M. 1003(c)(1)(B), one could conclude that because a sexual act accomplished by unlawful force or accomplished by bodily harm is related to an offense that is listed in the pre-15 May 2013 Part IV of the MANUAL, then the maximum punishment for the previously extant offense should apply. The difficulty with this approach is that no case interpreting Rule 1003(c)(1)(B) has ever applied its provisions to Articles 80 through 132 of the Uniform Code of Military Justice; instead, the Rule has been used only in those cases where offenses have been laid under Clause 1 or Clause 2 of the General Article and have not been included in the MANUAL as "various circumstances in which the elements of Article 134 could be met," *United States v. Jones*, 68 M.J. 465, 471 (C.A.A.F. 2010), or in prosecutions under Clause 3 of the

General Article for noncapital crimes and offenses, whether violations of other portions of the United States Code or violations of state law that are prosecuted under the Federal Assimilative Crimes Act, 18 U.S.C. § 13. *See, e.g., United States v. Beaty*, 70 M.J. 39 (C.A.A.F. 2011); *United States v. Leonard*, 64 M.J. 381 (C.A.A.F. 2007); *United States v. Bivins*, 49 M.J. 328 (C.A.A.F. 1998).

The Government is correct that past statutes and customs may support a cry for "substantial punishment" in sexual assault cases that approaches the jurisdictional maximum of a general court-martial. *See Beaty*, 70 M.J. at 49 (Baker, J., dissenting). Certainly, the current political climate points in that direction. Unfortunately, however, the "custom of the service" language appears in a portion of the Rules for Courts-Martial, 1003(c)(1)(B)(ii), that is inapplicable to the statutory offense with which AD3 Tabbitas is charged. The Government has likewise failed to present evidence of any "custom of the service" specific to the newly enacted legislation. *See Beaty*, 70 M.J. at 44 (absence of a custom "cannot mean" that the maximum of life without parole applies). Finally, the term "custom of the service" has historically been applied as one of limitation, not expansion, on punishments. *E.g.*, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1969), ¶ 125.

As a final note on the regulatory scheme, I reject the suggestion to look to other, analogous, statutes for guidance as provided in R.C.M. 1003(c)(1)(B)(ii). The plain language of the Rule directs consulting "the United States Code" for similar offenses if there is no punishment provided for a Part IV offense. Title 10 is indisputably part of the United States Code, and it provides for no punishments in these new Article 120 offenses.

The Government's suggestion is consonant with the Defense's proposed alternative middle ground, which is to adopt the punishment of battery for the offenses contained within the 2011 amendments. The difficulty with the Defense's position in this regard is that an arguably closely related statute -- battery in violation of Article 128, 10 U.S.C. § 928 -- also does not provide a definitive punishment; the punishment is provided by the President using his Article 56 authority. Even using the various stated punishments under Article 128 poses problems, as the assorted types of assault and battery are, logically, offenses that are included within the greater sexual assault offenses, yet they are punished more harshly (as will be discussed more fully below).

The Government's position is even more tenuous, as the constitutional basis for title 10 -- Congressional authority to enact laws for the regulation of the government of the land and naval forces complemented by the President's authority as Commander in Chief -- is different from the constitutional or other legal basis of other titles of the Code. *Compare, e.g.*, 18 U.S.C. § 1001 (frustration of a federal purpose) *with* 18 U.S.C. § 2422 (use of a means of interstate commerce to effect the crime). *Cf. United States v. Kebodeaux*, No. 12-418 (U.S. June 24, 2013), slip op. at 6-8 (noting that the Military Clause in the constitution may be carried into force by the Necessary and Proper clause). These constitutional bases are also reflected in jurisprudence over the ages recognizing a military society that is distinct from civilian society. *See, e.g., Parker v. Levy*, 417 U.S. 733, 743 (1974). While it is gratuitous perhaps to restate the point, neither the parties' briefs nor my own research reveals any instance in which the "other analogous statute" authority has been used outside the General Article context.

Ex Post Facto concerns

There is a case to be made that, because the President's Executive Order is not legislation, the constitutional *ex post facto* prohibition does not apply. The prohibition in fact is found in the "legislative" portion of the constitution. U.S. Const. art. I, § 9, cl. 3. *See also United States v. Gorski*, 47 M.J. 370, 373 (C.A.A.F. 1997)(opinion apparently limited to the effect of legislation). Considering, however, the manner in which the UCMJ is drafted and implemented, and because of the separation and sharing of powers envisioned by the Constitution in military and naval criminal matters, this strict textual argument must fail. Even if the *ex post facto* clause does not by its terms apply, the concept of the judicial interpretation that any law that aggravates an offense is harsh and oppressive, *see Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925), does, and accordingly due process, if nothing else, requires limiting the punishment. *See also Peugh v. United States*, No. 12-62 (U.S. June 10, 2013), slip op. at 13-14 (citing fifth amendment due process concerns for curtailing *ex post facto* effect).

Congress may not normally delegate legislative authority to the Executive branch, as to do so would violate the "finely wrought" constitutional provisions, especially the Presentment Clause, U.S. Const. Art. I § 7, cl. 2. *See Clinton v. City of New York*, 524 U.S. 417, 421 (1998). In some limited cases,

however, where the Executive is in control, as in foreign relations, Congress may constitutionally allow some discretion in shaping the contours of its legislation. *Id.* at 445 n.38 (citing *Field v. Clark*, 143 U.S. 649 [1892], upholding portions of the Tariff Act allowing the President to "suspend" various aspects of the Act in appropriate cases). Congress has in fact delegated some authority to the Executive in cases of controlled substances. *See* 21 U.S.C. § 811. Certainly any prosecution for a substance added to the various schedules of controlled substances is subject to the *Ex Post Facto* clause.

So, too, should a delegation to the Executive to decide punishments at courts-martial, recognizing the President's role as Commander in Chief of the Armed Forces, be considered a valid exercise of the legislative power, thus bringing such a determination into the fold of Article I authority for the purposes of *ex post facto* scrutiny. Congress is in all cases "the constitutionally recognized source of authority over the military system of justice." *Chappell v. Wallace*, 462 U.S. 296, 304 (1983). *Accord Jones*, 68 M.J. at 468. The President is the Commander in Chief of the Armed Forces. U.S. Const. Art. II § 2. "The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive branches." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973).

The Government argues that, because the potential maximum punishment was confinement for life without parole and all accessory punishments, then the Executive Order of 15 May 2013 works to the benefit of all service members and does not therefore constitute an *ex post facto* law. For the reasons discussed throughout this order, the Government's argument begins at the incorrect starting point. Accordingly, any punishment exceeding that which could be imposed by a summary court-martial is prohibited as *ex post facto*. *See, e.g., Beazell*, 269 U.S. at 169-70 (1925)(law is so well settled that citation is not necessary to support the proposition that making punishment more burdensome than previously violates the clause).

As a final point in its argument that the amendments are not *ex post facto*, the Government invokes *Taylor v. Garaffa*, 57 M.J. 645 (N.M.C.C.A. 2002). *Taylor* involved a challenge to the increase of the jurisdictional limit on punishments that could be imposed at a special court-martial. Before the amendments to Article 19, the maximum confinement that could be imposed at a special court-martial was 6 months, irrespective of any greater

maximum punishment authorized for the offense; the amendments increased the limit to confinement for a year. *Taylor*, 57 M.J. at 647-48.

Taylor's legal footing, however, was vastly different from AD3 Tabbitas's case. Sergeant Taylor would always have been subject to the maximum punishment for his offense of wrongful cocaine use -- confinement for 5 years, a dishonorable discharge, and other punishments -- had his case been referred for trial by a general court-martial. The legislation did not increase the punishment for that particular offense, merely the ceiling on the forum to which it had been referred. *See Taylor*, 57 M.J. at 651 (citing *Duncan v. Missouri*, 152 U.S. 377, 382-83 [1894] for the proposition that creating a new forum did not constitute a prohibited *ex post facto* law).

The Rule of Lenity

The Rule of Lenity provides that criminal statutes are to be strictly construed, with any ambiguity resolved in favor of an accused. *See, e.g., United States v. Thomas*, 65 M.J. 132, 135 n.2 (C.A.A.F. 2007). *But see United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820)(interpretation must give effect to the intent of the legislature).

When interpreting a statute and giving it effect, it is not enough to read it in isolation. Rather, the statute must be read in the context of the overall statutory scheme. *See, e.g., Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). Congress created the revised Article 120 in the context of the Uniform Code of Military Justice, Chapter 47 of title 10, and that Chapter's provisions include the three different courts-martial. Congress could have limited disposition of these types of offenses as it did in Article 106 (all allegations of Spying shall be referred to a general court-martial), but it chose not to do so. Indeed, as further evidence of Congress's understanding of its authority to specify fora and mandatory minimum punishments, one need look only as far as the draft National Defense Authorization Act for Fiscal Year 2014 proposed by the House Subcommittee on Military Personnel, H.R. Rep. No. 1960, 113th Cong., 1st Sess. 13 (2013)(providing that all sexual misconduct cases shall carry a mandatory minimum punishment of dismissal for officers or dishonorable discharge for enlisted members, punishments available only at a general court-martial). Congress could have enacted interim punishments as it did with the 2006 provisions, but it chose not to do so. *See also Gorski*, 47 M.J. at 372 n.1 (setting out "severance" language to

permit the legislation to survive a challenge against retrospective application). Instead, it left referral and punishment to convening authority and court-martial discretion.

Applying the Rule of Lenity leads to the conclusion that, while a service member may be convicted of the offenses established by the 2011 amendments, thus giving effect to the intent of the legislature to criminalize sexual offenses, the maximum punishment that can be imposed is the statutory limit imposed on a summary court-martial. This maximum punishment (confinement for 1 month, hard labor without confinement for 45 days, restriction to limits for 2 months, forfeiture of 2/3 pay per month for 1 month) may be imposed irrespective of forum. This maximum criminal penalty is, in the area of sexual offenses, augmented by a civil disability created by a requirement to register as a sex offender and to comply with conditions of varying degrees of severity from state to state. *See generally* Chapter 151 of title 42, *United States Code*. *See also Kebodeaux*, No. 12-418, (U.S. June 24, 2013), opinion of Roberts, C.J., concurring in the judgment at 2 (Congress can give rules in the Military Clause force by imposing consequences such as sex-offender registration on those who violate them). The legislature's interests are thus protected.

The Rule of Lenity extends to any conviction of AD3 Tabbitas of a lesser included offense under the authority of Article 79, UCMJ, 10 U.S.C. § 879. While Article 79's language addresses offenses that are "necessarily included" within a charged offense, in the military justice arena that statute has always been understood to mean "lesser included offense." *See generally United States v. Jones*, 68 M.J. at 467. The universal view in the cases, moreover, is that "lesser" describes not only the quantity or quality of elements, but also punishment. *See, e.g., Carter v. United States*, 530 U.S. 255, 260 n.2 (2000). It is here that due process dictates that the maximum punishment be limited to that of a summary court-martial.

CONCLUSION

This order is necessarily limited to the two Specifications under Charge I, namely, violations of Articles 120(a)(1) and 120(b)(1)(B), respectively. Additionally, because of the nature of a court-martial, this order has no precedential effect; it may, however, be persuasive before other courts-martial and on other aspects of the 2011 amendments.

Because the smallest punitive burden is found at a summary court-martial, as a matter of due process it is only those punishments authorized for that forum (confinement for 1 month, hard labor without confinement for 45 days, restriction for 2 months, forfeiture of 2/3 pay per month for one month) that may be imposed upon AD3 Tabbitas if he is convicted of any of the offenses alleged or of any lesser included offense under the authority of Article 79, UCMJ, 10 U.S.C. § 879. So ordered.

LEWIS T. BOOKER, JR.
CDR, JAGC, USN
Military Judge

12 AUG 2013

DEPARTMENT OF THE NAVY
NAVY AND MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
SPECIAL COURT-MARTIAL

U N I T E D S T A T E S	)	**5 AUGUST 2013**
v.	)	
NATHAN J. TABBITAS **AD3 / E-4** **United States Navy**	)	**MOTION TO DETERMINE THE MAXIMUM PUNISHMENT FOR ARTICLE 120 OFFENSES**

1. <u>Nature of Motion</u>.

Pursuant to Rule for Court-Martial (R.C.M.) 905(b), the Government requests that the Court determine the maximum punishment for the offenses charged under Article 120 of the Uniform Code of Military Justice (UCMJ).

2. <u>Summary of Facts</u>.

(a) On 18 October 2012, AN [redacted] and AD3 Nathan J. Tabbitas (hereafter "the Accused") went to a bar aboard Al Udeid Airbase, Qatar. They met that day when the Accused checked into AN [redacted]'s unit. Both lived on base in the barracks, but they did not know each other prior to this day.

(b) While at the bar, AN [redacted] and the Accused had two or three alcoholic beverages at the bar before they decided to walk back to the barracks. As she was walking with the Accused back to the barracks, AN [redacted] began feeling sick, dizzy, and

disoriented.

(c) At no time did AN [redacted] invite the Accused into her room or discuss engaging in any romantic or sexual activities with the Accused. When they arrived at AN [redacted]'s room, the Accused followed AN [redacted] into her barracks room, uninvited, and closed the door.

(d) AN [redacted] continued to feel dizzy and confused. She did not know why the Accused had followed her into her room.

(e) The Accused sat next to AN [redacted] on her bed while she ignored him and continued to feel sick. The Accused got up off the bed and when AN [redacted] looked up, the Accused had taken his clothes off and was naked. The Accused climbed on top of AN [redacted], and she told him to stop. The Accused pulled her pants and underwear off, held her down by placing his hand on her neck and holding one of her wrists down, and proceeded to rape her vaginally. AN [redacted] disclosed that she was in shock, unable to physically stop the Accused from raping her, and he did not respond to her when she told him to stop.

(f) The Accused climbed off AN [redacted] and sat on the floor near the bed. He then proceeded to pull AN [redacted] off the bed and he forced her to perform oral sex on him by holding the back of her head.

(g) The Accused ejaculated and then proceeded to get gather his belongings and leave AN [redacted]'s room.

(h) AN [redacted] reported this sexual assault on 22 October 2012 to an AFOSI agent in Qatar. She reported to this special agent after initially making a restricted report on 20 October 2012.

(i) On 15 April 2013, one Specification of rape and one Specification of sexual assault both under Article 120, UCMJ, were preferred against the Accused. In addition, the Accused was also charged with violating Article 125 of the UCMJ, forcible sodomy.

(j) On 2 June 2013, an Article 32 Investigation was conducted at Naval Air Station Whidbey Island. In his report dated 7 June 2013, the Investigating Officer concluded there were no reasonable grounds to go forward to a court-martial for all charges and specifications.

(k) On 29 July 2013, both Specifications charged under Article 120 were referred to a Special Court-Martial by Commander, Patrol and Reconnaissance Wing TEN.

(l) The Accused is charged with committing a sexual act upon AN [redacted] to wit: penetration of her vulva by his penis, by unlawful force, to wit: holding her down with his hands, forearm, and body in violation of Article 120 of the UCMJ. The Accused is also charged with committing a sexual act upon AN [redacted], to wit: penetration of her vulva by his penis, by causing bodily harm to her, to wit: by holding her on the bed and putting his hands on her wrists and arms in violation of

Article 120 of the UCMJ. In addition, the Accused is charged with committing forcible sodomy upon AN [redacted] in violation of Article 125, of the UCMJ.

3. <u>List of Authorities.</u>

a. Rule for Courts-Martial 1003

b. Article 18, Uniform Code of Military Justice

c. Article 19, Uniform Code of Military Justice

d. Article 56, Uniform Code of Military Justice

e. Article 120, Uniform Code of Military Justice

f. Article 120b, Uniform Code of Military Justice

g. 18 U.S.C. § 2241(a)(1) (2012)

h. 10 U.S.C. § 920 (2011)

i. *Loving v. United States*, 517 U.S. 748 (1996)

j. *United States v. Curtis*, 32 M.J. 252 (C.M.A. 1991)

k. *Taylor v. Garaffa*, 57 M.J. 645 (N.M.C.C.A. 2002)

l. *United States v. Gorski*, 47 M.J. 370 (C.A.A.F. 1997)

m. *United States v. Peugh*, 569 U.S.___ (2013)

n. *United States v. Kebodeaux,* 579 U.S. ___ (2013)

o. *United States v. Leonard*, 64 M.J. 381 (C.A.A.F. 2007)

p. *United States v. Beaty,* 70 M.J. 39 (C.A.A.F. 2011)

q. *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010)

4. <u>Discussion</u>.

In this case, the maximum punishment for the Specification of rape should be a dishonorable discharge, forfeitures of all

pay and allowances, and confinement for life without eligibility for parole. The maximum punishment for the Specification of sexual assault should be a dishonorable discharge, forfeitures of all pay and allowances, and confinement for 30 years. This is the maximum punishment recently established by the President in Executive Order 13643 published on 15 May 2013. This maximum punishment will be further limited by the special court-martial forum to a bad conduct discharge, forfeitures of two-thirds pay for 12 months, and confinement for 12 months.[1]

If the Court determines that the Executive Order is a violation of the *ex post facto* Clause, Article 120 is a "listed offense" under R.C.M. 1003, and the maximum punishment should be the jurisdictional maximum available at the court-martial. That would mean that the maximum punishment available for Article 120 would typically be a dishonorable discharge, forfeitures of all pay and allowances, and confinement for life without eligibility for parole because such offenses are generally referred to a general court-martial. Because this charge has been referred for trial by special court-martial, however, the forum limits the maximum punishment to a bad conduct discharge, forfeitures of two-thirds pay for 12 months, and confinement for 12 months.

Alternatively, if the Court determines Article 120 is not a "listed offense," it could look to either the previous version

[1] *See* Article 19, UCMJ; R.C.M. 201(f)(2)(B).

of Article 120 promulgated in 2007 or the United States Code for guidance by examining the maximum punishments in place for a "closely related" offense. Both offenses of rape and sexual assault as described in the current version of Article 120 and as charged in this case are essentially identical to the offenses of rape and aggravated sexual assault as described in the 2007 version of Article 120. Moreover, the offense of rape as described in the current version of Article 120 and as charged in this case is also essentially identical to the offense identified in 18 U.S.C. § 2241(a)(1) (2012).

a. Law regarding courts-martial maximum punishments.

Congress has the power to delegate to the President the establishment of penalties at courts-martial. *Loving v. United States*, 517 U.S. 748, 769 (1996). Congress delegated this power through Articles 18, 19, 20 and 56 of the UCMJ. *Id.* Article 56 provides that "the punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense," while Articles 18, 19, and 20 describe the maximum punishments permitted in each forum (general court-martial, special court-martial, summary court-martial), subject to any "limitations as the President may prescribe." R.C.M. 1003(b) further articulates the types of punishments that are authorized under the MCM. Overall, the maximum punishment authorized by the MCM is that which is

permitted at a general court-martial, the most serious forum available. Article 18 prescribes that the maximum punishment available at a general court-martial is "any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter."

These Articles, when taken together, reveal that Congress legislated that the President shall set the maximum punishments imposable in trial by courts-martial. *United States v. Curtis*, 32 M.J. 252, 261 (C.M.A. 1991). Finally, the current version of Article 120 dictates that for the offenses of rape and sexual assault, any person found guilty "shall be punished as a court-martial may direct."

b. Current state of the law.

As the Court is aware, on 15 May 2013, the President signed Executive Order 13643 that amended the Manual for Courts-Martial (MCM) and established the maximum punishment for Article 120 offenses that were committed after 28 June 2012. In this amended version, the maximum punishment for rape is: "dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole." The maximum punishment for sexual assault is: "dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years." This amendment puts in writing a maximum punishment that is within the allowable punishment at a general

court-martial.

c. The President has established Part IV of the MCM for Article 120 offenses committed after 28 June 2012.

Although this amendment to the MCM occurred after the commission of the offenses charged in the present case, it is the Government's position that it is not an *ex post facto* law because it does not increase the maximum punishment for the Accused. Rather, for Specification 1 of Charge I, the maximum punishment is unchanged by this amendment; it remains: a dishonorable discharge, forfeitures of all pay and allowances, and confinement for life without eligibility for parole. And for Specification 2, of Charge I, the maximum punishment is significantly reduced to confinement for 30 years.

The standard for determining whether a law is in violation of the *ex post facto* Clause, was addressed in *United States v. Gorski*, 47 M.J. 370 (CAAF 1997). It states that a law is *ex post facto* if it falls within any of the following four categories:

> 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the

> commission of the offence, *in order to convict the offender*.

Gorski, 47 M.J. at 373 (emphasis in original). "An increase in the maximum sentence to confinement authorized for a crime would clearly be *ex post facto* legislation." *Id.* "Legislation must give 'fair warning' of its effect so that people can rely on the law's meaning." *Id.* (quoting *Weaver v. Graham*, 450 U.S. 24, 28 (1981)). The Executive Order issued on 15 May 2013 created an Amendment to the 2012 MCM that does not increase the maximum sentence for the Accused; it does not change the maximum punishment for Specification 1 of Charge I and it lowers the maximum punishment for Specification 2 of Charge I. Therefore, the Accused was given fair warning of the maximum punishment for the offenses preferred against him.

In *Taylor v. Garaffa*, 57 M.J. 645 (N.M.C.C.A. 2002), a similar Executive Order was addressed that increased the jurisdictional maximum sentence at a Special Court-Martial. The court concluded that the application of that Executive Order did not violate the enhanced-punishment prohibition in the Constitution's *ex post facto* clause. The court stated that the petitioner, like the Accused in the present case, was already subject to the punitive consequences provided in the Amendment. Therefore, the Executive Order did not violate the *ex post facto* clause.

More recently, the United States Supreme Court reviewed a change to Federal Sentencing Guidelines to determine if they were applied as an *ex post facto* law in *United States v. Peugh*, 569 U.S.___ (2013). In this opinion, the Supreme Court concluded that the *ex post facto* clause is violated when a defendant is sentenced under Guidelines promulgated after he committed his criminal acts and the new version provides a higher sentencing range than the version in place at the time of the offense. The Court applied the following test in its analysis: "This Court's inquiry is whether a given change in law presents a 'sufficient risk of increasing the measure of punishment attached to the covered crimes.'" *Id.* (citing *Garner v. Jones*, 529 U.S. 244, 250 (2000)). In *Peugh*, "the purpose and effect of the change in [the Guidelines calculation] was to increase the rates and length of incarceration for [fraud]." *Id.* (citing *Miller v. Florida*, 482 U.S. 423, 431 (1987)).

The opinion in *Peugh* can be contrasted with the current Executive Order that did not create or increase a minimum *and* maximum punishment, but simply imposed a maximum punishment. The military judge is able to impose a range of punishments from no punishment at all up to the maximum punishment allowable for the particular offense and/or court-martial. Therefore, this case does not impact the *ex post facto* analysis for the present case.

In an even more recent opinion, the Supreme Court in *United States v. Kebodeaux,* 579 U.S. ___ (2013) reviewed the application of the Sex Offender Registration and Notification Act (SORNA), which was enacted in 2006, after Kebodeaux was convicted, served his sentence, and was discharged from the Air Force with a Bad Conduct Discharge. "By regulation, SORNA registration requirements apply to federal sex offenders who, when SORNA became law, had already completed their sentence." *Id.* The issue before the Court was whether Congress has the power to enact SORNA's registration requirements and apply them to a federal offender who had completed his sentence prior to the time of SORNA's enactment. The Court stated, "For purposes of answering this question, we assume that Congress has complied with the Constitution's *Ex Post Facto* and Due Process Clauses." *Id.* In addition to imposing sex offender registration requirements, SORNA "increased the federal penalty for a federal offender's registration violation to a maximum of 10 years from a maximum of 1 year for a first offense." *Id.* Although the Court did not specifically address this issue in its opinion, its assumption is that SORNA is not in violation of the *ex post facto* clause. However, it remains the Government's position that the Executive Order does not increase the maximum punishment because the maximum punishment before the Executive Order was already life without the possibility of parole. If

the Court disagrees with the Government's position, however, the Supreme Court has provided an example where an increase in the federal penalty is not a violation of the *ex post facto* clause.

Based on the above-mentioned cases, the Amendment to the 2012 edition of the MCM is not in violation of the *ex post facto* clause because it does not increase the maximum punishment for the Accused. Prior to the Amendment, the maximum punishment for the offenses the Accused is charged with committing was a dishonorable discharge, forfeitures of all pay and allowances, and confinement for life without the possibility of parole. This Amendment implements an equivalent maximum punishment. Therefore, the Accused had notice of the maximum punishment prior to this Amendment and he is not harmed by this Amendment.

d. Alternatively, if the Court finds the Amendment to be inapplicable to the present case, the maximum punishment for this offense should be the jurisdictional maximum at a general court-martial.

If the Court determines that the recent amendment to the 2012 edition of the MCM is not applicable to the present case, the following analysis should be applied to determine the maximum punishment. R.C.M. 1003(b) lists the only possible punishments that a non-capital court-martial may adjudge: a reprimand, forfeiture of pay and allowances, a fine, reduction in pay grade, restriction to specified limits, hard labor without confinement, confinement, and punitive discharge. In

addition to other limits found in the MCM,[2] R.C.M. 1003(c)(1) places maximum limits on those punishments based on the offense committed.

Maximum punishment limits based on offenses are separated in two categories: limits for offenses that are listed in Part IV and limits for offenses that are not listed in Part IV. *See* R.C.M. 1003(c)(1). Under R.C.M. 1003(c)(1)(A), if an offense is listed in Part IV, then the maximum punishment that can be adjudged at court-martial is that prescribed by the President in Part IV. R.C.M. 1003(c)(1)(B) provides that the maximum punishment for offenses not listed in Part IV may be that of an "included or closely related offense" listed in Part IV or, if an offense is not listed in Part IV and not included or closely related to an offense listed in Part IV, the maximum punishment shall be the punishment authorized by the United States Code, or as authorized by the custom of the service.

In this case, Article 120 *is* listed in Part IV of the MCM, found at paragraph 45. Because Article 120 is listed in Part IV, a plain reading of R.C.M. 1003(c)(1)(B) makes both subparagraphs (i) and (ii) of that Rule inapplicable. As a result, the maximum punishment that a court-martial can adjudge should be based on the inclusion of Article 120 in Part IV.

[2] See R.C.M. 201(f) and 1301(d) (jurisdictional limits of a court-martial); R.C.M. 1003(c)(2) (limits based on the rank of the accused).

R.C.M. 1003(b) lists the possible punishments that may be adjudged at court-martial: reprimand, forfeiture of pay and allowances, fine, reduction in pay grade, restriction to specified limits, hard labor without confinement, confinement, punitive separation, death, and punishments under the law of war. Death, however, is only permitted when "expressly authorized under Part IV of [the MCM] for an offense of which the accused has been found guilty." R.C.M. 1004(a)(1). Following that list of possible punishments, R.C.M. 1003(c)(1)(A) provides the "maximum" limit to three types of punishments: confinement, forfeitures, and punitive discharge. According to R.C.M. 1003(c)(1)(A), these maximum limits only apply to those offenses listed in Part IV of the MCM and are set at the maximum limit established in Part IV.

In this case, the Accused is charged with two Specifications in violation of Article 120. One Specification is defined as rape (Article 120(a)(1)) and one Specification is defined as sexual assault (Article 120(b)(1)(B)). Rape and sexual assault are offenses listed in Part IV of the MCM. However, specific maximum punishments were not included in Part IV for Article 120 offenses prior to the Amendment issued in the Executive Order on 15 May 2013. The listed offenses of rape and sexual assault in Part IV state that a person guilty of that offense "shall be punished as a court-martial may direct." Thus

these offenses are not punishable by death because Congress did not "expressly authorize" death within the statute itself. Therefore, the language, "shall be punished as a court-martial may direct," should be interpreted to mean that there is no applicable offense-based maximum punishment that can be adjudged, leaving the range of lawful punishments described in R.C.M. 1003(b) available to the court-martial.

Given that R.C.M. 1003(c)(1)(A) does not itself provide a maximum punishment that may be adjudged at court-martial, the maximum punishment for offenses under Article 120 should be the maximum allowable by a general court-martial under Article 18 for non-capital offenses, which is a dishonorable discharge, forfeitures of all pay and allowances, and confinement for life without eligibility for parole.[3]

e. Alternatively, the Court could apply the R.C.M. 1003(c)(1)(B) analysis to determine that 10 U.S.C. § 920 is closely related to the pre-amendment rape and sexual assault offenses as listed in the Manual.

If R.C.M 1003(c)(1)(B) is applied to Charge I and its two Specifications, the Court must first look to whether those offenses under Article 120 are included in or closely related to an offense that is listed in Part IV, as per R.C.M. 1003(c)(1)(B)(i). Given that all relevant sexually-based

[3] The maximum punishment would be further limited in this particular case because the Charges and Specifications have been referred to a Special Court-Martial. Therefore, the maximum punishment would be limited to the jurisdictional maximums provided in Article 19, UCMJ.

offenses have now been incorporated in Article 120, there remain no other closely related offenses listed in Part IV.

R.C.M. 1003(c)(1)(B)(i) has clearly been applied in many circumstances, resulting in some cases in a ruling that no "closely related" offense exists, *United States v. Beaty,* 70 M.J. 39, 45 (C.A.A.F. 2011), and others where *enumerated* offenses have been found to be the most "closely related" offense, *e.g., United States v. Ramsey, 40 M.J. 71, 76* (C.M.A. 1994).

In *Ramsey,* the Court of Military Appeals ruled that a military judge "failed to follow the clear mandate of R.C.M. 1003(c)(1)(B)(i)" when he chose Article 134, rather than the enumerated Article 115, Malingering, as the most "closely related" offense to a novel charge for the purposes of assessing the maximum sentence. 40 M.J. at 76. The court looked to several factors, including the "social cost," the "damage to the military," and the President's listing of the novel offense as a possible "lesser included" offense, despite the fact that the novel offense actually appeared in no paragraph of the MCM, and had no Presidentially-prescribed elements or punishment. *Id.* at 75.

When the 2011 National Defense Authorization Act became law, including the current 10 U.S.C. § 920, the President did not concurrently sign an Executive Order prescribing

Presidential elements or punishments for that crime. However, the President did not rescind Executive Order 13447, signed in 2007, which set the maximum punishment for the prior version of rape at death or such other punishment as a court-martial may direct and set the maximum punishment for the prior version of sexual assault at dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years.

The current rape statute as charged in this case, Article 120(a)(1), 10 U.S.C. § 920(a)(1), is almost identical to its prior version. Both statutes criminalize the actions of any person subject to the UCMJ who uses force to commit a sexual act upon another person without that person's consent. The only differences between the two versions are that the current statute specifies that the force used must be "unlawful" and that the current version requires the offender to actually commit the sexual act upon the other person rather than simply "cause[] another person . . . to engage in a sexual act," by force. *Compare* 10 U.S.C. § 920(a)(1) (2012) *with* 10 U.S.C. § 920(a)(1) (2007). Despite slight differences in form, the two versions of the statute are identical in substance.

The same analysis can be performed for Specification 2, Charge I: sexual assault. The current sexual assault statute as charged in this case, Article 120(b)(1)(B), 10 U.S.C. § 920(b)(1)(B), is also essentially identical to an offense in the

prior version of Article 120. Both statutes criminalize the behavior of someone who engages in a sexual act with another by causing bodily harm to that person without that person's consent. For this offense, the only differences between the two versions of the statute are that the current version defines the offense as "sexual assault," while the prior version defines the offense as "aggravated sexual assault." Moreover, the current version again requires that the offender commit the sexual act upon the person rather than "cause[] another person . . . to engage in a sexual act" by causing bodily harm. *Compare* 10 U.S.C. § 920(b)(1)(B) (2012) *with* 10 U.S.C. § 920(c)(1)(B) (2007). Again, these differences are only slight in form and leave the substance of the two versions of the statute identical.

f. If the Military Judge concludes that Article 120 is not a listed offense nor is it included in or closely related to a listed offense under the R.C.M. 1003(c)(1)(B) analysis, the Military Judge could look to the United States Code to determine the maximum punishment because 18 U.S.C. § 2241(a)(1) (2012) is an analogous offense to Specification 1, Charge I: rape.

Although not consistent with a literal interpretation of the MCM, the Court could hold that the offenses charged under Article 120 are not "listed" within Part IV for the purposes of R.C.M 1003(c)(1). Such a holding would be predicated on a requirement that to be listed in Part IV, an offense must contain all necessary sub-paragraphs, to include elements,

sample specifications, and maximum punishments at the time the offense was committed.

If the Military Judge finds that the offenses charged under Article 120 in this case are not listed in Part IV and are not included in or closely related to an offense listed in Part IV, the Military Judge should look to the maximum punishment "as authorized by United States Code" in accordance with R.C.M. 1003(c)(1)(B)(ii). If there is an analogous offense under the United States Code, then the maximum punishment for that offense should be used to provide the maximum punishment for the charged offenses here. *Cf. United States v. Leonard*, 64 M.J. 381, 383-84 (C.A.A.F. 2007) (discussing application of this provision). Here, there is an analogous offense under the United States Code.

To be sure, the appellate courts generally analyze R.C.M. 1003(c)(1)(B)(ii)'s authorization to look to the United States Code in the Article 134 context. *See, e.g., Leonard*, 64 M.J. at 383-84; *see also United States v. Beaty*, 70 M.J. 39, 43 (C.A.A.F. 2011). But this is a practical result of military sentencing rather than a matter of legal import. Neither R.C.M. 1003(c)(1)(B)(ii) nor the appellate courts' analysis limits this provision to Article 134 offenses.

18 U.S.C. § 2241(a)(1) (2012), criminalizes the behavior of someone who "knowingly causes another person to engage in a

sexual act by using force against that other person . . . .” Similarly, the current version of the rape statute as outlined in Article 120(a)(1), 10 U.S.C. § 920(a)(1) (2012), and as charged in this case criminalizes the behavior of someone who “commits a sexual act upon another person by using unlawful force against that other person . . . .” The two statutes are essentially the same. The maximum punishment for the offense outlined in 18 U.S.C. § 2241(a)(1) (2012) is that the offender “shall be fined under this title, imprisoned for any term of years or life, or both.” R.C.M. 1003(c)(1)(B)(ii) dictates that if the period of confinement provided in the United States Code for the closely related offense is one year or longer, “the maximum punishment by court-martial shall include confinement for that period . . . a dishonorable discharge and forfeiture of all pay and allowances . . . .” Since there is a directly analogous provision under the United States Code, the Military Judge should apply the federal statute’s maximum confinement: imprisonment “for any term of years or for life” as the maximum punishment for the offense of rape in this case.

Because there is no United States Code that is closely related to Charge I, Specification 2 (sexual assault – bodily harm), the Court should look to the custom of the service analysis provided below.

g. Alternatively, the Court could find each Specification

under Charge I to be punishable as authorized by the custom of the service.

If the Court does not determine that the offenses charged under Article 120 is included in or closely related to an offense that is listed in Part IV, as per R.C.M. 1003(c)(1)(B)(i), or an offense punished by the United States Code, as per R.C.M. 1003(c)(1)(B)(ii), the Court could look to the custom of service in determining an appropriate maximum punishment.

The "custom of the service" language of R.C.M. 1003(c)(1)(B)(ii) has been recently addressed by our appellate courts. In *United States v. Beaty*, 70 M.J. 39 (C.A.A.F. 2011), the Court found no United States Code nor custom of the service specific to the offense of possessing "what appears to be" child pornography in violation of Article 134, UCMJ. Given this, the Court held the maximum punishment for the offense of possessing "what appears to be" child pornography was four months confinement and forfeiture of two-thirds pay per month for four months a "disorder" under Article 134. *Id*. at 45.

The facts in *Beaty* differ substantially from the present case. In *Beaty*, the charged offense was a violation of Article 134, possessing "what appears to be" child pornography. In *Beat*y, the Court in their analysis focused on the fact that there was neither a United States Code nor a custom of the

service specific to the offense of possessing “what appears to be” child pornography.

Here, unlike *Beaty,* the language of the Specifications charged under Article 120, denotes actual criminal offenses that have been criminalized under the UCMJ for decades. The custom of the service is to punish the sexual offenses. A maximum punishment has been listed for both rape and sexual assault for decades.

Additionally, the drafters of Article 120 state that the subparagraphs that would normally address elements, explanation, sample specifications and maximum punishments had not yet been prescribed by the President at the time of publishing, and therefore, “[p]ractitioners should refer to appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide.” Para. 45, Part IV, Manual for Courts-Martial (2012 edition). Given that Appendix 28 contains the October 2007 version of Article 120, complete with elements, sample specifications, and maximum punishments, the Court should use the maximum punishment listed in Appendix 28 for the offenses of rape and aggravated sexual assault as punishment “authorized by the custom of the service” for the offenses charged in this case.

Therefore, based on the “custom of the service,” the Court could find that the maximum punishment for the offense of rape

is confinement for life or such other punishment as a court-martial may direct, and the maximum punishment for the offense of sexual assault is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years.

5. <u>Relief Requested</u>.

The Government respectfully requests the Court determine the maximum punishment for an offense under Article 120 is that which is provided in Executive Order 13643 issuing amendments to the MCM on 15 May 2013. This would set the maximum punishment for the Specification of rape at a dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole, and the maximum punishment for sexual assault at a dishonorable discharge, forfeitures of all pay and allowances, and confinement for thirty years. This maximum punishment would be further limited to the maximum permitted at a special court-martial. This punishment does not prejudice or harm the Accused because it is equal to the punitive consequences available at a general court-martial and is a lesser punishment than that imposed for the previous version of the rape statute.

6. <u>Oral Argument</u>.

The Government does not request oral argument.

//s//
J. L. WILT
LT, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief was served on defense counsel and the Court on the 5th day of August 2013.

//s//
J. L. WILT
LT, JAGC, USN
Trial Counsel

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES, Appellee v. Germaine THOMAS, Private First Class (E-2) U.S. Marine Corps Appellant	**APPELLANT'S BRIEF AND ASSIGNMENTS OF ERROR** Case No. 201300357 Tried at Camp Lejeune, North Carolina, on 14-18 May 2013 by a general court-martial convened by Commanding General, Training Command, Quantico, Virginia

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Assignments of Error

I

A MILITARY JUDGE IS REQUIRED TO INSTRUCT THE MEMBERS ON ALL ELEMENTS OF AN OFFENSE. HERE, THE MILITARY JUDGE DID NOT INSTRUCT THE MEMBERS ON THE DEFINITION OF THE ELEMENT OF "FORCE" FOR A CHARGE OF RAPE COMMITTED BY UNLAWFUL FORCE. DID THE MILITARY JUDGE COMMIT REVERSIBLE ERROR?

II

WHAT IS SUBSTANTIALLY ONE TRANSACTION SHOULD NOT BE MADE THE BASIS FOR AN UNREASONABLE MULTIPLICATION OF CHARGES. PFC THOMAS WAS CONVICTED OF THREE DIFFERENT SPECIFICATIONS OF RAPE AND SEXUAL ASSAULT FOR ONE ACT OF PENETRATION. SHOULD SOME OF PFC THOMAS'S CONVICTIONS BE DISMISSED?

III

CONGRESS ENACTED A NEW VERSION OF ARTICLE 120, UCMJ, ON 28 JUNE 2012, BUT THE PRESIDENT DID NOT ASSIGN MAXIMUM PUNISHMENTS TO THOSE OFFENSES UNTIL 15 MAY 2013. PFC THOMAS'S ALLEGED CRIMES OCCURRED ON 27 JULY 2012. TRIAL DEFENSE COUNSEL ARGUED THE MAXIMUM PUNISHMENT FOR PFC THOMAS'S ARTICLE 120 OFFENSES WAS SUMMARY COURT-MARITAL PUNISHMENT. THE MILITARY JUDGE DENIED THIS MOTION, FINDING THE MAXIMUM PUNISHMENT WAS LIFE WITHOUT THE POSSIBILITY OF PAROLE. WAS THIS FINDING ERROR?

Statement of Statutory Jurisdiction

Private First Class (PFC) Germaine Thomas's case is within this Court's Article 66(b)(1), Uniform Code of Military Justice (UCMJ), jurisdiction because he received an approved court-martial sentence that included a dishonorable discharge and confinement for three years.

Statement of the Case

An officer and enlisted members panel, sitting as a general court-martial, convicted PFC Thomas, contrary to his pleas, of one specification of rape and two specifications of sexual assault, in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2012).[1] (Charge Sheet; R. at 854.) The members found PFC

[1] The members convicted PFC Thomas of a rape specification that alleged unlawful force by using strength sufficient to overcome the complaining witness. The members also convicted PFC Thomas of two specifications of sexual assault under the following theories: 1) with a person who was asleep or otherwise unaware

Thomas not guilty of one specification of sexual assault and one specification of burglary, in violation of Articles 120 and 129, UCMJ, 10 U.S.C. §§ 920 and 929.[2] (Charge Sheet; R. at 854.) The members sentenced PFC Thomas to reduction to pay-grade E-1, confinement for three years, total forfeitures of pay and allowances, and a dishonorable discharge. (R. at 930.) The convening authority approved the sentence as adjudged and ordered the sentence executed.[3] (General Court-Martial Order No. 013-21, at 3.)

Statement of Facts

PFC Thomas and the complaining witness, PFC AA, were students at different classes at Public Affairs School. (R. at 308.) Both individuals lived in the same barracks, though men and women lived on separate floors. (R. at 312.) Initially they were friends and talked socially. (R. at 308.) PFC AA testified before the events in this case, PFC Thomas indicated he wanted to have sex with her but she was not interested. (R. at 309-11.) In contrast, PFC Thomas testified there was a

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the sexual act was occurring; and 2) with a person incapable of consenting due to impairment by an intoxicant.

[2] The members acquitted PFC Thomas of the sexual assault specification that alleged he caused bodily harm by touching the complaining witness's body with his hand.

[3] The convening authority's order to execute the punitive discharge is a legal nullity. *United States v. Tarniewicz*, 70 M.J. 543 (N-M. Ct. Crim. App. 2011).

mutual sexual interest and they had a plan to meet up to have sex on the evening of the incident. (R. at 739-41.)

On the night of Friday, 27 July 2012, PFC AA went to an off-base hotel party with several female classmates. (R. at 313-15.) PFC AA drank alcoholic beverages at the party, although there was conflicting testimony about exactly how much alcohol she consumed. PFC AA stated she drank one full Solo cup of Ciroc, a type of vodka, and orange juice, three half-full Solo cups of the same mixture, and roughly 1.5 cans of beer during a 2-3 hour period. (R. at 316-17, 344-45.) Two friends of PFC AA also testified to her level of intoxication. PFC Turner testified she only saw PFC AA with the same alcoholic drink all night (R. at 671-72), while Lance Corporal (LCpl) Bloomer stated she only saw PFC AA holding a drink once and the drink tasted like it only had a "little bit" of alcohol (R. at 590-91, 601). The group returned to base in a cab around midnight. (R. at 318.) PFC AA testified she felt "loud, dizzy, lightheaded, drunk," and was a 10 on of a scale of 0-10 of intoxication, with 10 being the highest level.[4] (R. at 318.)

There was conflicting testimony about the state of PFC AA's intoxication once she returned to base. PFC AA testified she needed help out of the car, had a spotty memory, and another

[4] Trial defense counsel impeached PFC AA with her prior statement to NCIS in which she claimed she was a 5 out of a possible 10 on the same intoxication scale. (R. at 347-48.)

student helped her walk to the barracks. (R. at 318-19.) PFC Turner testified PFC AA was loud and screaming, but was not stumbling and did not need help signing back into the barracks. (R. at 674-75.) LCpl Bloomer stated PFC AA was tipsy and loud but was walking fine once they returned to base. (R. at 593-94, 609.) LCpl McLemore also saw PFC AA in the barracks and stated she was louder than usual and tipsy, but not so drunk as to be unable to assess what was going on around her. (R. at 792-93.) PFC Clark walked around with PFC AA in the smoke pit of the barracks and did not notice she was intoxicated for the first fifteen minutes of their interaction. (R. at 414-15.) Lastly, Staff Sergeant (SSgt) Major was on duty at the barracks that night, and while she remembered three girls checking in together, there were no signs any of them were intoxicated. (R. at 633-35.)

PFC AA remembered checking back in to the barracks with her friends PFC Turner and PFC Bloomer. (R. at 319.) After checking-in, PFC AA recalled going to the lounge and seeing her friend PFC Patrick. (R. at 319.) PFC AA then went back to her barracks room with her roommate PFC Turner, made a head call, and went to sleep with her clothes on. (R. at 319-21.)

PFC AA testified she later woke-up because of the alleged assault, although she did not recall much of the incident. (R. at 321.) She remembered three "polaroid shots" during the

night: someone standing next to her bed; someone on top of her and it "felt like someone was having sex with [her];" and someone trying to put her clothes back on. (R. at 321.)

PFC AA testified she woke up at 0730 the next morning wearing only her underwear with a sticky substance between her thighs. (R. at 322-23.) PFC AA stated she was not sure who was in her room but she suspected it was PFC Thomas because he had indicated sexual interest. (R. at 322.) PFC AA testified she texted PFC Thomas "because [she] needed to talk to him," he responded he "needed to talk to [her] too," so they met in the barracks lounge. (R. at 324.) PFC AA stated she asked PFC Thomas if he was in her room the prior night and he responded he was and they had sex. (R. at 324.) PFC AA testified she next asked PFC Thomas if he knew she was drunk; he said yes and repeatedly apologized to her. (R. at 324.) PFC AA reported the incident later that day. (R. at 325.)

On the night in question, PFC Thomas was on duty until 0200 and did not see PFC AA once she returned to base before she went to sleep. (R. at 742.) PFC Patrick was on duty later that evening from 0200-0400 and testified PFC Thomas stayed to talk to her after duty turnover. (R. at 465-66.) PFC Thomas asked PFC Patrick to see if the door to PFC AA's room was open and to text PFC AA to see if she was awake. (R. at 466-67.) After not receiving a response to her text, PFC Patrick told PFC Thomas

that PFC AA was probably asleep because she came back to the barracks drunk. (R. at 469.) After this conversation, PFC Patrick observed PFC Thomas enter PFC AA's room. (R. at 471.)

PFC Thomas made two statements, one to PFC Patrick immediately after he left PFC AA's room, and one to a military policeman, in which it appears he admits guilt. (R. at 216-17, 474-75.) PFC Thomas also made a formal statement to Naval Criminal Investigative Service (NCIS) personnel during a recorded interview in which he appears to make more inculpatory statements. (Pros. Exs. 1, 2.) PFC Thomas testified at trial he believed PFC AA consented to sexual intercourse at the time, but only afterward realized she was intoxicated. (R. at 734-36, 743-46.) PFC Thomas explained he left some exculpatory facts out of his NCIS statement because he did not understand his rights and was just being cooperative. (R. at 734.)

The members convicted PFC Thomas of the specifications relating to rape by unlawful force, sexual assault when PFC AA was asleep or otherwise unaware, and sexual assault when PFC AA was impaired by an intoxicant. (R. at 854.) The members acquitted PFC Thomas of breaking into PFC AA's room and sexual assault by causing bodily harm to PFC AA. (R. at 854.)

Summary of Argument

A military judge must instruct the members on all elements of an offense. Here, the military judge did not instruct the

members on the definition of the term "force" for the charge of rape committed by unlawful force. Furthermore, PFC Thomas was convicted of three different crimes of rape and sexual assault for one act of penetration, which is an unreasonable multiplication of charges.

Argument

I

A MILITARY JUDGE IS REQUIRED TO INSTRUCT THE MEMBERS ON ALL ELEMENTS OF AN OFFENSE. HERE THE MILITARY JUDGE DID NOT INSTRUCT THE MEMBERS OF THE DEFINITION OF THE ELEMENT OF "FORCE" FOR A CHARGE OF RAPE COMMITTED BY UNLAWFUL FORCE. THE MILITARY JUDGE COMMITTED REVERSIBLE ERROR.

Standard of Review

Whether a panel was properly instructed is a question of law reviewed *de novo*. *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008). Generally, failure to object to an instructional error at trial results in waiver and a plain error review. Rule for Courts-Martial (R.C.M.) 920(f), Manual for Courts-Martial (MCM), United States (2012 ed.). This waiver principle does not apply when a required instruction is missing, which includes elements of the offense. *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000) (quoting *United States v. Taylor*, 26 M.J. 127, 128 (C.M.A. 1988)).

Discussion

PFC Thomas was charged with rape by using unlawful force. The military judge did not instruct the members on the meaning of the element of force for this offense, but rather only instructed on the meaning of unlawful force.[5] (R. at 835; Appellate Ex. LXXVII, at 3.) Trial defense counsel did not object to this incomplete instruction, but the absence of an objection to an instruction on a required element does not constitute waiver. *Davis*, 53 M.J. at 205.

A. It was error for the military judge to omit the definition of the element of force.

A military judge has a *sua sponte* duty to instruct the members on all elements of an offense. Article 51(c), UCMJ; R.C.M. 920(e)(1). The elements of rape by unlawful force are "commit[ting] a sexual act upon another person" by "using unlawful force." Manual for Courts-Martial (MCM), United States (2012 ed.), Part IV, ¶ 45a(a)(1). The statute defines "unlawful force" as "an act of force done without legal justification or excuse." MCM, Part IV, ¶ 45a(g)(6). The term "force" is defined as:

> (A) the use of a weapon;
> (B) the use of strength sufficient to overcome, restrain, or injure a person; or

[5] The military judge only instructed the members, "'[u]nlawful force' means an act of force done without legal justification or excuse." (R. at 835; Appellate Ex. LXXVII, at 3.)

(C) inflicting physical harm sufficient to coerce or compel submission by the victim.

MCM, Part IV, ¶ 45a(g)(5). The Military Judges' Benchbook requires military judges to give the statutory definition of force when a sexual act is alleged by unlawful force.[6] Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9 at 552 (Ch 3-45-13, Jan. 1 2010). To determine whether there was unlawful force, one must first understand the definition of force provided in the statute.

Here, the military judge entirely omitted the required instruction on the definition of force. Without this definition, the members had no guide on how to properly determine whether PFC Thomas even used force against PFC AA, let alone whether it was unlawful. The members could not properly find that the element of unlawful force was met without an instruction as to what constitutes force. It was error for the military judge to omit this required statutory definition of an element.

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[6] The Benchbook model instruction for unlawful force states:

> "Unlawful force" means an act of force done without legal justification or excuse. "Force" means the use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or inflicting physical harm sufficient to coerce or compel submission by the alleged victim.

Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9, at 552 (Ch 3-45-13, Jan. 1 2010).

B. The military judge's omitted instruction was not harmless beyond a reasonable doubt.

It is constitutional error for a military judge to fail to give a required instruction. *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002). To find this error harmless, this Court "must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). In other words, an error is not harmless unless this Court finds "a rational jury would have found the defendant guilty absent the error[.]" *Neder v. United States*, 527 U.S. 1, 18 (1999).

Here, this burden is not met. PFC AA's testimony was she was asleep or passed out from intoxication when she was assaulted. The Government made no showing PFC Thomas met any of the definitions of force – no evidence was presented he either: 1) used a weapon; 2) used strength sufficient to overcome, restrain, or injure PFC AA; or 3) inflicted physical harm to coerce or compel submission by PFC AA.

The prejudice from this instructional omission is even more glaring when one considers that the members acquitted PFC Thomas of sexual assault by causing bodily harm. (Charge Sheet; R. at 854.) Bodily harm is defined as "any offensive touching of another, however slight, including any nonconsensual sexual act." MCM, Part IV, ¶ 45a(g)(3). If the members found PFC

Thomas did not commit an offensive touching, it defies logic that they could find he used force under these factual circumstances. Therefore a rational jury would not have found PFC Thomas guilty of forcible rape absent the military judge's omission.

This Court must set aside PFC Thomas's rape conviction because the military judge's failure to instruct the members on an element of the offense of forcible rape was not harmless beyond a reasonable doubt.

C. This Court should remand for a sentence rehearing because there is a drastic change in the sentencing landscape.

If this Court sets aside and dismisses the forcible rape conviction, it must examine PFC Thomas's sentence as well. This Court may reassess a sentence when it is confident "that, absent any error, the sentence adjudged would have been of at least a certain severity." *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). This Court must be "assure[d] that the sentence is no greater than that which would have been imposed if the prejudicial error had not been committed." *United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985). If there is error of a constitutional magnitude at trial, then this Court must be "satisfied beyond a reasonable doubt that its reassessment cured the error." *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (citing *Sales*, 22 M.J. at 307). Lastly, a "dramatic

change in the penalty landscape" gravitates away from the possibility of reassessment. *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003).

The military judge found the maximum confinement for PFC Thomas for the Article 120 offenses was life without the possibility of parole, but he did not address the maximum confinement for each individual specification.[7] (R. at 189-90.) The maximum confinement PFC Thomas faced for forcible rape was life without the possibility of parole, while he faced a maximum of thirty years confinement for sexual assault. MCM, Part IV, ¶ 45e(1)-(2).

Here, the dismissal of the forcible rape charge creates a dramatic change in the sentencing landscape because the maximum confinement decreased from life without the possibility of parole to thirty years confinement.[8] While PFC Thomas only received three years confinement, this Court cannot be convinced beyond a reasonable doubt this dramatic change in the sentencing landscape would have had no impact on the sentence. Thus, this Court should not attempt to reassess PFC Thomas's sentence in

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[7] Assignment of Error III further discusses the military judge's determination of a maximum punishment.

[8] The military judge merged the convictions for sentencing (R. at 862, 915), which means under current law, the maximum punishment without the forcible rape charge was thirty years, MCM, Part IV, ¶ 45e(1)-(2).

light of the dismissed forcible rape conviction and should instead remand the case for a sentence rehearing.

II

WHAT IS SUBSTANTIALLY ONE TRANSACTION SHOULD NOT BE MADE THE BASIS FOR AN UNREASONABLE MULTIPLICATION OF CHARGES. PFC THOMAS WAS CONVICTED OF THREE DIFFERENT SPECIFICATIONS OF RAPE AND SEXUAL ASSAULT FOR ONE ACT OF PENETRATION. SOME OF PFC THOMAS'S CONVICTIONS SHOULD BE DISMISSED SO HE ONLY HAS ONE ARTICLE 120 CONVICTION.

Standard of Review

A military judge's decision to deny relief for unreasonable multiplication of charges is reviewed for an abuse of discretion. *United States v. Campbell*, 71 M.J. 19, 22 (C.A.A.F. 2012) (citing *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004)).

Discussion

PFC Thomas was convicted of three Article 120 specifications. The defense made a motion after findings to merge the all of the convictions for sentencing. (R. at 862.) The military judge granted this motion, instructing the members to only consider the convictions as one offense for sentencing purposes. (R. at 862, 915.) Some of the findings in this case, however, should have been set aside and dismissed so PFC Thomas only has one Article 120 conviction.

Generally, "[w]hat is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." Discussion, Rule for Courts-Martial (R.C.M.) 307(c)(4), Manual For Courts-Martial, United States (2012 ed.). This prohibition against the unreasonable multiplication of charges exists because of "those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion." *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001).

To determine whether there is an unreasonable multiplication of charges, this Court applies the following factors from *Quiroz*: (1) whether the accused objected at trial; (2) whether each charge and specification is aimed at distinctly separate criminal acts; (3) whether the number of charges and specifications misrepresents or exaggerates the appellant's criminality; (4) whether the number of charges and specifications unreasonably increases the appellant's punitive exposure; and (5) whether there is any evidence of prosecutorial overreaching or abuse in the drafting of the charges. *Id.* at 338. No single factor is dispositive, and merely "one or more factors may be sufficiently compelling." *Campbell*, 71 M.J. at 23.

An inquiry under the multi-factor *Quiroz* test favors the dismissal of some of PFC Thomas's convictions. To begin, the

defense made a motion for unreasonable multiplication of charges, albeit for sentencing, so factor one is met. (R. at 862.) Even if this Court finds PFC Thomas specifically needed to object to unreasonable multiplication of charges for findings, the remaining factors still weigh in his favor.

For factor two, the exact same underlying conduct was used to find PFC Thomas guilty of three different crimes. PFC Thomas was charged with committing a sexual act upon PFC AA by penetrating her vulva with his penis in Specifications 1 and 2 of Charge II and the sole specification of the Additional Charge. (Charge Sheet.) Charging the same act in three different ways is acceptable because of contingencies of proof and the Prosecution not knowing in advance exactly how the evidence will come out at trial. At the same time, allowing PFC Thomas's convictions to stand for the same set of facts under three different theories is unreasonable.

For the third *Quiroz* factor, the specifications misrepresent or exaggerate the criminality of PFC Thomas because they were not three distinct acts. Furthermore, these three specifications do not address distinct criminal purposes, but rather are based on the relative physical state of the alleged victim. The facts underlying these specifications were not only "substantially one transaction," but rather were the exact same

transaction – one act of penetrating PFC AA's vagina with his penis.

For the last two factors, the specifications unreasonably increased PFC Thomas's punitive exposure. While the military judge did merge all three convictions for sentencing purposes, this merger did not appropriately cure the unreasonably multiplied charges for findings. PFC Thomas was prejudiced by these additional guilty findings because an "'unauthorized conviction . . . constitutes unauthorized punishment in an [sic] of itself.'" *United States v. Falcon*, 65 M.J. 582, 586 (N-M. Ct. Crim. App. 2006) (quoting *United States v. Savage*, 50 M.J. 244, 245 (C.A.A.F. 1999)). Lastly, there is no evidence of prosecutorial overreaching in the drafting of the charges because the charges addressed different theories based upon the physical state of the complaining witness. Overall, however, a majority of the *Quiroz* factors favor a finding of an unreasonable multiplication of charges.

If there is an unreasonable multiplication of charges for findings, dismissal of the unreasonable charges is an appropriate remedy. *Campbell*, 71 M.J. at 22-23; *cf. United States v. Ducharme*, 59 M.J. 816, 819-20 (N-M. Ct. Crim. App. 2004) (dismissing conviction because it was an unreasonable multiplication of charges and merging the specifications). Even with the sentencing merger, PFC Thomas still has three

different federal sexual assault convictions for one crime, which is unreasonable. This Court should set aside and dismiss guilty findings so PFC Thomas only has one remaining Article 120 conviction.

III

CONGRESS ENACTED A NEW VERSION OF ARTICLE 120, UCMJ, ON 28 JUNE 2012, BUT THE PRESIDENT DID NOT ASSIGN MAXIMUM PUNISHMENTS TO THOSE OFFENSES UNTIL 15 MAY 2013. PFC THOMAS'S ALLEGED CRIMES OCCURRED ON 27 JULY 2012. TRIAL DEFENSE COUNSEL ARGUED THE MAXIMUM PUNISHMENT FOR PFC THOMAS'S ARTICLE 120 OFFENSES WAS SUMMARY COURT-MARITAL PUNISHMENT. THE MILITARY JUDGE DENIED THIS MOTION, FINDING THE MAXIMUM PUNISHMENT WAS LIFE WITHOUT THE POSSIBILITY OF PAROLE. THIS FINDING WAS ERROR.[9]

Standard of Review

The maximum punishment authorized for an offense is a question of law reviewed *de novo*. *United States v. St. Blanc*, 70 M.J. 424, 428 (C.A.A.F. 2012) (citing *United States v. Beaty*, 70 M.J. 39, 41 (C.A.A.F. 2011)).

Discussion

This Court should apply the same reasoning regarding the applicability of summary court-martial punishments to Article 120 offenses the Appellant argued in *United States v. Booker*. (App. 1.) Although this Court has recently decided this issue

[9] This Court recently reviewed a similar issue. *United States v. Booker*, No. 201300247, 2013 CCA LEXIS 771, at *22, unpublished op. (N-M. Ct. Crim. App. Sept. 20, 2013).

adversely to PFC Thomas's position, the Court of Appeals for the Armed Forces left the issue open for review in the normal course of appellate review. (App. 2.) Accordingly, Appellant raises this assignment of error to preserve the issue.

Conclusion

PFC Thomas respectfully requests this Court set aside his forcible rape conviction and remand for a sentence rehearing. PFC Thomas also respectfully asks this Court to set aside and dismiss his guilty findings so he only has one remaining Article 120 conviction.

/s/
JESSICA L. FICKEY
LT, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris St, SE
Bldg 58, Suite 100
Washington Navy Yard, D.C. 20374
Tel: (202) 685-7297
Fax: (202) 685-7426
jessica.fickey@navy.mil

APPENDIX

1. Respondent's Opposition to Government's Petition for Extraordinary Relief in the Nature of a Writ of Mandamus (No. 201300247), submitted in *United States v. Booker*, 72 M.J. 787 (N-M. Ct. Crim. App. 2013).

2. CAAF USCA Dkt. No. 14-8002/NA Order, Oct. 31, 2013.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and required copies of the foregoing were delivered to the Court on 18 December 2013. I further certify a copy of the foregoing was delivered to Director, Appellate Government Division, and electronically filed in CMTIS pursuant to Rule 5.2(b)(1) of this Court's Rules for Practice and Procedure, on 18 December 2013.

/s/

JESSICA L. FICKEY
LT, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris St, SE
Bldg 58, Suite 100
Washington Navy Yard, D.C. 20374
Tel: (202) 685-7297
Fax: (202) 685-7426
jessica.fickey@navy.mil

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
	)	Case No. 201400072
v.	)	
Fabian J. THOMPSON, Aviation Boatswain's Mate First Class (E-6) U.S. Navy Appellant	)	Tried at Region Legal Service Office Mid-Atlantic, Norfolk, Virginia, on February 19, May 7, July 8, August 2, and August 5-9, 2013 by a general court-martial convened by Commander, Naval Air Force Atlantic.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Errors Assigned

I.

TO AFFIRM A CONVICTION FOR AGGRAVATED SEXUAL ASSAULT, THIS COURT MUST BE CONVINCED THE ALLEGED VICTIM WAS SUBSTANTIALLY INCAPABLE OF DECLINING PARTICIPATION IN THE SEXUAL ACT. HERE, THE EVIDENCE INDICATES THE ALLEGED VICTIM WAS NOT SO INTOXICATED AS TO BE UNABLE TO DECLINE PARTICIPATION. CAN THIS COURT AFFIRM ABE1 THOMPSON'S CONVICTION?

II.

IT IS REVERSIBLE ERROR FOR THE CONVENING AUTHORITY TO USE RANK ALONE AS CRITERIA TO SELECT MEMBERS FOR A COURT-MARTIAL PANEL. THE CONVENING AUTHORITY PROHIBITED NOMINATIONS OF POTENTIAL MEMBERS BECAUSE THEY WERE PAY GRADE E-6 AND BELOW, WERE WARRANT AND CHIEF WARRANT OFFICERS, AND WERE PAY GRADE O-6 AND ABOVE. DID THIS EXCLUSION CONSTITUTE REVERSIBLE ERROR?

III.

THE GOVERNMENT IS OBLIGATED TO PRODUCE RELEVANT MATERIALS IN ITS POSSESSION UPON A TIMELY DEFENSE REQUEST. HERE, THE DEFENSE REQUESTED ALL MATERIALS CONSIDERED BY THE CONVENING AUTHORITY IN SELECTING MEMBERS. THE GOVERNMENT FAILED TO DISCLOSE THE CONVENING AUTHORITY'S MEMBER SELECTION INSTRUCTION. WAS THIS FAILURE TO DISCLOSE REVERSIBLE ERROR?

Statement of Statutory Jurisdiction

Appellant's approved sentence includes a bad-conduct discharge and one year of confinement. Accordingly, this Court has jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012).

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of aggravated sexual assault, in violation of Article 120, UCMJ), 10 U.S.C. §§ 920], (2012). The members sentenced Appellant to one year of confinement, reduction to pay grade E-1, and a bad-conduct discharge. The Convening Authority approved the sentence as adjudged, and except for the punitive discharge, ordered the sentence executed.

Statement of Facts

A. <u>During the morning of April 27, 2012, Appellant sexually assaulted ABE2 LBC</u>.

From the April 24-28, 2012, USS Enterprise (CVN 65) (hereinafter "Enterprise") was conducting a port call in Dubai, United Arab Emirates. On April 25, 2012, the victim, Aviation Boatwain's Mate Equipment Second Class (ABE2) LBC went on liberty from the ship with two friends from the ship, Master-at-Arms Second Class (MA2) Popo and MA2 Mack.[1] (R. 816,) ABE2 LBC and her liberty party went to the local Courtyard Marriott where they booked rooms. The two Masters-at-Arms shared a room on the first floor; ABE2 LBC had her own room on the fourth floor. Each was given only one key to their respective rooms.

Appellant and his liberty party also were staying at the same hotel during the port visit. (R. 817.) Both groups were part of a larger group of friends and had made plans to socialize together during the port visit. On April 26, 2012, the groups spent most of the day at a local mall, returning to the hotel around 2200. (R. 819.) When the group returned to the hotel, some, including ABE2 LBC and Appellant, congregated by the pool to drink and socialize. At some point after midnight early on April 27, the party migrated to the room of

[1] Both MA2 Popo and MA2 Mack have since advanced to MA1, but are referenced in this brief at the rate and grade they held during the relevant events.

another of Appellant's liberty group. ABE2 LBC recalled drinking Vodka and eventually she passed out drunk on one of the beds in the room. (R. 932-33.) MA2 Mack observed that by the end of the night ABE2 LBC appeared "very intoxicated." (R. 821.) The party began to break up after 0300 on April 27. (R. 895.) MA2 Popo asked a mutual acquaintance, ABE1 Otesile, to physically pick up ABE2 LBC and carry her back to her room on the fourth floor. (R. 895.)

ABE1 Otesile carried her to the elevator on his back, took her to her room on the fourth floor, used her key to get into her room, placed her in the bed, and then he left ABE2 LBC's room. (R. 895-96.) When ABE1 Otesile carried ABE2 LBC to her room she was still passed out, was not talking, and did not seem coherent. (R. 896.) ABE1 Otesile was only in the room long enough to make sure ABE2 LBC was in bed. (R. 896-97.) He left ABE2 LBC's room key on a nightstand next to the bed where she would see it when she woke up, and made sure the door was locked before he left her room. (R. 896-97.) On his way back to his room on the first floor, he stopped briefly at Appellant's room to retrieve his cell phone and charger. (R. 896-97.) He then went back to his room where he called MA2 Popo and told her that ABE2 LBC was safely in bed. (R. 896-97.) ABE2 LBC did not recall passing out or how she got back to her hotel room. (R. 933.)

1. Appellant, knowing that ABE2 LBC was passed out in her room, fraudulently obtained a room key, let himself into her room, and sexually assaulted her.

Approximately ten minutes after ABE1 Otesile came to his room, Appellant was observed on the hotel's surveillance system by the door to ABE2 LBC's room on the fourth floor. (R. 1123; Prosecution (Pros.) Ex. 2 at 03:38:15.) Appellant spent several minutes knocking on the door. (R. 1124; Pros. Ex. 2 at 03:40:25.) When she did not answer the door, he went down to the front desk and obtained a duplicate room key to ABE2 LBC's room. (R. 1124; Pros. Ex. 2 at 03:40:25.) He then returned to the fourth floor, and let himself into her room. (R. 1124; Pros. Ex. 2 at 03:40:25.)

ABE2 LBC awoke to feeling Appellant on top of her and his penis entering her vagina. (R. 934.) She asked "Who—who is this?" when she felt Appellant. (R. 934.) He whispered "Thompson" into her ear. (R. 934.) She then told him to stop, but Appellant persisted in his assault of her. (R. 935.) He then forcibly turned her over and penetrated her anus with his penis. (R. 935.) ABE2 LBC screamed in pain from the anal penetration and Appellant flipped her back over and again penetrated her vaginally. (Id.) ABE2 was later able to break free from Appellant. (R. 935-36.) She grabbed a towel from the bathroom and she fled her room wearing nothing but that towel

and her bra. (R. 935-36.) She ran to the elevator and took it down to the first floor room of her friends, MA2 Popo and MA2 Mack, and told them that she had just been sexually assaulted. (R. 936-37, 1127; Pros. Ex. 2 at 04:04:01, 04:04:58.) Approximately one minute after ABE2 LBC fled her room, Appellant was seen on the hotel's surveillance system returning to his room on the second floor. (R. 1128; Pros. Ex. 2 at 04:05:06.)

2. Forensic analysis of Appellant's clothing confirmed he had sexual contact with ABE2 LBC.

Later that morning, ABE2 LBC reported Appellant's sexual assault of her to the chain of command on Enterprise. During the course of the investigation of the assault, the ship's resident Naval Criminal Investigative Service (NCIS) Special Agent seized the t-shirt and pair of shorts that Appellant was seen wearing on the hotel's surveillance tape, as well as three pairs of underwear that were in a laundry bag on Appellant's rack on the ship with those other clothing items. (R. 1129-30; Pros. Ex. 18.) Those clothing items were sent to the United States Army Criminal Investigative Laboratory (USACIL) for DNA and trace analysis. (R. 1130; Pros. Ex. 18.) A mixture of Appellant's and ABE2 LBC's DNA profiles was subsequently found on the inside a pair of Appellant's underwear forwarded for testing. (R. 1130, 1167-69; Pros. Ex. 18; Defense (Def.) Ex. E. XX). The USACIL forensic biologist who tested Appellant's

clothes testified that the DNA evidence was "more indicative of a body-fluid transfer" such as semen, vaginal secretions, or saliva. (R. 1170.)

B. Pretrial motion to dismiss panel.

Prior to voir dire, the Assistant Trial Defense Counsel (ADC) raised a motion to stay the proceedings on the grounds that the members were improperly selected by the Convening Authority. (R. 505.) The motion was based on the racial composition of the members panel, who were all Caucasian, all male, and all married with children, being improper in light of Appellant being African-American. (R. 505, 509.) ADC couched her motion as "both Article 25 and equal protection under the law as applied" arguing that "by not considering ethnicity, [prospective African-American members] were indirectly excluded." (R. 507-508.)

ADC was clear that the Defense's position was not that the Convening Authority intentionally excluded African-Americans from the panel; rather, the Defense's contention was that "[the Convening Authority] should have considered ethnicity under equal protection under the law, and he didn't." (R. 509.) This position was based on the theory that "race and ethnicity is a part of someone's experience, and that when "[the Convening Authority] was reviewing questionnaires, he considered conflicts, but not experience." (R. 509-10.) ADC did not

proffer any legal support for this theory of interpretation of Article 25, UCMJ, when asked by the Military Judge. (R. 509, 513-15.) When the Military Judge noted that the Force Judge Advocate (FJA) to the Convening Authority was also African-American, ADC clarified that the Defense position was not that the Convening Authority intended to exclude African-Americans, but rather that the failure to consider race as part of a prospective members' experience was an equal protection violation. (R. 517.)

The Military Judge denied the motion, noting the lack of legal support for the Defense theory:

> It's denied because the issue . . . under Article 25 is whether or not the Convening Authority improperly did not consider the best qualified people, and the best qualified people are defined by those factors that we just discussed. The defense has presented virtually no evidence that the Convening Authority did not properly consider the Article 25 factors. . . . [W]hether the court agrees with you or not that race should be included as an additional factor, that's not something the law currently requires under Article 25.
>
> . . .[T]he court has received no evidence that the Convening Authority, or the SJA for the Convening Authority . . . did not properly consider Article 25. And because of that, the court finds no basis for finding in your favor on an improper selection of members.
>
> That ties into the fact that we appear to have an all Caucasian panel and an African-American accused. Now, the optics on that are not great, so I understand your concern, but that's not what the law requires. You have to have a problem under Article 25, you've got to have a factor that was inappropriately applied, and you've given me no evidence of that at this time. I

> understand you'd like to include race in the definition of "experience," but that's not what the law says.

(R. 523-25.)

Argument

I.

APPELLANT'S CONVICTION FOR FORCIBLE SODOMY IS LEGALLY AND FACTUALLY SUFFICIENT BECAUSE FORCIBLE SODOMY INCLUDES SITUATIONS WHERE A VICTIM CANNOT CONSENT DUE TO INCAPACITY.

A. These issues are reviewed *de novo*.

This Court reviews claims of legal and factual insufficiency *de novo*. Article 66(c), UCMJ; *United States v. Beatty*, 64 M.J. 456, 459 (C.A.A.F. 2007).

B. Considering the evidence admitted at trial in a light most favorable to the prosecution, a reasonable fact-finder could have found each element beyond a reasonable doubt.

The test for legal sufficiency is whether, considering the evidence admitted at trial in a light most favorable to the prosecution, a reasonable fact-finder could have found all the elements beyond a reasonable doubt. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). When testing for factual sufficiency, this Court asks whether, after weighing the evidence in the record of trial, this Court is independently convinced of Appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

In testing for factual sufficiency, this Court is required to "recogniz[e] that the trial court saw and heard the witnesses." *Id.* This is not a *pro forma* legal requirement. Rather, it takes into account that the trier of fact is best situated to assess a witness's credibility while testifying. *See United States v. Madey*, 14 M.J. 651, 653 (A.C.M.R. 1982), *rev. denied*, 15 M.J. 183 (C.M.A. 1983); *see also United States v. Ferguson*, 35 F.3d 327, 333 (7th Cir. 1994), *cert. denied*, 514 U.S. 1100 (1995)(trial court's evaluation of witness credibility "will not be disturbed unless it is completely without foundation."). It also takes into account that, where the court members are properly instructed to consider a witness's credibility, this Court should presume that the members followed the Military Judge's instructions. *See United States v. Collier*, 67 M.J. 347 (C.A.A.F. 2009).

1. <u>Appellant sexually assaulted ABE2 LBC by penetrating her vagina while she was passed out drunk and therefore unable to consent to the sexual acts</u>.

Specification 2 of Charge I alleged, in relevant part, that Appellant:

> did . . . engage in a sexual act, to wit: contact between the penis of [Appellant] and the vulva of [ABE2 LBC] who was substantially incapable of declining participation in the sexual act.

(Charge Sheet, Feb. 4, 2013.) The elements of aggravated sexual assault under Article 120, UCMJ, as charged in this case, are:

(1) that the accused engaged in a sexual act with another person; and (2) the other person was substantially incapable of declining participation in the sexual act. Manual for Courts-Martial, United States (MCM)(2008 ed.), Part IV, ¶ 45.b.(3)(c).

A "sexual act" is defined as:

> (A) contact between the penis and the vulva . . .; or
>
> (B) the penetration, however slight, of the genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

Article 120(t)(1), UCMJ.

In this case, there was more than sufficient evidence for the Members to conclude that ABE2 LBC was too intoxicated to consent to sexual acts with Appellant. MA2 Mack and the other witnesses who observed ABE2 LBC the morning of April 27, 2012 corroborate that she was so intoxicated early that morning that she was passed out on another Sailor's bed, and had to be carried back to her own hotel room. (R. 821, 895.) ABE1 Otesile's observations that ABE2 LBC was not talking and did not seem coherent as he carried her to her to her room establishes ABE2 LBC was too intoxicated to walk on her own, much less consent to sexual acts with Appellant. (R. 895-96.)

Moreover, ABE2 LBC's account of Appellant's sexual assault of her is compelling evidence that she did not in fact consent to any sexual acts with Appellant. ABE2 LBC awoke to Appellant

on top of her and his penis entering her vagina without her consent. (R. 934.) ABE2 LBC not only did not consent to sex with Appellant——she did not even know who he was. (R. 934.) Despite ABE2 LBC telling him to stop once she awoke and realized what was being done to her, Appellant persisted in his assault of her, and attempted to anally penetrate ABE2 LBC. (R. 935.) Only her screams of pain as Appellant inserted his penis into her anus seemed to deter Appellant from continuing. (R. 935.) By any objective account, ABE2 LBC was completely unconscious and unaware of Appellant entering her room and initiating sexual activity with her.

Viewed in a light most favorable to the prosecution, reasonable Members could have found that ABE2 LBC's observed level of intoxication, the fact that intoxication was sufficient to render her incapable of either making it to her room without assistance or consenting to any sexual activity with Appellant, and her account of awaking to Appellant engaging in sexual acts against her without her consent (and even without her consent to enter her room) satisfied the elements of aggravated sexual assault beyond a reasonable doubt.

2. This Court should be independently convinced of Appellant's guilt beyond a reasonable doubt as ABE2 LBC's account of events is corroborated by the testimonial evidence, the hotel surveillance video of Appellant's activities, and the DNA evidence establishing Appellant's sexual contact with her.

Additionally, ABE2 LBC's account of Appellant's sexual assault of her is corroborated by the physical evidence introduced at trial. Approximately ten minutes after ABE1 Otesile came to his room, Appellant was seen on the hotel's surveillance system by the door to ABE2 LBC's room on the fourth floor. (R. 1123; Pros. Ex. 2 at 03:38:15.) Appellant spent several minutes knocking on her door and, when she did not answer the door, he went down to the front desk, obtained a duplicate room key to ABE2 LBC's room, a key he had no authority to obtain, returned to ABE fourth floor, and let himself into her room. (R. 1124; Pros. Ex. 2 at 03:40:25.) ABE2 LBC's account was further corroborated by the surveillance video of her fleeing her room, taking the elevator down to MA2 Popo and MA2 Mack's room on the first floor after Appellant had been in the room for just over twenty-three minutes, and Appellant leaving her room shortly thereafter. (R. 936-37, 1127-28; Pros. Ex. 2 at 04:04:01, 04:04:58, 04:05:06.)

The forensic evidence of Appellant's and ABE2 LBC's DNA profiles inside of a pair of Appellant's underwear compellingly establishes that there was sexual contact between the two of

them that morning. (R. 1130, 1167-69; Pros. Ex. 18; Def. Ex. E.)

Based on the testimonial evidence of ABE2 LBC's level of intoxication, her testimony that she did not in fact consent to any sexual contact with Appellant, the forensic evidence establishing that notwithstanding her lack of consent Appellant sexually forced himself on her the morning of April 27, 2012, and the hotel's video surveillance corroborating ABE2 LBC's timeline and recollection of events, this Court should be convinced beyond a reasonable doubt that Appellant is guilty of aggravated sexual assault.

II.

THE CONVENING AUTHORITY PROPERLY SELECTED THE MEMBERS' PANEL IN ACCORDANCE WITH ARTICLE 25, UCMJ. THE MILITARY JUDGE PROPERLY DENIED APPELLANT'S REQUEST TO DISMISS THE ENTIRE PANEL.

A. This issue is reviewed *de novo*.

"Whether a court-martial panel was selected free from systematic exclusion" is a question of law which is reviewed *de novo*. *United States v. Kirkland,* 53 M.J. 22, 24 (C.A.A.F. 2000) (citing *United States McClain,* 22 M.J. 124 (C.M.A. 1986). Article 25(d)(2), UCMJ, requires that:

> When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education,

training, experience, length of service, and judicial temperament.

"Members may not be selected solely on the basis of their rank." *United States v. Roland,* 50 M.J. 66, 68 (C.A.A.F. 1999) (citing *United States v. Nixon,* 33 M.J. 433, 434 (C.M.A. 1991). Appellant shoulders the burden of establishing qualified personnel were improperly excluded from the selection process. *Roland,* 50 M.J. at 69.

B. Appellant has not offered any specific evidence that the Convening Authority did not properly apply the criteria in Article 25, UCMJ, in selecting the Members in his case.

1. Panel selection criteria under Article 25, UCMJ.

Article 25(a), UCMJ, generally provides that "[a]ny commissioned officer on active duty is eligible to serve on all courts-martial." Article 25(c)(1) generally provides that any enlisted member on active duty who is not a member of the same unit as the accused is eligible to serve on a court-martial panel where an enlisted accused has made a written request for enlisted members. From those servicemembers eligible to serve on a court-martial panel, "the convening authority shall detail as members thereof such members . . . as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." Article 25(d)(2), UCMJ. Although the convening authority must personally select the court-martial members, he

or she may rely on staff and subordinate commanders to compile a list of eligible members. *United States v. Dowty,* 60 M.J. 163, 169-70 (C.A.A.F. 2004).

The operation of Article 25, UCMJ, is further informed by case law. Improper motives to "pack" the member pool, or "systemic exclusion of otherwise qualified potential members based on an impermissible variable such as rank[, race, or gender] is improper"; however, courts "will be deferential to good faith attempts to be inclusive and to require representativeness so that court-martial service is open to all segments of the military community." *Dowty,* 60 M.J. at 171.

2. Appellant did not meet his burden at trial to establish that the Convening Authority improperly excluded African-Americans from the members' panel.

Relying upon a novel interpretation of *United States v. Santiago-Davila,* 26 M.J. 380 (C.M.A. 1988), at trial Appellant argued not that the screening methodology used in his case impermissibly excluded a cognizable racial group in violation of his due process rights under the *Fifth Amendment*, but rather that due process required the Convening Authority to consider and include African-American members in the panel. (R. 507-508.) In *Santiago-Davila*, a case involving a Puerto Rican accused, the government used its only peremptory challenge to exclude a potential member with a Hispanic surname who was "[r]aised in

Puerto Rico." *Santiago-Davila,* 26 M.J. at 384-86, 391. The *Santiago-Davila* Court, applying *Batson v. Kentucky*, 476 U.S. 79 (1986), held that the appellant had established a prima facie case of discrimination, thereby shifting the burden at trial to the government to present a neutral reason for excluding the member in question. *Santiago-Davila,* 26 M.J. at 391-92.

This case is distinguishable from *Santiago-Davila* and *Batson*. Although the resulting panel did not include African-American members, there is no evidence in the record of an improper motive to "pack the member pool" or to exclude members based on race. Moreover, the novel theory advanced by Appellant that Due Process requires the systematic *inclusion* of African-American members in cases involving an African-American accused is both contrary to case law and the proper application of the race-neutral selection criteria in Article 25, UCMJ. See *United States v. Roland*, 50 M.J. 66, 68 (C.A.A.F. 1999)(a nomination process may not systematically exclude or include a certain category of servicemembers).

There is no evidence that the FJA or Convening Authority knew the racial composition of potential members, as the members' questionnaires did not include any information about race. (Appellate Ex. XLIX.) Nor is there evidence in the Record that the FJA, directly or indirectly, advised the Convening Authority regarding race as a category for inclusion or exclusion on a

potential panel. Nor is there any evidence that the Convening Authority intended to exclude African-Americans from service. Thus, the Military Judge's factual conclusion that Appellant failed to meet his burden to establish that race was utilized as an improper criteria in screening the potential members was not clearly erroneous as there was no evidence of an intent to exclude African-Americans. (R. 523-25.)

3. The Convening Authority did not improperly exclude potential members based on rank.

Now on appeal, Appellant recasts his original argument asserted at trial, and instead argues that the screening criteria utilized by the Convening Authority improperly prohibited nomination of "potential members because they were paygrade E-6 and below, were Warrant and Chief Warrant officers, and were paygrade O-6 and above." (Appellant's Br., at 32.) Appellant's argument, however, misstates the clear language and applicability of the Convening Authority's administrative instruction tasking certain subordinate commands with providing nominees to be prospective courts-martial members. Paragraph 5 of COMNAVAIRLANTINST 5813.1H is prefaced with a clear statement that the tasking to subordinate commands for additional nominees is for the purpose of supplementing the Convening Authority's pool of prospective members:

> *In addition to* COMNAVAIRLANT Staff members who regularly sit on courts-martial, the commands listed

> below are required to submit quarterly nominations for prospective members in the number and grade indicated, to serve as court-martial members for a period of three months. . . (emphasis added)

(Supplemental Request for Clemency, Encl. 1.) Appellant urges this Court to disregard this language stating that the nominees from subordinate commands are to supplement the pool of "staff members who regularly sit on courts-martial" and interpret the tasking to the subordinate commands in Paragraph 5.a as comprising the entire range of paygrades considered by the Convening Authority as prospective courts-martial members.[2]

The instruction simply does not say what Appellant asserts that is says. Accordingly, Appellant's reliance upon *United States v. Kirkland*, 53 M.J. 22 (C.A.A.F. 2000), is misplaced. In *Kirkland*, the base legal office solicited subordinate commands with providing nominees for membership on courts-martial panels. *Kirkland*, 53 M.J. at 23. The legal office provided a chart that specified the "number and rank of the personnel that each commander was asked to nominate." *Id*. The chart had a column for E-7, E-8, and E-9, but no place to list a

[2] The United States notes that the instruction is unclear whether the solicitation of "LT or below" in Paragraph 5.a. applies only to commissioned officers or encompasses both commissioned officers in paygrades O1-O3 and warrant officers. But the United States does not concede Appellant's argument that subordinate commands are precluded from submitting nomination of warrant and chief warrant officers based on the language in this instruction.

nominee in a lower grade. To nominate an E-6 or below, the nominating official would have had to modify the form. *Id.*

Unlike *Kirkland*, here the nominations from the subordinate commands did not comprise the entire pool of potential members considered by the Convening Authority; rather, those nominations combined with staff assigned to Naval Air Force Atlantic constituted the pool of service members considered. Of the ten members originally detailed to Appellant's court-martial, four were staff assigned to Naval Air Force Atlantic and the remaining six were from subordinate commands. (R. 503; Appellate Ex. XLIX; General Court-Martial Convening Order 1-13, Feb. 4, 2013.) The detailing of COMNAVAIRLANT staff to Appellant's court-martial, in addition to members of subordinate commands, establishes that the Convening Authority selected qualified personnel both from his staff as well as the subset of nominees solicited from his subordinate commands.

As the pool of prospective members was significantly broader than Appellant argues and Appellant has not produced any evidence that the Convening Authority had an improper motive in composing the panel or did not otherwise properly apply the criteria of Article 25, UCMJ, Appellant has not met his burden to prove that any category of members were improperly excluded from the selection process. *Roland,* 50 M.J. at 69. Accordingly, this Court should conclude that there was no

impropriety or appearance of impropriety and that the panel was properly selected.

C. Assuming *arguendo* that the Convening Authority systematically excluded members of certain ranks, Appellant suffered no prejudice as there is no evidence that the Members were not fair and impartial.

"Where a convening authority has intentionally included or excluded certain classes of individuals from membership, in an attempt to comply with the requirements of Article 25, UCMJ—such as exclusion of junior officers and enlisted members because senior officers possess better maturity and judgment—we have placed the burden on the government to demonstrate lack of harm." *United States v. Bartlett,* 66 M.J. 426, 430 (C.A.A.F. 2008) (citing *United States v. Dowty,* 60 M.J. 163, 173-75 (C.A.A.F. 2004); *see also United States v. Gooch,* 69 M.J. 353, 361 (C.A.A.F. 2011). Furthermore, "there is a strong presumption that an error is not structural," and courts employ "a case-specific rather than a structural-error analysis in deciding issues of improper court member selection." *Bartlett,* 66 M.J. at 430.

Here, there is "no evidence the convening authority's motivation in detailing the members he assigned to Appellant's court-martial was anything but benign." *See id.* at 431. Appellant's case was convened by a Convening Authority who was authorized to convene a general court-martial; Appellant was

tried and sentenced by members personally chosen by the Convening Authority; and, "the court members all met the criteria in Article 25, UCMJ." *Id.* (articulating case-specific facts demonstrating any error was harmless); *see also Gooch,* 69 M.J. at 361 (finding error but no prejudice because "the Article 25, UCMJ, criteria were applied to the potential pool of panel members" and the resulting panel that tried appellant was "fair and impartial"). Absent specific evidence that the Members were not fair or impartial and there was some prejudice to Appellant because of that unfairness or impartiality——even assuming that the Convening Authority improperly excluded prospective members based on rank or grade——the Record as a whole demonstrates a lack of harm. *See Bartlett,* 66 M.J. at 430-31.

III.

THERE IS NO DISCOVERY VIOLATION HERE BECAUSE THE INSTRUCTION AT ISSUE WAS NOT RESPONSIVE TO THE DEFENSE REQUEST. EVEN ASSUMING THE INSTRUCTION WAS SUBJECT TO DISCOVERY, APPELLANT WAS TRIED BY A FAIR AND IMPARTIAL PANEL AND THEREFORE SUFFERED NO PREJUDICE.

Military appellate courts utilize a two-step process to analyze "discovery/disclosure issues[:]. . . first, we determine whether the information or evidence at issue was subject to disclosure or discovery; second, if there was nondisclosure of

such information, we test the effect of that nondisclosure on the appellant's trial." *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004).

Article 46, UCMJ, grants an accused "equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." 10 U.S.C. § 846 (2012). This statute is implemented by R.C.M. 701, which includes "papers . . . within the possession, custody, or control of military authorities . . . which are material to the preparation of the defense." R.C.M. 701(a)(2)(A). The disclosure requirements of this rule have been described as a "liberal mandate." *Roberts*, 59 M.J. at 325.
Contrary to Appellant's assertion, however, the Command Instruction is not responsive to this request because it is an administrative measure that, by its terms, merely delineates the pool of personnel from subordinate commands available to supplement the larger pool of personnel, including COMNAVAIRLANT staff, available for detailing to courts-martial. There is no evidence in the Record or elsewhere that this Instruction was used by the Convening Authority or constrained his authority under Article 25, UCMJ, in selecting final members for Appellant's court-martial.

In response to this request, Trial Counsel did provide lists of all Convening Orders and members questionnaires in this

case. (General Court-Martial Order 1B-13, Aug. 6, 2013; General Court-Martial Order 1A-13, Aug. 2, 2013; General Court-Martial Order 1-13, Feb. 4, 2013; Appellate Ex. XLIX.) These orders and questionnaires pertained to the prospective members who actually were nominated and considered by the Convening Authority for detailing to Appellant's trial——and were fully responsive to the Defense request here. Accepting Appellant's argument that the administrative instruction was responsive to the discovery request here would stretch R.C.M. 701 beyond all reason, requiring disclosure of all manner of instructions, regulations, statutory codes and other miscellaneous documents under penalty of reversal. This Court should not entertain such attenuated logic, and refuse relief on this assignment of error.

Further, even if a copy of the Instruction should have been disclosed, *arguendo*, nothing about Appellant's trial would have been different. As detailed in AOE II, *supra*, Appellant has produced no evidence that the Convening Authority did not select members from within his entire claimancy that were best qualified in accordance with Article 25, UCMJ. Appellant has similarly made no claim that the panel that tried him was anything other than fair and impartial. And, as detailed in AOE I, *supra*, there was ample testimonial and physical evidence to support the legal and factual bases of the charges of which Appellant was convicted. Accordingly, even assuming that there

was a discovery violation here, Appellant suffered no prejudice and the discovery error was harmless beyond a reasonable doubt.

Conclusion

WHEREFORE, the Government respectfully requests that this Court affirm the findings and sentence as adjudged and approved below.

KEITH B. LOFLAND
Lieutenant Commander, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-8384, fax (202) 685-7687

Certificate of Filing and Service

I certify the foregoing was delivered to the Court and a copy was served upon opposing counsel and electronically filed with the Court pursuant to N-M. Ct. Crim. App. Rule 5.2(b)(1) on August 18, 2014.

KEITH B. LOFLAND
Lieutenant Commander, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-8384, fax (202) 685-7687

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 3

UNITED STATES, Appellee v. Fabian J. THOMPSON, Aviation Boatswain's Mate, First Class (E-6) U. S. Navy Appellant	**APPELLANT'S BRIEF AND ASSIGNMENTS OF ERROR** Case No. 201400072 Tried at Region Legal Service Office Mid-Atlantic, Norfolk, Virginia, on 9 February, 7 May, 8 July, 2 August, and 5 through 9 August 2013, by a general court-martial convened by Commander, Naval Air Force Atlantic

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

JOHN J. STEPHENS
Major, U.S. Marine Corps
Appellate Defense Counsel
1254 Charles Morris St, SE
Bldg 58, Suite 100
Washington Navy Yard, D.C. 20374
Tel: (202) 685-8587
Fax: (202) 685-7426
john.j.stephens@navy.mil

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Assignments of Error

I.

TO AFFIRM A CONVICTION FOR AGGRAVATED SEXUAL ASSAULT, THIS COURT MUST BE CONVINCED THE ALLEGED VICTIM WAS SUBSTANTIALLY INCAPABLE OF DECLINING PARTICIPATION IN THE SEXUAL ACT. HERE, THE EVIDENCE INDICATES THE ALLEGED VICTIM WAS NOT SO INTOXICATED AS TO BE UNABLE TO DECLINE PARTICIPATION. CAN THIS COURT AFFIRM ABE1 THOMPSON'S CONVICTION?

II.

IT IS REVERSIBLE ERROR FOR THE CONVENING AUTHORITY TO USE RANK ALONE AS CRITERIA TO SELECT MEMBERS FOR A COURT-MARTIAL PANEL. THE CONVENING AUTHORITY PROHIBITED NOMINATIONS OF POTENTIAL MEMBERS BECAUSE THEY WERE PAY GRADE E-6 AND BELOW, WERE WARRANT AND CHIEF WARRANT OFFICERS, AND WERE PAY GRADE O-6 AND ABOVE. DID THIS EXCLUSION CONSTITUTE REVERSIBLE ERROR?

III.

THE GOVERNMENT IS OBLIGATED TO PRODUCE RELEVANT MATERIALS IN ITS POSSESSION UPON A TIMELY DEFENSE REQUEST. HERE, THE DEFENSE REQUESTED ALL MATERIALS CONSIDERED BY THE CONVENING AUTHORITY IN SELECTING MEMBERS. THE GOVERNMENT FAILED TO DISCLOSE THE CONVENING AUTHORITY'S MEMBER SELECTION INSTRUCTION. WAS THIS FAILURE TO DISCLOSE REVERSIBLE ERROR?

Statement of Statutory Jurisdiction

Aviation Boatswain's Mate First Class (ABE1) Fabian Thompson's case is within this Court's Article 66(b)(1), Uniform Code of Military Justice (UCMJ), jurisdiction because he received an approved court-martial sentence that included a bad-conduct discharge.[1]

Statement of the Case

An officer and enlisted members panel, sitting as a general court-martial, convicted ABE1 Thompson, contrary to his pleas, of one specification of aggravated sexual assault in violation of Article 120, UCMJ.[2] The members acquitted ABE1 Thompson of a second specification of aggravated sexual assault, and single specifications of forcible sodomy and burglary, in violation of Articles 120, 125, and 129, UCMJ.[3] ABE1 Thompson was sentenced to reduction to pay-grade E-1, confinement for one year, and a bad-conduct discharge.[4] The convening authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.[5]

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[1] 10 U.S.C. § 866 (2012).
[2] 10 U.S.C. § 920 (2012).
[3] 10 U.S.C. §§ 925, 929 (2012); Report of Results of Trial ICO U.S. v. ABE1 Fabian J. Thompson, USN, Aug. 9, 2013 (Results of Trial); R. at 1505.
[4] Results of Trial; R. at 1581.
[5] General Court-Martial Order No. 3-14, Jan. 28, 2014.

Statement of Facts

1. The party at the Courtyard Marriot in Dubai.

In late April of 2012, the USS ENTERPRISE (CVN 65), pulled into port in Dubai, in the United Arab Emirates.[6] Several sailors spent their liberty at the Dubai Courtyard Marriot.[7] Two groups of sailors, one group of men and one group of women, all socialized together at the hotel, as they had during past liberty calls.[8] The men's group consisted of ABE1 Thompson, ABE1 Matthew Otesile, ABE1 Lavon Turner, ABE1 Terrance Robinson, and ABE1 Terrance Grier.[9] The women were the alleged victim, ABE2 L.B., ABH1 Sheronda Fieldings, Master-at-Arms Second Class (MA2) Esther Popo, and MA2 Sharona Mack.[10] MA2 Mack and MA2 Popo shared a room on the first floor.[11] ABE1 Otesile also had a room on the first floor that he shared with ABE1 Robinson.[12] ABE1 Thompson shared a room with ABE1 Grier on the second floor.[13] The alleged victim had her own room on the fourth floor.[14]

Beginning around 2100, some in the group socialized by the

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[6] R. at 756, 816.
[7] R. at 757, 816-18.
[8] R. at 804.
[9] R. at 758, 817, 891.
[10] R. at 757.
[11] *Id*.
[12] R. at 892.
[13] R. at 1296; Pros. Ex. 2.
[14] R. at 757, 930.

hotel pool, while eating and drinking alcohol.[15] After midnight, the alleged victim accompanied some of the sailors to ABE1 Thompson's second-floor room to continue partying.[16] At this time, ABE2 L.B. was not intoxicated, having consumed between one and three mixed drinks and having eaten dinner.[17] MA2 Popo and MA2 Mack later joined the group.[18]

In ABE1 Thompson's room, there was singing, music, and dancing, as well as drinking.[19] The alleged victim continued to socialize with the others while playing a game to see who could find the oldest music on his or her cell phone or iPod.[20] ABE2 L.B. continued to consume mixed drinks over the next three hours, but no one observed her stumbling or unable to stand.[21] MA2 Mack said she was not "slurring her speech,"[22] though MA2 Popo recalled she slurred her words "a little bit."[23] ABE2 L.B. danced to the music in front of a large ottoman with a mirror.[24] Sometime around 0330, she laid down on ABE1 Thompson's bed.[25] Known for being a deep sleeper, and difficult to wake, some of

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[15] R. at 758-59, 893, 969-73.
[16] R. at 760, 820, 893.
[17] R. at 979.
[18] R. at 760, 820.
[19] R. at 761.
[20] R. at 821, 860.
[21] R. at 761, 780, 820.
[22] R. at 861.
[23] R. at 761.
[24] R. at 822, 860.
[25] R. at 762.

the other sailors began to jab and poke at her – to no effect.[26] Eventually, her friend, MA2 Popo, roused her and told her to go upstairs to her room on the fourth floor.[27]

MA2 Popo asked MA1 Otesile to escort the alleged victim up to her room.[28] MA1 Otesile then offered his back and, after she climbed on him, he carried her "piggyback" style.[29] They took the elevator up to the fourth floor, where, at 0328, the alleged victim dismounted and walked into her room without assistance.[30] Less than two minutes later,[31] MA1 Otesile left the room and went down to his room on the first floor, though he stopped briefly at ABE1 Thompson's room for a cell phone charger.[32] Once at his room, he called MA2 Popo and told her that the alleged victim was in her room in bed.[33]

About thirty-five minutes later,[34] the alleged victim, clad in only a hotel towel and her bra, loudly pounded on MA2 Popo and MA2 Mack's hotel room door.[35] When they let her in, she was "crying" and "hysterical", though she was not slurring her words

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[26] R. at 762-64.
[27] R. at 764.
[28] *Id*.
[29] *Id*.
[30] R. at 832; Pros. Ex. 2, at 03:28:05.
[31] R. at 833; Pros. Ex. 2, at 03:29:26.
[32] R. at 896-97.
[33] R. at 897.
[34] R. at 836; Pros. Ex. 2.
[35] R. at 764-65.

or unable to walk.[36] She complained of vaginal pain and when asked by MA2 Popo who had "touched her," the alleged victim initially refused to say, then said she "didn't know," but then said "he said his name was Thompson."[37]

2. The investigation into the incident.

MA2 Popo, despite the identification of ABE1 Thompson, believed MA1 Otesile had sexually assaulted the alleged victim.[38] MA2 Popo went down the hall to his room and questioned him.[39] She also questioned ABE1 Thompson, who denied entering the alleged victim's hotel room.[40]

The next morning, MA2 Popo and MA2 Mack continued their investigation and asked the hotel security to see the footage from the hallway surveillance cameras.[41] In it, they saw MA1 Otesile carrying the alleged victim to her room, where she dismounted and walked in under her own power at 0327.[42] The video also showed MA1 Otesile left the room after about two minutes and walked toward the elevator.[43] Ten minutes later, ABE1 Thompson knocked on her door, waited for two minutes, and

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[36] R. at 770. MA2 Popo described that ABE2 L.B. threw up "so many times in the room," but never describes the alleged victim as "substantially incapacitated."
[37] R. at 765.
[38] R. at 767.
[39] *Id*.
[40] *Id*.
[41] R. at 769, 828, 830-31.
[42] R. at 832; Pros. Ex. 2, at 03:28.
[43] R. at 833; Pros. Ex. 2, at 03:29.

then walked toward the elevator.[44] The video then showed ABE1 Thompson in the lobby requesting a key for the alleged victim's room.[45] He returned to her room at 0343, inserted the key card, and entered the room.[46] Twenty-one minutes later, the video showed the alleged victim, in a towel, exit the room and walk down the hallway to the elevator.[47] Finally, the video shows her in the elevator riding down to the first floor, where she exits and walks directly to MA2 Popo and MA2 Mack's room.[48]

When MA2 Popo returned to the ship, she reported the alleged incident.[49] The command responded by having a Master-at-Arms Security sailor escort ABE1 Thompson once he returned to the ship.[50] He was interviewed by a Naval Criminal Investigative Service (NCIS) Special Agent and then detained in an empty stateroom for two days.[51]

3. The alleged victim's credibility and motive to fabricate was questioned during the court-martial.

In her NCIS interview, ABE2 L.B. made a sworn statement declaring, "I have never had any kind of romantic relationship

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[44] R. at 834; Pros. Ex. 2, at 03:39 to 03:41.
[45] R. at 835; Pros. Ex. 2, at 03:42 to 03:43.
[46] R. at 835; Pros. Ex. 2, at 03:43.
[47] R. at 836; Pros. Ex. 2, at 04:04.
[48] Pros. Ex. 2, at 04:04 to 04:05.
[49] R. at 995.
[50] R at 127-130, 201-12; Appellate Ex. XXV.
[51] R. at 201-12. ABE1 Thompson was granted two days' confinement credit for illegal pretrial confinement. Appellate Ex. XXV.

with [ABE1] Thompson or given him the idea that I wanted to."[52] The defense prevailed on a motion under M.R.E. 412, and was allowed to admit evidence of a prior consensual sexual relationship between ABE1 Thompson and the alleged victim.[53] At trial, she again denied having had consensual sexual intercourse with or performing oral sex on ABE1 Thompson in October 2011 after going out to a nightclub in Virginia.[54] She told the members that "nothing" happened that night, except that ABE1 Thompson "tried to have sex with me."[55] She explained he "came over to the side of the bed and tried to have sex" with her, but she "pushed him off" and "grabbed [her] clothes and . . . ran downstairs."[56]

The alleged victim's testimony was directly contradicted by two defense witnesses and ABE1 Thompson. ABE3 Nicholas Rowe[57] and ABE3 Genena Evans-Johnson[58] both testified that in October 2011, they and the alleged victim and ABE1 Thompson went to the Queens Way Soul Café.[59] After a night of drinking and dancing, the quartet returned to ABE3 Rowe's home.[60] There, ABE2 L.B. had

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[52] Appellate Ex. LV, at 2.
[53] Appellate Ex. XII; R. at 35-65.
[54] R. at 997-98, 1025-26.
[55] R. at 1038-39.
[56] *Id*.
[57] ABE3 Rowe's testimony: R. at 1226-31.
[58] ABE3 Evans-Johnson's testimony: R. at 1209-26.
[59] R. at 1211-12, 1227.
[60] R. at 1212, 1227.

sex with ABE3 Rowe, ABE1 Thompson, and ABE3 Evans-Johnson.[61] The latter also testified that for a period of two to three years,[62] she and the alleged victim had every-other-month sexual encounters when they "were drunk."[63] Both Petty Officers Rowe and Evans-Johnson testified they directly observed ABE2 L.B. have consensual sexual intercourse and oral sex with ABE1 Thompson.[64] Despite these facts, the alleged victim maintained she had never had sexual relations with ABE1 Thompson.

The alleged victim was also cross-examined about her Sexual Assault Forensic Examination (SAFE).[65] She told Hospital Corpsman First Class (HM1) Judith Wesley, the Independent Duty Corpsman for USS ENTERPRISE, that she had no other sexual encounters for the five days prior to the alleged assault.[66] In fact, two days before the alleged incident, she had sexual intercourse with Aviation Ordnanceman Second Class (AO2) Shaun Parrish.[67] She admitted to the sex during cross-examination, but denied, even after viewing her SAFE report on the witness stand, that HM1 Wesley ever asked her about prior sexual encounters.[68]

The alleged victim also admitted that she had retained a

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[61] R. at 1215, 1229-30.
[62] R. at 1222.
[63] R. at 1216
[64] R. at 1212-13, 1229-30.
[65] R. at 990-94.
[66] R. at 1238-9; Def. Ex. A, at 3.
[67] R. at 931, 988.
[68] R. at 990-93.

civilian attorney[69] to pursue a compensation claim against the Marriot Corporation's insurance provider.[70] She was preparing to file a claim because the Marriot employee gave ABE1 Thompson an unauthorized hotel room key, which resulted in her alleged sexual assault.[71] She testified she "didn't know" if her lawyer was waiting to make a monetary settlement demand until after the results of the court-martial.[72]

4. ABE1 Thompson's version of events differs from the alleged victim's.

The alleged victim and ABE1 Thompson both recounted their sexual encounter during the court-martial. The alleged victim could only remember she was asleep in a bed and was roused by an unidentified man penetrating her vagina with his penis.[73] She asked, "Who is this?" and the man whispered, "Thompson."[74] When she asked him to stop, she claimed he flipped her over and attempted to penetrate her anus with his penis.[75] She then screamed.[76] Then, according to her, the man flipped her back over and again penetrated her vagina.[77] She did not remember

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[69] R. at 999.
[70] *Id*.
[71] *See* Appellate Ex. XVIII, Letter from civilian counsel to military judge, July 10, 2013.
[72] R. at 999.
[73] R. at 933.
[74] R. at 934.
[75] R. at 935.
[76] *Id*.
[77] R. at 935, 939-40.

resisting, but recalled somehow being able to escape.[78] She then ran to the bathroom, grabbed a towel, left the room, and, according to her testimony, "ran out of" her room "to the elevator."[79] On cross-examination, she said she ran because she was afraid the individual would come after her and after exiting the elevator, she ran down the hall to MA2 Popo's room.[80]

ABE1 Thompson testified he had been having trouble obtaining internet access through his laptop and phone while attempting to make a video call to his family back in the United States.[81] He decided he needed the power cord for his laptop computer.[82] Earlier, he lent the power cord to the alleged victim.[83] She had an identical laptop computer and had left her power cord on the ship.[84] This fact was not disputed at trial.[85]

When ABE1 Thompson entered the room, he walked over to the laptop computer on the desk.[86] He was able to see the cord in the dark room, because the battery unit had a green light that

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[78] R. at 935, 983.
[79] R. at 935.
[80] R. at 985-86.
[81] R. at 1296-97.
[82] R. at 1296, 1323-25.
[83] R. at 973.
[84] R. at 974.
[85] The alleged victim acknowledged ABE1 Thompson gave her his laptop battery cord to borrow because she left hers on the ship. R. at 973-74.
[86] R. at 1300.

was on and clearly visible.[87] He said, “Hey B., it’s Thompson. I’m just getting my laptop charger.”[88] As he was starting to unplug the charger, the alleged victim said, “Yo” in a low tone.[89] When ABE1 Thompson turned around, he saw her on the bed with her arms in a raised position.[90]

When he went over to her, he said, “It’s Thompson,” to which she responded by grabbing his arm and moving it down to her crotch and rubbing in a circular motion.[91] ABE1 Thompson then lay down on the bed next to her and they engaged in foreplay for a couple of minutes.[92] ABE1 Thompson recalled the alleged victim was only wearing her bra and underwear.[93] Then she climbed on top and began “dry humping” him with ABE1 Thompson holding her hips.[94] He still had on his t-shirt and his boxer shorts.[95]

Then the alleged victim reached down through the opening in his boxer shorts and began stroking his penis and rubbing it against her vagina.[96] She then inserted his penis into her

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[87] R. at 1300.
[88] *Id*.
[89] R. at 1301.
[90] *Id*.
[91] *Id*.
[92] R. at 1302.
[93] *Id*.
[94] *Id*.
[95] *Id*.
[96] R. at 1303.

vagina and they had intercourse for a few minutes.[97] ABE1 Thompson did not ejaculate.[98]

After the brief intercourse, the alleged victim laid down on the bed next to ABE1 Thompson.[99] After a moment she said, "Who is this? Who is this?" to which ABE1 Thompson said, "It's Thompson, it's Thompson."[100] She then said, "Take me to my room, take me to my room" to which he responded, "You are in your room."[101] After this exchange, she laid there for a minute and then got up and walked to the bathroom.[102] The next thing ABE1 Thompson recalled was hearing the hotel room door close; though from the bed, he could not see the door.[103] After this, ABE1 Thompson got up from the bed and left the room.[104] He quickly walked down the hallway to the stairs and returned to his room.[105]

5. The Convening Authority only considered members in the pay grades of E-7 to E-9 and O-1 to O-5 for the panel.

In 2008, the Convening Authority, Commander, Naval Air Force, Atlantic (COMNAVAIRLANT) issued an Instruction to his subordinate commanders (COMNAVAIRLANTINST 5813.1H or

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[97] R. at 1303.
[98] *Id*.
[99] *Id*.
[100] R. at 1304.
[101] *Id*.
[102] *Id*.
[103] R. at 1304-05.
[104] R. at 1304.
[105] R. at 1305-06; Pros. Ex. 2 at 04:06.

"Instruction").[106] This Instruction was to "publish procedures for submission of prospective court-martial members" and was in effect during ABE1 Thompson's court-martial.[107] It expressly provides that the only members subordinate commands may nominate are enlisted members of pay grades E-7, E-8, and E-9, and Officers from pay grade O-1 through 0-5.[108] It precluded subordinate commanders from submitting enlisted members of the pay grade E-6 and below, Officers in pay grade O-6 and above, or Warrant or Chief Warrant Officers.[109] The two General Court-Martial Convening Orders in this case both followed the Instruction.[110] The commanders nominated no enlisted member below the pay grade of E-7, no Officer above the pay grade of O-5, and no Warrant or Chief Warrant Officer.[111]

The trial defense counsel requested this Instruction from the Government in discovery.[112] The Government failed to produce it.[113] At trial, the defense made a timely motion to dismiss the panel for improper selection because the CA failed to consider

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[106] Supplemental Request for Clemency submitted on Jan. 21, 2014 (Clemency), encl. (1).
[107] Instruction.
[108] *Id*.
[109] *Id*.
[110] Clemency, encls. (3) and (4).
[111] *Id*.
[112] Clemency at 2-3.
[113] *Id*.

race as a type of experience under Article 25, UCMJ.[114] The military judge denied the motion. The convening order appointed two Commanders, two Lieutenant Commanders, two Lieutenants, and five Chiefs.[115] Ultimately, one Commander, one Lieutenant Commander, and three Chiefs comprised the general court-martial.

Despite the litigated Article 25 motion, the defense did not learn of the Instruction until after the completion of trial.[116] Trial defense counsel raised the issue to the CA in a supplement to her R.C.M. 1105 matters.[117] In an Addendum Staff Judge Advocate Recommendation (SJAR), the SJA determined the issue was waived.[118] The CA declined to grant any clemency, order a new trial, or request a post-trial 39(a) session.[119]

Summary of Argument

This Court may only affirm a conviction if it is convinced, beyond a reasonable doubt, of its factual and legal sufficiency. Here, ABE1 Thompson's conviction can only be affirmed if this Court believes the alleged victim was either asleep or was so intoxicated as to prohibit her ability to decline participation in the sexual act. The evidence that the alleged victim was

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[114] R. at 503-28.
[115] General Court-Martial Convening Order 1B-13, Aug. 6, 2013; R. at 715.
[116] Clemency at 2-3.
[117] Clemency.
[118] Staff Judge Advocate Recommendation Addendum, Jan. 28, 2014.
[119] General Court-Martial Order No. 3-14, Jan. 28, 2014.

asleep and could not decline participation only comes from the alleged victim herself. She lacks credibility because of she lied multiple times. And, significantly, she had an undeniable motive to fabricate to secure ABE1 Thompson's conviction since doing so would assist her monetary claim in her civil lawsuit. The evidence of her substantial incapacitation due to intoxication is also insufficient to allow this Court to be firmly convinced of ABE1 Thompson's guilt.

The Convening Authority is prohibited from using rank alone as a basis in which to select members for a court-martial. The Convening Authority issued an Instruction to subordinate commanders to nominate certain types of members. This Instruction precluded, based solely on rank, the nomination of the following personnel: (1) members in pay grade E-6 and below, (2) Warrant Officers and Chief Warrant Officers, and (3) members in pay grade O-6 and above. This scheme violated Article 25, UCMJ. The way the panel was selected calls into question the essential fairness and integrity of the court-martial. Accordingly, the findings and sentence must be set aside.

The Government has a continuing obligation to produce relevant materials pursuant to a timely request from the defense. The Government ignored its obligation and failed to produce the above-mentioned Instruction. This prevented the

defense from making a timely motion to dismiss the court-martial panel and require the Convening Authority to nominate new members in compliance with Article 25, UCMJ. The assembled panel should have never been convened to hear ABE1 Thompson's case.

I.

TO AFFIRM A CONVICTION FOR AGGRAVATED SEXUAL ASSAULT, THIS COURT MUST BE CONVINCED THAT THE ALLEGED VICTIM WAS SUBSTANTIALLY INCAPABLE OF DECLINING PARTICIPATION IN THE SEXUAL ACT. THE EVIDENCE INDICATES SHE WAS NOT SO INTOXICATED AS TO BE UNABLE TO DECLINE PARTICIPATION. THIS COURT CANNOT AFFIRM ABE1 THOMPSON'S CONVICTION.

Discussion

This Court has an independent obligation to review each case *de novo* for factual and legal sufficiency, and may substitute its own judgment for that of the trial court.[120] The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt."[121] The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the

[120] Art. 66, UCMJ; *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987).
[121] *Turner*, 25 M.J. at 324 (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

witnesses, [this Court is] convinced of the accused's guilt beyond a reasonable doubt."[122] In exercising this duty, this Court may judge the credibility of witnesses, determine controverted questions of fact, and substitute its judgment for that of the military judge.[123]

To sustain this conviction, the Government must prove, beyond a reasonable doubt, that ABE1 Thompson's penis contacted ABE2 L.B.'s vulva, while she was "substantially incapable of declining participation in the sexual act."[124] In addition, the Government must prove beyond a reasonable doubt that ABE1 Thompson did not hold an incorrect belief that ABE2 L.B. consented to the sexual act.[125]

A. The conviction cannot be affirmed because it depends entirely upon the credibility of ABE2 L.B.

ABE2 L.B. is not a credible witness. During trial, the members heard conflicting versions of what happened in the hotel room. One, from the alleged victim, featured a certainty of the necessary legal elements, and was plagued by memory lapses that arose in cross-examination. The other, from ABE1 Thompson, was an account of how a former paramour invited a sexual encounter

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[122] *Turner*, 25 M.J. at 325.
[123] Art. 66(c), UCMJ; *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990).
[124] Charge Sheet, Manual for Courts-Martial (MCM), United States (2012 ed.), App. 28, ¶ 45a(c)(2)(b).
[125] R. at 1432-33; *see* MCM Part IV, ¶ 45a(f); R.C.M. 916(j)(3).

and then, for some reason, became hysterical after the episode and left the room. Thus, the trial turned on ABE2 L.B.'s credibility.

The evidence revealed a significant, and telling, character trait about ABE2 L.B.: she lies about her sex life. She has an active, but private, sex life. She enjoys sex in various non-traditional ways, whether with women, men, in groups, her husband, or others. But, understandably, she desires to keep it private (as much as possible). To that end, she lied about her sex life to the Sexual Assault Nurse Examiner, her close friends, presumably even her own husband, NCIS agents, and the court-martial members. Her rampant lying about her sex life--the focus of this case--undermines her credibility.

At a minimum, it is clear ABE2 L.B. lied, or at the very least dissembled, about the following things: (1) whether she ever previously had sex with ABE1 Thompson; (2) whether, in the five days prior to the alleged sexual assault, she had sex with anyone else; (3) whether she had performed oral sex on ABE1 Thompson and had consensual sexual intercourse with him after a night out at a club in 2011; and (4) whether the SANE had ever asked her about her sexual activity in the five days prior to the reported incident.

It is simply not reasonable to believe ABE2 L.B. did not commit perjury during her testimony, especially on whether or not she had ever had engaged in prior sexual activity with ABE1 Thompson. Given the circumstances, ABE2 L.B. would have had absolutely nothing to lose by admitting she had sexual intercourse with ABE1 Thompson in 2011 and that she was embarrassed to admit it when she spoke to NCIS. That scenario would have been plausible. But she persisted in denying that sexual encounter. Incredibly, she did so despite testimony from two witnesses who participated in the sexual acts as part of group sex. Certainly ABE2 L.B. was informed that both eyewitnesses to her sexual intercourse with ABE1 Thompson were going to testify, one with a grant of immunity, to what they saw.[126] Yet, ABE2 L.B. persisted in her lie. This is pathological.

This Court should also consider the members apparently did not believe ABE2 L.B.'s version of events transpiring in her hotel room. She claimed, quite dramatically, that ABE1 Thompson flipped her over and penetrated her anus with his penis while he was holding her down. He was, of course, acquitted of that charge. Like the charge for which he was convicted, she said it happened, and he said it did not. How exactly can this Court be

[126] ABE3 Evans-Johnson testified under a grant of immunity. R. at 1213.

satisfied that the complaining witness is credible, or at least credible enough to sustain a conviction, when the members discounted a significant part of her account? If ABE2 L.B. is only half-credible, or partially credible, then she must also be partially unbelievable. If she is not to be believed on a major portion of her story, on what basis is she to be believed on the other part of her story?

Finally, the matter of the alleged victim's pending claim for damages against the Marriot Corporation's insurance company cannot be ignored. The trial counsel mocked this evidence before the members, when he said:

> The lawsuit against the Marriot, oh! This is all some grand conspiracy to get some cash. Why not just accuse Parrish then? What? Why not just accuse the man who [sic] she admitted to you, even though that's her personal private life, she admitted to you she had sex with the night before?[127]

This mockery demonstrates an ignorance of the basics of civil damage claims.[128] Though the trial counsel may be unaware, this Court surely understands the ramifications of a criminal conviction under the elevated standard of beyond a reasonable

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[127] R. at 1487.

[128] The trial counsel also seems to misunderstand that it would be an odd circumstance for ABE2 L.B. to allege in her civil complaint that AO2 Parish, rather than ABE1 Thompson, gained access to her room because of the Marriot employee. The doctrine of collateral estoppel, along with *res judicata*, is familiar to military justice. *United States v. Saulter*, 5 M.J. 281, 283 (C.M.A. 1978).

doubt for the alleged victim's claim against Marriot. The U.S. Court of Appeals for the Third Circuit, where the alleged victim would file her complaint,[129] has spoken on the well-settled issue of collateral estoppel:

> Under the doctrine of collateral estoppel, 'once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.' *Montana v. United States,* 440 U.S. 147, 153–54 (1979). It applies, however, only if: '(1) the issue sought to be precluded [is] the same as that involved in the prior action; (2) that issue [was] actually litigated; (3) it [was] determined by a final and valid judgment; and (4) the determination [was] essential to the prior judgment.' *In re Graham,* 973 F.2d 1089, 1097 (3d Cir.1992) (citations omitted). In light of these principles, we agree with the numerous courts that have held that, under the doctrine of collateral estoppel, a conviction for criminal tax evasion conclusively establishes the defendant's civil liability for tax fraud for the same year.[130]

With a conviction here, ABE2 L.B.'s claim will almost certainly be paid out. Even if she could not successfully negotiate with the insurance company and resorted to filing a complaint against Marriot in Federal District Court, she would be alleviated of the requirement to prove she was sexually assaulted and quite possibly, be allowed to proceed immediately to the damages phase of the trial. Put simply, this conviction is worth a significant amount of money to ABE2 L.B.

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[129] R. at 88; Appellate Ex. XVIII is a letter from the alleged victim's civilian attorney.
[130] *Anderson v. C.I.R.*, 698 F.3d 160, 164 (3rd Cir. 2012).

Defense counsel probed this significant interest during cross-examination. After a long pause, she answered that the idea to pursue damages against Marriot's insurance company came from her family.[131] The civil damages claim indicates this allegation spiraled out of control. It is important to remember that ABE2 L.B. never reported this incident. Her friend, MA2 Popo, reported the sexual assault allegation. Once this report was made, the alleged victim was faced with either recanting her story, and possibly facing punishment for adultery, or of continuing to re-tell her story where she was blameless. If her family did suggest a lawsuit, it is entirely reasonable that she would continue with her story if it could lead to a significant financial windfall. The existence of the civil claim does not enhance ABE2 L.B.'s credibility. It undermines the entirety of the Government's case.

B. <u>If the members accepted ABE1 Thompson's version of events, a conviction based on substantial incapacity cannot be maintained because he had a reasonable mistake of fact.</u>

Admittedly, the members could have credited only ABE1 Thompson's version of events and still convicted him of aggravated sexual assault due to ABE2 L.B.'s substantial incapacity. Even so, an error still occurred.

[131] R. at 1028; Appellate Ex. LXXXIV; R. at 1476.

As ABE1 Thompson responded to ABE2 L.B.'s invitation, there are some facts to be kept in mind. They had enjoyed sexual activity together in the past, in, to put it mildly, a non-traditional way. They were close friends. They were both nearing the end of a long deployment. They were both on a liberty port-call in an exotic location at the end of a day filled with fun and some drinking. They were alone. Each of them had had sex the night before (albeit with different people). That evening was the last night of their liberty call and the last opportunity for sex for some time, unless either of them attempted to have sex onboard the ship.

It is likely that ABE2 L.B. was sleeping when ABE1 Thompson knocked on her door. However, based on ABE1 Thompson's testimony, she appeared awake and consenting when she invited him over to her bed. With her participation in the sexual foreplay and the ensuing intercourse, it is impossible for the Government to contend that ABE1 Thompson's mistake was not reasonable under the circumstances. It is equally impossible for the Government to contend that ABE1 Thompson did not exercise the due care that a reasonable person would have exercised under those same circumstances.

After the intercourse, ABE2 L.B. then, inexplicably, asked ABE1 Thompson, "Who is this?" This bizarre turn of events

punctuated the couple's sexual contact. Up until this point, ABE1 Thompson had no reason whatsoever to believe ABE2 L.B. was "substantially incapable of declining participation in the sexual act." Both ABE1 Thompson and ABE2 L.B agree she uttered "Who is this?"[132] However, after this question, she claims ABE1 Thompson responded by flipping her over onto her stomach and holding her down while he inserted his penis into her anus. No evidence supports this. The forensic exam showed no evidence of anal penetration or bruising of any kind.[133] The only evidence for this was ABE2 L.B.'s testimony, which the members rejected.

ABE1 Thompson included more details about the alleged victim's bizarre statements. According to him, the alleged victim asked to be taken to her room, to which he replied that she was already in her room.[134] Again, these bizarre statements came after, not before or during, the sexual intercourse.

Even considering these bizarre statements, the evidence does not support a finding that ABE2 L.B. was "substantially incapable of declining participation" in the act. The members were essentially instructed that there were two viable options for the alleged victim's substantial incapacity; either she was

[132] R. at 934, 1304.
[133] Defense Ex. A, at 8.
[134] R. at 1304.

asleep or she was so intoxicated that she could not consent.[135] For the members to have believed ABE2 L.B. was asleep, they must rely only on her testimony – the same testimony that was littered with perjury and that the members discounted in the forcible sodomy allegation.

The members were then left to decide whether the alleged victim was so substantially incapacitated by her intoxication that she could not possibly manifest consent. This is also not reasonable. The Government asked the members to view the video surveillance as depicting the alleged victim as helpless due to extreme intoxication.[136] No one at the party described her as so intoxicated as to merit the designation of "substantially incapable." During that party, she was dancing and was not stumbling. She was interacting with others in a game of sorts, where she was manipulating her phone to search for specific older songs to play. MA1 Otesile, the man who carried her "piggyback" from the party, described her as "not dead weight."[137] The alleged victim dismounted and walked under her

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[135] R. at 1431-32.
[136] R. at 1452-53.
[137] R. at 917. ABE1 Otesile testified at the Article 32 hearing that the alleged victim was "not dead weight." During the general court-martial, he attempted to maintain that the alleged victim was "passed out" the entire time, but he was cross-examined using his prior, sworn statement at the Article 32. Appellate Ex. LXXII.

own power into the room.[138] MA1 Otesile did not describe her as stumbling, unresponsive, slurring her words, or so sick from alcohol intoxication that he was reluctant to leave her alone.

The surveillance recording is telling. When she exited the room after the alleged incident, she walked down the hallway. She did not stumble or sway. She walked with purpose to the elevator. She had no trouble manipulating the buttons or choosing the correct floor. She made a decision to go to her friend's room and arrived there without incident. At no time did she run, as she claimed during her testimony. When she arrived there, she was not described as anything that would resemble "substantially incapable" but rather she was described as upset and hysterical. She was not slurring her words, or unable to walk or respond to questioning.

Though she may have vomited once or twice several hours after the incident, it is unlikely this was evidence of her extreme intoxication based on the relatively ordinary amount of alcohol she consumed. If so, how is it that the only manifestation of the extreme intoxication was vomiting, but she was not slurring her words, stumbling, or unable to communicate?

In the Government's closing argument, the trial counsel suggested ABE1 Thompson had committed the "crime" of having

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[138] Pros. Ex. 2, at 03:28.

sexual intercourse with someone who was merely drunk, rather than "substantially incapable." He said, "She's still drunk. She's still got alcohol onboard."[139] The trial counsel told the members that "substantially incapable" meant "that level of impairment due to consumption of alcohol, which we heard plenty of, drinking at the pool, drinking clear drinks in the room, everyone said how she was drinking Gray Goose, they were drinking Patron, they're both clear."[140] Merely being intoxicated does not rise to the level of substantial incapacitation. If the trial counsel was confused about this issue, then the members certainly were as well.

The record does not support a conclusion that ABE2 L.B. was significantly impaired from alcohol. The evidence showed ABE2 L.B., who weighed around 140 pounds,[141] had somewhere between three to, perhaps, six mixed drinks in the span of six to seven hours. ABE2 L.B. recalled she slept until 1100 or 1200 on the day of the incident.[142] After spending the day sightseeing in Dubai, she joined ABE1 Thompson, and some others, at the hotel pool for an all-you-can-eat seafood buffet around 2100.[143] She

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[139] R. at 1488.
[140] R. at 1456-57.
[141] Defense Ex. A, at 6.
[142] R. at 969.
[143] R. at 969-73.

ate lobster and shrimp and several desserts.[144] During dinner, she ordered one mixed drink, which contained vodka, from the bar.[145] After dinner, while still down at the hotel pool, she played cards with some of the other sailors, one of whom had a bottle of vodka.[146] She had one, or two, mixed drinks of vodka and orange juice before proceeding to ABE1 Thompson's room sometime after midnight.[147] She admitted at that point she was not drunk.[148]

During the party in ABE1 Thompson's room, she only recalls drinking "some kind of mix of juice and vodka"[149] before falling asleep on the bed around 0300. Her SAFE indicated she experienced no memory loss or lapse of consciousness.[150] On cross-examination, she repeatedly[151] claimed she could not remember details because she "wasn't awake" but was "drunk" and "was in and out of it."[152] Even assuming, *arguendo*, that she was

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[144] R. at 975-76.
[145] R. at 974.
[146] R. at 976-78.
[147] R. at 978-79.
[148] After establishing that ABE2 L.B. had either two or three mixed drinks with dinner over the course of three to four hours, the trial defense counsel asked, "And when you – when the group got up to petty Officer Thompson's room about midnight, you were not drunk?" to which she answered, "No, ma'am." R. at 979.
[149] R. at 980.
[150] Defense Ex. A, at 9.
[151] ABE2 L.B. says she does not remember, recall, or know what happened during the alleged incident nearly twenty times. R. at 981-84.
[152] R. at 983.

drunk, having “drunk sex” is not yet prohibited by the UCMJ, despite the trial counsel’s assertions.

In reviewing Prosecution Exhibit 2, the surveillance video, this Court should consider the following hypothetical. Imagine if the alleged victim was normally dressed and leaving a bar sometime in the evening, with car keys in hand, and she was walking with the same purpose and balance with which she appears in the video. Would a police officer have reasonable suspicion, based solely on her walking, to conduct a *Terry*[153] stop for suspicion of being drunk-in public or to prevent her from getting behind the wheel? If the answer is no, then it is completely unreasonable to believe that she was “substantially incapable” of declining participation in the sexual act because of her intoxication that occurred mere minutes before, or that ABE1 Thompson did not have reasonable mistake of fact to her lack of consent or ability to consent.

The record shows ABE1 Thompson had what he reasonably believed to be consensual sexual contact with ABE2 L.B. When the situation turned bizarre after she questioned his identity, he had already ceased sexual contact with her and he did not initiate any further contact. The evidence also shows that, while the alleged victim had been drinking, she was not

[153] *Terry v. Ohio*, 392 U.S. 1 (1968).

substantially incapable of declining participation due to impairment from alcohol.

Conclusion

ABE Thompson's conviction for aggravated sexual assault is factually and legally insufficient.[154] The complaining witness, ABE2 L.B., lacks any credibility due to her persistent lying concerning her prior sexual relationship with ABE Thompson. The alleged victim also possessed a strong motivation to fabricate a story of sexual assault when questioned by the command after MA2 Popo's report. The alleged victim's motivation to fabricate increased dramatically after her family suggested she sue Marriot for financial gain. That lawsuit hinged on the outcome of this court-martial. Even if this Court ignores ABE2 L.B.'s persistent pattern of lying and finds her credible, ABE1 Thompson still had a reasonable mistake-of-fact as to consent defense. This Court should set aside and dismiss the conviction for aggravated sexual assault.

[154] This case fairly resembles other cases where this Court has used its Article 66, UCMJ, authority, to disapprove findings, *e.g.*, *United States v. Lucas*, No. 201100372, 2012 WL 3728017 (N-M. Ct. Crim. App. Aug. 28, 2012) (credibility of alleged victim insufficient to affirm conviction); *United States v. Wood*, No. 200900436, 2010 WL 742611 (N-M. Ct. Crim. App. Jan. 25, 2010) (evidence insufficient to show sufficient intoxication for alleged victim to be substantially incapacitated).

II.

IT IS REVERSIBLE ERROR FOR THE CONVENING AUTHORITY TO USE RANK ALONE AS CRITERIA TO SELECT MEMBERS FOR A COURT-MARTIAL PANEL. THE CONVENING AUTHORITY PROHIBITED NOMINATIONS OF POTENTIAL MEMBERS BECAUSE THEY WERE PAY GRADE E-6 AND BELOW, WERE WARRANT AND CHIEF WARRANT OFFICERS, AND WERE PAY GRADE 0-6 AND ABOVE. THIS EXCLUSION CONSTITUTES REVERSIBLE ERROR.

Discussion

This Court reviews *de novo* whether a court-martial panel was "selected free from systematic exclusion."[155] Military members facing court-martial do not have a Sixth Amendment right to trial by a jury,[156] though an accused does have a right to a fair and impartial members panel.[157] The selection of a members panel is governed by Article 25(d)(2), UCMJ, which makes no provisions for excluding members based solely on rank.[158]

Article 25, UCMJ, makes some specific statutory exclusions when a nominee is (1) the accuser, (2) a witness for the Government, (3) the investigating officer, (4) or counsel on the

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[155] *United States v. Kirkland*, 53 M.J. 22, 24 (C.A.A.F. 2000) (citing *United States v. McClain*, 22 M.J. 124 (C.M.A. 1986)).
[156] *United States v. Kemp*, 46 C.M.R. 152, 154 (C.M.A. 1973).
[157] *United States v. Roland*, 50 M.J. 66, 68 (C.A.A.F. 1999).
[158] Article 25(d)(2) requires, "When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."

case.[159] The only reference to rank is the comment that a member junior in rank to an accused should not be detailed "when it can be avoided."[160] Because the Government failed to disclose the Instruction, ABE1 Thompson was forced to raise this issue for the first time in submission of his R.C.M. 1105 matters, and he now raises it on appeal.

A. Systematic exclusion of court-martial members by rank is prohibited.

The U.S. Court of Appeals for the Armed Forces (CAAF) has made clear, even in reversing the sentence in a guilty plea,[161] that a CA may not use rank to systematically exclude potential members for courts-martial.[162] Such a scheme explicitly contradicts the Congressional intent behind Article 25.[163] Though the CAAF "will be deferential to good faith attempts to be inclusive and to require representativeness so that court-martial service is open to all segments of the military community,"[164] there is no evidence of such a good-faith intent here.

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[159] Article 25(d)(2), UCMJ.
[160] Article 25(d)(1), UCMJ.
[161] *Kirkland*, 53 M.J. at 22.
[162] *United States v. Dowty*, 60 M.J. 163, 171 (C.A.A.F. 2004).
[163] *Roland*, 50 M.J. at 69 (quoting *United States v. Nixon*, 33 M.J. 433, 434 (C.M.A. 1991)). *See also* R.C.M. 912(b)(1), Discussion ("Members are improperly selected when, for example, a certain group or class is arbitrarily excluded from consideration as members.").
[164] *Dowty*, 60 M.J. at 171.

This case has significant similarities with *United States v. Kirkland*.[165] In *Kirkland*, the base legal office sent out a quarterly letter to subordinate commanders seeking nominations for courts-martial.[166] The nomination process was designed to "avoid overtasking individual units" for members.[167] To that end, a chart was included for the "number and rank of the personnel that each commander was asked to nominate."[168] The chart "had a column for E-7, E-8, and E-9, but no place to list a nominee in a lower grade. To nominate an E-6 or below, the nominating official would have to modify the form."[169]

The CAAF found that "the exclusion of potentially qualified members below the grade of E-7 in this case was improper" and that, because it was a guilty plea, the case needed to be remanded for a rehearing on the sentence.[170] The CAAF held that "where an unresolved appearance that potentially qualified court members below the grade of E-7 were excluded, reversal of the sentence is appropriate to uphold the essential fairness and integrity of the military justice system."[171]

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[165] 53 M.J. at 22.
[166] 53 M.J. at 23.
[167] *Id*.
[168] *Id*.
[169] *Id*.
[170] *Id*. at 25.
[171] *Id*.

Here, as in *Kirkland*, there was no way for subordinate commanders to nominate anyone other than individuals outside of the ranks pre-selected by the CA, without altering the form, or disregarding the Instruction.[172] The result was the appearance that potentially qualified members were excluded from ABE1 Thompson's court-martial solely because of their rank.

The possibility that the Instruction is only guidance and does not preclude subordinate commanders from submitting additional personnel from the Instruction's prohibited ranks must be disregarded by this Court. The CAAF rejected this very concept in *Kirkland* and *Dowty*.

B. The Government cannot demonstrate a lack of harm to ABE1 Thompson from its improperly selected panel.

When the Government fails to comply with Article 25, UCMJ, this Court must determine whether the harm "materially prejudiced the substantial rights of the accused."[173] If this Court finds the Government improperly excluded members from the court-martial panel based on rank, the Government will have the burden to demonstrate a lack of harm. This Court looks to (1) "the motive of those involved in the preliminary screening;" (2)

[172] Though the Government may contend that the Instruction is administrative in nature, the language of the Instruction does not indicate in any way that the subordinate commanders are free to disregard the Instruction, submit additional court-martial nominees, or to deviate from the Instruction in any way.
[173] Article 59(a), UCMJ; *United States v. Gooch*, 69 M.J. 353, 360 (C.A.A.F. 2011).

"the nature of the preliminary screening variable;" and (3) "its impact on the selection of the members."[174]

Here, the Government cannot meet its burden on any of the prongs. The Government, in ensuring that only pay grades E-7 through E-9 and O-1 through O-5 are the only possible court-martial members, cannot be motivated by a desire to comply with Article 25, UCMJ. The statute itself states that all of the following individuals are available to serve as members, (1) any commissioned officer in all cases, (2) any warrant officer, except in cases where a commissioned officer is the accused, and (3) any enlisted member who is not in the same unit as the accused.[175] The "nature of the preliminary screening variable" was, again, in direct violation of Article 25. The CA substituted his judgment for the judgment of Congress, on the issue of who is eligible to be a member of a court-martial. This is the danger contemplated by CAAF in *United States v. Nixon*, that a CA "may adopt the shortcut of simply choosing by grade."[176]

Finally, the impact on ABE1 Thompson's court-martial was profound. Rather than solely Article 25 and its criteria, the members were selected based on the CA's whims. Three important

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[174] *Dowty*, 60 M.J. at 173.
[175] Article 25,(a)-(c), UCMJ.
[176] 33 M.J. 433, 434 (C.M.A. 1991).

groups of members were unavailable. Members in the pay grades O-6, Warrant Officers and Chief Warrant Officer, and members in pay grade E-6 (that were senior to ABE1 Thompson) are all precisely the types of members well-suited under the Article 25, UCMJ, criteria. This is especially true for pay grade O-6 and Chief Warrant Officers, who by virtue of their lengthy and successful careers "are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."[177]

On the face of the Instruction, based on rank alone, all pay grades below E-7, Warrant Officer and Chief Warrant Officers, and pay grade O-6 were systematically excluded from the nomination process. This violated ABE1 Thompson's right to have members selected according to Article 25, UCMJ.

C. The issue of improper selection of members is not waived.

The SJA advised the CA that this issue was waived.[178] He is wrong. This issue is being raised on appeal, but it was raised to the CA as soon as it was discovered by ABE1 Thompson. The UCMJ expressly provides guidance on this circumstance. R.C.M. 912(b) states:

> before the examination of members . . . begins, or at the next session after a party discovered or could have discovered by the exercise of diligence, the

[177] Article 25,(d)(2), UCMJ.
[178] Staff Judge Advocate Recommendation Addendum, Jan. 28, 2014.

> grounds therefor, whichever is earlier, the party may move to stay the proceedings on the ground that members were improperly selected.[179]

This issue is not waived if it alleges a violation arising under R.C.M. 502(a)(1), "Qualifications and duties of personnel of courts-martial."[180] This issue clearly involves the Article 25, UCMJ, criteria for member selection and is thus, not waived.

Conclusion

This Court should set aside ABE1 Thompson's guilty finding and sentence and remand to a new convening authority for a rehearing with a properly selected members panel.

III.

THE GOVERNMENT IS OBLIGATED TO PRODUCE RELEVANT MATERIALS IN ITS POSSESSION UPON A TIMELY DEFENSE REQUEST. THE DEFENSE REQUESTED ALL MATERIALS CONSIDERED BY THE CONVENING AUTHORITY IN SELECTING MEMBERS. THE GOVERNMENT FAILED TO DISCLOSE THE CONVENING AUTHORITY'S MEMBER SELECTION INSTRUCTION. THIS WAS REVERSIBLE ERROR.

Discussion

This Court, in determining whether there was a discovery violation, reviews the record to (1) determine whether the information at issue was subject to disclosure or discovery, and (2) test the effect of that nondisclosure on the appellant's

[179] R.C.M. 912(b).
[180] R.C.M. 912(b)(3).

trial.[181] An appellant will be entitled to relief unless the Government can show that "nondisclosure was harmless beyond a reasonable doubt."[182] "Failing to disclose requested material favorable to the defense is not harmless beyond a reasonable doubt if the undisclosed evidence might have affected the outcome of the trial."[183] "The review of discovery violations involves case-specific considerations."[184]

Discovery in courts-martial, under Article 46, UCMJ, is generally more expansive and more liberal than under the Federal Rules.[185] The defense is entitled to inspect any papers or documents within the possession, custody, or control of military authorities, which are material to the preparation of the defense.[186] The Government, in response, bears the burden of due diligence.[187]

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[181] *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004).
[182] *Id*. at 327 (citing *United States v. Hart,* 29 M.J. 407, 410 (C.M.A. 1990)).
[183] *United States v. Coleman*, 72 M.J. 184, 187 (C.A.A.F. 2013).
[184] *United States v. Santos*, 59 M.J. 317, 322 (C.A.A.F. 2004).
[185] *Hart*, 29 M.J. at 410; *see also* R.C.M. 701, Drafters' Analysis ("military discovery practice has been quite liberal," with "broader discovery than is required in Federal practice.").
[186] R.C.M. 701(a)(2).
[187] *United States v. Williams*, 50 M.J. 436, 441 (C.A.A.F. 1999) (quoting *United States v. Simmons*, 38 M.J. 376, 381 (C.M.A. 1993)).

A. The Instruction was discoverable and should have been disclosed per the defense request.

The Instruction was discoverable because it was a written material considered by the CA in selecting the court-martial members.[188] The Instruction is the document that directed which members were submitted as potential members. Under R.C.M. 912(a)(2), such documents "shall" be provided to the defense upon request. This document was requested in discovery and not provided by the Government, despite the Government's acknowledgement of its continuing discovery obligation.[189]

B. The Government cannot show nondisclosure was harmless beyond a reasonable doubt.

This Court assesses the harm of a discovery violation, without consideration of whether the issue was ruled on by the military judge at trial or "whether it arose from a Government decision to withhold certain evidence that was not discovered until after trial."[190] Nonetheless, it is also unconvincing to argue that ABE1 Thompson would not have raised this issue at trial, had he been provided the Instruction. ABE1 Thompson, through counsel, did make a motion under Article 25, UCMJ, over

[188] R.C.M. 912(a)(2). *See also United States v. Kroop*, 34 M.J. 628, 632 (A.F.C.M.R. 1992).
[189] Clemency at 2-3.
[190] *Roberts*, 59 M.J. at 327 n.3.

the racial composition of the panel.[191] Trial defense counsel was clearly focused on the selection criteria.

The Government's failure to disclose the Instruction deprived ABE1 Thompson of the ability to litigate the member selection process at trial. Due to the obvious nature of rank being an exclusive selection criterion for potential members, the military judge would have ordered a new panel to be selected. When the members were assembled for ABE1 Thompson's general court-martial, they were seated in violation of Article 25, UCMJ. An entirely different panel should have been nominated, selected, and assembled to judge the merits of the Government's case against ABE1 Thompson. Therefore, the Government cannot possibly show its failure to disclosure was harmless beyond a reasonable doubt.

Conclusion

The defense specifically requested discoverable information pertaining to member selection. The Government failed to disclose the Instruction. The Government cannot meet its burden to show this failure to disclose was harmless beyond a reasonable doubt. This Court should set aside and dismiss ABE1 Thompson's conviction and sentence and authorize a rehearing.

[191] R. at 503-28.

JOHN J. STEPHENS
Major, U.S. Marine Corps
Appellate Defense Counsel
1254 Charles Morris St, SE
Bldg 58, Suite 100
Washington Navy Yard, D.C. 20374
Tel: (202) 685-8587
Fax: (202) 685-7426
john.j.stephens@navy.mil

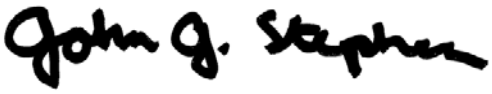
Appendix

1) *United States v. Lucas*, No. 201100372, 2012 WL 3728017 (N-M. Ct. Crim. App. Aug. 28, 2012).

2) *United States v. Wood*, No. 200900436, 2010 WL 742611 (N-M. Ct. Crim. App. Jan. 25, 2010).

CERTIFICATE OF FILING AND SERVICE

I certify that the original and required copies of the foregoing were delivered to the Court on 19 June 2014. I further certify a copy of the foregoing was delivered to Director, Appellate Government Division, and electronically filed in CMTIS and CMS pursuant to Rule 5.2(b)(1) of this Court's Rules for Practice and Procedure, on 19 June 2014.



JOHN J. STEPHENS
Major, U.S. Marine Corps
Appellate Defense Counsel
1254 Charles Morris St, SE
Bldg 58, Suite 100
Washington Navy Yard, D.C. 20374
Tel: (202) 685-8587
Fax: (202) 685-7426
john.j.stephens@navy.mil

UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
B.L. PAYTON-O'BRIEN, J.A. MAKSYM, T.R. ZIMMERMANN
Appellate Military Judges

UNITED STATES OF AMERICA

v.

SHAUN T. LUCAS
STAFF SERGEANT (E-6), U.S. MARINE CORPS

NMCCA 201100372
GENERAL COURT-MARTIAL

Sentence Adjudged: 18 March 2011.
Military Judge: LtCol Stephen Keane, USMC.
Convening Authority: Commanding General, 3d Marine Aircraft Wing, MCAS Miramar, San Diego, CA.
Staff Judge Advocate's Recommendation: Col K.J. Brubaker, USMC.
For Appellant: Capt Bow Bottomly, USMC; Capt Michael Berry, USMC.
For Appellee: Capt Samuel Moore, USMC.

28 August 2012

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

ZIMMERMANN, Judge:

A general court-martial with enlisted representation convicted the Appellant, contrary to his pleas, of one specification of forcible rape and one specification of adultery, in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934. The approved sentence included confinement for 24 months, forfeiture of all

pay and allowances, reduction to pay grade E–1, and a bad-conduct discharge.

The Appellant asserts the following errors: (1) the evidence is factually insufficient as to forcible rape; (2) the military judge erred in instructing the members that a mistake of fact must be both honest and reasonable; (3) the specification alleging forcible rape fails to state an offense because it does not fully allege the element of force; (4) the specification alleging adultery fails to state an offense because it does not allege the terminal element; (5) the verdict is fatally ambiguous due to the military judge's instruction that the members could find the Appellant guilty of adultery if they found the conduct was either prejudicial to good order and discipline or service discrediting, and therefore this court cannot conduct its review under Article 66, UCMJ; and (6) the evidence is factually insufficient as to adultery.

We have reviewed the record of trial and the pleadings of the parties, and heard oral argument on 23 May 2012.

For the reasons set out below, we set aside the findings of guilty for Charge I and the specification thereunder and dismiss them with prejudice.

Background

Beginning in late 2009, the Appellant and a female Marine in his unit, Corporal (Cpl) C, became close friends. In March 2010, they went on a date that culminated in consensual sexual intercourse in the Appellant's off-base housing. At the time, the Appellant was a sergeant and Cpl C was a corporal, both on active duty and in the same unit at Marine Corps Air Station Yuma, Arizona.

In April 2010, the Appellant married another woman (not Cpl C). Later that month, he was promoted to staff sergeant.

On 27 May 2010, the Appellant went to Cpl C's barracks room on her invitation to discuss some problems Cpl C was having with her chain of command.[1] He arrived there at approximately 1730, on his way to the change of command ceremony that all Marines in

[1] Cpl C had recently been disciplined for having alcohol in the barracks and had been told that she was to stand two extra duties that weekend, which would interfere with her plans to go to Los Angeles to celebrate her 21st birthday.

the unit were required to attend which was to begin at 1900. She was wearing “boots and uts,” which is the camouflage utility trousers and combat boots with a Marine Corps Martial Arts Program (MCMAP) belt, with the green t-shirt and no camouflage blouse. The Appellant was wearing his uniform, as well, including his blouse.

There is substantial disagreement between the parties as to the chain of events that took place next. Cpl C testified that while in her barracks room, the Appellant held her face down on her bed with his right forearm, using his left hand to undo their respective MCMAP belts and unbutton and pull down not only his trousers, but hers as she fought to keep them up. He then penetrated her vagina with his penis from behind, thereby committing forcible rape. After a few minutes of “fighting with all of [her] might,” Cpl C “froze” and stopped resisting the sexual intercourse. The Appellant, according to Cpl C, then turned her over onto her back and continued having nonconsensual sexual intercourse with her from the front.

The Appellant did not take the stand in his own defense at trial. However, during the videotaped interview conducted by an agent of the Naval Criminal Investigative Service (NCIS), he admitted that he was married and that he did have sexual intercourse with Cpl C, but insisted that the sexual activity was consensual. Prosecution Exhibit 18. He told the NCIS agent that at one point, Cpl C expressed reservations due to his marital status, but that “she went with it” and that her actions subsequent to voicing her concerns indicated her willingness and consent to engage in the sexual activity despite any moral misgivings she might have had about the fact that he was a married man. At the end of the interrogation, which lasted approximately two hours, the agent typed up a one-page statement and asked the Appellant to sign it. The statement made no reference to Cpl C’s conduct that indicated consent, including at least eight references during the interrogation by the Appellant to the agent that Cpl C was laughing throughout the entire episode.[2]

The parties agree that after the intercourse had continued for several minutes, the Appellant asked Cpl C where she would like him to ejaculate. Pursuant to her instructions, he ejaculated on her stomach, avoiding the new navel ring she had acquired. The parties also agree that the Appellant and Cpl C then went to the double sinks in Cpl C’s barracks room to clean

[2] Cpl C testified at trial that she expressed her consent to the March sexual encounter by, *inter alia*, laughing.

up, and both of them proceeded to the change of command ceremony. During the ceremony the two exchanged multiple text messages. In fact, over the eight days following the incident, the Appellant and Cpl C sent each other over 100 text messages. Although Cpl C told the NCIS agent that there was one text message that night, the agent did not obtain any of the text messages.

Fourteen days after the events of 27 May, Cpl C approached a female acquaintance and reported that she was raped. The acquaintance suggested that Cpl C report it to the authorities, so Cpl C told a sergeant in her chain of command. A victim advocate and NCIS then became involved, and the instant charges ensued.

On 8 June 2010, under NCIS direction, Cpl C placed a phone call to the Appellant in an effort to elicit a confession from him. NCIS recorded the call. The premise of the conversation was Cpl C's claim that she was pregnant. The Appellant sounded upset to hear this news, but told Cpl C that they were both responsible and they would handle the situation together. Significantly, Cpl C did not dispute the Appellant's assertion of joint responsibility, nor did she claim that the rape was forcible in any way during the call. While she did state that, "I told you 'no'," she said the reason for saying that was a fear of becoming pregnant. She did not reference the Appellant holding her down, removing her clothes without her permission, or any other force about which she later testified at trial.

Factual Sufficiency – Forcible Rape

The Appellant challenges the sufficiency of the rape allegation on two grounds: that the Government failed to prove force beyond a reasonable doubt and failed to disprove the Appellant's claim of mistake of fact as to consent beyond a reasonable doubt.

When we examine the factual sufficiency of the evidence, we must ourselves be convinced beyond a reasonable doubt of the appellant's guilt. We conduct our review with the understanding that we did not personally observe the witnesses. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Based on such a review, we agree with the Appellant that the Government failed to prove the element of force and disprove the Appellant's mistake of fact beyond a reasonable doubt.

1. Force

To prove force, the Government must prove that the Appellant took "action to compel submission of another or to overcome or prevent another's resistance by . . .[using] physical violence, strength, power, or restraint applied to another person, sufficient that the other person could not avoid or escape the sexual conduct." MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 45a(t)(5). We find the Government's evidence relative this issue fails for three reasons: (1) the chain of events about which Cpl C testified is illogical and unbelievable, 2) Cpl C's character for untruthfulness and her actions subsequent to the incident lead us to the conclusion that her testimony is not credible; and (3) the Appellant's version of events is more credible, as indicated by the NCIS videotaped interrogation (PE 18) and his evidence of good military character.

a. Logistics of Cpl C's Account of the Incident

Cpl C testified that the Appellant began and continued having sexual intercourse with her as she repeatedly "begged him to stop." She also claimed that she resisted with all her might, yet it was to no avail due to the difference in size between the parties.[3] According to Cpl C, the Appellant was able to accomplish a great deal with his left hand in order to facilitate the sexual intercourse (remove clothing, for example), all the while using only his right forearm on her back to hold her down on the bed:

> I was using all my strength in my arms to try and push up. My hands were underneath me. My arms were underneath my body about shoulder length apart. I was pushing up with all my might trying to push back, sir.
>
> . . . .
>
> I couldn't [leave], sir. He was holding me down. There was no way I could get up, sir.

Record at 345. She also claimed he was able to take her boot off without her cooperation.

It is illogical to believe that a man weighing just over 200 pounds could accomplish these tasks against a female Marine,

[3] The Appellant is approximately 67 inches tall and 207 pounds, and Cpl C weighs approximately 155 pounds.

trained in Marine Corps Martial Arts, weighing 155 pounds, under the circumstances described in the record before us. This is especially so when it appears that the Appellant is right handed (*see* PE 18, showing him sign his statement to NCIS with his right hand), and there is no allegation or evidence that Cpl C was intoxicated or otherwise incapacitated.

b. Cpl C's Post-Incident Conduct

We note that Cpl C exchanged approximately 30 text messages with the Appellant on the evening of 27 May; her explanation was that she wanted to avoid a confrontation. There were an additional 70 text messages that followed the next week; however, she only reported to the NCIS agent that there was one text message, which she claimed she had deleted.[4] It defies logic that one who suffered a traumatic forcible rape would carry on repeated friendly contact with her assailant, and then delete the messages. Additionally, Cpl C and the Appellant had at least one friendly face-to-face conversation between 27 May and the time Cpl C reported an assault.

The day after the incident, Cpl C found out that she did not, in fact, have to stand two extra duties, so she went to Los Angeles to celebrate her 21st birthday with fellow Marines and friends. Her behavior did not seem out of the ordinary to any of the friends who testified, nor did she report anything having occurred with the Appellant. One witness, Cpl C's immediate supervisor, testified that the following week Cpl C came to work looking disheveled and late, to the point where he recommended disciplinary action. Other Marines testified that they did not notice a difference in her appearance. We find that this conduct undercuts Cpl C's credibility sufficiently to raise a reasonable doubt as to the Appellant's guilt.

c. Cpl C's Character for Untruthfulness and Complaint Discrepancies

While there were witnesses who testified that Cpl C had good character for truthfulness, there were also witnesses who testified that she was not truthful. Significantly, JB, a former friend to whom Cpl C made her initial complaint, gave a completely different account of the circumstances of the conversation. For example, JB testified that Cpl C initially approached the witness laughing, and saying the witness would be angry with Cpl C for what she was about to disclose. This

[4] She also claimed to not remember any of these messages at trial.

behavior is inconsistent with the reporting of a sexual assault. While Cpl C denied that the conversation with JB took place in that manner, her multiple inconsistent statements to JB[5] and supposed lack of memory about important events militate in favor of our finding that JB's account from Cpl C's first recitation is the more likely version of what transpired between Cpl C and the Appellant.

Finally, during the 8 June recorded phone call that was intended to elicit a confession from the Appellant, Cpl C failed to mention any use of physical force by the Appellant or her vain efforts to escape from him, and, in fact, indicated that the only reason she did not consent was due to a fear of getting pregnant. Her choice of words during this phone call was completely inconsistent with a person who had endured the forcible rape that Cpl C described at trial. Also, it is significant that Cpl C did not dispute the Appellant's statement during the call that they were both responsible for the alleged pregnancy. Had the intercourse been nonconsensual, it would make no sense for the complaining witness to assume any degree of responsibility for the resulting pregnancy.

d. The Appellant's Good Military Character and the NCIS Statement

The Government presented no evidence that the Appellant possessed a character for untruthfulness. We find that the explanations he gave to the NCIS agent regarding the events of 27 May are believable, especially considering the evidence of his good military character and service history admitted at sentencing.[6]

Based on the totality of the evidence, we are not persuaded of the Appellant's culpability as we conclude that the alleged victim's testimony lacks credibility and we hereby reject it.

2. Mistake of Fact

---

[5] JB testified that Cpl C gave three significantly differing accounts of the afternoon in question.

[6] Although we recognize that the Appellant's typed statement to NCIS in some form admits culpability, we express grave concern about the lack of detail in the statement, particularly in light of the fact that NCIS interviewed the Appellant for almost two hours, yet produced a statement about the incident consisting of a mere 14 lines. Furthermore, when comparing the typed written statement and the interrogation video to the NCIS agent's in-court testimony, we note the agent left out or seriously mischaracterized important relevant details the Appellant provided during the interrogation.

Cpl C testified that during the earlier consensual sexual encounter between them in March, she had been laughing. While she denied laughing during the events of 27 May during her trial testimony, we find the Appellant's mention of her laughing at least eight times during the NCIS investigation to be credible and telling. Furthermore, his account that her only reservation or hesitation to engage in the sexual conduct was based on his marital status is believable, especially in the context of his explanation that once he removed his wedding band, Cpl C willingly participated in kissing, play-wrestling, and sexual intercourse with him. We find that these facts indicate that even if Cpl C did not subjectively consent to the sexual activity, her conduct was such that the Appellant had an honest and reasonable mistake of fact as to her consent.

Mindful that the members saw and heard the witnesses, we are not ourselves convinced beyond a reasonable doubt that the Appellant forcibly raped Cpl C. We will set aside the findings of guilty to Charge I and its specification and dismiss that charge and specification in our decretal paragraph.

In light of our resolution of the sufficiency of the forcible rape allegation above, the Appellant's other assignments of error relating to that charge and specification are moot.

Failure to State Offense – Adultery

The Appellant correctly notes that the adultery specification under Charge II failed to contain an explicit allegation of service discredit or prejudicial conduct, as required for violations of Article 134, UCMJ.

Whether a specification states an offense is a matter we review *de novo*. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). A specification states an offense if it alleges every element of the charged offense, either expressly or by necessary implication. *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012); *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011); *Crafter,* 64 M.J. at 211; RULE FOR COURTS-MARTIAL 307(c)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). When a specification does not expressly allege an element of the intended offense, appellate courts must determine whether the terminal element was necessarily implied. *Fosler*, 70 M.J. at 230. The interpretation of a specification in such a manner as to find an element was alleged by necessary implication is

disfavored. *Ballan*, 71 M.J. at 33-34; *see also United States v. Miller*, 67 M.J. 385, 389 (C.A.A.F. 2009).

"A charge that is defective because it fails to allege an element of an offense, if not raised at trial, is tested for plain error." *Ballan*, 71 M.J. at 34. Under the plain error analysis, the Appellant has the burden of showing (1) there was error; (2) the error was plain or obvious; (3) the error materially prejudiced a substantial right of the Appellant. *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011). Absence of the terminal element within a specification is plain and obvious error. *United States v. Humphries*, 71 M.J. 209, 2012 CAAF LEXIS 691 (C.A.A.F. 2012). However, the defective specification alone is insufficient to constitute substantial prejudice to an appellant's material right. *Id*. at *17. The Appellant's burden regarding prejudice may be met if neither the specification nor the record provides notice of which terminal element or theory of criminality the Government pursued. Thus, we must examine the record to see if the missing terminal element is somewhere extant in the trial record, or whether the element is essentially uncontroverted. *Id.* at *19-20.

Looking to the plain language contained within the four corners of the adultery specification, we are unable to conclude that it alleges the terminal element expressly or by necessary implication. *See United States v. Nealy*, 71 M.J. 73 (C.A.A.F. 2012). However, consistent with *Nealy*, having found error, we will test for prejudice. The Appellant bears the burden of demonstrating prejudice. *Ballan*, 71 M.J. at 34 n.6 (citing *Girouard*, 70 M.J. at 11). He has failed to meet that burden.

We note that during the pretrial proceedings and the Government's opening statement, there was no mention of the terminal element or the evidence the Government intended to introduce to prove it. However, during the defense case in chief,[7] there was direct testimony from LCpl JM as to the effect the Appellant's conduct had on good order and discipline of the armed services, and the defense registered no objection. Specifically, the following occurred during the Government's cross-examination of LCpl JM:

> TC: Everybody in that motor-T platoon knows about this; is that correct?

[7] We note that although this testimony was presented during the defense case on the merits, the defense failed to move either pretrial for a bill of particulars or at the close of the Government's case for dismissal of the adultery specification under R.C.M. 917.

W: Besides some of the new members of our unit, sir , it would be safe to say that. Yes, sir.

TC. And this incident has affected the platoon's morale; is that correct?
DC: Objection. Speculation, sir.

MJ: Response:

TC: He's part of the motor-T platoon, sir. He serves with Staff Sergeant Lucas. I think he can make an observation about whether it's affected the platoon's morale. It's also an element of adultery. It has to be prejudicial to good order and discipline and one of that is that it has had an impact on the unit.

MJ: Response?

DC: One man testifying to the – all right. That's fine. We'll withdraw.

MJ: You're withdrawing the objection?
DC: Yes, sir.

MJ: The objection is overruled. You may ask the question.

TC: Has this affected your platoon's morale?
W: You could say a little bit. Yes, sir. I mean to an extent. Yes, sir. I don't think any one person pays too much attention to it, sir. We all just kind of do our jobs and try to put the past in the past and try to move forward.

Record at 528.

The defense counsel, upon re-direct examination, even conducted further questioning of JM regarding the terminal element:

DC: Lance Corporal, has it affected morale the fact that you have one person charged for adultery at a general court-martial and the other person that was part of the adultery has not receivd anything whatsoever? Has that affected morale?
W: I would have to say so. Yes, sir.

Id. at 530.

Trial counsel then asked the following question: "A staff sergeant had sex with a corporal in the barracks and that doesn't affect the unit's morale?" The response from LCpl JM was " . . . I would say that it affected them a little bit . . . ." *Id.* There was no objection from the defense during the questioning of LCpl JM concerning the terminal element. In closing argument, the trial counsel referenced the elements of adultery, to include the terminal element. *Id.* at 548. The military judge then properly instructed the members on the terminal elements. *Id.* at 587-89. The defense did not object to these instructions. Based on the record before us, there was absolutely no indication that the Appellant or his counsel were surprised to learn of the Government's theory on the terminal element, albeit as presented during a defense witness' testimony, or unable to defend against the evidence regarding the terminal element. Most importantly, the defense counsel conceded that the Appellant "committed adultery" in his closing argument and specifically refers to the disparity in rank with respect to conduct prejudicial to good order and discipline. *Id*. at 568, 569, 577.

The Government's theory, and therefore the terminal element, "is somewhere extant in the trial record," and the Appellant was provided sufficient notice. *Humphries,* 2012 CAAF LEXIS 691, at *17. Therefore, under the totality of the circumstances in this case, in line with the court's reasoning in *Humphries*, we must conclude that the Appellant suffered no prejudice. *See id*.; *United States v. McMurrin*, 70 M.J. 15, 19-20 (C.A.A.F. 2011); *see also Fosler*, 70 M.J at 229.

The Appellant has not met his burden of showing that the error materially prejudiced his substantial right to notice. Accordingly, we decline to grant relief on this issue.

Ambiguity of Verdict – Adultery

In a supplemental assignment of error, the Appellant argues that this court cannot conduct review under Article 66, UCMJ, for two reasons: "this Court simply cannot be sure whether appellant was found guilty of a clause 1 offense or a clause 2 offense" and "the members' verdict contains an implicit not-guilty finding." Appellant's Supplemental Brief of 1 Jun 2012 at 3. We disagree.

Pursuant to Article 66(c), this court conducts a *de novo* review of a case for factual and legal sufficiency. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citing *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)).

When the charge presents multiple or alternate theories of liability, a general guilty verdict to the charge attaches a guilty verdict to all of the theories. *United States v. Rodriguez*, 66 M.J. 201, 204 (C.A.A.F. 2008) (citing *Turner v. United States*, 396 U.S. 398, 420 (1970)); *see also United States v. Vidal*, 23 M.J. 319, 325 (C.M.A. 1987) ("It makes no difference how many members chose one act or the other, one theory of liability or the other. The only condition is that there be evidence sufficient to justify a finding of guilty on any theory of liability submitted to the members").

In this case and in the context of Article 134 charged as clauses one and two, a general guilty verdict attaches equally to both the theories, service discrediting and prejudicial to good order and discipline.

The verdict was not ambiguous and this error is without merit.

Factual Sufficiency – Adultery

In his final assignment of error, the Appellant claims that the evidence was insufficient to prove the terminal element under Article 134, UCMJ. We disagree.

The MCM provides that:

> Adulterous conduct that is directly prejudicial includes conduct that has an obvious, and measurably divisive effect on unit or organization discipline, morale, or cohesion, or is clearly detrimental to the authority or stature of or respect toward a servicemember.

MCM, Part IV, ¶62c(2).

Some factors to be considered are:

(a) The accused’s marital status, military rank, grade, or position;
(b) The co-actor’s marital status, military rank, grade, and position, or relationship to the armed forces;

. . . .

(d) The impact, if any, of the adulterous relationship on the ability of the accused, [or] the co-actor . . . to perform their duties in support of the armed forces;

(e) The misuse, if any, of government time and resources to facilitate the commission of such conduct;

. . . .

(g) The negative impact of the conduct on the units or organizations of the accused [or] the co-actor . . . such as a detrimental effect on unit or organization morale, teamwork and efficiency . . . .

Id.

We are convinced beyond a reasonable doubt of the Appellant's guilt with the understanding that we did not see or hear the witnesses. *Turner,* 25 M.J. at 325.

Even disregarding Cpl C's testimony entirely, the Government proved that there was a significant disparity in rank between the Appellant and Cpl C; that the adulterous behavior occurred in the barracks during a work day, just prior to the change of command; that the Appellant failed to comply with regulations requiring him to sign in and out of the barracks when visiting residents; that Cpl C was aware that, at least according to her supervisor, she would have been culpable under the UCMJ for the crime of adultery; and that, at least according to her supervisor, Cpl C returned to work the week following the adulterous conduct with a disheveled appearance, "standoffish" behavior, looking "depressed," and arriving late to work. We find that these factors sufficiently indicate a detrimental effect on the unit and the stature of or respect toward a servicemember, thus satisfying the terminal element.

Sentence Reassessment

Due to our action on findings, we next consider whether we can reassess the sentence. A "'dramatic change in the penalty landscape' gravitates away from the ability to reassess" a sentence. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006) *(*quoting *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003)). Our action on findings dramatically changes the penalty landscape and we cannot reliably determine what sentence the members would have imposed. *Buber,* 62 M.J. at 479-80. The "only fair course of action" is to have the Appellant resentenced at the trial level. *Id*. at 480.

Conclusion

The findings as to Charge I and its specification are set aside and Charge I and its specification are dismissed with prejudice. The findings as to Charge II and the specification thereunder are affirmed. The sentence is set aside, and the record is returned to the Judge Advocate General of the Navy for transmission to an appropriate convening authority who may order a rehearing on the sentence. In the event that a rehearing on the sentence is impracticable, a sentence of no punishment may be approved. Art. 66(d), UCMJ. The record will then be returned to this court for completion of appellate review.

For the Court

R.H. TROIDL
Clerk of Court

Senior Judge PAYTON-O'BRIEN and Senior Judge MAKSYM concur.[8]

[8] Senior Judge MAKSYM participated in the decision of this case prior to departing the court.

UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
R.E. VINCENT, E.C. PRICE, J.R. PERLAK
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JEREMY O. WOOD
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS

NMCCA 200900436
GENERAL COURT-MARTIAL

Sentence Adjudged: 06 August 2008.
Military Judge: LtCol Thomas Sanzi, USMC.
Convening Authority: Commanding General, 1st Marine Division (Rein), Camp Pendleton, CA.
Staff Judge Advocate's Recommendation: LtCol R.M. Miller, USMC; **Addendum**: Maj K.C. Harris, USMC.
For Appellant: Capt Jeffrey Liebenguth, USMC.
For Appellee: Capt Michael Aniton, USMC.

25 January 2010

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PERLAK, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of violating a lawful general order and rape, in violation of Articles 92 and 120, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 920. The military judge sentenced the appellant to two years confinement, reduction to pay grade E-1 and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged and, except for the dishonorable discharge, ordered the sentence executed.

The appellant raises four assignments of error. First, he asserts that the evidence is factually insufficient to support a finding of guilty as to Charge II, rape. Second, the appellant asserts that his right to due process was violated where the Government advanced multiple inconsistent theories of guilt prior to and at trial. Third, the appellant asserts that his right to due process was violated where the prosecution suppressed photo and testimonial evidence favorable to the defense that was material to both guilt and punishment. Fourth, the appellant asserts that the Government's evidence was factually insufficient to sustain a conviction for wrongfully providing a person under the age of twenty-one an alcoholic beverage.

For the reasons set out below, we affirm only the finding of guilty for Charge I. We set aside the finding of guilty for Charge II, and authorize a rehearing on sentence.[1]

Sufficiency of the Evidence as to Rape

In his first assignment of error, the appellant contends that the evidence is factually insufficient to support his conviction for Charge II, rape. We agree.

Background

All facts pertinent to this case occurred in the appellant's barracks aboard the Marine Corps Base at 29 Palms, California during the early morning hours of 26 May 2007. Two college-aged women arrived from Palm Springs and joined a party in the barracks around midnight. The complainant, Ms. [T], testified that she consumed a moderate amount of alcohol, including a few sips of an alcoholic beverage that the appellant provided to her. Record at 92-93. At some point thereafter, Ms. [T] became ill. *Id*. at 93. Ms. [T] next remembers waking up in the appellant's bed with his penis inside her vagina. *Id*. Ms. [T] testified that she pushed the appellant away and that he left the room. *Id*. at 93-94. The allegation of rape surfaced the following Wednesday, 30 May 2007, when Ms. [T] presented at a pregnancy counseling center seeking, inter alia, communicable disease testing. *Id*. at 115. In two sworn statements given to the Naval Criminal Investigative Service following that allegation, the appellant admits to having consensual sexual intercourse with Ms. [T]. Additional facts necessary to this decision are included herein.

[1] We decide this case mindful of two orders issued 6 January 2010. One order, to which an enlargement of time was granted, compels production of photographs germane to an assignment of error rendered moot by this decision. The second order compelled a certificate of correction on the status of defense exhibits in the Record of Trial. The due date in that order passed with neither the action ordered completed nor an enlargement requested. The status of those exhibits no longer impacts this decision. Both orders are hereby rescinded.

Principles of Law

Article 66(c), UCMJ, requires this court to conduct a *de novo* review of the legal and factual sufficiency of each approved finding of guilty. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002)(citing *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)). The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

At trial, the Government was required to prove: (1) that the accused committed an act of sexual intercourse; and (2) that the act of sexual intercourse was done by force and without consent. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 45b(1). We look at the totality of the circumstances to determine whether the elements of force and lack of consent are established. *United States v. Bright*, 66 M.J. 359, 363 (C.A.A.F. 2008)(citing *United States v. Cauley*, 45 M.J. 353, 356 (C.A.A.F. 1996)). In determining whether the second element is proven, "Consent . . . may not be inferred . . . where the victim is unable to resist because of the lack of mental or physical faculties. In such a case there is no consent and the force involved in penetration will suffice. All the surrounding circumstances are to be considered in determining whether a victim gave consent . . . ." MCM, Part IV, ¶ 45c(1)(b).

Discussion

Only the second element, regarding force and lack of consent, is in issue. The Government's theory of the case was that Ms. [T] was incapacitated due to intoxication and therefore unable to give consent. In determining whether Ms. [T] consented or had the capacity to consent, we consider all of the surrounding circumstances. MCM, Part IV, ¶ 45c(1)(b). Ms. [T]'s level of intoxication is critical to addressing the second element. The evidence of her intoxication took the form of testimony from witness accounts, most of whom had also been drinking alcohol.

The most abundant and compelling witness testimony comes from Ms. [T] herself. She testified that she only drank about two to three alcoholic drinks of Red Bull mixed with vodka, and a shot of vodka. Record at 89-90. She also testified that she was sipping on the drinks and did not finish them. *Id*. at 91.

Ms. [T] also testified that while in another Marine's room, she drank a few sips of an alcoholic beverage the appellant brought her. *Id*. at 92. On a scale of 1-10 (with 10 being the most drunk a person or she has ever been), Ms. [T] testified that she was a "maybe a three or four." *Id*. at 108. She testified that she usually drinks on weekends and has several drinks, but has never blacked out from alcohol. *Id*. at 108-09. Ms. [T] stated again at the end of cross-examination that she was not drunk. *Id*. at 109. In response to a question from the military judge, Ms. [T] testified that she did not consider herself drunk. *Id*. at 113.

Lieutenant Colonel (LTC) Timothy Lyons, U.S. Army, was called as a witness and qualified as an expert in forensic toxicology. *Id*. at 139. LTC Lyons testified that getting sick, blacking out, and then passing out would not be consistent with Ms. [T]'s testimony of how much she drank. *Id.* at 154. He further testified to the toxicological effects of alcohol, assuming an even higher level of consumption than Ms. [T] reported, and calculated that the result would still not produce an inability to record memory (black out), much less cause someone to experience alcohol induced unconsciousness (pass out). *Id*. at 147-50. While testifying on the subject of memory black out, LTC Lyons indicated that while unable to record memory or exercise good judgment, a person in an alcohol-induced black out is nonetheless capable of various tasks, including consenting to sex. *Id*. at 154.

Although there was testimony that Ms. [T] was intoxicated and even ill at one point, Private First Class (PFC) [M] testified that she was able to get up and walk unassisted from the bathroom to a bed in his room. *Id*. at 176. Similarly, in the appellant's statement to NCIS, he states that Ms. [T] was sick earlier that evening, but that he saw her walk out of the bathroom without assistance. Prosecution Exhibit (PE) 2 at 2. Soon after, the appellant got onto the bed in PFC [M]'s room next to Ms. [T] and the two conversed. PFC [M] testified that they were flirtatious. Record at 187. PFC [M] maintained that Ms. [T] left his room with the appellant without any assistance. *Id*. at 183, 187-88. These events, as recounted by others, all occurred after Ms. [T] was ill, and during the period of time of which she has no recollection.

The appellant's two statements to NCIS are the only evidence of what may have occurred sexually between the appellant and Ms. [T] during the time period of her memory gap. PE 2, PE 6. While one of the statements does establish some

indeterminate level of intoxication by Ms. [T], including two brief periods of sleep during a lengthy sexual encounter, it does not constitute a confession to rape. PE 6 at 2-3. The appellant describes a consensual sexual encounter wherein Ms. [T] briefly fell asleep and he stopped having sex until Ms. [T] woke up, was responsive, and physically reciprocated. The appellant told NCIS that he stopped having sex with Ms. [T] when she pushed him away and asked him to stop. PE 2 at 4; PE 6 at 4. This is corroborated by Ms. [T]'s testimony that when she pushed the appellant away, he left the room. Record at 93-94.

We may only affirm such findings of guilty as we find correct in law and fact. After complete consideration of the record, the pleadings and oral arguments of the parties, and making allowances for and fully mindful of our statutory requirement that we recognize that the trial court saw and heard the witnesses, we conclude that the Government has failed to sustain its burden of proof, beyond a reasonable doubt, on the critical issue of incapacity and its nexus to consent. Art. 66(c), UCMJ. We take appropriate action in our decretal paragraph.

Assignments of Error II and III

Given our decision to set aside the finding of guilty on the Article 120 offense, we need not decide assignments of error II and III, which relate to the rape charge only.

Sufficiency of the Evidence as to the Orders Violation

In his fourth assignment of error, the appellant contends that the evidence is factually insufficient to support his conviction for Charge I, violation of a lawful general order. We disagree.

Marine Corps Order (MCO) 1700.22E paragraph (4)(a)(1)(g), dated March 21, 2006, a lawful general order, provides that knowingly selling or providing alcohol to anyone under the age of 21 is prohibited. Appellate Exhibit XI at 6. To prove a violation of MCO 1700.22E, paragraph (4)(a)(1)(g), the Government must prove that the order was in effect, that the appellant had a duty to obey it, and that that the appellant violated or failed to obey the order. MCM, Part IV, ¶ 16b. At trial, the military judge took judicial notice that MCO 1700.22E is a lawful general order that was in effect on 26 May 2007. Record at 171. The evidence establishes that the appellant was on active duty in the Marine Corps and subject to the order. PE

2, PE 6. Ms. [T] testified that she drank an alcoholic beverage that the appellant brought her. Id. at 92. In his statement to NCIS, the appellant stated that he brought Ms. [T] an alcoholic beverage. PE 2 at 2; PE 6 at 1. Ms. [T] testified that she told the appellant that she was 19 years old before he gave her the alcoholic beverage. Record at 97.

After taking into consideration that we did not see and hear the witnesses, we are convinced beyond a reasonable doubt of the appellant's guilt as to Charge I.

Sentence Rehearing

Due to our action on findings, we next consider whether we can reassess the sentence. A "'dramatic change in the penalty landscape' gravitates away from the ability to reassess" a sentence. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006)*(*quoting *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003)). Based on the orders violation and rape together, the military judge imposed a sentence of two years confinement, a dishonorable discharge, and a reduction to pay grade E-1. All that remains is the orders violation. The maximum punishment for the Article 120 offense was any lawful punishment, short of death, as a court-martial may direct. MCM, Part IV, ¶ 45e(1). The maximum punishment for the orders violation was confinement for 2 years, forfeiture of all pay and allowances, and a dishonorable discharge. MCM, Part IV, ¶ 16e(1). Our action on findings dramatically changes the penalty landscape and we cannot reliably determine what sentence the military judge would have imposed. *Buber,* 62 M.J. at 479-80. The "only fair course of action" is to have the accused resentenced at the trial level. *Id*. at 480.

Conclusion

We affirm the findings of guilty for Charge I and its specification. The findings of guilty for Charge II and its specification are set aside and Charge II and its specification are dismissed. The sentence is set aside and the appellant is ordered released from post-trial confinement. The record is returned to the Judge Advocate General of the Navy for remand to an appropriate convening authority with a rehearing on sentence authorized. In the event that a rehearing on the sentence is

impracticable, a sentence of no punishment may be approved. Art. 66(d), UCMJ.

Senior Judge VINCENT and Judge PRICE concur.[2]

For the Court

R.H. TROIDL
Clerk of Court

[2] Senior Judge VINCENT participated in the decision of this case prior detaching from the court.

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES,	)	BRIEF ON BEHALF OF
Appellant	)	THE UNITED STATES
	)	
v.	)	Case No. 201400205
	)	
Nicholas W. TIENTER,	)	
Lance Corporal (E-3)	)	
U.S. Marine Corps	)	
Appellee	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

CORY A. CARVER
Captain, USMC
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-8504, fax (202) 685-7687

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Preamble

COMES NOW the United States, pursuant to Article 62, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 862 (2012), and respectfully asks this Court to reverse the Military Judge's ruling suppressing text message conversations discovered on Appellee's cellular phone. *See* R.C.M. 908(b)(7), Manual for Courts-Martial, United States (2008 ed.); Crim. App. R. P. 21; N-M. Crim. App. R. 4-6.

Statement of Statutory Jurisdiction

The Government timely appealed the Military Judge's order suppressing Appellee's text messages relating to the sexual assault charge, which are substantial proof of a material fact in the proceeding. This Court has jurisdiction to hear this appeal pursuant to Article 62(a)(1)(B), UCMJ.

Issue Presented

THE MILITARY JUDGE ERRED IN SUPPRESSING "SEXUAL CRIME" TEXT MESSAGES AS BEING OUTSIDE THE SCOPE OF THE SEARCH AUTHORIZATION, WHERE: (1) THE AUTHORIZATION PERMITTED SEARCH AND SEIZURE OF "ALL TEXT MESSAGES"; (2) THE AGENT EXTRACTED "ALL TEXT MESSAGES" INTO A SINGLE FILE PDF REPORT USING SOFTWARE UNABLE TO DISTINGUISH BETWEEN TEXT MESSAGES RELATING TO DRUG OFFENSES AND UNRELATED TEXT MESSAGES; (3) THE AGENT PREVIOUSLY FOUND A TEXT MESSAGE RELATING TO BOTH A DRUG OFFENSE AND AN UNRELATED OFFENSE ON THE SAME PAGE OF THE PDF; AND (4) AFTER EXTRACTION, THE AGENT REVIEWED THE PDF REPORT USING PHRASES BOTH RELATED AND NOT RELATED TO THE CHARGED DRUG OFFENSES. UNDER SETTLED CASELAW, ONCE AGENTS ARE LAWFULLY AUTHORIZED TO SEARCH THE PLACE THEY ARE SEARCHING, NOTHING, EVEN SUBJECTIVE INTENT, RESTRICTS "HOW" THAT PLACE IS SEARCHED.

Statement of the Case

On September 23, 2013, the Convening Authority referred charges to a general court-martial against Appellee for sexual contact and indecent conduct, in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2012). The specifications both related to alleged sexual misconduct that took place on November 4, 2011.

Before trial, Appellee moved to suppress multiple text messages taken from his cellular phone that admitted and referred to sexual misconduct. On May 5, 2014, an Article 39(a) session was held on Appellee's motion to suppress. (R. 25.)

On May 13, 2014, the Military Judge made findings of fact and conclusions of law granting Appellee's motion to suppress

text messages. On May 16, 2013, Trial Counsel provided written Notice of Appeal to the Military Judge pursuant to R.C.M. 908.

Statement of Facts

A. Probable cause was established to search Appellee's cellular phone.

On November 4, 2011, Appellee allegedly inserted his penis in the mouth of LCpl K while LCpl K was substantially incapable of appraising the nature of the sexual contact. (Charge Sheet, Jun. 10, 2013.) These acts took place in the presence of two other Marines. (Charge Sheet.) Appellee was charged with sexual contact and indecent conduct. (Charge Sheet.)

While Appellee was under investigation for sexual assault, he began receiving prescription medication from his doctor for pain resulting from a shoulder injury. (R. 59.) Cpl Steven Savarino, USMC, began soliciting pain pills from Appellee. (R. 59.) An unidentified third Marine also began soliciting prescription medication from Appellee. (R. 29; Aff. in Support of Application, at ¶ 6, Nov. 20, 2013. (hereinafter "Aff.”))

In an effort to receive leniency from the Convening Authority in his sexual assault case, he provided copies of several segments of text messages to his command that showed another party soliciting drugs from him. (R. 27, 60; Aff. ¶ 6.) Criminal Investigative Division (CID) received these copies of the text messages on November 7, 2013. (Aff. ¶ 6.)

Separately, Special Agent (SA) Perez of CID was investigating Appellee's squadron for drug use based on a tip from a confidential informant. (R. 26.) SA Perez believed that Appellee's text messages indicated that the original full file of texts, and other texts between Appellee and third parties, would be relevant to his investigation. (R. 29.) Appellee did not provide dates of the relevant text messages, nor did he identify the second Marine who had solicited the prescription medication. (R. 27-28, 33; Aff. ¶ 3.) SA Perez used the selection of transcribed text messages provided by Appellee to seek command authorization to search the remaining text messages on Appellee's cellular phone, not provided voluntarily by Appellee. (R. 29; Aff. ¶ 6)

B. The search authorization and affidavit.

The Command Authorization authorized seizure of Appellee's cell phone, finding that "grounds for application for issuance of a command authorized search exists as stated in the supporting affidavit." (Appellate Ex. IX.) This refers to two affidavits submitted by SA Perez: a summary Affidavit, and an attached second Affidavit "which is considered a part of [the first Affidavit]." (Appellate Ex. IX.)

The Affidavits SA Perez submitted in support of his search authorization request stated that he wished to search for conversations providing evidence that Cpl Savarino solicited

Appellee for controlled substances. (Aff. ¶¶ 6, 7.) SA Perez also believed there were conversations providing evidence that an unidentified third party may have solicited Appellee for prescription pills. (Aff. ¶¶ 6, 7.)

SA Perez believed that evidence would be found in "[s]tored ... text messages" "in the cellular telephone to be searched." (Aff. ¶ 3.) SA Perez stated that he would "employ search protocols directed exclusively to the identification and extraction of data within the scope of this warrant." (Aff. ¶ 12.) SA Perez stated that "it is necessary to review and seize all electronic mails that identify any users of the subject account(s) and any electronic mails sent or received in temporal proximity to incriminating electronic mails that provide context to the incriminating mails." (Aff. ¶ 14.) SA Perez read the Affidavit literally: "there were no limitations to the search. We had authorizations to search the entire phone for evidence into 112a." (R. 42.)

C. <u>The seizure and search of Appellee's cellular phone and automated production of a single PDF report</u>.

Acting under the command's search authorization, SA Perez seized the cellular phone. (R. 31.) SA Perez extracted all text messages from the phone using a Cellebrite machine, which

created a single PDF file[1]. (R. 33, 47, 49.) Civilian Defense Counsel notes on the Record that this file was a continuous scrolling document, as PDFs are commonly known to be. (R. 82.) A Cellebrite machine is unable to extract or distinguish between individual text messages, but can, as here, distinguish between and extract only single types of files: "The one thing that [Cellebrite] does not do is allow us to limit it to timeframes, specific individuals in receiving messages. So it's either all or none." (R. 33.) Under cross-examination by the Defense, SA Perez reiterated: "Again, there is no way to separate ... messages or [the senders of messages]. It either pulls all or none." (R. 41-42.)

Although the PDF contained multiple files from Appellee's phone, SA Perez only reviewed the portions containing text messages. (R. 33.) The text messages were extracted from the original PDF into a separate PDF document for easy reading. (R. 33.) The PDF file reflects all text and instant messages sent and then received chronologically, and a single page of the file regularly reflects multiple days' text messages. (R. 34; Appellee's Mot. to Attach, Encl. 1, June 23, 2014.)[2]

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[1] Although not in the Record, PDFs are commonly known to be single, continuous-scrolling documents and not "folders" or nested "files" that require privileges or further "clicks" to access as one proceeds in the file.

[2] The "20,000" pages reference in the Record at 34 is to "some of these phones." The text messages in this case were far fewer.

D. A review of the PDF file revealed text messages relating to the sexual assault investigation.

SA Perez reviewed the PDF file for evidence supporting and providing context to the drug offenses. (R. 34.) During this review, SA Perez found evidence Appellee was having an affair with a married woman. (R. 34.) That message "was found basically on the same page where [SA Perez] found some other communication about bath salts and meth." R. 34.)

Drug-related charges were then preferred against other Marines in Appellee's squadron. (R. 35-36.) SA Perez received a phone call from Trial Counsel, Major Mann, requesting a copy of the PDF file for her review. (R. 35.) Major Mann's review of the PDF file uncovered at least one other text message involving a sexual offense, which she conveyed to SA Perez. (R. 36.) SA Perez reviewed the text messages Major Mann cited, then notified NCIS SA Stemen about the text messages and provided "the entire PDF" of text messages to him. (R. 36-37, 49.)

SA Stemen reviewed the text messages. (R. 55.) Nothing in the Record supports that a new Cellebrite extraction was ever performed. Despite the Military Judge's repeated questions indicating he believed SA Stemen ran a second extraction report on the phone, SA Stemen continually pushed back: "again, I didn't run the extraction." (R. 56; *see also* R. 55 ("I think [SA Perez] may have already done it previously... I'm not sure

exactly when he did the extraction.”).) Despite this, the Military Judge incorrectly concluded, *see infra,* that “SA Perez conducted another review ... once again using the Cellebrite machine” and that “SA Stevens began searching the extraction report using the Cellebrite machine.” (Appellate Ex. XIX, at 7.)

SA Stemen searched the text messages on the PDF using terms such as “[o]n top, oral sex, [and] blow job[.]”(R. 53.) Several text messages in the PDF were relevant to the sexual assault investigation. (R. 55.) SA Stemen wrote up his findings in a March 5, 2014, Report of Investigation. (R. 55.)

E. The Military Judge’s Findings of Fact and Conclusions of Law on the Motion to Suppress.

Appellee sought to suppress the text messages. (Appellate Ex. VIII.) Following an evidentiary hearing in which SA Perez, SA Stemen, and Appellee testified, the Military Judge suppressed the text messages related to the sexual assault. (Appellate Ex. VIII.)

Despite the motions hearing testimony indicating that the Cellebrite machine was only used once to extract information from Appellee’s phone, the Military Judge found in his ruling that the Cellebrite machine was used three times: the Military Judge stated that SA Perez used the Cellebrite machine on Appellee’s phone twice, once on December 10, 2013, and once on or about March 5, 2014; and the Military Judge made a factual

finding that the Cellebrite machine was run a third time on Appellee's phone by SA Stemen. (Appellate Ex. XIX, at 7.)

The Military Judge also found that multiple text messages were found that provided evidence relating to the drug charges, including text messages on July 15, 17, and 23, August 2, October 30 and 31, and November 1, 2013. (*Id.* at 6.) Those messages include solicitations for prescription medication, such as "Hey dude do u have any pills left... [l]ike percs or Vicodin" and "[y]our not the only one hittin me up for pills[.]" (Extraction Report, at 1117, 1376.)

The Military Judge found that the text messages relating to sexual assaults were found by SA Stemen, and that the messages occurred on November 8, 2011, June 17, 2013, and August 12, 2013.

Those messages contained evidence of oral sex and the alleged victim's level of intoxication, such as "I gotta tell yu what happened at the ball. It might turn into a big deal but I hope not[.]" "Me and Zamora were about to run a train on this girl at the hotel but I ended up leaving the room cuz I was way to drunk and she was even drunker and she's underaged and everyone in the squadron knows about it cuz Johnson went runnin his mouth about it." (Extraction Report, at 688-89.) "No man actually exact opposite I'm dealin with a sex assault case. At the marine corps ball in 2011 I got a bj from this chick in my

unit and right when I got back from afghan in march I got questioned by ncis. She's sayin she was too drunk to defend herself and I took advantage of her. 5 minutes of gettin my duck sucked is about to ruin my life." (Extraction Report, at 1226.)

The Military Judge concluded that the search authorization itself "was sufficiently specific in scope" and that "since the transcript provided by [Appellee] did not include any dates, the scope of the search authorization was legitimately broad to not only find the text messages in question, but also provide context for the conversations that occurred." (Appellate Ex. XIX, at 13.)

However, the Military Judge then suppressed the text messages relating to sexual assaults found by Major Mann, SA Perez, and SA Stemen. He found that SA Perez "mistakenly thought that [the adultery] message may relate to the case involving LCpl [K]," and that seizure of the adultery-related message by *both* "SA Perez and SA Stevens[3] [sic]" was proper under the plain view exception. (Appellate Ex., at 13-14.)

But the Military Judge concluded that, despite his finding that the scope of the search properly included all text messages on Appellee's cell phone, "any additional search for evidence

[3] Note that the Military Judge's Findings that refer to "SA Stevens" are in fact references to the witness SA Stemen. No "SA Stevens" has appeared at his court-martial.

relating to the sexual assault required an additional search authorization for evidence of that crime." (*Id.*) The Military Judge suppressed the sexual assault text messages, holding that they "exceeded the scope of the search authorization and violated [Mil. R. Evid.] 311, 315, and the Fourth Amendment, and no exception or exigency existed to justify his search." (*Id.* at 14-15.)

Argument

THE MILITARY JUDGE ERRED IN SUPPRESSING TEXT MESSAGES RELATING TO SEX CRIMES: THE TEXT MESSAGES WERE SEARCHED UNDER A LAWFUL SEARCH AUTHORIZATION FOR SEIZURE AND SEARCH OF "ALL TEXT MESSAGES." UNLIKE WARRANTLESS COMPUTER SEARCHES, A WARRANT AUTHORIZING THE EXTRACTION OF ALL TEXT MESSASGES INTO A SINGLE PDF FILE DOES NOT VIOLATE THE FOURTH AMENDMENT AND DOES NOT PREVENT AGENTS FROM EITHER SCROLLING THROUGH ALL PAGES OF THE CONTIGUOUS TEXT OR USING REGULAR DOCUMENT FUNCTIONS, NEITHER OF WHICH ARE TANTAMOUNT TO NEW "SEARCHES" FOR CONSTITUTIONAL PURPOSES. THE AGENTS WERE LAWFULLY AUTHORIZED TO REVIEW AND VIEW ALL TEXT MESSAGES IN THE PDF, ONCE LAWFULLY EXTRACTED FROM THE CELL PHONE.

A. The standard of review is abuse of discretion.

When this Court rules on an appeal under Article 62, UCMJ, it "may act only with respect to matters of law, notwithstanding [Article 66(c), UCMJ]." Article 62(b), UCMJ. When the government appeals a military judge's evidentiary ruling on a motion to suppress, this Court reviews that ruling for abuse of discretion. *United States v. Dease*, 71 M.J. 116, 120 (C.A.A.F.

2012) (citations omitted). A military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995).

B. The extraction of all text messages into a single PDF file was within the scope of the authorization, was based on probable cause, was reasonable, and as the Military Judge found, proper.

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." There must be probable cause that "the person, property, or evidence sought is located in the place or on the person to be searched[]" and the evidence in question is evidence of a crime. Mil. R. Evid. 315(f)(2), 316. If there is probable cause, a search authorization may be issued. Mil. R. Evid. 315(f) and (d)(1). "[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

The Military Judge here properly found probable cause to issue the search authorization to seize and search Appellant's cellular phone, to include all text messages. But the Military Judge erred in finding that SA Stemen exceeded the scope of the search authorization when he reviewed the previously created PDF file, after it was first reviewed by SA Perez, and subsequently reviewed by Major Mann, and then again by SA Perez.

First, the Military Judge clearly misunderstood how a Cellebrite machine functions, and therefore erred in finding that the Cellebrite machine was used three times, once for each review of the previously seized material. Second, he erred in concluding that the intent of the searcher under a warranted search matters. Here, agents were permitted to review all text messages. The search authorization give permission for the search and seizure of not only the text message between Appellant and Cpl Savarino, but also those of Appellant and an unidentified third party, and also all messages in turn that placed *those* messages in context. The scope of the search included *all* text messages. Third, practically speaking, the agents could have reviewed all of the text messages by reading every page of the PDF, by reading every tenth page, or by using the document's "Find" menu option, which is itself not a new "search" for constitutional purposes.

1. <u>The intent of searchers is irrelevant to warranted searches, and "how" the search is conducted is not conscribed. Since the authorization permitted search of all text messages, and permitted retrieval of text messages that provide context to the charged crimes, review of every text message was permitted under the authorization</u>.

To satisfy the Fourth Amendment, the search must be within the scope of the search authorization. *United States v. Williams*, 592 F.3d 511, 519 (4th Cir. 2010). The scope of the

search authorization "should be read with a commonsense and realistic approach[]" and not in a "hypertechnical manner." *Id*. (internal quotations and citations omitted). Law enforcement officials conducting a search pursuant to a search authorization are not required to interpret the scope narrowly, but are required to make realistic, commonsense determinations as to what constitutes evidence based on probable cause. *United States v. Fogg*, 52 M.J. 144 (C.A.A.F. 1999).

The subjective intent of law enforcement is irrelevant even if an officer fully expects and desires to find an unauthorized item of evidence in the course of a search. *United States v. Williams*, 592 F.3d 51, 522 (4th Cir. 2010); see *Maryland v. Garrison*, 480 U.S. 79 (1987); *Horton v. California*, 496 U.S. 128, 138 (1990); *Williams*, 592 F.3d at 522-23; *Whren v. United States*, 517 U.S. 806, 813 (1996). In *Williams*, the court noted that Supreme Court jurisprudence mandates that the scope of a search be "defined *objectively* by the terms of the warrant and the evidence sought, not by the *subjective* motivations of an officer." *Id.* at 522 (emphasis in original). The court rejected the view suggested by the Tenth Circuit in *United States v. Carey,* 172 F.3d 1268, 1271-73 (10th Cir. 1999), and treated with ambivalence by many circuits, that suggests that during a warranted search, any discovery of unauthorized evidence be "inadvertent." *Williams,* 592 F.3d at 523.

The *Williams* court denied suppression of the documents, given that the agents could legally view *every* file under the warrant: "because the scope of the search authorized by the warrant included the authority to open and cursorily view each file, the observation of child pornography within several of these files did not involve an intrusion on Williams' protected privacy interests beyond that already authorized by the warrant, regardless of the officer's subjective motivations." *Id.*

Here, the subjective motivations of Trial Counsel in reviewing the PDF file and the subsequent review by both SA Perez and SA Stemen is irrelevant to the constitutional analysis. As the search of the text messages in the PDF file was within the scope of the search authorization, it was valid.

2. Dicta in caselaw pertaining to recommended but controversial *ex ante* restrictions on computer search methodology, and the Tenth Circuit's *Carey* holding that is oft-cited but has been cabined in practice, is irrelevant to a warranted search authorizing seizure and search of all text messages, which are accordingly extracted into a single file for review.

A majority of Circuits recognize broadly that in the context of computer folder searches——that is, before individual files are opened——files themselves may be misnamed or misleading, and thus take a broad approach to computer *folder* searches conducted pursuant to a warrant. See *United States v. Grubbs*, 547 U.S. 90, 99 (2006); *United States v. Hill*, 459 F.3d

966, 977 (9th Cir. 2006); *Guest v. Leis*, 255 F.3d 325, 334-35 (6th Cir. 2001); *United States v. Brooks*, 427 F.3d 1246, 1251 (10th Cir. 2005); *United States v. Upham*, 168 F.3d 532, 537 (1st Cir. 1999)*; United States v. Burgess*, 576 F.3d 1078, 1092-94 (10th Cir. 2009). Because criminals often "hide, mislabel, or manipulate files to conceal criminal activity," broad searches are routinely accepted. *See Burgess*, 576 F.3d at 1092-94 ("[T]here may be no practical substitute for actually looking in many (perhaps all) folders and sometimes at the documents contained within those folders, and that is true whether the search is of computer files or physical files."); *United States v. Mann*, 592 F.3d 779, 782 (7th Cir. 2010) (relevant files are often hidden and can be mislabeled and "manipulated to hide their true contents"); *Williams*, 592 F.3d at 522 (where a warrant authorized a computer search for evidence of harassment, the agent was authorized to review every file on the computer).

The oft-cited but seldom adopted *Carey* view has since been modified many times by the Tenth Circuit, and is cited more for its dicta recommending "search methodologies" of computer folders, than for its actual binding holding. In *Carey,* the Tenth Circuit held that in a warranted-search situation, expanding the scope of the search of a computer's folders to look for child pornography by (1) clicking on strangely named folders, and (2) clicking on and opening individual JPG image

files, unlawfully expanded the scope of the search. 172 F.3d at 1271-73. The *Carey* court also found that the search did not permit a "plain view" exception because the JPG files "were in closed files and thus not in plain view." *Id.*

Since *Carey,* the Tenth Circuit adjusted course and limited the application of this doctrine, which is most frequently cited as justification for controversial *ex ante* search warrant restrictions. *See United States v. Stabile,* 633 F.3d 219, 238-39 (3rd Cir. 2011). More recent cases have indicated that search warrants should not "contain a particularized computer search strategy." *United States v. Brooks,* 427 F.3d 1246, 1251 (10th Cir. 2005). Further, the Tenth Circuit suggested in *United States v. Burgess,* that computer searches perhaps should begin with an analysis of file and folder structure, followed by a search of suspicious folders, and finally by looking at files most likely to contain the objects of the search——but in the end, *Burgess* concluded, "there may be no practical substitute for actually looking in many (perhaps all) folders and sometimes at the documents contained within those folders." 576 F.3d 1078, 1092-94 (10th Cir. 2009).

But this case does not involve *folder* searches——but rather, an authorized extraction of text messages. No individual files exist. Only one file was reviewed by the agents——a contiguous list of all text messages. And even under the recent *Burgess*

guidance from the most restrictive Tenth Circuit view, this search was proper. Unlike *Carey,* here all text messages were extracted into a single PDF file, not multiple files. Multiple days' text messages sometimes appeared on a single PDF page. No new files were opened. No new search of the phone was conducted after the first Cellebrite extraction. And no other documents or file types were reviewed. The agents *only* reviewed text messages to and from Appellee's cell phone. This is the equivalent of viewing a single file on a computer or opening one container and dumping all the contents out to look through.

Since only the scope of the search is constitutionally conscribed, and not the manner of the search, SA Perez and SA Stemen could have lawfully looked at *every* text message in the document. The warrant allowed for the search of all text messages between Appellant and an "unknown third party". They could have read each page of the document, hit "page down," or run a PDF search by keywords. None of these options would open a new "file folder" on the cellular phone or expand the search into areas not permitted by the authorization. Since the incriminating text messages were found within the PDF file to which the agents had legal access pursuant to the search authorization, the viewing was proper.

Their use of the PDF file by using the "Find" function was an unremarkable method for searching a single PDF file, and it

does not constitute a new search for constitutional purposes. No case law holds that once an agent has lawfully opened a file pursuant to a warrant, they cannot search *within that same file.* The Military Judge's holding, however, says exactly that. This Court should overturn the Military Judge's ruling, as the searches of the single PDF document were within the clear scope of the authorization to search all text messages.

3. The Military Judge fundamentally misunderstands the technology used and makes multiple factual errors that impact his conclusion. He erred in finding that more than one Cellebrite extraction was conducted, and erred in failing to find that SA Stemen was the third in a long line of parties that reviewed the PDF's sexual assault messages, including Major Mann and SA Perez. The Military Judge further erred in concluding that SA Stemen's review of the previously created PDF using document "find" functions was a new "search" for constitutional purposes.

A military judge abuses his discretion if his findings of fact are clearly erroneous or if his conclusions of law are incorrect. *Dease*, 71 M.J. at 120; *Ayala*, 43 M.J. at 298.

The Military Judge clearly erred by finding as a fact that SA Perez, after initially extracting the text messages from the cell phone once by hooking the Cellebrite machine up to the cell phone, used the Cellebrite machine again later to search the cell phone for keywords. In fact, the Cellebrite machine was used only once for the extraction of text messages and creation of a single PDF document. Nothing in the Record supports that

the Cellebrite machine was used again after the initial PDF file was created from the cell phone's text messages.

Further, the Military Judge clearly erred by overlooking that it was Trial Counsel who reviewed the PDF file and was the first person to discover the text messages relating to sexual assault. (Suppression Ruling at 7.) The Military Judge further clearly erred in failing to make any findings of fact whatsoever as to the Trial Counsel's "methodology"——which in any case is legally irrelevant, assuming she reviewed the phone's text and instant messages. It was only after Trial Counsel's review that she contacted SA Perez to inform him of the text messages relating to Appellee's sexual offense. (R. 36.) SA Perez then reviewed the text messages related to the sexual assault, and passed these on to SA Stemen. (R. 36.) The Military Judge clearly erred by not finding that it was Trial Counsel that discovered the text messages and passed that information on to SA Perez and then SA Stemen. Instead, the Military Judge based his ruling on a clearly erroneous factual finding that a third party——SA Stemen——using the PDF Reader's "find" function and retrieving messages found twice before by both SA Perez and Major Mann, with no finding whatsoever as to how SA Perez and Major Mann reviewed those message (which, again, is irrelevant, as all text messages were permitted to be searched).

Moreover, the Military Judge's conclusion that reading through the single file PDF report or searching it using keywords evidences a fundamental misunderstanding of how the PDF file works and is based on his erroneous findings of fact described herein. Moreover, restricting how agents look through the lawfully extracted and seized single file is not a correct application of the law.

The subsequent reading and using the keywords in the PDF's search function was not an additional search and certainly not a search under the Fourth Amendment. The Military Judge's conclusions of law were incorrect and significant findings of fact were clearly erroneous.

4. Neither of the two recent significant warrantless search cases, *Wick* at the Court of Appeals for the Armed Forces in 2014, and *Riley* at the Supreme Court just this week, alter this result.

Although the container analogy has been limited by the Court of Appeals for the Armed Forces where agents search through multiple computer or phone files, here that is not the case. *See United States v. Wick*, 73 M.J. 93, 102 (C.A.A.F. 2014). In *Wick*, officers conducted a warrantless search that explored all file folders on a phone. *Id.* The court hesitated to apply the "container" metaphor to a cell phone because the phone was, in essence, a computer containing a "vast amount of data that can be sorted and accessed, as well as the myriad ways

they can be sorted, filed, and protected," and phones "have the capability to be linked to one's bank account, personal calendar, e-mails, financial portfolios, and home security systems." *Id.* The court found that "it is not good enough to simply analogize a cell phone to a container." *Id.* The court emphasized the "potential invasion of privacy in a search of a cell phone is greater than in a search of a container in a conventional sense because a cell phone can provide access to a vast body of personal data." *Id.* (internal quotations and citations omitted).

The recent Supreme Court opinion in *Riley v. California* broadly found that arrests do not justify warrantless wholesale searches of cellphones. *Riley v. California*, Nos. 13-132 and 13-212, 2014 LEXIS 4497 (2014). The Court distinguished cell phones from other, non-digital items by noting that a cell phone "collects in one place many distinct types of information——an address, a note, a prescription, a bank statement, a video——that reveal much more in combination than any isolated record." *Id.* at 18. Cell phones thus "could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers." *Id.* at 17. The Court found that treating a cell phone as a container whose contents may be searched incident to arrest is problematic, as

cell phones may be used to access data located elsewhere, in the "cloud," and not stored on the phone. *Id.* at 21.

But the concerns of *Wick* and *Riley* are not present here. First, this search was pursuant to a warrant. Second, the search was limited specifically to one type of file——text messages (including instant messages and "SMS" messages, which are both forms of text messages), the equivalent to a single container. Third, the text messages were all stored locally on the phone--not "in the cloud." As there was no subsequent Cellebrite extraction, there was no concern for accessing other files on the phone when the agents reviewed the PDF file. No new files were opened and no other documents or file types were reviewed. This case is analogous to searching a single container and viewing its contents, which is what Trial Counsel, SA Perez and SA Stemen did with the PDF file.

C. Even if this Court disagrees and finds the review of the PDF by SA Stemen, after a previous review of sex assault-relevant messages by SA Perez and Major Mann, was a Fourth Amendment search, the text messages were nonetheless in plain view to *all three* parties, and the Military Judge erred in suppressing them.

"Law enforcement officials conducting a lawful search may seize items in plain view if the officials are acting within the scope of their authority, and they have probable cause to believe the item is contraband or evidence of a crime." *United States v. whe*, 58 M.J. 362 (C.A.A.F. 2003) (internal quotations

and citations omitted); *Fogg*, 52 M.J. at 149; *see* Mil. R. Evid. 316. If the officer "discovers items not specifically described in the warrant, he may seize those items which disclose that another crime is being or has been committed." *United States v. Modesto*, 39 M.J. 1055, 1059 (C.M.R. 1994).

1. SA Perez, Trial Counsel, and SA Stemen discovered the incriminating text messages while acting within the scope of the search authorization.

SA Perez and SA Stemen were acting within the scope of a valid search authorization when they discovered the incriminating text messages. *See supra* 12-19. The extraction placed all text and instant messages from Appellee's cellular phone onto a single PDF document that was then reviewed by the agents. (R. 33.) SA Perez and SA Stemen could have read through each of the 2,117 pages of texts in detail, skimmed it for highlights, or alternatively used the PDF search function to make it easier. The method is legally of no moment, as they were all extracted into a single file of contiguous text messages, with no "folders" and no ability to distinguish between messages except by reading every one. They discovered the incriminating text messages while acting within the scope of a valid search authorization.

2. Upon reading the "sex offense" text messages, Trial Counsel, SA Perez, and SA Stemen had probable cause to associate the text messages with criminal activity.

"The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity." *Fogg*, 52 M.J. at 149-50 (internal citation and quotations omitted); See *United v. Strader*, 2008 CCA LEXIS 132 (N-M. Ct. Crim. App. 2008). *United States v. Torres*, 60 M.J. 559 (A.F.C.C.A. 2004).

In *Torres*, the court upheld the officer's probable cause analysis that the tools discovered and seized were evidence of criminal activity because the officer "immediately linked [the tools] to a vehicle burglary that he investigated the previous day." 60 M.J. at 564.

Here, in reviewing the PDF document, the incriminating text messages were immediately apparent upon discovery because they were linked to a sexual assault investigation involving Appellee. The text messages referred to "run[ning] train on this girl at the hotel" when Appellee "was way to drunk and she was even drunker and she's underaged[.]" (Extraction Report, at 688-89.) In later text messages Appellee admits to receiving a "bj from this chick in my unit" and being questioned by NCIS about it. (Extraction Report, at 1226.) The "bj" taken with the

statements about the alleged victim being “even drunker” makes the evidentiary nature of the text messages immediately apparent. It was immediately apparent to Trial Counsel who initially discovered the text messages. She spoke with SA Perez to inform him of the incriminating nature of the text messages who in turn informed SA Stemen.

Even if this Court holds that review of individual text messages in the PDF file using the PDF Reader’s “find” function is itself a “search” for Fourth Amendment purposes, the incriminating text messages were nonetheless discovered while Trial Counsel and the agents acted within the scope of the search authorization and there was probable cause to believe that the text messages were evidence of a crime. As they were in plain view, the Military Judge erred in suppressing them.

The Military Judge abused his discretion by making clearly erroneous findings of fact and was incorrect in his conclusions of law. The text messages relating to Appellee’s sexual crime were seized and searched within the scope of a lawful search authorization that created a single PDF document that was properly viewed by law enforcement agents.

Conclusion

WHEREFORE, the Government respectfully requests that this Court set aside the Military Judge's erroneous ruling excluding the Appellee's text messages relating to the charged sexual assault.

CORY A. CARVER
Captain, USMC
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7396, fax (202) 685-7687

ANN E. DINGLE
Lieutenant, JAGC, USN
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7433, fax (202) 685-7687

Appendix

1. *Riley v. California*, Nos. 13-132 and 13-212, 2014 LEXIS 4497 (2014).

2. *United v. Strader*, 2008 CCA LEXIS 132 (N-M. Ct. Crim. App. 2008)

Certificate of Filing and Service

I certify that the original and required number of copies of the foregoing were delivered to the Court on June 27, 2014, and that a copy of the foregoing was delivered to the Appellate Defense Division on June 27, 2014.

CORY A. CARVER
Captain, USMC
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7396, fax (202) 685-7687

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DAVID LEON RILEY, PETITIONER v. CALIFORNIA; UNITED STATES, PETITIONER v. BRIMA WURIE

Nos. 13-132 and 13-212.

SUPREME COURT OF THE UNITED STATES

2014 U.S. LEXIS 4497

April 29, 2014, Argued [1]

1 Together with No. 13-212, *United States* v. *Wurie*, on certiorari to the United States Court of Appeals for the First Circuit.

June 25, 2014, Decided

NOTICE:

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: [*1]
ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE
People v. Riley, 2013 Cal. LEXIS 3714 (Cal., May 1, 2013)
United States v. Wurie, 728 F.3d 1, 2013 U.S. App. LEXIS 9937 (1st Cir. Mass., 2013)

DISPOSITION: No. 13-132, reversed and remanded; *No. 13-212, 728 F. 3d 1*, affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner and respondent defendants asserted that their cell phones were unlawfully searched incident to their arrests. Upon grants of writs of certiorari, petitioner United States appealed the judgment of the U.S. Court of Appeals for the First Circuit which suppressed evidence from the cell phone of respondent defendant, and petitioner defendant appealed the judgment of the California Court of Appeal which affirmed the defendant's conviction.

OVERVIEW: In both defendants' cases, the contents of the defendants' cell phones were searched after the defendants were arrested and evidence obtained from the cell phones was used to charge the defendants with additional offenses. The U.S. Supreme Court unanimously held that the police officers generally could not, without a warrant, search digital information on the cell phones seized from the defendants as incident to the defendants' arrests. While the officers could examine the phones' physical aspects to ensure that the phones would not be used as weapons, digital data stored on the phones could not itself be used as a weapon to harm the arresting officers or to effectuate the defendants' escape. Further, the potential for destruction of evidence by remote wiping or data encryption was not shown to be prevalent and could be countered by disabling the phones. Moreover, the immense storage capacity of modern cell phones implicated privacy concerns with regard to the extent of information which could be accessed on the phones.

OUTCOME: The judgment suppressing evidence from a

cell phone was affirmed. The judgment affirming the conviction was reversed and the case was remanded for further proceedings. Unanimous Decision; 1 Concurrence.

CORE TERMS: phone, cell, arrest, arrestee, search incident to arrest, digital, privacy, law enforcement, pocket, stored, warrantless search, arrested, remote, privacy interests, seized, destruction, cigarette, weapon, wiping, warrant requirement, photograph, lawful, scene, officer safety, arresting officer, exigent circumstances, wallet, video, police officer, electronic

LexisNexis(R) Headnotes

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
[HN1] See *U.S. Const. amend. IV*.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Warrants
[HN2] The ultimate touchstone of the *Fourth Amendment* is reasonableness. Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, reasonableness generally requires the obtaining of a judicial warrant. Such a warrant ensures that the inferences to support a search are drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Search Incident to Lawful Arrest > General Overview
[HN3] The U.S. Supreme Court acknowledges the right on the part of the government to search the person of an accused when legally arrested to discover and seize the fruits or evidences of crime. Such a search constitutes an exception to the warrant requirement.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Search Incident to Lawful Arrest > Extent & Manner of Search
[HN4] When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. There is ample justification, therefore, for a search of the arrestee's person and the area within his immediate control--construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Search Incident to Lawful Arrest > General Overview
[HN5] The authority to search a person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. Instead, a custodial arrest of a suspect based on probable cause is a reasonable intrusion under the *Fourth Amendment*; that intrusion being lawful, a search incident to the arrest requires no additional justification.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Search Incident to Lawful Arrest > Extent & Manner of Search
[HN6] Police are authorized to search a vehicle incident to arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search. There is an independent exception for a warrantless search of a vehicle's passenger compartment when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Warrants
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > General Overview
[HN7] A court generally determines whether to exempt a given type of search from the warrant requirement by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Search Incident to Lawful Arrest > General Overview
[HN8] Officers must generally secure a warrant before conducting a search of data on cell phones.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Search Incident to Lawful Arrest > General Overview
[HN9] Searches of a person incident to arrest, while based upon the need to disarm and to discover evidence, are reasonable regardless of the probability in a particular arrest situation that weapons or evidence would in fact be found. Rather than requiring a case-by-case adjudication, a court asks instead whether application of the search incident to arrest doctrine to a particular category of effects would untether the rule from the justifications underlying the exception to the warrant requirement.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Search Incident to Lawful Arrest > General Overview
[HN10] Not every search is acceptable solely because a person is in custody. To the contrary, when privacy-related concerns are weighty enough a search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Warrants
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Search Incident to Lawful Arrest > General Overview
[HN11] The United States Supreme Court's holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest. The Supreme Court's cases have historically recognized that the warrant requirement is an important working part of our machinery of government, not merely an inconvenience to be somehow "weighed" against the claims of police efficiency.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Warrants
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Search Incident to Lawful Arrest > General Overview
[HN12] The United States Supreme Court's answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple--get a warrant.

SYLLABUS

In No. 13-132, petitioner Riley was stopped for a traffic violation, which eventually led to his arrest on weapons charges. An officer searching Riley incident to the arrest seized a cell phone from Riley's pants pocket. The officer accessed information on the phone and noticed the repeated use of a term associated with a street gang. At the police station two hours later, a detective specializing in gangs further examined the phone's digital contents. Based in part on photographs and videos that the detective found, the State charged Riley in connection with a shooting that had occurred a few weeks earlier and sought an enhanced sentence based on Riley's gang membership. Riley moved to suppress all evidence that the police had obtained from his cell phone. The trial court denied the motion, and Riley was convicted. The California Court of Appeal affirmed.

In No. 13-212, respondent Wurie was arrested after

police observed him participate in an apparent drug sale. At the police station, the officers seized a cell phone [*2] from Wurie's person and noticed that the phone was receiving multiple calls from a source identified as "my house" on its external screen. The officers opened the phone, accessed its call log, determined the number associated with the "my house" label, and traced that number to what they suspected was Wurie's apartment. They secured a search warrant and found drugs, a firearm and ammunition, and cash in the ensuing search. Wurie was then charged with drug and firearm offenses. He moved to suppress the evidence obtained from the search of the apartment. The District Court denied the motion, and Wurie was convicted. The First Circuit reversed the denial of the motion to suppress and vacated the relevant convictions.

Held: The police generally may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested. Pp. 5-28.

(a) A warrantless search is reasonable only if it falls within a specific exception to the *Fourth Amendment*'s warrant requirement. See *Kentucky v. King, 563 U. S. ___, ___, 131 S. Ct. 1849; 179 L. Ed. 2d 865*. The well-established exception at issue here applies when a warrantless search is conducted incident to a lawful arrest.

Three related precedents govern [*3] the extent to which officers may search property found on or near an arrestee. *Chimel v. California, 395 U. S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685*, requires that a search incident to arrest be limited to the area within the arrestee's immediate control, where it is justified by the interests in officer safety and in preventing evidence destruction. In *United States v. Robinson, 414 U. S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427*, the Court applied the *Chimel* analysis to a search of a cigarette pack found on the arrestee's person. It held that the risks identified in *Chimel* are present in all custodial arrests, *414 U. S., at 235, 94 S. Ct. 467, 38 L. Ed. 2d 427*, even when there is no specific concern about the loss of evidence or the threat to officers in a particular case, *id., at 236, 94 S. Ct. 467, 38 L. Ed. 2d 427*. The trilogy concludes with *Arizona v. Gant, 556 U. S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485*, which permits searches of a car where the arrestee is unsecured and within reaching distance of the passenger compartment, or where it is reasonable to believe that evidence of the crime of arrest might be found in the vehicle, *id., at 343, 129 S. Ct. 1710, 173 L. Ed. 2d 485*. Pp. 5-8.

(b) The Court declines to extend *Robinson*'s categorical rule to searches of data stored on cell phones. Absent more precise guidance from the founding era, the Court generally determines whether to [*4] exempt a given type of search from the warrant requirement "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton, 526 U. S. 295, 300, 119 S. Ct. 1297, 143 L. Ed. 2d 408*. That balance of interests supported the search incident to arrest exception in *Robinson*. But a search of digital information on a cell phone does not further the government interests identified in *Chimel*, and implicates substantially greater individual privacy interests than a brief physical search. Pp. 8-22.

(1) The digital data stored on cell phones does not present either *Chimel* risk. Pp. 10-15.

(i) Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape. Officers may examine the phone's physical aspects to ensure that it will not be used as a weapon, but the data on the phone can endanger no one. To the extent that a search of cell phone data might warn officers of an impending danger, *e.g.*, that the arrestee's confederates are headed to the scene, such a concern is better addressed through consideration [*5] of case-specific exceptions to the warrant requirement, such as exigent circumstances. See, *e.g., Warden, Md. Penitentiary v. Hayden, 387 U. S. 294, 298-299, 87 S. Ct. 1642, 18 L. Ed. 2d 782*. Pp. 10-12.

(ii) The United States and California raise concerns about the destruction of evidence, arguing that, even if the cell phone is physically secure, information on the cell phone remains vulnerable to remote wiping and data encryption. As an initial matter, those broad concerns are distinct from *Chimel*'s focus on a defendant who responds to arrest by trying to conceal or destroy evidence within his reach. The briefing also gives little indication that either problem is prevalent or that the opportunity to perform a search incident to arrest would be an effective solution. And, at least as to remote wiping, law enforcement currently has some technologies of its own for combatting the loss of evidence. Finally, law enforcement's remaining concerns in a particular case might be addressed by responding in a targeted manner to

urgent threats of remote wiping, see *Missouri v. McNeely, 569 U. S. ___, ___, 133 S. Ct. 1552, 185 L. Ed. 2d 696*, or by taking action to disable a phone's locking mechanism in order to secure the scene, see *Illinois v. McArthur, 531 U. S. 326, 331-333, 121 S. Ct. 946, 148 L. Ed. 2d 838*. [*6] Pp. 12-15.

(2) A conclusion that inspecting the contents of an arrestee's pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items, but more substantial privacy interests are at stake when digital data is involved. Pp. 15-22.

(i) Cell phones differ in both a quantitative and a qualitative sense from other objects that might be carried on an arrestee's person. Notably, modern cell phones have an immense storage capacity. Before cell phones, a search of a person was limited by physical realities and generally constituted only a narrow intrusion on privacy. But cell phones can store millions of pages of text, thousands of pictures, or hundreds of videos. This has several interrelated privacy consequences. First, a cell phone collects in one place many distinct types of information that reveal much more in combination than any isolated record. Second, the phone's capacity allows even just one type of information to convey far more than previously possible. Third, data on the phone can date back for years. In addition, an element of pervasiveness characterizes cell phones but not physical records. A decade ago officers [*7] might have occasionally stumbled across a highly personal item such as a diary, but today many of the more than 90% of American adults who own cell phones keep on their person a digital record of nearly every aspect of their lives. Pp. 17-21.

(ii) The scope of the privacy interests at stake is further complicated by the fact that the data viewed on many modern cell phones may in fact be stored on a remote server. Thus, a search may extend well beyond papers and effects in the physical proximity of an arrestee, a concern that the United States recognizes but cannot definitively foreclose. Pp. 21-22.

(c) Fallback options offered by the United States and California are flawed and contravene this Court's general preference to provide clear guidance to law enforcement through categorical rules. See *Michigan v. Summers, 452 U. S. 692, 705, n. 19, 101 S. Ct. 2587, 69 L. Ed. 2d 340*. One possible rule is to import the *Gant* standard from the vehicle context and allow a warrantless search of an arrestee's cell phone whenever it is reasonable to believe that the phone contains evidence of the crime of arrest. That proposal is not appropriate in this context, and would prove no practical limit at all when it comes to cell phone searches. [*8] Another possible rule is to restrict the scope of a cell phone search to information relevant to the crime, the arrestee's identity, or officer safety. That proposal would again impose few meaningful constraints on officers. Finally, California suggests an analogue rule, under which officers could search cell phone data if they could have obtained the same information from a pre-digital counterpart. That proposal would allow law enforcement to search a broad range of items contained on a phone even though people would be unlikely to carry such a variety of information in physical form, and would launch courts on a difficult line-drawing expedition to determine which digital files are comparable to physical records. Pp. 22-25.

(d) It is true that this decision will have some impact on the ability of law enforcement to combat crime. But the Court's holding is not that the information on a cell phone is immune from search; it is that a warrant is generally required before a search. The warrant requirement is an important component of the Court's *Fourth Amendment* jurisprudence, and warrants may be obtained with increasing efficiency. In addition, although the search incident to arrest exception [*9] does not apply to cell phones, the continued availability of the exigent circumstances exception may give law enforcement a justification for a warrantless search in particular cases. Pp. 25-27.

No. 13-132, reversed and remanded; *No. 13-212, 728 F. 3d 1*, affirmed.

COUNSEL: Michael R. Dreeben argued the cause for petitioner.

Judith H. Mizner argued the cause for respondent.

JUDGES: ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in part and concurring in the judgment.

OPINION BY: ROBERTS

OPINION

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

These two cases raise a common question: whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested.

I

A

In the first case, petitioner David Riley was stopped by a police officer for driving with expired registration tags. In the course of the stop, the officer also learned that Riley's license had been suspended. The officer impounded Riley's car, pursuant to department policy, and another officer conducted an inventory search of the car. Riley was arrested for possession of concealed and loaded firearms when that search turned up two handguns under the car's hood. See *Cal. Penal Code Ann. §§12025(a)(1),* [*10] *12031(a)(1)* (West 2009).

An officer searched Riley incident to the arrest and found items associated with the "Bloods" street gang. He also seized a cell phone from Riley's pants pocket. According to Riley's uncontradicted assertion, the phone was a "smart phone," a cell phone with a broad range of other functions based on advanced computing capability, large storage capacity, and Internet connectivity. The officer accessed information on the phone and noticed that some words (presumably in text messages or a contacts list) were preceded by the letters "CK"--a label that, he believed, stood for "Crip Killers," a slang term for members of the Bloods gang.

At the police station about two hours after the arrest, a detective specializing in gangs further examined the contents of the phone. The detective testified that he "went through" Riley's phone "looking for evidence, because . . . gang members will often video themselves with guns or take pictures of themselves with the guns." App. in No. 13-132, p. 20. Although there was "a lot of stuff" on the phone, particular files that "caught [the detective's] eye" included videos of young men sparring while someone yelled encouragement using the [*11] moniker "Blood." *Id.*, at 11-13. The police also found photographs of Riley standing in front of a car they suspected had been involved in a shooting a few weeks earlier.

Riley was ultimately charged, in connection with that earlier shooting, with firing at an occupied vehicle, assault with a semiautomatic firearm, and attempted murder. The State alleged that Riley had committed those crimes for the benefit of a criminal street gang, an aggravating factor that carries an enhanced sentence. Compare *Cal. Penal Code Ann. §246* (2008) with *§186.22(b)(4)(B)* (2014). Prior to trial, Riley moved to suppress all evidence that the police had obtained from his cell phone. He contended that the searches of his phone violated the *Fourth Amendment*, because they had been performed without a warrant and were not otherwise justified by exigent circumstances. The trial court rejected that argument. App. in No. 13-132, at 24, 26. At Riley's trial, police officers testified about the photographs and videos found on the phone, and some of the photographs were admitted into evidence. Riley was convicted on all three counts and received an enhanced sentence of 15 years to life in prison.

The California Court [*12] of Appeal affirmed. No. D059840 (Cal. App., Feb. 8, 2013), App. to Pet. for Cert. in No. 13-132, pp. 1a-23a. The court relied on the California Supreme Court's decision in *People v. Diaz, 51 Cal. 4th 84, 119 Cal. Rptr. 3d 105, 244 P. 3d 501 (2011),* which held that the *Fourth Amendment* permits a warrantless search of cell phone data incident to an arrest, so long as the cell phone was immediately associated with the arrestee's person. See *id., at 93, 244 P. 3d, at 505-506*.

The California Supreme Court denied Riley's petition for review, App. to Pet. for Cert. in No. 13-132, at 24a, and we granted certiorari, *571 U. S. ___, 134 S. Ct. 999, 187 L. Ed. 2d 847 (2014).*

B

In the second case, a police officer performing routine surveillance observed respondent Brima Wurie make an apparent drug sale from a car. Officers subsequently arrested Wurie and took him to the police station. At the station, the officers seized two cell phones from Wurie's person. The one at issue here was a "flip phone," a kind of phone that is flipped open for use and that generally has a smaller range of features than a smart phone. Five to ten minutes after arriving at the station, the officers noticed that the phone was repeatedly receiving calls from a source identified [*13] as "my house" on the phone's external screen. A few minutes later, they opened the phone and saw a photograph of a woman and a baby

set as the phone's wallpaper. They pressed one button on the phone to access its call log, then another button to determine the phone number associated with the "my house" label. They next used an online phone directory to trace that phone number to an apartment building.

When the officers went to the building, they saw Wurie's name on a mailbox and observed through a window a woman who resembled the woman in the photograph on Wurie's phone. They secured the apartment while obtaining a search warrant and, upon later executing the warrant, found and seized 215 grams of crack cocaine, marijuana, drug paraphernalia, a firearm and ammunition, and cash.

Wurie was charged with distributing crack cocaine, possessing crack cocaine with intent to distribute, and being a felon in possession of a firearm and ammunition. See *18 U. S. C. §922(g)*; *21 U. S. C. §841(a)*. He moved to suppress the evidence obtained from the search of the apartment, arguing that it was the fruit of an unconstitutional search of his cell phone. The District Court denied the motion. *612 F. Supp. 2d 104 (Mass. 2009)*. [*14] Wurie was convicted on all three counts and sentenced to 262 months in prison.

A divided panel of the First Circuit reversed the denial of Wurie's motion to suppress and vacated Wurie's convictions for possession with intent to distribute and possession of a firearm as a felon. *728 F. 3d 1 (2013)*. The court held that cell phones are distinct from other physical possessions that may be searched incident to arrest without a warrant, because of the amount of personal data cell phones contain and the negligible threat they pose to law enforcement interests. See *id., at 8-11*.

We granted certiorari. *571 U. S. ___, 134 S. Ct. 999, 187 L. Ed. 2d 847 (2014)*.

II

The *Fourth Amendment* provides:

> [HN1] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

As the text makes clear, [HN2] "the ultimate touchstone of the *Fourth Amendment* is 'reasonableness.'" *Brigham City v. Stuart, 547 U. S. 398, 403, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006)*. Our cases have determined that "[w]here a search is undertaken by law [*15] enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant." *Vernonia School Dist. 47J v. Acton, 515 U. S. 646, 653, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995*). Such a warrant ensures that the inferences to support a search are "drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States, 333 U. S. 10, 14, 68 S. Ct. 367, 92 L. Ed. 436 (1948)*. In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement. See *Kentucky v. King, 563 U. S. ___, ___, 131 S. Ct. 1849, 179 L. Ed. 2d 865 (2011) (slip op., at 5-6*).

The two cases before us concern the reasonableness of a warrantless search incident to a lawful arrest. In 1914, this [HN3] Court first acknowledged in dictum "the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime." *Weeks v. United States, 232 U. S. 383, 392, 34 S. Ct. 341, 58 L. Ed. 652, T.D. 1964*. Since that time, it has been well accepted that such a search constitutes an exception to the warrant requirement. Indeed, the [*16] label "exception" is something of a misnomer in this context, as warrantless searches incident to arrest occur with far greater frequency than searches conducted pursuant to a warrant. See 3 W. LaFave, Search and Seizure §5.2(b), p. 132, and n. 15 (5th ed. 2012).

Although the existence of the exception for such searches has been recognized for a century, its scope has been debated for nearly as long. See *Arizona v. Gant, 556 U. S. 332, 350, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009)* (noting the exception's "checkered history"). That debate has focused on the extent to which officers may search property found on or near the arrestee. Three related precedents set forth the rules governing such searches:

The first, *Chimel v. California, 395 U. S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969)*, laid the groundwork

for most of the existing search incident to arrest doctrine. Police officers in that case arrested Chimel inside his home and proceeded to search his entire three-bedroom house, including the attic and garage. In particular rooms, they also looked through the contents of drawers. *Id., at 753-754, 89 S. Ct. 2034, 23 L. Ed. 2d 685*.

The Court crafted the following rule for assessing the reasonableness of a search incident to arrest:

> [HN4] "When an arrest is made, it is reasonable for the arresting [*17] officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. . . . There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'--construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Id., at 762-763, 89 S. Ct. 2034, 23 L. Ed. 2d 685*.

The extensive warrantless search of Chimel's home did not fit within this exception, because it was not needed to protect officer safety or to preserve evidence. *Id., at 763, 768, 89 S. Ct. 2034, 23 L. Ed. 2d 685*.

Four years later, in *United States v. Robinson, 414 U. S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973)*, the Court applied the *Chimel* analysis in the context of a search of the arrestee's person. A police officer had arrested Robinson for driving with a revoked license. The officer conducted a patdown search and felt an object that he could not identify in Robinson's [*18] coat pocket. He removed the object, which turned out to be a crumpled cigarette package, and opened it. Inside were 14 capsules of heroin. *Id., at 220, 223, 94 S. Ct. 467, 38 L. Ed. 2d 427*.

The Court of Appeals concluded that the search was unreasonable because Robinson was unlikely to have evidence of the crime of arrest on his person, and because it believed that extracting the cigarette package and opening it could not be justified as part of a protective search for weapons. This Court reversed, rejecting the notion that "case-by-case adjudication" was required to determine "whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest." *Id., at 235, 94 S. Ct. 467, 38 L. Ed. 2d 427*. As the Court explained, [HN5] "[t]he authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." *Ibid.* Instead, a "custodial arrest of a suspect based on probable cause is a reasonable intrusion under the *Fourth Amendment*; that intrusion being lawful, a [*19] search incident to the arrest requires no additional justification." *Ibid.*

The Court thus concluded that the search of Robinson was reasonable even though there was no concern about the loss of evidence, and the arresting officer had no specific concern that Robinson might be armed. *Id., at 236, 94 S. Ct. 467, 38 L. Ed. 2d 427*. In doing so, the Court did not draw a line between a search of Robinson's person and a further examination of the cigarette pack found during that search. It merely noted that, "[h]aving in the course of a lawful search come upon the crumpled package of cigarettes, [the officer] was entitled to inspect it." *Ibid.* A few years later, the Court clarified that this exception was limited to "personal property . . . immediately associated with the person of the arrestee." *United States v. Chadwick, 433 U. S. 1, 15, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977)* (200-pound, locked footlocker could not be searched incident to arrest), abrogated on other grounds by *California v. Acevedo, 500 U. S. 565, 111 S. Ct. 1982, 114 L. Ed. 2d 619 (1991)*.

The search incident to arrest trilogy concludes with *Gant*, which analyzed searches of an arrestee's vehicle. *Gant*, like *Robinson*, recognized that the *Chimel* concerns for officer safety and evidence preservation underlie the search incident [*20] to arrest exception. See *556 U. S., at 338, 129 S. Ct. 1710, 173 L. Ed. 2d 485*. As a result, the Court concluded that [HN6] *Chimel* could authorize police to search a vehicle "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *556 U. S., at 343, 129 S. Ct. 1710, 173 L. Ed. 2d 485*. *Gant* added, however, an independent exception for a warrantless search of a

vehicle's passenger compartment "when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" *Ibid.* (quoting *Thornton v. United States, 541 U. S. 615, 632, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004)* (SCALIA, J., concurring in judgment)). That exception stems not from *Chimel*, the Court explained, but from "circumstances unique to the vehicle context." *556 U. S., at 343, 129 S. Ct. 1710, 173 L. Ed. 2d 485.*

III

These cases require us to decide how the search incident to arrest doctrine applies to modern cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy. A smart phone of the sort taken from Riley was unheard of ten years ago; a significant majority of American adults now own such phones. See A. Smith, Pew Research Center, Smartphone Ownership--2013 [*21] Update (June 5, 2013). Even less sophisticated phones like Wurie's, which have already faded in popularity since Wurie was arrested in 2007, have been around for less than 15 years. Both phones are based on technology nearly inconceivable just a few decades ago, when *Chimel* and *Robinson* were decided.

Absent more precise guidance from the founding era, [HN7] we generally determine whether to exempt a given type of search from the warrant requirement "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton, 526 U. S. 295, 300, 119 S. Ct. 1297, 143 L. Ed. 2d 408 (1999).* Such a balancing of interests supported the search incident to arrest exception in *Robinson*, and a mechanical application of *Robinson* might well support the warrantless searches at issue here.

But while *Robinson's* categorical rule strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to digital content on cell phones. On the government interest side, *Robinson* concluded that the two risks identified in *Chimel*--harm to officers and destruction [*22] of evidence--are present in all custodial arrests. There are no comparable risks when the search is of digital data. In addition, *Robinson* regarded any privacy interests retained by an individual after arrest as significantly diminished by the fact of the arrest itself. Cell phones, however, place vast quantities of personal information literally in the hands of individuals. A search of the information on a cell phone bears little resemblance to the type of brief physical search considered in *Robinson*.

We therefore decline to extend *Robinson* to searches of data on cell phones, and hold instead that [HN8] officers must generally secure a warrant before conducting such a search.

A

We first consider each *Chimel* concern in turn. In doing so, we do not overlook *Robinson*'s admonition that [HN9] searches of a person incident to arrest, "while based upon the need to disarm and to discover evidence," are reasonable regardless of "the probability in a particular arrest situation that weapons or evidence would in fact be found." *414 U. S., at 235, 94 S. Ct. 467, 38 L. Ed. 2d 427*. Rather than requiring the "case-by-case adjudication" that *Robinson* rejected, *ibid.*, we ask instead whether application of the search incident to arrest doctrine to [*23] this particular category of effects would "untether the rule from the justifications underlying the *Chimel* exception," *Gant, supra, at 343, 129 S. Ct. 1710, 173 L. Ed. 2d 485*. See also *Knowles v. Iowa, 525 U. S. 113, 119, 119 S. Ct. 484, 142 L. Ed. 2d 492 (1998)* (declining to extend *Robinson* to the issuance of citations, "a situation where the concern for officer safety is not present to the same extent and the concern for destruction or loss of evidence is not present at all").

1

Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape. Law enforcement officers remain free to examine the physical aspects of a phone to ensure that it will not be used as a weapon--say, to determine whether there is a razor blade hidden between the phone and its case. Once an officer has secured a phone and eliminated any potential physical threats, however, data on the phone can endanger no one.

Perhaps the same might have been said of the cigarette pack seized from Robinson's pocket. Once an officer gained control of the pack, it was unlikely that Robinson could have accessed the pack's contents. But unknown physical objects may always pose risks, no matter how slight, during the tense atmosphere [*24] of a

custodial arrest. The officer in *Robinson* testified that he could not identify the objects in the cigarette pack but knew they were not cigarettes. See *414 U. S., at 223, 236, n. 7, 94 S. Ct. 467, 38 L. Ed. 2d 427*. Given that, a further search was a reasonable protective measure. No such unknowns exist with respect to digital data. As the First Circuit explained, the officers who searched Wurie's cell phone "knew exactly what they would find therein: data. They also knew that the data could not harm them." *728 F. 3d, at 10*.

The United States and California both suggest that a search of cell phone data might help ensure officer safety in more indirect ways, for example by alerting officers that confederates of the arrestee are headed to the scene. There is undoubtedly a strong government interest in warning officers about such possibilities, but neither the United States nor California offers evidence to suggest that their concerns are based on actual experience. The proposed consideration would also represent a broadening of *Chimel*'s concern that an *arrestee himself* might grab a weapon and use it against an officer "to resist arrest or effect his escape." *395 U. S., at 763, 89 S. Ct. 2034, 23 L. Ed. 2d 685*. And any such threats from outside the [*25] arrest scene do not "lurk[ ] in all custodial arrests." *Chadwick, 433 U. S., at 14-15, 97 S. Ct. 2476, 53 L. Ed. 2d 538*. Accordingly, the interest in protecting officer safety does not justify dispensing with the warrant requirement across the board. To the extent dangers to arresting officers may be implicated in a particular way in a particular case, they are better addressed through consideration of case-specific exceptions to the warrant requirement, such as the one for exigent circumstances. See, *e.g., Warden, Md. Penitentiary v. Hayden, 387 U. S. 294, 298-299, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967)* ("The *Fourth Amendment* does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others.").

2

The United States and California focus primarily on the second *Chimel* rationale: preventing the destruction of evidence.

Both Riley and Wurie concede that officers could have seized and secured their cell phones to prevent destruction of evidence while seeking a warrant. See Brief for Petitioner in No. 13-132, p. 20; Brief for Respondent in No. 13-212, p. 41. That is a sensible concession. See *Illinois v. McArthur, 531 U. S. 326, 331-333, 121 S. Ct. 946, 148 L. Ed. 2d 838 (2001)*; *Chadwick, supra, at 13, 97 S. Ct. 2476, 53 L. Ed. 2d 538*, and n. 8. [*26] And once law enforcement officers have secured a cell phone, there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone.

The United States and California argue that information on a cell phone may nevertheless be vulnerable to two types of evidence destruction unique to digital data--remote wiping and data encryption. Remote wiping occurs when a phone, connected to a wireless network, receives a signal that erases stored data. This can happen when a third party sends a remote signal or when a phone is preprogrammed to delete data upon entering or leaving certain geographic areas (so-called "geofencing"). See Dept. of Commerce, National Institute of Standards and Technology, R. Ayers, S. Brothers, & W. Jansen, Guidelines on Mobile Device Forensics (Draft) 29, 31 (SP 800-101 Rev. 1, Sept. 2013) (hereinafter Ayers). Encryption is a security feature that some modern cell phones use in addition to password protection. When such phones lock, data becomes protected by sophisticated encryption that renders a phone all but "unbreakable" unless police know the password. Brief for United States as *Amicus Curiae* in No. 13-132, p. 11.

As an initial [*27] matter, these broader concerns about the loss of evidence are distinct from *Chimel*'s focus on a defendant who responds to arrest by trying to conceal or destroy evidence within his reach. See *395 U. S., at 763-764, 89 S. Ct. 2034, 23 L. Ed. 2d 685*. With respect to remote wiping, the Government's primary concern turns on the actions of third parties who are not present at the scene of arrest. And data encryption is even further afield. There, the Government focuses on the ordinary operation of a phone's security features, apart from *any* active attempt by a defendant or his associates to conceal or destroy evidence upon arrest.

We have also been given little reason to believe that either problem is prevalent. The briefing reveals only a couple of anecdotal examples of remote wiping triggered by an arrest. See Brief for Association of State Criminal Investigative Agencies et al. as *Amici Curiae* in No. 13-132, pp. 9-10; see also Tr. of Oral Arg. in No. 13-132, p. 48. Similarly, the opportunities for officers to search a password-protected phone before data becomes encrypted

are quite limited. Law enforcement officers are very unlikely to come upon such a phone in an unlocked state because most phones lock at the touch of [*28] a button or, as a default, after some very short period of inactivity. See, *e.g.*, iPhone User Guide for iOS 7.1 Software 10 (2014) (default lock after about one minute). This may explain why the encryption argument was not made until the merits stage in this Court, and has never been considered by the Courts of Appeals.

Moreover, in situations in which an arrest might trigger a remote-wipe attempt or an officer discovers an unlocked phone, it is not clear that the ability to conduct a warrantless search would make much of a difference. The need to effect the arrest, secure the scene, and tend to other pressing matters means that law enforcement officers may well not be able to turn their attention to a cell phone right away. See Tr. of Oral Arg. in No. 13-132, at 50; see also Brief for United States as *Amicus Curiae* in No. 13-132, at 19. Cell phone data would be vulnerable to remote wiping from the time an individual anticipates arrest to the time any eventual search of the phone is completed, which might be at the station house hours later. Likewise, an officer who seizes a phone in an unlocked state might not be able to begin his search in the short time remaining before the phone [*29] locks and data becomes encrypted.

In any event, as to remote wiping, law enforcement is not without specific means to address the threat. Remote wiping can be fully prevented by disconnecting a phone from the network. There are at least two simple ways to do this: First, law enforcement officers can turn the phone off or remove its battery. Second, if they are concerned about encryption or other potential problems, they can leave a phone powered on and place it in an enclosure that isolates the phone from radio waves. See Ayers 30-31. Such devices are commonly called "Faraday bags," after the English scientist Michael Faraday. They are essentially sandwich bags made of aluminum foil: cheap, lightweight, and easy to use. See Brief for Criminal Law Professors as *Amici Curiae* 9. They may not be a complete answer to the problem, see Ayers 32, but at least for now they provide a reasonable response. In fact, a number of law enforcement agencies around the country already encourage the use of Faraday bags. See, *e.g.*, Dept. of Justice, National Institute of Justice, Electronic Crime Scene Investigation: A Guide for First Responders 14, 32 (2d ed. Apr. 2008); Brief for Criminal Law Professors [*30] as *Amici Curiae* 4-6.

To the extent that law enforcement still has specific concerns about the potential loss of evidence in a particular case, there remain more targeted ways to address those concerns. If "the police are truly confronted with a 'now or never' situation,"--for example, circumstances suggesting that a defendant's phone will be the target of an imminent remote-wipe attempt--they may be able to rely on exigent circumstances to search the phone immediately. *Missouri v. McNeely, 569 U. S. ___, ___, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013) (slip op., at 10*) (quoting *Roaden v. Kentucky, 413 U. S. 496, 505, 93 S. Ct. 2796, 37 L. Ed. 2d 757 (1973)*; some internal quotation marks omitted). Or, if officers happen to seize a phone in an unlocked state, they may be able to disable a phone's automatic-lock feature in order to prevent the phone from locking and encrypting data. See App. to Reply Brief in No. 13-132, p. 3a (diagramming the few necessary steps). Such a preventive measure could be analyzed under the principles set forth in our decision in *McArthur, 531 U. S. 326, 121 S. Ct. 946, 148 L. Ed. 2d 838*, which approved officers' reasonable steps to secure a scene to preserve evidence while they awaited a warrant. See *id., at 331-333, 121 S. Ct. 946, 148 L. Ed. 2d 838*.

B

The search incident to arrest exception rests [*31] not only on the heightened government interests at stake in a volatile arrest situation, but also on an arrestee's reduced privacy interests upon being taken into police custody. *Robinson* focused primarily on the first of those rationales. But it also quoted with approval then-Judge Cardozo's account of the historical basis for the search incident to arrest exception: "Search of the person becomes lawful when grounds for arrest and accusation have been discovered, and the law is in the act of subjecting the body of the accused to its physical dominion." *414 U. S., at 232, 94 S. Ct. 467, 38 L. Ed. 2d 427* (quoting *People v. Chiagles, 237 N. Y. 193, 197, 142 N. E. 583, 584 (1923)*); see also *414 U. S., at 237, 94 S. Ct. 467, 38 L. Ed. 2d 427* (Powell, J., concurring) ("an individual lawfully subjected to a custodial arrest retains no significant *Fourth Amendment* interest in the privacy of his person"). Put simply, a patdown of Robinson's clothing and an inspection of the cigarette pack found in his pocket constituted only minor additional intrusions compared to the substantial government authority exercised in taking Robinson into custody. See *Chadwick, 433 U. S., at 16, n. 10, 97 S. Ct. 2476, 53 L. Ed. 2d 538* (searches of a person are justified in part by

"reduced expectations of privacy [*32] caused by the arrest").

The fact that an arrestee has diminished privacy interests does not mean that the *Fourth Amendment* falls out of the picture entirely. [HN10] Not every search "is acceptable solely because a person is in custody." *Maryland v. King, 569 U. S. ___, ___, 133 S. Ct. 1958, 1979, 186 L. Ed. 2d 1, 30 (2013)*. To the contrary, when "privacy-related concerns are weighty enough" a "search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee." *Ibid.* One such example, of course, is *Chimel*. *Chimel* refused to "characteriz[e] the invasion of privacy that results from a top-to-bottom search of a man's house as 'minor.'" *395 U. S., at 766-767, n. 12, 89 S. Ct. 2034, 23 L. Ed. 2d 685*. Because a search of the arrestee's entire house was a substantial invasion beyond the arrest itself, the Court concluded that a warrant was required.

Robinson is the only decision from this Court applying *Chimel* to a search of the contents of an item found on an arrestee's person. In an earlier case, this Court had approved a search of a zipper bag carried by an arrestee, but the Court analyzed only the validity of the arrest itself. See *Draper v. United States, 358 U. S. 307, 310-311, 79 S. Ct. 329, 3 L. Ed. 2d 327 (1959)*. Lower courts applying *Robinson* and [*33] *Chimel*, however, have approved searches of a variety of personal items carried by an arrestee. See, *e.g., United States v. Carrion, 809 F. 2d 1120, 1123, 1128 (CA5 1987)* (billfold and address book); *United States v. Watson, 669 F. 2d 1374, 1383-1384 (CA11 1982)* (wallet); *United States v. Lee, 501 F. 2d 890, 892, 163 U.S. App. D.C. 330 (CADC 1974)* (purse).

The United States asserts that a search of all data stored on a cell phone is "materially indistinguishable" from searches of these sorts of physical items. Brief for United States in No. 13-212, p. 26. That is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together. Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse. A conclusion that inspecting the contents of an arrestee's pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items, but any extension of that reasoning to digital data has to rest on its own bottom.

1

Cell phones differ in both a quantitative and [*34] a qualitative sense from other objects that might be kept on an arrestee's person. The term "cell phone" is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers.

One of the most notable distinguishing features of modern cell phones is their immense storage capacity. Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy. See Kerr, Foreword: Accounting for Technological Change, 36 Harv. J. L. & Pub. Pol'y 403, 404-405 (2013). Most people cannot lug around every piece of mail they have received for the past several months, every picture they have taken, or every book or article they have read--nor would they have any reason to attempt to do so. And if they did, they would have to drag behind them a trunk of the sort held to require a search warrant in *Chadwick, supra*, rather than a container the size of the cigarette package in *Robinson*.

But the [*35] possible intrusion on privacy is not physically limited in the same way when it comes to cell phones. The current top-selling smart phone has a standard capacity of 16 gigabytes (and is available with up to 64 gigabytes). Sixteen gigabytes translates to millions of pages of text, thousands of pictures, or hundreds of videos. See Kerr, *supra*, at 404; Brief for Center for Democracy & Technology et al. as *Amici Curiae* 7-8. Cell phones couple that capacity with the ability to store many different types of information: Even the most basic phones that sell for less than $20 might hold photographs, picture messages, text messages, Internet browsing history, a calendar, a thousand-entry phone book, and so on. See *id.*, at 30; *United States v. Flores-Lopez, 670 F. 3d 803, 806 (CA7 2012)*. We expect that the gulf between physical practicability and digital capacity will only continue to widen in the future.

The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of

information--an address, a note, a prescription, a bank statement, a video--that reveal much more in combination than any isolated record. Second, [*36] a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. Jones for the past several months, as would routinely be kept on a phone. [1]

1 Because the United States and California agree that these cases involve *searches* incident to arrest, these cases do not implicate the question whether the collection or inspection of aggregated digital information amounts to a search under other circumstances.

Finally, there is an element of pervasiveness that characterizes cell phones but not physical records. Prior to the digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day. Now it is the person who is not carrying a cell phone, [*37] with all that it contains, who is the exception. According to one poll, nearly three-quarters of smart phone users report being within five feet of their phones most of the time, with 12% admitting that they even use their phones in the shower. See Harris Interactive, 2013 Mobile Consumer Habits Study (June 2013). A decade ago police officers searching an arrestee might have occasionally stumbled across a highly personal item such as a diary. See, *e.g., United States v. Frankenberry, 387 F. 2d 337 (CA2 1967)* (*per curiam*). But those discoveries were likely to be few and far between. Today, by contrast, it is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives--from the mundane to the intimate. See *Ontario v. Quon, 560 U. S. 746, 760, 130 S. Ct. 2619, 177 L. Ed. 2d 216 (2010)*. Allowing the police to scrutinize such records on a routine basis is quite different from allowing them to search a personal item or two in the occasional case.

Although the data stored on a cell phone is distinguished from physical records by quantity alone, certain types of data are also qualitatively different. An Internet search [*38] and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual's private interests or concerns--perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD. Data on a cell phone can also reveal where a person has been. Historic location information is a stand-ard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building. See *United States v. Jones, 565 U. S. ___, ___ , 132 S. Ct. 945, 955, 181 L. Ed. 2d 911, 925 (2012)* (SOTOMAYOR, J., concurring) ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.").

Mobile application software on a cell phone, or "apps," offer a range of tools for managing detailed information about all aspects of a person's life. There are apps for Democratic Party news and Republican Party news; apps for alcohol, drug, and gambling addictions; apps for sharing prayer requests; apps for tracking pregnancy symptoms; apps for planning your budget; apps for every conceivable hobby [*39] or pastime; apps for improving your romantic life. There are popular apps for buying or selling just about anything, and the records of such transactions may be accessible on the phone indefinitely. There are over a million apps available in each of the two major app stores; the phrase "there's an app for that" is now part of the popular lexicon. The average smart phone user has installed 33 apps, which together can form a revealing montage of the user's life. See Brief for Electronic Privacy Information Center as *Amicus Curiae* in No. 13-132, p. 9.

In 1926, Learned Hand observed (in an opinion later quoted in *Chimel*) that it is "a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him." *United States v. Kirschenblatt, 16 F. 2d 202, 203 (CA2)*. If his pockets contain a cell phone, however, that is no longer true. Indeed, a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a

broad array of private information never [*40] found in a home in any form--unless the phone is.

2

To further complicate the scope of the privacy interests at stake, the data a user views on many modern cell phones may not in fact be stored on the device itself. Treating a cell phone as a container whose contents may be searched incident to an arrest is a bit strained as an initial matter. See *New York v. Belton, 453 U. S. 454, 460, n. 4, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981)* (describing a "container" as "any object capable of holding another object"). But the analogy crumbles entirely when a cell phone is used to access data located elsewhere, at the tap of a screen. That is what cell phones, with increasing frequency, are designed to do by taking advantage of "cloud computing." Cloud computing is the capacity of Internet-connected devices to display data stored on remote servers rather than on the device itself. Cell phone users often may not know whether particular information is stored on the device or in the cloud, and it generally makes little difference. See Brief for Electronic Privacy Information Center in No. 13-132, at 12-14, 20. Moreover, the same type of data may be stored locally on the device for one user and in the cloud for another.

The United States [*41] concedes that the search incident to arrest exception may not be stretched to cover a search of files accessed remotely--that is, a search of files stored in the cloud. See Brief for United States in No. 13-212, at 43-44. Such a search would be like finding a key in a suspect's pocket and arguing that it allowed law enforcement to unlock and search a house. But officers searching a phone's data would not typically know whether the information they are viewing was stored locally at the time of the arrest or has been pulled from the cloud.

Although the Government recognizes the problem, its proposed solutions are unclear. It suggests that officers could disconnect a phone from the network before searching the device--the very solution whose feasibility it contested with respect to the threat of remote wiping. Compare Tr. of Oral Arg. in No. 13-132, at 50-51, with Tr. of Oral Arg. in No. 13-212, pp. 13-14. Alternatively, the Government proposes that law enforcement agencies "develop protocols to address" concerns raised by cloud computing. Reply Brief in No. 13-212, pp. 14-15. Probably a good idea, but the Founders did not fight a revolution to gain the right to government agency protocols. [*42] The possibility that a search might extend well beyond papers and effects in the physical proximity of an arrestee is yet another reason that the privacy interests here dwarf those in *Robinson*.

C

Apart from their arguments for a direct extension of *Robinson*, the United States and California offer various fallback options for permitting warrantless cell phone searches under certain circumstances. Each of the proposals is flawed and contravenes our general preference to provide clear guidance to law enforcement through categorical rules. "[I]f police are to have workable rules, the balancing of the competing interests . . . 'must in large part be done on a categorical basis--not in an ad hoc, case-by-case fashion by individual police officers.'" *Michigan v. Summers, 452 U. S. 692, 705, n. 19, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981)* (quoting *Dunaway v. New York, 442 U. S. 200, 219-220, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979)* (White, J., concurring)).

The United States first proposes that the *Gant* standard be imported from the vehicle context, allowing a warrantless search of an arrestee's cell phone whenever it is reasonable to believe that the phone contains evidence of the crime of arrest. But *Gant* relied on "circumstances unique to the vehicle context" [*43] to endorse a search solely for the purpose of gathering evidence. *556 U. S., at 343, 129 S. Ct. 1710, 173 L. Ed. 2d 485*. JUSTICE SCALIA's *Thornton* opinion, on which *Gant* was based, explained that those unique circumstances are "a reduced expectation of privacy" and "heightened law enforcement needs" when it comes to motor vehicles. *541 U. S., at 631, 124 S. Ct. 2127, 158 L. Ed. 2d 905*; see also *Wyoming v. Houghton, 526 U. S., at 303-304, 119 S. Ct. 1297, 143 L. Ed. 2d 408*. For reasons that we have explained, cell phone searches bear neither of those characteristics.

At any rate, a *Gant* standard would prove no practical limit at all when it comes to cell phone searches. In the vehicle context, *Gant* generally protects against searches for evidence of past crimes. See 3 W. LaFave, Search and Seizure §7.1(d), at 709, and n. 191. In the cell phone context, however, it is reasonable to expect that incriminating information will be found on a phone regardless of when the crime occurred. Similarly, in the vehicle context *Gant* restricts broad searches resulting from minor crimes such as traffic violations. See *id.*, §7.1(d), at 713, and n. 204. That would not necessarily be

true for cell phones. It would be a particularly inexperienced or unimaginative law enforcement officer who could not come up [*44] with several reasons to suppose evidence of just about any crime could be found on a cell phone. Even an individual pulled over for something as basic as speeding might well have locational data dispositive of guilt on his phone. An individual pulled over for reckless driving might have evidence on the phone that shows whether he was texting while driving. The sources of potential pertinent information are virtually unlimited, so applying the *Gant* standard to cell phones would in effect give "police officers unbridled discretion to rummage at will among a person's private effects." *556 U. S., at 345, 129 S. Ct. 1710, 173 L. Ed. 2d 485*.

The United States also proposes a rule that would restrict the scope of a cell phone search to those areas of the phone where an officer reasonably believes that information relevant to the crime, the arrestee's identity, or officer safety will be discovered. See Brief for United States in No. 13-212, at 51-53. This approach would again impose few meaningful constraints on officers. The proposed categories would sweep in a great deal of information, and officers would not always be able to discern in advance what information would be found where.

We also reject the United States' final suggestion [*45] that officers should always be able to search a phone's call log, as they did in Wurie's case. The Government relies on *Smith v. Maryland, 442 U. S. 735, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979)*, which held that no warrant was required to use a pen register at telephone company premises to identify numbers dialed by a particular caller. The Court in that case, however, concluded that the use of a pen register was not a "search" at all under the *Fourth Amendment*. See *id., at 745-746, 99 S. Ct. 2577, 61 L. Ed. 2d 220*. There is no dispute here that the officers engaged in a search of Wurie's cell phone. Moreover, call logs typically contain more than just phone numbers; they include any identifying information that an individual might add, such as the label "my house" in Wurie's case.

Finally, at oral argument California suggested a different limiting principle, under which officers could search cell phone data if they could have obtained the same information from a pre-digital counterpart. See Tr. of Oral Arg. in No. 13-132, at 38-43; see also *Flores-Lopez, 670 F. 3d, at 807* ("If police are entitled to open a pocket diary to copy the owner's address, they should be entitled to turn on a cell phone to learn its number."). But the fact that a search in the [*46] pre-digital era could have turned up a photograph or two in a wallet does not justify a search of thousands of photos in a digital gallery. The fact that someone could have tucked a paper bank statement in a pocket does not justify a search of every bank statement from the last five years. And to make matters worse, such an analogue test would allow law enforcement to search a range of items contained on a phone, even though people would be unlikely to carry such a variety of information in physical form. In Riley's case, for example, it is implausible that he would have strolled around with video tapes, photo albums, and an address book all crammed into his pockets. But because each of those items has a pre-digital analogue, police under California's proposal would be able to search a phone for all of those items--a significant diminution of privacy.

In addition, an analogue test would launch courts on a difficult line-drawing expedition to determine which digital files are comparable to physical records. Is an e-mail equivalent to a letter? Is a voicemail equivalent to a phone message slip? It is not clear how officers could make these kinds of decisions before conducting a search, [*47] or how courts would apply the proposed rule after the fact. An analogue test would "keep defendants and judges guessing for years to come." *Sykes v. United States, 564 U. S. 1, ___, 131 S. Ct. 2267, 2287, 180 L. Ed. 2d 60, 86 (2011)* (SCALIA, J., dissenting) (discussing the Court's analogue test under the Armed Career Criminal Act).

IV

We cannot deny that our decision today will have an impact on the ability of law enforcement to combat crime. Cell phones have become important tools in facilitating coordination and communication among members of criminal enterprises, and can provide valuable incriminating information about dangerous criminals. Privacy comes at a cost.

[HN11] Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest. Our cases have historically recognized that the warrant requirement is "an important working part of our

machinery of government," not merely "an inconvenience to be somehow 'weighed' against the claims of police efficiency." *Coolidge v. New Hampshire, 403 U. S. 443, 481, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971)*. Recent technological advances similar to those discussed here [*48] have, in addition, made the process of obtaining a warrant itself more efficient. See *McNeely, 569 U. S., at ___, 133 S. Ct. 1552; 1573, 185 L. Ed. 2d 696, 720*); *id.*, at ___ (ROBERTS, C. J., concurring in part and dissenting in part) (*133 S. Ct. 1552; 1573, 185 L. Ed. 2d 696, 720*) (describing jurisdiction where "police officers can e-mail warrant requests to judges' iPads [and] judges have signed such warrants and e-mailed them back to officers in less than 15 minutes").

Moreover, even though the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone. "One well-recognized exception applies when ' "the exigencies of the situation" make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the *Fourth Amendment*.'" *Kentucky v. King, 563 U. S., at ___, 131 S. Ct. 1849, 1856, 179 L. Ed. 2d 865, 874*) (quoting *Mincey v. Arizona, 437 U. S. 385, 394, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978))*. Such exigencies could include the need to prevent the imminent destruction of evidence in individual cases, to pursue a fleeing suspect, and to assist persons who are seriously injured or are threatened with imminent injury. *563 U. S., at ___, 131 S. Ct. 1849, 179 L. Ed. 2d 865*. In *Chadwick*, for example, the Court [*49] held that the exception for searches incident to arrest did not justify a search of the trunk at issue, but noted that "if officers have reason to believe that luggage contains some immediately dangerous instrumentality, such as explosives, it would be foolhardy to transport it to the station house without opening the luggage." *433 U. S., at 15, n. 9, 97 S. Ct. 2476, 53 L. Ed. 2d 538*.

In light of the availability of the exigent circumstances exception, there is no reason to believe that law enforcement officers will not be able to address some of the more extreme hypotheticals that have been suggested: a suspect texting an accomplice who, it is feared, is preparing to detonate a bomb, or a child abductor who may have information about the child's location on his cell phone. The defendants here recognize--indeed, they stress--that such fact-specific threats may justify a warrantless search of cell phone data. See Reply Brief in No. 13-132, at 8-9; Brief for Respondent in No. 13-212, at 30, 41. The critical point is that, unlike the search incident to arrest exception, the exigent circumstances exception requires a court to examine whether an emergency justified a warrantless search in each particular case. See *McNeely, supra, at ___, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (slip op., at 6*). [*50] [2]

2 In Wurie's case, for example, the dissenting First Circuit judge argued that exigent circumstances could have justified a search of Wurie's phone. See *728 F. 3d 1, 17 (2013)* (opinion of Howard, J.) (discussing the repeated unanswered calls from "my house," the suspected location of a drug stash). But the majority concluded that the Government had not made an exigent circumstances argument. See *id., at 1*. The Government acknowledges the same in this Court. See Brief for United States in No. 13-212, p. 28, n. 8.

***

Our cases have recognized that the *Fourth Amendment* was the founding generation's response to the reviled "general warrants" and "writs of assistance" of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity. Opposition to such searches was in fact one of the driving forces behind the Revolution itself. In 1761, the patriot James Otis delivered a speech in Boston denouncing the use of writs of assistance. A young John Adams was there, and he would later write that "[e]very man of a crowded audience appeared to me to go away, as I did, ready to take arms against writs of assistance." 10 Works of [*51] John Adams 247-248 (C. Adams ed. 1856). According to Adams, Otis's speech was "the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born." *Id.*, at 248 (quoted in *Boyd v. United States, 116 U. S. 616, 625, 6 S. Ct. 524, 29 L. Ed. 746 (1886))*.

Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans "the privacies of life," *Boyd, supra, at 630, 6 S. Ct. 524, 29 L. Ed. 746*. The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. [HN12] Our answer to the question of what police must do before searching a cell

phone seized incident to an arrest is accordingly simple--get a warrant.

We reverse the judgment of the California Court of Appeal in No. 13-132 and remand the case for further proceedings not inconsistent with this opinion. We affirm the judgment of the First Circuit in No. 13-212.

It is so ordered.

CONCUR BY: ALITO

CONCUR

JUSTICE ALITO, concurring in part and concurring in the judgment.

I agree with the Court that law enforcement officers, in conducting a lawful search incident to [*52] arrest, must generally obtain a warrant before searching information stored or accessible on a cell phone. I write separately to address two points.

I

A

First, I am not convinced at this time that the ancient rule on searches incident to arrest is based exclusively (or even primarily) on the need to protect the safety of arresting officers and the need to prevent the destruction of evidence. Cf. *ante*, at 9. This rule antedates the adoption of the *Fourth Amendment* by at least a century. See T. Clancy, The *Fourth Amendment*: Its History and Interpretation 340 (2008); T. Taylor, Two Studies in Constitutional Interpretation 28 (1969); Amar, Fourth *Amendment First* Principles, *107 Harv. L. Rev. 757, 764 (1994)*. In *Weeks v. United States, 232 U. S. 383, 392, 34 S. Ct. 341, 58 L. Ed. 652, T.D. 1964 (1914)*, we held that the *Fourth Amendment* did not disturb this rule. See also Taylor, *supra*, at 45; Stuntz, The Substantive Origins of Criminal Procedure, *105 Yale L. J. 393, 401 (1995)* ("The power to search incident to arrest--a search of the arrested suspect's person . . .--was well established in the mid-eighteenth century, and nothing in . . . the *Fourth Amendment* changed that"). And neither in *Weeks* nor in any of the authorities discussing [*53] the old common-law rule have I found any suggestion that it was based exclusively or primarily on the need to protect arresting officers or to prevent the destruction of evidence.

On the contrary, when pre-*Weeks* authorities discussed the basis for the rule, what was mentioned was the need to obtain probative evidence. For example, an 1839 case stated that "it is clear, and beyond doubt, that . . . constables . . . are entitled, upon a lawful arrest by them of one charged with treason or felony, to take and detain property found in his possession which will form material evidence in his prosecution for that crime." See *Dillon* v. *O'Brien*, 16 Cox Crim. Cas. 245, 249-251 (1887) (citing *Regina*, v. *Frost*, 9 Car. & P. 129, 173 Eng. Rep. 771)). The court noted that the origins of that rule "deriv[e] from the interest which the State has in a person guilty (or reasonably believed to be guilty) of a crime being brought to justice, and in a prosecution, once commenced, being determined in due course of law." 16 Cox Crim. Cas., at 249-250. See also *Holker v. Hennessey, 141 Mo. 527, 537-540, 42 S. W. 1090, 1093 (1897)*.

Two 19th-century treatises that this Court has previously cited in connection [*54] with the origin of the search-incident-to-arrest rule, see *Weeks, supra, at 392, 34 S. Ct. 341, 58 L. Ed. 652, T.D. 1964*, suggest the same rationale. See F. Wharton, Criminal Pleading and Practice §60, p. 45 (8th ed. 1880) ("Those arresting a defendant are bound to take from his person any articles which may be of use as proof in the trial of the offense with which the defendant is charged"); J. Bishop, Criminal Procedure §§210-212, p. 127 (2d ed. 1872) (if an arresting officer finds "about the prisoner's person, or otherwise in his possession, either goods or moneys which there is reason to believe are connected with the supposed crime as its fruits, or as the instruments with which it was committed, or as directly furnishing evidence relating to the transaction, he may take the same, and hold them to be disposed of as the court may direct").

What ultimately convinces me that the rule is not closely linked to the need for officer safety and evidence preservation is that these rationales fail to explain the rule's well-recognized scope. It has long been accepted that written items found on the person of an arrestee may be examined and used at trial. * But once these items are taken away from an arrestee (something that obviously [*55] must be done before the items are read), there is no risk that the arrestee will destroy them. Nor is there any risk that leaving these items unread will endanger the arresting officers.

* Cf. *Hill v. California, 401 U. S. 797, 799-802, 91 S. Ct. 1106, 28 L. Ed. 2d 484, and n. 1 (1971)* (diary); *Marron v. United States, 275 U. S. 192, 193, 198-199, 48 S. Ct. 74, 72 L. Ed. 231, Treas. Dec. 42528 (1927)* (ledger and bills); *Gouled v. United States, 255 U. S. 298, 309, 41 S. Ct. 261, 65 L. Ed. 647 (1921)*, overruled on other grounds, *Warden, Md. Penitentiary v. Hayden, 387 U. S. 294, 300-301, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967)* (papers); see *United States v. Rodriguez, 995 F. 2d 776, 778 (CA7 1993)* (address book); *United States v. Armendariz-Mata, 949 F. 2d 151, 153 (CA5 1991)* (notebook); *United States v. Molinaro, 877 F. 2d 1341 (CA7 1989)* (wallet); *United States v. Richardson, 764 F. 2d 1514, 1527 (CA11 1985)* (wallet and papers); *United States v. Watson, 669 F. 2d 1374, 1383-1384 (CA11 1982)* (documents found in a wallet); *United States v. Castro, 596 F. 2d 674, 677 (CA5 1979)*, cert. denied, *444 U. S. 963, 100 S. Ct. 448, 62 L. Ed. 2d 375, 1979 U.S. LEXIS 3815 (1979)* (paper found in a pocket); *United States v. Jeffers, 520 F. 2d 1256, 1267-1268 (CA7 1975)* (three notebooks and meeting minutes); *Bozel v. Hudspeth, 126 F. 2d 585, 587 (CA10 1942)* (papers, circulars, advertising matter, "memoranda [*56] containing various names and addresses"); *United States v. Park Avenue Pharmacy, 56 F. 2d 753, 755 (CA2 1932)* ("numerous prescriptions blanks" and a check book). See also 3 W. LaFave, Search and Seizure §5.2(c), p. 144 (5th ed. 2012) ("Lower courts, in applying Robinson, have deemed evidentiary searches of an arrested person to be virtually unlimited"); W. Cuddihy, *Fourth Amendment*: Origins and Original Meaning 847-848 (1990) (in the pre-Constitution colonial era, "[a]nyone arrested could expect that not only his surface clothing but his body, luggage, and saddlebags would be searched").

The idea that officer safety and the preservation of evidence are the sole reasons for allowing a warrantless search incident to arrest appears to derive from the Court's reasoning in *Chimel v. California, 395 U. S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969)*, a case that involved the lawfulness of a search of the scene of an arrest, not the person of an arrestee. As I have explained, *Chimel's* reasoning is questionable, see *Arizona v. Gant, 556 U. S. 332, 361-363, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009)* (ALITO, J., dissenting), and I think it is a mistake to allow that reasoning to affect cases like these that concern the search of the person of arrestees.

B

Despite [*57] my view on the point discussed above, I agree that we should not mechanically apply the rule used in the predigital era to the search of a cell phone. Many cell phones now in use are capable of storing and accessing a quantity of information, some highly personal, that no person would ever have had on his person in hard-copy form. This calls for a new balancing of law enforcement and privacy interests.

The Court strikes this balance in favor of privacy interests with respect to all cell phones and all information found in them, and this approach leads to anomalies. For example, the Court's broad holding favors information in digital form over information in hard-copy form. Suppose that two suspects are arrested. Suspect number one has in his pocket a monthly bill for his land-line phone, and the bill lists an incriminating call to a long-distance number. He also has in his a wallet a few snapshots, and one of these is incriminating. Suspect number two has in his pocket a cell phone, the call log of which shows a call to the same incriminating number. In addition, a number of photos are stored in the memory of the cell phone, and one of these is incriminating. Under established law, [*58] the police may seize and examine the phone bill and the snapshots in the wallet without obtaining a warrant, but under the Court's holding today, the information stored in the cell phone is out.

While the Court's approach leads to anomalies, I do not see a workable alternative. Law enforcement officers need clear rules regarding searches incident to arrest, and it would take many cases and many years for the courts to develop more nuanced rules. And during that time, the nature of the electronic devices that ordinary Americans carry on their persons would continue to change.

II

This brings me to my second point. While I agree with the holding of the Court, I would reconsider the question presented here if either Congress or state legislatures, after assessing the legitimate needs of law enforcement and the privacy interests of cell phone owners, enact legislation that draws reasonable distinctions based on categories of information or perhaps

other variables.

The regulation of electronic surveillance provides an instructive example. After this Court held that electronic surveillance constitutes a search even when no property interest is invaded, see *Katz v. United States, 389 U. S. 347, 353-359, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967),* [*59] Congress responded by enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211. See also *18 U. S. C. §2510 et seq.* Since that time, electronic surveillance has been governed primarily, not by decisions of this Court, but by the statute, which authorizes but imposes detailed restrictions on electronic surveillance. See *ibid.*

Modern cell phones are of great value for both lawful and unlawful purposes. They can be used in committing many serious crimes, and they present new and difficult law enforcement problems. See Brief for United States in No. 13-212, pp. 2-3. At the same time, because of the role that these devices have come to play in contemporary life, searching their contents implicates very sensitive privacy interests that this Court is poorly positioned to understand and evaluate. Many forms of modern technology are making it easier and easier for both government and private entities to amass a wealth of information about the lives of ordinary Americans, and at the same time, many ordinary Americans are choosing to make public much information that was seldom revealed to outsiders just a few decades ago.

In light of these developments, it would [*60] be very unfortunate if privacy protection in the 21st century were left primarily to the federal courts using the blunt instrument of the *Fourth Amendment*. Legislatures, elected by the people, are in a better position than we are to assess and respond to the changes that have already occurred and those that almost certainly will take place in the future.

UNITED STATES OF AMERICA v. TYLER M. STRADER, AVIATION ELECTRICIAN'S MATE AIRMAN (E-3), U.S. NAVY

NMCCA 200600385 SPECIAL COURT-MARTIAL

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

2008 CCA LEXIS 132

April 3, 2008, Decided

NOTICE: AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

SUBSEQUENT HISTORY: Review denied by *United States v. Strader, 2009 CAAF LEXIS 115 (C.A.A.F., Feb. 27, 2009)*

PRIOR HISTORY: [*1]

Sentence Adjudged: 01 April 2004. Military Judge: LCDR Ronald Johnson, JAGC, USN. Convening Authority: Commanding Officer, Helicopter Combat Support Squadron THREE, San Diego, CA.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant servicemember conditionally pleaded guilty to offenses related to possession of child pornography, but the servicemember asserted that evidence was obtained from an illegal search, that the servicemember was denied speedy review, and that the record was incomplete. The servicemember appealed the special court-martial findings and sentence as approved by the convening authority.

OVERVIEW: The servicemember's roommate and another person advised security officers that they discovered child pornography on the servicemember's computer, and the officers seized the computer. The servicemember subsequently confessed to downloading child pornography from the Internet and consented to a search of his barracks room. The military appellate court first held that, although the initial search of the servicemember's computer invaded his privacy, the searching parties were not government agents and the private search did not violate the U.S. Constitution. Further, the officers' initial search of the computer and a subsequent extraction of images from the computer did not exceed the scope of the private search, but web-sites, chat logs, and e-mail retrieved from the computer during the subsequent search exceeded the scope of the private search and were properly suppressed. Also, the servicemember's knowledge that his computer was seized did not taint his voluntary confession or consent to the search. Moreover, the servicemember showed no prejudice from the delay in review, and omissions from the record which were in fact considered by the convening authority were insubstantial.

OUTCOME: The court-martial findings and sentence were affirmed.

CORE TERMS: military, barracks, child pornography, suppress, convening, seized, seizure, assignments of error, confession, disk, post-trial, recommendation, clemency, drive, suspected, defense counsel, court-martial, sentence, omission, indecent, folder, plain view, search and seizure, proof of service, probable cause, materially, contraband, intrusion, exceeded, speedy

LexisNexis(R) Headnotes

Military & Veterans Law > Military Justice > Motions > Suppression
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review
[HN1] When reviewing a military judge's ruling on a motion to suppress, the evidence is considered in the light most favorable to the prevailing party.

Military & Veterans Law > Military Justice > Motions > Suppression
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review
[HN2] A military appellate court reviews a military judge's denial of a motion to suppress for an abuse of discretion under a clearly-erroneous standard. Findings of fact are affirmed unless they are clearly erroneous; conclusions of law are reviewed de novo.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
[HN3] A search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. Because a private search frustrates such an expectation, an ensuing police intrusion that stays within the limits of the private search is not a search for *Fourth Amendment* purposes. Thus, in a private search case, the legality of later governmental intrusions must be tested by the degree to which they exceeded the scope of the private search.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Plain View
[HN4] Law enforcement officials can seize objects which are in plain view if they have probable cause to believe the item is contraband or evidence of a crime.

Military & Veterans Law > Military Justice > Postconviction Proceedings > Record
[HN5] A complete record of proceedings and testimony is required to be prepared in every case where a court-martial results in a punitive discharge. R.C.M. 1104(a)(2)(B), Manual Courts-Martial. This includes any matter filed by the accused under R.C.M. 1105, Manual Courts-Martial, the post-trial recommendation of the staff judge advocate or legal officer, and proof of service of such upon the defense counsel in accordance with R.C.M. 1106(f)(1), Manual Courts-Martial. R.C.M. 1103(b)(2)(D), Manual Courts-Martial. A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the government must rebut. Insubstantial omissions from a record of trial do not raise a presumption of prejudice or affect that record's characterization as a complete one.

COUNSEL: For Appellant: LCDR Brian M. Bouffard, JAGC, USN; LT William Stoebner, JAGC, USN.

For Appellee: LT Justin Dunlap, JAGC, USN.

JUDGES: Before J.F. FELTHAM, D.E. O'TOOLE, F.D. MITCHELL, Appellate Military Judges. Judge O'TOOLE and Judge MITCHELL concur.

OPINION BY: J.F. FELTHAM

OPINION

OPINION OF THE COURT

FELTHAM, Senior Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of one specification each of attempted possession and attempted receipt of child pornography, in violation of Article 134, Uniform Code of Military Justice, *10 U.S.C. § 934*. [1] The convening authority approved the adjudged sentence of reduction to pay grade E-1, confinement for 90 days, forfeiture of $ 795.00 pay per month for three months, and a bad-conduct discharge.

1 The appellant was charged with violating *18 U.S.C. § 2252A(a)(5)(B)* and *(a)(2)(B)*, as assimilated under clause 3 of *Article 134, UMCJ*.

Before entering his pleas, the appellant moved to suppress evidence found by the Government during what he alleges was the [*2] illegal search of his barracks room and evidence he maintains is derivative of this search. The military judge granted the motion in part, and denied it in part. The appellant then entered conditional pleas of guilty, reserving his right to appeal the military judge's adverse ruling, pursuant to RULE FOR

COURTS-MARTIAL 910(a)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.).

The appellant now raises three assignments of error, claiming that: (1) the military judge erred when he denied a portion of the defense motion to suppress; (2) unreasonable post-trial delay materially prejudiced his right to speedy appellate review of his court-martial; and (3) the record of trial is incomplete because it does not include the appellant's clemency submission or proof of service of the legal officer's recommendation.

We have examined the record of trial, the appellant's assignments of error, and the Government's response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. *See Arts. 59(a)* and *66(c), UCMJ*.

Background

The following facts are taken from the military judge's ruling [*3] on the appellant's motion to suppress. Having reviewed the record, we find that "the military judge's findings of fact are well within the range of the evidence permitted under the clearly-erroneous standard." *United States v. Norris, 55 M.J. 209, 215 (C.A.A.F. 2001)*. Finding that they are not clearly erroneous, we adopt the military judge's findings of fact as our own. *See United States v. Reister, 44 M.J. 409, 413 (C.A.A.F. 1996)*(holding that [HN1] when reviewing a military judge's ruling on a motion to suppress, the evidence is considered in the light most favorable to the prevailing party).

The appellant shared a two-person barracks room with another Sailor, Aviation Electrician's Mate Airman Apprentice (AEAA) L. Their room was one of four that shared a common lounge area. The appellant owned a personal computer that he kept on his desk. He told his roommate not to use the computer, and made it clear that he did not want anyone else using it.

On 9 May 2003, the appellant went to work and left his computer on, but with an active screensaver visible. Neither the computer nor its files were password protected.

Later that day, AEAA L met a 19-year-old woman, Jessica, who was visiting a Sailor [*4] that lived in one of the adjoining rooms. After talking to her for a few minutes, AEAA L invited Jessica into his room to see the appellant's collection of "Hello Kitty" dolls. AEAA L told Jessica the appellant spent large amounts of time on his computer, and did not let anyone else use it. After she accidentally bumped the appellant's desk, causing the computer to return from standby, Jessica began to browse the computer out of curiosity. AEAA L then asked her to see what was on the appellant's computer. Jessica opened files on the appellant's hard drive, one of which was entitled "Avril." That folder contained what Jessica and AEAA L believed to be child pornography. Jessica scrolled through every image file with a ".jpg" suffix in the folder, noting that it contained approximately 260 images of child pornography.

Jessica and AEAA L then summoned two other Sailors to show them what they had discovered on the appellant's computer. After looking at some of the images of child pornography, one of the Sailors called security. Jessica closed the "Avril" folder, and either turned the screensaver back on, or left the computer, which returned to standby mode.

When the first two security officers [*5] arrived, they took statements from AEAA L and Jessica. AEAA L told them that he and Jessica had seen images of child pornography on the appellant's computer. The officers then secured the appellant's barracks room, and called their watch commander and field supervisor, Sergeant Worthington. When he arrived, Sergeant Worthington asked AEAA L and Jessica to show him what they had seen. Jessica, AEAA L, and the officers entered the barracks room and Sergeant Worthington asked Jessica how she knew what she had seen was child pornography. She replied that she would show him, opened the "Avril" folder, and scrolled through 23 of the images of child pornography that she and AEAA L had viewed earlier.

After looking at the images, Sergeant Worthington contacted the Naval Criminal Investigative Service (NCIS) Duty Agent, who advised him to seize the appellant's computer as it was in "plain view," but not to apprehend the appellant because NCIS would conduct a criminal investigation of him later. The officers then seized the appellant's computer tower, keyboard, monitor, and peripheral equipment. Later that day, NCIS took custody of these items.

On 30 May 2003, NCIS asked the Regional Computer [*6] Forensics Laboratory (RCFL) to search and analyze the appellant's computer hard drive. The

RCFL found that the computer contained 551 separate files which had images of suspected child pornography, including some images of child pornography that had not been viewed by AEAA L, Jessica, or any of the officers on 9 May 2003.

On 7 July 2003, 59 days after the Government's seizure of the appellant's computer, NCIS Special Agent Jacob Nocon interrogated the appellant, but did not tell him about the RCFL report. Special Agent Nocon advised the appellant that he was suspected of indecent acts with a minor, a charge unrelated to the search and seizure of his computer, and informed the appellant of his Article 31(b), UCMJ, rights using a "Military Suspect's Acknowledgment and Cleansing Waiver of Rights" form. The appellant voluntarily waived his rights and agreed to make a statement.

Special Agent Nocon began the interrogation by asking the appellant, "Why do you believe you are here?" Without further prompting, the appellant confessed to knowingly downloading child pornography from the Internet between April 2002 and May 2003.

After the appellant signed a written confession, NCIS agents asked [*7] him for consent to search his body for DNA samples and to search his barracks room. The appellant provided written consent on a "Permissive Authorization for Search and Seizure Form" that explained his "constitutional right to refuse to permit the search in the absence of a warrant." The consent form also explained that, by signing it, the appellant was giving his permission for the agents to remove and retain any evidence they found.

During the search of his barracks room, the appellant told Special Agent Nocon to take seven of his computer disks because some of them contained child pornography. The agent seized the disks and submitted them to the RCFL for analysis. The RCFL examination determined that one of the disks contained suspected child pornography.

Ruling on the Motion to Suppress

The military judge partially granted, and partially denied, the appellant's motion to suppress all evidence obtained during, or subsequently resulting from, the search of his barracks room. He found that the officers' search of the appellant's computer was lawful, since security entered the barracks room lawfully. Appellate Exhibit IX at 10. He also found that the officers had probable cause to believe [*8] the computer contained evidence of a crime. Accordingly, the military judge determined that the computer was properly seized under the "plain view doctrine," and, therefore, the seizure did not violate the *Fourth Amendment*. [2] AE IX at 13-14. However, the military judge found that "the Government exceeded the scope of the private search" by AEAA L and Jessica when the RCFL searched the appellant's computer for Internet web-sites visited, chat messages, e-mail, and other files. AE IX at 18. He suppressed this evidence, along with all reports or information related directly to it.

> 2 Whether the RCFL's search of the seized computer was proper was not considered in determining whether the seizure of the computer was proper.

The military judge also found that the portion of the RCFL hard drive search that revealed images of child pornography on the appellant's hard drive did not exceed the earlier private search. Therefore, he ruled those images were admissible. AE IX at 18.

Finally, the military judge denied the appellant's motion to suppress his confession and the images of child pornography contained on the floppy disk that were seized during the consent search of his barracks room. AE IX at 18.

Discussion

In [*9] his first assignment of error, the appellant contends that the military judge erred in denying, in part, his motion to suppress all evidence obtained during or eventually resulting from the search of his barracks room. He argues that the seizure of his computer without a warrant or search authorization was invalid, and that all evidence flowing from the invalid seizure was inadmissible.

[HN2] We review a military judge's denial of a motion to suppress for an abuse of discretion under a "clearly erroneous" standard. *United States v. Rader, 65 M.J. 30, 32 (C.A.A.F. 2007)*; *United States v. Khamsouk, 57 M.J. 282, 286 (C.A.A.F. 2002)*. "Findings of fact are affirmed unless they are clearly erroneous; conclusions of law are reviewed *de novo*." *Rader, 65 M.J. at 32*.

1. Private Search of the Appellant's Computer

Having reviewed the evidence regarding AEAA L and Jessica's examination of the appellant's computer, we agree with the military judge that although AEAA L and Jessica deliberately invaded the appellant's privacy in his computer, their actions were a purely private search which, therefore, did not violate the *Fourth Amendment*. *See Reister, 44 M.J. at 415*. Neither AEAA L nor Jessica became agents [*10] of the Government, as they were motivated solely by curiosity. Government officials did not instigate, know of, or acquiesce in their private search. *Id*.

2. Police Examination of the Appellant's Computer in his Barracks Room and Subsequent RCFL Search of Computer

[HN3] "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen, 466 U.S. 109, 113, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984)*.

> Because a private search frustrates such an expectation . . . an ensuing police intrusion that stays within the limits of the private search is not a search for *Fourth Amendment* purposes. . . . Thus, in a private search case, the legality of later governmental intrusions "must be tested by the degree to which they exceeded the scope of the private search."

United States v. Miller, 152 F.3d 813, 815 (8th Cir. 1998)(citations omitted)(quoting *Jacobsen, 466 U.S. at 115*).

The military judge found that the police "examination or intrusion into the [appellant's] computer hard drive did not exceed either the scope or product" of the earlier private search by Jessica and AEAA L. AE IX at 12. The military judge noted that the security examination of the appellant's computer [*11] was limited to viewing images that had previously been opened and viewed by AEAA L and Jessica. Therefore, he concluded that the officers' viewing of these same images was not a search within the meaning of the *Fourth Amendment*. We agree. The officers' examination of the appellant's computer in his barracks room did not exceed the scope of the earlier private search nor did it violate the *Fourth Amendment*. We also agree with the military judge's determination that the extraction and seizure of the child pornography images by the RCFL did not exceed the earlier private party search, but that the web-sites, chat logs, and e-mail retrieved from the computer during the RCFL search exceeded the scope of the private search and should be suppressed. AE IX at 18.

The military judge held that the seizure of the appellant's computer was authorized by the "plain view" doctrine, and did not violate the *Fourth Amendment*. AE IX at 13-14. We agree. [HN4] Law enforcement officials can seize objects which are in "plain view" if they "have probable cause to believe the item is contraband or *evidence of a crime*." *United States v. Fogg, 52 M.J. 144, 149 (1999)*(emphasis added). The officers had probable cause [*12] to believe that the computer, although not a contraband item *per se*, contained "contraband or evidence of a crime" because they received statements from Jessica and AEAA L about the pornographic pictures of children they had seen when browsing the contents of the computer, and the officers then viewed the images themselves.

3. The Appellant's Confession and Consent Search of his Barracks Room

The military judge denied the appellant's motion to suppress his confession as well as the evidence seized during the consent search of his barracks room, finding that the appellant was provided with Article 31(b), UCMJ, warnings, as well as a "cleansing warning" by NCIS, and that he voluntarily waived his rights. [3] AE IX at 6, 18. He held that the appellant was not pressured into confessing, or consenting to the search, because he was unaware of the RCFL examination results and the NCIS agents did not mention them during the interrogation. [4] AE IX at 17. We find that the military judge was correct in holding that the appellant's confession and consent to search were free and voluntary acts and were not influenced by the RCFL search because the appellant had no actual knowledge of the search or [*13] its results.

3 The military judge noted that the consent form the appellant signed allowing NCIS to search his barracks room specifically informed the appellant that he had the right to refuse to grant the search in the absence of a warrant.

4 The appellant claimed during trial that he "was pretty sure [RCFL] searched [the computer]." Record at 254. The appellant never demonstrated he had actual knowledge a search was conducted. We disregard his hunch that there was

Government coercion.

In his brief, the appellant argues that when law enforcement officers initially reviewed the images Jessica and AEAA L found while they were still in the appellant's barracks room "they were in fact conducting a second search without going through the proper procedure to secure a warrant." Supplemental Brief for the Appellant of 16 Nov 2006 at 16. The appellant then goes on to argue that his confession and search consent should be excluded because they are the "fruit of the poisonous tree" created by the illegal search and seizure of his computer. We disagree. We have already found that the officer's search and seizure of the appellant's computer was proper. It is, therefore, not a trigger for the application [*14] of an exclusionary rule analysis. *See Brown v. Illinois, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975)*; *Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).*

We also reject the appellant's argument that merely knowing his computer had been seized was sufficient to taint both his confession and his subsequent consent to the search of his barracks room. We find nothing in the agents' conduct to suggest that they tried to surprise, frighten, intimidate, or confuse the appellant. [5] We also note that the agents seized the computer disks from the appellant's room after the appellant told the agents they should take the disks because some of them contained child pornography. Therefore, we find that the appellant's consent to the search of his barracks room was given freely, and not as a result of the Government's exploitation or illegal conduct. Accordingly, we also find that the subsequent RCFL search and analysis of the computer disks seized from the appellant's barracks room was proper in light of his valid consent to the search of the room.

5 In particular, we do not consider the NCIS agents advising the appellant that he was suspected of indecent acts with a minor as an attempt to coerce him into consenting to the search [*15] of his room. In addition to confessing to the offenses pertaining to child pornography, we note that the appellant also confessed to committing indecent acts with two different minors. Therefore, we find that the agents had a legitimate basis upon which to question him about indecent acts, and that they did not advise him that he was suspected of these offenses for the purpose of surprising, frightening, intimidating, or confusing him.

We decline to grant relief on the appellant's first assignment of error.

Post-Trial Delay

In his second assignment of error, the appellant alleges he was denied speedy post-trial review of his court-martial because it took a total of 742 days from the day he was sentenced until his appeal was docketed with this court. We note with concern that nearly 18 months elapsed from the date the convening authority acted on the case to the date it was docketed.

Nevertheless, assuming, without deciding, that the appellant was denied the due process right to speedy post-trial review, we conclude that any error in that regard was harmless beyond a reasonable doubt. *United States v. Allison, 63 M.J. 365, 370 (C.A.A.F. 2006)*. The appellant has not demonstrated any harm [*16] due to the delay and we will neither infer any, nor provide windfall relief. *United States v. Rodriguez-Rivera, 63 M.J. 372, 386 (C.A.A.F. 2006)*. We are aware of our authority to grant relief under Article 66, UCMJ, but choose not to exercise it in this case. *United States v. Simon, 64 M.J. 205, 207 (C.A.A.F. 2006)*; *Toohey v. United States, 60 M.J. 100, 102 (C.A.A.F. 2004)*; *United States v. Tardif, 57 M.J. 219, 224 (C.A.A.F. 2002)*; *United States v. Brown, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)*(*en banc*).

Omission of the Appellant's Clemency Petition and the Legal Officer's Recommendation from the Record of Trial

In his third assignment of error, the appellant asks that we set aside the findings and sentence or, in the alternative, set aside the convening authority's action and remand the case for proper post-trial processing, because the record of trial does not contain his clemency submission to the convening authority and proof of service of the legal officer's recommendation (LOR). We decline to do so.

[HN5] A complete record of proceedings and testimony is required to be prepared in every case where a court martial results in a punitive discharge. R.C.M. 1104(a)(2)(B). This includes any matter [*17] filed by the accused under R.C.M. 1105, the post-trial

recommendation of the staff judge advocate or legal officer, and proof of service of such upon the defense counsel in accordance with R.C.M. 1106(f)(1). R.C.M. 1103(b)(2)(D).

"A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut." *United States v. Henry, 53 M.J. 108, 111 (C.A.A.F. 2000)* (citing *United States v. McCullah, 11 M.J. 234, 237 (C.M.A. 1981)*; *United States v. Gray, 7 M.J. 296 (C.M.A. 1979)*; and *United States v. Boxdale, 22 C.M.A. 414, 47 C.M.R. 351 (C.M.A. 1973))*. "Insubstantial omissions from a record of trial do not raise a presumption of prejudice or affect that record's characterization as a complete one." *Id*.

Here, the convening authority's action states that a copy of the legal officer's recommendation was served on the appellant's defense counsel on 4 August 2004, and that the defense counsel submitted a request for clemency on 16 August 2004. The convening authority's action further states that the convening authority specifically considered the letter of clemency submitted by the appellant's defense counsel when taking his action. Therefore, we find the [*18] missing items were considered by the convening authority prior to taking action. Their absence from the record now is an insubstantial omission that does not impede our responsibilities for review under *Article 66, UCMJ*, nor does it materially prejudice the appellant's substantial rights. Despite the alleged deficiencies, we find that this record of trial fulfills the requirements of *Article 54, UCMJ*, and decline to grant relief on this assignment of error.

Conclusion

Accordingly, we affirm the findings and the sentence, as approved by the convening authority.

Judge O'TOOLE and Judge MITCHELL concur.

DEPARTMENT OF THE NAVY
UNITED STATES MARINE CORPS
WESTERN JUDICIAL CIRCUIT

UNITED STATES v. NICHOLAS TIENTER LANCE CORPORAL U.S. MARINE CORPS	GENERAL COURT-MARTIAL DEFENSE MOTION TO SUPPRESS (UNCONSTITUTIONAL SEARCH AND SEIZURE OF CELLULAR PHONE) 22 April 2014

1. **Nature of the Motion.** Per R.C.M. 905(b)(2), the Defense moves the court to order the Government to suppress any evidence obtained from the unlawful search and seizure of Lance Corporal Tienter's cellular phone.

2. **Summary of Facts**

a. LCpl Tienter is charged with violating two specifications of Article 120, UCMJ, Abusive Sexual Contact and Indecent Acts. These charges arise from a sexual interaction between LCpl Tienter, LCpl Zamora and Corporal K which occurred on the night of 4 November 2011 after the HMH-462 Marine Corps Ball in San Diego, California.

b. LCpl Tienter was arraigned on 18 November 2013.

c. On 21 November 2013, LCpl Tienter was contacted by CID Agent Perez and told that Agent Perez had a warrant to sieze LCpl Tienter's phone in conjunction with an ongoing investigation related to drug use in the Squadron.

d. Prior to CID Agent Perez taking LCpl Tienter's phone, Capt Alcantara had a conversation with LtCol Harris, the Wing SJA, regarding LCpl Tienter's voluntary participation in the investigation and received assurances that the phone was being taken solely in furtherance of the drug investigation and that the phone would be returned to LCpl Tienter as soon as it was scanned and searched.

e. Civilian Defense Counsel also had a separate conversation with LtCol Harris to protest the seizure of the phone in this manner without any written assurance that the information obtained would not be used against LCpl Tienter and that his cooperation in the ongoing investigation would be favorably considered in determining the disposition of the subject case.

f. During that same conversation, Defense Counsel conveyed concerns to the SJA that the phone also contained privileged communication from the Defense Counsel to and from LCpl Tienter. The SJA again assured the Civilian Counsel that information contained on the phone would not be reviewed for any purpose other than the ongoing investigation into possible drug dealing or use within the squadron.

g. On 27 February 2014, the Squadron CO held a public NJP in the hangar bay at Miramar in front of approximately 350 Marines. During the NJP, the CO passed around "evidence" used at the NJP of several Marines charged as a result of the drug investigation in which LCpl Tienter's phone was seized. Transcripts of the texts from LCpl Tienter's phone which included some statements related to the subject case and other possible uncharged misconduct were circulated among the Marines in the hangar bay. LCpl Tienter was present at the NJP and Marines are generally aware he is currently facing Court-Martial in the subject case.

h. On 10 March 2014, Government Counsel served Defense Counsel with additional discovery in this case which was a log of all the information that was extracted from LCpl Tienter's phone. Included in the discovery is a log of all text messages from LCpl Tienter to include texts related to the drug case, the subject case and between LCpl Tienter and his counsel. No effort was made to distinguish between what may have been privileged communication or information specifically related to the distinct cases under investigation.

3. **Discussion**

The search of LCpl Tienter's cellular phone was unlawful if the information obtained is now being used as evidence in the subject case. The Fourth Amendment to the United States Constitution secures the right of the people to be free from "unreasonable searches and seizures." U. S. Const. Amend. IV. In *Katz v. United States*, the Supreme Court defined 'search' for Fourth Amendment purposes as a government intrusion into a persons reasonable expectation of privacy. *Katz v. United States,* 389 U.S. 347 (1967). This protection of the Fourth Amendment is enforced by the requirement that searches be conducted pursuant to warrants, issued only upon probable cause and after particularly stating what is to be seized. See Mil. R. Evid. 315. Additionally, whether an exigency, obviating the requirement of a warrant, exists, is determined by an objective view of the surrounding circumstances. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 404 (1943).

In this case, the accused's cellular phone was seized without consent, with a warrant intended for a separate and distinct investigation, and without the existence of exigent circumstances. The seizure was conducted after the accused had already been arraigned and put on notice that charges in the subject case were being aggressively pursued by the government. The charges pending against the accused allegedly occurred in November of 2011, about 2 years before the seizure of the cellular phone on 21 November 2013. The Government has been investigating these allegations since early 2013. At no point during their investigation has the government attempted to obtain the accused's cellular phone before preferral of charges or assignment of counsel to search for evidence related to this case.

The Supreme Court decided many years ago that an accused should be treated somewhat differently in our adversarial proceedings after he is represented by counsel and after an

indictment has been sought in a particular case. Referral of charges and arraignment in the military system would have the same effect with regard to counsel rights as what the Court sought to protect when they issued the opinion in *United States v. Massiah*, 377 U.S. 201 (1964). In *United States v. Wade,* 388 U.S. 218 (1967), the Court also extended the rights of an accused to avail themselves of the protections of counsel at situations such as post-indictment lineups or interrogations. While numerous cases have been decided in the past 45-50 years clarifying when counsel rights attach or what government obligations exist when dealing with an accused after indictment, or in a case such as this, referral of charges and arraignment on those charges, what is clear from the case law and the Military Rules of Evidence is that an accused should be put on notice as to what is being seized or obtained and for what purpose. In the subject case, LCpl Tienter and his counsel were assured prior to seizure of his phone that the only information sought from the phone was related to the ongoing investigation into drug use and that there was no intent to search for or use matters related to his current charges.

There is no question from the conversations the Detailed Counsel had with CID Agent Perez and the SJA and the Civilian Counsel had with the SJA that all parties were aware LCpl Tienter is represented by counsel and that his rights in that regard would be protected. Assurances were made that LCpl Tienter's cooperation would be noted and the search of LCpl Tienter's phone was in no way intended to seek evidence related to the subject case. To the extent evidence extracted from the phone has been turned over to the defense which contains admissions and other potential statements against interest related to the subject case, this information should be suppressed. Additionally, there are text messages and e-mails contained within the cellular phone that constitute privileged communications between LCpl Tienter and his counsel. The Government should not be able to access such privileged communications. The

Government has made no effort to distinguish between what was seized lawfully pursuant to the warrant issued for the specific and limited purpose of the ongoing drug investigation and that which is clearly related to the subject case or privileged communication between counsel. For the foregoing reasons and sbsent a valid warrant issued on probable cause, or probable cause coupled with exigent circumstances, the search of LCpl Tienter's phone and seizure of evidence from that phone was *per se* unlawful and should therefore be suppressed.

4. **Evidence and Burden of Proof.**

a. Mil. R. Evid. 311(e) requires that upon appropriate motion by the Defense, the Government show by preponderance of the evidence that the evidence obtained was not obtained as a result of an unlawful search or seizure.

b. CD containing extracts from LCpl Tienter's phone seized by CID on 21 Nov 2013.

5. **Relief Requested.**

The Defense requests the suppression of all evidence and any derivative evidence resulting from the unlawful search and seizure of LCpl Tienter's phone.

6. **Argument.**

The Defense requests oral argument.

Jon W. Shelburne
Civilian Defense Counsel

I hereby certify that a true copy of this motion was served upon trial counsel on 22 April 2014.

Jon W. Shelburne
Civilian Defense Counsel

WESTERN JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY

UNITED STATES	)	
	)	GENERAL COURT-MARTIAL
V.	)	
	)	Ruling on Defense
TIENTER, N. W.	)	Motion to Suppress Evidence
Lance Corporal	)	
U.S. Marine Corps	)	
	)	13 May 2014

STATEMENT OF CASE

1. The defense brought a motion to suppress evidence pursuant to Rule for Courts-Martial (R.C.M.) 905(b)(2), Military Rules of Evidence (M.R.E.) 311(e) and 315, Manual for Courts-Martial (2012), and the Fourth Amendment to the U.S. Constitution requesting the court suppress incriminating text messages seized from the accused cellular phone. The defense alleged the search was beyond the scope of the search authorization issued and the search resulted in seizure of communications between the defense counsel and the accused. The government opposed the motion.

2. The defense offered as evidence on the motion the testimony of the accused for the limited purpose of the motion and a CD of the extraction report of the accused cellular phone. When the court reviewed the CD, the court saw that the extraction report consisted of 2117 pages of material. Via an email sent on Thursday, 8 May 2014, the court asked the defense

counsel to identify specifically the page numbers associated with the communications the defense counsel thought were privileged and provide that information by close of business on Monday, 12 May 2014. The defense counsel did not provide the information the court requested. Due to the voluminous nature of the extraction report the court was unable to identify the alleged privileged communications.

3. The government offered multiple documents related to the NCIS report of investigation in the case, multiple documents related to an unrelated CID report of investigation which led to the seizure of the accused's cellular phone, and the testimony of CID SA Isaac Perez and NCIS SA John Stevens. In addition, the court requested and received from the government the disposition records relating to Marines who were the subject of a CID Investigation for wrongful use of controlled substances due to the contents of the accused's cellular phone.

4. Pursuant to R.C.M. 315(d)(5), the burden of proof is on the government by a preponderance of the evidence that the evidence obtained was not the result of an unlawful search or seizure.

FINDINGS OF FACT

1. The accused is charged with violating Article 120, UCMJ (abusive sexual contact and indecent conduct). The charges arise from an incident that occurred on 4 November 2011 in San

Diego, California. While attending the Marine Corps Ball, it is alleged that the accused, Cpl D.C. Zamora, U.S. Marine Corps, and SSgt J. A. Meadows, U.S. Marine Corps, sexually assaulted LCpl [redacted], U.S. Marine Corps. Specifically, it is alleged that while LCpl [redacted] was substantially incapacitated by alcohol, the accused, Cpl Zamora and SSgt Meadows performed sexual acts and contacts upon her while all four of them were in a hotel room. It is alleged the accused inserted his penis into the mouth of LCpl [redacted] in the presence of Cpl Zamora and SSgt Meadows when LCpl [redacted] was substantially incapacitated by alcohol.

2. The charges were preferred against the accused on 10 June 2013. The accused is represented by Capt D. E. Alacantara, U.S. Marine Corps, Lieutenant L. E. O'Brien, U.S. Navy, and Mr. Jon Shelburne. The Article 32, UCMJ Pretrial Investigation was completed on 29 July 2013. On 23 September 2013, the charges were referred to a general court-martial by the Commander, 3d Marine Aircraft Wing. On 28 October 2013, the accused had shoulder surgery. Thereafter, the accused was prescribed Percocet, a controlled substance. Soon thereafter, the accused began receiving text messages from Cpl Steven Savarino, U.S. Marine Corps asking the accused about his surgery and the medications he had been prescribed. Cpl Savarino was a Marine in the accused squadron, Marine Heavy Helicopter Squadron 361.

3. Eventually, Cpl Savarino began asking the accused to provide him some of his prescription medication. The accused refused, but Cpl Savarino became more persistent. On or about 7 November 2013, the accused reported to GySgt Brian Cox, U.S. Marine Corps, his staff noncommissioned officer in charge, that Cpl Savarino was soliciting him to provide prescription medication. The accused provided a transcript of text messages he had received from Cpl Savarino to support his allegation. None of the transcribed text messages included a date to indicate when the messages were sent or received. GySgt Cox reported the incident to SgtMaj D. W. Goldman, U.S. Marine Corps, who reported it to NCIS aboard MCAS, Miramar. NCIS reported the incident to CID who was already investigating Marines from Marine Heavy Helicopter Squadron 361 for use of controlled substances. Due to this information provided by the accused, CID SA Isaac Perez requested a seizure and search authorization from Col J. P. Farnam, U.S. Marine Corps, the Commanding Officer, MCAS, Miramar, California for the accused's cellular phone upon which the accused had told GySgt Cox that the text messages had been received. Col Farnam granted the request in a signed written document dated 20 November 2013. Specifically, Col Farnam granted SA Perez permission to seize the accused cellular phone and search it for evidence relating to the wrongful use and possession of controlled substances as

related to communications between the accused and Cpl Savarino. He also granted authorization to search for "any electronic mails sent or received in temporal proximity to (the) incriminating electronic mails that provide context to the incriminating mails."

4. On 20 or 21 November 2013, the accused was called by his command to report to the squadron command deck. The accused was not told why he needed to report. The accused called his defense counsel. Capt Alcantara accompanied the accused when he reported. When the accused and Capt Alcantara reported, they were met by SA Perez and shown the search authorization. Capt Alcantara called Mr. Shelburne and reported that CID had a search authorization to seize the accused's cellular phone. Mr. Shelburne and Capt Alcantara called LtCol Kevin Harris, the Staff Judge Advocate, 3d Marine Aircraft Wing. Both defense counsel objected to the seizure and expressed concern that the cellular phone may contain attorney/client privileged communications. LtCol Harris assured the defense counsel that the phone would only be searched for matters dealing with the alleged solicitation by Cpl Savarino of the accused for controlled substances. Thereafter SA Perez seized the accused's cellular phone. On 21 November 2013, he attached it to a Cellebrite Universal Forensic Extraction Device and downloaded the entire contents of the cellular phone's memory. He then

created an extraction report of the contents. The extraction report consists of 2117 pages of material collected from the accused's celluar phone to include numerous text messages most which are unrelated to the accused's conversations with Cpl Savarino.

5. On or about 10 December 2013, SA Perez reviewed the extraction report of the accused's cellular phone using the Cellebrite machine. During his review of the text messages, he saw text message conversations between the accused and a Cpl Jose Hernandez, U.S. Marine Corps, that occurred on 15 July 2013 in which Cpl Hernandez solicits the accused for Percocet and Vicodin, both controlled substances. He saw another series of text messages dated 17 July 2013 between the accused and Cpl Hernandez where Cpl Hernandez tells the accused that a sergeant wants pills. He saw another series of text messages dated 23 July 2013 in which the accused and another, not Cpl Savarino, are discussing persons involved in the use of pseudo-marijuana. In addition, he saw a text message conversation between the accused and another person, not Cpl Savarino, that occurred on 2 August 2013 in which the accused made an admission to committing adultery. Finally, SA Perez found the text messages pertaining to the accused's allegation against Cpl Savarino which were dated 30 and 31 October and 1 November 2013. SA Perez made a report of these findings dated 10 December 2013.

6. On or about 5 March 2014, SA Perez conducted another review of the extraction report looking for additional text messages relating to wrongful use or possession of controlled substances once again using the Cellebrite machine. SA Perez knew the accused was pending a general court-martial for charges of sexual assault at the time. SA Perez once again noticed the text message related to adultery. SA Perez thought the text message he saw regarding the accused's admission to committing adultery may relate to the sexual assault case. However, unknown to SA Perez, this text message was completely unrelated to the charges pending before the general court-martial. SA Perez told NCIS SA John Stevens that he had seen a text message that may be related to the sexual assault allegation. Without obtaining a new search authorization, SA Stevens began searching the extraction report using the Cellebrite machine for text messages related to the incident alleged by LCpl [redacted]. He used search terms in order to find any such messages.

7. In the course of his search, SA Stevens found text message exchanged between the accused and others, not his defense counsel, where the accused acknowledged that at the time of the incident alleged by LCpl [redacted] he believed LCpl [redacted] was extremely drunk, that she was under the legal drinking age, and that she had given him oral sex. These text

message conversations occurred on 8 November 2011, 17 June 2013, and 12 August 2013, respectively.

7. A CD containing this complete extraction report was given to Maj Melanie Mann, Senior Trial Counsel, MCAS Miramar, California. Maj Mann was also given a report that contained only the text messages in question and not any exchanged between the accused and his counsel. The detailed trial counsel in this case, Maj K. M. Brown, U.S. Marine Corps, and 1stLt M. C. Finnan, U.S. Marine Corps, have only received a redacted version of the extraction report and have not seen any text messages between the accused and his counsel. The court disqualified Maj Mann from acting as trial counsel in this case on 8 May 2014. In addition, the court directed that Maj Mann would act as a filtering conduit for any evidence provided to the trial counsel from the accused's cellular phone since it allegedly contained conversations between the accused and his defense counsel. Also, the court directed that before Maj Mann could provide any information to Maj Brown or 1stLt Finnan she would have to show the information to the defense counsel to ensure no privileged information was accidentally delivered to the trial counsel.

8. There was no evidence presented to the court to suggest or even suspect that the government had derived any additional evidence or gained any insight into defense strategy due to any alleged conversation that occurred between the defense counsel

and the accused via text message or any other form of communication.

9. As a result of the CID investigation regarding the allegations of wrongful use and possession of controlled substances, 18 Marines were subject to disciplinary action. Of those 18, three Marines had charges referred against them to a special court-martial. According to 1stLt Finnan, all three of those Marines had their cases successfully negotiated down to lower forums before a complete copy of the extraction report was provided to the trial counsel and a complete copy of the extraction report was never provided to the detailed defense counsel of these charged Marines.

STATEMENT OF LAW AND ANALYSIS

A. Seizure and Search of Cellphone

1. Pursuant to M.R.E. 315(d)-(g) and M.R.E. 316, absent an exigency, a search of property, in which a service member has a reasonable expectation of privacy, must be accompanied by probable cause and a proper search authorization. Pursuant to M.R.E. 316(c)(1), probable cause to seize property or evidence exists when there is a reasonable belief that the evidence in question is evidence of a crime.

2. Pursuant to M.R.E. 315(f)(2), probable cause to search exists when there is a reasonable belief that the evidence sought is located in the place or on the person to be searched.

Pursuant to M.R.E. 315(f), probable cause to issue a search authorization may be based upon written statements, oral statements or such information as may be known by the authorizing official that would not preclude the officer from acting in an impartial fashion. Pursuant to M.R.E. 315(d), only a commander or a military judge may issue a search authorization.

3. According to M.R.E. 315(d)(1), when the issuing authority is a commander, the commander must have control over the person or place where the property or person to be searched is situated or found. In addition, the search authorization must be specific as to the place, person or thing to be searched and the items to be sought. United States v. Mix, 35 M.J. 283 (C.M.A. 1992); United States v. Maxwell, 45 M.J. 406 (C.A.A.F. 1996). However, law enforcement officials conducting a search pursuant to a search authorization are not required to interpret it narrowly, but rather are required to make realistic, commonsense determinations as to what constitutes evidence based on probable cause. United States v. Fogg, 52 M.J. 144 (C.A.A.F. 1999).

4. If during the conduct of a lawful search, a law enforcement officer discovers items not specifically described in a search authorization, he may seize those items which

disclose that another crime is being or has been committed. M.R.E. 316(c)(5)(C); United States v. Modesto, 39 M.J. 1055 (A.C.M.R. 1994). This is known as the plain view doctrine. Id. However, as the Supreme Court noted, the "distinction between looking at a suspicious object in plain view and moving it even a few inches is much more than trivial for the purposes of the Fourth Amendment." Arizona v. Hicks, 480 U.S. 321, 325, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987). When dealing with computers, a search authorization or warrant permitting a search for specific evidence does not per se allow a general exploratory search outside the scope of the authorization even if the item to be searched is a mirror image of the computer seized. United States v. Osorio, 66 M.J. 632 (A.F.C.C.A. 2008); United States v. Washington, 2011 WL 498325 (A.C.C.A. 2011).

5. Generally, if evidence is seized in violation of an accused Fourth Amendment right to be free of unreasonable searches or seizures, it will be excluded from his or her trial. M.R.E. 311(a). However, it is an exception to the exclusionary rule that the evidence would have been inevitably obtained. M.R.E. 311(c)(2); United States v. Wicks, 73 M.J. 93 (C.A.A.F. 2014). For the doctrine of inevitable discovery to apply, the government must demonstrate by a preponderance of evidence that when the illegality occurred, the government agents possessed,

or were actively pursuing, evidence or leads that would have inevitably led to discovery of the evidence in a lawful manner. Wicks, at 103. Mere speculation and conjecture as to inevitable discovery of evidence is not sufficient when applying the inevitable discovery exception to the exclusionary rule and the exception is only applicable when routine procedures of law enforcement agency would inevitably find the same evidence. Id.

6. The accused had a reasonable expectation of privacy in his cellular phone. As a result, probable cause and a search authorization were required to both seize and search the cellular phone of the accused, absent an exigency. In this case no exigencies existed.

7. Col Farnam was the proper authority to grant the search authorization. He was the commanding officer of MCAS, Miramar, California and as such he had control over the accused and the property in the accused's possession while the accused was aboard the air station. After SgtMaj Goldman told SA Perez what the accused had relayed regarding the text message conversations between the accused and Cpl Savarino, SA Perez had probable cause that a crime had been committed, specifically criminal solicitation to distribute a controlled substance, and that the accused's cellular phone would produce evidence of that crime. After SA Perez relayed this information in affidavit form to Col

Farnam, Col Farnam shared the same probable cause as SA Perez and issued the search authorization. The search he ordered was sufficiently specific as to scope to allow SA Perez and other law enforcement personnel to search only for that evidence related to the conversations between the accused and Cpl Savarino that pertained to the use and possession of controlled substances. However, since the transcript provided by the accused did not include any dates, the scope of the search authorization was legitimately broad to not only find the text messages in question, but also provide context for the conversations that occurred. SA Perez's observation of the text message conversation of 2 August 2013, in which the accused made an admission to committing adultery, was within the scope of the authorized search and was observed in plain view.

8. However SA Stevens' search went beyond the scope of the search authorization and the text messages he found were seized in violation of M.R.E. 311 and the Fourth Amendment. SA Perez found a text message related to an adultery that had nothing to do with the sexual assault allegations pending against the accused. SA Perez mistakenly thought that this message may relate to the case involving LCpl [redacted]. He relayed his mistaken belief to SA Stevens. At that time, SA Perez and SA Stevens could have seized the message about the adultery under the "plain view" exception, but, any additional search for

evidence relating to the sexual assault required an additional search authorization for evidence of that crime. A search authorization for one crime does not allow a general exploratory search for evidence of any crime, even if the government has custody and control of the evidence due to a legitimate previously enacted search authorization. *See* Osorio at 637. When SA Stevens began a general exploratory search for evidence related to the sexual assault offense he exceeded the scope of the search authorization and violated M.R.E. 311, 315, and the Fourth Amendment, and no exception or exigency existed to justify his search.

9. In addition, the government has failed to show by a preponderance of the evidence that these text messages would have been inevitably discovered during the routine practices of law enforcement. There was no evidence presented to the court that established that SA Perez or any other law enforcement agent came across these incriminating text messages either before or after SA Stevens discovered them. In addition, the procedural history of the drug abuse cases indicates that the trial counsel for those cases was not even provided the extraction report from the accused's cellular phone until after the last one of these cases had already been successfully negotiated down to a lower forum. The court is convinced that it is more likely than not that absent SA Steven's search for

these text messages, they would never have been discovered by anyone associated with law enforcement. As a result, these text message conversations discovered on the accused's cellular phone which occurred on 8 November 2011, 17 June 2013 and 12 August 2013 must be suppressed.

B. Attorney/Client Protected Text Messages

1. Regarding the text messages exchanged between the accused and his defense counsel, those are protected under M.R.E. 502. As a result, none of those text messages can be admitted at trial over the accused's objection. In addition, no evidence derived from those messages can be used against the accused at his trial. Also, any counsel who has viewed those messages cannot act as trial counsel in this case. At this time, no evidence has been presented to the court to suggest any evidence has been derived from the content of these messages. In addition, the evidence presented to the court establishes that neither Maj Brown nor 1stLt Finnan have been privy to the content of these messages, and with the controls put into place by the court, the court is satisfied that neither Maj Brown nor 1stLt Finnan will become tainted by being exposed to the content of these alleged messages.

2. As a result, the court is satisfied that Maj Brown and 1stLt Finnan can proceed as trial counsel in this case.

RULING

The motion by the defense requesting the court suppress the text messages of the accused is **GRANTED**.

L. J. FRANCIS
Lieutenant Colonel
U.S. Marine Corps
Military Judge

CERTIFICATE OF SERVICE

This ruling was served upon trial counsel and defense counsel and provided to the court reporter on 13 May 2014.

L. J. FRANCIS
Lieutenant Colonel
U.S. Marine Corps
Military Judge

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 3

UNITED STATES, Appellee v. Alejandro TORRES Lance Corporal (E-3) U.S. Marine Corps, Appellant	**APPELLANT'S BRIEF AND ASSIGNMENTS OF ERROR** Case No. 201300396 Tried at the Marine Corps Combat Center, Twentynine Palms, California, on 17 April and 11, 26-28 June 2013 by a General Court-Martial convened by the Commanding General, 1st Marine Logistics Group, Twentynine Palms, California.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

CARRIE E. THEIS
Lieutenant, JAGC, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Bldg. 58, Ste. 100
Washington Navy Yard, DC 20374
(202) 685-7390
Fax (202) 685-7426
Carrie.Theis@navy.mil

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APPENDIX 1:

United States v. Booker, NMCCA No. 201300247, Respondent's Opposition to Government's Petition for Extraordinary Relief in the Nature of a Writ of Mandamus.

APPENDIX 2:

United States v. Schalager, C.A.A.F. Order of 31 Oct 2013

Assignments of Error

I.

WHETHER THE MILITARY JUDGE ERRED WHEN HE RELIED ON THE WAYS OF THE WORLD AND HUMAN EXPERIENCE TO DISCOUNT THE SCIENTIFIC EVIDENCE OF A.M.'S LEVEL OF ALCOHOL IMPAIRMENT?

II.

THE MILITARY JUDGE, SITTING AS THE FACT FINDER, INDICATED HE DID NOT KNOW THE DEFINITION OF "UNABLE TO CONSENT DUE TO IMPAIRMENT BY ALCOHOL" AND DID NOT CLEARLY ARTICULATE WHAT DEFINITION HE USED WHEN DECIDING LCPL TORRES' CASE. WAS APPELLANT DENIED DUE PROCESS OF LAW BECAUSE OF THE FACT-FINDER'S UNRESOLVED MISUNDERSTANDING OF AN ELEMENT OF THE CRIME?

III.

WHETHER THE APPLICATION OF ARTICLE 120(B)(3), UCMJ, TO LCPL TORRES VIOLATED HIS RIGHT TO EQUAL PROTECTION UNDER THE LAW?

IV.

IN THIS PROSECUTION FOR A VIOLATION OF ARTICLE 120(B)(3), UCMJ, WAS THE ELEMENT OF INCAPABLE TO CONSENT DUE TO IMPAIRMENT BY ALCOHOL UNCONSTITUTIONALLY VAGUE AS APPLIED?

V.

WHETHER THE EVIDENCE WAS LEGALLY AND FACTUALLY SUFFICIENT?

VI.

WHETHER THE MILITARY JUDGE ERRED IN HIS CALCULATION OF THE MAXIMUM PUNISHMENT FOR CHARGE I, SEXUAL ASSAULT?

VII.

WHETHER THE COMMANDANT'S HERITAGE TOUR CREATED APPARENT UNLAWFUL COMMAND INFLUENCE?

Statement of Statutory Jurisdiction

Lance Corporal (LCpl) Torres' approved general court-martial sentence included a punitive discharge. Accordingly, his case falls within this Court's jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ). 10 U.S.C. § 866(b)(1) (2012).

Statement of the Case

A military judge sitting as a general court-martial convicted LCpl Torres, United States Marine Corps, contrary to his pleas, of one specification of sexual assault and one specification of adultery, in violation of Articles 120(b) and 134, UCMJ. (R. at 373); 10 U.S.C. §§ 920, 934 (2012). LCpl Torres was sentenced to two years of confinement, reduction to pay-grade E-1, and a dishonorable discharge. (R. at 439.) The convening authority approved the adjudged sentence and, except for the dishonorable discharge, ordered the sentence executed. (General Court-Martial Convening Order 09-2013, Sept. 27, 2013.)

Statement of Facts

In July 2012, A.M., the alleged victim, was married to Cpl C.M. (R. at 152.) Although they had been married for almost two months, A.M. was not living with him. (R. at 152.) She came to visit him at Twentynine Palms over Independence Day weekend. (R. at 153.) On 2 July 2012, they stayed at a Motel 6. (R. at 153.) That night, A.M. and her husband got in a

fight over flirty text messages he had been sending a girl he worked with. (R. at 180-81.) During this fight, Cpl C.M. and A.M. talked about the possibility of a divorce. (R. at 199.) The next day they did not really see each other and had not resolved the issue when they moved locations to housesit for a friend. (R. at 153, 180.)

While housesitting, Cpl C.M. decided to throw a party at the house and invited a bunch of friends, including his good friend, LCpl Torres. (R. at 154.) LCpl Torres was the only friend that showed up, so Cpl C.M., A.M., and LCpl Torres hung out together drinking. (R. at 175-77.) The plan was for LCpl Torres to stay the night at the house with them. (R. at 177.) During the night, LCpl Torres and Cpl C.M. played several games of beer pong. (R. at 217.) LCpl Torres had at least seven to eight bottles of beer and several mixed drinks. (R. at 225.)

At trial, A.M. testified she had six to seven beers and five to six hard-alcohol drinks. (R. at 175.) A.M. testified she started drinking around 2000 and stopped drinking around 0115. (R. at 179.) A.M. knew the time she stopped drinking because she sent a text to her friend about what a great guy LCpl Torres was around 0115. (R. at 179.) A.M. stated after sending this text she passed out in the bathroom and later awoke on an air mattress to the feeling that someone was having sex with her in a side position. (R. at 166.) A.M. believed at

first it was her husband having sex with her, but then became aware that it was not her husband and testified that she immediately pushed him off. (R. at 185, 289-90.)

She testified she then got up, put on shorts and a sweatshirt, and went to find Cpl C.M. (R. at 187.) Cpl C.M. had passed out on a table in the yard. (R. at 189.) A.M. tried to wake him up by shaking him which resulted in him falling on his face onto the cement. (R. at 189.) Cpl C.M. immediately started bleeding but he still did not wake up, so A.M. called 911. (R. at 189.) During the call, she indicated to the 911 operator that LCpl Torres may have hit her husband in the face, despite knowing that her knocking him off the table caused the bleeding. (R. at 191.) A.M. agreed during trial that she did not sound intoxicated during the call. (R. at 199.)

At 0255 the deputies arrived at the scene. (R. at 123.) The deputies were on the phone with A.M. prior to arriving and as they arrived she exited the house to meet them. (R. at 135.) The deputies observed that A.M. could walk without stumbling and that she was coherent and articulate. (R. at 123.) A.M. did not indicate to the deputies that she woke up to LCpl Torres having sex with her, but rather told them that she was having sex and then realized the person having sex with her was not her husband. (R. at 127.) She also told the deputies LCpl Torres attempted to engage in anal sex with her. (R. at 198.) A.M.

told the deputies she had five beers and eight shots between 2230 and 0230 and she knew LCpl Torres was not sober. (R. at 127, 134.)

A.M. directed the police to a sleeping LCpl Torres, who was lying with his pants off on an air mattress in a spare bedroom. (R. at 117.) The deputies drew their guns on LCpl Torres, called at him for over a minute trying to wake him up with no success. (R. at 124.) When LCpl Torres finally woke up he was confused, disoriented, and appeared heavily intoxicated. (R. at 118, 125.) It took LCpl Torres awhile to get his bearing and understand what was going on. (R. at 118.) The deputies had difficulty interviewing him because of his level of intoxication and the slurring of his speech. (R. at 128.)

A.M. was taken to the hospital for a sexual assault forensic exam. The genital exam did not detect any injuries. (R. at 286.) A.M.'s vaginal swabs did not show the presence of LCpl Torres' DNA, however, swabs of LCpl Torres' penis showed A.M.'s DNA and Cpl C.M.'s semen. (R. at 259, 261.) As part of the exam, her blood was collected at 0730 and her urine was collected at 0710. (R. at 288.) A.M.'s blood alcohol level was 0.00 and her urine alcohol level was .08. (Pros. Ex. 2.)

Erin Crabtree, the Government's forensic toxicologist, testified about alcohol content in A.M.'s urine. She said the amount of alcohol in urine tells us at some prior time the

person has consumed alcohol. (R. at 301.) In general, urine Blood Alcohol Content (BAC) is higher than an individual's actual BAC. (R. at 301.) The type of urination (a first void or subsequent void) will give an indication on how to judge the alcohol in the sample. (R. at 301.) A second void will be closer to a person's BAC. (R. at 301.) In light of A.M.'s BAC being 0.00 near the time of the urine void, Ms. Crabtree testified the urine collected from A.M. was a first void and therefore not helpful in determining BAC. (R. at 324.)

Ms. Crabtree, using hypothetical facts akin to the best case scenario for the Government, stated A.M.'s BAC at the time the sexual act occurred was at most .09. (R. at 315.) According to Ms. Crabtree, if A.M. had drank the amount she reported at trial her BAC would have been .47, a potentially lethal dose, at the time of the sexual activity. (R. at 327-28.) Ms. Crabtree testified that had A.M. drank what she reported then her BAC would have been around .38 at the time of her blood draw the next morning. (R. at 327-28.) Given that A.M.'s BAC was 0.00 and not .38, Ms. Crabtree believed it was unlikely that A.M. drank what she reported. (R. at 328.)

The military judge, acknowledging that there was no clear definition to apply to the "new new" Article 120 terms, *sua sponte* entered special findings, convicting LCpl Torres of sexual assault, but noted that he hoped the reviewing

authorities would take their own review of what they thought the standard for alcohol impairment is. (R. at 442; Appellate Ex. XXXII.)

Summary of Argument

Assignment of Error I

The scientific evidence the Government presented at trial showed A.M. could not have imbibed the amount of the alcohol she claimed she consumed. In fact, the scientific evidence showed in the most favorable scenario for the Government her BAC was only .09. The military judge in his special findings discarded the scientific evidence based on his own experience. By injecting his own scientific knowledge into the court-martial he violated LCpl Torres' Due Process rights.

Assignment of Error II

Military judges are presumed to know the law and apply it correctly, absent evidence to the contrary. Here, evidence to the contrary exists. During trial, the military judge professed actual ignorance over the meaning of being impaired by alcohol to the point of not being able to consent. In his special findings, the military judge found the Government proved the alleged victim could not consent due to impairment by alcohol, but failed to state what definition of this term he applied, which constituted an element of the offense. This Court cannot now be convinced LCpl Torres' case was considered by a fact

finder who understood the law and applied it correctly. Accordingly, this Court should set aside the findings of the trial court.

Assignment of Error III

LCpl Torres and A.M. are similarly situated individuals. On 3 July 2012, they both showed signs of alcohol impairment with LCpl Torres showing an even greater effect of alcohol. These two individuals--with at least the same capacity--were nevertheless categorized into perpetrator and victim based on no identifiable standard other than the difference in their genders. The failure to apply the law equally violates LCpl Torres' right to equal protection under the law. He should equally be considered a victim or A.M. a perpetrator.

Assignment of Error IV

The crime of sexual assault, a violation of the "new new" Article 120(b), is unconstitutionally vague as applied here. There is no identifiable standard for the element of incapable to consent due to impairment by alcohol from the facts adduced at trial.

Assignment of Error V

LCpl Torres' convictions for sexual assault and adultery are factually and legally insufficient.

Assignment of Error VI

In light of the President's failure to set punishments for Article 120, LCpl Torres' conviction for Charge I, Specification 2 should have warranted no more than the jurisdictional maximum punishment at summary court-martial.

Assignment of Error VII

The Commandant of the Marine Corps' Heritage Brief infected this court-martial with a taint of impropriety. The public cannot be confident in the fairness of LCpl Torres' trial in light of the Commandant's actions.

Argument

I.

THE MILITARY JUDGE ERRED WHEN HE RELIED ON PURPORTED WAYS OF THE WORLD AND HUMAN EXPERIENCE TO DISCOUNT THE SCIENTIFIC EVIDENCE OF A.M.'S LEVEL OF ALCOHOL IMPAIRMENT.

Standard of Review

Military judges are presumed to know the law and to follow it absent clear evidence to the contrary. *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007). Accordingly, although there is no clear precedent, it seems appropriate to review the military judge's decision to rely on human experience under a plain error standard. Plain error has three requirements: (1) there must be error; (2) the error must be plain; and (3) the plain error must affect the substantial

rights of the accused. *United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998).

Discussion

Ordinary human experience and matters of common knowledge in the military community are proper considerations for the trier of fact. *United States v. Meeks,* 41 M.J. 150, 158 (C.M.A. 1994); *United States v. Kropf,* 39 M.J. 107, 108 (C.M.A. 1994). However, there is a limit to what may be considered common knowledge and ordinary human experience. An accused is entitled to the due process of law and to only be convicted based on the case the Government presents in court. *United States v. Bouie*, 26 C.M.R. 8, 13 (C.M.A. 1958). The Court of Appeals for the Armed Forces (C.A.A.F.) in *United States v. Fletcher*, succinctly enumerated what has previously been matters of common knowledge that may be relied upon:

> In the past, 'common knowledge' has included 'knowledge about routine personnel actions,' *United States v. Stargell*, 29 M.J. 92, 94 (C.A.A.F. 1998); knowledge of ongoing military actions overseas, *Meeks,* 41 M.J. at 158-59; knowledge of the Navy's 'zero tolerance' policy for drug offenses, *Kropf*, 39 M.J. at 108-09; the existence in the United States of a 'war on drugs,' *United States v. Barrazamartinez,* 58 M.J. 173, 175-76 (C.A.A.F. 2003); and any other matter 'upon which men in general have a common fund of experience and knowledge, through data notoriously accepted by all.' *United States v. Jones*, 2 C.M.A. 80, 87 (C.M.R. 1952) (quoting Wigmore, *Evidence* § 2570 (3d ed.)).

Fletcher, 62 M.J. 175, 183

Here the military judge stated in his findings of fact that his knowledge of "human nature and the ways of the world. . . allowed the court to reconcile the victim's BAC in light of her testimony describing her alcohol intake and resultant effects therefrom." (Appellate Ex. XXXII.) The military judge's reliance on his own "human experience," the details of this knowledge he fails to further specify, to dispute the scientific evidence of A.M.'s BAC being .09 at the time of the sexual act falls outside of the realm of what is proper matters of human experience and into scientific evidence. The Government simply did not prove its case and the military judge used his own outside knowledge of some scientific facts to overcome the Government's lack of proof. This was error and the error is plain.

Further evidence of the military judge's failure to acknowledge the weakness of the Government's case is the finding that A.M. consumed 6 (12 ounces) Beers, some amount of a Corona beer, 3 ounces of vodka (2 shots), a 6-8 ounces Mudslide hard liquor drink, and a 6-8 ounces Barcardi Limon rum and coke. The Government's own expert said it was not possible A.M. consumed this much alcohol. (R. at 328.) The military judge wholly discounted the scientific evidence presented by the Government's expert and applied a great degree of his own experience to determine the most pertinent fact of LCpl Torres' conviction,

the level of A.M.'s impairment from alcohol. This knowledge was outside the appropriate realm of "common experience." Therefore, not only was the error plain, but his substantial rights were implicated. Specifically, LCpl Torres's Due Process rights were violated because his conviction was based on evidence outside of the court-martial.

Request for Relief

This Court should set aside the findings as to Charge I and remand the case for a rehearing on sentence.

II.

THE MILITARY JUDGE, SITTING AS THE FACT FINDER, INDICATED HE DID NOT KNOW THE DEFINITION OF "UNABLE TO CONSENT DUE TO IMPAIRMENT BY ALCOHOL" AND DID NOT CLEARLY ARTICULATE WHAT DEFINITION HE USED WHEN DECIDING LCPL TORRES' CASE. APPELLANT WAS DENIED DUE PROCESS OF LAW BECAUSE OF THE FACT-FINDER'S UNRESOLVED MISUNDERSTANDING OF AN ELEMENT OF THE CRIME.

Standard of Review

In the absence of plain error, military judges are presumed to know the law and apply it correctly. *United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000). However, whether a fact-finder is properly instructed on the law is a question of law reviewed *de novo*. *United States v. Smith*, 68 M.J. 316, 319 (C.A.A.F. 2010); *see also United States v. Wolford,* 62 M.J. 418, 422 (C.A.A.F. 2006).

Discussion

A. This Court should not assume the military judge knew the law and applied it correctly because he clearly indicated he did not know the definition of "incapable to consent due to alcohol impairment."

An accused has the right to elect to be tried by a court composed solely of a military judge. *See* Rule for Courts-Martial (R.C.M.) 903(a)(2), Manual for Courts-Martial, United States (MCM) (2012 ed.). Where an accused elects to be tried by a military judge, the military judge will rule on motions, objections, and on the admissibility of evidence, determine guilt and, if necessary, an appropriate sentence. When sitting as triers of fact, military judges typically do not read instructions on the law into the record of trial because they are presumed to know the law and apply it correctly. *Robbins*, 52 M.J. at 457. However, this presumption is rebuttable and cannot stand in the face of evidence to the contrary. (*Id.*) Such evidence exists here.

While stating on the record his reason for *sua sponte* giving special written findings in LCpl Torres' case, the military judge commented he specifically was not applying the old definition of substantial incapacity. (R. at 442.) He then acknowledged military justice practitioners are having trouble defining the term and that the statute leaves it undefined. (R. at 442.) He then stated he hoped his special findings will clear up the matter of how A.M.'s level of intoxication meets

the statute; a matter he acknowledges was aggressively disputed by the defense. (R. at 442.) He then gave a nod to the reviewing authorities, saying they should look at his methodology to see if he got it right. (R. at 442.) However, in his special findings, the military judge never articulated what standard he actually used to determine guilt. (Appellate Ex. XXXII.)

Once the military judge indicated he did not know what the appropriate definition of "incapable to consent due to impairment by alcohol" was, he assumed a duty to clarify the law he was applying in order to preserve this record. Because this Court cannot know which definition the military judge employed, the presumption otherwise enjoyed by military judges when they sit as fact finders is now eviscerated. The conviction must be set-aside.

B. A military judge who manifests a lack of understanding about the law while sitting as the trier of fact, and then fails to resolve that confusion on the record, creates an error of Constitutional dimension. The Government cannot show this error was harmless beyond a reasonable doubt.

The error inherent in the military judge's puzzlement on a dispositive issue of law is akin to instructional error involving a panel of members acting as the trier of fact. Such error is Constitutional in nature and requires the government to show harmlessness beyond a reasonable doubt in the resolution of this case. *Wolford*, 62 M.J. at 420. "If instructional error is

found, because there are constitutional dimensions at play, [Appellant's] claims 'must be tested for prejudice under the standard of harmless beyond a reasonable doubt.'" *Id.* (citing *United States v. Kruetzer*, 61 M.J. 293, 298 (C.A.A.F. 2005)).

LCpl Torres prevails under this analysis. This Court cannot be certain, beyond a reasonable doubt, that the military judge applied an appropriate legal standard in determining "incapable to consent due to impairment by alcohol." The military judge injected doubt into the court-martial and, therefore, assumed a duty to clarify his legal reasoning. The utter lack of a standard articulated in his special findings and his desire for the reviewing Court to essentially do the trial court's job of applying the right standard flies in the face of Due Process. LCpl Torres was entitled to a trial on the law as it was set by Congress, not to be the subject of essentially a *Dubay* hearing where only the reviewing authority knows the standard.

The military judge's failure to clearly and unambiguously apply the proper legal theory requires that this Court set aside his findings because there is simply no way to know that he applied the correct standard.

Request for Relief

The military judge, acting as a trier of fact, is not entitled to the presumption that he knew the law and applied it

correctly because he expressly acknowledged that he simply did not know what definition to apply. This scenario is analogous to instructional error before a panel of members. The Government cannot prove this error was harmless beyond a reasonable doubt because it is not clear what definition the military judge employed, or that he employed the appropriate definition from the plain language of the statute.

LCpl Torres respectfully requests this Court set aside and dismiss Charge I and remand for sentence reassessment.

III.

THE APPLICATION OF ARTICLE 120(B)(3) TO LCPL TORRES VIOLATES HIS RIGHT TO EQUAL PROTECTION UNDER THE LAW.

Standard of Review

Whether a statute is unconstitutional as applied is reviewed *de novo*. *United States v. Ali*, 71 M.J. 256, 265 (C.A.A.F. 2012). Where an accused has failed to object below, this Court reviews for plain error. *United States v. Goings*, 72 M.J. 202 (C.A.A.F. 2013).

Principles of Law and Discussion

"The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike.'" *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (citation omitted). Through reverse incorporation, the Fifth Amendment imposes this obligation on the federal government. *See Bolling v. Sharpe*,

347 U.S. 497, 500 (1954). Here, LCpl Torres and A.M. were not treated equally under the law despite being in the same situation. LCpl Torres was at least as intoxicated, if not more so, than A.M. at the time of the sexual act. The "new new" Article 120 crime of Sexual Assault punishes a person that engages in a sexual act with another person who, because of impairment by alcohol, is incapable of consenting. MCM, ¶ 45(b)(3)(a). As charged by the Government in this case, it is the "impairment by alcohol" that is dispositive.

Here, both LCpl Torres and A.M. engaged in a sexual act with a person who had been drinking, yet the person with the higher symptoms of impairment is labeled the perpetrator while the other person is labeled the victim. The only significant difference between the two is gender. That is neither fair nor constitutional. The law cannot stand as applied here because the crucible of measurement, alcohol impairment, is not being applied in a fair manner. It violates the Fourteenth Amendment's equal protection guarantee.

Admittedly, different classification is not, on its own, dispositive of finding a constitutional violation. But equal protection principles demand that a statutory classification "bear a rational relationship to an independent and legitimate legislative end." *Romer v. Evans*, 517 U.S. 629, 633 (1996). For the law to treat one group of people differently than

another, the Government must show that there was a reason for the discrepancy that went beyond mere hostility to the targeted group. *Id.* at 632. Here, there is no apparent rational reason for the law to treat these two individuals differently if the standard by which they are judged is truly impairment by alcohol. If engaging in sexual intercourse with A.M. was a crime because of the effect alcohol had on her mental capacity that evening, then it was also a crime for A.M. to engage in sexual acts with LCpl Torres. The law must apply equally to all. That is what the Equal Protection Clause requires. Here, however, the law was not applied equally. That inequality violated LCpl Torres' constitutional rights.

Request for Relief

This Court should set aside the findings as to Charge I and remand the case for a rehearing on sentence.

IV.

IN THIS PROSECUTION FOR A VIOLATION OF ARTICLE 120, THE ELEMENT THAT A.M. WAS "INCAPABLE OF CONSENTING TO THE SEXUAL ACT DUE TO IMPAIRMENT BY ALCOHOL" IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO LCPL TORRES WHERE THE MILITARY JUDGE HIMSELF ACKNOWLEDGED HE DID NOT KNOW WHAT STANDARD TO APPLY.

Standard of Review

Whether a statute is unconstitutional as applied is reviewed *de novo*. *Ali*, 71 M.J. at 265. Where an accused has

failed to object below, this Court reviews for plain error. *Goings*, 72 M.J. at 202.

Discussion

"Incapable of consenting to the sexual act due to impairment by alcohol" is not sufficiently specific to inform a member of the public as to when it would be illegal to have sex with a person who has been drinking alcohol, because all drinking cause some level of impairment. An act of Congress is unconstitutionally vague if a person cannot reasonably discern whether the contemplated conduct is criminal. *United States v. Harriss*, 347 U.S. 612, 617 (1954). Due Process guaranteed by the Fifth Amendment requires fair notice that an act is forbidden and subject to criminal sanctions. *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003) (citing *United States v. Bivens*, 49 M.J. 328, 330 (C.A.A.F. 1998)); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). People of "common intelligence" must not be forced to guess at the meaning of the criminal law. *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

Statutes are also unconstitutionally vague when they do not provide standards for prosecutors and law enforcement officials. *Parker v. Levy*, 417 U.S. 733, 774-75 (1974). In other words, "[t]he Constitution does not permit a legislature to 'set a net large enough to catch all possible offenders, and leave it to

the courts to step inside and say who could be rightfully detained, and who should be set at large.'" *City of Chicago v. Morales*, 527 U.S. 41, 60 (1999) (quoting *United States v. Reese*, 92 U.S. 214, 221 (1876)).

Here, the application of the crime of Sexual Assault, Article 120, UCMJ, to LCpl Torres is unconstitutionally vague because it is unclear what factors satisfy the element of "incapable of consent due to impairment of alcohol" in this case. The law cannot be understood by the common man or those who prosecute it.

The crime of Sexual Assault prohibits engaging in a sexual act with a person who because of impairment by alcohol cannot consent. Article 120(b)(3)(a), 10 U.S.C. § 920 (2012). Here, the military judge acknowledged that he really had no standard to go off of when determining whether this element had been met. (R. at 442.) He stated that he *sua sponte* made special findings to give the benefit of the doubt to LCpl Torres and let the reviewing authorities decide if he had applied the right definition. (R. at 442.) Where the military judge, a learned person in the law, acknowledges he does not know what the standard is, then it is plain that this statute lacks a standard that the "common person" can understand.

The military judge's finding of guilt is even more perplexing in light of the expert testimony regarding the amount

of alcohol present in A.M. in this case. Looking at the evidence in the light most favorable for the Government, A.M.'s BAC at the time of the sexual act was at most .09, but this level assumes she had just arrived at a 0.00 BAC at the time of the blood draw--an unlikely scenario. (R. at 315.) It is hard to fathom how a person with .08 BAC is legally able to drive a vehicle but one with a .09 cannot consent to sexual activity -- surely it cannot be Congress' intent to treat consenting to sex as a more difficult task than driving a vehicle.

It is also important to note the charging decision. According to the Government, it is A.M.'s impairment by alcohol that made her unable to consent, not any other factor. The amount of alcohol must control, and by finding LCpl Torres guilty where 1) A.M.'s BAC is this low and, 2) the effects of alcohol on LCpl Torres were so much more significant, the term lacks an ascertainable standard for inclusion and exclusion.

Unbiased officers had the opportunity to view the intoxication of both parties. The police were unable to arouse LCpl Torres by calling out to him. (R. at 124.) He woke up confused, disoriented and appeared heavily intoxicated to the deputies when he awoke. (R. at 118, 125.) The deputies testified it took LCpl Torres awhile to get his bearing and understand what was going on and they had difficulty interviewing him because of his level of intoxication and

slurred speech. (R. at 118, 128.) Even A.M. noticed his level of inebriation. In her 911 call A.M. stated LCpl Torres was "really really drunk." (Prose. Ex. 1 (transcribed at Appellate Ex. XVIII, at 5.)) When the police arrived, she told the officers she knew LCpl Torres was not sober. (R. at 134.)

In contrast, the deputies observed A.M. could walk without stumbling and she was coherent and articulate. (R. at 123.) Even A.M. agreed during trial that she does not sound intoxicated during her call to 911. (R. at 199.) Moreover, right before the event A.M. was coherent enough to text message friends to try to set up LCpl Torres. (R. at 179.) The observations and scientific evidence point to LCpl Torres being more impaired by alcohol than A.M. Therefore the conviction of LCpl Torres in this case, using a standard the military judge acknowledged as unclear, leads to the conclusion that Article 120, UCMJ, is unconstitutionally vague as applied in this case.

Request for Relief

This Court should set aside the findings as to Charge I and remand the case for a rehearing on sentence.

V.

THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT.

Standard of Review

This Court reviews issues of legal and factual sufficiency *de novo*. *United States v. Hays*, 62 M.J. 158, 162 (C.A.A.F. 2005); *see also* Art. 66(c), UCMJ, 10 U.S.C. § 866(c) (2012).

Principles of Law

The test for legal sufficiency is whether, when viewed in the light most favorable to the Government, the evidence is such that a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *United States v. Harper*, 22 M.J. 157, 161 (C.M.A. 1986).

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing this Court neither saw nor heard the witnesses at trial, this Court is convinced, beyond a reasonable doubt, of Appellant's guilt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). In conducting this review, this Court may independently judge the credibility of the witnesses at trial, resolve questions of fact, and substitute its judgment for that of the military judge or the court-martial members. Art. 66(c), UCMJ, 10 U.S.C. § 866(c) (2012); *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990).

Discussion

The scientific evidence coupled with A.M. and Cpl C.M.'s credibility problems make LCpl Torres's conviction for Sexual Assault legally and factually insufficient. The medical

testimony only indicated that at most, A.M.'s BAC was .09. (R. at 315.) Moreover, A.M. and her husband's accounts of her intoxication are questionable due to their credibility problems. A.M.'s account of being significantly impaired is also unbelievable because the amount she claimed to drink was contradicted by the scientific evidence and her ability to text right before the event, which shows coherence. (R. at 179, 301.) The police officer's observations of her also indicate she was not significantly impaired. (R. at 123, 179, 315, 327-38.) Moreover, she tried to tell the 911 operator that it was possible LCpl Torres hit her husband when she knew full well her husband was bleeding because she knocked him off a table. (R. at 191.) Cpl C.M.'s reporting is questionable because he was severely intoxicated when he observed his wife's condition and later on a trial it was shown that he was facing charges of false official statement in an unrelated incident. (R. at 220-21, 230.) Cpl C.M. literally passed out to the point of not waking when he broke his nose on the cement within minutes of making his "observations" about his wife's condition. These observations are questionable given his level of intoxication.

A.M. also had a motive to lie. At the time of the event she had been married a short time. (R. at 152.) She had just had a fight with her husband the night before over another women and they even spoke of divorce. (R. at 180-81, 199.) The

discord in her marriage gave her the motive to get back at her husband by engaging in sex with another man. Only subsequently did A.M. get scared of what she did and lied to cover it up to preserve her marriage. This adds to reasonable doubt.

In regard to the legal and factually sufficiency of the adultery charge, as the defense argued in its R.C.M. 917 motion, the prejudice to good order and discipline element was not met. The effect of the event on Cpl C.M, a Marine, had nothing to do with adultery, it had to do with rape. The reason Cpl C.M. does not trust other Marines and the reason he does not introduce people to his wife is because of his paranoia about rape, not adultery. (*See* R. at 351; Appellate Ex. XXVIII.) Because the prejudice to Cpl C.M. does not stem from the crime of adultery, there was no competent evidence of prejudice to good order and discipline.

Request for Relief

This Court should examine the evidence and conclude that it is insufficient to find LCpl Torres sexually assaulted A.M. and that there is insufficient evidence of the element of prejudice to good order and discipline to support the adultery charge. The findings of guilt in this case must bet set aside.

VI.

THE MILITARY JUDGE ERRED IN HIS CALCULATION OF THE MAXIMUM PUNISHMENT FOR CHARGE I.

Standard of Review

The maximum punishment authorized for an offense is a question of law reviewed *de novo*. *United States v. St. Blanc*, 70 M.J. 424, 428 (C.A.A.F. 2012) (citing *United States v. Beaty*, 70 M.J. 39, 41 (C.A.A.F. 2011)).

Discussion

At trial, the military judge analyzed the issue of what maximum punishment should apply. (R. at 375-79.) Over defense objection, the military judge determined life in prison without the possibility of parole was the maximum punishment. He then applied the rule of lenity to determine that thirty years of confinement should be considered the maximum punishment in this case because of this statute's similarity to the previous version of Article 120(b). (R. at 379.) The military judge erred in this determination because the maximum punishment in this case equates to summary-court martial limits.

This Court should apply the same reasoning regarding the applicability of summary court-martial punishments to Article 120 offenses as advanced by the respondent in *United States v. Booker*. (App. 1.) Although this Court has decided this issue adversely to LCpl Torres's position, the C.A.A.F. left the issue open in the normal course of appellate review. (App. 2.) LCpl Torres raises this assignment of error to preserve the issue.

Congress drastically amended Article 120, UCMJ, in the National Defense Authorization Act for Fiscal Year 2012. Pub. L. No. 112-81, 125 Stat. 1298 (2011) ("NDAA 2012"). The amendments included the addition of new punitive articles like Article 120, 120a, 120b, and 120c, and applied to crimes committed on or after 28 June 2012. MCM, pt. IV, ¶ 45, Note at 68. However, Congress did not include subparagraphs that would normally address elements, explanation, lesser included offenses, maximum punishments, and sample specifications for any of the new provisions. MCM, pt. IV, ¶ 45, Note at 70. Such additional materials are generated under the President's authority to prescribe rules pursuant to Article 56, UCMJ. *Id.*

However, the new provisions stated that persons convicted under these new articles "shall be punished as a court-martial may direct." MCM, pt. IV, ¶ 45a.(b). Going through the R.C.M. 1003 analysis, the offense is not listed in the MCM, it is not closely related to a MCM provision, nor is it directly analogous to a federal crime. Accordingly, the rule of lenity requires applying the least possible punishment--that of summary court-martial.

The President issued Executive Order (EO) 13643-Amendments to the Manual for Courts-Martial, United States, on 15 May 2013, which set forth the maximum punishments, but those punishments were not in effect at the time of LCpl Torres' court-martial

convened. Exec. Order No. 13643, 78 Fed. Reg. 98 (May 21, 2013). The allegations that form the basis of Charge I occurred on 3 July 2012, and therefore fell in the window of time when there was no maximum punishment assigned to this case.

Request for Relief

This Court should set aside the sentence and remand the case for a rehearing on sentence in light of the dramatic change in the sentencing landscape.

VII.

THE COMMANDANT'S HERITAGE BRIEF TOUR IMPERMISSIBLY CREATED APPARENT UNLAWFUL COMMAND INFLUENCE.

Standard of Review

Claims of actual and apparent unlawful command influence are reviewed *de novo*. *United States v. Harvey*, 64 M.J. 13, 19 (C.A.A.F. 2006).

Principles of Law

Article 37, UCMJ, prohibits any person who is a member of the regular component of the armed forces from attempting to "coerce or, by any unauthorized means, influence the action of a court-martial or any member thereof, in reaching the findings and sentence in any case." Art. 37, UCMJ, 10 U.S.C. § 837 (2012). The C.A.A.F. has warned that unlawful command influence is the "mortal enemy of military justice." *United States v. Douglas*, 68 M.J. 349, 355 (C.A.A.F. 2010). In fact, the public

must have confidence the military court-martial system is free from "even the appearance of unlawful command influence." *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006) (quoting *United States v. Rosser*, 6 M.J. 267, 271 (C.M.A. 1979)).

Unlawful command influence can be either actual or apparent. Apparent unlawful command influence exists "where an objective, disinterested observer, fully informed of all facts and circumstances would harbor a significant doubt about the fairness of the proceeding." *United States v. Stoneman*, 57 M.J. 35, 42 (C.A.A.F. 2002).

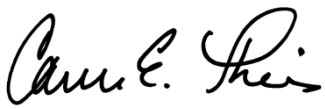
Discussion

In this case, a disinterested observer would harbor significant doubt about the fairness of the proceeding because the matter was discarded after LCpl Torres chose to go military judge alone. Defense counsel did raise the issue. (Appellate Ex. II.) The trial court, in considering the effect of the Heritage Briefs, found no actual Unlawful Command Influence, but did see apparent unlawful command influence. (R. at 57.) However, once apparent unlawful command influence was found there was no relief provided because LCpl Torres chose a military judge alone. The military judge was still a Marine, under the authority of the commandant. Notably, the C.A.A.F. has recognized the "difficulty of a subordinate ascertaining for

himself or herself the actual influence a superior has on that subordinate." *United States v. Gerlich*, 45 M.J. 309, 313 (C.A.A.F. 1996) (citing *Rosser*, 6 M.J. at 272). Unlawful command influence was found in this case, but there were no remediating measures. Accordingly this court should act to purge this scourge and dismiss Charge I.

Request for Relief

This Court should set aside Charge I and remand for a new sentencing in this case in light of the effect of the Commandant's Heritage Brief.



CARRIE E. THEIS
Lieutenant, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris St, SE
Bldg 58, Ste. 100
Washington Navy Yard. D.C. 20374
Tel: (202) 685-7390
Fax: (202) 685-7426
Carrie.theis@navy.mil

Certificate of Filing and Service

I certify that a copy of the foregoing was delivered to the Court and to Director, Appellate Government Division, and electronically filed on 12 February 2014.

CARRIE E. THEIS
Lieutenant, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris St, SE
Bldg 58, Ste. 100
Washington Navy Yard. D.C. 20374
Tel: (202) 685-7390
Fax: (202) 685-7426
Carrie.Theis@navy.mil

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Darron WARD Jr. Culinary Specialist Seaman Apprentice (E-2) United States Navy, Appellant	SUPPLEMENT TO PETITION FOR GRANT OF REVIEW Crim.App. No. 201400021 USCA Dkt. No. _____/NA

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

JESSICA L. FICKEY
LT, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris St, SE
Bldg 58, Suite 100
Washington Navy Yard, D.C. 20374
Tel: (202) 685-7297
Fax: (202) 685-7426
jessica.fickey@navy.mil
Bar No. 35895

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Issues Presented

I.

THE CONVENING AUTHORITY ISSUED AN INSTRUCTION THAT LIMITED COURT-MARTIAL MEMBER NOMINATIONS TO PERSONNEL ONLY IN THE PAY-GRADES BETWEEN E-7 AND O-5. THE LOWER COURT FOUND THIS SYSTEMATIC EXCLUSION OF PERSONNEL TO BE ERROR, BUT HARMLESS. SHOULD THIS COURT SET ASIDE CSSA WARD'S CONVICTIONS BASED ON THE RATIONALE OF *UNITED STATES V. KIRKLAND* DUE TO THE UNRESOLVED APPEARANCE OF UNFAIRNESS?

II.

THE LOWER COURT HELD IT WAS ERROR FOR THE GOVERNMENT TO FAIL TO DISCLOSE THE CONVENING AUTHORITY'S MEMBER SELECTION INSTRUCTION, BUT FOUND THIS ERROR TO BE HARMLESS BEYOND A RESONABLE DOUBT. THE LOWER COURT FAILED TO TAKE INTO ACCOUNT THE SJA'S STATEMENT THAT HE WOULD HAVE ADVISED EMPANELING NEW MEMBERS HAD HE KNOWN ABOUT THE IMPROPER SELECTION PROCESS; THIS WOULD LIKELY HAVE RESULTED IN A TAINT-FREE MEMBERS PANEL. TAKING ALL FACTS INTO ACCOUNT, SHOULD THIS COURT FIND THE DISCOVERY VIOLATION WAS NOT HARMLESS BEYOND A REASONABLE DOUBT?

Introduction

This Court's precedent is clear: convening authorities are prohibited from systematically excluding members by rank during the court-martial selection process. And yet such a systematic exclusion is exactly what happened at CSSA Ward's trial.

The convening authority (CA) issued an instruction that categorically excluded all members below the pay-grade E-7 and also all O-6 members. The Navy-Marine Corps Court of Criminal Appeals (NMCCA) properly found this systematic exclusion to be

error, but incorrectly found the error to be harmless. This holding was despite the fact that CSSN Ward, as an E-2, had no Seamen, Petty Officers or Captains present on his panel. The exclusion of so many categories of qualified personnel thwarted Congress' will under Article 25, UCMJ, and created an impermissible appearance of unfairness in our military justice proceedings.

This Court should grant review for three reasons. First, the facts in this case are strikingly similar to *United States v. Kirkland*, where this Court reversed when it found there was an "unresolved appearance" of the exclusion of potentially qualified members. 53 M.J. 22, 25 (C.A.A.F. 2000). The lower court ignored this rationale from *Kirkland* when determining prejudice for the systematic exclusion of members in CSSA Ward's court-martial. The NMCCA disregarded this Court's precedent and this Court should grant review to properly analyze the issue. C.A.A.F. R. 21(b)(5)(B)(i).

Second, this Court should grant review to reaffirm the principle that the members selection process needs to not only be fair, but also needs to appear to be fair. In the military justice system, an accused is not entitled to trial by jury, but rather by members hand-picked by the officer who decides to court-martial the accused and who selects the charges. It is

vitally important to the legitimacy of our judicial system that the members selection process be viewed as fair and impartial.

While the appearance rationale from *Kirkland* has not been explicitly overruled, this Court's recent member selection cases have not discussed that standard. This Court should grant review to reemphasize the importance of a fair member selection process to the military justice system and expressly affirm or overrule *Kirkland*. C.A.A.F. R. 21(b)(5)(A). Congress created Article 25, UCMJ, for a reason, and this Court should enforce it as the caretaker of military justice. C.A.A.F. R. 21(b)(5)(F).

Last, the Government's failure to provide to defense the CA's nomination instruction at the pretrial and trial stage was a discovery violation. Yet the NMCCA found this error to be harmless beyond a reasonable doubt. The lower court's opinion, however, ignored an affidavit from the Force Judge Advocate (FJA). In the affidavit, the FJA stated he would have advised convening a new panel if he had known about the problematic nomination instruction. This information shows the discovery error was not harmless beyond a reasonable doubt because had the instruction been properly disclosed, CSSA Ward would have received a different members panel free from the taint of improper selection. This Court should grant review to give this fact proper consideration, unlike the in the lower court's opinion.

Statement of Statutory Jurisdiction

CSSA Ward received a court-martial sentence that included a punitive discharge and confinement for over one year. Accordingly, his case fell within the lower court's jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ). 10 U.S.C. § 866(b)(1). He invokes this Court's jurisdiction under Article 67, UCMJ. 10 U.S.C. § 867.

Statement of the Case

A members panel with enlisted representation, sitting as a general court-martial, convicted CSSA Ward, contrary to his pleas, of fleeing apprehension, rape, and communicating a threat, in violation of Articles 95, 120, and 134, UCMJ, 10 U.S.C. §§ 895, 920, and 934 (2012). (Charge Sheet; R. at 924.) The members found CSSA Ward not guilty of assaulting a commissioned officer, in violation of Article 128, UCMJ, 10 U.S.C. § 928. (Charge Sheet; R. at 924.) The members sentenced CSSA Ward to confinement for 933 days and a dishonorable discharge. (R. at 1004.) The CA approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed. (General Court-Martial Order No. 1-14, Jan. 10, 2014, at 2.)

On July 31, 2014, the NMCCA affirmed the findings and sentence in this case. *United States v. Ward*, No. 201400021,

2014 LEXIS 550 (N-M. Ct. Crim. App. Jul. 31, 2014.) This timely appeal follows.

Statement of Facts

On July 29, 2008, Commander, Naval Air Force Atlantic (COMNAVAIRLANT), issued a written instruction to his subordinate units to "publish procedures for submission of nominations for prospective courts-martial members" to COMNAVAIRLANT. (Supp. Request for Clemency, Jan. 9. 2014, encl. (1), at 1 para. 1.) Paragraph five of the instruction required each subordinate unit to provide a certain amount of personnel from pay-grades E-7 through O-5, and did not provide the opportunity to nominate individuals below the pay-grade of E-7, or in the pay-grade of O-6. (*Id.* at 2.)

COMNAVAIRLANT referred the charges against CSSA Ward on May 17, 2013. (Charge Sheet.) This instruction remained in effect during the time the members panel was selected in this case. In accordance with the instruction, none of the members named in the three Convening Orders for this court-martial were below the rank of Chief Petty Officer or in the rank of Captain. (General Court-Martial Amending Orders 1-13; 1C-13; 1D-13.) No one in the excluded ranks served on CSSA Ward's panel. (R. at 100-01.)

Prior to trial, the defense submitted a discovery request that asked for copies of "all information, written or otherwise, which was used by the Convening Authority and the various

advisory personnel in nominating prospective, and in selecting final court members for all court-martial orders in this case . . . ." (Supp. Request for Clemency, encl. 7, at 7 para. nn.) The Government responded it "acknowledges its duty to disclose R.C.M. 912 materials to the defense should the case proceed to trial or presentencing with members." (Supp. Request for Clemency, encl. 9, at 3 para. 12.) The Government did not provide the instruction to the defense at any time during trial. (Supp. Request for Clemency, encl. 8, at 1 para. 2.)

The defense team did not know about the instruction's systematic exclusion of members until they had a chance to review it on 7 January 2014, roughly four months after trial. (Supp. Request for Clemency, encl. 8, at 1 para. 4, 5.) Trial defense counsel immediately submitted a supplemental clemency request to COMNAVAIRLANT, asking for either the findings and sentence to be set aside and a rehearing or for a post-trial Article 39(a) session to litigate this issue. (Supp. Request for Clemency, Jan. 9, 2014.) The FJA responded to the defense's allegation in an addendum the next day, giving no legal analysis and merely stating the issue was waived. (FJAR Addendum, Jan. 10, 2014.) The CA acted the same day as the addendum, awarding no clemency and not directing a post-trial Article 39(a) hearing to examine the issue. (General Court-Martial Order No. 1-14, Jan. 10, 2014, at 2-3.)

At the NMCCA, CSSA Ward again raised the improper selection issue. The lower court granted the Government's motion to attach to the record three affidavits: one from the FJA who served before CSSA Ward's court-martial, one from the FJA who served during and after the court-martial, and one from the CA.[1] The lower court considered these affidavits and found both the systematic exclusion of members and the Government's failure to turn over the CA's nomination instruction to be error, but also found these errors were harmless. CSSA Ward asserts NMCCA's prejudice determinations were flawed and this Court should grant review to correct these issues.

[1] The FJA who served before CSSA Ward's court-martial and advised the CA on empaneling the members was Captain (CAPT) Frederick Mitchell, JAGC, USN. CAPT Mitchell was the Chief Judge of the NMCCA at the time of the opinion and a Senior Judge when he submitted his affidavit.

Reasons for Granting Review

I.

THE CONVENING AUTHORITY ISSUED AN INSTRUCTION THAT LIMITED COURT-MARTIAL MEMBER NOMINATIONS TO PERSONNEL ONLY IN THE PAY-GRADES BETWEEN E-7 AND O-5. THE LOWER COURT FOUND THIS SYSTEMATIC EXCLUSION OF PERSONNEL TO BE ERROR, BUT HARMLESS. THIS COURT SHOULD APPLY THE RATIONALE OF *UNITED STATES V. KIRKLAND* AND REVERSE DUE TO THE UNRESOLVED APPEARANCE OF THE EXCLUSION OF POTENTIALLY QUALIFIED MEMBERS.

Standard of Review

This Court reviews *de novo* whether a court-martial panel was "selected free from systematic exclusion." *Kirkland*, 53 M.J. at 24 (citing *United States v. McClain*, 22 M.J. 124 (C.M.A. 1986)).

Discussion

There is not a constitutional right under the Sixth Amendment to trial by a jury in the military. *United States v. Kemp*, 46 C.M.R. 152, 154 (C.M.A. 1973). At the same time, a military accused has a right to a fair and impartial members panel. *United States v. Roland*, 50 M.J. 66, 68 (C.A.A.F. 1999). This right "is the cornerstone of the military justice system." *United States v. Hilow*, 32 M.J. 439, 442 (C.M.A. 1991). The selection of the members panel is governed by Article 25(d)(2), UCMJ, which provides:

> When convening a court-martial, the convening authority *shall* detail as members thereof such members

> of the armed forces as, in his opinion, are *best qualified* for the duty by *reason of age, education, training, experience, length of service, and judicial temperament.*

(emphasis added.) Thus, the convening authority must apply the criteria from Article 25, UCMJ, when selecting a members panel.

To ensure a CA makes an appropriate selection under Article 25, UCMJ, this Court's precedent is clear: it is impermissible to categorically exclude individuals from the member selection process by rank.[2] Thus, "[b]lanket exclusion of qualified officers or enlisted members in the lower grades is at odds with congressional intent and cannot be sustained." *Roland*, 50 M.J. at 69 (quoting *United States v. Nixon*, 33 M.J. 433, 434 (C.M.A. 1991)).

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[2] *See Kirkland*, 53 M.J. at 25 (reversing when potentially qualified members below rank of E-7 were excluded from nominating process); *McClain*, 22 M.J. at 131 (reversible error to systematically exclude junior officers and enlisted members below E-7 in order to avoid light sentences); *United States v. Daigle*, 1 M.J. 139, 141 (C.M.A. 1975) (reversing where rank was "used as a device for deliberate exclusion and systematic exclusion of qualified persons"); *United States v. Greene*, 43 C.M.R. 72, 78-79 (C.M.A. 1970) (reversible error due to systematic exclusion of junior officers); *United States v. Morrison*, 66 M.J. 508, 510 (N-M. Ct. Crim. App. 2008) ("A court-martial may not be purposefully 'stacked' to achieve a desired result and officers, otherwise eligible to serve, may not be excluded from service based solely on their rank."); *cf. United States v. Yager*, 7 M.J. 171, 173 (C.M.A. 1979) (finding it permissible to exclude members below grade E-3 because of the demonstrated relationship to Article 25, UCMJ, criteria); *United States v. Nixon*, 33 M.J. 433, 435 (C.M.A. 1991) (permissible for convening authority to select only high ranking NCOs because his testimony showed he complied with Article 25, UCMJ, criteria).

Almost all enlisted personnel (excluding those from his own command) in the rank of E-2 and above and all officers were eligible to serve on CSSA Ward's court-martial panel. The NMCCA properly found it was error for the CA to systematically exclude members by rank, which violated Article 25, UCMJ. The lower court, however, found this error to be harmless, citing a list of factors similar to those in *United States v. Bartlett*, 66 M.J. 426, 431 (C.A.A.F. 2008). Specifically, the NMCCA found there was no evidence of improper motive, the CA was advised of his Article 25 responsibilities, and the members met the criteria in Article 25, UCMJ.

While in *Bartlett* members were excluded based upon their military designators, *Kirkland* is more clearly on point because it directly addresses systematic exclusion by rank. Further, it has not been directly overruled. This Court should grant review of this issue both because the NMCCA ignored the precedent of *Kirkland* and to reemphasize the importance of the appearance of fairness in the member selection process.

a. The NMCCA ignored this Court's precedent from *United States v. Kirkland*.

The facts of the flawed member selection in this case are nearly identical to the facts in *Kirkland*. Despite this similarity, the NMCCA did not discuss *Kirkland*'s holding in relation to the remedy for the improper selection at issue here.

In *Kirkland*, the legal office sent a quarterly letter to Commanders, asking for nominees for a member selection pool. 53 M.J. at 23. The letter told them to nominate senior enlisted members using an attached chart. *Id.* However, the chart did not provide any place to nominate court members below the grade of E-7. *Id.* The staff judge advocate (SJA) testified that he informed the CA on "his duties and his ability to select other military members, assuming they met Article 25 criteria." *Id.*

This Court in *Kirkland* ruled the exclusion of potentially qualified members below the grade of E-7 was improper. *Id.* at 25. Even despite Kirkland pleading guilty at his court-martial, this Court held "'reversal of the appellant's sentence is appropriate to uphold the essential fairness and integrity of the military justice system.'" *Id.* (citing *McClain*, 22 M.J. at 133 (Cox, J., concurring in the result). Specifically, this Court found that there was an "unresolved *appearance*" that "potentially qualified court members below the grade of E-7 were excluded," so it was appropriate to set aside and dismiss the sentence.[3] *Id.* (emphasis added).

In CSSA Ward's case, the nomination instruction was in substantially the same form as in *Kirkland*--it listed required

[3] The appellant in *Kirkland* pled guilty in front of a military judge, so the improper selection of members had no impact on the findings. *Id.* Thus, this Court only reversed the sentence in that case.

amounts of personnel from each rank and did not provide the opportunity to nominate members below the pay-grade of E-7 and additional O-6s. Further, the evidence presented to support the selection process was also similar--the FJAs and the CA here all stated in their affidavits the CA knew of his duties under Article 25, UCMJ, and was aware he could choose members outside of the provided nomination list. With these identical facts in *Kirkland*, this Court found reversal was necessary due to an "unresolved appearance" of improper exclusion in order to "uphold the essential fairness and integrity" of our system. *Id.*

Here, the NMCCA did not discuss the ultimate holding in *Kirkland*, and this silence was error. The facts in these two cases are too similar for the lower court to disregard this Court's precedent. This Court should grant review to properly apply the rationale from *Kirkland*.

b. <u>This Court should ensure the members selection process is free from even the appearance of unfairness.</u>

In the last decade since *Kirkland* was decided, this Court has reviewed several other cases involving member selection issues. In determining prejudice in these situations, this Court recently stated it looks at whether the failure to comply with Article 25, UCMJ, "materially prejudiced the substantial rights of the accused." Article 59(a), UCMJ; *United States v.*

Gooch, 69 M.J. 353, 360 (C.A.A.F. 2011). When a preliminary screening of panel members improperly excludes by rank, the Government has the burden to "demonstrate lack of harm." *Bartlett*, 66 M.J. at 430 (citing *United States v. Dowty*, 60 M.J. 163, 175-75 (C.A.A.F. 2004)).

In addition to demonstrated unfairness, this Court has explicitly shown concern about the *appearance* of unfairness in an improperly selected members panel. In *United States v. McClain*, this Court focused on an appearance standard, stating

> . . . because "[d]iscrimination in the selection of court members on the basis of improper criteria threatens the integrity of the military justice system and violates the Uniform Code," *see United States v. Daigle*, 1 M.J. at 140 – this Court is *especially concerned to avoid either the appearance or reality of improper selection*.

22 M.J. at 132 (emphasis added). More recently, in *United States v. Dowty*, this Court also carried out a brief appearance analysis, observing there was "no *appearance* of unfairness arising from the service of any of the volunteer members." *Dowty*, 60 M.J. at 175 (emphasis added). Lastly, this Court also held in *Kirkland* there was an "unresolved appearance" of improperly selected members. 53 M.J. at 25.

This Court should grant review of CSSA Ward's case to reaffirm the importance of the appearance of fairness in members selection. The outcome in *Bartlett* seems to undermine the holding in *Kirkland* about the importance of a fair appearance in

this process. This principle of impartiality is fundamental to the legitimacy of our military justice system. A basic tenant of military justice is that it not only be a fair system, but that it also be perceived as fair. In general, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954) (Frankfurter, J.).

This concept is especially true in light of the fact that we do not have juries in our system. Rather the person referring the charges hand-selects the members. This process is a departure from the Constitutional rights every other defendant in the United States is provided. Because it is a departure from the norm of our country's basic legal tenants, this process must be beyond reproach to remain a legitimate system of justice. Thus, this Court has recognized it should be "especially concerned to avoid either the appearance or reality of improper selection." *McClain*, 22 M.J. at 132.

Under the prejudice holding in *Bartlett*, appellants are essentially left without any recourse from an improperly selected panel. This result further weakens the fairness of the members selection process. SJAs and CAs merely need to show that the CA considered Article 25, UCMJ, at some point in the selection process, even though an impermissible criteria limited the members pool before the CA even saw the list of candidates. The NMCCA's decision allows a CA to easily "fix" any improperly

selected members panel after the fact with corrective affidavits that reference Article 25, UCMJ, as seen here. This situation allows the presence of a fundamental flaw in the process before Article 25, UCMJ, consideration can even occur. Absent a smoking gun in the form of inculpatory testimony from an offending CA, an appellant can never demonstrate prejudice under this member selection framework. This result both appears to be, and actually is, unjust.

This tacit approval of an impermissible selection process allows CAs to continue systematic exclusion of members by rank without any oversight by this Court, in direct contradiction to Congressional intent. An appellant has no opportunity to receive meaningful relief under this practice, basically turning Article 25, UCMJ, into a dead letter. Thus, this Court needs to reemphasize the importance of the appearance of fairness in the members selection process. Otherwise, this cautionary tale will continue to occur:

> In short, we have a flawed process that produced multiple felony convictions. We have a criminal record that not only was imposed without a trial by jury, but through a process that failed to apply the procedures in lieu of trial by jury.

Dowty, 60 M.J. at 177 (Effron, J., dissenting). This Court should grant review to ensure the legitimacy of our military justice system and to prevent other CAs from continuing this unsanctioned practice in the future.

Conclusion

CSSA Ward's court-martial was composed of improperly selected members substantially more senior than his pay-grade of E-2. This panel convicted him of several serious crimes, including rape, and sentenced him to over two and half years in the brig and a dishonorable discharge. On its face, the composition of members appears to be unfair. The lower court failed to address this Court's precedent in *Kirkland* and sanctioned the improper selection process when it affirmed below. This result cannot stand. As the caretaker of military justice, this Court should revitalize the importance of the appearance of fairness in the members selection process, sending a message to all CAs that violations of Article 25, UCMJ, are not tolerated. In granting review, this Court will uphold the integrity of our criminal justice system by ensuring the public that the selection of members for courts-martial appears to be fair and just.

II.

THE LOWER COURT HELD IT WAS ERROR FOR THE GOVERNMENT TO FAIL TO DISCLOSE THE CONVENING AUTHORITY'S MEMBER SELECTION INSTRUCTION, BUT FOUND THIS ERROR TO BE HARMLESS BEYOND A RESONABLE DOUBT. THE LOWER COURT FAILED TO TAKE INTO ACCOUNT THE SJA'S STATEMENT THAT HE WOULD HAVE ADVISED EMPANELING NEW MEMBERS HAD HE KNOWN ABOUT THE IMPROPER SELECTION PROCESS; THIS WOULD LIKELY HAVE RESULTED IN A TAINT-FREE MEMBERS PANEL. THIS COURT SHOULD FIND THE DISCOVERY VIOLATION WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

Discussion

Article 46, UCMJ, states all parties "shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." To determine whether there is a discovery violation, this Court has recognized a two-step inquiry:

1. "determine whether the information or evidence at issue was subject to disclosure or discovery;" and if there was nondisclosure,
2. "test the effect of that nondisclosure on the appellant's trial."

United States v. Roberts, 59 M.J. 323, 325 (C.A.A.F. 2004). "Where an appellant demonstrates that the Government failed to disclose discoverable evidence in response to a specific request or as a result of prosecutorial misconduct, the appellant will be entitled to relief unless the Government can show that nondisclosure was harmless beyond a reasonable doubt." *Id.* at

327 (citing *United States v. Hart*, 29 M.J. 407, 410 (C.M.A. 1990)).

Here, the NMCCA properly concluded the CA's instruction was subject to discovery and the Government erred when it failed to disclose it. The lower court, however, incorrectly found this nondisclosure was harmless beyond a reasonable doubt. Based on the same rationale as the members selection issue, the NMCCA found CSSA Ward was tried by a fair and impartial panel so there was no prejudice from the discovery violation.

The NMCCA's opinion ignored a critical fact from the affidavit of one of the FJAs. The Government attached to the record the affidavit of Captain (CAPT) Thomas Welch, JAGC, USN, who was the FJA during CSSA Ward's court-martial. In that affidavit, which was submitted for another case where the issue of the same CA selection instruction was litigated at trial, the FJA stated:

> Had [defense counsel] contacted me prior to trial or had we been informed that our process might be problematic, like we did two weeks later in the DCFN Rhodes case, *I would have recommended to the Convening Authority that we empanel a new panel*, with specific attention to the issues raised by the accused.

CAPT Thomas Welsh Affidavit of Feb. 21, 2014, at 3 (emphasis added). In sum, the FJA stated that had he been aware of the issue with the selection process before trial, he would have recommended a new panel. If the Government properly disclosed

the problematic CA selection instruction, then the defense could have litigated this issue at trial, or at least brought it to the attention of the CA. In other words, CSSA Ward would have had an opportunity to be tried by a properly selected members panel.

In light of these facts, it defies reason to say the failure to disclose the insurrection was harmless, let alone harmless beyond a reasonable doubt. The Government presented direct evidence in the form of CAPT Welsh's affidavit that showed this discovery violation was actually *harmful* under any standard of review. If the Government turned over the instruction before trial, as it was required to do, the CA would have empaneled different members and CSSA Ward would have been tried by a properly-selected members panel. *Id.* The NMCCA ignored this critical fact in its opinion, giving the issue of prejudice a one-sentence analysis. This decision was incorrect.

Conclusion

Because of the Government's error, the defense did not get to address the issue in the member selection process at trial, which deprived CSSA Ward of a properly selected members panel. The Government cannot show its failure to disclosure was harmless beyond a reasonable doubt. Instead, the Government presented evidence on appeal to show it was prejudicial. The

lower court ignored this fact, so this Court should grant review to properly examine the issue.

Conclusion

CSSA Ward's court-martial contained two injustices: he was convicted and sentenced by members who were not properly selected according to statute, and he was not given the opportunity to challenge this error at trial. This Court should therefore grant review to remedy these issues.

JESSICA L. FICKEY
LT, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris St, SE
Bldg 58, Suite 100
Washington Navy Yard, D.C. 20374
Tel: (202) 685-7297
Fax: (202) 685-7426
jessica.fickey@navy.mil
Bar No. 35895

Appendix

1. *United States v. Ward*, No. 201400021, 2014 CCA LEXIS 550 (N-M. Ct. Crim. App. Jul. 31, 2014).

Certificate of Filing and Service

I certify on September 25, 2014, the foregoing was electronically filed with the Court, and copies were electronically delivered to the Appellate Government Division and Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity

Certificate of Compliance

This supplement complies with the page limitations of Rule 21(b) because it contains less than 9,000 words. Using Microsoft Word 2010 with 12-point Courier New font, this supplement contains 4,499 words, exclusive of appendices and tables of contents and authorities.

JESSICA L. FICKEY
LT, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris St, SE
Bldg 58, Suite 100
Washington Navy Yard, D.C. 20374
Tel: (202) 685-7297
Fax: (202) 685-7426
jessica.fickey@navy.mil
Bar No. 35895

UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
J.R. MCFARLANE, K.M. MCDONALD, M.C. HOLIFIELD
Appellate Military Judges

UNITED STATES OF AMERICA

v.

DARRON D. WARD, JR.
CULINARY SPECIALIST SEAMAN APPRENTICE (E-2), U.S. NAVY

NMCCA 201400021
GENERAL COURT-MARTIAL

Sentence Adjudged: 13 September 2013.
Military Judge: CDR Michael J. Luken, JAGC, USN.
Convening Authority: Commander, Naval Air Force Atlantic, Norfolk, VA.
Staff Judge Advocate's Recommendation: CAPT T.J. Welsh, JACG, USN.
For Appellant: LT Jessica L. Fickey, JAGC, USN.
For Appellee: LCDR Keith B. Lofland, JAGC, USN; Maj David N. Roberts, USMC.

31 July 2014

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

PER CURIAM:

A general court-martial consisting of officer and enlisted members convicted the appellant, contrary to his pleas, of one specification each of fleeing apprehension, rape, and communicating a threat, in violation of Articles 95, 120, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 895, 920,

and 934.[1] The members sentenced the appellant to confinement for 933 days and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged and, except for the punitive discharge, ordered it executed.

The appellant raises three assignments of error: (1) that members below the rank of E-7 and above the rank of O-5 were impermissibly excluded in the nomination process; (2) that the Government failed to respond to a specific defense discovery request for materials used by the CA in the nomination and selection of members; and, (3) that the appellant's conviction for rape under Article 120 was not legally or factually sufficient.[2]

After careful consideration of the record of trial, the parties' pleadings, and the appellant's assignments of error, we conclude that the findings and the sentence are correct in law and fact and that no error prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant and the victim in this case, a nineteen-year-old civilian named KB, met on a social networking website. On 21 February 2013, the appellant and KB began messaging one another via the website. Though the two had not previously met, KB asked the appellant to come and pick her up because she was bored. The appellant indicated that he would not pick her up unless they were going to have sex. After some banter about how much time they would spend getting to know one another first, KB agreed and asked the appellant to meet her at a fast food restaurant near her home.

Upon meeting the appellant at the restaurant, KB determined that she was not physically attracted to the appellant, and communicated that to him. Nonetheless, KB got into the car with the appellant, but quickly changed her mind and asked to be let out of the vehicle. After she got out, the appellant convinced

---

[1] The members acquitted the appellant of one specification of assaulting a commissioned officer in violation of Article 128, UCMJ, 10 U.S.C. § 928.

[2] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1992).

KB to return to the vehicle by stating the two would not have to do anything physical, but rather would just spend some time together.

Although the appellant told KB they were going to his apartment, he drove KB to an on-base hotel where he had procured a room. Once in the room, the appellant began to pursue a physical relationship with KB. The appellant hugged her, kissed her, and tried to remove her pants. During these encounters KB tried to discourage the appellant by telling him she didn't want to do anything, and by repeatedly going to the bathroom to get away from him. While in the bathroom, KB sent a text to a Navy friend, who she knew would have access to the base, and asked him to come pick her up.

At trial, KB testified that when she returned to the main room, the appellant was irritated, and that he again sought to unbuckle her belt and remove her pants. KB testified that she extricated herself from the situation by offering to remove the pants herself. When she got up, she did not remove her pants, but rather went to the other side of the hotel room. KB testified that the appellant became angry, pushed her down on the bed, and started to pull down her pants. KB testified that she yelled "no" and "don't rip my pants." KB also testified that she placed a pillow over her head to protect herself from the appellant, and that she used the cover to attempt to call 911. Although KB did not believe the call connected, it did, but only for a short period of time. A recording of that call, during which you can clearly hear a woman screaming, was admitted into evidence. Prosecution Exhibit 3. KB further testified that the appellant then penetrated her vagina, with either his fingers or his penis, two times. KB testified that she was fighting with the appellant, screaming, and saying "no" to him throughout the assault. KB also testified that, as a result of the struggling, they both fell off the bed and ended up on the floor. KB then testified that the assault was interrupted by someone pounding on the door.

Lieutenant Colonel (Lt Col) T, USAF, who was staying in the room directly above the appellant's room, heard KB's screams and responded immediately. He testified that once he heard the commotion he ran down stairs and pounded on the door. During

the course of that response, Lt Col T called the police and told the appellant that he was under military apprehension, and that he needed to stand down and wait for the police to arrive. The appellant ignored those orders, got into his vehicle, and left the scene.

Additional facts necessary to resolve the assigned errors are included herein.

Panel Member Selection

In his first assignment of error the appellant avers that members below the pay grade of E-7, and above the pay grade O-5, were impermissibly and systematically excluded from the nomination process by the CA. In July of 2008, Commander, Naval Air Force Atlantic issued an instruction to subordinate commands establishing the procedure for nominations of prospective court-martial members. That instruction directed each subordinate command to provide a certain number of nominees in the ranks of E-7 through O-5. The instruction did not call for nominees below E-7, regardless of how junior a particular appellant may be, and did not call for anyone O-6 or above.

The standard of review for the proper selection of a court-martial panel is *de novo*. *United States v. Kirkland* 53 M.J. 22, 24 (C.A.A.F. 2000). We look at three primary factors to determine whether an impermissible member selection has taken place:

1. Improper motive in packing a member pool;

2. Systematic exclusion of potential members based on rank or other impermissible variable; and,

3. Good faith attempts to be inclusive and open the court-martial process to the entirety of the military community.

United States v. Dowty, 60 M.J. 163, 171 (C.A.A.F. 2004). If either of the first two criteria is present, the process is impermissible. *Id.* These criteria are not only considered in the actual panel selection process, but also in the process of presenting nominations to the CA. *United States v. Roland*, 50 M.J. 66, 69 (C.A.A.F. 1999).

In a case of systematic exclusion of members by rank, it is the responsibility of the defense to establish the improper exclusion. *Kirkland*, 53 M.J. at 24. Once improper exclusion has been established, the burden is placed on the Government "to demonstrate that the error did not 'materially prejudice the substantial rights of the accused.'" *Dowty*, 60 M.J. at 173 (quoting Art. 59(a), UCMJ).

Although the record is clear that service members were impermissibly excluded from the member selection process by virtue of their rank, the question remains whether that improper nomination process materially prejudiced the appellant. In reviewing this case we find: (1) no evidence that the errant instruction was issued with an improper motive; (2) no evidence that the CA had an improper motive when detailing the members assigned to the appellant's court-martial; (3) the CA was a person authorized to convene a general court-martial; (4) the CA was properly advised of his Article 25 responsibilities, and that he could pick any member of his command, not just those who had been nominated; (5) the court members were personally chosen by the CA from a pool of eligible candidates; and, (6) the court members all met the criteria in Article 25, UCMJ. Under these circumstances, we are convinced that the appellant's case was heard by a fair and impartial panel, and that the error in this case was harmless. *See United States v. Bartlett*, 66 M.J. 426, 431 (C.A.A.F. 2008).

Discovery of Member Selection Matters

In the course of the discovery process, civilian defense counsel requested all information which the CA and his advisors used in the nomination of prospective members and in the final selection of the court members for the court-martial orders issued in this case. The instruction discussed above, which had the effect of systematically excluding members below E-7 and above O-5, was not provided to the defense, despite their request.

Through Article 46, UCMJ, a military accused is granted the "equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." Moreover, upon request, an appellant is permitted to inspect "papers . . . within the possession, custody, or

control of military authorities . . . which are material to the preparation of the defense." RULE FOR COURTS-MARTIAL 701(a)(2)(A), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.).

When determining whether there has been a discovery violation, this court must determine whether the evidence at issue was subject to discovery and, if so, determine what effect the failure to disclose had on the appellant's trial. *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004). To be eligible for discovery by defense a document must be in the Government's possession or control and material to the preparation of the defense. R.C.M. 701(a)(2)(A). When there has been a discovery violation we test that violation for prejudice. In cases where the appellant either did not make a discovery request or made only a general request for discovery, the Government has the burden of proving that the error was harmless. However, in those cases where the appellant made a specific request for the undisclosed information, the Government must show that the error was harmless beyond a reasonable doubt. *Roberts*, 59 M.J. at 327.

Although the appellant did not ask for the instruction in question by name, his request was specific enough to trigger the heightened requirement of proof beyond a reasonable doubt. *See United States v. Webb,* 66 M.J. 89, 92 (C.A.A.F. 2008); *United States v. Gonzalez,* 62 M.J. 303, 304 (C.A.A.F. 2006); *United States v. Garlick*, 61 M.J. 346, 352 (C.A.A.F. 2005). However, even applying that higher standard, we find against the appellant. For the same reasons articulated above, we find that despite the discovery violation, the appellant was tried by a fair and impartial panel, and that the discovery error was harmless beyond a reasonable doubt.

Legal and Factual Sufficiency

In his final assignment of error, the appellant asserts that his rape conviction is both legally and factually insufficient. We disagree.

We review questions of legal and factual sufficiency *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). We review the legal sufficiency of the evidence by determining "whether, considering the evidence in the light most

favorable to the prosecution, any reasonable fact-finder could have found all the essential elements beyond a reasonable doubt." *United States v. Day*, 66 M.J. 172, 173-74 (C.A.A.F. 2008) (citing *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987)). The test for factual sufficiency is whether "after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses as did the trial court, this court is convinced of the accused's guilt beyond a reasonable doubt." *United States v. Rankin*, 63 M.J. 552, 557 (N.M.Ct.Crim.App. 2006) (citing *Turner*, 25 M.J. at 325 and Art. 66(c), UCMJ), *aff'd*, 64 M.J. 348 (C.A.A.F. 2007). Beyond a reasonable doubt, however, does not mean that the evidence must be free from conflict. *Id.*

In this case, the evidence of the appellant's guilt was overwhelming. KB's allegations were supported by the 911 tape, which captured her screams during the assault, and by Lt Col T, who heard her pleas for help and rushed to the scene to lend assistance. The fact that she had engaged in sexual banter with the appellant on line, before they ever met, does little to undermine her credibility, or suggest that a reasonable person would have thought that she was consenting to the forcible acts the appellant committed.

After carefully reviewing the record of trial and considering the evidence in the light most favorable to the prosecution, we are convinced that a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt. Furthermore, after weighing all the evidence in the record of trial and having made allowances for not having personally observed the witnesses, we are convinced beyond a reasonable doubt of the appellant's guilt.

Conclusion

Accordingly, the findings and the sentence as approved by the CA are affirmed.

For the Court

R.H. TROIDL
Clerk of Court

DEPARTMENT OF THE NAVY
GENERAL COURT-MARTIAL
UNITED STATES NAVY-MARINE CORPS TRIAL JUDICIARY
EUROPE, AFRICA, SOUTHWEST ASIA JUDICIAL CIRCUIT

U N I T E D S T A T E S	)	**MOTION TO DISMISS THE CHARGE AND SOLE SPECIFICATION AS UNCONSTITUTIONAL**
v.	)	
LEO C. WILSON	)	
EN2, USN	)	**22 November 2013**

1. <u>Nature of Motion</u>

The Defense respectfully moves this court-martial to dismiss the charge and sole specification thereunder as unconstitutional. Specifically, the statutory element of Article 120 of the Uniform Code of Military Justice (UCMJ) "incapable of consenting due to impairment" is (1) unconstitutionally vague and overbroad and (2) violates the constitutionally protected right to privacy.

2. <u>Statement of Facts</u>

EN2 Wilson is charged with a sole specification arising from a single allegation of sexual assault under Article 120, UCMJ. The specification alleges that the complaining witness was "incapable of consenting to the sexual act due to impairment by an intoxicant, and that condition was known or reasonably should have been known by Engineman Second Class Leo C. Wilson, U.S. Navy."

The charge and specification arise from an accusation made by the complaining witness, MASN KL, a Sailor who served onboard Naval Support Activity Souda Bay, Greece. MASN KL alleges that, on the night of 9 March 2012, she went out drinking with 3 females from the USS BARRY (DDG-52) whom she met earlier in the evening. Early in the evening, she had a

number of drinks (the total number is in dispute). At the last bar she visited with "the Barry girls," she saw EN2 Wilson and recognized him from a previous function.

At approximately 2245 or 2300 that evening, she walked "the Barry girls" to the bus stop so they could catch the liberty bus, and then returned to American Alley to meet EN2 Wilson. She claims to have experienced what is referred to by psychologists and toxicologists as a "fragmentary blackout." Specifically, she alleges that she has blank spots in her memory and doesn't remember how much or what she drank, only the fact that she drank. The Complaining witness claims that she experienced periods of memory loss, but does have specific recollections of some portions of the sexual encounter. EN2 Wilson, in a statement to NCIS, claimed that the sexual encounter was consensual, and that the complaining witness actively participated in the sexual activity.

3. <u>Discussion.</u>

This case, as is often found in military justice, involves allegations of sexual assault after a sexual encounter preceded by alcohol consumption. Given that the fact of the sexual encounter is not in dispute, and given that there is no allegation of threat, force or coercion, this entire case turns on the meaning of the term "incapable of consenting due to impairment."

The latest iteration of Article 120 of the Uniform Code of Military Justice seeks to proscribe certain forms of sexual conduct, including situations where one participant has consumed alcohol or other intoxicants to the level that they are, statutorily, incapable of consenting to the sexual activity. The statute describes this state as "incapable of consenting due to impairment." For the reasons that follow, the statute is unconstitutional because (1) the language is unconstitutionally vague and overbroad and (2) if it eliminates lack of consent as an element of the offense, it is facially violative of the constitutionally protected right to privacy

articulated in Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472 (2003). As a result, the charge and sole specification should be dismissed.

I. Article 120(b)(3) is unconstitutionally vague.

Since the 1950's Congress has attempted to address military sexual crimes in the UCMJ, 10 U.S.C. §§ 800 *et. seq*. Historically, nonconsensual sexual behavior was addressed in Arts. 120, 125 and 134, UCMJ. In 1992, Congress began to implement amendments to Article 120 that ultimately revamped and expanded the scope of Article 120. The most notable changes to Article 120 came in the 2007 and 2012 Congressional amendments respectively. Specifically, Congress made key modifications to the definition of sexual assault in their 2007 and 2012 amendments to Article 120.

As stated above, in many military sexual assault cases the accusing witness alleges that he or she was impaired by the ingestion of alcohol or drugs. The degree of impairment is a frequent area of dispute during trial. In 2007, Congress completely overhauled the scope of Article 120 making a "sexual act" illegal if the victim was "substantially incapacitated" or "substantially incapable" of appraising the nature of the sexual act, declining participation in the sexual act, or communicating unwillingness to engage in the sexual act.

In 2011, Congress undertook another round of amendments to Article 120, UCMJ, which took effect on 28 June 2012. In the 2012 amendment to Article 120, often referred to as "the new-new 120," Congress attempted to shift the focus to what the accused "knew or reasonably should have known." The new-new 120 omits the term "substantially incapacitated," and instead inserted an element that the complaining witness was "incapable of consent due to impairment."

Unfortunately, the 2012 Article 120 repeats and exacerbates the failure of Congress to clearly define the parameters of sexual assault because it fails to provide the definition of

"incapable" in a manner that identifies with any degree of specificity when an individual is so impaired that they are incapable of providing consent. Congress essentially omitted one vague term - "substantially incapacitated" - and replaced it with another. The result is that the statute is too vague to provide the accused with notice of the definitions of the law's key element. Specifically, the law fails to define the requisite level of impairment necessary for the accused to determine that the complaining witness is incapable of consenting to a sexual act due to impairment. Effectively, the new-new Article 120 exacerbates the clarity problems with its predecessor by focusing on the mental state of the complaining witness, using a term that has no medical, legal or common-sense meaning and not providing notice to the accused.

A. Article 120 is so vague that EN2 Wilson could not possibly have been expected to conform his conduct to the law.

The charge and sole specification allege a violation of Article 120(b)(3), which reads in pertinent part (as related to the offenses alleged in this case):

Any person subject to this chapter who-

> *(3) commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to-*
>
> > *(A) impairment by any drug , intoxicant, or other similar substance, and that condition is known or reasonable should be known by the person.*

Based upon the foregoing language, the Government must prove in this case, beyond a reasonable doubt, that:

1. EN2 Wilson committed a sexual act upon the complaining witness;
2. The complaining witness was incapable of consenting due to impairment; and
3. EN2 Wilson knew, or should have known, the complaining witness was incapable of consenting due to impairment.

The first prong is clear, as the statute provides a clear definition of what constitutes a sexual act. Article 120(g)(1). The statute also defines consent, and provides some specific instances in which a person cannot consent, such as "a sleeping, unconscious, or incompetent person" or a person "under threat or fear." Article 120(g)(8). The section defining consent conspicuously omits "impairment" in the delineation of specific conditions in which, as a matter of law, a person cannot consent. This means that under some circumstances, a person is capable of consent when impaired. The question then, is when does a person reach a level of impairment such that they are no longer capable of consent, and any person who commits a sexual act upon them would be criminally liable under Article 120(b)(3). Unfortunately, there is no definition provided in the text of the statute as to what "incapable of consenting" and/or "impairment" specifically means. Furthermore, the Analysis of Punitive Articles in the Manual for Courts-Martial, a review of Legislative History, and the Military Judge's Benchbook are all silent, and of no utility in helping explain what these critical terms actually mean. The key term here, "incapable of consenting", is the very crux of the proscribed conduct, and is impermissibly and unconstitutionally vague such that EN2 Wilson could not have read the law's key elements and understood what "incapable of consenting due to impairment" means. This vagueness left EN2 Wilson with insufficient notice that his conduct may or may not have been proscribed. *See United States v. Moore*, 58 M.J. 466, 469 (C.A.A.F. 2003).[1]

B. Article 120(b)(3) is so vague as applied to EN2 Wilson, he is denied Due Process.

[1] Notably, the term "incapable of consenting" (which is not defined anywhere in the Manual for Courts-Martial) was chosen rather than other terms which are far more common. The federal sexual abuse statute instead uses "(A) incapable of appraising the nature of the conduct; or (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act" terms which are far more easily subject to definition and understanding. Moreover, Congress did not use the simple standard "incapacitated person," which Black's Law Dictionary defines as: "A person who is impaired by an intoxicant … to the extent that personal decision-making is impossible." Black's Law Dictionary, Seventh Edition.

Courts have on a number of occasions examined the question of whether a statute is impermissibly vague. A law will be deemed facially void if it is so unclear that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). A law failing to clearly define the conduct it proscribes "may trap the innocent by not providing fair warning," inevitably leading to impermissible delegation of "basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. Rockford*, 408 U.S. 104, 108-109 (1972). The D.C. Court of Appeals in *United States v. Capital Traction Co.*, 34 App. D.C. 592 (1910), analyzed a statute prohibiting municipal street railway companies from running an insufficient number of cars to accommodate passengers "without crowding." *Id.* The opinion's language, cited approvingly by the U.S. Supreme Court in *Connally*, is pertinent to this case and helpful to reproduce at length:

> *What shall be the guide to the court or jury in ascertaining what constitutes a crowded car? What may be regarded as a crowded car by one jury may not be so considered by another. What shall constitute a sufficient number of cars in the opinion of one judge may be regarded as insufficient by another*. . . . There is a total absence of any definition of what shall constitute a crowded car. This important element cannot be left to conjecture, or be supplied by either the court or the jury. It is of the very essence of the law itself, and without it the statute is too indefinite and uncertain to support an information or indictment…*The dividing line between what is lawful and unlawful cannot be left to conjecture.* The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, *must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue*. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another. *Id.* at 596, 598 (Emphasis added).

Capital Traction and *Connally* provide basic background on the doctrine of void-for-vagueness. The modern seminal case on the question is *Parker v. Levy*.[2] In *Parker*, the Court states, "void-for-vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." *Id.* at 757.[3] This standard is expanded upon in a series of military cases. In *United States v. Saunders*, C.A.A.F. framed the issue of whether an individual was on sufficient notice as an objective inquiry. 59 M.J. 1, 29 (2003). Later, *United States v. Pope* lists examples of "fair notice" sources to include federal law, state law, military case law, military custom and usage, and military regulations. 63 M.J. 68 (C.A.A.F. 2006). Training, pamphlets, and other materials may also serve as sources of notice by giving context to regulations and articulating differences between permissible and impermissible behavior. *See United States v. Brown*, 55 M.J. 375, 384 (C.A.A.F. 2001).

Here, EN2 Wilson had no notice that the complaining witness allegedly reached the undefined level of impairment such that her apparent consent was invalidated by alcohol consumption. The statute unrealistically expected him to gauge whether the complaining witness was "incapable of consenting due to impairment." Does "incapable of consenting due to impairment" mean that a person is *extremely impaired*? *Mostly* impaired? Above the legal blood alcohol content ("BAC") limit for operating a motor vehicle? When does the switch between capable of consenting and incapable of consenting occur? As an impaired individual's BAC inevitably drops, when does the person revert back to "capable" once again? Who is

[2] 417 US 733 (1974), citing *U.S. v. Harris*, 347 US 612, 617 (1954).

[3] While *Parker* upheld the statute, the Court explained that the military is subject to a less stringent analysis than our civilian counterparts. But this reasoning stems from the unique military nature of the laws at issue, Articles 133 and 134. The rationale used to justify an unclear statute in Parker cannot be used to compensate for Art. 120's failings. Arts. 133 and 134 are particularly inherent to our military structure and unknown in the civilian world. Not so with laws prohibiting sex crimes. The Government would be hard pressed to articulate a legitimate reason why a servicemember should receive less protection from the dangers of an unconstitutionally vague law than a civilian accused of the same conduct.

culpable in a situation where both parties have reached a level of impairment such that neither party was capable of consenting?

Determining whether someone is "incapable of consenting due to impairment" requires either medical training or the ability to make accurate, immediate determinations based on usually incomplete information (such as a potential sexual partner's height, weight, tolerance for alcohol, knowledge of how much alcohol was consumed, and knowledge of when alcohol consumption ceased). Consider the intoxicated complaining witness during a period of "black-out": externally appears capable of consenting, externally appears to actually consent, and it is not determined until later (usually by experts, analyzing facts that weren't necessarily known to the accused) that she was "incapable" of consenting at the time. Indeed, an Article 120(b)(3) referral all but assures the government and accused will be provided a forensic alcohol experts to help a panel of members understand the extent to which a person was intoxicated and the effect on their capability to consent. How can we expect that level of analysis of EN2 Wilson or any other lay person on the nights in question?

Article 120 is not "so clearly expressed" that EN2 Wilson could "intelligently choose, in advance, what course it is lawful for him to pursue." *Capital Traction Co.*, 34 App. D.C. at 598. As a result, EN2 Wilson could not have reasonably known whether the complaining witness had reached a level of impairment such that she was incapable of providing consent, and Article 120(b)(3) must be struck down as unconstitutionally vague.

II. Article 120(b)(3) violates the right of adults to engage in consensual sexual behavior, thus violating the constitutionally protected right to privacy.

Adults have a constitutional right to privacy, and within that right to privacy is the right, generally, to engage in private, consensual sexual conduct without governmental intrusions. See Lawrence v. Texas, supra. Service members generally maintain this right. See also, United

States v. Marcum, 60 M.J. 198 (C.A.A.F. 2004). With the 2007 amendment to Article 120, Congress removed the element of "lack of consent" in a misguided effort to shift the focus in sexual assault cases from victim to offender. Removal of this element reasonably suggests that Congress intended to criminalize certain otherwise consensual sexual behavior. The 2012 amendment exacerbates this concern. As noted above, a plain reading of the language "incapable of consenting due to impairment" suggests that individuals reach a level of impairment such that they are no longer capable of consent, and any person who commits a sexual act upon them would be criminally liable. Based upon this plain reading, Congress has effectively deprived individuals and servicemembers of their ability to engage in consensual sexual behavior. In essence, they have paternalistically stated that once you consume some unknown quantity of an intoxicant, and reach some undefined mental state of impairment, as a matter of law you can't have sex with anyone, or that person would be criminally liable. On its face, this is constitutionally impermissible.

An alternative interpretation that would salvage the constitutionality of the 2007 and 2012 amendments (at least in terms of right to privacy), is that lack of consent – even though removed as an express element and notwithstanding the addition of the term "incapable of consenting" – must be included in any rational determination of the criminality/wrongfulness of a sexual act. In this case, where EN2 Wilson and MASN KL are both junior enlisted, not within the same chain of command, and the alleged conduct was confined to a private, closed room, the only potential compelling Government interest in regulating their private sexual behavior is if the sexual behavior was *nonconsensual*. Therefore, unless the intent is to criminalize consensual sexual behavior amongst adults, "consent" and "mistake of fact as to consent" must remain

available defenses under Article 120, and EN2 Wilson is entitled to instructions on these defenses if generated by the evidence at trial.[4]

4. <u>Relief Requested</u>

The Defense respectfully requests the charge and sole specification thereunder be dismissed, with prejudice, as Art 120(b)(3) as unconstitutionally vague and/or in violation of the constitutionally protected right to privacy. Alternatively, if the Court finds that the statute is not unconstitutionally vague, the Defense requests that the Court compel the Government to provide a Bill of Particulars in order to properly inform EN2 Wilson of the meaning of "incapable of consenting" so that he may adequately prepare for trial. Finally, if the Court finds that the statute does not violate the right to privacy and that consent and mistake of fact as to consent remain valid defenses under Article 120(b)(3), the Defense requests the right to jury instructions on these defenses (if generated by evidence at trial).

5. <u>Evidence and Burden of Proof</u>.

The burden of proof in attacking the constitutionality of the statute is upon the defense. No evidence other than that previously submitted with other motions will be relied upon.

6. **<u>Argument</u>**. The Defense desires oral argument.

//s//
B. C. BARLETTO
LT, JAGC, USN

****

Certificate of Service

I hereby attest that a copy of the foregoing Motion to Dismiss was served on the Court and opposing counsel by email on 22 November 2013.

[4] It should be noted that this conclusion would not resolve the vagueness problem described above. To the contrary, it only reaffirms the vagueness problem, in that if Congress did not mean to criminalize sexual acts with a person who had reached a statutorily proscribed level of impairment such that they could not consent, then what does "incapable of consenting" actually mean?

//s//
B. C. BARLETTO
LT, JAGC, USN

DEPARTMENT OF THE NAVY
GENERAL COURT-MARTIAL
NAVY-MARINE CORPS TRIAL JUDICIARY
EUROPE, AFRICA, SOUTHWEST ASIA JUDICIAL CIRCUIT

U N I T E D S T A T E S **v.** **LEO C. WILSON** **EN2 USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS THE CHARGE AND SOLE SPECIFICATION AS UNCONSTITUTIONAL** **27 November 2013**

1. Nature of the Motion

This motion is filed pursuant to Rule for Courts-Martial 907 in response to the Defense's motion to dismiss of 22 November 2013 because the term "incapable of consenting due to impairment" is unconstitutionally vague and overbroad and violates the constitutionally protected right to privacy.

2. Summary of Facts

The accused is charged with one violation of the Uniform Code of Military Justice, Article 120, Sexual Assault, stemming from an incident in which the accused is alleged to have sexually assaulted a female shipmate, MASA KL, while she was incapable of consenting due to impairment by an intoxicant.

The sexual assault occurred on the night of 9-10 March 2013, after MASA KL consumed numerous drinks at various bars in Chania, Greece and had become intoxicated, meeting up with the accused during the evening. While with the accused at a bar, the accused bought her several drinks. (Enclosure 1). Additionally, the accused told MASA KL something to the effect of "I will take care of you" and put his hand on her back. (Id.). At one point while at the bar with the accused, MASA KL remembers getting up to go to the restroom and recalls stumbling and

feeling intoxicated. (Id.). The next memory that MASA KL has is walking out of the bar with the accused and being inside a taxicab. (Id.). MASA KL's next memory is waking up to the accused having vaginal sex with her. (Id.). She recalls being naked and lying on her back while the accused was penetrating her. (Id.). She specifically recalls seeing his bare chest with a tattoo on his chest and arms. (Id.). At this point, MASA KL reports that she was unable to move her body to get away or stop the sexual intercourse and was also unable to communicate because of a feeling of numbness, so she remained where she was and did not move while the accused was penetrating her. (Id.).

3. Authorities:

Rule for Courts-Martial 907, MANUAL FOR COURTS-MARTIAL (2012 ed.);
United States v. Vaughan, 58 M.J. 29 (C.A.A.F. 2003);
United States v. Cartwright, 2013 CCA LEXIS 735, (A.F.C.C.A., Aug. 15, 2013);
Parker v. Levy, 417 U.S. 733 (1974);
United States v. Mansfield, 33 M.J. 972 (A.F.C.M.R. 1991);
Grayned v. City of Rockford, 408 U.S. 104 (1972);
United States v. Frantz, 1953 CMA LEXIS 1020, (C.M.A., Feb. 6, 1953);
Krichman v. United States, 256 U.S. 363 (1921);
American Communications Assn. v. Douds, 339 U.S. 382 (1950);
Nash v. United States, 229 U.S. 373 (1913);
United States v. Moore, 58 M.J. 466 (C.A.A.F. 2003);
Coates v. Cincinnati, 402 U.S. 611 (1971);
United States v. Brown, 55 M.J. 375 (C.A.A.F. 2001);
United States v. Marcum, 60 M.J. 198 (C.A.A.F. 2004);
Lawrence v. Texas, 539 U.S. 558 (2003);
United States v. Goings, 72 M.J. 202 (C.A.A.F. 2013);
United States v. Stratton, 2012 CCA LEXIS 16 (N-M. Ct. Crim. App., Jan. 26, 2012);
Planned Parenthood v. Casey, 505 U.S. 833 (1992);
United States v. Vasquez, 72 M.J. 13 (C.A.A.F. 2013);
United States v. Ali, 71 M.J. 256 (C.A.A.F. 2012).

4. Discussion

I. **Article 120, Uniform Code of Military Justice, Is Not Unconstitutionally Vague Because It Appropriately Provides Fair Notice of Its Proscribed Conduct**.

A law is void for vagueness "if one could not reasonably understand that his contemplated conduct is proscribed." *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003). "A basic principle of due process requires 'fair notice' that an act is subject to criminal sanction and about the standard that is applicable to the forbidden conduct." *United States v. Cartwright*, 2013 CCA LEXIS 735, *19 (A.F.C.C.A., Aug. 15, 2013) (citing *Vaughan*, 58 M.J. at 31). What is sufficient from a notice standpoint "is determined in light of the conduct with which a defendant is charged." *Parker v. Levy*, 417 U.S. 733, 757 (1974). Essentially, "[v]oid for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his or her contemplated conduct is proscribed." *Id*. Additionally, "[c]riminal statutes are presumed to be constitutionally valid, and the party attacking the constitutionality of a statute has the burden of proving otherwise." *United States v. Mansfield*, 33 M.J. 972, 989 (A.F.C.M.R. 1991), *aff'd*, 33 M.J. 972 (C.M.A. 1993).

When it comes to criminal statutes, exact certainty as to the proscribed conduct is not required. According to the Supreme Court, "because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Put another way, "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." *Id*. at 110. Even with the most artfully drafted criminal statutes, "[a] certain minimum element of indistinction remains which, in legislation of this entirely defensible character, can never be expunged completely, and must be dealt with on a case-by-case basis." *United States v. Frantz*, 1953 CMA LEXIS 1020,

*7 (C.M.A., Feb. 6, 1953); *see also Krichman v. United States*, 256 U.S. 363, 367-68 (1921). Of course, [i]t will always be true that the fertile legal 'imagination can conjure up hypothetical cases in which the meaning of [disputed] terms will be in nice question.'" *Grayned*, 408 U.S. at 111 (citing *American Communications Assn. v. Douds*, 339 U.S. 382, 412 (1950)). Nevertheless, some ambiguity in criminal statutes is completely justifiable, "for 'the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree.'" *Frantz*, 1953 CMA LEXIS at *7 (citing *Nash v. United States*, 229 U.S. 373, 377 (1913)).

UCMJ Article 120 is not constitutionally void for vagueness. Defense Counsel specifically asserts that the term "incapable of consenting due to impairment" is constitutionally vague and asserts that not only is the statute itself deficient, but that the accused could not have been expected to conform his specific conduct to the law. Both arguments are without merit.

A. <u>The Statutory Language of Article 120, UCMJ, Is Constitutional</u>.

Defense Counsel argues that the term "incapable of consenting due to impairment" is included in the statutory language of the current Article 120 but that no additional amplifying information is provided to explain or define this specific term, and because of this, the statute is unconstitutionally vague. In its motion, Defense Counsel notes that the previous version of Article 120, UCMJ, included the term "substantial incapacitation" and noted that this specific term "was difficult to define with any clarity." *United States v. Moore*, 58 M.J. 466, 469 (C.A.A.F. 2003). Yet, even with some lacking of particular clarity, it is important to note that, as of 15 August 2013, "no appellate court has found Article 120, UCMJ, to be facially unconstitutional." *Cartwright*, 2013 CCA LEXIS at *8.

Thus, correctly stating that the new version of Article 120 "repeats the same problem of the 2007 Article 120 [statute]" first requires an actual constitutional vagueness problem in the

2007 version, which no appellate court has ever determined. Even if Congress did omit one indistinct term and replace it with another, no court has determined that the previous term was unconstitutionally vague. Thus, even though the current statute may not provide a definition of the specific term at issue, the specific term and the change between the 2007 and 2012 versions of Article 120, UCMJ, do not present an issue of unconstitutional vagueness.

B. The Statute Is Not So Vague That The Accused Could Not Have Appropriately Conformed His Conduct to The Law, And It Does Not Deny Him Due Process.

Defense Counsel also argues that the statute is so vague that the accused could not possibly have been expected to conform his conduct to the law. As stated above, whether a statute is unconstitutionally vague "is determined in light of the conduct with which a defendant is charged." *Parker*, 417 U.S. at 757. Because there is no definition provided in the statute, "[w]e are thus relegated, at best, to the words of the [statute] itself." *Grayned*, 408 U.S. at 110 (quoting *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971)). Additionally, as the Defense states in its motion, other sources may exist to provide notice to the accused of his potentially criminal conduct, including military custom and usage, training, pamphlets, and materials. *See United States v. Brown*, 55 M.J. 375, 384 (C.A.A.F. 2001).

In this case, the accused is alleged to have committed a sexual act upon the alleged victim when she was incapable of consenting due to impairment from alcohol; specifically, the sexual act of vaginal penetration. Additionally, alcohol is a central issue in this incident, which occurred after a night of alcohol consumption at local bars. After drinking out at the bars, the accused returned to his residence with the alleged victim and sexually assaulted her in his bedroom.

The accused is a 24-year old Second Class Petty Officer in the United States Navy. In his time in the Navy, he has received no less than eight separate trainings on the topic of sexual

assault. Additionally, he has received no less than seven separate trainings on the topic of alcohol and/or drug abuse. (Enclosure 2). It is reasonable to assume that this training, and the training materials used and presented at these trainings, were at least of general "importance in providing notice of the [proscribed conduct]" which involves elements of overindulgence in alcohol and at least risky sexual activity. *Id*. Furthermore, the actual words used in the statute are not overly complicated or technical such that the accused could not have reasonably understood their meaning. (Enclosure 3 – showing the accused's ASVAB score of 70). The Merriam-Webster Dictionary defines "impair" as "to damage or make worse by or as if by diminishing in some material respect," (Enclosure 4), and defines "incapable" as "lacking capacity, ability, or qualification for the purpose or end in view" (Enclosure 5). With these rather plain definitions, it is reasonable to believe that the accused was able to conform his conduct to the law, especially when the law and conduct at issue is the commission of vaginal penetration upon a female shipmate who had consumed alcohol directly before the sexual act. In fact, even the accused's actions before the sexual activity indicate that he understood the potential criminal riskiness of the charged behavior, as he states that "[he] declined [to have sex], saying that we were both drinking" and that "[he] wasn't comfortable" having sex with her at that time. (Enclosure 6).

Additionally, the accused is not denied due process from the specific terminology of Article 120, UCMJ. First, as noted above, the accused, and nearly all military members, have received training on both alcohol use and sexual assault. This training is relevant as to the issue of whether the accused was on notice of what conduct is potentially criminal in nature. Second, the accused is not denied due process from the application of the semi-scientific, but more common-sense, qualities of alcohol, because he has been appointed a specifically-requested

civilian forensic psychologist who specializes in the effects of alcohol on the body and mind. (Enclosure 7). The use of this expert goes a long way in guaranteeing that the accused will have a fair trial and his counsel will be able to understand, confront, and argue the appropriate issues and factors present in this case. For these reasons, the accused has not been denied due process.

II. **Article 120, Uniform Code of Military Justice, Does Not Violate The Constitutional Right to Privacy**.

"It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *United States v. Marcum*, 60 M.J. 198, 203 (C.A.A.F. 2004) (citing *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)). In *Lawrence*, a case in which the United States Supreme Court invalidated a Texas state statute criminalizing consensual homosexual sodomy, "the focal point of the constitutional protection involved an act of sexual intimacy between two individuals in a wholly private setting without more." *United States v. Goings*, 72 M.J. 202, 206 (C.A.A.F. 2013). Essentially, *Lawrence*, as applied to the military via *Marcum*, establishes "that individuals have a liberty interest that protects consensual 'private sexual conduct' including oral and anal sodomy." *United States v. Stratton*, 2012 CCA LEXIS 16, *7 (N-M. Ct. Crim. App., Jan. 26, 2012) (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992)). As such, "[n]o one disagrees that wholly private and consensual sexual activity, without more, falls within Lawrence." *Goings*, 72 M.J. at 206; *see also Lawrence*, 539 U.S. at 578 (stating that the case "involve[s] two adults who, **with full and mutual consent** from each other, engaged in sexual practices") (emphasis added).

"However, it is also clear that there are tangible limits to this liberty interest." *Stratton*, 2012 CCA LEXIS at *7. "*Lawrence* did not establish a presumptive constitutional protection for all offenses arising in the context of sexual activity." *Goings*, 72 M.J. at 206 (citing *Lawrence*, 539 U.S. at 578). Instead, the Court of Appeals for the Armed Forces set up a three-part test to

determine when sexual activity is protected by the ruling in *Lawrence* on an as-applied basis. *Marcum*, 60 M.J. at 206-207. Only the first prong applies here[1], which is "is the conduct that the accused was found of committing of a nature to bring it within the liberty interest identified by the Supreme Court?" *Id*. at 206. Essentially, this first prong asks "[i]n other words, did the 'conduct involve private, **consensual** sexual activity between two adults?'" *Stratton*, 2012 CCA LEXIS at *8 (quoting *Marcum*, 60 M.J. at 207) (emphasis added).

In this case, the conduct charged, a sexual act of vaginal penetration committed upon a person who was incapable of consenting to the sexual act because of impairment, is not protected by the liberty interest embodied in the Constitution and protected in *Lawrence* and *Marcum*. The basis of the charged conduct is that MASA KL was incapable of consenting, and as such, the sexual activity between her and the accused was not the "private, consensual sexual activity" which receives constitutional protection. Rather, the Defense is essentially arguing that a dispute as to an issue of fact, *i.e.*, whether MASA KL was incapable of consenting because of impairment, somehow removes the charged conduct from other classifications of sexual assault, and moves it into a classification of protected sexual activity. But this is not the case, as both parties will present evidence on this central issue of fact before the trier of fact: the Government will present testimony and evidence which seeks to prove that MASA KL was impaired and thus incapable of consenting, and the Defense will presumably introduce evidence and argue to the contrary. But this disputed issue of consent between the parties does not mean that the charged conduct is constitutionally protected. Unlike the defendant in *Lawrence* and the accused in *Marcum*, the accused in this case is not being prosecuted solely because of private sexual activity, but rather based on sexual activity upon a person who was incapable of consenting to

[1] The other two prongs are not relevant because the analysis of the first prong results in a finding that the charged conduct is not within the liberty interest identified by the Supreme Court, and as such, the analysis ends there.

such sexual activity. The Court of Appeals for the Armed Forces added clarity to this important distinction by stating:

> When the conduct being charged does not fall directly within the focal point of Lawrence – sexual conduct between two individuals in a wholly private setting that was criminal for no other reason than the act of the sexual conduct itself – and where, as here, the predicate sexual conduct is criminal because of some additional factor . . . the burden of demonstrating that such conduct should nonetheless be constitutionally protected rests with the defense at trial . . . Put another way . . . the individual must develop facts at trial that show why his interest should overcome the determination of Congress and the President that the conduct be proscribed.

Goings, 72 M.J. at 207 (citing *United States v. Vasquez*, 72 M.J. 13, 16-21 (C.A.A.F. 2013); *United States v. Ali*, 71 M.J. 256, 265 (C.A.A.F. 2012)). The defense fails with their burden, because the charged conduct here is not the simple act of the sexual activity itself, which may or may not be constitutionally protected, *see Marcum*, 60 M.J. 198, but rather the sexual activity made criminal because of the Government's charged element of an additional factor – the impairment of the other involved party which removes the sexual activity from its otherwise potentially protected realm. As such, Article 120, whether facially, or as applied to the accused in this case, is not unconstitutional and does not violate the right to privacy.

5. Relief Requested.

The Government respectfully requests that the Defense Motion to Dismiss be denied.

6. Evidence.

Enclosure 1: NCIS Statement of MASA KL dated 29 Mar 13
Enclosure 2: Training Record of Accused
Enclosure 3: Excerpt of Enlisted Qualification History of Accused
Enclosure 4: Merriam-Webster Dictionary Definition Excerpt
Enclosure 5: Merriam-Webster Dictionary Definition Excerpt
Enclosure 6: NCIS Statement of Accused dated 5 Apr 13
Enclosure 7: Convening Authority Expert Assistance Approval, Ser NOOJ/107

7. Oral Argument.

The Government requests oral argument on this motion.

//s//

Michael F. Whitican
LT, JAGC, USN
Trial Counsel

****

CERTIFICATE OF SERVICE

I hereby certify that a copy of this filing was served on the Detailed Defense Counsel, LT Bryan Barletto, via email on 27 November 2013.

//s//

Michael F. Whitican
LT, JAGC, USN
Trial Counsel

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 3

UNITED STATES, Appellee v. Daniel D. WILT, Sonar Technician Surface Third Class (E-4) U.S. Navy Appellant	)))))))))))))	ANSWER ON BEHALF OF APPELLEE Case No. 201300274 Tried at Region Legal Service Office, Mid-Atlantic, Naval Station Norfolk, Virginia, on August 14, 2012, October 23, 2012, November 19, 2012, December 3-7, 2012, by a general court-martial convened by Commander, Navy Region Mid-Atlantic.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

ANN E. DINGLE
Lieutenant, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7433, fax (202) 685-7687

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Errors Assigned

I.

A PROSECUTOR IS NOT ALLOWED TO PLACE THE MEMBERS IN THE VICTIM'S SHOES WHEN ARGUING FOR FINDINGS OR SENTENCE. HERE, TRIAL COUNSEL ARGUED THAT THE MEMBERS SHOULD SENTENCE NOT FROM THEIR "PRISTINE" BOX BUT "SITTING WHERE [THE VICTIM] WAS SITTING IN THAT HATCH." DOES THIS PROSECUTORIAL MISCONDUCT WARRANT A NEW SENTENCING HEARING?

II.

DID THE MILITARY JUDGE ERR WHEN, IMMEDIATELY AFTER GIVING THE INSTRUCTIONS REGARDING RECONSIDERATION ON FINDINGS, SHE TOLD THE MEMBERS THERE WAS "GENERALLY NO REASON FOR RECONSIDERATION"?

III.

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V.

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[1] Assignments of Errors IV-IX are submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

VI.

WERE THE DEFENSE COUNSEL INEFFECTIVE BY FAILING TO CHALLENGE MEMBERS MCC M AND FCC C WHEN THEY WERE BOTH PREVIOUSLY TRAINED SEX ASSAULT VICTIM INTERVENTION REPRESENTATIVES?

VII.

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X.

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XI.

THE MEMBERS FOR APPELLANT'S COURT-MARTIAL WERE SELECTED UNDER A REGIONAL INSTRUCTION THAT PER SE EXCLUDED PERSONNEL FROM THE MEMBERS POOL BASED ON RANK. DID THIS VIOLATION OF ARTICLE 25, UCMJ, PREJUDICE APPELLANT?[2]

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[2] Assignment of Error XI is a Supplemental Assignment of Error, provided in Appellant's Non-Consent Motion for Leave to File Supplemental Assignment of Error, Motion to Attach, and

Statement of Statutory Jurisdiction

Appellant's approved sentence includes a dishonorable discharge and more than one year of confinement. Accordingly, this Court has jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012).

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of rape, two specifications of forcible sodomy, three specifications of assault, and one specification of obstructing justice, in violation of Articles 120, 125, 128, and 134, UCMJ, 10 U.S.C. §§ 920, 925, 928 and 934 (2012). The Members sentenced Appellant to confinement for life and a dishonorable discharge. The Convening Authority credited Appellant 232 days of pre-trial confinement. The Convening Authority otherwise approved the sentence as adjudged and, except for the discharge, ordered the sentence executed.

Consistent with the Members' recommendation during sentencing, the Convening Authority waived automatic forfeitures for the maximum allowable period of six months contingent on

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Supplemental Assignment of Error, dated February 21, 2014. (hereinafter "Appellant's Supplemental Assignment of Error".)

Appellant establishing an allotment for the benefit of his spouse.

Statement of Facts

A. Appellant ambushed a female shipmate on board the USS Vella Gulf, trapped her in an equipment room, and raped her after telling her he would cut her into pieces with a box cutter if she continued to resist.

Appellant was a sonar technician serving aboard the USS Vella Gulf (CG 72) with then-DC3 SR. On April 26, 2012 at 0145, DC3 SR had just completed her watch shift. (R. 1027.) Appellant waited for her to walk pass him on her way to her berthing. (R. 1033.) Appellant asked her for assistance in fixing a leak with the Aqueous Film Forming Foam (AFFF), a system that was part of DC3 SR's responsibility on the ship. (R. 1033.) DC3 SR agreed and followed Appellant down the passageway. (R. 1033.) While DC3 SR was in front of Appellant kneeling looking at the "leak", he grabbed her from behind, choked her, and delivered a series of punches to her head and face. (R. 1039-1040, 1045.) Appellant also covered her mouth to prevent her from screaming. (R. 1040.) He continued by dragging her down an access trunk and said to her, "we're going to have some fun", or words to that effect. (R. 1043.)

Appellant subsequently threw her into the access trunk, dogged down the watertight hatch, and blocked the access behind DC3 SR. (R. 1042-1045.) During this time, DC3 SR continued to

fight back, using her self-defense training. (R. 1043, 1045.) Appellant, however, threatened DC3 SR with a box cutter, stating that “he would chop [her] body into pieces and throw [her] overboard, that he had weights and trash bags and that nobody would ever find [her].” (R. 1046.)

DC3 SR relented, complying with his orders to go down a ladder into a forward hold called the “dome equipment room”. (R. 1049.) In that dome equipment room, Appellant continued to threaten her, and would not let her leave. Appellant prevented her escape by securing the hatch behind her. (R. 1050-1054.) Appellant instructed DC3 SR to completely undress and take up poses. (R. 1058-1059.) Appellant started taking photographs with his cellular phone and began kissing her. (R. 1059.) He then took off all his clothes and instructed her to touch his penis. (R. 1060-1061.) When she refused, Appellant grabbed her wrist, directing her hand on his penis. (R. 1060.)

Appellant then opened the door to the Boatswain’s storage, forced her to go in, secured it behind him, and dogged down the hatch. (R. 1061-1068.) Appellant had previously lined the room in plastic trash bags. (R. 1062.) During a period of three and one-half hours, Appellant zip-tied DC3 SR’s wrists and ankles to a secured net, sodomized her orally and anally, ducted-taped her mouth, and raped her. (R. 979, 1069-1074, 1105.) At no point did DC3 SR consent to Appellant’s actions. (R. 1069). During

the course of her assault, she told him “please don’t”, to “stop”, and cried for help. (R. 1059, 1041, 1069.) Appellant also stated to her, “I knew I was going to be able to rape you.” (R. 1077.)

After he finished assaulting her, Appellant left the room and returned with a plastic apron and a precision box-cutting blade. (R. 1082-1083.) He pointed to an area on her thigh, stating that this is where he was going to cut her because it would bleed the most. (R. 1082-1083.) DC3 SR complied with Appellant’s directions for fear that he would kill her if she did not obey. (R. 1083-1084.)

Using her Sexual Assault Prevention and Response (SAPR) training, she convinced him to spare her life. (R. 1084-1085.) DC3 SR told Appellant that she would never tell anyone what had happened. (R. 1084-1085.) Appellant eventually relented. (R. 1097.) Appellant brought a bucket of water, and forced her to clean her body to remove any evidence of the assault. (R. 1097-1098.) He showed her a saw, and warned her that he would fulfill his plan to kill her with it if she told anyone. (R. 1101.) After Appellant let her free, DC3 SR immediately reported the assault.

B. Appellant’s Sentencing Proceedings and Findings.

During Trial Counsel’s closing argument on sentencing, Trial Counsel argued for a sentence of life with the possibility

of parole. Trial Counsel's argument covered seventeen pages of the Record, and discussed admitted evidence and testimony from witnesses. (R. 2237-2253.) At the conclusion, Trial Counsel stated:

> So we ask you, when you come back in from the deliberation room and you give a just sentence, that please do it not in the pristine area of this, [sic] Consider sitting where she was sitting in that hatch. So when a sentence is decided, we would be able to turn to then DC3 Russell as she is sitting on those totes covered in plastic, zip-tied up, hoping not to die, we say, 'This is the proper sentence in this case for what he did to you. Just survive.'

(R. 2244-2245.) At trial, Appellant faced a maximum punishment of confinement for life without the eligibility for parole, total forfeitures, reduction to pay grade E-1, a fine, and a dishonorable discharge. (R. 2253.) The members, however, sentenced Appellant to confinement for life *with* the possibility of parole, allowed his forfeitures to be paid to his dependents to the extent of the law, and a dishonorable discharge. (R. 2280.)

C. <u>Military Judge's Sentencing Instructions on Findings</u>.

Prior to closing the court-martial for sentencing deliberations, the Military Judge read to the members her procedural and voting instructions. When discussing reconsideration, the Military Judge stated:

> You may reconsider any finding prior to its being announced in open court. However, after you vote, if any member expresses a desire to reconsider any

> finding, the President of the court will tell the court that "a reconsideration has been proposed". Do not state whether the finding proposed to be reconsidered is a finding of guilty or not guilty, or which specification and charge is involved. I will then give you specific instructions on how to reconsider a finding.
>
> Okay, I'm going to be straight up with you about reconsideration. There is generally no reason for reconsideration if you've had a really full and free discussion on the evidence before you. So my advice to you is to have a full and free discussion about everything you've heard in the case. You'll have a computer to look at the discs as far as the evidence and pictures. You'll have all of the hard copy exhibits. You'll have all of the physical evidence.
>
> Take the time to talk through the case and everything you've heard and take a look at the evidence if you like to, there's no requirement that you do that but if you have a question about something you heard or saw, take the time to look at it and talk about it. If you do those things I think you'll avoid any concerns about reconsideration.

(R. 1974-1975.)

D. <u>Member LCDR Patto's experience as a knifepoint victim</u>.

During his military service, LCDR Patto was stationed in Brussels, Belgium. (R. 384.) He was having dinner with a date in the Turkish sector of the city, when three men approached him with a knife demanding money. (R. 384.) LCDR Patto complied, and then walked the other way. (R. 384.) There was no physical contact, and the three men did not follow them afterwards. (R. 384.)

After articulating that he was cognizant of and applying the liberal grant mandate, the Military Judge denied Trial

Defense Counsel's challenge for cause. (R. 510-512.) She noted that the circumstances he faced in a "run-in in Brussels with some type of street thug" are different than a "sexual assault case or something similar to the allegations here." The Military Judge found that there was no actual or implied bias. (R. 512-513.)

E. Any post trial delays were addressed and explained by the Convening Authority, and were due to the length of the Record of Trial, significant errors in the first draft transcription, and a high caseload by the Military Judge.

Appellant's sentence was adjudged on December 12, 2012. The electronic Record of Trial was received by the Court Reporter on March 4, 2013, and returned for further processing on April 17, 2013. (Authentication of Record of Trial, May 16, 2013.) The Convening Authority addressed the post-trial delay processing as follows:

> Delay in the post-trial processing of this case was caused by substantial errors due to poor transcription in several sections of the record, requiring hours of rework by the military judge. . . . During this time, the military judge also heard *U.S. v. Colyer* (GCM plea), *U.S. v. Lynch* (GCM plea), *U.S. v. Doughty* (*DuBay* hearing requiring substantial findings of fact, as well as authentication of the *Dubay* record), *U.S. v. Bean* (SPCM members trial), and took leave.

(Post-Trial Processing ICO U.S. v. STG3 Daniel D. Wilt, USN, July 8, 2013 at 1.) The Record of Trial was authenticated on May 16, 2013. (Post-Trial Processing at 1.) The Record was

delivered to Commander, Navy Region Mid-Atlantic on May 15, 2013 for post-trial processing. (Post-Trial Processing at 1.)

Trial Defense Counsel also requested an additional twenty days to submit clemency matters. (Post-Trial Processing at 1-2.) Clemency submissions were received on December 14, 2012, December 16, 2012, May 17, 2013, and finally on June 13, 2013. (Convening Authority's Action ("C.A.A.") at 5.) The clemency requests sought the following relief: a waiver of forfeitures for his family for six months and confinement over twenty-five years to be disapproved. (Request for Clemency ICO U.S. v. STG3 Daniel D. Wilt, USN, June 13, 2013 at 1.) The Staff Judge Advocate completed her recommendation, pursuant to R.C.M. 1106, on June 19, 2013, and submitted an addendum thereto on July 8, 2013. (C.A.A. at 5.) Trial Defense Counsel signed for receipt of the Staff Judge Advocate Recommendation (SJAR) on June 20, 2013. (Post Trial Processing at 2.) The Convening Authority took action on July 8, 2013, which was 207 days after trial. (*Id*. at 2; C.A.A. at 5). Defense requested additional twenty days to submit matters of clemency, which reduces this number to 187 days. The United States explained the delay. (Post-Trial Processing Letter from Commander, Navy Region Mid-Atlantic to Judge Advocate General (Code 20), July 8, 2013.) As noted above, this letter referenced a workload with numerous courts-martial responsibilities and time to fix the poor transcription. *Id.*

F. Convening Authority's Instruction to tenant commands on the provision of members' questionaires.

Appellant filed a supplemental assignment of error, alleging that some categories of people were systematically and improperly excluded from consideration as members by the convening authority. (Appellant's Supplemental Assignment of Error.) As evidence, Appellant provided a copy of the Convening Authority's instruction to tenant commands, which gave guidance for how each of these tenant commands were to provide members' questionaires of potential members for both courts-martial and boards of inquiry. (COMNAVREGMIDLANTINST 5813.1 dtd 20 Jun 2002, Appendix 1 of Appellant's Supplemental Assignment of Error.) Only one command was required to provide questionaires from potential members of the paygrades E-6 and below. (COMNAVREGMIDLANTINST 5813.1 dtd 20 Jun 2002, Encl. 1 at 1.)

Summary of Argument

I.

Trial Counsel's argument was not improper because it did not inflame the passions or prejudices of the members. Under *Baer*, imploring members to envision the victim's circumstances is permitted. The use of pronouns "we" and "us" are also allowed within reason, especially in light of the Military

Judge's instruction that arguments of counsel represent only "individual suggestions" and own opinions.

II.

The Military Judge did not err in her instruction on reconsideration of a vote during sentencing. There is no requirement that military judges exactly follow the script as laid out in the Military Judge's Benchbook. Her comments were intended to admonish the members to thoroughly and carefully examine the evidence and have a full and engaging discussion prior to making their decision on the case. Further, the Military Judge fully informed the members that they could do a vote on reconsideration if necessary, and the process by which to do so.

III.

Appellant's sentence is appropriate. In a horror lasting three and one-half hours, Appellant physically assaulted DC3 SR, raped her, forcibly sodomized her, and threatened to kill her. The Members' decision to sentence Appellant to confinement for life with the possibility of parole is fitting given the severe nature and seriousness of his offenses.

IV.

The Military Judge did not abuse his discretion in denying the challenge for cause as LCDR Patto's experience as a victim

at knifepoint was extremely dissimilar to the facts involving sexual assault in this case. There was neither actual nor implied bias, and LCDR Patto's participation in the court-martial did not cast doubt upon the fairness of the proceeding.

V.

Appellant has failed to explain how camera footage would be relevant to his defense. As such, Appellant has not shown that his counsel was ineffective.

VI.

Counsel's decision not to challenge MCC Mesta and FCC Curry because they previously served as Sex Assault Victim Intervention training representatives was reasonable under professional norms.

VII.

The Military Judge did not err by failing to give a consent or mistake-in-fact instruction, because no evidence was introduced at trial to give rise to such an instruction.

VIII.

Trial Defense Counsel's advisement to Appellant not to testify was sound advice. Appellant failed to provide explanation or evidence that Trial Defense Counsel provided this guidance. Assuming *arguendo* that he did, particular mannerisms, including the propensity to smirk, lend to sound advice that the

potential harm to Appellant’s case in testifying outweighed its benefit.

IX.

Appellant was lawfully sentenced to confinement for life with the possibility of parole by a three-fourth majority as set forth in Article 52(b)(2). Military jurisprudence has never required a unanimous vote for a confinement for life sentence, nor shall this Court compel this higher threshold.

X.

Appellant was subject to post-trial delay as the Convening Authority took 187 days (adjusted as Defense requested twenty days to issue matters for clemency) after trial to act. This delay, however, was a harmless error and Appellant has not identified any prejudice that occurred as a result of the additional time as instructed in the factors under *Barker v. Wingo*.

XI.

The Members in Appellant’s case were properly selected under Article 25, UCMJ. The Convening Authority was fully informed that his only limitation in selecting members was to those personnel who were attached to Commander, Navy Region Mid-Atlantic who were senior in paygrade to Appellant.

Argument

I.

TRIAL COUNSEL'S CLOSING STATEMENT DURING SENTENCING WAS PROPER BECAUSE HIS ARGUMENT USED IS CONSIDERED PERMISSIBLE PERSONALIZING UNDER *UNITED STATES v. BAER*.

A. Improper comments are reviewed de novo, tested for prejudice when objected to, and reviewed for plain error where Appellant failed to object.

Whether a Trial Counsel's argument was improper under R.C.M. 919 is a question of law reviewed *de novo*. *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005). But since there is a failure to object at trial, this Court shall review for plain error. *Fletcher*, 62 M.J. 181 (stating that "[b]ecause defense counsel did not raise any objection at trial, the injection of Trial Counsel's personal beliefs and opinions must rise to the level of plain error before relief is warranted."; R. 2244-2245.)

B. To have committed prosecutorial misconduct, Trial Counsel must violate a legal norm or standard.

Rule for Courts-Martial 919 sets the bounds for closing argument on findings on the merits. Although R.C.M. 1001(g) governing sentencing arguments does not repeat or refer to the standards spelled out in the discussion of R.C.M. 919(b), that discussion sets forth general principles that may be applied to sentencing arguments. *See United States v. Ferger*, 1997 CCA LEXIS 560, at *2 n.2 (N-M. Ct. Crim. App. Oct. 30, 1997).

Counsel may make "reasonable comment on the evidence in the case, including inferences to be drawn therefrom." MCM, *supra* note 2; R.C.M. 919. Counsel also may address the "testimony, conduct, motives, interests, and biases of witnesses to the extent supported by the evidence," and "may treat the testimony of witnesses as conclusively establishing the facts related by the witnesses." *Id*.; R.C.M. 919(b) discussion. In general, asking members to picture themselves or their families as crime victims, and thus to feel personal interest in the case, is foreclosed as "calculated to inflame the passions or prejudices" of the members. *See United States v. Shamberger*, 1 M.J. 377, 379 (C.M.A. 1977) (internal quotes omitted); *United States v. Moore*, 6 M.J. 661, 664 (A.F.C.M.R. 1978) (asking members to picture their families as crime victims was inflammatory).

C. Trial Counsel's argument is considered proper personalizing because it did not inflame the passions or prejudices of the members.

Not every effort to personalize a case in closing argument has been prohibited. Courts have allowed counsel to ask jury members to put themselves in the place of a witness. Personalized arguments aimed at relevant sentencing factors have also been allowed. A sentencing "argument asking the members to imagine the victim's fear, pain, terror, and anguish is permissible, since it is simply asking the members to consider victim impact evidence." *United States v. Baer*, 53 M.J. 235,

238 (C.A.A.F. 2000)*; see also United States v. Edmonds*, 36 M.J. 791, 792-93 (A.C.M.R. 1993) (asking members to imagine the fear of a robbery victim is permissible); *Basile v. Bowersox*, 125 F. Supp. 2d 930, 951 (E.D. Mo. 1999) (prosecutor asking jury to imagine the terror when the victim was aware of defendant behind her, grabbing her and then shooting her twice in the head constituted reasonable inferences from evidence, not improper personalization).

In the instant case, Trial Counsel's statement considering sentencing "not in the pristine area of" courtroom was meant to exhort the Members to consider the fear and terror felt by DC3 SR. Asking the Members to consider the victim's circumstances at the time of the crimes "is conceptually different from asking them to put themselves in the victim's place." *Baer*, 53 M.J. at 238*; see also United States v. Melbourne*, 58 M.J. 682, 690 (N-M. Ct. Crim. App. 2003); *Edmonds*, 36 M.J. at 793.

The use of the pronouns "we" and "us" are also not *per se* improper argument. *See Fletcher*, 62 M.J. at 181, (finding court plain error when the Trial Counsel "repeatedly inserted herself into the proceedings by using the pronouns 'I' and 'we'."); *but see United States v. Pimienta*, 66 M.J. 610, 618 (N-M.C.C.A. 2008) (Trial Counsel interjection of personal pronoun "we" often in argument does not rise to level of plain error).

In *Fletcher*, the trial counsel repeatedly vouched for the credibility of the Government's witnesses and evidence by interjected personal views of the evidence and told the members the accused was "guilty". There, the trial counsel made references to the Government's evidence as "unassailable, fabulous and clear" and disparaged defense's evidence as "unbelievable, ridiculous and phony." *Fletcher*, 62 M.J. at 180. Trial Counsel's comments in this case do not rise to the level of plain error in *Fletcher*. Instead, Trial Counsel's use of pronouns is acceptable when considering Trial Counsel's arguments in their entirety of his entire argument. *Pimienta*, 66 M.J. at 618 (holding counsel interjecting the personal pronoun "we" often in argument not as egregious as misconduct in *Fletcher*); *see also United States v. Robinson*, 485 U.S. 25, 33 (1988) (holding that "prosecutorial comment must be examined in context").

Finally, the Military Judge correctly instructed the members that arguments of counsel are only his "individual suggestions" and own opinion, but sentencing decisions remain solely for the members. (R. 2265.) Assuming *arguendo* that this part of the argument was improper, it was not so improper as to elicit a defense objection. As such, any error was harmless and that Appellant suffered no material prejudice to his substantial rights.

II.

MILITARY JUDGE DID NOT ERR IN HER FINDINGS INSTRUCTIONS WHERE HE ADDED TO THE MILITARY JUDGE'S BENCHBOOK SCRIPT REGARDING RECONSIDERATION.

A. Standard of Review.

Whether the Military Judge properly instructed the members is an issue of law reviewed *de novo*. *United States v. Maynulet,* 68 M.J. 374, 376 (C.A.A.F. 2010). Where there is no objection at trial, this Court reviews for plain error. *United States v. Tunstall*, 72 M.J. 191, 193 (C.A.A.F. 2013). "Under a plain error analysis, the accused has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused." *Tunstall*, 72 M.J. at 193-94 (quoting *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011)).

B. The Military Judge did not err in his instruction to the members regarding reconsideration during sentencing deliberations.

Nothing in military jurisprudence, the Rules for Courts Martial, or the UCMJ requires that a military judge to follow the script in the Military Judge's Benchbook verbatim. Military judges are entrusted with the authority to explain the law correctly, and are not mere automatons with the sole task of reading a script to the members. *See United States v. Warren*, 13 M.J. 278, 287 (C.M.A. 1982) (Fletcher, J., concurring)

("Trial judges are not mere robots; they are presumed to appreciate the law of the appellate courts, military or civilian, and the effect these decisions have on the matter then presently before them.").

Here, the Military Judge instructed the Members according to the Military Judge's Benchbook, and offered additional advice regarding the member's deliberations. The Military Judge did not state that the Members should not conduct reconsideration. Rather, her additional commentary was intended to encourage the Members to examine the evidence carefully and thoroughly. She told the Members to "have a full and free discussion about everything you've heard in the case. . . . Take the time to talk through the case and everything you've heard and take a look at the evidence." (R. 1974-1975.)

A reconsideration vote would be logically less likely to be necessary if all of the Members carefully examined the evidence and had a thorough and engaged discussion prior to taking a vote. This would allow each Member to make a clear and informed decision on the case. As such, the Military Judge's instruction was correct in form and function.

C. Even if the Military Judge's additional commentary beyond the script of the Benchbook did constitute error, there was no prejudice.

Even if the Military Judge erred by straying from the script contained in the Military Judge's Benchbook, the

statement that "[t]here is generally no reason for reconsideration if you've had a really full and free discussion on the evidence before you" did not prejudice Appellant. The commentary leaves open the Members' ability to conduct a vote on reconsideration if necessary. They were fully informed of their right to conduct such a vote from her prior instructions from the script of the Benchbook, even if she qualified these instructions with an explanation to carefully examine the evidence before taking a vote.

III.

APPELLANT'S SENTENCE OF CONFINEMENT FOR LIFE IS WARRANTED AND JUSTIFIED CONSIDERING THE NATURE OF HIS CRIMES AND THE REASONABLE FEAR THE VICTIM HAS FOR REPRISALS.

Sentence appropriateness is reviewed *de novo*. *United States v. Baier*, 60 M.J. 382, 383—84 (C.A.A.F. 2005). In conducting its analysis, this Court may only affirm so much of the sentence as it finds correct in law and fact based on a review of the entire record. Article 66; 10 U.S.C. § 866(c). Measuring sentence appropriateness requires an "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (*quoting United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). "Sentence appropriateness involves the judicial

function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 396 (C.M.A. 1988).

The members sentenced Appellant to confinement for life with the possibility of parole, forfeitures to be paid to dependents to the extent of the law, and a dishonorable discharge. (R. 2280.) At trial, Appellant faced a maximum punishment of confinement for life without the eligibility of parole, total forfeitures, reduction to pay grade E-1, a fine, and a dishonorable discharge. (R. 2253.)

Appellant's conduct was egregious enough to merit his awarded punishment. Appellant's assault was premeditated, predatory, and heinous. Appellant punched and choked DC3 SR, forced her to undress, and took pictures of her in sexual positions. (R. 1059.) Holding a blade to her, he threatened that if she did not comply, he would chop her up and toss her body parts out to sea. (R. 1046.) He forced her down two flights into a storage room within an equipment room covered with black plastic trash bags that he secured with duct tape, where he raped and sodomized her and then used zip ties to shackle her hands toward the ceiling. (R. 979, 1069-1074, 1105.) Finally, he threatened to kill her if she told anyone about this incident. (R. 1103-1104.)

Since the assault, DC3 SR went from a happy, Early Promote (EP) sailor to an average sailor that is scared to be alone. (R. 2065, R. 2090.) She also reasonably fears that Appellant would either realize his threat to kill her or assault other women if he were released. (R. 2090.) Appellant's sentence is appropriate. To grant relief at this point would be engaging in clemency, a prerogative reserved for the convening authority, and this Court should decline to do so. *United States v. Healy,* 26 M.J. 394, 395-96 (C.M.A. 1988).

IV.

THE MILITARY JUDGE DID NOT ERR IN DENYING THE CHALLENGE FOR CAUSE AGAINST LCDR PATTO BECAUSE HIS EXPERIENCES AT KNIFEPOINT ARE SUBSTANTIALLY DISSIMILAR TO FACTS OF THIS CASE.[3]

A. Standard of Review.

A military judge's denial of a challenge for cause may not be overturned by this Court unless there is a clear abuse of discretion in the military judge's application of the liberal-grant policy. *United States v. Napolitano*, 53 M.J. 162, 166 (C.A.A.F 2000)(citing *United States v. White*, 36 M.J. 284, 287 (C.M.A. 1993). A "military judge is given great deference when deciding whether actual bias exists because it is a question of fact, and the judge has observed the demeanor of the challenged

[3] Assignment of Error IV was submitted pursuant to *Grostefon*, 12 M.J. 431.

member." *Id.* (citing *United States v. Warden*, 51 M.J. 78, 81 (C.A.A.F. 1999). Less deference is given to the military judge's determination when this Court is reviewing a finding on implied bias because it is objectively "viewed through the eyes of the public." *Id.*

B. LCDR Patto had no actual bias.

LCDR Patto showed no actual bias during *voir dire*. LCDR Patto stated that his experience at knifepoint, where three men demanded for him to give him money would not affect his ability to be member in the court-martial. (R. 384.) Furthermore, this experience is far different than the sexual assault experienced by DC3 SR. As such, LCDR Patto held no actual bias in Appellant's case.

C. No implied bias exists from LCDR's previous experience assaulted by knifepoint.

"[I]ssues of implied bias are reviewed under a standard less deferential than abuse of discretion but more deferential than *de novo*." *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2008). When there is no actual bias, 'implied bias should be invoked rarely.'" *United States v. Warden*, 51 M.J. 78, 81-82 (1999). A military judge's denial of a challenge for cause may not be overturned by this Court unless there is a clear abuse of discretion in the military judge's application of the liberal-grant policy. *United States v. Napolitano*, 53 M.J. 162, 166

(C.A.A.F 2000) (citing *United States v. White*, 36 M.J. 284, 287 (C.M.A. 1993).

Implied bias exists when, regardless of an individual member's disclaimer of bias, most people in the same position would be biased. *Napolitano*, 53 M.J. at 167. Challenges for implied bias are evaluated based on the totality of the factual circumstances. *United States v. Bagstad*, 68 M.J. 460, 462 (C.A.A.F. 2010)(citation omitted). Courts have found that the "doctrine of implied bias should be reserved for 'exceptional situations' in which objective circumstances cast concrete doubt on the impartiality of a juror." *United States v. Torres,* 128 F.3d 38, 46 (2d Cir. 1997)(citing *Smith v. United States*, 455 U.S. 209, 222 (O'Connor, J., concurring)).

As the Military Judge articulated and applied the liberal grant mandate in denying the challenge for cause, his determinations are reviewed for an abuse of discretion. (R. at 510); *Napolitano*, 53 M.J. at 166.

Here, no "exceptional" circumstances existed which cast any doubt on LCDR Patto's impartiality. LCDR Patto's experience robbed at knifepoint in a foreign country is extremely dissimilar to the facts involving sexual assault in this case. (R. 384.) But it is almost exactly akin to a sexual assault case in which a court held that it could not "agree with counsel that being robbed at knife point in a foreign country (Lt Col B)

is sufficiently closely related to the facts in this case to give rise to an obvious challenge for cause." *United States v. Travels*, 47 M.J. 596, 600 (A.F.C.C.A. 1997). As such, the Military Judge did not abuse his discretion in finding that LCDR Patto had no actual or implied bias, and denying the challenge for cause against him.

V.

TRIAL DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO REQUEST CAMERA FOOTAGE DURING THE TIME OF THE ASSAULT BECAUSE APPELLANT HAS FAILED TO EXPLAIN HOW THIS EVIDENCE IS RELEVANT IN HIS DEFENSE.[4]

A. An appellant must demonstrate that counsel's acts or errors were outside the wide range of professionally competent assistance, and that prejudice resulted from those errors.

Claims of ineffective assistance of counsel are reviewed *de novo*. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). To prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate: (1) "a deficiency in counsel's performance that is so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment; and (2) that the deficient performance prejudiced the defense through errors so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *United States v.*

[4]Assignment of Error V was submitted pursuant to *Grostefon*, 12 M.J. 431.

Moulton, 47 M.J. 227, 229 (C.A.A.F. 1997) (quoting *Strickland,* 466 U.S. at 689 (internal quotation marks omitted)).

For a reviewing court to deem counsel's performance deficient, the performance must fall below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. The burden is on Appellant to point to specific errors made by his Trial Defense Counsel that were unreasonable under prevailing professional norms. *See United States v. Cronic*, 466 U.S. 648, 666 (1984). These acts or errors must be outside the wide range of professionally competent assistance. *Strickland*, 466 U.S. at 690. Any inadequacy must be a serious deficiency that falls measurably below the performance ordinarily expected of fallible lawyers. *United States v. DiCupe*, 21 M.J. 440, 442 (C.M.A. 1986) (citing *United States v. DeCoster*, 624 F.2d 196, 208 (D.C. Cir. 1979) (*en banc*)). The competence of the Trial Defense Counsel is strongly presumed, judged at the time of counsel's action and based on the facts as counsel knew them, and not judged through hindsight. *Strickland*, 466 U.S. at 689.

B. Trial Defense Counsels' decision not to obtain camera footage was reasonable under the circumstances.

The court should "not second-guess the strategic or tactical decisions made at trial by defense counsel, but where inaction occurs at a critical point where action is compelled by the situation——where, in other words, defense counsel remains

silent where there is no realistic strategic or tactical decision to make but to speak up." *United States v. Rivas*, 3 M.J. 282, 289 (C.M.A. 1977); *see also United States v. Sanders*, 37 M.J. 116, 118 (C.M.A. 1993) (dismissing an appellant's second-guessing of tactical decisions as "Monday-morning quarterbacking"). Courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

Appellant has not met his burden to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. at 687. Appellant has failed to explain at all how such camera footage would be relevant in his defense. *United States v. Davis*, 2005 CCA LEXIS 333, *11-12 (N-M. Ct. Crim. App. Oct. 31, 2005) ("Defense counsel need not traverse every possible evidentiary avenue in the course of their journey . . . , only those that might assist in defense.").

Appellant also has not shown prejudice in sentencing due to any alleged deficiency in counsels' performance. For prejudice, an appellant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Appellant cannot make this showing.

VI.

APPELLANT HAS FAILED TO DEMONSTRATE THAT TRIAL DEFENSE COUNSEL'S DECISION NOT TO CHALLENGE MCC MESTA AND FCC CURRY FOR REASONS THAT THEY BOTH WERE PREVIOUSLY SEX ASSAULT VICTIM INTERVENTION (SAVI) TRAINING REPRESENTATIVES AMOUNTS TO INEFFECTIVE ASSISTANCE OF COUNSEL.[5]

A. Standard of Review and Law.

The standard of review and law for an ineffective assistance of counsel claim is discussed in Assignment of Error IV, subsections A and B, *supra*.

B. Appellant has failed to demonstrate that not challenging MCC Mesta and FCC Curry was tantamount to ineffective assistance of counsel.

Appellant argues without additional explanation that Trial Defense Counsel's decision not to challenge MCC Mesta and FCC Curry for reasons that they both were previously Sex Assault Victim Intervention (SAVI) Training Representatives amounts to ineffectiveness assistance of counsel. (Appellant's Br. at 3.) The burden still lies with Appellant to demonstrate "that Trial Defense Counsel's failure to challenge . . . participation constituted ineffective assistance of counsel under the circumstances here." *United States v. Lucas*, 25 M.J. 9, 11 (C.M.A. 1987) (citing *United States v. Scott*, 24 M.J. 186, 187-89 (C.M.A. 1987)). Appellant also cannot demonstrate prejudice

[5]Assignment of Error VI was submitted pursuant to *Grostefon*, 12 M.J. 431.

to any alleged deficiency in counsels' performance. For prejudice, an appellant must show "a reasonable probability that, but for counsel's [failing to challenge these two members], the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. It is very unlikely that Trial Defense Counsel could successfully challenge these members. *See*, *e.g.*, *United States v. Gifford*, 2013 CCA LEXIS 97 (N-M. Ct. Crim. App. 2013) (holding military judge did not err by denying challenge for cause of member that was SAVI representative); *see also United States v. Diaz*, 61 M.J. 594 (N-M. Ct. Crim. App. 2005). As such, Appellant cannot make this showing.

VII.

THE MILITARY JUDGE DID NOT ERR BY FAILING TO GIVE A CONSENT OR MISTAKE-IN-FACT INSTRUCTION, BECAUSE NO EVIDENCE WAS INTRODUCED AT TRIAL THAT WOULD GIVE RISE TO SUCH AN INSTRUCTION.[6]

A. Standard of Review.

The issue of whether members were properly instructed is an issue of law reviewed *de novo*. *United States v. Schroeder*, 65 M.J. 49, 54 (C.A.A.F. 2007). Generally, a military judge has substantial discretionary power to decide whether to issue a jury instruction. *United States v. Maynulet*, 68 M.J. 374, 376 (C.A.A.F. 2010) (*citing United States v. McDonald*, 57 M.J. 18

[6]Assignment of Error VII was submitted pursuant to *Grostefon*, 12 M.J. 431.

(C.A.A.F. 2002)). Courts review a military judge's decision "to give or not give a specific instruction, as well as the substance of any instructions given, to determine if they sufficiently cover the issues in the case and focus on the facts presented by the evidence." *McDonald*, 57 M.J. at 20.

B. Military judges are required to instruct a panel on affirmative defenses that are "in issue" and when "some evidence" of the defense has been presented.

"A military judge is required to instruct members on any affirmative defense that is 'in issue,' and a matter is considered 'in issue' when 'some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they chose.'" *United States v. Neal*, 71 M.J. 60, 61 (C.A.A.F. 2012); *United States v. Dipaola*, 67 M.J. 98, 100 (C.A.A.F. 2008); *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007); R.C.M. 920(e)(3). "In other words, 'some evidence,' entitling an accused to an instruction, has not been presented until 'there exists evidence sufficient for a reasonable jury to find in [the accused's] favor.'" *United States v. Schumacher*, 70 M.J. 387, 389 (C.A.A.F. 2011) (quoting *Mathews v. United States*, 485 U.S. 58, 63 (1988)).

In *United States v. Biagase*, 50 M.J. 143 (C.A.A.F. 1999), the Court of Appeals for the Armed Forces considered the standard of "some evidence" for raising an issue of fact at trial. *Biagase* involved the defense's burden to produce some

evidence of unlawful command influence before the burden shifts to the prosecution to disprove its existence; the explanation of the "some evidence" standard is instructive here. While the threshold for raising the "some evidence" standard at trial is "low," the evidence required is more than mere allegation or speculation." *Biagase*, 50 M.J. 143; *United States* v. *Stoneman*, 57 M.J. 35 (C.A.A.F. 2002).

Additionally, a "military judge's duty to instruct is not determined by the defense theory; he must instruct if the defense is raised." *Dipaola*, 67 M.J. at 101. Although the defense theory is not dispositive in determining what affirmative defenses have been reasonably raised by the evidence, it can be taken into account when considering the evidence. *Dipaola*, 67 M.J. at 101 (citing *United States v. Hibbard*, 58 M.J. 71, 76 (C.A.A.F. 2003)).

C. Affirmative defense of consent.

Consent is an affirmative defense to a prosecution for aggravated sexual assault under Article 120(c). *See* Article 120(r), UCMJ. As explained in *United States v. Neal*, when used in the context of Article 120, affirmative defense of consent contains three components. 68 M.J. 289, 298 (C.A.A.F. 2010). The first component is that consent under Article 120 means words or overt acts indicating a freely given agreement to the sexual conduct at issue by a competent person. *Id*. at 289. The

second component identifies circumstances excluded from the definition of consent such as: the accused's use of, or threat of, force; a previous or current dating relationship; or manner of dress of the victim does not constitute consent. *Id*. The third component of the definition identifies circumstances in which a victim cannot give consent under Article 120, including persons substantially incapable of appraising the nature of the sexual conduct at issue because of specified mental or physical circumstances. *Id*. The evidence to support a defense can be presented by the prosecution, defense, or the court-martial. *Dipaola*, 67 M.J. at 100.

D. <u>The Military Judge correctly concluded there was insufficient evidence to warrant a consent instruction</u>.

In order to qualify for an instruction on the affirmative defense of consent, DC3 SR must have expressed words or undertaken overt acts indicating a freely given agreement to the sexual conduct. *Neal*, 68 M.J. 288.

The Military Judge correctly concluded that an instruction on the defense of consent was not warranted because the Record lacked "some evidence" of consent that the Members could rely on. (R. 1854.) The Military Judge properly did so because there was no evidence of there was any relationship between Appellant and DC3 SR before the assault, except for the occasional exchange of pleasantries. (R. 1854).

E. Assuming, *arguendo*, the Military Judge should have instructed the Members on the defense of consent, the error was harmless because it did not contribute to the verdict.

If this Court determines that a consent instruction should have been given, the test for determining whether this constitutional error was harmless is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967). To put it another way, "is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" *Neder v. United States*, 527 U.S. 1 (1999).

Ultimately, at trial, this case came down to the credibility of DC3 SR and whether the Members believed her testimony. Appellant's trial theory was to cast reasonable doubt, by showing DC3 SR consented to "playful, kinky sex". (R. 970-971.) The United States proved beyond a reasonable doubt that she did not consent to any of the sexual acts initiated by Appellant.

At trial, Trial Defense Counsel vigorously cross-examined DC3 SR on whether she knew Appellant, her statements to medical personnel, and her familiarity with the ship. (R. 1128-1163.) Trial Defense Counsel's cross-examination allowed the Members to gauge DC3 SR's credibility at the time of the assault. The

Members were free to weigh this evidence as they desired to do, and the weight or importance the Members placed on this evidence could have been sufficient to cast doubt on the Government case: that DC3 SR consented to the sexual acts. None of her testimony demonstrated that she somehow consented to Appellant's attack.

Because this case ultimately boiled down to the credibility of DC3 SR, any error that occurred was harmless and did not contribute to the verdict. A rational jury either believed or did not believe her testimony. The Members verdict indicates they did believe DC3 SR did not consent to Appellant's sexual acts. Therefore, it is clear beyond a reasonable doubt that any error in not instructing the Members on the affirmative defense of consent is harmless. *See Chapman*, 386 U.S. 18; *Neder*, 527 U.S. 1.

VIII.

APPELLANT HAS NOT MET HIS BURDEN TO DEMONSTRATE THAT TRIAL DEFENSE COUNSEL WAS INEFFECTIVE WHEN ADVISING APPELLANT NOT TO TESTIFY.[7]

A. Standard of Review and Law.

The standard of review and law for an ineffective assistance of counsel claim is discussed in Assignment of Error IV, subsections A and B, *infra*.

[7] Assignment of Error VIII was submitted pursuant to *Grostefon*, 12 M.J. 431.

B. Trial Defense Counsel's Advisement to Appellant not to testify was sound advice.

Appellant argues that his counsel was at fault and deficient when he advised him not to testify because ofd "particular mannerisms where he had the propensity to smirk even during serious discussion." (Appellate Br. at 3.) Appellant does not provide further explanation or evidence that Trial Defense Counsel provided this advice. Assuming *arguendo* that he did, Trial Defense Counsel's advice to Appellant not to testify was based on sound tactical reasons and was not ineffective. Particular mannerisms, including the propensity to smirk, lend to sound advice that the potential harm to Appellant's case outweighed the benefit of his testimony. *See*, *e.g.*, *United States v. Richardson*, 1998 CCA LEXIS 535, *6-7 (A.C.C.A. Sept. 30, 1998) (defense counsel's advice that appellant's inconsistent statements posed significant harm to him testifying was sound and reasonable).

C. If this Court finds a colorable claim of ineffective assistance of counsel under Assignments of Error V, VI, and/or VIII, it should order Trial Defense Counsel to submit an affidavit.

Trial defense counsels are not compelled to justify their actions until a court of competent jurisdiction reviews the allegation of ineffectiveness and the government response, examines the record, and determines that the allegation and the record contain evidence which, if unrebutted, would overcome the

presumption of competence. *United States v. Melson*, 66 M.J. 346, 347 (C.A.A.F. 2008) (citing *United States v. Lewis*, 42 M.J. 1, 6 (C.A.A.F. 1995)) (internal quotations omitted). Once the presumption of competence has been overcome, the court must provide the Government an opportunity to submit an affidavit from Trial Defense Counsel to rebut the allegations. *Id.* Thus, if the Court finds a colorable claim of ineffective assistance of counsel under this assignment of error or in Assignment of Error V and VI *infra*, the Government asks that this Court order Trial Defense Counsels to submit an affidavit so that this issue may be further litigated.

IX.

APPELLANT WAS LAWFULLY SENTENCED TO CONFINEMENT FOR LIFE BY A THREE-FOURTH MAJORITY AS SET FORTH IN ARTICLE 52(B)(2).[8]

Appellant implies, without providing an explanation, that the tenets of due process for a members panel to convict and sentence someone to life in prison should require a unanimous vote. Military jurisprudence has never required a unanimous vote for a confinement for life sentence, nor shall this Court compel this higher threshold.

Under military jurisprudence, only a death sentence requires a unanimous vote. Article 52(b)(1), UCMJ. The members

[8] Assignment of Error IX was submitted pursuant to *Grostefon*, 12 M.J. 431.

were instructed that "a sentence which includes confinement for life without eligibility for parole, confinement for life, or confinement in excess of ten years requires the concurrence of three-fourths or six members." (R. 2266.) This instruction by the Military Judge is correct under Article 52(b)(2) and R.C.M. 1006(d)(4)(B).

X.

ALTHOUGH IT TOOK THE CONVENING AUTHORITY 187 DAYS AFTER TRIAL TO ACT, THAT DELAY WAS HARMLESS ERROR AND APPELLANT HAS NOT IDENTIFIED ANY PREJUDICE THAT OCCURRED AS A RESULT.[9]

A. This issue is reviewed *de novo*.

This Court reviews *de novo* whether post-trial delay constitutes a due process violation. *United States v. Bush*, 68 M.J. 96, 102 (C.A.A.F. 2009)(*citing United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006)). If a due process violation occurred, the burden of proof and production is on the government to show, through the totality of the circumstances found in the record, that the error was harmless beyond a reasonable doubt. *Bush*, 68 M.J. at 104.

[9] Assignment of Error X was submitted pursuant to *Grostefon*, 12 M.J. 431.

B. The post-trial delay did not result in a due process violation under the four *Barker v. Wingo* factors.

"The Sixth Amendment to the United States Constitution contains the constitutional guarantee to a speedy trial." *United States v. Mizgala*, 61 M.J. 122, 124 (C.A.A.F. 2005). Appellate delay can result in a violation of due process when there is facially unreasonable delay, and the balancing of four factors weigh in Appellant's favor. *United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). Those four factors are: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *Id*. (*citing Barker v. Wingo*, 407 U.S. 514, 530 (1972)). The fourth factor, prejudice, contains three sub-factors: (1) prevention of oppressive incarceration; (2) minimization of anxiety and concern; and (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired. *Moreno*, 63 M.J. at 138-39. The Court weighs all four factors, but no one factor is determinative. *Id*. at 136.

1. The first *Barker* factor, length of delay, only marginally weighs in favor of Appellant. The second factor, the reason for the delay, weighs in favor of the United States.

A delay of over 120 days from the end of trial until the date the convening authority takes action on a case creates a presumption of unreasonable delay that triggers a full due

process analysis. *Moreno*, 63 M.J. at 142. This Court encourages the government to explain the reasons for post-trial delay, as it did here. *United States v. Brown,* 62 M.J. 602, 607 n. 5 (N-M. Ct. Crim. App. 2005) (*en banc*). Lengthy periods of delay that are unexplained are more likely to be due process violations. *United States v. Bredschneider,* 65 M.J. 739, 742 (N-M. Ct. Crim. App. 2007); *Brown,* 62 M.J. at 607 n.5.

In *United States v. Jones*, the delay of 290 days prior to convening authority action, along with the remaining seventy-three days before it was docketed with the Navy-Marine Corps Court of Criminal Appeals was deemed to be excessive for a trial that lasted only fifty-five minutes and had a transcript that was only thirty-seven pages in length. Egregious delay was found in *Bredschneider,* a case that lingered for over seven years before being docketed with the Navy Marine Corps Court of Criminal Appeals and where the government offered no reason for the delay. 65 M.J. at 742. In contrast, this case deals with a fully contested court-martial, the transcript of which, including motions and exhibits, spans fourteen volumes of material, the transcript itself being 2286 pages in length. The Convening Authority took action 207 days after Appellant’s trial ended, on July 8, 2013. (C.A.A. at 1, 5.) Because defense requested and received an additional twenty days to file additional matters for clemency, however, the actual time was

only 187 days. 187 days only exceeds the *Moreno* standards by sixty-seven days, and it is not particularly lengthy or egregious. Here, the delay is adequately explained by the military judge's workload, fully described in the Convening Authority's Action, as well as the time required to provide a complete and accurate record due to the initial poor transcription of the proceedings. (C.A.A. at 5-6.) The delay itself is not a particularly excessive, and is reasonable considering the circumstances.

2. The third *Barker* factor weighs in favor of the United States because, until now, Appellant has not asserted his right to speedy trial.

Addressing the third factor, an assertion of a speedy trial right will be given "strong evidentiary weight" in determining whether a violation occurred. *Barker,* 407 U.S. at 531-32. At no point in time did Appellant assert his right to timely review and brings this issue to light for the first time on appeal. (Appellant's Br. at 3.) Therefore, this factor weighs in favor of the United States.

3. The fourth *Barker* factor, dealing with prejudice, weighs in favor of the United States.

Appellant fails to carry his burden of establishing prejudice. There is no evidence of oppressive incarceration, he has not alleged any anxiety resulting from the delay, and he has not demonstrated how pressing this appeal would be adversely

affected by the delay. Since Appellant has not demonstrated any grounds to establish prejudice, either on the record or through other means, this Court may not simply presume that it exists. *Bush*, 68 M.J. at 104 (*citing Moreno*, 63 M.J. at 142; *Toohey*, 63 M.J. at 363)("We have declined to adopt such a [presumption of prejudice] standard in the past and see no need to alter that position.").

Weighing all four factors, the first factor only marginally favors Appellant. The remaining three factors strongly favor the United States. There is no due process violation, despite the delay. It follows that there is no reason to grant sentencing relief.

C. Even if a due process violation is assumed, Appellant should not be granted sentencing relief because the error was harmless beyond a reasonable doubt.

Assuming, without conceding, a due process violation, this Court then conducts a *de novo* review to determine if the violation is harmless. *Bush,* 68 M.J. at 104. The burden is on the Government to show, on the basis of the record before the court, that the violation is harmless beyond a reasonable doubt. *Id*. "In those cases where the record does not reflect *Barker* prejudice, as a practical matter, the burden to establish harmlessness may be more easily attained by the Government." *Id*. Even absent actual prejudice, this court is responsible to review the appropriateness of a sentence in light of

presumptively excessive and unexplained delay in post-trial processing. Article 66(c), UCMJ. *See generally United States v. Toohey*, 63 M.J. 353, 362-63 (C.A.A.F. 2006); *Moreno*, 63 M.J. at 143; *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); *United States v. Ney*, 68 M.J. 613, 616-17 (A.C.C.A. 2010).

In this case the totality of the circumstances in the Record shows no prejudicial impact from the post-trial delay. As discussed above, there is nothing in the Record that indicates any prejudice, nor does Appellant allege any. To find prejudice in this case would be to adopt a presumption of prejudice, contrary to the Court of Appeals for the Armed Forces' holding in *Bush*. Because there has been no prejudice to Appellant resulting from the delay, it is harmless beyond a reasonable doubt.

D. Although this Court can review the sentence pursuant to Article 66(c), no reason exists for granting Appellant's requested confinement credit.

Article 66(c), UCMJ, vests in the courts of criminal appeals broad authority to determine the findings and sentence that should be approved. *Toohey v. United States*, 60 M.J. 100, 103 (C.A.A.F. 2004). In conducting its sentence appropriateness review under Article 66(c), UCMJ, a court of criminal appeals has "'broad discretion to grant or deny relief for unreasonable or unexplained [post-trial] delay . . . .'" *United States v. Ashby*, 68 M.J. 108, 124 (C.A.A.F. 2009). Even absent actual

prejudice, this court is responsible to review the appropriateness of a sentence in light of presumptively excessive and unexplained delay in post-trial processing. *See* Article 66(c); *see generally Toohey*, 63 M.J. at 362-63; *Moreno*, 63 M.J. at 143; *Tardif*, 57 M.J. at 224.

Here, there are no grounds for sentencing relief of the type Appellant seeks. First, the delay was short; even though 187 days is presumptively unreasonable under *Moreno*, the Record contains detailed documentation about the reasons for this delay——listing the names and types of courts-martials, including whether they were contested cases or guilty pleas, and if they included rulings that required substantive findings of fact on the part of the military judge. (C.A.A. at 5.) Contrary to Appellant's argument, the delay here is not excessive and is fully explained, and gives this Court no reason to grant additional confinement credit to Appellant. This Court should not grant relief under Article 66(c) because it would be a windfall to Appellant under the *Brown* factors. The delay was fully acknowledged, processed as quickly as reasonably possible considering the workload, and not a product of gross negligence or bad faith by the government.

XI.

THE MEMBERS IN APPELLANT'S COURT-MARTIAL WERE PROPERLY SELECTED UNDER THE CRITERIA SET FORTH IN ARTICLE 25, UCMJ.

A. Standard of review.

Whether a panel is properly selected is a matter of law reviewed de novo. *United States v. Gooch*, 69 M.J. 353, 358 (C.A.A.F. 2011) (*citing United States v. Dowty,* 60 M.J. 163, 171 (C.A.A.F. 2004)).

B. The Convening Authority appropriately applied the Article 25 criteria in selecting members.

"As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel." *Gooch*, 69 M.J. at 357 (*quoting United States v. Downing,* 56 M.J. 419, 421 (C.A.A.F. 2002)). But there is no Constitutional right to a panel drawn from a fair cross-section of the military community in courts-martial. *See United States v. Santiago-Davila*, 26 M.J. 380, 389-90 (C.M.A. 1988).

Article 25, UCMJ, 10 U.S.C. § 825 (2012), governs how a convening authority must select members. It provides:

> When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are the best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.

Article 25, UCMJ. Beyond this, military law restricts convening authority discretion in the selection of members only in three instances:

> (1) "we will not tolerate an improper motive to pack the member pool," (2) "systemic exclusion of otherwise qualified potential members based on an impermissible variable such as rank [, race, or gender] is improper," and (3) "this Court will be deferential to good faith attempts to be inclusive and to require representativeness so that court-martial service is open to all segments of the military community."

Gooch, 69 M.J. at 358 (*quoting United States v. Dowty,* 60 M.J. 163, 171 (C.A.A.F. 2004)).

Appellant made no objection at trial to the overall composition of the initial group of members provided by the Convening Order. Appellant does not claim exclusion based on race or gender, but rather that the Convening Authority systematically excluded members below officer paygrade of O-3 and enlisted paygrade E-6. (Appellant's Supplemental Br. at 3.) However, COMNAVREGMIDLANTINST 5813.1 dtd 26 Jun 2002 did include some members below those paygrades, and specifically requested that NAVPHIBASE Little Creek Public Safety PM provide three members' questionnaires from personnel E-6 or below. (COMNAVREGMIDLANTINST 5813.1 dtd 26 Jun 2002.)

The Convening Authority properly chose the members for Appellant's court-martial. Appellant asserts that the Convening Authority made a "blanket exclusion" of junior officers and

junior enlisted because the order under which subordinate units provided members' questionnaires in advance to the Convening Authority's did not include enough junior officers and junior enlisted. (Appellant's Supplemental Br. at 7.) However, this instruction was merely intended to assist the Convening Authority in gathering enough potential candidates for members' panels. As the instruction states, "In order for the Commander to effectively administer his responsibilities pertaining to courts-martial and BOIs, addressees are required to nominate officers and enlisted personnel for consideration and detailing..." (COMNAVREGMIDLANTINST 5813.1A, para. 3.)

Article 25 states that members should be senior in rank to the accused. (Article 25(d)(1), UCMJ.) This requirement logically leads to more senior personnel than junior personnel being selected as members, as many junior personnel would be precluded from being so under Article 25(d)(1), when the accused is of a higher paygrade. Thus, this instruction, meant only to facilitate the easy gathering of potential members, would naturally provide more senior members to assist the Convening Authority in gathering a pool of qualified potential members.

There is no evidence that the Convening Authority was limited to only personnel whose questionnaires were provided pursuant to this instruction. Nowhere in this instruction does it state that the Convening Authority will limit their selection

of potential members only to those personnel whose questionnaires were provided per this instruction. The Convening Authority put no limitations whatsoever on himself in issuing this instruction, but only instructed tenant commands to provide a certain number of questionnaires on a quarterly basis in order to facilitate his selection of members who he considered best qualified by reason of age, education, training, experience, length of service, and judicial temperament. (Article 25(d)(2), UCMJ; COMNAVREGMIDLANTINST 5313.1 dtd 26 Jun 2012.)

Conclusion

WHEREFORE, the Government respectfully requests that this Court affirm the findings and sentence as adjudged and approved below.

ANN E. DINGLE
Lieutenant, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7433, fax (202) 685-7687

DAVID N. ROBERTS
Major, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7059, fax (202) 685-7687

Appendix

1. *United States v. Davis*, 2005 CCA LEXIS 333 (N-M. Ct. Crim. App. Oct. 31, 2005)

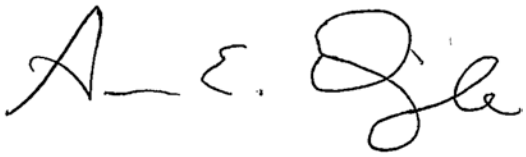
2. *United States v. Ferger*, 1997 CCA LEXIS 560 (N-M. Ct. Crim. App. Oct. 30, 1997).

3. *United States v. Gifford*, 2013 CCA LEXIS 97 (N-M. Ct. Crim. App. 2013)

4. *United States v. Richardson*, 1998 CCA LEXIS 535 (A.C.C.A. Sept. 30, 1998)

Certificate of Filing and Service

I certify the foregoing original was hand-delivered to the Court and a copy served upon opposing counsel on June 16, 2014.



ANN E. DINGLE
Lieutenant, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7433, fax (202) 685-7687

Appendix Cases

Citation #1
2005 CCA LEXIS 333

LEXSEE

Positive
As of: May 18, 2014

UNITED STATES v. Calvin K. DAVIS, Ensign (O-1), U.S. Navy

NMCCA 200301256

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

2005 CCA LEXIS 333

October 31, 2005, Decided

NOTICE: [*1] AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

SUBSEQUENT HISTORY: Motion granted by United States v. Davis, 62 M.J. 450, 2006 CAAF LEXIS 140 (C.A.A.F., 2006)
Review denied by United States v. Davis, 2006 CAAF LEXIS 1556 (C.A.A.F., Sept. 21, 2006)

PRIOR HISTORY: Sentence adjudged 11 October 2002. Military Judge: J.W. Rolph. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Mid-Atlantic, Norfolk, VA. Capt.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant servicemember was convicted by a general court-martial of larceny of several items of government property, in violation of Unif. Code Mil. Justice art. 121, 10 U.S.C.S. ß 921. The servicemember was sentenced to a term of confinement and dismissal from naval service, but the automatic forfeitures were waived. The servicemember challenged the findings of guilt and sentence.

OVERVIEW: The appellate court accepted the government's concession that the evidence was insufficient as to certain items. However, the evidence was factually sufficient as to all other items. The defense team was not ineffective as it was not remiss in opting to waive the opening statement, the strategic and tactical decisions as to potential defense evidence were reasonable, there was no evidence that the servicemember was prevented from testifying, defense counsel had addressed the servicemember's explanation for why the items were in his house during witness examination and argument, and the failure to obtain credit card records and files did not matter in the absence of a credible explanation for the presence of the property in the servicemember's house. Moreover, his ex-wife's motives in contacting investigators was of little significance as there was no reason to believe that she framed the servicemember and even if defense counsel expressed false confidence in the deficiencies in the government's evidence, that error did not result in relief. Although the convening authority erred in summarily denying a request for deferment of confinement, there was no showing of prejudice.

OUTCOME: The findings were modified to except the words "Northstar power washer," "shirts," and "duffle bags" from the specification. The findings were affirmed as excepted. The sentence, as approved by the convening authority, was affirmed.

CORE TERMS: defense team, military, defense counsel, opening statement, convening, civilian, reasonable doubt, confinement, ineffective, sentence, washer, ex-wife's, burden of proof, cross-examination, specification, generator, military character, assignments of error, legally sufficient, interviewed, television, confidence, factually, deferment, deficient, portable, pretrial, duffle, shirts, bags

LexisNexis(R) Headnotes

Military & Veterans Law > Military Justice > Evidence > Weight & Sufficiency
[HN1]The test for legal sufficiency is well-known. It requires the United States Navy-Marine Court of Criminal Appeals to review the evidence in the light most favorable to the government. In doing so, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the evidence is legally sufficient.

Military & Veterans Law > Military Justice > Evidence > Weight & Sufficiency
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review
[HN2]The test for factual sufficiency requires the United States Navy-Marine Corps Court of Criminal Appeals to be convinced of an appellant's guilt beyond a reasonable doubt, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses. Proof beyond a reasonable doubt, however, does not mean the evidence must be free from conflict. The fact finders may believe one part of a witness' testimony and disbelieve another. So, too, may the United States Navy-Marine Corps Court of Criminal Appeals. In resolving the question of factual sufficiency, the court carefully reviews the record of trial, but gives no deference to the factual determinations made at the trial level.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Military & Veterans Law > Military Justice > Counsel
[HN3]To obtain relief for a complaint that he was deprived of the effective assistance of counsel, an appellant in a court-martial proceeding has the burden to show that his lawyer's performance fell below an objective standard of reasonableness. Counsel's performance is presumed to be competent and adequate; thus, the appellant's burden is especially heavy on this point. He must establish a factual foundation for his complaint of deficient performance. Second-guessing, sweeping generalizations, and hindsight will not suffice.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Military & Veterans Law > Military Justice > Counsel
[HN4]To determine whether the presumption of competence is overcome, the United States Navy-Marine Corps Court of Criminal Appeals follows a three-part test: (1) Are the appellant's allegations true, and if so, is there a reasonable explanation for the lawyer's actions? (2) If the allegations are true, did the level of advocacy fall measurably below the performance standards ordinarily expected of fallible lawyers? (3) If so, the court tests for prejudice by asking whether there is a reasonable probability that, but for the lawyer's error, there would have been a different result.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Military & Veterans Law > Military Justice > Counsel
[HN5]While it is unusual to forgo an opening statement in a court-martial proceeding, it is not ineffective assistance to do so in certain circumstances.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Military & Veterans Law > Military Justice > Counsel
[HN6]A defense counsel's duty to zealously represent his client in a court-martial proceeding normally encompasses calling witnesses on the merits on behalf of his client. However, where the defense team has considered the appellant's suggested witnesses, interviewed them, consulted the appellant afterward, and otherwise conducted an adequate pretrial investigation, there may be times when the defense team may properly rest without presenting the appellant's desired witnesses.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Military & Veterans Law > Military Justice > Counsel
[HN7]Defense counsel in a court martial proceeding need not traverse every possible evidentiary avenue in the course of their journey through pretrial preparation, only those that might assist in the defense.

Military & Veterans Law > Military Justice > Sentencing > Confinement
[HN8]Citing R.C.M. 1101(c)(3), Manual Courts-Martial (1984), the United States Court of Military Appeals has decreed that the convening authority's decision on a request for deferment of confinement must be in writing and must include the reasons upon which the decision is based.

COUNSEL: ROLANDO R. SANCHEZ, USMC, Appellate Defense Counsel.

Maj WILBUR LEE, USMC, Appellate Government Counsel.

JUDGES: BEFORE Charles Wm. DORMAN, C.A. PRICE, J.F. FELTHAM. Chief Judge DORMAN and Judge FELTHAM concur.

OPINION BY: C.A. PRICE

OPINION

PRICE, Senior Judge:

Contrary to his pleas, the appellant was convicted of larceny of several items of Government property, in violation of Article 121, Uniform Code of Military Justice, 10 U.S.C. ß 921. A military judge sitting as a general court-martial sentenced him to confinement for 18 months and dismissal from the naval service. The convening authority approved the sentence, but waived automatic forfeitures.

We have considered the record of trial, the assignments of error [1], the Government's response, and the appellant's reply. The appellant's motion for oral argument is denied. Except for insufficient evidence as to some of the items of property, there [*2] is no reason to grant relief. As modified, the findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

1 I. THE MILITARY JUDGE'S GUILTY VERDICT THROUGH EXCEPTIONS AND SUBSTITUTIONS WAS VAGUE AND AMBIGUOUS AND FAILED TO REFLECT WHICH FACTS CONSTITUTED THE OFFENSE FOR WHICH ENS DAVIS WAS CONVICTED, THEREBY DEPRIVING ENS DAVIS OF A FULL AND FAIR REVIEW OF HIS CONVICTION UNDER ARTICLE 66(c), UCMJ.II. ENS DAVIS' DUE PROCESS RIGHTS WERE VIOLATED WHEN THE MILITARY JUDGE RETURNED A FINDING OF GUILTY TO THE SOLE CHARGE AND SPECIFICATION BY EXCEPTIONS AND SUBSTITUTIONS THAT SUBSTANTIALLY CHANGED THE NATURE OF THE OFFENSE, THEREBY CREATING A FATAL MATERIAL VARIANCE.III. THE PROSECUTION FAILED TO PRESENT FACTUALLY AND LEGALLY SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT ENSIGN DAVIS HAD STOLEN MILITARY PROPERTY BOUGHT BY SK1 CHARLES L. SHIRD.IV. THE PROSECUTION FAILED TO PRESENT FACTUALLY AND LEGALLY SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT ENSIGN DAVIS HAD STOLEN A NORTHSTAR POWER WASHER, A HONDA PORTABLE GENERATOR AND A COMBINATION TELEVISION/VCR.V. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE TRIAL DEFENSE COUNSEL FAILED TO PRESENT RELEVANT AND MATERIAL EVIDENCE ON THE MERITS.VI. THE CONVENING AUTHORITY ABUSED HIS DISCRETION BY FAILING TO SPECIFY THE REASONS FOR DENIAL OF ENS DAVIS' REQUEST FOR DEFERMENT OF CONFINEMENT.

[*3] **Background**

The appellant was charged with stealing military property, without further description of the property in the specification. In entering a finding of guilty, the military judge excepted the words, "military property," and substituted the following specific list of items: "hand tools, power tools, a Honda portable generator, a Northstar power washer, knives, jackets, gloves, shirts, sunglasses, wristwatches, backpacks, duffle bags, medical equipment, camping equipment and a combination television/VCR." Record at 426-27.

The property named in the specification was found in the appellant's house, mostly in the basement. Various documents showed that many of the items were purchased through use of the appellant's Government credit card.

Sufficiency of Evidence

The appellant contends that the evidence is insufficient to show that he stole military property bought by a co-worker, Storekeeper First Class (SK1) Charles L. Shird, a Northstar power washer, a Honda portable generator, and a combination television/VCR. We agree in part.

[HN1]The test for legal sufficiency is well-known. It requires this court to review the evidence in the light most favorable to the Government. [*4] In doing so, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the evidence is legally sufficient. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987). We conclude that the evidence was legally sufficient to support the conviction.

[HN2]The test for factual sufficiency, however, is more favorable to the appellant. It requires this court to be convinced of the appellant's guilt beyond a reasonable doubt, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses. *Turner*, 25 M.J. at 325. Proof be-

yond a reasonable doubt, however, does not mean the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)(citing *United States v. Steward*, 18 M.J. 506 (A.F.C.M.R. 1984)). "The factfinders may believe one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979). So, too, may we. In resolving the question of factual sufficiency, we [*5] have carefully reviewed the record of trial, but have given no deference to the factual determinations made at the trial level. *See United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

We first note that the Government concedes that the evidence is insufficient as to the Northstar power washer, shirts, and duffle bags. Based on our scrutiny of the record, we agree with the Government and accept that concession. However, we conclude that the evidence is factually sufficient as to all other items.

Ineffective Assistance of Counsel

The appellant asserts that his trial defense team was deficient in their representation on the merits in the following particulars:

> 1. They presented no opening statement.
>
> 2. They offered no evidence in the defense case-in chief other than documentation of his good military character.
>
> 3. They convinced the appellant not to testify. "On numerous occasions I wanted to testify on my behalf, only to be told . . . that the prosecution had the burden of proof." Appellant's Affidavit of 25 Nov 2003 at 2.
>
> 4. They failed to cross-examine witnesses or produce other evidence to explain why the property was found [*6] in his home.
>
> 5. They failed to properly obtain and evaluate the appellant's supply records and Missing, Lost, or Stolen property reports.
>
> 6. They failed to cross-examine his ex-wife regarding her motive to wrongfully accuse him.
>
> 7. They expressed confidence that the Government's evidence was not enough to prove him guilty.

Having carefully considered the appellant's assertions, the responsive affidavits of his two trial defense counsel, and the entire record of trial, we conclude that the appellant has failed to show that his defense team was constitutionally ineffective.

In its recent decision of *United States v. Davis*, 60 M.J. 469 (C.A.A.F. 2005), our superior court set forth a comprehensive explanation of the legal concept of ineffective assistance of counsel under the Sixth Amendment. [HN3]To obtain relief for a complaint that he was deprived of the effective assistance of counsel, the appellant has the burden to show that his lawyer's performance fell below an objective standard of reasonableness. Counsel's performance is presumed to be competent and adequate; thus, the appellant's burden is especially heavy on this point. He must establish [*7] a factual foundation for his complaint of deficient performance. Second-guessing, sweeping generalizations, and hindsight will not suffice. *Davis*, 60 M.J. at 473.

[HN4]To determine whether the presumption of competence is overcome, we follow a three-part test:

> 1. Are the appellant's allegations true, and if so, is there a reasonable explanation for the lawyer's actions?
>
> 2. If the allegations are true, did the level of advocacy fall measurably below the performance standards ordinarily expected of fallible lawyers?
>
> 3. If so, we test for prejudice by asking whether there is a reasonable probability that, but for the lawyer's error, there would have been a different result.

Id. at 474. We will apply this test to the appellant's complaints.

1. No opening statement. [HN5]"While it is unusual to forgo an opening statement, it is not ineffective assistance to do so in certain circumstances." *United States v. McConnell,* 55 M.J. 479, 486 (C.A.A.F. 2001). Here, the defense strategy was to reserve opening statement pending presentation of the Government's evidence, vigorously attack that evidence, then reassess the [*8] status of the case before deciding whether to make an opening statement or not. Having done so, the defense team concluded that it had presented most of the available exculpatory evidence through cross-examination and that, other than documentary evidence of good military character, presenting additional evidence was too risky or useless. Specifically, the appellant elected not to testify. We also note that this was a trial before military judge

alone, who "could understand the evidence," without the need for an opening statement. Affidavit of Mr. Otis K. Forbes, III of 5 Oct 2005 at 2. Under these circumstances, we conclude that the defense team was not remiss in opting to waive opening statement. *See United States v. Lorenzen*, 47 M.J. 8, 12 (C.A.A.F. 1997).

2. No evidence in the defense case-in-chief other than good military character. [HN6]A defense counsel's duty to zealously represent his client normally encompasses calling witnesses on the merits on behalf of his client. However, where the defense team has considered the appellant's suggested witnesses, interviewed them, consulted the appellant afterward, and otherwise conducted an adequate pretrial investigation, [*9] there may be times when the defense team may properly rest without presenting the appellant's desired witnesses. Such was the case here. The appellant specifically mentions SK1 Farkas and Construction Mechanic First Class (CM1) Halford in his affidavit, although he did not say whether he thought they should be called by the defense or simply interviewed to assist in pretrial preparation. We note that the defense team interviewed both petty officers and concluded that they would not be helpful as defense witnesses. SK1 Farkas was called to testify by the Government and the defense team conducted an adequate cross-examination. We conclude that the defense team was not deficient in their strategic and tactical decisions as to potential defense evidence. *See United States v. Dewrell*, 55 M.J. 131, 136 (C.A.A.F. 2001)(holding appellate courts will not second-guess defense counsel's reasonable choice of strategy).

3. Appellant's Choice Not to Testify. The appellant states in his affidavit that he wanted to testify but his counsel told him that the prosecution had the burden of proof. He does not allege that the defense team prevented him from testifying or pressured [*10] him to remain silent. The affidavits submitted by the civilian defense counsel and the trial defense counsel both unequivocally state that the appellant was advised of the Government's burden of proof and that he had an absolute right to testify. Those affidavits also clearly indicate that the pros and cons of testimony were discussed and that the appellant was told it would be unwise to take the stand. The affidavits even go so far as to explain the reasoning, i.e., given the appellant's lack of credible explanations for the presence of thousands of dollars worth of military property in his house he would open himself to damaging cross-examination. After considering the advice, the appellant elected not to testify. We reject the appellant's second-guessing on this point. *See Davis*, 60 M.J. at 473.

4. No Explanation for the Presence of the Property. The appellant complains that his counsel failed to properly explore possible explanations for the presence of the property in his house. In his affidavit, the appellant lists several items of property seized by the Government and admitted in evidence, then attempts to explain how and why that property was in his [*11] house. For some items, such as a generator and table saw, the appellant contends that he purchased the items at stores for his own use, yet he could not provide receipts or other corroborating information for that contention. The appellant also claims that someone could have brought the items into his house without his permission or knowledge and that his young son told him men were actually doing so. As stated in the affidavits of the civilian counsel and the trial defense counsel, these points were made at trial during witness examination and argument. The fact that the military judge was not persuaded by the evidence and argument does not render the defense team ineffective.

5. Failure to Obtain and Evaluate Records. The appellant next complains that the defense team failed to obtain and evaluate credit card records and files and any Missing, Lost or Stolen property reports the command may have submitted. The affidavits of the civilian and trial defense counsel do not directly dispute this complaint, but point out that in the absence of a credible explanation for the presence of the property in the appellant's house, it did not matter. We concur. [HN7]Defense counsel need not [*12] traverse every possible evidentiary avenue in the course of their journey through pretrial preparation, only those that might assist in the defense. We also note that the appellant fails to explain how such records and reports would be relevant in his defense.

6. Failure to Fully Explore Bias of the Appellant's Ex-Wife. In his affidavit, the appellant accuses his ex-wife of starting the investigation and alleges that her main motivation was getting him in trouble so that she could keep the children during separation and divorce proceedings she initiated at the same time as she contacted investigators. The affidavits of the civilian and trial defense counsel correctly point out that Mrs. Davis was a Government witness at trial and underwent cross-examination on her motives and bias. Even assuming *arguendo* that the appellant is correct, we conclude that the appellant suffered no prejudice of any material right because his counsel may not have cross-examined his ex-wife as thoroughly as he wanted them to do. Given the large amount of property purchased for the Government that was found in the appellant's basement, his ex-wife's motives and bias are of little significance [*13] unless there was also some reason to believe that she alone, or with somebody else, framed the appellant. Nothing before us suggests such an evil scheme.

7. False Confidence in Deficiencies in Government's Evidence. The appellant claims that his civilian defense counsel expressed confidence that the Government had not borne its burden of proof and, therefore, declined to present any evidence in the defense case-in-chief. In his

affidavit, the civilian defense counsel states that he does not believe that he advised the appellant in such a manner. In his affidavit, the trial defense counsel states that no promises or assurances were made to the appellant. While this might be construed as a factual conflict, we conclude that any such error would not result in relief under the circumstances of this case, even if the factual conflict were resolved in the appellant's favor. *See United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). [2]

2 The appellant's 18 October 2005 motion for a fact-finding hearing pursuant to *United States v. DuBay*, 17 C.M.A. 147, 37 C.M.R. 411 (C.M.A. 1967) is denied.

[*14] Having applied the *Davis* test to the appellant's assertions, we conclude that he has failed to overcome the presumption of competence. This assignment of error lacks merit.

Failure to Explain Refusal to Defer Confinement

Finally, the appellant correctly asserts that the convening authority erred by summarily denying his request for deferment of six days of confinement. [HN8]Citing RULE FOR COURTS-MARTIAL 1101(c)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1984 ed.), our superior court has decreed that the convening authority's decision on a request for deferment of confinement must be in writing and must include the reasons upon which the decision is based. *United States v. Sloan*, 35 M.J. 4, 7 (C.M.A. 1992). The Government concedes the error but argues that the appellant has failed to show prejudice other than the lack of knowledge for the reasons for the denial of the request. We are persuaded by the Government's argument. *See id.* While the convening authority erred in summarily denying the request, we decline to grant relief.

Conclusion

We have considered the remaining assignments of error and find them lacking in merit. We except the words [*15] "a Northstar power washer," "shirts," and "duffle bags" from the specification. Those words are dismissed. As excepted, the findings are affirmed. We have reassessed the sentence in accordance with *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998). As reassessed, we conclude that the approved sentence is both appropriate and is no greater than that which would have been imposed if the prejudicial error had not been committed. The sentence, as approved by the convening authority, is affirmed.

Chief Judge DORMAN and Judge FELTHAM concur.

Citation #2
1997 CCA LEXIS 560

LEXSEE

Caution
As of: May 18, 2014

UNITED STATES v. Thomas E. FERGER, Jr., 219 11 1860 Lance Corporal (E-3), U.S. Marine Corps

NMCM 97 00301

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

1997 CCA LEXIS 560

October 30, 1997, Decided

NOTICE: [*1] AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PRIOR HISTORY: Sentence adjudged 7 October 1996. Military Judge: A.W. Keller. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 1st Marine Division (Rein), Camp Pendleton, CA.

DISPOSITION: Affirmed.

CORE TERMS: sentence, trial counsel's, improper comments, sentencing, assignments of error, inappropriately, severe, prejudiced, military

COUNSEL: LT DALE O. HARRIS, JAGC, USNR, Appellate Defense Counsel.

Maj ERIC B. STONE, USMC, Appellate Government Counsel.

LCDR PAUL JONES, JAGC, USNR, Appellate Government Counsel.

JUDGES: BEFORE E.D. CLARK, Senior Judge, K.T. SEFTON, Judge, LARRY D. WYNNE, Judge.

OPINION

PER CURIAM:

We examined the record of trial, the assignments of error, [1] and the Government's response. The findings and sentence are correct in law and fact and no error materially prejudicial to the substantial rights of the appellant was committed. Our rationale follows.

> 1 I. APPELLANT WAS PREJUDICED BY IMPROPER COMMENTS CONTAINED IN THE TRIAL COUNSEL'S SENTENCING ARGUMENT.II. A SENTENCE OF FIVE YEARS CONFINEMENT AND A DISHONORABLE DISCHARGE IS INAPPROPRIATELY SEVERE FOR SOCIAL USE AND DISTRIBUTION, WHERE ALL DISTRIBUTIONS INVOLVED ONE-HALF GRAM OR LESS OF METHAMPHETAMINE, APPELLANT WAS ONLY 19 YEARS OLD AT THE TIME OF TRIAL, HAD NO PRIOR HISTORY OF CRIMINAL MISCONDUCT, WAS AN EXPECTANT FATHER AT THE TIME OF TRIAL, AND HAD OUTSTANDING PROFICIENCY/CONDUCT RATINGS.

[*2] The appellant says he was "prejudiced by improper comments contained in the trial counsel's sentencing argument." Brief and Assignment of Errors at 3. The appellant also asserts that we should reassess his sentence because "the military judge did not stop trial counsel during argument and state on the record that he would not consider the improper comments[.]" Appellant's Reply Brief at 1-2.

The trial counsel's comments were not improper. "Arguments may properly include reasonable comment on the evidence in the case, including inferences to be drawn therefrom[.]" [2] The trial counsel's argument is

firmly founded in Prosecution Exhibit 1, a four-page stipulation of fact, and the inferences which may be drawn from it. The military judge did not err.

2 RULE FOR COURTS-MARTIAL 919(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.) [hereinafter R.C.M.]. Admittedly, the Rule which addresses sentencing arguments, R.C.M. 1001(g), is less explicit, but the language of R.C.M. 919 embodies our concept of argument in adversarial proceedings. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.), app. 21, at A21-64.

[*3] As to the second assignment of error, clemency is not the function of this court, *United States v. Healy,* 26 M.J. 394 (C.M.A. 1988), and the sentence is not inappropriately severe for drug trafficking. *See United States v. Snelling,* 14 M.J. 267 (C.M.A. 1982).

Accordingly, the findings of guilty and the sentence are affirmed.

E.D. CLARK, Senior Judge

K.T. SEFTON, Judge

LARRY D. WYNNE, Judge

Citation #3
2013 CCA LEXIS 97

LEXSEE

Caution
As of: May 18, 2014

UNITED STATES OF AMERICA v. MATTHEW R. GIFFORD, MASTER-AT-ARMS SEAMAN RECRUIT (E-1), U.S. NAVY

NMCCA 201200169

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

2013 CCA LEXIS 97

February 14, 2013, Decided

NOTICE: AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

SUBSEQUENT HISTORY: Petition for review filed by United States v. Gifford, 2013 CAAF LEXIS 408 (C.A.A.F., Apr. 16, 2013)
Review denied by United States v. Gifford, 2013 CAAF LEXIS 851 (C.A.A.F., Aug. 2, 2013)

PRIOR HISTORY: [*1]
GENERAL COURT-MARTIAL.

Sentence Adjudged: 3 December 2011. Military Judge: CAPT Tierney Carlos, JAGC, USN. Convening Authority: Commander, Navy Region Mid-Atlantic, Norfolk, VA. Staff Judge Advocate's Recommendation: CDR F.D. Hutchison, JAGC, USN.

CASE SUMMARY:

OVERVIEW: Where accused was charged with aggravated sexual assault in violation of UCMJ art. 120(c), a military judge did not abuse his discretion in refusing to recuse a member on the grounds of bias under R.C.M. 912(f), Manual Courts-Martial, where the judge stated on the record that the member's alcohol abstinence was not an issue because she was merely on a health kick and had consumed alcohol in the past and where, although she had been a sexual assault victim intervention representative, she only had two cases and neither reached the court-martial process while she was involved.

OUTCOME: Findings and sentence affirmed.

CORE TERMS: military, specification, court-martial, disjunctive, sexual act, sexual assault, sentence, conjunctive, guilt, assault, ambiguous, sexual, apartment, de novo, theory of liability, adultery, alcohol, bias, intercourse, bed, assignments of error, reasonable doubt, incapacitated, unwillingness, prejudicial, duplicitous, bedroom, good order, communicating, aggravated

LexisNexis(R) Headnotes

Military & Veterans Law > Military Justice > Judges
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review
[HN1]A military court of criminal appeals reviews a military judge's decision on the issue of recusal for an abuse of discretion. In general, a military judge must disqualify himself in any proceeding in which that military judge's impartiality might reasonably be questioned. R.C.M. 902(a), Manual Courts-Martial. A military judge also must recuse himself if he has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding. R.C.M. 902(b)(1).

Military & Veterans Law > Military Justice > Judges
[HN2]Whether a military judge should recuse himself under R.C.M. 902(a), Manual Courts-Martial, is an objective test, so it is assessed not in the mind of the military judge himself, but rather in the mind of a reasonable

man who has knowledge of all the facts. However, a military judge need not recuse himself solely on the basis of prior judicial exposure to an accused and his alleged criminal conduct. If a judge is disqualified to sit as judge alone, he is also disqualified to sit with members.

Military & Veterans Law > Military Justice > Challenges
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review
[HN3]A military court of criminal appeals reviews a challenge for cause of a member for implied bias under a standard of review that is less deferential than abuse of discretion, but more deferential than de novo. If a military judge applies the liberal grant mandate on the record when deciding the challenge, the court gives his decision more deference on review than if he had not.

Military & Veterans Law > Military Justice > Challenges
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review
[HN4]R.C.M. 912(f), Manual Courts-Martial, lays out the reasons that a member shall be excused for cause. Specifically, a member shall be excused if it appears that he or she should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality. R.C.M. 912(f)(1)(N). The possible implied bias of a member is analyzed under an objective standard, which is viewed through the eyes of the public. In considering this issue, a military court of criminal appeals asks whether most people in the same position would be prejudiced (i.e. biased) considering the totality of the factual circumstances. When a military judge rules on implied bias, the record must reflect a clear signal that the military judge applied the right law. Therefore, the military judge must conduct an objective implied bias test on the record and must consider the effect, if any, that the liberal grant mandate should have upon his ruling.

Military & Veterans Law > Military Justice > Trials > Instructions > General Overview
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review
[HN5]A military court of criminal appeals reviews whether a military judge properly instructed the panel de novo. The court also reviews the sufficiency of a general verdict de novo.

Military & Veterans Law > Military Justice > Trials > Findings
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review
[HN6]A military court of criminal appeals reviews the sufficiency of a general verdict de novo.

Military & Veterans Law > Military Justice > Pretrial Proceedings > Charges
Military & Veterans Law > Military Justice > Trials > Instructions > General Overview
[HN7]If a fact is a theory of liability and not an element, then it is well established that when the government charges in the conjunctive, and the statute is worded in the disjunctive, a court can instruct the jury in the disjunctive. The U.S. Navy-Marine Corps Court of Criminal Appeals has recognized this general principle by stating that when a statute provides for alternative means by which an offense can be committed, the charge should use the conjunctive "and" rather than the disjunctive "or."

Military & Veterans Law > Military Offenses > General Article > Categories of Offenses > General Overview
[HN8]Clauses 1 and 2 of Unif. Code Mil. Justice art. 134, 10 U.S.C.S. ß 934, are two different theories of liability under which an accused can be found guilty; they are not two separate elements.

Military & Veterans Law > Military Offenses > General Article > Categories of Offenses > General Overview
Military & Veterans Law > Military Justice > Pretrial Proceedings > Charges
[HN9]A finding of guilty under Unif. Code Mil. Justice art. 134, 10 U.S.C.S. ß 934 is not dependent on the members finding an accused guilty of both theories, but rather only one theory, and merely charging the specification in the conjunctive does not change the government's burden or the requirements under the law.

Military & Veterans Law > Military Justice > Pretrial Proceedings > Charges
Military & Veterans Law > Military Justice > Trials > Findings
[HN10]When a charge presents multiple or alternate theories of liability, a general guilty verdict to the charge attaches a guilty verdict to all of the theories. It is not necessary for the panel members to agree on one theory of liability; as long as they agree that the government has proven all the elements of the offense.

Military & Veterans Law > Military Justice > Pretrial Proceedings > Charges
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review
[HN11]A military court of criminal appeals reviews whether a specification is defective de novo. When this issue of a defective specification is raised for the first time on appeal, the issue is forfeited in the absence of plain error. Plain error can be established if an appellant can show: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused.

Military & Veterans Law > Military Offenses > Carnal Knowledge & Rape
[HN12]See Unif. Code Mil. Justice art. 820(c)(2), 10 U.S.C.S. ß 920(c)(2).

Military & Veterans Law > Military Offenses > Carnal Knowledge & Rape
[HN13]Unif. Code Mil. Justice (UCMJ) art. 820(c)(2), 10 U.S.C.S. ß 920(c)(2) creates one offense, composed of the following two elements: (1) engaging in a sexual act with another; and (2) doing so when that person is substantially incapacitated or substantially incapable of appraising the nature of the sexual act, declining participation in the sexual act, or communicating unwillingness to engage in the sexual act. The four forms of substantial incapacity listed under UCMJ art. 120(c)(2) are alternate ways of committing the same offense, not varying terminal elements for four separate offenses.

Military & Veterans Law > Military Offenses > General Overview
Military & Veterans Law > Military Justice > Appeals & Reviews > Courts of Criminal Appeals
[HN14]A military court of criminal appeals is not bound by the President's interpretation of the elements of substantive offenses in the Manual for Courts-Martial.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Double Jeopardy
Criminal Law & Procedure > Accusatory Instruments > Accusatory Instruments Generally > Contents > General Overview
Criminal Law & Procedure > Double Jeopardy > General Overview
[HN15]There are two problems with pleading criminal charges in the disjunctive: (1) lack of required notice; and (2) Double Jeopardy concerns.

Military & Veterans Law > Military Justice > Evidence > Weight & Sufficiency
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review
[HN16]Under Unif. Code Mil. Justice art. 66(c), 10 U.S.C.S. ß 866(c), a military court of criminal appeals reviews issues of factual sufficiency de novo. The test for factual sufficiency is whether after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses this court is convinced of an accused's guilt beyond a reasonable doubt.

Military & Veterans Law > Military Justice > Evidence > Weight & Sufficiency
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review
[HN17]Unif. Code Mil. Justice art. 66(c), 10 U.S.C.S. ß 866(c) requires a court to review issues of legal sufficiency de novo. The test for legal sufficiency is, considering the evidence in the light most favorable to the government, whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Military & Veterans Law > Military Justice > Postconviction Proceedings > Record
[HN18]Military members are entitled to records that correctly reflect the results of their court-martial proceedings.

Military & Veterans Law > Military Justice > Sentencing > General Overview
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review
[HN19]Sentence appropriateness involves the judicial function of assuring that justice is done and that an accused gets the punishment he deserves. This process requires individualized consideration of a particular accused on the basis of the nature and seriousness of the offense and character of the offender.

COUNSEL: For Appellant: LT Gregory Morison, JAGC, USN; LT Jared Hernandez, JAGC, USN.

For Appellee: Maj Paul Ervasti, USMC; LT Ian D. MacLean, JAGC, USN.

JUDGES: Before B.L. PAYTON-O'BRIEN, R.Q. WARD, J.R. MCFARLANE, Appellate Military Judges.

Senior Judge PAYTON-O'BRIEN and Judge WARD concur.

OPINION BY: J.R. MCFARLANE

OPINION

OPINION OF THE COURT

MCFARLANE, Judge:

The appellant was tried before a general court-martial composed of members with officer and enlisted representation. The appellant was found guilty, contrary to his pleas, of one specification of aggravated sexual assault and one specification of adultery in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. ßß 920 and 934. [1] The appellant was sentenced to confinement for seven years and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged.

1 The appellant was found not guilty of one specification of forcible sodomy, Article 125, UCMJ, 10 U.S.C. ß 925.

The appellant [*2] alleges the following nine assignments of error:

I. The military judge should have recused himself because he sentenced the appellant to a bad-conduct discharge in a prior court-martial;

II. The military judge failed to grant a challenge for cause for a member who was a prior Sexual Assault Victim Intervention (SAVI) representative and victim advocate;

III. The Article 134 charge resulted in an ambiguous verdict because the specification was pled in the conjunctive but was instructed in the disjunctive;

IV. The Article 120 specification was fatally defective because it was pled in the disjunctive;

V. The military judge committed plain error by not correcting the defective Article 120 specification and his instructions to the members resulted in an ambiguous verdict;

VI. The finding of guilt for the Article 120 charge was factually insufficient;

VII. The finding of guilt for the Article 134 charge was legally insufficient;

VIII. The court-martial order incorrectly states the disposition and date of sentencing; and

IX. The appellant's sentence was disproportionate. [2]

2 This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

After carefully considering the record of [*3] trial and the submissions of the parties, we conclude that the findings and sentence are correct in law and fact and that no errors materially prejudicial to the substantial rights of the appellant were committed. Arts. 59(a) and 66(c), UCMJ. We do, however, find merit in the appellant's argument that the court-martial order incorrectly states the disposition and date of sentencing. We will address that error in our decretal paragraph.

Background

The appellant, Master-at-Arms Seaman Recruit (MASR) Gifford, engaged in a romantic relationship with Master-at-Arms Seaman (MASN) CH from November of 2010 to January of 2011 while they were both stationed in Bahrain. Because the appellant was married at the time, he and MASN CH kept their romantic relationship secret. During this timeframe, they engaged in consensual sexual intercourse on several occasions.

On 31 December 2010, the appellant and MASN CH went to an off-base nightclub to ring in the New Year. They were accompanied by Master-at-Arms Third Class (MA3) L and his civilian friend, AT, who had volunteered to be the designated driver. The club was charging a hefty entrance fee that night, but was offering "free" drinks until midnight. [*4] MASN CH took advantage of this policy and drank to the point of being visibly intoxicated. When they left the club at 0130, MASN CH was slurring her words, having trouble walking, and she fell asleep on a couch while waiting for a second club to open at 0200. When the group decided to return to MA3 L's residence instead of going to the second club, MASN CH needed assistance to get to the car. Once there, she had to be placed in the back seat, to include having someone else put her feet inside the car. MASN CH then slept for the duration of the ride.

When the group arrived at MA3 L's apartment, the appellant and AT helped MASN CH inside and placed her unconscious body on one of the guest beds. The appellant then suggested to AT that AT leave the apartment to find MA3 L, who had become separated from the group. AT did as he was asked, but once he reached his car he decided to use his cell phone to find MA3 L instead of driving around town. After making several unsuccessful attempts to reach MA3 L by phone, AT re-

turned to the apartment. Not finding the appellant elsewhere in the apartment, AT looked for him in the guest bedroom. When AT pushed open the door to the guest bedroom, he observed [*5] the appellant on top of MASN CH, in what AT described as the "missionary position." Both the appellant and MASN CH were naked from the waist down, and the appellant was thrusting his pelvic area between MASN CH's legs. MASN CH, on the other hand, was not moving at all. AT observed MASN CH lying perfectly still on the bed, her eyes shut, and her hands at her sides. Upon observing this scene, AT said "What the f***?," retreated from the bedroom, and went to the living room. In response to the interruption, the appellant got off of MASN CH, walked over to the bedroom door, closed the door, locked it, and then went back to having intercourse with MASN CH.

Several minutes later, MASN CH realized that the appellant was having vaginal intercourse with her. Seeing that MASN CH had become aware of the situation, the appellant moved to the other bed in the room and said that he was "sorry," "stupid," and a "bad person." MASN CH then fell trying to get out of the bed, and while crying and screaming, stumbled into the living room, where she told AT "that bastard raped me." MASN CH and AT then left the apartment and went to AT's car, where AT attempted to comfort her. Sometime thereafter, MASN CH [*6] became angry and decided to return to the apartment to confront the appellant. When AT and MASN CH entered the apartment they found the appellant passed out on the bathroom floor, surrounded by both vomit and blood, the latter apparently coming from the appellant's bloody nose. MASN CH and AT made sure that the appellant was not seriously injured and then put the appellant to bed. MASN CH then asked AT not to say anything about what had happened that evening.

The following day, the appellant apologized to MASN CH for hurting her, and presented her with flowers and a diamond ring. Although MASN CH was angry and confused about what had happened on New Year's Eve, she nonetheless resumed her relationship with the appellant and socialized with him on a daily basis until he left Bahrain to return to the United States on 7 January 2011.

Shortly after the appellant left Bahrain, MASN CH made comments to her co-workers about being raped on New Year's Eve. Those comments led to her being interviewed by the Naval Criminal Investigative Service (NCIS). Although MASN CH initially refused to provide NCIS with any details of the assault, she later changed her mind and made a full report. This change [*7] of heart was based, at least in part, upon a telephone conversation that MASN CH had with the appellant wherein she warned him of NCIS's involvement, but found him unconcerned about being charged with a crime. The appellant's attitude offended MASN CH, and led her to conclude that she should no longer cover for him. Further relevant facts are developed below as necessary.

Recusal of the Military Judge

Several weeks prior to the events recounted above, the appellant plead guilty at a special court-martial to committing an orders violation and making a false official statement, in violation of Articles 92 and 107, UCMJ. The presiding military judge accepted the appellant's guilty pleas and sentenced the appellant to 60 days confinement, reduction to pay grade E-1, forfeiture of two-thirds pay per month for two months, and a bad-conduct discharge. That same military judge presided over this case a year later, thus providing the basis for the appellant's first assignment of error.

For this court-martial, the appellant was arraigned on 31 August 2011 by another military judge in Norfolk. At the arraignment, the defense reserved the right to *voir dire* or challenge any other military judge detailed [*8] to the case because they were aware the trial would take place in Bahrain. At an Article 39(a), UCMJ, session on 10 November 2011, the defense conducted *voir dire* of the newly assigned military judge about his having presided over the appellant's first court-martial. After *voir dire*, the defense made a motion pursuant to Rule for Courts-Martial 902(a), Manual for Courts-Martial, United States (2008 ed.), for the military judge to recuse himself from the present case. After hearing argument and reviewing several cases provided by the defense, the military judge denied the motion.

[HN1]This court reviews a military judge's decision on the issue of recusal for an abuse of discretion. *United States v. Butcher*, 56 M.J. 87, 90 (C.A.A.F. 2001). In general, a military judge must disqualify himself "in any proceeding in which that military judge's impartiality might reasonably be questioned." R.C.M. 902(a). A military judge also must recuse himself if he has a "personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding." R.C.M. 902(b)(1).

[HN2]Whether the military judge should recuse himself under R.C.M. 902(a) is an objective test, so it [*9] is "assessed not in the mind of the military judge himself, but rather in the mind of a reasonable man . . . who has knowledge of all the facts." *United States v. Wright*, 52 M.J. 136, 141 (C.A.A.F. 1999) (citations and internal quotation marks omitted). However, a military judge need not recuse himself "solely on the basis of prior judicial exposure to an accused and his alleged criminal conduct." *United States v. Soriano*, 20 M.J. 337, 340 (C.M.A. 1985). If a judge is disqualified to sit as

judge alone, he is also disqualified to sit with members. *United States v. Sherrod*, 26 M.J. 30, 33 (C.M.A. 1988).

In this case, the military judge did not abuse his discretion by not recusing himself from the appellant's court-martial. His knowledge of the appellant came solely from prior judicial exposure unrelated to the present case. Moreover, the military judge noted for the record that the two courts-martial were not related, that he knew nothing about the current case beyond the motions that had been filed, that he had not formed an opinion as to the appellant's guilt or innocence, and that he had no opinion on the appellant's credibility. Based on these facts, we find that a reasonable person [*10] with knowledge of all the facts presented above would not find that the military judge should have recused himself under the circumstances of this case.

Challenge for Cause of Member

The appellant next alleges that it was error for the military judge to deny a challenge for cause, based upon implied bias, against Personnel Specialist First Class (PS1) K. The factual basis set forth at trial to support the challenge was that PS1 K was a former SAVI representative, had been a victim advocate, abstained from alcohol use, and had minored in criminal justice 15 years prior to the appellant's court-martial. PS1 K served as a victim advocate in the Navy's SAVI program at three different commands, most recently from 2007 to 2010. Over the course of those additional duty assignments, PS1 K assisted two alleged victims of sexual assault, neither of whom had their case go to court-martial while PS1 K served as their victim advocate. While serving as a SAVI representative, PS1 K attended quarterly SAVI training and provided command training. PS1 K unequivocally stated that she could set aside her training and experiences as a SAVI representative and victim advocate and follow the military judge's [*11] instructions.

[HN3]This court reviews a challenge for cause of a member for implied bias under a standard of review that is "less deferential than abuse of discretion, but more deferential than de novo . . . ." *United States v. Bagstad*, 68 M.J. 460, 462 (C.A.A.F. 2010) (citation and internal quotation marks omitted). If a military judge applies the liberal grant mandate on the record when deciding the challenge, we give his decision "more deference on review" than if he had not. *United States v. Clay*, 64 M.J. 274, 277 (C.A.A.F. 2007).

[HN4]R.C.M. 912(f) lays out the reasons that a member shall be excused for cause. Specifically, a member shall be excused if it appears that he or she, "[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." R.C.M. 912(f)(1)(N). The possible implied bias of a member is analyzed under an objective standard, which is viewed through the eyes of the public. *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996). In considering this issue, we ask whether "most people in the same position would be prejudiced [i.e. biased]" considering the "totality of the factual circumstances." [*12] *United States v. Strand*, 59 M.J. 455, 459 (C.A.A.F. 2004) (citation and internal quotation marks omitted).

When the military judge rules on implied bias, the record must reflect "a clear signal that the military judge applied the right law." *United States v. Terry*, 64 M.J. 295, 305 (C.A.A.F. 2007) (quoting *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002)). Therefore, the military judge must conduct an objective implied bias test on the record and must consider the effect, if any, that the liberal grant mandate should have upon his ruling. *Clay*, 64 M.J. at 278.

In this case, the military judge stated on the record that PS1 K's alcohol abstinence was not an issue because she merely was on a "health kick" and had consumed alcohol in the past. The military judge also recognized that while she had been a SAVI representative, she only had two cases and neither reached the court-martial process while she was involved. The military judge specifically mentioned the liberal grant mandate and found that a reasonable member of the public would not doubt the impartiality of PS1 K. We find that under the circumstances, the military judge did not err by denying the challenge for cause.

Article [*13] **134 General Verdict**

The appellant next alleges that there was an ambiguous verdict for the Article 134 charge because it was charged in the conjunctive, but instructed in the disjunctive. The specification alleged that the adultery was "prejudicial to good order and discipline *and* was of a nature to bring discredit upon the armed forces." Charge Sheet (emphasis added). The military judge's instructions on this specification, however, stated that the Government needed to prove that the appellant's conduct was "prejudicial to good order and discipline *or* was of a nature to bring discredit upon the armed forces." Appellate Exhibit XLIII at 6 (emphasis added).

[HN5]We review whether the military judge properly instructed the panel *de novo*. *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008). [HN6]We also review the sufficiency of a general verdict *de novo*. *United States v. Rodriguez*, 66 M.J. 201, 203 (C.A.A.F. 2008); *United States v. Brown*, 65 M.J. 356, 358-59 (C.A.A.F. 2007).

"The crux of the issue is whether a fact constitutes an element of the crime charged, or a method of commit-

ting it." *Brown*, 65 M.J. at 359. [HN7]If a fact is a theory of liability and not an element, then it is "well established [*14] that when the Government charges in the conjunctive, and the statute is worded in the disjunctive, the [court] can instruct the jury in the disjunctive." *United States v. Perry*, 560 F.3d 246, 256 (4th Cir. 2009) (citations omitted); *see also United States v. Farish*, 535 F.3d 815 (8th Cir. 2008); *United States v. Brown*, 504 F.3d 99, 378 U.S. App. D.C. 260 (D.C. Cir. 2007); *United States v. Haymes*, 610 F.2d 309 (5th Cir. 1980); *United States v. Gunter*, 546 F.2d 861 (10th Cir. 1976). This court has recognized this general principle by stating, "when a statute provides for alternative means by which an offense can be committed, the charge should use the conjunctive 'and' rather than the disjunctive 'or'." *United States v. Woode*, 18 M.J. 640, 641 (N.M.C.M.R. 1984) (citations omitted).

To begin, we must determine if the terminal element of Article 134 is composed of separate elements or merely different theories of liability. This court recently addressed this issue in an opinion that was published after the parties had already filed their briefs. As stated in *United States v. Miles*, 71 M.J. 671, 673 (N.M.Ct.Crim.App. 2012), [HN8]clauses 1 and 2 of Article 134 are two different theories of liability under which an accused [*15] can be found guilty; they are not two separate elements.

Next, we must review the military judge's instructions to the members. It was proper for the military judge to instruct in the disjunctive even though the offense was charged in the conjunctive because Article 134 itself is worded in the disjunctive. The specification here put the appellant on notice that he had to defend against two different theories of criminal liability, namely that: (1) his conduct was prejudicial to good order and discipline, and; (2) his conduct was of a nature to be service discrediting. [HN9]A finding of guilty under Article 134 is not dependent on the members finding the appellant guilty of *both* theories, but rather only one theory, and merely charging the specification in the conjunctive does not change the Government's burden or the requirements under the law. The appellant was on notice that the Government was pursuing both theories, and under the recognized principle of "plead in the conjunctive, prove in the disjunctive" the military judge's instructions were proper. *See e.g. Perry*, 560 F.3d at 246.

Lastly, we review whether there was an ambiguous verdict. [HN10]"When the charge presents multiple or alternate [*16] theories of liability, a general guilty verdict to the charge attaches a guilty verdict to all of the theories." *Miles*, 71 M.J. at 673 (citing *United States v. Rodriguez*, 66 M.J. 201, 204 (C.A.A.F. 2008)); *see also Turner v. United States*, 396 U.S. 398, 420, 90 S. Ct. 642, 24 L. Ed. 2d 610 (1970) (holding that if a "jury returns a guilty verdict on an indictment charging several acts in the conjunctive . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged"). It is not necessary for the panel members to agree on one theory of liability; as long as they agree that the Government has proven all the elements of the offense. *United States v. Vidal*, 23 M.J. 319, 325 (C.M.A. 1987). Accordingly, we find no ambiguous verdict here.

Article 120 Specification

In his fourth and fifth assignments of error, the appellant alleges that the Article 120 charge was fatally defective because it was plead in the disjunctive, and that the military judge erred by not correcting the resulting duplicitous specification, thus leading to an ambiguous verdict. Because these assignments of error are closely related, we will address them together.

As noted previously, [HN11]we review whether a specification is [*17] defective *de novo*. *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012). When this issue of a defective specification is raised for the first time on appeal, the issue is forfeited in the absence of plain error. *United States v. Humphries*, 71 M.J. 209, 211 (C.A.A.F. 2012). Plain error can be established if the appellant can show: "(1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused." *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011) (citing *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998)).

We turn first to the allegation that the specification was duplicitous. In order to determine whether the specification is duplicitous we need to resolve whether Article 120(c)(2) lists different elements, and therefore states more than one offense, or if that section merely lists different theories of criminal liability. The actual text of the statute reads, in pertinent part, as follows:

[HN12](c) *Aggravated Sexual Assault.* Any person subject to this chapter who --

(2) engages in a sexual act with another person of any age if that other person is substantially incapacitated or substantially incapable of [*18] --

> (A) appraising the nature of the sexual act;
>
> (B) declining participation in the sexual act; or
>
> (C) communicating unwillingness to engage in the sexual act; is guilty of aggravated sexual assault . . . .

Art. 120(c)(2), UCMJ.

Based upon the wording and structure of the statute, we find that [HN13]Article 120(c)(2) creates one offense, composed of the following two elements:

> (1) engaging in a sexual act with another; and
>
> (2) doing so when that person is substantially incapacitated or substantially incapable of appraising the nature of the sexual act, declining participation in the sexual act, or communicating unwillingness to engage in the sexual act.

More precisely, we find that the four forms of substantial incapacity listed under Article 120(c)(2) are alternate ways of committing the same offense, not varying terminal elements for four separate offenses. [3] *See United States v. Prather*, 69 M.J. 338, 342 (C.A.A.F. 2011) (noting that "[t]he essential elements of [an Article 120(c)(2)] offense are (1) that the accused engaged in a sexual act with another person; and (2) that person was substantially incapacitated"). *See also United States v. Wilkins.* 71 M.J. 410 (C.A.A.F. 2012) (expressing no concerns [*19] about the fact that the specification in question alleged that the victim "was substantially incapable of declining participation in the sexual act or communicating unwillingness to engage in the sexual act . . . .").

> 3 We recognize that this holding is arguably inconsistent with the President's listing of the elements for *Aggravated Sexual Assault* in the Manual for Courts-Martial, United States (2008 ed.), Part IV, ∂45b(3)(c). While we believe that the MCM provision can be read in a manner that is consistent with our opinion, to the extent it cannot we "note that [HN14]we are not bound by the President's interpretation of the elements of substantive offenses." *United States v. Davis*, 47 M.J. 484, 486 (C.A.A.F. 1998). *Accord United States v. Mance*, 26 M.J. 244, 252 (C.M.A. 1988).

Given our holding, the specification in this case was not duplicitous. Because the specification was not duplicitous, the military judge did not need to take curative action. Lastly, under the same analysis that we discussed in the prior section regarding general verdicts, the finding of guilt with respect to this specification is not ambiguous.

We turn next to the allegation that the Article 120 specification was fatally [*20] defective because it was pled in the disjunctive. As discussed in the prior section, charging in the disjunctive is disfavored. *See Miles*, 71 M.J. at 673; *United States v. Gonzalez*, 39 M.J. 742, 749 (N.M.C.M.R. 1994), *aff'd*, 42 M.J. 469 (C.A.A.F. 1995). Assuming, without deciding, that it was error to charge in the disjunctive in this case, we review this issue under the remaining prongs of the plain error test.

As the United States Supreme Court noted many years ago, [HN15]there are two problems with pleading criminal charges in the disjunctive: 1) lack of required notice; and Double Jeopardy concerns. *Confiscation Cases*, 87 U.S. 92, 104, 22 L. Ed. 320, 22 L. Ed. 327 (1874) ("[A]n indictment or a criminal information which charges the person accused, in the disjunctive, with being guilty of one or of another of several offences, would be destitute of the necessary certainty, and would be wholly insufficient. It would be so for two reasons. It would not give the accused definite notice of the offence charged, and thus enable him to defend himself, and neither a conviction nor an acquittal could be pleaded in bar to a subsequent prosecution for one of the several offences.") However, in this case, neither of those issues [*21] is present.

The appellant was charged with sexually assaulting MASN CH on a particular date, and at particular place, while she "was substantially incapable of declining participation in the sexual act or communicating unwillingness to engage in the sexual act." Charge Sheet. These two legal theories of liability are so closely related that the appellant could not have been prejudiced by the Government's failure to plead in the conjunctive. The critical point that the appellant had to defend against was whether the victim was substantially incapacitated. Whether that incapacity left her unable to decline participation in the sexual act, or unable to communicate her unwillingness to engage in the sexual act, was of little consequence. As for Double Jeopardy concerns, the pleading included sufficient specificity as to time, place, the alleged victim, and the nature of the sexual offense as to preclude any chance of the appellant facing a second trial on the same offense. For these reasons, we find the appellant's assignment of error regarding the disjunctive Article 120, UCMJ, pleading to be without merit.

Factual Sufficiency of the Article 120 Charge

[HN16]Under Article 66(c), UCMJ, we review [*22] issues of factual sufficiency *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for factual sufficiency is whether "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses" this court is "convinced of the accused's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

From the record, we can discern that the appellant engaged in sexual intercourse with MASN CH, that be-

fore the time of the intercourse MASN CH had consumed a large quantity of alcohol and displayed significant indicia of impairment, and that MASN CH had memories of the sexual activity that occurred that night. MASN CH testified that she consumed numerous alcoholic beverages over a few hours. MASN CH also testified that she thought she was dreaming and was unable to move or resist at the time of the assault. MASN CH stated that while her eyes were closed for most of the assault, she still remembered sounds and the way things felt during the sexual assault, including the appellant penetrating her vagina. Lastly, MASN CH had an immediate emotional reaction after she came to and escaped the [*23] assault, and the appellant made incriminating statements to her immediately following the assault.

The testimony from AT, who did not consume any alcohol, also corroborates MASN CH's account of the assault. AT stated that MASN CH was drinking at Club Taboo, was falling asleep outside of another club, needed assistance to the car, was non-responsive during the drive home, and was also non-responsive while he and the appellant were putting her to bed. Importantly, AT walked into the bedroom during the sexual assault and saw that MASN CH's eyes were closed, she was not moving, and had no emotion on her face. AT testified that in his opinion, "[MASN CH] was just literally unconscious." Record at 455.

The defense had a forensic toxicology expert testify about the MASN CH's actions during the night in question. The expert testified that MASN CH's testimony was not consistent with a person who was passed out because of the level of detail she was able to recall and because she had no lingering motor function degradation after she became aware of the assault occurring. However, on cross-examination the expert stated that a "hypothetical" person who was semi-conscious, who needed to be carried, [*24] who was falling asleep, and who was not responding to external stimuli, would be substantially incapacitated. Accordingly, the expert's testimony was not enough to create a reasonable doubt as to appellant's guilt in light of the testimony of MASN CH and AT.

We likewise find that the appellant did not reasonably have a mistaken belief that MASN CH consented to sexual activity. The record shows that MASN CH was completely unresponsive during the sexual assault. The reasonably careful, ordinary, prudent, sober adult would not have thought that MASN CH, who appeared to be passed out after consuming a large amount of alcohol, would have consented to sexual activity under those circumstances - despite the fact that the appellant and MASN CH had a sexually active dating relationship at the time. After reviewing the record of trial, we are convinced of the appellant's guilt of the Article 120, UCMJ, charge beyond a reasonable doubt.

Legal Sufficiency of the Article 134 Charge

[HN17]Article 66(c), UCMJ, requires the court to review issues of legal sufficiency *de novo*. *Washington*, 57 M.J. at 399. The test for legal sufficiency is, considering the evidence in the light most favorable to the Government, [*25] whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Winckelmann*, 70 M.J. 403, 406 (C.A.A.F. 2011) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

It was clear and undisputed that the appellant was married and the appellant had sexual intercourse with MASN CH. The only remaining element of the adultery charge is whether the appellant's conduct was prejudicial to good order and discipline or of a nature to be service discrediting. Given the facts and circumstances of this case, as set forth in great detail in the preceding sections of this opinion, we find that a rational trier of fact could have found the essential elements of the adultery charge beyond a reasonable doubt, and therefore the finding of guilt to the adultery charge is legally sufficient. [4]

4 Although the issue of factual sufficiency was not raised by the appellant with respect to the adultery charge, the court notes that "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses" we are also "convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325.

Court [*26] **Martial Order Errors**

Next the appellant alleges that his court-martial order (CMO) contains two errors. The appellant states that the CMO: (1) indicates a sentencing date of December 4, 2011, when he was actually sentenced on December 3, 2011; and (2) indicates that Specification 1 of Charge I was "withdrawn/dismissed," when he was actually found guilty of that specification, and conversely, Specification 2 of Charge I shows him having been found guilty, whereas that specification was the one that was dismissed by the military judge. *See* General Court-Martial Order No. 10-12, 13 April 2012. We agree that these entries were made in error, and in keeping with the principle that [HN18]military members are entitled to records that correctly reflect the results of their court-martial proceedings, we will order corrective action in our decretal paragraph. *See United States v. Crumpley*, 49 M.J. 538, 539 (N.M. Ct. Crim. App. 1998).

Sentence Appropriateness

Lastly, the appellant alleges that his sentence was disproportionate to the crimes he was convicted of and the evidence presented at sentencing. [HN19]"Sentence appropriateness involves the judicial function of assuring that justice is done and that the [*27] accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This process requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 10 C.M.A. 102, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

After carefully reviewing the entire record we conclude that the adjudged sentence is appropriate for this particular offender and his offenses. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005). In reaching this decision, we considered the fact that the appellant sexually assaulted a fellow Sailor who both loved and trusted him, after knowing that she had previously been the victim of sexual assault, and even resumed the assault after he was interrupted by AT. In this case, granting any sentence relief would be to engage in clemency, which is a function reserved for the CA, and we decline to do so. *Healy*, 26 M.J. at 395-96.

Conclusion

The findings and sentence are affirmed. The supplemental Court-Martial Order shall reflect that the correct date of the sentence was 3 December 2011 and that [*28] the appellant was found guilty of Specification 1 of Charge I and that Specification 2 of Charge I was "withdrawn/dismissed."

Senior Judge PAYTON-O'BRIEN and Judge WARD concur.

Citation #4
1998 CCA LEXIS 535

LEXSEE

UNITED STATES, Appellee v. Specialist JOHN G. RICHARDSON II, United States Army, Appellant

ARMY 9600725

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

1998 CCA LEXIS 535

September 30, 1998, Decided

NOTICE: NOT FOR PUBLICATION

PRIOR HISTORY: [*1]
United States Army Infantry Center and Fort Benning (trial). United States Army Armor Center and Fort Knox (DuBay Hearing). L. R. Dean (trial) and G. J. Holland (DuBay Hearing), Military Judges.

CORE TERMS: tactical decisions, defense counsel, court-martial, military, ineffective assistance of counsel, tactical reason, favorable, strategic, tactical, trial strategy, counsel stated, counsel's decision, right to testify, uncharged misconduct, prior to trial, well-reasoned, furtherance, strenuously, cumulative, sentencing, testifying, sentence, phase, skin, character witnesses

COUNSEL: For Appellant: Dennis Olgin, Esq. (argued); Captain Mary J. Bradley, JA (on brief and on supplemental brief); Captain Paul J. Perrone, Jr., JA.

For Appellee: Captain Elizabeth N. Porras, JA (argued); Colonel Joseph E. Ross, JA; Lieutenant Colonel Frederic L. Borch III, JA (on brief).

JUDGES: Before TOOMEY, TRANT, and CARTER, Appellate Military Judges. Senior Judge TOOMEY and Judge CARTER concur.

OPINION BY: TRANT

OPINION

MEMORANDUM OPINION

TRANT, Judge:

Contrary to his pleas, a general court-martial composed of officer and enlisted members convicted appellant of assault consummated by battery upon a child under the age of sixteen years and false swearing (two specifications), in violation of Articles 128 and 134, Uniform Code of Military Justice, 10 U.S.C. ßß 928 and 934 (1988) [hereinafter UCMJ]. The convening authority approved the adjudged sentence to a dishonorable discharge, confinement for five years, forfeiture of all pay and allowances, and reduction to Private E1.

Appellant asserts that his trial defense counsel provided [*2] ineffective assistance of counsel by: (1) denying appellant the right to testify; (2) failing to object to uncharged misconduct testimony by appellant's spouse (E.R.); and, (3) failing to call certain witnesses requested by appellant who would have provided favorable testimony. On 15 June 1998, we ordered that an evidentiary hearing pursuant to *United States v. Dubay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967) be conducted to resolve the factual issues concerning these assignments of error. Such hearing was conducted on 10 August 1998, and the record of trial, including the transcript of the *DuBay* hearing, is again before this court for automatic review pursuant to Article 66, UCMJ.

Trial defense counsel are responsible for making numerous decisions, after consultation with the accused where feasible and appropriate, concerning trial strategy and tactics. *See United States v. MacCulloch*, 40 M.J. 236, 239 (C.M.A. 1994). Whether those decisions amount to ineffective assistance of counsel or not will be determined under the standard of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The right to make those strategic or tactical decisions, however, is clearly that of the defense counsel, not [*3] the client. *See* 1 A.B.A. STANDARDS FOR CRIMINAL JUSTICE, Standard 4-5.2(b) (3d ed. 1993) [hereinafter CRIMINAL JUSTICE]. Indeed, as noted by Justice Harlan, "a lawyer may properly make a tactical determination of how to run a trial even in the face of his client's incomprehension or even explicit disapproval."

Brookhart v. Janis, 384 U.S. 1, 8, 86 S. Ct. 1245, 16 L. Ed. 2d 314 (1966)(Harlan, J., writing separately).

As to the lack of objection to E.R's testimony regarding certain acts of uncharged misconduct, the trial defense counsel stated to the military judge during the court-martial that he had a tactical reason for not objecting to this testimony. During the *DuBay* hearing, counsel elaborated upon his tactical reasons. Counsel's theory of the case was that appellant was a loving, caring father and, as such, the marks on his baby's skin were not cigarette burns but instead, the skin condition known as impetigo. Counsel sought to undermine E.R's testimony by portraying it as merely an unseemly by-product of the acrimonious divorce and child custody battle in which appellant and E.R. were involved. Counsel had discussed the general trial strategy with appellant prior to trial and appellant was in complete agreement [*4] with that strategy. Counsel reasoned that the more E.R. made outlandish and unsupported allegations of spousal abuse, the more her credibility declined. We find, as did the military judge, that counsel's decision to allow E.R. to hoist herself on her own petard was a well-reasoned and competent tactical decision in furtherance of a sound strategy. *See* *United States v. Wright*, 42 M.J. 283, 285 (1995); *United States v. Wallace*, 34 M.J. 353, 358 (C.M.A. 1992).

As to the failure to call certain good character witnesses, defense counsel stated his tactical reasons during the *DuBay* hearing. These witnesses would essentially have presented testimony that appellant was a good father, who was unlikely to intentionally harm his daughter, and other favorable character testimony. Counsel had interviewed these witnesses and ensured that they were available to testify during the trial. However, counsel chose not to call them to testify on the merits or during the presentencing phase of the court-martial. During trial on the merits, counsel was able to elicit this same favorable testimony during cross-examination of government witnesses. Counsel decided not to call the additional character witnesses [*5] on appellant's behalf because the point had already been effectively made and their testimony was cumulative.

During sentencing, counsel presented good character evidence through the testimony of appellant's mother and sister. Counsel decided not to call the additional character witnesses because: (1) they were cumulative; (2) some had second thoughts about appellant's good fatherhood following his conviction; and (3) one of them presented a very poor appearance and demeanor (this witness's testimony was introduced by a stipulation of expected testimony). Appellant's allegations amount to no more than second-guessing his counsel's tactical decisions. As the court noted in *United States v. Sanders*, 37 M.J. 116, 118 (C.M.A. 1993), "[a]fter a losing effort, hindsight usually suggests other ways that might have worked better; but that is not the measure of ineffective assistance of counsel." We find that counsel discussed this tactical decision with appellant and appellant raised no objection, and that counsel's decision was a well-reasoned and competent tactical decision in furtherance of a sound strategy.

The right of a criminal accused to testify is not a mere tactical or strategic decision, [*6] but is a constitutionally protected right. *See* *Rock v. Arkansas*, 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987); *Brooks v. Tennessee*, 406 U.S. 605, 92 S. Ct. 1891, 32 L. Ed. 2d 358 (1972). The decision to testify belongs ultimately to the accused. *See* *United States v. Belizaire*, 24 M.J. 183, 184-85 (C.M.A. 1987). Defense counsel can, indeed must, advise accused regarding the exercise of that right and can strenuously recommend how that right should be exercised. While the defense counsel should explain the strategic and tactical implications of the defendant testifying or not, in the end the personal decision of the accused must be honored by the defense counsel. *See* CRIMINAL JUSTICE, Standard 4-5.2(a).

The original record of trial is silent as to who made the decision during trial to not have appellant testify. In his post-trial affidavit and at the *DuBay* hearing, appellant asserts that he strenuously requested to testify, but his counsel refused to call him as a witness. During the *DuBay* hearing, counsel testified that he fully advised appellant that it was appellant's right to decide whether or not to testify. Counsel advised against appellant testifying because appellant had made three inconsistent statements prior to trial and would have [*7] been effectively cross-examined. Counsel believed that the potential harm to the defense case outweighed the benefit of appellant's testimony. We find, as did the military judge, that counsel completely and competently advised appellant of his right to testify and that it was appellant's voluntary, knowing and intentional decision not to testify. We further find that counsel's advice was sound and reasonable under prevailing professional norms.

For the foregoing reasons, we find that appellant's counsel was not ineffective under the standard of *Strickland v. Washington* during either the findings or the sentencing phase of appellant's court-martial. *See* *United States v. Scott*, 24 M.J. 186 (C.M.A. 1987).

The remaining assertions of error, to include appellant's supplemental assertion of error and those errors raised personally by the appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), are without merit.

The findings of guilty and the sentence are affirmed.

Senior Judge TOOMEY and Judge CARTER con- cur.

IN THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Before Panel No. 3

United States, Appellee v. Daniel D. WILT Sonar Technician Surface Third Class / E-4 U.S. Navy, Appellant	**BRIEF AND ASSIGNMENTS OF ERROR** **Case No. 201300274** Tried at Region Legal Service Office, Mid-Atlantic, Naval Station Norfolk, Virginia on 14 Aug 2012; 23 Oct 2012; 19 Nov 2012; 3-7 Dec 2012; and 10-13 Dec 2012, before a general court-martial convened by Commander, Navy Region Mid-Atlantic.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Assignments of Error[1]

I.

A PROSECUTOR IS NOT ALLOWED TO PLACE THE MEMBERS IN THE VICTIM'S SHOES WHEN ARGUING FOR FINDINGS OR SENTENCE. HERE, TRIAL COUNSEL ARGUED THAT THE MEMBERS SHOULD SENTENCE NOT FROM THEIR "PRISTINE" BOX BUT "SITTING WHERE [THE VICTIM] WAS SITTING IN THAT HATCH." DOES THIS PROSECUTORIAL MISCONDUCT WARRANT A NEW SENTENCING HEARING?

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[1] Appellant is awaiting clarification of another issue that has cast doubt upon the members' selection process for this region. *See* Appellant's Non-Consent Motion to Compel and Suspend Briefing dated 6 February 2014. Appellant awaits action on this motion to compel materials necessary to his appeal. However, as of the deadline for this filing, this Court has yet to rule. Therefore, Appellant seeks to preserve this issue for supplement filing once this Court acts upon his pending motion.

II.

DID THE MILITARY JUDGE ERR WHEN, IMMEDIATELY AFTER GIVING THE INSTRUCTIONS REGARDING RECONSIDERATION ON FINDINGS, SHE TOLD THE MEMBERS THERE WAS "GENERALLY NO REASON FOR RECONSIDERATION"?

III.

IS A SENTENCE INCLUDING CONFINEMENT FOR LIFE AN APPROPRIATE SENTENCE IN THIS CASE?

IV.

DID THE JUDGE ERR IN FAILING TO DISMISS LCDR P FROM THE MEMBERS POOL FOR IMPLIED OR ACTUAL BIAS WHEN THE CHARGES INVOLVED AN ASSAULT WITH A RAZOR AND LCDR P HAD PREVIOUSLY BEEN A VICTIM OF AN ASSAULT AT KNIFEPOINT?[2]

V.

WERE THE DEFENSE COUNSEL INEFFECTIVE WHEN THEY FAILED TO SEEK OR OBTAIN POTENTIALLY EXCULPATORY CAMERA FOOTAGE FROM THE SHIP WHERE THE CHARGED OFFENSES OCCURRED?

VI.

WERE THE DEFENSE COUNSEL INEFFECTIVE BY FAILING TO CHALLENGE MEMBERS MCC M and FCC C WHEN THEY WERE BOTH PREVIOUSLY TRAINED SEX ASSAULT VICTIM INTERVENTION REPRESENTATIVES?

VII.

DID THE MILITARY JUDGE ERR IN FAILING TO GIVE A CONSENT OR MISTAKE OF FACT AS TO CONSENT INSTRUCTION ON FINDINGS?

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[2] Assignments of Errors IV-IX are submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

VIII.

WHETHER TRIAL DEFENSE COUNSEL WERE INEFFECTIVE BY ADVISING APPELLANT NOT TO TESTIFY DUE TO PARTICULAR MANNERISMS WHERE HE HAD THE PROPENSITY TO SMIRK EVEN DURING SERIOUS DISCUSSION.

IX.

DOES IT VIOLATE THE TENETS OF DUE PROCESS FOR A MEMBERS PANEL TO CONVICT AND SENTENCE SOMEONE TO LIFE IN PRISON WITHOUT UNANIMOUS VOTE?

X.

DID THE 207 DAYS FROM THE DATE OF TRIAL TO CONVENING AUTHORITY'S ACTION PREJUDICE APPELLANT?

Statement of Statutory Jurisdiction

Appellant's approved sentence included a life sentence with the possibility of parole and a dishonorable discharge from naval service. Accordingly, this Court has jurisdiction under Article 66, Uniform Code of Military Justice (UCMJ).[3]

Statement of the Case

Appellant was charged with, rape, forcible oral and anal sodomy, multiple assaults consummated by a battery, and kidnapping of Damage Controlman Third Class (DC3) R (later promoted to DC2) arising from a sexual encounter onboard a ship. Members with enlisted representation, sitting as a general

[3] 10 U.S.C. § 866(b)(1) (2012).

court-martial, convicted Appellant, contrary to his pleas, of all charges and specifications. The members sentenced Appellant to be confined for life with the possibility of parole and to be dishonorably discharged from the Naval service.

Statement of Facts

DC2 R alleged at trial that Appellant assaulted her onboard their ship one night after she was returning from duty. The Government charged and convicted him of rape, forcible sodomy, assault consummated by a battery, and communicating a threat. Prior to findings, the military judge read the standard procedural and voting instructions. However, when the military judge reached the procedure for reconsideration, she went off script and informed the members: "Okay, I'm going to be straight up with you about reconsideration. There is generally no reason for reconsideration if you've had a really full and free discussion on the evidence before you."[4] The members then deliberated. The members did not seek reconsideration during their deliberations and convicted Appellant in total.[5]

During sentencing, the trial counsel argued for a sentence of life with the possibility of parole. The trial counsel concluded his argument with:

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[4] R. at 1974.

[5] R. at 1985.

> So we ask you, when you come back in from the deliberation room and you give a just sentence, that please do it not in the pristine area of [the member's box], consider sitting where she was sitting in that hatch. So when a sentence is decided, we would be able to turn to then DC3 [R] as she is sitting on those totes covered in plastic, zip-tied up, hoping not to die, we say, 'This is the proper sentence in this case for what he did to you. Just survive.'[6]

Summary of Argument

I.

Trial counsel argued that in determining a sentence, the members should leave their pristine members' box and go to the place where the victim was assaulted. While making this sentencing argument, he displayed a picture of the hatch door where DC3 R would have stared while she was assaulted. Both actions were improper. This argument was an improper personalization of the case to the members meant to take the members away from sober consideration of the evidence and commonly accepted principles of sentencing and substitute raw emotion and visceral need for revenge. This argument was particularly prejudicial as it was combined with the actual view that DC3 R would have had during the assault. This was an appeal for the members to literally see through the eyes of the victim while they determined a sentence. This argument inappropriately inflamed the members' passions resulting in and

[6] R. at 2245 (while displaying Pros. Ex. 17, the picture of the hatch door, to the members).

prejudicing Appellant's right to have a sentence reached by a calm, deliberative process with reference to generally accepted sentencing principles.

II.

The military judge's off-topic commentary eviscerated her instructions to the members regarding the possibility and process of reconsidering their deliberations. This commentary amounts to instructional error depriving Appellant of his due process rights as enumerated by the Rules for Courts-Martial. Of course, Appellant would never be able to pierce the deliberative process to affirmatively show prejudice. But as a deprivation of constitutional dimensions, there is a presumption of prejudice.

III.

A sentence of confinement for life, even with the possibility of parole, is the second most egregious deprivation of liberty our system inflicts. Appellant's sentence to life with the possibility of parole in this case was not appropriate given his military service, family scenario and lack of criminal history. While Appellant committed a serious crime, the appropriate amount of confinement in this case would be nearer thirty years.

Argument

I.

THE TRIAL COUNSEL'S SENTENCING ARGUMENT IMPROPERLY PLACED THE MEMBERS IN THE SHOES OF THE VICTIM AND RESULTED IN THEIR ADOPTING THE GOVERNMENT'S SUGGESTED EXTREME SENTENCE.

Standard of Review

Courts review allegations of improper argument raised for the first time on appeal for plain error.[7] Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused.[8]

Discussion

When arguing for an appropriate sentence, a trial counsel is at liberty to strike hard but not foul blows.[9] Considering this axiomatic position, a trial counsel is free to argue the evidence arising in a case and the reasonable inferences arising therefrom.[10] A trial counsel may not make arguments seeking to

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[7] *United States v. Holiday*, No. 200700105, 2007 CCA LEXIS 454, at *10 (N-M. Ct. Crim. App. Nov. 28, 2007) (citing *United States v. Edwards*, 35 M.J. 351, 355 (C.M.A. 1992)); *United States v. Oatney*, 41 M.J. 619, 631 (N-M. Ct. Crim. App. 1994) (*en banc*), *aff'd*, 45 M.J. 185 (C.A.A.F. 1996).

[8] *United States v. Haney*, 64 M.J. 101, 105 (C.A.A.F. 2006).

[9] *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000) (citing *United States v. Edwards*, 35 M.J. 351 (C.M.A. 1992)); *Berger v. United States*, 295 U.S. 78, 79 L. Ed. 1314, 55 S. Ct. 629 (1935).

[10] *Baer*, 53 M.J. at 237 (citing *United States v. Clifton*, 15 M.J. 26, 30 (CMA 1983)); *See also United States v. Nelson*, 1 M.J. 235, 239 (C.M.A. 1975).

influence the members from imposing a sentence based upon a "cool, calm consideration of the evidence and commonly accepted principles of sentencing."[11] One such category of argument that is *per se* improper, if not *per se* reversible, is the so-called "Golden Rule" argument.[12] The Golden Rule argument is when a prosecutor asks the members to stand in the shoes of the victim and see the case through her eyes.[13] This is improper because it urges the members to depart from consideration of the evidence and commonly accepted principles of sentencing and instead to focus on raw emotion and a naked desire for vengeance.[14]

The Government opened its sentencing argument requesting life in prison with the possibility of parole. But, to obtain this extreme sentence, the trial counsel--in textbook fashion--broke the Golden Rule. The Government's strategy in arguing for a life sentence was to make it personal to the members.[15] The

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[11] *Id.* (internal citations and quotations omitted).

[12] *United States v. Baer*, 53 M.J. at 237-38 (quoting *United States v. Teslim*, 869 F.2d 316, 327 (7th Cir. 1989) ("A 'Golden Rule' appeal in which the jury is asked to put itself in the plaintiff's position 'is universally recognized as improper because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence.'")).

[13] *Id.*

[14] *United States v. Baer*, 53 M.J. at 237-38.

[15] R. at 2237-45 (hereinafter "Government's Argument").

Government's argument throughout utilizes the first-person plural "we" as a way to identify with and create a collective consciousness meant to create the feeling that the Government, the victim, and members were one body that had been put in danger by Appellant's misconduct.[16] The Government then added to its improper personalization when it directly argued the members' and Government's collective fears regarding Appellant's release: "I submit to you that right now, none of **us**[17] in this room can really honestly say that when he is released, that **we** will be safe."[18] The final culmination of this strategy occurred in the Government's final paragraph of its sentencing argument. The Government used this ethic of groupthink and personalization to energize its final advance.

> **It concerns government counsel** that **we** sentence in a vacuum. What I mean by that is the fact that when **we** come up with a sentence, in this environment, eight months later. It's easier for **us** because we have carpet, a bailiff, safety, people, time's passed,

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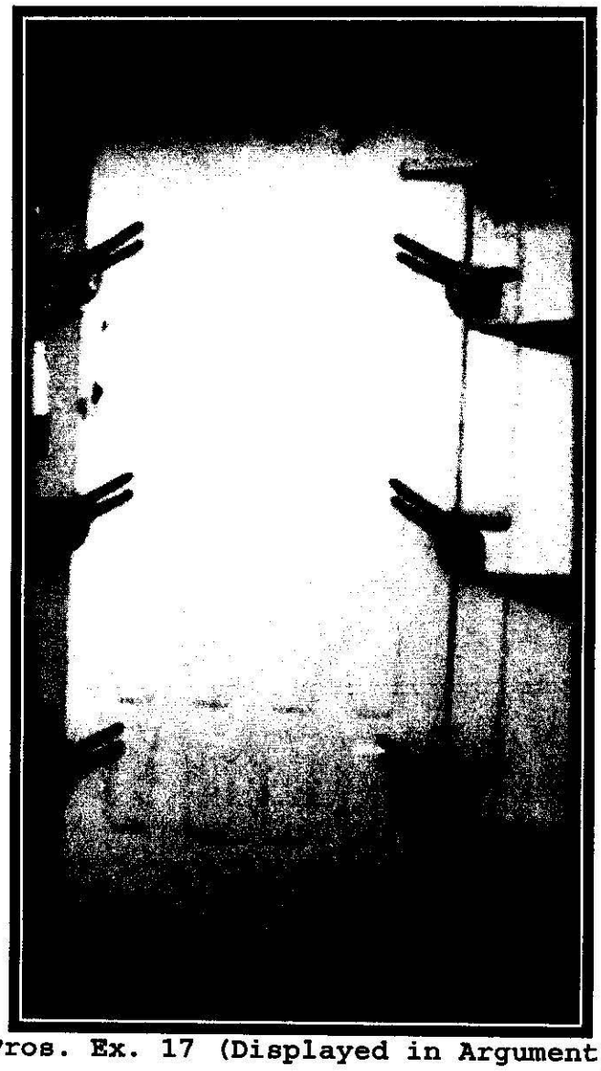
[16] Government's Argument (emphasis added). By Appellant's count, the Government used the term "we" forty-seven times throughout the sentencing argument; further conflating the barrier between the members and, the Government and the victim by using "we" to refer to the Government purely and then "we" to refer to the Government and, members and victim combined.

[17] The term "us" is used four times through the argument.

[18] Government's Argument at 2240 (Trial Counsel momentarily caught his error and attempted to qualify the term "we" by stating, "[w]hen I say, we, I'm talking about the public at large" but then continues to conflate and combine the three "we"s).

people have gone on with their lives. It's not as fresh. Showing Prosecution Exhibit 17. [Exhibit being displayed via ELMO.]



Pros. Ex. 17 (Displayed in Argument)

How many hours did she have to sit there and **look at the hatch** and wonder, when he came back in, after he did to her, what he did? How many hours did she have to sit there and **stare at that hatch** on the bag wondering, "Am I going to get out of here alive?" So we ask you, when you come back in from the deliberation room and you give a just sentence, **that please do it not in the pristine area of this [the members' box], Consider sitting where she was sitting in that hatch.** So when a sentence is decided, **we would be able to turn to then DC3 [R] as she is sitting on**

> **those totes covered in plastic, zip-tied up, hoping not to die, we say, "This is the proper sentence in this case for what he did to you. Just survive."[19]**

Taken in its entirety, the Government's sentencing argument violated the Golden Rule. Trial Counsel, from the start, improperly attempted to place the members in DC2 R's place. This impermissible argument amounted to prosecutorial misconduct for many reasons. First, Trial Counsel used personal pronouns throughout his argument.[20] This tactic placed the prestige of the Government behind the Trial Counsel. It also brought the members, victim and Government together as a "team" in deciding Appellant's fate. Second, the argument preyed upon the personal fears of the members. Trial Counsel infused personal fear in the members by saying they may not be safe upon Appellant's release.

Finally--and most egregious--Trial Counsel asked the members to stand in the victim's shoes and look through her eyes at the actual hatch and experience her assault. Yet, staring through her eyes was not enough. Trial Counsel went further and actually asked the members to speak to DC2 R in that same time and space: speak to her while she was behind that hatch and tell

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[19] Government's Argument at 2244-45 (emphasis added).

[20] *See United States v. Fletcher*, 62 M.J. 175, 180 (C.A.A.F. 2005)(holding that personal pronouns are improper vouching by the Government when used in argument).

DC2 R how they will help her by giving Appellant a life sentence. The entirety of this argument sought to appeal to the emotions of the members in an inflammatory manor and cannot stand.

While the entire argument fails under our principles for cool, calm, consideration of the evidence, the most egregious is the final paragraph. The final paragraph breached the Golden Rule principle in one specific way. It instructed the members to not sentence in the deliberative "vacuum" but leave the "pristine" area of the courtroom and go sit where "she was sitting" when giving a sentence. This error was plain, obvious, and uncured.

This improper argument constituted prosecutorial misconduct as it violated a well-known established legal norm for the conduct of sentencing argument.[21] It is such a well-established legal norm that its presence on the record is not only error but should be plain to all parties of a court-martial.

In assessing prejudice under the plain error standard involving prosecutorial misconduct, a court evaluates the cumulative impact on the accused's substantial rights and the

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[21] *United States v. Cabrera-Frattini*, 65 M.J. 950, 955 (N-M. Ct. Crim. App. 2008).

fairness and integrity of the trial.[22] The method military courts use to determine if an improper sentencing argument merits relief is by balancing: (1) the severity of the misconduct; (2) the measures adopted to cure the misconduct; (3) whether the comments, taken as a whole, were so damaging that the court cannot be confident that an appellant was sentenced on the evidence alone.[23]

All three factors weigh in favor of Appellant in this case. As shown above, the misconduct was replete from the beginning to end of the argument. The argument's whole purpose was to confuse the lines between dispassionate viewing of the evidence in the "vacuum" of the court-martial but rather improperly personalize it to both the members' fear and the victim's firsthand experience. Secondly, the military judge took no action to counteract this improper argument. It is the third factor that resoundingly supports reversal in this case. This Court, given the record and ultimate sentence, cannot be confident that Appellant was sentenced upon the evidence alone. While the facts Appellant was convicted upon were of a serious nature, they do not merit a sentence based upon enflamed passions and improper personalization. Yet, as explained in

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[22] *United States v. Halpin*, 2013 CAAF LEXIS 166, at *7-9 (C.A.A.F. Feb. 13, 2013).

[23] *Id.*

greater detail, *infra*, this sentence is disproportionately severe. Most notably, it is the exact sentence requested by the infringing trial counsel; exact in every way up to and including the recommendation of deferral of forfeitures to his dependents.[24] It is the exactitude of the sentence that makes evident the prejudicial impact of the trial counsel's successful attempt to merge the Government's interest and the members' and victim's consciences' before looking together through the victim's eyes.

WHEREAS, Appellant asks this Court to set aside the sentence in this case and order a new sentencing hearing.

II.

THE MILITARY JUDGE'S INSTRUCTION THAT RECONSIDERATION WAS GENERALLY UNNECESSARY WAS EITHER INSTRUCTIONAL ERROR OR WAS AN APPEARANCE OF BIAS AGAINST RECONSIDERATION.

Standard of Review

"Whether a panel was properly instructed is a question of law reviewed *de novo*."[25] Where there is no objection to an instruction, the courts test for plain error.[26] When a military

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[24] R. at 2238.

[25] *United States v. Garner*, 71 M.J. 430, 432 (C.A.A.F. 2013) (quoting *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008)).

[26] *United States v. Payne*, No. 13-0345, 2014 CAAF LEXIS 18, at *7 (C.A.A.F. Jan. 6, 2014).

judge's impartiality is challenged on appeal, the test is "whether, 'taken as a whole in the context of this trial,' a court-martial's 'legality, fairness, and impartiality' were put into doubt by the military judge's questions."[27] The test is objective, judged from the standpoint of a reasonable person observing the proceedings.[28]

Discussion

1. The judicial instruction discouraging reconsideration amounted to instructional error.

Instructional error may violate due process.[29] An accused has the right to have the findings or sentence in his court-martial reconsidered should members desire it.[30] The military judge's commentary during findings instructions on the nature and procedure of reconsideration improperly slammed the door on this possibility. As cited in the facts, *supra*, the military judge injected her own perspective and commentary on reconsideration immediately following the bench book

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[27] *United States v. Ramos*, 42 M.J. 392, 396 (C.A.A.F. 1995) (citation omitted).

[28] *Id.*

[29] *United States v. Forbes*, 59 M.J. 934, 941 (N-M. Ct. Crim. App. 2004) (citing *United States v. Jackson*, 6 M.J. 116, 117 (C.M.A. 1979)); *United States v. Davis*, 47 M.J. 484, 486 (C.A.A.F. 1998).

[30] Manual for Courts-Martial, Rules for Courts-Martial 924, 1009 (2012). *See also* Article 52(c), UCMJ, 10 U.S.C. 852(c) (2006).

reconsideration instruction. This commentary, in essence, instructed the members to disregard reconsideration as unnecessary. Its placement inside the instructions and the official character of its delivery converted this commentary in to a *de facto* instruction that amounts to plain error.

This instruction is plain error because it instructs members to disregard the statutory and regulatory option of reconsideration. Or, at the very least, chills a member's desire to reconsider should it occur. As an axiom, this sort of error is plain as military judges may not instruct members to disregard Rules for Courts-Martial or statutory processes in the military justice system. This is especially true when it affects procedures on voting in either the findings or sentencing phase as this is the quintessential purpose of a court-martial. Moreover, the error was plain because there was no legitimate purpose for the military judge to deviate from the benchbook instruction.

Once this Court acknowledges the plain error of a military judge's instruction to disregard a court-martial procedure, the question remains what type of error exists. Simply put, this error is structural. Since it affects the very purpose of court-martial, this structural error precludes the need to show

prejudice.[31] However, Appellant admits that the law regarding instructional error and the showing of prejudice has recently changed at least with respect to elements.[32]

While Appellant in no way concedes that this commentary was not structural error, if this Court sees it differently, the error must at least be subjected to a harmless beyond a reasonable doubt analysis as it violates due process arising from the Fifth Amendment.[33]

Finally, at a minimum, if this Court is reticent to see the constitutional implications of such an instruction, Appellant urges this Court to adopt the hybrid analysis used by this Court in *United States v. Forbes*.[34] In *Forbes*, this Court found that an instructional error did not justify harmless error analysis yet was not benign enough to force a showing of prejudice by Appellant.[35] As a compromise, this Court adopted a presumption

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[31] *Payne*, slip op. at 16-17.

[32] *Id.* (omitting instruction on an element of a charged offense was at one point structural error. Now, the Court of Appeals of the Armed Forces recently overruled this perspective and tests for prejudice).

[33] *Cf. Forbes*, 59 M.J. at 940.

[34] 59 M.J. at 940-41.

[35] *Id.*

of prejudice analysis that could be rebutted by a preponderance of the Government's evidence.[36]

No matter which analysis this Court adopts, relief is warranted. If the error is structural, as Appellant maintains, then the error itself is sufficient to warrant reversal. If the burden is shifted to the Government to show that the error is harmless beyond reasonable doubt, Appellant succeeds as there is no method by which we can pierce the members' deliberative process to judge the effect on the panel. Therefore, absent actual evidence that the panel asked to reconsider a finding or sentence, the Government cannot meet its burden. Finally, it is this same prohibition on piercing the deliberative process that warrants relief under the third and final possible analysis. Yet again, even with a preponderance standard, there is no way for the Government to show the error harmless absent an actual reconsideration by the members. The firewall of deliberations is why this type of judicial commentary instruction is so harmful. No one is allowed to know what goes on in that sanctified room. Therefore, such an error must tie to a presumption in favor of appellants when military judges make such odd and unique missteps.[37]

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[36] *Id.* at 941.

[37] It is the mere possibility of a chilling effect on a member that is the esoteric yet still significant harm in this…

2. Even if the military judge's comments are not considered instructional error, her comments demonstrated an improper bias against reconsideration.

Should this Court fail to see the matter as instructional at all, Appellant still merits relief. The military judge's comments showed a bias against the process of reconsideration. As a rule, military judges cannot allow their own desires or biases to leak into the members' deliberative process. However, this is exactly what occurred here. The military judge, for reasons unknown, finds reconsideration to be unnecessary. This is not a legal maxim but an unsolicited personal opinion that prejudices an accused's chances at a full and exhaustive deliberation. At the very least, such commentary displays an apparent bias where an objective observer would question the fairness of the proceedings when a judge advises against a statutory and regulatory due process right.

WHEREAS, Appellant asks this Court to set aside the findings and sentence in this case and remand for a new trial free of instructional error and judicial bias.

...case. Imagine briefly a member who is possessed with cognitive dissonance over a finding of guilty just determined. In his own mind he deliberates back and forth over whether to voice his concerns. Ultimately, this member harkens back to the judge's instruction commentary and he allows the scales of his mind to tip towards silence rather than speaking up for reconsideration. This is the tacit destruction of the full process that comments like these impact.

III.

A SENTENCE OF CONFINEMENT FOR LIFE IS INAPPROPRIATELY SEVERE.

Standard of Review

This court reviews sentence appropriateness *de novo*.[38]

Discussion

This Court "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved."[39] The appropriateness of the sentence must be judged by an "individualized consideration" of the appellant, "on the basis of the nature and seriousness of the offense and the character of the offender."[40]

The punishment should fit both the offender and the crime.[41] If a sentence is unjustifiably severe, this Court may not approve it.[42] The sentence should not be more severe than that "warranted by the offense, the circumstances surrounding the

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[38] *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006).

[39] Art. 66(c), UCMJ, 10 U.S.C. § 866(c).

[40] *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (citation omitted).

[41] *United States v. Mack*, 9 M.J. 300, 317 (C.M.A. 1980) (citing *Williams v. New York*, 337 U.S. 241 (1949)).

[42] *See United States v. Lanford*, 6 U.S.C.M.A. 371, 376, 20 C.M.R. 87, 92-95 (1955).

offense, [the accused's] acceptance or lack of acceptance of responsibility for his offense, and his prior record."[43]

The members, due to the influence of the trial counsel mentioned above, awarded an inappropriately severe sentence in this case. In fact, their sentence was exactly what the Government requested. This shows the members here ignored the extensive extenuation and mitigation case raised by Appellant. Weighing greatly in Appellant's favor was his lack of any criminal record prior to these events. Further, he was shown to be a father under great stress caring for children with significant developmental infirmities. Finally, there was the valuable recidivism testimony given by Dr. Michael Sweda regarding the future prospects of violence for Appellant. It is primarily these three aspects that weigh in favor of Appellant's sentence being reduced to one including no more than thirty years of confinement.

A sentence of thirty years of confinement is the appropriate sentence in this case as it will meet all the relevant factors for a just and fair sentence. Confinement for thirty years supports both general and specific deterrence as it is a significant punishment; taking about half of Appellant's life away from him. Additionally, such a punishment allows for

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[43] *United States v. Aurich*, 31 M.J. 95, 97 n. (C.M.A. 1990).

great rehabilitation and reformation of character while confined. In Appellant's case, he will be in his mid-fifties by the time he has served thirty years. During that time, he will have received treatment and rehabilitation services of a federal penitentiary. Additionally, time is its own rehabilitation in these scenarios as sex offender recidivism drops precipitously when comparing individuals in their twenties and thirties to individuals in their fifties.[44] Appellant will be a different man upon his exit from confinement. A man rehabilitated through years of training and one that, because of age, will be unlikely to ever commit such an act again.

Confinement for thirty years also fits the seriousness of the offenses in this case. Appellant, for all the bad acts he was convicted of, did not take a life that night. Therefore, our system should not take his away in the form of a life sentence. To be sure, Appellant stands convicted of serious crimes that deserve serious punishment. But a thirty year sentence and a dishonorable discharge is serious punishment that is appropriate here.

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[44] R. at 2157; *See also* Helmus, Leslie *et al.*, *Improving the Predictive Accuracy of Static-99 and Static-2002 with Older Sex Offenders: Revised Age Weights*, Sex Abuse: A Journal of Research and Treatment 2012 24: 64, Aug. 15 2011, at 89 (available at http://sax.sagepub.com/content/24/1/64.full.pdf+html).

Appellant, in weighing the seriousness of his crimes, also asks this Court to consider analogous cases to see the great severity of his sentence.[45] The cases Appellant specifically asks this Court to review are: *United States v. Simpson*, 58 M.J. 368, 370 (C.A.A.F. 2003); *United States v. Brown*, No. 9801503, 2000 CCA LEXIS 353, at *1 (A. Ct. Crim. App. Dec. 11, 2000); *United States v. Breshears*, No. 24803, 1985 CMR LEXIS 3495, at *2 (A.F.C.M.R. July 3, 1985); *United States v. Andreozzi*, 60 M.J. 727, 728 (A. Ct. Crim. App. 2004); *United States v. Bailey*, 52 M.J. 786, 788 (A.F. Ct. Crim. App. 1999); *United States v. Lindsey*, No. 32088, 1996 CCA LEXIS 398, at *1 (A.F. Ct. Crim. App. Dec. 30, 1996); *United States v. Straight*, 42 M.J. 244, 246 (C.A.A.F. 1995). Appellant contends that in these cited cases, and many others, the misconduct of the appellants was much greater than his yet their sentence was at or near thirty years of confinement. Appellant asks this Court to see the great injustice in this comparison and affirm only so much of the sentence that includes thirty years of confinement.[46]

Finally, the members' sentence does not sufficiently account for the significant family circumstances of the

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[45] This paragraph is submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[46] This paragraph is submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Appellant. Detailed by his mother on page 2217 of the record, Appellant's children both possess great developmental, physical and mental infirmities. His wife is now alone to care for these children until Appellant can return. A life sentence removes Appellant from caring for and supporting these disabled children. These kids and his wife must be mitigating factors here. Appellant cannot be removed permanently from their home despite what he is convicted of. Such extreme confinement is not justice when compared to the issues described above. Such confinement takes more than what Appellant owes. It takes more than what the evidence supported. It takes more because the trial counsel enflamed the passions of the members to punish beyond the facts of this case.

WHEREAS, Appellant asks this Court to affirm only so much of the sentence that includes confinement for thirty years.

Jason R. Wareham
Captain, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, D.C. 20374
(202) 685-7394
jason.wareham@navy.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was delivered to the Court and to the Director, Appellate Government Division, and electronically filed on 12 February 2014.

Jason R. Wareham
Capt, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, D.C. 20374
(202) 685-7394
jason.wareham@navy.mil

DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
SOUTHERN JUDICAL CIRCUIT
GENERAL COURT-MARTIAL

United States of America vs. [redacted] HM3 USN	)	DEFENSE MOTION TO DISMISS: UNCONSTITUTIONALLY VOID FOR VAGUENESS 15 OCTOBER 2013

1. Nature of Motion

This is a motion to dismiss Specification 2 of the sole charge alleging a violation of Article 120(c) of the Uniform Code of Military Justice because the term "substantially incapacitated" is unconstitutionally vague.

2. Statement of Facts

HM3 [redacted] is charged with sexual assault under Article 120, UCMJ. Specifically, Specification 2 under the charge is based upon the theory that [redacted] USN, the complaining witness, was "substantially incapacitated." [redacted] alleges that she, HM3 [redacted], and several other friends spent the evening of 6 October 2011 at the Navy Ball onboard Naval Air Station Pensacola, Florida.

[redacted] testified at the Article 32 investigation that she had about four alcoholic drinks while at the Navy Ball. After leaving the Navy Ball and while in the parking lot, [redacted] invited HM3 [redacted] to her apartment, an invitation that HM3 [redacted] accepted. [redacted] drove [redacted] and HM3 [redacted] to [redacted]'s apartment, where the pair retired for the night.

While in the apartment, [redacted] and HM3 [redacted] engaged in sexual intercourse. The next morning, [redacted] woke up with no recollection of the events after she left the Navy Ball due to her being blacked out. Peculiarly, her memory of the period of black out returned to her several days after the night in question. Several months later, [redacted] reported that she was raped by HM3 [redacted].

3. **Discussion.**

Specification 2 of the sole charge alleges a violation of Article 120(c) under the previous version of Article 120, which reads in pertinent part (as related to the offenses alleged in this case):

> *Any person subject to this chapter who-*
>
> > *(2) engages in a sexual act with another person of any age if that other person is substantially incapacited or substantially incapable of -*
> >
> > > *(A) appraising the nature of the sexual act;*
> > >
> > > *(B) declining participation in the sexual act; or*
> > >
> > > *(C) communicating unwillingness to engage in the sexual act; is guilty of aggravated sexual assault and shall be punished as a court-martial may direct.*

This case, as is often found in military justice, involves allegations of sexual assault in which alcohol consumption and intoxication are principal factors. The 2007-2012 iteration of Article 120 of the Uniform Code of Military Justice seeks to proscribe certain forms of sexual conduct, including situations where one participant has consumed alcohol or other intoxicants to the level that they are, statutorily, incapable of consenting to the sexual activity. The statute describes this state as being "substantially incapacitated" but provides no amplifying information

or definition as to what this term means. For the reasons that follow, this language is unconstitutionally vague, and Specification 2 of this charge should be dismissed with prejudice.

A. Statutory Background.

Since the 1950s Congress has defined military sexual crimes in Article 120 of the Uniform Code of Military Justice (UCMJ). 10 U.S.C.S. § 920 et.seq. In 1992, Congress began to implement amendments to Article 120 that ultimately revamped and expanded the scope of Article 120. The most notable changes to Article 120 came in the 2007 and 2011 Congressional amendments respectively. Specifically, Congress made key modifications to the definition of sexual assault in their 2007 and 2011 amendments to Article 120.

As stated above, in many military sexual assault cases the complaining witness alleges that he or she is impaired by the ingestion of alcohol or drugs. The degree of impairment is a frequent area of dispute during trial. In 2007, Congress completely overhauled the scope of Article 120 making a "sexual act" illegal if the victim was "substantially incapacitated" or "substantially incapable" of appraising the nature of the sexual act, declining participation in the sexual act, or communicating unwillingness to engage in the sexual act. Subsequent case law demonstrated that "substantially incapacitated" was difficult to define with any clarity. *United States v. Moore*, 58 M.J. 466, 469 (C.A.A.F. 2003).

B. Article 120(c) is so vague that HM3 [redacted] could not possibly have been expected to conform his conduct to the law such that he is denied Due Process.

Substantial incapacitation is not sufficiently specific to inform a member of the public as to when it would be illegal to have sex with a person who has been drinking alcohol. An act of Congress is unconstitutionally vague if a person cannot reasonably discern whether the contemplated conduct is criminal. *United States v. Harriss*, 347 U.S. 612, 617 (1954). Due Process guaranteed by the Fifth Amendment requires fair notice that an act is forbidden and

subject to criminal sanctions. *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003) (citing *United States v. Bivens*, 49 M.J. 328, 330 (C.A.A.F. 1998)); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). A law will be deemed facially void if it is so unclear that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

Vague statutes are also unconstitutionally vague when they do not provide standards for prosecutors and law enforcement officials. *Parker v. Levy*, 417 U.S. 733, 774-75 (1974). In other words, "[t]he Constitution does not permit a legislature to set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *City of Chicago v. Morales*, 527 U.S. 41, 60 (1999) (quoting *United States v. Reese*, 92 U.S. 214, 221 (1876)).

Connally provides a basic background on the doctrine of void-for-vagueness. The modern seminal case on the question is *Parker v. Levy*, 417 US 733 (1974). In *Parker*, the Court states, "void-for-vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." *Id.* at 757. This standard is expanded upon in a series of military cases. In *United States v. Saunders*, C.A.A.F. framed the issue of whether an individual was on sufficient notice as an objective inquiry. 59 M.J. 1, 29 (2003). Later, *United States v. Pope* lists examples of "fair notice" sources to include federal law, state law, military case law, military custom and usage, and military regulations. 63 M.J. 68 (C.A.A.F. 2006). Training, pamphlets, and other materials may also serve as sources of notice by giving context to regulations and articulating differences between permissible and impermissible behavior. *See United States v. Brown*, 55 M.J. 375, 384 (C.A.A.F. 2001).

Here, the application of the crime of aggravated sexual assault, a violation of Article 120, UCMJ, to HM3 [redacted] is unconstitutionally vague because it is unclear what factors satisfy the element of substantial incapacitation. The law cannot be clearly understood by the common man or those who prosecute it. HM3 [redacted] had no notice that the complaining witness allegedly reached the undefined level of "substantial incapacitation" such that her consent was invalidated by alcohol consumption. The statute unrealistically expected him to gauge whether the complaining witness was "substantially incapable" of consenting to sexual activity.

Determining whether someone is "substantially incapacitated" requires either medical training or the ability to make accurate, immediate determinations based on usually incomplete information (such as a potential sexual partner's height, weight, tolerance for alcohol, knowledge of how much alcohol was consumed, and knowledge of when alcohol consumption ceased). Consider the intoxicated complaining witness, such as the one in the case at bar, during a period of "black-out" where the witness externally appears capable of consenting, externally appears to actually consent, and it is not determined until later (usually by experts, analyzing facts that weren't necessarily known to the accused) that she was "substantially incapable" of consenting at the time.

Article 120 is not "so clearly expressed" that HM3 [redacted] could "intelligently choose, in advance, what course it is lawful for him to pursue." *Capital Traction Co.*, 34 App. D.C. at 598. As a result, HM3 [redacted] could not have reasonably known whether the complaining witness had reached a level of impairment such that she was "substantially incapacitated" and Article 120(c) of the previous Article 120 rendition must be struck down as unconstitutionally vague.

4. **Relief Requested**

Defense respectfully requests that the Specification 2 of the sole charge be dismissed, with prejudice, as Art 120(c) is unconstitutionally vague.

5. **Evidence and Burden of Proof**.

The burden is upon the defense. No evidence other than that previously submitted with other motions will be relied upon.

6. **Argument**. The Defense respectfully requests oral argument.

Respectfully submitted,

[redacted]

Lieutenant, JAG Corps, U.S. Navy
Assistant Defense Counsel

****

Certificate of Service

I hereby attest that a copy of the foregoing Motion to Dismiss was served on the Court and opposing counsel by email on 15 October 2013.

[redacted]

Lieutenant, JAG Corps, U.S. Navy
Assistant Defense Counsel

DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
SOUTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

U N I T E D S T A T E S	)	
	)	GOVERNMENT MOTION IN RESPONSE TO DEFENSE MOTION TO DISMISS SPECIFICATION 2 OF THE CHARGE AS UNCONSTITUTIONALLY VAGUE
v.	)	
[redacted]	)	
HM3/E-4	)	
U.S. NAVY	)	21 October 2013

1. Nature and Summary of Government Response

This motion is filed pursuant to Rule for Courts-Martial 907 in response to the Defense's motion to dismiss of 15 October 2013 because the term "substantially incapacitated" is unconstitutionally vague. The government requests that the Court deny the defense motion because the 2007-2012 version of Article 120 is not unconstitutionally vague, and has never been found so by any appellate court.

2. Burden

Pursuant to R.C.M. 905(c), the defense bears the burden of proof on any factual issue necessary to determine this motion by a preponderance of the evidence.

3. Summary of Facts

The accused is charged with two specifications of violation of Article 120 of the Uniform Code of Military Justice for

aggravated sexual assault. The first specification alleges sexual assault by causing bodily harm, the second specification alleges sexual assault due to the substantial incapacity of the victim.

The specifications stem from the evening of 6 October 2011, the night of the Navy Ball onboard Naval Air Station Pensacola. The alleged victim, HM2 B.G., drank a significant amount of alcohol while at the ball. When the ball concluded, HM2 B.G. saw that the accused was intoxicated and concluded that he should not drive himself home. HM2 B.G. offered the accused a ride with her designated driver, and offered to allow him to spend the night on her pull-out couch in her living room. The accused agreed.

When they returned to HM2 B.G.'s apartment, she went to sleep in her room, closing the door behind her. At some point later the accused opened HM2 B.G.'s door and started talking to her, waking her up. HM2 B.G.'s only specific memory of that moment is telling the accused that she did not bring him to her home to have sex with him. She then fell back asleep. HM2 B.G.'s next memory is of the accused in her bed, pulling off her pajama pants, and getting on top of her. The accused then penetrated HM2 B.G.'s vagina with his penis, at which point she remembers waking up in pain and telling the accused to get off of her. HM2 B.G. fell back asleep while the accused was still

on top of her. The next morning, HM2 B.G. awoke to find the accused in her bed with his arm around her.

The following day, HM2 B.G. sent the accused a Facebook message asking him to contact her. The accused texted HM2 B.G. in response, at which point she asked him whether they had had sex after the ball. The accused confirmed that they did, and when asked what HM2 B.G. had done to suggest that she wanted to have sex, he replied that she was "hot," and they were both drunk.

HM2 B.G. filed an unrestricted report of sexual assault in December 2012. On 16 January 2013, NCIS interviewed the accused and obtained a sworn statement. During the interview, the accused confessed to having sex with HM2 B.G. while she was asleep or trying to sleep, and without her consent.

3. **Authorities**:

Nash v. United States, 229 U.S. 373 (1913);
Krichman v. United States, 256 U.S. 363 (1921);
American Communications Assn. v. Douds, 339 U.S. 382 (1950);
Coates v. Cincinnati, 402 U.S. 611 (1971);
Grayned v. City of Rockford, 408 U.S. 104 (1972);
Parker v. Levy, 417 U.S. 733 (1974);
United States v. Frantz, 1953 CMA LEXIS 1020, (C.M.A., Feb. 6, 1953);
United States v. Brown, 55 M.J. 375 (C.A.A.F. 2001);
United States v. Moore, 58 M.J. 466 (C.A.A.F. 2003);
United States v. Vaughan, 58 M.J. 29 (C.A.A.F. 2003);
United States v. Mansfield, (A.F.C.M.R. 1991);
United States v. Cartwright, 2013 CCA LEXIS 735, (A.F.C.C.A., Aug. 15, 2013);
Rule for Courts-Martial 907, MANUAL FOR COURTS-MARTIAL (2012 ed.)

4. **Discussion**

I. Article 120, Uniform Code of Military Justice, Is Not Unconstitutionally Vague Because It Appropriately Provides Fair Notice of Its Proscribed Conduct.

A law is void for vagueness "if one could not reasonably understand that his contemplated conduct is proscribed." United States v. Vaughan, 58 M.J. 29, 31 (C.A.A.F. 2003). "A basic principle of due process requires 'fair notice' that an act is subject to criminal sanction and about the standard that is applicable to the forbidden conduct." United States v. Cartwright, 2013 CCA LEXIS 735, *19 (A.F.C.C.A., Aug. 15, 2013) (citing Vaughan, 58 M.J. at 31). What is sufficient from a notice standpoint "is determined in light of the conduct with which a defendant is charged." Parker v. Levy, 417 U.S. 733, 757 (1974). Essentially, "[v]oid for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his or her contemplated conduct is proscribed." Id. Additionally, "[c]riminal statutes are presumed to be constitutionally valid, and the party attacking the constitutionality of a statute has the burden of proving otherwise." United States v. Mansfield, 33 M.J. 972, 989 (A.F.C.M.R. 1991), aff'd, 33 M.J. 972 (C.M.A. 1993).

When it comes to criminal statutes, exact certainty as to the proscribed conduct is not required. According to the Supreme Court, "because we assume that man is free to steer

between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Put another way, "[c]ondemned to the use of words, we can never expect mathematical certainly from our language." Id. at 110. Even with the most artfully drafted criminal statutes, "[a] certain minimum element of indistinction remains which, in legislation of this entirely defensible character, can never be expunged completely, and must be dealt with on a case-by-case basis." United States v. Frantz, 1953 CMA LEXIS 1020, *7 (C.M.A., Feb. 6, 1953); see also Krichman v. United States, 256 U.S. 363, 367-68 (1921). Of course, "[i]t will always be true that the fertile legal 'imagination can conjure up hypothetical cases in which the meaning of [disputed] terms will be in nice question.'" Grayned, 408 U.S. at 111 (citing American Communications Assn. v. Douds, 339 U.S. 382, 412 (1950)). Nevertheless, some ambiguity in criminal statutes is completely justifiable, "for 'the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree.'" Frantz, 1953 CMA LEXIS at *7 (citing Nash v. United States, 229 U.S. 373, 377 (1913)).

UCMJ Article 120 is not constitutionally void for vagueness. Defense Counsel specifically asserts that the term

"substantially incapacitated" is constitutionally vague and asserts that not only is the statute itself deficient, but that the accused could not have been expected to conform his specific conduct to the law. Both arguments are without merit.

A. The Statutory Language of Article 120, UCMJ, is Constitutional.

The charge in this case is drafted under the 2007-2012 version of the UCMJ Article 120 because the alleged offense occurred in 2011. Defense counsel argues that the term "substantially incapacitated" included in the statutory language of the 2007-2012 Article 120 contains no additional amplifying information to explain or define the specific term, and because of this, the statute is unconstitutionally vague. Counsel claims that case law demonstrates that "'substantial incapacity' was difficult to define with any clarity," and cites United States v. Moore, 58 M.J. 466, 469 (C.A.A.F. 2003) to support their position. While Moore does include a brief discussion of the vagueness doctrine as it relates to a violation of Article 92 (and concludes that the order given was not unconstitutionally vague), it makes absolutely no mention of Article 120 or the difficulty of understanding the meaning of substantial incapacity. Additionally, the decision was issued in 2003, a full four years before the 2007-2012 version of Article 120 went into effect.

Assuming, arguendo, that the 2007-2012 version of Article 120 is lacking particular clarity, it is important to note that, as of 16 August 2013, "no appellate court has found Article 120, UCMJ, to be facially unconstitutional" or unconstitutionally vague. Cartwright, 2013 CCA LEXIS at *8. In Cartwright the Court also noted that the appellant was on notice of all potential theories of liability under the statute when the charge was that the victim was "substantially incapacitated," that the term "substantially incapacitated" was analogous to "substantially incapable," and that the defense readily demonstrated its understanding of the meaning of the term by its arguments and cross examinations at trial. The meaning of "substantially incapacitated" may not be defined to mathematical precision in the statute, but such precision is not required to provide sufficient notice and overcome a constitutional vagueness challenge. Grayned, 408 U.S. at 110.

B. <u>The Statute Is Not So Vague That The Accused Could Not Have Appropriately Conformed His Conduct to The Law, And It Does Not Deny Him Due Process</u>.

Defense Counsel also argues that the statute is so vague that the accused could not possibly have been expected to conform his conduct to the law. As stated above, whether a statute is unconstitutionally vague "is determined in light of the conduct with which a defendant is charged." Parker, 417 U.S. at 757. Because there is no definition provided in the

statute, "[w]e are thus relegated, at best, to the words of the [statute] itself." Grayned, 408 U.S. at 110 (quoting Coates v. Cincinnati, 402 U.S. 611, 614 (1971)). Additionally, as the Defense states in its motion, other sources may exist to provide notice to the accused of his potentially criminal conduct, including military custom and usage, training, pamphlets, and materials. See United States v. Brown, 55 M.J. 375, 384 (C.A.A.F. 2001).

In this case the accused committed a sexual act on the alleged victim, who was incapable of consenting because she was asleep and impaired by alcohol. Specifically, he is charged with committing the sexual act of vaginal penetration with the victim. The incident occurred after a night of alcohol consumption the Pensacola Navy Ball, and both the accused and the alleged victim took advantage of a designated driver because of their level of intoxication. However, instead of sleeping on the pull out couch offered to him by a concerned shipmate, the accused entered HM2 B.G.'s closed bedroom of and engaged in a sexual act with her while she was intoxicated, asleep, and unable to consent.

The accused is a 26-year old Third Class Petty Officer in the United States Navy. Like all other Sailors, he has presumably received trainings on the topics of sexual assault and alcohol and/or drug abuse. It is reasonable to assume that

this training, and the training materials used and presented at these trainings, were at least of general "importance in providing notice of the [proscribed conduct]" which involves elements of overindulgence in alcohol and at least risky sexual activity. Id. Furthermore, the actual words used in the statute are not overly complicated or technical such that the accused could not have reasonably understood their meaning. (Enclosure 1 - showing the accused's AFQT score of 73). The Merriam-Webster Dictionary defines "substantially" as the adverb form of "substantial:" "5. being largely but not wholly that which is specified." "Substantial," Merriam-Webster.com. Merriam-Webster, n.d. Web. 18 Oct. 2013. <http://www.merriam-webster.com/dictionary/ substantial>. It defines "incapacitate[d]" as: "to make (someone or something) unable to work, move, or function in the usual way." "Incapacitate" Merriam-Webster.com. Merriam-Webster, n.d. Web. 18 Oct. 2013. <http://www.merriam-webster.com/dictionary/incapacitate>. With these rather plain definitions, it is reasonable to believe that the accused was able to conform his conduct to the law, especially when the law and conduct at issue is the commission of an act of penile penetration upon a female who had consumed alcohol, gone to bed, closed the bedroom door, and told the accused she did not want to have sex directly before the sexual act.

Additionally, the accused is not denied due process from the specific terminology of Article 120, UCMJ. First, as noted above, the accused and nearly all military members have received training on both alcohol use and sexual assault. This training is relevant to whether the accused was on notice of the types of conduct that are potentially criminal in nature. Second, the accused is not denied due process from the application of the semi-scientific, but more common-sense, qualities of alcohol. He has been appointed a specifically-requested civilian forensic psychologist who specializes in the effects of alcohol on the body and mind. The use of this expert will help to guarantee that the accused has a fair trial and his counsel will be able to understand, confront, and argue about the appropriate issues and factors present in this case. For these reasons, the accused has not been denied due process.

The accused has not met the heavy burden to show that the term "substantially incapacitated," of Article 120 of the UCMJ is unconstitutionally vague, and the motion to dismiss should be denied.

5. Relief Requested.

The Government respectfully requests that the defense Motion to Dismiss be denied.

6. Evidence.

Enclosure 1: Excerpt of Member Data Summary of Accused

7. Oral Argument.

The government does not request oral argument on this motion.

[redacted]

LT, JAGC, USN
Trial Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this filing was served on the Detailed Defense Counsel and the Court via email on 21 October 13.

[redacted]

LT, JAGC, USN
Trial Counsel

DEPARTMEMENT OF THE NAVY
NAVY-MARINE CORP TRIAL JUDICIARY
SOUTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** [redacted] **HM3 / E-4** **U.S. Navy**	**COURT'S SUPPLEMENTAL FINDINGS AND CONCLUSIONS** **(Defense Motion to Dismiss: Unconstitutionally Void for Vagueness)** **25 October 2013**

1. **Nature of the Motion:** The Defense moved this Court on 15 October 2013 dismiss specification 2 of the sole charge alleging a violation of Violations of Article 120 of the Uniform Code of Military Justice because the term "incapable of consenting due to impairment" is unconstitutionally vague. The Defense presented oral argument on 25 October 2013. The Government opposed the motion, both in written response on 21 October 2013 and at oral argument. The Defense, as the moving party, bears the burden of persuasion on any factual issues. For the reasons discussed both herein and on the record, the Defense's motion was DENIED.

2. **Findings of Fact:**

a. The accused is charged with two specifications of violation of Article 120 of the Uniform Code of Military Justice for aggravated sexual assault. The first specification alleges sexual assault by causing bodily harm, the second specification alleges sexual assault due to the substantial incapacity of the victim.

b. The charge is drafted under the version of Article 120 in effect from 1 October 2007 to 27 June 2012.

c. Congress amended Article 120, U.C.M.J., with new language which took effect on 28 June 2012.

d. The two Article 120 specifications stem from an incident which occurred on the evening of 6-7 October 2012 in which the accused is alleged to have sexually assaulted a female shipmate. The alleged victim, HM2 B.G., alleges that on the night of 6 October 2011, she drank a significant amount of alcohol at the Navy Ball. At the end of the Ball, HM2 B.G. offered to allow the accused to sleep on her couch instead of drive herself home, and a designated driver drove them both to her apartment. After HM2 B.G. had gone to bed, the accused entered her bedroom, got in her bed, and vaginally penetrated her with his penis. HM2 B.G. alleges that she

told the accused that she did not want to have sex with him. She further alleges that she was intoxicated and asleep at the time of the penetration and did not consent to it, but woke up during the act.

e. The accused is a Third Class Petty Officer, and a Hospital Corpsman, with over six years of Naval service.

3. **Analysis and Conclusions of Law**:

A law is void for vagueness "if one could not reasonably understand that his contemplated conduct is proscribed." *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003). "[A] basic principle of due process requires 'fair notice' that an act is subject to criminal sanction and about the standard that is applicable to the forbidden conduct." United States v. Cartwright, 2013 CCA LEXIS 735, *19 (A.F.C.C.A., Aug. 15, 2013) (citing Vaughan, 58 M.J. at 31).

What is sufficient from a notice standpoint "is examined in the light of the conduct with which a defendant is charged." *Parker v. Levy*, 417 U.S. 733, 757 (1974). Essentially, "[v]oid for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." *Id.*

Additionally, "[c]riminal statutes are presumed to be constitutionally valid, and the party attacking the constitutionality of a statute has the burden of proving otherwise." *United States v. Mansfield*, 33 M.J. 972, 989 (A.F.C.M.R. 1991), *aff'd*, 33 M.J. 972 (C.M.A. 1993).

When it comes to criminal statutes, exact certainty as to the proscribed conduct is not required. In criminal statutes, "[a] certain minimum element of indistinction remains which, in legislation of this entirely defensible character, can never be expunged completely, and must be dealt with on a case-by-case basis." *United States v. Frantz*, 1953 CMA LEXIS 1020, *7 (C.M.A., Feb. 6, 1953); see also *Krichman v. United States*, 256 U.S. 363, 367-68 (1921).

The Court finds that the new Article 120, U.C.M.J., specifically the term "incapable of consenting due to impairment," is not constitutionally void for vagueness. The Defense could cite no case in the military or federal jurisdiction that stood for the proposition that the language in either the current, or 2007, Article 120 has been found to be unconstitutionally void for vagueness. This Court will not do so.

The 2007-2012 version of Article 120, U.C.M.J., which included the term "substantial incapacitation," was never declared unconstitutionally vague by any court. *Cartwright*, 2013 CCA LEXIS at *8. The replacement of this term with the existing term "incapable of consent due to impairment" does not create an unconstitutional vagueness in the statute. The new version of Article 120, U.C.M.J., does not repeat the same problem of the previous Article 120, U.C.M.J. terminology, because no problem existed in the previous version from a constitutional standpoint.

Whether a statute is unconstitutionally vague "is examined in the light of the conduct with which a defendant is charged." *Parker*, 417 U.S. at 757. Because no definition of

"impairment" is included in the statute, the plain meaning of the term controls. Additionally, other sources may exist to provide notice to the accused of his potentially criminal conduct, including military custom and usage, training, pamphlets, and materials. See *United States v. Brown*, 55 M.J. 375, 384 (C.A.A.F. 2001). The accused's Naval experience, including his attendance of numerous training sessions focusing on the presentation of information concerning alcohol abuse and sexual assault prevention are evidence of notice provided to the accused of what conduct is considered criminal.

The actual words used in the statute are not overly complicated or technical such that the accused could not have reasonably understood their meaning, as the word "impair" has a common-sense meaning of "damage[ing] or mak[ing] worse," which is a plain definition capable of understanding by the general population. The words "substantially" and "impaired" have common-sense meanings of "being largely but not wholly that which is specified," and "unable to work, move, or function in the usual way." Both words are plainly capable of being understood by the general population.

With this rather plain definition, it is reasonable to believe that the accused was able to conform his conduct to the law, especially when assessing the law concerning sexual assault upon an impaired individual in the context of the accused's alleged conduct: a sexual act upon an individual who had consumed significant amounts of alcohol, was clearly asleep or attempting to sleep, and who expressed a lack of willingness to engage in sexual activity.

The accused is not denied due process from the specific terminology of Article 120, U.C.M.J. First, the accused has received training on both alcohol abuse and sexual assault prevention, which is relevant to providing the accused notice of what conduct is potentially criminal in nature. Second, the accused has been appointed a specifically-requested civilian forensic toxicologist who specializes in the effects of alcohol on the body and mind, which will allow him to effectively prepare, confront, and argue the appropriate issues in this case.

2. **<u>Ruling and Order</u>: For the reasons stated above and on the record, the Defense's Motion to Dismiss the charge and specifications as being unconstitutionally void for vagueness is DENIED.**

[redacted]

R. B. BLAZEWICK
Captain, JAGC, U.S. Navy
Circuit Military Judge
Southern Judicial Circuit

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2. SSN	3. RANK/RATE	4. PAY GRADE
[redacted]	[redacted]	HM2	E-5

5. UNIT OR ORGANIZATION	Date of Birth	6. CURRENT SERVICE a. INITIAL DATE	b. TERM
Navy Recruiting District New Orleans	[redacted]	[redacted]	3yrs,7mos

7. PAY PER MONTH a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL	8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
$2,555.10	N/A	$2,555.10	None	N/A

II. CHARGES AND SPECIFICATIONS

Charge I: Violation of the UCMJ, Article 92

Specification 1: In that Hospital Corpsman Second Class [redacted] U.S. Navy, Navy Recruiting District New Orleans, on active duty, did, at or near Spanish Fort, Alabama, on divers occasions, between on or about 17 April 2013 and on or about 22 April 2013, violate a lawful general order, to wit: paragraph (5) of COMNAVCRUITCOMINST 5370.1F, dated 12 October 2011, by wrongfully engaging in an unduly familiar relationship with Airman Apprentice [redacted], U.S. Navy, who was then an applicant, while assigned as a Navy Recruiter.

Specification 2: In that Hospital Corpsman Second Class [redacted], U.S. Navy, Navy Recruiting District New Orleans, on active duty, did, at or near Spanish Fort, Alabama, on divers occasions between on or about 1 March 2013 and on or about 31 March 2013, violate a lawful general order, to wit: paragraph (5) of COMNAVCRUITCOMINST 5370.1F, dated 12 October 2011, by wrongfully engaging in an unduly familiar relationship with Airman Apprentice [redacted], U.S. Navy, who was then an applicant, while assigned as a Navy Recruiter.

(SEE CONTINUATION PAGE)

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI)	b. GRADE	c. ORGANIZATION OF ACCUSER
[redacted]	LN1/E-6	RLSO SE DET PENSACOLA, FL

d. [redacted]	e. DATE
	21 Feb 14

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 21st day of February, 2014, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

Keven P. Schreiber	RLSO SE DET PENSACOLA, FL
Typed Name of Officer	*Organization of Officer*
LT, JAGC, USN	Trial Counsel
Grade and Service	*Official Capacity to Administer Oaths (See R.C.M. 307(b)--must be commissioned officer)*

[redacted]

DD FORM 458 MAY 2000
S/N 0102-LF-000-4580

ORIGINAL

12. On 24 February, 20 14, the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me. (*See R.C.M. 308(a)*). (*See R.C.M. 308 if notification cannot be made.*)

Larry Booker *Typed Name of Immediate Commander*	Navy Recruiting District (NRD) New Orleans, New Orleans, LA *Organization of Immediate Commander*
E7/OSC [redacted]	

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at 1300 hours, 24 February 20 14 at Navy Recruiting District New Orleans, New Orleans, LA
Designation of Command or Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

	~~FOR THE~~[1]
Christian A. Stover *Typed Name of Officer*	Commanding Officer *Official Capacity of Officer Signing*
O5/CDR [redacted]	

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE
Navy Recruiting Command	Millington, TN	23 May 2014

Referred for trial to the General court-martial convened by General Court-Martial Convening Order 1-14

dated , 23 May 20 14 ,subject to the following instructions:[2] None.

By _____ of _____
Command or Order

A. B. ANDREWS *Typed Name of Officer*	COMMANDER *Official Capacity of Officer Signing*
RDML, U.S. Navy *Grade*	
[redacted] *Signature*	

15. On 29 May, 20 14, I (caused to be) served a copy hereof on (each of) the above named accused.

Kevin P. Schriber *Typed Name of Trial Counsel*	LT, JAGC, USN *Grade or Rank of Trial Counsel*
[redacted]	

FOOTNOTES
1 – When an appropriate commander signs personally, inapplicable words are stricken.
2 – See R.C.M. 601(e) concerning instructions. If none, so state.

DD Form 458 Reverse May 2000

ORIGINAL

[redacted] 3May 14

DD FORM 458 CONTINUATION SHEET ICO HM2 [redacted] XXX-XX-[redacted], USN

Specification 3: In that Hospital Corpsman Second Class [redacted], U.S. Navy, Navy Recruiting District New Orleans, on active duty, did, at or near Spanish Fort, Alabama, on or about ~~March 2013~~ April 2012, violate a lawful general order, to wit: paragraph (5) of COMNAVCRUITCOMINST 5370.1F, dated 12 October 2011, by wrongfully engaging in an unduly familiar relationship with Machinist's Mate Fireman Apprentice [redacted], U.S. Navy, who was then an applicant, while assigned as a Navy Recruiter.

Charge II: Violation of the UCMJ, Article 120

Specification (Abusive Sexual Contact): In that Hospital Corpsman Second Class [redacted], U.S. Navy, Navy Recruiting District New Orleans, on active duty, did, at or near Spanish Fort, Alabama, on or about 19 April 2013, directly touch the groin of Airman Apprentice [redacted], U.S. Navy, by causing bodily harm upon her, to wit: forcing his hand into her underwear without her consent.

Charge III: Violation of the UCMJ, Article 128

Specification: In that Hospital Corpsman Second Class [redacted], U.S. Navy, Navy Recruiting District New Orleans, on active duty, did, at or near Spanish Fort, Alabama, on or about 22 April 2013, unlawfully touch Airman Apprentice [redacted], U.S. Navy, on the thigh and waist with his hand.

Charge IV: Violation of the UCMJ, Article 134

[redacted] 27May 14

Specification: In that Hospital Corpsman Second Class [redacted], U.S. Navy, Navy Recruiting District New Orleans, on active duty, did, at or near Spanish Fort, Alabama, on or about March 2013 ~~wrongfully~~ endeavor to impede an investigation in the case of Hospital Corpsman Second Class [redacted], by communicating to Airman Apprentice [redacted], U.S. Navy, that it would hurt her career if she said anything to anyone about the said Hospital Corpsman Second Class [redacted]'s inappropriate comments and questions towards her.

(AND NO OTHERS)

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2. SSN	3. RANK/RATE	4. PAY GRADE
[redacted]	[redacted]	HM2	E-5

5. UNIT OR ORGANIZATION	Date of Birth	6. CURRENT SERVICE a. INITIAL DATE	b. TERM
Navy Recruiting District New Orleans	[redacted]	[redacted]	3yrs, 7mos

7. PAY PER MONTH a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL	8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
$2,555.10	N/A	$2,555.10	None	N/A

II. CHARGES AND SPECIFICATIONS

Additional Charge: Violation of the UCMJ, Article 134

Specification: In that Hospital Corpsman Second Class [redacted], U.S. Navy, Navy Recruiting District New Orleans, on active duty, did, at or near Spanish Fort, Alabama, on or about March 2013, wrongfully endeavor to impede an investigation in the case of Hospital Corpsman Second Class [redacted], by communicating to Airman Apprentice [redacted], U.S. Navy, that it would hurt her career if she said anything to anyone about the said Hospital Corpsman Second Class [redacted]'s inappropriate comments and questions towards her, or words to that effect, and that said conduct was to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces.

(AND NO OTHERS)

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI)	b. GRADE	c. ORGANIZATION OF ACCUSER	e. DATE
[redacted]	LN1/E-6	RLSO SE DET PENSACOLA, FL	20 May 14

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 20th day of May, 2014, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

Keven P. Schreiber
Typed Name of Officer

RLSO SE DET PENSACOLA, FL
Organization of Officer

LT, JAGC, USN
Grade or Rank

Trial Counsel
Official Capacity to Administer Oaths
(See R.C.M. 307(b)—must be commissioned officer)

[redacted]

DD FORM 458 MAY 2000
S/N 0102-LF-000-4580

ORIGINAL

12. On 20 May, 20 14, the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me. *(See R.C.M. 308(a)). (See R.C.M. 308 if notification cannot be made.)*

Larry Booker *Typed Name of Immediate Commander*	Navy Recruiting District (NRD) New Orleans, New Orleans, LA *Organization of Immediate Commander*
E7/OSC [redacted] *Signature*	

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at _____ hours, 20 May 20 14 at Navy Recruiting District New Orleans, New Orleans, LA
Designation of Command or Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

	~~FOR THE~~[1]
Christian A. Stover *Typed Name of Officer*	Commanding Officer *Official Capacity of Officer Signing*
[redacted] O5/CDR [redacted] *Signature*	

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE
Navy Recruiting Command	Millington	23 May 14

Referred for trial to the General court-martial convened by General Court-Martial Convening Order 1-14

dated _____, 23 May 20 14, subject to the following instructions:[2] To be tried in conjunction with the charges perferred on 21 Feb 2014 against HM2 [redacted], U.S. Navy By _____ of _____
Command or Order

A. B. ANDREWS *Typed Name of Officer*	Commander *Official Capacity of Officer Signing*
RDML, U.S. Navy [redacted]	

15. On 29 May, 20 14, I (caused to be) served a copy hereof on (each of) the above named accused.

Keven P. Schreiber *Typed Name of Trial Counsel*	LT, JAGC, USN *Grade or Rank of Trial Counsel*
[redacted]	

FOOTNOTES *1 – When an appropriate commander signs personally, inapplicable words are stricken.*
2 – See R.C.M. 601(e) concerning instructions. If none, so state.

DD Form 458 Reverse May 2000

ORIGINAL

[redacted] LT RLSO SE, JACKSONVILLE

From: Giarraputo, Jaimica M LCDR RLSO SE, MAYPORT
Sent: Monday, June 09, 2014 13:58
To: [redacted]

Cc:

Subject: VLC Discovery
Signed By: [redacted]

TCs/LNs,

If you have not been tracking discovery provided to VLC, please begin doing so now. Just use the same method we use to provide discovery to defense (signed discovery receipt). Keep a copy of the receipt in the master discovery binder and one in the case file.

Questions/concerns, let me know. Thanks!

V/r STC

Jaime M. Giarraputo
Senior Trial Counsel
Region Legal Service Office Southeast
[redacted]

CONFIDENTIALITY NOTICE:
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4 Sept 14

From: FCSN [redacted], USN
To: Commanding Officer, Region Legal Service Office Southeast

Subj: FREEDOM OF INFORMATION ACT, PRIVACY ACT REQUEST, ARTICLE 54(e) REQUEST ICO FCSN [redacted], USN

Ref: (a) The Freedom of Information Act, 5 U.S.C. §552
(b) The Privacy Act, 5 U.S.C. §552a
(c) Article 54(e), UCMJ
(d) SECNAVINST 5211.5E
(e) SECNAVINST 5720.42

1. This is a request pursuant to references (a) through (e) for all audio recordings related to the General Court-Martial in the case of United States v. AD2 [redacted] USN, held at Naval Air Station Jacksonville, Florida and Naval Station Mayport, Florida from December 2013 through August 2014. I was the named victim in the charges and testified during the proceedings.

2. This request specifically includes copies of the audio recordings for the following proceedings:

a. The Article 32, UCMJ investigation conducted on or about 16 December 2013.

b. All Article 39(a), UCMJ sessions.

c. All open court sessions.

3. The above materials are requested under the more liberal of references (a) through (c), as said statutes apply to the respective materials requested. The recordings may be provided to me on a digital media such as a DVD. Sexual assaults in the military are an item of general public interest, and this request is not primarily in the commercial interests of the requester. Therefore, I request any fees be waived. If you do not agree to waive fees associated with this request, please contact me through my Victims' Legal Counsel.

4. If you deny any portion of this request, please cite each rule you feel justifies the refusal to release the information, and provide the remaining information with while indicating any redactions made.

5. Please direct any questions regarding this request and provide the requested materials to my Victims' Legal Counsel, LCDR [redacted], JAGC, USN, at [redacted] or [redacted].

[redacted]

DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
SOUTHERN JUDICAL CIRCUIT
GENERAL COURT-MARTIAL

United States of America vs. Damon R. Shirah, HM3 USN	)	DEFENSE MOTION TO COMPEL DISCOVERY VLC BRADY MATERIALS 7 AUGUST 2014

1. Nature of Motion. The defense respectfully moves this court pursuant to R.C.M. 906 to compel the government and the Victim's Legal Counsel to provide discovery to the defense pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963).

2. Statement of Relevant Facts.

a. On 27 December 2013 Congress passed and the President signed the National Defense Authorization Act of 2014, which included changes to the UCMJ. Specifically, Article 6b was created that established rights of alleged victims of crimes under the UCMJ.

b. The act also created a requirement for Special Victim's Counsel, which included the right to "(8) Legal consultation and assistance—(B) in any proceedings of the military justice process in which a victim can participate as a witness or other party;"

c. Article 6b provides complaining witnesses with certain rights that are modeled under the Crime Victim's Rights Act, 18 U.S.C. 3771.

d. While the CVRA provides that "Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction" 18 U.S.C. 3771(d)(6), no such language exists in Article 6b.

e. On 11 February 2014, [redacted], VLC, submitted a notice of appearance to this court.

f. On 27 June 2014, the defense filed a motion pursuant to Mil. R. Evid. 412.

g. On 8 July 2014, LT [redacted] filed a response to the defense motion filed pursuant to Mil. R. Evid. 412, objecting to the admission of evidence under the rule.

h. On 9 July 2014, LCDR [redacted] filed a response to the defense motion filed pursuant to Mil. R. Evid. 412, objecting to the admission of evidence under the rule.

i. VLC has also sought to be heard on the following issues, and has asserted that the complaining witness has an interest in these proceedings.

j. On 4 August 2014 the defense served a discovery request on Trial Counsel, specifically requesting "all exculpatory material within the possession or control of the government or the VLC" in this case.

k. On 4 August 2014 the government responded to the defense's discovery request, admitting that they have a duty to turn over evidence pursuant to *Brady v. Maryland*, but denying that such an obligation existed for the VLC.

l. Director, TCAP, sent out a letter to each of the RLSOs discussing the issue of M.R.E. 412 at Article 32 hearings. He indicated that TCs should "leverage their VLC's" in getting the Convening Authority to order that no M.R.E. 412 evidence be considered at the Article 32.

3. Burden of Proof. As the moving party, the Defense bears the burden of proof by a preponderance of evidence. R.C.M. 905(c).

4. Authorities.

Robertson v. United States ex rel *Watson*, 560 U.S. 272, 130 S. Ct. 2184; 176 L. Ed. 2d 1024 (2010)

Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963);

United States v. O'Neill, 437 F.3d 654 (7th Cir. 2006);

United States v. Bell, 38 M.J. 358, 365 (C.M.A. 1993);

Cronan ex rel. State v. Cronan, 774 A.2d 866, 877 (R.I. 2001)

John D. Bessler, The Public Interest and the Unconstitutionality of Private Prosecutors, 47 Ark. L. Rev. 511 (1994)

5. Discussion.

The protections of *Brady v. Maryland*, 373 U.S. 83, (1963) provide that the prosecution is required to turn over exculpatory material to the defense pursuant to the 5th Amendment's Due Process Clause. "The protections our *Bill of Rights* affords those facing criminal prosecution apply to "*any* person," "*any* criminal case," and "*all* criminal prosecutions." *Robertson v. United States* ex rel *Watson*, 560 U.S. 272, 276 (2010)(Roberts, C.J. dissenting from dismissal as improvidently granted) (emphasis in original).

One of the key functions of a prosecutor is that the prosecutor can exercise prosecutorial discretion. "Prosecuting attorneys frequently decline to charge, or nol pros, criminal cases." *Granger v. Payton*, 379 F.2d 709, 712 (4th Cir. 1967). "The exercise of prosecutorial discretion is a prerogative of the executive branch of government," *United States v. O'Neill*, 437 F.3d 654, 660 (7th Cir. 2006) (citing *Wayte v. United States*, 470 U.S. 598, 607, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985)). Strategic choices beyond just charging an individual case fall squarely within the exercise of prosecutorial discretion. *See e.g. United States v. Bishop*, 306 Fed. Appx. 934, 937 (decision not to conduct an investigation is one that is within the discretion of the prosecutor); *United States v. Robertson*, 45 F.3d 1423, 1438 (10th Cir. 1995)(describing

"prosecutorial decisions to bring charges in the first place" as "nearly absolute" and explaining that the "separation of powers counsel[s] hesitancy before second-guessing prosecutorial choices.").

Indeed, the Court of Military Appeals has stated in dicta that prosecutorial discretion also includes the decision on how to try the case. *See United States v. Holt*, 52 M.J. 173, 184 (C.A.A.F. 1999)(The investigating officer "did not exercise any form of prosecutorial discretion or make any tactical or strategic decisions with respect to the conduct of the trial. The decisions with respect to testing the jeans, timing of information provided to the defense, and presentation of testimony ... were made by trial counsel, not by [the investigating officer]"). Military courts have likewise recognized that the executive branch maintains the right to exercise prosecutorial discretion. See *United States v. Bell*, 38 M.J. 358, 365, 370 (C.M.A. 1993)(holding that the choice whether to exercise "the prosecution function . . . is plainly a matter of prosecutorial discretion.")

A private prosecutor is a private individual who performs prosecutorial functions in the name of the state. *See* John D. Bessler, "The Public Interest and the Unconstitutionality of Private Prosecutors," 47 Ark. L. Rev. 511 (1994). States that permit private prosecutors have allowed them to perform discrete

functions, such as conducting research, to full participation in trials. (*See State v. Bennett*, 798 S.W.2d 783 (Tenn. Crim. App. 1990)(private prosecutors delivered opening statements); *State v. Baker*, 239 Kan. 431, 445 (1991)(private prosecutor conducted voir dire, conducted witness examinations, assisted with closing argument and provided input on sentencing).

While the practice of employing private prosecutors is rare within the United States, when private prosecutors are employed, the protection of the bill of rights apply equally to both private and public prosecutions. "Although they were privately employed, the attorneys who prosecuted this case represented the state. Thus, they were required to meet all the pretrial disclosure and discovery responsibilities expected of any public prosecutor." *Cronan ex rel. State v. Cronan*, 774 A.2d 866, 877 (R.I. 2001). This is because "Our entire criminal justice system is premised on the notion that a criminal prosecution pits the government against the governed, not one private citizen against another." *Robertson* 560 U.S. at 278. "To say that private parties could (and still can, in some places) exercise some control over criminal prosecutions says nothing to rebut the widely accepted principle that those parties necessarily acted (and now act) on behalf of the sovereign." *Id.* at 279.

In this case, the complaining witness has made the transition from being a private party to that of a private prosecutor. She has appeared before this court-martial with a licensed attorney who has made an appearance, and made arguments on the admissibility of evidence. She has also sought to introduce evidence of her own on the issue of the admissibility of evidence under Mil. R. Evid. 412. By appearing before the court-martial and seeking to lend argument to the strategic decisions by the parties on the introduction of evidence, and arguing against the introduction of evidence sought by the defense, the VLC has undertaken tactical and strategic decisions on how to try the case against the accused.

Furthermore, through legislation and DoD directives, the government has given the complaining witness apparent veto authority over the prosecution of this case. Pursuant to the DoD Instruction, the complaining witness has the ability to refuse to cooperate, and the trial counsel and convening authority are advised that they "should honor" that refusal. When Congress enacted Article 6b they conspicuously removed from the language of the Crime Victim's Rights Act, on which Article 6b was based, any mention of the prosecutorial discretion - not to mention language that indicated that Article 6b did not limit the Convening Authority's exercise of prosecutorial discretion.

Indeed, Congress went to great lengths to limit the discretion of convening authorities in cases of sexual assault when the complaining witness wants to go forward - from decisions made on whether to refer charges to court martial (section 1744 - providing for secretarial review of convening authority's decision not to refer charges when a complaining witness has made an allegation of a qualifying sexual offense; section 1708 - removing from consideration by the convening authority the ability to consider the military service of the accused in making a determination to proceed with trial by court-martial); to decisions on clemency (section 1702 - removing or reducing authority of convening authority to grant clemency in certain situations; section 1706 - providing for participation of the complaining witness in clemency process).

Additionally, the director of TCAP has explicitly recognized that VLCs can play a role in assisting the prosecution of a case. He explicitly sought Trial Counsel to seek out the VLCs and to "leverage" the VLC in assisting the Trial Counsel in putting together the Article 32 proceeding - something that ultimately was approved by the Convening Authority.

Thus, this court-martial is proceeding because of the complaining witness's involvement. If the complaining witness chose not to proceed with an action, the Convening Authority's

direction is that such a decision should be honored. If the Convening Authority decides not to go forward, even though the complaining witness wants to proceed, such a decision is now subject to review by a civilian authority. While this review is required regardless of the reason the CA has for not going forward, a non-prosecution on the basis of the complaining witness's desires is far less likely to draw scrutiny. Furthermore, the complaining witness, through the VLC, has exercised prosecutorial duties by seeking to limit evidence that the defense has sought to introduce, and providing argument on that evidence.

The complaining witness's actions through her VLC have transformed her into a *de facto* private prosecutor. While the defense objects to the participation of a private prosecutor in this case, this court should find that at a minimum the private prosecutor has an obligation to provide the defense with any material that is discoverable pursuant to *Brady*. Anything less would allow the government to hide potentially exculpatory material in a third party who can control the conduct of the criminal proceedings against the accused without being required to respect his due process rights.

5. Evidence Offered. No evidence offered on this motion.

6. Relief Requested. The defense respectfully seeks an order from the court that the VLC shall be required to comply with the

requirements of *Brady*, the Due Process Clause, and Article 46 and turn over all relevant exculpatory evidence, without regard to whether that evidence is claimed to be covered by the attorney-client privilege or the work product doctrine. If the VLC refuses to do so, the defense will seek abatement of the proceedings.

7. Oral Argument. As it is entitled, the defense respectfully requests the opportunity to present oral argument on this motion. *See* R.C.M. 905(h). Specifically, the defense requests the opportunity to argue this motion at the UCMJ, 39(a) session scheduled for Monday, 18 August 2014.

Respectfully submitted,

[redacted]

Lieutenant, JAG Corps, U.S. Navy
Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that the foregoing motion was filed and served on Trial Counsel on the 7th day of August 2014.

[redacted]

Lieutenant, JAG Corps, U.S. Navy
Defense Counsel

DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
SOUTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

U N I T E D S T A T E S v. Shirah, Damon R. HM3/E-4 U.S. NAVY	)	GOVERNMENT RESPONSE TO DEFENSE MOTION COMPEL DISCOVERY OF BRADY MATERIALS FROM VLC 12 August 2014

1. Nature of the Response

The government opposes the defense motion to compel the Victim Legal Counsel (VLC) to disclose materials under *Brady v. Maryland*, 373 U.S. 83 (1963). The defense's argument that the VLC is a "private prosecutor" is without merit, because VLC act purely as the representative of a limited participant and do not actually prosecute any case.[1]

2. Burden.

Under Rule for Court Martial (R.C.M.) 905(c)(2) and 906(b)(7), the burden of proof is on the defense to establish the facts necessary to the resolution of the motion by a preponderance of the evidence.

3. Summary of the Facts

The government adopts the defense's summary of the facts as to the procedural history of this issue. However, defense asserted that the government's response to their 4 August 2014 discovery request

[1] This response will be narrowly tailored to the issue of whether VLC have disclosure obligations under *Brady*. Other types of discovery and production with regard to VLC will be discussed in the government's response to the motion to compel material sent to and communications with VLC.

denied that a *Brady* obligation exist for the VLC. While that is true and will be discussed below, the government's response was, "the government has no control over VLC and therefore cannot act on the request to produce material in control of the VLC." The VLC entered an appearance in this case on 25 April 2014, and asserted his right to represent his client on matters concerning her rights. The VLC has not questioned witnesses, conducted voir dire, assisted trial counsel with prosecution of the case, or conducted any other form of prosecutorial function. The government incorporates its previous statements of fact insofar as they are relevant.

4. **Discussion**

VLC are not private prosecutors subject to constitutional discovery obligations.

Brady v. Maryland and its progeny compel the government to disclose to the defense evidence that may be found in investigative files that reasonably tends to be favorable to the defense. The rule is codified in the Rule for Court Martial (R.C.M.) 701(a)(6). More commonly the rule is explained as the government's obligation to turn over information and materials that are exculpatory. Defense motion at 4. The government, through the trial counsel, has and will continue to adhere to that rule.

A private prosecutor is an individual generally hired by the victim of a crime or their family to prosecute criminal matters or assist the state-employed prosecutor in the same. John D. Bessler, "The Public Interest and the Unconstitutionality of Private Prosecutors," 47 Art. L. Rev. 511 (1994). The employment of private

prosecutors has a long history in the Anglo-Saxon common law tradition, but has been uncommon in the United States. *Id.* Today, the employment of private prosecutors is disallowed in all but a handful of states, and then often limited to distinct types of cases or otherwise subject to the oversight and control of a public prosecutor. *Id.* A private prosecutor is not merely the representative of one party's interests in a proceeding like a VLC; instead, they act in the same role as a public prosecutor. *Id.* Private prosecutors sit at counsel table, make arguments to juries, examine witnesses, and generally act in the same capacity as a public prosecutor, subject to whatever restrictions the jurisdiction imposes. *Id.* A private prosecutor is empowered to attempt to convince the fact-finder that the accused is guilty.

A crime victim involved in the court-martial process (or any criminal process) has the right to contest and protect privileges that are their right to exercise. *LRM v. Kastenberg*, 72 M.J. 364, 368 (C.A.A.F. 2013). This "limited participant standing" has been recognized by the Supreme Court and other federal courts, and federal courts often allow third parties to assert their interests in preventing disclosure of materials sought in criminal proceedings. *Id.* at 368-69. As a result, crime victims are entitled to be represented by counsel in situations in which their rights are at issue, specifically on issues arising under M.R.E. 412 and M.R.E. 513.[2] *Id.*

[2] There is no indication in the case law or rules that representation is limited to those rules. Indeed, in this case, the rights of the alleged victim to confidentiality with her counsel are at issue.

VLC, whether provided by the military or hired privately, solely represent the interests of their clients. They have no power or ability to prosecute the accused, present evidence, argue to the fact-finder that the accused is guilty, or compel the government counsel to make particular arguments or present particular evidence. In this case the VLC's own notice of representation asserts only the right to be heard on issues concerning the alleged victim's rights. The representation of their client's rights with respect to the admissibility of evidence should not be confused with the government's strategic decision making on how or whether to prosecute the case. In fact, it is not uncommon for the government to disagree with VLC about the admissibility of evidence, either as a matter of law or strategy. See, *United States v. LTJG* [redacted], before this court currently. VLC have none of the powers of a trial counsel, and therefore cannot be considered a private prosecutor subject to disclosure requirements under *Brady*. A private prosecutor acting in the role of a prosecutor would be subject to *Brady* disclosure requirement, but VLC are not.

5. **Evidence**

1) Notice of Appearance dtd 25 April 2014

6. **Relief Requested**

The government respectfully requests that the defense motion to compel *Brady* disclosures by the VLC be denied.

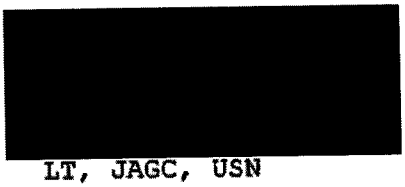
7. **Oral Argument**

The government is prepared for oral argument.

LT, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this response was filed with this Court and served on defense counsel via electronic mail on this 12th day of August 2014.



LT, JAGC, USN
Trial Counsel

[redacted]LT RLSO SE, JACKSONVILLE

From: Giarraputo, Jaimica M LCDR RLSO SE, MAYPORT
Sent: Wednesday, April 09, 2014 15:12
To: [redacted]

Cc:

Subject: Victim Records
Signed By: [redacted]

TCs/LNs,

I was recently advised by NCIS that they are "required" to seek victim medical and mental health records, and a data extraction of the victim's cell phone, in all Art. 120 cases or provide a reason why they didn't. I suspect this may be a slight misunderstanding of what they are actually required to do but I could be wrong (should know more soon). In any case, it is the understanding that at least some of the agents are operating under. So here is what I'd like you to do:

As always, jump in on the investigation as early in the process as possible. NCIS is required to notify us within 24 hours of determination that a case meets special victim criteria. As we all know, that does not always happen. Regardless of how or when we find out about a special victim allegation, we need to provide trial counsel consult to NCIS within the next 24 hours (if NCIS has not observed the 24 hour notification requirement, consider your consult requirement to be more of an "immediately" thing as opposed to the usual 24 hours). I am aware that this may be a forcible consult in some cases as not all NCIS agents are eager to get our input. Be that as it may, we are mandated to provide that consultation, so we need to make the attempt and document it. (If you meet any resistance, let me know. If the 24/48 hour notification/consult requirement is not going smoothly, I need to know details. You can trust me to handle it diplomatically and, where possible, generically. I will not compromise your relationship with your agents.)

At that initial discussion, ask that the agent not attempt to collect victim records as part of the investigation. Propose that this step is more appropriate for the discovery process. Early in the investigation, the victim probably will not have had the opportunity to consult with VLC (if she's even entitled to one) or TC and most likely has little appreciation for the implications of a decision to authorize release of medical or mental health records. Additionally, in the usual case, disclosure of victim records really is a matter most appropriately regulated by the military judge. If we have to deal with victim records making their way into the NCIS investigation things get really messy really quickly. If that is the situation you find yourself in, notify me immediately (read: STCCIR). We need to take additional measures to safeguard those records until we can sort out what is subject to proper discovery and ensure that process plays out in accordance with the rules.

This may seem contrary to our common practice, but the defense is not necessarily entitled to anything and everything in the NCIS investigation. We just rarely find ourselves in a situation where the NCIS investigation contains something we need to safeguard.

If you get any pushback from NCIS on the above, let me know so I can facilitate the discussion.

The other sensitive item NCIS may be seeking to obtain from the victim is a rip and strip of her cell phone. I'm less inclined to advise them not to take this step as a matter of policy because there is often a legitimate need to gather data from the victim's phone (we should seek to be part of that discussion). If we are going to get into a piece of electronic media, we create more issues than we avoid if we don't do it by extraction. For that reason (and many others), I don't advise having the agent try to document cell phone content manually. That said, we can't allow a victim's authorization to copy and search her cell phone to become a free for all. In all 120 investigations, we need to anticipate a victim cell phone extraction and be on the lookout for it when we receive the investigation. It should not go to the defense as a matter of course. We need to first determine whether any of the content is subject to discovery. Then we need to discover to the defense only that portion of the data dump. The NCIS ROI will put the defense on notice that the data dump exists. If they want more than what we provide, they can move the court and we'll go from there. Just be sure that all you're retaining from the NCIS investigation is the extraction itself and not the portion of the ROI to which it's enclosed. There's no reason to keep that from defense. The objective here is simply to avoid invading the victim's privacy any more than necessary. Even if she signed an authorization, there's a good chance the data extraction pulled off more than she bargained for (e.g., previously deleted naked selfies and sext conversations from last summer).

If any of this doesn't make sense, let me know. Questions/concerns, let me know. Suggestions for a better way, let me know (cue email from LT[redacted] in 3...2.... - I'm teasing him, but only because [redacted]s great about taking the time to give input whenever I ask for it).

One last point, this email should underscore the importance of reaching out to victims ASAP and advising on the right to legal counsel. Please be sure to do all you can to enable victims to take full advantage of the right to VLC.

Thanks, all.

V/r STC

Jaime M. Giarraputo
Senior Trial Counsel
Region Legal Service Office Southeast
[redacted]