

**U.S. NAVY-MARINE CORPS TRIAL JUDICIARY  
WESTERN JUDICIAL CIRCUIT  
GENERAL COURT-MARTIAL**

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U N I T E D S T A T E S	)	<b>COURT RULING</b>
	)	
v.	)	<b>Defense Motion to Dismiss as</b>
	)	<b>Unconstitutionally Vague</b>
Joseph D. Bates	)	
Sergeant	)	1 August 2014
U.S. Marine Corps	)	

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1. **Nature of the Ruling:** The Defense's motion to dismiss Specifications 3 and 4 of Charge III and Specification 2 of the Additional Charge is denied.

2. **Findings of Fact:**

a. In 2012, the Accused was assigned to recruiting duty in Bloomington, Illinois.

b. As a result of this assignment, the accused met Ms. K.E.C., a graduating high school student who expressed some interest in joining the Marine Corps.

c. After her graduation from high school in May of 2012, K.E.C. continued to socialize with the Accused.

d. On or about 12 October 2012, the Accused and a poolee named S [REDACTED] C [REDACTED] visited Ms. K.E.C. at her home. Also present was Ms. K.E.C.'s friend, S [REDACTED] R [REDACTED].

e. The Accused brought a case of beer and the four played beer pong, until all of the beer was consumed.

f. The Accused and Ms. K.E.C. went to Walmart to try and buy more alcohol, but were unsuccessful.

g. When the Accused and Ms. K.E.C. returned to her home, Mr. C [REDACTED] and Ms. R [REDACTED] were gone.

h. Ms. K.E.C. testified at the Article 32 hearing that she was intoxicated at this time, having drunk 7-8 beers. She testified that the Accused tried to kiss her, that she rebuffed his advances and went upstairs to go to sleep. She testified that due to her intoxication, she was unable to walk without stumbling, and crawled up the stairs to her bedroom. She further testified that the Accused followed her to her room, uninvited, and that he then engaged her in sexual activity that she did not consent to, but could not stop because he held her arms down and because of her level of intoxication.

3. **Statement of Law:**

Article 120(b)(3)(A) states that "any person subject to this chapter who . . . commits a sexual act upon another person 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 . . . is guilty of sexual assault and shall be punished as a court-martial may direct." Article 120(b)(3)(A). "The term 'consent' means a freely given

agreement to the conduct at issue by a competent person.”

Article 120(g) (8) (A) .

Due process requires “fair notice” that an act is forbidden and subject to criminal sanction. *United States v. Bivins*, 49 M.J. 328, 330 (C.A.A.F. 1998). It also requires fair notice as to the standard applicable to the forbidden conduct. *Parker v. Levy*, 417 U.S. 733, 755 (1974). A law will be deemed void when 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).

However, a statute is presumed valid and courts will not automatically invalidate as vague a statute simply because “difficulty is found in determining whether certain marginal offenses fall within their language.” *United States v. National Dairy Corp.*, 372 U.S. 29, 32-33 (1963). Additionally, the Supreme Court in *Parker* stated that military laws and regulations need not be as precise as criminal statutes in the civilian sector. *Parker*, 417 U.S. at 751. The Court found that in the military the requisite fair notice could be supplied by military customs, regulations, and other sources that serve to inform servicemembers of required standards of behavior. *Id.*

4. **Conclusions of Law:**

The defense has not met its burden. The statute at question in Specifications 3 and 4 of Charge III and Specification 2 of the Additional Charge is not so vague as to fail to provide the Accused fair and reasonable notice of the illicit nature of his conduct.

The defense argues that the term impaired is undefined and that the term "incapable of consent due to impairment" requires a person to evaluate another's internal ability to consent. This argument ignores the entirety of the statute and the direction that it provides.

The entire statute proscribes committing a sexual act when the other person is unable to make a "freely given agreement" to the sexual act because of that person's impairment by an intoxicant *when the actor knows or reasonably should know that the other person is in this condition.* Contrary to the defense arguments, the criminality of this offense does not lie in an actor guessing the subjective level of intoxication or impairment of another.

The requirement that the actor know or be in a position where he or she reasonably should know that the other person is incapable of making a freely given agreement ensures that

objective observations and external indicators of that impairment be present.

Further, we are not left without any idea of what the term "impaired" might mean. By using "military case law, military custom and usage, military regulations, along with training and other materials that give context to regulations and explain the differences between permissible and impermissible behavior," its meaning is apparent. *United States v. Pope*, 63 M.J. 466, 469 (C.A.A.F. 2003). It is defined in Article 111 as "any intoxication which is sufficient to impair the rational and full exercise of the mental or physical faculties." Article 111, para. (c) (6).

Therefore, when an actor knows or reasonably should know that the other person cannot rationally and fully exercise his or her mental or physical faculties, due to an intoxicant, to the extent that he or she cannot make a freely given agreement to a sexual act, committing a sexual act with that other person is a sexual assault. Article 120(b) (3) (A) does not violate the Due Process Clause of the Fifth Amendment.

5. **Ruling:**

The Defense motion to dismiss Specifications 2 and 3 of Charge III and Specification 2 of the Additional Charge is DENIED.

So ordered this 1<sup>st</sup> day of August.



E. A. H  
Lieutenant Colonel  
U.S. Marine Corps  
Military Judge

WESTERN JUDICIAL CIRCUIT  
NAVY-MARINE CORPS TRIAL JUDICIARY

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3 UNITED STATES,

GENERAL COURT-MARTIAL

4 vs.

RULING ON DEFENSE MOTION TO  
DISMISS CHARGE I (ONE) AS  
UNCONSTITUTIONALLY VAGUE

5 JOSHUA D. NEWLAN

6 CPL (E-4), U.S. MARINE CORPS

31 JANUARY 2014

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8 **STATEMENT OF THE CASE**

9 The Defense moves this Court to dismiss both Specifications  
10 under Charge I as being unconstitutionally vague. R.C.M.  
11 907(b)(3)(A) pertains. Specifically, as clarified at hearing,  
12 the Defense contends terms "unaware" in Specification 1 and  
13 "impaired" in Specification 2 are vague. The Government  
14 opposes. After considering the Defense motion, the Government  
15 response, and all evidence presented at an Article 39(a) hearing  
16 held 27 January 2014, the court concludes the following:

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18 **FINDINGS OF FACT**

19  
20 1. The accused is charged with two specifications of Article  
21 120, UCMJ (Sexual Assault), five specifications of Article 107,  
22 UCMJ (False Official Statement) and Article 134, UCMJ  
23 (Adultery). The charges arise from an incident that allegedly  
24 occurred on 17 November 2012 at Brewskis' Bar in San Diego,  
25 California. On that day, the accused went to Brewskis' to

1 socialize with friends. While he was playing pool, LCpl KLH and  
2 Sgt S. W. B [REDACTED], U.S. Marine Corps, approached him and  
3 challenged him and his friend to a game of pool. LCpl KLH knew  
4 the accused from attending Corporal's Course together. LCpl KLH  
5 had gone to Brewskis' with Sgt B [REDACTED]. Before approaching the  
6 accused, LCpl KLH had told Sgt B [REDACTED] that she thought the  
7 accused was cute. During the night the accused and LCpl KLH  
8 began flirting with each other. The accused was married at the  
9 time to another woman not LCpl KLH.

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11 2. As the night progressed, LCpl KLH and the accused began  
12 drinking heavily and both became intoxicated by alcohol.  
13 Eventually, both the accused and LCpl KLH went to the accused's  
14 truck that was parked in the parking lot of Brewskis'. Sgt  
15 B [REDACTED] saw LCpl KLH in the parking lot with the accused and  
16 asked her if she was alright. She acknowledged his question and  
17 nodded back to him indicating she was alright. Later in the  
18 evening, Sgt B [REDACTED] noticed that LCpl KLH had not returned to  
19 the bar from the parking lot and began looking for her. He  
20 looked into the accused's truck and saw the accused on top of  
21 her in the front seat. The accused was naked from the waist  
22 down, as was LCpl KLH, and the accused was thrusting his pelvis  
23 into her pelvis.  
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1 3. Sgt B [REDACTED] knocked on the window of the truck and said it  
2 was time to go. The accused got dressed and exited the truck  
3 through the driver's side door. Sgt B [REDACTED] saw LCpl KLH still  
4 naked from the waist down with her eyes closed. He called her  
5 name a few times but she was unresponsive. He then tapped her  
6 cheek a couple of times and called her name again. She then  
7 moaned but did not otherwise respond or get up. Sgt B [REDACTED]  
8 with the help of the accused, then put her pants back on. Sgt  
9 B [REDACTED] then lifted her up to a sitting position, put one of her  
10 arms around his neck and helped her out of the truck. He then  
11 sat her down on the curb next to the truck and she vomited.

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13 4. Sgt B [REDACTED] took LCpl KLH to his barracks room via taxi.  
14 LCpl KLH put on the pajamas he provided and fell asleep on his  
15 bed. Sgt B [REDACTED] then contacted a Uniformed Victim Advocate and  
16 the Provost Marshal's Office (PMO). PMO and San Diego Police  
17 arrived soon thereafter, followed an hour later by paramedics.

18 5. LCpl KLH recalls playing pool in the bar and waking up in  
19 Sgt B [REDACTED]'s room - but no time in between. She has no memory  
20 of what occurred in the truck with the accused.  
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1 **STATEMENT OF THE LAW**

2 As the moving party, the Defense bears the burden of proof  
3 which must be met by a preponderance of the evidence [R.C.M.  
4 905(c)(1)]. In the case of a challenge against a statute for  
5 vagueness on its face, the Defense must show the statute:

6 "...to be incapable of conveying fair notice in any  
7 circumstance,<sup>1</sup> or that the statute, as applied, failed to  
8 provide to the defendant fair and reasonable notice of the  
9 illicit nature of the conduct.<sup>2</sup> It is not enough to show  
10 that the statute, though generally ambiguous, might be  
11 applied unconstitutionally in a relatively small number of  
12 circumstances not before the court."<sup>3</sup>

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**1-13 Schlueter, Military Criminal Justice: Practice and  
Procedure § 13-3(O)(3) (2013).**

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<sup>1</sup> *Hoffman Estates v. Flipside*, 455 U.S. 489 (1982); *Smith v. Goguen*, 415 U.S. 566 (1974).

<sup>2</sup> *Hoffman Estates v. Flipside*, 455 U.S. 489 (1982); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *United States v. Vaughan*, 58 M.J. 29 (2003) (accused had fair notice that child neglect may still be subject to criminal penalty even though child suffered no actual harm; further, he had due process fair notice based upon elements listed by trial judge in providence inquiry); *United States v. Rogers*, 54 M.J. 244 (2000) (accused convicted under Article 133 for wrongfully developing an "unprofessional relationship of inappropriate familiarity" with subordinate; court rejected argument that specification was vague); *United States v. Mayfield*, 21 M.J. 418 (C.M.A. 1986); *United States v. Boie*, 70 M.J 585 (A.F.Ct.Crim.App. 2011) (accused had fair notice of Article 119a which criminalizes conduct which causes death of unborn child); *United States v. Van Steenwyk*, 21 M.J. 795 (N.M.C.M.R. 1985) .

<sup>3</sup> *United States v. National Dairy Prod. Corp.*, 372 U.S. 29 (1963); *United States v. Harriss*, 347 U.S. 612 (1954).

1 The Due Process Clause of the Fifth Amendment requires laws  
2 to be drafted with at least a minimum level of specificity<sup>4</sup> and  
3 provide "fair notice that an act is forbidden and subject to  
4 criminal sanction." *United States v. Vaughan*, 58 M.J. 29, 31  
5 (C.A.A.F. 2003).

6 A statute may thus be declared void for vagueness if:

7 "(1) It does not provide fair notice to the person within  
8 its scope,<sup>5</sup> the conduct prohibited or excluded from  
9 prohibition<sup>6</sup> or the penalty to be assessed;<sup>7</sup>

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10 <sup>4</sup> *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (the Court  
11 declared that "a statute which either forbids or requires the doing of an act  
12 in terms so vague that men of common intelligence must necessarily guess at  
its meaning and differ as to its application violates the first essential of  
due process of law"). See also *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

13 <sup>5</sup> *United States v. Cardiff*, 344 U.S. 174 (1952) (the Court noted that "words  
14 which are vague and fluid may be as much a trap for the innocent as the  
ancient laws of Caligula"); *United States v. Pope*, 63 M.J. 68 (2006) (Air  
15 Force Recruiting Regulation prohibiting sexual harassment was not  
unconstitutionally vague; accused was on fair notice that he could be subject  
16 to criminal actions and that compliance was mandatory); *United States v.*  
*Boie*, 70 M.J. 585 (A.F.Ct.Crim.App. 2011) (Article 119a which criminalizes  
17 conduct which causes death of unborn child is not unconstitutionally vague,  
does not violate equal protection, and does not violate First Amendment's  
Establishment Clause).

18 <sup>6</sup> *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (laws must give persons a  
19 reasonable opportunity to know what is prohibited so as to steer between  
lawful and unlawful conduct). See also *Rose v. Locke*, 423 U.S. 48 (1975) ;  
20 *Baggett v. Bullitt*, 377 U.S. 360 (1964) ; *United States v. Harriss*, 347 U.S.  
612 (1954) ; *United States v. Cohen Grocery Co.*, 255 U.S. 81 (1921); *Culver*  
21 *v. Secretary of Air Force*, 389 F. Supp. 331 (D. D.C. 1975) ; *United States v.*  
*Brantner*, 54 M.J. 595 (C.G.Ct.Crim.App. 2000) (court rejected argument that  
22 general regulation governing use of government property was vague; court  
noted that because the regulation spoke in generalities did not make it vague  
in light of common sense reading; if boundaries of lawful conduct can be  
23 determined with reasonable certainty, regulation is not vague); *United States*  
*v. Swan*, 48 M.J. 551 (N.M.Ct.Crim.App. 1998) (Secretary of the Navy  
Instruction prohibiting sexual harassment was not unconstitutionally vague).

24 <sup>7</sup> *United States v. Evans*, 333 U.S. 483 (1948) (statute void that allowed a  
25 "multiple choice" of "possible, yet inconsistent" interpretations of the  
penalty to be assessed).

1 (2) its terms, by their ambiguity, grant unbridled  
2 discretion to enforcement authorities;<sup>8</sup> or (3) its  
3 imprecision endangers First Amendment rights."<sup>9</sup>

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**1-13 Schlueter, Military Criminal Justice: Practice and  
Procedure § 13-3(O) (3) (2013).**

Applying these tenets to the military context, the Supreme Court noted in *Parker v. Levy*, 417 U.S. 733, 749 (1974) that military laws and regulations need not be as precise as criminal statutes in the civilian sector. Rejecting a vagueness attack on Articles 133 and 134, the Court reasoned that the broad and inexact language of the Articles was necessary to allow military authorities to respond effectively to all possible threats to military discipline, and that the Articles were therefore not facially violative of due process. *Id.* at 751. The Court further found that, as applied, the requisite fair notice could

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<sup>8</sup> *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (the effect of such discretion is to "impermissibly delegate basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis"); *United States v. Reese*, 92 U.S. 214 (1876) (Court analogizes statute that grants such discretion to a "net" that ensnares all possible offenders). See also *Smith v. Goguen*, 415 U.S. 566 (1974); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *United States v. Cochrane*, 60 M.J. 632 (N.M.C.C.A. 2004) (court rejected argument that SECNAV Instruction that prohibited unlawful use of controlled substance was unconstitutionally void for vagueness; the instruction established a clear standard by which one's conduct is to be measured and the instruction's language did not encourage arbitrary or discriminatory enforcement).

<sup>9</sup> *Baggett v. Bullitt*, 377 U.S. 360 (1964); *NAACP v. Button*, 371 U.S. 415 (1963); *United States v. Montes*, 60 M.J. 759 (C.G.Ct.Crim.App. 2004) (Coast Guard general order was not unconstitutionally vague regarding use of term "sexually explicit;" court held that term is commonly used and understood and military judge provided adequate definition during providence inquiry); *United States v. Swan*, 48 M.J. 551 (N.M.Ct.Crim.App. 1998) (Secretary of the Navy Instruction prohibiting sexual harassment did not violate accused's free speech rights).

1 be supplied by military customs, regulations, and other sources  
2 that serve to inform servicemen of required behavioral  
3 standards. *Id.*

4 Thus "to withstand a challenge on vagueness grounds, a  
5 regulation must provide sufficient notice so that a  
6 servicemember can reasonably understand that his conduct is  
7 proscribed. *United States v. Pope*, 63 M.J. 466, 469 (C.A.A.F.  
8 2003). Sources of fair notice include: "federal law, state law,  
9 military case law, military custom and usage, military  
10 regulations, along with training and other materials that give  
11 context to regulations and explain the differences between  
12 permissible and impermissible behavior." *United States v.*  
13 *Caporale*, 73 M.J. 501, 504 (A.F.C.C.A. 2013), *citing Pope* at 73.

#### 15 CONCLUSIONS

16 The Court finds that the defense has not met its burden. The  
17 term "unaware" is not *per se* a legal term requiring dissection.  
18 "Aware" has a plain meaning in the English language,<sup>10</sup> as does  
19 its antonym. Coupled with the statutory context of Article 120  
20 in which the word is used ("asleep, unconscious, or otherwise  
21 unaware"), the argument that the accused was not provided fair  
22 notice under the statute is without merit. Paragraph (b) (2) of

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24 <sup>10</sup> "Aware, *adj.* 1. Having knowledge; conscious; cognizant: *aware of the*  
25 *danger.* 2. Informed; alert; knowledgeable: *He is one of the most politically*  
*aware young men around.*" The Random House College Dictionary, p. 94 (1980).

1 the statute does not violate the Due Process of the Fifth  
2 Amendment.

3 The term "impaired," on the other hand, could be subject to  
4 interpretation. However, by using "military case law, military  
5 custom and usage, military regulations, along with training and  
6 other materials that give context to regulations and explain the  
7 differences between permissible and impermissible behavior," its  
8 meaning under the law is apparent. The UCMJ defines "impaired"  
9 as "any intoxication which is sufficient to impair the rational  
10 and full exercise of the mental or physical faculties." <sup>11</sup>

11 Viewed in conjunction with the myriad of training and other  
12 materials that give context to the term, "impaired," as utilized  
13 in Article 120, provides "fair notice that an act is forbidden  
14 and subject to criminal sanction." Paragraph (b)(3)(A) of the  
15 statute does not violate the Due Process Clause of the Fifth  
16 Amendment.

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18 **ORDER**

19 The defense Motion to Dismiss Charge I for unconstitutional  
20 vagueness is DENIED. So ORDERED, this 31<sup>st</sup> day of January 2014.

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22 A. H. H  
23 CAPT, JAGC, USN  
24 Military Judge

25 <sup>11</sup> UCMJ Article 111 at para (c)(6).

**EASTERN JUDICIAL CIRCUIT  
NAVY-MARINE CORPS TRIAL JUDICIARY**

UNITED STATES	)	
	)	
V.	)	GENERAL COURT-MARTIAL
	)	FINDINGS INSTRUCTIONS
Entralgo, B.	)	
LIEUTENANT	)	
U.S. NAVY	)	8 April 2014

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Members of the court, at this time I will instruct you on the law to be applied in this case. When you close to deliberate and vote on the findings, each of you must resolve the ultimate question of whether the accused is guilty or not guilty based upon the evidence presented here in court and upon the instructions which I will give you.

My duty is to instruct you on the law. Your duty is to determine the facts, apply the law to the facts, and determine the guilt or innocence of the accused. You must reach your own independent determination as to whether the accused is guilty or not guilty, and that determination may not be influenced by the views of any person outside the deliberation room. The law presumes the accused to be innocent of the charges against him.

You will hear an exposition of the facts by counsel for both sides as they view them. Bear in mind that the arguments of counsel are not evidence. Argument is made by counsel in order to assist you in understanding and evaluating the evidence, but you must base the determination of the issues in the case on the evidence as you remember it and apply the law as I instruct you.

During the trial some of you took notes. You may take your notes with you into the deliberation room. However, your notes are not a substitute for evidence admitted in trial and should not be shown or read to the other members. You may use your notes to refresh your own recollection.

You may find the accused guilty of an offense only if you are convinced as to guilt by legal and competent evidence beyond reasonable doubt as to each and every *element* of that offense.

I will now advise you of the *elements* of the offenses alleged.

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**IN THE SPECIFICATION OF CHARGE I**, the accused is charged with the offense of Indecent Language, in violation of Article 134, UCMJ. In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond reasonable doubt of the following *elements*:

**(1) That on or about 28 October 2012, at or near Jacksonville, NC, the accused orally communicated to LT H. C. S., U.S. Navy, certain language, to wit: “I’m going to fuck you tonight,” or words to that effect;**

**(2) That the language 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 and of a nature to bring discredit upon the armed forces).**

“**Communicated to**” means that the language was actually made known to the person to whom it was directed.

“**Indecent language**” is that which is grossly offensive to the community sense of modesty, decency, or propriety, or shocks the moral sense of the community because of its vulgar, filthy, or disgusting nature.

Language is also indecent if it is grossly offensive to the community sense of modesty, decency, or propriety, or shocks the moral sense of the community, because of its tendency to incite lustful thought. Language is, therefore, indecent if it tends reasonably to corrupt morals or incite lustful thought, either expressly or by implication from the circumstances under which it was spoken. Seemingly chaste or innocuous language can constitute this offense if the context in which it is used sends an indecent message, as reasonably interpreted by commonly accepted community standards.

Not every use of language that is indecent constitutes an offense under the UCMJ. The government must prove beyond a reasonable doubt, by direct or circumstantial evidence, that LT Entralgo’s conduct was prejudicial to good order and discipline in the armed forces and/or of a nature to bring discredit upon the armed forces.

“**Community**,” as used in this instruction, means the standards that are applicable to the military as a whole, and not the accused’s unit.

“**Conduct prejudicial to good order and discipline**” is conduct which causes a reasonably direct and obvious injury to good order and discipline.

“**Service discrediting conduct**” is conduct which tends to harm the reputation of the service or lower it in public esteem.

With respect to prejudice to good order and discipline, the law recognizes that almost any irregular or improper act on the part of a service member could be regarded as prejudicial in some indirect or remote sense; however, only those acts in which the prejudice is reasonably direct and palpable is punishable under this Article.

With respect to service discrediting, the law recognizes that almost any irregular or improper act on the part of a service member could be regarded as service discrediting in some indirect or remote sense; however, only those acts which would have a tendency to bring the service into disrepute or which tend to lower it in public esteem are punishable under this Article.

Not every act charged under Article 134 constitutes an offense under the UCMJ. The government must prove beyond a reasonable doubt, either by direct evidence or by inference,

that the accused's conduct was prejudicial to good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. In resolving this issue, you should consider all the facts and circumstances to include where the conduct occurred, the nature of the official and personal relationship between the persons who were involved, who may have known of the conduct, the effect, if any, upon the accused's or another's ability to perform their duties, and the effect the conduct may have had upon the morale or efficiency of a military unit.

The government has alleged that the conduct in question the specifications of Charge I was to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces. To convict the accused of the specification of Charge I, you must be convinced beyond a reasonable doubt of all the elements for that specification, including that the accused's conduct was to the prejudice of good order and discipline in the armed forces and/or was of a nature to bring discredit upon the armed forces.

If you are convinced of all the elements the offense except the element of the service discrediting nature of the conduct, you may still convict the accused the offense. In this event, you must make appropriate findings by excepting the language "of a nature to bring discredit upon the armed forces."

On the other hand, if you are convinced of all the elements except the element of prejudice to good order and discipline in the armed forces, you may still convict the accused of the offense. In this event, you must make appropriate findings by excepting the language "to the prejudice of good order and discipline in the armed forces."

If you are convinced beyond a reasonable doubt that the conduct in question was both to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces, then you may convict the accused as he is charged provided you are convinced beyond a reasonable doubt as to the other elements of the offense. If you find the conduct was neither service discrediting nor prejudicial to good order and discipline, then you must find the accused not guilty of the offense.

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**IN SPECIFICATION 1 OF CHARGE II**, the accused is charged with the offense of Rape, in violation of Article 120, UCMJ. In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond reasonable doubt of the following elements:

**(1) That on or about 28 October 2012, at or near Jacksonville, North Carolina, the accused committed a sexual ACT upon Lieutenant H. S., U.S. Navy, to wit: *penetration* of her VULVA with his PENIS; and**

**(2) That the accused did so by using UNLAWFUL FORCE against LT S., to wit: *pulling down her shorts*.**

The court is advised that the offense of Sexual Assault is a **lesser included offense** of Rape. When you vote, if you find the accused not guilty of the offense charged, that is Rape, then you should consider the lesser included offense of Sexual Assault, also in violation of Article 120,

UCMJ. In order to find the accused guilty of this lesser offense, you must be convinced by legal and competent evidence beyond reasonable doubt of the following *elements*:

**(1) That on or about 28 October 2012, at or near Jacksonville, North Carolina, the accused committed a sexual ACT upon Lieutenant H. S., U.S. Navy, to wit: *penetration* of her VULVA with his PENIS; and**

**(2) That the accused did so by causing BODILY HARM against LT S., to wit: placing his penis in her vulva.**

*See definitions and other instructions on page 6.*

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**IN SPECIFICATION 2 OF CHARGE II**, the accused is charged with the offense of Sexual Assault, in violation of Article 120, UCMJ. In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond reasonable doubt of the following *elements*:

**(1) That on or about 28 October 2012, at or near Jacksonville, North Carolina, the accused committed a sexual ACT upon Lieutenant H. S., U.S. Navy, to wit: *penetration* of her VULVA with his PENIS; and**

**(2) That the accused did so when LT S. 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.**

*See definitions and other instructions on page 6.*

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**The facts and circumstances alleged in Charge II, Specification 1 (and its lesser included offense) and Charge II, Specification 2, are the same incident, and therefore the accused may only be found Guilty of one or the other, but not both. He still however, may be found Not Guilty of both.**

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**IN SPECIFICATION 3 OF CHARGE II**, the accused is charged with the offense of Aggravated Sexual Contact, in violation of Article 120, UCMJ. In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond reasonable doubt of the following *elements*:

**(1) That on or about 28 October 2012, at or near Jacksonville, North Carolina, the accused committed a sexual CONTACT upon Lieutenant H. S., U.S. Navy, to wit: *touching* of her BREAST with his MOUTH; and**

**(2) That the accused did so by using UNLAWFUL FORCE against LT S., to wit: laying on top of her.**

The court is advised that the offense of Abusive Sexual Contact is a **lesser included offense** of Aggravated Sexual Contact. When you vote, if you find the accused not guilty of the offense charged, that is Aggravated Sexual Contact, then you should consider the lesser included offense of Abusive Sexual Contact, also in violation of Article 120, UCMJ. In order to find the accused guilty of this lesser offense, you must be convinced by legal and competent evidence beyond reasonable doubt of the following *elements*:

**(1) That on or about 28 October 2012, at or near Jacksonville, North Carolina, the accused engaged in sexual CONTACT, to wit: *touching* Lieutenant H. S.'s, U.S. Navy, BREAST with his MOUTH;**

**(2) That the accused did so when LT S. by causing BODILY HARM against LT S., to wit: touching LT S.'s breast with his mouth.**

*See definitions and other instructions on page 6.*

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**IN SPECIFICATION 4 OF CHARGE II**, the accused is charged with the offense of Abusive Sexual Contact, in violation of Article 120, UCMJ. In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond reasonable doubt of the following *elements*:

**(1) That on or about 28 October 2012, at or near Jacksonville, North Carolina, the accused committed a sexual CONTACT upon Lieutenant H. S., U.S. Navy, to wit: *touching* of her BREAST with his MOUTH; and**

**(2) That the accused did so when LT S. 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.**

*See definitions and other instructions on page 6.*

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**The facts and circumstances alleged in Charge II, Specification 3 (and its lesser included offense) and Charge II, Specification 4, are the same incident, and therefore the accused may only be found Guilty of one or the other, but not both. He still however, may be found Not Guilty of both.**

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**DEFINITIONS AND OTHER INSTRUCTIONS FOR SPECIFICATIONS 1-4 OF CHARGE II:**

**“Sexual act”** means:

(A) contact between the penis and the vulva, and for the purposes of this subparagraph contact involving the penis occurs upon penetration, however slight.

**“Sexual contact”** means:

(A) touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an ***intent*** to abuse, humiliate or degrade any person; OR

(B) any touching, or causing another person to touch, either directly or through the clothing, any body part of any person, if done with an ***intent*** to arouse or gratify the sexual desire of any person.

Touching may be accomplished by any part of the body.

The **“vulva”** is the external genital organs of the female, including the entrance of the vagina and the labia majora and labia minora. “Labia” is the Latin and medically correct term for “lips.”

**“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.

**“Bodily harm”** means any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact.

**“Impairment”** means the state of being diminished, weakened, or damaged, especially mentally or physically.

**“Consent”** means a freely given agreement, by words or conduct, to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating or social or sexual relationship by itself shall not constitute consent.

Lack of consent may be inferred based on the circumstances. All 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.

The evidence has raised the issue of whether LT S. consented to the sexual conduct listed in the Specifications under Charge II. All of the evidence concerning consent to the sexual conduct is relevant and must be considered in determining whether the government has proven beyond a reasonable doubt every element of a particular offense under Charge II, and/or that the sexual conduct was done by unlawful force for Specifications 1 and 3 of Charge II. Stated another way, evidence the alleged victim consented to the sexual conduct, either alone or in conjunction with the other evidence in this case, may cause you to have a reasonable doubt as to whether the government has proven every element of a particular offense, and/or that the sexual conduct was done by unlawful force for Specifications 1 and 3 of Charge II.

**Mistake of Fact: (1) Consent, (2) Offensive Touching, (3) Level of Impairment.**

(1) The evidence has raised the issue of mistake on the part of the accused whether LT S. consented to the sexual conduct alleged concerning all of the Specifications under Charge II.

Mistake of fact as to consent is a defense to all of the charged offenses under **Charge II**. "Mistake of fact as to consent" means the accused held, as a result of ignorance or mistake, an incorrect belief that LT S. consented to all that sexual conduct. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that LT S. consented.

The prosecution has the burden of proving beyond a reasonable doubt that the accused did not reasonably believe that LT S. consented to the charged sexual conduct. If you are convinced beyond a reasonable doubt, at the time of the charged offense, the accused did not believe that LT S. consented to the sexual conduct alleged, the defense does not exist. Furthermore, even if you conclude the accused *was* under a mistaken belief that LT S. consented to the sexual conduct alleged, 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.

(2) The evidence has also raised the issue of mistake on the part of the accused whether the accused putting his penis in LT S.'s vulva was an offensive touching in the lesser included offense of Specification 1 of Charge II, and whether the accused touching LT S.'s breast with his mouth was an offensive touching in the lesser included offense of Specification 3 of Charge II.

Mistake of fact as to whether the accused putting his penis in LT S.'s vulva was an offensive touching is a defense to the lesser included offense of **Specification 1 of Charge II**, and whether the accused touching LT S.'s breast with his mouth was an offensive touching in the lesser included offense of **Specification 3 of Charge II**. "Mistake of fact as to the offensive touching" means the accused held, as a result of

ignorance or mistake, an incorrect belief that LT S. was not offended by the touching. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that LT S. was not offended.

The prosecution has the burden of proving beyond a reasonable doubt that the accused did not reasonably believe that LT S. was not offended by the touching mentioned above. If you *are* convinced beyond a reasonable doubt, at the time of the charged offense, the accused did not believe that LT S. not offended by the touching alleged in the lesser included offenses of Specifications 1 and 3 of Charge II, the defense does not exist. Furthermore, even if you conclude the accused *was* under a mistaken belief that LT S. did not find the touchings offensive, 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.

(3) The evidence has also raised the issue of mistake on the part of the accused whether LT S. was incapable to consent due to LT S.'s impairment in Specification 2 of Charge II, and Specification 4 of Charge II.

Mistake of fact as to LT S.'s capability to consent despite her level of impairment is a defense to **Specifications 2 and 4 of Charge II**. "Mistake of fact as to impairment" means the accused held, as a result of ignorance or mistake, an incorrect belief that LT S. was capable of consenting to the sexual conduct despite any level of impairment she may have had. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that LT S. was not impaired and was capable of consenting.

The prosecution has the burden of proving beyond a reasonable doubt that the accused did not reasonably believe that LT S. was capable to consent despite her level of impairment. If you *are* convinced beyond a reasonable doubt, at the time of the charged offense, the accused did not believe that LT S. was capable to consent due to impairment in Specifications 2 and 4 of Charge II, the defense does not exist. Furthermore, even if you conclude the accused *was* under a mistaken belief that LT S. was capable of consent, 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.

The ignorance or mistake or *any of the above* ((1) Consent, (2) Offensive Touching and/or (3) Impairment) cannot be based on the negligent failure to discover the true facts. "**Negligence**" is the absence of due care. "**Due care**" is what a reasonably careful person would do under the same or similar circumstances.

You should consider the inherent probability or improbability of the evidence presented on this matter. You should consider the accused's age, education, experience, along with the other evidence on this issue.

**VOLUNTARY INTOXICATION as it applies to Mistake of Fact.** There has been some evidence concerning the accused's state of intoxication at the time of the alleged offenses. On the question of whether the accused's ignorance or belief regarding (1) Consent, (2) Offensive Touching and/or (3) Impairment was reasonable, you may not consider the accused's intoxication, if any, because a reasonable ignorance or 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 ignorance or belief in the mind of a sober person to be considered reasonable because the person is intoxicated.

**VOLUNTARY INTOXICATION as it applies to Specific Intent.** The evidence has raised the issue of voluntary intoxication in relation to Specification 3 (and its lesser included offense) and Specification 4 of Charge II (**note, this instruction does NOT apply to any other specification**). I advised you earlier that one of the elements of these offenses is that the accused had the specific intent to have committed a sexual contact upon LT S. with an intent to abuse, humiliate, harass, or degrade her or to arouse or gratify the sexual desire of the accused. In deciding whether the accused had such a specific intent at the time you should consider the evidence of voluntary intoxication.

The law recognizes that a person's ordinary thought process may be materially affected when he is under the influence of intoxicants. Thus, evidence that the accused was intoxicated may, either alone, or together with other evidence in the case cause you to have a reasonable doubt that the accused had the *specific intent* to commit the offenses identified in **Specification 3 (and its lesser included offense) and Specification 4 of Charge II**.

On the other hand, the fact that a person may have been intoxicated at the time of the offense does not necessarily indicate that he was unable to have the specific intent to abuse, humiliate, harass, or degrade LT S. or to arouse or gratify his own sexual desires, because a person may be drunk yet still be aware at that time of his actions and their probable results.

In deciding whether the accused had the specific intent to commit these offenses you should consider the effect of intoxication, if any, as well as the other evidence in the case.

The burden of proof is on the prosecution to establish the guilt of the accused. If you are convinced beyond a reasonable doubt with respect to **Specification 3 (and its lesser included offense) and Specification 4 of Charge II** that the accused in fact had the specific intent to abuse, humiliate, harass, or degrade LT S., or to arouse or gratify his own sexual desires, the accused will not avoid criminal responsibility because of voluntary intoxication.

\*\*\*\*\*

**SPILOVER.** An accused may be convicted based only on evidence before the court not on evidence of a general criminal disposition. Each offense must stand on its own and you must keep the evidence of each offense separate. Stated differently, if you find or believe that the accused is guilty of one offense, you may not use that finding or belief as a basis for inferring, assuming, or proving that he committed any other offense.

If evidence has been presented which is relevant to more than one offense, you may consider that evidence with respect to each offense to which it is relevant. For example, if a person were charged with stealing a knife and later using that knife to commit another offense, evidence concerning the knife, such as that person being in possession of it or that person's fingerprints being found on it, could be considered with regard to both offenses. But the fact that a person's guilt of stealing the knife may have been proven is not evidence that the person is also guilty of any other offense.

The burden is on the prosecution to prove each and every element of each offense beyond a reasonable doubt. Proof of one offense carries with it no inference that the accused is guilty of any other offense.

**CIRCUMSTANTIAL EVIDENCE.** Evidence may be direct or circumstantial. "Direct evidence" is evidence which tends directly to prove or disprove a fact in issue. If a fact in issue was whether it rained during the evening, testimony by a witness that he/she saw it rain would be direct evidence that it rained.

On the other hand, "circumstantial evidence" is evidence that tends to prove some other fact from which, either alone or together with some other facts or circumstances, you may reasonably infer the existence or nonexistence of a fact in issue. If there was evidence the street was wet in the morning, that would be circumstantial evidence from which you might reasonably infer it rained during the night.

There is no general rule for determining or comparing the weight to be given to direct or circumstantial evidence. You should give all the evidence the weight and value you believe it deserves.

**CREDIBILITY OF WITNESSES.** You have the duty to determine the believability of the witnesses. In performing this duty you must consider each witness's intelligence, ability to observe and accurately remember, sincerity, and conduct in court, friendships and prejudices. Consider also the extent to which each witness is either supported or contradicted by other evidence; the relationship each witness may have with either side, and how each witness might be affected by the verdict.

In weighing discrepancies by a witness or between witnesses, you should consider whether they resulted from an innocent mistake or a deliberate lie.

Taking all these matters into account, you should then consider the probability of each witness's testimony and the inclination of the witness to tell the truth.

The believability of each witness's testimony should be your guide in evaluating testimony, not the number of witnesses called.

These rules apply equally to the testimony given by Lieutenant Entralgo.

**PRIOR INCONSISTENT STATEMENT.** You have heard evidence that before this trial LT Entralgo made a statement to LT S. that may be inconsistent with his testimony here in court. I

have admitted into evidence the prior statements of LT Entralgo as Prosecution Exhibit 18. You may consider that statement in deciding whether to believe LT Entralgo's in-court testimony.

You may also consider that statement along with all the other evidence in this case.

You have also heard evidence that before this trial LT S. made a statement to LT D. that may be inconsistent with her testimony here in court. I have admitted into evidence testimony concerning the prior statement of LT S. regarding memory loss. You may consider that statement in deciding whether to believe LT S.'s in-court testimony.

You may also consider that statement along with all the other evidence in this case.

**EXPERT TESTIMONY.** You have heard the testimony of Courtney Tourre. She is known as an "expert witness" because her knowledge, skill, experience, training, or education may assist you in understanding the evidence or in determining a fact in issue. You are not required to accept the testimony of an expert witness or give it more weight than the testimony of an ordinary witness. You should, however, consider her qualifications as an expert.

When an expert witness answers a hypothetical question, the expert assumes as true every asserted fact stated in the question. Therefore, unless you find that the evidence establishes the truth of the asserted facts in the hypothetical question, you cannot consider the answer of the expert witness to that hypothetical question.

**REASONABLE DOUBT.** You are further advised: First, that the accused is presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt;

Second, if there is reasonable doubt as to the guilt of the accused, that doubt must be resolved in favor of the accused, and he must be acquitted;

Lastly, the burden of proof to establish the guilt of the accused beyond a reasonable doubt is on the government. The burden never shifts to the accused to establish innocence or to disprove the facts necessary to establish each element of the offense.

Beyond a reasonable doubt is intended not a fanciful or ingenious doubt or conjecture, but an honest, conscientious doubt suggested by the material evidence or lack of it in the case. It is an honest misgiving generated by insufficiency of proof of guilt. Proof beyond a reasonable doubt means proof to an evidentiary certainty, although not necessarily to an absolute or mathematical certainty. The proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair and rational hypothesis except that of guilt. The rule as to reasonable doubt extends to every element of the offenses, although each particular fact advanced by the prosecution, which does not amount to an element, need not be established beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the accused's guilt. However, if, on the whole evidence you are satisfied beyond a reasonable doubt of the truth of each and every element, then you should find the accused guilty.

Bear in mind that only matters properly before the court as a whole should be considered. In weighing and evaluating the evidence you are expected to use your own common sense, and your knowledge of human nature and the ways of the world. In light of all the circumstances in the case, you should consider the inherent probability or improbability of the evidence. Bear in mind you may properly believe one witness and disbelieve several other witnesses whose testimony conflicts with the one. The final determination as to the weight or significance of the evidence and the credibility of the witnesses in this case rests solely upon you.

**COMMENTS OF THE JUDGE.** You must disregard any comment or statement made by me during the course of the trial that might seem to indicate to you an opinion on my part as to whether the accused is guilty or not guilty since you, and you alone, have the responsibility to make that determination. As court members, each of you must impartially resolve this ultimate issue in accordance with the law I have given you, the evidence admitted in court, and your own conscience.

\*\*\*\*\*

Counsel have referred to instructions that I gave you; if there is any inconsistency between what counsel have said about the instructions and the instructions which I gave you, you must accept my statement as being correct.

The following procedural rules will apply to your deliberations and must be observed: The influence of superiority in rank will not be employed in any manner in an attempt to control the independence of the members in the exercise of their own personal judgment. Your deliberation should include a full and free discussion of all the evidence that has been presented. After you have completed your discussion, then voting on your findings must be accomplished by secret, written ballot, and all members of the court are required to vote.

You vote on the Specifications under a Charge before you vote on a Charge. If the vote results in a finding that the prosecution has not proved the elements of that Specification, then your vote constitutes a finding of not guilty for that Specification, and you need not further consider that Specification that your vote concerned.

If you find the accused guilty of any Specification under a Charge, the finding as to that *Charge* is guilty.

The junior member will collect and count the votes. The count will then be checked by the president, who will immediately announce the result of the ballot to the members.

The concurrence of at least two-thirds of the members present when the vote is taken is required for any finding of guilty. Since we have 5 members, that means 4 members must concur in a finding of guilty. If you have at least 4 votes of guilty of an offense, then that will result in a finding of guilty for that offense. If fewer than 4 members vote for a finding of guilty, then your ballot resulted in a finding of not guilty.

If a finding of not guilty is made to one of the Specifications that has a lesser included offense (Specification 1 under Charge II and the Specification 3 under Charge II), vote next on the lesser

included offense of that Specification. If a finding of guilty is made on the lesser included offense, you have convicted the accused of that lesser included offense. If you have voted on the lesser included offense and a finding of not guilty is made, you have acquitted the accused of this specification and its lesser included offense.

You are reminded that the facts and circumstances alleged in Specifications 1 and 2 of Charge II are the same incident, and therefore the accused may only be found Guilty of one or the other, but not both. He still however, may be found Not Guilty of both.

You are also reminded that the facts and circumstances alleged in Specifications 3 and 4 of Charge II are the same incident, and therefore the accused may only be found Guilty of one or the other, but not both. He still however, may be found Not Guilty of both.

You may reconsider the finding prior to its being announced in open court. However, after you vote, if any member expresses a desire to reconsider any finding, open the court and the president should announce only that reconsideration of a finding has been proposed. Do not state whether the finding proposed to be reconsidered is a finding of guilty or not guilty. I will then give you specific instructions on how to go about a reconsideration of findings.

As soon as the court has reached its findings, and I have examined the Findings Worksheet, the findings will be announced by the president in the presence of all parties. As an aid in putting your findings in proper form and making a proper announcement of the findings, you may use the Findings Worksheet which the Bailiff may now hand to the president.

The first portion of the worksheet will be used if the accused is acquitted of all charges and specifications, or if he is convicted of all charges and specifications. The second part will be used if the accused is convicted of some, but not all, of the offenses.

You will note that the findings worksheet has been modified to reflect the words that would be deleted. These modifications of the worksheet in no way indicate any opinion by myself or by counsel concerning any degree of guilt of this accused. They are merely included to aid you in understanding what findings might be made in this case, and for no other purpose whatsoever. The worksheet is provided only as an aid in finalizing your decision.

Cross out everything that is not applicable, and fill in any applicable blanks.

Keep the Findings Worksheet with you until you return to open court.

When announcing your findings, you will read aloud everything that is not bold and not lined out. Once you return to the courtroom, I will check your findings before you announce them in open court so that I can ensure that they are in proper form.

In your deliberation room, you will have all the exhibits that have been admitted into evidence. Please do not write on any of the original exhibits except obviously for the Findings Worksheet or the copies that have been provided to each of you.

The Uniform Code of Military Justice prohibits me or anyone else from entering your closed session deliberation. As a matter of law, you are not permitted to use cell phones, blackberries, or similar devices while in your closed session deliberations.

1 **U.S. V. CPL AHN, USMC - FINDINGS INSTRUCTIONS**

2 Members of the court, I will now instruct you on the law that you must  
3 apply. When you close to deliberate and vote on the findings, each of you  
4 must resolve the ultimate question of whether Cpl Ahn is guilty or not guilty  
5 based upon the evidence presented here and these instructions. It is my  
6 duty to instruct you on the law. It is your duty to determine the facts, apply  
7 the law to the facts, and thus determine the guilt or innocence of Cpl Ahn,  
8 bearing in mind, again, that the law presumes Cpl Ahn to be innocent of the  
9 charge and specifications against him.

10  
11 If you took notes, you may take your notes and your copy of any exhibits  
12 with you into the deliberation room. However, your notes are not a  
13 substitute for evidence and should not be shown or read to the other  
14 members. You may use your notes to refresh your own recollection.

15  
16 You may find Cpl Ahn guilty of the offense or the lesser-included offense  
17 only if you are convinced as to guilt by legal and competent evidence  
18 beyond a reasonable doubt as to each and every element of that offense.

19  
20 Only Cpl Ahn is on trial before you and your only duty is to determine if Cpl  
21 Ahn is guilty or not guilty. While he is charged with committing the offense  
22 in the Specification in conjunction with LCpl Bridenstine, it is not necessary  
23 that you also find LCpl Bridenstine guilty, nor is it required that you find he  
24 committed the offense in conjunction with LCpl Bridenstine. If you are  
25 satisfied beyond a reasonable doubt that Cpl Ahn is guilty, but have a  
26 reasonable doubt that Cpl Ahn committed the offense in conjunction with  
27 LCpl Bridenstine, you may still find him guilty of that offense.

1 I will now discuss the offense as it appears on your charge sheet.

2 **SEXUAL ASSAULT (ARTICLE 120)**

3 In the specification of the Charge, Cpl Ahn is charged with the offense of  
4 Sexual Assault, in violation of Article 120, UCMJ. In order to find Cpl Ahn  
5 guilty of this offense, you must be convinced by legal and competent  
6 evidence beyond reasonable doubt:

7 (1) That on or about 15 December 2013 at or near Tumo, Guam, the  
8 ■ accused committed (a) sexual act upon Seaman Recruit ■  
9 ■ US Navy, to wit: inserting his penis into her anus; and

10 (2) That the accused did so when Seaman Recruit ■  
11 ■ US Navy was incapable of consenting to the sexual act due to  
12 impairment by an intoxicant, or other similar substance, and that condition  
13 was known or reasonably should have been known by the accused.

14 (3) That the accused did so without the consent of Seaman Recruit  
15 ■

16 The only sex act that Cpl Ahn is charged with is the penetration of the anus  
17 with his penis.

18 The term "Sexual act" means the penetration, however slight, of the vulva  
19 or anus or mouth of another by the penis of Cpl Ahn with intent to arouse or  
20 gratify the sexual desire of any person.

21 The "vulva" is the external genital organs of the female, including the  
22 entrance of the vagina and the labia majora and labia minora. "Labia" is  
23 the Latin and medically correct term for "lips."

24 "Consent" means a freely given agreement to the conduct at issue by a  
25 competent person. An expression of lack of consent through words or  
26 conduct means there is no consent. Lack of verbal or physical resistance  
27 does not constitute consent. The manner of dress of the person involved  
28 with Cpl Ahn in the conduct at issue shall not constitute consent.

29 Lack of consent or consent may be inferred based on the circumstances.  
30 All the surrounding circumstances are to be considered in determining  
31 whether a person gave consent. A sleeping, unconscious, or incompetent  
32 person cannot consent to a sexual act.

1 A person cannot consent to sexual activity if that person is incapable of  
2 appraising the nature of the sexual conduct at issue, due to mental  
3 impairment or unconsciousness resulting from consumption of alcohol or is  
4 incapable of physically declining participation in the sexual conduct at  
5 issue; or incapable of physically communicating an unwillingness to engage  
6 in the sexual conduct at issue.

7  
8 The government has the burden to prove beyond a reasonable doubt that  
9 consent to the physical act did not exist. Therefore, to find Cpl Ahn guilty of  
10 the offense of sexual assault, as alleged in the specification of the Charge,  
11 you must be convinced beyond a reasonable doubt that Seaman ██████ did  
12 not consent to the physical act.

13  
14 I have instructed you that there is a difference between passing out and  
15 blacking out. In this court the term blacking-out is used in the form of  
16 someone not being able to remember what they did while drinking alcohol.  
17 A person could blackout the events they engaged in while drinking, but still  
18 be responsible for their actions while intoxicated. In other words, a blacked  
19 out state is one of the facts and circumstances that must be considered  
20 when determining whether a person was capable or incapable of  
21 consenting to the sexual act. The term passed-out means to lose  
22 consciousness.

23  
24 Evidence concerning consent to the sexual conduct, if any, is relevant and  
25 must be considered in determining whether the government has proven  
26 that the alleged victim was incapable of consenting to the sexual act due to  
27 impairment by an intoxicant beyond a reasonable doubt. Stated another  
28 way, evidence an alleged victim consented to the sexual conduct, either  
29 alone or in conjunction with the other evidence, may cause you to have a  
30 reasonable doubt as to whether the government has proven every element  
31 of that specification.

32  
33 The evidence has raised the issue of (ignorance) or (mistake) on the part of  
34 Cpl Ahn concerning SN ██████ condition in relation to the alleged offense  
35 of sexual assault and the lesser included offense of assault consummated  
36 by a batter.

37 I advised you earlier that to find Cpl Ahn guilty of sexual assault or the  
38 offense of assault consummated by a battery, you must find beyond a  
39 reasonable doubt that Cpl Ahn knew or reasonably should have known that

1 the victim was incapable of consenting to the sexual conduct due to  
2 impairment by an intoxicant and that she did not consent.

3 The accused is not guilty of the offense of sexual assault and/or the lessor-  
4 included offense of assault consummated by a battery, if:

5 (1) Cpl Ahn did not know that Seaman Recruit ██████████ US  
6 Navy was incapable of consenting or that he reasonably believed that she  
7 did consent to the sexual conduct; and

8 (2) Such (ignorance) or (belief) on his part was reasonable.

9 To be reasonable the (ignorance) or (belief) must have been based on  
10 information, or lack of it, which would indicate to a reasonable person that  
11 Seaman Recruit ██████████ US Navy was not incapable of  
12 consenting to the sexual conduct due to impairment by an intoxicant.

13 The (ignorance) or (mistake) cannot be based on a negligent failure to  
14 discover the true facts. Negligence is the absence of due care. Due care  
15 is what a reasonably careful person would do under the same or similar  
16 circumstances. You must consider all the facts and circumstances in  
17 considering this issue.

18 The burden is on the prosecution to establish Cpl Ahn's guilt. If you are  
19 convinced beyond a reasonable doubt that, at the time of the charged  
20 offense, Cpl Ahn was not ignorant of the fact that the alleged victim was not  
21 incapable of consenting to the sexual conduct due to impairment by a drug,  
22 intoxicant, or other similar substance, the defense of (ignorance) or  
23 (mistake) does not exist.

24 Even if you conclude that Cpl Ahn was mistakenly believed the alleged  
25 victim was not incapable of consenting to the sexual conduct due to  
26 impairment by a drug, intoxicant, or other similar substance, if you are  
27 convinced beyond a reasonable doubt that, at the time of each of the  
28 charged offense, Cpl Ahn's (ignorance) or (mistake) was unreasonable, the  
29 defense of (ignorance) or (mistake) does not exist.

30 Concerning the Specification, there has been some evidence concerning  
31 Cpl Ahn's state of intoxication at the time of the alleged offense. On the  
32 question of whether Cpl Ahn's (ignorance) or (belief) was reasonable, you  
33 may not consider Cpl Ahn's intoxication, if any, because a reasonable  
34 (ignorance) or (belief) is one that an ordinary, prudent, sober adult would

1 have under the circumstances of this case. Voluntary intoxication does not  
2 permit what would be an unreasonable (ignorance) or (belief) in the mind of  
3 a sober person to be considered reasonable because the person is  
4 intoxicated.

5 **Lessor-Included Offense**

6 You are further advised that the offense of assault consummated by a  
7 battery in violation of Article 128 UCMJ is a lesser-included offense of the  
8 offense set forth in the specification of sexual assault. When you vote, if  
9 you find Cpl Ahn not guilty of the offense charged, that is sexual assault,  
10 then you should consider the lesser-included offense of assault  
11 consummated by a battery, in violation of Article 128, UCMJ. In order to  
12 find Cpl Ahn guilty of this lesser offense, you must be convinced by legal  
13 and competent evidence beyond reasonable doubt:

14 ***ASSAULT CONSUMMATED BY A BATTERY (ARTICLE 128)***

15 (1) That (state the time and place alleged), the accused did bodily  
16 harm to (state the name of the alleged victim);

17 (2) That the accused did so by (state the manner alleged); and

18 (3) That the bodily harm was done with unlawful force or violence.

19 An “assault” is an attempt or offer with unlawful force or violence to do  
20 bodily harm to another. An assault in which bodily harm is inflicted is called  
21 a battery. A “battery” is an unlawful and intentional application of force or  
22 violence to another. The act must be done without legal justification or  
23 excuse and without the lawful consent of the victim. “Bodily harm” means  
24 any physical injury to or offensive touching of another person, however  
25 slight.

26 The offense charged, that is sexual assault, and the lesser included offense  
27 of assault consummated by a battery, differ in that sexual assault requires  
28 as elements that you be convinced beyond a reasonable doubt that Cpl  
29 Ahn committed a sexual act upon the victim and committed the sexual act  
30 at a time when the alleged victim was incapable of consenting to the sexual  
31 act due to impairment by an intoxicant. Whereas the lesser include offense  
32 of assault consummated by a battery does not include such elements.

33

1 You are reminded that the defenses of consent and mistake of fact as  
2 consent both apply to the lesser-included offense.

3

4 ***VARIANCE—FINDINGS BY EXCEPTIONS AND SUBSTITUTIONS***

5 If you have doubt about the (time) (place) or manner in which the offense  
6 as described in the specifications was committed, but you are satisfied  
7 beyond a reasonable doubt that the offense (or a lesser included offense)  
8 was committed (at a time) (at a place) (in a particular manner) that differs  
9 slightly from the exact (time) (place) (manner) as described in the  
10 specification, you may make minor modifications in reaching your findings.  
11 You do this by changing the (time) (place) (manner in which the alleged  
12 acts described in the specification were committed, provided that you do  
13 not change the nature or identity of the offense (or the lesser-included  
14 offense).

15 You are further instructed that, **First**, that Cpl Ahn is presumed to be  
16 innocent unless and until his guilt is established by legal and competent  
17 evidence beyond a reasonable doubt; **Second**, if there is a reasonable  
18 doubt as to the guilt of Cpl Ahn, that doubt must be resolved in favor of Cpl  
19 Ahn, and he shall be acquitted; **Third**, if there is a reasonable doubt as to  
20 the degree of guilt, that doubt must be resolved in the favor of the lowest  
21 degree of guilt as to which there is no reasonable doubt;

22

23 The burden of proof to establish the guilt of Cpl Ahn beyond a reasonable  
24 doubt is on the government. The burden never shifts to Cpl Ahn to  
25 establish innocence or to disprove the facts necessary to establish each  
26 element of each the offenses alleged.

27

28 **Reasonable doubt:** Some of you may have served as jurors in civil cases,  
29 or as board members in administrative boards, where you were told that it  
30 is only necessary to prove that a fact is more likely true than not true. In

1 criminal cases, the government's proof must be more powerful than that, it  
2 must be beyond a reasonable doubt.

3  
4 By reasonable doubt is intended not a fanciful, speculative, or ingenious  
5 doubt or conjecture, but an honest and actual doubt suggested by the  
6 material evidence or lack of it in the case. It is a genuine misgiving caused  
7 by insufficiency of proof of guilt. Reasonable doubt is a fair and rational  
8 doubt based upon reason and common sense and arising from the state of  
9 the evidence. Proof beyond a reasonable doubt is proof that leaves you  
10 firmly convinced of Cpl Ahn's guilt. There are very few things in this world  
11 that we know with absolute certainty, and in criminal cases, the law does  
12 not require proof that overcomes every possible doubt. If, based on your  
13 consideration of the evidence, you are firmly convinced that Cpl Ahn is  
14 guilty of the crime charged, you must find him guilty. If, on the other hand,  
15 you think there is a real possibility that he is not guilty, you shall give him  
16 the benefit of the doubt and find him not guilty. The rule as to reasonable  
17 doubt extends to every element of the offense, although each particular fact  
18 advanced by the prosecution that does not amount to an element need not  
19 be established beyond a reasonable doubt. However, if on the whole of the  
20 evidence, you are satisfied beyond a reasonable doubt of the truth of each  
21 and every element of an offense, then you should find Cpl Ahn guilty of that  
22 offense.

23  
24 **Credibility of evidence:** You should bear in mind that only matters  
25 properly before the court as a whole should be considered, and in weighing  
26 and evaluating the evidence, you are expected to utilize your own common  
27 sense and your knowledge of human nature and the ways of the world. In

1 light of all the circumstances in the case, you should consider the inherent  
2 probability or improbability of the evidence. Bear in mind you may properly  
3 believe one witness and disbelieve several other witnesses whose  
4 testimony is in conflict with the one. The final determination as to the  
5 weight or significance of the evidence and the credibility of the witnesses in  
6 this case rests solely upon you, the members of the court.

7  
8 **Comments and questions of the judge:** You must disregard any  
9 comment or statement made by me during the trial that might seem to  
10 indicate an opinion on my part as to the guilty or innocence of Cpl Ahn  
11 since you, and you alone, have the responsibility to make that  
12 determination. As court members, each of you must impartially resolve this  
13 ultimate issue in accordance with the law I have given you, the evidence  
14 admitted in court, and your own conscience.

15 ***CHAIN OF CUSTODY***

16 The evidence in this case has placed into issue the question of the “chain  
17 of custody” of the alleged victim’s clothing and the DNA sample allegedly  
18 given by Cpl Ahn.

19 The “chain of custody” of an exhibit is simply the path taken by the sample  
20 from the time it is given until it is tested in the laboratory. In making your  
21 decision in this case you must be satisfied beyond a reasonable doubt that  
22 the sample tested was Cpl Ahn’s, and that it was not tampered with or  
23 contaminated in any significant respect before it was tested and analyzed  
24 in the laboratory. You are also advised that the government is not required  
25 to maintain or show a perfect chain of custody. Minor administrative  
26 discrepancies do not necessarily destroy the chain of custody.

27 Similarly, you must be satisfied that the laboratory properly analyzed the  
28 sample and produced an accurate result.

29 You are entitled to infer that the procedures in the laboratory for handling  
30 and testing the sample were regular and proper unless you have evidence

1 to the contrary. However, you are not required to draw this inference. The  
2 weight and significance to be attached to this evidence is a matter for your  
3 determination.

4 ***EXPERT TESTIMONY***

5 You have heard the testimony of CDR Naval and Michele L. Cappetto.  
6 They are known as an “expert witnesses” because their knowledge, skill,  
7 experience, training, or education may assist you in understanding the  
8 evidence or in determining a fact in issue. You are not required to accept  
9 the testimony of an expert witness or give it more weight than the testimony  
10 of an ordinary witness. You should, however, consider their qualifications  
11 as an expert.

12 When an expert witness answers a hypothetical question, the expert  
13 assumes as true every asserted fact stated in the question. Therefore,  
14 unless you find that the evidence establishes the truth of the asserted facts  
15 in the hypothetical question, you cannot consider the answer of the expert  
16 witness to that hypothetical question.

17 **Circumstantial evidence:** Evidence may be direct or circumstantial.

18 Direct evidence is evidence that tends directly to prove or disprove a fact in  
19 issue. Circumstantial evidence is evidence that tends directly to prove not  
20 a fact in issue, but some other fact or circumstance from which, either  
21 alone or together with some other facts or circumstances you may  
22 reasonably infer the existence or non-existence of a fact in issue. Let me  
23 give you an example. If a witness testified that he or she saw it rain during  
24 the evening, that would be direct evidence. If there was evidence the street  
25 was wet in the morning, that would be circumstantial evidence from which  
26 you might reasonably infer it rained during the night. There is no general  
27 rule for determining or comparing the weight to be given to direct or  
28 circumstantial evidence. You should give all the evidence the weight and  
29 value you believe it deserves.

30

1 **[Knowledge]** I have instructed you that you must be satisfied beyond a  
2 reasonable doubt that Cpl Ahn knew or reasonably should have known that  
3 the alleged victim was incapable of consenting to the sexual act alleged in  
4 the specifications. This knowledge, like any other fact, may be proved or  
5 disproved by circumstantial evidence. In deciding this issue, you must  
6 consider all relevant facts and circumstances about which there has been  
7 testimony.

8  
9 **Credibility of witnesses:** You have the duty to determine the credibility,  
10 that is the believability, of the witnesses. In performing this duty, you must  
11 consider each witness's intelligence, ability to observe and accurately  
12 remember, in addition to the witness's sincerity and conduct in court, and  
13 motives or bias. Consider also the extent to which each witness is either  
14 supported or contradicted by other evidence, the relationship each witness  
15 may have with either party, and how each witness might be affected by the  
16 verdict. In weighing a discrepancy by a witness or between witnesses, you  
17 should consider whether it resulted from an innocent mistake or a  
18 deliberate lie. Taking all these matters into account, you should then  
19 consider the probability of each witness's testimony and the inclination of  
20 the witness to tell the truth. The credibility of each witness's testimony  
21 should be your guide in evaluating testimony and not the number of  
22 witnesses called

23  
24 **Prior inconsistent statement:** You have heard evidence that SN [REDACTED]  
25 may have made a statement prior to trial that may be inconsistent with her  
26 testimony at this trial. Specifically, that she had never previously  
27 mentioned vomiting in the bed before her trial testimony, that she never

1 mentioned being laid down in the bed and that she never identified the  
2 male in the room when she awoke the next morning as being the male that  
3 engaged with her. If you believe that an inconsistent statement was made,  
4 you may consider the inconsistency in evaluating the credibility of the  
5 testimony of the witness who made it. You may not, however, consider the  
6 prior statement as evidence of the truth of the matters contained in that  
7 prior statement.

8  
9 **Accused's silence:** The accused has an absolute right to remain silent.  
10 You will not draw any inference adverse to Cpl Ahn from the fact that he did  
11 not testify as a witness. You must disregard the fact that Cpl Ahn has not  
12 testified.

### 13 **FINDINGS ARGUMENT BY COUNSEL**

14 MJ: You are about to hear an explanation of the facts by counsel for both  
15 parties as they view them. Bear in mind that the arguments of counsel are  
16 not evidence. Argument is made by counsel in order to assist you in  
17 understanding and evaluating the evidence. You must base the  
18 determination of the issues, on the evidence as you remember it.

19  
20 MJ: Counsel may refer to these instructions, and in that regard, if there is  
21 any inconsistency between what the counsel say and the Court's  
22 instructions, you must follow the court's instructions.

23  
24 MJ: (Trial counsel), because you have the burden of proof in this trial, you  
25 may argue first and present a rebuttal argument.

26  
27 MJ: (Defense counsel), you may argue on findings.

1  
2 MJ: (Trial counsel), do you desire a rebuttal argument?

3  
4 **Procedural Instructions on Findings:** Members the following procedural  
5 rules will apply to your deliberation and must be observed: The influence of  
6 superiority in rank will not be employed in any manner in an attempt to  
7 control the independence of the members in the exercise of their own  
8 personal judgment. Your deliberations should properly include a full and  
9 free discussion of all the evidence that has been presented. After you have  
10 completed your discussion, then voting on your findings must be done by  
11 secret written ballot, and all members of the court must vote.

12  
13 You vote on the specification under the charge before you vote on the  
14 charge. If you find Cpl Ahn guilty of the specification under the charge, the  
15 finding as to the charge is guilty. If a finding of not guilty of sexual assault  
16 is made, vote next on the lesser-included offense of assault consummated  
17 by a battery. If a finding of guilty is made, you have convicted Cpl Ahn of  
18 the lesser-included offense. If you have voted on the lesser-included  
19 offense and a finding of not guilty is made, you have acquitted Cpl Ahn of  
20 the Charge, the specification and the lesser-included offense.

21  
22 The junior member collects and counts the votes, and the count is checked  
23 by the president, who immediately announces the result of the ballot to the  
24 members.

25  
26 The concurrence of at least two thirds of the members is required for any  
27 finding of guilty. Since we have \_5\_ members, that means that \_4\_  
28 members must concur in any finding of guilty. If you have \_4\_ votes of

1 guilty with regard to the offense, then that will result in a finding of guilty for  
2 that offense. If fewer than 4 members vote for a finding of guilty, then  
3 your ballot resulted in a finding of not guilty.

4

5 You may reconsider any finding prior to its being announced in open court.  
6 However, after you vote, if any member expresses a desire to reconsider  
7 any finding, the president of the court tell the court that “a reconsideration  
8 has been proposed”. Do not state whether the finding proposed to be  
9 reconsidered is a finding of guilty or not guilty. I will then give you specific  
10 instructions on how to reconsider a finding.

11 As soon as the court has reached its findings, and I have examined  
12 the findings worksheet, the findings will be announced by the president in  
13 open court. The format is set out for you in the findings worksheet,  
14 Appellate Exhibit \_\_\_\_\_. The bailiff will deliver Appellate Exhibit \_\_\_\_\_ to the  
15 president of the court at this time.

16

17 You may use the findings worksheet as an aid in putting your findings in  
18 proper form. The first portion of the worksheet will be used if Cpl Ahn is  
19 acquitted of the charge and the specification. The second part will be used  
20 if Cpl Ahn is convicted of the charge and specification. And the third  
21 portion will be used if Cpl Ahn is convicted of the lesser-included offense.

22

23 Once you have completed the portions that are applicable and, cross out  
24 everything that is not applicable and sign it at the bottom.

25

26 You will note that the findings worksheet has been modified to reflect the  
27 words that would be deleted (as well as the words that would be substituted

1 there for) if you found Cpl Ahn guilty of the lesser-included offense. These  
2 modifications of the worksheet in no way indicate any opinion by me or by  
3 counsel concerning any degree of guilt of this accused. They are merely  
4 included to aid you in understanding what findings might be made in this  
5 case, and for no other purpose whatsoever. The worksheet is provided  
6 only as an aid in finalizing your decision.

7

8 MJ: Counsel are there any objections to instructions as given, or are there  
9 any requests for additional instructions at this time?

10

11 If, during your deliberations, you have any questions concerning the  
12 findings worksheet or any other matter, please open the court and I will  
13 take those matters up with you. I would ask that if you do have any such  
14 question, that you write it down on one of the question forms provided so  
15 that an accurate record of your question can be maintained.

16 In your deliberation room, you will have all the exhibits that have been  
17 admitted into evidence. Please do not write on any of the original exhibits  
18 except for the findings worksheet. The UCMJ prohibits me or anyone else  
19 from entering your deliberations. As a matter of law, you are not permitted  
20 to use cell phones, blackberries, or similar devices while in your closed  
21 deliberations. You may not consult the Manual for Courts-Martial or any  
22 other legal publication.

23

24

25