IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee, v. NICHOLAS S. STEWART Captain (O-3) U.S. Marine Corps, Appellant.	**BRIEF ON BEHALF OF APPELLANT** Crim.App. No. 201000021 USCA Dkt. No. 11-0440/MC

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

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Statement of Statutory Jurisdiction

The lower court reviewed Capt Stewart's case pursuant to Article 66(b)(1), UCMJ, 10 U.S.C. § 866(b)(1). The statutory basis for this Court's jurisdiction is Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

Capt Stewart was tried at a general court-martial consisting of members for two specifications alleging a violation of Article 120, UCMJ. Consistent with his plea, he was found not guilty of Specification 1. Contrary to his plea, he was found guilty of

Specification 2 and the charge.[1] He was sentenced to two years confinement and a dismissal.[2] The convening authority approved the sentence as adjudged and ordered it executed.[3]

NMCCA affirmed the findings and the sentence in its January 31, 2011 opinion.[4] On March 1, 2011, Capt Stewart moved for reconsideration, which NMCCA denied on March 14, 2011. On April 12, 2011, Capt Stewart filed a petition for grant of review with this Court, which was granted on August 10, 2011.

Statement of Facts

1. The MBA graduation party.

In May 2008, Capt Stewart attended a party given at Ms. N's home to celebrate her graduation from George Mason University's MBA program.[5] Ms. N and Capt Stewart were well-acquainted, as they had been sexually intimate in the past.[6] All of the party-goers were drinking alcohol.[7]

Ms. N went to her room around 10:30 in the evening to sleep.[8] Capt Stewart joined her around 4:00 AM.[9] Although she did not remember going to bed, she recalled waking up unclothed

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[1] JA at 36, 83.
[2] JA at 84.
[3] JA at 11-12.
[4] *United States v. Stewart*, 2011 CCA LEXIS 15, unpublished op. (N.M. Ct. Crim. App. 31 Jan 2011).
[5] JA at 65.
[6] JA at 63-64.
[7] JA at 66.
[8] JA at 41, 50-51.
[9] JA at 42.

with Capt Stewart next to her and then putting her clothes on.[10] She also remembers that Capt Stewart touched her vagina while atop her, that she rebuffed his sexual intercourse advance, and that he stimulated himself until ejaculating onto her stomach.[11]

Ms. N also recalls Capt Stewart asking her afterwards if she was on the pill because he was concerned that they had not used a condom.[12] The two remained in the room together.[13] When Ms. N's brother checked in on them at about 7 or 8 AM, he was given no signs by Ms. N of discomfort or alarm.[14] Ms. N and Capt Stewart then joined others in the living room, including her brother, who reported that "neither of them acted odd or like anything was wrong."[15] Two days later, Ms. N told Capt Stewart that she was angry about being the "girl of choice" and felt used.[16] But Capt Stewart was distraught at having cheated on his girlfriend.[17] About a month after the party, Ms. N's brother accused Capt Stewart of sexually assaulting his sister.[18]

When Ms. N's parents learned of their daughter's claim from her brother, they contacted the Marine Corps, which began an investigation.[19] The Article 32 investigating officer, Colonel

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[10] JA at 58.
[11] JA at 59-60.
[12] JA at 62.
[13] JA at 43-44.
[14] *Id.*
[15] JA at 44-47.
[16] JA at 93; JA at 68-69.
[17] JA at 69.
[18] JA at 40, 48-49.
[19] JA at 37.

Thomas Bowers, USMC, found that "there exists no significant evidence that Ms. N was substantially incapacitated or was substantially incapable of declining participation in the sexual act."[20] Thus, he found that "reasonable grounds do not exist to believe that the accused committed the offense alleged," and recommended the charge be dismissed.[21]

2. The sole specification . . .

> In that Captain Nicholas S. Stewart, U.S. Marine Corps, on active duty, did, at or near Fairfax, Virginia, on or about 17 May 2008, engage in a sexual act, to wit: using his penis to penetrate the vagina of [Ms. N], who was *substantially incapacitated* or *substantially incapable* of declining participation in the sexual act.[22]

. . . severed into two substantively identical ones.

The defense objected to the specification, arguing that the MCM required the Government to choose between alleging substantially incapacitated, or substantially incapable, but that it could not allege both in a single specification.[23]

The military judge gave the defense two options: (1) keep the specification intact and have the members instructed that they can return a guilty finding on substantially incapacitated, or substantially incapable, but not both, or (2) have the specification severed into two specifications.[24] If severance was chosen and the members returned a guilty finding on both

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[20] JA at 113, 116.
[21] JA at 116.
[22] JA at 8 (emphasis added).
[23] JA at 13, 16 (citing MCM, ¶ 45b (3) (c)).
[24] JA at 16-23.

specifications, then the military judge would merge them for sentencing.[25] The defense chose severance.[26]

Substantively, the two resulting specifications allege the same offense, with Specification 1 using the language "substantially incapacitated," and Specification 2 using the language "substantially incapable of declining participation in the sexual act."[27]

3. Pursuing the consent defense.

At an Article 39(a) session – prior to members being empanelled – the military judge addressed the affirmative defense of consent, which Capt Stewart wanted to pursue.[28] The military judge ruled that because he was "in the best position" to determine if the consent defense is raised by the evidence,[29] Capt Stewart was required – then and there – "to show by a preponderance of the evidence" the existence of consent in the case.[30] The defense objected to the procedure, but to no avail.[31]

So Capt Stewart submitted two documents: (1) his declaration made under penalty of perjury provided to NCIS, and (2) the verbatim transcript of Ms. N's Article 32 testimony.[32] Based on this evidence the military judge ruled that the defense had met

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[25] JA at 24.
[26] JA at 25.
[27] JA at 10.
[28] JA at 26-30, 35.
[29] JA at 28.
[30] JA at 27.
[31] JA at 28.

its preponderance burden and would receive the consent-defense instruction, emphasizing that although the ruling was taking place at a preliminary stage in the trial, "I'm stuck with the state of evidence as it comes in[;]" so "[o]nce I make a ruling as to preponderance, that's it. It's coming in."[33]

4. Motion for a finding of not guilty denied.

After the prosecution rested, the defense moved for a not-guilty finding under R.C.M. 917.[34] The military judge denied it; and he did so without considering his finding that the evidence showed by a preponderance that Ms. N consented.[35]

5. The military judge's instructions.

The members were instructed that consent is a defense to the charge and its two specifications, that the evidence raised the defense, and that the prosecution had the burden to disprove consent beyond a reasonable doubt.[36] The military judge further instructed:

> In order to find the accused guilty [under Specification 1], you must be convinced . . . [that] the accused engaged in a sexual act, to wit: penetrate the vagina of [Ms. N] with his penis; and that the accused did so when [Ms. N] was *substantially incapacitated*.[37]
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> . . . .

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[32] JA at 28-29, 108-112, 117-170.
[33] JA at 30-31, 34-35.
[34] JA at 74.
[35] *Id.*
[36] JA at 80-81.
[37] JA at 77 (emphasis added).

> In order to find the accused guilty [under Specification 2], you must be convinced . . . [that] the accused engaged in a sexual act, to wit: penetrate the vagina of [Ms. N] with his penis; and that the accused did so when [Ms. N] was *substantially incapable of declining participation in the sexual acts* [sic].[38]

Substantially incapacitated and *substantially incapable of declining participation* were then defined identically for the members:

Substantially Incapacitated	**Substantially Incapable**
Means that level of mental impairment due to consumption of 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.[39]	Means that level of mental impairment due to consumption of 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.[40]

Next, the members were instructed that they could only return a guilty finding for one specification.[41] Thus, they were further instructed that if they found Capt Stewart not guilty of Specification 1, they had to vote on Specification 2; but if they

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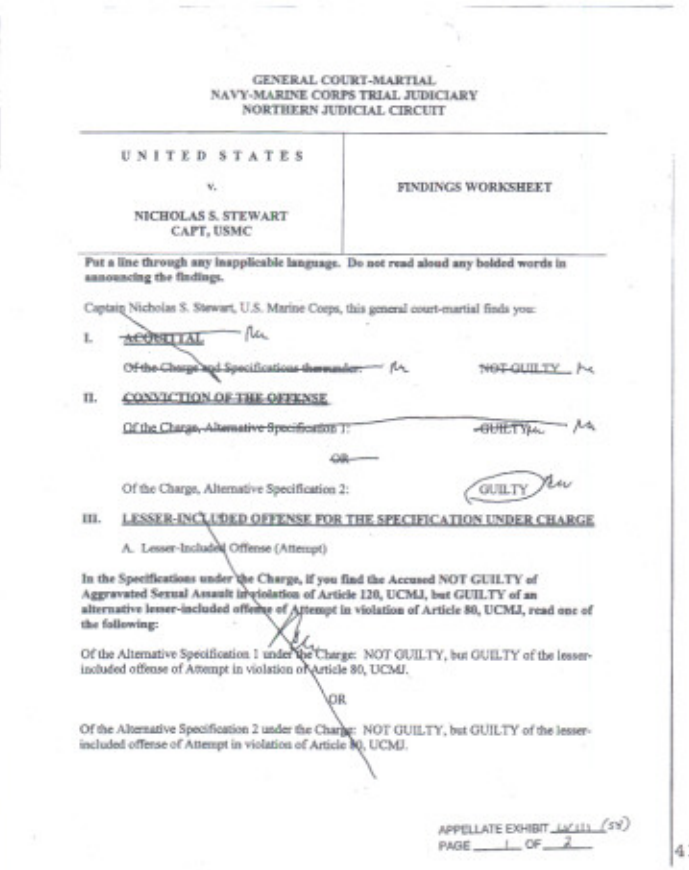
[38] JA at 79 (emphasis added).
[39] JA at 78, 171.
[40] JA at 172, 177.
[41] JA at 82.

found him guilty of Specification 1, they would not vote on Specification 2.[42]

6. Findings and evidence never given to the members.

Members found Capt Stewart not guilty of Specification 1, but guilty of Specification 2:



GENERAL COURT-MARTIAL
NAVY-MARINE CORPS TRIAL JUDICIARY
NORTHERN JUDICIAL CIRCUIT

UNITED STATES v. NICHOLAS S. STEWART CAPT, USMC	FINDINGS WORKSHEET

Put a line through any inapplicable language. Do not read aloud any bolded words in announcing the findings.

Captain Nicholas S. Stewart, U.S. Marine Corps, this general court-martial finds you:

I. ~~ACQUITTAL~~

~~Of the Charge and Specifications thereunder:~~ ~~NOT GUILTY~~

II. CONVICTION OF THE OFFENSE

~~Of the Charge, Alternative Specification 1:~~ ~~GUILTY~~

~~OR~~

Of the Charge, Alternative Specification 2: GUILTY

III. LESSER-INCLUDED OFFENSE FOR THE SPECIFICATION UNDER CHARGE

A. Lesser-Included Offense (Attempt)

In the Specifications under the Charge, if you find the Accused NOT GUILTY of Aggravated Sexual Assault in violation of Article 120, UCMJ, but GUILTY of an alternative lesser-included offense of Attempt in violation of Article 80, UCMJ, read one of the following:

Of the Alternative Specification 1 under the Charge: NOT GUILTY, but GUILTY of the lesser-included offense of Attempt in violation of Article 80, UCMJ.

OR

Of the Alternative Specification 2 under the Charge: NOT GUILTY, but GUILTY of the lesser-included offense of Attempt in violation of Article 80, UCMJ.

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[43]

And they did so without considering Capt Stewart's declaration or Ms. N's Article 32 testimony transcript – the evidence that the military judge ruled showed by a preponderance that Ms. N

[42] JA at 82.

[43] JA at 173; *see also* JA at 83.

consented – because he ruled they were "not in evidence."[44] But this ruling came at the end of trial, during Civilian Defense Counsel's closing argument:

> [CDC]: Captain Stewart has an absolute right to remain silent, and you're not allowed to draw any adverse inference from the fact that he remained silent. But you already know that he didn't remain silent. You saw the five-page document that NCIS was provided:
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> [TC]: Objection, sir.
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> [MJ]: Sustained. Not in evidence, sir.[45]

[44] JA at 75.
[45] *Id.*

Argument

I

RCM 917 REQUIRED THE MILITARY JUDGE TO ENTER A FINDING OF NOT GUILTY WHEN HE FOUND BY A PREPONDERANCE OF THE EVIDENCE THAT MS. N CONSENTED TO THE SEXUAL ACT BECAUSE, UNDER *UNITED STATES V. PRATHER*, IT WAS LEGALLY IMPOSSIBLE FOR THE PROSECUTION TO DISPROVE THE DEFENSE BEYOND A REASONABLE DOUBT.

Under R.C.M. 917, "[t]he 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 . . . if the evidence is insufficient to sustain a conviction of the offense affected."[46] Whether a not-guilty finding is required under R.C.M. 917, is an issue of legal sufficiency that this Court reviews *de novo*.[47]

Thus, the threshold question here is "'whether, after viewing the evidence in the light most favorable to the prosecution,'" it was possible for the affirmative defense of consent to be disproven "'beyond a reasonable doubt.'"[48] Under *United States v. Prather*,[49] the answer is no. There, this Court stressed that when the Article 120 double-burden shift becomes a legal impossibility, there must be a not-guilty finding:

> Article 120(t)(16), UCMJ, initially assigns the burden of proof for any affirmative defense to the accused. It then provides that "[a]fter the defense meets this burden, the prosecution shall have the burden of

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[46] RULE FOR COURTS-MARTIAL 917(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

[47] *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011) (citation omitted).

[48] *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

[49] *United States v. Prather*, 69 M.J. 338 (C.A.A.F. 2011).

> proving beyond a reasonable doubt that the affirmative defense did not exist."[50]
>
> . . .
>
> [But] the second burden shift is a legal impossibility. The problem with the provision is structural. If the trier of fact has found that the defense has proven an affirmative defense by a preponderance of the evidence, it is legally impossible for the prosecution to then disprove the affirmative defense beyond a reasonable doubt and there must be a finding of not guilty.[51]

Here, the military judge found that the defense had proved the consent defense by a preponderance of the evidence. So under R.C.M. 917 and *Prather*, he was required to enter a not-guilty finding.

Still, the Government will likely cling to NMCCA's notion that "the military judge was not the fact-finder, the members were the fact-finders."[52] Not true. Under R.C.M. 917 the military judge must be a fact-finder in order to determine "if the evidence is insufficient to sustain a conviction."

To be sure, the military judge could have ruled that he would instruct on the consent defense because there was "some evidence" that Ms. N consented.[53] But he explicitly rejected this standard on the record,[54] opted for the preponderance standard, and then found that the standard was met. That finding gave rise to the legal impossibility described in *Prather*, and entry of a not-guilty finding was therefore required.

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[50] *Prather*, 69 M.J. at 344-45.
[51] *Id.* at 345.
[52] *Stewart*, 2011 CCA LEXIS 15, at 17.
[53] *United States v. Maynulet*, 68 M.J. 374, 376 (C.A.A.F. 2010).
[54] JA at 31.

II

THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERRED IN FINDING THE EVIDENCE FACTUALLY SUFFICIENT TO SUSTAIN APPELLANT'S CONVICTION UNDER SPECIFICATION 2 BECAUSE, IN DOING SO, IT (1) VIOLATED THE *PRATHER* LEGAL-IMPOSSIBILITY PRINCIPLE AND (2) IMPERMISSIBLY FOUND AS FACTS ALLEGATIONS THAT HE WAS FOUND NOT GUILTY OF IN SPECIFICATION 1.

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.[55] The test for factual sufficiency is whether the reviewing court is convinced of the appellant's guilt beyond a reasonable doubt.[56] The test for legal sufficiency is "whether, considering the evidence in a light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt."[57]

This Court reviews factual determinations by service appellate courts for an abuse of discretion, which occurs if the service court's factual conclusions are arbitrary and capricious.[58] This Court reviews questions of legal sufficiency *de novo*.[59]

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[55] *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)).
[56] *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).
[57] *Id.* at 324 (citation omitted).
[58] *United States v. Baldwin*, 37 C.M.R. 336, 341 (C.M.A. 1967) (citations omitted).
[59] *United States v. Harman*, 68 M.J. 325, 327 (C.A.A.F. 2010).

A. Under *Prather*, it was impossible for NMCCA to find that the prosecution disproved the consent defense beyond a reasonable doubt.

As discussed, if consent is proved by a preponderance of the evidence, it is legally impossible for the defense to be disproved beyond a reasonable doubt. Thus, because the trial judge here found that Capt Stewart proved by a preponderance that Ms. N consented, it was impossible for NMCCA to find that this defense was disproved beyond a reasonable doubt. Thus, the lower court should have done what the trial judge failed to do: conclude that a not-guilty finding was required. It erred by not doing so.

B. NMCCA impermissibly found as facts allegations that Capt Stewart was found not guilty of in Specification 1.

Review by a court of criminal appeals is limited by the principle announced by this Court in *United States v. Smith*: that it "may not make findings of fact contradicting findings of not guilty reached by the fact-finder."[60] That is, a reviewing court is prohibited from finding "as fact any allegation in a specification for which the fact-finder below has found the accused not guilty."[61]

In *United States v. Walters*, this Court indicated that the *Smith* principle applies in "a narrow circumstance involving the

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[60] *United States v. Smith*, 39 M.J. 448, 451-52 (C.M.A. 1994) (citations omitted).

[61] *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003) (citing *Smith*, 39 M.J. at 451; *United States v. Nedeau*, 23 C.M.R. 182, 185 (C.M.A. 1957).

conversion of a 'divers occasions' specification to a 'one occasion' specification through exceptions and substitutions."[62] In this situation, the guilty finding by exceptions and substitutions means that the accused was found not guilty of some of the acts alleged.[63] And when there is no indication of which acts the accused was found not guilty of and which act formed the basis of the conviction, the findings are ambiguous and cannot be reviewed on appeal because "such action creates the possibility that the court would affirm a finding of guilt based on an incident of which the appellant had been acquitted by the fact-finder at trial."[64]

But this Court's *Walters* opinion – and its "narrow circumstance" limitation – could not have predicted other circumstances where, because of the Government's charging decisions, error by the military judge, or both, the *Smith* principle would apply.

For example, in *United States v. Saxman*, NMCCA applied this principle to a non-divers-occasions specification.[65] There, the Government charged the accused – in one specification – with possessing 22 video files containing child pornography.[66]

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[62] *Walters*, 58 M.J. at 396.
[63] *United States v. Rodriguez*, 66 M.J. 201, 204-05 (C.A.A.F. 2008).
[64] *United States v. Wilson*, 67 M.J. 423, 428 (C.A.A.F. 2009) (citing *Walters*, 58 M.J. at 395); *see also United States v. Augsburger*, 61 M.J. 189, 192 (C.A.A.F. 2005).
[65] *United States v. Saxman*, 2010 CCA LEXIS 68 (N.M. Ct. Crim. App. 2010).
[66] *Id.* at 5.

Members found the accused guilty by excepting the number 22 and substituting the number 4, but did not indicate which 4 files the guilty finding was based upon.[67] Applying *Smith*, NMCCA found that it could not conduct a proper Article 66 review because it could not "affirm a conviction for *any* video without creating a risk that doing so [would] overturn the members' not-guilty findings."[68] The Army Court of Criminal Appeals reached a similar conclusion in *United States v. Karajman*,[69] a case that also did not involve a divers-occasions specification.

As in *Saxman* and *Karajman*, this case presents circumstances – unforeseeable by this Court in *Walters* – where *Smith* applies. That is, this Court could not have predicted that:

(1) an accused would be charged identically in two specifications under the same charge,

(2) the military judge would require the members to vote on both, and

(3) the members would find the accused not guilty of the first specification, but guilty of the second.

Because these circumstances exist here, when NMCCA found the evidence factually sufficient to sustain Capt Stewart's conviction under Specification 2,[70] it found as facts the very allegations that the members found him not guilty of in Specification 1, which *Smith* prohibits.

Of course, this case differs from *Smith* and *Walters*. Those

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[67] *Saxman*, 2010 CCA LEXIS 68, at 8-9.

[68] *Id.* at 17.

[69] *United States v. Karajman*, 2007 CCA LEXIS 594, unpublished op. (Army Ct. Crim. App. 10 Sep 2007); *see* JA at 175.

cases deal with the creation of findings ambiguity when a divers-occasions specification is converted to a single-occasion specification by exceptions and substitutions, while this case deals with incompatible findings on substantively identical specifications. And unlike those cases, here it is possible to determine which act formed the basis of the members' guilty and not-guilty findings—that act just happens to be the same for both. But these differences do not foreclose the application of the *Smith* principle here. As shown via *Saxman* and *Karajman*, the principle is not reserved for the "narrow circumstances" described in *Walters*.

Indeed, unlike *Smith* and *Walters*, here it was certain that, if NMCCA affirmed the Specification 2 guilty finding, it would find as fact the very allegations that members found Capt Stewart not guilty of in Specification 1. This was inescapable because the Specification 1 element – substantially incapacitated – and the Specification 2 element – substantially incapable – were defined identically for the members by the military judge.

This Court should therefore: (1) set aside the findings and the sentence, and (2) dismiss the charge with prejudice because double-jeopardy principles bar a rehearing.[71]

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[70] *Stewart*, 2011 CCA LEXIS 15, at 18-21.

III

THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY REQUIRING THE DEFENSE TO PRESENT EVIDENCE ON THE DEFENSE OF CONSENT AT AN ARTICLE 39(a) SESSION PRIOR TO TRIAL.

A military judge has discretionary control over the presentation of evidence.[72] Still, the exercise of this control must comply with the Due Process Clause of the Fifth and Fourteenth Amendments, which require that "criminal defendants be afforded a meaningful opportunity to present a complete defense," and that prosecutions be fundamentally fair, respectively.[73] This Court reviews a military judge's discretionary action for an abuse of discretion,[74] but reviews denial-of-due-process claims *de novo*.[75]

A. The military judge erred.

Here, the military judge erred – and NMCCA agreed[76] – by requiring Capt Stewart to present consent evidence before the Government's case. This was error because "[a]n affirmative defense 'may be raised by evidence presented by the defense, the

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[71] *Walters*, 58 M.J. at 397.
[72] *See* R.C.M. 801(a), R.C.M. 913(c), and Mil. R. Evid. 611(a).
[73] *United States v. Webb*, 66 M.J. 89, 92 (C.A.A.F. 2008) (citations omitted).
[74] *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010) (citations omitted).
[75] *United States v. Othuru*, 65 M.J. 375, 380 (C.A.A.F. 2007) (citation omitted).
[76] *Stewart*, 2011 CCA LEXIS 15, at 13.

prosecution, or the court-martial.'"[77]

This error was exacerbated because the military judge required Capt Stewart to present the evidence with members absent. Article 120(t)(16) requires that consent evidence be presented to the fact-finder at trial. Its presentation with the members absent made no sense, unless of course the military judge was going to give it to them later, which did not happen.

B. Captain Stewart was prejudiced.

(1) The error contributed to the guilty findings.

This Court considers the whole record in determining whether a constitutional error was harmless beyond a reasonable doubt.[78] The Government bears the burden of establishing that the error was harmless because there is no reasonable possibility that it contributed to the guilty findings.[79]

As the Supreme Court emphasized, an accused has a "right as a matter of simple due process to present evidence favorable to himself on an element that must be proven to convict him."[80] And as this Court stressed in *Prather*, consent evidence "'must be considered in deciding whether there [is] a reasonable doubt

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[77] *United States v. Hibbard*, 58 M.J. 71, 73 (C.A.A.F. 2003) (quoting R.C.M. 916(b) discussion).

[78] *United States v. Othuru*, 65 M.J. 375, 377 (C.A.A.F. 2007) (citation omitted).

[79] *Id.* (citations omitted).

[80] *United States v. Clark*, 548 U.S. 735, 769 (2006); *see also Chambers v. Mississippi*, 410 U.S. 284, 294 (1973)("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.").

about the sufficiency of the State's proof of the elements of the crime.'"[81] Neither of these principles was adhered to here because the military judge failed to provide the members with the consent evidence that his preponderance ruling was based upon. As a result, the members did not see Capt Stewart's NCIS statement, and therefore were not given his version of events: that Ms. N consented, or appeared to consent, to sexual relations with him.[82]

Had the members seen this evidence, they likely would have acquitted. Indeed, the critical difference in evidence possessed by Col Bowers – the IO – and the members, was Capt Stewart's written statement, which Col Bowers found to be crucial evidence.[83] With the statement considered, Col Bowers concluded that "reasonable grounds do not exist to believe that the accused committed the offense alleged," and recommended the charge be dismissed.[84] Without it, the members convicted. Under these circumstances, the Government cannot prove that there is no reasonable possibility that the error here contributed to the findings.

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[81] *Prather*, 69 M.J. at 344 (original brackets omitted) (quoting *United States v. Neal*, 68 M.J. 289, 299 (C.A.A.F. 2010) (quoting *Martin v. Ohio*, 480 U.S. 228, 234 (1987)).

[82] JA at 111-12.

[83] JA at 115.

[84] JA at 116.

2. Capt Stewart was prejudiced because he was led to believe that his statement was admitted into evidence, and he planned his trial strategy around that belief.

The Government will likely argue that Capt Stewart could have given his version of events by testifying. True, but irrelevant. His testimony was unnecessary because his version of events had already been admitted into evidence via his statement. This was Civilian Defense Counsel's understanding, which is why he tried to argue in his closing argument that Capt Stewart did not remain silent: "You saw the five-page document that NCIS was provided." The prosecutor thought so too. When the defense moved for a not-guilty finding under R.C.M. 917, he argued: "The accused, by his own admissions, admitted to having sex with her on the early morning hours of 17 May 2008 . . . ."[85] The "admission" that the prosecutor was referring to was found in Capt Stewart's statement. And in denying the 917 motion, the military judge never indicated that Capt Stewart's declaration was not in evidence. Nor should he have, since he based his preponderance ruling partly upon it.

Because Capt Stewart relied on this evidence to plot his trial strategy, it was prejudicial for the military judge to rule – during closing arguments – that it was not in evidence. The Third Circuit's 2010 opinion in *United States v. Liburd*[86] is instructive on this point.

In *Liburd*, the accused was passing through an airport X-ray

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[85] JA at 74.

[86] *United States v. Liburd*, 607 F.3d 339 (3rd Cir. 2010).

scanner when two brick-like objects were detected in his luggage.[87] The accused said that they were "bricks of cheese."[88] Satisfied with this answer, and after discovering and discarding two bottles of shampoo that were not allowed on the flight, security allowed Liburd to proceed to his gate.[89] While in line for his flight, Liburd was selected for a random inspection, during which he stated, "there's something in my bag."[90] It was then discovered that the "bricks" were cocaine, and he was arrested.[91]

At trial, Liburd moved to suppress the statements he made at the airport.[92] This motion was not ruled on because the prosecutor promised not to introduce any of those statements.[93] As a result, Liburd argued that he did not know that there were bricks of cocaine in his bag, and that maybe someone put them there after he cleared the X-ray machine.[94] But this argument, the Third Circuit noted, had two weaknesses: (1) the testimony by X-ray personnel that the bricks were there when he passed through, and (2) his cheese statement.[95]

Liburd attacked the first weakness by arguing that the two

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[87] *Liburd*, 607 F.3d at 340.
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.* at 341.
[93] *Id.*
[94] *Id.*
[95] *Id.*

bricks seen on the X-ray were actually the two shampoo bottles.[96] Of course, this did not explain his cheese statement, but Liburd did not have to explain that statement because the prosecutor had promised not to introduce it.[97] As the Third Circuit highlighted, "So long as that promise was kept, the jury would never hear about the cheese statement, and Liburd's theory [that someone put the cocaine in his bag after he cleared the X-ray machine] remained plausible."[98]

But the government broke its promise and elicited testimony about Liburd's cheese statement.[99] Liburd therefore moved for a mistrial, arguing that the prosecutor's deliberate elicitation of testimony about the cheese statement unfairly prejudiced his defense.[100] The trial judge denied the motion and instead instructed the jury to disregard the statement.[101] Liburd was then convicted.[102]

On appeal, the Third Circuit reversed, finding that the prosecutor's actions "made a fair trial impossible"[103] because it detrimentally influenced the defense strategy:

> [The prosecutor's] promise . . . not to introduce "any" statements Liburd made influenced Liburd's strategic decisions – and therefore the record evidence before us – from the outset. But for [the prosecutor's] promise,

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[96] *Liburd*, 607 F.3d at 341.
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.* at 341-42.
[101] *Id.* at 342.
[102] *Id.*
[103] *Id.* at 345.

> Liburd almost certainly would have chosen a trial strategy with a better chance of success. . . . Indeed, Liburd's trial strategy must have been crafted with [the prosecutor's] promise in mind. His theory of the case was that someone slipped the cocaine into his bag after he passed through the TSA checkpoint, and that the "objects" [seen] on the X-ray machine were the bottles of shampoo . . . later discarded.
>
> . . . .
>
> The Cheese statement obliterated this theory. Evidence that Liburd had acknowledged having bricks of *something* in his bag all but disproved his claim that his bag contained only shampoo.
>
> . . .
>
> [And] even if jurors were inclined to believe that the masses revealed by the X-ray scanner were shampoo, they still would have been left with an obvious question: what were the bricks that Liburd [said] were cheese? Liburd had no answer, because he was led to believe that he would not need one. If he had known that the jury would hear about the Cheese Statement, however, surely he would have adjusted his strategy accordingly.[104]

Thus, the Third Circuit concluded that the prosecutor's "use of the Cheese Statement 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'"[105]

Here, the military judge led Capt Stewart to believe that his statement was in evidence. The military judge referred to it as evidence; he based his preponderance finding partly upon it; and, by all accounts, he relied on it in denying the defense's 917 motion. Thus, it was sensible for Capt Stewart to believe that the statement would be given to the members for the same reason it was given to the military judge – to show that Ms. N

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[104] *Liburd*, 607 F.3d at 345 (citation omitted).

consented – a defense theory from the beginning.

Thus, in trying to argue the consent defense in closing argument, Civilian Defense Counsel referred to Capt Stewart's statement, only to learn that the military judge considered it not in evidence. This obviously influenced civilian counsel's closing argument, as he suddenly argued to the members that the prosecution had provided no evidence that sexual intercourse occurred at all.[106] Surely this was not planned; he never would have argued that the prosecution offered no evidence that sex took place after just directing the members to Capt Stewart's statement, which indicates that it had. Thus, the members were smacked with contradictory arguments: (1) that no sex occurred, per the defense counsel's closing argument, and (2) that sex occurred and it was consensual, per the military judge's instruction. This was disastrous.

As in *Liburd*, had Capt Stewart known that the evidence the military judge based his preponderance ruling upon would never be seen by the members, he surely would have adjusted his trial strategy. He may have testified, or the defense theory of the case may have changed. Like the *Liburd* court, this Court can only speculate. But what is not speculative is that Capt Stewart's reliance on his statement being in evidence, and the subsequent ambush of having it deemed not in evidence, "'so infected the trial with unfairness as to make the resulting

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[105] *Liburd*, 607 F.3d at 346 (citation and bracket omitted).

conviction a denial of due process[,]'"[107] just like in *Liburd*.

Conclusion

As this Court emphasized in *United States v. Elfayoumi*, military judges have "the constitutional and statutory duty to ensure that an accused receives a fair trial."[108] That did not happen here. The "problematic" nature of the new Article 120 described by this Court in *Medina*,[109] so perplexed the military judge that he required Capt Stewart to present consent evidence before the prosecution's case. From there, the errors continued to pile up.

The military judge did not recognize that his preponderance ruling required a not-guilty finding. Yet even this error's impact may have been mooted had he provided the members with the consent evidence that he based his preponderance ruling upon, as the members likely would have voted for a full acquittal if he had. But he didn't, and the result was that the members were presented with a ruinous argument: that no sex occurred, but if it did, it was consensual. This, combined with the conclusions of Col Bowers — who had Capt Stewart's statement — makes it impossible for the Government to prove beyond a reasonable doubt that this error did not contribute to Capt Stewart's conviction.

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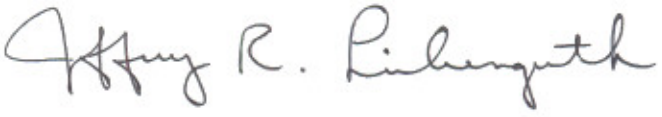
[106] JA at 76.
[107] *Liburd*, 607 F.3d at 346 (citation and bracket omitted).
[108] *United States v. Elfayoumi*, 66 M.J. 354, 356 (C.A.A.F. 2008).
[109] *United States v. Medina*, 69 M.J. 462, 465 n. 5 (C.A.A.F. 2011).

Still, NMCCA could have set things right. But it also failed to recognize that a not-guilty finding was required because of the interplay between the military judge's preponderance ruling, R.C.M. 917, and the *Prather* legal-impossibility principle. Even so, it had another opportunity to ensure a correct outcome, an opportunity missed because it did not see that under *Smith*, it could not conduct a factual-sufficiency review of Capt Stewart's case.

In the end, Capt Stewart should prevail on all three of the issues presented. This Court should therefore set aside his conviction and sentence, and dismiss the charge with prejudice under Issue I or II.



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I certify that the original and seven copies of the foregoing brief and the joint appendix were hand-delivered to the Court, and that copies of each were hand-delivered to Appellate Government Division and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on September 8, 2011.

Certificate of Compliance

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