

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S,) **FINAL BRIEF ON BEHALF OF**
Appellee) **APPELLANT**
)
v.) Crim. App. No. 20110348
)
Specialist (E-4)) USCA Dkt. No. 13-0565/AR
)
CHRISTOPHER R. KEARNS,)
United States Army,)
Appellant)

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

Issue Presented

**WHETHER THE EVIDENCE IS LEGALLY SUFFICIENT
TO PROVE THAT APPELLANT HAD THE INTENT TO
ENGAGE IN CRIMINAL SEXUAL CONDUCT WITH KO, A
MINOR, WHEN HE FACILITATED KO'S TRAVEL IN
INTERSTATE COMMERCE AND WAS FOUND GUILTY IN
SPECIFICATION 1 OF CHARGE III OF VIOLATING
18 U.S.C. § 2423(a).**

Statement of Jurisdiction

The Army Court of Criminal Appeals [hereinafter Army Court] had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 866 (2012). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On January 4, April 27, and May 5-6 2011, an officer panel sitting as a general court-martial tried Specialist (SPC) Christopher R. Kearns in absentia at Fort Bliss, Texas.

Contrary to the not guilty pleas the military judge entered on SPC Kearns' behalf, the panel convicted SPC Kearns of false official statement, aggravated sexual assault of a child under the age of sixteen years, transporting a minor across state lines with the intent to engage in criminal sexual conduct with the minor, and disorderly conduct, in violation of Articles 107, 120, and 134, UCMJ, 10 U.S.C. §§ 907, 920, 934 (2006).

Specialist Kearns was found not guilty of adultery in violation of Article 134, UCMJ. The panel sentenced SPC Kearns to reduction to E-1, forfeiture of all pay and allowances, confinement for four years, and a bad-conduct discharge. The convening authority approved the adjudged sentence. Specialist Kearns is currently in confinement at the Joint Regional Correctional Facility at Fort Leavenworth, Kansas. (JA 123).

On April 17, 2013, the Army Court set aside the finding of guilty for disorderly conduct (Specification 2 of Charge III). (JA 1). The Army Court affirmed the remaining specifications and the sentence. On September 24, 2013, this Honorable Court granted SPC Kearns' petition for review.

Statement of Facts

Specialist Kearns' brother, Jonathan Kearns, was married to Angela Kearns. (JA 17-19). Angela's sister, KO, lived with Jonathan and Angela. (JA 17-19). In November and December 2009, while SPC Kearns was home on leave for the holidays, he

and KO had sexual intercourse twice. (JA 22, 24). Each time they had sex, KO initiated the sexual encounter with SPC Kearns while he was drunk. (JA 38). KO was fifteen years-old at the time, and SPC Kearns had known KO for several years prior. (JA 17-18).

The first sexual encounter between SPC Kearns and KO took place late at night while SPC Kearns was at his brother's house in Sipesville, Pennsylvania for Thanksgiving leave in November 2009. (JA 22). Specialist Kearns was extremely intoxicated, and was asleep on a couch when KO initiated the sexual encounter. (JA 46, 79). The pair engaged in sexual intercourse. (JA 22). However, SPC Kearns was unable to clearly recall the entire episode. (JA 67). He was uncertain whether he had sexual intercourse with KO. (JA 67). Specialist Kearns told his friend, Justin Weigle, that he thought he had sex with KO. (JA 67).

Specialist Kearns returned to Pennsylvania on leave in December 2009. (JA 68). According to KO, SPC Kearns and KO had sexual intercourse again. (JA 24). KO testified that SPC Kearns came to her house late at night and SPC Kearns was extremely intoxicated. (JA 38, 44). According to KO, she approached SPC Kearns and once again initiated the sexual encounter with SPC Kearns by kissing him. (JA 46). Specialist

Kearns had trouble walking and talking due to his high level of intoxication before and after this sexual encounter. (JA 45).

Specialist Kearns returned to his duty station at Fort Bliss in January 2010 and remained in contact with KO. (JA 26). KO told SPC Kearns that she loved him. (JA 27). KO's feelings for SPC Kearns grew deeper and she expressed a desire to go to Texas to see him. (JA 29). KO sent an unsolicited picture of herself topless to SPC Kearns. (JA 100).

In mid-January 2010, KO told SPC Kearns that she was being raped by SPC Kearns' brother, Jonathan Kearns. (JA 27-28). At trial, KO testified that she made up this false sexual assault allegation because she wanted to go to Texas to be with SPC Kearns. (JA 27-28).

Specialist Kearns told a female friend of his, Nicole, about KO's revelations and had Nicole contact KO and talk to her about the abuse that KO was suffering. (JA 120-22). Nicole, whose real name is NA, was a friend of SPC Kearns from El Paso, Texas. (JA 49, 120-22). Nicole and KO talked on the phone about the sexual assaults, then Nicole and SPC Kearns talked about bringing KO to Texas to live with Nicole to stop the sexual abuse KO was suffering. (JA 60, 120-22). Specialist Kearns and KO made arrangements for KO to travel to Texas. (JA 28). Initially, KO planned to ride a bus to Texas, but Nicole volunteered to pick up KO in Pennsylvania on her way back from a

trip to New York. (JA 29). Once in Texas, KO was supposed to live with Nicole and help Nicole at her house. (JA 28).

In late January 2010, Nicole and several of her friends left El Paso, Texas, and drove east. (JA 52). Nicole told SPC Kearns that she was going on a vacation, and KO believed that Nicole had a trip planned to New York. (JA 29, 120-22). Specialist Kearns gave Nicole approximately \$700 for the trip. (JA 52). Nicole picked up KO and another minor, KS, in Pennsylvania and drove towards Texas. (JA 53). On January 23, 2010, Nicole and her passengers were pulled over in Texas by civilian police. (JA 33-34). The police determined that KO and KS were minors and possible runaways. (JA 34, 56, 120-22).

After Nicole, KO, and the others were pulled over, Texas law enforcement officials contacted Fort Bliss investigators. Army investigators interviewed SPC Kearns about his relationship with KO and his involvement in her travel to Texas. (JA 119-22). Specialist Kearns downplayed the extent of his previous relationship with KO, including the fact that he previously had sex with her. (JA 119-22).

At trial KO testified that when she and SPC Kearns discussed her traveling to Texas, the two did not discuss having sex with each other. (JA 36). On the contrary, SPC Kearns and KO decided that their previous encounters were mistakes and that they would wait until KO was an adult to continue their

relationship. (JA 37). KO believed that SPC Kearns thought her rape allegations were true. (JA 38).

The military judge instructed the panel that, "The offense of transporting a minor in interstate commerce with the intent to engage in sexual intercourse requires a *specific intent* to engage in sexual intercourse with [KO] knowing she was a minor." (JA 97-98) (emphasis added). The military judge did not further define "intent."

The Army Court held that the government was not required to prove that SPC Kearns' intent to have sex with KO "was a motivating, compelling, or significant purpose of transporting KO across state lines." *United States v. Kearns*, 72 M.J. 586, 588 (Army Ct. Crim. App. 2013). Instead the Army Court adopted a less stringent standard and held that "[a]s long as the illegal sexual activity is a purpose of the transport and not merely incidental to the travel, the requisite intent is met." *Id.* at 589.

Summary of Argument

The government's circumstantial evidence is not sufficient to support the finding that SPC Kearns arranged for KO's travel to Texas with "compelling" or "significant" purpose to engage in criminal sexual conduct. The government relied on the fact that KO initiated sexual intercourse with SPC Kearns on two previous occasions in Pennsylvania to establish SPC Kearns' intent.

However, SPC Kearns' intent cannot be determined by the actions of KO. There was no evidence that SPC Kearns was motivated by a "significant" or "compelling" purpose to engage in illegal sexual conduct with KO. The evidence established that SPC Kearns' "compelling" or "significant" purpose for effecting KO's travel to Texas was to remove her from the abusive environment in Pennsylvania.

Argument

WHETHER THE EVIDENCE IS LEGALLY SUFFICIENT TO PROVE THAT APPELLANT HAD THE INTENT TO ENGAGE IN CRIMINAL SEXUAL CONDUCT WITH KO, A MINOR, WHEN HE FACILITATED KO'S TRAVEL IN INTERSTATE COMMERCE AND WAS FOUND GUILTY IN SPECIFICATION 1 OF CHARGE III OF VIOLATING 18 U.S.C. § 2423(a).

Law

This Court conducts a de novo review for issues of legal sufficiency. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

"The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humphreys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987) (citations omitted)). The assessment of legal sufficiency is

limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

The term "reasonable doubt" does not mean that the evidence must be free from conflict. *United States v. Reed*, 51 M.J. 559, 562 (N-M. Ct. Crim. App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000). However, it does mean that the government must prove guilt "to an evidentiary certainty" and must exclude "every fair and reasonable hypothesis of the evidence except that of guilt." Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 2-5 (1 Jan. 2010).

18 U.S.C § 2423(a) is part of the Mann Act and states in pertinent part:

A person who knowingly transports an individual who has not attained the age of 18 years in interstate . . . commerce . . . with intent that the individual engage . . . in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title and imprisoned not less than 10 years or for life.

"The government must prove beyond a reasonable doubt that the [accused]: (1) knowingly transported a minor across state lines, (2) with the intent to engage in sexual activity with the minor [for which any person can be charged with a criminal offense], and (3) that the minor was under eighteen at the time of the offense." *United States v. Broxmeyer*, 616 F.3d 120, 128 (2d Cir. 2010) (quotations omitted). The government bears the

burden of proving that the intended sexual act would be criminal conduct. Additionally, in the context of a specification alleged under clause 3 of Article 134, UCMJ, the government also has the burden to prove that the federal statute was in effect at the time of the alleged offense. Omission of proof on any of the elements is fatal to the government's efforts to convict under the federal statute.

In analyzing a former version of the Mann Act, the Supreme Court stated that "the dominant motive" of the trip must be to engage in outlawed conduct. *United States v. Mortenson*, 322 U.S. 369, 375 (1944). Courts have since held that criminal sexual activity need not be the only purpose of interstate travel. *United States v. Meacham*, 115 F.3d 1488, 1495 (10th Cir. 1997).

Even if multiple purposes exist, several circuits have added modifiers to "purpose" in determining an accused's intent when transporting a minor under 18 U.S.C. 2423(a). The Second Circuit recognized that a person can have more than one dominant purpose, "in the context of multiple purposes, 'dominant' simply means that these motivations predominate over other, less powerful motivations for conduct." *United States v. Miller*, 148 F.3d 207, 212 (2d Cir. 1998); see also *United States v. Hayward*, 359 F.3d 631, 638 (3rd Cir. 2004) (a "significant or motivating purpose of the travel across state . . . boundaries [must be] to

have the individual [being] transported engage in illegal sexual activity"); *United States v. Campbell*, 49 F.3d 1079, 1083 (5th Cir. 1995) ("[i]n determining whether a 'dominant purpose' exists, we instead ask whether the illicit behavior is 'one of the efficient and compelling purposes' of the travel") (citations omitted); *United States v. Meacham*, 115 F.3d 1488, 1495 (10th Cir. 1997) ("illicit sexual activity need not be the only purpose for interstate travel; it is sufficient if it was one of defendant's efficient and compelling purposes") (quotations and citations omitted).

Other circuits do not add modifiers such as "significant" or "compelling" to purpose when determining an accused's intent under the Mann Act. In *United States v. McGuire*, the Seventh Circuit expressly rejected the use of modifiers. 627 F.3d 622 (7th Cir. 2010). It held that instead of courts attempting to define "dominant," the real question should be whether the trip would have taken place "had a sex motive not been present." *Id.* at 625. (rejecting other courts' attempts to "define down [] 'dominant' to mean 'significant,' 'efficient and compelling,' 'predominat[ing],' [and] 'motivating'") (citations omitted); see also *United States v. Hoffman*, 626 F.3d 993, 996 (8th Cir. 2010) (the illicit behavior does not need to be the dominant purpose but "must be one of the purposes"); *United States v. Tavares*, 705 F.3d 4, 17 (1st Cir. 2013) (the intent to engage in

criminal sexual activity needs to be "at least one of the defendant's motivations for taking the trip in the first place") (quotations omitted).

While the courts may disagree on whether the intent to engage in illegal sexual conduct has to be a "compelling", "significant" or "efficient" motivating purpose of the travel versus just a motivating purpose of the travel, the courts agree that the sexual activity cannot be merely incidental to the trip. See *Hoffman*, 626 F.3d at 996 ("[t]he sexual activity . . . may not be merely incidental to the trip"); see also *Hayward*, 359 F.3d at 638; *United States v. Garcia-Lopez*, 234 F.3d 217, 220 (5th Cir. 2000) ("'[D]ominant motive' is equated with 'motivating purpose,' and if a particular purpose is not motivating, then it is merely non-existent or incidental.").

"The plain wording of the statute requires that the *mens rea* of intent coincide with the *actus reus* of crossing state lines." *United States v. Broxmeyer*, 616 F.3d 120, 129 (2nd Cir. 2010). The government must prove that the accused formed the intent to engage in illegal sexual conduct with a minor at the time that a state line was crossed. See *Broxmeyer*, 616 F.3d at 129-30. However, the illicit intent only need to have been formed "before the conclusion of the interstate state [sic] journey." *Hoffman*, 626 F.3d at 997 (alteration in original) (quotations and citations omitted).

"The intent, purpose and motive of the accused in transporting the [minor] may be proved by circumstantial evidence. The conduct of the parties within a reasonable time before and after the trip are circumstances which a jury may consider in determining such intent, motive or purpose." *United States v. Brooks*, 309 F.2d 580, 583 (10th Cir. 1962).

Argument

A. The Army Court's decision

The Army Court erred when it rejected SPC Kearns' argument that the government had to prove that the intent to engage in "illegal sexual activity with KO was a motivating, compelling, or significant purpose" for the interstate travel. *Kearns*, 72 M.J. at 588. In rejecting SPC Kearns' position, the Army Court stated, "Rather the circuits are in essential agreement that an accused must entertain the intent that the minor engage in unlawful sexual activity as a purpose of the transportation not necessarily *the* purpose." *Id.* at 588 (emphasis in original) (citing *United States v. Hayward*, 359 F.3d 631 (3rd Cir. 2004)).

After acknowledging that there is no "published military justice opinion relative to the intent" element, the Army Court adopted the "formula-less" standard of *McGuire* and held that "[a]s long as the illegal sexual activity is a purpose of the transport and not merely incidental to the travel, the requisite intent is met." *Id.* at 588-89 (emphasis added). This standard

adopted by the Army Court is less rigorous than the standards adopted by some federal circuits. See *Hayward*, 359 F.3d at 638 (upholding a jury instruction requiring the government to prove that the intent to engage in illegal sexual activity was "a significant or motivating" purpose for the travel; *Campbell*, 49 F.3d at 1083 (finding that unlawful sex must be an "efficient and compelling purpose" for the travel).

Specialist Kearns agrees with the Army Court that the Supreme Court's usage of the term "dominant" in *Mortenson* does not require the government to prove that the intent to have sex was the sole purpose for interstate travel. *Id.* at 558; see *Mortenson*, 322 U.S. at 375. However, the Second, Third, Fifth, and Tenth circuits still modify the term "purpose" and require that the intent to engage in illegal sexual conduct be more than just a purpose. Meanwhile, the First, Seventh, and Eighth circuits have dispensed with modifiers.

In perhaps the strongest modification of the terms "purpose" or "motive," the Second Circuit held that the intent to engage in illegal sexual conduct must "predominate over other, less powerful motivations." *Miller*, 148 F.3d at 212; see also *Hayward*, 359 F.3d at 638 (a "significant or motivating purpose of the travel across state . . . boundaries [must be] to have the individual [being] transported engage in illegal sexual activity").

Inexplicably, the Army Court improperly cited to *Campbell* in support of its new standard which abandoned the modifiers adopted by several circuits. *Kearns*, 72 M.J. at 589. The Fifth Circuit held that the intent to engage in illegal sexual conduct must be "one of the efficient and compelling purposes of the travel." *Campbell*, 49 F.3d at 1083 (quotations and citations omitted). The Army Court dropped the "compelling" modifier from the standard in *Campbell*. *Id.* This Court should reject the lower standard created by the Army Court and instead apply the "compelling purposes" standard from *Campbell* or the "significant purposes" standard from *Hayward*.

B. The evidence is legally insufficient

The government failed to prove that SPC Kearns transported KO across state lines with the intent to engage in criminal sexual conduct with KO. For SPC Kearns to be guilty, the government must prove that the intent to engage in illegal sexual conduct predominated "over other, less powerful motivations." *Miller*, 148 F.3d at 212. Or the government must show that the intent to engage in unlawful sex with KO was a *significant* purpose of the travel. *Hayward*, 359 F.3d at 638; see also *Campbell*, 49 F.3d at 1083 (finding that unlawful sex must be an efficient and compelling purpose for the travel). Specialist Kearns' compelling or significant motivation to transport KO from Pennsylvania to Texas was to remove KO from a

situation where KO reported to SPC Kearns that she was subjected to sexual assault from SPC Kearns' brother. According to KO, she did not discuss having sex with SPC Kearns prior to attempting her travel to Texas. Specialist Kearns' motivation was to remove KO from an unsafe environment, that motivation alone "predominate[d] over [any] other, less powerful motivations." *Miller*, 148 F.3d at 212. Thus, SPC Kearns compelling or significant purpose of having KO travel to Texas was not to engage in illegal sexual conduct. If KO intended to initiate sexual activity with SPC Kearns in Texas then that conduct would have been merely incidental to the travel and would not be reflective of SPC Kearns' intent. Specialist Kearns' desire to remove KO from a dangerous situation predominated over any lesser motivations. *Miller*, 148 F.3d at 212.

The government's prosecution of SPC Kearns under the Mann Act relied solely on circumstantial evidence. (JA 99). This circumstantial evidence is not legally sufficient to support SPC Kearns' conviction. When using circumstantial evidence to prove the accused's intent, purpose, or motive in a Mann Act prosecution, it is appropriate to consider the conduct of the parties within a reasonable time before the travel. See *Brooks*, 309 F.2d 583.

In this case, the government overstated the significance of SPC Kearns' prior sexual history with KO. (JA 99). The government argued that SPC Kearns' intent was to have sex with KO once she got to Texas. (JA 100). However, SPC Kearns' conduct, as it relates to KO, from November 2009 through January 2010 does not support a finding that a motivating, significant, or compelling purpose for transporting KO was to engage in criminal sexual conduct with her. See *Bonty*, 383 F.3d at 578.

The sexual activity between SPC Kearns and KO in Pennsylvania was *merely incidental* and cannot be used to infer that SPC Kearns intended to have sex with KO in Texas. The first sexual encounter occurred while SPC Kearns was home on leave in Pennsylvania for Thanksgiving. (JA 22). KO initiated this sexual encounter while SPC Kearns was drunk. (JA 38). The second sexual encounter in December 2009 between SPC Kearns and KO was equally isolated and once again initiated by KO. (JA 38). Specialist Kearns was again highly intoxicated. (JA 45). While the evidence shows that SPC Kearns went to KO's bedroom that evening, there is no evidence that he was driven by the motivation to have sex with her. (JA 44). It was KO who initiated sex with SPC Kearns by approaching him and kissing him. (JA 46).

The record does not reflect the exact length of time that SPC Kearns was home on leave during his two trips; however, it

is reasonable to infer that it was for at least several days. Even though SPC Kearns was home for several days, SPC Kearns and KO only engaged in sexual activity on two isolated occasions, both of which were initiated by KO. Specialist Kearns went home on leave to celebrate the holidays and because he had just returned from a deployment. Sex was not a motivating purpose for SPC Kearns' trips to Pennsylvania, therefore any sexual interaction between SPC Kearns and KO while he was home on leave was "merely incidental" to his trip—not a purpose for his trips. See *Garcia-Lopez*, 234 F.3d at 220.

Even under the *McGuire* test adopted by the Army Court, SPC Kearns' trips to Pennsylvania cannot be used to infer his intent. The trips would have still occurred even if the sexual conduct had not taken place. See *McGuire*, 627 F.3d at 635. Specialist Kearns simply went home for the holidays and it is illogical to assume that he would not have gone home if he did not believe that KO would initiate sex with him when he was drunk. Thus, the incidental sexual encounters between SPC Kearns and KO in Pennsylvania provide little support for the argument that KO's trip to Texas was for the purpose of criminal sexual conduct.

After SPC Kearns went back to Fort Bliss in January 2010, he and KO stayed in contact. (JA 26). They exchanged text messages and talked on the phone, and KO even sent SPC Kearns

topless pictures of herself. (JA 26). While there is no evidence that SPC Kearns solicited these photos from KO (or even retained them), the government argued that this independent action of KO proves intent on the part of SPC Kearns. (JA 100). The Army Court erred in relying on KO's actions to infer SPC Kearns' intent. *Kearns*, 72 M.J. 589.

Additionally, SPC Kearns never discussed sexual topics with KO during their phone conversations. (JA 95). While they may have developed deeper feelings for each other and told each other "I love you," SPC Kearns and KO decided to wait until KO was eighteen years old to have a relationship. (JA 27, 37, 93-94).

Specialist Kearns' conduct during this time period does not support the conclusion that he was motivated to engage in sexual activity with KO. In fact, engaging in sexual activity was not a motivating purpose for any of SPC Kearns' contacts with KO during this period. Specifically, KO testified that SPC Kearns did not arrange her travel to Texas for the purpose of sexual activity. (JA 42).

Indeed, SPC Kearns did not arrange for KO travel to Texas until after he learned that she was being sexually assaulted by SPC Kearns' brother. (JA 27, 120-22). Thus, the compelling or significant purpose of the trip was to rescue KO, not sex. Nicole and her passengers were not pulled over in Texas until

January 23, 2010, thus the travel did not occur until late January. If SPC Kearns was motivated by sex with KO, then he would have arranged her travel to Texas much earlier than late January after he had already been home for several weeks. (JA 33-34). Additionally, KO was supposed to live with Nicole and not SPC Kearns. (JA 28). Finally, there was no indication that the sexual relationship would continue between SPC Kearns and KO. (JA 36). Specialist Kearns believed that KO was being sexually assaulted by his brother and wanted to ensure that KO was safe. (JA 38).

Specialist Kearns may have been hesitant to tell the investigators about his involvement in KO's and KS's travels to Texas and the extent of his interactions with KO. However, this does not prove that he possessed the intent to engage in sex with KO. It may have been because he did not want to be implicated in a scheme to assist runaways or because he was hesitant to reveal that he and KO had engaged in sex while he was in Pennsylvania, an act which was a crime. Nonetheless, SPC Kearns' reluctance does not prove that he possessed the requisite intent under the Mann Act. All of the actors in this case agree that SPC Kearns believed that KO was being sexually abused by his brother.

Notably, KO was not traveling by herself; her friend KS was on her way to Texas as well. (JA 30-31). There is no evidence

that SPC Kearns had any previous sexual history with KS or designs to engage in sex with her. He believed that both KO and KS were the victims of abuse. (JA 120-22). His motivation to have them transported to Texas was not based on any intent to engage in sexual conduct with either of them. To put it another way, even under the *McGuire* standard, SPC Kearns would have had KO travel to Texas to escape the sexual abuse even if he never engaged in sexual intercourse with her previously. See 627 F.3d at 635 (holding that the real question should be whether the trip would have taken place "had a sex motive not been present"). The issue of KS's travels illuminates SPC Kearns' intent where it concerns KO. Since SPC Kearns had no previous sexual history with KS, he was motivated only by his concern for her safety since he believed that his brother attempted to rape KS and her father also physically abused her. (JA 120). The same conclusion must be reached regarding SPC Kearns' purposes for having KO travel to Texas—that he was compelled to protect her.

The government's case cannot rely on KO's actions and her own motivations if they were unknown to SPC Kearns. The government argued that "[KO] would have you believe that their sexual relationship was going to stop," and the government also argued that KO and SPC Kearns "were going to have sex again whenever she got [to Texas]." (JA 99). This line of reasoning

fails to address SPC Kearns and his intent. The Army Court discounted KO's testimony on this matter and found her not credible; however, the Army Court erred because there was no other evidence to suggest she was not credible on this matter. *Kearns*, 72 M.J. at 589, n.8. As noted above, KO initiated the sexual acts with SPC Kearns.

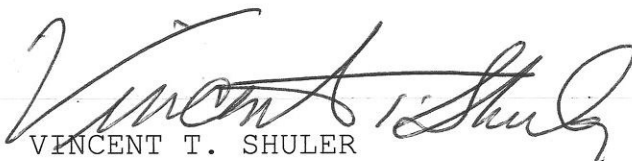
This theory of liability fails to take into account the *intent* of SPC Kearns himself. The government's case regarding Specification 1 of Charge III overwhelmingly subsisted on using the motivations and actions of KO to impute liability on SPC Kearns. Thus, the evidence is insufficient to support the finding of guilty for Specification 1 of Charge III. This case rested on circumstantial evidence which failed to establish that a motivating, compelling, or significant purpose of SPC Kearns was to engage in criminal sexual conduct with KO. See *Hayward*, 359 F.3d at 638; *United States v. Bonty*, 383 F.3d 575, 578 (7th Cir. 2004). The government's case rested on unreasonable inferences drawn from SPC Kearns' prior history with KO. Further, the Army Court adopted a standard that eschewed the standards used by several other circuits which requires the intent to have illegal sexual intercourse be more than just a purpose.

Conclusion

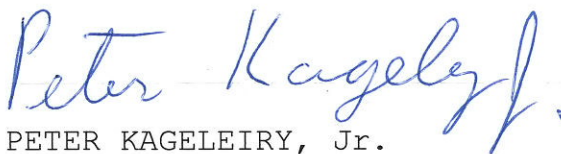
WHEREFORE, SPC Kearns respectfully requests that this Honorable Court set aside the finding of guilty as to Specification 1 of Charge III and set aside the sentence.



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CERTIFICATE OF COMPLIANCE WITH RULES 24(d)

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Kearns, Crim. App. Dkt. No. 20110348, Dkt. No. 13-0565/AR, was delivered to the Court and Government Appellate Division on October 24, 2013.



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