IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant	)	BRIEF ON BEHALF OF APPELLANT
v.	)	Crim.App. Dkt. No. 201400165
Jacob L. PEASE, Information Systems Technician Second Class (E-5) U.S. Navy Appellee	)	USCA Dkt. No. 16-0014/NA

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

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Issues Presented

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THE LOWER COURT JUDICIALLY DEFINED "INCAPABLE OF CONSENTING" CONTRARY TO THE INSTRUCTIONS GIVEN TO THE MEMBERS AND USED THIS DEFINITION TO FIND THREE CHARGES OF SEXUAL ASSAULT AND ONE CHARGE OF ABUSIVE SEXUAL CONTACT FACTUALLY INSUFFICIENT. IN CREATING THIS NEW LEGAL DEFINITION NOT CONSIDERED BY THE FACTFINDER AND NOWHERE PRESENT IN THE RECORD, DID THE LOWER COURT CONSIDER MATTERS OUTSIDE THE RECORD AND OUTSIDE ITS STATUTORY AUTHORITY IN CONDUCTING ITS FACTUAL SUFFICIENCY REVIEW?

II.

THE LOWER COURT JUDICIALLY DEFINED "INCAPABLE OF CONSENTING" IN A MANNER THAT LIMITS PROSECUTIONS TO ONLY TWO SITUATIONS—— "INABILITY TO APPRECIATE" AND "INABILITY TO MAKE AND COMMUNICATE" AN AGREEMENT. TO PROVE THE LATTER, THE COURT FURTHER REQUIRED PROOF THAT A VICTIM BE UNABLE BOTH TO MAKE *AND* TO COMMUNICATE A DECISION TO ENGAGE IN THE CONDUCT AT ISSUE. NOTHING IN THE STATUTE REFLECTS CONGRESSIONAL INTENT TO LIMIT ARTICLE 120, UCMJ, PROSECUTIONS IN THIS MANNER. DID THE LOWER COURT ERR?

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012), because Appellee's approved sentence included a dishonorable discharge and more than one year of confinement. This Court has jurisdiction over this case pursuant to Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2) (2012).

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellee, contrary to his pleas, of two specifications of violating a lawful general order prohibiting fraternization, three specifications of sexual assault, and one specification of abusive sexual contact, in violation of Articles 92 and 120, UCMJ, 10 U.S.C. §§ 892 and 920 (2012). The Members sentenced Appellee to six years of confinement and a dishonorable discharge. The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

The Record was docketed with the lower court on May 2, 2014. Appellee assigned five errors, among them that the evidence was legally and factually insufficient, and that the Military Judge erred by failing to give Appellee's requested instruction on the definition of competent.

On July 14, 2015, the United States Navy-Marine Corps Court of Criminal Appeals affirmed the guilty fraternization findings. *United States v. Pease*, 74 M.J. 763, 764 (N-M. Ct. Crim. App. 2015). However, the court set aside and dismissed the guilty sexual assault and abusive sexual contact findings. *Id.* at 771. On September 14, 2015, the United States filed a Certificate for Review of the lower court decision.

Statement of Facts

A. In 2007, Congress criminalized sexual acts against individuals substantially incapable of appraising the nature of, declining participation in, or communicating unwillingness to engage in the sexual acts. Consent was an affirmative defense.

The National Defense Authorization Act (NDAA) for Fiscal Year 2006 modified Article 120, UCMJ. Pub. L. No. 109-163, § 552, 119 Stat. 3136, 3256-63 (2006). The amendments were effective October 1, 2007. *Id.* at 3263. One of the statutory changes involved the criminalization of sexual acts against a person who is "substantially incapacitated or substantially incapable of: (A) appraising the nature of the sexual act; (B) declining participation in the sexual act; or (C) communicating unwillingness to engage in the sexual act." Article 120(c)(2), UCMJ, 10 U.S.C. § 920(c)(2) (2007).

Congress made consent an affirmative offense to the sexual assault offenses under Article 120(c). Article 120(r), UCMJ, 10 U.S.C. § 920(r) (2007). As defined in 2007, consent is: "words or overt acts indicating a freely given agreement to the sexual conduct at issue by a competent person." Article 120(t)(14)(B), 10 U.S.C. § 920(t)(14)(B) (2007). But, a person cannot consent if substantially incapable of:

> (i) appraising the nature of the sexual conduct at issue due to—

(I) mental impairment or unconsciousness resulting from consumption of alcohol, drugs, a similar substance, or otherwise; or

(II) mental disease or defect that renders the person unable to understand the nature of the sexual conduct at issue;

(ii) physically declining participation in the sexual conduct at issue; or

(iii) physically communicating unwillingness to engage in the sexual conduct at issue.

Id.

B. In 2012, Congress amended the statutory language of sexual assault to sexual acts against individuals incapable of consenting due to impairment by an intoxicant or a mental disease or defect. Congress also removed the *Prather* unconstitutional burden shift and simplified the structure and definition of consent.

Due in part to the unconstitutional burden shift identified in the 2007 version of Article 120, Congress again amended Article 120 in the NDAA for Fiscal Year 2012. Pub. L. No. 112-81, § 541, 125 Stat. 1298, 1404-07 (2011); Manual for Courts-Martial (MCM), United States (2012 ed.), Appx. 23 at A23-15. *See United States v. Prather*, 69 M.J. 338, 343 (C.A.A.F. 2011) (initial burden shift in Article 120(t)(14) unconstitutional). The new statute took effect on June 28, 2012. 125 Stat. at 1411.

Congress again criminalized sexual acts against a person, but revised, in part, to sexual acts against a person who is incapable of consenting to the sexual acts due to:

> (A) impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person; or
>
> (B) a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person.

Article 120(b)(3), UCMJ, 10 U.S.C. § 920(b)(3) (2012).

Congress also "simplified the structure" and content of the definition of consent. MCM, Appx. 23 at A23-15. Consent, as defined in 2012, is: "a freely given agreement to the conduct at issue by a competent person." Article 120(g)(8)(A), UCMJ, 10 U.S.C. § 920(g)(8)(A) (2012). Congress again defined situations when a person cannot consent, *e.g.*, "[a] sleeping, unconscious, or incompetent person cannot consent." Article 120(g)(8)(B), UCMJ, 10 U.S.C. § 920(g)(8)(B) (2012). Congress also added a permissible inference of lack of consent: "[l]ack of consent may be inferred based on the circumstances of the offense. All the surrounding circumstances are to be considered in determining whether a person gave consent." Article 120(g)(8)(C), UCMJ, 10 U.S.C. § 920(g)(8)(C) (2012).

These revisions allow parties to dispute consent when relevant. MCM, Appx. 23 at A23-15.

C. Appellee was charged, under Article 120(b)(3)(A), UCMJ, of the 2012 statute, with sexual assault of ITSN SK, and sexual assault and abusive sexual contact of IT2 BS, when the victims were incapable of consenting due to impairment by alcohol.

After sexual assault allegations reported by ITSN SK, the United States charged Appellee in Specification 1 of Charge I with committing a sexual act upon ITSN SK, by penetrating her vulva with his penis when she was incapable of consenting to the sexual act due to impairment by an intoxicant, when that condition was known or reasonably should have been known by Appellee. (J.A. 12-15).

Due to sexual assault allegations reported by IT2 BS, the United States charged Appellee with:

(1) in Specification 2 of Charge I, committing a sexual act upon IT2 BS, by penetrating her anus with his penis when she was incapable of consenting to the sexual act due to impairment by an intoxicant, and that condition was known or reasonably should have been known by Appellee.

(2) in Specification 3 of Charge I, committing a sexual act upon IT2 BS, by penetrating her vulva with his penis when she was incapable of consenting to the sexual act due to impairment by an intoxicant, and that condition was known or reasonably should have been known by Appellee.

(3) in Specification 5 of Charge I, committing sexual contact upon IT2 BS, by biting her breast when she was incapable

of consenting to the sexual contact due to impairment by an intoxicant, and that condition was known or reasonably should have been known by Appellee. (J.A. 12-15.)

D. Trial Defense Counsel challenged the constitutionality of Article 120(b)(3), claiming the definition of "incapable of consenting" was vague.

Prior to trial, Trial Defense Counsel challenged the constitutionality of Article 120(b)(3), stating that it was unconstitutionally vague because it lacked a definition for "incapable of consenting due to impairment." (J.A. 122-36, 192-224.)

The Military Judge denied the Motion. (J.A. 135-36.) He found that the required proof under the current Article 120's definition of "incapable of consenting"——"that the accused knew or should have known that the alleged victim was incapable of consenting"——is a clearer and "arguably . . . higher standard" than the standards and definitions in prior years' versions of the statute. (J.A. 135-36.)

E. The Military Judge instructed on the elements of the offenses and the definition of consent using the 2012 statutory language.

The Military Judge instructed that the United States had to prove that both ITSN SK and IT2 BS were incapable of consenting to the sexual acts in Specifications 1, 2, and 3 of Charge I due to impairment by an intoxicant. (J.A. 142-44.) The Military Judge also instructed that evidence of consent is relevant to

whether the United States proved the elements beyond a reasonable doubt. (J.A. 144.) He defined consent using the language of the 2012 statute:

> The term consent means a freely given agreement 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 consent——I'm sorry. Lack of verbal or physical resistance, a current or previous dating, or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does 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 cease to resist only because of another person's actions. A sleeping, unconscious or incompetent person cannot consent to a sexual act.

(J.A. 145, 226-28.) The Military Judge similarly instructed on the elements of abusive sexual contact and the definition of consent. (J.A. 147-48, 228.)

F. The Parties disputed the definition of competent.

Trial Counsel provided his closing argument slides to the Defense during trial. (J.A. 137.) During an Article 39(a) session prior to argument, Civilian Trial Defense Counsel questioned the meaning of "competent" in Trial Counsel's slides. (J.A. 137, 237.) Civilian Trial Defense Counsel believed it meant legal competence and that "just being drunk doesn't mean incompetent." (J.A. 137, 139.)

Trial Counsel indicated that he intended to argue that the alleged victim was not competent "if she's like collapsed on the

floor and puking." (J.A. 139.) The Military Judge agreed that Trial Counsel could argue it that way, explaining that, based on the charges, the issue was intoxication, not mental competence. (J.A. 137-39.)

During argument, Trial Counsel explained that a competent person is a "person who is actually able to consent to something." (J.A. 168.) He then argued essentially that Appellee was guilty if a reasonable person who viewed the incidents would conclude that the alleged victim was "so impaired she's not competent to agree to [the sexual act]." (J.A. 169, 237.)

Appellee argued that "[a] drunk person can still be a competent person." (J.A. 171.)

At the close of argument, the Military Judge asked Trial Counsel if the language in his slide——"[s]he's so impaired that she's not competent to agree to this"——was taken from his instructions. (J.A. 172; 237.) Trial Counsel indicated that the language was his own and not from the instructions. (J.A. 172.)

In response to Trial Counsel's explanation, the Military Judge cautioned and instructed the Members that they must follow the Military Judge's instructions that "[t]he alleged victims are incapable of consenting," because "those are the words actually contained in the elements." (J.A. 172-73.)

G. Before convicting Appellee of sexual assault and abusive sexual contact, the Members asked if there was a legal definition of "competent." The Military Judge instructed the Members to apply the plain and ordinary meaning of the word.

During deliberations, the Members asked "Is there a legal definition of a competent person?" (J.A. 174, 238.)

Appellee argued that the word means basic competence and requested that the Military Judge use Black's Law definition——a basic or minimal ability to do something." (J.A. 174.) He asserted that otherwise the Government "get[s] two bites at the apple to demonstrate that the individual was intoxicated . . . you could either win because they're intoxicated as incapable of consenting, or you could win under this theory which is consent by a freely given agreement to the conduct at issue by a competent person." (J.A. 176.)

Trial Counsel opposed Appellee's suggested definition, and requested that the Members apply their own "knowledge and common sense to the definition and give it its plain and ordinary meaning." (J.A. 178-80.) Trial Counsel also compared Black's definition to Webster's Collegiate Dictionary——"having requisite or adequate ability or qualities." (J.A. 185.)

The Military Judge declined to provide further definition: "I think the fact that we are having to grapple with it this extensively tells me that it would probably be best to leave it

up to the members." (J.A. 187-88.) The Military Judge thus instructed:

> There is no definition within this statute. Okay? We can look to other sources. We can look to other statutes. We can look to legal dictionaries, but those may provide definitions that are inapposite to the statute in this case, so when a statute does not give a definition then it's up to the reader to just employ the plain and ordinary meaning of the words. Okay? So whatever it means to you based on your experience, understanding, vocabulary lessons from elementary school, whatever it may be, the court's not able to give you a more precise legal definition under this statute, because there is not one. Okay? So I just admonish you to go back and read the elements of the offenses. Read the definitions and the other instructions that I provided you for all of the Charges and Specifications and you're going to—— nobody said this was going to be easy. You're going to have to make a determination based on the law as I have instructed you. Okay? So it's with my regret that I inform you of that, but that's where we stand.

(J.A. 187-88.) After instruction, the Members indicated that they had no further questions. (J.A. 188.)

H. <u>After the Members convicted Appellee of sexual assault and abusive sexual contact, Appellee renewed his "Motion for Unconstitutional Vagueness of the Article 120 Statute</u>."

The Members convicted Appellee of sexual assault against ITSN SK and sexual assault and abusive sexual contact against IT2 BS. (J.A. 189.)

Thereafter, Trial Defense Counsel orally renewed his "Motion for Unconstitutional Vagueness of the Article 120 Statute." (J.A. 190-91.) Trial Defense Counsel argued that because the Members asked for the definition of "competent," it

demonstrated that Article 120 was unconstitutionally vague. (J.A. 190.) The Military Judge reconsidered his previous ruling on the record, but declined to modify it. (J.A. 190-91.)

I. Before the lower court, Appellee challenged the Military Judge's instructions in response to the Members' question on the definition of competent, the legal and factual sufficiency of his Article 120 convictions, and the constitutionality of Article 120.

Appellee raised five issues before the lower court, including the Military Judge's response to the Members' question on the definition of competent, the legal and factual sufficiency of the sexual assault and abusive sexual contact convictions, and the constitutionality of Article 120. (J.A. 16-39.) First, Appellee asserted that the Victims' testimony established that they were capable of consenting to the sexual conduct, thus his convictions were factually insufficient. (J.A. 28-32.) Second, Appellee asserted that the Military Judge abused his discretion by failing to give Appellee's requested instruction. (J.A. 32-34.) Third, Appellee reprised his trial claim that Article 120 is unconstitutionally vague. (J.A. 35-39.)

J. The lower court defined statutory terms——"competent," "incompetent," "freely given agreement," and "incapable of consenting"——and used these definitions to conduct its factual sufficiency review. Under these definitions, the lower court decided that there was a reasonable doubt that the Victims were incapable of consenting.

In a published opinion, the lower court overturned Appellee's Article 120, UCMJ, convictions——"[t]he short answer is our interpretation of the law applied to our assessment of the facts in this case leaves us with reasonable doubt that the complainants were legally 'incapable of consenting'. . . [and] under the facts of this case, the Government did not prove beyond a reasonable doubt that the appellant knew or reasonably should have known of this condition." *Pease*, 74 M.J. at 770.

The court first looked "no further than the words of the statute itself." *Id.* The court determined that the terms competent and freely given agreement in the consent definition "refer back to the punitive language regarding those incapable of consenting." *Id.* Thus, "the Government must prove that a listed condition rendered the complainant incapable of entering into a freely given agreement." *Id.*

Second, the court defined competent and incompetent:

> [A] "competent" person is simply a person who possesses the physical and mental ability to consent. An "incompetent" person is a person who lacks either the mental or physical ability to consent due to a cause enumerated in the statute.

Id.

Third, the court established what is required to enter into a freely given agreement:

> To be able to freely give an agreement, a person must first possess the cognitive ability to appreciate the nature of the conduct in question, then possess the mental and physical ability to make and to communicate a decision regarding that conduct to the other person.

Id.

Finally, applying the newly created "freely given agreement" standard to the facts of the case, the lower court determined that the evidence did not establish beyond a reasonable doubt that the Victims were "incapable of consenting":

> Applying that interpretation to this case, we are not convinced beyond a reasonable doubt that the complainants were incapable of consenting——that is, that they lacked the cognitive ability to appreciate the sexual conduct in question or the physical or mental ability *to make and to communicate* a decision about whether they agreed to the conduct.

Id. (emphasis added).

As to ITSN SK, the court had reasonable doubt that "she had become manifestly unaware of what was happening or unable to make or to communicate decisions." *Id.* at 771. The court had "[s]imilar concerns" about IT2 BS. *Id.*

Summary of Argument

A service court cannot find a conviction factually insufficient based on a different interpretation of the law than the one relied on by the factfinder. The lower court exceeded

its Article 66(c) power by doing so here. Further, the lower court avoided answering the requisite legal question of whether the Military Judge abused his discretion in failing to provide Appellee's requested instruction. This is at odds with the approach taken by the other service courts.

In defining critical statutory terms contrary to their plain and ordinary meaning, the lower court created ambiguity in Article 120. This approach is also at odds with the other service courts. This service split should be resolved in favor of application of the plain and common meaning of the terms as defined by Congress through its statutory scheme.

Remand is appropriate here to allow the lower court to: (1) properly conduct its factual sufficiency review using only those legal principles instructed upon by the Military Judge and considered by the Members, and (2) address whether the Military Judge abused his discretion in failing to give the defense-requested instruction on the definition of competent.

Argument

I.

THE LOWER COURT OVERSTEPPED THE BOUNDS OF ARTICLE 66(c) BY USING ITS NEWLY JUDICIALLY-CREATED DEFINITIONS, THAT WERE NEITHER INSTRUCTED UPON BY THE MILITARY JUDGE NOR CONSIDERED BY THE FACTFINDER, TO REDEFINE APPELLEE'S CONVICTIONS AND FIND THEM FACTUALLY INSUFFICIENT.

A. Standard of Review.

The court of criminal appeals "may affirm only such findings and sentence that it: (1) finds correct in law; (2) finds correct in fact; and (3) determines, on the basis of the entire record, should be approved." *United States v. Nerad*, 69 M.J. 138, 141 (C.A.A.F. 2010) (citing *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002)); Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2012).

Article 66(c) is an "awesome, plenary de novo power." *See, e.g., id.* at 144; *United States v. Beatty*, 64 M.J. 456 (C.A.A.F. 2007). The scope and meaning of Article 66(c) is reviewed *de novo*. *Nerad*, 69 M.J. at 142 (citing *United States v. Lopez de Victoria*, 66 M.J. 67, 73 (C.A.A.F. 2008)).

Despite Article 66(c)'s broad fact-finding powers, the lower court's "application of the law to the facts must [still] be based on a correct view of the law." *United States v. Leak*, 61 M.J. 234, 242 (C.A.A.F. 2005) (quoting *United States v. Weatherspoon*, 49 M.J. 209, 212 (C.A.A.F. 1998)). Thus, this

Court can review "a lower court's determination of factual insufficiency for application of correct legal principles." *Id.* at 241.

This Court in *Leak* remanded to clarify an ambiguity in the standards applied by the lower court in conducting its factual sufficiency review. 61 M.J. at 248. The lower court had exercised its Article 66(c) power to set aside a rape conviction because the evidence was factually insufficient and instead affirmed a finding of guilty to the lesser-included offense of indecent assault. *United States v. Leak*, 58 M.J. 869 (A.C.C.A. 2003). This Court found that the lower court's rationale for concluding that the evidence was factually insufficient to constitute rape was "susceptible to two interpretations, one correct in law and the other not." *Leak*, 61 M.J. at 248. This Court set aside the lower court's decision and remanded the case for further consideration. *Id.* at 249.

Although this Court may only act with respect to findings set aside as incorrect in law under Article 67(c), UCMJ, this Court recognized in *Leak* that without an ability to review the terminology used by the lower court, matters of law would be beyond reach "in those cases purportedly decided on the grounds of factual insufficiency." *Id.* at 242.

B. The lower court overstepped its Article 66(c) authority by judicially defining Appellee's convictions using legal principles not instructed upon by the Military Judge or considered by the Members, and applying those to find the judicially-defined convictions factually insufficient.

1. Under *Riley*, *Medina*, and *Tunstall*, the lower court erred in defining Appellee's convictions not based on the charge sheet and the instructions an extrastatutory, judicially-created legal basis present nowhere in the Record and never instructed on at Appellee's trial.

"The Due Process principle of fair notice mandates that 'an accused has a right to know what offense and *under what legal theory*' he will be convicted." *United States v. Tunstall*, 72 M.J. 191, 196 (C.A.A.F. 2013) (quoting *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010)); *see also United States v. Medina*, 66 M.J. 21, 27 (C.A.A.F. 2008) ("an accused has a right to know to what offense and under what legal theory he or she is pleading guilty").

A conviction is limned, indeed defined, by the charge sheet, the instructions given the factfinder at trial, and the findings of the factfinder. *See United States v. Rosa*, 507 F.3d 142, 151 (2nd Cir. 2007) (charging document and jury instructions define the offense of conviction); *Becht v. United States*, 403 F.3d 541, 543 (8th Cir. 2005) ("jury instruction under which [appellant] was convicted defined 'child pornography' as a 'visual depiction that is, or appears to be, of a minor engaging in sexually explicit conduct'"); *United*

States v. Holt, 58 M.J. 227, 232 (C.A.A.F. 2003) (record defined by military judge's rulings and instructions).

Here, in a contested members trial, the outer limits of Appellee's convictions are defined by the charge sheet, the military judge's instructions, and the Members' findings. Appellee's convictions are directly related to the Members' application of instructions provided to them at trial.

Here, applying the Military Judge's instructions to the offenses as charged, the Members convicted Appellee:

> based on a totality of the circumstances, [that] the Victims were incapable of consenting because they were either: (1) unable to consent because their level of intoxication rendered them incompetent, or (2) unable to enter into a freely given agreement based on their level of intoxication.

(J.A. 145.)

But the lower court implicitly disagreed with the legal basis of Appellee's convictions and the instructions actually given on the Record. *Pease*, 74 M.J. at 770. Instead, the lower court created an extrastatutory legal theory nowhere present in the Record, and redefined Appellee's convictions as convictions for acts where:

> the Victims were incapable of consenting because they lacked either: (1) the cognitive ability to appreciate the sexual nature in question, or (2) the physical or mental ability to make and to communicate a decision about whether they agreed to the conduct.

Id.

This is improper. The service courts cannot change the legal basis of a conviction——including instructions given, or the legal definition of a crime——and thereby modifying the record on appeal. For example, in *Holt*, the court of criminal appeals erred in conducting its Article 66(c) review, by improperly relying on evidence that was excluded at trial. 58 M.J. at 232. The military judge in *Holt* had "defined the nature and quality of the evidence in this record of trial by his rulings and instructions." *Id*. The military judge specifically instructed that the members may not consider them "as proof of the matters asserted therein." *Id.* The service court improperly "changed the evidentiary nature of these exhibits by holding that the exhibits were admissible under specified exceptions to the hearsay rule." *Id.* The *Holt* court found that this erroneously modified the "qualitative evidentiary content of the record of trial"——creating a matter outside the record. *Id.*

Like *Holt*, the service court here erred by failing to define Appellee's convictions for purposes for its factual sufficiency review pursuant to his charges as defined by the Military Judge's instructions.

2. *Beatty* and *Holt* constrain Article 66(c) review to matters presented to the members during findings and on the Record. By logical extension, the lower court here erred by overturning Appellee's convictions for factual insufficiency based on matters outside the Record——extrastatutory, judicially-created legal definitions never provided to the Members on the Record of Trial.

Article 66(c), UCMJ, grants the court of criminal appeals the authority to "substitute its judgment" for that of the military judge or members, *Beatty*, 64 M.J. at 458, and to make "its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." United States v. *Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). However, "review of findings——of guilt and innocence—— [is] limited to the evidence presented at trial." *Beatty*, 64 M.J. at 458 (citing *United States v. Duffy*, 3 C.M.A. 20, 23 (C.M.A. 1953); *United States v. Whitman*, 3 C.M.A. 179, 180 (C.M.A. 1953); *United States v. Lanford*, 6 C.M.A. 371, 379 (C.M.A. 1955)). Article 66(c) precludes a service court from considering "extra-record" matters. *Holt*, 58 M.J. at 232.

This Court in *Beatty* recognized that Article 66(c) factual sufficiency review is not unlimited. 64 M.J. at 459. The lower court in *Beatty* exercised its Article 66(c) power to set aside the appellant's convictions for committing indecent liberties and indecent acts. *United States v. Beatty*, No. 35523, 2006 CCA LEXIS 124, *5-*6 (A.F. Ct. Crim. App. May 30, 2006). Conducting

its Article 66 review, the court noted that the victim "was unwavering in her account of the appellant's actions," and that she testified pre-trial, during trial, and in presentencing. *Id.* at *5. This Court remanded to clarify the ambiguity in the lower court's action in assessing the victim's credibility—— "[w]e cannot determine from the record whether the court in fact considered [the victim's] testimony in pretrial motion practice or in presentencing on the issue of her credibility." *Beatty*, 64 M.J. at 459.

Similarly, in *Holt*, this Court found error in the lower court's Article 66(c) review——"[r]ather than limiting itself to reviewing the propriety of the military judge's trial determinations, the Court of Criminal Appeals changed the evidentiary nature of these exhibits." 58 M.J. at 232.

This is an inappropriate extension of the lower court's Article 66(c) power——a conviction must be reviewed for factual sufficiency, and thereby almost certainly foreclose appeal of the adverse opinion by the United States, through the Record of Trial actually docketed at the lower court——not the Record a lower court wishes had been docketed. *See Holt*, 58 M.J. at 232. *See also United States v. Riley*, 50 M.J. 410, 415 (C.A.A.F. 1999) (appellate courts may only affirm offenses based on theories presented to the trier of fact). Because the lower court's extrastatutory, judicially-created theory was not

presented to the factfinder on the Record, the lower court erred in relying on it for its factual sufficiency review.

C. Limiting Article 66(c) review to analysis of a conviction based on the charge sheet and a military judge's instructions is consistent with this Court's protecting against expansion of the record on appeal except in limited circumstances.

A conviction is reviewable on appeal only to the extent the conviction is supported in the Record forwarded for review. This Court has closely protected against attempts by the parties, and courts, from expanding the record of trial and thereby attacking, or preserving, court-martial convictions except in well-defined and limited circumstances. *See, e.g., United States v. Luke*, 69 M.J. 309 (C.A.A.F. 2011) (new trials based on newly discovered evidence); *Denedo v. United States*, 66 M.J. 114 (C.A.A.F. 2008) (*coram nobis* relief post-finality); *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997) (attachments of extra-record evidence via affidavit).

Just as this Court limited its review to the facts alleged in specification and the findings of the factfinder when considering whether any exceptions or substitutions had been made in *United States v. Lubasky*, 68 M.J. 260, 264-65 (C.A.A.F. 2010), this Court should so limit Article 66(c) review to the Members' findings that were based on their application of the law as instructed by the Military Judge to the facts presented at trial.

D. Remand is appropriate. The lower court neither found factual insufficiency based on the instructions actually given, nor did it find an abuse of discretion based on the military judge's refusal to give Appellee's requested instruction on the definition of competent. Instead, the lower court erred by redefining the statute, creating ambiguity, and finding factual insufficiency based on this statutory redefinition.

In *United States v. Ginn*, No. 38551, 2015 CCA LEXIS 334 (A.F. Ct. Crim. App. Aug. 17, 2015), decided one month after *Pease*, the Air Force Court of Criminal Appeals faced a remarkably similar issue concerning a military judge's instruction on the definition of competent. The appellant in *Ginn* was charged with sexual assault when the victim was incapable of consenting due to impairment by alcohol. *Id.* at *10. During deliberations, the members asked for a definition of competent. *Id.* at *15. With no objection from either party, the military judge instructed:

> [T]here is no particular legal definition for the word "competent." We oftentimes expect people to just apply common usage of words. You develop the facts, you look at the instructions that I've given you defining the law and you make a determination whether under the facts these things apply. So there is no particular legal definition that I can provide for you to give you a better vector on what that word means. That may not be satisfactory; but that is the state of the law at this stage.

Id. at *16.

The Air Force court found no plain error by the judge's "common usage" instruction:

> When the panel was instructed that consent in this context means a "freely given agreement," the members were effectively charged with determining whether the victim had, at the time of the sexual activity, freely agreed to engage in it. The victim could not "freely" agree to an activity unless she was capable of agreeing, or, in other words, unless she was "competent" to agree. A further definition of the word "competent" was unnecessary, and the lack of such a further definition did not materially prejudice a substantial right of the appellant.

Id. at *19-*20.

Similarly, in *United States v. Cagle*, No. 38592, 2015 CCA LEXIS 294, *13-*15 (A.F. Ct. Crim. App. July 16, 2015), the Air Force court addressed a military judge's denial of the defense's requested definition of incapable of consenting, finding it "problematic." Moreover, the Army court in *United States v. Long*, 73 M.J. 541, 544-45 (A.C.C.A. 2014), addressed the correctness of a military judge's instruction in response to a members' question on the definition of competent.

Unlike both the Army and Air Force courts, the lower court here did not address the limited legal question regarding the sufficiency of the military judge's instructions, creating a split in the services' precedent.

And the lower court's analysis here avoids a more deferential standard of review. Instead of unnecessarily defining and redefining words outside the statutory construct and using them to find Appellee's convictions factually insufficient, the lower court should have analyzed whether

Appellee's requested instruction on the definition of competent ——"a basic or minimal ability to do something" (J.A. 175)—— constituted reversible error under *United States v. Damatta-Olivera*, 37 M.J. 474 (C.A.A.F. 1993). Alternatively, or in addition to, the lower court could have analyzed whether Appellee's convictions were factually sufficient based on the convictions as defined by the Members through the Military Judge's instructions.

The latter involves application of the court's "awesome, plenary *de novo*" power. *Nerad*, 69 M.J. at 144. But the former includes a detailed analysis, under an abuse of discretion standard, of whether: (1) the requested instruction is correct, (2) it is substantially covered in the main instruction, and (3) failure to give the instruction deprived Appellee of presenting a defense. *Damatta-Olivera*, 37 M.J. at 478. *See also Cagle*, 2015 CCA LEXIS 294 (no abuse of discretion in denying defense's requested instruction on definition of incapable of consenting).

This backdoor approach to reviewing instructional error circumvents application of the legal principles established by this Court's precedent and cannot be upheld. *See Tardif*, 57 M.J. at 230 (Sullivan, S.J., dissenting) ("Article 66(c), UCMJ, was not intended by Congress as a means for a subordinate court to evade or avoid unpopular legal precedent of this Court").

II.

THE LOWER COURT ERRED BY DEFINING AND REDEFINING CRITICAL STATUTORY TERMS OUTSIDE THEIR PLAIN AND ORDINARY MEANING. THIS CREATES AMBIGUITY WITHIN THE STATUTORY SCHEME CONTRARY TO CONGRESSIONAL INTENT AND CONFLICTS WITH OTHER SERVICE COURTS.

A. Standard of Review.

This Court reviews issues of statutory interpretation *de novo*. *United States v. Schloff*, No. 15-0294, 2015 CAAF LEXIS 610, 74 M.J. 312 (C.A.A.F. July 16, 2015).

B. The lower court erred by failing to apply the plain and ordinary meaning of critical statutory terms within Article 120. The Air Force court in *Ginn* correctly declined to follow *Pease*.

In choosing to redefine critical statutory terms under Article 120, UCMJ, the court overlooked the rule that it must start with the statutory language and "determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." United States v. *McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014). The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Id.* (quoting *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002)).

This Court in *Schloff* recently applied the ordinary meaning of the word "touching" as used in the definition of sexual contact under Article 120(g)(2)——it encompasses both "body-to-body contact and object-to-body contact." 2015 CAAF LEXIS 610,

at *5, *7. The military judge had ruled that object-to-body contact did not constitute sexual contact because, in his view, "it can only occur when one person's body touches another person's body (body-to-body contact)." *Id.* at *1-*2. But, as this Court recognized, the "statutory offense and its definition contain no limiting or qualifying words that would either require body-to-body contact or exclude object-to-body contact." *Id.* at *5. Finding no ambiguity in the statutory definition, this Court declined to apply canons of construction requested by the appellant. *Id.* at *7.

The lower court here agreed that it "need look no further than the words of the statute itself." *Pease*, 74 M.J. 770. And the lower court correctly began its analysis with reference to the statutory construct and language as in *Schloff*. But the lower court then erred by unnecessarily defining words that have meaning within the statutory construct. *See Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000)) ("It is well established that 'when the statute's language is plain, the sole function of the courts——at least where the disposition required by the text is not absurd——is to enforce it according to its terms.'").

1. The lower court improperly defined the disputed term "competent" when its meaning was plain within the statutory construct. The Air Force court in *Ginn* correctly declined to follow *Pease*, finding it "unnecessary" to define the word "competent."

The Supreme Court in *Yates v. United States*, 135 S. Ct. 1074 (2015) stated:

> [w]hether a statutory term is unambiguous, however, does not turn solely on dictionary definitions of its component words. Rather, "[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole."

Id. at 1081-82 (internal citation omitted).

Without explanation, the lower court defined competent as "the physical and mental ability to consent." *Pease*, 74 M.J. at 770. The lower court did not explain this definition or why this definition was necessary.

Significantly, the use and definition of the word "competent" was disputed at trial and again challenged on appeal. (J.A. 16-40, 174-186.) The Parties discussed several possible definitions of the word, including a basic or minimal ability to do something, from Black's Law Dictionary (J.A. 180); having the requisite or adequate ability or qualities from Webster's Collegiate Dictionary, (J.A. 185); "basic competence," from Trial Defense Counsel (J.A. 183); and a person who is

actually able to consent to something, from Trial Counsel (J.A. 168).

But the lower court declined to address the Military Judge's denial the defense-requested instruction of the definition of competent. *Pease*, 74 M.J. at 764, 770. Nor did the lower court reconcile the Parties' proposed definitions with its own. Instead, the lower court simply redefined "competent" outside its plain and ordinary meaning within the statutory construct, and proceeded with its factual sufficiency review on that basis. *See Lopez v. Gonzales*, 549 U.S. 47, 53 (2006) (apply "everyday understanding" of word not defined in statute).

The Air Force court in *Ginn*, albeit not expressly, correctly declined to follow *Pease*. 2015 CCA LEXIS 334, at *18-*20. Unlike here, the *Ginn* court upheld a military judge's decision to instruct the members to apply the common usage of the word competent. *Id.* at *16. And as the *Ginn* court correctly found, "further definition of the word 'competent' was unnecessary." *Id.* at *20. The same is true here. As in *Ginn*, the Military Judge's instructions here effectively instructed the Members that the Victims "could not 'freely' agree to an activity unless [they were] capable of agreeing, or, in other words, unless [they were] 'competent' to agree." *Id.* (J.A. 145, 148.)

2. The lower court further erred in defining "freely given agreement." This too is not an obscure concept or term of art that requires definition.

Wisconsin criminalizes sexual assault similar to the 2012 version of Article 120. Wis. Stat. § 940.225(2) (2015). In Wisconsin, it is a crime if a person:

> has sexual contact or sexual intercourse with a person who is under the influence of an intoxicant to a degree which renders that person incapable of giving consent if the defendant has actual knowledge that the person is incapable of giving consent and the defendant has the purpose to have sexual contact or sexual intercourse with the person while the person is incapable of giving consent.

Id. at § 940.225(2)(cm). In Wisconsin, consent is defined as: "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact." *Id.* at § 940.225(4). There is a rebuttable presumption that a person is incapable of consenting if the person "is unconscious or for any other reason is physically unable to communicate unwillingness to an act." *Id.* at § 940.225(4)(c).

In *State v. Ferrara*, 1982 Wisc. App. LEXIS 4291, *1, *4 (Ct. App. Wi. Dec. 21, 1982), the Court of Appeals of Wisconsin upheld an appellant's sexual assault conviction because, in part, evidence showed that consent was not freely given. The appellant argued, in part, that the statute provided no guidelines to determine what words or overt acts constitute a

freely given agreement. *Ferrara*, 1982 Wisc. App. LEXIS 4291, at *4.

In upholding the conviction, the Wisconsin court noted that "'[f]reely given agreement' is not so obscure a concept or language as to be unconstitutionally vague. An ordinary person would not have construed the complainant's acquiescence as freely given consent." *Id.* at *4-*5.

Jurors and thus military members can give an ordinary meaning to an instruction containing the words "freely given agreement." *See Ferrara*, 1982 Wisc. App. LEXIS 4291, at *4. The Wisconsin statute and its interpretation in *Ferrara* reinforce the lower court's error in *sub silentio* overturning the Military Judge's instructions provided to the Members. Despite this, the lower court did not address this word's meaning within the statutory construct——and, its definition was not even disputed.

The lower court overstepped its role. See *Badaracco v. Commissioner*, 464 U.S. 386, 397-98 (1984) (court is not "authorized to rewrite a statute because [it] might deem its effects susceptible to improvement"); *see also Nerad*, 69 M.J. at 148 (Baker, J., concurring in the result) (service court is not a policy-making body).

C. The lower court's extrastatutory, judicial definitions interject ambiguity into Article 120.

1. The lower court's definition of "incompetent" is subject to at least five different interpretations, creating ambiguity.

After defining competent, the lower court defined the anti-element, "incompetent." *Pease*, 74 M.J. at 770. Instead of simply reversing its definition of competent, the court added a qualifier "*due to a cause enumerated in the statute*." *Id.* (emphasis added).

This definition of "incompetent" creates needless confusion for litigants, centering on the qualifier of "a cause enumerated in the statute." This sentence is susceptible to multiple interpretations.

First, a "cause enumerated in the statute" could mean that "incompetent" relates only to "impairment" or "mental disease or defect, or physical disability" if the "enumerated cause" is specific to Article 120(b)(3), UCMJ, the offense at issue here.

Second, in addition to the 120(b)(3) offenses, "cause enumerated in the statute" could include all offenses where lack of consent is an element, *i.e.*, Article 120(a)(5) (administering a drug, intoxicant, or other substance without the consent of that person), Article 120(b)(1)(B) (causing bodily harm), and Article 120(b)(2) (person is otherwise unaware).

Third, because the language is broad, "cause enumerated in the statute" could mean every cause within the statute (*e.g.* using unlawful force; using force likely to cause grievous bodily harm; placing in fear; rendering another unconscious; administering an intoxicant by force or without consent; threatening or placing in fear; causing bodily harm; making a fraudulent representation; or, inducing belief by any artifice, pretense, or concealment") renders a person "incompetent."

Fourth, this judicial definition could include all of the causes listed in the previous paragraph, with the addition of "sleeping, unconscious, or incompetent."

Fifth, "enumerated cause" could mean *only* those causes specifically categorized in Congress' definition of "consent" in Article 120(g)(8)(B): that is, "sleeping, unconscious, or incompetent".

But the lower court gave no indication of what its redefinition of "incompetent" means, injecting needless ambiguity.

2. <u>In addition to defining "incompetent," the lower court injects confusion by creating a new definition of "consent," including ambiguous "cognitive ability" language present nowhere in the statute</u>.

After defining "competent" and "incompetent," the lower court created a two-part standard of what it takes to freely give an agreement: "a person must first possess the cognitive

ability to appreciate the nature of the conduct in question, then possess the mental and physical ability to make and to communicate a decision regarding that conduct to the other person." *Pease*, 74 M.J. at 770.

This "cognitive ability"——present nowhere in the statute—— is troubling. *Pease*, 74 M.J. at 770. The phrase "cognitive ability" is subject to multiple characterizations depending on how it is used. For example, in *United States v. Carbullido*, 307 F.3d 957, 959 (9th Cir. 2002), a psychiatrist concluded the accused "did not possess the cognitive ability to understand his act . . . . His thinking was significantly distorted as a result of severe mental disease or defect, namely, schizophrenia, paranoid type, precluding the use of logical thought, normal reasoning and adequate judgment." In contrast, a psychologist in *People v. Garcia*, No. 05250C-2005, 2009 N.Y. Misc. LEXIS 1994, *37 (N.Y. Sup. Ct. 2009), testified that the accused did not have the cognitive ability to appreciate *Miranda* warnings——he had "a dependent personality, a below average IQ, limited education, impaired reading ability and psychiatric problems." *See also Am. Acad. Of Pediatrics v. Lungren*, 16 Cal. 4th 307, 371 (Cal. 1997) ("the great majority of minors [who have become pregnant] possess the cognitive ability and maturity to make a fully-informed choice as to abortion and are competent to give informed consent to abortion").

As demonstrated by *Carbullido*, *Garcia*, and *Lungren*, a person's cognitive ability to do something can be characterized in many ways depending on the context in which it is applied. In *Carbullido*, it was a severe mental disease or defect like schizophrenia, in *Garcia* it involved below-average intelligence, and in *Lungren* it involved maturity and ability to give informed consent. *Carbullido*, 307 F.3d at 959; *Garcia*, 2009 N.Y. Misc. LEXIS 1994, at *37; *Lungren*, 16 Cal. 4th at 371.

3. The lower court's definitions of "competent," "incompetent," and "freely given agreement," culminate in an express definition of "incapable of consenting" that limits prosecutions to only two situations and increases the United States burden to prove that a person is "incapable of consenting."

Congress defined incapable of consenting——it is a crime to commit a sexual act against a person who is incapable of consenting due to impairment in Article 120(b)(3)(A), or mental disease or defect, or physical disability, in Article 120(b)(3)(B). But, instead of using this definition and Congress' definition of "incapable of consenting," the lower court eviscerates portions of Congress' definition of consent, and limits the scope of Article 120(b)(3) prosecutions to only two situations: (1) inability to appreciate the sexual conduct in question and (2) inability to physically or mentally make and communicate a decision. *Pease*, 74 M.J. at 770.

This is best viewed in the context of instructions of a hypothetical prosecution under Article 120(b)(3)(A). The military judge will instruct that the Government must prove that the victim was incapable of consenting to the sexual acts due to impairment by an intoxicant. The military judge will then define "incapable of consenting" as: the victim is incapable of consenting if the victim lacks the cognitive ability to appreciate the sexual conduct in question or the physical or mental ability to make and to communicate a decision about whether a victim agreed to the conduct. Lack of consent may be inferred based on the circumstances.

But this approach necessarily renders certain portions of Congress' definition of consent superfluous——an approach that must be avoided. *See TRW Inc. v. Andrews,* 534 U.S. 19, 31 (2001) (each word should be given effect so that no part of the text drafted by Congress is rendered "superfluous, void, or insignificant"). It would be nonsensical to continue to instruct that consent is a freely given agreement by a competent person or that an incompetent person cannot consent——both of which Congress deemed relevant to Article 120(b)(3) prosecutions.

Moreover, it increases the burden on the United States to prove that a victim is "incapable of consenting"——the lower court described the second prong of its definition of "incapable

of consenting" with the conjunctive "and" rather than the disjunctive "or." *Pease*, 74 M.J. 770. Thus, the United States' burden is now two-fold: the person must be able to both make *and* communicate a decision, either physically or mentally. *Id*. (emphasis added).

D. Congress "simplified" and broadened its definition of consent in 2012. The lower court disregarded this, and resurrected the more limiting statutory language repealed by Congress from its 2007 statute. The Air Force court in *Cagle* declined to adopt such terms. This Court should too.

By defining "consent" in its 2012 version of Article 120, Congress rejected the 2007 statutory definition. But the lower court resurrected the 2007 definitions by its judicial redefinition of "freely given agreement." Specifically, the lower court added three requirements a person must possess to consent: (1) cognitive ability to appreciate the nature of the conduct; (2) physical and mental ability to make a decision; and (3) physical and mental ability to communicate a decision. *Pease*, 74 M.J. at 770.

But nowhere within the 2012 version of Article 120 are such definitional concepts as "cognitive ability to appreciate" or "physical or mental ability to make and to communicate" present. If Congress desired to limit prosecutions in this manner, it could have done so. Indeed, it previously had——Congress removed substantially similar requirements from its 2007 statute, which

provided that a person cannot consent if incapable of (1) appraising the nature the sexual conduct at issue; (2) physically declining participation in the sexual conduct; or (3) physically communicating unwillingness to engage in the sexual conduct. Congress opted for a broad, totality of the circumstances approach within its statutory construct——not the three-part standard adopted by the lower court. Article 120(g)(8), UCMJ. This Court should not interpret the statute to include such restrictive language specifically removed by Congress. *See Rodriquez v. United States*, 480 U.S. 522, 525 (1987) (legal presumption that "Congress acts intentionally and purposefully in the disparate inclusion or exclusion" of statutory language).

Indeed, the Air Force court in *Cagle* declined to do so. 2015 CCA LEXIS 294, at *12-*13. The *Cagle* court upheld a military judge's decision not to give an instruction requested by the defense that defined "incapable of consenting" as being unable to: (1) appraise the nature of the sexual conduct, (2) physically communicate unwillingness to engage in the sexual conduct, and (3) otherwise unable to make or communicate competent decisions. *Id.* The court found the defense's requested definition of incapable of consenting "problematic"—— the requested language was not found within the statute, it was "arguably inconsistent with the statute's definition of

consent," and it interjected "other also-undefined concepts such as competence." *Id.* at *14-*15.

Conclusion

Wherefore, the United States respectfully requests that this Court reverse the decision of the lower court and remand to allow the lower court to: (1) properly conduct its factual sufficiency review using only those legal principles instructed upon by the Military Judge and considered by the Members, and (2) address whether the Military Judge abused his discretion in failing to give the defense-requested instruction on the definition of competent under *Damatta-Olivera*, 37 M.J. at 478.

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