IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

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I.

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 COMMUNCIATE 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

Information Systems Technician Second Class (IT2) Jacob L. Pease's approved general court-martial sentence included a dishonorable discharge and six years of confinement. Accordingly, the Navy-Marine Corps Court of Criminal Appeals had jurisdiction over his case in accordance with Article 66(b)(1), Uniform Code of Military Justice (UCMJ). 10 U.S.C. § 866(b)(1) (2012). This case is before this Court pursuant to

certification under 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 IT2 Pease, United States Navy, contrary to his pleas, of three specifications of sexual assault, one specification of abusive sexual contact, and two specifications of fraternization in violation of a lawful general order, violations of Articles 120 and 92, UCMJ, 10 U.S.C. §§ 920, 892 (2012). IT2 Pease was sentenced to six years of confinement and discharge from the Naval service with a dishonorable discharge. The convening authority approved the adjudged sentence and, except for the dishonorable discharge, ordered it executed.

The record was docketed with the Navy-Marine Corps Court of Criminal Appeals on May 2, 2014. In his initial brief, IT2 Pease assigned five errors: (1) whether IT2 Pease's constitutional right to due process was violated when the military judge improperly applied Military Rules of Evidence (Mil. R. Evid.) 413 to charged conduct; (2) whether the evidence was legally and factually sufficient; (3) whether the military judge erred by failing to give the trial defense's requested definition of the word "competent"'; (4) whether IT2 Pease's constitutional right to due process was violated when he was

convicted of violating Article 120, which is unconstitutionally vague for lacking a definition of the word “competent”; and (5) whether the military judge abused his discretion by admitting the irrelevant and non-probative testimony of an expert on counterintuitive behavior.

Statement of Facts

In December 2012 and January 2013, IT2 Pease was stationed aboard the USS MOUNT WHITNEY, Geata, Italy, in the radio division of the communications department. (J.A. at 276-77, 374.) Two other individuals within the radio division were Information Systems Technician Seaman (ITSN) S.K. and IT2 B.S. (J.A. at 275, 373.) ITSN S.K. arrived to the USS MOUNT WHITNEY in November 2012. (J.A. at 275.) IT2 B.S. arrived to the ship sometime in the early part of January 2013. (J.A. at 374-75.)

A. IT2 Pease engaged in sexual intercourse with ITSN S.K., an Individual who was not incapable of consenting and did not reasonably appear to be incapable of consenting, due to impairment by an intoxicant.

On December 6, 2012, ITSN S.K. went to three local bars with some of the other Sailors in her shop. (J.A. at 279-89.) They started at a bar called The Dutch, arriving there around dinner time. (J.A. at 279, 281-82.) ITSN S.K. consumed beer and liquor while at this bar. (J.A. at 280.) At some point, ITSN S.K. and two others left The Dutch and walked to another bar, Anna’s. (J.A. at 282.)

During the walk over to Anna's, the group encountered shore patrol. (J.A. at 282.) Shore patrol consisted of senior personnel who would frequent the local establishments at night to ensure that other Sailors were not being disruptive and send Sailors back to the ship, if necessary. (J.A. at 485-86.) It was the policy of the shore patrol to err on the side of caution and they would sometimes send a Sailor home even if he or she was not overly intoxicated. (J.A. at 486-89.) Chief Warrant Officer 3 (CWO3) G.B. was one of two shore patrol officers on duty that evening. (J.A. at 282, 493.)

At Anna's, ITSN S.K. consumed beer and liquor. (J.A. at 285.) IT3 S.K. and the group that she was with continued to go back and forth between Anna's and another bar, Monique's, which is located right next door. (J.A. at 284, 286.) ITSN S.K. again encountered shore patrol outside of the bars, at which point CWO3 G.B. told her to return to the ship. However, instead of returning to the ship, ITSN S.K. went to Monique's and continued to drink. (J.A. at 286-87)

While she was in Monique's sitting with IT2 Pease, shore patrol approached her a third time. (J.A. at 287-88.) CWO3 G.B. once again directed her to return to the ship, and told IT2 Pease to go with her. (J.A. at 493.) CWO3 G.B. described this as one of his "conservative" calls. (J.A. at 496.) ITSN S.K. told CWO3 G.B. that she did not want to return to the ship, but

rather she wanted to go back to The Dutch. CWO3 G.B. told her no, and to return to the ship; IT2 Pease and ITSN S.K. walked back to the ship, while shore patrol walked behind them. (J.A. at 289, 493-94.) During the walk, neither CWO3 G.B. nor his shore patrol partner, Information Systems Technician First Class (IT1) J.V., recalled ITSN S.K. stumbling, falling, or having to lean on IT2 Pease for support. (J.A. at 273, 494-95.)

Once back at the ship, ITSN S.K. and IT2 Pease ascended the stairs to the quarterdeck, scanned their identification (ID) cards to gain access, and proceeded to the smoke deck. (J.A. at 289, 317-18, 329-30, 496.) While on the smoke deck, ITSN S.K. told IT2 Pease that she thought he was cute and the two began kissing. (J.A. at 319.) They then went to the Joint Operations Center (JOC) where they had vaginal intercourse on one of the tables. (J.A. at 320-21.) During the intercourse, ITSN S.K. was leaning back on the table, using her elbows to help prop up her body and to support her weight.[1] (J.A. at 323-24.) After the intercourse, she returned to the female berthing, which required descending between two and three ladder wells. (J.A. at 328-29.) Once inside female berthing, she maneuvered into her rack, which was in the middle of three beds. (J.A. at 329.)

[1] On cross-examination, ITSN S.K. conceded that it was possible that she said “Yes” to the sexual-intercourse, and perhaps just did not remember it. (J.A. at 324-25.)

The following morning she encountered several individuals to whom she could have made a report of sexual assault; she did not make a report to either individual. (*See* J.A. at 520, 526, 529.) She told the first individual that she had been messing around with someone in the JOC, and that she needed access to retrieve her ID card. (J.A. at 333-35, 518-20.) Later that day, ITSN S.K. attended the International Cultural Relations (ICR) trip. (J.A. at 524-52.) During this trip, she told a fellow Seaman, who coincidentally was one of the individuals she was out with the previous night, that she had intercourse with IT2 Pease, and that she was not sure if she liked it or not. (J.A. at 335-36, 526.) Throughout the trip she was observed as laughing, joking, and giggling. (J.A. at 527.) She talked with the Seaman again several days later about having intercourse with IT2 Pease, but never referred to it as a sexual assault. (J.A. at 337, 529.)

B. IT2 Pease engaged in sexual intercourse and sexual contact with IT2 B.S., an individual who was not incapable of consenting and who did not reasonably appear to be incapable of consenting, due to impairment by an intoxicant.

On the evening of Thursday, January 24, 2013, IT2 B.S. and ITSN S.K. were consuming alcohol at another Petty Officer's off-ship apartment. (J.A. at 410.) The next morning, January 25, 2013, the Sailor who owned the apartment failed a fit-for-duty breathalyzer. For her part, IT2 B.S. had missed her bus to work

and decided to “play hooky” by remaining at a laundromat during the remaining working hours. (J.A. at 412-13.) As a result, both ITSN S.K. and IT2 B.S. were required to give statements regarding their consumption of alcohol on the night of 24 January. ITSN S.K. gave her statement on January 25, and IT2 B.S. gave hers on the morning of January 26. (J.A. at 303, 401.)

On the evening of January 25, 2013, IT2 B.S. and three other Sailors went to The Dutch for dinner. (J.A. at 376.) While there, IT2 B.S. consumed two drinks. (J.A. at 377.) After dinner, the group walked to two other bars, and IT2 B.S. consumed a drink at each location. (J.A. at 379-80.) After the third bar, she returned to one of the Sailor’s apartment to put on some warmer clothes. She then met back up with the group, and they proceeded to Anna’s. (J.A. at 380-81.) While there, she and IT2 Pease were seen sitting with each other, arms interlocked, shoulders touching, whispering to each other. (J.A. at 513.) From Anna’s, the group went “next door” to Monique’s were IT2 B.S. had two more drinks. (J.A. at 384-85.) While the group was at Monique’s, IT2 B.S. went outside and encountered CWO3 G.B. who was conducting shore patrol. (J.A. at 387.)

At this time, CWO3 G.B. made the decision to have IT2 B.S. return to the ship. (J.A. at 387-88.) CWO3 G.B.’s decision to

send her back was another one of his "conservative" calls. (J.A. at 500.) Prior to leaving, IT2 B.S. said "Goodnight, COMO" to CWO3 G.B., a name he was commonly referred by, indicating she knew who she was talking to. (J.A. at 368, 370, 488-89.) She began walking back with a Seamen from her ship, at which time IT2 Pease offered to walk her back. (J.A. at 388, 499.) During this time, IT2 B.S. had no difficulty walking, and was not stumbling. (J.A. at 370, 499-500.) As they passed the ship, she stated that she did not want to return, but would rather stay out and keep "partying." (J.A. at 389.) The two then walked to an apartment approximately a mile from the ship. (J.A. at 483.) To access that particular apartment, one has to walk down a flight of stairs. (J.A. at 425, 482.)

Once there, IT2 Pease and IT2 B.S. engaged in various forms of intercourse, beginning with anal sex. (J.A. at 390.) IT2 B.S. found this form of intercourse to be painful; she told IT2 Pease to stop, which he did. (J.A. at 390.) Once IT2 Pease disengaged, IT2 B.S. became ill and vomited on the bedding. (J.A. at 390-91.) IT2 B.S. then left the bedroom, and went across the hallway to the restroom to clean herself off. (J.A. at 392-93.) IT2 Pease went to the restroom to check on her, and the two then returned to the bed. (J.A. at 393-94.)

After some amount of time, IT2 B.S. got out of bed, went into the kitchen, and got a glass of water. She told IT2 Pease

that she knew where she was because she had previously looked at the same apartment to rent. (J.A. at 429-30.) She then returned to the bed with him. (J.A. at 430.) A little while later, IT2 B.S. and IT2 Pease engaged in vaginal intercourse; IT2 B.S. alternated between being on top of IT2 Pease and engaging in what she described as "doggie style" sex during which she was on her hands and knees facing away from him. (J.A. at 395, 431-32.) IT2 B.S. later told Naval Criminal Investigative Services (NCIS) during her interview that she enjoyed this "doggie style" intercourse.[2] (J.A. at 432, 442.) At one point during sex IT2 Pease bit IT2 B.S.'s nipple; she told him that this hurt and he did not do it again. (J.A. at 395, 432-33.)

The next morning, IT2 B.S. was awoken by another Sailor in the radio division who was sent to take her back to the ship; IT2 Pease was no longer in the apartment. (J.A. at 398-99.) IT2 B.S. asked him if she had any hickies and if she was in trouble. (J.A. at 399.) She figured he was there to take her back to the ship to talk to CWO3 G.B., since she had disregarded his instruction of the previous night to return to the ship.

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[2] During examination at trial, counsel asked IT2 B.S. a follow up question regarding this statement to NCIS. Counsel queried, "Does that mean it felt good?"; IT2 B.S. replied, "That night, yes, for those moments, yes, after the next day, no." (J.A. at 442.) The Navy-Marine Corps Court of Criminal Appeals made note of this in its findings. *United States v. Pease*, 74 M.J. 763, 769 (N.M.Ct.Crim.App. 2015) (J.A. at 06).

(J.A. at 399.) As they were walking back to the ship, the two ran into CWO3 G.B., who instructed IT2 B.S. to go speak with her Chief. (J.A. at 400.) Before doing this, she went to give a statement regarding her drinking the night of 24 January. (J.A. at 401-02.)

Lieutenant Junior Grade (LTJG) P., referred to by Sailors as Ms. P., viewed herself as the female mentor on the ship and was present during IT2 B.S.'s conversation with the Chief. (J.A. at 304-05, 402.) IT2 B.S. received a verbal counseling from the two about her involvement with alcohol and was told that she was not making a good first impression on the ship. (J.A. at 402-03.) At no time during this conversation did IT2 B.S. mention anything regarding a sexual assault. (J.A. at 403.)

Shortly after this conversation occurred, LTJG P. called ITSN S.K. in to speak with her. (J.A. at 304.) LTJG P. told ITSN S.K. that she needed to make more friends, and that some of her current friends, specifically referring to IT2 B.S., would end up stabbing her in the back. She then proceeded to tell ITSN S.K. that, despite what she may have heard about IT2 B.S.'s incident the previous night, nothing had happened and she was now back on the ship. (J.A. at 304.)

ITSN S.K. then went to talk to IT2 B.S. (J.A. at 304.) After talking for a little while, IT2 B.S. told ITSN S.K. that she had slept with IT2 Pease the previous night. (J.A. at 306.)

ITSN S.K. said that she had done nearly the exact same thing approximately one month prior. (J.A. at 407.) The two then continued to talk and decided that IT2 B.S. would make a report. (J.A. at 408.)

ITSN S.K. then got the Victim Advocate (VA) to speak with IT2 B.S. (J.A. at 306.) IT2 B.S. stopped ITSN S.K. as she turned to walk away, telling the VA that she should probably speak to her as well. (J.A. at 306-07.) After she made the report, IT2 B.S. told her fiancé about what had occurred. (J.A. at 418.)

C. Disagreement over the legal definition of "competent" appears to have been impactful to the findings of the panel.

On July 18, 2013, IT2 Pease's matter was referred to a general court martial; he was charged with three specifications of sexual assault, in violation of Article 120(b)(3)(B), UCMJ, 10 U.S.C. § 920(b)(3)(B) (2012), and one specification of abusive sexual contact, in violation of Article 120(d), UCMJ, 10 U.S.C. § 920(d) (2012). (J.A. at 12-15.) During various pre-trial Article 39(a) sessions, several motions were argued including a defense motion to dismiss Charge I because the underlying statute, Article 120, UCMJ, 10 U.S.C. § 920 (2012) was vague and thus unconstitutional. (J.A. at 121-35, 192-201.) The military judge denied the motion. (J.A. at 136.)

At trial, each side presented an expert witness on the effects of alcohol. The government's witness, a forensic toxicologist, testified generally on how the body processes alcohol and the stages of alcohol influence at various blood alcohol content (BAC) levels in accordance with the Dubowski chart. This witness did not feel comfortable calculating a specific BAC for either IT3 S.K. or IT2 B.S. (J.A. at 461-62.) He also testified about blackouts, during which a person could be functioning and responsive to others, while not recording any memories. (J.A. at 463-64.) Based on the testimony the expert heard regarding IT3 S.K.'s and IT2 B.S.'s capacities to function the nights in question, the expert agreed that both individuals were likely operating in a blackout phase at some point during the evening. (J.A. at 467, 471.)

The defense presented an expert in clinical psychology who conducts research on the effects of alcohol. (J.A. at 536.) Her focus is on "the effects of alcohol intoxication with specific focus on alcohol related blackouts, [and] the effects of alcohol intoxication on behavior such as sexual risk taking." (J.A. at 541.) With respect to risk taking, she testified that "[a]t higher doses of alcohol as people become progressively more intoxicated, they might begin to act in a reckless, aggressive or even sexually provocative ways." (J.A. at 544.) She continued by discussing how alcohol affects thinking:

> An interesting effect to sort of narrow an individual's attention to the most salient aspects, so alcohol dampens cognitive ability so that we tend to focus in on the most salient events or cues in our environment and in the research world we refer to this as alcohol myopia or sort of a shortsightedness where individuals focus on the immediate and oftentimes disregard the long-term consequences of a behavior. As you can imagine that often times lead people to perhaps make a decision that they might later regret.

(J.A. at 544-45.) With respect to blackouts, she testified that individuals experiencing this state are:

> still able to engage in voluntary behavior and thought processes. They make decisions, for example, to drive home from a bar, or to climb onto a roof of a building, or to purchase an airline ticket online, all activities which require complex cognitive abilities, but the individual might not remember the next day and might, in fact, regret it.

(J.A. at 553.) She also testified that individuals in this state are "still fully conscious." (J.A. at 546.)

Prior to closing arguments, defense counsel sought clarification by the military judge and government counsel on the government's emphasis on the word "competent" in its closing PowerPoint slides. (J.A. at 137-140.) Much of the colloquy centered on what the parameters of "competent" are when used in the context of "impairment by an intoxicant". (J.A. at 137-140.)

During this colloquy, the government counsel stated, "[O]bviously, the competency is not defined for [the members], so they have to take that word and consider what it means." (J.A. at 139.) The military judge concluded the discussion by sanctioning the PowerPoint slides stating, "As long as [the government is not] going toward something that's not in evidence . . . then it's fair game . . . It's what lawyer's do. [The trial government counsel's] going to tell you, he's going to argue that she's incompetent. [The trial defense counsel's] going to argue she's competent." (J.A. at 140.) During the government's closing argument and rebuttal, the trial counsel focused the members' attention on the word "competent" when referencing "consent" and "impairment". (J.A. at 168-69, 172, 569.)

During deliberations on the merits, the president of the panel requested a legal definition of "competent". (J.A. at 174.) The defense proposed using the definition from Black's Law Dictionary, which was "a basic or minimal ability to do something." (J.A. at 174-75, 178, 180.) The government counsel requested the military judge "point [the members] to where [competent] is included in the instructions which is in the consent instruction." (J.A. at 179.)

The military judge responded that such an answer would prove futile because clearly the members were lacking a

definition and were requesting one. (J.A. at 179.) Later in the colloquy the government argued "the bedrock rule is that the statutes are supposed to be given their plain meaning unless the statute provides a specific definition." (J.A. at 184.) Ultimately, the military judge provided the following instructions:

> 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 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 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?

(J.A. at 187-88.)

Following the announcement of findings of guilt, the defense renewed its motion to dismiss Charge I based on the fact that Article 120 is unconstitutionally vague. (J.A. at 190-91.) Defense counsel argued that the members' request for a

definition of "competent" clearly demonstrated that the statute was ambiguous and therefore void for vagueness. (J.A. at 190-91.) The military judge noted the renewal of the motion but again denied it. (J.A. at 191.)

In its clemency request, the defense submitted an affidavit of the president of the panel in which he explicitly stated that had the Black's Law Dictionary definition been provided, the determination of guilt or innocence would likely have been different in the case. (J.A. at 572-73.)

D. Acting under the statutory purview of Article 66(c), UCMJ, the Navy-Marine Corps Court of Criminal Appeals reviewed the entire record of trial and found neither ITSN S.K. nor IT2 B.S. was incapable of consenting to sexual intercourse or sexual contact due to impairment by an intoxicant, and that IT2 Pease reasonably may have believed they were willing partners in sexual activity.

On May 1, 2015, c Navy-Marine Corps Court of Criminal Appeals held oral argument on the assigned errors of whether the military judge erred by failing to give the trial defense's requested definition of the word "competent", and whether Article 120 was unconstitutionally vague because it does not contain a definition of "competent".

The Navy-Marine Corps Court of Criminal Appeals issued its published ruling on July 14, 2015. *United States v. Pease*, 74 M.J. 763 (N.M.Ct.Crim.App. 2015) (J.A. at 01-09). At the outset of the opinion, the lower court restated the five assigned

errors raised by IT2 Pease. *Id.* at 764 (J.A. at 02). The court then held:

> After carefully considering the record of trial and the pleadings and oral arguments of the parties, we find the sexual assault and sexual contact convictions factually insufficient. Arts. 59(a) and 66(c), UCMJ. Having considered [IT2 Pease's] assertion that the fraternization convictions were legally and factually insufficient, we find they are legally and factually sufficient and affirm them. *United States v. Clifton*, 35 M.J. 79, 81-82 (C.M.A. 1992). The remaining [assignments of error] are mooted by our decision.

Id.

The court delved into the specific facts of the sexual encounters between ITSN S.K. and IT2 Pease, and IT2 B.S. and IT2 Pease. *Id.* at 764-68 (J.A. at 02-06). The evidence relied upon by the court mirrors the evidence listed *supra*. *See Id.* The court then discussed the expert testimony of both the government's forensic toxicologist and the defense's clinical psychologist. *Id.* at 768-69 (J.A. at 06-07). The evidence relied upon by the court mirrors the evidence listed *supra*. *See Id.* The court cited to the record in each of its factual reiterations. *See Id.* at 764-69 (J.A. at 02-07).

Prior to conducting its analysis, the Navy-Marine Corps Court of Criminal Appeals outlined its review authority under Article 66(c), UCMJ. *Id.* at 769 (J.A. at 07). It then explained that after "careful deliberation," it was not

convinced that the government proved the elements of sexual assault and sexual contact (2012) beyond a reasonable doubt. *Id.* at 770 (J.A. at 08). The court clarified that its "interpretation of the law applied to [its] assessment of the facts in [the] case [left it] with reasonable doubt that the complainants were legally 'incapable of consenting' as well as reasonable doubt that the appellant knew or reasonably should have known they were incapable of consenting." *Id.*

Using the "words of the statute itself" the court went on to interpret "incapable of consenting", "competent", and "freely given agreement" in the following way:

> To be able to freely given 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 another person.

Id. (referencing *United States v. Ron Pair Enters.*, 489 U.S. 235, 240-41 (1989)). The court applied specific facts and evidence, listed *supra*, to this interpretation and found: (1) that neither ITSN S.K. nor IT2 B.S. were incapable of consenting; (2) that IT2 Pease did not know or reasonably should have known that they were incapable of consenting; and (3) that IT2 Pease reasonably may have believed both individuals were willing partners in the sexual activity. *Id.* at 770-71 (J.A. at 08-09). Based upon this finding, the Navy-Marine Corps Court of

Criminal Appeals set aside and dismissed the charge and specifications of sexual assault and abusive sexual contact. *Id.* at 771 (J.A. at 09).

Summary of Argument

Issue I

In order to resolve their confusion over the term "competent", the military judge instructed the members to reference Article 120, UCMJ, and the definitions contained therein, and to apply what they understood to be the plain and ordinary meaning of the word. The Navy-Marine Corps Court of Criminal Appeals performed the same task pursuant to its statutorily-prescribed duty of review under Article 66(c), UCMJ. Upon conclusion of its *de novo* review, the court found that the evidence presented at trial was factually insufficient to sustain IT2 Pease's convictions on the Article 120 charge and specifications. Such a finding rendered moot all other originally-assigned errors.

Issue II

The Navy-Marine Corps Court of Criminal Appeals properly interpreted "incapable of consenting" and "competent" for the purposes of "consent" by employing the plain meaning of the statutes. This interpretation avoids ambiguity and focuses on the congressionally-established parameters on the degree of

impairment necessary to render an individual incapable of consenting.

Argument

I.

THE LOWER COURT ACTED WITHIN THE BOUNDS OF ITS AUTHORITY UNDER ARTICLE 66(c), UCMJ. ADDITIONALLY, REMAND IS INAPPROPRIATE AS THE GOVERNMENT DID NOT APPEAL THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS' FACTUAL INSUFFICIENCY RULING ON THE SECOND ELEMENT OF ARTICLE 120(B)(3) OR THE RULING ON THE AFFIRMATIVE DEFENSE OF MISTAKE OF FACT AS TO CONSENT.

A. Standard of review.

The scope and meaning of Article 66(c), UCMJ, is reviewed *de novo*. *United States v. Nerad*, 69 M.J. 138, 142 (C.A.A.F. 2010) (citing *United States v. Lopez de Victoria*, 66 M.J. 67, 73 (C.A.A.F. 2008)).

B. Remand is inappropriate. Under the law-of-the case doctrine, the Navy-Marine Corps Court of Criminal Appeals' ruling is final in this case. Furthermore, a Court of Criminal Appeals is not required to rule on all assigned errors.

"When a party does not appeal a ruling, the ruling of the lower court normally becomes the law of the case." *United States v. Parker*, 62 M.J. 459, (C.A.A.F. 2006) (referencing *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002)). This doctrine is a discretionary appellate policy, and is inapplicable when the "lower court's decision is 'clearly erroneous and would work a manifest injustice.'" *Id.* at 464-65

(quoting *Doss*, 57 M.J. at n. * (citing *United States v. Williams*, 41 M.J. 134, 135 n. 2 (C.M.A. 1994)).

1. Article 120(b)(3) requires a finding that the victim was incapable of consenting due to impairment *and* that the accused knew or reasonably should have known of this condition. The Navy-Marine Corps Court of Criminal Appeals found factual insufficiency on both elements; however, the government did not appeal the factual findings of the court, the finding on the second element, or the finding based on the affirmative defense of mistake of fact as to consent.

In its opinion, the Navy-Marine Corps Court of Criminal Appeals pointed to the specific facts on which it relied in finding that there was a reasonable doubt as to the guilt of IT2 Pease. With respect to ITSN S.K., the court noted:

> [T]wo impartial witnesses observed her walk back to the ship with the appellant without any apparent difficulty, navigate the gate and ladder well, request permission to come aboard, and scan her identification card. While she was intoxicated enough that CWO3 G.B. singled her out and ordered her back to the ship, this, standing alone, does not prove she was sufficiently impaired that she was incapable of consenting to sexual activity. Further, ITSN S.K. herself conceded in cross-examination that she may have said "yes" to the sexual intercourse, and just could not remember doing so. We think this more than a speculative possibility here. Under these circumstances, her fragmentary memory of kissing [IT2 Pease] and telling him he was cute, then of being propped up supporting her own weight on her elbows having sexual intercourse with him does not persuade us beyond a reasonable doubt that somewhere in between, she had become manifestly unaware of what was happening or unable to make or to communicate decisions.

Pease, 74 M.J. at 771 (J.A. at 08-09). With respect to IT2 B.S., the court noted:

> Similar concerns apply to IT2 B.S. She was able to recall making the decision to "stay out and party" despite being aware of shore patrol's order to return to the ship. She conceded during cross-examination that she knew she had been ordered back, was able to formulate the thought that she wanted to stay out instead, and was able to decide and to communicate that she wanted to stay out. As with ITSN S.K., she had only fragmentary memory from there, but she remembered that when certain activities were painful or unpleasant, she was able to determine that she did not want that activity to continue and to articulate that to [IT2 Pease], who stopped. She further candidly related active participation in and even enjoying portions of the sexual activity.

Id. (J.A. at 09) (internal citation omitted).

The court further explained:

> In addition to not supporting the conclusion that ITSN [S.K.] and IT2 B.S. were "incapable of consenting," we view this as evidence supporting the conclusion that [IT2 Pease] reasonably may have believed that they were willing partners in sexual activity. Under these and all circumstances in the record, we are not convinced beyond a reasonable doubt that the appellant knew or reasonably should have known that [they were] incapable of consenting.

Id.

The government did not appeal these findings and its brief is curiously silent on the underlying facts of this case. But, as articulated by the lower court, these facts clearly show that

the behavior of both ITSN S.K. and IT2 B.S. on the nights in question raises doubt as to whether they were intoxicated to the point of being incapable of entering into a freely given agreement to engage in sexual encounters, and whether a third person viewing their behavior (i.e. IT2 Pease) would reasonably believe that they were incapable of willingly engaging in sexual activity.

Whether one is incapable of consenting is an entirely separate question from whether an individual observing their behavior would know or reasonably know that they were incapable of consenting. In other words, the question to answer is: as a third party observer, does this individual appear to be willingly engaging in sexual activity? There is no requirement for a prerequisite determination that the individual is incapable of consenting; a finding that the person appeared to be willingly engaging in the activity is sufficient for a finding of factual insufficiency.

The government has not appealed the lower court's findings in this regard; rather, it appeals the court's interpretation of "incapable of consenting", which has no impact on the court's findings on the second element or on the affirmative defense of mistake of fact as to consent. Thus, there appears to be no dispute as to the correctness of the finding. Therefore, the law-of-the case doctrine is applicable, and this Court should

affirm the decision of the lower court. The Navy-Marine Corps Court of Criminal Appeals' findings unappealed are dispositive of the case, and this Court can affirm without considering this issued raised by the government.

2. A Court of Criminal Appeals is not required to issue a ruling on an error of law, in accordance with Article 59(a), prior to issuing a ruling under Article 66(c).

The government asserts that the Navy-Marine Corps Court of Criminal Appeals erred in using its "awesome, plenary *de novo* power" under Article 66(c), UCMJ, prior to conducting a more limited review under Article 59(a), UCMJ. (Appellant's Br. at 24-26 (quoting *Nerad*, 69 M.J. at 144)). In support of this contention, the government provided two arguments: (1) that other service courts applied this more deferential standard of review over a plenary review; and (2) that this "backdoor approach to reviewing instructional error [thereby] circumvent[ing] application of the legal principles established by this Court's precedent." (Appellant's Br. at 26. (citing *United States v. Tardif*, 57 M.J. 219, 230 (C.A.A.F. 2002) (Sullivan, S.J. dissenting).)

i. The government's use of *Cagle*, *Long*, and *Ginn* are misplaced as the service courts in these cases were either not presented the specific assigned error of factual or legal insufficiency or the particular facts in the case were more suitable to the limited legal ruling under Article 59(a), UCMJ.

The government erroneously argues that both the Air Force Court of Criminal Appeals (in *Cagle*)and the Army Court of Criminal Appeals (in *Long*) made the sound judgment to employ a more "deferential standard of review" as opposed to abusing its authority under Article 66(c), UCMJ, as it claims the Navy-Marine Corps Court of Criminal Appeals has done. (Appellant's Br. at 25-26.) However, neither one of those service courts was presented with the specific question of whether the case was factually insufficient. The two courts simply reviewed the errors as assigned and issued rulings accordingly.

In support of its contention that other service courts more aptly applied a deferential review over a plenary review, the government cites to *United States v. Cagle*, No. 38592, 2015 CCA LEXIS 294, *13-*15 (A.F.Ct.Crim.App. July 16, 2015) (J.A. at 244-52), and *United States v. Long*, 73 M.J. 541, 544-45 (A.C.C.A. 2014). The government argues that unlike those two cases, here the Navy-Marine Corps Court of Criminal Appeals failed to address the "limited legal question regarding the sufficiency of the military judge's instructions," and that the court's analysis avoids a "more deferential standard of review"

by interpreting the statute and finding factual insufficiency under Article 66(c), UCMJ. (Appellant's Br. at 25.)

In making this argument, the government omits one important fact: in neither case did the appellate defense counsel raise the error of factual or legal insufficiency. In *Cagle*, the five errors assigned were: (1) several specifications were multiplicious, (2) the military judge erred in his instructions, (3) apparent unlawful command influence made a fair trial or clemency consideration impossible, (4) appellant's sentence was inappropriately severe, and (5) post-trial processing delays warranted relief. *Cagle*, 2015 CCA LEXIS 294, *1-*2 (J.A. at 246). In *Long*, the only assigned error concerned the military judge's instructions. *Long*, 73 MJ at 543.

The government also cites to *United States v. Ginn*, 2015 CCA LEXIS 334 (A.F.Ct.Crim.App. 2015) (J.A. at 256-267). But, as discussed *infra* on pages 41-42 of this brief, the facts in *Ginn* are wholly different from those in the present case. In that case, the appellate defense counsel raised both factual and legal insufficiency and error by the military judge in failing to provide a definition of "competent". Upon review, the Air Force Court of Criminal Appeals found the facts were sufficient to prove beyond a reasonable doubt that the appellant committed a sexual act upon the victim, who was incapable of consenting to the sexual act due to impairment by alcohol, and that the

appellant knew or reasonably should have known of that condition. *Ginn*, 2015 CCA LEXIS 334, at *22-*23 (J.A. at 265). Therefore, the Air Force Court of Criminal Appeals appropriately found that the military judge did not err by failing to provide an instruction because the appellant was not materially prejudiced as a result.

ii. Precedence set by this Court holds that a review under Article 59(a), UCMJ, is separate and distinct from a review under Article 66(c), UCMJ, and a Court of Criminal Appeals is not required to conduct a review under Article 59(a) prior to conducting a review under Article 66(c).

The government also asserts that the Navy-Marine Corps Court of Criminal Appeals took a "backdoor approach to reviewing instructional error [thereby] circumvent[ing] application of the legal principles established by this Court's precedent." (Appellant's Br. at 26.) In support of this, the government does not cite to this Court's precedent, rather it cites to the dissenting view in *Tardif*, 57 M.J. at 230. (Appellant's Br. at 26 ("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.").)

There are several reasons that this language does not control in this case. First, the citation is from the dissent, not the majority's opinion, which has been the precedent of this Court since 2002. There is no indication that this case has

been overturned or undermined.[3] Second, the majority in *Tardif* held that "[b]ased on the legislative and judicial history of Articles 59(a) and 66(c), . . . the power and duty to review" under Article 66(c), UCMJ, is "separate and distinct from [the] power and duty to review" under Article 59(a), UCMJ. *Tardif*, 57 M.J. at 224. Specifically, "Article 59(a) was intended by Congress to preclude the reversals for minor technical errors." *Id.* at 223 (citing *United States v. Powell*, 49 M.J. 460, 462 (C.A.A.F. 1998).

> Considered together, Articles 59(a) and 66(c) "bracket" the authority of a Court of Criminal Appeals. Article 59(a) constrains the authority to reverse "on the ground of an error of law." Article 66(c) is a broader, three-pronged constraint on the court's authority to affirm. Before it may affirm, the court must be satisfied that the findings and sentence are (1) "correct in law," and (2) "correct in fact." Even if these two prongs are satisfied, the court may affirm only so much of the findings and sentence as it "determines, on the basis of the entire record, should be approved." *See Powell*, *supra* at 464-64. The first prong pertains to error of law and, as such, it also implicates Article 59(a). The second and third prongs do not involve errors of law and, thus, do not implicate Article 59(a).

[3] The Air Force Court of Criminal Appeals, in an unpublished opinion dated June 17, 2015, declined to extend the second holding in *Tardif*, which was that a Court of Criminal Appeals has authority to grant relief short of dismissal of the charges if it finds excessive post-trial delay. *United States v. Lister*, 2015 WL 4039394, *5 (A.F.Ct.Crim.App. 2015). However, that ruling has no impact on the analysis discussed above.

Tardif, 57 M.J. at 224.

Based on this Court's statutory analysis in *Tardif*, and contrary to the government's assertions, the Navy-Marine Corps Court of Criminal Appeals conducted a proper review under Article 66(c). It was not required to first determine whether the military judge's failure to provide a certain instruction materially prejudiced IT2 Pease.

3. A Court of Criminal Appeals is not required to rule on all assignments of errors raised by the appellant.

The government requests the relief of remand to allow the Navy-Marine Corps Court of Criminal Appeals to rule on the originally-assigned error of whether the military judge erred in failing to provide a requested definition of the word "competent". (Appellant's Br. at 24.) This requested relief is inappropriate as the lower court was not required to rule on all assigned errors; the government has provided no case law to the contrary.

In this case, the lower court only ruled on one of the five assigned errors, deeming the others "moot." *Pease*, 74 M.J. at 764 (J.A. at 02). In its brief, the government takes issue with the fact that the lower Court did not address the instructional error, but has no concern with failure to rule on the issues concerning evidence erroneously admitted under Mil. R. Evid. 413 or the improper admission of bolstering expert testimony. The

reason for this is simple; the lower court has no affirmative duty to rule on all assigned errors.

After reviewing the record, the Navy-Marine Corps Court of Criminal Appeals found that the evidence was factually insufficient to sustain the Article 120 convictions. There was simply no need to determine whether the military judge erred in failing to give an extraneous definition, because the "definition" was already within the confines of the statutory language provided to the members. To render such a decision would have been superfluous. Absent any controlling case law to the contrary, which the government has not provided, the Navy-Marine Corps Court of Criminal Appeals is not bound to issue a ruling on all assigned errors.

C. The Navy-Marine Corps Court of Criminal Appeals acted within the parameters of Article 66(c) and did not consider evidence outside the record of trial.

1. A Court of Criminal Appeals' review under Article 66(c), UCMJ, is a *de novo* review, permitting the service courts to weigh all evidence in the record of trial under the burden of beyond a reasonable doubt.

Article 66(c), UCMJ, provides:

> In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it *finds correct in law and fact* and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge

> the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2012) (emphasis added).

"The test for factual sufficiency is 'whether, after weighing all the evidence in the record of trial and making allowances for not having personally observed the witnesses,' we are ourselves convinced of the accused's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). "Such a review involves a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency beyond the admonition in Article 66(c), UCMJ, to take into account the fact that the trial court saw and heard the witnesses." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

2. The government's use of *Holt* and *Beatty* is misplaced. Both focus on ambiguities as to whether certain evidence was properly before the members; neither are a review of statutory language. Reviewing the plain language not change the evidentiary scope of the record of trial, nor did the Navy-Marine Corps Court of Criminal Appeals consider evidence outside the scope of the record of trial.

The government's premise that the Navy-Marine Corps Court of Criminal Appeals judicially defined "incompetent", "freely given agreement", and "incapable of consenting" contrary to the instructions provided to the members, and that, as a result of these judicially created definitions, the lower court

impermissibly considered matters outside of the record, is wrong for five reasons. First, the judge did not define any of these terms for the members, therefore there is no conflict between the Navy-Marine Corps Court of Criminal Appeals' interpretation of the statute and the instructions. (*See* J.A. 1154-64, 1286-87.)

Second, in response to the members' request for a legal definition of "competent", the military judge instructed them to use the plain and ordinary meaning of the word and to refer back to the statutory language for further guidance. (J.A. at 187-88.) The lower court's interpretation is consistent with this instruction.

Third, the meaning of a statute is a question of law and questions of law, which are reviewed *de novo*, are never off limits to an appellate court, no matter how the military judge instructed the members. *See United States v. Martinelli*, 62 M.J. 52, 56 (C.A.A.F. 2005). Furthermore, Article 66(c), UCMJ, recognizes that the court must look at the law and facts to conduct its review.

Fourth, conclusions regarding questions of law are not evidence and they are not matters outside the record. Finally, the lower court does not cite to any extraneous evidence in making its finding of factual insufficiency. *Pease*, 74 M.J. at 770-71 (J.A. at 08-09).

The cases the government cites to support its contention to the contrary do not support its position. For example, in *United States v. Beatty*, 64 M.J. 456, 459 (C.A.A.F. 2007), this Court found that it was unclear whether the Air Force Court of Criminal Appeals relied on testimony that was not before the members in making a credibility assessment during its Article 66(c), UCMJ, review. As this may have been improper, the case was remanded for further review.

In *United States v. Holt*, 58 M.J. 227 (C.A.A.F. 2003), the Air Force Court of Criminal Appeals changed the evidentiary nature of several prosecution exhibits by holding that the exhibits were admissible under certain hearsay exceptions. *Holt*, 58 M.J. at 232. By changing the nature of the hearsay exceptions, this Court found that the exhibits were "elevated to exhibits admitted for the 'truth of the matter asserted,'" which had previously been excluded at trial. *Id.* (citing Mil. R. Evid. 801(c)). This Court found that a Court of Criminal Appeals may not "resurrect excluded evidence during appellate review under Article 66(c)," and that "[i]n reviewing guilt, evidence excluded in a trial forum cannot be considered on appeal to affirm guilt." *Id.* at 232-33.

Neither case found that legal conclusions were evidence, much less "evidence outside the record." In short, the Navy-Marine Corps Court of Criminal Appeals did exactly what it was

required to do in accordance with Article 66(c), UCMJ: interpret the statute and apply it to the facts.

II

THE NAVY-MARINE CORPS COURT OF CRIMMINAL APPEALS PROPERLY INTERPRETED "INCAPABLE OF CONSENTING" BY EMPLOYING THE PLAIN MEANING OF THE STATUTORY LANGUAGE. THIS INTERPRETATION AVOIDS AMBIGUITY AND FOCUSES ON THE CONGRESSIONALLY-ESTABLISHED PARAMETERS FOR DETERMINING THE DEGREE OF IMPAIRMENT NECESSARY TO RENDER AN INDIVIDUAL INCAPABLE OF CONSENTING.

A. Standard of review.

Article 67, UCMJ, permits this Court to "review questions of law certified by Judge Advocates General where the courts of criminal appeals have set aside a finding on the ground of factual insufficiency." *United States v. Leak*, 61 M.J. 234, 242 (C.A.A.F. 2005).

B. The Navy-Marine Corps Court of Criminal Appeals interpreted the phrases "incapable of consenting" and "competent" for purposes of "consent" using a plain language approach. Such interpretation avoids ambiguity.

The Navy-Marine Corps Court of Criminal Appeals' interpretation was proper as the lower court employed the plain meaning of the statute. Two cannons of statutory construction are: (1) words in a statute shall be given their common meaning; and (2) a word is given more precise content by the neighboring words with which it is associated. In the absence of a statutory definition, the Supreme Court and this Court have

routinely counseled that courts should look "to regular usage to see what Congress probably meant." *Lopez v. Gonzales*, 549 U.S. 47, 53 (2006); *accord Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) ("When interpreting a statue, we must give words their 'ordinary or natural' meaning."); *United States v. Kuemmerle*, 67 M.J. 141, 143 (C.A.A.F. 2009); *United States v. McCollum*, 58 M.J. 323, 340 (C.A.A.F. 2003) ("[W]ords should be given their common and approved usage.") (internal citations and quotation marks omitted). The Supreme Court has also counseled that language should be construed "in its context and in light of the terms surrounding it." *Leocal*, 543 U.S. at 9; *accord Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2042 (2012) (explaining the meaning of an undefined statutory term is confirmed by the "common sense cannon of *noscitur a sociis* - - which counsels that a word is given more precise content by the neighboring words with which it is associated.") (quoting *United States v. Williams*, 553 U.S. 294 (2008)).

In interpreting the meaning of the phrase "incapable of consenting," the Navy-Marine Corps Court of Criminal Appeals explained that in its own quest for the meaning, it needed to "look no further than the words of the statute itself." *Pease*, 74 MJ at 770 (referencing *Ron Pair Enters.*, 489 U.S. at 240-41 ("as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the

plain language of the statute.”)). In so doing, the lower court went on to write:

> After enumerating that it is a crime to commit sexual acts or contact upon a person incapable of consenting, Article 120 defines “consent” as “a freely given agreement to the conduct at issue by a competent person” and goes on to state that a “sleeping, unconscious, or incompetent person cannot consent.” Art 120(g)(8), UCMJ. Here, the terms “competent” and “incompetent” in the definitions section merely refer back to the punitive language regarding those incapable of consenting; it adds no further punitive exposure. Thus, in this context, 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. 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.

This language clearly shows that the Navy-Marine Corps Court of Criminal Appeals derived the “causes” which render a person incompetent for purposes of consenting from the text of Article 120(b)(3) itself. It criminalizes a sexual act, which is committed upon another:

> when the other person is incapable of consenting to the sexual act due to –

> (A) impairment by any drug, intoxicant, or other similar substance, and that condition is reasonably 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)(A)-(B), UCMJ, 10 U.S.C. §920(b)(3)(A)-(B) (2012). The separation of "impairment by any drug, intoxicant, or other similar substance," and "a mental disease or defect, or physical disability," into two separate prongs was intentional on Congress' part. As the lower court correctly analyzed, Congress essentially stated that a person must possess the mental or physical ability to enter into a freely given agreement (i.e. consent). This intentional separation makes "impairment by an intoxicant" synonymous with being mentally or physically incapable of entering into a freely given agreement. Congress further clarified its definition of "consent" by adding language that a "sleeping, unconscious, or incompetent person cannot consent." Article 120(g)(8)(B), UCMJ, 10 U.S.C. § 920(g)(8)(B) (2012).

Per the discussion above, it has already been established that an incompetent person lacks the "mental or physical" ability to consent. "Sleeping and unconscious" informs us that, in order to enter into a "freely given agreement," a person must first possess the *cognitive* ability to appreciate the nature of

the conduct in question. A sleeping or unconscious person certainly does not possess this basic cognitive ability.

Such interpretation avoids ambiguity because it relates back to the clauses to which it is relevant, i.e., those outlined in Article 120(b)(3). These are impairment by an intoxicant, impairment by a mental disease or defect, or impairment due to a physical disability. Furthermore, there is no practical application of "incompetent" to the theories of criminality outlined in Article 120(b)(1) or where the physical act is alleged as both the *actus reus* and the bodily harm; lack of consent is not an element. And in those bodily harm cases, where it is an element, the issue is whether the victim consented, not whether she *had the ability* to consent.

C. The Navy-Marine Corps Court of Criminal Appeals' interpretation of "incapable of consenting" focuses on the Congressionally-established parameters for determining the degree of impairment.

On pages 36-38 of its brief, the government argues that the Navy-Marine Corps Court of Criminal Appeals' definition confines 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. (Appellant's Br. at 36 (referencing *Pease*, 74 M.J. at 770).) To the contrary, the Navy-Marine Corps Court of Criminal Appeals has not confined areas of prosecution. Rather, it recognized and highlighted the

Congressionally-established parameters on what constitutes a competent person for purposes of entering into a freely given agreement and consenting when impaired by an intoxicant.

To what extent must the person be impaired by the intoxicant to render them incapable of consenting? By looking at the text of the punitive portion of the statute, we find that they must be incapable of mentally or physically making or communicating a decision regarding an agreement to enter into the conduct. By looking at the text of the definition of consent, we find that the person must have the cognitive ability to be able to appreciate the nature of the conduct (e.g. a sleeping or unconscious person cannot consent).

The Navy-Marine Corps Court of Criminal Appeals did not craft an extraneous definition in this case. Rather, it looked at the intentionally selected, and much debated, words provided by Congress, and interpreted the purpose behind those words, which was to provide logical parameters. To sustain a conviction, the prosecution then must take the facts of the specific case it is litigating (i.e. "all the surrounding circumstances that are required to be considered in determining whether consent was given" Article 120(g)(8)(C)) and fit them within these parameters.

D. The Navy-Marine Corps Court of Criminal Appeals did not apply the 2007 version of the statute.

The government argues that the Navy-Marine Corps Court of Criminal Appeals' interpretation of "competent" and a "freely given agreement" is incorrect because it essentially applies the 2007 version of the statute, which was amended by Congress in 2012. (Appellant's Br. at 38-40.) This assertion is incorrect for at least two reasons. First, both the 2007 and 2012 versions use some of the same words, including "incapable", "consent", "competent", and various forms of the word "impair". Further, both statutes address sexual activity where the victim is impaired, so naturally there will be some similarities in the definitions. Second, unlike the 2012 version, the 2007 version's definition of consent reveals that the meaning of the term "incapable" (which is used in both versions) was ambiguous because of the qualifier "substantially". In defining consent, the 2007 statute states:

> A person cannot consent to sexual activity if - -
>
> (B) [that person is] *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 act at issue; or
> >
> > (iii) physically communicating unwillingness to engage in the sexual conduct at issue.

Article 120(t)(14)(B), UCMJ (2007). The 2012 statute removed this nebulous standard. It required that the victim's intoxication render her "incapable" rather than "substantially incapable". Because the victim must still be incapable it is no wonder that there is some similarity in the meaning of the statutory schemes. Given the language of both statutes, that similarity does not support the government's claim that the Navy-Marine Corps Court of Criminal Appeals incorporated the definition provided in the 2007 statute.

E. No other Court of Criminal Appeals has interpreted the statute under its Article 66(c), UMCJ, review authority. Rather, the other service courts have reviewed for an abuse of discretion for failure to provide a requested instruction, because the other cases were factually different from *Pease* and such review was appropriate in those particular cases.

Contrary to the government's assertion on page 29 of its brief, the Air Force Court of Criminal Appeals in *United States v. Ginn*, 2015 CCA LEXIS 334 (A.F.Ct.Crim.App. 2015) did not decline to follow *Pease*. Quite the opposite, the Air Force Court of Criminal Appeals quoted the Navy-Marine Corps Court of

Criminal Appeals' interpretation provided in *Pease*.[4] *Ginn*, 2015 CCA LEXIS 334, at *20, FN 8 (J.A. at 264).

In *Ginn,* the Air Force Court of Criminal Appeals held that the military judge did not err in failing to provide the members a definition of the word "competent", despite a request from the members. *Id.* at *19-*20. The test for determining error in *Ginn* was plain error, since the trial defense counsel did not object to either the military judge's use of a particular definition, or his failure to provide a particular definition. *Id.* at *15-*17 (J.A. at 262-63). The court found that "on the facts of th[e] case the military judge's instructions to the members to 'just apply [the] common usage' of the word 'competent' was not plain error when considered with the context of all the instructions provided to them." *Id.* at *19 (J.A. at 264).

An analysis of plain error requires a showing that "there was error, that the error was plain or obvious, and that the error materially prejudiced a substantial right." *Id.* at *16-*17 (J.A. at 263) (citing *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011)). Under this framework, the Air Force Court

[4] The Air Force Court of Criminal Appeals also noted that the circular language in the 2012 definition of consent "does not assist in defining the word 'competent' short of a sleeping or unconscious victim. *Ginn*, 2015 CCA LEXIS 334, at *18, FN 7 (J.A. at 264). However, the Air Force Court of Criminal Appeals did not pause to interpret the language as the facts of the case did not necessitate such a review.

of Criminal Appeals specifically noted that "[t]he appellant has not stated what definition of 'competent' the military judge should have provided nor how the failure to provide the panel with that definition materially prejudiced his substantial rights." *Id.* at *20, FN 8 (J.A. at 264).

Furthermore, as previously noted, the Air Force Court of Criminal Appeals found the "facts of the case" did not warrant further definition. *Id.* at *19 (J.A. at 264). The particular facts in *Ginn* differ greatly from those in *Pease*. In *Ginn*, a friend of the appellant whose memory of the evening was more complete than either the victim's or the appellant's testified that prior to the alleged incident, he had to assist the victim in being transported from the bathtub (where he found her after seeing vomit on the bathroom floor, up the walls, and in the doorway) to the appellant's bedroom. He had to physically lift her from the bathtub; once in the bedroom, she kept lapsing in and out of consciousness. *Id.* at *4-*5 (J.A. at 260). After some time, the friend left her in the room so that he could continue cleaning her clothes, soiled with vomit; upon returning, he found her "leaning partly on the bed and partly off the bed." *Id.* at *5 (J.A. at 260). He eased her onto the floor so that she could "sleep it off" at which time the friend left to discuss the victim's condition with another Airman. The two decided that she needed to be returned to her own room. The

two Airmen went back to the appellant's room to convince him to return the victim to her room; after some time, the appellant answered the door, but "rebuffed their suggestions." *Id.* at *6 (J.A. at 260). The friend could hear the victim's "slurred, drunken speech" from inside the room. *Id.*

From these facts, it is clear that the victim in *Ginn* was overtly intoxicated to the point she was unlikely aware of her surroundings. The Air Force Court of Criminal Appeals recognized as much in its finding that the military judge did not err by failing to provide a definition of "competent". In fact, prior to the incident occurring, the friend testified that the victim was slipping in and out of "awareness." *Id.* at *5 (J.A. 260). In such a case, the members could easily discern whether the victim was able to "freely" enter into an agreement because she was incapable of agreeing. If she was unlikely to be aware of her situation or her surroundings, then she was unlikely to be able to agree to something.

The facts in *Pease* are less discernable without further interpretation of the word "competent". In *Pease*, it was not clear whether either of the two alleged victims were intoxicated to the point that they were unaware of their surroundings; they certainly were not in a state of intoxication comparable to the victim in *Ginn*. For that reason, it was necessary for the Navy-Marine Corps Court of Criminal Appeals to look further at the

term “competent” for purposes of conducting a factual sufficiency review. Given the facts in *Ginn*, a similar review was unnecessary.

Conclusion

For the reasons stated above, IT2 Pease respectfully requests that this Court find that, under the law-of-the case doctrine, the Navy-Marine Corps Court of Criminal Appeals findings and ruling are binding. Alternatively, IT2 Pease respectfully requests this Court find the Navy-Marine Corps Court of Criminal Appeals’ interpretations of “incapable of consenting” and “competent” for purposes of “consenting”, while conducting a factual sufficiency review, were appropriate and affirm the lower court’s ruling.

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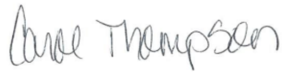

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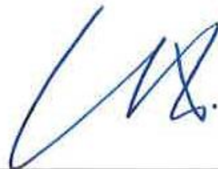

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