IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	) BRIEF ON BEHALF OF) APPELLANT)
v.	) Crim. App. Dkt. No. 20150199)
Private First Class (E-3) **MITCHELL L. BRANTLEY**, United States Army, Appellant	) USCA Dkt. No. 17-0055/AR))))

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

Issue Presented

WHETHER THE GOVERNMENT PROVED BEYOND A REASONABLE DOUBT THAT APPELLANT KNEW OR REASONABLY SHOULD HAVE KNOWN THAT SR WAS "OTHERWISE UNAWARE" OF SEXUAL CONTACT.

Statement of Statutory Jurisdiction

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

Statement of the Case

On February 11 and March 24-25, 2015, at Fort Polk, Louisiana, an enlisted panel sitting as a general court-martial convicted Private First Class (PFC) Mitchell

L. Brantley, contrary to his plea, of abusive sexual contact, in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2012). The panel sentenced PFC Brantley to reduction to E-1, ninety days confinement, and a bad-conduct discharge. (JA 301). The convening authority approved the finding of guilty and sentence as adjudged. (JA 302).

On October 6, 2016, the Army Court affirmed the finding of guilty and sentence. (JA 1). Private First Class Brantley was subsequently notified of the Army Court's decision and petitioned this Court for review on October 26, 2016. On January 12, 2017, this Honorable Court granted appellant's petition for review.

Statement of Facts

September 19-October 1, 2014

On Friday, September 19, 2014, PFC DS invited PFC Brantley and other friends to her home for dinner. (JA 68). Private First Class DS wanted PFC Brantley to meet her mother, SR, who was visiting from Missouri. (JA 68). After dinner, SR drank nine shots of Bacardi Dragon Berry Rum. (JA 26). As the evening progressed, SR began feeling sick and asked PFC DS to get Zofran, an anti-nausea medication, from her purse. (JA 27). Private First Class DS instead retrieved a medication called Klonopin and gave SR two pills to take. (JA 28, 70). Klonopin should not be taken while drinking alcohol because it may make

sleepiness or dizziness worse. (JA 272). As the evening progressed, SR began stumbling, slurring her words, and vomiting. (JA 103-104).

Private First Class DS ensured PFC Brantley stayed the night at her home because he had also been drinking. (JA 71). Private First Class Brantley offered to take care of SR when PFC DS and her husband, Specialist (SPC) CS, went to sleep. (JA 71-72). When PFC DS left SR and PFC Brantley between 12:30 and 1:00 A.M., SR was hunched over the couch but was not sleeping. (JA 90).

SR testified she remembered PFC Brantley straddling her and trying to pull her shorts to the side before "passing back out." (JA 30-31). She said she told PFC Brantley to get off of her during this encounter. (JA 45). SR remembered her husband sent her a text message and she was able to see it was around 4:30 A.M. (JA 47). After waking up a few hours later, SR said PFC Brantley threatened her, saying that if she told anyone about what happened, he would "go after" PFC DS and "hurt her." (JA 32).

Over the next two days, PFC Brantley, SR, PFC DS, and SPC CS went to dinner, played miniature golf, and watched a movie together. (JA 36-37). SR testified she received a text message from PFC Brantley on Sunday night that said, "while you were passed out, I took out your breasts and masturbated to them." (JA 37). SR responded, "you did not do that," to which PFC Brantley said, "I had to." (JA 37). SR showed this text message to PFC DS, then deleted it. (JA 37, 77). SR

said she deleted the messages because she "just wanted to run" from the situation or not "deal with it anymore." (JA 38). SR refused to allow the Army Criminal Investigative Command (CID) access to her phone to try to obtain the text messages. (JA 61). Despite conducting a digital forensic examination of PFC Brantley's cell phone, CID did not retrieve any text messages between PFC Brantley and SR. (JA 162).

On September 24, 2014, PFC DS received a text message from PFC Brantley asking "what's wrong?" (JA 81, 304). Private First Class DS asked him:

> PFC DS: Did you do anything else to my mom while she was sleeping besides take her boobs out of her shirt and masturbate to them? She deserves to know.
>
> PFC Brantley: Nothing else happened.
>
> PFC Brantley: I feel ashamed.
>
> PFC DS: So just that?
>
> PFC Brantley: Yes.

(JA 303-304, 306-307).

When CID interviewed PFC Brantley on October 1, 2014, he denied touching SR inappropriately. (JA 305, 309). Private First Class Brantley later testified at trial that he did touch SR's breast over her shirt only after she began touching his penis and arousing him. (JA 207). Once SR stopped touching his penis, PFC Brantley stopped touching her breast, stood up, and went to sleep on a

different couch. (JA 208). Throughout the weekend, SR sent PFC Brantley text messages which he perceived flirtatious. (JA 224). SR confirmed she may have exchanged as many as forty-seven text messages with PFC Brantley after he allegedly admitted touching her breast while she was sleeping. (JA 53, 311-317).

Trial: March 24-25, 2015

After both parties rested, the military judge proposed panel instructions in an Article 39(a) hearing. (JA 263-264). The military judge confirmed the theory of liability for the Specification of Charge I was SR was "otherwise unaware" and he was not going to instruct the panel about SR being asleep. (JA 264). The trial counsel did not object. (JA 264). Later, the trial counsel agreed with the military judge there was no possibility of variance regarding Charge I and findings by exceptions and substitutions were not appropriate. (JA 265).

Regarding the Specification of Charge I, the military judge instructed the panel:

> In the specification of Charge I, the accused is charged with the offense of Abusive Sexual Contact, in violation of Article 120, UCMJ. In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond reasonable doubt:
>
> One, that at or near Fort Polk, Louisiana, between on or about 19 September 2014 and on or about 20 September 2014, the accused committed sexual contact upon Mrs. SR, to wit: touching her breast; and

> Two, that the accused did so when he knew or reasonably should have known that Mrs. SR was *otherwise unware* that the sexual contact was occurring.

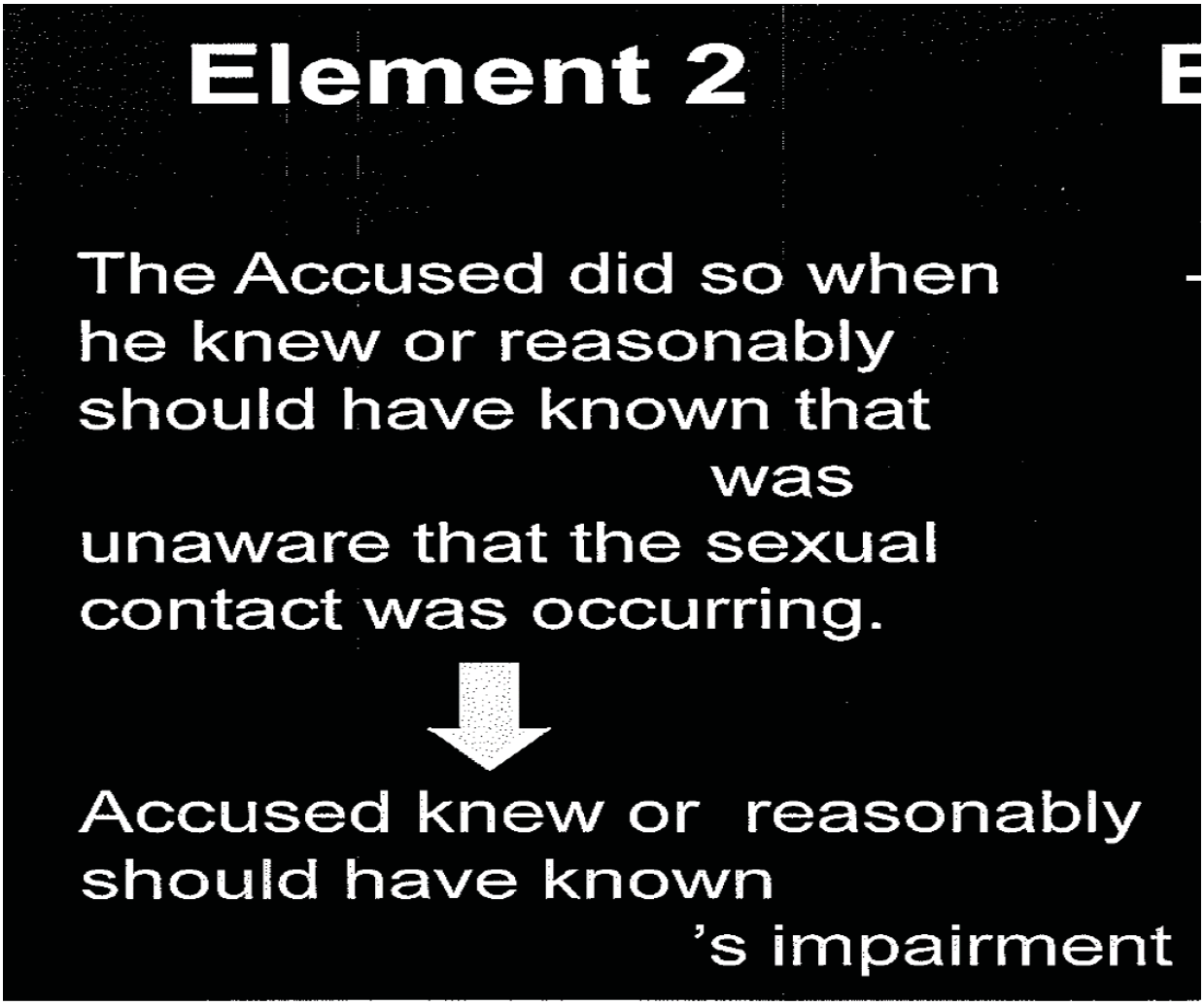
(JA 267, 320)(emphasis added). The military judge also instructed the panel about the defenses of consent and mistake of fact as to consent using only the "otherwise unaware" language. (JA 267-270, 320-322).

During closing argument, the trial counsel described SR's level of intoxication:

> Next we have the second element [of the Specification of Charge I] that the accused did so, and he did that contact but he knew or reasonably should have known that SR was otherwise unaware that the sexual contact was occurring. This is really two things, panel members, that he knew or reasonably should have known, those are two different things. What is it that he needs to have known or reasonably should have known about? *Well, that's the level of impairment. That she was otherwise unaware, that she was impaired*.
>
> What evidence do we have here? We have the accused's statement to CID Agent Hyatt, where he indicates that *she was impaired* and you have his in-court testimony today, where he again tells you that he knew *she was impaired*. Then we also have the reasons, he should have known.
>
> *When I cupped her breast, I knew she was drunk at that point*. Yeah, she threw up for a couple of hours. You're drinking and taking medication that turned out to be Klonopin. That's how he indicates to us that he knew *she was impaired*.

(JA 280-281)(emphasis added).

The trial counsel simultaneously displayed this and other slides to the panel asserting "otherwise unaware" was equal to "impairment."



(JA 277, 337)(SR's name omitted).

On rebuttal, the government again emphasized this theme:

> Panel members, this case really comes down to just two things. *Her impairment* and his words. Everything else is a distraction, smoke and mirrors obscuring you from what's really important. *Let's talk about her impairment*.
>
> The accused saw her behaving in an *impaired manner*.

> You heard the accused's own words that she is vomiting for several hours. There's no question that *she's impaired* that night.

(JA 296-297)(emphasis added). The panel found PFC Brantley guilty of the Specification of Charge I but acquitted him of the remaining charges and specifications. (JA 299-300).

Summary of Argument

The government set a high burden of proof for itself by only charging the theory of liability that PFC Brantley touched SR's breasts when he knew or reasonably should have known SR was otherwise unaware of sexual contact. The government believed it could meet its burden by presenting evidence and arguing that being impaired and otherwise unaware were one in the same. However, Congress criminalized sexual contact when an alleged victim is incapable of consent due to impairment by an intoxicant, asleep, unconscious, or otherwise unaware as separate and distinct theories of liability. The government's failures to recognize these distinctions and present any evidence SR was otherwise unaware of sexual contact renders PFC Brantley's conviction legally insufficient.

Issue Presented

WHETHER THE GOVERNMENT PROVED BEYOND A REASONABLE DOUBT THAT APPELLANT KNEW OR REASONABLY SHOULD HAVE KNOWN THAT SR WAS "OTHERWISE UNAWARE" OF SEXUAL CONTACT.

Standard of Review

This Court reviews questions of legal sufficiency and statutory construction de novo. *United States v. Wilson*, No. 16-0267/AR, slip. op. at 3 (C.A.A.F. Jan. 13, 2017)(citing *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011); *United States v. Atchak*, 75 M.J. 193, 195 (C.A.A.F. 2016)). The standard of review for legal sufficiency is "whether, after reviewing the evidence in the light most favorable to the government, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id*. (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Law

Article 120(d), UCMJ, states:

> Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (b)(sexual assault) had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court-martial may direct.

Taken in conjunction with Article 120(b)(2) and (b)(3)(A), a person subject to this chapter commits abusive sexual contact when:

> (2) the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual contact is occurring; or
>
> (3) the other person is incapable of consenting to the sexual contact 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;

A fundamental tenet of statutory construction is to construe a statute in accordance with its plain meaning. *Loving v. United States*, 62 M.J. 235, 240 (C.A.A.F. 2005). An inquiry into a statute's meaning "begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd., LLC. v. United States*, 541 U.S. 176, 183 (2004)(citations omitted). The preeminent canon of statutory interpretation requires courts to "presume that [the] legislature says in a statute what it means and means in a statute what it says there." *Id.* (citing *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992)). Congress is not to be presumed to have used words for no purpose. *Platt v. Union P.R. Co.*, 99 U.S. 48, 58 (1878). The admitted rules of statutory construction declare that a legislature is presumed to have not used superfluous words. *Id*. Courts are to accord a meaning, if possible, to every word in a statute. *Id*.

A party that fails to request or object to an instruction before the members close to deliberate waives the objection in the absence of plain error. Rule for

Court-Martial 921(f). An appellate court cannot affirm a criminal conviction on the basis of a theory of liability not presented to the trier of fact. *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008)(citing *Chiarella v. United States*, 445, U.S. 222, 236-37 (1980)). "To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process." *Id*. (citations omitted). "[I]t is as much a denial of due process to send an accused to prison following conviction for a charge that was never made as it is to convict him upon a charge for which there is no evidence to support that conviction." *Garner v. Louisiana*, 368 U.S. 157, 164 (1961).

Argument

The government wedded itself to the theory of liability that SR was "otherwise unaware" of the sexual contact at numerous points throughout PFC Brantley's court-martial. First, the government elected to specifically prefer, investigate, and refer only this theory. (JA 5-6). The government then waived the ability to change course at trial and on appeal when it failed to request instructions on alternative theories of liability and conceded findings by exceptions and substitutions for Charge I were not appropriate. (JA 263-265). Nevertheless, the government attempted to prove their theory by only presenting evidence of SR's impairment and arguing that being impaired was the same as being otherwise unaware. (JA 280-281, 296-297).

Even when viewed in the light most favorable to the government, the record is devoid of sufficient evidence SR was otherwise unaware of sexual contact. Therefore, PFC Brantley's conviction for abusive sexual contact is legally insufficient because no rational trier of fact could have found the evidence met this essential element beyond a reasonable doubt.

1. Being "otherwise unaware" and "incapable of consenting due to impairment" are two separate and distinct theories of liability.

Congress intended to make these two theories of liability separate and distinct by listing each under different subsections of Article 120. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1405 (2011)(codified as amended at 10 U.S.C. § 920(b)(2) and (b)(3)(A) (2012)). Congress specifically added the language in subsection (b)(2) to the 2012 version of the statute to clarify "previously confusing language from the 2007 version regarding the state of a victim's consciousness by prohibiting a sexual act with a person who the accused knows or reasonably should know is sleeping, unconscious, or otherwise unaware that the sexual act is occurring." *Manual for Courts-Martial, United States*, Article 120 analysis, at A23-15 (2012).

The terms "unaware" and "impairment" also have very different meanings. "Impairment" is defined as "the fact or state of being damaged, weakened, or diminished." *Black's Law Dictionary* 819 (9th Ed. 2009). "Unawareness" is the converse to "awareness," which means, "having or showing realization, perception,

or knowledge." *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/awareness (last visited February 3, 2017).

The government attempted to prove SR was otherwise unaware by only presenting evidence she was highly intoxicated through a mixture of alcohol and Klonopin. (JA 26, 28, 70). The trial counsel then conflated the principles of impairment and awareness for the panel during closing argument, a misstatement of law which the military judge never corrected. (JA 280-281).

While impairment can contribute to a lack of awareness, a person can have diminished alertness and capacity but still have some realization, perception, or knowledge of their surroundings. Therefore, proof SR was otherwise unaware required much more than simply finding she was impaired. The government had to prove a more difficult theory of liability and fell short of meeting its self-imposed burden. Even if SR was impaired by alcohol and Klonopin, her actions and memories from that night show she still could have been aware the sexual contact was occurring. If the panel was left to believe that to convict PFC Brantley, it only had to find SR was incapable of consenting due to impairment, then it was applying the wrong legal standard to that element and the conviction is legally insufficient.

2. "Asleep, unconscious, or otherwise unaware" are three separate and distinct theories of liability.

When Congress drafted Article 120(b)(2), it criminalized a sexual act or contact when a person knew or reasonably should have known the other person was asleep, unconscious, *or otherwise unaware.* (emphasis added). This Court is currently reviewing whether the Navy-Marine Corps Court of Criminal Appeals erred when it held "asleep" and "unconscious" do not establish theories of criminal liability, but only the phrase "otherwise unaware" establishes criminal liability. *United States v. Sager*, No. 16-0418/NA. In that case, the government charged all three theories of liability but the panel returned only a finding of guilty on the theory the alleged victim was "otherwise unaware." (JA 350). Regardless of how this Court decides that issue in *Sager*, PFC Brantley's case is distinguishable because the government only charged, and the panel was only instructed that SR was "otherwise unaware" of the sexual contact.

As the appellant argued in *Sager*, applying the ordinary-meaning and surplusage canons of statutory interpretation, the words "or otherwise unaware" indicate Congress intended that phrase mean something different than asleep or unconscious. (JA 354). Under the ordinary-meaning canon, if context indicates that words bear a technical legal meaning, they are to be understood in that sense. *IBEW, Local # 111 v. Public Serv. Co. of Colo*, 773 F.3d 1100, 1108 (10th Cir. 2014). Under the surplusage canon, every word in a statute is to be given effect.

Asadi v. G.E. Energy United States L.L.C., 720 F.3d 620, 628 (5th Cir. 2013)(citing *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)).

In any statutory construction case, courts start with the statutory text and proceed from the understanding that "unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *Sebelius v. Cloer*, 133 S. Ct. 1886, 1893 (2013)(citing *BP America Production Co. v. Burton*, 549 U.S. 84, 91 (2006)). Applying this standard method of interpretation to Article 120(b)(2), the words "or" and "otherwise" have legal meaning and effect. "Or" is used as a function word to indicate an alternative. *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/or (last visited February 3, 2017). Put another way, as opposed to "and," "or" is a disjunctive, not a conjunctive. *See United States v. Beaty*, 70 M.J. 39, 43 (C.A.A.F. 2011). "Otherwise" means something or anything else. *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/otherwise (last visited February 3, 2017).

Applying the surplusage canon, Congress intended "or" and "otherwise" to have effect in Article 120(b)(2) as modifiers to other words in the statute. Taken in context in the phrase "asleep, unconscious, or otherwise unaware," the term unaware is an alternative to and not included in asleep or unconscious. The term "otherwise unaware" serves as a catch-all for situations not including sleep or unconsciousness. (JA 354). Some examples could include being unaware of sexual

contact due to temporary or induced paralysis or a psychiatric episode. Yet another possibility could be a person is unaware of sexual contact occurring on a crowded train or bus because of the close proximity to other riders.

The record contains weak evidence SR was asleep or unconscious when PFC Brantley touched her breast from PFC Brantley's alleged admission over text message and SR's testimony she was "passed out." However, this evidence does not make PFC Brantley's conviction for abusive sexual contact legally sufficient. Ignoring the weight and credibility issues with this evidence, a rational trier of fact could find SR was asleep or unconscious but not that she was otherwise unaware of the sexual contact under the ordinary meaning of the terms.

"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. Gaskins*, 72 M.J. 225, 235 (C.A.A.F. 2013). The government's decisions not to charge "asleep" or "unconscious" in the Specification of Charge I and request corresponding instructions bar it from now asking this Court to affirm the conviction under these separate and distinct theories of liability. These theories were not presented to the panel at trial and therefore, cannot serve as the basis for affirming PFC Brantley's conviction on appeal. *Ober*, 66 M.J. at 405; *United States v. Riley*, 50 M.J. 410, 415 (C.A.A.F. 1999); *Chiarella*, 445 U.S. at 236.

3. The government failed to prove SR was otherwise unaware of sexual contact beyond a reasonable doubt.

The government did not present evidence SR was unaware due to reasons other than being potentially asleep or unconscious. (JA 31). Also, SR's testimony is contrary to many of the intricate details she did remember and testified happened throughout the evening despite her level of intoxication. SR allegedly remembered PFC Brantley straddling her and pulling at her shorts, PFC Brantley threatening to hurt PFC DS, and receiving and comprehending a text message from her husband at 4:30 A.M. (JA 30, 32, 47). The inconsistencies in SR's testimony, SR deleting PFC Brantley's alleged inculpatory text messages, and SR's lack of cooperation with CID all damage her credibility. The evidence SR continued to communicate and flirt with PFC Brantley throughout the weekend, even after his alleged sexual assault, assault, and threats, further undermines her credibility.

In addition to the lack of evidence that SR was otherwise unaware of the sexual contact, the defense demonstrated PFC Brantley had a reasonable mistake of fact SR was aware the sexual contact was occurring. Prior to SR initiating the sexual contact, she spoke to PFC Brantley and told him, "it's ok, you don't have to do this [take care of her]." (JA 206). After SR spoke to PFC Brantley, he felt her hand touching the inside of his thigh and penis. (JA 207). It was only then that he moved his hand onto her breast. (JA 207). SR's verbal statement and touching his

penis gave PFC Brantley a reasonable belief she was aware the sexual contact was occurring.

A rational trier of fact could not have found the government proved the second element of the Specification of Charge I beyond a reasonable doubt. The government relied upon evidence supporting an uncharged theory of liability and did not present any evidence that SR was otherwise unaware the sexual contact was occurring. Private First Class Brantley's conviction is legally insufficient under the government's narrowly charged theory of liability. Accordingly, this Court should set aside and dismiss PFC Brantley's conviction for abusive sexual contact in the Specification of Charge I.

Conclusion

WHEREFORE, based on the foregoing considerations, PFC Brantley respectfully requests this Honorable Court grant the requested relief.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitations of Rule 24(c) because this brief contains 3,710 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because this brief has been typewritten in 14-point font with proportional, Times New Roman typeface using Microsoft Word Version 2013.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Brantley*, Army Dkt. No. 20150199, USCA Dkt No. 17-0055/AR, was electronically filed with the Court and Government Appellate Division on February 10, 2017.

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