IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Jeffrey D. SAGER Aviation Ordnanceman Airman (E-3) United States Navy, Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 201400356 USCA Dkt. No. 16-0418/NA

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

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Index of Brief

TABLE OF AUTHORITIES

Issues Presented

I.

IN AFFIRMING THE ABUSIVE SEXUAL CONTACT CONVICTION, THE LOWER COURT RELIED ON FACTS OF WHICH THE MEMBERS ACQUITTED APPELLANT. WAS THIS ERROR?

II.

ARTICLE 120(d), UCMJ, PROHIBITS SEXUAL CONTACT ON ANOTHER PERSON WHEN THAT PERSON IS "ASLEEP, UNCONSCIOUS, OR OTHERWISE UNAWARE." DESPITE THESE SPECIFIC STATUTORY TERMS, THE LOWER COURT HELD THAT "ASLEEP" AND "UNCONSCIOUS" DO NOT ESTABLISH THEORIES OF CRIMINAL LIABILITY, BUT ONLY THE PHRASE "OTHERWISE UNAWARE" ESTABLISHES CRIMINAL LIABILITY. DID THE LOWER COURT ERR IN ITS INTERPRETATION OF ARTICLE 120(d), UCMJ?

Statement of Statutory Jurisdiction

Airman Sager's approved general court-martial sentence includes a punitive discharge. Accordingly, his case fell within the lower court's jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ).[1] This Court has jurisdiction under Article 67, UCMJ.[2]

[1] 10 U.S.C. § 866(b)(1) (2012).
[2] 10 U.S.C. § 867 (2012).

Statement of the Case

An officer and enlisted members panel, sitting as a general court-martial, convicted Airman Sager, contrary to his pleas, of one specification of abusive sexual contact in violation of Article 120, UCMJ.[3] The members, on the findings worksheet, acquitted Airman Sager on the theory that Airman TK was asleep or unconscious, but found him guilty of the offense on the theory that Airman TK was "otherwise unaware the sexual contact was occurring."[4]

The members also acquitted Airman Sager of another specification of abusive sexual contact under Article 120, UCMJ, which alleged Airman Sager committed sexual contact on Airman TK while he was incapable of consenting due to impairment by an intoxicant.[5] Airman Sager was sentenced to confinement for twenty-four months and a bad-conduct discharge.[6] The convening authority approved the sentence as adjudged and, except for the punitive discharge, ordered

[3] 10 U.S.C. § 920(d) (2012); JA at 00062, 00327.
[4] App. Ex. CXXXI. On the findings worksheet, the members circled "reasonably should have known" and "otherwise unaware" as their findings of guilt for the charge as the military judge instructed them to do. JA at 00325. The members' failure to circle the "asleep" and "unconscious" theories under the charge are therefore findings of not guilty. *See Green v. United States*, 355 U.S. 184, 191 (1957).
[5] 10 U.S.C. § 920(d) (2012); JA at 00062, 00327.
[6] Results of Trial; JA at 00064.

the sentence executed.[7] On December 29, 2015, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed the findings and sentence.[8]

On January 15, 2016, Airman Sager filed a timely motion for reconsideration with NMCCA, which it denied on February 3, 2016. This Court granted review on May 31, 2016.

Statement of Facts

The complaining witness in the case, Airman TK, testified that during the evening of March 8, 2013, he consumed alcohol at various locations.[9] Airman TK ended up at a bar where he met Airman Sager and some of Airman Sager's friends.[10] Airman TK testified at this point he was "feeling pretty drunk."[11] Eventually, Airman TK walked with Airman Sager and the others to spend the night at the apartment of Airman Sager's friend.[12] Airman TK testified by the time he reached the apartment, he was "very drunk."[13]

At the apartment, Airman TK and Airman Sager discussed Airman TK's girlfriend.[14] Airman TK also remembered texting with his girlfriend during this

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[7] General Court-Martial Order No. 3-14, Sept. 19, 2014.
[8] *United States v. Sager*, No. 201400356, 2015 CCA LEXIS 571 (N-M. Ct. Crim. App. Dec. 29, 2015).
[9] JA at 00102-00106.
[10] JA at 00109.
[11] JA at 00110.
[12] JA at 00117.
[13] JA at 00118.
[14] JA at 00120.

conversation.[15] Airman TK testified he threw up in a bucket and drank a glass of water before he laid down on the futon and passed out.[16] Airman TK recalled wearing jeans, a belt, socks and boxer shorts, but remembered removing his t-shirt prior to going to sleep.[17] Airman Sager brought Airman TK a glass of water and was standing next to the futon when Airman TK passed out.[18]

Airman TK remembered waking up with his penis in Airman Sager's hand.[19] Airman TK remembered his jeans were on.[20] Despite feeling a hand on his penis, Airman TK claimed he could not move and could not talk.[21] He remembered this occurring for approximately five to ten minutes.[22] Airman TK, claiming he still could not move, tried to consciously lose his erection.[23]

Airman TK reported he never opened his eyes.[24] The only thing he claimed to remember was hearing someone breathing heavily in his ear.[25] Despite not being able to visually identify this person, Airman TK recalled the heavy breathing

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[15] JA at 00200.
[16] JA at 00120, 00122.
[17] JA at 00121.
[18] JA at 00124.
[19] *Id*.
[20] JA at 00204.
[21] JA at 00124.
[22] *Id*.
[23] JA at 00205.
[24] *Id*.
[25] *Id*.

sounded like Airman Sager.[26] After waking up the following day, Airman TK did not report what happened to anyone at the apartment.[27] Airman TK later went to the hospital and eventually reported his allegations to the Naval Criminal Investigative Service.[28]

Based on Airman TK's report, Airman Sager was charged in the Additional Charge with abusive sexual contact on the theory that Airman Sager committed sexual contact on Airman TK while he knew or reasonably should have known Airman TK was "asleep, unconscious, or otherwise unaware the sexual contact was occurring."[29] Airman Sager was charged with another abusive sexual contact charge in Charge I, based on the same facts, on the theory Airman Sager committed sexual contact on Airman TK while he was "incapable of consenting due to impairment by an intoxicant."[30]

At the close of the Government's case, the Government argued only that the evidence supported a finding that Airman TK was asleep or intoxicated.[31] For the Additional Charge, the MJ instructed the members that "a sleeping, unconscious or

[26] JA at 00126.
[27] JA at 00208.
[28] JA at 00142, 00144.
[29] *See* Charge Sheet II, Additional Charge.
[30] *See* Charge Sheet, Charge I.
[31] JA at 00290.

incompetent person cannot consent to a sexual act."[32] The military judge did not define the phrase "otherwise unaware." Also in his findings instructions, the military judge instructed the members they must circle "the theory of the government you adopt if you convict."[33] On the findings worksheet, the members circled "reasonably should have known" and "otherwise unaware" as their findings of guilt for the Additional Charge. The members did not circle "asleep" and "unconscious."[34]

At the conclusion of their deliberations, therefore, the members acquitted Airman Sager of the theory that Airman TK was asleep or unconscious, but found him guilty of the offense on the theory that Airman TK was "otherwise unaware the sexual contact was occurring."[35] The members also expressly acquitted Airman Sager of the theory that he committed sexual contact on Airman TK while he was incapable of consenting due to impairment by an intoxicant as alleged in Charge I.[36]

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[32] JA at 00322. The MJ included "incompetent" in the list because he combined the instruction to encompass the theories of sleep/unconsciousness, and the separately-charged theory that Airman TK was incapable of consenting (i.e., incompetent) due to impairment by an intoxicant.
[33] JA at 00325.
[34] JA at 00062.
[35] *Id. See Green v. United States*, 355 U.S. 184, 191 (1957).
[36] JA at 00062, 00327.

Summary of Argument

Two problems occurred at the lower court. Faced with facts in the record that only supported a determination that Airman TK was asleep, unconscious, or intoxicated—the facts of which the members acquitted Airman Sager—the lower court resurrected those facts and found the conviction legally sufficient. This violated the Double Jeopardy Clause and precedent from both the Supreme Court and this Court.

Additionally, the lower court usurped the authority of Congress and the Supreme Court when it misinterpreted Article 120, UCMJ. No facts presented at trial supported the "otherwise unaware" finding from the members. Instead, the lower court simply rewrote Article 120(d), UCMJ, to accommodate facts that were presented at the court-martial. This is error and violated the substantial rights of Airman Sager. Under a correct interpretation of Article 120(d), UCMJ, the evidence presented at trial was legally insufficient to support a conviction.

Argument

I.

THE LOWER COURT ERRED BECAUSE IT RELIED ON FACTS OF WHICH THE MEMBERS FOUND AIRMAN SAGER NOT GUILTY.

Standard of Review

Whether an appellate court's factual sufficiency review violated the Double Jeopardy Clause by rehearing an incident for which the accused was found not guilty is a Constitutional question.[37] Thus, this Court reviews the question under a *de novo* standard.[38]

Discussion

A. Airman Sager was acquitted of committing sexual contact while he knew or reasonably should have known Airman TK was asleep, unconscious, and incapable of consenting due to impairment by an intoxicant.

The members identified the sole theory alleged in the Additional Charge on which they convicted Airman Sager: that he reasonably should have known that Airman TK was "otherwise unaware" the sexual act was occurring.[39] By convicting him of this theory and remaining silent on the others, the members found him not guilty of the allegation that Airman Sager committed the sexual contact while Airman TK was asleep or unconscious.

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[37] *United States v. Stewart*, 71 M.J. 38, 42 (C.A.A.F. 2012).
[38] *United States v. Marcum*, 60 M.J. 198, 202-03 (C.A.A.F. 2004) (citing *Jacobellis v. Ohio*, 278 U.S. 184, 190 (1964)).
[39] JA at 00062.

This is clear from the Supreme Court's holding in *Green v. United States*.[40] In *Green*, the defendant was charged with first degree murder. At the conclusion of the merits phase, the judge instructed the members on both first degree murder and the lesser-included offense of second degree murder.[41] The jury returned a verdict of guilty on the second degree murder charge, but was totally silent on the first degree murder charge.[42] The Supreme Court held that the jury's silence on the first degree murder charge was the equivalent of the jury returning a not guilty verdict.[43] Here, the findings were silent on Airman Sager's actual knowledge, of Airman TK's level of consciousness. The findings were further silent regarding Airman TK being either "asleep" or "unconscious." Applying *Green* to the present case, the members returned a verdict of not guilty to the Government's allegations that Airman TK was asleep or unconscious when the sexual assault occurred.

Additionally, the members expressly found Airman Sager not guilty of Charge I, alleging that he committed a sexual act on Airman TK while Airman TK was incapable of consenting due to impairment by an intoxicant.[44]

Under established standards of review, the lower court could not consider the facts supporting allegations resulting in acquittals in conducting its Article

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[40] 355 U.S. 184 (1957).
[41] *Id*. at 185-86.
[42] *Id*. at 186.
[43] *Id*. at 191.
[44] JA at 00062, 00327.

66(c), UCMJ, review. The lower court, though, affirmed the conviction as factually and legally sufficient by heavily relying on conduct of which Airman Sager was acquitted.

B. The lower court erred when it affirmed the conviction based on conduct of which the members acquitted Airman Sager.

As a result of the express acquittal and the acquittals by operation of *Green*, the lower court violated the Double Jeopardy Clause when it relied on the not-guilty findings to affirm the conviction. The Double Jeopardy Clause of the Fifth Amendment protects an accused from "a second prosecution for the same offense after acquittal."[45] This principle means a "Court of Military Review may not make findings of fact contradicting findings of not guilty reached by the factfinder."[46] Appellate courts can "affirm only such findings of guilty . . . as it finds correct in law and fact."[47] Courts "cannot find as fact any allegation in a specification for which the fact-finder below has found the accused not-guilty."[48] Despite this prohibition, the lower court concluded:

> AN TK testified that when he *awoke* the appellant was already manually stimulating his penis. The Government introduced substantial evidence that AN TK was *heavily intoxicated* when he returned to FC2 DS's apartment and laid [sic] on the futon. Whether AN TK was asleep or unconscious due to alcohol

[45] *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).
[46] *United States v. Smith*, 39 M.J. 448, 451-52 (C.M.A. 1994).
[47] 10 U.S.C. § 866(c) (2012).
[48] *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003).

> consumption/exhaustion, or a combination of those things is only relevant as to whether the appellant reasonably should have known AN TK was "otherwise unaware" of the sexual contact.[49]

The lower court's reliance on facts that contradict the findings of not guilty by the members (i.e., sleep, unconsciousness due to alcohol consumption, exhaustion, or some combination thereof) was error because it violated Double Jeopardy Clause of the Constitution.[50] Each of the theories articulated by the lower court were expressly contradicted by the members' findings. Further, the lower court's attempt to combine all theories of liability as a novel, judicially-created catch-all is erroneous due to its reliance on acquitted conduct. Simply combining all the factual bases together does not somehow change the fact that the members acquitted Airman Sager on each of those theories.

A demonstration of the double jeopardy problem presented in this case was articulated by this Court in *United States v. Stewart*.[51] In *Stewart*, the members were presented with two separate specifications alleging sexual offenses.[52] Despite the distinct specifications, the military judge defined both the offenses in the exact

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[49] *Sager*, 2015 CCA LEXIS 571 at *11 (emphasis added).
[50] *United States v. Stewart*, 71 M.J. 38, 42 (C.A.A.F. 2012); *United States v. Wilson*, 67 M.J. 423, 428 (C.A.A.F. 2009) (citing *Green v. United States*, 355 U.S. 184, 187-88 (1957)); *United States v. Walters*, 58 M.J. 391, 295 (C.A.A.F. 2003); *United States v. Smith*, 39 M.J. 448, 451-52 (C.M.A. 1994).
[51] 71 M.J. 38 (C.A.A.F. 2012)
[52] *Id.* at 40.

same manner.[53] Further, the judge instructed the members that they could only return a finding of guilt for one but not both offenses.[54] The members returned a finding of not guilty to the first specification, but guilty to the second specification.[55] The CCA then affirmed the conviction. This Court reversed, however, and held that it was impossible for the CCA to conduct a factual sufficiency review "without finding as fact the same facts the members found Stewart not guilty of in Specification 1" because doing so would violate the Double Jeopardy Clause.[56]

Here, the members acquitted Airman Sager under the theories that Airman TK was asleep, unconsciousness, or incapable of consenting due to intoxication. Despite the acquittals, the lower court relied on those factual theories to find the conviction both factually and legally sufficient.[57] There is simply no way to separate the lower court's decision from the acquittals in this case. This is a textbook example of a reviewing court improperly affirming a conviction based on acquitted conduct.

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[53] *Id.*
[54] *Id.* at 41.
[55] *Id.*
[56] *Id.* at 43.
[57] This is true despite the conviction on a theory Airman TK was "otherwise unaware," because the basis of the lower court's opinion clearly relied on the acquitted conduct. Further, the issue of a proper interpretation of the phrase "otherwise unaware" is discussed in the second Issue Presented.

C. The lower court's violation of the Double Jeopardy Clause warrants dismissal of the charge.

Since the lower court relied on facts of which Airman Sager had been acquitted, this Court should set aside the findings and dismiss the specification with prejudice. Under *United States v. Stewart*, a reviewing court cannot reconsider a not-guilty finding of the members when conducting its Article 66 factual and legal sufficiency review.[58] Thus, dismissal with prejudice is the appropriate remedy.[59]

Conclusion

This Court should set aside the findings and sentence, and dismiss the charge.

[58] 71 M.J. at 43.
[59] *Id.*

II.

THE LOWER COURT ERRED WHEN IT HELD THE TERMS "ASLEEP" AND "UNCONSCIOUS" DO NOT REPRESENT THEORIES OF CRIMINAL LIABILITY UNDER ARTICLE 120(d), UCMJ, BUT INSTEAD THE PHRASE "OTHERWISE UNAWARE" IS THE ONLY OPERATIVE PHRASE IN THE STATUTE THAT ESTABLISHES CRIMINAL LIABILITY.

Standard of Review

A question of statutory construction is a question of law reviewed *de novo*.[60]

Discussion

The statutory language at issue is: "Any person subject to this chapter who . . . commits [sexual contact] upon another person when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring" is guilty of abusive sexual contact.[61]

In its factual and legal sufficiency analysis, the lower court purported to interpret the phrase "otherwise unaware" found in Article 120(d), UCMJ.[62] In reality, the lower court rewrote the entire provision. Courts, however, are not legislative or policy-making bodies, and are not "authorized to rewrite a statute

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[60] *United States v. Lopez de Victoria*, 66 M.J. 67, 73 (C.A.A.F. 2008) (internal citation omitted).
[61] 10 U.S.C. § 920(b)(2); 10 U.S.C. § 920(d).
[62] 10 U.S.C. § 920(d). Technically, "asleep, unconscious, or otherwise unaware" is found in 10 U.S.C. § 920(b)(2), but 10 U.S.C. § 920(d) incorporates those conditions for purposes of an abusive sexual contact charge.

because they might deem its effects susceptible of improvement."[63] Thus, the lower court wrongly concluded that "asleep or unconscious are examples of how an individual may be 'otherwise unaware' and are not alternate theories of criminal liability.[64]

In reaching its decision, the lower court relied on an unpublished case from the Air Force Court of Criminal Appeals, *United States v. Chero*.[65] In *Chero*, the AFCCA claimed "asleep is just one example of how an individual may be 'otherwise unaware' and is not an alternative theory."[66] But the AFCCA provided no case law—or even analysis—to support this claim.[67] The lower court's reliance on *Chero* was misplaced because (1) that case turned on notice issues stemming from a variance between the statute and specification; and (2) the AFCCA misinterpreted Article 120(b)(2), UCMJ, in an aside and without analysis. Accordingly, the lower court erred by relying on *Chero*.

More importantly, the lower court's interpretation of "otherwise unaware" contradicts two canons of statutory interpretation—the ordinary meaning canon

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[63] *Badaracco v. Commissioner*, 464 U.S. 386, 398 (1984).
[64] *United States v. Sager*, No. 201400356, 2015 CCA LEXIS 571 at *7 (N-M. Ct. Crim. App. Dec. 29, 2015).
[65] No. ACM 38470, 2015 CCA LEXIS 168 at *9 (A.F. Ct. Crim. App. Apr. 28, 2015) (Appendix 3).
[66] *Id.*
[67] The AFCCA's citation to a fatal variance case, *United States v. Mandy,* 73 M.J. 619 (A.F. Ct. Crim. App. 2014), has no bearing on the proper interpretation of the statute at issue. *See Chero*, 2015 CCA LEXIS 168 at *9.

and the surplusage cannon. While the lower court claimed it had discerned the "plain meaning" of the statute, it actually displaced the statutory terms with a definition the lower court preferred Congress would have used.

A. The lower court violated the ordinary-meaning canon.

The ordinary-meaning rule is the most fundamental semantic rule of interpretation.[68] This canon, codified in numerous jurisdictions, means that the plain and ordinary definition of the terms used in a statute prevail.[69]

In this statute, the phrase "otherwise unaware" has a straightforward, ordinary meaning. "Otherwise," when used as an adjective, means "not the same,"[70] or "in a different state or situation."[71] Additionally, the use of the term "or" before the phrase is important. "Or" is a disjunctive, which creates alternatives; as opposed to the conjunctive "and," which combines items.[72] Therefore, "otherwise" plainly serves as a catchall for instances of unawareness different from sleep or unconsciousness.

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[68] *See, e.g.*, James Kent, COMMENTARIES ON AMERICAN LAW 432 (1826) ("The words of a statute are to be taken in their natural and ordinary signification and import; and if technical words are used, they are to be taken in a technical sense.").
[69] *See Richards v. United States*, 369 U.S. 1, 9 (1962).
[70] Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/otherwise (last visited June 30, 2016).
[71] Oxford Dictionary, http://www.oxforddictionaries.com/us/definition/american_english/otherwise (last visited June 30, 2016).
[72] Antonin Scalia & Bryan Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 116 (2012).

Taken together, an ordinary reading of the statute yields: a crime occurs when sexual contact is committed on a person who is "asleep," on a person who is "unconscious," or on a person who is not asleep or unconscious, but is still unaware of the sexual contact. In contrast, the lower court concluded that "[a] ***plain meaning*** of the phrase [otherwise unaware] is that a person cannot engage in sexual contact with another person when he/she knows or reasonably should know that the recipient of the contact does not know it is happening."[73] However, the lower court's conclusion eviscerated the distinctions found in the statute and instead collapsed them (asleep, unconscious and otherwise) into the single term "unaware." The lower court effectuated this violation of the ordinary meaning cannon by violating the surplusage cannon.

[73] *United States v. Sager*, No. 201400356, 2015 CCA LEXIS 571 at *9 (N-M. Ct. Crim. App. 29 Dec. 2015) (emphasis added).

B. The lower court violated the surplusage canon.

If possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*). No word should be ignored. No word should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.[74]

In jurisprudence there is a presumption that the every word in a statute has meaning, and Congress is presumed to have used no superfluous words.[75] The statute proscribes the commission of sexual contact on someone who is "asleep, unconscious, or otherwise unaware that the sexual act is occurring."[76] Yet the lower court found that "asleep" and "unconscious" are simply examples of how an individual may be "otherwise unaware." Assuming "asleep" and "unconscious" are merely examples of the final phrase in the list renders "asleep" and "unconscious" unnecessary surplusage. This was an improper interpretation under the surplusage canon.

Furthermore, under the logic of the lower court's conclusion, the term "otherwise" is also rendered unnecessary. Absent the terms "asleep" and "unconscious" (or, assuming they are merely examples not modified by the term

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[74] Antonin Scalia & Bryan Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012).
[75] *Platt v. Union P.R. Co.*, 99 U.S. 48 (1878); *see also* William N. Eskridge, Jr. & Philip P. Frickey, LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 644 (2d ed. 1995).
[76] 10 U.S.C. § 920 (b)(2) (2012).

"otherwise"), means the statute simply prohibits sexual contact committed on someone unaware that the sexual contact is occurring. Under a plain reading of the lower court's interpretation, there is no other referent the term "otherwise" could be modifying. Thus, the lower court effectively struck four words out of the statute ("asleep," "unconscious," "or," and "otherwise"), in violation of the surplusage canon which, enjoins courts to avoid interpretations that render words of a statute unnecessary.

There is simply no rational, legally sound way to read the statute as using the terms "asleep" and "unconscious" subsumed into "otherwise unaware" as the lower court would have us understand it. The lower court erred, and the error prejudiced Airman Sager's substantial rights.

C. The lower court's flawed interpretation prejudiced Airman Sager because under a correct interpretation, the conviction is legally insufficient.

Working together, the ordinary-meaning and surplusage canons dictate that since "otherwise unaware" immediately follows "asleep" and "unconscious" in a disjunctive list, the term "otherwise" must refer to a theory of unawareness other than sleep or unconsciousness. Examples of "otherwise unaware," therefore, could include a person suffering from paralysis, hallucinations, or dementia. However, none of these examples were proven on the evidence presented in this case.

Even more problematic, the lower court's flawed interpretation resurrected theories of criminal liability that the members specifically rejected through not-

guilty findings, as addressed in the first Issue Presented. The lower court's statutory "interpretation" essentially created a legal fiction that it used to affirm the factual and legal sufficiency of the conviction in violation of Airman Sager's substantial rights.

The Supreme Court has held "[I]t is as much a denial of due process to send an accused to prison following a conviction for a charge that was never made as it is to convict him on a charge for which there is no evidence to support that conviction."[77] To affirm a conviction in this case would go even further, as it would require this Court to affirm a conviction on a charge of which Airman Sager was acquitted based on an incorrect interpretation of a statute. Additionally, an appellate court's legal sufficiency review is supposed to serve as a safeguard against improper convictions.[78] Here, the lower court distorted the statute in an effort to save an improper conviction.

Reviewing courts are also bound by the evidence presented at trial, and they are bound by the members' findings of not guilty.[79] The evidence supported potential findings that Airman TK was intoxicated and incapable of consenting, or he was asleep or unconscious. Unsurprisingly, therefore, the Government's arguments exclusively focused on these theories because the evidence presented

[77] *Garner v. Louisiana*, 368 U.S. 157 (1961).
[78] *United States v. Powell*, 469 U.S. 57, 67 (1984).
[79] *Walters*, 58 M.J. at 395.

was limited to those two potential conclusions. In closing argument, trial counsel argued "The other facts we know corroborate [Airman TK]'s testimony that he was asleep. He was intoxicated."[80] The members clearly did not reach either conclusion, and the lower court's botched statutory interpretation cannot save the conviction.

Given that evidence of sleep, unconsciousness and/or intoxication was the only evidence presented, combined with the findings of the members, the lower court's interpretation is logically flawed and resulted in an improper affirmance. There is no rational, legal way to conclude that Airman TK was "otherwise unaware" of the sexual contact where the unawareness was not due to his sleep, unconsciousness or intoxication. The conviction is legally insufficient and must be set aside and dismissed with prejudice.

Conclusion

This Court should set aside the conviction and dismiss the charge.

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[80] JA at 00290.

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Certificate of Filing and Service

I certify that the foregoing was delivered to this Court, the Appellate Government Division, and to the Administrative Support Division, Navy-Marine Corps Appellate Review Activity on June 30, 2016.

Certificate of Compliance

This brief complies with the page limitations of Rule 21(b) because it contains fewer than 14,000 words. Using Microsoft Word version 2010 with 14-point Times-New-Roman font, this brief 5,019 words.

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