IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Colby C. Bailey Seaman (E-3) U.S. Coast Guard, Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. No. 1428 USCA Dkt. No. 17-0265/CG

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

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Issue Presented

UPON REQUEST BY THE DEFENSE COUNSEL AND USING A DEFENSE-DRAFTED INSTRUCTION, SHOULD THE MILITARY JUDGE HAVE PROVIDED THE MEMBERS WITH AN EXPLANATION OF THE TERM "INCAPABLE"?

Statement of Statutory Jurisdiction

Because the convening authority approved a sentence that included a punitive discharge, the U.S. Coast Guard Court of Criminal Appeals (CGCCA) had jurisdiction over Seaman (SN) Colby C. Bailey's case under Article 66(b)(1), Uniform Code of Military Justice (UCMJ).[1] This Court has jurisdiction over this matter pursuant to Article 67, UCMJ.[2]

Statement of the Case

A panel composed of officers and enlisted members, sitting as a general court-martial, convicted SN Bailey, contrary to his pleas, of three specifications of sexual assault, one specification of abusive sexual contact, and one specification of assault consummated by a battery in violation of Articles 120 and 128, UCMJ.[3] The military judge then dismissed the Article 128, UCMJ, charge and specification.[4]

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[1] 10 U.S.C. §866(b)(1) (2012).
[2] 10 U.S.C. §867 (2012).
[3] 10 U.S.C. §§920, 928 (2012).
[4] J.A. at 26.

The members sentenced SN Bailey to confinement for eighteen months, reduction to paygrade E-1, forfeiture of all pay and allowances, and a dishonorable discharge.[5] The convening authority approved the sentence as adjudged and ordered the approved sentence executed except for the dishonorable discharge.[6]

On January 4, 2017, the CGCCA affirmed the findings and the sentence "as approved below"[7] although it failed to mention the adjudged forfeiture of pay and allowances. Seaman Bailey petitioned this Court for review on March 3, 2017. On April 20, 2017, this Court granted review of SN Bailey's petition.

Statement of Facts

In May 2013, SN Bailey met Ms. LH, then a 24-year-old woman, using a website designed to connect people with similar interests.[8] They played online games with each other on multiple occasions over the course of a few weeks.[9] They then met in real life and went to a movie together.[10] At the end of the night, they agreed to meet the next night to play video games while drunk at SN Bailey's house.[11]

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[5] J.A. at 192-93.
[6] J.A. at 27.
[7] J.A. at 10.
[8] J.A. at 48.
[9] *Id.*
[10] *Id.*
[11] J.A. at 49.

On that day, SN Bailey picked up LH from her parents' home. Before leaving, LH told her parents she was going to a friend's house to play games.[12] She did not tell her parents she was going to SN Bailey's house nor did she tell them she would be spending the night with him.[13] Although LH was an adult, her parents would not have allowed her to stay at SN Bailey's house.[14]

After SN Bailey picked LH up, they stopped at a liquor store to buy refreshments for the evening.[15] Seaman Bailey bought Crown Royal for himself.[16] LH bought a bottle of Bacardi 151 rum for herself.[17] Later, at SN Bailey's house, they stood in his kitchen, drinking and talking.[18]

As the evening progressed they moved to SN Bailey's bedroom where they had sex.[19] While she was performing oral sex on SN Bailey, LH vomited.[20] Seaman Bailey helped her to the bathtub, where he put a pillow behind her head and ran water to help her clean up.[21] Seaman Bailey then returned to his room to clean up the vomit stains on his floor.[22] As he was cleaning, LH repeatedly asked

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[12] J.A. at 81.
[13] J.A. at 82.
[14] J.A. at 84.
[15] J.A. at 49-50.
[16] J.A. at 51.
[17] J.A. at 51, 98.
[18] J.A. at 51, 171.
[19] J.A. at 51, 171.
[20] J.A. at 54, 67.
[21] J.A. at 106.
[22] J.A. at 172.

SN Bailey to come to the bathroom to talk to her.[23] Although irritated, SN Bailey went to the bathroom to talk to LH, who shared with him details about her family life.[24] While in the bathtub, LH asked SN Bailey for her phone and contacted her father.[25] She then demanded that SN Bailey take her to the hospital.[26] While hesitant at first, SN Bailey took LH to the hospital after she vomited what appeared to be foam and told him she had taken some pills earlier.[27]

They arrived at the hospital around 4:00 a.m., and an emergency room nurse and physician tended to LH around 4:30 a.m.[28] LH was lethargic but was oriented, cooperative, and able to communicate with the hospital staff.[29] Based on those observations, the emergency room physician believed LH was capable of consenting to medical procedures.[30]

After LH described her reason for being at the hospital, the physician called the police.[31] A police officer responded to the hospital and interviewed LH.[32] The officer testified that based on his experience, he found LH to be severely

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[23] *Id.*
[24] J.A. at 172-73.
[25] J.A. at 72,116, 173.
[26] J.A. at 106-07.
[27] J.A. at 173.
[28] J.A. at 57, 165
[29] J.A. at 57, 59, 165.
[30] J.A. at 61.
[31] *Id.*
[32] J.A. at 63.

intoxicated.[33] Nevertheless, the officer also was able to ask LH questions and receive coherent responses from her.[34]

At trial, LH agreed with SN Bailey's version of events before and after the sex. However, she testified that she had no memory of how she came to be in his room or whether they had oral and vaginal sex.[35] In fact the only sexual act she claimed to remember was anal sex, and for this, she claimed she was able to tell SN Bailey to stop penetrating her.[36]

LH recalled that SN Bailey was upset after she vomited.[37] She did not remember anything else about the sexual acts. Despite previously telling a sexual assault nurse examiner that she recalled being in a position to perform mutual oral sex with SN Bailey,[38] she testified that she did not recall performing oral sex on SN Bailey.[39]

When LH was at the hospital, her serum alcohol content was measured at 198 mg/dL.[40] With that calculation and relying on assumptions regarding other variables, a toxicologist estimated her blood alcohol concentration was .22-.24% at

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[33] J.A. at 65.
[34] J.A. at 69-70.
[35] J.A. at 103, 105-06.
[36] J.A. at 104-05.
[37] J.A. at 105.
[38] J.A. at 73.
[39] J.A. at 119.
[40] J.A. at 85, 168.

the time of the sexual activity[41] and that she was "significantly impaired,"[42] but never said whether LH was incapable of consenting to sexual activity. Instead, he described a significantly impaired person as someone who is experiencing "[d]epression of inhibition and impairment of critical judgment of reasoning, of ability…to encode memory."[43]

Before closing arguments, the military judge asked the parties if they wanted him to consider any instructions not contained in the court's final version.[44] In response, the trial defense counsel proposed an instruction on the meaning of "incapable" as that word is used in Article 120(b)(3), UCMJ.[45] That instruction[46] proposed the following explanation:

> "Incapable" means a complete and total mental impairment and incapacity due to the consumption of alcohol, drugs, or similar substance; while asleep or unconscious; which rendered the alleged victim completely unable to appraise the nature of the sexual conduct at issue, completely unable to physically communicate unwillingness to engage in the sexual conduct at issue, or otherwise completely unable to communicate competent decisions.[4]

[41] J.A. at 86.
[42] *Id.*
[43] J.A. at 87.
[44] J.A. at 120.
[45] *Id.*
[46] J.A. at 197.

Without explanation, the military judge declined to give the instruction,[47] and instead gave the following instruction:[48]

15604 [redacted] Consent means a freely given agreement to the conduct at
15605 issue by a competent person. An expression of lack of consent
15606 through words or conduct means there is no consent. Lack of
15607 verbal or physical resistance or submission resulting in the
15608 use of force, threat of force or placing another person in fear
15609 does not constitute consent. A current or previous dating or
15610 social or sexual relationship by itself or the manner of dress
15611 of the person involved with the accused in the conduct at issue
15612 shall not constitute consent. Lack of consent may be inferred
15613 based on the circumstances. All the surrounding circumstances
15614 are to be considered in determining whether a person gave
15615 consent. A sleeping, unconscious or incompetent person cannot
15616 consent to a sexual act. [redacted]

Summary of Argument

The Defense's requested instruction correctly defined the term 'incapable' consistent with this Court's jurisprudence. The definition was not substantially covered by any part of the military judge's instructions even though the term was the crux of determining liability. And because LH exhibited a number of behaviors evidencing that she was capable of consenting, the lack of the instruction distorted the way in which the evidence should have been viewed.

[47] J.A. at 121.
[48] J.A. at 124.

Argument

THE MILITARY JUDGE FAILED TO ADEQUATELY INSTRUCT THE MEMBERS WHEN HE REFUSED TO PROVIDE THEM THE PROPOSED INSTRUCTION REQUESTED BY THE DEFENSE.

Standard of Review

When the requested instruction is required to be given to the members, this Court reviews *de novo* whether the members were adequately instructed.[49] If the requested instruction was not required, this Court reviews whether the military judge abused his discretion by refusing to give the instruction.[50]

Discussion

When a party properly requests from the military judge an instruction that explains a word or phrase that has not been defined by lawmakers or the President, the military judge is required to give the requested instruction if it is necessary.[51]

An instruction is necessary (and denial of the instruction is error) when (1) the instruction is correct; (2) it is not substantially provided for in the judge's

[49] *United States v. Dearing*, 63 M.J. 478, 482 (C.A.A.F. 2006) (citations omitted).
[50] *United States v. Forbes*, 61 M.J. 354, 358 (C.A.A.F. 2005).
[51] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 920(e)(7) (2012).

prepared instructions; and (3) the failure to give the instruction deprived the accused of a defense or seriously impaired the presentation of a defense.[52]

In this case, the instruction proposed by the Defense was necessary for these reasons, and the military judge erred when he declined to give it. This error was not harmless.

A. Trial defense counsel's proposed instruction correctly explained the law.

Fundamentally, the proposed instruction defined "incapable" consistent with definitions used by the Navy-Marine Corps Court of Criminal Appeals (NMCCA) in *United States v. Pease*.[53] Indeed, those definitions and much of the operative language of the proposed instruction not only tracks that found in *Pease* but also mirrors the definition of "consent" found in the prior version of Article 120, UCMJ, which existed from October 1, 2007 to June 27, 2012.[54]

The CGCCA did not find that the core terminology was incorrect. Rather, in its opinion, the CGCCA held that the adjective phrase "complete and total" and the adverb "completely" suggest a requirement for "total incapacity," which is not based on the words in the statute, thereby rendering the instruction incorrect.[55]

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[52] *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993).
[53] *United States v. Pease*, 74 M.J. 763 (N-M. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 180 (C.A.A.F. 2016).
[54] J.A. at 37.
[55] *United States v. Bailey*, No. 1428, slip op., at *5 (C.G. Ct. Crim. App. Jan. 4, 2017).

While those modifiers are not found in the current statute, total incapacity or incapability[56] is, in fact, required by the statue. One is either incapable or capable of consenting; there is no in-between. Because the prosecution bears the burden to show an alleged victim was incapable of consenting to sex, the prosecution must prove the alleged victim was without the capacity or capability to consent. To be without a certain quality is to lack it and thus to lack it totally. If that quality is possessed in any way whatsoever, one is not without that quality. Since Article 120, UCMJ, uses the word "incapable"—which means "not capable"[57]—members must find a total deprivation of the capacity or ability to consent beyond a reasonable doubt.

Also, this understanding is neither unnecessarily restrictive nor inconsistent with legislative intent. In 2011, when Congress amended Article 120, UCMJ, it did so to clarify the separate sexual assault offenses and to address deficiencies in the then-existing law that were identified by military courts and addressed in the December 2009 report of the Defense Task Force on Sexual Assault in the Military.[58] In that report, the authors found that judge advocates considered the

[56] There is no meaningful or legal distinction between capacity and capability, and these terms are often interchangeable.
[57] *Online Etymology Dictionary*, Douglas Harper (last visited May 25, 2017), http://www.etymonline.com/index.php?term=incapable&allowed_in_frame=0.
[58] S. REP. NO. 112-26, at 115 (2011).

then-existing version of Article 120, UCMJ, to be "cumbersome and confusing" and may have led to "unwarranted acquittals."[59]

Although the report does not identify which part of the statute was unfair to the prosecution, one way the prior statute may have confused practitioners is with the term "substantially incapacitated" or "substantially incapable." It was originally thought that using "substantially" as a modifier "avoid[ed] the possibility that a factfinder might require the victim's complete or total incapacity, or alternatively the factfinder might conclude that any incapability whatsoever is sufficient."[60] While those possibilities are understandable, the plain understanding of the word "incapable" renders the modifier "substantially" unnecessary. Even the authors who recommended the use of "substantially" recognized that, without it, incapacity is "apparently absolute."[61] Therefore, since Congress deleted the modifier "substantially" from Article 120, UCMJ, a total and complete (i.e., absolute) incapacity is the best understanding of how the term "incapable of consenting" should be understood.

Additionally, the words at issue clarify for the members that impairment, even significant impairment as the Government argued at trial, is not another way of saying "incapable of consenting." While arguably "a complete and total mental

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[59] DEF. TASK FORCE ON SEXUAL ASSAULT IN THE MIL. SERVS., REP. 81 (2009).
[60] JOINT SERVICE COMMITTEE SUBCOMMITTEE, SEX CRIMES AND THE UCMJ: A REPORT FOR THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE 257 (2005).
[61] *Id.* at 7 (comparing 18 U.S.C. §2241(b)(2)(1) with 18 U.S.C. §2242(2)(A)).

impairment" is not required to find a person incapable of consenting, the proposed level of impairment described in the instruction was not nearly as important as informing the members that the impairment must rise to the level of rendering an alleged victim incapable of consenting.[62] But whatever deficiency may exist in the technicalities, the trial defense counsel's requested instruction is correct regarding the legal theory of liability and did not excuse the military judge from his duty to provide the members with correct instructions.[63]

B. The proposed instruction was not substantially provided for in the military judge's instructions.

Instead of accepting the proposed instruction, the military judge gave the standard instruction,[64] which recited in full the statutory definition of consent.[65]

While the standard instruction stated the elements of the offense, the proposed instruction was not otherwise provided for in the military judge's instructions. Much of the standard instruction was irrelevant to the facts of this case since liability turned on whether LH was *incapable* of consenting, not whether consent existed. Notably, the instruction defined consent as "a freely given

[62] *United States v. Newlan*, No. 201400409, 2016 WL 4791945, at *8 (N-M. Ct. Crim. App. Sept. 13, 2016).
[63] *See Dearing*, 63 M.J. at 484.
[64] J.A. at 124, 180.
[65] J.A. at 29-30.

agreement to the conduct at issue by a competent person,"[66] but offered no definition of the term "incapable."

The phrase "incapable of consenting" can be understood by a person of ordinary intelligence—when the phrase is properly explained. Without an explanation identical or substantially similar to that affirmed in *Pease*, it is unlikely members of ordinary intelligence would engage in the same level of deduction or examination of the "broader statutory context"[67] that accomplished appellate judges with extra-ordinary intelligence did with the statutory definition of "consent.[68] Members are presumed to follow instructions,[69] not to interpret them.

C. Seaman Bailey was seriously impaired in the presentation of his defense.

In its closing argument, the prosecution trumpeted the toxicologist's testimony regarding a person's judgment and memory affected by a blood alcohol concentration between .22 and .24%[70] The counsel then stated in a "just-so" fashion that LH was incapable of consenting. Similarly, the prosecution began its

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[66] J.A. at 124, 180.
[67] *Pease*, 75 M.J. at 184.
[68] *See Pease*, 74 M.J. at 770 (deducing from, first, "consent," to "competent," then "incompetent," followed by "freely given agreement, and concluding with "incapable of consenting").
[69] *United States v. Jenkins*, 54 M.J. 12, 20 (C.A.A.F. 2000).
[70] J.A. at 132.

rebuttal argument by repeatedly stating LH was drunk, and thence jumped to the conclusion that LH was incapable of consenting.[71]

While incorrect, this line of argument is uniquely persuasive in the Armed Forces. Service members are expected to actively participate in efforts to eliminate sexual assault from the ranks.[72] This includes participation in training sponsored by the Department of Defense, which teaches that alcohol *per se* "adversely affects decision-making and impulse control"[73] and routinely propagates the falsehood that any alcohol consumption means one cannot consent.[74]

Given the mandatory sexual assault prevention and response (SAPR) training which every member received,[75] the proposed instruction would have shifted the weight of the evidence toward the trial defense counsel's argument that LH was capable of consenting. For example, during LH's direct examination, she testified that not long after the sexual activity, she desired to go to the hospital and directed SN Bailey to take her there.[76] The testimony also established that LH

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[71] J.A. at 150.
[72] MESSAGE, ALCOAST 144-14, 031940Z APR 14, DEPUTY COMMANDANT FOR MISSION SUPPORT, SUBJECT: MANDATORY STAND DOWN-SEXUAL ASSAULT AWARENESS MONTH, https://www.uscg.mil/announcements/ALCOAST/144-14_ALCOAST.txt.
[73] SEXUAL ASSAULT PREVENTION AND RESPONSE OFF., DEP'T OF DEFENSE, 2014-2016 SEXUAL ASSAULT PREVENTION STRATEGY, at 5 (Apr. 30, 2014).
[74] *See Newlan*, 2016 WL 4791945, at *8.
[75] J.A. at 44-45.
[76] J.A. at 106-07.

communicated with her father.[77] And, perhaps indicative of an error in the prosecution's charging strategy, LH testified that she communicated her refusal of consent to anal sex, thereby contradicting the claim that she was incapable of consenting.[78]

Had the Defense received its instruction, the Defense could have linked those facts to the crucial components of possessing situational awareness and the ability to make and communicate decisions and argued convincingly that the evidence showed LH was a competent person during and not long after the sexual activity, and therefore was more likely than not a competent person before the sexual activity. Without the requested instruction, the members lacked an adequate legal foundation to evaluate properly LH's weak and contradictory testimony her mental and physical capabilities at the time of the sexual activity.[79]

Conclusion

Because the military judge failed to properly instruct the members, SN Bailey suffered material prejudice to his right to a fair trial. As a result, this Court should set aside the findings of Charge II and its four specifications and set aside the sentence.

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[77] J.A. at 116.
[78] J.A. at 104-05.
[79] *Damatta-Olivera*, 37 M.J. at 479.

Respectfully submitted,

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