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	REPLY BRIEF 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:

JASON W. ROBERTS
Lieutenant Commander, USCG
Appellate Defense Counsel
1254 Charles Morris St., SE
Bldg. 58, Ste. 100
Washington, DC 20374
Tel: (202) 685-7389
jason.w.roberts@navy.mil
CAAF Bar No. 36766

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"?

A. Appellant did not waive or abandon his argument that the requested instruction was correct.

Appellee states in a footnote that by conceding at oral argument that the requested instruction was "incongruent" with the definitions approved in *United States v. Pease*,[1] Appellant waived his right to argue that the instruction was correct and should have been given.[2] No waiver occurred. Although the instruction was largely similar in content and meaning to the *Pease* definition, the requested instruction was not a mirror image of the language approved in *Pease* since the proposed instruction included the words "total" and "complete."[3] However, counsel correctly maintained the position that the instruction was an accurate statement of the law. Counsel simply added at argument (without briefing) before the Court of Criminal Appeals that, regardless of the proposed instruction, the military judge should have instructed the members with the exact definitions approved in *Pease*. Despite the government's argument of waiver at

[1] 75 M.J. 180 (C.A.A.F. 2016).
[2] Appellee's Br. 11 n.1
[3] Appellant's counsel used the term "incongruent" in its geometric sense – not being equal.

CCA, there was no finding by the court that Appellant waived or abandoned its position when it fully responded to the assignment of error. Absent a finding of abandonment by the lower court, the Appellee's waiver argument does not apply.

B. The instruction was correct.

1. Appellee's understanding of the plain meaning of "incapable" is wrong.

Appellee states that the term "incapable" is "not understood in absolutes, but gradation."[4] This simple and common error is precisely why the defense's proposed instruction should have been provided to the members. To be incapable to consent means to not have the ability to consent. As such, there can be no gradation to consider. Capability, on the other hand, can exist in various stages so much so that one could have diminished capability (even significantly so) and still be capable to consent. However, the law does not permit a conviction to stand on proof of diminished capability. It requires a showing of no capability. By using the words "total" and "complete," the instruction strongly reinforces the plain meaning of "incapable" as "without capability."

2. Requiring total incapacity does not change "or" to "and."

Appellee also alleges that proposed instruction would require the *Pease* definition of "incapable of consenting" to change from "to make or to

[4] Appellee's Br. at 20.

communicate" to "to make and to communicate."[5] But this is not so. The purpose of using "or" instead of "and" in between the phrase "to make or to communicate" is for the purpose of addressing the concept of voluntariness, which is a necessary condition for valid consent.[6] Requiring total incapacity does not eliminate the voluntariness aspect of consent. In fact, the defense counsel accounted for this truth by using "or" in the proposed instruction.

C. The instruction provided by the military judge does not substantially cover the meaning of "incapable of consenting."

The military judge told the members that to convict SN Bailey, they had to find beyond a reasonable doubt that LH was incapable of consenting. To assist them, he also defined "consent" and then told them what is not consent and who could not consent.[7] While the military judge correctly defined the type of person who could not consent ("incompetent"), none of the "critical principles"[8] or competencies surrounding the process of consenting (observation and orientation, decision, and action) were supplied with this terse statement of one of the elements of the crime.

The defense's proposed instruction adequately addressed those critical principles and did so fifteen months before this Court's decision in *Pease*. Yet

---

[5] Appellee's Br. at 13.
[6] *Pease*, 75 M.J. at 185.
[7] JA at 180.
[8] *United States v. Carruthers*, 64 M.J. 340, 348 (C.A.A.F. 2007).

despite this foresight, Appellee argues that "incapable" should remain unexplained and that the judicially-approved meaning should be shielded from the members. Appellee argues that the burden of proof combined with the instructions regarding the surrounding circumstances and potential defenses provided the members "the necessary understanding of how intoxicated someone needs to be incapable of consenting."[9] They do not. They provide the members with the necessary understanding of how much evidence they need to convict or to acquit. They are silent with respect to the ultimate issue of judging the level of LH's intoxication in relation to her ability to consent. Therefore, they are insufficient.

D. The denial of the requested instruction substantially impaired the defense.

In its closing argument, the prosecution took advantage of the absence of a clear explanation of "incapable" and argued that memory loss, vomiting, and an inability to walk meant that LH could not consent.[10] However, none of these characteristics relate to the ability to perceive, decide, and communicate.

Appellee argues that seven prosecution witnesses (including LH) overwhelmingly established LH's intoxication.[11] Yet LH's intoxication was never in doubt and was not at issue. It was her capacity to consent that was contested. Tellingly, not one prosecution witness testified that LH was incapable of

[9] Appellee's Br. at 15.
[10] JA at 127-35.
[11] Appellee's Br. at 22.

communicating with each of them. In fact, it was the opposite – they all could communicate with her, like the treating physician who testified that LH was oriented to her surroundings, made a decision to undergo a forensic examination, and communicated that decision to the hospital staff, all actions that indicate capacity under a Pease standard.[12]

Armed with evidence that LH was able to communicate and understand her surroundings, the member's would likely have found that LH was able to consent if the military judge had provided the members with the defense's requested instruction. If the proper legal standard had been available for the defense during argument, those considerations may have tipped the credibility balance in SN Bailey's favor.[13] Therefore, the military judge's refusal to give the instruction was not harmless.

Conclusion

This Court should find the military judge erred by failing to give the defense's proposed instruction, set aside the findings of Charge II and its four specifications, and set aside the sentence.

[12] JA at 60-61.
[13] *See United States v. Moss*, 63 M.J. 233, 239 (C.A.A.F. 2009)(finding excluded evidence "may have tipped the credibility balance in Appellant's favor").

Respectfully submitted,

ROBERTS.JASON.WILLIAM.1114349778

Digitally signed by ROBERTS.JASON.WILLIAM.1114349778
DN: c=US, o=U.S. Government, ou=DoD, ou=PKI, ou=USCG, cn=ROBERTS.JASON.WILLIAM.1114349778
Date: 2017.07.12 17:10:38 -04'00'

JASON W. ROBERTS
Lieutenant Commander, USCG
Appellate Defense Counsel
1254 Charles Morris St., SE
Bldg. 58, Ste. 100
Washington, DC 20374
Tel: (202) 685-7389
jason.w.roberts@navy.mil
CAAF Bar No. 36766

Certificate of Compliance

1. This reply complies with the page limitation of Rule 24(b).

2. This reply complies with the type style requirements of Rule 37 because it has been prepared with a proportional typeface using Microsoft Word 2010 with 14 point, Times New Roman font.

ROBERTS.JASON.WILLIAM.1114349778
Digitally signed by ROBERTS.JASON.WILLIAM.1114349778
DN: c=US, o=U.S. Government, ou=DoD, ou=PKI, ou=USCG, cn=ROBERTS.JASON.WILLIAM.1114349778
Date: 2017.07.12 17:10:16 -04'00'

JASON W. ROBERTS
Lieutenant Commander, USCG
Appellate Defense Counsel
1254 Charles Morris St., SE
Bldg. 58, Ste. 100
Washington, DC 20374
Tel: (202) 685-7389
jason.w.roberts@navy.mil
CAAF Bar No. 36766

Certificate of Filing and Service

I certify that the foregoing was delivered to the Court and a copy served on opposing counsel on 12 July 2017.

ROBERTS.JASON.WILLIAM.1114349778
Digitally signed by ROBERTS.JASON.WILLIAM.1114349778
DN: c=US, o=U.S. Government, ou=DoD, ou=PKI, ou=USCG, cn=ROBERTS.JASON.WILLIAM.1114349778
Date: 2017.07.12 17:09:51 -04'00'

JASON W. ROBERTS
Lieutenant Commander, USCG
Appellate Defense Counsel
1254 Charles Morris St., SE
Bldg. 58, Ste. 100
Washington, DC 20374
Tel: (202) 685-7389
jason.w.roberts@navy.mil
CAAF Bar No. 36766