IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	BRIEF ON BEHALF OF THE APPELLEE
v.	Crim. App. No. 1428
Colby C. BAILEY, Seaman (E-3), United States Coast Guard, Appellant	USCA Dkt. No. 17-0265/CG

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

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Index of Brief

Table of Cases, Statutes, and Other Authorities

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

This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867 (2012), because it is a case reviewed by the Coast Guard Court of Criminal Appeals (CGCCA) in which this Court has granted Appellant's petition for review. The CGCCA had jurisdiction over this case under Article 66(b)(1), UCMJ, 10 U.S.C. § 866(b)(1) (2012).

Statement of the Case

Appellant was convicted, contrary to his pleas, at a general court-martial composed of officer members, 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, 10 U.S.C. §§ 920, 928 (2012). The panel sentenced Appellant to confinement for eighteen months, reduction in rank to E-1, and a dishonorable discharge. The convening authority approved the findings and adjudged sentence on June 18, 2015. J.A. at 27.

The CGCCA reviewed the case and issued a decision on January 4, 2017. The court affirmed the findings and the sentence. J.A. at 10. On April 20, 2017, this Court granted Appellant's petition for review.

Statement of Facts

Appellant and LH met online and played video games together several times before once going to a movie together. J.A. at 167, 170. The evening following the movie, LH went to Appellant's home to play video games; they agreed in advance that they would not engage in sexual activity that evening. J.A. at 171. At Appellant's home, LH drank approximately six and a half ounces, or half a bottle, of Bacardi 151, a 151-proof liquor. J.A. at 51, 58. LH became intoxicated, fading in and out of consciousness, and does not remember much of the evening. J.A. at 103-07, 118-19.

Despite her intoxicated state and their previous agreement, Appellant engaged in oral, anal, and vaginal sexual intercourse with LH. J.A. at 171-72. LH vomited, six times or more, during the sexual activity. J.A. at 49, 171-72. Appellant took LH to his bathroom and left her in the bathtub. J.A. at 173. LH requested to go to the hospital several times. *Id*. Appellant acquiesced only after LH began foaming at the mouth while vomiting in the bathtub, and Appellant carried LH to the car and transported her to the hospital. J.A. at 174.

Among the witnesses at Appellant's court-martial were the nurse, doctor, and police officer who spoke with LH at the hospital. J.A. at 174. A toxicology expert testified that LH's blood alcohol content at the time of the sexual assault could have been .24. J.A. at 87. The United States also offered Appellant's written statement he provided to Coast Guard Investigative Service (CGIS), detailing in his own words that LH had vomited at least six times while he was having sex with her. J.A. at 49, 171-72.

During trial, before closing arguments, the military judge asked the parties if they wanted him to consider any instructions not contained in the court's proposed instructions. J.A. at 120. Defense counsel requested the military judge provide the panel a the definition of "incapable" as it applied to the Article 120, UCMJ, specifications, and proposed:

> "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.

J.A. at 197. The military judge reviewed the defense-requested definition and declined to give it. *Id*. Instead, he provided the full definition of consent from the Military Judges' Benchbook:

> Consent means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting in the use of force, threat of force or placing another person in fear does not constitute consent. A current or previous dating or social or sexual relationship by itself … shall not constitute consent. *Lack of consent may be inferred based on the circumstances*. *All the surrounding circumstances are to be considered in determining whether a person gave consent*. A sleeping, unconscious or incompetent person cannot consent to a sexual act. Evidence concerning consent to the sexual conduct, if any, is relevant and must be considered in determining whether the government has proved the elements of the offense beyond a reasonable doubt. Stated another way, evidence the alleged victim consented to the sexual conduct, either alone or in conjunction with the other evidence in this case may cause you to have a reasonable doubt as to whether the government has proven every element of the offense.

J.A. at 124-25 (emphasis added). The military judge also read the members an instruction on mistake of fact. J.A. at 125-26.

At oral argument on appeal before the CGCCA, Appellant conceded the defense-requested instruction was incompatible with the plain and ordinary meaning of the statutory term "incapable of consenting." J.A. at 4. The lower court held the military judge did not abuse his discretion in rejecting Appellant's request, in part because the terms "complete and total" and "completely" in the requested instruction would have incorrectly "suggested a requirement for absolute incapacity." J.A. at 5-6. The lower court further held that the military judge's instructions contained no error.

Summary of Argument

The military judge did not abuse his discretion by denying the defense-proposed definition of "incapable" because the instruction was an incorrect statement of law, the word has a plain meaning and was substantially covered in the instructions given, and the failure to give the instruction did not affect Appellant's ability to present a full defense. *See United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993), *cert. denied*, 512 U.S. 1244 (1994). In *United States v. Pease*, 75 M.J. 180 (C.A.A.F. 2016), this Court adopted a service court's definition of "incapable of consenting," but did not impose that definition as a required instruction beyond the plain and ordinary meaning of the words. The military judge had no *sua sponte* duty to create and provide a definition of the term. Finally, any possible instructional error is harmless because Appellant's defense of mistake-of fact-as-to-consent, though ultimately unsuccessful, was unfettered throughout the court-martial.

Argument

I. Standard of review.

A military judge's denial of a requested instruction is reviewed for abuse of discretion. *United States v. Carruthers*, 64 M.J. 340, 345-46 (C.A.A.F. 2007) (citing *Damatta-Olivera*, 37 M.J. at 478 (C.M.A. 1993)).

The party making the claim bears the burden of presenting "conclusive argument that the judge abused his discretion." *United States v. Mosley*, 42 M.J. 300, 303 (C.A.A.F. 1995) (quoting *United States v. Mukes*, 18 M.J. 358, 359 (C.M.A. 1984)). The abuse of discretion standard is strict, calling for more than a difference of opinion; the challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous. *United States v. Solomon*, 72 M.J. 176, 179 (C.A.A.F. 2013) (citation and internal quotation marks omitted).

Acknowledging that a military judge has "substantial discretionary power in deciding on the instructions to give," *Damatta*, 37 M.J. at 478, this Court reviews *de novo* the question of whether a panel was properly instructed. *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002) .

II. The military judge did not abuse his discretion in declining to depart from the standard Benchbook instructions. The defense-proposed definition was an incorrect statement of law, the standard instruction substantially covered the issue of capability, and no instruction decision prevented Appellant from presenting his defense.

R.C.M. 920(e) details instructions that are required to be given: those relating to the elements of the offenses and lesser-included offenses, all defenses, presumption of innocence, reasonable doubt, burden of proof, procedures for deliberating and voting, and "such other explanations, descriptions, or directions as may be necessary and which are properly

requested by a party or which the military judge determines, *sua sponte*, should be given." R.C.M. 920(e)(7). The Rule is clear: a military judge is "*not* required to give the specific instruction requested by counsel," so long as the issue is "adequately covered" in the instruction as a whole. R.C.M. 920(c), discussion (emphasis added).

The test to determine whether a judge abused his or her discretion in denying a requested instruction: whether (1) requested instruction is correct; (2) it is not substantially covered in the main instruction; and (3) it is on such a vital point in the case that the failure to give it deprived the accused of a defense or seriously impaired its effective presentation. *Damatta-Olivera*, 37 M.J. at 478.

1. Appellant's proposed definition of "incapable," requiring complete and total impairment and incapacity, conflicts with the plain meaning of the term and would impermissibly elevate the United States' burden. It is incorrect.[1]

"Determinations as to what constitutes a federal crime, and the delineation of the elements of such criminal offenses—including those found in the UCMJ—are entrusted to Congress." *United States v. Jones*, 68 M.J. 465, 471 (C.A.A.F. 2010). This Court "interpret[s] words and phrases used in the UCMJ by examining the ordinary meaning of the language, the

[1] Appellant waived this argument by conceding at oral argument in this case before the CGCCA that the definition was incongruent with the language approved in *Pease*. J.A. at 4.

context in which the language is used, and the broader statutory context." *United States v. Pease*, 75 M.J. 180, 184 (C.A.A.F. 2016) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *United States v. Schloff*, 74 M.J. 312, 314 (C.A.A.F. 2015)). Here, the defense-proposed definition is inconsistent with both the statutory language and the plain and ordinary meaning of "incapable."

a. The defense-proposed instruction violated the plain meaning of "incapable."

This Court and its predecessor have long held that words with a plain and ordinary meaning need not be defined. *See, e.g.*, *United States v. Glover*, 50 M.J. 476, 478 (C.A.A.F. 1999) (finding no plain error where military judge did not define "wrongfully"); *United States v. Soukup*, 7 C.M.R. 17, 21 (C.M.A. 1953) (distinguishing the need to define reasonable doubt in most circumstances, but holding "willfully" has a "generally accepted content of meaning" and requires no definition); *United States v. Shepard*, 4 C.M.R. 79, 84 (C.M.A. 1952) ("Words generally known and in universal use do not need judicial definition.").

The Government is not aware of any case in which a court has held that "incapable" is a term that lacks plain meaning. Indeed in *Pease*, while this Court adopted a service court's expansion on the phrase "incapable of consenting"—it did so only after noting that the lower court's definition was

based on "the ordinary meaning of the phrase, the context in which it was used, and the broader statutory context." *Pease*, 75 M.J. at 185-86.

However, Appellant's definition of incapable expands the scope of not capable, to "totally" not capable, which goes beyond the dictionary definitions and beyond the language this Court subsequently endorsed in *Pease*. If "incapable" were interpreted to require total incapacity, as argued by Appellant, the distinction made by this court in *Pease* regarding the meaning of incapable of consent, distinguishing between "to make and to communicate" and "to make or to communicate" would have been unnecessary. *See id*. at 186. Total incapacity would mean an inability to make *and* to communicate a decision, a reading of the statute rejected by this Court. *See id*. As the CGCCA correctly noted, the term "incapable" can be understood by a person of ordinary intelligence and no additional explanation was necessary because giving Appellant's proposed instruction would have imposed an "unwarranted change to the ordinary meaning" of the word. J.A. at 5.

b. *The defense-proposed instruction would inappropriately raise the Government's burden.*

The defense-requested definition of "incapable" mirrors the Benchbook definitions of "substantially incapable" and "substantially incapacitated" under a previous version of the statute—with the word

"substantially" struck in favor the words "total" and "completely." *See* U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK (1 Sept. 2014) 3-45-5, paragraph (d) (providing definitions for the previous version of the statute); J.A. at 37. As such, Appellant asked the military judge to take a statute that is no longer applicable, inflate its definition, and apply it to this court-martial.

The CGCCA correctly held that this definition impermissibly raised the standard in this case by "suggest[ing] a requirement for absolute incapacity, a requirement that is not rooted in the statutory text." J.A. at 5. Appellant provides no statutory support or other authority for his current argument that his proposed definition, which is derived from the history of the statute and accompanying definitions, is appropriate here. App. Br. at 9.

2. <u>The standard Benchbook definition of consent gave the panel all necessary information to determine whether LH was incapable of consenting</u>.

Additional definitions of statutory terms are unnecessary when the matters are covered in other instructions. *See United States v. Carruthers*, 64 M.J. 340, 346 (C.A.A.F. 2007) (holding the instruction substantially covered the underlying issues of leniency and possible motives to lie, despite not giving the proposed accomplice instruction); *United States v. Poole*, 47 M.J. 17, 19 (C.A.A.F.1997) (finding instruction on resistance to

apprehension substantially covered defense's requested instruction on "mere flight," even though it did not use the term "mere flight"); *Damatta-Olivera*, 37 M.J. at 487–79 (finding instruction adequately addressed accomplice's credibility, the issue underlying defense's requested instruction). Here, the Benchbook consent instruction used derives from actual statutory language. See 10 U.S.C. § 920(g)(8). Based on the consent and mistake of fact instructions alone, the Members understood the following: (1) whether LH was capable of consenting depended on the surrounding circumstances; (2) some evidence of consent would rightly cause doubt about whether the United States had proved each criminal element; and (3) if Appellant, even in error, reasonably believed the circumstances showed consent, he is entitled to a defense of mistake. The burden of proof beyond a reasonable doubt, combined with the instructions, provide the necessary understanding of how intoxicated someone needs to be to be incapable of consenting. Thus, in addition to the word's plain and ordinary meaning, the matter of "incapable" was substantially provided through the instructions already given.

3. The military judge's decision not to give Appellant's proposed definition had no impact on the presentation of the defense case.

Nothing in the way that the military judge instructed the members precluded the defense from arguing that although LH was drunk, she was

still competent to consent to the sexual activity at issue. By following the military judge's instruction, the members were not barred from analyzing the information presented and reaching a determination on whether LH was "incapable" of consenting.

Relying heavily on Appellant's exculpatory statements, the defense argued that LH consented to sex with Appellant. J.A. at 135-37, 142, 146-49. In closing, the defense discussed LH's demeanor and behavior as observed by individuals at the hospital and invited the members to conclude that LH was similarly conscious and responsive hours before at Appellant's house. J.A. at 143-45. They also argued that LH either was lying about her lack of consent, or that she did not remember consenting, but had behaved in a way that led Appellant to believe she did. J.A. at 146. The military judge's instructions did not preclude these arguments in any way. The members were in no way barred from evaluating the evidence presented, applying the instruction and its necessary implications, and reaching a determination on whether the government met its burden based on the evidence presented.

Appellant's contentions that his defense was harmed are not supported by the record. App. Br. at 13-15. Appellant's argument that Coast Guard training leads a panel to believe that one drink makes a complainant incapable of consenting was addressed during *voir dire*. App. Br. at 14.

Panelists were asked, "[D]oes everyone agree that someone who has had something to drink may still be able to consent to sex?" and "Do each of you agree that regardless of what [civilian or military senior leadership] may have said about sexual assault, that those statements have no relevance on what you do here this week?" J.A. at 45-46. There is no indication in the record that any of the panel members heard or believed that consuming any amount of alcohol means that one cannot consent.

Appellant also points to the prosecution's repeated statements in rebuttal closing statements that LH was "drunk." App. Br. at 13-14. These statements did not harm his defense. Through use of testimony of Officer Renfroe, Dr. Murphy, and Dr. Harris, the Government described LH as "severely intoxicated" and "severely impaired," terms analogous with excessively drunk. J.A. at 86, 149, 155. The prosecutor argued LH was "impaired to the extent that she was incapable of consenting," not because she was merely drunk, but because her physical abilities were severely impaired and the testimony of Dr. Harris explained that physical abilities deteriorate *after* mental abilities. J.A. at 155, 157-58. All of the above terms are easily understood by a layman and any use of the word "drunk" did not impact Appellant's ability to present his defense, which was that LH may

have been drunk but was still capable of and in fact did communicate her consent to the sexual activity.

III. Appellant also fails to show the panel was improperly instructed. *Pease* approved a service court's definition of the word "incapable", but nothing in *Pease* imposes upon military judges a *sua sponte* duty to create a novel definition of "incapable" where the term has a plain and common meaning and was not specifically defined in the statute or case law.

"A military judge has wide discretion in choosing the instructions to give but has a duty to provide an accurate, complete, and intelligible statement of the law." *United States v. Behenna*, 71 M.J. 228, 233 (C.A.A.F. 2012).

At the time of trial in this case, neither the President nor the Benchbook explicitly defined "incapable" as used in Art. 120(b)(3), UCMJ.[2] The military judge in this case acted appropriately when he declined to give an instruction that was not required and not defined in the statute or case law.

Service Courts of Criminal Appeal, including the CGCCA in this case, have refused to find a requirement for additional instruction in cases arising under Article 120(b)(3). J.A. at 5-6. In *United States v. Lovett*, the Army Court of Criminal Appeals (ACCA) held that although *Pease* provides

[2] After this Court's decision in *Pease*, the Military Judge's Benchbook has been updated to include the articulated definition from that case. BENCHBOOK, 3-45-5, paragraph (d) (2017).

a useful definition of "incapable of consenting," the case does not require that the military judge give an instruction on the term because it can be understood by a person of ordinary intelligence. ARMY 20140580, 2016 WL 1762045, at *4 (Army Ct. Crim. App. April 29, 2016) (unpublished); J.A. at 200. The ACCA continued that the decision whether to give an instruction on "incapable of consenting" will be based on the "degree to which the evidence puts the matter at issue, whether the panel requests additional guidance, and is ultimately within the sound discretion of the military judge." *Id.*

Furthermore, in *United States v. Newlan*, the NMCCA set aside a sexual assault conviction under Art. 120(b) where defense requested and the military judge provided an incorrect definition of the statutory term "impairment." No. 201400409, 2016 WL 4791945, at *10 (N.M. Ct. Crim. App. Sept. 13, 2016) (unpublished); J.A. at 210-11. The military judge in that case imported the definition of "impairment" found in the Art. 111, UCMJ, prohibition against drunken operation of a vehicle, into a case charged under Article 120 and the NMCCA found that was error, holding that the Art. 111 definition of "impaired" is a term of art applicable only to that article. *Id.* at 11. In this case, where the statute does not specifically define the term, the members were properly instructed when they were asked

by the judge's instructions to apply the common understanding of the word "incapable."

As discussed above, "incapable" of consent based on impairment is not understood in absolutes, but gradation. Appellant's total lack of ability to consent argument would not require such a totality of the circumstances review, nor a safeguard that whether the belief of the accused was reasonable be based on that of an ordinary, prudent, sober adult. Even an intoxicated person is capable of telling whether someone is completely unresponsive such as when asleep, unconscious, or dead. In addition, the circumstances under which a person could come to a "reasonable belief" that a totally incapacitated person consented to a sexual act would be vanishingly small, and thus, Appellant's proposed definition would eliminate the need for a mistake of fact instruction.

In *United States v. Torres*, this Court held that a military judge *should* instruct the panel about the effects of automatism on the accused's mental state in cases where it has been reasonably raised by the evidence and may serve to negate the *actus reus* of a criminal offense. 74 M.J. 154, 158 (C.A.A.F. 2015). The Court reached this conclusion after finding that the condition of automatism is not commonly understood by members, nor squarely addressed in the Manual for Courts-Martial. *Id.* at 157. The Court

then looked to the Model Penal Code and common law, which communicate the general tenets that require criminal acts to be voluntary, before holding that the members be instructed that automatism may negate the necessary *actus reus* to find the accused guilty. *Id.* at 158. This case is not similar to *Torres*, where it was appropriate for this Court to guide a military judge's mandatory instructions to members for a confusing, uncommon exculpatory issue. Here, the term "incapable" has a common meaning that can be understood by the members; it is neither an uncommon issue as related to alcohol consumption nor is it confusing. Therefore, a requirement for a military judge to instruct the members on this word is not appropriate.

IV. Any possible instructional error was harmless. The defense presentation of its case did not depend on any definition of LH's incapability, which was established by overwhelming evidence.

When a defense-requested instruction is rejected in error, the Government bears the burden of showing the error was harmless. *See United States v. Carruthers*, 64 M.J. 340, 345 (C.A.A.F. 2007). The test for harmlessness is whether the instructional error had "substantial influence" on the findings; if it did, or if this Court is "left in grave doubt, the conviction cannot stand." *United States v. Gibson*, 58 M.J. 1, 7 (C.A.A.F. 2003) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)).

The Appellant fully litigated the defense of mistake of fact as to consent. In his brief, the Appellant does not argue he was precluded from presenting evidence or argument, but only that the instruction would have "shifted the weight of the evidence toward the trial defense counsel's argument…." App. Br. at 14. This contention lacks legal foundation and does not meet this Court's standard regarding what constitutes harm.

In *United States v. Langley*, the Court of Military Appeals held that even where a military judge gave an improper mistake of fact instruction requiring that a mistake be both honest and reasonable, rather than just honest, the error was harmless due to the Government's overwhelming evidence. 33 M.J. 278, 283 (C.M.A. 1991). The Court added that "even if correctly instructed upon, the members would have been no more ready to find the mistake honest than they were to find it honest and reasonable." *Id.*

In this case, the Government's overwhelming evidence established that Appellant suffered no harm from any instructional error. The members heard from seven government witnesses testifying to her intoxication shortly after the sexual assault. These witnesses included the staff that treated LH at the hospital the night of the sexual assault, the responding police officer who also attended the hospital, and a toxicology expert who opined that LH's blood alcohol content may have reached a .24 at the peak of her intoxication.

J.A. at 87. Furthermore, Appellant's own six-page statement to CGIS revealed the most damning evidence in this case. He detailed the encounter where she vomited twice while his penis was inserted in her mouth, her foaming at the mouth while sitting naked in his bathtub, her begging to go to the hospital, and his having to carry her to the car to do so. J.A. at 170-75. The panel members fully considered whether LH was "incapable of consenting" and whether Appellant's defense of mistake of fact as to consent was reasonable, but ultimately were convinced beyond a reasonable doubt that Appellant was guilty of the offenses charged.

Conclusion

Appellant is entitled to no relief because the military judge did not abuse his discretion in denying the defense's proposed definition of "incapable," and the panel was properly instructed. As such, this Court should affirm the findings and sentence.

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Certificate of Service

I certify that a copy of the foregoing was electronically submitted to the Court on July 3, 2017, and that Appellant's counsel, LT Jason W. Roberts, was copied on the email at jason.w.roberts@navy.mil.

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