IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee,* *v.* Techincal Sergeant (E-6) **ROBERT A. CONDON,** United States Air Force, *Appellant.*	**APPELLANT'S BRIEF IN SUPPORT OF THE GRANTED ISSUES** USCA Dkt. No. 17-0392/AF Crim App. No. ACM 38765

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

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I.

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

II.

WHETHER THE MILITARY JUDGE ERRED IN ADMITTING APPELLANT'S INVOCATION OF HIS RIGHT TO COUNSEL IN HIS AFOSI INTERVIEW AT TRIAL OVER DEFENSE OBJECTION, AND, IF SO, WHETHER THAT ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals had jurisdiction over Appellant's case under Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012). This Honorable Court has jurisdiction over Appellant's case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

Contrary to Appellant's pleas, a military panel with enlisted representation, sitting as a general court-martial, convicted Appellant of

one charge and two specifications of violating Article 92, UCMJ, 10 U.S. Code §892; one charge and two specifications of violating Article 120, UCMJ, 10 U. S. Code §920; one charge and specification in violation of Article 120a, UCMJ, 10 U.S. Code §920a; one charge and specification in violation of Article 125, UCMJ, 10 U. S. Code §925; one charge and specification in violation of Article 128, UCMJ, 10 U. S. Code §928; and one charge and four specifications of violating Article 134, UCMJ, 10 U. S. Code §934. (JA 53-59, 523.) The panel sentenced Appellant to a reduction in grade to E-1, forfeiture of all pay and allowances, confinement for 30 years, and a dishonorable discharge. (JA 53-59.) The convening authority approved the adjudged findings and sentence. (JA 53-59.) The Air Force Court of Criminal Appeals (AFCCA) affirmed the findings and sentence on appeal under Article 66(c), UCMJ, 10 U. S. Code §966(c). *United States v. Condon*, No. ACM 38765, 2017 CCA LEXIS 187 (A.F. Ct. Crim. App. 10 March 2017). (JA 1-46.)

This Court granted Appellants petition on 19 July 2017.

Statement of Facts

Issue I

On Specification 4 of Charge II, the Government alleged Appellant had sexual intercourse with Special Agent AD while she was incapable of consenting because of alcohol impairment. The Military Judge gave the members the following prefatory instruction at the beginning of the trial without objection from either party. (JA 89.)

> A sleeping, unconscious, or incompetent person cannot consent to a sexual act. The government has the burden to prove beyond a reasonable doubt that consent did not exist. And then likely would give you some factors to consider. The important thing is alcohol, of course, can be a factor in play in a lack of consent. However, the government, if you have any problem with this, let me know, a single drink *likely* does not obviate consent. I mean, a lack of consent is where a person is not capable of understanding their actions and doesn't understand what they're consenting to. That can differ of course from person to person and situation to situation. So, I want you to understand that.

Id.

The military judge discussed consent and intoxication, with counsel while preparing his findings instructions. (JA 398-400.) The defense asked the military judge to instruct that "a person is capable of consenting to a sexual act of sexual intercourse unless she is incapable of: (1)

understanding the act; (2) it's motive; (3) and its possible consequences," to which the prosecution objected. (JA 398-400,) The defense "lodged an objection, a continuing objection, and that is to the impairment instruction." (JA 405.) The military judge declined to give the defense requested instruction. (JA 405-406.) Ultimately, the military judge only instructed that "'Impaired' means any intoxication sufficient to impair the rational and full exercise of the mental or physical faculties." (JA 419.)

Issue II

Prior to trial, the defense moved to suppress the statements contained in Pros. Ex. 6 (PE-6), Appellant's videotaped AFOSI interrogation, and the motion was denied. (JA 75-81, 624-685.) During this interrogation, Appellant invoked his right to remain silent and requested counsel. (JA 524.) Subsequent to his decision to remain silent and to request counsel, he continued speaking to the law enforcement agents present (JA 524.) Based on how the events progressed and the agents' responses to his questions, Appellant chose to continue the interrogation. (JA 524.) At some point during the back and forth between

Appellant and the law enforcement agents, SA Paradis re-advised Appellant of his Article 31, UCMJ, rights. (JA 524.)

At trial, when the government offered PE-6 into evidence, the defense objected to the portion during which Appellant invoked his rights and requested counsel. (JA 195.) Trial counsel disagreed and argued that:

> …to excise certain portions or mute certain portions would lead us to a spot where it would be more confusing to the members to excise those portions and have them understand the re-right's advisement than just to leave that in there and give them a curing instruction.

(JA 196.)

The military judge ultimately admitted PE-6 and found this portion was "marginally" relevant and not prejudicial. (JA 196-197.)

> You're (sic) objection is overruled in part, in part granted which is, I'm going to give a corrective instruction. I will probably give them a very short corrective instruction before the video starts. So, *that won't be the final instruction*…

(JA 197.) (emphasis added).

Before the government published PE-6 to the court members, the military judge addressed Appellant's invocation of counsel in the following manner:

> Additionally, one *small* limiting instruction, and *you'll see it in my written instructions* in better form, but during the initial part of the interview at one point, there is mention of an attorney. You know, probably you all know this from Article 31, there's the time when you read people their rights. And there's discussions about the attorney early on in the video, and then it comes up a couple of times, and at one point there is a statement. I mean you're going to tell me what you hear on this because you're going to decide everything that's said on here. You don't have a transcript; you need to listen to it. But if there's a request for an attorney by somebody, I just need to tell you, don't draw any adverse inference from that. That's why we give people Article 31 rights. Anybody, of course, can ask for an attorney at any point during any interview. That's the point of those rights, and it's no indication of anything. So, I just need you to not draw any negative inferences from that. *But you can consider everything in the video and pay attention to everything in the video for how it relates to this case.* And again, *you'll see more of that in my written instructions*.

(JA 199.) (emphasis added).

The military judge did not give the promised limiting instruction during his final oral instructions (JA 408-448, 641-678).

Argument

I.

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

Standard of Review

This Court reviews the claim of instructional error de novo for an abuse of discretion, on the facts of this case. *Killion*, 75 M.J. at 214; *United States v. Maxwell*, 45 M.J. 406, 424 (C.A.A.F. 1996).

Law and Analysis

> While military judges have some discretion in tailoring panel instructions, a military judge has a "duty to 'provide appropriate legal guidelines to assist the jury in its deliberations.'" "Failure to provide correct and complete instructions to the panel before deliberations begin may amount to a denial of due process." R.C.M. 920(e) expressly requires that instruction on findings include, inter alia, "[a] description of the elements," R.C.M. 920(e)(1), and "[s]uch 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).

United States v. Killion, 75 M.J. 209, 213-14 (C.A.A.F. 2016) (citations omitted). "The military judge's instructions are [also] intended to aid the members in the understanding of terms of art[.]" *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006). This Court requires "lucid guideposts" to enable the court members to apply the law to the facts. *United States v. Buchana*, 19 U.S.C.M.A. 394, 396-97 (1970) (citations omitted).

A. The military judge erred when he failed to properly instruct the court members regarding the term "incapable", after a legally

correct instruction was requested and proposed by the defense to explain this ambiguous legal term to the court members.

When an appellant's case is pending direct appeal, the law used to determine whether there was an error is the law as it stands during the pendency of the appeal. *United States v. Harcrow*, 66 M.J. 154, 157 (C.A.A.F. 2008) (citing *Griffith v. Kentucky*, 479 U.S 314, 328 (1987) (holding "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on review") (citations omitted)).

Being "impaired" and "incapable" can mean many things to different listeners. Contrast, for example, a pilot who violates the "bottle to throttle" rule, a driver who minimally exceeds the state blood alcohol level while driving, a person who has "one alcoholic drink", and a person who physically passed out and is unresponsive according to the Glasgow Coma Scale. Impairment and capacity are matters of degree and it is the unfettered unguided interpretation of the individual member that can lead to multiple variations of meaning during deliberations. Unguided by an instruction, the members were entitled to set that degree, or level, using their own, potentially very low pilot or driver standard—or maybe

the "one alcoholic drink". Where that level lies becomes a highly variable and subjective inquiry based upon the unique facts of every case. This Court must set the port and starboard markers to channel the fact-finder to a reasonably clear definition given that the legislature and the rule makers have failed in this regard. Such an aid to navigation allows the fact-finder to apply a reasonably similar definition in the mind of each member of what "incapable" requires and means in the context of alcohol consumption.

The military judge was aware of the potential adverse effects of sexual assault training as demonstrated by his initial instruction to the members and his efforts to educate the members during voir dire. (JA 89-90.) He identified and addressed the military community's understanding of alcohol's influence in a sexual assault case given the training military members are required to take. *Id.* Sexual Assault Prevention and Response (SAPR) training is intended to hammer home different standards of conduct and ways to define actions and responses. In the military, the ordinary meaning of alcohol and consent has morphed into "one drink means no consent" as the military judge mentioned to the members. *Id.*

The impact of SAPR training will continue to affect courts-martial for the foreseeable future given the mandatory SAPR training every member receives. "Sexual assault prevention goes beyond an hour of training, an awareness campaign, or an inspiring poster. Preventing sexual assault requires sustained progress, innovative methodologies, and a commitment from every service member, not just the military sexual assault response professionals." DoD Sexual Assault Prevention and Response Office News Release, 17 October 2016.[1] That alcohol per se "adversely affects decision-making and impulse control," is a teaching point. SEXUAL ASSAULT PREVENTION AND RESPONSE OFFICE, DEPARTMENT OF DEFENSE, 2014-2016 SEXUAL ASSAULT PREVENTION STRATEGY, at 5 (30 April 2014).

The defense timely raised the issue and the need for a special instruction explaining and clarifying the definition of "incapable." Counsel discussed the proposed instruction that "came from another military judge". (JA 399.)

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[1] Available at: https://www.defense.gov/News/Article/Article/975474/dod-recognizes-innovative-initiatives-to-prevent-sexual-assault/ (last visited: 29 August 2017).

The court below relied on the analysis in *United States v. Miller*, 58 M.J. 266, 270 (C.A.A.F. 2003), to find the military judge did not abuse his discretion. In applying the Miller three-part test, they found the requested instruction (1) contained an incorrect statement of the law; (2) that the remaining instructions were sufficient; and, (3) that it "was not vital" to give the requested instruction. (JA. 1-46, Slip op. at 22-23.) The court below erred in their analysis and application of the three-part *Miller* test.

The requested instruction may not have been the best example of what the instruction should look like, but the defense proposed it based on what another military judge was using. Moreover, once the defense and military judge recognized and acknowledged the unavoidable confusion and ambiguity involving 'impairment' and 'consent' in a military court post-mandatory sexual assault training, to the point where the military judge began addressing it during voir dire, the military judge and the parties should have engaged in a process of crafting a better instruction. Certainly, there were elements of the military judge's initial instruction to the members that could have been incorporated or crafted into an acceptable instruction.

The standard instruction given by the military judge is parsimonious when it comes to defining incapacity due to alcohol—especially in a climate that includes heavy influences of SAPR training. The instruction allows for the wide range of definitions per the individual member. The court below considered the definition of "impairment" as sufficient "consistent with the normal sense of the work in common usage. (JA. 1-46, Slip op. at 23.) But therein lies the problem—common usage of the terms in the military community may well be different than that understood. A driver who has a blood alcohol level of at least 0.08 is considered legally impaired—but not necessarily or actually impaired to make decisions about sex. Impaired in the context of driving a vehicle is a common usage of the word 'impaired' and is undoubtedly close to the one-drink "standard" taught in SAPR training. The ambiguity is perhaps highlighted by Lieutenant Colonel McDonough, a member (excused), during voir dire:

> Q: … Tell me a little bit about your thoughts on that, about intoxication and consent.
>
> A: Sure. You know, we talked about one drink, and I think we all unanimously nodded and our heads that yeah, you can give consent. You know, what's intoxication? Is it .08 blood alcohol level? I think

> that's what it is now for driving and whatnot. I mean to me, it's going to be different for each person. If someone's a regular social drinker, it's going to be different if they're intoxicated. So, to me anytime someone is -- I don't know if inebriated and intoxicated are the same. If someone is drunk, then they need to be protected.

(JA 96.) As another example, SMSgt Scholl (excused peremptorily) stated:

> Q. All right. I believe you stated that you cannot con -- an individual who is intoxicated can't consent, you know, in response to one of the defense counsel's questions.
>
> A. Yes, sir.
>
> Q. So, tell me -- talk to me just a little bit about how -- what you thought, what was going through your mind, when you responded to that question? Just talk to us a little bit about that.
>
> A. Well, I believe if you're intoxicated, you're not in your -- you're not using your full capacity to make decisions. So, you couldn't necessarily consent to sexual activity, if you are not fully capacitated.

(JA 112.)

Appellant recognizes these members were excused from the panel, but their responses serve to illustrate how military members understand 'impairment to consent' to be something very different from one another and why it is so dangerous when it comes to the application of a legal

standard each member understand to be something completely different. The instructions failed to present the "members an adequate legal foundation to properly evaluate" the testimony as to the victim's capacity to consent. *United States v. Damatta-Olivera*, 37 M.J. 474, 479 (C.M.A. 1993). Additionally, the defense request did not call for the military judge to give undue emphasis on any of the evidence. *See id*.

Even if this Court determines the proposed instruction contained an incorrect statement of the law, two of the three *Miller* factors favor Appellant and this Court should therefore hold that the military judge abused his discretion.

B. Appellant was prejudiced by the lack of an adequate explanation from the military judge to the court members of the term "incapable" and this error was not harmless beyond reasonable doubt.

The military judge's error was not harmless. A key—often central—point in any "drunk sex" case is the level of intoxication and the impact of the alcohol on the victim's ability to consent (JA 71-74.) The military judge himself acknowledged how military sexual assault training has caused confusion or misunderstanding. (JA 89-90.) Before individual voir dire and the presentation of evidence, the military judge cautioned the

members regarding the interplay of intoxication as it related to an ability to consent (*Id.* and JA 1-46, Slip op. at 21-22.)

This Court should view "incapable of consenting due to impairment" as a term of art, which people of ordinary intelligence are not expected to decipher in the way the Navy-Marine Court of Criminal Appeals did in *United States v. Pease*, 75 M.J. 180 (C.A.A.F. 2016) or as the other courts of criminal appeal have begun to do.

Without an explanation identical or close to the one this Court affirmed in *Pease*, it is unlikely court members of ordinary intelligence would engage in the same level of deduction that accomplished lawyers/appellate judges did with the statutory definition of "consent." Members are presumed to follow instructions, not to interpret them. *United States v. Holt*, 33 M.J. 400 (C.M.A. 1991); *Unites States v. Ricketts*, 23 U.S.C.M.A. 487, 490 (1975).

Appellant echoes the court of appeals' conclusion *United States v. Newlan*, No. 201400409, 2016 CCA LEXIS 540, (N.M. Ct. Crim. App. Sep. 13, 2016), where they stated the military judge's simplified instruction "amplified the risk that members would confuse the distinction between any impairment and impairment which was sufficient to render a person

'incapable of consenting.'" *Id.*, at *1. The *Newlan* court understood that "the definition of impairment was not nearly as important as informing the members that the impairment must rise to the level of rendering [the other person] 'incapable of consenting.'" *Id.*, at *7.

In Appellant's case, whether Special Agent AD was incapable of consenting due to impairment by alcohol is arguably the central issue regarding Specification 4 of Charge II presented before the members. Based on the evidence presented, there were only four possible explanations for what happened on 30-31 August 2013: (1) Special Agent AD did not consent to sex and a reasonable person would not have mistaken her acts/statements as consent; (2) Special Agent AD did not consent to sex but a reasonable person could have mistaken her acts/statements as consent; (3) Special Agent AD did consent to sex, which means that she lied during her testimony; (4) Special Agent AD did consent to sex, but does not remember doing so due to a blackout. Based on the evidence, option one is the least likely.

Special Agent AD met Appellant in December 2012, and they began a dating relationship. (JA 203, 211.) On 30 August 2013, Special Agent AD and her friends went to the Red Door Saloon, Destin FL at 2000 hours

to celebrate her roommate's new job. (JA 225, 300.) Special Agent AD testified that while at the Red Door she consumed six to seven shots of different types of liquor. (JA 228.) As the defense highlighted during closing argument, there is evidence suggesting the amount of alcohol in the shots she consumed was significantly less than the amount of alcohol in a 'typical' shot of liquor. (JA 503.)

Special Agent AD left the bar around 0000-- the evidence showed she was reviewing photos Appellant sent via text while in the car on the drive to her house at 0001 and it is a 15-minute drive from the bar to her house. (JA 305, 322, 553.) Minutes after arriving home, she asked Appellant to "come over" via text message at 0014, and he arrived at 0051. (JA 553-554.) Basically, she was drinking for approximately 4 hours and had stopped drinking for approximately one hour prior to Appellant arriving at her house. Special Agent AD consumed about five to six drinks over the course of five hours. At approximately one drink per hour, this means that not only was Special Agent AD not incapable of consent due to impairment; she may have been able to drive legally without incurring a DUI.

Not only the level of impairment is in question, but the consent is as well. Significantly more evidence points to the fact she consented than the alternative.

Special Agent AD is a trained law enforcement agent with advanced sexual assault investigation training. (JA 246.) Since 2012, Special Agent AD and Appellant had a somewhat turbulent romantic dating relationship, that can arguably be described as 'on-and-off', and which included sex. (JA 203, 208, 525-619.) On 30 August 2013, they were in the process of starting an "on-again" phase of the relationship and, while at the bar, they made plans for a future dinner date scheduled for 1 September 2013. (JA 250.)

Special Agent AD was acting flirtatiously at the Red Door towards Appellant and made a couple of sexual remarks indicating she wanted to have sex with him that evening, specifically that "she was excited to be able to take her sexy man home that evening." (JA 392.)

Minutes after being dropped off at her house, Special Agent AD texts Appellant and asks him to come over. (JA 529-531.) Appellant hesitates because he knows they have a date scheduled two days later and wants to make sure Special Agent AD wants him to come over. *Id.* He says "Lets

wait till Sunday. I don't want to do this wrong", but Special Agent AD insists, and Appellant relents. *Id.* Special Agent AD could text appropriately, talk on the phone, and walk up and downstairs to let Appellant in. (Id. and JA 257.) All this evidence leads to a reasonable belief that Special Agent AD was not impaired to a level where she was incapable of consenting to sex.

Additionally, Special Agent AD asked Appellant for sex and recalls asking Appellant for sex.

> Appellant: You asked me to fuck you. And when you asked me to stop I did.
>
> […]
>
> Special Agent AD: I asked you, yes, but you should have said no.

(JA 541-542.) Furthermore, she testified she was not sure she felt sexually assaulted (JA 237, 268); she told Appellant the afternoon after sex (on Aug. 31) she had fun with him (JA 263-264); and, she continued a relationship with him after the alleged incident (JA 265-267).

Until she learned Appellant was under investigation for sexual assault, Special Agent AD continued to see Appellant, continued to make

plans to see him, continued to hide it from her friends, and even made out with him at Starbucks. *Id.*

Special Agent AD's testimony shows Appellant is innocent of the alleged sexual assault of Special Agent AD based on her either actual consent or a reasonable mistake of fact on the part of Appellant. Either way, there is no question consent and impairment are at the heart of this allegation and the defense was deprived of an opportunity to better construct its findings arguments connected to an adequate instruction. The defense would have been able to show that Special Agent AD had the capacity to consent and that Appellant had no reason to believe otherwise.

C. This Court should adopt the *Pease* explanation of the term "incapable" and require its application in trials by court-martial.

In *United States v. Pease*, 74 M.J. 763, 770 (N-M Ct. Crim. App. 2015) (NMCCA), the Navy-Marine Corps Court of Criminal Appeals defined what "incapable" of consent meant so it could conduct its factual sufficiency review. This Court agreed the NMCCA had the authority to define "incapable of consenting," and agreed the definitions were proper. *Pease*, 75 M.J. at 186.

The Army Court of Criminal Appeals (ACCA) has applied *Pease* for appellate review because it gives "clearer guidance," but not for the trial court—they are awaiting further developments in the law. *United States v. Lovett*, No. 201440580, 2016 CCA LEXIS 276, at *11-13 (A. Ct. Crim. App. 29 April 2016*), pet. denied*, 75 M.J. 433 (C.A.A.F. 2016). This Court should also accept ACCA's implied invitation. In *United States v. Long*, 73 M.J. 541, 544-45 (A. Ct. Crim. App. 2014), the ACCA approved an instruction given by the military judge in response to a members' request for clearer definition of incapable.

> A person cannot consent to sexual activity if that person is substantially incapable of appraising the nature of the sexual conduct at issue, due to mental impairment or unconsciousness resulting from consumption of alcohol, drugs, a similar substance, or otherwise; substantially incapable of appraising the nature of the sexual conduct at issue due to mental disease or defect, which renders the person unable to understand the nature of the sexual conduct at issue; or substantially incapable of physically declining participation in the sexual conduct at issue; or substantially incapable of physically communicating an unwillingness to engage in the sexual conduct at issue.

The Air Force Court of Criminal Appeals has arguably applied *Pease* on appellate review, but not for trial. *See United States v. Bishop*, 76 M.J. 627, 637-39 (A.F. Ct. Crim. App. 2017).

The Navy-Marine Corps has effectively adopted the *Pease* definition with the publication of its most recent electronic Benchbook.

> ("Substantially incapacitated") (and) ("Substantially incapable") mean(s) that level of mental impairment due to consumption of alcohol, drugs, or similar substance; while asleep or unconscious; or for other reasons; which rendered the alleged victim unable to appraise the nature of the sexual conduct at issue, unable to physically communicate unwillingness to engage in the sexual conduct at issue, or otherwise unable to make or communicate competent decisions.

Instr. 3-45-5, Military Judge's Benchbook, Navy v17.1 (Electronic), January 2017. *See also*, *United States v. Newlan*, No. 201400409, 2016 CCA LEXIS 540, at *22 (N-M Ct. Crim. App. 13 September 2016) (unpub.) ("In the future, when asked to provide a definition of impairment as applicable to Article 120(b), UCMJ, a military judge could instruct the members" similar to *Pease*."); *United States v. Clugston*, No. 201500326, 2017 CCA LEXIS 43 (N-M Ct. Crim. App. 31 Jan. 2017) (unpub.) *pet. denied*. 2017 CAAF LEXIS (C.A.A.F. 5 July 2017).

This Court is now presented with a situation in which seasoned lawyers who are appellate judges or appellate counsel require a definition of incapable of consenting to guide them and provide a lucid definition to evaluate the factual sufficiency of the evidence. It may seem overly

simplistic, but if appellant judges and lawyers need guidance surely, panel members need that guidance even more.

This Court has granted the appellant's petition in *United States v. Bailey*, No. 1428, 2017 CCA LEXIS 2 (C.G. Ct. Crim. App. 4 January 2017) (unpub.), pet. granted, 76 M.J. 266 (C.A.A.F. 2017). Oral argument in *Bailey* is scheduled for 25 October 2017.

II.

WHETHER THE MILITARY JUDGE ERRED IN ADMITTING APPELLANT'S INVOCATION OF HIS RIGHT TO COUNSEL IN HIS AFOSI INTERVIEW AT TRIAL OVER DEFENSE OBJECTION, AND, IF SO, WHETHER THAT ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

Standard of review

Did, looking at the matter *de novo*, the military judge abuse his discretion in admitting the evidence of Appellant's rights invocation. *United States v. Carter*, 74 M.J. 204, 206 (C.A.A.F. 2015); *United States v. Eslinger*, 70 M.J. 193, 197 (C.A.A.F. 2011). This standard requires more than just disagreement with the military judge's decision. *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015).

Law and Analysis

A. The military judge erred by admitting Appellant's invocation of counsel into evidence at a trial by a panel of members

A servicemember has the absolute right to remain silent and to request counsel during a law enforcement interrogation. It is axiomatic that the prosecution cannot inform the members when a suspect invokes their rights, absent the defense opening the door through cross-examination or in its case-in-chief. *See, e.g., United States v. Pope*, 69 M.J. 328, 337 (C.A.A.F. 2011) (Stucky, J., concurring) (discussing the "fair response doctrine"). The Government may not use a defendant's assertion of his Fifth Amendment rights as substantive evidence against him. *United States v. Gilley*, 56 M.J. 113, 120 (C.A.A.F. 2001) (citations omitted); *Griffin v. California*, 380 U.S. 609, 614 (1965).

In *Doyle v. Ohio*, 426 U.S. 610 (1976), the Supreme Court held that where a defendant exercises his right to remain silent after being informed of his *Miranda* rights, the government may not use that silence to impeach an explanation offered by the defendant at trial. *Id.*, at 618.

This Court has "often held that a curative instruction can render an error harmless." *United States v. Armstrong*, 53 M.J. 76, 82 (C.A.A.F.

2000). However, in *United States v. Rosser*, 6 M.J. 267, 271 (C.M.A. 1979), this Court reaffirmed that a curative instruction is not a perfunctory exercise.

As evidence by their argument, the government was fully aware of PE-6's contents, including that portion which showed Appellant invoking his rights—but failed to redact the video before offering it at trial. This Court may presume trial counsel knew the law on the admissibility of an accused's rights invocation. "It has long been settled that an accused's pretrial reliance upon his rights under . . . Article 31, when interrogated concerning an offense of which he is suspected, may not be paraded before a court-martial . . ." *United States v. Brooks*, 12 U.S.C.M.A. 423, 425-26 (1961); *United States v. Clark*, 69 M.J. 438, 443 (C.A.A.F. 2011). This Court may further presume the government intended to offer Appellant's rights invocation as substantive evidence, regardless of whether they intended to argue it.

There was no plausible argument from trial counsel as to the relevance or admissibility of PE-6 at the time it was offered. The explanation offered by trial counsel was that it "would lead us to a spot where it would be more confusing to the members to excise those

portions." (JA 196.) The argument is one of convenience, not of relevance or admissibility, as was the military judge's comment about "cutting the video up, then I have to give the members an instruction telling them parts of the video are out." (JA 196-197.) An instruction about gaps in the video would have been the proper response. There were other gaps in the video. Instructing the members that parts had been cut out for their convenience, where nothing relevant was happening, would have put the members at ease and avoided the concerns this Court now has.

Appellant is unable to discern a plausible reason, offered or existing, for admission of evidence that Appellant exercised his rights to silence and counsel. There is no fact at issue that is possibly resolved by the members knowing Appellant exercised his rights.

The military judge himself held the evidence was relevant, in his words, "marginally". (JA 196.) The military judge's analysis is insufficient to be accorded any deference. *See generally United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000). The military judge had an affirmative obligation to ask searching questions of the prosecution as to a proper purpose for presenting evidence of appellant's invocation. *See, e.g.*, *United States v. Carrasquillo*, 72 M.J. 850 (A. Ct. Crim. App. 2013).

Having admitted Appellant's initial invocation, the military judge erred. The prosecution impliedly exploited that error by having a contrast between Appellant's assertion of his rights and later his statements offered to investigators in denial or explanation.

B. The military judge's error in admitting such evidence was not harmless beyond a reasonable doubt.

There was a timely objection to Appellant's invocation of counsel being offered into evidence, and this Court must determine if the error prejudices Appellant's right to a fair trial and if it is harmless beyond reasonable doubt. Mil. R. Evid. 103(a); *United States v. Riley*, 47 M.J. 276, 278 (C.A.A.F. 1997).

This Court considers four factors to evaluate prejudice from erroneous evidentiary rulings: (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question. *United States v. Barnett*, 63 M.J. 388, 397 (C.A.A.F. 2006); *United States v. Gomez*, 76 M.J. 76, 80 (C.A.A.F. 2017). There is arguably a fifth factor to consider in Appellant's case: did the military judge take adequate steps to ensure that

the members were properly instructed with limiting or curative instructions where necessary?

The military judge compounded the error by failing to give adequate instructions at the close of the case, as he told the members he would do. *See, e.g., United States v. Garrett*, 24 M.J. 413, 417 (C.M.A. 1987).

The military judge's initial instruction was a "small limiting instruction," thus implying it was not meaningful or of consequence. The military judge promised the members he'd give a more explanation in writing. Thus, the members at this point could rely on the military judge's commitment and not pay as close attention to the small limiting instruction as they might otherwise have done.

During the OSI interview (JA 524) Appellant denied both the assault and the sexual encounter in the OSI interview with A1C ML and the only evidence presented contrary to Appellant's statement is A1C ML's statement. (JA 119-194.)

The evidence was not overwhelming in regard to A1C ML or Special Agent AD.

Appellant and A1C ML initially met through a dating website in which it was clear the nature of the relationship would be one based on

BDSM principles. Thus, some amount of physical force and aggression was to be expected by both parties—and the parties did engage in such behavior. They engaged in spanking, spanking with a paddle, biting, slapping and simulated choking. A1C ML was a willing participant and Appellant would be fully aware of this. The relationship turned sour when A1C ML learned that Appellant was seeking others to engage with using the same Craigslist meeting site. Appellant's lack of 'monogamy' toward A1C ML and the likelihood that they would not have a long-term relationship could easily translate into a motive get even with or take revenge against Appellant. There was no exclusive relationship and AwC ML would be angry about that. The lack of corroboration of A1C ML's statements to law enforcement coupled with a motive to testify falsely could well lead to doubt in the minds of the members. Of particular significance was A1C ML's denials that there was a 'safe word' agreed to between her and Appellant.

Special Agent AD's testimony of her intoxication level was not compelling. Her communications with Appellant after the alleged event lead to a conclusion that she knew and consented to sex and that her asserted lack of memory was tailored for the purpose of the court-martial

and not to the truth. The evidence as to Appellant's state of mind and mistake as to consent was compelling.

Appellant did not testify, but the members had his denials and explanations before them, and they could consider those statements for whatever value they assigned. The prosecution made a significant argument about PE-6, the videotaped statements, especially emphasizing the statements as false exculpatory statements—coming right after he invoked his rights. (JA 1621-1658). The trial counsel, to their credit, did not explicitly argue consideration of that invocation in determining guilt. (JA 518-519.) However, they didn't need to—it was the skunk in the jury box. The prosecution impliedly exploited the error by having a contrast between Appellant's assertion of his rights and later his statements offered to investigators in denial or explanation. Here, the members could interpret the silence as a consciousness of guilt, while at the same time the trial counsel argued Appellant's lies once he decided to re-engage with investigators. *United States v. Toohey*, 60 M.J. 703, 713 (N-M Ct. Crim. App. 2004), *rev'd and remanded on other grounds*, 63 M.J. 353 (C.A.A.F. 2006), is offered on point; *Toohey* highlights the concerns when an accused's invocation of rights becomes evidence at trial.

The concern for admission of an accused's rights invocation is "founded upon the open-eyed realization that to many, even to those that know better, the invocation by a suspect of his constitutional and statutory rights to silence and to counsel equates to a conclusion of guilt that a truly innocent accused has nothing to hide behind assertion of these privileges." *United States v. Carrasquillo*, 72 M.J. 850, 860 (A. Ct. Crim. App. 2013) citing *Ullmann v. United States*, 350 U.S. 422, 426 (1956). The members could quite easily have concluded Appellant was guilty and therefore invoked his rights, but then he changed his mind and lied. A trial counsel and military judge must consider "with trepidation" revealing the rights invocation to a panel of members. *Id.*

> In light of the self-evident purpose of the privilege against self-incrimination, a government witness's testimony that an accused explicitly invoked the privilege raises a nearly irresistible inference that the accused was hiding something incriminating. Put another way, although silence may be interpreted in many ways, *see Doyle*, 426 U.S. at 617 ("every post-arrest silence is insolubly ambiguous"), the affirmative assertion of the privilege against self-incrimination raises a clear inference of culpability. Accordingly, since such testimony more directly implies that the defendant was hiding something, it is necessarily more prejudicial than testimony that simply notes that the defendant at some point stopped answering questions.

United States v. Andujar-Basco, 488 F.3d 549, 556 (1st Cir. 2007). Here, there is no reason to disbelieve the members considered the invocation an inference of guilt followed closely by a lie.

> There are two well-known facts about evidentiary instructions of both varieties. The first is that our system relies heavily on these instructions. The second is that they do not work. Courts "presume" that juries follow evidentiary instructions, as well as other instructions from the judge. This presumption is often said to be a "premise upon which our jury system is founded.'" But the presumption is also widely acknowledged to be false, a kind of professional myth. The most frequently quoted assessment of evidentiary instructions is Justice Jackson's: "The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction." Juries are "presumed" to follow evidentiary instructions not because we believe that they do, but because trusting them to do so is a practical necessity.

David Alan Sklansky, Evidentiary Instructions and the Jury as Other. 65 STANDFORD L. REV. 407, 408-09 (2013). The jury system relies heavily on a crucial presumption that an instruction will be followed. *Parker v. Randolph*, 442 U.S. 62, 73 (1979); *Opper v. United States*, 348 U.S. 84, 95 (1954).

Here, the military judge gave a short preliminary instruction before evidence was presented with a promise that he would give more in writing after the evidence. The military judge did not issue a final instruction

regarding such a significant matter. This Court should find, as an additional factor that the failure of the military judge to fully instruct the members about the rights invocation significantly contributed to the overall prejudice of admitting evidence of Appellant's rights invocation.

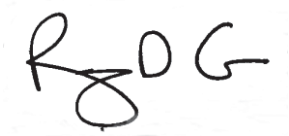
"Given the breadth of the argument, the prejudicial effect [of the erroneously admitted evidence] is not limited to" any single one of the alleged offenses. *United States v. Alameda*, 57 M.J. 190, 202 (C.A.A.F. 2002) (Effron, J., concurring and dissenting in part).

For the above reasons this Court should find the error was not harmless beyond reasonable doubt.

Conclusion

WHEREFORE, Appellant respectfully asks this Court to set-aside the findings and the sentence.

Respectfully submitted,



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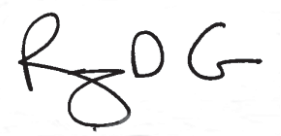
CERTIFICATE OF FILING AND SERVICE

I certify I electronically filed a copy of the foregoing with the Clerk of the Court on October 2, 2017, and that a copy was served electronically on the Air Force Appellate Government Division on this same date.



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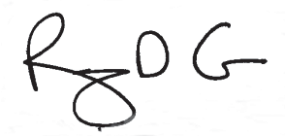
CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(c)—the principal brief may not exceed 14,000 words—this brief contains less than 7000 words.



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