IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	25 September 2018 ANSWER TO APPELLANT'S ASSIGNMENT OF ERRORS ON BEHALF OF THE UNITED STATES
v.	CGCMG 0365 Docket No. 1461 Before McClelland, Brubaker, Mooradian
Juan A. Guzman, Machinery Technician Third Class (E-4) U.S. Coast Guard, Appellant.	Tried at Seattle, Washington by a general court-martial convened by Commander, Thirteenth Coast Guard District, on 15 November 2016, 13 January, 6 March, and 14-19, 21-25 August 2017.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

The United States, through undersigned counsel, submits this answer and brief in accordance with Rule 15 of this honorable Court's Rules of Practice and Procedure.

STATEMENT OF THE CASE

The Appellant, Machinery Technician Third Class Juan A. Guzman, was tried at a general court-martial on 15 November 2016, 13 January, 6 March, and 14-19, 21-25 August 2017 for a single specification of false official statement in violation of Article 107, UCMJ, 10 U.S.C. § 907 (2016), and four specifications of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2016). Contrary to his pleas, a panel consisting of officer members found Appellant guilty of the Charge and sole specification under Article 107, UCMJ, with exceptions, and specifications 1 and 2 of Charge II, under Article 120, UCMJ. R. at 1912-13. The members found Appellant not guilty of specifications 3 and 4 of Charge II under Article 120, UCMJ. R. at

1913. The military judge conditionally dismissed Charge II, specification 2 (alleging sexual assault by bodily harm) as an unreasonable multiplication of charges pending appellate review. R. at 1951, 1953. On August 25, 2017, the members sentenced Appellant to reduction in paygrade to E-1, confinement for four years, forfeiture of all pay and allowances, and a dishonorable discharge. R. at 2014. On February 1, 2018, the convening authority approved the findings, and sentence, and ordered the sentence executed, except for the part of the sentence extending to the dishonorable discharge. General Court-Martial Order No. 01-18, February 1, 2018. This Court has jurisdiction over this case pursuant to Article 66(b)(1), UCMJ, 10 U.S.C. § 866(b)(1) (2016).

STATEMENT OF FACTS

A. Facts related to sexual assault of AS

1. Events on or about May 16, 2014

On May 16, 2014, AS, a seventeen year old high school student, left her home on the Lower Elwha Reservation and took a bus to Port Angeles, Washington. R. at 1128-30. After she arrived, AS went to a Safeway grocery store where she stole a bottle of Jack Daniel's whiskey and a bottle of Skyy vodka around 6:00 p.m. R. at 1129-30, 1229-30; P.E. 3; D.E. E; A.E. 74. With the stolen alcohol concealed in her back pack, AS met her ex-boyfriend, ML, at the Jefferson Elementary playground, where AS began drinking the bottle of whiskey. R. at 1132-33, 1274. AS and ML then walked a few blocks to Albertson's grocery store, where AS resumed drinking the whiskey in an area behind bushes. R. at 1133-34. ML testified that AS drank about half of the bottle of whiskey, was "pretty drunk," falling over, and slurring her speech outside Albertson's. R. at 1270, 1294. AS testified that she consumed about three quarters of the bottle

of whiskey in total, and eventually "passed out" while ML was still with her behind Albertson's. R. at 1134.

When AS fell over and passed out, ML propped her against a wall outside Albertson's. R. at 1134, 1271. ML tried shaking AS, patting her face, and telling her she needed to wake up. R. at 1271. Around 7:50 p.m., ML left AS while she was still passed out in the bushes. R. at 1284. AS regained consciousness for the first time behind the bushes at Albertson's at nighttime, and ML was gone. R. at 1134. AS testified that she noticed people were trying to get a hold of her on her cell phone, but that could not feel her legs, felt tired and weak, and had difficulty keeping consciousness. R. at 1135. AS passed out again. *Id.*

When AS woke up for a second time behind Albertson's, she noticed her shirt, backpack, and phone were gone. *Id.* AS testified that she still could not feel anything and was having trouble keeping consciousness. R. at 1136. AS then headed towards the front of Albertson's to call her father for a ride home. *Id.* After discovering that Albertson's was closed, AS, wearing only pants, shoes, and her bra, started to walk to Safeway to utilize a phone to get home. R. at 1137, 1191-92. During the walk from Albertson's to Safeway, a car pulled up and someone handed AS a sweater. *Id.* AS testified that she did not remember most of the walk to Safeway, could not keep her balance, and had very blurry vision. R. at 1137.

Once AS arrived near the Safeway, Appellant and his friend, [redacted], pulled up in Appellant's silver car and offered AS, who they had never met before, a ride. R. at 1137-38, 1344-45. Appellant and [redacted] had been drinking at Bar Nine in Port Angeles earlier that night. R. at 1341-42. At trial, [redacted] testified that he and Appellant decided to leave Bar Nine, and were planning to "hang out" with some "girls" they had just met at the bar. R. at 1344. [redacted] testified that after he and Appellant left the bar, they could not keep up with these girls and

eventually lost sight of them. *Id.* Not ready to call it a night, Appellant and [redacted] then approached AS at Safeway in Appellant's car. R. at 1345-46. [redacted] explained, "It was Saturday night….we were energized you know. Wanted to hang out I guess you could say." R. at 1346.

AS accepted the offer for a ride. R. at 1140. Within minutes, AS, Appellant, and [redacted] arrived at Appellant's apartment. R. at 1140, 1347-48. The time was around 2:00 a.m. R. at 1382. AS's recollection of what happened inside Appellant's apartment was limited to flashes of memory. R. at 1141-43. AS testified that she felt very tired, could not feel her legs, and could not see well. R. at 1141. Specifically, after AS entered Appellant's apartment, AS next remembered waking up on Appellant's bed naked, while one of the men touched her and stated that she had a beautiful body. R. at 1142. AS testified she lost consciousness again and next remembered waking up to Appellant, on top of her, penetrating her vagina with his penis. R. at 1143. While Appellant continued on, AS lost consciousness again. R. at 1145. AS also testified that she never gave Appellant permission to have sex with her. *Id.*

[redacted], who was initially present at Appellant's apartment with AS, testified that he helped AS take off her wet clothes shortly after they arrived. R. at 1355. Appellant, [redacted], and AS then proceeded to Appellant's bedroom, where [redacted] claimed that he engaged in conversation with AS. R. at 1350. After AS's clothes were off and she was on Appellant's bed, [redacted] eventually sensed that "something wasn't quite right" with AS and that she was slurring her words. R. at 1352, 1393. [redacted] asked AS if she was "taking anything" or under the influence of drugs or alcohol, to which he claimed AS responded, "No." R. at 1353, 1393. Within less than 30 minutes after they entered the apartment, [redacted] testified Appellant made sexual contact with AS. R. at 1349, 1354. Shortly after Appellant began having sex with AS,

[redacted] left, explaining that he "wasn't going to engage or be a part of what was happening." R. at 1354-56.

AS's next memory was waking up on the morning of May 17, 2014 on the ground outside Albertson's. R. at 1145. AS testified she felt very nauseous, dehydrated, and had a headache. *Id.* After trying to find her backpack and phone, AS started to walk back home, met a man who was trimming his bushes, and told him, "I think I got raped." R. at 1146, 1244-45. The incident was reported to the Port Angeles police. R. at 1146-47, 1246. Port Angeles Police Office [redacted] responded to the scene, and observed that he smelled "an odor of intoxicants" coming off AS. R. at 1444-45. AS indicated to Officer [redacted] that "she felt like she had been anally and vaginally raped." R. at 1445.

AS was transported to a hospital in Port Angeles. R. at 1147. The hospital in Port Angeles was not qualified to administer a sexual assault forensic examination, and AS was subsequently transported to Harrison Memorial Hospital in Bremerton, Washington. R. at 880, 1147. At the hospital, a sexual assault nurse examiner (SANE) administered a forensic examination on AS, which included an examination of her genitalia and collection of oral, vaginal, and anal DNA swabs from AS. R. at 880-883, 891-898. AS's underpants were also collected during this examination. R. at 916.

On May 23, 2014, AS was interviewed by Port Angeles detectives, and two of the detectives took AS throughout the area surrounding Safeway to identify the location of the sexual assault. R. at 1147-48, 1476. AS identified Appellant's apartment as the location she was sexually assaulted. R at 1148-49, 1477-78; P.E. 15.

2. Appellant's interviews with Coast Guard Investigative Service

On July 2, 2015, Coast Guard Investigative Service (CGIS) Special Agents [redacted] and [redacted] interviewed Appellant about the events that occurred on May 16, 2014. R. at 60. In this interview, Appellant provided multiple contradictory statements, and provided different versions of his interaction with AS. Appellant initially denied knowing AS, or ever meeting her. P.E. 1 (1 of 9) at 19:36, 26:14. Appellant eventually admitted that he did have an encounter with a girl walking by Safeway after midnight, but denied having any sexual relations with AS. P.E. 1 (2 of 9) at 22:24 – 24:23. Appellant indicated his friend, [redacted], had sex with AS at Appellant's apartment, and that Appellant was "pretty pissed." *Id.* Appellant eventually admitted that he had sex with AS, detailed his sexual encounter with AS several times during the interview, and continued to claim that [redacted] also had sexual contact with her. P.E. 1 (3 of 9) at 05:30 – 06:35; P.E. 1 (3 of 9) at 24:00 – 25:20; P.E. 1 (7 of 9) at 23:37 – 26:13.

During this interview, Appellant estimated that AS was nine out of ten in terms of her level of intoxication. P.E. 1 (4 of 9) at 11:05. Throughout the interview, Appellant commented repeatedly that AS was drunk. P.E. 1. Appellant also stated that he noticed AS smelled like urine and alcohol. P.E. 1 (3 of 9) at 22:29; P.E. 1 (5 of 9) at 03:10 – 3:20. After Appellant and AS had sex, Appellant stated that he "made [AS] drink some water." P.E. 1 (7 of 9) at 17:50. The following morning, Appellant stated that he explained to AS that they had sex that night. P.E. 1 (7 of 9) at 19:48; *id.* (8 of 9) at 02:35. Appellant further indicated that the next morning, he drove AS to Albertson's, "freaked out," and left her there. P.E. 1 (7 of 9) at 1:40 – 2:20.

Three days after his initial interview with CGIS, Appellant contacted CGIS and requested a second interview. R. at 71. In the second interview held on July 9, 2018, Appellant told a different version of events. Specifically, Appellant denied having sexual intercourse with AS,

claiming, “I didn’t f*** her or anything like that.” P.E. 2 (1 of 2) at 06:23 – 06:30. Appellant claimed that he touched AS, and AS started to perform oral sex on him. P.E. 2 (1 of 2) at 12:00 – 14:15. Appellant further claimed he asked AS for consent to engage in sexual intercourse, and AS responded, “Yes.” P.E. 2 (1 of 2) at 13:15 – 13:28. Appellant claimed that when AS told him she was sixteen years-old, he stopped and told her he was taking her home. P.E. 2 (1 of 2) at 14:30 – 15:00. Appellant also claimed that before they went to sleep that night, AS told him she had woken up with someone on top of her earlier in the night. P.E. 2 (1 of 2) at 15:50 – 16:15. Appellant also claimed that AS left her “panties” in his car before he dropped her off at Albertson’s the next morning. P.E. 2 (1 of 2) at 22:49 – 23:35. When confronted with the inconsistencies in his statement, Appellant claimed he was in shock and having nightmares after he realized he almost had sex with a sixteen year-old girl. P.E. 2 (1 of 2) at 22:10 – 22:45; P.E. 2 (2 of 2) at 03:40 – 04:00.

3. DNA Testing[1]

[redacted]

[1] Facts filed separately under seal.

B. M.R.E. 412 Motions[2]

[redacted]

[2] *Id.*

[redacted]

C. Post-trial Processing

1. Staff Judge Advocate Recommendation and Addendum

Pursuant to R.C.M. 1106, the Staff Judge Advocate (SJA) provided her recommendation to the convening authority on December 20, 2017, which included advice on the convening authority's options for sentencing action. R. at 28 - 30. In the recommendation, the SJA identified that Appellant's case involved straddling offenses that occurred before and after June 24, 2014, and advised the convening authority that he "may take whatever action you deem appropriate on the guilty findings and/or on the sentence." *Id.* at 30. In paragraph 12b, the SJA advised the convening authority that, "[b]ecause the adjudged sentence includes confinement for more than six months and a dishonorable discharge, you may not disapprove, commute or suspend the sentence of confinement and dishonorable discharge." *Id.*

On January 25, 2018, Appellant, through trial defense counsel, submitted a request for clemency, which included an alleged legal error about the SJA's clemency advice to the convening authority. R. at 10 – 11. Specifically, Appellant alleged that the SJA's advice in paragraph 12b was incorrect, and that the convening authority did, under the law, have the discretion to take action to approve, disapprove, commute or suspend the sentence in whole or in part. *Id.* On January 30, 2018, the SJA prepared an addendum to her recommendation to the convening authority under R.C.M. 1106(f)(7). The addendum included as an enclosure Appellant's request for clemency. *Id.* at 8 – 9. In reference to Appellant's allegation of legal error relating to the convening authority's clemency power, the SJA stated: "Upon review of these allegations, I assume, without conceding, that the matter raised in paragraph two of the enclosure constitutes error; however, no corrective action on the findings or sentencing is warranted." *Id.* On February 1, 2018, the Convening Authority took action, approved the findings and sentence, and ordered the sentence executed, except for the part of the sentence extending to the dishonorable discharge. General Court-Martial Order No. 01-18, February 1, 2018.

Other facts necessary to resolving the errors assigned are discussed below.

RESPONSE TO ASSIGNMENT OF ERRORS I. – III.:[3]

[redacted]

[3] Response to Assignment of Errors I. – III. filed separately under seal.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

IV.

MEMBERS MAY RETURN A FINDING OF GUILT FOR SEXUAL ASSAULT OFFENSES CHARGED IN THE ALTERNATIVE, AND THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION BY NOT PROVIDING AN INSTRUCTION TO THE MEMBERS ON THIS ISSUE.[6]

Standard of Review

The issue of whether the military judge gave the members proper instructions is a question of law, which is reviewed *de novo*. *United States v. Payne*, 73 M.J. 19, 22-23 (C.A.A.F. 2014) (citation omitted). Where there is no objection to an instruction at trial, this Court reviews for plain error. *United States v. Haverty*, 76 M.J. 199, 208 (C.A.A.F. 2017). To prevail under a plain error analysis, an appellant "has the burden of demonstrating that: (1) there was an error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right." *United States. v. Tunstall*, 72 M.J. 191, 193 - 194 (C.A.A.F. 2013) (citing *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011).

Discussion

A. The military judge's instruction to the members did not constitute plain error.

Contrary to Appellant's argument, members may enter guilty findings for different specifications alleged under Article 120, UCMJ, when charged for exigencies of proof, as the members did in this case. The government may properly advance in its charging decision alternative theories of criminal liability in response to a single act. *See United States v. Jones*, 68 M.J. 465, 472–73 (C.A.A.F. 2010) ("[T]he government is always free to plead in the

[6] The corresponding assignment of error was raised by Appellant in the event that this Court's disposition of the case revives Charge II, Specification 2, which was conditionally dismissed pending appellate review. See App. Brief at 27 ("MK3 Guzman raises this instructional issue in the event this Court's disposition of the case results in reviving Specification 2 of Charge II so as not to waive the issue."). As the conviction for Charge II, Specification 1 is both legally and factually sound, the United States respectfully submits that the Court does not need to address this issue.

alternative."). When there is a "genuine question as to whether one offense as opposed to another is sustainable, . . . the prosecution may properly charge both offenses for exigencies of proof, a long accepted practice in military law." *United States v. Morton*, 69 M.J. 12, 16 (C.A.A.F. 2010) (citations omitted). "In cases where offenses are pleaded for exigencies of proof, depending on what the plea inquiry reveals or of which offense the accused is ultimately found guilty, the military judge may properly accept the plea and dismiss the remaining offense." *Morton*, 69 M.J. at 16. Multiple convictions are also authorized, at a single trial, for different statutory violations arising from the same conduct, unless Congress or the legislative history shows otherwise. *See United States v. Teters*, 37 M.J. 370, 378 (C.M.A. 1993).

1. The military judge's omission of an instruction to the members regarding sexual assault specifications charged in the alternative did not constitute error.

For the first time on appeal, Appellant appears to argue that the military judge had a *sua sponte* duty to instruct the members on lesser-included offenses, and that failing to instruct members that they may not convict on multiple offenses charged alternatively to accommodate exigencies in proof was plain error. App. Brief at 28. As an initial matter, the two sexual assault offenses at issue were not multiplicious for double jeopardy purposes, and did not stand in a greater/lesser offense relationship, as Appellant suggests.[7] Instead, the offenses were alternate theories of liability, charged under different provisions of Article 120, UCMJ, that had different elements and each required proof of a fact the other did not. *See Teters*, 37 M.J. at 378 ("[T]he test to be applied to determine whether there are two offenses or only one is whether each

[7] To the extent Appellant is also raising a double jeopardy multiplicity claim within this Assignment of Error, the United States submits Appellant waived this right, as he never raised a multiplicity claim on these grounds at the trial level. *See United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000) ("[D]ouble jeopardy claims, including those found in multiplicity, are waived by failure to make a timely motion to dismiss, unless they rise to the level of plain error). Since Charge II, Specifications 1 and 2 are not facially duplicative, there is no plain error. *See id.* ("An appellant may show plain error and overcome waiver by showing that the specifications are 'facially duplicative,' that is factually the same." (citation omitted) (internal quotation marks omitted)).

provision requires proof of an additional fact which the other does not." (citation omitted)).

A military judge has a *sua sponte* duty to provide instructions to members, even when not requested by the defense, when such instructions are reasonably raised by the evidence presented. *United States v. Hibbard*, 58 M.J. 71, 75 (C.A.A.F. 2003). Here, there was simply no reason for the military judge to provide an instruction to the members that they had to choose between theories of liability. The same criminal act on which an offense is based may not only be properly charged as multiple offenses for contingencies of proof, but also submitted to the members without the instruction Appellant alleges is required. *See United States v. Villareal*, 52 M.J. 27, 31 (C.A.A.F. 1999) (finding that the military judge properly submitted the charges of obstruction of justice and solicitation to obstruct justice to the members to allow for contingencies of proof by the prosecution); *cf. United States v. Elespuru*, 73 M.J. 326, 328-29 (C.A.A.F. 2014) (members found appellant guilty of both abusive sexual contact and wrongful sexual contact charged in the alternative for exigencies of proof); *United States v. Mayberry*, 72 M.J. 467 (C.A.A.F. 2013) (members found appellant guilty of two specifications of aggravated sexual assault based on the same act). As detailed *infra* at VII and VIII, there was a sufficient factual basis upon which to send both sexual assault specifications to the members and for the members to convict Appellant. Thus, there was no error in the military judge's instructions to the members.

Appellant cites to *United States v. Gaddis*, 424 U.S. 544 (1976) and *United States v. Marshall*, 248 F.3d 525 (6th Cir. 2001) for the proposition that members should be instructed that they may not return a guilty finding on more than one offense charged in the alternative. App. Brief at 28. But, those cases are inapposite here. First, *Gaddis* and *Marshall* primarily involved the sufficiency of evidence to support a conviction for receiving stolen property in

addition to taking and carrying away the same property, not evaluation of the sufficiency of a judge's instruction in a sexual assault case. Second, in both cases, there was no evidence to support the theory that the respective defendants were guilty of receiving stolen property. Instead, the evidence supported but one theory that the defendants stole the property. Third, the *Gaddis* Court held that Congress was trying to reach two different wrongdoers – those who receive property from robbers and the robbers who steal the property – in enacting the different statutory provisions. 424 U.S. at 547. No such corollary exists for sexual assault offenses under Article 120, UCMJ. To the contrary, the provisions of Article 120, UCMJ are aimed at the same wrongdoer – the perpetrators of unlawful sexual acts.

2. The military judge's omission of an instruction to the members did not constitute plain and obvious error.

Because the members could convict Appellant on both theories of liability based on the facts before it, the military judge did not commit plain and obvious error by not *sua sponte* including an instruction to the members that they could only convict Appellant of one offense. Courts find a military judge's failure to provide a *sua sponte* instruction to be plain and obvious where in the context of the entire trial, the accused shows the military judge should be "faulted for taking no action" even without an objection. *United States v. Maynard*, 66 M.J. 242, 245 (C.A.A.F. 2008). It is accepted practice for the government to charge alternate theories of liability in sexual assault cases, and common place for members to return guilty findings on more than one specification. *See Elespuru*, 73 M.J. at 329; *Mayberry*, 72 M.J. at 467; *Thomas*, 74 M.J. at 570-571. When supported by the evidence, there is no error in a panel returning findings of guilt for different sexual assault offenses not standing in a greater/lesser offense relationship based on the same sexual act. Thus, no plain and obvious error arises when the military judge does not include instructions to the contrary.

3. Even if the military judge's instructions are deemed plain error, Appellant is not entitled to relief because the instructions provided did not materially prejudice a substantial right of Appellant.

Finally, Appellant did not suffer material prejudice to a substantial right as a result of the military judge's omission of an alternate theory of liability instruction. Assuming *arguendo* that the lack of instruction constituted error, the military judge's conditional dismissal of Charge II, Specification 2 cured any error. Because Specification 2 was conditionally dismissed as an unreasonable multiplication of charges, Appellant will only stand convicted of one sexual assault offense, if upheld on appellate review. There is no prejudice in this result for Appellant.

The potential revival of the conditionally dismissal also does not materially prejudice a substantial right of the Appellant. First, the members found Appellant guilty of both specifications, which are adequately supported in fact and law. Second, the military judge explicitly explained if Charge II, Specification 1 was dismissed during appellate review, the appellate court would have an opportunity to address Specification 2, which Appellant's trial defense counsel acknowledged. R. at 1953. Thus, Appellant was expressly on notice that the conditionally dismissed specification may be revived on appeal, and that he must raise any issues with the conditionally dismissed specifications on appeal, as he has done, in case it is revived. The fact that Appellant may only be guilty of one offense rather than two and has the opportunity to defend his rights related to a conditionally dismissed charge cannot possibly prejudice a substantial right.

Appellant relies on *Green v. United States*, 355 U.S. 184, 193 (1957) for the notion that he cannot be convicted of a greater and lesser offense, and by extension he would be twice guilty for the same offense if the conditional dismissal was revived during appellate. *Green* involved a defendant who was charged with first degree murder, but only convicted of second degree

murder, which was clearly a lesser included offense. 355 U.S. at 185-86. When the second degree murder conviction was overturned on appeal, the Court held that the defendant could not be re-tried for the greater offense of first degree murder. *Id.* at 198. The sexual assault offenses here did not stand in a greater and lesser relationship and were not multiplicious for double jeopardy purposes. Reviving the conditionally dismissed specification on appeal would not violate double jeopardy, as the members found Appellant *guilty* of both offenses. Any reliance on *Green* is thus misplaced.

Appellant suffered no prejudice at sentencing either. In his initial instructions, the military judge informed the members he had conditionally dismissed Specification 2 of Charge II and instructed the members that, "the only two specifications and charges that you're considering when you're imposing your sentence are the sole Specification of Charge I and Specification 1 of Charge II." R. at 1977-78. The military judge repeated this instruction, stating, "[the members] must bear in mind that Petty Officer Guzman is only to be sentenced for the offenses which remain before [the members], again, to say again, the sole--Charge I and the sole Specification thereunder and Charge II and Specification 1 thereunder." R. at 1978. When the members later asked the military judge to explain why Charge II, Specification 2 will not be considered for sentencing, the Military Judge provided a thorough and detailed explanation and made it clear that the members were only authorized to consider Charge II, Specification 1 and Charge I for sentencing. *See* R. at 1990-91. Undoubtedly, the members were well aware that they could only consider one specification of sexual assault in determining the appropriate sentence in this case. Thus, Appellant suffered no prejudice at sentencing based on the findings of guilt for both sexual assault specifications. Accordingly, Appellant has failed to identify how the military judge's failure to instruct the members prejudiced a substantial right.

V.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION BY CONDITIONALLY DISMISSING CHARGE II, SPECIFICATION 2 AS AN UNREASONABLE MULTIPLICATION OF CHARGES FOR SENTENCING.

Standard of Review

A military judge's decision to deny relief for unreasonable multiplication of charges is reviewed for an abuse of discretion. *United States v. Campbell*, 71 M.J. 19, 22 (C.A.A.F. 2012).

Discussion

"[T]he prohibition against unreasonable multiplication of charges has long provided courts-martial and reviewing authorities with a traditional legal standard—reasonableness—to address the consequences of an abuse of prosecutorial discretion in the context of the unique aspects of the military justice system." *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001). Courts consider the following non-exhaustive factors to determine if an unreasonable multiplication of charges has occurred:

> (1) Did the [appellant] object at trial that there was an unreasonable multiplication of charges and/or specifications?;
>
> (2) Is each charge and specification aimed at distinctly separate criminal acts?;
>
> (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?;
>
> (4) Does the number of charges and specifications [unreasonably] increase the appellant's punitive exposure?;
>
> (5) Is there any evidence of prosecutorial overreach or abuse in drafting of the charges?

Quiroz, 55 M.J. at 338 (citation omitted). When offenses are found to be unreasonably multiplied for sentencing, a military judge must determine an appropriate remedy.

"Dismissal of unreasonably multiplied charges is a remedy available to the trial court." *United States v. Roderick*, 62 M.J. 425 (C.A.A.F. 2006). When a panel of members returns guilty findings for two specifications charged for exigencies of proof, one of the specifications should be either consolidated or dismissed. *Elespuru*, 73 M.J. at 329; *Mayberry*, 72 M.J. at 467-68. "Dismissal of specifications charged for exigencies of proof is particularly appropriate given the nuances and complexity of Article 120, UCMJ, which make charging in the alternative an unexceptional and prudent decision." *Elespuru*, at 329-30.

The election of a conditional dismissal, opposed to a full dismissal, is also within the discretion of the military judge and allows for the revival of the subject charge and specification by this Court. Conditional dismissal of a specification may be used to remedy an unreasonable multiplication of charges while preserving the government's interests pending appellate review. "Conditional dismissals 'become effective when direct review becomes final in the manner described in Article 71(c), UCMJ' and therefore 'protect the interests of the Government in the event that the remaining charge is dismissed during [appellate] review.'" *United States v. Thomas*, 74 M.J. 563, 569 (N-M. Ct. Crim. App. 2014) (quoting *United States v. Britton*, 47 M.J. 195, 203–05 (C.A.A.F. 1997) (Effron, J., concurring)).

In *United States v. Frazier*, 51 M.J. 501 (C.G. Ct. Crim. App. 1999), this Court set aside the conviction of two specifications of indecent acts but restored a finding of guilty for a conditionally dismissed Article 92 offense. 51 M.J. at 506. This Court stated "we are of the view that the finding under [the Article 92] charge may be revived and affirmed by us upon the setting aside of the corresponding indecent act offense, by analogy to what we would do with a lesser-included offense when the major offense is disapproved." *Id*. The United States Navy-Marine Corps Court of Criminal Appeals and Army Court of Criminal Appeals have also endorsed

conditional dismissals at the trial court level. *See Thomas*, 74 M.J. at 570 ("Like our sister courts, we also believe that trial judges have the inherent authority to conditionally dismiss a charge or specification, and should consider the use of such a procedure where consolidation is impracticable."); *United States v. Gonzales-Gomez*, 75 M.J. 965, 968 (A. Ct. Crim. App. 2016), *review granted in part sub nom. United States v. Gonzalez-Gomez* (C.A.A.F. 2017), and *decision set aside sub nom. United States. v. Gonzalez-Gomez*, 77 M.J. 99 (C.A.A.F. 2017) (noting that a conditional dismissal "appropriately reflects appellant's crimes, preserves the government's interests on appeal, and serves the interests of judicial economy. A conditional dismissal also places an appellant on notice of the consequences if, for example, the remaining specification does not survive appellate review.").

Thus, consolidation and conditional dismissal are both appropriate remedies to an unreasonable multiplication of charges. *See id.; see also Elespuru*, 73 M.J. at 329. Though in either case an appellant has a single conviction, there remains a subtle difference between the two remedies. When offenses are consolidated, the facts contained within the consolidated specification, and the attached finding of guilt pertaining to those facts, are incorporated into the second specification. *See United States v. Sorrell*, 23 M.J. 122, 122 n.1 (C.M.A. 1986) (noting that "the findings of guilty as to [the consolidated] specifications are not affected because they still apply to the portions of the specifications added to the remaining specification, and those specifications are not dismissed."); *see e.g.*, *Mayberry*, 72 M.J. at 467 (consolidating two aggravated sexual assault specifications based on the same sexual act); *Thomas*, 74 M.J. at 570-571 (consolidating two sexual assault specifications, one for committing a sexual act when the accused knew or should have known the victim was asleep or unaware and one for committing the same sexual act when the accused knew or reasonably should have known the victim was

incapable of consenting due to impairment by an intoxicant, into one). On the other hand, a conditionally dismissed specification, and the accompanying finding of guilt, will become fully dismissed when the judgment becomes final under Article 71(c), UCMJ, unless otherwise revived during appellate review. *See Britton*, 47 M.J. at 203–05.

On appeal, Appellant asserts that the military judge should have merged the findings of guilt for the two sexual assault specifications into a single specification as the defense requested and that this Court should consolidate the specifications into a single specification.[8] App. Brief at 33-34. The United States does not dispute the Military Judge's findings that the two sexual assault specifications were charged for exigencies of proof, or that these specifications constituted an unreasonable multiplication of charges for sentencing. *See* R. at 1741-1752, 1951. Nonetheless, the Military Judge properly exercised his discretion to remedy the unreasonable multiplication of charges for sentencing by conditionally dismissed Charge II, Specification 2.

Contrary to his claims, Appellant specifically requested that the military judge *dismiss* the sexual assault by bodily harm specification as an unreasonable multiplication of charges, rather than merge or consolidate the specifications. After findings and the presentation of evidence for sentencing was completed, the military judge asked defense counsel, "[D]o you want to make a motion in regard to Specifications 1 and 2 or do you object to merging Specifications 1 and 2 of Charge II for sentencing?" R. 1950. After a brief recess, the following colloquy occurred between the military judge and trial defense counsel:

> MJ: Defense, what's your position towards the merging of Specifications 1 and 2 of Charge II for sentencing?

[8] It remains unclear if Appellant is using the terms "merge" and "consolidate" interchangeably, or to distinguish between available remedies. *See United States v. Thomas*, 74 M.J. 563, n. 2 (N-M. Ct. Crim. App. 2014) (noting that there was "no difference between the terms 'merge' and 'consolidate'" as used in the context of unreasonable multiplication of charges for sentencing). Appellant avers that the "defense requested that the military judge merge the findings into a single specification." App. Brief at 32-33. However, the United States could not locate any request for merger or consolidation by trial defense counsel in the context of unreasonable multiplication of charges.

> DC: Your Honor, the defense's position is *not* that the charges should be merged for the purposes of sentencing, but the defense moves that the judge--military judge *dismiss* Specification 2 as an unreasonable multiplication of charges.
>
> MJ: As it applies to sentencing?
>
> DC: Yes, Your Honor.

R. at 1951 (emphasis added).

In considering the *Quiroz* factors, the Military Judge found the sexual assault specifications were charged in the alternative and that defense was objecting at trial. R. at 1951. Citing to *United States v. Campbell*, the Military Judge found that Specifications 1 and 2 of Charge II constituted an unreasonable multiplication of charges for sentencing and that "the proper remedy is a conditional dismissal of Specification 2 pending the completion of appellate review." R. at 1953. Having found that the specifications constituted an unreasonable multiplication of charges for sentencing and charged for exigencies of proofs, the Military Judge followed the law and used an available and appropriate remedy to Appellant's benefit.

Since he requested dismissal as the remedy at trial, Appellant waived his right to ask for a different remedy, that is, consolidation, on appeal. "[F]orfeiture is the failure to make the timely assertion of a right, [and] waiver is the intentional relinquishment or abandonment of a known right." *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (internal quotation marks and citation omitted). Because Appellant specifically requested dismissal at trial, he cannot now claim that he should have been afforded the remedy of consolidation instead. *See United States v. Trogdon*, 2018 WL 1091523 (A. Ct. Crim. App. Feb. 26, 2018) (holding that the appellant had relinquished his right to seek an alternate remedy to unreasonable multiplication of charges on appeal). Even if this Court finds Appellant did not waive the issue, this Court should find the military judge did not abuse his discretion in conditionally dismissing Specification 2.

As the specifications at issue involved sexual assault offenses charged for exigencies of proof, it was "particularly appropriate" for the military judge to conditionally dismiss Specification 2 involving sexual assault by bodily harm. *See Elespuru*, 73 M.J. at 329. If the charges were consolidated as Appellant's Brief requests, the consolidated charge would include the fact that Appellant sexually assaulted AS by bodily harm *and* when she was incapable of consenting. Instead, the conditionally dismissed sexual assault specification of sexual assault by bodily harm will ripen into a full dismissal at the end of appellate review, unless the Court revives Specification 2. Consequently, the military judge's conditional dismissal of Specification 2 was not only well grounded in the law but also a favorable result for Appellant. Therefore, this Court should find that the military judge did not abuse his discretion by conditionally dismissing Charge II, Specification 2, pending completion of appellate review.

VI.

BECAUSE THE STAFF JUDGE ADVOCATE'S ADDENDUM ADEQUATELY COMPLIED WITH THE REQUIREMENTS OF R.C.M. 1106(d)(4), THERE WAS NO ERROR IN POST-TRIAL PROCESSING.

Standard of Review

Claims of post-trial processing error involving the staff judge advocate's recommendation (SJAR) are reviewed *de novo*. *See United States v. Wheelus*, 49 M.J. 283 (C.A.A.F. 1998).

Discussion

A. The Staff Judge Advocate's recommendation and accompanying addendum complied with R.C.M. 1106(d)(4).

Appellant alleges that the staff judge advocate (SJA) failed to adequately respond to a legal error raised in Appellant's clemency request. App. Brief at 35. After trial, Appellant,

through trial defense counsel, alleged that part of the SJA's advice concerning the convening authority's ability to grant clemency to Appellant was incorrect, and that the convening authority did, under the law, have the discretion to take action to approve, disapprove, commute or suspend the sentence in whole or in part. Appellant's Clemency Recommendation. Though the SJA did respond to Appellant's legal error in an Addendum, Appellant now claims the response was deficient under R.C.M. 1106(d)(4), because the SJA failed to advise the convening authority whether she agreed with the legal error, and whether corrective action was warranted. App. Brief at 34 – 35.

Before the convening authority takes action under R.C.M. 1107 on a record of trial by general court-martial, a SJA or legal officer is required to submit a recommendation to the convening authority to assist in deciding what action to take on the sentence. R.C.M. 1106. During the review, the SJA is not required to examine the record for legal errors. R.C.M. 1106(d)(4). However, when an allegation of legal error is raised in matters submitted by the accused under R.C.M. 1105, "the staff judge advocate shall state whether, in the staff judge advocate's opinion, corrective action on the findings or sentence should be taken." *Id.* The SJA's response "*may* consist of a statement of agreement or disagreement with the matter raised by the accused" under R.C.M. 1105. *Id.* (emphasis added). "An analysis or rationale for the staff judge advocate's statement, if any, concerning legal error is not required." *Id.*

To warrant correction of a claimed error in post-trial processing, an appellant must (1) allege the error at the Court of Criminal Appeals, (2) allege prejudice as a result of the error, and (3) show what he would do to resolve the error if given such an opportunity. *United States v. Wheelus*, 49 M.J. 283, 288-9. (C.A.A.F. 1998). "Because of the highly discretionary nature of the convening authority's action on the sentence, [USCAAF] will grant relief if an appellant

presents 'some colorable showing of possible prejudice.'" *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000); (quoting *Wheelus*, 49 M.J. at 289). If an appellant satisfies these requirements, a service appellate court can either provide meaningful relief or the case may be remanded to a convening authority for a new post-trial recommendation and action. *Wheelus*, 49 M.J. at 289.

Here, there was no error because the SJA's addendum met the requirements of R.C.M. 1106(d)(4). While the United States concedes that the initial SJAR advice to the Convening Authority that "[he] may not disapprove, commute, or suspend the sentence of confinement and dishonorable discharge," was incorrect, the convening authority did not take action upon this initial advice alone. First, the original SJAR, in paragraph 11, included the correct guidance that the CA could take any action he deemed appropriate on the findings and sentence. Second, Appellant's clemency recommendation noted the legal error in paragraph 12 of the SJAR, and which was attached to the SJA's addendum to the CA before action was taken in Appellant's case. Third, the SJA's addendum complied with R.C.M. 1106(d)(4). In the SJA's addendum dated 30 January 2018, the SJA identified Appellant's allegation of error for the CA's review by specifically acknowledging the legal errors raised by Appellant within his clemency request, and commenting on the error related to clemency. Addendum SJAR dated 30 January 2018. The SJA provided the required statement as to whether corrective action on the findings or sentence should be taken, opining that "no corrective action on the findings or sentence is warranted." *See id.* Contrary to Appellant's assertions, the SJA was not required to "include a statement of agreement or disagreement" with the accused's alleged error. *See* R.C.M. 1106(d)(4). Even so, the SJA's addendum acknowledged, without conceding, that the initial advice regarding the limitations on the convening authority's clemency power constituted error. Moreover, Appellant's clemency recommendation quoted verbatim the correct provision.

Though two sister courts of criminal appeal have recently found error in SJA advice related to clemency, both cases are readily distinguishable. In *United States v. So*, the SJA's incorrect advice that the CA could not disapprove, commute or suspend the adjudged discharge stood entirely uncorrected, as trial defense counsel did not allege legal error and the SJA did not provide an addendum to the original advice. *United States v. So*, 2017 WL 1034630, at *2 (N-M. Ct. Crim. App. Mar. 17, 2017). Unlike *So* which contained an uncorrected affirmative misstatement of the law, the SJA, here, deferred to the trial defense counsel's interpretation that the original advice regarding the convening authority's clemency authority constituted error. In *United States v. Rogers*, the Air Force Court of Criminal Appeals held that the SJA erred when she advised the convening authority that she could not disapprove Appellant's punitive discharge. 76 M.J. 621, 626 (A.F. Ct. Crim. App. 2017). However, the SJA in *Rogers*, also failed to notify the convening authority of Appellant's initial clemency request and, did not submit an addendum, as the SJA here did. *Cf. id.* In this case, the addendum deferred to the defense counsel's correct interpretation, but considering the serious nature of the charges of conviction, maintained that no corrective action was necessary.

Because the SJAR met the legal requirement of R.C.M. 1106(d)(4) by assuming the initial advice was in error and by attaching the matters submitted under R.C.M. 1105 to the record itself, there was no error in the SJAR. Even assuming *arguendo* there was error, any error was harmless. In light of the serious nature of the charges of conviction, including sexual assault by incapacitation of a seventeen year old girl whom Appellant met mere minutes before he committed the egregious offense, and the lack of compelling reasons to afford Appellant any clemency relief, there is no reasonable possibility that the CA would have provided sentence relief. However, should this Court find error that was not harmless, the United States requests

that the record of trial be returned to The Judge Advocate General for remand to the convening authority for new post-trial processing.

VII.

THE EVIDENCE WAS FACTUALLY SUFFICIENT TO SUPPORT APPELLANT'S CONVICTION FOR SEXUAL ASSAULT UNDER ARTICLE 120(b)(1)(B), UCMJ.[9]

Standard of Review

This Court has a statutory mandate to review *de novo* the factual sufficiency of a conviction. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017).

A. Factual sufficiency.

In reviewing the factual sufficiency of evidence, the test is "whether, after weighing the evidence in the record of trial, and making allowances for not having personally observed the witnesses, the members of the service court are themselves convinced of appellant's guilt beyond a reasonable doubt." *Id*. In conducting this review, service appellate courts take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002); *United States v. Clifft*, 77 M.J. 712, 719 (CG Ct. App. 2018). "'[R]easonable doubt' is not intended as fanciful or ingenious doubt or conjecture, but an honest, conscientious doubt suggested by the material evidence or lack of it in this case.... The proof

[9] The corresponding assignment of error was raised by Appellant in the event that this Court's disposition of the cases revives Charge II, Specification 2, which was conditionally dismissed pending appellate review. App. Brief n. 3 at 36. As the conviction for Charge II, Specification 1 is both legally and factually sound, the United States respectfully submits that the Court does not need to address this issue.

must be such as to exclude not every hypothesis or possibility of innocence, but every fair and rational hypothesis except that of guilt." *United States v. Loving*, 41 M.J. 213, 281 (C.A.A.F. 1994).

B. The government proved beyond a reasonable doubt that Appellant committed sexual assault by bodily harm upon AS under Article 120(b)(1)(B).

1. Offense of sexual assault by bodily harm.

In order to convict Appellant of Charge II, Specification 2 of sexual assault by bodily harm, the United States was required to prove beyond a reasonable doubt that Appellant (1) committed a sexual act upon AS, and (2) that the sexual act caused bodily harm to AS. 10 U.S.C. § 920(b)(1)(B), Article 120(b)(1)(B), UCMJ, MCM Pt. IV, ¶ 45.b(3)(b). Under Article 120(g)(3), bodily harm includes "any offensive touching of another, however slight, including any nonconsensual sexual act." Consent is defined as:

> [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 from lack 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.

Article 120(g)(8), UCMJ. "Sexual assault by causing bodily harm requires proof of a lack of actual consent to the sexual act." *Clifft*, 77 M.J. at 718. "The definition of sexual assault by causing bodily harm was clarified to note that any sexual act or contact without consent constitutes bodily harm." Manual for Courts–Martial, United States (2016 ed.), App. 23, Analysis of Punitive Articles, ¶ 45 at A23–15. "A lack of consent 'may be inferred based on the circumstances of the offense. All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person's actions.'" *Clifft*, 77 M.J. at 718 (quoting Article 120(g)(8)(C)).

Article 120(f) permits an accused to raise "any applicable defenses available under this chapter or the Rules for Court-Martial [sic]." R.C.M. 916(j), in turn, explains that:

> It is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances, such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense . . . [i]f the ignorance or mistake goes to [an] element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances.

The government bears the burden of proving beyond a reasonable doubt that the defense did not exist. R.C.M. 916(b)(1). In the context of sexual assault, mistake of fact as to consent requires that the accused subjectively believed that the victim consented to the sexual act and that the belief was objectively reasonable. *United States v. Jones*, 49 M.J. 85 (C.A.A.F. 1998) ("[A] mistake-of-fact defense to a charge of rape requires that a mistake as to consent be both honest and reasonable.") (quoting *United States v. Willis*, 41 M.J. 435, 438 (C.A.A.F. 1995)). Only the second element is at issue on appeal.

2. The United States proved beyond a reasonable doubt that AS did not consent to the sexual act.

The main issue is whether the United States proved that AS did not freely agree to have sex with Appellant, and that the sexual assault was thus committed by causing AS bodily harm. The evidence at trial, though a closer call than sexual assault of an incapacitated person, proved beyond a reasonable doubt that Appellant caused AS bodily harm through a nonconsensual sexual act.

Appellant's main argument appears to be that AS was required to affirmatively say "no" to prove she did not consent. *See* App. Br. at 37. However, this is not the only way that the United States could have proved its case beyond a reasonable doubt. Though evidence of affirmative non-consent would certainly have supported a finding of guilt, only proof of a lack of consent, which can be based on circumstantial evidence, is required. Notably, "[l]ack of verbal

or physical resistance . . . does not constitute consent." Article 120(g)(8)(A). Thus, the United States was required to prove a lack of actual consent, which may be inferred based on the circumstances, and did not need to introduce evidence of an affirmative statement of non-consent to meet its burden.

AS never affirmatively consented to the sexual act. First, AS's testimony about her conduct demonstrates that she did not freely agree to have sex with Appellant. Specifically, AS testified that after she made it to Appellant's apartment, she next remembered waking up on a bed in the apartment with all of her clothes off. R. at 1141. AS recalled that one of the men was touching her body while saying she had "a beautiful body." R. at 1142. After passing out again, AS testified that she recalled waking up on her back with Appellant on top of her, while Appellant was having sex with her. R. 1142 – 43. AS described that Appellant's "hands were on the sides of my shoulders, and his legs were between mine." R. at 1143. AS testified that she could not move, and acknowledged that she did not want Appellant to put his penis inside of her. R. at 1144. When asked if she gave Appellant permission to have sex with her, AS responded, "I never did." R. at 1145. Further, AS indicated she did not ask Appellant to have sex with her. R. at 1145. Though AS lacked recollection of the entirety of the sexual encounter, AS's testimony established that she never verbally consented to the sexual act with Appellant during her periods of lucidity.

Second, in his first lengthy interview with CGIS, Appellant never once stated that AS affirmatively consented to having sexual intercourse with him. Though Appellant stated that AS did not say "no, no, no," and that he "thought [sex] was a go," he did not claim that he received a verbal agreement of consent from AS. P.E. 1 (5 of 9) at 00:59. In fact, Appellant stated that AS was "not saying anything" to him in the lead up to the sexual act. P.E. 1. (7 of 9) at 11:05 –

11:14. During his testimony at trial, [redacted], who was present when Appellant initiated the sexual act upon AS, never stated that AS affirmatively consented to vaginal intercourse.

Furthermore, the surrounding circumstances also showed that AS did not consent to the sexual act. Appellant and [redacted] picked up AS, a wandering teenager, off the streets in the middle of the night, and brought her back to Appellant's apartment. R. at 1345-48. Within minutes of entering the apartment, AS's wet clothes, with the assistance of [redacted], were removed and AS laid naked on Appellant's bed. R. at 1355. Before Appellant engaged in the penetrative act, he noticed that AS smelled like urine, yet took no action to determine why. By this time, [redacted] suspected something was wrong with AS and ultimately decided he was "not going to be a part of the situation," and that things "didn't seem right to [him]." R. at 1356. As Appellant continued on and started to have sex with AS, [redacted] left Appellant's apartment. R. at 1354. While Appellant claimed AS was moaning, he also indicated she made no sounds of pleasure during sex. P.E. 1 (5 of 9) at 3:45. Both Appellant and AS indicated Appellant's was on top of AS while he was penetrating her, a position that would not require AS' participation. Likewise, Appellant made no comments about AS actively participating in sexual intercourse.

Appellant's version of events changed several times throughout his interview with CGIS and differed dramatically from that of AS and [redacted] In his first interview with CGIS, Appellant initially denied having any sexual relations with AS and instead indicated [redacted] had sex with her, which [redacted] denied and AS did not recall. Then, Appellant changed course, admitting that he did have sex with AS, but claimed that [redacted] also had sexual contact with her. Not only did Appellant's story change in his initial interview, but Appellant reengaged with CGIS after the initial interview to recant his previous claim that he had sex with AS, showing a complete lack of credibility. Of course, the members convicted Appellant of violating Article

107, UCMJ, by falsely claiming he did not have vaginal intercourse with AS.

Finally, Appellant's reaction following the sexual act, in contrast to AS's reaction, further supports the factually sufficiency of this element. The next morning, Appellant thought it was necessary to tell AS that he had sex with her the previous night, "just to let [her] know," which could reasonably lead to the inference that he knew she did not consent. *See* P.E. 1 (6 of 9) at 26:20 – 26:30. Any concern Appellant feigned for AS in his interview, including his fabricated self-serving story that AS had been in a "rape" situation before their sexual encounter, was tarnished by his comment the following morning to [redacted] that he "dropped the b**** off at Albertsons." R. at 1366. In contrast to Appellant's apathy, AS's visceral reaction and ensuing anxiety upon seeing Appellant in his apartment the week after the sexual assault further supports the inference that she did not consent to the sexual act. R. at 1149, 1478. Based on all those factors, the members, as this Court should, could have inferred a lack of consent by AS, beyond a reasonable doubt.

Overall, the United States proved Appellant committed Charge II, Specification 2, beyond a reasonable doubt, through evidence that AS did not consent to sex. The members had all of the evidence set out above, as well as the military judge's instructions which recited the statutory definition of consent, including that a lack of verbal or physical resistance does not constitute consent, and found Appellant guilty. The specification is factually sufficient, and this Court should affirm the finding of guilty if revived during appellate review.[10]

[10] Should the Court's decision affirm Charge II, Specification 1, the United States submits the military judge's conditional dismissal of Charge II, Specification 2 should remain in place pending the completion of appellate review under Article 71, UCMJ.

VIII.

THE EVIDENCE WAS FACTUALLY SUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT SEXUALLY ASSAULTED AS, IN VIOLATION OF ARTICLE 120(b)(3)(A), UCMJ.[11]

Standard of Review

This Court has a statutory mandate to review *de novo* the factual sufficiency of a conviction. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017).

A. Factual Sufficiency

For a discussion of the law applicable to this assignment of error, see *supra* at VII.A.

B. The evidence presented at trial was factually sufficient to support Appellant's conviction for sexual assault by incapacitation under Article 120(b)(3)(A).

In order to convict Appellant of Charge II, Specification 1, under Article 120(b)(3)(A), UCMJ, the United States was required to prove beyond a reasonable doubt that:

> 1) Appellant committed a sexual act upon AS by causing penetration, however slight, of the vulva or anus or mouth by the penis;
> 2) That AS was incapable of consenting to the sexual act due to impairment by intoxicant; and
> 3) That Appellant knew or reasonably should have known of the impairment of AS.[12]

At trial, Appellant did not dispute that a sexual act, specifically penetration of the vulva by the penis, occurred. R. at 1795-96, 1830-31; *see generally* App. Brief. As it is undisputed and supported in the record that Appellant had sexual intercourse with AS, only the second and third elements concerning AS's capacity to consent due to impairment by alcohol and Appellant's

[11] This issue was raised by Appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1981). Though the heading for Assignment of Error VIII refers to Charge II, Specification 1 as sexual assault by bodily harm, the Government assumes, based on the context, that Appellant is referring to Charge II, Specification 2, relating to sexual assault on an incapacitated person.

[12] Appellant did not dispute that a sexual act, specifically vaginal intercourse, occurred. R. at 1795-96, 1830-31; *see generally* Brief of Appellant.

knowledge of AS's impairment remain at issue.

1. The United States proved beyond a reasonable doubt that AS was incapable of consenting to the sexual act due to impairment by an intoxicant.

A victim is incapable of consenting to a sexual act due to impairment by an intoxicant where the victim either does not possess the mental ability to appreciate the nature of the conduct—i.e., the sexual act; does not possess the physical ability to make or communicate a decision regarding such conduct; or does not possess the mental ability to make or communicate a decision regarding such conduct. *United States v. Pease*, 74 M.J. 763, 770 (N-M. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 180 (C.A.A.F. 2016).

The United States proved beyond a reasonable doubt that AS was incapable of consenting due to impairment by an intoxicant, specifically, alcohol. Appellant misconstrues the evidence presented at trial, and fails to acknowledge the overwhelming evidence, including his own statements of AS's alcohol impairment. Contrary to Appellant's assertions, the evidence clearly established that AS, a seventeen year old girl, was incapable of consenting due to impairment by alcohol when Appellant committed the undisputed sexual act in his apartment.

After AS stole two bottles of liquor from a Safeway around 6:00 p.m., AS met up with ML at a playground. R. at 1130, 1132, 1129. While there, ML observed AS drink straight from the Jack Daniel's bottle, consuming a quarter of a bottle at a time. R. 1266. As ML and AS left the park, ML observed that AS was acting tipsy and buzzed, and was wobbling and stumbling. R. at 1267.

AS and ML eventually walked from the park to Albertson's, where AS continued drinking. R. 1268-9. In less than two hours, AS drank, in total, half to three quarters of a large bottle of Jack Daniel's liquor and consumed no food. R. at 1134, 1294, 1284; *see* A.E. 74. AS's motor functions continued to deteriorate. Outside Albertson's, ML observed that AS was "pretty

drunk," started falling over, and was slurring her speech. R. at 1270. AS also smelled like strong whiskey. *Id.* At some point, AS fell over and passed out, causing ML to prop her against a wall outside the store. R. at 1134, 1271. Despite shaking her, patting her face, and telling her she needed to wake up, ML was unable to rouse AS. R. at 1271. Remarkably, ML repeatedly tried waking AS for approximately 25 – 30 minutes to no avail. R. at 1272. ML then left AS, while she was still passed out in the bushes behind Albertson's, at around 7:50 p.m. R. at 1284.

AS testified that the first time she woke up outside Albertson's after passing out she could not keep consciousness, felt very tired and weak, and could not feel her legs. R. at 1135. The second time she woke up, AS testified that she felt tired, could not feel anything, and was having trouble keeping consciousness. R. at 1135-6. AS also testified that she could not see very well, and her shirt was gone. R. at 1136. Focused on getting home, AS, wearing only a bra, pants, and shoes, walked from the Alberton's towards a nearby Safeway to find a phone. R. at 1136, 1191.

While AS eventually walked about a mile to the Safeway, this behavior did not mitigate AS's high level of intoxication and inability to make or communicate decisions. First, AS was still significantly impaired by the effects of her intoxication. AS testified that she did not remember most of the walk to Safeway, could not keep her balance, and had very blurry vision. R. at 1137. Second, Dr. [redacted], the government's expert forensic psychologist, testified that AS's ability to find her way to Safeway and recall the store's hours of operation did not show that AS had a high level of executive function. R. at 1658. Instead, Dr. [redacted] testified that AS was "drawing from long-term memories" and that recalling the hours of a store is a "semantic memory" which "[a]lcohol has very limit[ed] impact" on. R. at 1658.

After AS arrived at the Safeway parking lot, Appellant and [redacted], who had just lost the

trail of the women they were pursuing, stopped and asked AS if she wanted a ride. R. at 1137, 1344-7. AS, who had never met Appellant or [redacted], agreed and climbed in the back seat of Appellant's car. R. at 1137-8. As AS's sole focus was to get home, which Dr. [redacted] described as consistent with "alcohol myopia," her attention was narrowed and made her unable to process potential dangers, including getting into a car in the middle of the night with two strange men, including Appellant. R. at 1136, 1658. Within minutes, the three arrived at Appellant's apartment, where AS initially thought she was at her dad's house. *See* R. at 1140, 1347.

At Appellant's apartment sometime around 2:00 a.m., AS was still under the effects of alcohol and her level of impairment prevented her from having the physical or mental ability to make or communicate a decision regarding the sexual act. Appellant estimated that AS was nine out of ten in terms of her level of intoxication when she was inside Appellant's bedroom. P.E. 1 (4 of 9) at 11:05. In his first interview with CGIS, Appellant commented repeatedly that AS was drunk. *See* P.E. 1. Appellant also stated that before they had sex, he noticed AS smelled like urine. P.E. 1 (5 of 9) at 03:10 – 3:20. [redacted], too, suspected that AS was intoxicated. When [redacted] was on the bed with AS, he sensed that AS was slurring her words and that "something wasn't quite right." R. at 1393.

The time of the sexual act was mere minutes from when she entered Appellant's apartment, and AS remained impaired due to her alcohol intoxication. AS was blacked out at the start of the sexual act, and did not remember when Appellant started to engage in sex with her. R. at 1142-43. AS's next memory was after Appellant was already on top of her, penetrating her vulva with his penis. *Id.* AS struggled to maintain consciousness, and Appellant indicated AS was not saying anything to him before they had sex. *See* R. at 1144; P.E. 1 (7 of 9) at 11:10.

While the defense expert, without further explanation, testified that the thoughts and behaviors of AS - in walking to Safeway to make a phone call - are consistent with someone who would have the cognitive ability to consent to sexual activity, Dr. [redacted] rebutted this opinion, opining that she "did not believe that [AS], at the time she was at the apartment, had the cognitive capacity to make reasoned decisions." R. at 1627, 1662. Even more, AS was a seventeen year old girl – not a fully developed adult. Dr. [redacted] testified as to the effects of alcohol on adolescents, explaining that "it's very clear that alcohol does more significantly impair the adolescent brain." R. at 1654. Thus, the effects of drinking half to three quarters of a bottle of whiskey could have a more significant impact on AS than a fully developed adult.

Immediately after the sexual act occurred, AS remained unable to maintain consciousness due to her alcohol intoxication. Appellant, himself, made AS drink water, and thought she might throw up due to her high level of intoxication. P.E. 1 (7 of 9) at 17:50; P.E. 1 (4 of 9) at 11:05. Further, the effects of the impairment by alcohol were still present the morning after Appellant committed the sexual act. Detective [redacted], who responded to the call from a local citizen about AS's initial report that she had been raped, testified that he smelled an intoxicant on AS's breath when he met with AS the morning after the sexual assault. R. at 1444-45. All these factors demonstrate AS's high level of intoxication at the time of the sexual act, and prove beyond a reasonable doubt that AS did not possess the physical or mental ability to make or communicate a decision regarding the sexual act.

2. The United States proved beyond a reasonable doubt that Appellant knew, or reasonably should have known, that AS was incapable of consenting.

The evidence presented at trial proved that Appellant knew, or at a minimum reasonably should have known, that at the time of the sexual act, AS was incapable of consenting. Appellant's own actions and observations of AS demonstrate that he knew she was impaired by

alcohol and incapable of consenting. Within thirty minutes of picking up AS, a stranded drunk teenager walking in the middle of the night alone, Appellant was committing a sexual act upon her in his bedroom. Appellant admitted that AS was nine out of ten drunk, with ten being "blown out," and stated repeatedly that he knew she was drunk. *See* P.E. 1 (4 of 9) at 11:05. Before he had sex with AS, Appellant admitted that he noticed AS smelled like urine, supporting the inference that Appellant was on notice that AS lost the ability to control basic bodily functions due to her level of intoxication. As discussed in *supra* VII.B.2., AS did not affirmatively consent to the sexual activity.

Further, Appellant's actions after he committed the sexual act upon AS also demonstrate he knew she was incapable of consenting. Not only did Appellant offer AS water, he *made* her drink after he committed the sexual act. *See* P.E. 1 (7 of 9) at 17:50. Most significantly, Appellant had to inform AS the next morning that they had sex the night before. *See* P.E. 1 (6 of 9) at 26:20 – 26:30; P.E. 1 (7 of 9) at 19:48; P.E. 1 (8 of 9) at 2:35. This type of behavior is inconsistent with someone who knew their partner was capable of consenting.

Even if Appellant did not actually know about AS's inability to consent, the evidence overwhelmingly demonstrates he should have known AS was unable to consent due to impairment by alcohol. As Appellant points out, remarkably, a third party, [redacted] was present at Appellant's apartment before he started having sexual intercourse with AS. As noted above, [redacted] sensed that something was off with AS and repeatedly asked her if she was on drugs or had been drinking. Instead of engaging in sexual acts with AS as Appellant did, [redacted] found AS's behavior so strange that he left Appellant's apartment. Moreover, the indicators that AS was drunk and smelled like urine, and that Appellant made her drink water and had to inform her they had sex the following morning also prove that Appellant should have known AS was

incapable of consenting. Based on the aforementioned evidence the members found beyond a reasonable doubt, as this Court should, that Appellant knew or reasonably should have known of AS's condition. The specification is factually sufficient, and this Court should affirm the finding of guilty.

PRAYER FOR RELIEF

WHEREFORE, the United States prays that this honorable Court affirm the findings and sentence.

Respectfully submitted,

DATE: 25 September 2018

Stephen P. McCleary
Appellate Government Counsel
Commandant (CG-LMJ)
2703 Martin Luther King Jr. Ave. SE
Washington, D.C. 20593-7213
[redacted]

Emily A. Rose
Lieutenant Commander, U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
2703 Martin Luther King Jr. Ave. SE
Washington, D.C. 20593-7213
[redacted]

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was delivered to the Court and opposing counsel on 25 September 2018.

Emily A. Rose
Lieutenant Commander, U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
2703 Martin Luther King Jr. Ave. SE
Washington, D.C. 20593-7213
[redacted]