

**UNITED STATES NAVY-MARINE CORPS  
COURT OF CRIMINAL APPEALS  
WASHINGTON, D.C.**

**Before  
J.A. MAKSYM, J.R. PERLAK, B.L. PAYTON-O'BRIEN  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**ERIC R. SKINNER  
DAMAGE CONTROLMAN FIRST CLASS (E-6), U.S. NAVY**

**NMCCA 201000555  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 16 June 2010.

**Military Judge:** Lt Col M.D. Mori, USMC.

**Convening Authority:** Commander, Navy Region Hawaii, Pearl Harbor, Hawaii.

**Staff Judge Advocate's Recommendation:** LCDR K. A. Elkins, JAGC, USN.

**For Appellant:** LT Michael B. Hanzel, JAGC, USN.

**For Appellee:** Capt Robert E. Eckert, USMC.

**29 July 2011**

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**OPINION OF THE COURT**  
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**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS  
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

MAKSYM, Senior Judge:

A general court-martial, composed of members with enlisted representation, convicted the appellant, contrary to his pleas, of one specification of aggravated sexual assault by engaging in a sexual act with a person who was substantially incapable of appraising the nature of the sexual act, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. The members sentenced the appellant to 180 days confinement, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, except for the bad-conduct discharge, ordered the sentence executed.

The appellant assigned three (3) errors in his initial brief filed on 6 December 2010 and a supplemental error in an additional brief filed on 11 April 2011. Those errors are as follows: (1) that the appellant was not properly advised of the nature of the allegation against him when he was initially questioned by the Naval Criminal Investigative Service (NCIS) in violation of Article 31(b) of the UCMJ; (2) that the military judge erred by admitting the appellant's video recorded confession when NCIS failed to post an adequate sign noting that the confession would be video-taped;<sup>1</sup> (3) that the statutory scheme of UCMJ Article 120 violates the due process clause by placing an unconstitutional burden on the accused to disprove an element of the offense; and (4) that it is a due process violation to convict an accused under Article 120 in light of the *Prather*<sup>2</sup> and *Medina*<sup>3</sup> decisions issued by the Court of Appeals for the Armed Forces (CAAF) because it essentially amounts to a judicially created statute. After considering the pleadings of the parties as well as the entire record of trial, we conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

### Background

During November 2009, the USS O'KANE (DDG 77) made a port call to Hong Kong in the People's Republic of China. Record at 330. Both the appellant and the victim in the case, Gas Turbine System Technician (Mechanical) Fireman Apprentice (GSMFA) AP, were assigned to the O'KANE at the time. *Id.* at 329-30. The appellant and GSMFA AP went out separately early in the day but eventually made their way to the same bar, the Dog House, by early evening where they and their liberty buddies consumed alcohol. *Id.* at 333. By the time GSMFA AP arrived at the Dog House, she had already consumed two alcoholic beverages. *Id.* at 332-33. Once at the Dog House, the appellant goaded GSMFA AP into drinking faster, and she consumed two more alcoholic beverages. *Id.* at 337, 350-51.

While at the Dog House, GSMFA AP saw a friend of hers with whom she had previously attended training school, Hull Maintenance Technician Fireman Apprentice (HTFA) RK. HTFA RK's ship, USS GEORGE WASHINGTON (CVN 73), was also making a port call in Hong Kong. *Id.* at 334, 428-29. Later on, GSMFA AP and HTFA RK absconded to the bathroom in the bar where the two of them engaged in sexual intercourse. *Id.* at 434. HTFA RK testified that while he was having sex with GSMFA AP, her level of

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<sup>1</sup> According to Appellate Defense Counsel's Brief, this assignment of error was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Defense Brief at 1.

<sup>2</sup> *United States v. Prather*, 69 M.J. 338 (C.A.A.F. 2011).

<sup>3</sup> *United States v. Medina*, 69 M.J. 462 (C.A.A.F. 2011).

intoxication become more apparent, causing him to discontinue from the sexual act as "she was too intoxicated for [his] likings". *Id.* at 434. After the encounter in the bathroom, GSMFA AP returned to the bar proper and consumed more alcohol with her shipmates. *Id.* at 409-11, 436. At this point, she was demonstrating visible signs of intoxication. Prosecution Exhibit 4, page 2 of 4.

Before the entire group of Sailors returned to their respective ships, GSMFA AP once again went to use the bathroom in the Dog House. Record at 371-72, 410-12, 436. This time, the appellant followed her into the restroom and found her on the floor, "passed out," between the toilet and the sink. PE 2 at 20:00; PE 4, page 3 of 4. The appellant lifted GSMFA AP, who was falling all over "like a jellyfish", up off the ground and proceeded to lock the door to the bathroom. PE 2 at 22:30; PE 4, page 3 of 4. At that point, as the appellant explained in his video recorded statement to NCIS, GSMFA AP "was trying to get something started" by undoing his belt, yet she was not saying anything to the appellant at that time "because she couldn't even hardly talk." PE 2 at 47:50. GSMFA AP proceeded to take her pants down to urinate, and when she was done, she bent over the toilet and pointed her buttocks towards the appellant. PE 4, page 3 of 4. Due to the large amounts of alcohol he had consumed, the appellant was unable to achieve an erection, so he never placed his penis near GSMFA AP's vagina. PE 2 at 1:06:00; PE 4 at 3. Instead, he placed his fingers inside of her vagina. PE 4, page 3 of 4. After a few minutes, he ended the encounter because GSMFA AP was so drunk that she was falling down. PE 2 at 1:30:00. The two then left the bathroom. GSMFA AP was highly intoxicated when she exited the bathroom and was unable to walk on her own, light a cigarette on her own, or sit up straight on a stool on her own. Record at 373-74, 414-15. The group of Sailors then took GSMFA AP back to her ship.

GSMFA AP's memories of the evening were very limited. However, she did have a memory of being in the bathroom with the appellant when he made a statement to her about having just engaged in anal sex with her. *Id.* at 337-38. She also went to medical onboard her ship after the incident to have an exam conducted because she was experiencing posterior pain. *Id.* at 340-41. Eventually, the allegations against the appellant were reported to NCIS and an investigation ensued.

Approximately 6 weeks after the incident at the Dog House bar in Hong Kong, the appellant was questioned by two NCIS agents in Pearl Harbor, HI. The interrogation was video recorded. PE 2. Before the actual interrogation started, one of the NCIS agents stated to the appellant that it appeared as though the appellant was well aware of the allegations against him,<sup>4</sup> to

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<sup>4</sup> The appellant had already been questioned about the incident by the command master-at-arms assigned to the USS O'KANE in November 2009. AE IV, pages 29-30 of 34.

which the appellant responded, "I am. I am." PE 2 at 08:45. The agent then advised the appellant of his rights and notified him of the nature of the allegation against him by utilizing a Military Suspect's Acknowledgement and Waiver of Rights form. PE 4, page 1 of 4. The form stated that the appellant was "suspected of sodomizing GSMFA [AP]." PE 4, page 1 of 4. During this interview, the appellant equivocated and amended his story multiple times. At first he denied engaging in any sort of sexual contact with GSMFA AP. However, he eventually admitted that he inserted his fingers into GSMFA AP's vagina while they were in the bathroom of the Dog House bar. PE 2 and PE 4.

Through pretrial motions, the appellant's trial defense team sought to suppress the appellant's video recorded confession. NCIS policy requires that a sign be posted outside of all interrogation rooms informing those who enter that the interrogation could be electronically monitored. Appellate Exhibit VIII, page 9-10 of 15. The defense argued at the trial level that the appellant never saw the sign when he entered the room because the sign in the NCIS Pearl Harbor field office was not of the proper size and placement. Record at 27. They argued that this warranted exclusion of the video recorded confession. The military judge found that the appellant did in fact see the sign in question and that the video recording could be admitted into evidence. *Id.* at 35-36, 61-62. Trial defense counsel never sought to suppress the appellant's statement based upon NCIS' failure to properly advise him of the offense that he was suspected of having committed.

## **Discussion**

### **Notice to the appellant during his rights advisement**

The appellant's first assignment of error is that the appellant's statements to NCIS never should have been admitted into evidence because NCIS never accurately advised him of the nature of the allegation against him, thus violating his rights under Article 31(b), UCMJ. We find that the appellant's inculpatory statements were properly admitted because the appellant was provided sufficient notice of what type of offenses he was suspected of having committed when he confessed to NCIS.

While the trial defense team objected to admission of the appellant's confession at the trial level, they did so under a theory different from that now posited. Such action could be considered to constitute waiver. See MILITARY RULES OF EVIDENCE 103(a)(1), 103(d), 304(d)(2)(a); see also *United States v. Toy*, 65 M.J. 405, 409 (C.A.A.F. 2008) (discussing generally the issue of waiver when a different theory is used on appeal to challenge the admission of evidence). While this new theory is one that "might have called for the military judge to make different findings and conclusions had it been presented at trial", we decline to resolve the issue of waiver in this case and review for error instead. *Toy*, 65 M.J. at 409.

Article 31(b), UCMJ, states that a suspect must be informed of "the nature of the accusation" against him before he can be interrogated. 10 U.S.C. § 831(b). This court will apply a *de novo* review on the question of whether "'the omission of [certain offenses] in the rights' advisement was inconsistent with the applicable rights warning requirements.'" *United States v. Simpson*, 54 M.J. 281, 283-84 (C.A.A.F. 2000); see also *United States v. Carter*, NMCCA 200601139, 2007 CCA LEXIS 174, at \*5-6 (N.M.Ct.Crim.App. May 23, 2007). The purpose of the rights advisement is "to orient [the accused] to the transaction or incident in which he is allegedly involved." *Simpson*, 54 M.J. at 284 (quoting *United States v. Rice*, 29 C.M.R. 340, 342 (C.M.A. 1960)). "[T]he nature of the charge need not be spelled out with the particularity of a legally sufficient specification" but rather it is adequate "if, from what is said and done, the accused knows the general nature of the charge" or allegation, *id.* at 284 (quoting *United States v. Davis*, 24 C.M.R. 6, 8 (1957)), "to include the area of suspicion that focuses the person toward the circumstances surrounding the event., *id.* (citation omitted)." When analyzing whether the "nature-of-the-accusation" requirement has been met, this court will look at "whether the conduct is part of a continuous sequence of events . . . whether the conduct was within the frame of reference supplied by the warnings . . . or whether the interrogator had previous knowledge of the unwarned offenses." *Id.* at 284 (internal citations omitted).

We find that the language on the rights advisement form adequately informed the appellant of the "general nature of the charge" against him. Therefore, it was not error for the military judge to admit the appellant's statements into evidence. Weeks before the NCIS agents advised the appellant of his rights, GSMFA AP had reported pain in her posterior region to the independent duty corpsman (IDC) onboard the O'KANE, and the IDC conducted a sexual assault forensic exam on GSMFA AP. Record at 340-41, 458-59. That exam yielded evidence of irritation around GSMFA AP's posterior region. *Id.* at 459; PE 6, page 3 of 6. When considering the results of the sexual assault exam and GSMFA AP's memory of the appellant stating that the two of them had engaged in anal sex in the bathroom of the Dog House bar, it becomes clear why the NCIS agents advised the appellant that he was suspected of "sodomizing" the victim. We have no reason to believe that the NCIS agents were advising the appellant that he was suspected of one crime as a ruse to lure him into confessing to another crime. The warning about sodomy was adequate to notify the appellant that he was suspected of engaging in misconduct of a sexual nature with GSMFA AP in the bathroom of the Dog House bar in November 2009. Furthermore, the appellant had previously been questioned about that same incident and even admitted when first speaking with the NCIS agents that he was aware of the suspicion surrounding him in relation to GSMFA AP. It was not then necessary for NCIS to provide specific warnings about each and every possible crime that the appellant might have

perpetrated against the victim while in the bathroom that night. The rights advisement form provided by NCIS oriented the appellant generally to the nature of the crime that he was suspected of committing. Therefore, the military judge properly applied current case law and did not err when he admitted the appellant's confession into evidence. *Toy*, 65 M.J. at 409-11.

### **Videorecording of the appellant's statements**

The appellant's second assignment of error asserts that the military judge erred through his admission of the video recording of the appellant's confession into evidence notwithstanding the fact that NCIS agents had failed to adhere to their internal policy that required notice to suspects about recording of interrogations. A military judge's decision to admit a confession into evidence is reviewed for an abuse of discretion. *Simpson*, 54 M.J. at 283. We will accept the trial judge's findings of fact unless they are clearly erroneous. *United States v. Ford*, 51 M.J. 445, 451 (C.A.A.F. 1999). We find that the military judge's findings of fact were not clearly erroneous relative to this issue and that he did not abuse his discretion by admitting the video recording into evidence. Furthermore, the appellant provides no legal authority for the proposition that his confession should have been suppressed based upon NCIS' failure to comply with its own internal policy.

The appellant's assigned error rests on the fact that NCIS policy requires that a sign be posted outside its interrogation rooms notifying suspects that their statements can be recorded. AE VIII, page 9-10 of 15. In fact such a sign was posted outside the interrogation room at the NCIS Pearl Harbor field office, and the military judge concluded that the appellant saw it. Record at 36. The military judge's findings of fact are not clearly erroneous. Therefore, we find no abuse of discretion on his part in admitting the appellant's confession. Even if there were error on the part of the military judge, we cannot see how such an error would be prejudicial to the appellant or how the lack of an adequate sign would confer a substantive legal right on the appellant to challenge the admission of the video recording. We find no error. The confession was properly admitted.

### **Constitutional Challenges to Article 120(c), UCMJ**

The appellant's third assignment of error as well as his supplemental assignment of error challenge his conviction on the grounds that Article 120(c), UCMJ, is unconstitutional because its application to him violated his due process rights and because it amounts to a judicially created statute in light of recent opinions of the CAAF. While we note that appellate defense counsel's briefs on these matters, especially his supplemental brief, were artfully composed and presented many well-researched legal points, the appellant's arguments ultimately fail on both counts. We find that the trial judge properly instructed on Article 120(c)(2) and that there was no

constitutional violation warranting reversal of the appellant's conviction.

Both issues presented by the appellant are pure questions of law relating to whether Article 120(c), UCMJ, is unconstitutional. We therefore review them *de novo*. *United States v. Disney*, 62 M.J. 46, 48 (C.A.A.F. 2005). "It is well established that the Due Process Clause "'protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" *United States v. Prather*, 69 M.J. 338, 342 (C.A.A.F. 2011) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)). The essential elements of the section of Article 120(c)(2) under which the appellant was convicted, are the following: (1) that the accused engaged in a sexual act with another person; and (2) that person was substantially incapable of appraising the nature of the sexual act. *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2008 ed.), Part IV, ¶ 45. Article 120(r), UCMJ, provides that "consent" is not an element of this offense, but rather is an affirmative defense to be raised by the accused. *Id.* Additionally, Article 120(t)(16), UCMJ, provides that if an accused raises an affirmative defense, he must prove it by a preponderance of the evidence. In *Prather*, the CAAF found that the statutory interplay between these sections of Article 120 creates an unconstitutional burden shift because it forces an accused to prove the capacity to consent on the part of the victim, thereby forcing the accused to disprove an element of the offense, i.e. that the victim was substantially incapacitated. 69 M.J. at 343. The CAAF held that instructing members consistent with this statutory scheme creates an unconstitutional burden shift to the accused that cannot be cured by the standard "ultimate burden" instruction. *Id.* at 343-44. The CAAF further commented on this scenario in its *Medina* decision, where it held that the failure on the part of a trial judge to instruct members in compliance with the statutory language of Article 120 constituted error but that the error was harmless beyond a reasonable doubt. *United States v. Medina*, 69 M.J. 462, 465-66 (C.A.A.F. 2011).

Much like the accused in *Prather*, the appellant was prosecuted under Article 120(c)(2). The specification on which the appellant was convicted alleged that he did "engage in a sexual act, to wit: penetration of the genital opening of [GSMFA AP], with his finger, while the said [GSMFA AP] was substantially incapable of appraising the nature of the sexual act." Charge Sheet, Charge I, Specification 1. In the appellant's case, unlike in *Prather*, the prosecution was not "impermissibly relieve[d]" of its burden of proof. 69 M.J. at 341-42. The CAAF in *Prather* held that the standard "ultimate burden" instruction was insufficient to resolve the constitutional issue raised by the military judge's burden shifting instruction. 69 M.J. at 344. However, in the current case, the military judge never gave an instruction on the statutory provisions that would have shifted the burden to the appellant to prove capacity to consent

on the part of GSMFA AP. Rather, the military judge instructed the members that "the prosecution has the burden to prove beyond a reasonable doubt that consent did not exist." Record at 505. The military judge instructed similarly on mistake of fact as to consent. *Id.* at 505-06. In other words, the military judge provided instructions in accordance with the military judge's benchbook and not with the statutory scheme outlined in Articles 120(c), 120(r), and 120(t)(16). See Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9 at Instruction 3-45-5 (1 Jan 2010). While the military judge may have committed error by instructing in this manner, such error stands harmless because the unconstitutional burden shift created by the statute was negated by the trial judge's instructions. *Medina*, 69 M.J. at 465-66. Therefore, no burden was impermissibly placed on the appellant in violation of his Due Process rights. The burden was always on the Government. Therefore, we find no prejudice to the appellant has been realized.

The appellant's argument that his Due Process rights were violated because he was "convicted under a judicially-created statute"<sup>5</sup> also fails because it refuses to recognize the ability of the CAAF, this court, or a trial judge to properly sever the portions of Article 120 that create an unconstitutional burden shift. In *Medina*, the CAAF specifically stated that it did not see its role as rewriting the law. *Medina*, 69 M.J. at 465 n.5. Instead, it noted that the "responsibility clearly rests with Congress to revise the statute to remedy the unconstitutional statutory scheme" and that the CAAF was only acting in accord with Supreme Court guidance to "give a constitutional saving construction . . . when the statute is susceptible to such a construction." *Id.* It is a principle of severability, and a rule announced by the CAAF's predecessor, the United States Court of Military Appeals, that a holding that severs a portion of one section of the UCMJ because it is unconstitutional does not demand that we invalidate the entire section. See *United States v. Burney*, 21 C.M.R. 98, 104 (C.M.A. 1956). The absence of a severability clause in the statute itself "does not raise a presumption against severability." *Alaska Airlines v. Brock*, 480 U.S. 678, 686 (1987). In fact, nothing in the CAAF's *Prather* or *Medina* opinions disrupts the *raison d'être* of Article 120, which is to punish sexual assault crimes. Article 120(c)(2) is still capable of "functioning independently" even when the offending interplay with Articles 120(r) and 120(t)(16) is severed. *Brock*, 480 U.S. at 684. It is evident that Congress would want the remaining portion to survive as "fully operative." *Id.* The CAAF's current case law has simply severed an unconstitutional burden shift relating to the specific interplay between Articles 120(c)(2), 120(r), and 120(t)(16). It has not created a wholly new statute that is inconsistent with the law initially passed by Congress. Therefore, the military judge, when acting in a manner consistent with the *Prather* and *Medina* decisions, did not

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<sup>5</sup> See Appellant's Supplemental Brief at 10.

judicially legislate, but rather properly deployed his judicial authority to cure the statute of its deficiency.

**Conclusion**

The findings and sentence are affirmed.

Judge PERLAK and Judge PAYTON-O'BRIEN concur.

For the Court

R.H. TROIDL  
Clerk of Court