

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

**Before  
M.D. MODZELEWSKI, F.D. MITCHELL, E.C. PRICE  
Appellate Military Judges**

**UNITED STATES OF AMERICA  
(Petitioner)**

**v.**

**COMMANDER LEWIS T. BOOKER, JR., JAGC, USN  
MILITARY JUDGE  
(Respondent)**

**FABIAN D. MEDINA  
ELECTRONICS TECHNICIAN THIRD CLASS (E-4), USN  
(Real Party in Interest)**

**NMCCA 201300325  
Review of Petition for Extraordinary Relief in the Nature of a  
Writ of *Mandamus***

**Military Judge:** CDR Lewis T. Booker, JAGC, USN.  
**Convening Authority:** Commander, Navy Region Northwest,  
Silverdale, WA.  
**For Petitioner:** LT Ian D. MacLean, JAGC, USN.  
**For Real Party in Interest:** LT Jennifer Myers, JAGC, USN.

**31 October 2013**

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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.**

PRICE, Judge:

**I. Introduction**

Petty Officer Medina is charged with two specifications of sexual assault and one specification of abusive sexual contact in violation of the recently amended Articles 120(b)(1)(B),

120(b)(2), and 120(d), Uniform Code of Military Justice, 10 U.S.C §§ 920(b)(1)(B), 920(b)(2), and 920(d) (2012).<sup>1</sup> On 3 July 2013, the military judge ruled that the maximum punishment authorized for each specification alleging sexual assault and abusive sexual contact was the jurisdictional limitation of a summary court-martial to include confinement for one month and no punitive discharge.

In its Petition for Extraordinary Relief, the Government requests that this court issue a writ of *mandamus* setting aside the military judge's ruling and directing him to apply the correct maximum authorized punishment for each specification. This is the Government's second petition seeking extraordinary relief from a ruling by this military judge that the maximum authorized punishment for violation of the recently amended Article 120, UCMJ, was the jurisdictional limitation of a summary court-martial.<sup>2</sup> See *United States v. Booker*, 72 M.J. 787, NMCCA No. 201300247, 2013 CCA Lexis 771 (N.M.Ct.Crim.App. 20 Sep 2013).

In *Schaleger*, we granted the relief requested by the Government after concluding that the authorized maximum punishment for a sexual assault in violation of the revised Article 120(b)(2), on or after 15 May 2013, included a dishonorable discharge and confinement for 30 years. *Id.* at \*62-63. Our decision in *Schaleger* is dispositive with respect to the sexual assault alleged in violation of Article 120(b)(2) (Specification 1 of Charge I). *Id.*

For the reasons discussed below, we conclude that the authorized punishment for the sexual assault alleged in violation of Article 120(b)(1)(B) (Specification 2 of Charge I) includes a dishonorable discharge and 30 years confinement, and, that the authorized punishment for abusive sexual contact alleged in violation of Article 120(d) (Specification 3 of Charge I) includes, at a minimum, six months confinement and a bad-conduct discharge.

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<sup>1</sup> The Fiscal Year 2012 National Defense Authorization Act (NDAA) amended Article 120, UCMJ, including the offenses of sexual assault and abusive sexual contact, and is applicable to offenses committed on or after 28 June 2012. See NDAA for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298, 1404-07 (2011) (codified as amended at 10 U.S.C. § 920).

<sup>2</sup> In the earlier case, like this one, the military judge was named as the respondent. Petty Officer Christopher Schaleger was the real party in interest in that earlier case. We will refer to that case by the name of the real party in interest.

We also conclude that review of the Government's writ petition is "in aid" of our jurisdiction, that issuance of a writ of *mandamus* is the only available means for the Government to attain the relief requested - (i.e., set aside of the military judge's ruling on the maximum authorized punishment and authorization of greater maximum punishment), that the right to issuance of the writ is clear and indisputable, and that the drastic remedy of a writ of *mandamus* is necessary and appropriate under these extraordinary circumstances. *Id.* at 7, 66 (citing *Hasan v. Gross*, 71 M.J. 416, 418 (C.A.A.F. 2012) (additional citation omitted)).

We order appropriate action in our decretal paragraph.

## **II. Background**

Petty Officer Medina, the Real Party in Interest, allegedly sexually assaulted [K.B.] by penetrating her vulva with his penis when he either "knew or reasonably should have known" that she was "asleep" (Specification 1 of Charge I), and "by causing bodily harm to her[.]" (Specification 2 of Charge I). He is also alleged to have committed abusive sexual contact through the "intentional touching of her body with an intent to arouse or gratify the sexual desire of [K.B.] when [he] knew or reasonably should have known [that she] was asleep and otherwise unaware of the sexual contact that was occurring." (Specification 3 of Charge I).

The sexual conduct allegedly occurred on 1 December 2012 and was charged in violation of the amended Articles 120(b)(1)(B), 120(b)(2), and 120(d), which apply to offenses committed on or after 28 June 2012. The Charge and three specifications were preferred on 18 March 2013, and referred for trial by general court-martial on 20 June 2013. Petty Officer Medina was arraigned on the alleged offenses on 3 July 2013, and trial was expected to commence in September 2013.

The amendments to Article 120 applicable to offenses committed on or after 28 June 2012 did not specify the maximum punishments for the offenses, but authorized punishment "as a court-martial may direct." Arts. 120(b)(1)(B) and 120(d), UCMJ. On 15 May 2013, the President amended Paragraph 45 of Part IV of the Manual for Courts-Martial, establishing the maximum punishment authorized for each sexual assault to include a dishonorable discharge and confinement for 30 years, and for abusive sexual contact to include a dishonorable discharge and confinement for seven years. Executive Order 13643 of 15 May

2013. On 27 June 2013, the Government filed a Motion *in Limine* requesting that the military judge determine the maximum authorized punishment for the two sexual assault offenses included "a dishonorable discharge . . . and confinement for 30 years," and that the specification alleging abusive sexual contact was punishable by "a dishonorable discharge . . . and confinement for 7 years." Government Motion to Determine the Maximum Punishment for Article 120 Offenses of 27 Jun 2013.

In a written ruling of 3 July 2013, the military judge reasoned that "[t]o resolve the issue of the maximum punishment that can be imposed . . . it is necessary to consider the complementary nature of Congressional and Presidential power . . . what effect the prohibition on *ex post facto* laws may have [and] to determine what punishment is permissible if neither the Congress nor the President speaks definitively before a statute [under the Uniform Code of Military Justice] takes effect." Appellate Exhibit III at 1. He ultimately concluded that "[b]ecause the smallest punitive burden is found at a summary court-martial, as a matter of due process it is only those punishments authorized for that forum . . . that may be imposed upon [Petty Officer Medina] if he is convicted of any of the offenses alleged[.]" *Id.* at 12.

On 16 August 2013, the Government filed its Petition for Extraordinary Relief in the Nature of a Writ of *Mandamus*. On 21 August 2013, the Government moved to attach documents indicating that an Article 39(a) session to address pretrial motions was scheduled for 30 August 2013. On 22 August 2013, we granted the Government's motion to attach documents and ordered a stay of proceedings. On 15 October 2013, the Government filed a consent motion for leave to file and a motion for expedited review.

### III. Discussion

A writ of *mandamus* is "a drastic instrument which should be invoked only in truly extraordinary situations." *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983) (*per curiam*) (citations omitted). Only exceptional circumstances amounting to a "clear abuse of discretion or usurpation of judicial power," *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953) (citation and internal quotation marks omitted), "justify the invocation of this extraordinary remedy," *Will v. United States*, 389 U.S. 90, 95 (1967) (citation omitted). "To justify reversal of a discretionary decision by *mandamus*, the judicial decision . . . must amount to a judicial usurpation of power . . . or be characteristic of an erroneous practice which

is likely to recur." *Labella*, 15 M.J. at 229 (internal citations and quotation marks omitted). "To prevail on [a] writ of mandamus, [the Petitioner] must show that: (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances." *Hasan*, 71 M.J. at 418 (citing *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004)).

For the reasons discussed below, we conclude that the military judge misapplied RULE FOR COURTS-MARTIAL 1003(c)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), to the sexual assault alleged in Specification 2, and the abusive sexual contact alleged in Specification 3, and "rendered a ruling on the authorized punishment that was clearly contrary to statute, settled case law, and the Rules for Courts-Martial." *Schaleger*, 2013 CCA Lexis 771 at \*33.

As we ruled in *Schaleger*, "prior to 15 May 2013, the revised Article 120 was not an 'Offense[] listed in Part IV' of the Manual within the meaning of [R.C.M. 1003(c)(1)(A)]." *Id.* at \*42-43. We therefore again find the appropriate offense-based criteria for determining the authorized punishment prior to 15 May 2013, to be for "Offenses not listed in Part IV" of the Manual. *Id.* (citing R.C.M. 1003(c)(1)(B)). We will now discuss those offense-based limits on punishments with respect to Specifications 2 and 3, the two offenses alleged here that were not explicitly addressed in *Schaleger*.

#### **A. Sexual Assault (Specification 2 - Bodily Harm)**

Applying the President's offense based-limits for "Offenses not listed in Part IV" of the Manual to the sexual assault "by causing bodily harm" in violation of Article 120(b)(1)(B), we conclude that "aggravated sexual assault" applicable to misconduct committed during the period 1 October 2007 through 27 June 2012 is "closely related" to the charged offense. R.C.M. 1003(c)(1)(B)(i); Art. 120(c)(1)(B), UCMJ (2007).

The charged "sexual assault" is a revised version of "aggravated sexual assault" previously punishable as Article 120(c)(1)(B). The charged offense was apparently "renamed 'Sexual Assault' from 'Aggravated Sexual Assault' in the 2007 version because the term 'aggravated' led to confusion due to the fact that there was no sexual act offense of lesser severity. 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 (2012 ed.), App. 23, Analysis of Punitive Articles, ¶ 45 at A23-15. Comparison of the statutory text confirms that the charged offense is a minor revision of the 2007 version of the offense.<sup>3</sup>

Both statutes define "sexual act" as including "contact between the penis and the vulva . . . and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight." Compare 10 U.S.C.S. § 920(t)(1)(A) (2007) and 10 U.S.C.S. § 920(g)(1)(A) (2012). Both statutes also require: (1) commission of a sexual act with another person, and (2) "causing bodily harm." See *United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010) (noting that aggravated sexual assault in violation of Article 120(c)(1)(B), UCMJ (2007) "has two elements: (1) causing another to engage in a sexual act, and (2) causing bodily harm.").

The military judge's conclusion that aggravated sexual assault in violation of the 2007 version of Article 120(c)(2) is not closely related to the alleged misconduct is inconsistent with his assumption that that offense remained listed in Part IV of the Manual, and the plain language of R.C.M. 1003(c)(1)(B)(i). The rule requires only that the comparison offense be listed in Part IV of the Manual and be "closely related," not that the alleged conduct be punishable in violation of that "closely related offense," as implied by the military judge's ruling. *Schaleger*, 2013 CCA Lexis 771 at \*51 (citing R.C.M. 1003(c)(1)(B)(i) and *United States v. Beaty*, 70 M.J. 39, 42 (C.A.A.F. 2011)); AE III at 6.

"Aggravated sexual assault," the predecessor offense to the charged, "sexual assault" remains listed in Part IV of the Manual and is closely related therefore the "maximum punishment [for the charged offense] shall be that of the offense listed."

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<sup>3</sup> The only distinction of note is that the amended Article 120(b)(1)(B) substitutes the language "commits a sexual act upon another person" for the words "causes another person of any age to engage in a sexual act."

10 U.S.C. § 920(c) (2007): "Aggravated Sexual Assault. Any person subject to this chapter who -- (1) causes another person . . . to engage in a sexual act by -- (B) causing bodily harm . . . is guilty of aggravated sexual assault and shall be punished as a court-martial may direct."

10 U.S.C. § 920(b) (2012): "Sexual assault. Any person subject to this chapter who -- (1) commits a sexual act upon another person by . . . (B) causing bodily harm to that other person . . . is guilty of sexual assault and shall be punished as a court-martial may direct."

R.C.M. 1003(c)(1)(B)(i). In this case, that includes a dishonorable discharge and confinement for 30 years, the limits on punishment imposed by the President for aggravated sexual assault, and the same limits on punishment for the charged offenses imposed by Executive Order on 15 May 2013. MCM (2008 ed.), Part IV at ¶ 45f(2).

### **B. Abusive Sexual Contact (Specification 3)**

The specification in pertinent part alleges that:

[Petty Officer Medina] did . . . on or about 1 December 2012, commit sexual contact upon [K.B.] to wit: intentional touching of her body with an intent to arouse or gratify the sexual desire of [K.B. when Petty Officer Medina] knew or reasonably should have known that [K.B.] was asleep and otherwise unaware that sexual contact was occurring."

Charge Sheet.

The specification alleges an intentional touching (of K.B.'s body) and a specific intent (to arouse or gratify K.B.'s sexual desire), but does not identify the specific body part(s) touched. This absence of specificity and the recent significant expansion of the conduct punishable as "sexual contact" complicate application of the President's offense-based limits on punishment. The alleged offense appears closely related to at least two offenses listed in Part IV of the Manual: "abusive sexual contact" punishable in the 2007 version under Article 120(h), and "assault consummated by a battery," long punishable under Article 128. R.C.M. 1003(c)(1)(B)(i).<sup>4</sup>

We find that the alleged offense is closely related to "abusive sexual contact" punishable under Article 120(h) of the 2007 version of the law, because the statutory text of the two versions of the offense is similar.<sup>5</sup> The analysis in the Manual

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<sup>4</sup> We will limit discussion to these two "closely related" offenses as they provide the most and "least severe of the listed offenses" for determining the maximum punishment authorized for the charged offense. *Id.*

<sup>5</sup> 10 U.S.C. § 920(h) (2007): "Abusive Sexual Contact. Any person subject to this chapter who *engages in* or causes sexual contact with or by another person, if to do so would violate subsection (c) (*aggravated sexual assault*) had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court-martial may direct." (Emphasis added).

10 U.S.C. § 920(d) (2012): "Abusive Sexual Contact. Any person subject to this chapter who *commits* or causes sexual contact upon or by another person, if to do so would violate subsection (b) (*sexual assault*) had the sexual

indicates that “[a]busive sexual contact remains significantly unchanged . . . except to substitute ‘commits’ for ‘engages in[.]’” MCM (2012 ed.), App. 23, Analysis of Punitive Articles, ¶ 45 at A23-15 (Sexual Contact Offenses). Of note, the maximum punishment authorized for “abusive sexual contact” under the previous version of Article 120 includes a dishonorable discharge and confinement for 7 years, the same limits on punishment imposed by the President for the charged offense by Executive Order on 15 May 2013. MCM (2008 ed.), Part IV at ¶ 45f(5).

However, as previously mentioned, the statutory definition of “sexual contact” has been broadened to include the “touching [of] any body part of any person . . . if done with an intent to arouse or gratify the sexual desire of any person.”<sup>6</sup> See also MCM (2012 ed.), App. 23, Analysis of Punitive Articles, ¶ 45 at A23-15 (Definitions). Notably, the 2007 version proscribed only the “intentional touching . . . of the genitalia, anus, groin, breast inner thigh, or buttocks of another person,” [hereinafter “specified body parts”] with the intent to arouse or gratify the sexual desire of any person. Article 120(t)(2) (2007).<sup>7</sup> The revised definition of “sexual contact” significantly expands the scope of punishable conduct. Stated another way, the first element of “abusive sexual contact,” under the revised version now actually means touching “any body part of any person with an intent to arouse or gratify the sexual desire of any person,” as opposed to touching one or more of the statutorily specified body parts in the earlier version. Compare Articles 120(d) and 120(g)(2)(B). *Cf. United States v. Bonner*, 70 M.J. 1, 3 (C.A.A.F. 2011) (noting that the first element of “wrongful

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contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court-martial may direct.” (Emphasis added).

<sup>6</sup> 10 U.S.C. 920(g)(2) (2012): “Sexual Contact. The term “sexual contact” means-- (A) touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person; or (B) *any touching*, or causing another person to touch, either directly or through the clothing, *any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person. Touching may be accomplished by any part of the body.*” (Emphasis added).

<sup>7</sup> 10 U.S.C. § 920(t)(2) (2007): “Sexual contact. The term ‘sexual contact’ means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, or intentionally causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.” (Emphasis added).

sexual contact," "[t]hat the accused had sexual contact with another person" actually means "intentionally causing another person to touch . . . the genitalia . . . of any person, with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person") (citing Article 120(t)(2), UCMJ (2007)).

We also find that assault consummated by a battery, punishable under Article 128, is both a lesser included offense and closely related to "abusive sexual contact." *Cf. Bonner*, 70 M.J. at 3-4 ("assault consummated by a battery" is a lesser included offense of "wrongful sexual contact" under the elements test). The elements of an assault consummated by a battery are: "(1) '[t]hat the accused did bodily harm to a certain person; and (2) [t]hat the bodily harm was done with unlawful force or violence.'" *United States v. Johnson*, 54 M.J. 67, 69 (C.A.A.F. 2000) (quoting MCM, Part IV, ¶ 54(b)(2) (1995 ed.)). Indeed, the essential facts of Specification 3 of Charge I also allege a legally sufficient specification of assault consummated by a battery under Article 128. *See Bonner*, 70 M.J. at 3 ("one could transplant the essential facts from the wrongful sexual contact specification, without alteration, into a legally sufficient specification for assault consummated by a battery under Article 128, UCMJ").

In the context of R.C.M. 1003(c)(1)(B)(i), the expansive definition of conduct now punishable as sexual contact implicates at least two closely related offenses, the previous version of abusive sexual contact and assault consummated by a battery. Determination of the extent of the relationship between Specification 3 and those closely related offenses is dependent, at least in part, on whether the body part allegedly touched was a specified body part in the 2007 version of abusive sexual contact, or not. Our ability to make this determination, or to determine whether Specification 3 is "equally closely related to two or more listed offenses," is complicated by the relative ambiguity of the specification and limited record before us. R.C.M. 1003(c)(1)(B)(i). Since R.C.M. 1003(c)(1)(B)(i) makes the relative relationship between Specification 3 and the closely related offense(s) dispositive in determination of the maximum authorized punishment, we decline to render such a subjective determination in the context of this extraordinary writ. *Cf. United States v. Woods*, 28 M.J. 318, 320 n.2 (C.M.A. 1989) (concluding in a Government appeal under Article 62, UCMJ, that a specification stated an offense under Article 134 but did "not decide what the maximum punishment would be, this being best left to the development of

the facts to determine which offense the conduct alleged is 'closely related to' [.]") (citing R.C.M. 1003(c)(1)(B), MCM, 1984). However, we do conclude that the authorized maximum punishment for the alleged abusive sexual contact includes at least six months confinement and a bad-conduct discharge, the punishment authorized for an assault consummated by a battery. MCM (2008 and 2012 eds.), Part IV, ¶ 54e(2).

As determination of the particular maximum punishment authorized for Specification 3 of Charge I is not required to address the Government's Petition, we decline to do so on this significant question of law and limited record. *Cf. Woods*, 28 M.J. at 320 n.2; see also *United States v. Chisholm*, 59 M.J. 151, 152 (C.A.A.F. 2003) ("Courts established under Article I of the Constitution . . . generally adhere to the prohibition on advisory opinions as a prudential matter") (citation omitted). Under these circumstances, we find that the trial court, guided by this opinion and a more comprehensive record, is the more appropriate forum for determining the particular maximum punishment authorized for Specification 3 of Charge I.

#### **IV. Conclusion**

"The military judge's ruling that the maximum imposable punishment for each sexual offense alleged is the jurisdictional limitation of a summary court-martial was contrary to the relevant statutes, case law, and valid, Presidentially-prescribed Rules for Courts-Martial." *Schaleger*, 2013 CCA Lexis 771 at \*66. The authorized maximum punishment for each alleged sexual assault offense includes a dishonorable discharge and confinement for 30 years, and the authorized maximum punishment for the alleged abusive sexual contact includes, at a minimum, six months confinement and a bad-conduct discharge. The military judge's erroneous interpretation and application of the President's unambiguous rules for determining the authorized maximum punishment exceeded the recognized boundaries of judicial authority, was a "clear abuse of discretion," and constitutes a "usurpation of judicial authority." *Id.* (quoting *Bankers Life & Casualty Co.*, 346 U.S. at 383) (additional citations omitted). "This error 'is likely to recur' in the prosecution of offenses defined in the amended Article 120, UCMJ, which allegedly occurred on or after 28 June 2012 and before 15 May 2013." *Id.* at \*67 (quoting *Labella*, 15 M.J. at 229) (citations and internal quotation marks omitted).

"The Petitioner has established that there is no other adequate means to attain the relief requested, that the right to issuance of the writ is clear and indisputable, and that the

drastic remedy of issuance of a writ of mandamus is necessary and appropriate under these extraordinary circumstances." *Id.* (citing *Hasan*, 71 M.J. at 418). "The military judge's ruling 'overreached [his] judicial power to deny the Government the rightful fruits of a valid conviction,' *Will v. United States*, 389 U.S. 90, 97-98 (1967) (citation omitted), confinement in accordance with a law enacted by Congress exercising its Constitutional authority 'to define crimes and fix punishments,' and the President's exercise of Congressionally-delegated authority to define limits on punishment, *Ex parte United States*, 242 U.S. [27,] 42 [(1916)]." *Id.* at \*65 (additional citation omitted).

We also conclude that Constitutional *ex post facto* prohibitions are not implicated with respect to the sexual assault offenses as Executive Order 13643, which established maximum punishments for those offenses effective 15 May 2013, did not increase the punishments previously authorized for those offenses through application of R.C.M. 1003(c)(1)(B). *Id.* at \*43 (citing *Collins v. Youngblood*, 497 U.S. 37, 41-42 (1990) ("the constitutional prohibition on *ex post facto* laws applies only to penal statutes which disadvantage the offender affected by them . . . . [including] [e]very law that *changes the punishment*, and inflicts a *greater punishment*[.]")). Based upon the substantial expansion of the definition of sexual contact, limited record and ambiguous specification, we conclude that the trial court, acting consistent with this opinion, is the appropriate forum for determination of the particular punishment authorized for the abusive sexual contact alleged.

The Order of the Military Judge of 3 July 2013 is set aside. The Stay of Proceedings ordered by this Court on 22 August 2013 is lifted and the court-martial may proceed consistent with this opinion.

Chief Judge MODZELEWSKI and Senior Judge MITCHELL concur.

For the Court

R.H. TROIDL  
Clerk of Court