QUESTION FROM A COURT MEMBER

Col Stoltz

Court Member's Grade and Name

QUESTION(S) *(For witnesses, state question exactly like you would like it asked)*:

You stated you checked your clothing and your pants and belt were still buckled, however MSgt Donovan stated you said they were undone when she picked you up — which is it?

COUNSEL REVIEW

PROSECUTION:__________(INITIALS)

☒ NO OBJECTION

☐ REQUEST 39(a)

☐ OBJECT – *Grounds:*

DEFENSE:__________(INITIALS)

☒ NO OBJECTION

☐ REQUEST 39(a)

☐ OBJECT – *Grounds:*

APPELLATE EXHIBIT XXXIX

PAGE MARKED 895

FINDINGS WORKSHEET
UNITED STATES V. LT COL JAMES H. WILKERSON

[NOTE: After the court members have reached their findings, the President shall strike out all inapplicable language. After the Military Judge has reviewed the worksheet, the President will announce the findings by reading the remaining language. The President will not read the language in bold print.]

Lieutenant Colonel James H. Wilkerson, this court-martial finds you:

I. Full Acquittal or Full Conviction

Of all Charges and their Specifications:
~~[a] Not guilty~~
[b] Guilty

~~**II. Mixed Findings**~~

~~**Charge I (Sexual Offenses)**~~
~~Of Specification 1 of Charge I:~~

~~[a] Not guilty~~
~~[b] Guilty~~
~~[c] Not guilty, but guilty of Wrongful Sexual Contact, in violation of Article 120~~

~~Of Specification 2 of Charge I:~~

~~[a] Not guilty~~
~~[b] Guilty~~

~~Of Charge I:~~
~~[a] Not guilty **[If Completely Not Guilty as to Both Specifications]**~~
~~[b] Guilty **[If Guilty to either Specification or LIO]**~~

~~**Charge II (Conduct Unbecoming an Officer and a Gentleman)**~~
~~Of Specification 1 of Charge II:~~

~~[a] Not guilty~~
~~[b] Guilty~~

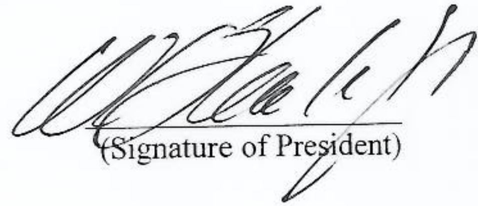
~~Of Specification 2 of Charge II:~~

~~[a] Not guilty~~
~~[b] Guilty~~

FINDINGS WORKSHEET
UNITED STATES V. LT COL JAMES H. WILKERSON

~~Of Specification 3 of Charge II:~~
[a] ~~Not guilty~~
[b] ~~Guilty~~

~~Of Charge~~ II:
~~[a] Not guilty~~ **~~[If Completely Not Guilty as to all three Specifications in Charge II]~~**
~~[b] Guilty~~ **~~[If Guilty to any of the Specifications in Charge II]~~**



(Signature of President)

QUESTION FROM A COURT MEMBER

Col Stentz
Court Member's Grade and Name

Beth Wilkerson
Name of Witness (if any)

QUESTION(S) *(For witnesses, state question exactly like you would like it asked)*:

Is there any possibility that the lower bedroom furniture and or decorations were changed or moved or replaced since 23 Mar 12?

COUNSEL REVIEW

PROSECUTION: JW (INITIALS)

☒ NO OBJECTION

☐ REQUEST 39(a)

☐ OBJECT – *Grounds:*

DEFENSE: TS (INITIALS)

☒ NO OBJECTION

☐ REQUEST 39(a)

☐ OBJECT – *Grounds:*

APPELLATE EXHIBIT XLI

PAGE MARKED 920

Members of the court, when you close to deliberate and vote on the findings, each of you must resolve the ultimate question of whether the accused is guilty or not guilty based upon the evidence presented here in court and upon the instructions which I will give you. My duty is to instruct you on the law. Your duty is to determine the facts, apply the law to the facts, and determine the guilt or innocence of the accused. The law presumes the accused to be innocent of the charges against him.

During the trial some of you took notes. You may take your notes with you into the deliberation room. However, your notes may not be read or shown to other court members.

I will advise you of the elements of each offense alleged.

CHG I, SPEC 1: ABUSIVE SEXUAL CONTACT (ARTICLE 120)

In the specification 1 of Charge I, the accused is charged with the offense of Abusive Sexual Contact. To find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond a reasonable doubt of the following elements:

> (1) That at or near Roveredo in Piano, Italy, on or about 24 March 2012, the accused engaged in sexual contact, to wit: fondling (b)(6) ' breasts with his hands; and
>
> (2) That the accused did so when (b)(6) was substantially incapable of appraising the nature of the sexual contact.

"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.

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

There is evidence in this case that indicates that, at the time of the alleged abusive sexual contact, the accused may have been under the influence of alcohol. The accused's state of voluntary intoxication, if any, at the time of the offense is not a defense to this offense. Nevertheless, you must consider all evidence in deciding whether the prosecution has proven the elements of the charged offense, beyond a reasonable doubt.

LESSER INCLUDED OFFENSE - WRONGFUL SEXUAL CONTACT

The offense of wrongful sexual contact is a lesser-included offense of the offense set forth in Specification 1 of Charge I. When you vote, if you find the accused not guilty of the offense charged, that is Abusive Sexual Contact, then you should next consider the lesser-included offense of Wrongful Sexual Contact, in violation of Article 120. To find the accused guilty of this lesser offense, you must be convinced by legal and competent evidence beyond a reasonable doubt of the following elements:

(1) That, at or near Roveredo in Piano, Italy, on or about 24 March 2012, the accused engaged in sexual contact, to wit: fondling (b)(6) breasts with his hands;

(2) That such sexual contact was without the permission of (b)(6) and

(3) That such sexual contact was wrongful.

I have previously defined "sexual contact."

"Wrongful" means without legal justification or lawful authorization.

"Without permission" means without consent.

The prosecution has the burden to prove lack of consent beyond a reasonable doubt. Therefore, to find the accused guilty of the offense, you must be convinced beyond a reasonable doubt that, at the time of the sexual contact alleged, (b)(6) did not consent.

The offense charged, Abusive Sexual Contact, and the lesser included offense of Wrongful Sexual Contact, differ primarily in that the offense charged requires, as anessential element, that you be convinced beyond a reasonable doubt that the contact occurred when (b)(6) was substantially incapable of appraising the nature of the sexual contact, whereas, the lesser offense of Wrongful Sexual Contact does not include such an element but still does require that you be satisfied beyond a reasonable doubt that the contact was wrongful and without the permission of Ms. Kimberly Hanks.

CHG I, SPEC 2: AGGRAVATED SEXUAL ASSAULT (ARTICLE 120)

In the specification 2 of Charge I, the accused is charged with the offense of Aggravated Sexual Assault. To find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond a reasonable doubt of the following elements:

(1) That at or near Roveredo in Piano, Italy, on or about 24 March 2012, the accused engaged in a sexual act, to wit: digital penetration of (b)(6) vagina; and

(2) That the accused did so when (b)(6) was substantially incapable of appraising the nature of the sexual act.

"Sexual act" means the penetration, however slight, of the genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

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

The "vulva" is the external genital organs of the female, including the entrance of the vagina and the labia majora and labia minora. "Labia" is the Latin and medically correct term for "lips."

The "genital opening" is the entrance to the vagina, which is the canal that connects the genital opening to the uterus.

There is evidence in this case that indicates that, at the time of the alleged sexual act, the accused may have been under the influence of alcohol. The accused's state of voluntary intoxication, if any, at the time of the offense is not a defense to this offense. Nevertheless, you must consider all evidence in deciding whether the prosecution has proven the elements of the charged offense, beyond a reasonable doubt.

CHG II, SPEC 1: CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN (ARTICLE 133)

In the specification 1 of Charge II, the accused is charged with the offense of Conduct Unbecoming an Officer and a Gentleman. To find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond a reasonable doubt of the following elements:

(1) That at or near Roveredo in Piano, Italy, on or about 24 March 2012, the accused wrongfully entered a bed occupied by (b)(6)

(2) The Accused was married;

(3) (b)(6) was not the accused's wife; and

(4) That, under the circumstances, the accused's conduct was unbecoming an officer and a gentleman.

"Wrongful" means without any legal justification or excuse.

"Conduct unbecoming an officer and a gentleman" means behavior in an unofficial or private capacity which, in dishonoring or disgracing the individual personally, seriously detracts from his standing as a commissioned officer. "Unbecoming conduct" means misbehavior more serious than slight and of a material and pronounced character. It means conduct morally unfitting and unworthy rather than merely inappropriate or unsuitable misbehavior which is more than opposed to good taste or propriety.

CHG II, SPEC 2: CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN (ARTICLE 133)

In the specification 2 of Charge II, the accused is charged with the offense of Conduct Unbecoming an Officer and a Gentleman. To find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond a reasonable doubt of the following elements:

(1) That at or near Roveredo in Piano, Italy, on or about 24 March 2012, the accused wrongfully engaged in sexual contact with (b)(6), to wit: fondling her breasts with his hands;

(2) The Accused was married;

(3) (b)(6) was not the accused's wife; and

(4) That, under the circumstances, the accused's conduct was unbecoming an officer and a gentleman.

I have previously defined "Wrongful" and "Conduct Unbecoming an Officer and a Gentleman."

"Sexual contact" is defined as it was in Specification 1 of Charge I. Specifically, it 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.

CHG II, SPEC 3: CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN (ARTICLE 133)

In the specification 3 of Charge II, the accused is charged with the offense of Conduct Unbecoming an Officer and a Gentleman. To find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond a reasonable doubt of the following elements:

(1) That at or near Roveredo in Piano, Italy, on or about 24 March 2012, the accused wrongfully engaged in a sexual act with (b)(6) to wit: digital penetration of her vagina;

(2) The Accused was married;

(3) (b)(6) was not the accused's wife; and

(4) That, under the circumstances, the accused's conduct was unbecoming an officer and a gentleman.

I have previously defined "Wrongful" and "Conduct Unbecoming an Officer and a Gentleman."

"Sexual act" is defined as it was in Specification 2 of Charge I. Specifically, it means penetration, however slight, of the genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

OTHER INSTRUCTIONS

7-3-1. CIRCUMSTANTIAL EVIDENCE

Evidence may be direct or circumstantial. Direct evidence is evidence which tends directly to prove or disprove a fact in issue. If a fact in issue was whether it rained during the evening, testimony by a witness that he or she saw it rain would be direct evidence that it rained.

On the other hand, circumstantial evidence is evidence which tends to prove some other fact from which, either alone or together with some other facts or circumstances, you may reasonably infer the existence or nonexistence of a fact in issue. If there was evidence the street was wet in the morning, that would be circumstantial evidence from which you might reasonably infer it rained during the night.

There is no general rule for determining or comparing the weight to be given to direct or circumstantial evidence. You should give all the evidence the weight and value you believe it deserves.

7-4-1. STIPULATIONS OF FACT

The parties to this trial have stipulated or agreed to the facts as set forth in Prosecution Exhibits 3 and 4. When counsel for both sides, with the consent of the accused, stipulate and agree to a fact, the parties are bound by the stipulation and the stipulated matters are facts in evidence to be considered by you along with all the other evidence in the case.

7-9-1. EXPERT TESTIMONY

You have heard the testimony of Dr. Howard Taylor and Dr. Rex Frank. They are known as "expert witnesses" because their knowledge, skill, experience, training, or education may assist you in understanding the evidence or in determining a fact in issue. You are not required to accept the testimony of an expert witness or give it more weight than the testimony of an ordinary witness. You should, however, consider their qualifications as experts.

When an expert witness answers a hypothetical question, the expert assumes as true every asserted fact stated in the question. Therefore, unless you find that the evidence establishes the truth of the asserted facts in the hypothetical question, you cannot consider the answer of the expert witness to that hypothetical question.

7-7-1. CREDIBILITY OF WITNESSES

You have the duty to determine the believability of the witnesses. In performing this duty you must consider each witness' intelligence, ability to observe and accurately remember, sincerity and conduct in court, prejudices, and character for truthfulness. Consider also the extent to which each witness is either supported or contradicted by other evidence; the relationship each witness may have with either side; and how each witness might be affected by the verdict.

In weighing any discrepancy by a witness or between witnesses, you should consider whether it resulted from an innocent mistake or a deliberate lie.

Taking all these matters into account, you should then consider the probability of each witness' testimony and the inclination of the witness to tell the truth.

The believability of each witness' testimony should be your guide in evaluating testimony and not the number of witnesses called.

7–11–1. PRIOR INCONSISTENT STATEMENT

You may have heard evidence that prior to trial a witness or witnesses may have made a statement or statements that may be inconsistent with their testimony here in court.

If you believe that any inconsistent statement was made, you may consider the inconsistency in deciding whether to believe that witness's in-court testimony.

You may not consider the earlier statement as evidence of the truth of the matters contained in the prior statement. In other words, you may only use it as one way of evaluating the witness's testimony here in court. You cannot use it as proof of anything else.

For example, if a witness testifies in court that the traffic light was green, and you heard evidence that the witness made a prior statement that the traffic light was red, you may consider that prior statement in evaluating the truth of the in-court testimony. You may not, however, use the prior statement as proof that the light was red.

7-8-1. CHARACTER OF ACCUSED TO SHOW PROBABILITY OF INNOCENCE

To show the probability of his innocence, the defense has produced evidence of the accused's good military character.

In rebuttal the prosecution has produced evidence of the accused failing to counsel other military members regarding wearing their seatbelt and vehicle safety on or about 23 March 2012, as well as evidence bad military character.

Evidence of the accused's character for good military character may be sufficient to cause a reasonable doubt as to his guilt.

On the other hand, evidence of the accused's good military character may be outweighed by other evidence tending to show the accused's guilt and the prosecution's evidence of the accused's poor military character.

7–18. "HAVE YOU HEARD" QUESTIONS TO IMPEACH OPINION

During the testimony of several character witnesses, one or more of them were asked whether they were aware that the accused burned a couch in a restricted area of the flight line without authorization, intentionally peered over a bathroom stall at a female, sang sexually explicit songs at squadron functions, or was verbally abusive toward a subordinate. Those were permissible questions.

To the extent, however, that a witness testified that they were not aware of that conduct, the question does not constitute evidence of that conduct. In those situations, the question was permitted to test the basis of the witnesses' opinion and to enable you to assess the weight you accord their testimony. You may not consider the question for any other purpose.

To the extent that a witness answered that they were aware of such purported conduct, you may consider that witnesses answer. In those situations, the purpose of the question was to test the basis of the witness's opinion, to enable you to assess the weight you accord to their testimony, and to rebut the opinion given. You may not infer from this evidence that the accused is a bad person or has criminal tendencies and that the accused, therefor, committed the offenses charged.

7-9-1. WITNESS OPINION AS TO GUILT OR INNOCENCE – NOT PERMITTED

Only you, the members of the court, determine the credibility of the witnesses and what the facts of this case are. No witness – expert or otherwise - can testify that the alleged victim's or accused's account of what occurred is true or credible, that a witness believes the alleged victim, or that a sexual encounter occurred. To the extent that you believed that SA Matthew Bolduc, another agent, or an expert witness stated that they believed the alleged victim or the accused, that a crime occurred, or that an agent or expert witness opined on the victim or accused's credibility, you may not consider this as evidence that a crime occurred or evidence of the alleged victim or accused's credibility.

As to any statements by a law enforcement agent, this was merely an investigative technique and did not an constitute opinion as to either the Accused's or (b)(6) credibility, or as to whether a crime did or did not occur.

As to the testimony by any expert witness, their testimony did not constitute an opinion as to either the Accused's or (b)(6) credibility, or as to whether a crime did or did not occur. I have previously advised you regarding the use of such testimony and hypothetical questions.

7–19. WITNESS TESTIFYING UNDER A GRANT OF IMMUNITY

Colonel Dean Ostovich testified under a grant of immunity. This means that this witness was ordered to testify truthfully by the convening authority. Under this grant of immunity, nothing the witness said, and no evidence derived from that testimony, can be used against that witness in a criminal trial.

If the witness did not tell the truth, the witness can be prosecuted for perjury. In determining the credibility of this witness, you should consider the fact this witness testified under a grant of immunity along with all the other factors that may affect the witness's believability.

4–1. ACCUSED'S PRE-TRIAL STATEMENT TO INVESTIGATORS

A pretrial statement by the accused has been admitted into evidence as Prosecution Exhibit 1 and 2.

You must decide the weight or significance, if any, such statements deserve under all the circumstances. In deciding what weight or significance, if any, to give to the accused's statements, you should consider the specific evidence offered on the matter, you own common sense and knowledge of human nature, and the nature of any corroborating evidence as well as the other evidence in this trial.

7-12. ACCUSED'S ELECTION NOT TO TESTIFY

The accused has an absolute right to remain silent. You will not draw any inference adverse to the accused from the fact that the accused did not testify as a witness. The fact that the accused has not testified must be disregarded by you.

7–17. "SPILLOVER"—FACTS OF ONE CHARGED OFFENSE TO PROVE ANOTHER

An accused may be convicted based only on evidence before the court not on evidence of a general criminal disposition. Each offense must stand on its own and you must keep the evidence of each offense separate. Stated differently, if you find or believe that the accused is guilty of one offense, you may not use that finding or belief as a basis for inferring, assuming, or proving that he committed any other offense.

If evidence has been presented which is relevant to more than one offense, you may consider that evidence wit respect to each offense to which it is relevant. For example, if a person were charged with stealing a knife and later using that knife to commit another offense, evidence concerning the knife, such as that person being in possession of it or that person's fingerprints being found on it, could be considered with regard to both offenses But the fact that a person's guilt of stealing the knife may have been proven is not evidence that the person is also guilty of any other offense.

The burden is on the prosecution to prove each and every element of each offense beyond a reasonable doubt Proof of one offense carries with it no inference that the accused is guilty of any other offense.

2-5-12. CLOSING SUBSTANTIVE INSTRUCTIONS ON FINDINGS

You are further advised:

First, that the accused is presumed to be innocent until the accused's guilt is established by legal and competent evidence beyond a reasonable doubt;

Second, if there is reasonable doubt as to the guilt of the accused, that doubt must be resolved in favor of the accused, and he must be acquitted;

Third, if there is a reasonable doubt as to the degree of guilt, that doubt must be resolved in favor of the lower degree of guilt as to which there is no reasonable doubt; and

Lastly, the burden of proof to establish the guilt of the accused beyond a reasonable doubt is on the government. The burden never shifts to the accused to establish innocence or to disprove the facts necessary to establish each element of each offense.

A "reasonable doubt" is a conscientious doubt, based upon reason and common sense, and arising from the state of the evidence. Some of you may have served as jurors in civil cases, or as members of an administrative board, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the accused's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the accused is guilty of any offense charged, you must find the accused guilty. If, on the other hand, you think there is a real possibility that the accused is not guilty, you must give the accused the benefit of the doubt and find him not guilty.

Bear in mind that only matters properly before the court as a whole should be considered. In weighing and evaluating the evidence you are expected to use your own common sense, and your knowledge of human nature and the ways of the world. In light of all the circumstances in the case, you should consider the inherent probability or improbability of the evidence. Bear in mind you may properly believe one witness and disbelieve several other witnesses whose testimony conflicts with the one. The final determination as to the weight or significance of the evidence and the credibility of the witnesses in this case rests solely upon you.

You must disregard any comment or statement or expression made by me during the course of the trial that might seem to indicate any opinion on my part as to whether the accused is guilty or not guilty since you alone have the responsibility to make that determination. Each of you must impartially decide whether the accused is guilty or not guilty according to the law I have given you, the evidence admitted in court, and your own conscience.

2-5-13. FINDINGS ARGUMENT

At this time you will hear argument by counsel. You will hear an exposition of the facts by counsel for both sides as they view them. Bear in mind that the arguments of counsel are not evidence. Argument is made by counsel to assist you in understanding and evaluating the evidence, but you must base the determination of the issues in the case on the evidence as

you remember it and apply the law as I instruct you. Counsel may refer to instructions I have given you. If there is any inconsistency between what counsel have said about the instructions and the instructions which I gave you, you must accept my statement as being correct. As the government has the burden of proof, trial counsel may open and close.

[COUNSEL FINDINGS ARGUMENT]

2-5-14. FINISH FINDINGS INSTRUCTIONS

The following procedural rules will apply to your deliberations and must be observed: The influence of superiority in rank will not be employed in any manner in an attempt to control the independence of the members in the exercise of their own personal judgment. Your deliberation should include a full and free discussion of all the evidence that has been presented. After you have completed your discussion, then voting on your findings must be accomplished by secret, written ballot, and all members of the court are required to vote.

The order in which the charges and specifications are to be voted on should be determined by the president subject to objection by a majority of the members. You vote on the specification specifications under the charge before you vote on the charge. If you find the accused guilty of any specification under a charge, the finding as to that charge must be guilty.

The junior member will collect and count the votes. The count will then be checked by the president who will immediately announce the result of the ballot to the members.

The concurrence of at least two-thirds of the members present when the vote is taken is required for any finding of guilty. Since we have 5 members, that means 4 members must concur in any finding of guilty.

If you have at least 4 votes of guilty of any offense then that will result in a finding of guilty for that offense. If fewer than 4 members vote for a finding of guilty, then your ballot resulted in a finding of not guilty bearing in mind the instructions I just gave you about voting on the lesser included offenses.

You may reconsider any finding prior to its being announced in open court. However, after you vote, if any member expresses a desire to reconsider any finding, open the court and the president should announce only that reconsideration of a finding has been proposed. Do not state:

(1) whether the finding proposed to be reconsidered is a finding of guilty or not guilty, or

(2) which specification and charge is involved.

I will then give you specific further instructions on the procedure for reconsideration.

As soon as the court has reached its findings, and I have examined the Findings Worksheet, the findings will be announced by the president in the presence of all parties. As an aid in

putting your findings in proper form and making a proper announcement of the findings, the President may use the Findings Worksheet which the Bailiff may now hand to the president.

As indicated on the Findings Worksheet, the first portion will be used if the accused is either completely acquitted or convicted of the charges and specifications. The second portion will be used if the accused is convicted of some but not all of the offenses. Once you have finished circling what is applicable, please line out or cross out everything that is not applicable (as well as everything in bold) so that when I check your findings I can ensure that they are in proper form.

The worksheet is provided only as an aid in finalizing your decision. The president will use this worksheet to announce the findings in open court.

Any questions about the findings worksheet?

MBRS: (Respond.)

If, during your deliberations, you have any questions, open the court, and I will assist you. The Uniform Code of Military Justice prohibits me and everyone else from entering your closed session deliberations. As I mentioned at the beginning of the trial, you must all remain together in the deliberation room during deliberations. While in your closed-session deliberations, you may not make communications to or receive communications from anyone outside the deliberation room, by telephone or otherwise. If you have need of a recess, if you have a question, or when you have reached findings, you may notify the Bailiff, who will then notify me that you desire to return to open court to make your desires or findings known. Further, during your deliberations, you may not consult the *Manual for Courts-Martial* or any other legal publication unless it has been admitted into evidence.

Members of the court, when you close to deliberate and vote on the findings, each of you must resolve the ultimate question of whether the accused is guilty or not guilty based upon the evidence presented here in court and upon the instructions which I will give you. My duty is to instruct you on the law. Your duty is to determine the facts, apply the law to the facts, and determine the guilt or innocence of the accused. The law presumes the accused to be innocent of the charges against him.

During the trial some of you took notes. You may take your notes with you into the deliberation room. However, your notes may not be read or shown to other court members.

I will advise you of the elements of each offense alleged.

CHG I, SPEC 1: ABUSIVE SEXUAL CONTACT (ARTICLE 120)

In the specification 1 of Charge I, the accused is charged with the offense of Abusive Sexual Contact. To find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond a reasonable doubt of the following elements:

(1) That at or near Roveredo in Piano, Italy, on or about 24 March 2012, the accused engaged in sexual contact, to wit: fondling (b)(6) breasts with his hands;

(2) That the accused did so when (b)(6) was substantially incapable of appraising the nature of the sexual contact.

"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.

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

CONSENT DEFENSE – ABUSIVE SEXUAL CONTACT

Any evidence that Ms. (b)(6) consented to the sexual contact concerning the offense of Abusive Sexual Contact, as alleged in specification 1 of Charge I, is relevant to whether the government has proven the elements of Abusive Sexual Contact, beyond a reasonable doubt, and must be considered by you.

"Consent" means words or overt acts indicating a freely given agreement to the sexual conduct 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 the accused's use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating relationship by itself or the manner of dress of the person involved with the accused in the sexual conduct at issue shall not constitute consent.

A person cannot consent to sexual activity if that person is:

Appellate Exhibit XLIV
Marked Page 1031

1) substantially incapable of appraising the nature of the sexual conduct at issue due to mental impairment or unconsciousness resulting from consumption of alcohol, drugs, a similar substance, or otherwise; or

2) substantially incapable of appraising the nature of the sexual conduct at issue due to mental disease or defect which renders the person unable to understand the nature of the sexual conduct at issue; or

3) substantially incapable of physically declining participation in the sexual conduct at issue; or

4) substantially incapable of physically communicating unwillingness to engage in the sexual conduct at issue.

Based on how the element of substantially incapable is defined, an alleged victim's lack of consent is a required element of the offense of Abusive Sexual Contact. Because the government must prove every element of an alleged offense beyond a reasonable doubt, the prosecution has the burden to prove, beyond a reasonable doubt, that consent did not exist.

Therefore, to find the accused guilty of the offense of Abusive Sexual Contact, as alleged in Specification 1 of Charge I, you must be convinced beyond a reasonable doubt that, at the time of the sexual contacts alleged, (b)(6) did not consent.

MISTAKE OF FACT AS TO CONSENT DEFENSE – ABUSIVE SEXUAL CONTACT

Further, you must also consider the affirmative defense of mistake on the part of the accused whether (b)(6) consented to the sexual contact concerning the offense of Abusive Sexual Contact, as alleged in Specification 1 of Charge I.

Mistake of fact as to consent is a defense to a charge of Abusive Sexual Contact.

"Mistake of fact as to consent" means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual conduct consented. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person consented. Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. "Negligence" is the absence of due care. "Due care" is what a reasonably careful person would do under the same or similar circumstances.

As to the affirmative defense of mistake of fact as to consent in an allegation of Abusive Sexual Contact, the defense has the burden to prove, by a preponderance of the evidence that the mistake of fact as to consent did exist. Proof by a preponderance of the evidence is evidence that a fact is more likely true than not true.

Therefore, even if you find that the government has proven every element of Abusive Sexual Contact, beyond a reasonable doubt, you must still find the accused not guilty of this offense if you are convinced, by a preponderance of the evidence that, at the time of the charged Abusive Sexual Contact, the accused was under a reasonable, mistaken belief that the alleged victim consented to the sexual contact.

If, however, the defense did not prove, by a preponderance of the evidence, that the accused was reasonably mistaken as to whether the alleged victim consented to the sexual contact, the defense does not exist.

There is evidence in this case that indicates that, at the time of the alleged abusive sexual contact, the accused may have been under the influence of alcohol. The accused's state of voluntary intoxication, if any, at the time of the offense is not relevant to mistake of fact. A mistaken belief that (b)(6) consented must be that which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense. Voluntary intoxication does not permit what would be an unreasonable belief in the mind of a sober person to be considered reasonable because the person is intoxicated.

Even if you determine that the defense does not exist, however, you must consider any evidence going to this affirmative defense in deciding whether the prosecution has proven the elements of the charged offense, beyond a reasonable doubt.

LESSER INCLUDED OFFENSE OF WRONGFUL SEXUAL CONTACT

The offense of wrongful sexual contact is a lesser-included offense of the offense set forth in Specification 1 of Charge I. When you vote, if you find the accused not guilty of the offense charged, that is Abusive Sexual Contact, then you should next consider the lesser-included offense of Wrongful Sexual Contact, in violation of Article 120. To find the accused guilty of this lesser offense, you must be convinced by legal and competent evidence beyond a reasonable doubt of the following elements:

(1) That, at or near Roveredo in Piano, Italy, on or about 24 March 2012, the accused engaged in sexual contact, to wit: fondling (b)(6) breasts with his hands;

(2) That such sexual contact was without the permission of (b)(6) and

(3) That such sexual contact was wrongful.

I have previously defined “sexual contact” and “consent”

“Wrongful” means without legal justification or lawful authorization.

“Without permission” means without consent.

The prosecution has the burden to prove lack of consent beyond a reasonable doubt. Therefore, to find the accused guilty of the offense of wrongful sexual contact, as alleged in Specification 1 of Charge I, you must be convinced beyond a reasonable doubt that, at the time of the sexual contact alleged, Ms. (b)(6) did not consent.

As to the lesser included offense of Wrongful Sexual Contact, you must also consider the defense of mistake of fact as to consent.

I have previously defined “mistake of fact as to consent.” I have previously explained voluntary intoxication as it relates to mistake of fact as to consent.

The offense charged, Abusive Sexual Contact, and the lesser included offense of Wrongful Sexual Contact, differ primarily in that the offense charged requires, as essential elements, that you be

convinced beyond a reasonable doubt that the contact occurred when (b)(6) was substantially incapable of appraising the nature of the sexual contact, whereas, the lesser offense of Wrongful Sexual Contact does not include such an element but still does require that you be satisfied beyond a reasonable doubt that the contact was wrongful and without the permission of (b)(6)

CHG I, SPEC 2: AGGRAVATED SEXUAL ASSAULT (ARTICLE 120)

In the specification 2 of Charge I, the accused is charged with the offense of Aggravated Sexual Assault. To find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond a reasonable doubt of the following elements:

(1) That at or near Roveredo in Piano, Italy, on or about 24 March 2012, the accused engaged in a sexual act, to wit: digital penetration of (b)(6) vagina; and

(2) That the accused did so when (b)(6) was substantially incapable of appraising the nature of the sexual act.

"Sexual act" means the penetration, however slight, of the genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

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

The "vulva" is the external genital organs of the female, including the entrance of the vagina and the labia majora and labia minora. "Labia" is the Latin and medically correct term for "lips."

The "genital opening" is the entrance to the vagina, which is the canal that connects the genital opening to the uterus.

CONSENT DEFENSE – AGG SEX ASSAULT

Any evidence that Ms. (b)(6) consented to the sexual act concerning the offense of Aggravated Sexual Assault, as alleged in Specifications 2 of Charge I, is relevant to whether the government has proven the elements of Aggravated Sexual Assault, beyond a reasonable doubt, and must be considered by you.

"Consent" was previously defined in Specification 1 of Charge I. Specifically, it means words or overt acts indicating a freely given agreement to the sexual conduct 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 the accused's use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating relationship by itself or the manner of dress of the person involved with the accused in the sexual conduct at issue shall not constitute consent.

A person cannot consent to sexual activity if that person is:

1) substantially incapable of appraising the nature of the sexual conduct at issue due to mental impairment or unconsciousness resulting from consumption of alcohol, drugs, a similar substance, or otherwise; or

2) substantially incapable of appraising the nature of the sexual conduct at issue due to mental disease or defect which renders the person unable to understand the nature of the sexual conduct at issue; or

3) substantially incapable of physically declining participation in the sexual conduct at issue; or

4) substantially incapable of physically communicating unwillingness to engage in the sexual conduct at issue.

Based on how the elements of substantially incapable are defined, an alleged victim's lack of consent is a required element of the offense of Aggravated Sexual Assault. Because the government must prove every element of an alleged offense beyond a reasonable doubt, the prosecution has the burden to prove, beyond a reasonable doubt, that consent did not exist.

Therefore, to find the accused guilty of the offense of Aggravated Sexual Assault, as alleged in Specification 2 of Charge I, you must be convinced beyond a reasonable doubt that, at the time of the sexual act alleged (b)(6) did not consent.

MISTAKE OF FACT AS TO CONSENT DEFENSE – AGG SEX ASSAULT

Further, you must also consider the affirmative defense of mistake on the part of the accused whether (b)(6) consented to the sexual acts concerning the offenses of Aggravated Sexual Assault, as alleged in Specifications 2 of Charge I.

Mistake of fact as to consent is a defense to a charge of Aggravated Sexual Assault.

The "mistake of fact as to consent" defense was previously defined in Specification 1 of Charge I. Specifically, it means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual conduct consented. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person consented.

Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. "Negligence" is the absence of due care. "Due care" is what a reasonably careful person would do under the same or similar circumstances.

As to the affirmative defense of mistake of fact as to consent, the defense has the burden to prove, by a preponderance of the evidence, that the mistake of fact as to consent did exist. Proof by a preponderance of the evidence is evidence that a fact is more likely true than not true.

Therefore, even if you find that the government has proven every element of Aggravated Sexual Assault, beyond a reasonable doubt, you must still find the accused not guilty of this offense if you are convinced, by a preponderance of the evidence that, at the time of the charged Aggravated Sexual Assault, the accused was under a reasonable, mistaken belief that the alleged victim consented to the sexual acts.

If, however, the defense did not prove, by a preponderance of the evidence, that the accused was reasonably mistaken as to whether the alleged victim consented to the sexual act, the defense does not exist.

There is evidence in this case that indicates that, at the time of the alleged aggravated sexual assault, the accused may have been under the influence of alcohol. The accused's state of voluntary intoxication, if any, at the time of the offense is not relevant to mistake of fact. A mistaken belief that Ms. (b)(6) consented must be that which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense. Voluntary intoxication does not permit what would be an unreasonable belief in the mind of a sober person to be considered reasonable because the person is intoxicated.

Even if you determine that the defense does not exist, however, you must consider any evidence going to this affirmative defense in deciding whether the prosecution has proven the elements of the charged offense, beyond a reasonable doubt.

Burden of Proof for consent and mistake of fact as to consent – Abusive Sexual Contact and Aggravated Sexual Assault (substantially incapable of appraising)

After reviewing CAAF's decisions in *US v. Neal*, *US v. Prather*, and *US v. Medina* – as well as AFCCA's decision in *US v. Boore* (Msc. Dkt. No. 2011-01), as well as A120(r), A120(t)(14-16), and RCM 916(b)(1,4), this court believes that the statutorily & constitutionally required burdens of proof as to affirmative defenses in A120 are as follows:

As to an aggravated sexual assault upon someone substantial incapable of appraising the contact or act, once some evidence of the defense of consent is raised, the government must prove, beyond a reasonable doubt, that the defense does not exist. As to a defense of mistake of fact as to consent, however, it is this court's position that the defense has the burden by a preponderance of the evidence to prove the mistake of fact as to consent defense.

Analytical approach:

To clarify the court's position for the record.

1. The court notes that the 5 CAAF judges and their decision in Prather ... specifically that the second burden shift in Art 120(t)(16) is a nullity. In effect, this court's understanding is that the proper reading of the statute results in severing the second burden shift from Art 120(t)(16).

2. For defenses that overlap – but are not necessarily subsumed – by an element of the charged offense, this court applies Art 120(t)(16) as written and instruct the members accordingly. In such situations, however, it is necessary for the court to ensure that any evidence that may pertain to both the offense and the defense is considered by the members in determining whether the government has proven the elements of the crime beyond a reasonable doubt.

3. For defenses that are necessarily subsumed by an element of the offense, I do not apply Art 120(t)(16) at all and instead recognize that the defense – in actuality – is part of the government's required proof as an element of the offense.

Further Explanation:

This court reads CAAF's *US v. Neal*, *US v. Prather*, and *US v. Medina* as hinging on whether the defense at issue merely overlaps an element of the charged offense – or is necessarily subsumed by an element that the government must prove beyond a reasonable doubt. If the defense is subsumed by an element that the government MUST prove that the defense does not apply BRD ... the defense can not constitutionally have a burden as to that defense. To hold otherwise, would effectively shift the government's burden of proof as to the element of the charged offense onto the defense. If, on the other hand, the potential defense merely overlaps an element of the crime, then it is permissible to have the defense prove the defense by a preponderance of the evidence in accordance with Article

120(t)(16). Because of the overlap, however, it would be necessary to specifically instruct the members that evidence of the defense must also be considered in determining whether the government has met their burden beyond a reasonable doubt.

As to the relationship between the element of "substantially incapable of appraising" and the defense of "consent," my reading of *US v. Prather* was that CAAF held that "consent" was necessarily subsumed within the "substantially incapacitated" element and it constitutionally required the gov't to disprove a potential consent defense BRD when evidence was raised.[1] In other words, for an accused to show that an alleged victim actually consented would necessarily result in the government failing to satisfy the substantially incapacitated element of the offense. Consequently, in that limited situation, it would be unconstitutional to suggest that the defense had a burden as to an alleged victim's actual consent. To instruct the members otherwise creates an error of constitutional dimensions. This analysis is equally valid as it applies to "substantially incapable of appraising the sexual act/contact."

Turning to the relationship between the element of "substantially incapable" and the defense of "mistake of fact as to consent," I find that the mistake of fact as to consent merely overlaps the "substantially incapable" element. In other words, the members could find that the government proved this element beyond a reasonable doubt, yet still conclude that there was a reasonable mistake of fact as to consent. Because of this, the application of Article 120(t)(16) that purports to place the burden of affirmative defenses on the defense, by a preponderance of the evidence, is constitutional... at least as long as the members are instructed that evidence to this offense is also relevant to whether the government has proven the elements of the offense beyond a reasonable doubt.

Consideration of AFCCA's US v. Boore decision

In analyzing this issue, the Court is cognizant of AFCCA's decision in *US v. Boore* and footnote 5 that suggests, in dicta, that an appropriate approach to the mistake of fact as to consent defense would mirror that as to consent.

In *Boore*, AFCCA chose to utilize the doctrine of severance to sever the portion of Article 120(t)(16) that provides that the accused has the burden of proof, by a preponderance of the evidence, to prove the existence of an affirmative defense. By severing this portion, AFCCA reasoned, they were then left with the "second burden shift" of Art 120(t)(16) that states that the prosecution has the burden of proof, beyond a reasonable doubt, to demonstrate that there is not an affirmative defense.

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[1] For purposes of determining the proper the burden of proof and proper construction of Article 120 as it applies to affirmative defense, this court believes that this analysis applies equally for an alleged victim who is either "substantially incapable of appraising the sexual act/contact" or "substantially incapacitated."

Footnote 5, however, appears to inadvertently contradict the holdings of CAAF in *US v. Neal, US v. Prather, and US v. Medina.*

As an initial matter, CAAF held in *Neal* that the defense's initial burden could be applied constitutionally as applied. The generalized approach suggested in footnote 5 of *Boore* does not address this apparent inconsistency.

Secondly, CAAF held in Prather that it was the second burden shift that was the nullity. At least to this point, all five CAAF judges agreed. The generalized severance approach suggested by the benchbook and by AFCCA in footnote 5 subverts this point by relying on the "nullified" 2nd burden shift to save the initial burden shift.

QUESTION FROM A COURT MEMBER

LtCol Rood
Court Member's Grade and Name

Name of Witness (if any)

QUESTION(S) *(For witnesses, state question exactly like you would like it asked)*:
Request to see the inside of the house.

COUNSEL REVIEW

PROSECUTION:__________(INITIALS)
☐ NO OBJECTION
☐ REQUEST 39(a)
☐ OBJECT – *Grounds:*

DEFENSE:__________(INITIALS)
☐ NO OBJECTION
☐ REQUEST 39(a)
☐ OBJECT – *Grounds:*

APPELLATE EXHIBIT XLVI

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SENTENCE WORKSHEET

PRESIDENT: Lieutenant Colonel James H. Wilkerson, this court-martial sentences you,

NO PUNISHMENT

☐ To no punishment.

REPRIMAND

☐ To be reprimanded.
NOTE: The court may not specify the terms of wording of a reprimand.

MONETARY PENALTIES

☐ To forfeit all pay and allowances.

☐ To forfeit $__________.00 of your pay per month for (______ years) (and) (______ months).
NOTE: Forfeitures should be specified in whole dollar amounts. Any forfeitures in excess of one month should specify the amount per month to be deducted from the member's pay. Forfeitures for one year or more should be expressed in year(s) and month(s).

☐ To pay to the United States a fine of $__________.00.
NOTE: Ordinarily, a fine should not be adjudged unless the accused was unjustly enriched by the offense. You may adjudge both a fine and forfeitures as part of your sentence.

☐ To pay to the United States a fine of $__________.00 and to be (further) confined until said fine is paid, but for not more than (______ years) (and) (______ months) (and) (______ days) (in addition to the confinement adjudged below).

RESTRAINT

☒ To be confined for (1 years) (and) (______ months) (and) (______ days).
NOTE: The court may not specify the place or manner of confinement. Confinement for one year or more should be expressed in year(s) and month(s). Three-fourths of the members must concur in a sentence to confinement in excess of 10 years.

☐ To be restricted to the limits of (your base) (__________________________________)
for a period of (______ months) (and) (______ days).
NOTE: Restriction may not exceed two months.

PUNITIVE DISCHARGE

☒ To be dismissed from the service.

NOTE: Any member may propose a sentence. Each proposal shall be in writing and shall contain the complete sentence proposed. After discussion, the court should vote on the proposed sentences, beginning with the lightest, until a sentence is adopted by vote of the required number of members.

The court may not alter the formats on this worksheet without consulting with the military judge in open court. After a sentence is adopted by vote of the required number of members, the boxes corresponding to the adjudged punishment should be marked and the proper figures filled in.

Read all lines which are marked. Do not read the titles or italicized notes.

XLVII

Appellate Exhibit

Page Marked 1064

Members of the court, you are about to deliberate and vote on the sentence in this case. It is the duty of each member to vote for a proper sentence for the offenses of which the accused has been found guilty. Your determination of the kind and amount of punishment, if any, is a grave responsibility requiring the exercise of wise discretion. Although you must give due consideration to all matters in mitigation and extenuation, as well as to those in aggravation, you must bear in mind that the accused is to be sentenced only for the offenses which he has been found guilty.

The offenses are one for sentencing purposes. Therefore, in determining an appropriate sentence in this case, you must consider the offenses as one offense.

You must not adjudge an excessive sentence in reliance upon possible mitigating action by the convening or higher authority.

A single sentence shall be adjudged for all offenses of which the accused has been found guilty.

MAXIMUM PUNISHMENT

The maximum punishment that may be adjudged in this case is:

a. Forfeiture of all pay and allowances;

b. Confinement for 30 years; and

c. Dismissal from the service.

The maximum punishment is a ceiling on your discretion. You are at liberty to arrive at any lesser legal sentence.

In adjudging a sentence, you are restricted to the kinds of punishment which I will now describe or you may adjudge no punishment. There are several matters which you should consider in determining an appropriate sentence. You should bear in mind that our society recognizes five principal reasons for the sentence of those who violate the law. They are rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of his crimes and his sentence from committing the same or similar offenses. The weight to be given any or all of these reasons, along with all other sentencing matters in this case, rests solely within your discretion.

REPRIMAND:

This court may adjudge a reprimand, being in the nature of a censure. The court shall not specify the terms or wording of any adjudged reprimand.

RESTRICTION:

This court may adjudge restriction to limits for a maximum period not exceeding two months. For such a penalty, it is necessary for the court to specify the limits of the restriction and the period it is to run. Restriction to limits will not exempt an accused from any assigned military duty.

CONFINEMENT:

As I have already indicated, this court may sentence the accused to confinement for 30 years. A sentence to confinement should be adjudged in either full days, full months, or full years; fractions (such as one-half or one-third) should not be employed. So, for example, if you do adjudge confinement, confinement for a month and a half should instead be expressed as confinement for 45 days. This example should **not** be taken as a suggestion, only an illustration of how to properly announce your sentence.

FORFEITURES—ALL PAY AND ALLOWANCES:

This court may sentence the accused to forfeit all pay and allowances. A forfeiture is a financial penalty which deprives an accused of military pay as it accrues. In determining the amount of forfeiture, if any, the court should consider the implications to the accused of such a loss of income. Unless a total forfeiture is adjudged, a sentence to a forfeiture should include an express statement of a whole dollar amount to be forfeited each month and the number of months the forfeiture is to continue. The accused is in pay grade O-5 with over 20 years of service, the total basic pay being $8199.30 per month.

This court may adjudge any forfeiture up to and including forfeiture of all pay and allowances.

EFFECT OF ARTICLE 58B

Any sentence which includes either confinement for more than six months *or* some amount of confinement along with a dismissal will require the accused, by operation of law, to forfeit all pay and allowances during the period of confinement. However, if the court wishes to adjudge any forfeitures of pay and/or pay and allowances, the court should explicitly state the forfeiture as a separate element of the sentence.

58b AND IMPACT ON FAMILY

The trial or defense counsel may make reference to the availability or lack thereof of monetary support for the accused's family members. Again, either confinement for more than six months, or some amount of confinement along with a punitive discharge, then the accused will forfeit all pay and allowances due him during any period of confinement.

However, when the accused has dependents, the convening authority may direct that any or all of the forfeiture of pay which the accused otherwise by law would be required to forfeit be paid to the accused's dependents for a period not to exceed six months. This action by the convening authority is purely discretionary. You should not rely upon the convening authority taking this action when considering an appropriate sentence in this case.

FINE—GENERAL COURT-MARTIAL:

This court may adjudge a fine either in lieu of, or in addition to, forfeitures. A fine, when ordered executed, makes the accused immediately liable to the United States for the entire amount of money specified in the sentence.

In your discretion, you may adjudge a period of confinement to be served in the event the fine is not paid. Such confinement to enforce payment of the fine would be in addition to any other confinement you might adjudge and the fixed period being an equivalent punishment to the fine. The total of all confinement adjudged, however, may not exceed the maximum confinement for the offenses in this case.

PUNITIVE DISCHARGE:

The stigma of a punitive discharge is commonly recognized by our society. A punitive discharge will place limitations on employment opportunities and will deny the accused other advantages which are enjoyed by one whose discharge characterization indicates that he has served honorably. A punitive discharge will affect an accused's future with regard to his legal rights, economic opportunities, and social acceptability.

In addition, a punitive discharge terminates the accused's status and the benefits that flow from that status, including the possibility of becoming a military retiree and receiving retired pay and benefits.

This court may adjudge a dismissal. You are advised that a sentence to a dismissal of a commissioned officer is, in general, the equivalent of a dishonorable discharge of a noncommissioned officer or an enlisted Airman. A dismissal deprives one of substantially all benefits administered by the Veteran's Administration and the Air Force establishment. It should be reserved for those who, in the opinion of the court, should be separated under conditions of dishonor after conviction of serious offenses of a civil or

military nature warranting such severe punishment. Dismissal, however, is the only type of discharge the court is authorized to adjudge in this case.

NO PUNISHMENT:

Finally, if you wish, this court may sentence the accused to no punishment.

OTHER INSTRUCTIONS

MATTERS TO CONSIDER:

In determining the sentence, you should consider all the facts and circumstances of the offenses of which the accused has been convicted and all matters concerning the accused whether presented before or after findings. Thus, you should consider the accused's background, character, service record, combat record, all matters in extenuation and mitigation, and any other evidence he presented. You should also consider any matters in aggravation.

ACCUSED'S UNSWORN STATEMENT ELECTION:

The court will not draw any adverse inference from the fact that the accused has elected to make a statement which is not under oath. An unsworn statement is an authorized means for an accused to bring information to the attention of the court, and must be given appropriate consideration. The accused cannot be cross-examined by the prosecution or interrogated by court members or me upon an unsworn statement, but the prosecution may offer evidence to rebut statements of fact contained in it. The weight and significance to be attached to an unsworn statement rests within the sound discretion of each court member. You may consider that the statement is not under oath, its inherent probability or improbability, whether it is supported or contradicted by evidence in the case, as well as any other matter that may have a bearing upon its credibility. In weighing an unsworn statement, you are expected to use your common sense and your knowledge of human nature and the ways of the world.

The accused's unsworn statement included the accused's personal belief that he would be required to register as a sex offender. An unsworn statement is a proper means to bring information to your attention, and you must give it appropriate consideration. Your deliberations should focus on an appropriate sentence for the accused for the offenses of which the accused stands convicted. However, as a general evidentiary matter, evidence regarding possible registration as a sex offender and the potential of an administrative discharge, and the consequences thereof, would be characterized as a collateral consequences, and thus inadmissible outside of the context of an unsworn statement. This is so because:

1. Your duty in sentencing is to adjudge an appropriate sentence for this accused, under these facts, in accordance with my instructions. Possible collateral consequences of the sentence, beyond those upon which you are instructed, other than mentioned above, should not be a part of your deliberations.

2. As to sex offender registration requirements, they may differ between jurisdictions such that registration requirements, and the consequences thereof, are not necessarily predictable with any degree of accuracy.

3. Whether or not the accused will be or should be registered as a sex offender is not a decision before you.

In short, after due consideration of the unsworn statement and my prior instructions regarding the nature of an unsworn statement, the consideration and weight you give the reference is up to you in your sound discretion. Your duty is to adjudge an appropriate sentence for this accused in accordance with these instructions.

ARGUMENT FOR A SPECIFIC SENTENCE:

During argument, counsel may recommend that you consider a specific sentence in this case. You are advised that the arguments of counsel and their recommendations are only their individual suggestions and may not be considered as the recommendation or opinion of anyone other than such counsel.

CONCLUDING SENTENCING INSTRUCTIONS

When you close to deliberate and vote, only the members will be present. I remind you that you all must remain together in the deliberation room during deliberations. I also remind you that you may not allow any unauthorized intrusion into your deliberations. You may not make communications to or receive communications from anyone outside the deliberations room, by telephone or otherwise. Should you need to take a recess or have a question, or when you have reached a decision, you may notify the Bailiff, who will then notify me of your desire to return to open court to make your desires or decision known.

Your deliberations should begin with a full and free discussion on the subject of sentencing. The influence of superiority in rank shall not be employed in any manner to control the independence of members in the exercise of their judgment. When you have completed your discussion, then any member who desires to do so may propose a sentence. You do that by writing out on a slip of paper a complete sentence. The junior member collects the proposed sentences and submits them to the president, who will arrange them in order of their severity.

You then vote on the proposed sentences by secret written ballot. All must vote; you may not abstain. Vote on each proposed sentence in its entirety, beginning with the lightest, until you arrive at the required concurrence, which is two-thirds or 4 members. A sentence which includes confinement in excess of ten years requires the concurrence of three-fourths which, in this case, is also 4 members.

The junior member will collect and count the votes. The count is then checked by the president who shall announce the result of the ballot to the members. If you vote on all of the proposed sentences without arriving at the required concurrence, you may then repeat the process of discussion, proposal of sentences and voting. But once a proposal has been agreed to by the required concurrence, then that is your sentence.

You may reconsider your sentence at any time prior to its being announced in open court. If after you determine your sentence, any member suggests you reconsider the sentence, open the court and the president should announce that reconsideration has been proposed without reference to whether the proposed reballot concerns increasing or decreasing the sentence. I will give you specific instructions on the procedure for reconsideration at that time.

As an aid in putting the sentence in proper form, the court may use the Sentence Worksheet which the Bailiff may now hand to the president.

BAILIFF: (Comply.)

Extreme care should be exercised in using this worksheet and in selecting the sentence form which properly reflects the sentence of the court. If you have any questions concerning sentencing matters, you should request further instructions in open court in the presence of all parties to the trial. In this connection, you are again reminded that you may not consult the Manual for Courts-Martial or any other publication or writing not properly admitted or received during this trial. These instructions must not be interpreted as indicating an opinion as to the sentence which should be adjudged, for you alone are responsible for determining an appropriate sentence in this case. In arriving at your determination, you should select the sentence which will best serve the ends of good order and discipline, the needs of the accused, and the welfare of society. When the court has determined a sentence, the inapplicable portions of the Sentence Worksheet should be lined through. When the court returns, I will examine the Sentence Worksheet. The president will then announce the sentence.

POST-TRIAL RIGHTS ADVISEMENT
United States v. Lt Col James H. Wilkerson

1. **INTRODUCTION.** If you are convicted in a court-martial proceeding, you have several important post-trial rights, including the right to submit clemency matters to the convening authority and the right of appeal. As you read the following information, make a note of any questions so that you may discuss them with your counsel.

2. **DEFERMENT**

a. **DEFERMENT OF CONFINEMENT**: The convening authority may grant a postponement to the actual time that you enter confinement so that you can take care of personal business. It normally lasts a day or so and can be requested through your counsel. Unless you have been granted a deferment, immediately after a sentence to confinement has been announced, you will be escorted from the base legal office by personnel from the confinement facility. A deferment gives you a chance to get your personal affairs in order. Be aware, however, that the convening authority is not obligated to grant your request, so it is wise to be prepared to enter confinement at the end of the trial.

b. **DEFERMENT OR WAIVER OF FORFEITURE OF PAY**: Unless deferred or waived by the convening authority, forfeitures of pay and allowances up to the jurisdictional limit of the court begin immediately upon the announcement of sentence if that sentence includes confinement for more than six months, or confinement for six months or less and a punitive dismissal. The jurisdictional limit of a general court-martial is total forfeitures. The convening authority has the power to waive any or all of the forfeitures for a period not to exceed six months so as to direct an involuntary allotment to provide for the support of your dependents. If your sentence does not include a punitive dismissal and you are sentenced to six months confinement or less, this automatic forfeiture rule incident to confinement does not apply. However, this does not mean that forfeitures of pay will not be part of your adjudged sentence. If your sentence includes forfeitures, and the automatic forfeiture rule incident to confinement does not apply, any adjudged forfeitures become effective 14 days after the announcement of the sentence by the court, or when the convening authority approves the sentence, whichever is earlier. Usually, more than 14 days will elapse before the convening authority approves any adjudged sentence, so it is unlikely that any such forfeitures will become effective before 14 days have elapsed. You have the option of requesting that the convening authority defer the imposition of any forfeitures until after he or she takes final action. Unless a deferment of the forfeitures is requested, and the convening authority grants that request, the forfeitures will be effective no later than 14 days after the announcement of sentence.

3. **SJA'S POST-TRIAL REVIEW AND DEFENSE COUNSEL'S REBUTTAL**: Immediately after the court-martial is adjourned, several administrative steps are taken. The court reporter will type a complete record of trial and serve a copy on the trial counsel, defense counsel, and military judge, who will authenticate it and return it to the base legal office. This process usually takes three to four weeks. The SJA for the convening authority reviews the record of trial and advises the convening authority on whether the court-martial was lawfully constituted and had jurisdiction over the accused and each offense, whether any errors were committed which materially prejudiced your substantial rights, whether there is enough evidence in the record to support each finding of guilty, and whether the sentence is lawful. When this is complete, it is sent with the record of trial to the defense counsel for rebuttal. The defense

counsel has 10 days in which to send a response to the convening authority pointing out anything considered to be erroneous, inadequate, or misleading in the SJA's review. The defense counsel is also permitted to comment on any other matter, including clemency, in this rebuttal.

4. **CLEMENCY**: The basic concept of the clemency process is to give the convening authority additional information to help him or her determine a just sentence in your case. He or she has the options of setting aside the findings and/or the sentence, reducing the sentence, and suspending some portion of the sentence, including a dismissal. Before the convening authority acts on your case, you will have an opportunity to submit matters to him or her for his or her consideration. You will have 10 days from the date a copy of the authenticated record of trial, or, if applicable, the recommendation of the SJA is served on you, or upon your defense counsel in your absence, to submit your matters for the convening authority's consideration.

5. **ACTION BY THE CONVENING AUTHORITY**: Once the convening authority has received both the SJA review and the defense counsel's rebuttal, he or she will take action in the case. Normally, this occurs within one or two months of the date of trial. Historically, the sentence awarded at the trial, as limited by any pretrial agreement, is the sentence approved by the convening authority. However, the convening authority may for any reason disapprove a legal sentence, mitigate (lessen) the sentence, or change a punishment to one of a different nature, so long as the severity is not increased. If a facility other than the one you are stationed at is designated, you can usually expect a two to three month delay in transferring there due to administrative processing time. The confinement NCO will keep you informed in this area.

6. **APPELLATE RIGHTS**: The most important thing for you to know about appellate rights is that you should sign an AF Form 304 requesting appellate defense counsel to represent you in any appellate proceedings. You have the option of waiving appellate review, but in most cases that would be unwise. You have little to gain and a lot to lose by doing so. Be aware also that if at any point you submit a waiver or withdraw your appeal, it is irrevocable. This decision should be discussed thoroughly with your defense counsel. Unless you have waived or withdrawn your appeal, you have various appellate routes, depending upon your sentence.

7. **REVIEW BY THE U.S. AIR FORCE COURT OF CRIMINAL APPEALS**: Under Article 66, UCMJ, the Air Force Court of Criminal Appeals (AF Ct Crim App) must examine every case involving a general officer, and sentences including death, a punitive dismissal, or confinement of one year or more. The AF Ct Crim App cannot only determine questions of law, but also make findings of fact and review the sentence imposed. Consideration of cases by the AF Ct Crim App does not depend on whether you desire a review. You have the right to be represented free of charge at the AF Ct Crim App by appointed appellate defense counsel and should make the request on the AF Form 304.

8. **EXCESS LEAVE**: While your case is being reviewed by the AF Ct Crim App, it is possible that any sentence to confinement will have been completed. If that occurs, the general court-martial convening authority will generally place you on involuntary excess leave pending the final outcome of your case. It is absolutely essential that you keep your appellate counsel informed of your whereabouts. This can be done by writing the Appellate Defense Division, AFLOA/JAJA, 1500 West Perimeter Road, Suite 1100, Joint Base Andrews Naval Air Facility, Washington, D.C., 20762, or by calling DSN 612-4770, or commercial (240) 612-4770. While on excess leave, you will be allowed to keep your ID card and use the commissary, BX, and hospital, but you will not receive any pay. You are permitted to seek other employment, but be aware that if your case if overturned on appeal, you may be ordered back into

a duty status. If you should be required to return to military control for a rehearing or other purposes, you will be required to pay your own way. In addition, during the time you are in excess leave status, you are still subject to military jurisdiction. The importance of staying in touch with your appellate defense counsel cannot be over emphasized.

9. **REVIEW BY THE U. S. COURT OF APPEALS FOR THE ARMED FORCES**: The U.S. Court of Appeals for the Armed Forces reviews the record in two types of cases: mandatory review cases and permissive review based upon an accused's petition. The U.S. Court of Appeals for the Armed Forces (CAAF) must review the record of all cases affecting general officers or extending to death and of all cases that The Judge Advocate General (TJAG) of the Air Force sends to it. If your case has been heard by the AF Ct Crim App, you may petition the U.S. Court of Appeals for the Armed Forces to examine any issues of law involved in the case. You have 60 days from the date you received notice of the AF Ct Crim App decision to petition the US Court of Appeals for the Armed Forces. The US Court of Appeals for the Armed Forces may order TJAG to return the record to the AF Ct Crim App for further proceedings, order a rehearing, and if the convening authority finds that it is impossible to do, the convening authority may dismiss the charges. As in the AF Ct Crim App, you have the right to have appellate defense counsel to represent you, free of charge at the proceeding, and right to hire civilian defense counsel at no expense to the government. If the review by CAAF is unfavorable, you may petition the Supreme Court to grant a review of your case under 28 USC section 1259.

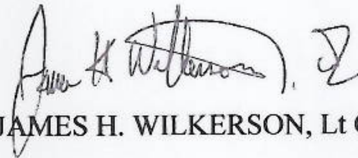
10. **REVIEW BY TJAG UNDER ARTICLE 69**: If your case is a general court-martial and there was a finding of guilty but you did not receive a punitive dismissal or confinement for one year or more, and you do not waive you right to appellate review, then your case will automatically be reviewed by TJAG under Article 69(a), UCMJ. If your case is a special court-martial and there is a finding of guilty and the approved sentence does not include a punitive dismissal, your only post-trial remedy is an application for review by TJAG under Article 69(b), UCMJ. Relief is granted, "on the grounds of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, or error prejudicial to the substantial rights of the accused." The application must be filed within two years of completion of the post-trial review process. The Article 69(b) application is actually a collateral review procedure rather than an appeal, but TJAG has authority to modify or vacate the findings and/or the sentence in whole or in part. You may further challenge Article 69 reviews under the Administrative Procedure Act. Cothran v. Dalton, 83 F.Supp.2d 58 (D.D.C. 1999).

11. **PETITION FOR NEW TRIAL UNDER ARTICLE 73**: You have the right to petition for a new trial under Article 73, UCMJ, under more limited circumstances than Article 69. A petition for a new trial must be based on either fraud in the court or newly discovered evidence. It must be made within two years after the sentence is approved by the convening authority and should be made to TJAG.

12. **PETITIONING THE SECRETARY OF THE AIR FORCE**: Under Article 74, UCMJ, the Secretary of the Air Force may substitute an administrative dismissal for a punitive dismissal or dismissal. Under Article 74(a) the Secretary or his or her designee may remit or suspend any part or an unexecuted sentence. You may further challenge the Secretary's decision under the Administrative Procedure Act without first filing a complaint under Article 138, UCMJ. Wilhelm v. Caldera, 90 F.Supp.2d 3 (D.D.C. 2000).

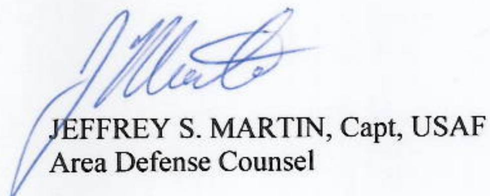
13. **CONCLUSION**: To summarize, you will want to take care of your personal and financial obligations prior to the court-martial proceeding. To preserve your appeal rights, you should fill out the AF Form 304, Request for Appellate Defense Counsel. To assist in the preparation of

your appeal, you should stay in touch with your appellate defense counsel by writing or calling on a regular basis. If you should have any further questions, please feel free to contact the Area Defense Counsel.



JAMES H. WILKERSON, Lt Col, USAF

The preceding document was signed by Lt Col James Wilkerson after he was fully counseled by me and advised of his rights on 31 October 2012.



JEFFREY S. MARTIN, Capt, USAF
Area Defense Counsel