NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT

U N I T E D S T A T E S	)	GENERAL COURT-MARTIAL
v.	)	GOVERNMENT RESPONSE TO DEFENSE MOTION TO RECONSIDER DISMISSAL OF SPECIFICATIONS 1 THROUGH 3 OF CHARGE III
Douglas S. Wacker XXX XX 3913 Captain U.S. Marine Corps	)	11 FEBRUARY 2011

1. Nature of Response

This response opposes the defense motion to dismiss Charge III, Specifications 1 through 3. The defense bears the burden as the moving party, per R.C.M. 905(c)(2).

2. Summary of Facts

a. The government incorporates the summaries of facts provided in its previous motions and responses in this case.

3. Discussion

The defense's most recent motion to dismiss the Article 133 charges in this case is based upon CAAF's recent holding in *U.S. v. Prather* (C.A.A.F. 2011). The *Prather* holding addressed the "new" Article 120 and its burden-shifting scheme. The government's position remains unchanged: the Article 133 offenses charged in this case have absolutely nothing to do with the "new" Article 120. The government has not incorporated the new 120 offenses offenses into the Article 133 charges in this case. Because *Prather* does not impact the charging scheme in the instant case, much of this response repeats earlier arguments the government made in earlier pleadings; the government repeats these arguments for ease of reference.

The fact that certain language used in an Article 133 specification is potentially unconstitutional as applied to the original law does not render the Article 133 charge defective.

It is well settled that "conduct need not be a violation of any other punitive article of the Code, or indeed a criminal offense at all, to constitute conduct unbecoming an officer." *United States v. Forney*, 67 M.J. 271, 275 (C.A.A.F. 2009). The CAAF went on to rule in *Forney* that despite the fact that the accused had been charged with an Article 133 offense which incorporated language from a child pornography statute later found to be unconstitutional, the Article 133 charge was still valid. *Id.* This ruling was based on the fact that "'the essence of an Article 133 offense is not whether an accused officer's conduct otherwise amounts to an offense -- although, of course, it may -- but simply whether the acts meet the standard of conduct unbecoming an officer . . . . Clearly, then, the appropriate standard for assessing criminality under Article 133 is whether the conduct or act charged is dishonorable and compromising as hereinbefore spelled out -- this notwithstanding whether or not the act otherwise amounts to a crime.'" *Id.* at 275 (*quoting United States v. Giordano*, 15 C.M.A. 163, 168, 35 C.M.R. 135, 140 (1964)).

The government does not, however, concede that the language used in the Article 133 specifications incorporates language in the new 120. The language of the specifications under Article 133 is not cut and pasted from the new 120. Some of the language may be similar, but it is worth pointing out that alleging some version of "incapacity" to consent in sexual assault cases is a concept which long pre-dates the new Article 120. See Military Judge's Benchbook, Dept. of the Army Pamphlet 27-9, paragraph 3-45-1 (Rape, pre-2007) note 11 (victims incapable of consent due to sleep, unconsciousness, or intoxication). Even if it the government *had* copied language out of a subsequently passed statute and incorporated it into a novel general article specification, the court would not be bound by the statutory burden-shifting scheme in the later statute, because the only statute the court would be required to follow would be the general article (Article 133) in existence at the time of the offense. The defense's reliance on *U.S. v.*

Ashby, 68 M.J. 108 (CAAF 2008), is therefore misplaced, as it is abundantly clear that in this case, the Article 133 charges on the charge sheet do not incorporate the new Article 120.

In *U.S. v. Ashby* the C.A.A.F. also make clear, however, that "the criminal conduct sought to be punished by an Article 133, UCMJ, offense is the act of committing dishonorable or compromising conduct, regardless of whether the underlying conduct constitutes an offense under the UCMJ." *Ashby* at 115 (*citing United States v. Conliffe*, 67 M.J. 127, 132 (C.A.A.F. 2009) (*quoting United States v. Giordano*, 15 C.M.A. 163, 168, 35 C.M.R. 135, 140 (1964)). Therefore, the operative question in the case at bar is not whether the charges allege acts which the government could have charged under the new Article 120, had the offenses occurred after 2007. Rather, the question is whether the charges state an offense under Article 133. As the Court of Military Appeals pointed out, "[i]t has long been recognized that a 'higher code termed honor' holds military officers 'to stricter accountability.'" *United States v. Moore*, 38 M.J. 490, 493 (C.M.A. 1994) (*citing Parker v. Levy* 417 U.S. 733, 765, 94 S. Ct. 2547, 2566, 41 L. Ed. 2d 439 (1974); *United States v. Wales*, 31 M.J. 301, 311 (CMA 1990) (Cox, J., dissenting in part and concurring in the result); *United States v. Guaglione*, 27 M.J. 268, 271 (CMA 1988); *United States v. Tedder*, 24 M.J. 176, 182 (CMA 1987); *Fletcher v. United States*, 26 Ct. Cl. 541, 563 (1891), rev'd., 148 U.S. 84, 13 S. Ct. 552, 37 L. Ed. 378 (1893)). Furthermore, "[t]he conduct of an officer may be unbecoming even when it is in private." *Id.* (*citing United States v. Guaglione*, 27 M.J. 268, 272 (CMA 1988)).

The government has alleged that the accused committed three separate sexual acts while the female victims of those acts were "significantly intoxicated and mentally and physically impaired." The charges further allege that "a reasonable officer in the Naval service would have recognized that [the female victims were] incapable of knowingly and voluntarily consenting."

The gravamen of these offenses is that a Marine Corps Captain dishonored his status as an officer by engaging in this conduct. It is not necessary that the conduct otherwise be an offense, either military or civilian. *See United States v. Taylor***,** 23 M.J. 314, 318 (C.M.A. 1987) ("An officer may be charged under Article 133 for conduct which may not constitute a violation of other provisions of the Code"). What matters is whether the accused violated the special trust and confidence imbued in him by virtue of his commission. *See United States v. Scott*, 21 M.J. 345, 351 (C.M.A. 1986) (concurrence by Judge Cox) (n1 "The appointment of an 'officer' in the Armed Forces is a function of the President of the United States vested in that office by Article II, Section 2, of the Constitution. 'Officer' is a term of art, and a person appointed to such a position must be regarded as unique in the eyes of the law").

To state an offense, therefore, the government must allege acts which constitute conduct unbecoming an officer. The highest military court has rejected any requirement that every Article 133 allegation must be supported by some other regulation or law. *See United States v. Rogers*, 54 M.J. 244, 256 (C.A.A.F. 2000) (*quoting United States v. Boyett*, 42 M.J. 150, 159 (1995)(Sullivan, C.J., concurring in the result)("[a]lthough there have been occasional hints by some judges of our Court that proof of a service custom or regulation may be a requirement of Article 133 prosecutions generally . . . that view . . . 'has not commanded a majority of this Court'"). The standard boils down to whether "a reasonable military officer would have no doubt that the activities charged in this case constituted conduct unbecoming an officer." *United States v. Frazier*, 34 M.J. 194, 198-199 (C.M.A. 1992) (footnote omitted) (*citing Parker v. Levy*, 417 U.S. 733, 757, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974)).

In this case, the evidence will show that the accused drank with the two victims, and encouraged their further drinking. The evidence will also show that when the women left the

bar, they were highly intoxicated. The evidence will further show that even after the accused brought the two women to a hotel room that he rented out, they were both in states of severe intoxication. The accused thereupon engaged in sexual intercourse with one of the two highly intoxicated women (Ms. Brooder), then attempted to engage in intercourse and the other (Ms. Easley) and engaged in other sexual contact with her (Ms. Easley). Members could certainly find that these actions constituted, at the very least, "crime[s] involving moral turpitude" as contemplated in the discussion to Article 133 in the Manual for Courts-Martial. The accused is therefore clearly on notice that his actions constituted conduct unbecoming an officer.

The government's position is that the burden-shifting argument in the defense's motion is without merit. The accused is not charged with the new Article 120. He is charged with violation of Article 133. Whether the women consented to these acts or not is certainly evidence the defense may attempt to put before the members. Lack of consent, however, is not an element of the Article 133 offense as charged. The government does not need to prove lack of consent because the actions the accused took would have constituted a crime even if the girls had consented. That is, the crimes charged alleged that a reasonable officer would not have engaged in sexual activity, or attempted to do so, regardless of whether the women manifested consent, and regardless of whether the accused mistakenly believed they did consent. Furthermore, nothing on the face of the Charge alleged requires to the accused to disprove anything, which is the major concern arising out of the *Prather* decision. The charges are based on the fact that a commissioned officer should have known that the significant intoxication these women were exhibiting made it likely they were unable to manifest true consent to his sexual advances, and therefore he should have done the honorable thing—that is, something other than attempt to engage in, or actually engage in, sexual activity with them.

The accused is also free to argue to members that his actions did not disgrace his position of an officer. *United States v. Court*, 24 M.J. 11, 15 (C.M.A. 1987) ("in a prosecution under Article 133, an accused officer may defend on two grounds -- (a) that the alleged conduct did not occur and (b) that, even if it occurred, it was not 'unbecoming' within the meaning of Article 133"). The three specifications under Charge III clearly state offenses, however, and the accused was on notice that, as an officer, his actions fell well below the standard expected of a Marine Captain. On their faces, the three specifications allege conduct which violates the principle outlined by the Court of Military of Appeals, that "every officer is proscribed from acting in a way 'to bring dishonor or disrepute upon the military profession which he represents.'" *United States v. Moore*, 38 M.J. 490, 493 (C.M.A. 1994) (citing 417 U.S. at 754, 94 S. Ct. at 2560). Therefore, the Charge III and the three specifications thereunder should not be dismissed.

4. Relief Requested

The government requests that the court deny the defense motion.

5. Evidence and Burden of Proof

The defense bears the burden of proof. The government does not intend to offer any evidence on this motion.

6. Oral Argument

The government respectfully requests oral argument on this motion.

E. S. DAY
Captain, U.S. Marine Corps
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served on the court and defense counsel by electronic mail on 11 February 2011.

E. S. DAY
Captain, U.S. Marine Corps
Trial Counsel