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 DISMISS SPECIFICATIONS 1 THROUGH 3 OF CHARGE III
Douglas S. Wacker XXX XX 3913 Captain U.S. Marine Corps	)	1 November 2010

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 charged offenses occurred on the night of 3-4 April 2007 in New Orleans, LA. During that week, approximately 20 law students from the University of San Diego, including the accused and two victims, Jessica Brooder and Elizabeth Easley, were in New Orleans for a volunteer service trip with an organization called the Student Hurricane Network. The accused was participating in the Excess Leave Program, and was a first-year law student himself at the time. On the night of 3 April, the entire group met for dinner in the French Quarter, after which a smaller group (including the accused, Ms. Brooder, Ms. Easley, and Rebecca Barker, and 3-4 other students) stayed out to visit a series of bars along Bourbon Street in the French Quarter.

b. At one point in the night, the group visited a club called Razzoo on Bourbon Street. While at Razzoo, the accused offered to buy drinks, and did buy drinks, for both Ms. Brooder and Ms. Easley. Both Ms. Brooder and Ms. Easley experienced a significant decline in their ability to recall the events of that night after taking the drinks brought by the accused. Ms.

Brooder was unable to recall anything until the next morning, other than a flash of Ms. Barker's face.

c. At some point while the group was at Razzoo, Ms. Barker began to notice that Ms. Brooder was exhibiting signs of severe intoxication. Ms. Barker observed Ms. Brooder swaying on the dance floor with her eyes closed. Prior to 3 April 2007, Ms. Barker had observed Ms. Brooder under the influence of large amounts of alcohol on multiple occasions and had never seen her act in this manner. Ms. Brooder told Ms. Barker that she couldn't see and then vomited on a table at the bar. Ms. Easley then helped Ms. Brooder go to the bathroom to throw up more, physically supporting her as they went into the bathroom. While the two women were in the bathroom, Ms. Barker asked the accused to make sure that they closed out their bar tabs and got home safely. The accused looked Ms. Barker in the eye and repeated her instructions.

d. Ms. Easley's memory of the remainder of the night consists of a series of brief "flashes." One flash includes Ms. Easley holding back Ms. Brooder's hair in the restroom at Razzoo while Ms. Brooder vomited. Another flash involves the accused handing drinks to Ms. Easley and Ms. Brooder in a daiquiri stand, presumably on Bourbon Street. In later flashes of memory, Ms. Easley was on a bed in a hotel room with a shadowy male figure on top of her. In these "flashes," Ms. Easley could recall visual details but no sounds or tactile sensation.

e. Ms. Easley eventually woke up on a hotel bed, looked over, and saw Ms. Brooder lying on an adjacent bed, on her back and not moving, with the accused lowering himself on top of her. Ms. Easley left the room, went back to the room she had been staying in with Ms. Brooder and Ms. Barker, woke Ms. Barker up, and eventually ran back to the room where the accused was with Ms. Brooder.

f. Ms. Easley pounded on the door for a long period of time before the accused answered wearing his boxer shorts. Ms. Easley entered the room and found Ms. Brooder lying unconscious and naked on the same bed where Ms. Easley had last seen her. Ms. Easley attempted to wake Ms. Brooder, who was still sluggish, incoherent, and required Ms. Easley to put her clothes on for her. Ms. Easley assisted Ms. Brooder back to their original room, where Ms. Easley and Ms. Barker helped Ms. Brooder put on a pair of athletic shorts before getting her into bed. Before Ms. Brooder got back into bed, Ms. Barker observed her talking nonsensically, unable to communicate coherently. Ms. Easley also attempted to call her boyfriend, Donald Cook. Mr. Cook described her speech during that conversation as slow, disjointed, fragmented, incoherent, and inconsistent with his prior experience with Ms. Easley on numerous occasions when she was intoxicated.

g. Both Ms. Easley and Ms. Brooder stayed in bed for most of the following day, rather than going to their volunteer job placements. Ms. Brooder felt a lingering sensation of intoxication and physical sluggishness which she testified was similar to "walking through water." Both Ms. Easley and Ms. Brooder had body-wide muscle soreness when they woke up, for no apparent reason.

h. After Ms. Brooder sent the accused a distraught message saying that she didn't know what had happened, the accused returned to the hotel from his volunteer job and gave a version of the night's events to Ms. Brooder and Ms. Easley. The accused began by telling both women that "first of all, nothing happened." He initially insisted that they had gone back to the hotel and rented an additional hotel room with the intention of having a "threesome," but nothing happened beyond kissing. After Ms. Easley interjected that she recalled seeing Ms. Brooder naked when she returned to the room, the accused responded that "well, yeah, more clothes came

off, but nothing else happened" or words to that effect. The accused continued to insist that no further sexual activity had taken place.

i. Both Ms. Brooder and Ms. Easley booked early flights home from New Orleans on 4 April. During a lay-over in Charlotte, NC, Ms. Brooder went to the bathroom to check her tampon, which she had not replaced since the night before, and discovered that it was displaced so far up inside her vagina that it took 20-30 minutes to retrieve.

j. On 21 June, 2007, the University of San Diego held a "Critical Issues Board" pertaining to the sexual assault complaint against the accused. At that hearing, the accused continued to insist that no sexual intercourse had occurred, either consensual or non-consensual, with Ms. Brooder.

k. Ms. Brooder saved the athletic shorts that her friends had put on her after she returned to her room in the early morning of 4 April 2007. She mailed the shorts to the New Orleans police department, who subsequently released them to NCIS. Forensic testing of the shorts by the U.S. Army Criminal Investigative Lab confirmed the presence of the accused's semen on the crotch of the shorts.

3. <u>Discussion</u>

The defense's primary argument is based upon the notion that Article 120, MCM 2008, may at some point be found to be unconstitutional. As it now stands, the new Article 120 is good law. *See generally United States v. Neal* 68 MJ 289 (C.A.A.F. 2010). Therefore, the defense's motion, insofar as it alleges that Specifications 1 through 3 of Charge III allege crimes under the new Article 120, is moot. Even were the issue ripe, the fact that certain language used in an Article 133 specification is 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)).

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 is not barred from charging conduct under Article 133 solely because it is similar to an offense under an enumerated article of the UCMJ. Although the defense does not explicitly cite the "preemption" doctrine, the defense argument that the specifications under Charge III fail to state offenses because they do not allege every element of a similar enumerated offense is a preemption argument. Under the preemption doctrine, where the legislature has set forth elements of a specific offense in a statute, it may be improper for the government to prosecute similar conduct by charging the conduct under Article 134 but omitting some of the elements defined by the legislature. *United States v. Taylor*, 23 M.J. 314, 316 (C.M.A. 1987). "Simply because the offense charged under Article 134, UCMJ, embraces all but one element of an offense under another article does not trigger operation of the preemption doctrine. For an offense to be excluded from Article 134 based on preemption it must be shown that Congress intended the other punitive article to cover a class of offenses in a complete way." *United States v. Erickson*, 61 M.J. 230, 233 (C.A.A.F. 2005), quoting *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979).

However, unlike Article 134, "Article 133 is not subject to preemption by other punitive articles." *Taylor*, 23 M.J. at 318; see also *United States v. Conliffe*, 67 M.J. 127, 133-34 FN2 (C.A.A.F. 2009) ("Whereas the military preemption doctrine bars the government from charging an accused under Article 134(1), UCMJ, and Article 134(2), UCMJ, for conduct that is appropriately charged under an enumerated article, this same doctrine does not apply to Article 133, UCMJ"). In *Taylor*, the court held that "an officer's request that another person commit an offense can constitute an Article 133 violation, even though she entertained no specific intent

that the offense be committed by the person to whom the request was made," as the government would have been required to prove in order to establish the offense of solicitation under Article 82 or 134. 23 M.J. at 318. The government may incorporate the elements of an enumerated offense into an Article 133 specification, as discussed by the defense, but the government is not required to do so as long as the government sufficiently alleges conduct unbecoming of an officer.

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 Taylor***,** 23 M.J. at 318 ("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. As the defense points out, statutes, regulations and other offenses may inform us as to the whether the accused was on notice that his conduct was prohibited. However,

the highest 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. A friend of the two women who observed them in a highly intoxicated state trusted the accused to help them get home safely partially because he was a Marine officer. 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 and deserves little consideration, if any. 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 women 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. The accused himself acknowledged, in the course of the same proceeding that he denied having sex with Ms. Brooder, that "…if there was someone who is incoherent that I would make sure that they get back to where ever they are going." 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. All defense requests for production of witnesses pertaining to this motion are denied.

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 1 November 2010.

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