INVESTIGATING OFFICER'S REPORT

(Of Charges Under Article 32, UCMJ and R.C.M. 405, Manual for Courts-Martial)

1a. **FROM:** *(Name of Investigating Officer - Last, First, MI)*	b. GRADE	c. ORGANIZATION	d. DATE OF REPORT
LAMBRIGHT, TEAH, L. F.	0-3	17 TRW/JA	25 APR 11

2a. **TO:** *(Name of Officer who directed the investigation - Last, First, MI)*	b. TITLE	c. ORGANIZATION
BEEN, DAVID, B.	COMMANDER	7 BW (ACC)

3a. NAME OF ACCUSED *(Last, First, MI)*	b. GRADE	c. SSN	d. ORGANIZATION	e. DATE OF CHARGES
BURKE, PATRICK T.	0-2	625208883	9TH BS (ACC)	21 MAR 11

(Check appropriate answer)	YES	NO
4. IN ACCORDANCE WITH ARTICLE 32, UCMJ, AND R.C.M. 405, MANUAL FOR COURTS-MARTIAL, I HAVE INVESTIGATED THE CHARGES APPENDED HERETO (Exhibit 1)	X	
5. THE ACCUSED WAS REPRESENTED BY COUNSEL (If not, see 9 below)	X	
6. COUNSEL WHO REPRESENTED THE ACCUSED WAS QUALIFIED UNDER R.C.M. 405(d) (2), 502(d)	X	

7a. NAME OF DEFENSE COUNSEL *(Last, First, MI)*	b. GRADE	8a. NAME OF ASSISTANT DEFENSE COUNSEL *(If any)*	b. GRADE
PUCKETT, NEAL, A.	CIV	DOZER-PASQUAL, RANAE	0-3

c. ORGANIZATION *(If appropriate)*	c. ORGANIZATION *(If appropriate)*
N/A	AFLOA/ADC
d. ADDRESS *(If appropriate)*	d. ADDRESS *(If appropriate)*
1800 Diagonal Rd, Suite 210 Alexandria, VA 22314	N/A

9. *(To be signed by accused if accused waives counsel. If accused does not sign, investigating officer will explain in detail in Item 21.)*

a. PLACE	b. DATE
N/A	N/A

I HAVE BEEN INFORMED OF MY RIGHT TO BE REPRESENTED IN THIS INVESTIGATION BY COUNSEL, INCLUDING MY RIGHT TO CIVILIAN OR MILITARY COUNSEL OF MY CHOICE IF REASONABLY AVAILABLE. I WAIVE MY RIGHT TO COUNSEL IN THIS INVESTIGATION.

c. SIGNATURE OF ACCUSED
N/A

10. AT THE BEGINNING OF THE INVESTIGATION I INFORMED THE ACCUSED OF: *(Check appropriate answer)*	YES	NO
a. THE CHARGE(S) UNDER INVESTIGATION	X	
b. THE IDENTITY OF THE ACCUSER	X	
c. THE RIGHT AGAINST SELF-INCRIMINATION UNDER ARTICLE 31	X	
d. THE PURPOSE OF THE INVESTIGATION	X	
e. THE RIGHT TO BE PRESENT THROUGHOUT THE TAKING OF EVIDENCE	X	
f. THE WITNESSES AND OTHER EVIDENCE KNOWN TO ME WHICH I EXPECTED TO PRESENT	X	
g. THE RIGHT TO CROSS-EXAMINE WITNESSES	X	
h. THE RIGHT TO HAVE AVAILABLE WITNESSES AND EVIDENCE PRESENTED	X	
i. THE RIGHT TO PRESENT ANYTHING IN DEFENSE, EXTENUATION, OR MITIGATION	X	
j. THE RIGHT TO MAKE A SWORN OR UNSWORN STATEMENT, ORALLY OR IN WRITING	X	
11a. THE ACCUSED AND ACCUSED'S COUNSEL WERE PRESENT THROUGHOUT THE PRESENTATION OF EVIDENCE *(If the accused or counsel were absent during any part of the presentation of evidence, complete b below.)*	X	

b. STATE THE CIRCUMSTANCES AND DESCRIBE THE PROCEEDINGS CONDUCTED IN THE ABSENCE OF ACCUSED OR COUNSEL
N/A

NOTE: If additional space is required for any item, enter the additional material in Item 21 or on a separate sheet. Identify such material with the proper numerical and, if appropriate, lettered heading *(Example: "7c".)* **Securely attach any additional sheets to the form and add a note in the appropriate item of the form: "See additional sheet."**

12a. THE FOLLOWING WITNESSES TESTIFIED UNDER OATH: *(Check appropriate answer)*				
NAME *(Last, First, MI)*	GRADE *(If any)*	ORGANIZATION/ADDRESS *(Whichever is appropriate)*	YES	NO
ADAMS, ROBERT H.	0-3	436 TS/IP, DYESS AFB	X	
FERGUSON, JOHN, F.	0-4	28 BS/ADOF	X	
DYKAS, JAMES E.	0-4	19 SOS/DOIG	X	
HARDING, ELLIOTT	CIV	RAPID CITY, SOUTH DAKOTA POLICE DEPARTMENT	X	
POCHES, WARREN	CIV	RAPID CITY, SOUTH DAKOTA POLICE DEPARTMENT	X	
NO MOCCASIN, WENDY, M.	CIV	N/A	X	
b. THE SUBSTANCE OF THE TESTIMONY OF THESE WITNESSES HAS BEEN REDUCED TO WRITING AND IS ATTACHED.			X	
13a. THE FOLLOWING STATEMENTS, DOCUMENTS, OR MATTERS WERE CONSIDERED; THE ACCUSED WAS PERMITTED TO EXAMINE EACH.				
DESCRIPTION OF ITEM	LOCATION OF ORIGINAL *(If not attached)*			
PLEASE SEE ATTACHED SUPPLEMENT.				
b. EACH ITEM CONSIDERED, OR A COPY OR RECITAL OF THE SUBSTANCE OR NATURE THEREOF, IS ATTACHED			X	
14. THERE ARE GROUNDS TO BELIEVE THAT THE ACCUSED WAS NOT MENTALLY RESPONSIBLE FOR THE OFFENSE(S) OR NOT COMPETENT TO PARTICIPATE IN THE DEFENSE. *(See R.C.M. 909, 916(k).)*			X	
15. THE DEFENSE DID REQUEST OBJECTIONS TO BE NOTED IN THIS REPORT *(If Yes, specify in Item 21 below.)*				X
16. ALL ESSENTIAL WITNESSES WILL BE AVAILABLE IN THE EVENT OF TRIAL			X	
17. THE CHARGES AND SPECIFICATIONS ARE IN PROPER FORM			X	
18. REASONABLE GROUNDS EXIST TO BELIEVE THAT THE ACCUSED COMMITTED THE OFFENSE(S) ALLEGED				X
19. I AM NOT AWARE OF ANY GROUNDS WHICH WOULD DISQUALIFY ME FROM ACTING AS INVESTIGATING OFFICER. *(See R.C.M. 405(d) (1).*			X	

20. I RECOMMEND:
a. TRIAL BY ☐ SUMMARY ☐ SPECIAL ☒ GENERAL COURT-MARTIAL
b. ☐ OTHER *(Specify in Item 21 below)*

21. REMARKS *(Include, as necessary, explanation for any delays in the investigation, and explanation for any "no" answers above.)*
PLEASE SEE ATTACHED SUPPLEMENT.

22a. TYPED NAME OF INVESTIGATING OFFICER	b. GRADE	c. ORGANIZATION
TEAH L. F. LAMBRIGHT	0-3	17 TRW/JA

d. SIGNATURE OF INVESTIGATING OFFICER	e. DATE
Teah L. F. Lambright	25 APR 11

DD Form 457 Reverse, AUG 84

SUPPLEMENT TO DD FORM 457, INVESTIGATING OFFICER'S REPORT
First Lieutenant Patrick T. Burke, 625-20-8883

Item 12a (continued):

Name	Grade	Organization/ Address	Testified under oath
BURKE, JOHN, L.	CIV	N/A	Yes

Item 12(b):

Applicable rules state that the Investigating Officer is required to include in the report of investigation a summary of the substance of all testimony and whenever possible, reduce the substance of the testimony of each witness to writing, and unless it would unduly delay the completion of the investigation, have each witness sign and swear to the truth of the respective summaries. RCM 405(g)(5)(h)(1)(A) discussion (2008). In this case, I contacted Ms. No Moccasin via email on two occasions and telephonically on two occasions regarding her summarized testimony. Ms. No Moccasin indicated that there were some "issues" or "problems" with her statement, but did not specify what those problems were. I gave her my personal contact information and asked that she contact me over the weekend to make any necessary corrections and she failed to do so. Consequently, I deemed it most appropriate to forego further attempts to secure her signature to avoid excessive delays in submitting this report.

Item 13a:

IO Exhibit Number and Description of Item		Location	Considered
1	Charge Sheet, DD Form 458, dated 21 Mar 11 (3 pages)	Attached	Yes
2	Appointing Order, dated 23 Mar 11 (1 page)	Attached	Yes
3	IO Scheduling Memorandum, dated 5 Apr 11 (4 pages)	Attached	Yes
4	AF IMT 1168, 1st Lt Patrick T. Burk, dated 14 Oct 10 (8 pages)	Attached	Yes
5	AF IMT 1168, Capt Robert H. Adams, dated 13 Oct, (6 pages)	Attached	Yes
6	AF IMT 1168, Maj John F. Ferguson, dated 20 Oct 10, (8 pages)	Attached	Yes
7	AF IMT 1168, Maj James E. Dykas, dated 19 Oct 10, (4 pages)	Attached	Yes
8	CR# 10-264773, Case Report Addendum, Officer Elliott Harding, dated 11 Aug 10, (4 pages)	Attached	Yes
9	CR# 10-264773, State of South Dakota Investigator's Motor Vehicle Traffic Accident Report, 11 Aug 10 (2 pages)	Attached	Yes
10	CR# 10-264773, Vehicle Recovered/Impounded Report, dated 11 Aug 10 (1 page)	Attached	Yes
11	CR# 10-264773, 911 Report of Stolen Vehicle Audio Recording, dated 10 Aug 10 (15 minutes, 40 seconds)	Attached	Yes
12	Photographs of Wendy No Moccasin, dated 10 Aug 10 (10 pages)	Attached	Yes
13	Photographs of Wendy No Moccasin's vehicle, dated 10 Aug 10 (14 pages)	Attached	Yes
14	CR# 10-264773, Case Report Addendum, Detective Warren Poches, dated 19 Oct 10 (6 pages)	Attached	Yes

15	Photographs of Wendy No Moccasin, dated 12 Aug 10 (13 Pages)	Attached	Yes
16	CR# 10-264773, Line up Viewing Document, dated 7 Oct 10 (3 pages)	Attached	Yes
17	Summarized Testimony of Capt Robert H. Adams (5 pages)	Attached	Yes
18	Summarized Testimony of Maj John F. Ferguson (2 pages)	Attached	Yes
19	Summarized Testimony of Maj James E. Dykas (2 pages)	Attached	Yes
20	Summarized Testimony of Officer Elliott Harding (3 pages)	Attached	Yes
21	Summarized Testimony of Detective Warren Poches (3 pages)	Attached	Yes
22	Summarized Testimony of Wendy M. No Moccasin (5 pages)	Attached	Yes
23	Summarized Testimony of John L. Burke Jr. (1 page)	Attached	Yes
24	John L. Burke Transcript of CR# 10-264773, 911 Audio Recording (9 pages)	Attached	No
25	7 BW Fatigue Management Briefing, dated 26 Jul 10 (20 pages)	Attached	Yes
26	Written Analysis Points of John L. Burke, adopted as Defense Counsel's Argument, (5 pages)	Attached	Yes
27	Letter from Attorney Randall Connelly, adopted as Defense Counsel's Argument, dated 4 Feb 11, (3 pages)	Attached	Yes

Item 14:

In response to a question as to whether there were grounds to believe that the Accused was not mentally responsible at the time of the alleged offenses and/or not competent to participate in his defense, Defense Counsel answered in the affirmative. However, when further questioned, Defense Counsel declined to make a formal request for a Sanity Board in accordance with RCM 706. Specifically, Defense Counsel asserted that while issues of mental responsibility of the Accused may be raised at some later date, the Accused was competent to participate in his own defense at the Article 32 Investigation.[1]

Item 21:

A. Case Synopsis

On 9 Aug 10, Maj James Dykas, Maj John Ferguson, Capt Robert Adams, and 1st Lt Patrick Burke, hereinafter "the Accused," all members of a B-1 crew, ferried an aircraft from Al Udeid Air Base to Ellsworth Air Force Base on a 20 hour flight. (IO Exhibit 4; IO Exhibit 5; IO Exhibit 6; IO Exhibit 17; IO Exhibit 19). The crew was issued "Go Pills" or Dexedrine to help them stay awake and alert during the flight. (IO Exhibit 4; IO Exhibit 17; IO Exhibit 19).

The crew arrived at Ellsworth AFB, at approximately 1600, checked in to base billeting, and attempted to make travel arrangements to return to their home station, Dyess, AFB. However, due to

[1] In accordance with RCM 706(a) failure to formally raise the issue of competence at the Article 32 Investigation does not preclude the future assertion of lack of mental responsibility as an affirmative defense.

some difficulty coordinating commercial travel, the crew was unable to book travel back Dyess AFB on 10 Aug 10 as expected and had to wait until 11 Aug 10 to finalize their travel plans. (IO Exhibit 6).

Between approximately 1800 and 2000, all four members of the crew went to dinner in downtown Rapid City, South Dakota at restaurant called the Firehouse. (IO Exhibit 4; IO Exhibit 5; IO Exhibit 6; IO Exhibit 7). A junior officer from the 34 BS was assigned to drive the crew to dinner. (IO Exhibit 4; IO Exhibit 6; IO Exhibit 17; IO Exhibit 18). While at the Firehouse, all the members of the crew ate dinner and had at least two alcoholic drinks each. (IO Exhibit 4; IO Exhibit 5; IO Exhibit 6; IO Exhibit 7). The crew stayed at the Firehouse for approximately an hour and a half before going to an Irish bar within walking distance. While at the Irish bar, everyone in the crew had several more alcoholic drinks. (IO Exhibit 5; IO Exhibit 6; IO Exhibit 7). The crew was there for approximately an hour before Capt Adams decided he wanted to go and see motorcycles that were in the area for a major motorcycle event. The Accused agreed to accompany Capt Adams and the two left the Irish bar. Maj Dykas and Maj Ferguson declined to accompany them and remained at the Irish bar. (IO Exhibit 4; IO Exhibit 5; IO Exhibit 6; IO Exhibit 7).

Capt Adams and the Accused walked to a bar where they each had a beer and one shot of liquor. (IO Exhibit 17). Next, sometime between 2200 and 2300, the two walked to another bar named Teddy's where they had a few more drinks. (IO Exhibit 17). While there, they met and had casual conversation with Wendy No Moccasin, a South Dakota native. They introduced themselves as "Pat" and "Bob". (IO Exhibit 5; IO Exhibit 17; IO Exhibit 22).

Shortly after Capt Adams and the Accused met Ms. No Moccasin, they all agreed that Ms. No Moccasin would provide transportation for the rest of the evening and then drive Capt Adams and the Accused back to Ellsworth AFB. (IO Exhibit 5; IO Exhibit 17; IO Exhibit 22). The group stayed at Teddy's for approximately thirty minutes before Ms. No Moccasin drove them to Oasis, another local bar in Rapid City. (IO Exhibit 5; IO Exhibit 17; IO Exhibit 22). While at Oasis, Capt Adams, the Accused, and Ms. No Moccasin had at least two glasses of beer. (IO Exhibit 5; IO Exhibit 17; IO Exhibit 22). They played at least four games of pool and stayed at that location until close to closing time. (IO Exhibit 17; IO Exhibit 22).

After leaving Oasis, Ms. No Moccasin drove to a convenience store where Capt Adams bought a 12-pack of Budweiser. (IO Exhibit 4; IO Exhibit 17; IO Exhibit 22). Ms. No Moccasin then drove to her cousin's house, where Capt Adams, the Accused, and Ms. No Moccasin stood in the driveway and drank approximately one can of Budweiser each. (IO Exhibit 17; IO Exhibit 22). The group then decided that Ms. No Moccasin would drive the group up to Skyline Drive, a high point that overlooks Rapid City. (IO Exhibit 4; IO Exhibit 5; IO Exhibit 17; IO Exhibit 22).

Once the group arrived at Skyline Drive, they got out of the car and found a place to sit and drink more of the Budweiser that Capt Adams had previously purchased at the gas station. (IO Exhibit 4; IO Exhibit 17; IO Exhibit 22). Not long after they arrived, a white vehicle drove up. Approximately four to five strangers exited the vehicle, approached them, and appeared to Capt Adams and Ms. No Moccasin to be behaving in an aggressive manner. (IO Exhibit 4; IO Exhibit 5; IO Exhibit 17; IO Exhibit 22). The Accused, however, engaged the strangers in conversation in Spanish for a few minutes before getting in the car and leaving with Capt Adams and Ms. No Moccasin. (IO Exhibit 4; IO Exhibit 5; IO Exhibit 17).

Both Ms. No Moccasin and Capt Adams agree that the three were only back in the vehicle momentarily before the Accused began insisting that Ms. No Moccasin pull over. Ms. No Moccasin did pull over and all three people got out of the vehicle. The Accused then began to accuse Capt Adams and Ms. No Moccasin of being CIA agents, terrorists, and spies. The Accused also said that he had conversations with Jack Bauer, a character from the television series "24." (IO Exhibit 4; IO Exhibit 5; IO Exhibit 17; IO Exhibit 22). According to Capt Adams, once he and Ms. No Moccasin were able to calm the Accused down, the three returned to the vehicle and Ms. No Moccasin began to drive to Ellsworth AFB. (IO Exhibit 5; IO Exhibit 17). According to Ms. No Moccasin, after the Accused calmed down, the group found another location where they continued to talk and drink. The Accused's accusations continued to escalate and Ms. No Moccasin decided it was time to take both Capt Adams and the Accused back to Ellsworth AFB. (IO Exhibit 22).

In accordance with both accounts, on the way back to Ellsworth AFB, the Accused suddenly reached from the back seat and began to choke and punch Capt Adams in the front passenger seat. (IO Exhibit 4; IO Exhibit 5; IO Exhibit 17; IO Exhibit 22). Ms. No Moccasin immediately stopped the car and attempted to assist Capt Adams, at which point the Accused began hitting her. (IO Exhibit 17; IO Exhibit 22). Capt Adams, overcome with a sense of "fight or flight," exited the vehicle and ran down the side of a steep embankment. (IO Exhibit 5; IO Exhibit 17; IO Exhibit 22). At some point while fleeing the scene, Capt Adams heard what he believed was an engine revving up and tires peeling off. While he assumed that Ms. No Moccasin was likely leaving the scene as well, from his position, he was not able to see or hear anything that was happening at the top of the hill. (IO Exhibit 5; IO Exhibit17).

Immediately after Capt Adams exited the vehicle Ms. No Moccasin grabbed her car keys from the ignition and exited the vehicle. According to Ms. No Moccasin, the Accused pursued her and demanded her keys by saying, "Give me your keys...Give me your fucking keys or I am going to kill you." The Accused then came up behind her and tripped her. The Accused hit Ms. No Moccasin several times in her head with his fists in an attempt to take her car keys. According to Ms. No Moccasin, once he retrieved the keys, the Accused returned to the vehicle, got in the driver's seat, and drove away. (IO Exhibit 8; IO Exhibit 14; IO Exhibit 22).

Ms. No Moccasin called the police and followed the vehicle on foot. Ms. No Moccasin remained on the phone with a 911 dispatcher for approximately 15 minutes until the Rapid City Police Department arrived. (IO Exhibit 11). Approximately one half mile from the incident, Ms. No Moccasin found her vehicle crashed into a guardrail with the lights on and the front passenger door open. (IO Exhibit 8; IO Exhibit 11; IO Exhibit 14; IO Exhibit 22). The Accused was not in the vehicle.

Officer Elliott Harding of the Rapid City Police Department was the responding officer on the scene. When Officer Harding approached, he saw a 1994 Nissan Sentra, blue in color, crashed into a guardrail on the left hand side of the road. (IO Exhibit 8; IO Exhibit 13; IO Exhibit 20). The vehicle sustained significant damage to the left front side and the hood, such that it had to be towed from the scene. (IO Exhibit 8; IO Exhibit 10; IO Exhibit 13; IO Exhibit 20).

When Officer Harding arrived on the scene, Ms. No Moccasin was present and visibly upset. Officer Harding took a statement from Ms. No Moccasin and took photographs documenting her injuries. Specifically, Officer Harding noted a red mark on Ms. No Moccasin's chest that she attributed to the

Accused scratching her with her car keys as he tried to wrest them from her. (IO Exhibit 8; IO Exhibit 12; IO Exhibit 20).

Ms. No Moccasin admitted to drinking alcohol that night, and agreed to take a breathalyzer test. Ms. No Moccasin blew a presumptive blood alcohol content (BAC) of .14%. (IO Exhibit 8; IO Exhibit 20).

Officer Harding investigated the scene as a robbery with Ms. No Moccasin as the complaining witness. Officer Harding did not investigate Ms. No Moccasin for drunk driving or any other alcohol or driving related offenses. (IO Exhibit 8; IO Exhibit 20).

On 12 Aug 10, two days after the incident, Detective Warren Poches of the Rapid City Police Department received the case file involving Capt Adams, the Accused, and Ms. No Moccasin. Detective Poches conducted his normal follow up investigation to determine whether there was merit for a potential prosecution. In so doing, Detective Poches interviewed and photographed Ms. No Moccasin. Detective Poches was also able to confirm the identities of the men Ms. No Moccasin knew as "Pat" and "Bob" as 1st Lt Patrick Burke and Capt Robert Adams. (IO Exhibit14; IO Exhibit 16; IO Exhibit 21).

Capt Adams ultimately made his way back to Ellsworth AFB in the early morning hours of 10 Aug 10 where he made contact with Maj Ferguson. Capt Adams informed Maj Ferguson about the incident and the fact that he did not know where the Accused was or his condition. (IO Exhibit 5; IO Exhibit 17). Maj Ferguson then borrowed a vehicle and he and Capt Adams proceeded to search for the Accused in Rapid City near the Skyline Drive area. (IO Exhibit 6; IO Exhibit18). While searching for the Accused, Maj Ferguson received a phone call that the Accused had returned to Ellsworth AFB. Maj Ferguson and Capt Adams then returned to Ellsworth AFB. All four members of the crew met up for lunch at approximately 1500. (IO Exhibit 4; IO Exhibit 5; IO Exhibit 6; IO Exhibit 7; IO Exhibit 17; IO Exhibit 18; IO Exhibit 19).

While at lunch, Capt Adams relayed the previous night's events to the Accused, who was genuinely apologetic for his behavior, but had some difficulty remembering many of the details. (IO Exhibit 4; IO Exhibit 5; IO Exhibit 6; IO Exhibit 7; IO Exhibit 17; IO Exhibit 18; IO Exhibit 19). The Accused did, however, remember going to dinner with the crew, leaving with Capt Adams, visiting several local bars on foot, and meeting a Native American female of medium build. The Accused also remembered going to the convenience store to purchase beer, visiting the Native American female's house, driving up to Skyline Drive, and speaking with several strangers in Spanish. (IO Exhibit 4).

The Accused further recalled being agitated and not wanting to be in the car with Capt Adams and the Native American woman. He cited as the reason for his discomfort the fact that he noticed the Native American woman drinking when they got to Skyline Drive and he did not want to be in the car with a drunk driver. (IO Exhibit 4).

The Accused had only a faint recollection of the accusations regarding the CIA and no recollection of the accusations regarding spies and Jack Bauer. The Accused remembered putting Capt Adams in a "sleeper hold" but had no recollection of hitting the Native American woman at all. (IO Exhibit 4). According to the Accused, after the "sleeper hold" incident, the Native American woman yelled for him to get out of her car and he did. The Accused then walked down the hill and at some point stopped to lie down, where he remained until he awoke and began making his way back to Ellsworth AFB. (IO Exhibit 4). The Accused could not remember or explain why he would have exited the vehicle, walked part way down the hill, and then lay down. (IO Exhibit 4).

The Accused recalled drinking at least six beers and admits to having a "fuzzy" memory starting at the Native American woman's house because at that point he had been awake for 32 hours. (IO Exhibit 4).

B. Elements of the Offense(s) and Discussion of the Evidence[2]

Charge I and its Specification, Drunk Driving: Charge I and its Specification alleges that the Accused did on or about 10 August 2010 operate a vehicle, to wit: a 1994 Nissan Sentra while drunk. The elements of the offense are:

(1) That the Accused was operating a 1994 Nissan Sentra; and
(2) That the Accused was operating said vehicle while drunk.

Discussion of the Evidence: There are substantive issues regarding the legal sufficiency of Charge I and its Specification. As it pertains to element one, there are three substantive factual issues. First, Ms. Wendy No Moccasin is the only source of evidence to establish element one of this offense and there is no other evidence to support her account that the Accused was driving her car. By the time the Accused allegedly took Ms. No Moccasin's keys and operated her vehicle, Capt Adams was already running downhill and away from the scene. Consequently, he was unable to witness anything that was happening atop Skyline Drive. (IO Exhibit 4; IO Exhibit 5; IO Exhibit 17; IO Exhibit 22). And, according to both Officer Harding, the responding officer on the scene, and Detective Poches, who was responsible for conducting follow up investigation, there was no forensic or physical evidence collected at the scene indicating that the Accused had ever operated the vehicle. (IO Exhibit 20; IO Exhibit 21).

Second, while witness credibility is an issue typically resolved by the finder of fact, in this case, as the sole witness, Ms. No Moccasin's credibility weighs heavily in the determination of whether reasonable grounds exist that the Accused drove her vehicle. With that in mind, the fact that Ms. No Moccasin was intoxicated at the time of the incident is an issue. By Ms. No Moccasin's own account, she had consumed at least eight beers between 2300 when she first met the Accused and Capt Adams, and 0422, when she reported her car stolen to the Rapid City Police Department. When the police responded to the scene, Ms. No Moccasin agreed to submit to a breathalyzer and blew a presumptive .14% BAC. (IO Exhibit 8; IO Exhibit 9; IO Exhibit 22).

Third, due to her likely intoxication and admitted drunken driving earlier in the evening, Ms. No Moccasin may have had a reason to fabricate a story as to who was operating her vehicle and how it was wrecked. Officer Harding admitted that even though Ms. No Moccasin blew a .14% BAC, he specifically did not conduct a field sobriety test or otherwise investigate Ms. No Moccasin for any drunken driving related offenses because he was focused on investigating the crime of robbery or theft. (IO Exhibit 20). There was no direct evidence presented that Ms. No Moccasin was aware, before calling

[2] The standard of proof in an Article 32 Investigation is whether reasonable grounds exist to believe that the accused committed the offense(s) alleged, not whether the government has presented a prima facie case. RCM 405(j)(2)(H); DD Form 457, Item 18. Reasonable grounds exist when the evidence convinces a reasonable, prudent person there is probable cause to believe a crime was committed and the accused committed it. A finding that reasonable grounds exist does not require a recommendation of trial by court-martial.

the police, that she would not be investigated for drunk driving or similar offenses. However, the obvious potential benefit of calling the police as a reporting party and victim, rather than as a potential perpetrator of a crime, creates a serious question as to the motive behind the report. [3]

As it pertains to element two, there is again a substantive factual issue. According to the applicable statute, drunkenness is defined as any intoxication sufficient to impair the rational and full exercise of the mental or physical faculties.[4] In this case, there are multiple reports about how much alcohol the Accused consumed that evening, ranging from six beers to ten beers and at least two shots. (IO Exhibit 4; IO Exhibit 5; IO Exhibit 6; IO Exhibit 7; IO Exhibit 17; IO Exhibit 19; IO Exhibit 22). What is noticeably absent is any report documenting how the Accused processed the alcohol. (IO Exhibit 8; IO Exhibit 14). While a blood alcohol test and/or a breathalyzer are not required to prove drunkenness, the lack of such evidence leaves one to rely solely on the observations of the Accused's conduct to determine if he was intoxicated. To that end, Capt Adams reported that the Accused, "seemed slightly buzzed." (IO Exhibit 17). Ms. No Moccasin also reported that she believed the Accused was "pretty drunk" because he was "staggering a little...slurring his words a little and his eyes looked a little drowsy." (IO Exhibit 22). On their face, these observations are of the type which might convince a reasonably prudent person that there is probable cause to believe the Accused was intoxicated.[5]

However, these observations and conclusions cannot be evaluated in a vacuum. When evaluating the Accused's conduct and perceived drunkenness one must also consider that by the time of the incident, the Accused had been awake for nearly 37 hours. (IO Exhibit 4; IO Exhibit 5; IO Exhibit 6; IO Exhibit 17; IO Exhibit 19). Sleep deprivation for 24 hours can mimic the effects of .10% BAC. (IO Exhibit 25). The Accused was awake for 13 hours more than that. Without any evidence to distinguish what effects, if any, may be attributed to this extreme lack of sleep, rather than to the Accused's purported drunkenness, there are serious factual issues regarding element two of this offense.

Considered in its entirety, the evidence presented regarding Charge I and its Specification raise a very close question as to whether reasonable grounds exist to believe that the Accused committed the offenses. However, in light of the evidentiary deficiencies regarding element two of this offense, I find that reasonable grounds do not exist to believe that the Accused committed the offense as alleged. For the above stated reasons, I recommend that Charge I and its Specification not be referred to trial by court-martial.

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[3] It is worth noting that when Ms. No Moccasin called 911, she reported that she was assaulted and her car was stolen. (IO Exhibit 11). It was only after being on the telephone with a 911 dispatcher for an additional 90 seconds that Ms. No Moccasin indicated that she located the vehicle and that it was crashed. (IO Exhibit 11). The fact that Ms. No Moccasin did not initially report the crash, lends some credibility to the notion that her report was not a fabrication designed to conceal the fact that she had drunkenly wrecked her own vehicle.

[4] *Manual for Courts-Martial, Part IV, 35(c)(6), 2008.*

[5] Ms. No Moccasin did report that the Accused engaged in several activities that would likely require the employment of both his physical and mental faculties. Specifically, the Accused played and won two games of pool while at the Oasis and he taught her a country line dance while at Skyline Drive. (IO Exhibit 22).

Charge II and its Specification, Wrongful Appropriation: Charge II and its Specification allege that the Accused did on or about 10 August 2010 wrongfully appropriate a 1994 Nissan Sentra, the property of Ms. Wendy No Moccasin, valued at more than $500.00. The elements of the offense are:

(1) That the Accused wrongfully took a 1994 Nissan Sentra from the possession of Wendy No Moccasin;
(2) That the property belonged to Wendy No Moccasin;
(3) That the property was of a value of more than $500.00; and
(4) That the taking of the property by the Accused was with the intent to temporarily appropriate the property to the Accused's own use.

Discussion of the Evidence: There are substantive issues with Charge II and its Specification. Element one suffers from the same deficiencies present in element one of Charge I and its Specification—specifically that Ms. No Moccasin was the only witness, she was intoxicated, and there is no other physical or forensic evidence to establish that the Accused drove the vehicle, therefore "taking it" from Ms. Moccasin. (IO Exhibit 8; IO Exhibit 14: IO Exhibit; IO Exhibit 20; IO Exhibit 21). However, if one does rely on the reporting statement and testimony of Ms. No Moccasin, the wrongfulness of the taking is evident. Applicable statutes define "wrongful taking" as that taking which is done without the consent of the owner and with a criminal state of mind.[6] In this case, there was evidence presented that Ms. No Moccasin did not give the Accused permission to take her car. (IO Exhibit 8; IO Exhibit 11; IO Exhibit 14; IO Exhibit 22). In fact, according to Ms. No Moccasin, a physical struggle for the car keys ensued before the Accused got into the car and drove away. (IO Exhibit 8; IO Exhibit 11; IO Exhibit 14; IO Exhibit 22).

Elements two and three are easily established by the statements of Accused, Capt Adams, and Ms. No Moccasin. As it pertains to element two, the "owner of property" is defined as one who "at the time of the taking has a superior right to possession of the property in light of all the conflicting interests which may be present in a particular case."[7] In this case, the Accused and Capt Adams had never even met Ms. No Moccasin before the night in question and there was no evidence presented that either the Accused or Capt Adams would have had any legal rights that superseded Ms. No Moccasin's rights to the 1994 Nissan Sentra. (IO Exhibit 5; IO Exhibit 5: IO Exhibit 17; IO Exhibit 22). As it pertains to element three, the valuation of the stolen property, Ms. No Moccasin testified that she purchased the vehicle for $1500.00 from Mr. Ron Strongheart. (IO Exhibit 22).

Element four of the offense, that Accused took the car for his own temporary use, may be established by evidence of the Accused's desire not be driven by Ms. No Moccasin, whom he had determined was intoxicated. (IO Exhibit 4; IO Exhibit 5; IO Exhibit 17; IO Exhibit 22). By all accounts, the Accused had demanded that he be let out of the vehicle and only returned when he was convinced to do so by Capt Adams. (IO Exhibit 4; IO Exhibit 5; IO Exhibit 17; IO Exhibit 22). The fact that the Accused needed a ride to Ellsworth AFB and that he was not willing to let Ms. No Moccasin drive him there

[6] *Manual for Courts-Martial, Part IV, 46(c)(1)(b), 2008.*
[7] *Manual for Courts-Martial, Part IV, 45(c)(1)(c)(ii), 2008.*

suggests that there are reasonable grounds to believe the Accused did have the requisite intent to temporarily appropriate the 1994 Nissan Sentra for his own use.

Considering the evidence presented on all four elements, there is again a close question as to whether reasonable grounds exist to believe that Ms. No Moccasin's vehicle was wrongfully taken and that the Accused took it. However, in light of the standard of proof at an Article 32 Investigation, and the fact that there was some credible evidence presented which could establish three of the four elements of the offense, I recommend that Charge II and its Specification be referred to trial by general court-martial.

Charge III, Specification 1, Assault Consummated by Battery: Charge III, Specification 1 alleges that the Accused did on or about 10 August 2010 assault Ms. Wendy No Moccasin. The elements of the offense are:

(1) That the Accused did bodily harm to Wendy No Moccasin;
(2) That the Accused did so by tripping her and causing her to fall to the ground and unlawfully striking her in the head with his hands; and
(3) That the bodily harm was done with unlawful force or violence.

Discussion of the Evidence: There are no substantive issues regarding the legal sufficiency of Charge III, Specification 1. In regards to the first element, bodily harm is defined as any physical injury or offensive touching.[8] Ms. No Moccasin reported injuries to her chest, scalp, left arm, and left leg that she attributed to a physical altercation with the Accused. (IO Exhibit 22). Her reports of these injuries were timely, and according to the law enforcement officials involved, consistent with her account of the altercation with the Accused. (IO Exhibit 8; IO Exhibit 14; IO Exhibit 22). These injuries were also documented with photographs. (IO Exhibit 12; IO Exhibit 15).

Ms. No Moccasin's repeated, consistent account of the assault, coupled with the documentation of her injuries are sufficient evidence to establish the second element of the offense—that she was tripped and hit in the head by the Accused. (IO Exhibit 8; IO Exhibit 14; IO Exhibit 22).

Finally, in order for bodily harm to be done with unlawful force or violence, it must be done without consent or legal justification. The fact that Ms. No Moccasin reported the incident to the police and that she was visibly upset for at least 15 minutes after the incident suggests that the act was done without Ms. No Moccasin's lawful consent. (IO Exhibit 8; IO Exhibit 11; IO Exhibit 14; IO Exhibit 22).[9]

As there are no substantive issues with Charge III, Specification 1, I recommend that it be referred to trial by general court-martial.

Charge III, Specification 2, Assault upon a Commissioned Officer: Charge III, Specification 2 alleges that the Accused did on or about 10 August 2010 assault Capt Robert Adams. The elements of the offense are:

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[8] *Manual for Courts-Martial, Part IV, 54(c)(1)(a), 2008*

[9] Though not direct evidence of a battery on Ms. No Moccasin, the fact that just moments before this incident, the Accused admits to being "agitated" and then violent with his colleague, Capt Adams, is certainly informative of his intent and state of mind. (IO Exhibit 4; IO Exhibit 5; IO Exhibit 17; IO Exhibit 22).

(1) That the Accused did bodily harm to Capt Robert Adams;
(2) That the Accused did so by unlawfully striking him in the head with his hands and by choking the neck of Capt Adams with either his arms or hands;
(3) That the bodily harm was done with unlawful force or violence;
(4) That Capt Robert Adams was a commissioned officer of the United States Air Force; and
(5) That the Accused knew that Capt Robert Adams was a commissioned officer of the United States Air Force.

Discussion of the Evidence: There are no substantive issues regarding the legal sufficiency of Charge III, Specification 2.[10] Capt Adams statement that he suffered a small cut on his head, a sore neck, and a small black eye as a result of the Accused's actions is sufficient to establish that the Accused did bodily harm to Capt Adams. The general nature of the assault and the fact that it was done without legal justification or consent is actually confirmed by Capt Adams, Ms. No Moccasin, and the Accused. (IO Exhibit 4; IO Exhibit 5; IO Exhibit 17; IO Exhibit 22). All three witnesses agree that while Ms. No Moccasin was driving on Skyline Drive, Capt Adams was in the front passenger seat while the Accused was seated in the back seat. At some point, the Accused leaned forward and either choked or put Capt Adams in a "sleeper hold". (IO Exhibit 4; IO Exhibit 5; IO Exhibit 17; IO Exhibit 22). Ms. No Moccasin and Capt Adams further reported that at some point during the choking incident, the Accused also hit Capt Adams in the head with his hands. (IO Exhibit 5; IO Exhibit 17; IO Exhibit 22). The attack was serious enough that Ms. No Moccasin stopped the vehicle to assist and Capt Adams fled the vehicle for his own safety. (Exhibit 5; IO Exhibit 17; IO Exhibit 22). That Capt Adams is a commissioned officer and that the Accused was aware of that fact is easily established by the statements given by Maj Dykas, Maj Ferguson, Capt Adams, and the Accused regarding their TDY to Al Udeid. (IO Exhibit 4; IO Exhibit 5; IO Exhibit 6; IO Exhibit 7; IO 17; IO Exhibit 18; IO Exhibit 19). Seeing no substantive issues with Charge III, Specification 2, I recommend that it be referred to trial by general court-martial.

Charge IV, and its Specification, Fleeing the Scene of an Accident: Charge IV and its Specification allege that the Accused did on or about 10 August 2010 flee the scene of an accident. The elements of the offense are:

(1) That the Accused was the driver of a vehicle which was involved in an accident;
(2) That the Accused knew the vehicle had been involved in an accident;
(3) That the Accused left the scene without making his identity known;
(4) That the Accused's departure was wrongful and unlawful; and
(5) That under the circumstances, the conduct of the Accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Discussion of the Evidence: There are substantive issues with Charge IV and its Specification.

[10] The definitions for elements one through three for Charge III, Specification 2 are identical to those of Charge III, Specification 1.

Element one suffers from the same deficiencies which were previously discussed regarding Charge I and its Specification and Charge II and its Specification—specifically that Ms. No Moccasin was the only witness, she was intoxicated, and there is no other physical or forensic evidence to establish that the Accused drove the vehicle.

However, even if one finds Ms. No Moccasin's statement to be credible, that she saw the Accused drive the vehicle away, Ms. No Moccasin can provide no further details regarding what happened after the Accused drove out of her view. (IO Exhibit 11; IO Exhibit 22). Consequently, there is apparently no evidence, direct or circumstantial, to establish elements two through four of the offense. For example, there was no evidence presented that even if the Accused was driving the vehicle at the time of the accident, that he was in a state of mind where he was actually able to appreciate the fact that he was in an accident or that his departure from the scene was wrongful or unlawful.

In fact, to the degree that there is any evidence on these points, it suggests that the Accused may not have been in a state of mind to appreciate having just been in accident. According to the Accused, he remembers exiting the vehicle shortly after attacking Capt Adams, walking down a hill, and then just laying down. When asked why he stopped on the side of that hill to sleep for the night the Accused replied, "I don't know." (IO Exhibit 4). Further, as there is evidence that the vehicle was not drivable, the Accused was in a location with which he was unfamiliar, and that sometime shortly after this incident the Accused lost his phone, there are serious questions as to whether reasonable grounds exist to believe that the Accused's departure was wrongful and unlawful. (IO Exhibit 10; IO Exhibit 4).

In light of the insufficient evidence regarding elements two through five of this offense, I find that reasonable grounds do not exist to believe that the Accused committed the offense as alleged.
For the above stated reasons, I recommend that Charge IV and its Specification not be referred to trial by general court-martial.

C. Investigating Uncharged Misconduct:[11] Government representatives requested that I investigate the offense of driving while impaired, in violation of Article 111, UCMJ and Communicating a Threat in violation of Article 134 UCMJ.

Driving While Impaired, Article 111, UCMJ: The elements of the offense are:

(1) That the Accused was operating a 1994 Nissan Sentra; and
(2) That the Accused was operating the said vehicle while impaired.

Discussion of the Evidence: There are substantive issues with this potential charge and Specification. The term impaired is used in relation to intoxication by a substance described in Article

[11] In accordance with AFI 51-201, para 4.1.11, if evidence is received at an Article 32 investigation indicating that the Accused committed uncharged misconduct, the IO may investigate the subject matter of such offense and make a recommendation as to its disposition prior to preferral of charges on that offense. The IO should ensure the Accused is present at the investigation, is informed of the nature of each uncharged offense investigated, and is afforded the right to counsel, cross-examination and presentation of evidence.

112(a), UCMJ.[12] The only substance identified during the investigation that could qualify as one described in Article 112a is the, "Go Pill" or Dexedrine, which is a schedule II controlled substance. Maj Dykas, Maj Ferguson, Capt Adams, and the Accused were all issued "Go Pills" for use during the flight. (IO Exhibit 4; IO Exhibit 17; IO Exhibit 19). However, there was no evidence presented during the investigation that the Accused used the pills in any other manner than as prescribed or that he was otherwise under the influence of said pills at the time of the incident. For that reason, I would not recommend adding the language "impaired" to Charge I and its Specification, nor would I recommend substituting the word "impaired" for the word "drunk," nor would I recommend preferring an additional Specification alleging driving while impaired in violation of Article 111, UCMJ.

Communicating a threat, Article 134, UCMJ: The elements of the offense are:

(1) That the Accused communicated certain language, to wit: "Give me your fucking keys or I am going to kill you," or words to that effect;
(2) That the communication was made known to Wendy No Moccasin;
(3) That the language used by the Accused under the circumstances amounted to a threat, that is, a clear, present determination or intent to injure the person of Ms. No Moccasin in the future;
(4) That the communication was wrongful;
(5) And that under the circumstances the conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed services.

Discussion of the Evidence: There are no substantive issues with this potential charge and Specification. Elements one, two, and three were established by the testimony of Ms. No Moccasin who reported that after she and Capt Adams had fled her vehicle in response to the Accused's violent outburst, the Accused followed her and demanded, "Give me the fucking keys or I am going to kill you," or words to that effect. (IO Exhibit 14; IO Exhibit 22). While the law does not require that the Accused actually intend to do the injury threatened, the fact that there is evidence that the Accused forcibly removed Ms. No Moccasin's keys from her hands after he knocked her down is informative of the context in which this alleged threat was issued.[13] (IO Exhibit 8; IO Exhibit 11; IO Exhibit12; IO Exhibit 14; IO Exhibit 22). Finally, where there is evidence that a known military member allegedly threatens a civilian without legal justification or excuse, there are reasonable grounds to believe that the threat was of a nature to bring discredit upon the armed forces and that such communication was wrongful. For the above stated reasons, I recommend preferring an additional charge of Communicating a Threat in violation of Article 134, UCMJ.

D. Legal Issues:

(1) Investigating Officer's Exhibits not Considered. In accordance with AFI 51-201, Administration of

[12] *Manual for Courts-Martial, Part IV, 35(c)(6), 2008.*
[13] *Manual for Courts-Martial, Part IV, 110(c), 2008.*

Military Justice, para 4.1.7.2, Investigating Officers should consider all evidence that is relevant not cumulative, and reasonably available. In this case, Defense Counsel submitted IO Exhibit 24, which purported to be a transcript of Ms. No Moccasin's 911 call to Rapid City Police on 10 Aug 10. However, because I had the opportunity to review the audio recording first hand (IO Exhibit 11) and because of Mr. Burke's lack of professional experience as a transcriptionist and his obvious bias towards his son, the Accused, I deemed IO Exhibit 24 to be cumulative and did not consider it.

(2) Argument. In accordance with AFI 51-201, para 4.1.7.5, the Accused or counsel may make a statement in the form of a brief argument at the end of the presentation of the evidence. In this case, rather than make an oral argument, Defense Counsel opted to submit the red-type face portion of IO Exhibit 24 and the entire document of IO Exhibit 27 as argument.

E. Recommendations:

(1) I recommend that Charge I and its Specification not be referred to trial by court-martial. However if Charge I and its Specification are referred to trial by court-martial, I recommend a minor change be made in the form of lining out an additional comma and space following the word "Drive" and before the word "did".

(2) I recommend that Charge II and its Specification be referred to trial by general court-martial.

(3) I recommend that Specifications 1 and 2 of Charge III be referred to trial by general court-martial.

(4) I recommend that Charge IV and its Specification not be referred to trial by court-martial.

(5) I recommend that an additional Charge and Specification be preferred in violation of Article 134, UCMJ, Communicating a Threat.

F. Chronology

(1) 23 March 2011, Appointed as Investigating Officer

(2) 31 March 2011, Received preliminary evidentiary materials from Government Representative

(3) 5 April 2011, Submitted an Investigating Officer's Scheduling Memorandum

(4) 11 April 2011, Article 32 Investigation held

(5) 12-13 April 2011, Preparation for litigated court-martial, Goodfellow, AFB

(6) 14-15 April 2011, United States v. Pogue, Goodfellow, AFB

(7) 16-24 April 2011, Compiling Article 32 Investigating Officer's Report

(8) 25 April, Article 32Investigating Officer's Report submitted