

UNITED STATES  
v.  
JAY D. WYLIE  
COMMANDER  
XXX-XX-(b)(6) 1110  
USS MOMSEN (DDG 92)

CMTIS: 201101250

No. I of II

RECORD OF TRIAL

By

GENERAL COURT-MARTIAL

CONVENED BY

COMMANDER  
NAVY REGION NORTHWEST  
1100 HUNLEY ROAD  
SILVERDALE, WA 98315-1100

Tried at

WESTERN JUDICIAL CIRCUIT COURTHOUSE  
NAVAL BASE SAN DIEGO, CALIFORNIA 92136-5025

ON

28 OCTOBER 2011

THERE ARE NO COMPANION CASES

COPY FOR GOVERNMENT COUNSEL  
CASE BEFORE NMCCA PANEL NO. 2

201200088

## APPELLATE AND POST-TRIAL RIGHTS

### Record of Trial

You are advised that your counsel is required by law to fully explain to you the following post-trial and appellate rights, and that you have the right to request the military judge explain all or any portion of your appellate rights in open court prior to adjournment of your court-martial.

A copy of the record of trial will be prepared and given to you. You may request that your copy of the record of trial be delivered to your defense counsel.

### Staff Judge Advocate or Legal Officer's Recommendation

If you received a punitive discharge or were sentenced by a general court-martial, the convening authority's staff judge advocate or legal advisor will submit a recommendation to the convening authority. Before forwarding the recommendation and the record of trial to the convening authority, this legal advisor will serve a copy of the written review and recommendation upon your defense counsel. A separate copy will be served on you. If it is impracticable to serve the recommendation on you for reasons including, but not limited to, your transfer to a distant place, your unauthorized absence, or military exigency, your copy will be forwarded to your defense counsel. You may also request on the record at this court-martial or in writing that your copy be sent to your defense counsel instead of yourself.

### Submission of Matters to the Convening Authority

You have a right to submit matters to the convening authority before that officer takes action on your case. In this regard, you have the right to request deferment of any sentence to confinement. These matters must be submitted within 10 days after a copy of the authenticated record of trial or, if applicable, the recommendation of the staff judge advocate or legal officer is served on you or your defense counsel, whichever is later. The convening authority may extend these periods, for good cause, for not more than an additional 20 days. Failure to submit matters within the time prescribed waives the right to submit matters later.

### Action by the Convening Authority

The convening authority will take action on the sentence adjudged and may, in his discretion, take action on findings of guilty. The action to be taken on the findings and sentence is within the sole discretion of the convening authority and is a matter of command prerogative. The convening authority is not required to review the case for legal errors or factual sufficiency. In taking action on the sentence, the convening authority may approve, disapprove, commute, or suspend the sentence in whole or in part. Under no circumstances may the convening authority increase the severity of the sentence. The convening authority is not empowered to reverse a finding of "not guilty"; however, the convening authority may change a finding of guilty to a charge or specification to a finding of guilty to a lesser offense included within that charge or specification, may disapprove a finding of guilty and order a rehearing, or may set aside and dismiss any charge or specification. If you were tried by a special court-martial and your sentence, as finally approved by the convening authority, does not include a punitive discharge, your case will be reviewed under the direction of the staff judge advocate for the convening authority's superior general court-martial convening authority. You may suggest, in writing, possible legal errors for the judge advocate to consider, and that judge advocate must file a written response to legal errors noted by you. After such review, and completion of any required action by the general court-martial convening authority, you may request the Judge Advocate General of the Navy take corrective action. Such a request must be filed within two years of the convening authority's action, unless the time is extended for good cause. If you were tried by a general court-martial and your sentence, as finally approved by the convening authority, does not include a punitive discharge or at least one year's confinement, your case will be forwarded to the Office of the Judge Advocate General. You may suggest, in writing, possible legal errors or other matters for consideration by the Judge Advocate General. The record may be examined for any legal errors and for appropriateness of the sentence and the Judge Advocate General may take corrective action, if appropriate.

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If your sentence, as finally approved by the convening authority, includes a punitive discharge (regardless of the type of court-martial), dismissal, a year's confinement or more, or death your case will be reviewed by the Navy-Marine Corps Court of Criminal Appeals for legal error, factual sufficiency, and appropriateness of sentence. This review is automatic. Following this, your case could be reviewed by the United States Court of Appeals for the Armed Forces, and, finally, it could be reviewed by the United States Supreme Court.

Waiver of Review

You may waive appellate review, giving up the foregoing rights, or you may withdraw your case from appellate review at a later time. Once you file a waiver or withdrawal, your decision is final and appellate review is barred. If you waive or withdraw appellate review, a judge advocate will review your case for certain legal errors. You may submit, in writing, suggestions of legal error for consideration by the judge advocate, who must file a written response to each. The judge advocate's review will be sent to the general court-martial convening authority for final action. Within two years after such final action, you may request the Judge Advocate General to take corrective action in your case. The two year period may be extended for good cause. You have the right to the advice and assistance of counsel in exercising or deciding to waive your post-trial and appellate rights.

Right to Counsel

It is your defense counsel's responsibility to represent you during the convening authority's action stage of your court-martial conviction. Your defense counsel is responsible for examining the record of trial for errors and, where applicable, the post-trial recommendation of the staff judge advocate or legal officer for errors or omissions. It is your defense counsel's obligation to advise and assist you in preparing matters for submission to the convening authority for consideration prior to action being taken on the record of trial.

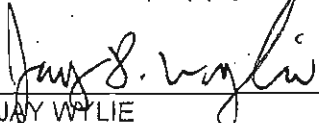
If your case is reviewed by the Navy-Marine Corps Court of Criminal Appeals, military counsel will be appointed to represent you at no cost to you and, if you choose, you may engage civilian counsel at no expense to the United States. If your case should be reviewed by the United States Court of Appeals for the Armed Forces or by the United States Supreme Court, you would continue to have the same appellate counsel rights before these courts.

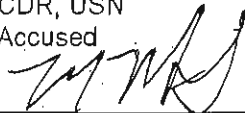
Acknowledgement

I acknowledge: (1) that prior to adjournment of my court-martial, I was provided with the above written advice; (2) that I have read and understand my post-trial and appellate rights; (3) that I have discussed them with my lawyer prior to signing this form; and, (4) that the military judge will discuss my appellate rights with me on the record prior to adjournment of the court, if I so desire.

I specifically request that my copy of the record of trial be delivered to  
(me) (my counsel) Mr. Jeremiah J. Sullivan, III.

I specifically request that my written copy of the staff judge advocate/legal officer recommendation be delivered to (me) (my counsel) Mr. Jeremiah J. Sullivan, III.

  
\_\_\_\_\_  
JAY WYLIE  
CDR, USN  
Accused

  
\_\_\_\_\_  
MARK FULTON  
CDR, JAGC, USN  
Defense Counsel

28 OCT 11  
DATE

28 OCT 11  
DATE

From: CDR Jay Wylie, USN  
To: The Judge Advocate General of the Navy

Subj: APPELLATE RIGHTS STATEMENT

1. I was convicted and sentenced by a General Court-Martial on 28 October 2011 at Naval Station San Diego, California. Pursuant to Article 70, Uniform Code of Military Justice, and R.C.M. 502(d)(6), R.C.M. 1105, and R.C.M. 1110, M.C.M., 2002 my defense counsel, CDR Mark Fulton, JAGC, USN, has advised me of my appellate rights and the review process of the record of my court-martial as follows:

a. The convening authority will take action on the sentence and may, in his discretion, take action on the findings. The action to be taken on the findings and sentencing is within the sole discretion of the convening authority. The determination of the action to take on findings and sentence is a matter of command prerogative. The convening authority is not required to review the case for legal errors or factual sufficiency. In taking action on the sentence, the convening authority may approve, disapprove, commute, or suspend the sentence in whole or in part. The convening authority is not empowered to reverse a finding of not guilty; however, the convening authority may change a finding of guilty to a charge or specification to a finding of guilty to a lesser offense included within that charge or specification, may disapprove a finding of guilty and order a rehearing, or may set aside and dismiss any charge or specification. Under no circumstances may the convening authority increase the severity of the sentence as adjudged. I have been advised by my defense counsel that it is counsel's responsibility to represent me during the convening authority's action stage of my court-martial conviction. In this regard, my defense counsel has advised me of my right to request deferment of any sentence to confinement, and of counsel's obligation to advise and assist me in preparing matters for submission to the convening authority for consideration prior to his taking action. I understand that I have 10 days after a copy of the authenticated record of trial is served in accordance with R.C.M. 1104(b) or the recommendation of the staff judge advocate or legal officer is served in accordance with R.C.M. 1105(c), whichever is later, to submit matters to the convening authority. The convening authority may, for good cause, extend the 10-day period for not more than 20 additional days. It is also understood that the failure to submit matters within the times prescribed waives the right to submit matters. I may also expressly waive, in writing, my rights to submit matters, and such waiver may not be revoked. My defense counsel has also advised me of his responsibility to examine the record of trial and to note any errors and to examine the post-trial recommendation by the staff judge advocate or legal officer for error or omissions, and to reply within ten days from the date of service of the record of trial under R.C.M. 1104(b) or service of the recommendation under R.C.M. 1105(c), whichever is later. The convening authority may, for good cause, extend this time period for up to 20 additional days.

(1) If, after action by the convening authority, my sentence includes dismissal or a punitive discharge, as applicable, or confinement at hard labor for one year or more, I understand the record of trial will be forwarded to the Judge Advocate General for referral to the U.S. Navy-Marine Corps Court of Criminal Appeals (NMCCA) in Washington, D.C., for review. I understand that NMCCA is limited to reviewing the findings and sentence as approved by the convening authority and may not reverse a finding of not guilty, approve findings of guilty

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AE VI (6)

Enclosure (1)

Subj: APPELLATE RIGHTS STATEMENT

previously disapproved, or approve a sentence more severe than that previously approved. In this regard, I understand that no findings of guilty approved on review below may be affirmed by NMCCA unless that court is satisfied that each element of the offense or offenses of which I was convicted is established beyond reasonable doubt by legal and competent evidence of record. I further understand that if NMCCA approves a finding of guilty with regard to one or more offenses, the court is then required to determine the appropriateness of the sentence as approved on review below, and the court may not affirm a sentence as approved on review below unless it finds that the sentence is a legal, adequate, and appropriate punishment in view of all the circumstances.

(2) If NMCCA affirms the findings and sentence, in whole or in part, I understand that I have the right to seek further review of my court-martial conviction before the Court of Appeals for the Armed Forces (CAAF). In this regard, I understand that CAAF is composed of five civilian judges and is located in Washington, D.C. Insofar as further review before CAAF is concerned, I understand that, whereas the review process described in the preceding paragraph is automatic, I must request review before CAAF by filing a petition for grant of review within 60 days from the earlier of the date of being notified of the NMCCA decision or the date on which my copy of the NMCCA decision, after having been served on my appellate counsel of record, if any, is deposited in the United States mail for delivery by first-class certified mail to the address I have provided; or, if I fail to provide such an address, to the latest address listed by me in my service record. Furthermore, I understand that a petition for grant of review before CAAF does not have to be granted by that court. I understand that such a petition is granted only on good cause shown and the CAAF determines whether good cause is shown. I understand that if CAAF should grant my petition for review, its review of my case is limited solely to questions of law, and that its review will also be limited to those questions of law for which review was granted. I understand that CAAF generally must accept the facts as found at trial or during the prior review of my case and that it has no power to amend the sentence as affirmed by NMCCA except in very limited circumstances.

(3) If CAAF reviews my case, or otherwise grants relief, I understand that I may further petition the U.S. Supreme Court for review of the CAAF decision by writ of certiorari. I understand that the grant or denial of a writ of certiorari is within the sole discretion of the U.S. Supreme Court and that the application for a writ of certiorari must be filed in accordance with, and within the time limits prescribed by, the rules of the U.S. Supreme Court.

(4) My defense counsel has further advised me that I may waive the appellate review as just explained to me or I may withdraw the appeal of my case from such review. If I do waive the review or withdraw my appeal, then my case will be reviewed by a judge advocate. This judge advocate review must be in writing and set forth conclusions as to whether: (1) the court has jurisdiction over me and the offense(s); (2) the charge(s) and specification(s) stated an offense; and, (3) the sentence was within the limits prescribed as a matter of law. The judge advocate must also respond in writing to each allegation of error made by me or my defense counsel. If the judge advocate determines that corrective action is required or if the sentence includes dismissal, a punitive discharge, or confinement for more than six months, the record of trial and the judge advocate's review and recommendation will be sent to the officer exercising

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Enclosure (1)

Subj: APPELLATE RIGHTS STATEMENT

Special Court-Martial jurisdiction for action. The officer exercising Special Court-Martial jurisdiction may disapprove or approve the finding(s) or sentence, in whole or in part; may remit, commute, or suspend the sentence, in whole or in part; may order a rehearing on the findings or the sentence, or on both; or may dismiss the charge(s).

(5) I further understand that the portion of my sentence providing for a punitive discharge or dismissal may not be ordered executed until the court-martial conviction is final and the sentence, as finally approved, including the punitive discharge or dismissal. A court-martial conviction is final when the review is completed by NMCCA and:

(a) I fail to file a petition for grant of review before CAAF within 60 days after notification, or the date of certified mailing, as appropriate, or the NMCCA decision in my case;

(b) My petition for grant of review is denied or otherwise rejected by CAAF;

(c) My case is not otherwise under review by CAAF; or

(d) Review is completed in accordance with the judgment of CAAF and:

1. A petition for a writ of certiorari is not filed within the time limits prescribed by the U.S. Supreme Court;

2. A petition for a writ of certiorari is denied or otherwise rejected by the U.S. Supreme Court; or,

3. Review is otherwise completed in accordance with the judgment of the U.S. Supreme Court.

Additionally, if I have waived review of my case by NMCCA or withdrawn my appeal from that court, my court-martial conviction is final when review by a judge advocate is completed and action is taken by the officer exercising Special Court-Martial jurisdiction approving the findings and sentence. If my sentence includes a dismissal, approval by the Secretary of the Navy or such Under or Assistant Secretary as is designated is further required. If my sentence, as finally approved, includes a punitive discharge or dismissal, it is understood that I will be discharged or dismissed in accordance with the approved punishment.

2. In view of the foregoing, and should my court-martial be referred to NMCCA under Article 66 or Article 69, Uniform Code of Military Justice, I have been informed that I am entitled to representation before NMCCA, CAAF, and the U.S. Supreme Court by appellate defense counsel who is a lawyer qualified in accordance with Article 27(b), Uniform Code of Military Justice, designated by the Judge Advocate General of the Navy, and provided at no expense to me. Although I am entitled to such representation, I understand that I must request such representation. I also understand that, in addition to or in lieu of my designated appellate defense counsel, I may retain a civilian counsel to represent me before NMCCA, CAAF, and

Subj: APPELLATE RIGHTS STATEMENT

the U.S. Supreme Court, but that the services of a civilian counsel would be at my own expense and at no expense to the Government.

3. Having fully discussed the foregoing with my defense counsel, I do desire to be represented by appellate defense counsel. By my signature below, I hereby request the Judge Advocate General of the Navy to designate an appellate defense counsel to represent me. I understand that I may waive representation by appellate defense counsel, and that I may also waive or withdraw from appellate review. If I desire to exercise any of these rights, I will so indicate by separate correspondence to my appellate defense counsel.

4. In addition to, and separate from, my right to review by NMCCA, I have the right to sentence review by the Naval Clemency and Parole Board (NCPB). The NCPB will accept the findings of my court-martial and will not review my case for legal errors. After reviewing my case, however, the NCPB may grant clemency by reducing a part of my sentence. I understand that I may waive review by the NCPB. The decision whether to waive such review is an important one and I understand that I have the right to consult with counsel before making that decision.

5. For administrative purposes, the following information is provided:

- a. A civilian counsel was retained to represent the accused at trial.
- b. The services of an individual military counsel were not utilized.
- c. Detailed defense counsel's address and telephone number are:

Naval Legal Service Office Northwest  
Bremerton, WA  
360 476-6313

d. Principal defense counsel in this case was: Jeremiah J. Sullivan, III

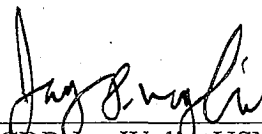
Subj: APPELLATE RIGHTS STATEMENT

e. I understand that in order for my defense counsel or any successor counsel properly to represent me, I must keep counsel informed of my current mailing address. In this regard, I may be contacted at the following address and phone number:

(b) (6)

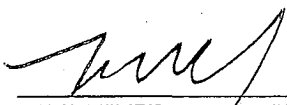
f. By my signature below, I agree to forward any change of address or phone number to:

Director, Appellate Defense Division (Code 45)  
Navy-Marine Corps Appellate Review Activity  
Office of the Judge Advocate General  
Washington Navy Yard  
Washington, DC 20374-1111

  
\_\_\_\_\_  
CDR Jay Wylie, USN

Date: 28 OCT 11

Witnessed by:

  
\_\_\_\_\_  
DETAILED DEFENSE COUNSEL  
CDR Mark Fulton, JAGC, USN

Date: 28 OCT 11



DEPARTMENT OF THE NAVY

NAVY REGION NORTHWEST  
1100 HUNLEY ROAD  
SILVERDALE, WASHINGTON 98315-1100

21 Feb 12

DNA processing required IAW 10 U.S.C. § 1565

GENERAL COURT-MARTIAL ORDER NUMBER 5-12

Commander Jay D. Wylie, U.S. Navy, USS MOMSEN (DDG 92), was arraigned on 28 October 2011, at Region Legal Service Office Southwest, San Diego, California, at a General Court-Martial convened by Commander, Navy Region Northwest General Court-Martial Convening Order 02-10, dated 15 September 2010. Commander Wylie entered pleas on 28 October 2011 on the following offenses, and the following findings or other dispositions were reached on 28 October 2011:

**CHARGE I: VIOLATION OF THE UCMJ. ARTICLE 92**

**Plea: Not Guilty. Finding: Withdrawn and Dismissed.**

Specification 1: In that Commander Jay D. Wylie, U.S. Navy, USS MOMSEN, on active duty, did, at or near Victoria, Seychelles, on or about 1 January 2011, violate a lawful general order to wit: OPNAVINST 5370.2C, Navy Fraternalization Policy, dated 26 April 2007, by wrongfully engaging in unduly familiar conduct that did not respect differences in pay grade or rank with Ensign (b) (6) (b) (6) U.S. Navy, to wit: rubbing her shoulders, leaning against her and pinning her to a bar, requesting that she kiss him, attempting to kiss her, putting his hand up her dress and inside her underwear, rubbing and digitally penetrating her vagina with his hand and fingers. **Plea: Not Guilty. Finding: Withdrawn and Dismissed.**

Specification 2: In that Commander Jay D. Wylie, U.S. Navy, USS MOMSEN, on active duty, did, at or near Victoria, Seychelles, on or about 1 January 2011, violate a lawful general order to wit: SECNAVINST 5300.26D, Navy Sexual Harassment Policy, dated 3 January 2006, by committing sexual harassment as defined therein by wrongfully making unwelcome sexual advances and making unwelcome sexual contact with Ensign (b) (6) U.S. Navy, to wit: rubbing her shoulders, leaning against her and pinning her to a bar, requesting that she kiss him, attempting to kiss her, putting his hand up her dress and inside her underwear, and rubbing and digitally penetrating her vagina with his hand and fingers. **Plea: Not Guilty. Finding: Withdrawn and Dismissed.**

Specification 3: In that Commander Jay D. Wylie, U.S. Navy, USS MOMSEN, on active duty, did, at or near Naval Magazine Indian

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~~Any misuse or unauthorized disclosure may result in civil and criminal penalties.~~

Certified to be a true copy  
*Michael E. Winters*  
MICHAEL E. WINTERS  
Legal Assistant, RLSO NW

GENERAL COURT-MARTIAL ORDER NUMBER 5-12

Island, Washington and on board USS MOMSEN (DDG 92) on or about 25 April 2011, violate a lawful general order to wit: OPNAVINST 5370.2C, Navy Fraternalization Policy, dated 26 April 2007, by wrongfully engaging in unduly familiar conduct that did not respect differences in pay grade or rank with Engineman Fireman (b) (6) U.S. Navy, to wit: brushing his hand on her shoulder, requesting that she come home with him, placing his hand on the small of her back, escorting her to his cabin, grabbing her shirt, kissing her, placing his mouth on her vagina, placing his finger(s) inside her vagina and anus and telling her "I'm so hard right now" or words to that effect.  
Plea: Not Guilty. Finding: Withdrawn and Dismissed.

Specification 4: In that Commander Jay D. Wylie, U.S. Navy, USS MOMSEN, on active duty, did, at or near Naval Magazine Indian Island, Washington and on board USS MOMSEN, on or about 25 April 2011, violate a lawful general order to wit: SECNAVJNST 5300.26D, Navy Sexual Harassment Policy, dated 3 January 2006, by committing sexual harassment as defined therein by wrongfully making unwelcome sexual advances and making unwelcome sexual contact with Engineman Fireman (b) (6) U.S. Navy, to wit: brushing his hand on her shoulder, requesting that she come home with him, placing his hand on the small of her back, escorting her to his cabin, grabbing her shirt, kissing her, placing his mouth on her vagina, placing his finger(s) inside her vagina and anus and telling her "I'm so hard right now" or words to that effect.  
Plea: Not Guilty. Finding: Withdrawn and Dismissed.

CHARGE II: VIOLATION OF THE UCMJ, ARTICLE 93

Plea: Not Guilty. Finding: Withdrawn and Dismissed.

Specification 1: In that Commander Jay D. Wylie, U.S. Navy, USS MOMSEN, on active duty, at or near Victoria, Seychelles, on or about 1 January 2011, did maltreat Ensign (b) (6) U.S. Navy, a person subject to his orders, by rubbing her shoulders, leaning against her and pinning her to a bar, requesting that she kiss him, attempting to kiss her, putting his hand up her dress and inside her underwear, and rubbing and digitally penetrating her vagina with his hand and fingers.  
Plea: Not Guilty. Finding: Withdrawn and Dismissed.

GENERAL COURT-MARTIAL ORDER NUMBER 5-12

Specification 2: In that Commander Jay D. Wylie, U.S. Navy, USS MOMSEN, on active duty, at or near Naval Magazine Indian Island, Washington and on board USS MOMSEN, on or about 25 April 2011, did maltreat Engineman Fireman (b) (6) U.S. Navy, a person subject to his orders, by brushing his hand on her shoulder, requesting that she come home with him, placing his hand on the small of her back, escorting her to his cabin, grabbing her shirt, kissing her, placing his mouth on her vagina, placing his finger(s) inside her vagina and anus and telling her "I'm so hard right now" or words to that effect.

Plea: Not Guilty. Finding: Withdrawn and Dismissed.

CHARGE III: VIOLATION OF THE UCMJ, ARTICLE 120

Plea: Guilty. Finding: Guilty.

Specification 1: In that Commander Jay D. Wylie, U.S. Navy, USS MOMSEN, on active duty, did; at or near Victoria, Seychelles, on or about 1 January 2011, cause Ensign (b) (6) U.S. Navy, to engage in a sexual act, to wit: penetration of her vagina with his finger, by using strength sufficient that she could not avoid or escape the sexual conduct. Plea: Guilty.

Finding: Guilty.

Specification 2: In that Commander Jay D. Wylie, U.S. Navy, USS MOMSEN, on active duty, did, at or near Victoria, Seychelles, on or about 1 January 2011, cause Ensign (b) (6) U.S. Navy, to engage in a sexual act, to wit: penetration of her vagina with his finger, by causing bodily harm to wit: pushing her up against a bar so that she could not move. Plea: Not Guilty. Finding: Withdrawn and Dismissed.

Specification 3: In that Commander Jay D. Wylie, U.S. Navy, USS MOMSEN, on active duty, did, on board USS MOMSEN, at or near Naval Magazine Indian Island, Washington, on or about 25 April 2011, cause Engineman Fireman (b) (6) U.S. Navy, to engage in a sexual act, to wit: penetration of her vagina with his finger, through abuse of his military rank, position and authority, creating an implied threat to negatively affect the military career of Engineman Fireman (b) (6) U.S. Navy, if she did not comply. Plea: Guilty. Finding: Guilty.

Specification 4: In that Commander Jay D. Wylie, U.S. Navy, USS MOMSEN, on active duty, did, on board USS MOMSEN, at or near

GENERAL COURT-MARTIAL ORDER NUMBER 5-12

Naval Magazine Indian Island, Washington, on or about 25 April 2011, cause Engineman Fireman (b) (6) U.S. Navy, to engage in sexual contact, to wit: penetration of her anus with his finger, through abuse of his military rank, position and authority, creating an implied threat to negatively affect the military career of Engineman Fireman (b) (6) U.S. Navy, if she did not comply. Plea: Guilty. Finding: Guilty.

Specification 5: In that Commander Jay D. Wylie, U.S. Navy, USS MOMSEN, on active duty, did, on board USS MOMSEN, at or near Naval Magazine Indian Island, Washington, on or about 25 April 2011, cause Engineman Fireman (b) (6) U.S. Navy, to engage in sexual contact, to wit: placing his mouth on her vagina, through abuse of his military rank, position and authority, creating an implied threat to negatively affect the military career of Engineman Fireman (b) (6) U.S. Navy, if she did not comply. Plea: Guilty. Finding: Guilty.

CHARGE IV: VIOLATION OF THE UCMJ, ARTICLE 125

Plea: Not Guilty. Finding: Withdrawn and Dismissed.

Specification: In that Commander Jay D. Wylie, U.S. Navy, USS MOMSEN, on active duty, did, on board USS MOMSEN, at or near Naval Magazine Indian Island, Washington, on or about 25 April 2011, commit sodomy with Engineman Fireman (b) (6) U.S. Navy, by force and without the consent of the said Engineman Fireman (b) (6) U.S. Navy. Plea: Not Guilty. Finding: Withdrawn and Dismissed.

CHARGE V: VIOLATION OF THE UCMJ, ARTICLE 133

Plea: Guilty. Finding: Guilty.

Specification 1: In that Commander Jay D. Wylie, U.S. Navy, USS MOMSEN, on active duty, did, at or near Victoria, Seychelles, from on or about 31 December 2010 to 1 January 2011, wrongfully and dishonorably become publically intoxicated in front of members of his crew, make unwanted sexual advances and engage in an unwanted sexual contact with Ensign (b) (6) U.S. Navy, a junior officer under his command, which conduct was unbecoming an officer and a gentleman. Plea: Guilty. Finding: Guilty.

GENERAL COURT-MARTIAL ORDER NUMBER 5-12

Specification 2: In that Commander Jay D. Wylie, U.S. Navy, USS MOMSEN, on active duty, did, on board USS MOMSEN, at sea, on or about February 2011, wrongfully and dishonorably encourage Ensign (b) (6) U.S. Navy, a junior officer under his command, not to report an incident in which he had sexually assaulted her on or about 1 January 2011 while on liberty at or near Victoria, Seychelles, which conduct was unbecoming an officer and a gentleman. Plea: Guilty. Finding: Guilty.

Specification 3: In that Commander Jay D. Wylie, U.S. Navy, USS MOMSEN, on active duty, did, at or near Naval Magazine Indian Island, Washington and on board USS MOMSEN, on or about 25 April 2011, wrongfully and dishonorably become publically intoxicated in front of members of his crew, make unwanted sexual advances and then, inside his cabin, engage in unwanted sexual conduct with Engineman Fireman (b) (6) U.S. Navy, a junior enlisted sailor under his command which conduct was unbecoming an officer and a gentleman. Plea: Guilty. Finding: Guilty.

SENTENCE

Sentence adjudged on 28 October 2011: to forfeit all pay and allowances; to be confined for 10 years; and to be dismissed from the service.

ACTION

In the case of Commander Jay D. Wylie, U.S. Navy, the sentence is approved and, except for that part of the sentence extending to a dismissal, will be executed, subject to the following terms of the pretrial agreement. First, all confinement in excess of 42 months will be suspended for the period of confinement adjudged plus 12 months thereafter, at which time, unless sooner vacated, the suspended portion will be remitted without further action. Second, adjudged forfeitures will be suspended for 12 months from the date of this action, at which time, unless sooner vacated, all suspended adjudged forfeitures will be remitted without further action. Third, automatic forfeitures pursuant to Article 58b(a)(1), UCMJ are deferred provided that the Accused establishes and maintains a dependents allotment in the total amount of the deferred forfeiture amount during the entire period of deferment and for

Certified to be a true copy  
*Michael E. Winters*  
MICHAEL E. WINTERS  
Legal Assistant, RLSC NW

GENERAL COURT-MARTIAL ORDER NUMBER 5-12

six months, thereafter. Further, automatic forfeitures pursuant to Article 58b(a)(1), UCMJ, are hereby waived for six (6) months from the date of this Action, provided that the accused establishes and maintains a dependent's allotment in the total amount of the waived forfeitures during the entire waiver period. The waived forfeitures shall be paid to Mrs. (b) (6) who is a dependent of the accused. Naval Consolidated Brig Miramar, Miramar, California, is designated as the place of confinement.

Per the accused's request on the record, a copy of the Record of Trial was served on the accused's detailed defense counsel via Federal Express on 9 December 2011. Per the accused's request on the record, a copy of the Staff Judge Advocate's Recommendation was served on the accused's detailed defense counsel and civilian defense counsel on 4 January 2012. The defense counsel submitted a petition for clemency under R.C.M. 1105 on 16 February 2012, requesting that I recuse myself from taking action, or alternatively reduced the period of confinement to 30 months and substitute a guilty finding for Aggravated Sexual Assault instead of Rape under UCMJ Article 120 in Specification 1 of Charge III.

In taking this action, I have considered only the record of trial, the results of trial, the Staff Judge Advocate's recommendations under R.C.M. 1106, and all matters submitted by the accused through detailed defense counsel on 16 February 2012 under R.C.M. 1105. I have not considered any messages, comments or outside opinions in taking action on this matter.

The record of trial is forwarded to the NAMARA Code 40, 1254 Charles Morris Street SE, Suite B01, Washington Navy Yard, Washington, DC 20374-5047 for review under Article 66, UCMJ.

*D. Biesel*

D. T. BIESEL  
Rear Admiral, U.S. Navy  
Commander, Navy Region Northwest

Distribution:

Original - Original ROT  
Duplicate Original - Accused SRB  
Certified Copies - 1 to Original ROT

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Certified to be a true copy  
*Michael H. Winters*  
MICHAEL H. WINTERS  
Legal Assistant, RLSO NW

DNA processing required IAW 10 U.S.C. § 1565

GENERAL COURT-MARTIAL ORDER NUMBER 5-12

- 1 to each copy ROT
- 2 to Consolidated Brig Miramar
- 1 to COMNAVPERSCOM (Pers 4834)
- 1 to DFAS-POCE/DE
- 1 to USACIL

Plain copies - 1 to accused

- 1 to RLSO Northwest, Bremerton, WA
- 1 to MJ
- 1 to TC
- 1 to DC

30 Dec 11

From: Staff Judge Advocate

To: Commander, Navy Region Northwest

Subj: STAFF JUDGE ADVOCATE'S RECOMMENDATION ICO UNITED STATES v. COMMANDER JAY D. WYLIE, USN

Ref: (a) Manual for Courts-Martial (latest ed.)  
(b) 10 U.S.C. § 1565  
(c) JAGMAN

Encl: (1) Results of Trial  
(2) Pretrial Agreement

1. This recommendation is to assist you in deciding what action to take on the sentence in the Court-Martial of Commander Jay D. Wylie. While action on the guilty findings or sentence is a matter within your discretion, you must consider the results of trial (enclosure (1)), this recommendation and any supplements thereto, and any post-trial matters submitted by the defense. You may also consider the record of trial and the personnel record of the accused as well as any other matters you deem appropriate. If, however, these matters are adverse to the accused and not included in the record of trial, the defense must be given the opportunity to comment. Reference (a).

2. Results of Trial: I have reviewed the results of trial, enclosure (1), and it accurately reflects the charges, findings, and sentence adjudged in this case, as well as any applicable confinement credit.

3. Pretrial Agreement. Enclosure (2) is a copy of the pretrial agreement. Having reviewed the record of trial, the accused has complied with the terms of the agreement and is entitled to the agreed upon relief.

4. Recommendation of the Sentencing Authority. I have reviewed the record of trial and there is no clemency recommendation by the sentencing authority made in conjunction with the announced sentence.

Subj: STAFF JUDGE ADVOCATE'S RECOMMENDATION ICO UNITED STATES v. COMMANDER JAY D. WYLIE, USN

5. Legal Error. The defense has not yet raised any allegations of legal error, but may do so in response to this recommendation.

a. While not legally significant, it should be noted that there are several administrative errors present in the record of trial. These errors include the accused's name being misspelled as "Wiley" throughout the record of trial, the accused's parent command being inaccurately identified, and the wrong defense counsel being set out as certifying receipt of the record of trial. These errors cannot be rectified, as they were not discovered until after the record had been authenticated.

6. Post-Trial Matters Submitted by the Accused. Post-trial matters by the defense will be provided when received. You are required to consider these matters in determining whether to approve or disapprove any of the findings of guilty and the action you take on the sentence. If, however, the defense does not submit matters within the time allowed, they will have waived this right.

7. DNA Collection. Federal law and service regulations require authorities, upon conviction of certain qualifying offenses, to collect a sample of the offender's DNA. The order promulgating your action in those cases must contain certain notice requirements. Reference (b). This case requires DNA collection, thus the order promulgating your action must comply with applicable notice requirements.

8. Post-trial Processing. Service regulations require that you take action within 120 days of the date the court-martial adjourns. This post-trial processing objective will be met. Reference (c).

9. Companion Cases. In order to make an informed decision in this case, service regulations require you to note in your action the separate trial of any companion cases. Reference (c). Companion cases are other cases referred to trial by you and involve servicemembers who, along with the accused, engaged in criminal conduct in a concerted effort to achieve a common goal. There are no companion cases.

Subj: STAFF JUDGE ADVOCATE'S RECOMMENDATION ICO UNITED STATES v. COMMANDER JAY D. WYLIE, USN

10. Recommendation. Having reviewed the record of trial, I recommend that you approve the sentence as adjudged and execute the sentence in accordance with the UCMJ and applicable regulations and the terms of the pretrial agreement.

11. Requests for Deferment. With the exception of the pretrial agreement, there have been no requests to defer any part of the sentence, either as adjudged or as mandated under the UCMJ.



D. E. RIEKE

Acknowledgement of Service

From: Jeremiah J. Sullivan, III, Civilian Defense Counsel  
To: Staff Judge Advocate

Subj: STAFF JUDGE ADVOCATE'S RECOMMENDATION ICO UNITED  
STATES v. COMMANDER JAY D. WYLIE, USN

1. I acknowledge that I received the Staff Judge Advocate's recommendation in the subject case on \_\_\_\_\_ and, unless I request and am granted additional time, that I have ten days to submit post-trial matters in accordance with R.C.M. 1105 and 1106, MCM(latest edition).

2. I understand that I have a professional duty to inform and consult with the accused concerning the submission of post-trial matters. Failure to do so maybe the basis of ineffective assistance of counsel claims. Although comment to this recommendation and to matters submitted under R.C.M. 1105, may be waived, such waiver can only be submitted under the express direction of the accused. *(Having advised the accused of the purpose and advantages of submitting matters under R.C.M. 1105, the accused expressly desires to waive the right to submit matters. Further, I have no matters to submit in accordance with R.C.M. 1106.)*

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J. J. SULLIVAN

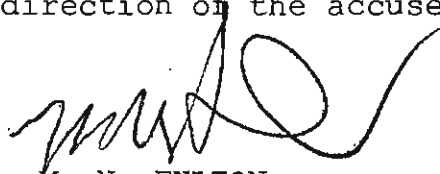
**Acknowledgement of Service**

From: Marcus N. Fulton, CDR, Detailed Defense Counsel  
To: Staff Judge Advocate

Subj: STAFF JUDGE ADVOCATE'S RECOMMENDATION ICO UNITED STATES v. COMMANDER JAY D. WYLIE, USN

1. I acknowledge that I received the Staff Judge Advocate's recommendation in the subject case on 30 December, 2011, and, unless I request and am granted additional time, that I have ten days to submit post-trial matters in accordance with R.C.M. 1105 and 1106, MCM(latest edition).

2. I understand that I have a professional duty to inform and consult with the accused concerning the submission of post-trial matters. Failure to do so maybe the basis of ineffective assistance of counsel claims. Although comment to this recommendation and to matters submitted under R.C.M. 1105, may be waived, such waiver can only be submitted under the express direction of the accused.



M. N. FULTON

RECORD OF TRIAL

OF

WILEY                      JAY                      D                      (b) (6)                      CDR/O-5  
(LAST NAME)              (FIRST)              (MIDDLE)              (SSN)              (RATE)

UNITED STATES NAVY                      NAVY REGION NORTHWEST  
(ARMED FORCE)                      SILVERDALE, WA 98315-1100  
(UNIT or ORGANIZATION)

BY

GENERAL COURT-MARTIAL

CONVENED BY

COMMANDER  
NAVY REGION NORTHWEST  
SILVERDALE, WA 98315-1100

TRIED AT

NAVAL BASE  
SAN DIEGO, CALIFORNIA 92136

ON

28 OCTOBER 2011

Transcribed by:  
SUNRAY ENTERPRISES, LLC  
325 W. CHICKASAW RD  
VIRGINIA BEACH, VA 23462  
PHONE: 757-574-7227  
E-MAIL: (b) (6)

COPIES OF RECORD

One copy of the record of trial furnished to the defense counsel as per the attached Certificate of Receipt.

\* \* \* \* \*

CERTIFICATE OF RECEIPT

I hereby acknowledge receipt of a copy of the record of trial in the case of the United States v. CDR JAY D. WILEY, USN delivered to me at Naval Legal Service Office Northwest, Bremerton, Washington.

2011

MARCUS N. FULTON  
CDR, JAGC, USN  
DEFENSE COUNSEL

CERTIFICATE IN LIEU OF RECEIPT

(Place)

(Date)

I certify that on this date a copy of the record of trial in the case of United States v. \_\_\_\_\_ was transmitted (delivered) to the accused,

(Rank and Name of Accused)

at \_\_\_\_\_ by, \_\_\_\_\_ (Place of delivery, or address sent to) (Means of effecting delivery, i.e., mail, messenger, etc.)

and that the receipt of the accused had not been received on the date this record was forwarded to the convening authority. The receipt of the accused will be forwarded as soon as it is received.

(Signature of trial counsel)

OR

The accused was not served personally because (he/she is absent without leave) \_\_\_\_\_ (Other reason)

Accused has no defense counsel to receive the record because (defense counsel has been excused under RCM 505(d)(2)(B)) \_\_\_\_\_ (Other reason)

(Date)

(Signature of trial counsel)

OR

REGION LEGAL SERVICE OFFICE  
NAVAL BASE KITSAP  
BREMERTON, WASHINGTON

(Place)

9 December 2011

(Date)

I certify that on this date a copy of the record of trial in the case of United States v. CDR JAY D. WYLIE, USN

(Rank and Name of Accused)

was transmitted (delivered) to the accused's defense counsel, JEREMIAH J. SULLIVAN, II

(Rank and Name)

at 2404 BROADWAY, SAN DIEGO, CA 92102 by, FEDERAL EXPRESS (Place of delivery or address sent to) (Means of effecting delivery, i.e., mail, messenger, etc.)

because (it was impracticable to serve the record of trial on the accused because he/she was transferred to \_\_\_\_\_ (Place)

(the accused requested such at trial) (the accused so requested in writing, which is attached) (the accused is absent without leave) (other reason)

9 DECEMBER 2011 (DATE)

MICHAEL H. WYTERS, GPT, LEGAL TECH  
LT PATRICK KORODY, JAGC, USN, ASSISTANT TRIAL COUNSEL (Signature of trial counsel)

CERTIFICATE

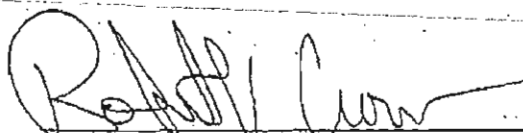
IN THE CASE OF

United States v. CDR JAY D. WILEY, U.S. Navy

The accused's civilian defense counsel was served the accused's copy of the record because:

- The accused so requested in a written request, which is attached.
- The accused so requested on the record at the court-martial.
- The accused was transferred to \_\_\_\_\_
- The accused is absent without authority.
- The accused was sent on appellate leave.

November 2011



ROBERT J. CROW  
CDR, JAGC, USN  
TRIAL COUNSEL

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**Law Offices of Jon W. Shelburn**

The Quartermass-Wilde House  
2404 Broadway, Second Floor  
San Diego, CA 92102  
Ph 619.208.4272  
Fax 619.578.5995

16 February 2012

Rear Admiral D. T. Biesel  
Commander, Navy Region Northwest  
1100 Hunley Road  
Silverdale, WA 98315-110

Dear Admiral Biesel:

This letter is written to you in accordance with RCM 1106 and is submitted to you through counsel acting on behalf of CDR Jay D. Wylie, XXX-XX(b) (6) 1110, who was convicted at a General Court-Martial in San Diego on 28 October 2011. As an initial matter, CDR Wylie respectfully requests you not take any action approving the findings or any portion of the sentence in this case, and that you request either Chief of Naval Operations or Vice Chief of Naval Operations to serve as substitute convening authority. This request is reasonable because the actions of Commander, Pacific Fleet during the post-trial processing of this case as set forth below create an appearance of unlawful command influence and disqualify you from acting on this case.

Should you disagree with the concern of any unlawful command influence in this case, CDR Wylie respectfully requests that you grant clemency in this matter after consideration of all matters provided herein and in the record of trial. Specifically, CDR Wylie asks for the period of confinement to be reduced to 30 months and that the guilty finding in Specification 1 of Charge III be reduced to a finding of guilty for Aggravated Sexual Assault vice Rape under Art 120.

Disqualification due to unlawful command influence is warranted in this case for the following reasons:

1. In a message sent to the entire Pacific Fleet area of responsibility, Commander, Pacific Fleet addressed the subject of sexual assault with subordinate commanders. (Enclosure 1). Commander, Pacific Fleet admonished commanders that "despite on-going training and prevention efforts, sexual assault continues to be a persistent problem in the Navy that demands our attention." The message reported that "two-thirds of all sexual assaults are blue-on-blue, to include seniors sexually assaulting juniors. It would be unwise for [commanders] to underestimate the impact that sexual violence has within the Navy." Commander, Pacific Fleet further admonished commanders not to "dismiss" sexual assault "as typical adolescent behavior or a combination of alcohol and hormones." Commanders are counseled to "react forcefully" when sexual assault occurs.

2. In urging the seriousness with which commanders should treat sexual assault cases, Commander, Pacific Fleet used Commander Wylie's case as an example. In an unmistakable reference to Commander Wylie's case, Commander, Pacific Fleet stated, "One of the most recent examples includes the commanding officer of a destroyer who

was found guilty at court-martial for sexual assault and sentenced to a lengthy period of confinement.”

3. By directing subordinate commanders to “react forcefully” when sexual assault occurs, and by holding out Commander Wylie’s awarded confinement as an example to his subordinate commanders, Commander, Pacific Fleet has created an unlawful command influence problem that would taint the action of any subordinate commander tasked with acting on Commander Wylie’s case.

4. Unlawful command influence, of course, can take the form of actual or apparent unlawful command influence. Actual unlawful command influence occurs when, under the totality of the circumstances, the evidence would lead a reasonable person to conclude that command influence affected the disposition of a case and prejudiced the accused. *See, e.g., United States v. Cruz*, 20 M.J. 873 (A.C.M.R. 1985), *rev’d on other grounds*, 25 M.J. 326 (C.M.A. 1987). Apparent unlawful command influence occurs when reasonable members of the public would believe command influence prejudiced the accused. *See, e.g., United States v. Rosser*, 6 M.J. 267 (C.M.A. 1979).

5. The evidence in this case would indicate that both forms of unlawful command influence are present. A reasonable person would conclude that a commander subordinate to Commander, Pacific Fleet would not fail to take “forceful” action in the very case held out by Commander, Pacific Fleet as emblematic of severe consequences for sexual assault. Guidance such as that found in the message is not promulgated so that it can be ignored. Of course a reasonable person would conclude that a subordinate commander’s actions would be influenced by the message directing “forceful” action and mentioning only one case—Commander Wylie’s.

6. Even if you were to determine in your own mind that you should ignore Commander, Pacific Fleet’s guidance in your disposition of this case, a reasonable member of the public would not be able to have confidence that Commander, Pacific Fleet’s guidance was disregarded by you. It is generally expected by the public that subordinate commanders heed the guidance provided by their superiors.

7. For the foregoing reasons, the appropriate course of action for post-trial processing in this case is to forward the case to the commander in your chain of command that is senior to Commander, Pacific Fleet; Chief of Naval Operations or Vice Chief of Naval Operations.

If you find that unlawful command influence will not preclude you from acting in this case then clemency in this matter is warranted for the following reasons:

1. CDR Wylie has taken full responsibility for his actions not only through his pleas of guilty at trial and the words he shared during sentencing in his case but also by the way he has responded to everything confronting him and his family during this whole ordeal. His willingness to expedite the trial and not delay beyond the end of October

despite significant family pressures at the time indicate strongly his willingness to accept responsibility without forcing the government or the victims into a lengthy and painful trial. At trial, his responses to the military judge were straightforward and direct with regard to all of the charges and his statement during sentencing (Record of Trial, hereinafter ROT, at pp. 228-240). This further shows his willingness to accept responsibility while also highlighting the efforts he is making to deal with his alcoholism. He is not using alcohol as a crutch or an excuse but he is taking every step within his power to learn from this and share his experience to be a warning to others. He has continued to work with the counselors at the brig and do anything he can while there to use his own experience as a way to help others both at the brig and on the outside. (Enclosure 2).

2. The most obvious indicator of the character of a man is what he does when he is faced with adversity. In Jay Wylie's case, he has chosen to do anything and everything he can to make himself a better man and restore himself through active participation in counseling and volunteering for any activity that will help him grow as a person while helping others. Please note as you read enclosure 2, the number and variety of groups CDR Wylie is participating in while he is incarcerated. Learning to crochet to help the Wounded Warriors project and volunteering to assist with AA and the suicide watch are just a few of the ways he is giving back. The counselors at the brig recognize his leadership ability and recently appointed him to the Prisoner Communication Council so he can help build a liaison with brig officials to help improve daily life for the prisoners and create other opportunities for growth. CDR Wylie knows he cannot work himself out of the harm he has caused but rather than sit back and do nothing or whining about his circumstances, he chooses to be proactive in his recovery and positive about the future he wants for himself and his family. These are merely the first steps in accepting responsibility and moving forward to make amends as best he can.

3. The defense exhibits submitted during presentencing at trial paint a very different picture of CDR Wylie than the person who is now convicted and sentenced following those proceedings. (ROT at pp. 227-228, Defense Exhibits A-J). There can be no question or argument that CDR Wylie would not have selected for Command if his record was not outstanding in all respects. His 19 years of service was good and honorable but it also took him away from his family on numerous occasions and for extended periods of time. His service was impeccable and noteworthy until his alcoholism and poor judgment led to his demise. However, nothing can take away the honorable service he provided the Navy and our country. He and his family who sacrificed so much during his time of service respectfully ask that you consider his service record when making a decision about what is just and fair not only to him but to

(b) (6)

4. (b) (6) accepting so much while supporting (b) (6) who chose to serve. Her letter to you highlights how difficult this situation has been for (b) (6) as they come to terms with a life that will no longer include the support, both financial and otherwise, from the Navy. (Enclosure 3). She is doing everything she can to keep the family together and is trying to be creative in her efforts to

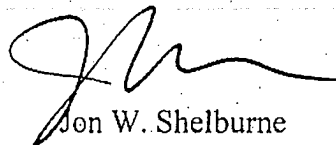
rebound from this devastating moment in the life of her family. The one thing she asks is for you to recognize how much extended incarceration in this case hurts (b) (6) far more than society can gain in this circumstance. The message has been sent loudly and clearly to the fleet that this will not be tolerated. Reducing the time Jay Wylie must serve will not take away from the message, will not make the punishment any less severe and will not pose a greater threat to society in any way.

5. In light of the potential unlawful command influence issue highlighted above and the issue raised by the military judge with respect to the terminal element of the Article 133 offenses, granting clemency in this case would be one way to signal to the appellate courts that even if these issues are found to have merit, you have been proactive in ensuring CDR Wylie was not harmed directly or indirectly by either improper influence or legal error. Meaningful relief prior to forwarding this case for appellate review would have a significant impact on how these issues are viewed by the court.

It should be noted that prior to submitting these matters, the defense requested and was granted additional time to respond beyond what is required under RCM 1106. As part of the agreement to grant the extension of time, it was agreed by and between counsel that any *Moreno* issues would be waived by the defense. CDR Wylie was not harmed by any delay in this matter and the defense hereby waives any *Moreno* issue that may arise as a result of additional time being granted in this case.

For the foregoing reasons, CDR Wylie, through counsel respectfully requests that his case be forwarded to the commander in your chain of command that is senior to Commander, Pacific Fleet; Chief of Naval Operations or Vice Chief of Naval Operations, for action in this case. If this request is denied and you choose to take convening authority's action on this case, we respectfully request that you reduce CDR Wylie's period of confinement to 30 months and reduce the guilty finding in Specification 1 of Charge III to Aggravated Sexual Assault vice Rape under Art 120.

Sincerely,



Jon W. Shelburne  
Civilian Counsel

Marcus Fulton  
CDR, JAGC  
Detailed Defense Counsel

-----Original Message-----

-----OFFICIAL INFORMATION DISPATCH FOLLOWS-----

RTTUZYUW RHHMHAA0002 3410138-UUUU-RHMCSUU.

ZNR UUUUU.

R 070138Z DEC 11 ZYB

FM COMPACFLT PEARL HARBOR HI//N00//

TO ALPACFLT

INFO CNO WASHINGTON DC//N00/N09/N1//

COMUSFLTFORCOM NORFOLK VA//N00//

COMPACFLT PEARL HARBOR HI//N00//

BT

UNCLAS

ALPACFLT 020/11

UNCLAS PERSONAL FOR COMMANDERS, COMMANDING OFFICERS, AND OFFICERS IN CHARGE, INFO ADM GREENERT, ADM FERGUSON, ADM HARVEY, VADM VAN BUSKIRK FROM ADM WALSH

MSGID/GENADMIN/COMPACFLT//

SUBJ/LEADERSHIP AGAINST SEXUAL ASSAULT//

RMKS/1. DESPITE ON-GOING TRAINING AND PREVENTION EFFORTS, SEXUAL ASSAULT CONTINUES TO BE A PERSISTENT PROBLEM IN THE NAVY THAT DEMANDS OUR ATTENTION. BASED ON CURRENT DATA, ON AVERAGE, ONE OR MORE OF OUR SHIPMATES IS SEXUALLY ASSAULTED EVERY DAY, AND THE FY10 DOD ANNUAL REPORT ON SEXUAL ASSAULT ESTIMATES 70-80 PERCENT OF ALL SEXUAL ASSAULTS GO UNREPORTED. YOUR OWN OPREP REPORTS SHOW THAT TWO-THIRDS OF ALL SEXUAL ASSAULTS ARE BLUE-ON-BLUE, TO INCLUDE SENIORS SEXUALLY ASSAULTING JUNIORS. IT WOULD BE UNWISE FOR US TO UNDERESTIMATE THE IMPACT THAT SEXUAL VIOLENCE HAS WITHIN THE NAVY. THIS INCLUDES IMPACTS ON MORALE, UNIT COHESION, AND OPERATIONAL READINESS. ACCORDINGLY, WE MUST REINFORCE OUR EFFORTS TO PROTECT SERVICE MEMBERS AND THEIR FAMILIES FROM SEXUAL VIOLENCE.

2. GIVEN THE DATA THAT SUGGESTS THE MAJORITY OF SEXUAL ASSAULTS GO UNREPORTED, YOU SHOULD NOT ASSUME THIS BEHAVIOR ONLY OCCURS AT OTHER COMMANDS OR IS SOMEONE ELSE'S PROBLEM. NOR CAN IT BE DISMISSED AS TYPICAL ADOLESCENT BEHAVIOR OR A COMBINATION OF ALCOHOL AND HORMONES. ONE OF THE MOST RECENT EXAMPLES INCLUDES THE COMMANDING OFFICER OF A DESTROYER WHO WAS FOUND GUILTY AT COURT-MARTIAL FOR SEXUAL ASSAULT AND SENTENCED TO A LENGTHY PERIOD OF CONFINEMENT. THE DEPARTMENT OF THE NAVY SEXUAL ASSAULT PREVENTION AND RESPONSE OFFICE (DON SAPRO) ALSO REPORTS THAT THE NAVY IS SEEING AN INCREASE IN REPORTS OF MALE-ON-MALE ASSAULTS RANGING FROM RAPE TO INAPPROPRIATE TOUCHING.

3. DESPITE THE PROBLEMS DESCRIBED ABOVE, WE HAVE OBSERVED SOME BEST PRACTICES THAT DEMONSTRATE THE RIGHT LEVEL OF COMMAND SUPPORT AND INVOLVEMENT IN SEXUAL ASSAULT PREVENTION TRAINING. A FEW WEEKS AGO, MS. JILL LOFTUS AND HER STAFF FROM DON SAPRO VISITED CPF AND SHARED SEVERAL POSITIVE COMMENTS FROM HER RECENT VISITS WITH PACFLT COMMANDS. FOR EXAMPLE, THIS PAST AUGUST, A REGIONAL SAPR MINI-SUMMIT WAS CONDUCTED BY COMMANDER, NAVY REGION NORTHWEST IN EVERETT, WA AND INCLUDED SEPARATE SUMMIT SESSIONS FOR BOTH LEADERSHIP AND INDIVIDUAL SAILORS. THE OVERALL RESULTING TONE WAS EXCELLENT, AND IT SENT A GREAT MESSAGE TO SAILORS THAT SENIOR LEADERSHIP IS ENGAGED. WHILE VISITING SHIPS IN HAWAII, DON SAPRO REPORTS THAT IT WAS EVIDENT THAT WATERFRONT CO'S WERE ENGAGED IN SEXUAL ASSAULT PREVENTION EDUCATION AND AWARENESS TRAINING, AS WELL AS IN SUPPORTING SEXUAL ASSAULT VICTIMS. I ENCOURAGE ALL OF YOU TO PROVIDE SIMILAR SUPPORT TO YOUR SAPR PROGRAMS.

4. TO ASSIST IN THIS EFFORT, PACFLT AND NAVY POLICIES, PROCEDURES, AND TRAINING OPPORTUNITIES HAVE BEEN PUT IN PLACE TO HELP YOU BE SUCCESSFUL IN ACHIEVING THE CNO'S GOAL OF ZERO TOLERANCE FOR SEXUAL ASSAULTS. TO NAME A FEW:

ENCLOSURE (1)

A. ANNUAL COMBINED PACFLT AND OPNAV PERSONAL READINESS SUMMITS ARE SCHEDULED FOR ALL FLEET CONCENTRATION AREAS INCLUDING MANY OF OUR SMALLER REMOTE LOCATIONS. I URGE YOU TO FULLY SUPPORT THESE VISITS AND EXPECT MAXIMUM PARTICIPATION FROM THE WATERFRONT.

B. ROUTINE VISITS AND PROGRAM REVIEWS BY DON SAPRO.

C. CLARIFIED SEXUAL ASSAULT REPORTING REQUIREMENTS.

D. BYSTANDER INTERVENTION PROGRAMS AND TRAINING.

E. SEXUAL ASSAULT POCS IDENTIFIED AT THE UNIT LEVEL.

F. REGIONAL SEXUAL ASSAULT RESPONSE COORDINATORS (SARC) ASSIGNED.

G. ECHELON II AND III SAPR PROGRAM MANAGERS ASSIGNED.

H. ONGOING TRAINING, GMT, ETC. AT VARIOUS CAREER JUNCTURES.

5. I JOIN THE CNO IN SAYING "WE HAVE A PROFESSIONAL AND MORAL OBLIGATION TO UPHOLD A COVENANT WITH OUR SAILORS." IN EVERY INSTANCE THINK "THAT'S MY SAILOR" AND DO ALL WITHIN YOUR POWER TO KEEP THEM SAFE. WITH STRONG PROCESSES IN PLACE TO RESPOND TO VICTIMS OF SEXUAL ASSAULT, IT IS NOW OUR OBLIGATION TO CREATE COMMAND CLIMATES THAT ACTUALLY PREVENT IT. CONSIDER THE FOLLOWING:

A. TAKE PERSONAL AND PROFESSIONAL OWNERSHIP OF THIS ISSUE.

B. EMPHASIZE YOUR COMMITMENT TO STAMP OUT SEXUAL MISCONDUCT.

C. KEEP THE ISSUE OF SEXUAL ASSAULT PREVENTION VISIBLE.

D. PUBLICLY SUPPORT YOUR SAPR TEAM, BYSTANDER INTERVENTION, AND PROGRAMS THAT DEGLAMORIZE ALCOHOL.

E. CLOSELY MONITOR INVESTIGATIONS OF SEXUAL MISCONDUCT.

F. LEAVE NO DOUBT THAT YOU STAND FOR PROFESSIONALISM, RESPECT, AND INTEGRITY, AND THAT YOU EXPECT OTHERS TO DO THE SAME.

G. INCLUDE SEXUAL ASSAULT QUESTIONS IN YOUR ANNUAL COMMAND CLIMATE SURVEYS.

H. CONTINUE TO SUBMIT TIMELY AND ACCURATE REPORTS ON SEXUAL ASSAULT INCIDENTS.

6. AS A NAVY LEADER, YOUR ATTITUDE AND INVOLVEMENT IS CRITICAL IN MAKING A DIFFERENCE IN THIS CHALLENGING AREA. IT BEGINS WITH LEADERS WHO MODEL THE RIGHT BEHAVIOR AND ATTITUDES, CREATE A COMMAND CLIMATE THAT MAKES IT HARD FOR SEXUAL PREDATORS TO OPERATE, AND WHO REACT FORCEFULLY AND CONSISTENTLY WHEN SEXUAL MISCONDUCT OCCURS. OUR CORE VALUES AND NAVY ETHOS DEMANDS NO LESS THAN OUR 100 PERCENT EFFORT. OUR SUCCESS IN THIS AREA WILL SUBSTANTIALLY STRENGTHEN OUR NAVY.

7. ADMIRAL WALSH SENDS. //

BT

#0002

NNNN

<DmdsReleaser>COMNAVREGJMHS.OIX.RELEASER.9000025712</DmdsReleaser>

UNCLASSIFIED//

04 January 2012

Admiral,

Thank you for taking the time to review my clemency package - I know you have an extremely busy schedule and I appreciate your indulgence. I would like to offer the following thoughts and factors for your consideration.

For twenty years I have selflessly served my country in both peace and war, at home and abroad. I have tried to do my duty to my utmost. Like you, I have faced the stress and terrors, the joys and exhilaration, the service and sacrifice that come with senior leadership and command at sea. Nothing in my life will compare with the experience of leading my crew in the fight against piracy and terrorism, the rescue of mariners about to be lost at sea, and facing down adversaries in combat. Yet I remember too the pain of long family separation, the loneliness of command, and the anguish of lost or hurt shipmates. These memories will haunt me for the rest of my days.

Until recently, I thought I was handling these stressors well, at least as well as my contemporaries. My seniors, peers, and subordinates thought so too, by all accounts. But I was not. I was bottling up my fears, stress, and emotional pain deep within, using ever increasing amounts of alcohol as my only coping strategy. I took every defeat or perceived slight, every lost friend, every poor programmatic or policy decision, every frustration personally, my only outlet for this stress being copious amounts of alcohol. I reasoned that to ask for any other sort of help would be a sign of weakness and would end my career. I thought that by "self-medicating" with alcohol I could drown all my sorrows and be back at it the next day, with only increasingly severe hangovers to fight through. It seemed to be an ideal solution.

Of course it was not - that thinking was the rationalization of my alcoholic mind. I think only (b) (6) suspected the reality of what was happening to me. I was gradually losing control of my life as my drinking grew increasingly worse and worse until I did the unthinkable; I harmed two of my Sailors - people who I had sworn to protect and whom I would have killed or died for under any other circumstance. My actions were totally inexcusable and my drinking is not in any way an excuse. But it is a reason

ENCLOSURE (2)

"why" an otherwise good person and apparently effective field commander could commit such a reprehensible act. I have had to face the harsh reality that I am an alcoholic and that I must get sober and make amends for my misconduct.

In support of this effort, I have done everything in my power to accept responsibility and make restitution for my actions. I have cooperated to the fullest extent possible to minimize the expense and effort in the handling of my case and to avoid any embarrassment or further harm to my victims or to the Navy. Additionally, I am trying to take advantage of every opportunity offered at the Naval Consolidated Brig Miramar (NCBM) to better myself. I am participating in all available treatment and self improvement programs, including:

- Substance Abuse Education
- Substance Abuse Treatment Program
- Victim Impact
- Sex Offender Education
- Sex Offender Treatment Program
- Situational Leadership: A Faith-based course in how to resist temptation and help others to do the same by example.
- Spiritual Journey: A Faith-based 12 Step program
- Inside Out Dads - a program designed to help improve parenting skills.
- Behavioral Treatment: Group counseling designed to help patients develop positive attitudes and deal with complex emotional stresses in a healthy way.

I have also volunteered to be a Suicide Watch Team member; I stand a four-hour watch in a 24-hour rotation to ensure prisoners in distress do not harm themselves. Additionally, I am learning to crochet in order to make blankets for wounded warriors and underprivileged children. I have completed 2 blankets thus far. Admittedly, they aren't beautiful; but I am getting better.

Equally importantly, I am doing everything humanly possible to get and stay sober. I have over 9 months of sobriety and am looking forward to celebrating a year of sobriety in April. The root of my problem was my alcoholism, and I am determined to remain sober for the rest of my life. I am taking the previously mentioned Substance Abuse classes despite the fact that I already completed the Navy's Three Week Out-Patient Substance Abuse

Treatment Program (SARP) in MAY 2011. I attend one Alcoholics Anonymous and one Narcotics Anonymous meeting every week here at the brig, and contact my sponsor (either during a visitation or via phone) weekly at a minimum. I have completed my initial 12 step work with him, and have begun to sponsor another prisoner under his tutelage. My sponsor is working with the San Diego AA Central Office to provide additional books to those prisoners who need them, and is lobbying the Clinical Services office here to let him start a second AA meeting weekly.

This is part of a passionate effort of mine to help others avoid the mistakes I made. I am doing everything I can while incarcerated to serve my community and especially my fellow alcoholics.

- Prior to confinement, I spoke at the Navy's Point Loma Inpatient Alcohol Treatment Program. I addressed a group of 50 Sailors and Marines who were in recovery during AA speakers meetings, sharing my experience, strength, and hope with them.

- I am participating in NCBM's "Outreach" program, where I speak to PREVENT, ADAMS, or other classes/groups of Sailors/Marines about my experiences and the dangers of substance abuse/alcoholism. I have been recommended for a lower security classification ("Medium-Out") so that I can do this without being shackled. This recommendation has been accelerated due to my performance and positive attitude while here at the Brig.

- I have had an article published in PROCEEDINGS concerning alcoholism and ways to for others to avoid the pitfalls I encountered.

- I am applying to San Diego State University in pursuit of a MS degree in Social Work/PhD in Psychology so that I can better help others struggling with substance abuse issues. Additionally, I am working with the NCBM Education Department to get permission to participate in an approved California Drug and Alcohol Counselor program with the goal of becoming a certified Drug and Alcohol Counselor.

- I have developed an inspirational wristband that I offer to alcoholics to help the fight triggers or cravings. I had established a website and message board in support of this effort prior to confinement; the site is dormant now but I intend to revive it once free in order to continue my outreach efforts.

- I am writing a book about my experiences to help others be more aware of the dangers of alcoholism and the road to

recovery. I am committed to make a positive out of this negative experience through this effort.

I am doing my best but know I can do more if allowed. I plead with the Judge in my case to try and let me serve as an example to others with similar issues; I would like to make the same plea to you. I would be happy to speak to Surface Warfare Officer School PCO/PXO/DH classes, or any other forum deemed appropriate, about my experiences. I fear that my struggles are not unique; sadly, one needs only to read the NAVY TIMES to see how many of my peers are falling victim to the same traps. If a personal presentation is deemed inappropriate or not cost effective, I would be happy to make a video for the Navy discussing my experiences and the dangers of substance abuse/alcoholism.

Again, I am extremely passionate about helping others to avoid the pitfalls that befell me. I have served my Navy for 20 years, and would do anything you see fit to have me do to continue to serve my country, my Navy, and especially my Shipmates.

Finally, I would like to appeal to you as a (b) (6) (b) (6) As you can imagine, this experience has been an incredible hardship on my young family.

(b) (6)

- We are selling my car to lower our insurance bills and to get additional funds for our living expenses.
- (b) (6) is returning to work to pay the bills, but we will have (b) (6) costs due to the (b) (6)

(b) (6)

Admiral, I am doing little for the Navy or for society in here, other than being a drain on resources. Meanwhile, my family is suffering. I have learned the error of my ways, and am getting the help I need to fully recover. I have expressed my responsibility and remorse to the Navy and my victims, and after being relieved of the finest command a Captain could hope for, ending a promising career, being publicly humiliated in the media, losing my retirement, being dishonorably discharged and labeled a convicted felon, and being separated from my young, and loving family, I feel that I have been punished enough. I ask that you find it in your heart to lower my charges so that I can start my life over and serve the public once released, and to reunite me with my loved ones, who need me as (b) (6). Once released, I know I can be of tremendous value writing and speaking on the dangers of substance abuse/alcoholism, and helping others to recover. Please give me this chance to redeem myself.

Before I was confined, I had the opportunity to reconnect with (b) (6)

(b) (6)

Very Respectfully,

*Jay D. Wylie*  
Jay D. Wylie

(b) (6)

(b) (6)

ORIGINAL

5815  
28 Oct 11

From: CDR Robert J. Crow, JAGC, USN, Trial Counsel, Region  
Legal Service Office Northwest  
To: Commander, Navy Region Northwest

Subj: REPORT OF RESULTS OF TRIAL BY GENERAL COURT-MARTIAL ICO  
CDR JAY D. WYLIE, USN, XXX-XX- (b) (6)

Ref: (a) R.C.M. 1101(a), MCM (2008 Edition)  
(b) R.C.M. 1103, MCM (2008 Edition)

Encl: (1) Trial Counsel Feedback Information Sheet

1. Pursuant to reference (a), notification is hereby given in the case of *United States v. CDR Jay D. Wylie, USN*, a trial by General Court-Martial occurring at Western Judicial Circuit, Naval Base San Diego, San Diego, California, convened by Commander, Navy Region Northwest.

2. The trial by General Court-Martial in the subject case was completed on 28 October 2011. The forum for this General Court-Martial was by military judge alone. The presiding military judge was CAPT Carol J. Gaasch, JAGC, USN; the detailed trial counsel was CDR Robert J. Crow, JAGC, USN; the assistant trial counsel was LT Patrick K. Korody; the detailed defense counsel was CDR Marcus N. Fulton, JAGC, USN; and the civilian defense counsel was Mr. Jeremiah J. Sullivan, III.

3. The pleas and findings were as follows:

CHARGES	PLEAS	FINDINGS
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Charge I: Violation UCMJ Art. 92	NG	W/D
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Specification 1: (DIBRS CODE UCMJ 092-A3): Did, at or near Victoria, Seychelles; on or about 1 January 2011, violate a lawful general order to wit: OPNAVINST 5370.2C, Navy Fraternalization Policy, dated 26 April 2007, by wrongfully engaging in unduly familiar conduct that did not respect differences in pay grade or rank with Ensign (b) (6) U.S. Navy, to wit: rubbing her shoulders, leaning against her and pinning her to a bar, requesting that she kiss him, attempting to kiss her, putting his hand.	NG	W/D
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CDR JAY D. WYLIE, USN, XXX-XX-(b) (6)

up her dress and inside her underwear, rubbing and digitally penetrating her vagina with his hand and fingers.

Specification 2: (DIBRS CODE UCMJ 092-A6): Did, at NG W/D  
or near Victoria, Seychelles, on or about  
1 January 2011, violate a lawful general order to wit:  
SECNAVINST 5300.26D, Navy Sexual Harassment Policy,  
dated 3 January 2006, by committing sexual harassment  
as defined therein by wrongfully making unwelcome  
sexual advances and making unwelcome sexual contact  
with Ensign (b) (6) U.S. Navy, to wit:  
rubbing her shoulders, leaning against her and pinning  
her to a bar, requesting that she kiss him, attempting  
to kiss her, putting his hand up her dress and inside  
her underwear, and rubbing and digitally penetrating  
her vagina with his hand and fingers.

Specification 3: (DIBRS CODE UCMJ 092-A3): Did, at NG W/D  
or near Naval Magazine Indian Island, Washington and  
on board USS MOMSEN (DDG 92) on or about  
25 April 2011, violate a lawful general order to wit:  
OPNAVINST 5370.2C, Navy Fraternalization Policy, dated  
26 April 2007, by wrongfully engaging in unduly  
familiar conduct that did not respect differences in  
pay grade or rank with Engineman Fireman (b) (6)  
U.S. Navy, to wit: brushing his hand on her  
shoulder, requesting that she come home with him,  
placing his hand on the small of her back, escorting  
her to his cabin, grabbing her shirt, kissing her,  
placing his mouth on her vagina, placing his finger(s)  
inside her vagina and anus and telling her "I'm so  
hard right now" or words to that effect.

Specification 4: (DIERS CODE UCMJ 092-A6): Did, at NG W/D  
or near Naval Magazine Indian Island, Washington and  
on board USS MOMSEN, on or about 25 April 2011,  
violate a lawful general order to wit: SECNAVJNST  
5300.26D, Navy Sexual Harassment Policy, dated  
3 January 2006, by committing sexual harassment as  
defined therein by wrongfully making unwelcome sexual  
advances and making unwelcome sexual contact with  
Engineman Fireman (b) (6) U.S. Navy, to  
wit: brushing his hand on her shoulder, requesting

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CDR JAY D. WYLIE, USN, XXX-XX-(b) (6)

that she come home with him, placing his hand on the small of her back, escorting her to his cabin, grabbing her shirt, kissing her, placing his mouth on her vagina, placing his finger(s) inside her vagina and anus and telling her "I'm so hard right now" or words to that effect.

Charge II: Violation UCMJ Art. 93 NG W/D

Specification 1: (DIBRS CODE UCMJ 093---): At or near Victoria, Seychelles, on or about 1 January 2011, did maltreat Ensign (b) (6) U.S. Navy, a person subject to his orders, by rubbing her shoulders, leaning against her and pinning her to a bar, requesting that she kiss him, attempting to kiss her, putting his hand up her dress and inside her underwear, and rubbing and digitally penetrating her vagina with his hand and fingers. NG W/D

Specification 2: (DIBRS CODE UCMJ 093---): At or near Naval Magazine Indian Island, Washington and on board USS MOMSEN, on or about 25 April 2011, did maltreat Engineman Fireman (b) (6) U.S. Navy, a person subject to his orders, by brushing his hand on her shoulder, requesting that she come home with him, placing his hand on the small of her back, escorting her to his cabin, grabbing her shirt, kissing her, placing his mouth on her vagina, placing his finger(s) inside her vagina and anus and telling her "I'm so hard right now" or words to that effect. NG W/D

Charge III: Violation UCMJ Art. 120 G G

Specification 1: (Rape) (DIBRS CODE UCMJ 120-A1): Did, at or near Victoria, Seychelles, on or about 1 January 2011, cause Ensign (b) (6) U.S. Navy, to engage in a sexual act, to wit: penetration of her vagina with his finger, by using strength sufficient that she could not avoid or escape the sexual conduct. G G

Specification 2: (Aggravated Sexual Assault by Bodily Harm) (DIBRS CODE UCMJ 120-C2): Did, at or near Victoria, Seychelles, on or about 1 January 2011, NG W/D

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Subj: REPORT OF RESULTS OF TRIAL BY GENERAL COURT-MARTIAL ICO  
CDR JAY D. WYLIE, USN, XXX-XX-(b) (6)

cause Ensign (b) (6) U.S. Navy, to engage in a sexual act, to wit: penetration of her vagina with his finger, by causing bodily harm to wit: pushing her up against a bar so that she could not move.

Specification 3: (Aggravated Sexual Assault by Using Threats) (DIBRS CODE UCMJ 120-C1): Did, on board USS MOMSEN, at or near Naval Magazine Indian Island, Washington, on or about 25 April 2011, cause Engineman Fireman (b) (6) U.S. Navy, to engage in a sexual act, to wit: penetration of her vagina with his finger, through abuse of his military rank, position and authority, creating an implied threat to negatively affect the military career of Engineman Fireman (b) (6) U.S. Navy, if she did not comply. G G

Specification 4: (Abusive Sexual Contact by Using Threats) (DIBRS CODE UCMJ 120-H1): Did, on board USS MOMSEN, at or near Naval Magazine Indian Island, Washington, on or about 25 April 2011, cause Engineman Fireman (b) (6) U.S. Navy, to engage in sexual contact, to wit: penetration of her anus with his finger, through abuse of his military rank, position and authority, creating an implied threat to negatively affect the military career of Engineman Fireman (b) (6) U.S. Navy, if she did not comply. G G

Specification 5: (Abusive Sexual Contact by Using Threats) (DIBRS CODE UCMJ 120-H1): Did, on board USS MOMSEN, at or near Naval Magazine Indian Island, Washington, on or about 25 April 2011, cause Engineman Fireman (b) (6) U.S. Navy, to engage in sexual contact, to wit: placing his mouth on her vagina, through abuse of his military rank, position and authority, creating an implied threat to negatively affect the military career of Engineman Fireman (b) (6) U.S. Navy, if she did not comply. G G

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Subj: REPORT OF RESULTS OF TRIAL BY GENERAL COURT-MARTIAL ICO  
CDR JAY D. WYLIE, USN, XXX-XX-(b) (6)

Charge IV: Violation UCMJ Art. 125 NG W/D

Specification: (DIBRS CODE UCMJ 125A): Did, on board NG W/D  
USS MOMSEN, at or near Naval Magazine Indian Island,  
Washington, on or about 25 April 2011, commit sodomy  
with Engineman Fireman (b) (6) U.S. Navy,  
by force and without the consent of the said Engineman  
Fireman (b) (6) U.S. Navy.

Charge V: Violation UCMJ Art. 133 G G

Specification 1: (DIBRS CODE UCMJ 133D): Did, at or G G  
near Victoria, Seychelles, from on or about  
31 December 2010 to 1 January 2011, wrongfully and  
dishonorably become publically intoxicated in front of  
members of his crew, make unwanted sexual advances and  
engage in an unwanted sexual contact with Ensign  
(b) (6) U.S. Navy, a junior officer  
under his command.

Specification 2: (DIBRS CODE UCMJ 133D): Did, on G G  
board USS MOMSEN, at sea, on or about February 2011,  
wrongfully and dishonorably encourage Ensign (b) (6)  
(b) (6) U.S. Navy, a junior officer under his  
under his command, not to report an incident in which  
he had sexually assaulted her on or about  
1 January 2011 while on liberty at or near Victoria,  
Seychelles.

Specification 3: (DIBRS CODE UCMJ 133D): Did, at or G G  
near Naval Magazine Indian Island, Washington and on  
board USS MOMSEN, on or about 25 April 2011,  
wrongfully and dishonorably become publically  
intoxicated in front of members of his crew, make  
unwanted sexual advances and then, inside his cabin,  
engage in unwanted sexual conduct with Engineman  
Fireman (b) (6) U.S. Navy, a junior  
enlisted sailor under his command.

4. Any preferred charge withdrawn before trial: None.

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CDR JAY D. WYLIE, USN, XXX-XX-(b) (6)

5. The following sentence was adjudged:

Punitive Discharge:	Dismissal
Confinement:	10 yrs
Reduction:	N/A
Forfeitures:	Total
Fines:	None
Other:	None

6. Date sentence adjudged: 28 October 2011. Adjudged forfeitures, automatic forfeitures, and adjudged reduction in grade, if any, become effective on 11 November 2011 (14 days after date sentence was announced) unless indicated otherwise in paragraph 9, below, or unless written notice of deferment by the convening authority is received by authorities with responsibility for the accused's service and pay records. Absent pertinent direction to the contrary in paragraph 9, below, or such written notice of deferment, action by those authorities in this case giving effect to the adjudged and automatic sentence, when applicable must occur by the second date in this paragraph. Trial counsel must be provided with originals of such written approved deferments for inclusion in record of trial in accordance with reference (b).

7. Automatic forfeitures apply.

a. GCM X (forfeitures of all pay and allowances while confined)  
\*Per the pretrial agreement, all automatic forfeitures will be deferred and waived and shall be paid to the accused's dependent.

8. Credits to be applied to confinement, if any:

a. Pretrial Confinement:	None.
b. Judicially-ordered credits:	None.
c. Total Credits:	None.

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Subj: REPORT OF RESULTS OF TRIAL BY GENERAL COURT-MARTIAL ICO  
CDR JAY D. WYLIE, USN, XXX-XX-(b)(6)

9. There was a pretrial agreement in this case. It had the following affect on the adjudged sentence:
- a. Confinement: May be approved as adjudged. However, all confinement in excess of 42 months will be suspended for the period of confinement adjudged plus 12 months thereafter, at which time, unless sooner vacated, the suspended portion will be remitted without further action. The period of suspension will begin on the date when the Convening Authority acts on the sentence. This Agreement constitutes my request for, and the Convening Authority's approval of, deferment of all confinement suspended pursuant to the terms of this Agreement. The period of deferment will run from the date of adjournment of the court-martial until the date the Convening Authority acts on the sentence.
10. Clemency recommendation made by the military judge: None.
11. Upon convening authority's action in this case, sex offender notifications may be required per 42 U.S.C. Section 14071: \_\_\_ NO, X YES.
12. DNA processing is required. Title 10 U.S.C. section 1565.
13. Please complete enclosure (1) and return it to this command, attention Senior Trial Counsel, at your earliest convenience.

  
ROBERT J. CROW

Distribution (w/o enclosure)  
Commander, Navy Region Northwest  
Military Judge  
Trial Counsel Case File  
Defense Counsel  
Record of Trial  
Applicable PSD

ORIGINAL



DEPARTMENT OF THE NAVY

COMMANDER DESTROYER SQUADRON NINE  
UNIT 25068  
FPO AP 96601-4712

5800  
Ser 00/126  
17 Aug 11

From: Commander, Destroyer Squadron NINE  
To: Commander, Navy Region Northwest

Subj: RECOMMENDATION FOR TRIAL BY GENERAL COURT-MARTIAL ICO  
CDR JAY D. WYLIE, USN, XXX-XX (b) (6) 1110

Ref: (a) R.C.M. 401, MCM (2008 edition)

Encl: (1) Charge sheet  
(2) Investigative reports and witness statements  
(3) Unconditional waiver of Article 32

1. Enclosures (1) through (3) are forwarded per reference (a) with the recommendation that Commander Wylie be brought to trial by general court-martial.

2. All charges are contained within enclosure (1). In summary they include specifications of violations of lawful general orders, cruelty and maltreatment of subordinates, rape and aggravated sexual assault, forcible sodomy, and conduct unbecoming an officer. Commander Wylie's unconditional waiver of his right to an article 32 investigation of these charges is contained as enclosure (3). It is my opinion that the severity of the charges warrants trial by general court-martial.

3. Command point of contact for this case is LCDR Michael Montgomery. He may be reached at (425) 754-9571 or (b) (6) for information and assistance.

  
C. A. HOTTENROTT



Subj: RECOMMENDATION PURSUANT TO ARTICLE 34, UCMJ, FOR TRIAL BY  
GENERAL COURT-MARTIAL IN THE CASE OF CDR JAY D. WYLIE, USN,  
XXX-XX-(b) (6)1110

- Art. 93 (Maltreatment) 2 Specifications.
- Art. 120 (Rape, sexual assault, and other sexual misconduct) 5 Specifications; 1 specification of aggravated sexual contact by using physical violence, strength, power or restraint; 1 specification of abusive sexual contact by causing bodily harm; 1 specification of aggravated sexual assault by using threats or placing in fear; and 2 specifications of aggravated sexual contact by using threats or placing in fear.
- Art. 125 (Sodomy) 1 Specification.
- Art. 133 (Conduct unbecoming an officer) 2 Specifications.

5. Conclusions.

- a. The charge and specifications allege offenses under the UCMJ;
- b. The allegations of the offenses are warranted by the evidence submitted in enclosures (4) through (6);
- c. A court-martial would have jurisdiction over the accused and the offenses.

6. Recommendations.

- a. I concur with Commander, Destroyer Squadron NINE and recommend that the charges and specifications as recommended be referred to a General Court-Martial.

7. If you concur in my recommendation, please sign the indicated blocks on the charge sheets referring the charges and associated specifications to trial by General Court-Martial.

Very respectfully,



D. E. RIEKE  
LCDR, JAGC, USN

15 Aug 2011

From: CDR Jay D. Wylie  
To: Commander, Navy Region Northwest

Subj: UNCONDITIONAL WAIVER OF ARTICLE 32 PRETRIAL INVESTIGATION  
ICO U.S. v. CDR Jay D. Wylie, USN

Ref: (a) R.C.M. 405  
(b) R.C.M. 804

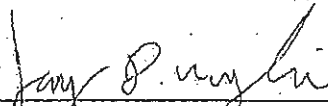
1. I am the accused at an Article 32, Uniform Code of Military Justice, investigation ordered by the Special Court-Martial Command, to investigate the charges and specifications preferred.
2. I have thoroughly discussed the charges and specifications contained on the charge sheet with my defense counsel, Mr. Jeremiah J. Sullivan, III.
3. My defense counsel has advised me of my rights in accordance with reference (a), to have an Article 32, Uniform Code of Military Justice Investigation, including:
  - a. the right to be informed of the charges under investigation;
  - b. the right to be informed of the identity of the accuser;
  - c. except in circumstances described in subsection (b)(2) of reference (b), the right to be present throughout the taking of evidence;
  - d. the right to be represented by counsel;
  - e. the right to be informed of the witnesses and other evidence then known to the investigating officer;
  - f. the right to be informed of the purpose of the investigation;
  - g. the right to be informed of my right against self-incrimination under Article 31, Uniform Code of Military Justice;
  - h. the right to cross-examine witnesses who are produced under subsection (g) of reference (a);

Subj: UNCONDITIONAL WAIVER OF ARTICLE 32 PRETRIAL INVESTIGATION  
ICO U.S. v. CDR Jay D. Wylie, USN.

- i. the right to have witnesses produced as provided for in subsection (g) of reference (a);
- j. the right to have evidence, including documents or physical evidence, within the control of military authorities produced as provided under subsection (g) of reference (a);
- k. the right to present anything in defense, extenuation or mitigation for consideration by the investigating officer; and,
- l. the right to make a statement in any form.

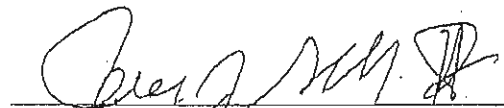
4. I understand: (1) that an Article 32, Uniform Code of Military Justice investigation, unless waived by me, is an essential requirement before the charges and specifications can be referred to a general court-martial; (2) that if I waive my right to an Article 32, Uniform Code of Military Justice investigation, there is a strong possibility that the charges and specifications brought against me will be referred to a general court-martial; and, (3) I am subject to the maximum jurisdictional punishment if I am found guilty of the charges and specifications contained in the charge sheet.

5. In accordance with subsection (k) of reference (a), it is my decision voluntarily to waive my right to an Article 32 investigation in this case.

  
\_\_\_\_\_  
CDR JAY D. WYLIE

DATE: 15 Apr 11

WITNESS:

  
\_\_\_\_\_  
JEREMIAH J. SULLIVAN, III  
CIVILIAN DEFENSE COUNSEL

DATE: 15 Apr 2011



DEPARTMENT OF THE NAVY

NAVY REGION NORTHWEST  
1100 HUNLEY ROAD  
SILVERDALE, WASHINGTON 98915-1100

15 Sep 2010

GENERAL COURT-MARTIAL CONVENING ORDER 02-10

Pursuant to authority contained in paragraph 0120a, Judge Advocate General of the Navy Instruction 5800.7E of 20 June 2007, a general court-martial is hereby convened with the following members:

MEMBERS

Commander Constance E. Hymas, NC, U.S. Navy;  
Commander Lori J. Martinelli, NC, U.S. Navy;  
Lieutenant Commander Brian T. Bialek, U.S. Navy;  
Lieutenant Commander Rix A. Boonyobhas, U.S. Navy;  
Lieutenant Commander Timothy S. Hunt, U.S. Navy;  
Lieutenant Brian F. Breshears, U.S. Navy;  
Lieutenant David M. Chaney, U.S. Navy;  
Lieutenant Benjamin W. Fischer, U.S. Navy;  
Lieutenant Aldebaran K. Imperatore, U.S. Navy;  
Lieutenant Junior Grade Todd M. Beatty, U.S. Navy;  
Ensign Aleksandra T. Reed, U.S. Navy, and  
Chief Warrant Officer Dwight D.N. Baker, U.S. Navy.

*D. Biesel*

D. T. BIESEL  
Rear Admiral, U.S. Navy  
Commander, Navy Region Northwest

CERTIFY TO BE A TRUE COPY

*D. O. Hilton*

D. O. HILTON

PROCEEDINGS OF A GENERAL COURT-MARTIAL

[The military judge called the Article 39(a) session to order at Region Legal Service Office Southwest, San Diego, California, at 0907 hours, 28 October 2011, pursuant to the following orders:]

[General Court-Martial Convening Order Number 02-10, Commander, Navy Region Northwest, dated 15 September 2010.]

[END OF PAGE]

MJ: This general court-martial is called to order at Naval Base San Diego, in the case of United States versus Commander Jay D. Wiley, United States Navy.

Trial Counsel; would you please state the jurisdictional data for the court-martial, followed by your qualifications?

TC: Yes, Your Honor.

This court is convened by Commander, Navy Region Northwest, by General Court-Martial Convening Order 2-10, dated 15 September 2010, copies of which have been furnished to the military judge, defense counsel, the accused, court reporter for insertion into the record of trial. There are no modifications or corrections to the convening order.

The general nature of the charges are: violations of Uniform Code of Military Justices Articles 92, 93, 120, 125 and 133.

The charges were preferred on 15 August 2011 by LN2 Samantha Garrity, United States Navy, a person subject to the Uniform Code of Military Justice; they were sworn before an officer authorized to administer oaths; and have been properly been referred to this court-martial for trial by Commander, Navy Region Northwest, the Convening Authority. The Article 32 investigation in this case was waived by the accused.

MJ: And I understand there's a written waiver, and that's been provided to the court?

TC: It has, Your Honor.

MJ: As well as the Article 34 advice?

TC: That's correct, Your Honor.

MJ: You may continue.

TC: The charges have not been referred to any other court than that reflected on the referral block of the charge sheet.

The charges were served on the accused on 31 August 2011; the 5-day waiting period has expired.

The accused and the following persons detailed to the court-martial are present:

<sup>W</sup>  
CAPTAIN CAROL J. GAASCH, JAGC, U.S. NAVY, MILITARY JUDGE;

COMMANDER ROBERT J. CROW, JAGC, U.S. NAVY, TRIAL COUNSEL;

LIEUTENANT PATRICK K. KORODY, JAGC, U.S. NAVY, ASSISTANT

TRIAL COUNSEL;

COMMANDER MARCUS N. FULTON, JAGC, U.S. NAVY, DEFENSE

COUNSEL; and

JEREMIAH J. SULLIVAN, III, CIVILIAN DEFENSE COUNSEL.

I should state that Mr. Sullivan has not been detailed but is here in court as Civilian Defense Counsel.

The members are absent.

Mr. Juan Lopez has been detailed as court reporter for this court-martial and has previously been sworn.

The members of the prosecution have been detailed to this court-martial by Commanding Officer, Region Legal Service Office Northwest in Bremerton, Washington. We are qualified and certified under Article 27(b) and sworn under Article 42(a) of the UCMJ. Neither Lieutenant Korody nor myself have acted in any manner which might tend to disqualify us in this court-martial.

MJ: Thank you.

And Commander Fulton, would you please state by whom you have been detailed, your legal qualifications and status as to oath----

DC: Yes, ma'am.

MJ: ----and whether you have acted in any disqualifying manner?

DC: Yes, ma'am.

I am qualified and certified under Article 27(b) of the UCMJ and sworn under 42(a). I have detailed myself to this case in my capacity as Commanding Officer, Naval Legal Service Office Northwest, and I have not acted in any manner which might tend to disqualify me in this case.

MJ: Thank you. And has any other defense counsel been detailed to the case?

DC: No, Your Honor.

MJ: Has any individual military counsel been sought?

DC: No, Your Honor.

MJ: Thank you. And I note we do have a civilian counsel here:  
Mr. Jay Sullivan.

Mr. Sullivan, would you please state your full name, your legal qualifications and your business address? And I will note that we do have your notice of appearance on record; that's been marked as Appellate Exhibit II, but if you could state it orally, as well.

CDC: Yes, my full name is Jeremiah J. Sullivan, III. My office address is 2404 Broadway, San Diego, California 92102. My office phone is area code 619-578-5958. I am also certified with 27(b) and previously sworn under 42(a) of the UCMJ, and I'm admitted to practice law in the state of California.

MJ: And you're in good standing with that bar?

CDC: Yes, I am, Your Honor.

MJ: I'll swear you in at this time.

[The civilian defense counsel was sworn.]

MJ: And are you Commander Jay D. Wiley, the accused in this case?

ACC: Yes--yes, ma'am.

MJ: And Commander Fulton, is <sup>ed</sup> ~~the~~ Commander Wiley attired in the appropriate uniform with all awards and decorations to which he is entitled?

DC: He is, Your Honor. Those include the Meritorious Service Medal, two awards; Navy Commendation Medal, two awards; Navy

Achievement Medal, four awards; Joint Meritorious Unit Commendation; the Navy Unit Commendation; the Meritorious Unit Commendation, four awards; the Battle "E", three awards; National Defense Service Medal, two awards; Armed Forces Expeditionary Medal, two awards; Global War Against Terrorism Expeditionary Medal; Global War Against Terrorism Service Medal; Armed Forces Service Medal; Humanitarian Service Medal; Sea Service Deployment Ribbon, six awards; Expert Rifle; Expert Pistol; and Surface Warfare Officer qualification, ma'am.

MJ: Thank you. You may all be seated.

[All persons did as directed.]

MJ: Commander Wiley, I do appreciate your rising. From here on out, you may remain seated unless I direct you to stand or your counsel advises you to.

ACC: Aye, aye, ma'am.

MJ: You have the right to be represented in this court-martial by Commander Fulton, your detailed defense counsel. You also have the right to be represented by military counsel of your own selection, provided that the counsel that you request is reasonably available. Now, if you were represented by military counsel of your own selection, then your detailed counsel Commander Fulton, would normally be excused; however, you could request that he continue to represent you along with the counsel you selected. In that case, the

detailing authority would have the sole discretion to either grant or deny that request.

Do you understand these rights?

ACC: Yes, Your Honor.

MJ: Now, all mil--all military defense counsel are provided to you free of charge.

Do you understand this?

ACC: Yes. Yes, Your Honor.

MJ: In addition to your military defense counsel, you have the right to be represented by civilian counsel, but at no expense to the United States, meaning you'd have to pay for it yourself. Civilian counsel may represent you alone or along with your military defense counsel.

Do you understand this?

ACC: Yes, Your Honor.

MJ: Do you have any questions about your rights to counsel?

ACC: No, Your Honor.

MJ: By whom do you wish to be represented?

ACC: I'd like Mr. Sullivan and Commander Fulton to represent me.

MJ: Very well. Do you wish to be represented by any other attorney, either military or civilian?

ACC: No, Your Honor.

MJ: I have been detailed to this court-martial by myself as the Senior Military Judge of the Western Judicial Circuit, Navy and Marine Corps Trial Judiciary, San Diego office. I am certified and sworn as a military judge in accordance with Articles 26(b) and (c), and 42(a) of the UCMJ. I will not be a witness for either side for this case, and I am not aware of any matter that I believe may be a ground for challenge against me.

However, do counsel for either side wish to voir dire or challenge the military judge?

TC: The government does not, Your Honor.

DC: No, Your Honor.

MJ: Very well.

Commander Wiley, you have the right to be tried by a court-martial composed of members. If you were found guilty of an offense, the members would also determine the appropriate sentence.

You may also request to be tried by the military judge alone. If that request is approved, I would determine your guilt or innocence, and if you were convicted of any offense, I would determine the appropriate sentence.

Do you understand these rights?

ACC: Yes, Your Honor.

MJ: Have you discussed these choices with your counsel?

ACC: Yes, Your Honor.

MJ: Do you wish to be tried by a court composed of members or by military judge alone?

ACC: Military judge alone, Your Honor.

MJ: Now, are you requesting trial by military judge alone as part of a pretrial agreement that you have with the Convening Authority?

ACC: Yes, that's correct.

MJ: Did anyone force you to give up your right to a trial by members?

ACC: No. No, Your Honor.

MJ: Your request for trial by military judge alone is approved, and this court-martial is assembled.

I have had a couple of 802 conferences with counsel:

The first one was a telephonic 802. All counsel were present on the phone; the accused was not present. That was on 12 October 2011. We primarily discussed scheduling of the trial. All parties concurred with trial to commence today. We discussed general logistics for the trial, particularly considering that all of the military counsel were coming from out of town. We also briefly discussed possible issues regarding intoxication of the accused at the time of the alleged offenses.

Then I had an in-person conference--802 conference--with counsel in my chambers yesterday. It was fairly lengthy. All

counsel were present; again, the accused was not present. We discussed the 32 and 34--the written waiver of the 32 advice and the 34 advice that had been proved<sup>id</sup>. We discussed a number of administrative matters and logistical issues. There was some discussion about the stipulation, and I believe all those matters have been worked out. The stipulation has been signed; I've had an opportunity to review it.

The 133 offenses were discussed at length; those are conduct unbecoming an officer--officer and a gentleman. I had requested via email that counsel provide me with proposed elements for the 133 offenses, and they did that, and that has been marked as Appellate Exhibit I. I also expressed a concern that the terminal element, conduct unbecoming an officer and a gentleman, had not been alleged. Although I know that has been accepted practice in military jurisprudence from its inception, in light of the direction I believe our appellate courts are going, I expressed a concern as to whether that would still state an offense, realizing that it is a different analysis than 134.

As a result of that, the government moved in our 802, not--not in writing, just orally, to amendment-Mr. Sull--to amend it to allege those terminal elements.

Mr. Sullivan, I understand you have no objection, is that correct, to that amendment?

CDC: No objection. I've discussed it with Commander Wiley, no objection.

MJ: Very well. So the charges have been amended to reflect the terminal 133 element, accordingly.

We also discussed the--the elements for the three 133 offenses. I appreciate counsel getting together and--and agreeing on the elements; however, after--after our lengthy discussion, I think all sides agree--it's my intention and the parties agreed that I would treat this as a novel 133 offense since it was not--the way they were alleged there was no specific enumerated offense that applied to any of the alleged 133 offenses. So that's what I have done, and when I get to the elements we'll go over that.

I discussed with the parties their position on whether they believed any of the specifications were multiplicitous, and I will hold that discussion to a later time once we've gone through providency.

Again, we discussed issues involving voluntary intoxication, as well as any possible psychological issues. I was informed by the parties that an R.C.M. 706 board had not been convened. Both sides indicated for various reasons they didn't think one was necessary. I will get into that in more detail, as well, at the appropriate time if it appears to be necessary once we've gone through providency and/or the sentencing process.

There is also a request by the defense to take a--possibly take a witness out of order because there was a--a limited timeframe that he was available.

I believe that was Commander Cunha, is that correct?

CDC: That is correct, Your Honor; he'll be available at 11.

MJ: He's available until 11?

CDC: At--at 11, I had told him to report here to the----

MJ: Oh, but--but then he has to leave by noon is my understanding?

CDC: Correct, Your Honor.

MJ: Is there any objection <sup>by the</sup> to the government if we--if it's necessary to take him out of order?

TC: No, Your Honor.

MJ: So I--I indicated to the defense absent no objection from the government that I would do that, so if we're not to <sup>at</sup> ~~a~~ <sup>the</sup> defense case by that time just remind me, Mr. Sullivan, and we'll take him when we need to.

Finally, I received an email this morning from a Ms. Ellen Sattler-Harpin on behalf of Commander Wiley, and--and while I appreciate Ms. Sattler-Harpin's concern and the effort she took to send me an email, as the parties know, I cannot consider anything in this case that has not been offered and approp--appropriately received into evidence in open court. So I forwarded <sup>it to</sup> ~~on~~ to counsel,

notified them that I would not consider it unless one side or the other did offer it into evidence and it were, in fact, received into evidence.

All right, I believe that summarizes the 802 conferences that we've had.

Would either side, starting with the government, is there anything you would like to correct or amend, or is there anything else you would like to add?

TC: No, Your Honor, I think that fairly gets it.

One question, though: the email letter from Ms. Satler-Harpin--and I know the defense intends to offer an exhibit similar to what was in there--is that marked as an appellate exhibit as part of the record or----

MJ: Well----

TC: I--I don't see the need to, but I just wasn't sure if----

MJ: I--I won't do that unless either side requests that I do it.

CDC: I--I--I'm going to request at the appropriate time, Your Honor, it be admitted into evidence----

MJ: The email itself?

CDC: Yes, Your Honor.

MJ: Okay. All right. So assuming the email itself is accepted into evidence, there's no need to mark it as an appellate exhibit.

If--if it's not, then we can address it again. Actually, if something else similar that is offered into evidence, it probably would be a good idea to mark it as an appellate exhibit, but again, if it's the exact same email, then there's no need to.

And you're representing that it is going to be the exact same email?

CDC: It's not the exact same, so in an abundance of caution, I'm going to--I--I've reviewed it, I have another similar email, I'm just going to offer both of them into evidence.

MJ: Okay. Very well.

CDC: Thank you.

MJ: Does the defense have anything they'd like to amend of-- regarding my summary, or anything you'd like to add?

CDC: No, Your Honor. Fair statement.

MJ: Very well.

MJ: The accused will now be arraigned.

Are there any corrections or additions to the charges or specifications?

TC: None that haven't already been made, and that's the three pen-and-ink changes to 133 offenses.

MJ: Very well.

Does the defense request the charges and specifications be read?

DC: Waive reading, Your Honor.

MJ: The reading may be omitted.

[THE CHARGE SHEET FOLLOWS AND IS NOT A NUMBERED PAGE.]

[END OF PAGE]

ORIGINAL

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI) WYLIE, Jay D.		2. SSN (b) (6)	3. RANK/RATE CDR	4. PAY GRADE O-5
5. UNIT OR ORGANIZATION USS MOMSEN (DDG 92)			6. CURRENT SERVICE	
			a. INITIAL DATE 8MAY92	b. TERM Indefinite
7. PAY PER MONTH		8. NATURE OF RESTRAINT OF ACCUSED None	9. DATE(S) IMPOSED N/A	
a. BASIC \$7,856.70	b. SEA/FOREIGN DUTY \$0			

II. CHARGES AND SPECIFICATIONS

10. CHARGE I: VIOLATION OF THE UCMJ, ARTICLE 92

Specification 1: In that Commander Jay D. Wylie, U.S. Navy, USS MOMSEN, on active duty, did, at or near Victoria, Seychelles, on or about 1 January 2011, violate a lawful general order to wit: OPNAVINST 5370.2C, Navy Fraternalization Policy, dated 26 April 2007, by wrongfully engaging in unduly familiar conduct that did not respect differences in pay grade or rank with Ensign (b) (6) U.S. Navy, to wit: rubbing her shoulders, leaning against her and pinning her to a bar, requesting that she kiss him, attempting to kiss her, putting his hand up her dress and inside her underwear, rubbing and digitally penetrating her vagina with his hand and fingers.

Specification 2: In that Commander Jay D. Wylie, U.S. Navy, USS MOMSEN, on active duty, did, at or near Victoria, Seychelles, on or about 1 January 2011, violate a lawful general order to wit: SECNAVINST 5300.26D, Navy Sexual Harassment Policy, dated 3 January 2006, by committing sexual harassment as defined therein by wrongfully making unwelcome sexual advances and making unwelcome sexual contact with Ensign (b) (6) U.S. Navy, to wit: rubbing her shoulders, leaning against her and pinning her to a bar, requesting that she kiss him, attempting to kiss her, putting his hand up her dress and inside her underwear, and rubbing and digitally penetrating her vagina with his hand and fingers.

SEE ATTACHED SHEET

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI) GARRITY, Samantha E.	b. GRADE LN2	c. ORGANIZATION OF ACCUSER Region Legal Service Office Northwest
d. SIGNATURE OF ACCUSER <i>Samantha E. Garrity</i>	e. DATE 15 August 2011	

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 15th day of August, 2011, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

DAVID C. PECK  
Typed Name of Officer

LCDR, JAGC, USN  
Grade and Service

*David C. Peck*  
Signature

Region Legal Service Office Northwest  
Organization of Officer

Judge Advocate General  
Official Capacity to Administer Oaths  
(See R.C.M. 307(b)--must be commissioned officer)

ORIGINAL

12. On 22 AUGUST, 20 11, the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me. (See R.C.M. 308(a)). (See R.C.M. 308 if notification cannot be made.)

MARTO M. CORREA, JR.

Typed Name of Immediate Commander

COMNAVSURFPAC

Organization of Immediate Commander

LT, USN, JAGC

Grade



Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at 1116 hours, 16 August 20 11 at COMDESRON NINE  
Designation of Command or

Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

FOR THE

CAROL HOTTENROTT

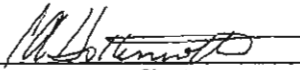
Typed Name of Officer

Commander

Official Capacity of Officer Signing

CAPT, USN

Grade



Signature

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY

b. PLACE

c. DATE

NAVY REGION NORTHWEST

Silverdale, Washington

22 Aug 11

Referred for trial to the GENERAL court-martial convened by my General Court-Martial Convening  
Order 02-10

15 September 20 10, subject to the following instructions:<sup>2</sup>

By \_\_\_\_\_ of \_\_\_\_\_  
Command or Order

G. B. SMITH

Typed Name of Officer

COMMANDER - ACTING

Official Capacity of Officer Signing

O-6/CAPT

Grade



Signature

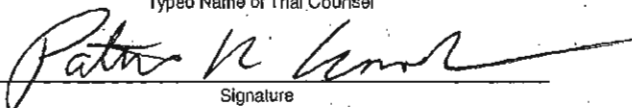
15. On 31 August, 20 11, I (caused to be) served a copy hereof on ~~(each of)~~ the above named accused.

P. K. KORODY

LT, JAGC, USN

Typed Name of Trial Counsel

Grade or Rank of Trial Counsel



Signature

FOOTNOTES

1 -- When an appropriate commander signs personally, inapplicable words are stricken.  
2 -- See R.C.M. 601(e) concerning instructions. If none, so state.

**ORIGINAL**

DD FORM 458 CONTINUATION SHEET ICO CDR JAY D. WYLIE, USN, XXX-XX (b) (6)

Specification 3: In that Commander Jay D. Wylie, U.S. Navy, USS MOMSEN, on active duty, did, at or near Naval Magazine Indian Island, Washington and on board USS MOMSEN (DDG 92) on or about 25 April 2011, violate a lawful general order to wit: OPNAVINST 5370.2C, Navy Fraternalization Policy, dated 26 April 2007, by wrongfully engaging in unduly familiar conduct that did not respect differences in pay grade or rank with Engineman Fireman (b) (6)

(b) (6) U.S. Navy, to wit: brushing his hand on her shoulder, requesting that she come home with him, placing his hand on the small of her back, escorting her to his cabin, grabbing her shirt, kissing her, placing his mouth on her vagina, placing his finger(s) inside her vagina and anus and telling her "I'm so hard right now" or words to that effect.

Specification 4: In that Commander Jay D. Wylie, U.S. Navy, USS MOMSEN, on active duty, did, at or near Naval Magazine Indian Island, Washington and on board USS MOMSEN, on or about 25 April 2011, violate a lawful general order to wit: SECNAVINST 5300.26D, Navy Sexual Harassment Policy, dated 3 January 2006, by committing sexual harassment as defined therein by wrongfully making unwelcome sexual advances and making unwelcome sexual contact with Engineman Fireman (b) (6) U.S. Navy, to wit: brushing his hand on her shoulder, requesting that she come home with him, placing his hand on the small of her back, escorting her to his cabin, grabbing her shirt, kissing her, placing his mouth on her vagina, placing his finger(s) inside her vagina and anus and telling her "I'm so hard right now" or words to that effect.

#### CHARGE II: VIOLATION OF THE UCMJ, ARTICLE 93

Specification 1: In that Commander Jay D. Wylie, U.S. Navy, USS MOMSEN, on active duty, at or near Victoria, Seychelles, on or about 1 January 2011, did maltreat Ensign (b) (6) (b) (6) U.S. Navy, a person subject to his orders, by rubbing her shoulders, leaning against her and pinning her to a bar, requesting that she kiss him, attempting to kiss her, putting his hand up her dress and inside her underwear, and rubbing and digitally penetrating her vagina with his hand and fingers.

Specification 2: In that Commander Jay D. Wylie, U.S. Navy, USS MOMSEN, on active duty, at or near Naval Magazine Indian Island, Washington and on board USS MOMSEN, on or about 25 April 2011, did maltreat Engineman Fireman (b) (6) U.S. Navy, a person subject to his orders, by brushing his hand on her shoulder, requesting that she come home with him, placing his hand on the small of her back, escorting her to his cabin, grabbing her shirt, kissing her, placing his mouth on her vagina, placing his finger(s) inside her vagina and anus and telling her "I'm so hard right now" or words to that effect.

**ORIGINAL**

ORIGINAL

DD FORM 458 CONTINUATION SHEET ICO CDR JAY D. WYLIE, USN, XXX-XX (b) (6)

CHARGE III: VIOLATION OF THE UCMJ, ARTICLE 120

Specification 1: In that Commander Jay D. Wylie, U.S. Navy, USS MOMSEN, on active duty, did, at or near Victoria, Seychelles, on or about 1 January 2011, cause Ensign (b) (6) (b) (6) U.S. Navy, to engage in a sexual act, to wit: penetration of her vagina with his finger, by using strength sufficient that she could not avoid or escape the sexual conduct.

Specification 2: In that Commander Jay D. Wylie, U.S. Navy, USS MOMSEN, on active duty, did, at or near Victoria, Seychelles, on or about 1 January 2011, cause Ensign (b) (6) (b) (6) U.S. Navy, to engage in a sexual act, to wit: penetration of her vagina with his finger, by causing bodily harm to wit: pushing her up against a bar so that she could not move.

Specification 3: In that Commander Jay D. Wylie, U.S. Navy, USS MOMSEN, on active duty, did, on board USS MOMSEN, at or near Naval Magazine Indian Island, Washington, on or about 25 April 2011, cause Engineman Fireman (b) (6) U.S. Navy, to engage in a sexual act, to wit: penetration of her vagina with his finger, through abuse of his military rank, position and authority, creating an implied threat to negatively affect the military career of Engineman Fireman (b) (6) U.S. Navy, if she did not comply.

Specification 4: In that Commander Jay D. Wylie, U.S. Navy, USS MOMSEN, on active duty, did, on board USS MOMSEN, at or near Naval Magazine Indian Island, Washington, on or about 25 April 2011, cause Engineman Fireman (b) (6) U.S. Navy, to engage in sexual contact, to wit: penetration of her anus with his finger, through abuse of his military rank, position and authority, creating an implied threat to negatively affect the military career of Engineman Fireman (b) (6) U.S. Navy, if she did not comply.

Specification 5: In that Commander Jay D. Wylie, U.S. Navy, USS MOMSEN, on active duty, did, on board USS MOMSEN, at or near Naval Magazine Indian Island, Washington, on or about 25 April 2011, cause Engineman Fireman (b) (6) U.S. Navy, to engage in sexual contact, to wit: placing his mouth on her vagina, through abuse of his military rank, position and authority, creating an implied threat to negatively affect the military career of Engineman Fireman (b) (6) U.S. Navy, if she did not comply.

CHARGE IV: VIOLATION OF THE UCMJ, ARTICLE 125

Specification: In that Commander Jay D. Wylie, U.S. Navy, USS MOMSEN, on active duty, did, on board USS MOMSEN, at or near Naval Magazine Indian Island, Washington, on or about 25 April 2011, commit sodomy with Engineman Fireman (b) (6) U.S. Navy, by force and without the consent of the said Engineman Fireman (b) (6) U.S. Navy.

ORIGINAL

ORIGINAL

DD FORM 458 CONTINUATION SHEET ICO CDR JAY D. WYLIE, USN, XXX-XX (b) (6)

CHARGE V: VIOLATION OF THE UCMJ, ARTICLE 133

Specification 1: In that Commander Jay D. Wylie, U.S. Navy, USS MOMSEN, on active duty, did, at or near Victoria, Seychelles, from on or about 31 December 2010 to 1 January 2011, wrongfully and dishonorably become publically intoxicated in front of members of his crew, make unwanted sexual advances and engage in an unwanted sexual contact with Ensign

(b) (6) U.S. Navy, a junior officer under his command, which conduct was unbecoming  
an officer and a gentleman. R3C 270-11

Specification 2: In that Commander Jay D. Wylie, U.S. Navy, USS MOMSEN, on active duty, did, on board USS MOMSEN, at sea, on or about February 2011, wrongfully and dishonorably encourage Ensign (b) (6)

U.S. Navy, a junior officer under his under his command, not to report an incident in which he had sexually assaulted her on or about 1 January 2011 while on liberty at or near Victoria, Seychelles, which conduct was unbecoming an officer  
and a gentleman. R3C 270-11

Specification 3: In that Commander Jay D. Wylie, U.S. Navy, USS MOMSEN, on active duty, did, at or near Naval Magazine Indian Island, Washington and on board USS MOMSEN, on or about 25 April 2011, wrongfully and dishonorably become publically intoxicated in front of members of his crew, make unwanted sexual advances and then, inside his cabin, engage in unwanted sexual conduct with Engineman Fireman (b) (6)

U.S. Navy, a junior  
enlisted sailor under his command, which conduct was unbecoming an officer and a gentleman. R3C 270-11

ORIGINAL

MJ: Are there any motions in this case?

CDC: No, Your Honor.

MJ: Government, do you have any?

TC: No, Your Honor.

MJ: Accused and counsel, please rise.

[The accused and his counsel did as directed.]

MJ: Mr. Sullivan, how does the accused plead?

CDC: Your Honor:

To Charge I, Specification 1:	Not Guilty.
To Charge I, Specification 2:	Not Guilty.
To Specification 3:	Not Guilty.
To Specification 4:	Not Guilty.
To the Charge:	Not Guilty.

To--well, Charge II and Specification 1:	Not Guilty.
Charge II, Specification 2:	Not Guilty.
To the Charge:	Not Guilty.

To Charge III, Specification 1:	Guilty.
To Specification 2:	Not Guilty.
To Specification 3:	Guilty.
To Specification 4:	Guilty.
To Specification 5:	Guilty.
To the Charge:	Guilty.

To Charge IV and the sole Specification thereunder:	Not Guilty.
To the Charge:	Not Guilty.

To Charge V, Specification 1:	Guilty.
To Specification 2:	Guilty.
To Specification 3:	Guilty.
To the Charge:	Guilty.

MJ: Commander Wiley, do you understand those pleas?

ACC: Yes, Your Honor.

MJ: Is that, in fact, how you wish to plead?

ACC: Yes, Your Honor.

MJ: All right, you may be seated.

[The accused and his counsel did as directed.]

MJ: Commander, I'm now going to discuss your pleas of guilty of guilty with you.

Do you have a copy of the charge sheet there?

ACC: Yes--yes, Your Honor.

MJ: I can only accept your guilty pleas if you understand their meaning and effect. I want you to keep a copy of the charge sheet in front of you. At one point, when I go over the elements, I'll ask you to read along with me on the charge sheet to make sure you agree with everything I'm saying. But for this--for now, I just want you to keep it in front of you in case you have any questions. If you do have any questions, or if you don't understand what I'm saying, or for any reason, please speak up, let me know, and I will either try to answer your question or I will give you an opportunity to consult with your counsel.

Do you understand this?

ACC: Yes, ma'am.

MJ: Now, as long as you speak up, you don't need to lean for--  
lean forward; it will pick you up as long as you continue to speak  
up.

A plea of guilty is the strongest form of proof known to  
the law. Based on your pleas of guilty alone, without receiving any  
evidence, this court can find you guilty of the offenses to which you  
are pleading guilty. Your pleas of guilty won't be accepted unless  
you understand that by pleading guilty you are admitting your guilt  
as to each and every element of the offenses to which you are  
pleading guilty.

Do you understand this?

ACC: Yes, ma'am.

MJ: Further, I can only accept your pleas of guilty if you're  
pleading guilty because you really are guilty and because you believe  
you are really guilty. If you don't believe you are guilty, then you  
should not plead guilty for any reason.

Do you understand this?

ACC: Yes.

MJ: Even if you believe you are guilty, you still have a legal  
and a moral right to enter a plea of not guilty and require the  
government to prove its case against you, if it can, by legal and  
competent evidence beyond a reasonable doubt. If you were to plead  
not guilty, then you would be presumed under the law to be innocent,

and only by introducing evidence and proving your guilt through legal and competent evidence beyond a reasonable doubt could the government overcome this constitutionally-protected presumption of innocence.

Do you understand this?

ACC: Yes, Your Honor.

MJ: Now, by your pleas of guilty you give up certain important rights. The rights you give up are:

First, the right against self-incrimination; that means the right to say nothing at all about these offenses;

Second, you give up the right to a trial of the facts by this court; that is, the right to have the court decide whether or not you are guilty based on evidence presented by the prosecution and, if you choose to do so, by the defense; and

Third, you give up the right to confront witnesses against you and to call witnesses in your own behalf.

Do you understand these rights?

ACC: Your Honor, I----

MJ: Would you like me----

ACC: The only--but I--I still would be able to have the witnesses that we already have----

MJ: This is only on the merits. This is before we get to--it has nothing to do with the sentencing process.

ACC: Oh----

MJ: This has to do with----

ACC: Understand, ma'am.

MJ: ----the process we're going through to determine if you're guilty and if I can accept your pleas of guilty.

ACC: Yes, Your Honor----

MJ: It has only to do with the merits.

ACC: ----now I understand.

MJ: You understand? All right, and understanding that, do you then give--agree to give up these rights?

ACC: Yes, Your Honor.

MJ: Now you've also entered pleas by a manner that we call "mixed pleas," and that means that you've entered through your counsel pleas of not guilty to some of the offenses, so I want you to understand, with regard to the three rights I just discussed with you, you keep those rights with regard to the offenses to which you've entered pleas of not guilty. You only give up those rights with regard to the offenses to which you pled guilty:

Do you understand this?

ACC: Yes, Your Honor.

MJ: Again, if you plead guilty, which you have, there will not be a trial of any kind as to the offenses to which you are pleading guilty. And again, by pleading guilty, you give up the three rights

I just described with the exception of the offenses to which you pled not guilty.

One more time, do you understand that?

ACC: Yes, Your Honor.

MJ: Did you discuss these matters with your counsel?

ACC: Yes, extensively.

MJ: Now you--do you agree to give up these three rights with regard to the offenses to which you have pled guilty and answer my questions?

ACC: Yes, Your Honor.

MJ: Commander--or Mr. Sullivan, what have you advised the accused is the maximum sentence for the offenses to which he's pled guilty?

CDC: The maximum jurisdictional punishment is life without the possibility of parole; forfeiture of all pay and allowances; and a dismissal.

MJ: And a fine is a possibility----

CDC: And a fine is a possibility.

MJ: ----not likely in a case like this, but it is a possibility.

And does the government concur?

TC: Yes, Your Honor.

MJ: All right, Commander Wiley, the maximum potential sentence for the offenses to which you have pled guilty is as your counsel has stated. That is: confinement for life without parole; total forfeitures of pay and allowances; a fine, although a fine is not a likely punishment in a case like this but it is an authorized punishment; and a discharge from the service with a dismissal.

Is that your understanding?

ACC: Yes, Your Honor.

MJ: Was that your understanding when you entered pleas of guilty?

ACC: I--I----

CDC: Can we have a moment, Your Honor?

MJ: Yes, you may.

ACC: [Conferring with counsel.]

I apologize for the delay, Your Honor. I--I understand the punishment.

MJ: Okay, don't--don't apologize for delays. I said if you had any questions at all, now is the time to get it cleared up. So anytime you feel you need to consult with your counsel or ask me any further questions, please do so. We'll take as much time as we need to.

So you understand the maximum punishment, and you understood that when you entered your pleas of guilty?

ACC: Yes.

MJ: I also want you to understand that in addition to the maximum potential punishment in your case, there are also potential collateral effects of your pleading guilty to these charges, and I'm going to go over those with you.

The first one is the possibility that you will have to register as a sex offender.

Mr. Sullivan, have you advised the accused of the operation and potential impact of the sex-offender-registration laws, including DoD Instruction 1325.7 and SECNAV Instruction 5800.14A, and the DoD instruction has been further revised by Deputy Undersecretary of Defense memo dated 16 November 2009?

CDC: Yes, we have discussed it, and Commander Wiley understands the potential collateral consequences.

MJ: Very well.

Commander Wiley, do you understand the potential effects of existing sex-offender-registration laws to your case

ACC: Yes, Your Honor.

MJ: Considering the possible effects of these registration laws, do you still wish to plead guilty?

ACC: Yes, Your Honor.

MJ: There are some other potential collateral effects in your case, and they're--these are included in your pretrial agreement.

I'm going to go--I'm going to summarize those with you now, and I need to ensure that--that you're aware of these at this point and that you still wish to plead guilty, considering these other collateral effects.

You indicate that you've been advised by your defense counsel that your guilty pleas could preclude you from the ownership, receipt or transport of any firearm that has been transported in interstate or foreign commerce under 18USC922g.

Do you understand that effect?

ACC: Yes, Your Honor.

MJ: You understand, as a collateral effect of your guilty pleas, that you may be discharged from the Navy for misconduct, either by dismissal or administrative matters, and that could require you to repay the government for any advanced educational-assistance benefits that you've received, and that is if your early separation from the Navy precludes you from fulfilling any additional service requirements that were required as consideration for any advanced-educational assistance.

Do you understand that effect?

ACC: Yes, Your Honor.

MJ: You've also--you indicate you've been advised by your counsel that if there is a dismissal adjudged in this case, and if it's ultimately approved, that that could adversely affect your

ability to receive retirement pay and any other benefits due you as a result of your military service.

Do you understand that potential----

ACC: Yes, Your Honor.

MJ: ----collateral effect?

And we discussed the possible effect of the sex-offender-registration laws.

So, considering all the possible collateral effects in your case, do you still wish to plead guilty?

ACC: May--may I have one moment, Your Honor?

MJ: You may.

ACC: [Conferring with counsel.]

Yes, Your Honor, I--I understand.

MJ: And with that understanding of the potential collateral effects, do you still wish to plead guilty?

ACC: Yes, Your Honor.

MJ: And I emphasize "potential" because I can't guarantee one way or the other what the collateral effects will--will be, but they are potential collateral effects.

ACC: Yes, Your Honor, and--and I just wanted to clarify that--that I really, truly understood what those collateral effects were, and--and counsel advised me.

MJ: Very well.

Do you believe you've had enough time to discuss your case with your counsel?

ACC: Yes, Your Honor.

MJ: And do you believe that their advice has been in your best interests?

ACC: Yes, Your Honor.

MJ: Are you pleading guilty freely and voluntarily?

ACC: Yes, Your Honor.

MJ: Did anyone force or threaten you into pleading guilty?

ACC: No, Your Honor.

MJ: In just a moment, you will be placed under oath by the trial counsel, and we'll discuss the facts of your case. If what you say is not true, your statements may be used against you in a later prosecution for perjury or false statement.

Do you understand this?

ACC: Yes, Your Honor.

MJ: In addition, the government may ask that your answers be used against you in the sentencing portion of this trial.

If I grant that request, do you understand that your answer would then be used against you in the sentencing portion of your trial?

ACC: Yes, Your Honor.

MJ: Commander Wiley, would you, please, stand and face the trial counsel, and raise your right hand?

[The accused did as directed.]

MJ: Commander Crow, would you, please, administer the oath to the accused?

[The accused was sworn.]

MJ: All right, and I noted<sup>ed</sup> that there is a stipulation of fact in this case; it's been marked as Prosecution Exhibit 1 for identification.

Do you have a copy of that at the defense table?

ACC: Yes, Your Honor.

MJ: Is this your signature on the last page?

ACC: Yes, Your Honor.

MJ: Before you signed this stipulation, did you read it over completely and discuss it with your counsel?

ACC: Yes, Your Honor.

MJ: And do you understand everything that's contained within this stipulation of fact?

ACC: Yes, Your Honor.

MJ: Is everything in this stipulation the truth?

ACC: Yes.

MJ: Do counsel for both sides agree to the stipulation and that these are your signatures on the last page?

TC: Yes, Your Honor.

CDC: Yes, Your Honor.

MJ: Commander Wiley, at this point I'm going to discuss the stipulation of fact with you. I want to ensure that you understand it and that you agree to its uses.

A stipulation of fact is an agreement between the trial counsel, the defense counsel and you that the contents of the stipulation are true and if entered into evidence will be--will become facts that cannot be contradicted by either side in this case. Now you have the absolute right not to enter into this stipulation, and it will not be accepted without your consent.

Do you understand this?

ACC: Yes, Your Honor.

MJ: Did anyone force or threaten you to agree to this stipulation?

ACC: No, Your Honor.

MJ: If I admit this stipulation into evidence, it will be used by the court in two ways: first, I will use it to determine if you are, in fact, guilty; and second, I will use it in determining an appropriate sentence in your case.

Do you understand this?

ACC: Yes, Your Honor.

MJ: Do you agree to these two uses?

ACC: Yes, Your Honor.

MJ: Do counsel for both sides agree?

TC: Yes, Your Honor.

CDC: Yes, Your Honor. Thank you.

MJ: Commander, a stipulation of fact ordinarily cannot be contradicted. If this stipulation should be contradicted after I have accepted your guilty pleas, I will have to reopen my inquiry into the factual basis for your pleas. So you should let me know at any time during this inquiry and this proceeding if there's anything at all in this stipulation that you disagree with or you believe is untrue.

Do you understand this?

ACC: Yes, Your Honor, I do.

MJ: At this time, is there anything in the stipulation of fact that you disagree with or you believe is untrue?

ACC: No, Your Honor. There are portions of the stipulation of fact that I have difficulty remembering, but I have no reason to believe that any of the statements in there are untrue, and I--I have no reason to believe that any of the parties involved have any reason to--to say anything that was untrue.

MJ: Thank you, and--and I appreciate your letting me know that, and I understand that from your counsel, as well. We'll get in

that--into that in more detail when we discuss the facts of your case.

ACC: Yes, Your Honor.

MJ: But thank you.

MJ: Mr. Sullivan, is there any objection to Prosecution Exhibit 1 for identification?

CDC: No objection, Your Honor.

MJ: Prosecution Exhibit 1 for identification, the stipulation of fact, is admitted into evidence; the words "for identification" will be stricken, and I had a prior opportunity to review it.

Commander Wiley, I am now going to explain the elements of the offenses to which you've entered pleas of guilty. By "elements," I mean the facts the government would have to prove through legal and competent evidence beyond a reasonable doubt before you could be found guilty if you had pleaded not guilty. When I state each of these elements, I want you to ask yourself if it is true and whether you want to admit to me that it is true. Then we'll talk about the facts. So at this time, I ask that you follow along on your copy of the charge sheet as I go over the elements for the offenses to which you have pled guilty. I'm going to take them in the order they are on the charge sheet.

We'll begin with Charge III, and it's a violation of UCMJ, Article 120. The elements for Specification 1 of Charge III, which

is the charge of rape, are as follows--and by pleading guilty to this offense you are admitting that these following elements are true and accurately describe what you did:

That on or about 1 January 2011, at or near Victoria, Seychelles, you caused Ensign (b) (6) United States Navy, to engage in a sexual act, to wit: penetration of her vagina with your finger; and

That you did so by using force against Ensign (b) (6) to wit: using strength sufficient that she could not avoid or escape the sexual conduct.

I'm going to provide you with some legal definitions that apply to this offense.

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

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

"Force" in this regard means action that compels submission of another or to overcome or prevent another's resistance by physical violence, strength, power or restraint applied to another person

sufficient that the other person cannot avoid or escape the sexual act.

Now I understand from what you just told me and from what your counsel have told me that there--you were intoxicated at the time of this offense. So I'm going to discuss some legal concepts with you regarding voluntary intoxication. And I understand that these apply to all the offenses under Article 120, so what I'm going to discuss with you now would also apply to the other three specifications to which you pled guilty.

Now your--as I indicated, your stipulation of fact, as well as what you and your counsel have told me indicate that at the time of the alleged rape you were under the influence of alcohol.

I advised<sup>of</sup> you that, per the definition of "sexual act," one of the elements of this offense of rape is that you had the specific intent to either abuse, humiliate, harass or degrade any person, or to arouse or gratify the sexual desire of any person.

The law recognizes that a person's ordinary thought process may be materially affected when he is under the influence of intoxicants to a point that he cannot form the requisite specific intent--in this case, based on what your stipulation<sup>states of</sup>, that is to arouse or gratify your sexual desires--cannot form that requisite specific intent due to the voluntary intoxication and then would not be guilty of the crime if he could not form that requisite intent.

Now, on the other hand, the fact that you may have been intoxicated at the time of this offense does not necessarily indicate that you were unable to have the specific intent to arouse or gratify your sexual desires, because a person may be drunk, yet still be aware at the time of his actions and their probable results. The inability to remember because of intoxication, sometimes called "alcoholic amnesia" or a "blackout," is not in itself a defense.

Alcoholism is recognized by the medical profession as a disease involving a compulsion towards intoxication. As a matter of law, however, intoxication from drinking as a result of the compulsion of alcoholism is regarded as voluntary intoxication and is not in itself a defense.

Now I'm going to give you some legal definitions with regard to consent and mistake of fact as to consent, and then how voluntary intoxication applies with regard to mistake of fact as to consent. And these elements that I'm about--or these definitions that I'm about to give you also apply to the other three offenses to which you've pled guilty with regard to Article 120.

Consent is a defense to this offense of rape or to the other three offenses to which you've pled guilty under 120. "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 your 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 you in the sexual conduct at issue does not constitute consent.

Mistake of fact as to consent: A mistake of fact as to consent is also a defense to this charged<sup>ed</sup>, as well as the other three under 120. Mistake of fact as to consent means you 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 your mind 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.

Now voluntary intoxication and how it interrelates to mistake of fact as to consent: Your state--and this is separate from what I advised you with regard to being able to form the specific

intent, which is an element of the offense. This applies only to mistake of fact as to consent.

Do you understand that distinction?

ACC: Yes, Your Honor.

MJ: Your state of voluntary intoxication, if any, at the time of the offense is not relevant to mistake of fact. It is relevant to whether you could form specific intent, but it is not relevant to mistake of fact. A mistaken belief that Ensign (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 a person was intoxicated.

All right, let's turn to Specification 3, and that's aggravated sexual assault by using threats. In Specification 3 of Charge III, you're charged with the offense of aggravated sexual assault in violation of Article 120 of the UCMJ. By pleading guilty to this offense, you're admitting that the following elements are true and accurately describe what you did:

The first element is that on or about 25 April 2011, onboard the USS MOMSEN (DDG-92)--which I'll refer to<sup>as ct</sup> the MOMSEN from here--here on out--at or near Naval Magazine Indian Island--Naval Magazine Indian Island, Washington, you caused Engineman Fireman

(b) (6) United States Navy, to engage in a sexual act, to wit: penetration of her vagina with your finger; and

That you did so by threatening Fireman (b) (6) to wit: through abuse of your military rank, position and authority created an implied threat to negatively affect her military career if she did not comply.

I've already provided you with the definition of "sexual act" and the definition of the "genital opening" with regard to a sexual act. I'm going to give you a definition now as it pertains to this offense with regard to what we mean by "threatening."

That means a communication or action that is of sufficient consequence to cause a reasonable fear that noncompliance will result in the alleged victim or another person being subjected to a lesser degree of harm than death, grievous bodily harm or kidnapping. Such lesser degree of harm includes a threat <sup>through</sup> ~~to~~ the use or abuse of military position, rank or authority to affect or threaten to affect either positively or negatively the military career of a person.

And again, the definitions I gave you with regard to "voluntary intoxication," "consent," mistake of fact as to consent" and "voluntary intoxication of mistake of fact as to consent" apply here, as well.

Would you like me to explain those further to you, or do you feel you understand them?

ACC: I feel I understand them.

MJ: All right, let's turn to Specification 4.

In Specification 4 of Charge III, you're charged with the offense of abusive sexual contact by using threats, again in violation of Article 120 of the UCMJ. By pleading guilty to this offense, you are admitting that the following elements are true and accurately describe what you did:

That on or about 25 April 2011, onboard the USS MOMSEN, at or near Naval Magazine Indian Island, Washington, you caused Engineman Fireman (b) (6) United States Navy, to engage in sexual contact, to wit: you penetrated her anus with your finger; and

That you did so by threatening Fireman (b) (6) to wit: through abuse of your military rank, position and authority, created an implied threat to negatively affect her military career if she did not comply.

Now this offense involved sexual conduct--or excuse me, sexual contact as opposed to sexual act, so I'll--it's a different definition; I'm going to give that to you now.

"Sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin<sup>ca</sup>, 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.

The same definition of "threatening" applies here as applied in Specification 3.

Do you understand that definition, or would you like me to go over it with you again?

ACC: I understand.

MJ: And again, with regard to "voluntary intoxication," "consent," "mistake of fact as to consent" and "voluntary intoxication of mistake of fact as to consent" apply here, as well.

Let's go to Specification 5.

In Specification 5 of Charge III, you're charged with the offense of abusive sexual contact by using threats in violation of Article 120 of the UCMJ. And by pleading guilty to this offense, you're admitting that the following elements are true and accurately describe what you did:

That on or about 25 April 2011, onboard the MOMSEN, at or near Naval Magazine Indian Island, Washington, you caused Engineman Fireman (b) (6) United States Navy, to engage in sexual contact, to wit: you placed your mouth on her vagina; and

That you did so by threatening Fireman (b) (6) to wit: through abuse of your military rank, position and authority, you

created an implied threat to negatively affect her military career if she did not comply.

The definitions I gave you with regard to "sexual contact," "threatening" and--as well as "voluntary intoxication," "consent," "mistake of fact as to consent" and "voluntary intoxication with regard to mistake of fact as to consent" apply here, as well.

Is there anything about those you don't understand or anything you'd like for me to go over with you again?

ACC: No, Your Honor.

MJ: So you fully understand those definitions and--and the potential defenses in this case?

ACC: Yes, Your Honor.

MJ: Very well.

All right, let's turn to Charge V; that's a violation of the UCMJ, Article 133: conduct unbecoming an officer and a gentleman.

In Specification 1 of Charge V, you're charged with the offense of conduct unbecoming an officer and a gentleman in violation of Article 133 of the UCMJ, and by pleading guilty to this offense, you are admitting that the following elements are true and accurately describe what you did:

That on or about 31 December 2010 to 1 January 2011, at or near Victoria, Seychelles, you wrongfully and dishonorably became

publicly intoxicated in front of members of your crew, made unwanted sexual advances and engaged in unwanted sexual contact with Ensign

**(b) (6)** United States Navy, a junior officer under your command; and

That under the circumstances, your conduct was unbecoming an officer and a gentleman.

I'm reading you the legal definitions for "conduct unbecoming an officer and a gentleman," and keep in mind as I go through the other specifications that they apply there, as well.

"Conduct unbecoming an officer and a gentleman" means, in this case, behavior in an unofficial or private capacity which in dishonoring or disgracing the individual personally, seriously detracts from your standing as a commissioned officer.

"Unbecoming conduct" means behavior--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.

Now let's turn to Specification 2.

In Specification 2 of Charge V, you're charged again with conduct unbecoming an officer and a gentleman in violation of Article 133 of the UCMJ, and by pleading guilty to this offense you're

admitting that the following elements are true and accurately describe what you did:

That on or about February 2011, onboard the MOMSEN, while at sea, you wrongfully and dishonorably encouraged Ensign (b) (6) United States Navy, a junior officer under your command, not to report an incident in which you had sexually assaulted her on or about 1 January 2011, while on liberty at or near Victoria, Seychelles; and

That under the circumstances, your conduct was unbecoming an officer and a gentleman.

And the definitions for "conduct unbecoming," <sup>OR U</sup> and "conduct unbecoming an officer and a gentleman," as well as "unbecoming conduct" apply here, as well.

Would you like me to go over those again, or do you understand them?

ACC: No--no, Your Honor, I understand them.

MJ: Very well, turn to Specification 3.

In Specification 3 of Charge V, you're charged with the offense of conduct unbecoming an officer and a gentleman, again in violation of Article 133 of the UCMJ, and by pleading guilty to this offense, you are admitting that the following elements are true and accurately describe what you did:

That on or about 25 April 2011, at or near Naval Magazine Indian Island, Washington, onboard--while you were onboard the USS MOMSEN, you wrongfully and dishonorably became publicly--actually, the public intoxication you were not onboard; this occurred both at Naval Magazine Indian Head (sic), Washington, and onboard the MOMSEN, you wrongfully and dishonorably became publicly intoxicated in front of members of your crew, made unwanted sexual advances, and then inside your cabin onboard the--the ship, you engaged in unwanted sexual conduct with Engineman Fireman (b) (6) United States Navy, a junior enlisted Sailor under your command; and

That under the circumstances, your conduct was unbecoming an officer and a gentleman.

And do you understand the definitions for that, or would you like me to give them--them to you again?

ACC: No, Your Honor, I understand them.

MJ: Very well.

Do you understand the elements, along with the legal definitions and potential defenses of all the offenses to which you've pled guilty?

ACC: Yes, Your Honor.

MJ: Do these elements correctly describe what you did on each occasion?

ACC: Yes, Your Honor.

MJ: In each of the specifications, is your name, rank, unit and organization correctly spelled--stated and spelled for the specifications to which you've entered pleas of guilty?

ACC: Yes, Your Honor.

MJ: Are you currently on active duty in the United States Navy?

ACC: Yes, Your Honor.

MJ: And on the date of the earliest offense, which was 31 December 2010, were you a member of the United States Navy, on active duty?

ACC: Yes--yes, Your Honor.

MJ: Have you been discharged or released from active--released from active duty since that date?

ACC: No.

MJ: It's now time to talk about the facts, and I need to hear from you in your own words what makes you guilty of this offense. I'm going to lay the groundwork for you and ask you some questions, some foundational questions, and then, again, we'll talk about the facts.

We'll take them in the order they are on the charge sheet, so we'll start with the Article 120 offenses.

Did you, on or about 1 January 2011, at or near Victoria, Seychelles, in fact, commit a sexual act, as I've defined that for you, with or on Ensign (b) (6)

ACC: Yes--yes, Your Honor.

MJ: Okay, and how do you remember that particular date:  
1 January 2011?

ACC: We had arrived--we arrived in the Seychelles on the--  
31 December, and proceeded to anchorage. We anchored the ship  
without incident. I wrapped up some--some paperwork, and then my--  
went to the admin that we had procured, along with the XO and a  
number of----

MJ: Okay. Well, let's--let's take it a step at a time. I  
appreciate that, but so that's how you remember the date is you  
arrived on 31 December, and then the incident that you're charged  
with occurred the next--next night?

ACC: Well, actually that same night. It--31 December rolling  
into the 1<sup>st</sup> of----

MJ: Okay, so it was after midnight.

ACC: Yes.

MJ: Okay. So you agree with the date of 1 January 2011?

ACC: I can't--I can't confirm or deny the exact time because  
I--I--I--frankly, I just don't recall the exact time, but--but I  
wouldn't disagree that it was after midnight.

MJ: Okay, so 1 January 2011.

ACC: Yes, ma'am.

MJ: And you were in Victoria, Seychelles.

ACC: Yes.

MJ: Okay. Now who is Ensign (b) (6)

ACC: Ensign (b) (6) at the time, was the OI Division Officer; she had reported to the ship shortly prior to my assumption of command.

MJ: Okay, for the record, would you say what the OI Division Officer is?

ACC: The OI Division Officer is a division officer who's in charge of the Operations Division. Her personnel included operations specialists, and essentially her responsibilities were the maintenance and operation of the Combat Information Center onboard----

MJ: Okay.

ACC: ----the ship.

MJ: And you say she had just recently arrived onboard the ship?

ACC: She--she had arrived just prior to my assumption of command in July 2010.

MJ: Okay. So she was onboard when you assumed command?

ACC: That's correct.

MJ: And your relationship with her was professional or personal or both?

ACC: Completely professional.

MJ: As her Commanding Officer.

ACC: As her Commanding Officer. One of the things I did as the Commanding Officer was I would hold dinners in my cabin with the Executive Officer and the cognizant department head and the individual to get to know them better and to find out what their career goals and personal goals. And I had--had the opportunity to do that with Ensign (b) (6) so I--I had gotten to know her a little bit more personally.

She had expressed an interest in the environment and--and green fuels and--and--and those types of things, and--and was looking at--she's a prospective nuclear officer and was looking at those types of things in her career path, and I--I know that we were--we had discussed those things, and I was kind of on the lookout of those opportunities for her in the future.

So I had--had the opportunity to--to have a professional relationship, but was--was, you know, trying to look out for her personal interests, as well.

MJ: So you might have had a little more interaction with her than some of the other junior officers?

ACC: No, I had--I had done that, essentially, with all of my junior officers, but--but I guess what I'm trying to say is I was trying to make sure that I knew each of these individuals more personally than--than just purely professional and that I was trying to get to know them so that I could look out for their--so that I

could look out for their desires and goals. It was something that I didn't think was done for me as a junior officer, and I was trying to do my best to take care of them.

MJ: Okay. So you were beginning to describe for me what happened. You set anchor.

ACC: So we--we set anchor, and then after doing some administrative work, the Executive Officer and I went ashore with a couple other officers from the ship, went to the admin and----

MJ: And the admin being?

ACC: It was a house that we had rented in the Seychelles, fairly large house, and we relaxed there, started drinking alcoholic beverages, smoked a cigar----

MJ: Do you remember about what time this was that you started drinking?

ACC: This was probably early afternoon, 3--3 or 4 in the afternoon.

MJ: What were you drinking?

ACC: Mostly vodka with ice, some gin, and then some beers. And it was very scenic; it was a beautiful location. I just remember looking out over the water, and the Seychelles is a beautiful place. And as--as we were relaxing and just talking, and we were--we were very--we were happy because we had just wrapped up a month of counter-piracy operations and had been pretty successful at it. We

had--we had introduct--intredict two pirate vessels and a pirate-  
logistics vessel, and we had been working for Commander Task Force  
151, which is the coal--coalition task-force commander for counter-  
piracy, and that--it was a Pakistani commodore at the time, and he  
had really singled us out for praise as, you know, being particularly  
aggressive, and a couple of the officers who were there were the  
leaders of my boarding teams, and I was really, you know,  
congratulating them for how well they had done, and--and how well we  
had handled these pirate incidents.

MJ: Was Ensign (b) (6) there, as well?

ACC: She was not there at first. She arrived later, and as we  
were----

MJ: When--when all this was going on, she had not yet arrived?

ACC: She--she and several other of the younger junior officers  
did arrive later in the--the evening.

And we were just talking about, you know, the experiences  
we had had, and in fact, the day--the day before, we had been  
diverted to do a medical evacuation for a--a gentleman who had a  
ruptured appendix on a Military Sealift Command vessel, and we were  
talking about that operation because we had had to burn a lot of fuel  
and go very fast and go out of our way.

assumed command, my predecessor had done a great job training the crew, and they were a fantastic crew. They just finished INSURV in November, and the ship was in great material condition and--and they had a tremendous sense of ownership.

But what they didn't have, I felt, I didn't feel they were very tactically savvy, and I was very concerned as we headed towards the deployment that we were going to have to be very proficient in the application of force and very proficient in the application of weapons. And I drilled them a lot. We shot a lot. We had our entire--the ship, because it hadn't been operational because of the INSURV and--and just our schedule, we almost had our entire FY-10 allocation of ammunition, and I ran drills, no-notice drills, you know, with our smart--small-caliber-action team a lot and forced them to shoot a lot.

MJ: So, when you say "obligated," you felt--to get them some downtime to----

ACC: To give them some downtime----

MJ: ----to socialize and----

ACC: and then to show them my appreciation of--that I really appreciate all their drills because at first I think it was a bit of a shock to them how many drills I was running, particularly as we were on deployment. In fact, the Master Chief had asked me to--to back off a little bit and, you know, space out those drills, and so I

wanted to reward them for a job well done and tell them how much I cared about them, and--and show that I was approachable and--and to try and get them comfortable coming to me with their requests and their goals, and--and to try to help them, and just show them that I was a--a human being.

MJ: Okay, so you got in the van to go to town.

ACC: Yeah, we--we drove down, and I--I--I think I--I somewhat dozed off for a minute on the--the ride down there. We got to the--we got to the bar, and I woke up, and from that point on my--my memory is pretty spotty, but I remember----

MJ: From the time that you arrived at the bar?

ACC: Yes. I remember walking around and--and seeing a bunch of crew members and, you know, shaking hands and patting people on the back----

MJ: At--at--at this point I want you to just tell me what you independently remember, and then we will get into areas that you may don't--may not remember, so I want you to draw a distinction for me at this point in time and tell me what you independently remember.

ACC: Yes--yes, Your Honor.

MJ: Without having read the investigation or talked to----

ACC: Right.

MJ: So you said your memory was spotty when you arrived.

ACC: Right. Yes, and I--I remember walking around the bar and--and--and trying to see everybody who was there and shaking hands and--and--and patting people on the back and--and--and just joking, laughing--I remember laughing a lot. I remember going up on the dance floor and dancing with a bunch of people just kind of in a silly way and then, you know, walking away. I don't remember being there very long.

MJ: Do you remember anything about Ensign (b) (6) did she ride in the van with you to the bar----

ACC: Yes, and I remember her being there, and I remember dancing with her but as part of a group of people. I don't remember singling her out for any reason.

And I remember going to the bar, and I sat down there, and there was a chief petty officer of mine, and--male chief petty officer, and we started talking and, you know, he was saying how great things were going and--and--and, you know, how much he liked me and admired me, and then he said, you know, "There's something I've got to tell you," and he--he disclosed his homosexuality to me, and I--I recognize this as being ahead of the don't-ask-don't-tell policy, and I remember just embracing him and telling him, "Hey," you know, "you're a great chief, and--and I understand. I appreciate your candor, but let's not talk about this for another few months."

And I remember I embraced him again, and I think I made him feel uncomfortable, and now, looking back on it, I don't know why I did that, and I----

MJ: Well, why don't we focus in on Ensign (b) (6) and what happened with her.

ACC: Yes--yes--yes, ma'am. What I'm--what--what I was trying to is that at that point I think I was starting to see that my impulses were not being controlled and I was----

MJ: Understand.

ACC: And after that----

MJ: But you--you were aware--were--but you were aware of what you were doing.

ACC: Yeah, I--I--I remember doing that, but I don't--I don't remember feeling--I remember feeling surprised at his reaction, that--that--that he felt it was inappropriate and now----

MJ: Well, when you say you--you were telling me that because you--you wanted me to be aware that that's when your impulses--you realized your impulses were becoming hard to control, did you realize that at the time----

ACC: No.

MJ: ----or was this looking back?

ACC: No, this is hindsight. That's hindsight.

After that, my memory is pretty spotty, and I remember--I remember seeing one of my crew members and him buying me a drink and saying that, you know, the only price was a coin, and I--I had several of my command coins in my pocket. I--I always carried those, and I gave him one of those. I remember that.

And then I remember being by myself at the bar and the-- it's kind of a horseshoe-shaped bar, and I remember there was a--the forward portion of the bar, and there was a kind of a back portion with a railing, and I--I remember being against a railing, and I remember thinking to myself, "Boy, I'm really not doing so well. I--I--I," you know, "need to go home pretty soon," because I'm really feeling the effects of the alcohol, and I'm feeling, you know, slurring my speech and, you know, starting to not feel so well, and my recollection is--is I felt Ensign (b) (6) come around my--my--my backside side, and I just--I--I honestly felt like I was slowly, you know, kind of beginning to pass out a little bit, you know, the room was kind of getting a little----

MJ: How did you know it was Ensign (b) (6) coming around behind you?

ACC: I--I looked back and I remember seeing her, and I faced back to the bar, and then--so I--I knew that she was back there, and then I remember I felt like she had brushed my shoulder or had touched my shoulder with her hand--at least that's my recollection--

and then I remember, you know, just bits and pieces after that, but I remember reaching back and starting to touch her, and then that's when I had my hand into her--her underwear and started to touch her.

And then I kind of--my memory fades out again, and then I--I--I--it was almost like I woke up, and I realized what was happening, and I turned to face her, and I just looked at her, and she looked at me, and we stared at each other for a minute, and then I said, "I think we should go outside," and she pushed my arm away and said, "No," and went away. And I--I stood there for a moment, and I--I just didn't know what had happened, and then I just--I remember wandering around the bar, and the next thing I really remember is the next morning, and that's the--it's--it's a really spotty memory due to alcohol, but I--I--that's--that's how I remember things.

MJ: Okay. Well, and that's what I wanted you to do is tell me what you independently recollected. But now let's talk about what you're charged with and what you said in your stipulation. So I'd like you to look at Page 2 of your stipulation.

ACC: [Turns to Page 2, as directed.]

MJ: And I remind you, the charge is rape by force, and in this case using your strength sufficient that she could not over--could not avoid or escape the sexual conduct. And it--what--what you've told me--just told me doesn't meet that definition, and it's

different than what you have in your stipulation. Now this <sup>may be</sup> mean you don't--because you were drunk you don't remember exactly, so let's look at your stipulation with regard to your trying to massage her shoulders before--before you got to the bar with her.

Do you believe that happened? Because you didn't--you didn't indicate to me--now you were doing just what I wanted you to do is tell me what you independently remember, but looking at, say, Paragraph 10, do you believe what you state there happened: that you tried to massage her shoulders, and she told you not to touch her?

ACC: I don't--I don't recall that at all, but I have no reason to believe that Ensign (b) (6) would--would make that up.

MJ: So where--where did you get this information?

ACC: This is from the investigation and Ensign (b) (6) statements.

MJ: Okay. So this was in--I have not seen that, so this was in--in her statement?

ACC: Right. Oh, and in the interviews with Commander Fulton with Ensign (b) (6)

MJ: Okay.

ACC: Commander Fulton was able to speak to the victim prior to this proceeding and told me that that's what she said. I--I don't want to believe that I did that. I don't remember it at all, but I

can't believe that she would make it up. I have no reason to believe that she would make it up. I can't deny it.

MJ: Well, it's got to be more than can't deny, and it's got to be you believe it happened.

ACC: I--I don't think she was lying, and--and I--I--but I honestly just don't know if I did it or not. I--I think--actual--I don't think she would lie, so I--I have to believe it happened.

MJ: Okay.

And then look at Paragraph 12, which is, again, a different description than what you just gave me.

ACC: [Looking at Paragraph 12, as directed.]

I--I don't have any recollection of it, but I--but I can't argue with it. I--I don't think Ensign (b) (6) would make it up. I--I'd like to believe that she was intoxicated, as well, but I--I--I can't believe I would do something like this, but I--I--I can't deny it. I can't, and I----

MJ: Why do you think your recollection is quite different, actually, than what----

ACC: Well----

MJ: ----you've got in your stipulation?

ACC: Well, I--I think because of the--the blackout portions. There is no memory of certain things, so I think that maybe this

happened during one of those periods of time that I--I just can't recall. My----

MJ: You say you do recall, though, the incident of you penetrating her vagina with your finger, right?

ACC: I--I--I do----

MJ: But that's a different way than what's described in your stipulation.

ACC: Right. I--I remember being very unsteady. I remember, you know, again, when you kind of--the--the room not necessarily spinning, but me not being very balanced and--and in control of my body's movements, so it's very possible that my perspective or my perception was--was different than what her perception was. And since she was behind me, it very well could be that I was on her and I didn't know it, you know, was--was pinning her as--as she said, and--and I just don't--I don't have a lot of confidence in my memory because of the----

MJ: Okay.

ACC: ----because of the alcohol, and it's just--it----

MJ: Well, again, read--I want you to read Paragraph 12 and Paragraph 13, and tell me whether you believe that that happened.

ACC: [Reads Paragraphs 12 and 13, as directed.]

I do. I--I don't remember it, but I--she would have no reason to lie, and I don't think that she would make something like

this up. She has no reason to--to--to get me, and--and--and I--since I can't remember it and I know that I've had blackouts before, and I know that I--I've had some impulse issues with--with alcohol, I--I can't--I can't defend myself. I can't say that I didn't do that.

MJ: Well, do you believe----

ACC: I really--I really--I would like to be able to say that, but I--I don't think I can.

MJ: Do you believe that what you've stated in your stipulation in Paragraphs 12 and 13, and 14 are--is what happened?

ACC: Yes, Your Honor.

MJ: And that--and that--according to this, she wasn't behind you; she was standing at the bar, and you came up behind her.

ACC: A--again, it's--it's--that's not how my memory----

MJ: I--I--yeah, I understand it's not how you remember it, but do you----

ACC: Right.

MJ: ----believe that that's what happened?

ACC: Yes.

MJ: And that you tried to kiss her, and she tried to resist.

ACC: [No response.]

MJ: And that you at that time then penetrated her vagina with your finger.

ACC: Yes. Yes.

MJ: So you believe that you did that.

ACC: Yes. I--I do have recollections of that happening. I know that that happened.

MJ: Now you--you talked about how drunk you were, almost in like it wasn't intentional.

Did you intentionally penetrate her vagina with your finger?

ACC: I--I--it was not an accidental contact, but I don't have any idea why I would have done that.

MJ: Well, remember, one of the definitions--or----

ACC: Right.

MJ: ----one of the elements is that you had to do it intentionally with the specific intent to gratify your sexual desires.

ACC: I--I know that I had no intent to--for the other definition, to, you know, abuse or humiliate her or any of that kind of stuff, so it must have been to--to gratify sexual desires.

MJ: That you did it intentionally.

ACC: Yes.

MJ: And there would be no other reason for doing it?

ACC: I--no. No, I can't imagine any other reason.

MJ: Now some of the things you've talked about almost sound like a--a sort of a consent here, like she first initiated contact.

Do you believe that: that she consented?

ACC: At the time, I think I did believe there was consent, but now I do not believe that there was. Having read everything and the impact that it's had on her, I--I do not believe there was consent.

MJ: And at the time you believe she did because--as you remember it?

ACC: I just don't remember any indications of non-consent. I don't have any recollection of--of non-consent until after the contact had happened.

MJ: Well, let me go over the legal definition of "consent" with you again. It--it's more than just non-consent; it's words or overt acts indicating a freely-given agreement to the sexual conduct of a competent person, meaning she wasn't substantially incapacitated herself.

ACC: Right.

MJ: An expression of lack of consent, so she actually says, "I don't consent," that means there's no consent; and then lack of verbal or physical resistance or submission resulting from your use of force, threat of force--use of force in this case--doesn't constitute consent.

ACC: Right.

MJ: So how does that fit with what we're talking about?

ACC: Well, I--she certainly did not give any verbal consent. She gave no resistance. I didn't feel like I was using any physical force, so I think at the time I felt like she was not--she was giving me any indication of consent, but at the same time I didn't see any non-consent. So I think, in my inebriated state, I--I didn't think that I was harming her until I came to my senses and recognized that, "Hey, I'm doing something wrong," and turned to her to look and see, you know, what the effect of my action had been.

So I--I don't think that she gave me any indication of consent; I just--I think maybe in my inebriated state the lack of non-consent was affecting my--my judgment.

And again, it--God, my memories are just so spotty and--and hard to recall. It just seems like--I--I recognize now that there was not consent.

MJ: All right. Well, I also gave you the definition of "mistake of fact as to consent."

ACC: Right.

MJ: So, even if your memory <sup>of us</sup> ~~is~~ how you recollect it is correct, would you agree that you would not have the defense of mistake of fact as to consent, as I explained that to you?

ACC: [No response.]

MJ: Let me--let me go over that with you again.

Your state of voluntary intoxication at the time of the offense is not relevant to a mistake of fact. A mistaken belief that Ensign (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.

ACC: I don't think a--a reasonable, prudent or sober person would have had the same recollection I did. They--I think that--if I had been sober, I would have known that there was not consent.

MJ: Okay.

Now let's go back to what you said in your stipulation because, again, you're talking about how you independently remember it, but based on what you've agreed to in your stipulation, I mean it's fairly clear that she didn't consent as to what she says.

You, again, believe what you said in your stipulation----

ACC: Yes----

MJ: ----that you came up to the bar and--because you told me you didn't think you were using force, but that's required. An intentional use of force is required to be guilty of this offense, not an accidental use of force but an intentional use of force to get the other to--to succumb to what you want them to do, and in this case penetrate her vagina with your finger.

Do you think you intentionally pinned her against the bar, as you've said here in your stipulation, based on what the

investigation, her statement and what you've discussed with your attorneys?

ACC: May I have a moment with counsel?

MJ: You may.

ACC: [Conferring with counsel.]

I--I do believe that I positioned my body in such a way that I could digitally penetrate Ensign (b) (6) I--I didn't feel that I was intentionally in--in--intending to physically pin her in such a way that she could escape. I don't think that I had any intention whatsoever of--of forcing her into that position. I--I--I feel like I was responding to the contact that she had had with me and was leaning in towards her so that I could--so that I could digitally penetrate her. I--I didn't re----

MJ: Okay, you need to look at your stipulation. Because, again, we're--we're talking now--you've talk--told me what you independently recollect, but that's different than what you said in your stipulation.

CDC: One moment, Your Honor.

[Conferring with the accused.]

ACC: Yes, Your Honor, I--I--I--I do believe that my--my body did come against Ensign (b) (6) where she could not move, and that--that was the initial contact. Yeah, I do believe that based on--based on all the facts.

MJ: [Pause.] So do you agree with what you said in your stipulation, based on----

ACC: Yes. Yes, Your Honor, I do.

MJ: Now you've talked about--we've talked about the consent issue. According to your stipulation, you were trying to get her to kiss you, and she was resisting.

Do you agree that a sober person would have realized she was resisting?

ACC: Yes, a sober person would definitely realized (sic).

MJ: And it's while you had her pressed against the bar that you penetrated her vagina with your finger?

ACC: Yes.

MJ: Let me give you the definition again of "force" in this case: That you did the sexual act by using force her-against her to the point that--well, to wit: that you used your strength sufficient that she could not avoid or escape the sexual act--act or the sexual conduct.

Do you agree that's what you did?

ACC: I--I think I used my weight, not my strength.

MJ: Well, your strength or----

ACC: My--my----

MJ: Strength of <sup>of</sup> your body----

ACC: Right.

MJ: ----being your weight.

ACC: Yes. Yes, Your Honor.

MJ: And then the definition of "force" is action to compel submission of another or to overcome or prevent another's resistance--by strength in this case or power or restraint, not--not physical violence--applied to another person sufficient that they could not avoid or escape the sexual act.

ACC: Yes, Your Honor.

MJ: That's what you did?

ACC: Yes.

MJ: And you did it to compel her submission, based on what you've read? I know you don't remember it that way, but based on what you've read?

ACC: Yes. Yes.

MJ: Okay. I think at this time it would be a good idea--and this is also applicable, I believe, we'll see when we get there, but to talk a bit about alcohol--use of alcohol and how it affects memories, and particularly, in this case, the specific intent to gratify your sexual desires.

Do you feel that you were able to form the specific intent to gratify your sexual desires, and that's why you penetrated her vagina with your finger?

ACC: I--I do. I--I don't recall having that specific thought, but I--I--I think--I think I could at that point. I can't imagine that I would do it for any other reason.

MJ: As I explained to you, the law recognizes that a person's ordinary thought process may be materially affected when under the influence of intoxicants. So, as a result, if you were to plead not guilty to this offense of rape, which again is a violation of Article 120 of the UCMJ, I would instruct the panel of members, if you chose to go with members, that evidence that you were intoxicated may, either alone or together with other evidence, cause them to have a reasonable doubt that you had the specific intent to gratify your sexual desires, which is required for conviction of this offense.

On the other hand, I would also instruct the members that the fact that you may have been intoxicated at the time of the offense does not necessarily indicate that you were unable to form that specific intent. That is because you may be drunk, yet still be aware of your actions at the time--just not remember them--but aware of the actions at the time and of the probable results.

I'd also instruct the members that in deciding whether you had that requisite specific intent to be guilty of this offense--had the intent at the time of the offense--that the members would be instructed to consider the effect of intoxication, as well as other evidence in the case, including the possibility that your

intoxication was sufficient to cause a blackout or alcoholic amnesia. Again, the inability to remember because of intoxication, sometimes called alcoholic amnesia or a blackout is not by itself a defense. It is, however, a factor to be considered in determining the extent and effect of your intoxication.

Now do you understand how alcoholism--we haven't talked about alcoholism; let's talk about that for just a moment.

Do you feel like you're an alcoholic?

ACC: Yes. Yes, Your Honor, I am an alcoholic. I'm 183 days sober.

MJ: Alcoholism, I need to give you some legal definitions with regard to that. It's recognized by the medical profession as a disease involving the compulsion towards intoxication. As a matter of law, however, intoxication from drinking as a result of a compulsion of alcoholism is regarded as voluntary intoxication--and I just previously explained to you how that works.

We have a concept in our criminal procedure involving legal insanity, or lack of mental responsibility, and that means that as a result of a severe mental disease or defect--you said you believe you're an alcoholic, which is recognized as a disease--that you were unable to appreciate the nature and quality of the wrongfulness of your acts at the time of the offense. However, severe mental disease or defect does not in a legal sense include an abnormality manifested

only by repeated criminal or otherwise antisocial conduct or other non-psychotic behavior disorders and personality disorders.

With regard to the lack of mental responsibility----

Well, let me ask you first, do you understand how alcoholism, as I just explained that to you, is a disease, and then <sup>at</sup> how the lack of mental responsibility, voluntary intoxication and amnesia or blackout apply to--to this offense of rape?

ACC: Yes.

MJ: And you discussed this with your counsel?

ACC: Yes, Your Honor.

MJ: And have you specifically discussed the effect of alcohol in the formation of specific intent in this case to gratify your sexual desires, as that is an element of the offense? Have you specifically discussed that with your counsel?

ACC: Yes, Your Honor.

MJ: Do you have any questions about the terms or anything I've described for you so far?

ACC: No, Your Honor.

MJ: Now, with regard to the lack of mental responsibility, have you ever been treated by a mental-healthcare provider?

ACC: Yes, Your Honor, I've been under psychiatric care for the last 6 months. I have a psychologist who has been doing both individual treatment and family counseling, and I am under the care

of a Navy psychiatrist for symptoms of post-traumatic stress disorder and alcoholism. And then I also had seen a--counselors during my outpatient alcohol-treatment program and am still under continuing care.

MJ: You're still being treated?

ACC: Yes. Yes, Your Honor.

MJ: So you said alcoholism and PTSD?

ACC: Yes, Your Honor.

MJ: What's the PTSD from?

ACC: Well, my psychiatrist and I are trying to get to the bottom of that. I've seen--I've witnessed a number of pretty bad accidents at sea. I used to suffer from nightmares--I suffer from a lot of nightmares from just the fear that I had of--of my Sailors being hurt when I was a boarding officer in the Gulf as a lieutenant. I had fears of failure as a--as a department head, as the Operations Officer on ships, and then worrying about my crew as--as--as an XO and as a Captain, and because I had a particular commanding officer who is extremely verbally and emotionally abusive to me, and I think that's really where my drinking got really bad is--is I was self-medicating--I was taking--I was drinking to try and deal with the frustrations and stresses and fears that I had, and when I started seeing the psychologist for my alcoholism, he asked me to fill out some questionnaires about PTSD, and I crossed the threshold for that,

so, although I--I never thought I had any kind of PTSD-type issues because I had never been boots on the ground in Iraq and Afghanistan, but the more he started talking to me about my naval career and the things I had seen, the more he thought, "Well, you know, actually, why don't you talk to somebody about this because I think you do have these symptoms? You--you may not have the disorder, but you've got all the symptoms."

And so I started seeing Dr. McLay, a Navy psychiatrist, and he agrees that I--I have all they symptoms, but the--he can't really figure out which of these specific events is the--is the--the trigger, and he's--he's placed me on medication for my nightmares. It's a blood prer--blood-pressure medication that helps me not have the--the nightmares because it restricts the adrenal-gland production.

MJ: Are you on that medication right now?

ACC: Yes, ma'am, I am.

MJ: Does that affect your ability to understand what's going on here today----

ACC: No. No, ma'am, I--I don't think it does. It--it makes me a little tired and short of breath at times, but that's the only effect that I know of.

MJ: So you under--you understand what we're doing here today?

ACC: Yes, Your Honor, I do.

MJ: Okay, and you feel like you're fully aware?

ACC: Yes, Your Honor, I do.

MJ: So at--at the time of this incident with Ensign (b) (6) were you suffering from PTSD at that time, do you believe?

ACC: I--I--I do. I--I was definitely having nightmares. I--I never really considered myself the best ship handler in the world. I thought I was very tactically proficient. I thought I was a good Captain, but I--I would get very scared when we came alongside another ship for replenishment because I just had some self-doubts, and I used to have nightmares while in command, especially the night before underway replenishments, thinking about accidents and--and all those types of fears.

And I know that I had had a lot of problems as a younger officer prior to the incident with Ensign (b) (6). When I was working for the Captain who's kind of abusive, I would--I would drink heavily those nights, and it got to the point where I'd get so scared, and I don't know why, but I'd lock my bedroom door, and I'd--I'd load my .45 pistol and put it under my pillow because I was just scared, and I--I don't know why I did that; there's no--nobody was coming to get me----

MJ: Well, do you think your PTSD had anything to do with the incident with Ensign (b) (6)

ACC: No, I don't think it had anything to do with the incident with Ensign (b) (6) other than I think it was a significant contributor to the progression of my alcoholism.

MJ: Okay. So you--you'd--you--you say you--were you diagnosed at that time as having a disease of----

ACC: No, I--I--I did not seek out any kind of treatment for fear that I would be derailed in my career, and that I would not get security clearance, and--and I was deathly afraid of reporting myself to a mental-health professional.

MJ: So you were not under treatment at the time of--of either of the incidents----

ACC: No.

MJ: ----either with Fireman (b) (6) or----

ACC: No. No, no, I was not, Your Honor.

MJ: Okay.

ACC: I was not.

MJ: And tell me again when you started.

ACC: It was--I started seeing the psychologist in May of 2011, and I started seeing the psychiatrist in July--end of July/beginning of August 2011.

MJ: But you believe you were suffering from both--well, the PTSD was contributing to alcoholism, which you believe you were suffering with at the time?

ACC: Yes, most definitely.

MJ: So--I asked--I asked you, I believe, and I'm going to ask you again, did you discuss the lack of mental--the possible defense of lack of mental responsibility with your counsel?

ACC: Yes, Your Honor, we did.

MJ: And do you understand it? I've given you some definitions with regard to it? Do you feel you understand it?

ACC: Yes, I do.

MJ: That defense?

ACC: I do.

MJ: Do you have any questions about that potential defense: a lack of mental responsibility?

ACC: No, Your Honor.

MJ: Do you believe you've been able to participate with your counsel in preparing for your--your trial?

ACC: Yes, Your Honor, I have.

MJ: And you believe you're still an alcoholic?

ACC: [Chuckling.] Yes, Your Honor, I definitely am an alcoholic.

MJ: And you're still under the care of the mental-health professional?

ACC: Yes, Your Honor. I saw my psychiatrist yesterday.

MJ: We have a process in our system, it's under Rule for Court-Martial 706, in which you can be evaluated if you believe you might have a defense of lack of mental responsibility, or it might be an issue with regard to the offenses that you're charged with, that you pled guilty to. We call it a 706 board, and that's you meet with a board of medical professions, at least one person up to three--three persons, and they evaluate you for your responsibility at the time of the offense and also your ability to stand trial to participate in your defense, cooperate with your counsel, that sort of thing. We call it a 706 board.

Did you discuss that with your counsel?

ACC: [Conferring with counsel.]

Yes, Your Honor, we--we did. We did talk about it, and I--I--I feel like I'm fit.

MJ: Okay. So do you believe that you should be evaluated? And we're talking now about your ability to--lack of mental responsibility as a defense for the--for what you did? Do you feel like you should be evaluated?

ACC: No, Your Honor, not based on what my psychologist and psychiatrist have said.

MJ: Mr. Sullivan, we've talked about this during our 802, but would you state what's been done so far and what your position is?

CDC: Yes, Your Honor.

Commander Wiley has been evaluated by Dr. Wood at length,  
and they've had a----

MJ: By--by whom?

CDC: By Dr. Dennis Wood.

MJ: And he is?

CDC: Forensic psychologist. He has----

MJ: And you say he has been--as part of the defense  
preparation----

CDC: Correct.

MJ: It's not--it's not a formal 706 board.

CDC: Correct. No, we have never requested a 706 because we  
didn't believe it was necessary. I know that Commander Wiley has  
been under the care of two psychologists and a psychiatrist. I know  
Dr. Wood has looked at all the psychiatrist's reports, that Commander  
Wiley was found fit for full duty by the psychiatrist. We're well  
aware that there's issues of alcoholism and PTSD symptoms; there was  
never a diagnosis, but symptoms, and----

MJ: So there's not been actual formal diagnosis----

CDC: I----

MJ: ----of PTSD?

CDC: They--they talk about PTSD symptoms, and--but there--I  
have not seen any--any reports or anything that would--would--that  
led us to believe that there was any issues of competency, whether at

the time of the offense or assisting with his defense. Commander Wiley has been very engaged in assisting with both counsel, able to answer our questions, been able to, you know, communicate and--and to make--make decisions, so we have not had any concerns about his competency.

MJ: And in his--you say he's been evaluated <sup>by ex</sup> Commander Woodson, you said?

CDC: Dr. Wood.

MJ: Dr. Woodson----

CDC: Dr. Wood.

MJ: Dr. Wood.

CDC: Dr. Dennis Wood.

MJ: Okay..

CDC: And we have----

MJ: And was there any discussion----

CDC: May we have a moment, Your Honor, please?

MJ: You may.

CDC: [Conferring with co-counsel and the accused.]

Your Honor, we just have received a--a supplemental report faxed to us today sent up to the court, but I'm looking again at the--at his actual diagnosis, which is an anxiety disorder with PTSD-like symptoms, depressive disorder, alcohol dependence, but no Axis-II disorders or personality disorders or competency issues that

would require us to do a 706. If I thought it was necessary, we'd have done it.

MJ: Okay. So you said anxiety disorder, PTSD symptoms, alcohol----

CDC: I'll read it again just so I'm clear.

The Axis-I diagnosis included:

Anxiety disorder, in parentheses is "PTSD-like symptoms," end parentheses;

Number two, depressive disorder, in parentheses "major depressive symptoms, but in the contents--the context of alcohol use;" and

Three, alcohol dependence, and in parentheses "in early remission;" and

For Axis II: deferred.

There was, again, no other diagnosis or--and again, I've <sup>talked to</sup> to Dr. Wood at length, and I've talked to him today, that there was nothing that would inhibit Commander Wiley to assist in his defense, nor was there any sort of competency issues where he couldn't appreciate his situation at the time of the offenses. So we're-- we're comfortable with that.

MJ: Government, I'd like to hear from you on this----

TC: We agree, and we've had the same conversations with the defense, and--and based on those representations have not ordered or requested that a formal 706 be ordered.

MJ: Okay.

So, on the date of the offense, of the incident with Ensign (b) (6) Commander Wiley, did you understand what you were doing, either based on your own recollection or based on having read the investigation and--and talked with your attorneys and her statement? Do you believe you understood what you were doing?

ACC: Yes. Yes, Your Honor.

MJ: Do you believe you knew what you were doing was wrong at the time?

ACC: I--I believe it was wrong, and I--I'm not sure I was aware it was wrong at the time, but I realized it was wrong very, very shortly after.

MJ: Okay, and you're saying because of this--what we talked about, your mistake of fact as to consent?

ACC: Yes.

MJ: Do you think--and again, looking back, do you think that--do you actually believe she was consenting, or you just don't remember it correctly based on what you've read and the investigations?

ACC: I think I either completely misinterpreted or I just am not remembering correctly because there's so many facts, so many things that--that I just don't have any memory of.

MJ: Do you believe the facts in your case raise a lack of mental responsibility as a defense?

ACC: Not as you described it in the definitions.

MJ: Why don't you elaborate with me on what you mean by that?

ACC: I--you said in the definitions that, you know, a reasonable, sober person would----

MJ: Well, that's mistake of fact as----

ACC: Okay, that's mistake of fact.

MJ: I'm just talking about the--the disease of alcoholism as possibly being a--a defense in your case in that you could not appreciate the nature and quality and wrongfulness of your acts.

ACC: I--I know that because of the blackouts and the--the lack of impulse control that I seem to encounter when I was--when I was drunk, I do--I--I--I don't feel like I had control of my actions, but at the same time I--I--I think I should have known better. I think I should have understood.

MJ: [Pause.] And again, you said you don't believe that PTSD, other than causing you to drink, had anything to do with the incident.

ACC: No, I--I don't.

MJ: Let's talk about the inability--your alcoholic amnesia and how that factors in.

You--you said you had had a lot to drink when you were at the admin house; did you continue drinking once you got to----

ACC: Yes.

MJ: Do you remember what, how much?

ACC: I know a number of crew members brought me drinks. I know that there was a number of mixed drinks; I--I mean it just kind of ran the gamut. I know there was a couple beers involved. I know that there was a lot of mixed drinks involved, but I--I honestly can't recall what all those mixed drinks were, so--I know some of them had whiskey in them, but that's--that's all I can remember.

MJ: Have you had, in the past, had that much to drink before?

ACC: Yes.

MJ: And how did----

ACC: Although that was--that was a lot, but I have had that much in the past.

MJ: And I'm not asking about other acts of conduct or misconduct, but when you drank in the past, had you had these same problems with impulse control?

ACC: I've had--I've had blackouts before, and I have had incidents where I--I recall saying or doing things that I regretted the next day and wondered why I had--had done them, but nothing to

this degree, nothing like this, just mostly, you know, either being silly or--or--or, you know, saying a--a mean comment to someone. But yes, I do remember, and it seemed like it was getting progressively worse as time went on.

MJ: But knowing this, you chose to drink on that night, correct, drink to excess?

ACC: Yes. I--I definitely did. I--I felt that if I--I felt in many ways that drinking was the thing that made me happy. Drinking was the thing that made everything okay, that drinking was the thing that took away the worries and the stress and the fears. I honestly believe that drinking was helping me hang onto reality, helping me hang onto my sanity, and in fact, it was the opposite that was true. But I didn't realize that until after I had had treatment.

MJ: Okay. Well, you know, your stipulation is very detailed.

What else--obviously, the--the incident with Ensign (b) (6) at the bar, I don't think anybody else--based on your stipulation--observed that, but there are other incidents described in here about your dancing with her and chiefs coming to take her off the floor.

Was that all contained in the investigation? Is that how you know about this?

ACC: Yes. Yes, Your Honor.

MJ: So there's--the investigation included her statement; were there other statements, as well?

ACC: That's correct.

MJ: What other statements did you read?

ACC: There was one by a chief petty officer who had placed Ensign (b) (6) in time-out, who had taken her off the dance floor and had her time-out for her own good. I--I remember reading that chief's----

MJ: Her own good because of you?

ACC: That--that's how I took it.

MJ: Is that what the statement said?

ACC: It--it--I'm trying to recall because it was a while ago that I read it, but yes, it was the--the chief had taken Ensign (b) (6) away and said, you know, "You need to go into a little time out for a little while, but you don't have to stay here," and--and actually told her that she didn't need to stay at the bar, that she could, you know, she could leave. But that's all I recall. But at--but because of that and--and Ensign (b) (6) statements and--and Commander Fulton's comments to--with Ensign (b) (6) that's--that's how I came to believe the items in the stipulation of fact.

MJ: Okay, so go back to the--and you believe--you believe that; do you have any reason to disbelieve what any of these people said?

ACC: No.

MJ: Including Ensign (b) (6)

ACC: No.

MJ: Do you believe you were provided with everything the government had?

ACC: Yes----

CDC: We're getting close to 11 o'clock, Your Honor.

MJ: Well--yeah, I think we're about to wrap this up, so----

CDC: Oh, you're looking for a segue, okay.

MJ: Then we'll take a break before we get to the rest of the charges.

Government, have you provided the defense with everything you have in this case?

TC: Yes, Your Honor, including summaries of interview that trial counsel have had, more particularly with--with Petty Officer (b) (6) but to a limited extent also with Ensign (b) (6) so not only written, but we've sort of created what would, you know, probably otherwise would be work product have been furnished to the--the defense, as well.

MJ: And Mr. Sullivan, are you satisfied that you have everything that the government has?

CDC: Oh, yes, Your Honor.

MJ: And Commander Wiley, before you decided to plead guilty, did you read everything, read the investigation, discuss it with your counsel?

ACC: Yes, Your Honor, I did.

MJ: We've talked about your memory varies somewhat from what's in the stipulation; which do you believe is correct: what you remember or what's in the stipulation?

ACC: At this point I believe what's in the stipulation.

MJ: What--well, you say at this point; what do you mean?

ACC: I--it--it's been hard for me, and I--I've had extensive conversations with, you know, Mr. Sullivan and--and Commander Fulton, and at first it was very hard for me to accept and believe that--that what I was remembering was inaccurate or--or--or the perception was not correct. But the more I looked at the evidence in the investigation and was able to talk to Commander Fulton about what Ensign (b) (6) had said, and the strength of her conviction and her recollection, the more I began to question mine, and I just can't believe that--that Ensign (b) (6) would make this serious a charge without their being some validity in it.

MJ: Some validity or----

ACC: Well, being--with it--without it being accurate, and it's just very--it's just been very hard for me to accept that I did these

things, and I--particularly when my memory is--is slightly different, but I have to believe and I do believe what she said is--is accurate.

MJ: Okay. So you believe that you attempted to dance with her.

ACC: Yes.

MJ: And you believe that after she left the dance floor that you went up to her and tried to massage her shoulders?

ACC: Yes.

MJ: And that she went to the bar, and you went to the bar--that she was standing at the bar, and you went up to the bar?

ACC: Yes, Your Honor.

MJ: And that you leaned against her with her bod--with your body?

ACC: Yes, Your Honor.

MJ: And that you tried to kiss her, and she tr--she resisted?

ACC: Yes, Your Honor.

MJ: And that while you were attempting to kiss her with your body against hers, holding her against the bar, that you put your hand up her dress and digitally penetrated her vagina?

ACC: Yes, Your Honor.

MJ: And that with your strength she was compelled to submit to your--to--to your doing that action, that sexual act?

ACC: Yes, Your Honor.

MJ: And you believe that she did not consent to that?

ACC: Yes, Your Honor.

MJ: And you did your actions in order to gratify your sexual desires?

ACC: Yes, Your Honor.

MJ: Do you believe the prosecution could prove this case if it had been a contested case?

ACC: [Pause.]

MJ: That basically goes to whether you believe what she's saying is true.

ACC: I--I--I think so, yes.

MJ: And are you personally convinced that you're guilty of this offense?

ACC: Yes, Your Honor.

MJ: Do you understand that if the prosecution were required to prove your guilt, they would also have to prove that you had the requisite intent, that is to satisfy your sexual desires? Do you understand that? That would be one of the things they would have to prove?

ACC: Yes, Your Honor.

MJ: Do you understand that in--in the course of this that the members would consider the evidence presented on your state of intoxication as to whether you could form that specific intent?

ACC: Yes.

MJ: So, even though you cannot recall specifically what occurred as laid out in your stipulation with Ensign (b) (6) at the bar in the Seychelles because of your intoxication, are you convinced at this time that you did have the specific intent to gratify your sexual desires?

ACC: Can--can I have a moment?

[Conferring with counsel.]

Ye--yes, Your Honor.

MJ: And on the date of the offenses, even though you can't remember it all, but based on--on what you've read in the investigation, do you believe you understood what you were doing?

ACC: [No response.]

MJ: Not on your own independent recollection, but including what you've read in the investigation?

ACC: Yes, I--I do believe so.

MJ: And you understand that by pleading guilty, you're waiving the possible defense of intoxication as it relates to the specific intent of desire to gratify your sexual desires.

ACC: Yes, Your Honor.

MJ: And you wish to waive that possible defense?

ACC: Yes, Your Honor.

MJ: And are you convinced as to your own guilt of--of the charge of rape in this case?

ACC: Yes.

MJ: Despite your inability to recall all the circumstances, do you still wish to plead guilty to this offense?

ACC: Yes, Your Honor.

MJ: [Lengthy pause.] And I'm going to ask you again, based on what you've read and not just your own recollection, do you believe you were able at the time to appreciate the nature and quality, or wrongfulness of your conduct?

ACC: Just--just a moment.

[Conferring with counsel.]

Yes--yes, Your Honor, I do.

MJ: Just a few more questions.

Do you agree that it was your use of force, in this case your body against hers holding her against the bar, that made it possible for you to engage in sexual--this sexual conduct, that is digital penetration of the vagina of Ensign (b) (6)

ACC: Yes, the positioning--yes, I do.

MJ: Do you believe that you were forced or coerced by anyone or anything into committing this act?

ACC: No. No, Your Honor.

MJ: Do you believe you could have avoided your actions if you had wanted to?

ACC: [Pause.] Yes. Yes----

MJ: For one, you didn't have to drink to the extent you did, correct?

ACC: Right, right, right. Yes, yes, I----

MJ: And even being drunk, you could have avoided doing what you did.

ACC: I--I--I do.

MJ: You didn't have to do what you did, did you?

ACC: No. No.

MJ: Were you forced to do what you did?

ACC: No----

MJ: You may have had a loss of control, but could you have avoided those actions if you had wanted?

ACC: Yes. Yes.

MJ: And do you agree that it was a freely-made decision on your part to do what you did?

ACC: Yes.

MJ: Both to drink and then to----

ACC: Yes.

MJ: To do what you did at the bar.

ACC: Yes, Your Honor.

MJ: We've talked about all kinds of potential defenses.

Based on everything we've discussed, do you believe you had any legal justification or excuse for your actions?

ACC: No. No, Your Honor, none whatsoever.

MJ: All right, is your witness standing by, Mr. Sullivan?

CDC: Could we take a brief recess?

MJ: We can, but is he standing by or----

CDC: He should be.

MJ: It's 5 after 11. What I'd like to do is take about a 15-minute recess. I'd like counsel just to come by in my chambers for about 5 minutes, and--and then we'll take a recess so they can make--take a comfort break, and then <sup>when we</sup> we come back we will hear from the witness, and then we'll continue with the providency inquiry.

[The court-martial recessed at 1105 hours, 28 October 2011.]

[The court-martial was called to order at 1134 hours, 28 October 2011.]

MJ: Court will come to order. All parties present when the court recessed are again present.

As discussed in our 802 conference, we'll take the testimony of the defense witness, and then we'll take a lunch break.

So is your witness standing by?

CDC: Yes.

[END OF PAGE]

COMMANDER ERIC E. CUNHA, MC, U.S. Navy, was called as a witness for the defense, was sworn and testified as follows:

DIRECT EXAMINATION

Questions by the trial counsel:

Q. Commander, if you could, please, state your name for the record?

A. Eric Edward Cunha, C-U-N-H-A.

Q. And your current position?

A. I'm a commander, and I'm also the current clinic director for substance abuse rehabilitation program for the Naval Medical Center San Diego, all outpatient.

TC: Thank you.

CDC: Good morning, sir.

Questions by the civilian defense counsel:

Q. Could you, please, provide the judge with a little bit of your military background?

A. Sure.

WIT: Good morning, ma'am.

MJ: Good morning.

WIT: Currently, I've been in 19 years. I'm a clinical psychologist. I also have a specialty in pediatric neuropsychology. I've worked forensically with the court before, and right now I'm a substance-abuse specialist. I'm also--I also work part time as a

professor for the University of Southern California for their social-work program, and that pretty much sums it up, ma'am.

Q. Doctor, could you<sup>you</sup> just explain for the judge what--what your current duties and responsibilities are, just a little more----

A. Yeah.

Q. ----about what you do?

A. Yeah. My current duties, I'm--as I said, I'm currently the clinic director for all outpatient substance-abuse rehabilitation, and basically what that consists of, we have a--an outpatient program, an intensive outpatient program, and continuing care. We also do impact. So we have a--a breadth, so everyone who's just basically--who have gotten a DUI but no diagnosis all the way to, you know, significant substance dependency, and that can be all different levels whether it's heroin or alcohol. If it's more severe than that, they would go to the residential program.

Q. Okay. And Doctor, at some point in time, did you meet Commander Jay Wiley?

A. Yes, I did. I did his screening for alcohol.

Q. Do you know approximately when that happened?

A. That was in April, I believe.

Q. Okay, and--and since that time, have you had an opportunity to review any more of his records regarding----

MJ: Excuse me, when was the date of that, the screen?

WIT: I believe it was in April, ma'am.

MJ: Of this year?

WIT: Yes.

Q. Since that time, have you had an opportunity to review additional records or talk to additional people in the mental-health profession about Commander Wiley's case?

A. Oh, yes, I--I've kept up on top of it. Well, any time we have a commanding officer come through our program, my Director wants to be kept informed of the case, so I--I follow the case pretty closely and stuff. But I also follow the case in a sense of knowing how they're doing and stuff, and I--I've had additional meetings with him throughout that period of time.

Q. And--and other people involved in this case, like, for instance the Navy Now----

A. MORE Program.

Q. MORE? Okay, who else have you, I guess, specifically talked to about his case or----

A. Well, his licensed provider--or we call "LIP," licensed independent provider, I've talked to her, I've talked to the MORE counselors, I've talked to his continuing-care counselors, and basically anyone who's had contact with him.

Q. Okay, and I'd--I'd like to educate the military judge as to Commander Wiley's diagnosis and also his progression with this----

A. Certainly. I--I diagnosed him with alcohol dependency. Given what we know at this time about him, we would now say that it's--he's alcohol-dependent in early full remission. So bas--to get full remission, he has to be alcohol-free for a year; he hasn't reached that criteria yet. And there would be no other diagnosis; there's no Axis-II diagnosis, III or IV. There's some stressors, obviously, legal issues, but he's done very well in the program.

Q. And when you say he's done very well, could you just describe for the military judge what he's accomplished in your program from talking to other, you know, people in--involved in the case?

A. Certainly. Where I'd like to start is this is the first time in any particular case I've ever been I court for SARP. I--I typically don't do those types of things, but in his particular case, in our opinion he's done so well that we've decided to do that. The--and what I mean by that is that a lot of times when we have senior individuals come in, whether they're commanding officers or command master chiefs or anything like that, they actually have a tendency to sort of want to run the group and almost be like a fellow counselor to us. That was not the case here. He, essentially, ate a lot of humble pie, and he was able to be a true peer to his--the

group members that he participated in the intensive-outpatient program, and he worked diligently. And what I mean by that is that any assignments that we asked him to do, whether it was to get a sponsor at AA, or whether it was to do--we--we call them homework assignments, but basically it's journaling, all of those things were done.

He's participated in the MORE program. At this time, he's finished four of the seven modules, and that means he's pretty--he's on track with that because it takes about a little more than a year to complete all the modules----

MJ: What is this program?

WIT: The MORE program? Basically, it's a computer-based program that adds additional help besides going to AA. And so they have counselors, and so they actually have modules that they work, very similar to the modules that we would have given in--in the intensive-outpatient program, and they act--he has an additional counselor because of that, and they keep in contact with him.

And what the counselors do, if--if he writes a journal or something, they'll--they get an email, basically, and they then communicate with him via the phone or he comes in and sees them. And he's been very participatory within that program.

MJ: And that's M-O-R-E?

WIT: M-O-R-E, yes, ma'am.

Q. Is that a relatively new program?

A. It is; it stands for My Online Recovery----

ACC: Experience.

WIT: Experience, thank you.

And it's new. It--it has been in place at Naval Medical Center for just over a year, about 13 months.

Q. Okay, Doctor, and in your observations, has--has Commander Wiley accepted the fact that he--he is an alcoholic?

A. Yes--well----

Q. Why do you say--why do you say that?

A. Yeah--well, it's part of the program in a sense. In other words, you know, if a person truly is in recovery, the--the term really is "once an alcoholic, always an alcoholic," even if the person has been free from alcohol for 20 years. You know, there are true chemical changes that happen within the brain of a--of a person who has alcoholism, and so those--those changes remain. Now that doesn't mean he's going to relapse and all those types of things and stuff like that; in fact, our--the way we see it is that he's worked the program so well, we believe his--his chance of relapse is minimal. It would have to take an exceedingly large stressor to have him return to that. But right now, you know, he has a very good support system: (b) (6) all those types of things are

supporting him. So we would really see any type of relapse to be very minimal.

Q. Has Commander Wiley, you know, minimized his abuse of alcohol at all?

A. No, that--that would be--I wouldn't be here. And so--no, he--he's been very upfront about, you know, his drinking experiences and stuff, and--and you know, he was drinking to the amounts--well, I'll say how it was reported.

He was reportedly saying that he drank five to seven drinks; however, those were self-poured, you know. Self-poured drinks, no one knows what an ounce is, and especially an alcoholic. They just pour, and so those 5 to 7 drinks, it's more likely to be, you know, 7 to possibly up to 18 drinks, so it's significant. And when you're drinking that much alcohol, it has a tendency to shut down the frontal lobe so a person can become more impulsive, you know.

A person who says they never get behind a wheel of a car, they get behind the wheel of a car. It also can interfere with what they call--there's a structure in the brain called the hippocampus, which helps convert short-term memory into long-term memory, and so individuals--you know, you've heard the term "blackout," and that's really is (sic); they do not remember the events that have transpired because the hippocampus was so impacted by the alcohol that those

short-term memories have not been processed, and they will never be processed--they're gone--into long-term memory.

Q. Okay, and--and Doctor, in your professional opinion, what-- what is Commander Wiley's likelihood for success?

A. In the terms of going back to drinking; is that what you're asking?

Q. Or--or succeeding in remaining sober.

A. Sober. We--we see it as very good, excellent. You know, as I said, we believe the chance is minimal that he'll go back to that. It would have to take a tremendous stressor, and the only one that I could think of would be that, you know, if he lost his family. You know, as long as he has the support of his family, I really don't see that as an issue.

CDC: Doctor, I want to thank you for your time. Commander Crow may have some questions for you.

MJ: Does the government have cross-examination?

TC: Yes, Your Honor.

MJ: You may proceed.

#### CROSS-EXAMINATION

Questions by the trial counsel:

Q. Doctor, do you remember specifically when he reported, when you first met him?

A. I--I don't remember the actual date, I mean----

Q. Did--is part of the treatment, does he also talk about the-- the conduct that led to him going into treatment?

A. To a degree. I mean we certainly have people there that have had other legal issues and stuff like that, and a lot of times they will not share certain pieces of that stuff, on the advice of their lawyer and those types of things and stuff. And so--I mean I certainly got inklings of some of the legal stuff that was going on. I mean any CO that is removed from his command obviously has significant possible legal issues. And then there was some--also mention of some sexual stuff, and so I--I certainly understood that it was a serious case.

Q. But--but that was not part of the ongoing therapy in group and so forth?

A. No, my understanding was he has a--he had a personal therapist that he was dealing with some of those things with, and so what we were dealing with was actually his level of alcohol that he was drinking and how that was impacting his life.

Q. Now, sir, as a near-20-year commander in the Navy, you've been around the alcohol system for quite a while, is that fair?

A. Yes.

Q. So was he aware through his prior positions as an XO, CO--I guess what I'm asking, does the Navy educate people in command responsibility, command leadership positions as to the different

treatment options, the--the way to get assistance and so forth so they can, then, take care of their crew?

A. Well, I--I think there is--obviously, there is some education that the COs get. You know, I've been on two carriers, and--I can tell you, though, that the COs have a tendency to ask their experts that are on the ship what those treatment things are, and so I--I have educated COs. So do I think they're educated? Absolutely. Do I--do I think that they also rely on their onboard experts? Yes..

Q. And would you agree with me--I mean I think all commanding officers now undergo the ADAMS program, is that correct?

A. I believe that is correct, yes.

Q. And that's Alcohol and Drug Abuse Management for Supervisors.

A. Yes..

Q. Part of that, they're supposed to spot warning signs of others.

A. Correct.

Q. And so here, he's had the training in this timeframe. Had he desired to do so, he could have come forward and sought treatment prior to the incident that led him to--to being relieved of command?

A. Well, I--I--yes, with hindsight, certainly, you know, people look at those things and stuff, but he had the training, yes.

Q. Were you involved in the public--have you read his--his article: "It Can Happen To You: - A Cautionary Tale?"

A. Oh, I think I--could you just share that one with me? I don't know if I read that whole thing.

Q. Was--was that something that was discussed within his treatment as----

A. Oh, well, he certainly--he has certainly told us that, you know, he's writing a book and those types of things and stuff, and he's--he has shared pieces of it with us; there's no question about that. You know, he even asked me at one time because--he actually has really adopted some of this stuff and he's had some interest in possibly in the future going into the help of others, like social work and those types of things, and I've actually helped him research whether he could do that or not.

Q. But you agree that, you know, as a commanding officer, he is responsible to look out for his crew and including any alcohol issues----

A. Well----

Q. ----that they may have?

A. Part of their purview, absolutely.

TC: Thank you, sir.

WIT: Uh-huh.

MJ: Mr. Sullivan, do you have redirect?

CDC: Just a follow-up.

REDIRECT EXAMINATION

Questions by the civilian defense counsel:

Q. Now, Doctor, I guess one of the issues that Commander Crow or--I'll bring it up is; well, shouldn't, you know, COs such as Commander Wiley know better and, you know--you know, if someone is an alc--shouldn't an alcoholic know better?

A. Well, we--we--we hope, but the problem is is--I'll use a term, you know, people that abuse alcohol, they drink. You know, right? People that are alcohol-dependent, the drinks drink them; they lose control. And you know, it's--when we think of COs, we think of COs being in control, but you know, when we're talking about substance dependence--and I know, of course, most people think of substance dependence, they think of the wine that's, you know, in--in the gutter; however, that is not the case. I see many people that are--have substance dependence, and I see them all the way from the O-6's, you know, all the way down to the E-1's and, you know, did they--when they grew up, did they say, "You know, I'm going to grow up and be an alcoholic." No. I don't believe that at all. But I certainly do believe they got into circumstances, whether it was partly genetic--because there can be genetic factors and stuff--or they got into situations of such stress that they used alcohol to deal with those types of thing.

And then, as you increase or as you have tolerance, at some point, because of those brain-structure changes that I've talked about, they then become dependent upon, and then, you know, they-- they are no longer in control.

CDC: Doctor, thank you very much.

TC: Nothing further, ma'am.

MJ: Commander Crow, no--no recross?

I have no further questions.

[The witness was excused and withdrew from the courtroom.]

MJ: All right, as we discussed, we're going to break for lunch now. It's 10 to 12. Let's reconvene at 1230.

[The court-martial recessed at 1150 hour, 28 October 2011.]

[The court-martial was called to order at 1307 hours, 28 October 2011.]

MJ: Court will come to order. All parties present when the court recessed are again present.

At the end of our last session we were hearing from the witness, but we were also still in the middle of the providency inquiry.

And I would like to discuss with you, Commander Wiley, a bit more Specification 1 of Charge III, which is the incident with Ensign (b) (6) on the night of 1 January 2011. I had gone through some of the paragraphs, and you responded with a "yes," but I would

like to hear from you in your own words, based on everything you now know, everything that you've read and your discussions with your attorneys what you believe happened that night.

ACC: I believe----

MJ: And focus it to the incident with Ensign (b) (6)

ACC: Yes. I believe that I approached the bar, backed up to the bar or came sideways to the bar right next to Ensign (b) (6) and leaned on the bar and--and--based on what she said on her, as well, and reached around and digitally penetrated her. I--I don't believe that I had her consent to do so. I had no indication of consent. I agree that it was against her will, and that based on my body positioning and my size that she didn't have the opportunity to--to resist that--that contact.

MJ: Okay. Well, I asked you when we first started this what your own independent recollection was, which--which I have to do. I have to know what your own independent recollection<sup>is at</sup> and what you believe based on the investigation, but what you've told me is pretty dramatically opposed to what it says in your stip and what you're telling me now you believe happened.

Why do you think there's such a difference between what you remember and--and what you now believe happened?

ACC: It's taken me a long time to--to make peace with the difference in the two stories, and I think the reason that I feel

that way is because of the alcohol and because my memory is so spotty and there are such gaps in that memory that I just--part of me thinks that maybe my mind wants to believe my version of reality is true. I just--and the more I look at the evidence, the more I look at the investigation and--and more I speak with my--my counsel and with Commander Fulton about what the victim says, you know, I--I just--I can't deny it, and it makes--it seems like--that what I'm remembering is just not accurate, and it--and it's the effect of the alcohol, and----

Although I've talked to Dr. Cunha many times, even his testimony made me remember the effects of alcohol--before I was diagnosed as being an alcoholic, I didn't fully understand what was happening to me; and now that I've been through treatment and been through Alcoholics Anonymous, and I understand how it affects the frontal lobe and--and memory and perception, now I understand that even though I may with every ounce of my strength not want to believe that I was capable of doing these things and make me not want to do these things, and any other circumstances, you know, particularly not when I was sober, that you do lose control. And--and I now believe that I didn't have control, and I--and--and that her version of reality is more accurate than my own, and I have come to believe that what she has said in her statement is--is accurate, and what I'm remembering, although it's very hard for me to--to--to disagree with

my own memories, is just not accurate because there are just so many gaps, so many things I can't remember.

MJ: Okay. I'd like to follow up a little--on one thing that you said, your loss of control, but do you, again, believe that what you did that night was on your own--it--maybe because you were drinking, but it was your--your intentional volition what you did that night.

ACC: Yes. Yes. I would never have done it sober, and--but I--I--it was not accidental; it was not inadvertent. There's no other explanation for why I would have done that whatsoever, so it had to be intentional.

MJ: Okay, anything further from the government?

TC: No, Your Honor, I think that covers it.

MJ: Anything further from the defense?

CDC: No, Your Honor.

MJ: Okay, let's move on.

Let's turn to Specification 3, which is aggravated sexual assault, and actually what I'd like to do since Specifications 3, 4 and 5 are all related, happened at the same time, we'll just talk about them all together.

ACC: Yes, ma'am.

MJ: I'm going to--there's a slight difference in--or difference in legal definitions with regard to Specification 3 and

Specifications 4 and 5, but first I want to talk about the facts<sup>ed</sup> and then I'll go over those with you.

First, who is Fireman (b) (6)

ACC: Fireman (b) (6) was a member of A Division; she was a--an engineman. A Division is the Auxiliaries Division, and their----

MJ: Onboard your ship?

ACC: Yes--yes, ma'am.

MJ: Okay.

ACC: Sorry. She--excuse me. Auxiliaries Division maintains the ship's air-conditioning plants, small-boat engines and reefers and--refrigeration units, and they touch pretty much every aspect of the ship. Anything that's not a main-propulsion engine or electrical as part of our ship's engineering plant is--is A Division. It's a very large responsibility, and she was one of the members of that division.

MJ: Did you know her before the night in question: that's 25 April 2011?

ACC: Yes, she had submitted a request--I had a policy where the crew could either email me directly or put suggestions in my suggestions box, and she had on a number of occasions requested that while we were on deployment that the ship conduct a swim call where, essentially, we just stop the ship in the ocean and allow the--the crew to go swimming. And I had known that she had put in the

request, and I--I bumped into her at a steel-beach picnic we had onboard while we were underway and--and tried to explain to her why--we had wanted to do it on one occasion but weather conditions did not permit us to do that safely so I elected not to do it, and so I explained to her why we couldn't do it, and I--I told her I'd try and find another opportunity but that, you know, the safety of the crew members was my--my main priority, and I apologized for not being able to fill her request.

MJ: So you----

ACC: But that was the only time I had really----

MJ: Okay.

ACC: ----directly interfaced with her other than, you know, Captain's calls or bumping in the passageway or something.

MJ: And so your relationship with her was as her Commanding Officer.

ACC: Correct, strictly.

MJ: Did the events in question concerning Specifications 3, 4 and 5 of Charge III in fact happen on 25 April 2011?

ACC: Yes.

MJ: And--and how is it that you remember that specific date?

ACC: I have very, very spotty memories, very--even more--even less so than the previous----

MJ: Well, I'm not asking at this moment what happened, but why that--that particular date? How do you place it in time----

ACC: Well, because-----

MJ: -----at that date?

ACC: -----we were--we shifted berths from Naval Station Everett to the weapons station, and that was the first time I had done that particular maneuver as the Commanding Officer, and it had gone really well, so I--I was very relieved that that had happened, and we were working with the Destroyer Squadron 9 staff to make sure that the scheduling of this and the start of our SRA the following week and the--a brief to Third Fleet were all going to be timed, so I--I really remember being very grateful that we were able to execute that berth-shift on time and so quickly because it made our ship schedule work.

MJ: You remember it as being that--that night, 25 April?

ACC: Yes.

MJ: And-----

ACC: I remember being tired after that--kind of a busy morning, and then the preparations we had made that afternoon for moving ammunition.

MJ: And so at--at the time--this is charged as--as being at Naval Magazine Indianhead--Indian Island, Washington, as well as on

board the ship, so you were berthed at Naval Magazine Indian Island at the time?

ACC: Yes, ma'am, that's correct.

MJ: Why don't you tell me, first, what you--your--indep--what happened that night based on your independent recollection?

ACC: I was wrapping up some work in my--my cabin, and started to leave the ship to go to the club in question, a place called Diggers, and was informed that--that we were not allowed to--to walk to this place because of the--it was on a naval magazine and we'd have to take a--a vehicle, and I hadn't realized that, so--I had kind of been hoping to walk----

Q. And what was Diggers?

A. Diggers----

Q. I know some of this stuff is in your stipulation, but I have to get it orally on the record, as well.

A. I understand, ma'am. It's a little bit tough to explain.

Diggers is a--a--it's a facility that is not--it's owned by MWR and it's run by the naval magazine, but they do not staff the establishment. There's no personnel who run the establishment; it's--it's just a facility, and if you pay a fee to the base MWR, you can have it opened and you can purchase hot dogs, and there's, like, a hot-dog machine in there, and you can purchase beverages from the Navy Exchange, whatever, and then you can serve them in this

facility, and it has pool tables and just, you know, various things. It looks just like a bar, but it's--it's--it's essentially a bar without staff.

So our chief petty officers were raising funds for their chief-petty-officers' mess and the upcoming chiefs' transition once chief petty--new chief petty officers were selected, and so they had paid the fee to MWR and bought beverages and hot dogs and--and--and things and were running the club for that evening. And----

MJ: Okay. Were they----

ACC: I wanted----

MJ: Were they serving the alcohol or----

ACC: Yes.

MJ: Okay.

ACC: Yes. They--again, I--I--I definitely wanted to go there, but I also was feeling kind of tired and--I convinced myself that--that I should go there again to show my support to the chiefs, and--and, you know, but I--I had every intention of just having a--a couple of drinks and coming home early, and probably would have done that if I was walking. But because of the regulations on the base, I had to take the van, and so I went over to the club.

We got there, and they had beer available for purchase, and so I bought a beer. And one of the chiefs said, "Ah, well, you know, you're one of our special customers, Captain," and--and they had

bought a number of bottles of hard liquor and poured me a very stiff vodka drink, and I drank that. And from that point on, I kind of dipped into that--that stash and--of the hard liquor and was making my own drinks at that point.

And I remember walking around the bar and just talking to Sailors, congratulating them on the deployment and asking them what they were going to do for their--or what they did for their post-deployment leave. Didn't really play any games, but just, you know, socialized, and then I sat down at the bar and I was waiting for the next van run because I--I knew it was time for me to get back, and there was a--a number of iPods sitting down by a stereo system, so I started thumbing through those and picking songs to play and--and played some music and just kind of waiting for the van to come.

And then the van came, and I went out to the van. I remember getting in the van, and I remember feeling very, very sleepy, and I--I--I remember dozing off and my head touching the side of the van, the window. I remember the van pulling up to the ship, and I remember walking up the brow and stumbling slightly, and I remember someone steadying me or--and I remember catching the rail, and the brow was--at this naval station is very difficult to--to navigate. It wasn't a standard Navy brow, and I remember being a little bit worried about it.

I remember going up on the quarterdeck and being rung aboard and--and reporting to the Officer of the Deck, and then I remember being in the passageway. I remember Fireman [REDACTED] being there, as well, and I remember her going to my cabin. I remember going into the wardroom pantry and getting a glass of water, and I remember being back in my stateroom, and then I remember waking up in my bed.

MJ: Okay. How much do you--do you have any idea of how much you had to drink that night?

ACC: My memory is five to seven vodkas with ice and one beer, but I--they--they were large red cups, and I don't know how much--I tried to keep it small to start with, and I--and I think it just kept going from there.

MJ: So you were quite intoxicated?

ACC: Yes, ma'am.

MJ: And we listed to Dr. Cunha, and he talked about blackouts, and I gave you some definitions about alcoholic amnesia and blackouts, and how the brain is affected.

Do you think that's what you were experiencing that night?

ACC: Yes. I definitely--there's huge patches that I just don't remember.

MJ: You've read the investigation. We've talked about that a lot, and--and statements with regard to this particular incident and these three charges.

What do you now believe happened that night?

ACC: I believe the statement in the stipulation of fact based on the NCIS investigation, the DNA evidence--I believe the stipulation of fact. I really wish I could argue otherwise, but I--I can't. I can't.

MJ: In your stipulation of fact, you say your first interaction with Fireman (b) (6) was when--was at Diggers when you gave her a--a sip of your drink.

Do you believe that happened?

ACC: Yes.

MJ: And with regard to her specifically, because there's some things in your stipulation about being in the van and--tell me in your own words what you believe happened that night from the time you left Diggers and got in the van until you woke up the next morning--or until she left your stateroom.

ACC: I do--I do remember seeing her at Diggers and saying--I don't remember what I said, but I remember having a conversation with her as--and then, as the stipulation of fact indicates, I--I did offer her some of my drink. I do believe I sat next to her in the van and had a conversation with her. I do believe that I asked her

to come back up to my cabin. I do believe that--that she came with me, and I believe that while in my cabin I asked her to undress and then penetrated her digitally and performed oral sex on her. I do believe that that happened, based on the--on her testimony and on the DNA evidence, even though I don't----

MJ: I know that----

ACC: Yeah, right.

MJ: ----we talked about lack of memory, and I've gone over-- would you like me to discuss that with you again on----

ACC: No.

MJ: ----on lack of memory and how you can--that doesn't necessarily negate your ability to--you know, that you, in fact, did what you did----

ACC: Right.

MJ: ----or that you could form the specific intent.

ACC: Correct.

MJ: You--you feel like you understand that?

ACC: Yes, I--I do understand.

MJ: Well, let's look at your stipulation, Paragraph 27; there's some discussion in Paragraph 27 about incidents that happened in the van.

Do you believe that happened? Read over it and tell me if you believe that happened.

ACC: [Reading Paragraph 27, as directed.]

MJ: Based on--not just--not on just based on the stipulation,  
but based on----

ACC: Yes.

MJ: ----the investigation----

ACC: I--I--I believe it based on the investigation. I do  
believe it.

MJ: You don't have an independent recollection of that, but you  
believe it happened?

ACC: I--I remember being in the van, and I remember conversing,  
and--but I'm not 100 percent positive I remember that it was Fireman  
(b) (6) who I was conversing with.

MJ: And you say here that you basically were touching her. You  
would brush your hand against her shoulders and rub her arm.

Do you--do you believe that happened?

ACC: Yes. I do.

MJ: Do you remember that or----

ACC: No.

MJ: ----just based on the investigation and the statements?

ACC: Based--based on the investigation and Fireman (b) (6)  
statements with Commander Fulton.

MJ: Okay, let's look at Paragraph 28 of your stipulation.

ACC: [Reading over Paragraph 28, as directed.]

MJ: Do you remember following her up the--you said--I believe you thought she was following you or someone was following you?

ACC: I--I--I did think she was following me. I don't--I recall going up the brow. I recall there being other Sailors going up the brow, as well, ahead of me, but that's all I remember. But based on the investigation and the--the statements of the Officer of the Deck at the time, Petty Officer (b)(6)(b)(3) and Fireman (b)(6) statements, I believe that this paragraph is--is accurate and correct.

MJ: Is it also a statement from the Officer of the Deck that----

ACC: He saw me coming onboard. He didn't see anything--what I recall of his statement, he didn't see anything untoward, but he did see me coming aboard with Fireman (b)(6) and that we were, you know, essentially walking onboard the ship at the same time.

MJ: Okay.. Again, in Paragraph 28, about the middle on down, do you remember closing the hatch to prevent somebody from coming in?

ACC: No. I have no memory of that.

MJ: Do you believe that happened?

ACC: Yes, based on Fireman (b)(6) testimony, I do.

MJ: So at this point it's just the two of you. I mean----

ACC: Yes.

MJ: ----there's nobody else other than whoever this person was. Apparently we don't know who that was, but----

ACC: Right.

MJ: Do you remember standing in a position so that she could not go down to berthing and then putting your hand on her back and guiding her to your stateroom?

ACC: I do not.

MJ: Do you----

ACC: I don't remember it at all.

MJ: Do you believe it happened?

ACC: Yes.

MJ: And Paragraph 29, I mean that's something that was in her head. I'm sure that comes from her statement.

ACC: Yes.

MJ: You might not have been aware of that anyway, even if you had not been--even if you had a memory of it because it sounds like that was things that were in her head.

What about Paragraph 30? I want you to look at that and tell me if you think the events in Paragraph 30 happened.

ACC: [Reading Paragraph 30, as directed.]

I--I don't have any--I don't have any memory of those events, but I--I do believe that they happened based on the investigation and based on Fireman (b)(6) comments.

MJ: So we're talking about ask--asking her, telling her to--telling her to kiss you; you don't remember that.

ACC: No.

MJ: And then kissing and--but you believe that happened, you say?

ACC: Yes.

MJ: And you say you do remember telling her to take off her pants?

ACC: No, I--I don't remember anything in this paragraph.

MJ: Is your mem----

ACC: Other than--other than I remember walking down the passageway and coming towards the--the door, and I remember Fireman (b) (6) being in the passageway with me. But I don't remember actually entering.

MJ: And you say you don't remember anything----

ACC: No, I--I don't remember any of these----

MJ: I mean, once you got in the stateroom, you don't remember anything after that?

ACC: No.

MJ: Okay. So I want--I want you to tell me, from the time you get in the stateroom in a little more detail, what happened.

ACC: I remember opening the door to the--the stateroom, and then stumbling and heading towards the cabin door, and that's--that's all I remember.

MJ: But based on the investigation, as you sit here now, what do you believe happened----

ACC: Oh----

MJ: ----once you got in the stateroom?

ACC: I--I believe that I shepherded Fireman (b) (6) into the cabin and that I asked her to kiss me, and--and we kissed, and that she undressed as she claims. So I do believe----

MJ: I mean did you----

ACC: ----I believe the paragraph.

MJ: Tell me what--did you--did you ask her or tell her to undress?

ACC: I--I--I don't--if--if she says that I--I told her to, then yes, I believe I told her to.

MJ: Well, if she says, I mean does she have a statement where she says that?

ACC: [Reading from stipulation of fact.] She says----

MJ: Well, I know what your--I know what your stipulation says----

ACC: Right, right.

MJ: ----but that came from something. Did you read a statement----

ACC: Yes, that was--yes, that was from her statement. That was from her statement in the investigation.

MJ: And you believe that's what you did?

ACC: Yes.

MJ: And then in terms of her taking her pants off, what do you think happened? How did that come about?

ACC: She--in her statement, she said that she--I told her to do so, and she complied. And I--I believe that that--that happened.

MJ: And then what happened next?

ACC: Then, according to her statement, I touched her and penetrated her and performed oral sex on her, and I--I believe that that--even though I don't have any memory of it, the--the NCIS investigation, the DNA evidence and the--what she said, I--I believe that happened.

MJ: See, and again, I have not seen the investigation yet; is there, in fact, DNA evidence----

ACC: Yes.

MJ: ----that--that, what, in her genital area or----

ACC: My saliva was on her breast and on her underwear.

MJ: Okay.

ACC: So I----

MJ: So you had more to go on than just her statement.

ACC: Yes. Yes.

MJ: So her statement and the DNA evidence?

ACC: Yes.

MJ: In your stipulation, you say you sat her down on the bed, and that's when you--to use the language in the charge, you put your mouth on her vagina.

Is that--did you, in fact, do that?

ACC: Yes.

MJ: And that----

ACC: I believe--I believe that I did that.

MJ: Okay. And you've got two things: her statement and the DNA evidence.

ACC: Yes.

MJ: And that during this time you also digitally penetrated her anus.

Do you believe you did that?

ACC: Yes.

MJ: Is there any DNA evidence of that or----

ACC: No.

MJ: Just her statement?

ACC: Yes.

MJ: But you believe it?

ACC: I don't feel like she'd have any reason to lie.

MJ: I want to know whether you believe it or not.

ACC: Yes. Yes. I'm sorry, yes, I do.

MJ: But the reason you believe it is----

ACC: Yes.

MJ: ----you don't think she would lie.

ACC: Yes, I don't think that there's any reason she would make that up.

MJ: And then did you digitally penetrate her vagina?

ACC: Yes.

MJ: You don't have any independent recollection, but----

ACC: Yes.

MJ: ----was this all sort of happening at the same time, or--  
based on what you've read and----

ACC: That--that's what she said happened, yes. And--and that--  
based on the DNA evidence and the timeline and the statements that  
she made that--I believe that to be what happened.

MJ: Okay. And what do you think happened next, based on her  
statement and everything else that you've discussed with your  
attorneys and----

ACC: She--she indicated that she needed to go to the head, and  
she went----

MJ: In your stateroom, the one in your----

ACC: Yes, there's a stateroom cabin and--and a head, and she  
went from the cabin into the head, and when she came out I had  
crawled into bed, and she said she had to go, got dressed and left.

And that--that would be consistent with my memory of waking up in bed.

MJ: Okay.

She says that you--you took your pants and underwear off.

Did you wake up with your pants and underwear off?

ACC: Yes.

MJ: Is that normally how you would sleep, or is that----

ACC: No, and I--I had a--a pair of shorts that I normally sleep in that were in the cabin, and I--I remember waking up and putting those on and--and being confused as to why they weren't on.

MJ: But does it make sense to you now?

ACC: Yes.

MJ: All right, let's look at the specific charges.

Aggravated sexual assault is the first one: Specification 3 of Charge III, and that's penetrating her vagina with your finger, and you said you believe you did that.

ACC: Yes.

MJ: And I gave you the definition of a "sexual act," which basically just means that: penetration of the vagina with your finger, so you agree that on--that act does, in fact, fit that definition of "sexual act?"

ACC: Yes.

MJ: And why do you believe you did that?

ACC: I believe I did that for sexual gratification.

MJ: For yours and----

ACC: Yes.

MJ: Well, maybe hers, too, I don't know, but----

ACC: Yes.

MJ: I mean--and why do you believe that was your reason in doing that?

ACC: I can't imagine any other reason to--to do it, and I--I certainly would never want to abuse or--or hurt any one of my Sailors. I--that's the only reason I can think of. I don't think it was accidental or--or any other reason.

MJ: And do you--I know you can't remember it now, but based on what you believe happened, do you believe at the time you had the ability to--to form that specific intent to gratify your sexual desires?

ACC: I believe I did.

MJ: Now to be guilty of this offense, you had to have done it by threatening her, and the charge is--and--and it's one of the ways a threat can--can be carried out, that you abused your military rank, position and authority to create an implied threat. You didn't actually say, "I'm going to hurt your career" or something, but just by your position as her Commanding Officer, and a senior officer and a

junior enlisted, that she would have believed that that threat was hanging over her if she did not comply.

Do you believe that?

ACC: I believe that that is exactly what she thought.

MJ: And why do you think that?

ACC: I--I just--based on her statements and--and her perspective on her relationship with me as Commanding Officer, I believe that she firmly believed that. That's--yeah, that's--that's what I think.

MJ: And--and do you understand how--how you--a person like you, that that could be a threat to someone like her?

ACC: It's hard for me to believe because of the pains that I went to to try and be approachable as a Commanding Officer, and I implored every member of my crew to always, you know, tell me when I'm wrong and not----

MJ: Well, this is a very unusual circumstance. You're talking about a working relationship; this is a very unique----

ACC: Yeah--yes, I can understand how--I try and put myself or other people in her position, and I--I can't believe that--that they wouldn't realize that this was, you know, a completely unlawful order, but--but I'm not her, and I can see how, based on her background and--and--and on her experiences, she would see this as an implied threat.

MJ: And--and do you believe that this implied threat did, in fact, compel or overcome her resistance to your advances and the sexual acts?

ACC: Yes.

MJ: Do you believe she consented in any way to the sexual act?

ACC: All----

MJ: By consent, remember we're talking about she complied--you said you thought she complied because of this implied threat.

ACC: I--I do think it was because of the implied threat. I don't think she gave consent because of her free will.

MJ: You started to hesitate, but I just wanted to make sure you understand----

ACC: I just wanted to make--I just needed to think about it for a minute, and--and that does make--yes, that makes sense to me.

MJ: And it's--we're talking about the legal definition of "consent;" it doesn't necessarily mean that you--she had to be fighting you off.

ACC: Right, right.

MJ: That's not the law anymore.

ACC: Right.

MJ: Do you believe at the time you were under any mistaken belief that she consented?

ACC: I think at the time--at the time because she was complying, I probably, in my inebriated state, looked at that as consent, but I--but I think a sober person would not have and would have recognized the rank disparagy--disparity.

MJ: So do you believe you have the mistake-of-fact defense--mistake-of-fact-as-to-consent defense in this case? If you want to consult with counsel if you don't understand my question.

ACC: [Conferring with counsel.]

Yes, I--I agree that I--I don't have any legal defense for mistaken--mistaken consent. I--I think it was solely due to my rank and authority.

MJ: So you--do you believe what you did was wrong?

ACC: Yes.

MJ: And I'll--I'll ask the question, do you--if you had been sober, do you believe--think you would believe it was wrong, but I think you'll probably tell me you wouldn't have done it if you had been sober.

ACC: I would not have done it if--not in a million years.

MJ: Do you believe you had any legal justification or excuse? And I've discussed a lot of those with you: intoxication, mental capacity due to alcoholism, we've talked about PTSD; but you've said you don't think--do you think your PTSD diagnosis or PTSD-symptoms diagnosis had anything to do with what you did that night?

ACC: Not other than contributing to the amount of alcohol that I drank. But no, not--not investigating the incident with Fireman

(b) (6)

MJ: And do you wish to raise the defense of voluntary intoxication as to the specific intent to gratify your sexual desires?

ACC: No, I do not.

MJ: Do you feel you could have controlled your actions that night if you had wanted to? Was it a freely-made decision on your part?

ACC: Yes. Yes.

MJ: The question I should have asked: Could you have avoided doing what you did if you wanted to?

ACC: Yes, before I--certainly before I took my first drink, yes.

MJ: But no one forced you to----

ACC: No----

MJ: ----shepherd her into your stateroom.

ACC: No, absolutely not.

MJ: Okay, Specifications 4 and 5 are abusive sexual contact, and that is the--putting your mouth on her vagina as Specification 5, and penetrating her anus with your finger, and that's Specification 4.

And you've said you believe you did that, correct?

ACC: Yes.

MJ: And what was your purpose in doing that in both of those acts?

ACC: Sexual gratification.

MJ: And why do you believe that?

ACC: I can't imagine any other reason to do it, and I would never want to hurt or abuse anybody.

MJ: Now this is sexual contact, as opposed to the other two charges when we were talking about--let's see, I always get these mixed up--sexual act as opposed to sexual contact. The other two were sexual act; this is sexual contact. And I gave you the definition of "sexual contact," and that means the intentional touching, either directly or through the clothing----

But in this case it was directly; do you agree to that?

ACC: Yes.

MJ: Of the genitalia and--pertinent to this case--genitalia or anus, and doing it intentionally.

ACC: Yes.

MJ: With the intent to, in this case, gratify sexual desire of any person.

ACC: Yes.

MJ: Do you agree that your acts for Specifications 4 and 5 met that--meet that definition?

ACC: Yes.

MJ: And in this case, same question applies as I asked for the--Specification 3, but do you agree that you abused your military rank and position and authority to create an implied threat?

ACC: Yes.

MJ: For both--both those acts?

ACC: Yes.

MJ: And do you believe that that, in fact, compelled or overcame her resistance to the sexual acts?

ACC: Yes.

MJ: And do you believe that she consented to either your placing your mouth on her vagina or your placing your finger in her anus?

ACC: No.

MJ: And you agree that what you did was wrong.

ACC: Yeah--yes.

MJ: Do you believe you had any legal justification or excuse?

ACC: No.

MJ: Could you have avoided doing what you wanted--what you did if you had wanted to?

ACC: Yes.

MJ: And it was a freely-made decision on your part that night, even though you don't remember it?

ACC: Yes.

MJ: All right, does either side desire any further questions with regard to Charge III?

TC: No, Your Honor.

CDC: No, Your Honor.

MJ: Now let's turn to Charge V, and these involve the same events that we've been discussing; although it sort of covers the broad spectrum.

And let's look at Specification 1, and that is that beginning on 31 December--and I think you said it started on 31 December, correct, and went into the early-morning hours of 1 January?

ACC: Yes.

MJ: And you were in the Seychelles.

ACC: Yes.

MJ: That you wrongfully and dishonorably became publicly intoxicated in front of the members of your crew.

And you've already told me that you did that, but do you believe you did that?

ACC: Yes. Yes.

MJ: We talked at length about sexual advances.

Do you believe that you made unwanted sexual--or do you agree that you made unwanted sexual advances and engaged in unwanted sexual contact with Ensign (b) (6)

ACC: Yes.

MJ: And she was, in fact, a junior officer under your command, correct?

ACC: Yes.

MJ: And you agree that your advances were unwanted?

ACC: Yes.

MJ: Let's talk about the terminal element in this case, and that's conduct unbecoming an officer and a gentleman, and that is-- I'll remind you of the definition: behavior--this case in an unofficial private capacity--which in dishonoring or disgracing the individual personally serious--seriously detracts from your standing as a commissioned officer.

And then the definition of "unbecoming conduct" is that 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. It is more than opposed to good taste or propriety.

Do you believe your actions reflected in Specification 1 fit the definition of "conduct unbecoming an officer and a gentleman?"

ACC: Yes.

MJ: And why do you think that, based on the definition I just gave you?

ACC: It certainly was contrary to good order and discipline----

MJ: We're not talking good order and discipline----

ACC: Or----

MJ: ----conduct unbecoming an officer and a gentleman.

ACC: Yes, I--I--it meets all----

MJ: But go ahead, I'm sorry. I didn't mean to interrupt you. Go ahead.

ACC: Everything that you said about these actions fits this definition incredibly accurately.

MJ: Do you have the definition there in front of you?

ACC: No, just from what you----

MJ: Okay.

ACC: ----read to me and as--as you were reading it to me, it just----

MJ: Okay, do you believe your actions dishonored or disgraced you personally and detracted from your standing as a commissioned officer?

ACC: Absolutely.

MJ: And--and why do you think what you did would do that?

ACC: Because doing anything to a member of your crew under your command and--and doing anything in public where your crew can witness it, that is not proper, and in my opinion fits that definition, and I--if I did those things, then absolutely it meets this criteria.

MJ: If you did those things. You believe you did them----

ACC: Yes, by doing those things, I--by definition, I feel like I violated the specification.

MJ: And do you believe your actions were wrongful and dishonorable?

ACC: Yes.

MJ: And when we're talking about the actions, we're talking about both being--becoming publicly intoxicated and also making unwanted sexual advances----

ACC: Yes.

MJ: ----on a junior officer in your command.

ACC: Yes.

MJ: Which is an aspect of it, as well, do you agree----

ACC: Yes.

MJ: It's enough if it's just anybody, but somebody that's under your command.

ACC: Yes.

MJ: And do you believe that conduct was morally unfitting and unworthy?

ACC: Yes, I do.

MJ: Let's look at Specification 2, and this is--has to do with Ensign (b) (6) again, and it alleges in the month of February 2011.

I'd like you to read over the specification, and then tell me what happened.

ACC: [Reading over the specification, as directed.]

I had set up an appointment to meet with Ensign (b) (6). The guilt that I was feeling after the incident was almost unbearable, and seeing her--although we were able to interact professionally----

MJ: So you remembered enough of it----

ACC: Yes, the morning after, I rem--I knew something bad had happened, and I attempted to apologize to Ensign (b) (6) and--and really to get clarification on what had actually happened; she didn't speak to me. And then after that, while we were onboard the ship, I could tell, although she was able to perform all her duties and we were able to interface professionally, she was very cold towards me, and--and I didn't feel like, you know, things were right, and I just--I knew that something bad had happened, and it was--I finally set up a time when we could talk, and when she--we talked about some things professionally, and then I just--I--I told her I knew something had happened, that I didn't have a lot of memory of exactly

what had happened, but I knew that I had wronged her, and I told her, you know, how sorry I was and how, you know, I----

MJ: This is in the meeting in your stateroom?

ACC: Yes.

MJ: What--tell me how that came--came about.

ACC: There's a--one of her collateral duties was as the Assistant Safety Officer, and I--the safety program was going very well, and she had done a--a very good job enhancing it, but I had been a safety officer two previous commands, and so I was pretty familiar with the program, and I wanted to make sure that we were on the right track and doing the very best that we could with the program.

It looked like the Safety Officer was going to be there, but he--it turned out that he was on watch at that time, so that it was just me and Ensign (b) (6) and I took that opportunity to--to talk about safety programs and--and--and those types of things, but since it was just me and her, I--I wanted to take the opportunity to apologize to her and to explain what I was feeling, or the remorse I was feeling, and--and that's exactly what I did.

And I--I began to suspect at that point that--that I had a drinking problem because I--I just couldn't fathom why I would ever do anything--both the incident with the chief petty officer I mentioned earlier and this, I felt for the first time that I wasn't

able to control my--my actions, and it--it scared me. And I told her that I was going to, you know, cut down on my drinking, and--and--and I told her that I had--I had found God, which is true. I was starting to have this Sailor's Bible I've had forever, and I--I pulled it out and I--I was starting to read it every day, and--and I was really, "Hey, you know, I--I--I've got to make sure that I'm living right."

And I--and I--I--I just told her what I was doing, and then she said, "Well, I've been thinking a lot about this, and I--I agree what you did was wrong, but you're a great Captain, and you're doing so well, and I don't--I am afraid of reporting this because I think it will negatively impact me and the ship, and I've decided to forgive you, and" you know, "I just want to make sure this never happens again, and I want the ship to go on," and I--I agreed with her and I said, "I want to do what's right for the ship, as well," and I feared that--the ship had such a fantastic reputation, and we're in a combat zone, and I really feared that the ship would be endangered by a change of command and an incident like this while on deployment, and I--I just--I wanted to do what was right for the mission and what was right for the--for the individual Sailors who would be impacted by this.

I thought about all the--the training we had done and all the, you know, the--the piracy events we had been through and what we

were going to go through, and she and I looked at each other and said, you know, "Let's put our personal differences aside and--and--and carry on," and--and--and when she said that to me, I agreed. And that--and that, essentially, was it. That was the end of the--the discussion.

MJ: And this was, you say, approximately a month, so the February timeframe would be correct?

ACC: Yes. It--it may--it may have been the end of January.

MJ: So, but on or--on or about February 2011.

ACC: Yes. Yes.

MJ: Well, the charge is that you wrongfully and dishonorably encouraged her not to report an incident--the incident that occurred at the Seychelles.

Is that what happened?

ACC: I--I feel that that happened. I didn't say to her directly, "Please don't report this," or "I don't think you should report this," but when she said she was not going to, I agreed with her. And in that regard, I could see how that would have been looked at as encouragement. But I never said to her----

MJ: Well, this is not what she thought; this is what you did.

ACC: Right, I--I never--I never said, "Please don't report this," but I--when she said she was not going to report it, I didn't contradict her, and I didn't tell her to do so, which----

MJ: Yeah, I want-----

ACC: -----I should have done.

MJ: I want you to look at Paragraph 20 of your stipulation.

ACC: [Reads Paragraph 20, as directed.]

That--when I say I convinced her that it was a bad idea to report me and persuaded her that I had my actions under control and persuaded her to trust me, I definitely--I definitely told her that I--I was going to change and that I was going to control my drinking and that this would never happen again. I definitely did that. But convincing her it was a bad idea to report me, I think that was--I was supporting what she was saying, but I never said to her, "Don't report me." I--I know I did not say that, but I think by con--by convincing her, I meant that by agreeing with her and saying, "Yes, I think the ship should go forward, and we should move forward," I think that gave her the--the convincing that she needed to--to not report it. But I never said, "Please don't report me," or "This is a bad idea to--to report me;" I said--I agreed with her when she said she would not, and I think that--I think that that concurrence on my part did convince her not to.

MJ: Okay, tell me again exactly how that--how that went down.

ACC: She--I told her that I was absolutely ashamed of myself, that--that there had been inappropriate contact between us. I told her that I was deeply, deeply ashamed of myself. I told her that I

have no excuse and no--even understanding of why that it happened. I told her that I suspected I--I had a drinking problem. I said I was going to try and--and--and control my drinking, I was going to cut down, that I was turning to God to try and find help with my problems, and that I really--asked her to forgive me, and I stopped.

And then she started to speak, and she said that she was very up--you know, disappointed and that it went against her belief system not to report this, but that she had decided not to, and that she had decided to forgive me because she didn't want to hurt the ship, she was worried about endangering her career, and that she was--she didn't want this one thing to ruin our--our command, and she thought that I was a great commanding officer and--and, you know, wanted to move forward from there.

And I agreed with her and said, "Yes," you know, "I want the ship to move forward, as well, and I don't want the ship to be hurt, and I'm worried that," you know, "we're in a combat zone, and I'm worried that--that this would hurt us," and that--and that was essentially the--the conversation.

MJ: And that's--that last part is what you believe was--she would take as encouraging her not----

ACC: Yes.

MJ: Okay.

If you go to Paragraph 41, this is the phone call that you had with her when NCIS was on the phone.

ACC: Uh-huh. Yes.

MJ: You say, "I again encouraged her not to report me and told her to trust me."

Did you tell her when she was in your stateroom to trust you?

ACC: I--I did. I--I--I said--I told her to trust me in that--in that I was going to control my behavior.

MJ: Did you do what's alleged here in Paragraph 41? The "encouraging," is that the same sort of encouraging or--that you were just talking about?

A. Yes. Yes, I--I--I told her that I had failed to control my drinking on my own because I--I couldn't, as an alcoholic, and I needed treatment. I was in treatment when she called me, and that treatment was--was absolutely changing my life. It was giving me the tools I needed to be in recovery, and that's--that's why I told her to trust me again.

When she said she was--she said she was thinking about coming forward and, you know, my--my point of view was I'm already going to, you know, get charged and--and punished by the Navy for this action, and my feeling was because she had expressed to me how concerned she was for her own career and, you know, negative

attention from her peers and--she talked about not being able to go to Nuclear Power School with her friends and--and people not looking at her the same and--and having all these negatives, and I knew that was all my fault and I felt incredibly guilty about it, and so during the phone call I was saying to her, "You don't have to come forward. I'm already going to go down for this. I don't want you to have to go through this because of me," and--and that's--so I--yes, I think that again encouraged--was encouragement for her not to report.

MJ: So, when you were saying "I'm already going to go down," you were talking about with (b) (6) the incident with----

ACC: Yes. "I'm already going to be punished, and it's, you know, there's no reason for you to suffer more because of me."

MJ: And you can see how--or can you see how your comments to her when she was in your stateroom would have encouraged her not to report you?

ACC: Yes, I do now.

MJ: And why do you think that?

ACC: Because she was probably unsure of herself and was looking for confirmation that she was making the right choices for the ship, for the bigger picture. I think that she and I are--are actually probably a lot alike in that we believe in something greater than ourselves, and I think she didn't want to be the person to let down the ship any more than I wanted to be the person that let down the

ship, and I think she was looking to see that--that we were doing the right thing for the ship and the crew and not putting ourselves first. And I can see how she was feeling that, you know.

I know she was very proud of her success at the Naval Academy and--and really, you know, she's a very--very much a team player, and--and thinks of the--the ship. I can see how she might be looking to me for confirmation that that--that she was making the right decisions.

Or--or she might have been looking for me to stand up and say, "No, this is not right," you know, "you should report me, or I should just report myself." I couldn't think of a way that I could report myself without getting her involved somehow, so I can see how that would have been encouragement.

MJ: Do you think your actions--we're talking about the stateroom conversation--fit the definition of "conduct unbecoming an officer and a gentleman?"

ACC: I--I do now. I think I--at the time, I felt like I was doing the right thing for the ship, but in hindsight I was wrong, and it was conduct unbecoming an officer and a gentleman.

MJ: And why do you think that?

ACC: No matter what, I'm obligated to report violations of the Uniform Code of Military Justice, and I should have done it; that's my moral obligation.

MJ: I--okay, agree. That's--that's good, but also focusing in on your interaction with her and your encouragement----

ACC: I should not have influenced her to do something that was a violation of the Uniform Code of Military Justice.

MJ: And you agree that that dishonored and disgraced you as an individual personally and detracted from your standing as a commissioned officer?

ACC: Yes.

MJ: Do you think that this was misbehavior of a material and pronounced character?

ACC: I--I'm sorry?

MJ: Well, the definition of "unbecoming conduct" is misbehavior--serious misbehavior, not slight misbehavior, and of a material and pronounced character. And that behavior here is wrongfully and dishonorably encouraging her, a junior officer under your command, not to report the incident.

ACC: Yes.

MJ: And why do you think it fits that level of seriousness?

ACC: Because of the--well, because of the seriousness of the offense and because of the--because--it--it's not the right thing to do. I really and truly believed it was at the time because of the--the situations we were facing as a ship in a combat zone. But now,

I--I--I agree that she--I should never have influenced her, even encouraged her to do something that was--was against regulations.

CDC: May we have a moment, Your Honor?

MJ: You may.

CDC: [Conferring with the accused.]

ACC: I--I know that if--if it had come up about someone else in my chain of command, I would have taken action, and I know that although I did have the intent of the--the--the--the interest of the ship involved because as the Commanding Officer, I had more influence over the ship than anybody else onboard, I mean I also, I'm sure and I know that my own fears of--of punishment and my own self-interest were involved in that, too, and--it could be that I was trying to convince myself not to report myself because of--of the needs of the ship and--and combat, but I know that the fear of--of the punishment I was going to receive myself was a factor, as well.

MJ: So you agree that your--do you believe that your actions were wrongful and dishonorable?

ACC: Yes. Yes.

MJ: Government, do you believe the accused is provident to this offense?

TC: Yes, Your Honor.

MJ: I concur.

Mr. Sullivan, do you concur?

CDC: Nothing further, Your Honor.

MJ: All right, let's look at Specification 3, and this is the incident with Fireman (b) (6) and--well, it's--it's, again, the spectrum of that night, and that's being intoxicated in front of the crew that was at Diggers and then unwanted sexual advances--actually, I'm not--based on what we have here, made unwanted--it reads--the specification reads: "made unwanted sexual advances and then inside your cabin."

Are you talking about the--what happened in the van?

TC: Yes, Your Honor.

MJ: We talked about this. You don't remember doing that in the van, but you remember being intoxicated in front of the crew at Diggers, correct?

ACC: Yes.

MJ: And--and being very intoxicated, because you didn't drink any more after you left, right?

ACC: Yes, that's correct.

MJ: So you were pretty intoxicated, do you agree?

ACC: Yes.

MJ: And we talked about what happened inside the--the shuttle back to the ship.

ACC: Yes.

MJ: And do you believe that those were sexual advances?

ACC: Yes.

MJ: I mean you don't remember doing it, but----

ACC: No.

MJ: ----you believe you did what you're alleged to have done, correct?

ACC: Yes.

MJ: And you believe, knowing yourself and the incident and how, you know, humans interact, that what you were doing was, in fact, sexual advances?

ACC: Yes.

MJ: And then inside the cabin, you've already said you agree you engaged in unwanted sexual conduct with her, correct?

ACC: Yes.

MJ: You agree it was unwanted.

ACC: Yes.

MJ: And she was, in fact, a junior enlisted Sailor under your command?

ACC: Yes.

MJ: So you did commit the acts that are charged.

ACC: Yes.

MJ: And do you believe those acts were conduct unbecoming an officer and a gentleman?

ACC: Yes.

MJ: And why do you believe that?

ACC: Because a--you know, violations of the Uniform Code of Military Justice that I'm supposed to enforce, and, you know, to again try to force a junior person under my command to do something against their will is morally reprehensible.

MJ: That's true.

What about having sex with--even if she had consented, having sex----

ACC: That would have been a violation and would have been morally reprehensible, as well.

MJ: What about becoming publicly intoxicated in front of members of your crew, do you think that----

ACC: Yes.

MJ: ----fits the definition "unbecoming an officer and a gentleman?"

ACC: Yes.

MJ: And why do you think that?

ACC: Failure to enforce regulation and set the appropriate example.

MJ: Do you believe your actions were wrongful and dishonorable?

ACC: Yes.

MJ: And why do you think that?

---

ACC: Because they--they were conduct unbecoming an officer and a gentleman. They were--they were--didn't set the proper example, violated the regulations I'm sworn to enforce, and contrary to good order and discipline.

MJ: Do you agree that your--the behavior as alleged here was serious behavior?

ACC: Yes.

MJ: Misbehavior.

ACC: Yes.

MJ: Of a material and a pronounced character?

ACC: Yes.

MJ: And it's conduct that was morally unfitting and unworthy?

ACC: Yes.

MJ: Now for all three specifications, the actions in the three specifications under Article 133, do you believe you had any legal justification or excuse for any of those actions?

ACC: No.

MJ: Including Specification 2? Do you believe you had any legal justification or excuse for encouraging Ensign (b) (6) not to report the incident?

ACC: [No response.]

MJ: Legal justification or excuse?

ACC: No.

MJ: If you want to discuss that with your---

ACC: No, I didn't have any legal excuse.

MJ: For any of the actions in Specifications 1, 2 and 3, do you believe you were forced or coerced in any way to engage in those actions?

ACC: No.

MJ: It was a freely-made decision on your part in every case?

ACC: Yes.

MJ: You could have avoided your actions if you had wanted to in each case.

ACC: Yes.

MJ: All right, does either side desire any further inquiry with regard to Specification 5--or Charge V and its specifications?

TC: No, Your Honor.

CDC: No, Your Honor.

MJ: Okay, we'll turn to the pretrial agreement.

Does anybody need a break before we do that?

CDC: Could we get a brief recess, Your Honor?

MJ: Ten minutes?

CDC: Yes, Your Honor.

MJ: Courts in--it's 1410; let's--we'll recess for 10 minutes.

Please be back by 1420.

BAILIFF: All rise.

MJ: Carry on. Court's in recess.

[The court-martial recessed at 1413 hours, 28 October 2011.]

[The court-martial was called to order at 1430 hours, 28 October 2011.]

MJ: Court will come to order. All parties present when the court recessed are again present.

I have a copy of Part I of the pretrial agreement; it's been marked as Appellate Exhibit III.

Do you have a copy of that there at defense table?

ACC: Yes.

MJ: Commander Wiley, is this your signature on Page 7?

ACC: Yes, it is.

MJ: Before you signed this document, did you read it over completely and discuss it with your counsel?

ACC: Yes, I did.

MJ: I do not have a copy of Appellate Exhibit IV. I've not seen it yet, and I don't want to see it at this point in time. That contains the sentence-limitation portion of your pretrial agreement.

Do you have a copy of that there?

ACC: Yes.

MJ: Did you also sign that agreement?

ACC: Yes.

MJ: Before you signed that agreement or document, did you read it over completely and discuss it with your counsel?

ACC: Yes.

MJ: Now, normally, the sentence-limitation portion of a pretrial agreement is in--in this case--four distinct parts, to include: a punitive discharge; confinement and/or restraint; forfeiture or fines; and any other lawful punishment that may be adjudged.

Are each of these distinct parts addressed in the sentence-limitation portion of your pretrial agreement? Don't tell me specifically what it says; just whether they're covered.

ACC: Yes, they are.

MJ: As I indicated, I don't know, and I do not want to know at this time, what the sentence limitation is that you've agreed to with the Convening Authority, but I want to ensure that you understand it, so I'd like you to read over it. When you finish reading over it, look up and tell me if you understand what it says, again without specifically telling me what it says.

ACC: [Looking over Appellate Exhibit IV, as directed.]

MJ: And again, we're talking about Part II because I'm going to go over Part I with you.

ACC: Yes. Yes, ma'am, I have read through Part II and understand it.

MJ: Very well.

I'm going to go over Part I with you; again, that's Appellate Exhibit III, and we'll start with Paragraph 1.

In a pretrial agreement, you agree to enter pleas of guilty to certain charges and specifications as indicated in Part I. In return, the Convening Authority agrees to approve and order executed no sentence greater than the one you agreed to in Part II of your agreement.

Do you understand this?

ACC: [Pause.] Yes.

MJ: And if--if you don't understand anything I'm saying, please ask me to repeat it or I'll give you an opportunity to consult with your counsel.

ACC: Okay.

MJ: Okay, we're still talking about Paragraph 1, and I'm summarizing; I'm not----

ACC: Yes.

MJ: ----reading it to you exactly.

If the sentence adjudged by this court is greater than the one provided in the agreement, the Convening Authority would have to reduce the sentence to one no more severe than the one in the agreement. On the other hand, if the sentence adjudged by this court

is less than the one in the agreement, the Convening Authority cannot increase the sentence adjudged.

Do you understand this?

ACC: Yes.

MJ: Okay, let's go to Paragraph 2.

Part I contains all the terms of your agreement except for the sentence-limitation portion in Part II.

Are Parts I and II the entire agreement between the government and you?

ACC: Yes. To--to--to the best of my knowledge.

CDC: [Conferring with the accused.]

ACC: Okay, yes.

MJ: The--the idea is we can't have anything, any--a sub rosa agreement, which means an agreement that the court is not aware of. Although I'm not aware of the specifics in Part II, anything that's not contained within the four corners of the--Part I and Part II are--are not allowed under our rules.

So the question is: are there any other agreements that are not contained within that?

ACC: No, ma'am.

MJ: I've already gone over Paragraph 3 with you, so we'll move on to Paragraph 4.

Are you satisfied with your defense counsel in all respects?

ACC: Yes.

MJ: Are you entering into this agreement freely and voluntarily?

ACC: Yes.

MJ: Did anyone make any attempt to force or coerce you into making this agreement or into pleading guilty?

ACC: No.

MJ: Let's go to Paragraph 6

MJ: Do you understand that administrative processing is separate from this trial?

ACC: Yes.

MJ: Do you also understand that any agreement you may have regarding a punitive discharge does not prevent the Navy from initiating administrative-discharge proceedings against you that could result in an other-than-honorable discharge?

ACC: Yes.

MJ: Do you understand that an administrative discharge could occur even if part or all of the sentence, including a punitive discharge, is suspended or disapproved for any reason?

ACC: Yes.

MJ: Let's go to Paragraph 7.

You may request to withdraw any of your pleas of guilty at any time before sentence is announced in the case, and if you have a good reason for that request I will allow you to do so.

Do you understand this?

ACC: Yes.

MJ: Let's go to Paragraph 8.

Paragraph 8 lists events that would make this pretrial agreement null and void, meaning of no effect, and these events are:

If you fail to plead guilty as required by this agreement;

If I refuse to accept your pleas of guilty, any of your pleas of guilty;

If I set aside any of your pleas of guilty for whatever reason, including upon your request, before--before sentence is announced;

If you fail to satisfy any material term of the pretrial agreement; or

If you fail to plead guilty as required by this agreement at a rehearing if a rehearing should occur.

Now did you understand the effect these events would have when you signed your pretrial agreement, that is these are events that would have made the pretrial agreement null and void?

ACC: Yes, I did. I'm just for--just for Stipulation 5, could--could you explain the rehearing, why that might happen?

MJ: Well, it--it most likely won't, but----

ACC: Right.

MJ: ----a rehearing can be ordered either by the Convening Authority in a certain--if there's something wrong with the proceedings or if there's a correction that needs to be made, or it could be ordered by an appellate court. Sometimes they order a sentence rehearing for various reasons. Sometimes they'll order a factual hearing, so there--there are various--it's a--like I say, it can be ordered by either the Convening Authority if there's a--a problem with the proceedings or it can be ordered by an appellate court.

ACC: So, if there was a rehearing, I would be required to make the same pleas and--by the terms of this agreement.

MJ: Well, if you want to maintain the pretrial agreement. You can always back out of the pretrial agreement.

ACC: Right.

MJ: But if events that would make this agreement null and void, meaning of no effect----

ACC: Okay.

MJ: ----would be if--if a rehearing had to do with the--maybe a rehearing on this whole thing, you know, the whole guilty plea, if you did not plead guilty if there were a rehearing ordered on the

trial itself, the whole thing, then that would make--your pretrial agreement would no longer be in effect..

ACC: I understand. Thank you.

MJ: Do you also understand that if you--if this agreement would become null and void, then your offer to plead guilty and enter into the agreement cannot be used against you in any way in determining whether you're guilty or not guilty of the charges or to determine a sentence. So it cannot be used against you if, for some reason, the agreement becomes null and void.

ACC: Right. Yes, ma'am, I understand.

MJ: Paragraph 10: Do you understand that if the adjudged sentence includes a punitive discharge and confinement, or confinement in excess of 6 months, the law requires the forfeiture of all pay and allowances due to you during any period of confinement served?

ACC: Yes.

MJ: And do you understand that this automatic forfeiture would occur whether part of your sentence is suspended or not?

ACC: Yes.

MJ: Do you understand this automatic forfeiture would occur unless the Convening Authority takes action to stop or delay it?

ACC: Yes.

MJ: And do you understand that forfeitures, whether they take effect automatically or as part of your sentence, will begin 14 days after today unless the Convening Authority takes action in your case before then, which is highly unlikely?

ACC: Yes.

MJ: Do you understand that you may request in writing that the Convening Authority delay these forfeitures until he or she takes action in your case?

ACC: Yes.

MJ: And do you understand that you may request that the Convening Authority delay automatic forfeitures for up to 6 months from the date of his or her action?

ACC: Yes.

MJ: Now let's turn to Paragraph 11 and 12, and 11 and 12 contain three timeframes.

The first two are found in Paragraph 11, and the first one is--has to--is the time that's already past. It has to do from the time that you sign the pretrial agreement until today, the date of your trial. But I want to ensure that you understood what you were signing when you signed it, and you agreed that if you had committed any misconduct from the date signed the agreement until today, that would--and the Convening Authority chose to withdraw from the pretrial agreement based on that misconduct, that is another event

that--like we just discussed in Paragraph 8--that would have made the pretrial agreement null and void.

Do you--did you understand that when you signed this?

ACC: Yes, I did.

MJ: The second portion is also in 11, and that--I mean, excuse me, Paragraph 11, and that has to do with the timeframe from today until the Convening Authority takes action in your case. And you've agreed that if you commit any misconduct after today, or the date of your trial, whenever we conclude, but before the date in which the Convening Authority takes action in your case, then the Convening Authority may withdraw from the sentence-limitation in Part II of your agreement.

Do you understand that?

ACC: Yes.

MJ: Do you understand that if the Convening Authority would do that, withdraw from the sentence-limitation based on any misconduct, that the entire sentence adjudged at this court-martial could, then, be approved and imposed upon you?

ACC: Yes.

MJ: I want you to also understand, though, that you have certain rights with regard to this, and it's reflected in your agreement, and those are found in Article 72 of the UCMJ and Rule for Courts-Martial 1109, and what those provide is that if the Convening

Authority decided that you had committed misconduct and was going to take action to withdraw from the agreement, you--you would be--you have the right to be notified of that before the Convening Authority could do it. You have a right to request a hearing with the Convening Authority; it's not a trial, it's an administrative hearing. You could request a hearing, to be represented by counsel, to hear the evidence against you, to, you know, provide any evidence you want to provide on your own part. So you would have those rights before he could withdraw from the agreement.

Do you understand that?

ACC: Yes.

MJ: All right, let's look at Paragraph 12 and that third timeframe, and that's from the time after the Convening Authority takes action in your case, and that provides that if you commit any misconduct or you violate any agreed-upon term or condition of a suspended sentence while part of your sentence is suspended, the Convening Authority could, then, vacate that suspension, and if the Convening Authority would do that, then any previously-suspended portion of your sentence could, then, be imposed upon you.

Do you understand that?

ACC: Yes.

MJ: But you would have those same rights here that are found in the UCMJ and Rules for Court--Rule for Courts-Martial 1109.

Do you understand that?

ACC: Yes.

MJ: Then Paragraph 13: Do you understand that you may be placed on appellate leave under the provisions of Article 76(a) of the UCMJ?

ACC: Yes.

MJ: And do you understand that someone placed in an appellate leave status normally does not receive any pay or allowances?

ACC: Yes.

MJ: You've also agreed that if a punitive discharge is adjudged by this court, you will submit within 14 days from the date of the conclusion of your trial a written request to be placed on appellate leave.

Do you understand that?

ACC: Yes.

MJ: In Paragraph 14--Paragraphs 14, 15, 16 and 17 contain the collateral effects--potential collateral effects that I discussed with you earlier:

14 has to do with ownership of a firearm;

Paragraph 15 has to do with monetary reimbursement--and I went over those with you in more detail when we first started the proceeding;

16 has to do with the effects a dismissal could have on any pay or retire--your pension or any other benefits to which you're entitled as a result of your military service; and

17 has to do with the sex-offender registration laws.

Do you understand these collateral effects--or potential collateral effects?

ACC: Yes.

MJ: All right, let's turn to Paragraph 18, and that's styled as specially-negotiated provisions. What this means is, the ones we've been talking about, with the exception of the collateral consequences, are fairly boiler--boilerplate provisions, but the subparagraphs in Paragraph 18 have been specially negotiated between you and the government.

ACC: Yes.

MJ: So I'm going to go over those subparagraphs.

So paragraph (a), you agree to request trial and sentencing by military judge alone, which you did, and waive your right to a trial by members, which you did.

When you signed this agreement, did you know what your rights were in this regard?

ACC: Yes.

MJ: And you voluntarily, without coercion, chose to give up your right to a trial by members?

ACC: Yes.

MJ: You agreed that you would enter--enter into a stipulation of fact, which you did, describing the facts and circumstances surrounding the offenses to which you're pleading guilty, and you indicate your understanding when you--and this has already past, but that when you signed this agreement that the failure of the parties to reach a mutually-agreed-upon stipulation could result in either side withdrawing from this agreement.

ACC: Yes.

MJ: And you also agreed that you would not object to the stipulation being considered in the providency inquiry, which you did not, as well as during the presentencing proceeding.

Do you understand and agree with this provision?

ACC: Yes.

MJ: Now do you also understand that you don't--you do not have to enter a stipulation of fact. Now there could be consequences; you might not have gotten the pretrial agreement. But it's your free and voluntary choice to enter into the stipulation of fact.

ACC: Yes.

MJ: Did you understand that at the time you signed this?

ACC: I did.

MJ: The government, on its part, agreed that it would fund the travel fees up to \$3600.00 of Dr. Dennis Wood included in any travel expenses.

ACC: Yes, I understood.

MJ: Okay?

ACC: Yes..

MJ: And did that happen? Has the government fulfilled its part in that?

TC: Yes, Your Honor.

MJ: You agree, also, Commander, that you would not request at government expense the presence of any other witness located outside a hundred-mile radius of the site of your trial--that's here--but you also indicated your belief that this provision does not interfere with your ability to present an effective case in extenuation and mitigation.

Do you----

ACC: Yes.

MJ: ----agree with that? Now, as we discussed earlier, this doesn't mean you can't have witnesses here. You can have witnesses here; it just means you would not require the government to provide or pay for witnesses outside a hundred-mile radius.

ACC: Yes. Yes, Your Honor, I understand.

MJ: You also indicate that you would use alternative means to present witness testimony or material.

ACC: Yes.

MJ: And the government, on its part, agrees that it would not-- will not object on the grounds of hearsay, authen--authentication or foundation to admission into evidence of written statements in extenuation and mitigation from any witnesses outside the hundred-mile area that--that are--might not be here. There may be other grounds on which they can object, but they agreed they would not object on the--the grounds laid out in your agreement.

Do you understand that?

ACC: Yes.

MJ: You agreed that you'd be fully prepared to go to trial no later than 30 November, and we're well in advance of that date.

Both sides have agreed that they would not object to service-record documents being offered into evidence in sentencing only on the basis of hearsay or authenticity. There may be other grounds like relevance or a number of other grounds there could be a basis for objecting, but both sides agree they would not object on the basis of hearsay or authenticity.

Do you understand that?

ACC: Yes.

MJ: And you--I assume you discussed with your counsel what that means, what those grounds are.

ACC: Yes, sir.

MJ: Subparagraph (f) has to do with motions. As I'm sure your counsel explained to you, there are some motions that are not waivable. Even if you wanted to, you could not waive them, and the government cannot require you to waive them as part of the pretrial agreement, and those motions are those that have to do with due process, primarily, but: to challenge the jurisdiction of the court-martial; the right to a speedy trial; the right to raise the issue of unlawful command influence; or any other motion, generally due process, that cannot be waived under our rules for courts-martial.

ACC: Yes.

MJ: But other than the non-waivable motions, you agree that you would waive any other motions, and you specific--specifically addressed here is you waived a right to suppress a motion with regard to evidence seized by agents of NCIS----

ACC: Correct.

MJ: ----Naval Criminal Investigative Service or any statements made by you to NCIS.

Do you understand that?

ACC: Yes.

MJ: And Mr. Sullivan, were there--other than--were there any viable motions in this case, do you believe, that you waived?

CDC: No, Your Honor, we didn't file any motions.

MJ: Well, you didn't file, but were there any viable motions that----

CDC: No, Your Honor.

MJ: Okay.

All right, let's turn to the next subparagraph, subparagraph (g): you--you indicate your understanding that you're going to be required to participate in the DNA-sample-collection program as a result of your conviction here if I accept your guilty pleas, and that you agree that as part of this you will voluntarily consent to submit to collection of DNA samples within 5 days from the date of your sentencing.

Do you understand that?

ACC: Could I have a moment?

MJ: You may.

ACC: [Conferring with counsel.]

Ye--yes, Your Honor, I was confused because I had already provided DNA, but I understand I'll do it again. No--no problem, I understand.

MJ: Well, it may not be required of you if you've already provided it, but if they ask you to do it, you're willing to----

ACC: Yes, ma'am, I understand.

MJ: Okay.

ACC: No problem.

MJ: Both sides have agreed that they would not object to the court receiving telephonic or VTC testimony in lieu of live testimony during the sentencing proceedings----

ACC: Yes.

MJ: But--but that doesn't mean that either side is precluded from objecting to that testimony. There may be grounds they could object, but they will not----

ACC: Right.

MJ: ----object to the form of the testimony.

ACC: Yes. I understand.

MJ: And this next one is particularly important. This is (i). You under--you indicate your understanding that in return for your pleas of guilty and following my--and you've pled guilty, I have not yet accepted your pleas of guilty, but following my acceptance of your pleas of guilty, the Convening Authority will withdraw the charges and specifications to which you have pled not guilty. And then after the sentence is announced in this case, those charges will be dismissed by the Convening Authority without prejudice.

Now the withdrawal means they're just withdrawn from this court; they are no longer in front of this court, but they still

exist. Once the sentence is announced in this case, they will then dismiss them, which means they do no--no longer exist, those charges to which you pled not guilty, but without prejudice, meaning that they could conceivably bring them back. With prejudice means they're gone forever; without prejudice means they could conceivably bring them back. However, the Convening Authority has stated that it does not intend to do that and agrees it will not do that unless for some reason this agreement is set aside or deemed unenforceable.

Do you understand that?

ACC: Yes.

MJ: Now you've already--you did agree, as we talked in (h) that you would not object to telephonic or video-teleconferencing in lieu of live testimony, but you've also agreed in (j) that you would not object to admission into evidence of written or video statements--videotaped statements by Ensign (b) (6) or Fireman (b) (6) on specific grounds, and those are hearsay--well, on any grounds actually, on any grounds, including but not limited to hearsay, authenticity, best-evidence rule, foundation or the confrontation clause in the Sixth Amendment. But you've agreed that you--you would not object to the government admitting the--admitting into evidence those statements on any grounds.

I assume you've discussed that with your counsel, and you understand what this means?

ACC: Yes.

MJ: In terms of the types of objections, but again, you would not object on any grounds.

ACC: Right.

MJ: And finally, under (k), the Convening Authority has agreed to recommend to Commander, Naval Personnel Command that runs the naval-confinement facilities, corrections and programs, that the designated place of confinement be Naval Consolidated Brig Miramar. It's important that you understand, though--and you've indicated your understanding here--that--that the Convening Authority has no control over that; all they can do is recommend.

ACC: Yes.

MJ: Once--if you are sentenced to confinement, once you are confined and the Convening Authority approves the sentence, then it then--you no longer belong to the Convening Authority; you belong to the Naval Personnel Command (Corrections and Programs), and they can pretty much put you where they want to put you.

Do you understand that?

ACC: Yes.

MJ: Hopefully, they would follow the recommendation of the Convening Authority, but they're not bound to do so.

ACC: Yes, I understand.

MJ: Again, the Convening Authority has agreed that he would recommend that you be confined there if you receive confinement.

Commander Wiley, other than Parts I and II, are there any other agreements in this case, either oral or written?

ACC: Not--not that I'm aware of, no, ma'am.

MJ: Counsel for both sides agree?

TC: Yes, Your Honor.

CDC: Yes, Your Honor.

MJ: Commander Wiley, do you have any questions about any provision of your agreement?

ACC: No, I do not.

MJ: Do you believe you understand each and every provision?

ACC: Yes.

MJ: Do counsel for both sides agree with the court's interpretation of the pretrial agreement?

TC: The government does, Your Honor.

CDC: Yes, Your Honor.

MJ: Commander, do you have any questions at all about your pleas of guilty, your pretrial agreement or anything else we've discussed?

ACC: No, Your Honor.

MJ: At this point, I find the pretrial agreement to be in accord with appellate case law, not contrary to public policy or my own notions of fairness, and the agreement is accepted.

Do you have any questions at all about the meaning and effect of your pleas of guilty?

ACC: No, ma'am.

MJ: Do you still wish to plead guilty?

ACC: Yes, Your Honor.

MJ: I find that you have knowingly, intelligently and consciously waived your rights against self-incrimination, to a trial of the facts by this court and to confront witnesses against you. I further find that your pleas are made voluntarily and with a factual basis, and they are accepted.

Government, what is your position regarding the offenses to which the accused has pled not guilty?

TC: Your Honor, at this point those offenses have been withdrawn from the court, and upon your pronouncement of sentence they will be dismissed without prejudice per the pretrial agreement.

MJ: Very well:

Accused and counsel, please rise.

[The accused and his counsel did as directed.]

MJ: Commander Jay D. Wiley, United States Navy, this court finds you:

Of all Charges and Specifications  
now still pending in front of  
this court:

Guilty.  
Specifically, that's  
Charge III, and  
Specifications 1, 3, 4  
and 5 of Charge III; and  
Charge V and  
Specifications 1, 2 and  
3 of Charge V.

You may be seated.

[The accused and his counsel did as directed.]

MJ: I'd like to hear from the parties at this time, starting with the government, their position on whether they believe--I'll say we discussed in an 802 whether any of these offenses could be considered multiplicitous for findings. I have just accepted his pleas, so I determined that I don't believe they are so, multiplicitous for findings; I believe they are targeted as distinctly different criminal acts, and under the circumstances of this case, I don't believe they're an unreasonable multiplication of charges. I probably should have asked counsel about this before I announced my findings, but I--I'd like to hear you on that at this point.

TC: No, Your Honor, the--the government agrees completely, and under the Quiroz factors, again, there--there has been no objection. Each one is aimed at a distinctly separate criminal act. These were discrete, separate and apart from each other in that you've got the--

and--and I think we're talking about the three specifications--  
Specifications 3, 4 and 5 of----

MJ: Now say again what you were saying.

TC: ----Charge III.

That the first act was actually a separate offense than  
the----

MJ: How about Ensign (b) (6)

TC: ----subsequent two. No, I was talking purely with respect  
to----

MJ: 3, 4 and 5, okay.

TC: 3, 4 and 5----

MJ: So I think we----

TC: ----of Charge III with----

MJ: Well, let--let's just parse this out.

We have, clearly, Specification 1 of--of Charge III is a  
distinct charge, and both sides I think would agree that the law is  
clear that 133--there were additional acts alleged within the 133,  
and our law's clear that a 133 charge can be charged in addition to the  
substantive offense.

Do both sides agree with that?

TC: Yes, Your Honor.

CDC: Yes, Your Honor.

MJ: So we're talking Specifications 3, 4 and 5 of Charge  
III----

TC: Yes, Your Honor.

MJ: ----as--would be the ones with the possible issue.

TC: And that's the ones we discussed in the 802, so my remarks were addressed to those, that--again, they are distinctly separate criminal acts.

They don't misrepresent or exaggerate his criminality. The rape offense, when charged, carried the possibility of death once referred obviously, we've done so where he's only facing life in prison.

There's no overreaching in this, and it does not unfairly increase his punitive exposure based on that maximum punishment that he's pled guilty to here today is life without possibility of parole, and--and again, they do specifically address different conduct. In fact, Specification 3 is aggravated sexual assault, where the-- Specifications 4 and 5 were abusive sexual contact, and they were broken up within time based on his acts there, so we do not believe they meet unreasonable multiplication of charges.

MJ: Mr. Sullivan, do you concur or dis--disagree with the----

CDC: Concur. I've had an opportunity to discuss with Commander Crow and--and yourself, and we concur with the--the government's position.

MJ: I am considering--as I discussed in the 802--I agree with the analysis that you just gave, Commander Crow, with regard to the merits, but I am considering merging 3, 4 and 5 for purposes of sentencing as one continuous course of conduct, based on the stipulation and what the accused told me during providency.

I'd like to hear from you before--at this point as to your position on that.

TC: No objection, Your Honor, to considering all three as--as one course of conduct and--and let the sentence, you know, reflect that appropriately.

MJ: All right, so you concur, Mr. Sullivan?

CDC: Concur. No objection to the merger.

MJ: OK,<sup>UA</sup> and in case I forget to announce it before I close the court, I will say at this point I am going to merge--I am merging for purposes of sentencing Specifications 3, 4 and 5 as one course of conduct for Charge III.

Are we ready to move into the sentencing portion?

ATC: Yes, Your Honor.

MJ: You're going to be doing sentencing?

ATC: Yes, Your Honor.

MJ: Are you going to be doing sentencing, Mr. Sullivan, or  
is----

CDC: Commander Fulton and I will both be doing sentencing.

MJ: Okay.

Does either side see--need a break at this point?

ATC: No, Your Honor.

CDC: We're fine, Your Honor. We're ready to proceed forward.

<sup>OK</sup> MJ: Are there any corrections or additions to the personal data listed on the charge sheet?

ATC: No, Your Honor.

MJ: Mr. Sullivan do you have any motion requesting relief from unlawful pretrial punishment or restraint?

CDC: No, Your Honor.

MJ: And Lieutenant, I always mispronounce your name; it's Korody?

ATC: Korody, yes.

MJ: Korody. Do you request that the matters addressed during the providency inquiry be considered in sentencing?

ATC: Yes, ma'am.

MJ: Is there any objection from the defense?

CDC: No objection.

MJ: This court will note the personal data on the charge sheet and will consider the matters addressed during the providency inquiry, including the stipulation of fact, Prosecution Exhibit 1, in determining a sentence.

Commander Wiley, at this point in the trial you have the right to present matters in extenuation and mitigation; what this means is matters about the offenses or yourself which you want this court to consider in determining a sentence in your case. Included in your right to present such matters are the right you have to testify under oath, to make an unsworn statement or to remain silent.

If you testify under oath, you may be cross-examined by the trial counsel and you may be questioned by me. If you decide to make an unsworn statement, you may not be cross-examined by the trial counsel and you may not be questioned by me; the government would, however, have the right to rebut any statement of fact in your unsworn statement. If you decide to make an unsworn statement, you may do so orally or through your counsel, <sup>in</sup> writing, personally, you may use a combination of those methods.

If you decide to exercise your right to remain silent, that cannot and will not be held against you any way.

Do you understand these rights?

ACC: Yes.

MJ: Does the prosecution have evidence to present on sentencing?

ATC: Yes, Your Honor.

At this time, the prosecution would move Prositu--  
Prosecution Exhibit 2 for identification, which is a CD containing

the 19 May 2011 wire intercept between Ensign [REDACTED] and Commander Wiley. That CD is with the court reporter, ma'am, and we'd like to move that into evidence and have the words "for identification" stricken.

MJ: Are you going to play this, or do you just want me to listen to it during deliberations.

ATC: Your Honor, we may play it following the witnesses, ma'am.

MJ: Is there any objection from the defense to Prosecution Exhibit 2 for identification?

CDC: No objection.

MJ: And this is the same one referred to in the stipulation?

ATC: Yes, ma'am.

MJ: All right, Prosecution Exhibit 2 for identification is received into evidence; the words "for identification" will be stricken.

You may proceed.

ATC: Yes, Your Honor, at this time, the defense (sic) would call Petty Officer Third Class (b) (6) United States Navy.

MJ: Very well.

[END OF PAGE]

ENGINEMAN THIRD CLASS (b) (6) U.S. Navy, was called as a witness for the prosecution, was sworn and testified as follows:

DIRECT EXAMINATION

Questions by the assistant trial counsel:

Q. Would you state your full name, and spell your last?

A. (b) (6)

Q. What is your current rate and rank?

A. EN3.

Q. What's your armed force?

A. U.S. Navy.

Q. And what is your current duty station?

A. USS SHOUP.

MJ: All right, Petty Officer (b) (6) I'm going to have to ask you to speak up a bit. I know you're probably nervous, but we're recording everything, so we need to be able to hear you. So if you could move your chair forward a little bit and just speak up.

WIT: [Does as directed.]

ATC: Thank you, ma'am.

Q. Petty Officer (b) (6) would you tell the military judge when you joined the United States Navy?

A. In June of 2009.

[END OF PAGE]

Q. What aspirations did you have when you joined the Navy?

A. I wanted a career. I wanted to go to school. That's pretty much it.

Q. Where did you first go in the Navy?

A. To USS MOMSEN.

Q. Was that your first duty station?

A. Yes.

Q. And was that after you went to boot camp?

A. Yes.

Q. How about "A" school?

A. Yes, I did.

Q. Which "A" school did you have?

A. Engineman "A" school in Great Lakes.

Q. Do you remember what day--or what date you reported to the USS MOMSEN?

A. The day after Thanksgiving in 2009.

MJ: Apparently you need to turn the microphone or--either that or wear the portable mike.

ATC: Yes, ma'am [does as directed].

Q. So you say you reported to the MOMSEN after Thanksgiving in 2009?

A. Yes.

Q. When you reported to the MOMSEN, what duties were you assigned?

A. Normal PMS, watch-standing.

Q. Were you onboard when the accused, Commander Wiley, took over as Commanding Officer?

A. Yes.

Q. Do you remember when that occurred?

A. The summer before we deployed in 2010.

Q. Prior to April 2011, what type of interaction did you have with your Commanding Officer onboard the MOMSEN?

A. Very little. I spoke to him once during deployment.

Q. How about in the wardroom, did you ever have any interaction with him in the wardroom?

A. I spent a couple weeks cranking in the wardroom, and I had to serve him.

Q. Did you respect Commander Wiley as your Commanding Officer before April 2011?

A. Yes, sir.

Q. Can you tell the military judge why?

A. [Pause.] I thought that he was professional. I thought that he showed a greater presence than my prior CO to the crew.

Q. Were you happy on the MOMSEN prior to April 2011?

A. Yes, sir.

Q. What did you enjoy about being on the MOMSEN prior to April 2011?

A. I enjoyed working. I enjoyed my job. The crew was very tight-knit.

Q. Petty Officer (b) (6) I'm going to direct your attention to April 2011, and I want to talk about what happened when you were up doing the ammo offload at the naval magazine, okay?

A. Yes, sir.

Q. Do you remember being at Diggers that night?

A. Yes, sir.

Q. At what point on that night did you begin to fear that you were in a bad place with Commander Wiley?

A. When we entered the duty van.

Q. How did you feel when you got in the duty van?

A. [Pause.] Well, trapped, nervous, slightly confused.

Q. Do you still think about that fear you had that came over you?

A. Yes, sir.

Q. How often do you think about that fear?

A. Every day, sir.

[END OF PAGE]

Q. And what happens to your body, physically, when you start thinking about what happened?

A. I--I shake, I can't breathe very well. I have trouble putting my thoughts together, just----

Q. I want to talk about another time later that night, about when you were finally able to get out of Commander Wiley's stateroom and get in the passageway. Do you remember about that?

A. Yes, sir.

Q. What were you feeling when you were able to get out of his stateroom?

A. Hysterical. I didn't think that, like, anything was real.

Q. How long did--did that feeling last for you, Petty Officer

**(b) (6)**

A. [Pause.] Quite a while, a couple weeks.

Q. Do you think about the way you felt coming out of that stateroom?

A. Yes, sir.

Q. How often do those feelings--do you catch yourself feeling that way now?

A. Every day.

Q. As a result of Commander Wiley's misconduct, as a result of him assaulting you, has that affected your opinion of naval officers?

A. Yes, sir.

Q. Would you, please, tell the judge how?

A. I have trouble trusting anyone really. [Pause.] It's hard--hard for me to trust officers in general. I--I feel as if--as if they have a little bit too much power over me. I don't feel comfortable anywhere alone with officers. [Pause.] My new CO makes me nervous.

Q. Petty Officer [REDACTED], earlier you told me that when you joined the Navy you had career aspirations. Do you still think the Navy is going to be a career for you?

A. I'm not sure, sir.

Q. Why aren't you sure?

A. [Pause.] It--the Navy doesn't seem like it--like I thought it was when I came in. The way I think about the institution itself has changed.

Q. Is that because of what your Commanding Officer did to you?

A. Yes, sir.

Q. What impact have Commander Wiley's actions had on our ability to interact with other males in the Navy?

A. The amount of trust and respect that you should naturally give a person when you're working with them; I--I don't have. [Pause.] As an engineer, I work with a lot of men, and having to be in a room full of men makes me nervous, and sometimes things are said

that make me uncomfortable that wouldn't have before. [Pause.] I'm sorry, I've--I've totally lost the question.

ATC: Well, I'll move--I'll move to another question.

Q. You mentioned earlier that you have these emotions that frequent you as a result of Commander Wiley's misconduct. Do those ever impact your ability to perform your duties at work?

A. Yes, sir.

Q. How?

A. Sometimes I just get so upset that I--I don't want to do anything. There--there are some people that I--I have trouble working with, and also--I mean just--we have training, I actually have trouble sitting through sexual-harassment training. I have to get up and leave.

Q. Did you have any of these problems before April 2011?

A. No, sir.

Q. Petty Officer [REDACTED], I see you're wearing the--the patch of the USS SHOUP on your--on your right arm. Are you no longer assigned to the MOMSEN?

A. I'm not, sir.

Q. Why?

A. I was afraid to go back, sir.

## INSTRUCTIONS FOR PREPARING AND ARRANGING RECORD OF TRIAL

**USE OF FORM** - Use this form and MCM, 1984, Appendix 14, will be used by the trial counsel and the reporter as a guide to the preparation of the record of trial in general and special court-martial cases in which a verbatim record is prepared. Air Force uses this form and departmental instructions as a guide to the preparation of the record of trial in general and special court-martial cases in which a summarized record is authorized.

Army and Navy use DD Form 491 for records of trial in general and special court-martial cases in which a summarized record is authorized. Inapplicable words of the printed text will be deleted.

**COPIES** - See MCM, 1984, RCM 1103(g). The convening authority may direct the preparation of additional copies.

**ARRANGEMENT** - When forwarded to the appropriate Judge Advocate General or for judge advocate review pursuant to Article 64(a), the record will be arranged and bound with allied papers in the sequence indicated below. Trial counsel is responsible for arranging the record as indicated, except that items 6, 7, and 15e will be inserted by the convening or reviewing authority, as appropriate, and items 10 and 14 will be inserted by either trial counsel or the convening or reviewing authority, whichever has custody of them.

1. Front cover and inside front cover (chronology sheet) of DD Form 490.
2. Judge advocate's review pursuant to Article 64(a), if any.
3. Request of accused for appellate defense counsel, or waiver/withdrawal of appellate rights, if applicable.
4. Briefs of counsel submitted after trial, if any (Article 38(c)).
5. DD Form 494, "Court-Martial Data Sheet."
6. Court-martial orders promulgating the result of trial as to each accused, in 10 copies when the record is verbatim and in 4 copies when it is summarized.
7. When required, signed recommendation of staff judge advocate or legal officer, in duplicate, together with all clemency papers, including clemency recommendations by court members.

8. Matters submitted by the accused pursuant to Article 60 (MCM, 1984, RCM 1105).

9. DD Form 458, "Charge Sheet" (unless included at the point of arraignment in the record).

10. Congressional inquiries and replies, if any.

11. DD Form 457, "Investigating Officer's Report," pursuant to Article 32, if such investigation was conducted, followed by any other papers which accompanied the charges when referred for trial, unless included in the record of trial proper.

12. Advice of staff judge advocate or legal officer, when prepared pursuant to Article 34 or otherwise.

13. Requests by counsel and action of the convening authority taken thereon (e.g., requests concerning delay, witnesses and depositions).

14. Records of former trials.

15. Record of trial in the following order:

- a. Errata sheet, if any.
- b. Index sheet with reverse side containing receipt of accused or defense counsel for copy of record or certificate in lieu of receipt.
- c. Record of proceedings in court, including Article 39(a) sessions, if any.
- d. Authentication sheet, followed by certificate of correction, if any.
- e. Action of convening authority and, if appropriate, action of officer exercising general court-martial jurisdiction.
- f. Exhibits admitted in evidence.
- g. Exhibits not received in evidence. The page of the record of trial where each exhibit was offered and rejected will be noted on the front of each exhibit.
- h. Appellate exhibits, such as proposed instructions, written offers of proof or preliminary evidence (real or documentary), and briefs of counsel submitted at trial.