United States Navy–Marine Corps
Court of Criminal Appeals

Before
HOLIFIELD, DEERWESTER, and STEWART
Appellate Military Judges

UNITED STATES
Appellee

v.

Claudio MARIN
Lance Corporal (E-3), U.S. Marine Corps
Appellant

No. 202100301

Decided: 30 March 2023

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judges:
Kevin S. Woodard (arraignment)
Kyle G. Philips (motions)
Glen R. Hines (trial)

Sentence adjudged 22 July 2021 by a general court-martial convened at Marine Corps Air Station Cherry Point, North Carolina, consisting of officer and enlisted members. Sentence in the Entry of Judgment: reduction to E-1, confinement for eighteen months, forfeiture of all pay and allowances, and a dishonorable discharge

For Appellant:
Lieutenant Commander Michael W. Wester, JAGC, USN (on brief)
Captain Jasper W. Casey, USMC (argued, on reply brief)

4 April 2023: Administrative Correction to reflect that Appellate Defense Counsel who argued also wrote the reply brief.

For Appellee:
Lieutenant Commander Paul S. LaPlante, JAGC, USN (on brief)
Lieutenant R. Blake Royall, JAGC, USN (on brief)
Lieutenant Ebenezer K. Gyasi, JAGC, USN (argued, on brief)

Senior Judge DEERWESTER delivered the opinion of the Court, in which Chief Judge HOLIFIELD and Senior Judge STEWART joined.

PUBLISHED OPINION OF THE COURT

DEERWESTER, Senior Judge:

Appellant was convicted, contrary to his pleas, of one specification of attempted sexual assault in violation of Article 80, Uniform Code of Military Justice [UCMJ],[1] for attempting to commit a sexual act upon Corporal (E-4) [Cpl] Sierra[2] at a house party in August of 2019.

Appellant asserts five assignments of error (AOEs) which we have restated: (1) whether the finding of guilt is legally and factually sufficient; (2) whether the military judge erred by excluding Cpl Sierra's statement to Appellant that she would have a "threesome" with Appellant and his girlfriend; (3) whether it was error for the military judge to admit evidence of a prior sexual encounter between Appellant and Cpl Sierra under Military Rule of Evidence [Mil. R. Evid.] 413 and to provide the Mil. R. Evid. 413 instruction; (4) whether it was error for the military judge to deny a motion to dismiss the words "or reasonably should have known" from the Specification, thereby rendering it impossible to know if the members convicted Appellant on an invalid legal theory, and; (5) whether the military judge erred by refusing to grant a challenge to Sergeant (E-5) [Sgt] Rodger.

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[1] 10 U.S.C. § 880.

[2] All names in this opinion, other than those of Appellant, the judges, and counsel, are pseudonyms.

We have carefully reviewed Appellant's first AOE and we find it meritless.[3] We find merit in Appellant's fourth AOE. We take action in our decretal paragraph to set aside Appellant's conviction and authorize a rehearing.

As we find error in Appellant's fourth AOE which resulted in this Court setting aside Appellant's conviction and authorizing a rehearing, any relief based on Appellant's remaining AOEs would be without effect. "Because there would be no further practical effect on the outcome of Appellant's appeal arising from review" of the other questions raised by Appellant, we find Appellant's other AOEs are moot and decline to analyze them further.[4]

I. BACKGROUND

A. The Attempted Sexual Assault

Appellant was charged with attempted sexual assault for conduct that occurred on 23 August 2019 at a house party that was attended by both Appellant and the victim, Cpl Sierra. At trial, several witnesses testified about the events they witnessed leading up to the charged conduct. Cpl Foxtrot explained that she arrived at the house party around 2200 that evening and did not drink any alcohol that night. She observed that there were more than ten people at the party, including Cpl Sierra, who Cpl Foxtrot testified was "wasted" by the time Cpl Foxtrot arrived.[5] Cpl Foxtrot testified that the victim did not respond when she spoke to her, and was swaying. Cpl Foxtrot stated that it "seemed [Cpl Sierra] was getting to the point of being blacked out drunk."[6] Cpl Papa, another guest at the party, testified at trial that she observed Cpl Sierra appeared to be intoxicated during the party. Cpl Papa stated that the victim appeared able to walk, but needed assistance going to the restroom. Later, both Cpl Papa and Cpl Foxtrot observed that the victim was asleep on the downstairs sofa. Cpl Foxtrot testified that Cpl Sierra had "laid down on the couch and blacked out, she wouldn't wake up."[7]

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[3] *United States v. Matias*, 25 M.J. 356, 363 (C.A.A.F. 1987); *See United States v. Belton*, No. NMCCA 201200292, 2013 CCA LEXIS 368, at *12-13 (N-M. Ct. Crim. App. Apr. 30, 2013).

[4] *United States v. Dedolph*, No. 202100150, 2022 CCA LEXIS 658, at *30 (N-M. Ct. Crim. App. Nov. 15, 2022).

[5] R. at 537-540.

[6] R. at 540-41.

[7] R. at 542.

A small group, which included Appellant, helped to carry Cpl Sierra to an upstairs bedroom. Cpl Foxtrot testified that they laid the victim on an air mattress turned on her stomach "so that if she threw up, she wouldn't choke on her vomit."[8] Cpl Foxtrot stated that she and her friend, Sgt Jack, checked on Cpl Sierra every fifteen to twenty minutes. During the first check-in, Cpl Foxtrot testified that they had observed that the victim had thrown up. The next time they checked on the victim, she had urinated on herself.

Mr. Papa, another individual who helped carry Cpl Sierra upstairs, testified that Appellant remained in the room after the group initially left the victim on the air mattress. Later, Mr. Papa and another guest, Mr. Lima, entered the room to check on the victim. When they opened the door, Mr. Papa testified that he saw Appellant leaning down over the victim with his penis exposed. Appellant then got up, slammed the door shut, and locked the door. Mr. Papa stated that he and Mr. Lima attempted to get Appellant to open the door and that Appellant eventually came out of the room and hurried downstairs. In contrast, Mr. Lima testified that he never saw Appellant's penis exposed and that he and Mr. Papa did not attempt to reopen the door. However, Mr. Lima stated that Appellant's pants were down such that his buttocks were exposed.

B. The Rule for Courts-Martial [R.C.M.] 907 Motion

Appellant was charged with one specification of attempted sexual assault in violation of Article 80, UCMJ. The Specification of the Charge alleged that Appellant, "on or about 23 August 2019, attempted to commit a sexual act upon [Cpl Sierra] who was incapable of consenting due to intoxication, while [Appellant] knew or *reasonably should have known* of that condition."[9] At trial, after the Government had rested, Appellant made two motions. First, Appellant moved for a finding of not guilty under R.C.M. 917. Second, Appellant moved the military judge to dismiss the Charge and Specification for failure to state an offense pursuant to R.C.M. 907. To that end, Appellant raised an argument (a) that the Specification lacked sufficient specificity with regard to the alleged "overt act," and, relevant to the present appeal, (b) argued that the military judge should dismiss the charged language "or reasonably should have known" for failure to state an offense pursuant to R.C.M. 907.

During oral argument on the motions, the Defense, in relation to the R.C.M. 907 motion, argued:

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[8] R. at 542.

[9] The charge sheet, 16 December 2020 (emphasis added).

> The [G]overnment has alleged, "knew or reasonably should have known." This is a specific intent crime. Article 80 says all elements, including not just the act, so it's not just the penetration that must be specific intent, but knowledge that the alleged victim was incapable of consenting is specific intent. A person cannot have specific intent to do something they do not know. So while the portion of the Charge…that says "knew too intoxicated consent" [sic] would sustain, but the portion that says "or reasonably should have known cannot. [Appellant] cannot have the specific intent to do something that he "or reasonably should have known," your honor.[10]

The military judge then discussed the R.C.M. 917 motion with the Government and the evidence presented to prove each element of the Charge. After the Government argued, the military judge provided a ruling denying the R.C.M. 917 motion, finding that the Government had "put on some evidence on each element of attempt, as well as the underlying offense of sexual assault."[11] The military judge also denied the R.C.M. 907 motion as it pertained to the specificity of the charged overt act, holding that the act could be "alleged or raised by the evidence."[12] The military judge then asked the Defense if it wished to be heard further. The following colloquy ensued:

> MJ: [Defense counsel [DC]], do you want to be heard further?
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> DC: I do, Your Honor. Not on the two rulings we just heard, sir. On the third portion on the subcomponent, I didn't hear a Court's ruling, Your Honor. That is the, "or reasonably should have known" language.
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> …
>
> MJ: So I find the [G]overnment has put on sufficient evidence…that would together with all reasonable inferences and applicable presumptions could reasonably establish every element required for the underlying scienter requirement. That is, that [Appellant] either knew or reasonably should have known. And again, the evidence has shown that the accused and [Cpl Sierra]

[10] R. at 826.

[11] R. at 831.

[12] R. at 830.

> traveled together and were both drinking leading up to the incident charged, both were present in the house on board Camp Lejeune at which the charged incident took place … Witnesses have placed him in the room when she was either helped or carried upstairs and placed on the air mattress. Witnesses have said that he insisted on remaining in the room after everyone else left the room. And then Witnesses have testified to the ultimate act charged.
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> So I find that the [G]overnment put on some evidence to establish either of those scienter requirements, and so that's the ruling on the third issue that you discussed, [defense counsel]. So the Court is denying the R.C.M. 917 motion for finding of not guilty at this time. And I say "at this time," the rule is very clear that they can be readdressed, if necessary, at a later time.
>
> Do both sides understand the Court's ruling?
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> TC: Yes, Your Honor.
>
> DC: Yes, Your Honor.[13]

The military judge denied the motion to dismiss the "reasonably should have known" language and allowed the members panel to deliberate on the specification unaltered and as charged. After the Defense had presented its case, the military judge gave instructions to the members on findings. The military judge instructed the members that they could convict "if they were satisfied beyond a reasonable doubt that the accused knew or reasonably should have known that [Cpl Sierra] was incapable of consenting to the sexual act due to the impairment by an intoxicant."[14]

During closing argument, the Government presented one slide in a presentation that contained the "reasonably should have known" language in a list of the elements for sexual assault. The Government argued during closing that:

> …[the G]overnment must prove to you that the accused had the specific intent to commit each of the underlying elements of the sexual assault. And you'll see that each of those has been proven

[13] R. at 831-32.

[14] App. Ex. LVII at 7.

> here. … And the third is that, the accused knew or reasonably should have known that she was too drunk to consent.[15]

The Government also argued during closing argument that Appellant knew that Cpl Sierra was incapable of consenting.

II. DISCUSSION

A. Standard of Review and the Law

1. Invalid Legal Theory and Harmlessness

Whether an appellant is convicted based upon an invalid legal theory is a question of constitutional error that this Court reviews de novo.[16] Once an appellate court identifies the possibility that an invalid legal theory may have been used to convict an appellant -- such as a conviction based on a general verdict where members were instructed on multiple theories of guilt, one of which is invalid -- the next question a court must consider is the appropriate relief. The parties in the instant case disagree on the state of the law applicable to this second question.

Appellant points this Court to the Supreme Court's holding in *Yates v. United States*, where the Court examined a general verdict that may have been supported by an invalid legal theory.[17] There, the Court explained that under such circumstances, there was "no way of knowing" whether the jury found the accused guilty under a valid, or invalid, legal theory.[18] The Court announced that "the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected."[19] This was the general framework that, for nearly half a century, was familiar to legal practitioners and that which was adopted by the Court of Appeals for the Armed Forces [CAAF].[20]

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[15] R. at 917.

[16] *United States v. Prasad*, 80 M.J. 23, 29 (C.A.A.F. 2020).

[17] *Yates v. United States,* 354 U.S. 298, 312 (1957); Appellant's Brief at 58-60.

[18] *Yates*, 354 U.S. at 311-12.

[19] *Id*. at 312.

[20] *See, e.g.*, *United States v. Shelton*, 62 M.J. 1, 2 (C.A.A.F. 2005) (per curiam). *Stromberg v. California*, 283 U.S. 359 (1931), is another invalid legal theory case in line with *Yates* that has been previously relied upon by the CAAF. *See, e.g., United*

In 2008, the Supreme Court addressed amending this framework in *Hedgpeth v. Pulido*.[21] Reasoning that both "*Stromberg* and *Yates* were decided before we concluded in *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), that constitutional errors can be harmless. Accordingly, neither *Stromberg* nor *Yates* had reason to address whether the instructional errors they identified could be reviewed for harmlessness, or instead required automatic reversal."[22] Citing the existence of a "series of post-*Chapman* cases" where the Court concluded that "various forms of instructional error are not structural but instead trial errors subject to harmless-error review," the Court held that there was nothing to suggest that a harmless-error analysis should not apply to invalid legal theory general verdict cases.[23] Accordingly, we agree with the position posited by the Government in Appellant's case that erroneous charging and instruction on an invalid legal theory is tested for harmlessness beyond a reasonable doubt.[24]

Thus, we apply the following standard of review to Appellant's case: We first determine whether there was an error in Appellant's case involving an invalid legal theory – a constitutional error that this Court reviews de novo.[25] Once there is a showing that there was a preserved constitutional error at the court-martial, the burden is immediately placed on the Government to show that this error was harmless beyond a reasonable doubt. Thus, in order to prevail, the Government must convince the Court that "there was no reasonable possibility that the error might have contributed to the verdict."[26]

States v. Piolunek, 74 M.J. 107, 108-09 (C.A.A.F. 2015). Both *Stromberg* and *Yates* were long interpreted by federal courts through a structural error framework. *See, e.g., Lara v. Ryan*, 455 F.3d 1080 (9th Cir. 2006). Structural error refers to a constitutional right that is so basic to a fair trial automatic reversal of the conviction is mandated. *See, Weaver v. Massachusetts*, 137 S.Ct. 1899, 1907-08 (2017).

[21] *Hedgpeth v. Pulido*, 555 U.S. 57 (2008).

[22] *Id*. at 60.

[23] *Id*. at 60-61 (internal citation omitted).

[24] Gov't Brief at 66-67.

[25] *Prasad*, 80 M.J. at 29.

[26] *United States v. Tovarchavez*, 78 M.J. 458, 460 (C.A.A.F. 2019); *see also Skilling v. United States*, 561 U.S. 358, 414 (2010) (holding that errors of the *Yates* variety are subject to harmless-error analysis); *Prasad*, 80 M.J. at 29.

2. Inchoate Offenses

Attempt, like conspiracy or solicitation, is an inchoate offense. For inchoate offenses, the Government must prove beyond a reasonable doubt that an accused "had the requisite *mens rea* concurrent with an *actus reus*."[27] "The *actus reus* for inchoate offenses is an overt act that goes beyond preparatory steps and is a direct movement toward the commission of the [underlying] offense."[28] The *mens rea* for an inchoate offense is the specific intent to commit the underlying offense.[29] In cases where an appellant is charged with attempted sexual assault and the theory is that the victim could not consent, the Government is required to prove that the appellant *knew* that the victim could not consent.[30] An appellant *cannot* be convicted if he believes that the victim could consent, despite the fact that a reasonable person would know otherwise under the circumstances.[31]

B. Appellant's Conviction for Attempted Sexual Assault

Appellant was convicted of attempting to "commit a sexual act upon [Cpl Sierra] who was incapable of consenting due to intoxication, while [Appellant] knew or *reasonably should have known* of that condition."[32] At trial, Appellant clearly alerted the military judge to the erroneously included language. During litigation over Appellant's R.C.M. 907 motion, Appellant argued that the language should have been struck – stating that Appellant "cannot have the specific intent to do something that he '[] reasonably should have known.'"[33]

From our review of the record, it appears that the military judge missed the crux of the argument raised by Appellant's R.C.M. 907 motion. After ruling on the R.C.M. 917 issues raised by Appellant, Appellant's defense counsel directed the military judge back to the R.C.M. 907 issue arising from the "or reasonably should have known" language. The military judge addressed Appellant's concerns through the lens of evidentiary requirements as he had

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[27] *United States v. Dorrbecker*, 79 M.J. 538, 563 (N-M. Ct. Crim. App. 2019).

[28] *Id*. (internal quotation omitted).

[29] *Id*.

[30] *United States v. Washington*, No. 201700242, 2019 CCA LEXIS 47, at *23 (N-M. Ct. Crim. App. Feb. 8, 2019).

[31] *Id*. at *24 n.40.

[32] The charge sheet, 16 December 2020 (emphasis added).

[33] R. at 826.

properly done in his R.C.M. 917 analysis. The military judge did not address the matter for what it was—an improper legal theory. As a result, Appellant's case proceeded to findings with the "or reasonably should have known" language intact. The member's panel received closing arguments and an instruction from the military judge which referenced the "or reasonably should have known" language.

In Appellant's case, the Government has conceded, and we agree, that "the Military Judge should have struck 'or reasonably should have known' from the specification and instructed the members they could only convict Appellant if they found he knew [Cpl Sierra] was incapable of consenting due to intoxication."[34] The state of the law is clear on this matter: an attempted sexual assault while the complaining witness was incapable of consenting requires the Government to prove an accused's "actual knowledge" of that condition. We conclude that there was an error in Appellant's case involving an invalid legal theory. Accordingly, the burden is on the Government to show that this error was harmless beyond a reasonable doubt.

C. The Government has not Shown that the Error was Harmless Beyond a Reasonable Doubt

Having determined that there was constitutional error at trial, we examine whether the Government has met its burden of proof to demonstrate that the error was harmless beyond a reasonable doubt.[35] This is a very high standard. The standard of harmless beyond a reasonable doubt is only satisfied where "a court is confident that there was *no reasonable possibility* that the error *might* have contributed to the conviction."[36] If we cannot be certain that the error did not contribute to the verdict, Appellant's conviction must be overturned.[37]

The CAAF has instructed that appellate courts should examine "the strength of the Government's case" as well as "the content of the military judge's findings instructions."[38] Our superior Court has instructed that "overwhelming" evidence of guilt is sufficient to uphold a conviction, but evidence

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[34] Gov't Brief at 55.

[35] *Prasad*, 80 M.J. at 29.

[36] *Id*. (quoting *Tovarchavez*, 78 M.J. at 460) (emphasis added).

[37] *Prasad*, 80 M.J. at 29.

[38] *Id*.

that shows it was merely "certainly possible" that the accused was not convicted due to the error is insufficient to sustain a conviction.[39]

The Government argues that there is sufficient evidence that the erroneous legal theory was harmless beyond a reasonable doubt. First, the Government argues that this Court should take a similar approach as in past cases where we overturned sexual assault convictions, but then examined the record for evidence that supported an appellant's specific intent to commit the charged offense and upheld convictions for the lesser-included offense of *attempted* sexual assault.[40] We decline to do so here. This Court may "affirm an appropriate lesser-included offense under that originally charged if we are satisfied that the evidence of record establishes each element of that lesser offense by legal and competent evidence beyond a reasonable doubt."[41] That undertaking is distinct from the task at hand. It is one thing for this Court to conclude that sufficient evidence of specific intent exists to sustain a conviction under a lesser-included offense. It is another matter entirely for this Court to find evidence of specific intent, and then further conclude that there is no reasonable possibility that the erroneous "should have known" theory of liability did not contribute to the verdict.

Second, the Government argues that overwhelming evidence exists to support the proposition that Appellant knew that Cpl Sierra was incapable of consenting. To that end, the Government points to the fact that Appellant saw Cpl Sierra drinking multiple shots on the way to the party,[42] that he knew Cpl Sierra was drinking on an empty stomach,[43] that evidence was presented that Cpl Sierra had to be carried upstairs and put on the air mattress, and that Appellant was present when several people discussed placing Cpl Sierra on her side in case she vomited. While the evidence supporting Appellant's knowledge can be characterized as "strong," it is inescapable that the members also received instruction from the military judge on the charge that they could convict under the lesser "reasonably should have known" standard. Strong evidence of

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[39] *Id*. at 30.

[40] Gov't Br. at 70-71 (citing *Washington*, 2019 CCA LEXIS 47; *United States v. Welch*, No. 201500184, 2016 CCA LEXIS 253 (N-M. Ct. Crim. App. Apr. 21, 2016); *United States v. Angiolini*, No. 201600114, 2016 CCA LEXIS 738 (N-M. Ct. Crim. App. Dec. 30, 2016).

[41] *United States v. Odom*, 53 M.J. 526, 536 (N-M. Ct. Crim. App. 2000).

[42] R. at 642-44.

[43] R. at 655.

Appellant's *mens rea* is not enough. To sustain a conviction, the Government must present "overwhelming" evidence that the instructional error did not contribute to the verdict.[44]

Third, the Government argues that, as part of the inquiry into whether the evidence overwhelming supports conviction under the valid legal theory, this Court should examine, as the Federal Circuit Courts have in the past, whether the Government focused on the invalid legal theory at trial.[45] While this inquiry can no doubt be a part of a holistic analysis of the strength of the Government's case, we find it unpersuasive here. Even if we were to conclude that the gravamen of the Government's focus was on the legal theory requiring actual knowledge, it is inescapable that that the lesser standard was presented by trial counsel, both orally and on slides during closing argument, and by the military judge in findings instructions. Importantly, we note that in none of the cases cited by the Government was the invalid legal theory so inseparably linked to the valid legal theory as in Appellant's case.[46]

In this case, we cannot conclude that there was no reasonable possibility that this error might have contributed to the verdict. Here, there is simply far too much overlap between the invalid legal theory (an objective reasonableness requirement) and the constitutionally permissible legal theory (a subjective specific intent requirement). Every piece of the evidence which supports the valid legal theory necessarily also supports the invalid legal theory – a lower *mens rea* standard. On these facts, it is certainly possible that the members convicted Appellant under the permissible legal theory. However, under the stringent standard of review appropriate for constitutional errors, "certainly possible" is insufficient to sustain Appellant's conviction.[47] Here we do not find

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[44] *Prasad*, 80 M.J. at 30.

[45] Gov't Brief at 70 (citing *United States v. Yates*, 16 F.4th 256, 269 (9th Cir. 2021); *United States v. Skilling*, 683 F.3d 480, 483 (5th Cir. 2011); *United States v. Black*, 625 F.3d 386, 393 (7th Cir. 2010)).

[46] At oral argument for the first time before this Court, the Government also referenced *United States v. Cannon*, 987 F.3d 924 (11th Cir. 2021). The Court reminds litigants of Rule 23.8 of its Rules of Appellate Procedure requiring litigants to file a motion to cite supplemental authority discovered subsequent to the submission of their brief. In any event, we have reviewed the additional authority and find it to be unpersuasive on the question of harmlessness beyond a reasonable doubt. *Cannon*, like other federal cases cited by the Government, deals with factually distinct predicates which make up the valid and invalid legal theories at issue there. *Cannon*, 987 F.3d at 947-49.

[47] *Prasad*, 80 M.J. at 29-30.

that the evidence "overwhelmingly" supports the conclusion that Appellant was convicted under the valid legal theory.[48] We cannot be certain that the error was harmless beyond a reasonable doubt. Therefore, Appellant's conviction must be overturned.[49]

III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, we have determined that a constitutional error at Appellant's court-martial was not harmless beyond a reasonable doubt.[50] Accordingly, the findings and sentence are **SET ASIDE** and a rehearing is authorized.

Chief Judge HOLIFIELD and Senior Judge STEWART concur.

FOR THE COURT:

MARK K. JAMISON
Clerk of Court

[48] *Id.*

[49] *Id.*

[50] Articles 59 & 66, UCMJ.