

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before Panel No. ___

<p>UNITED STATES</p> <p>Appellant/Appellee</p> <p>v.</p> <p>Appellant</p> <p>Colonel, U.S. Army Trial Military Judge d</p>	<p>MOTION FOR ADDITIONAL TIME TO RESPOND TO AN ART. 62, UCMJ, APPEAL, AND TO CROSS-FILE ASSIGNMENTS OF ERROR IN ACCORDANCE WITH ART. 66, UCMJ</p> <p>Docket No. ARMY _____</p> <p>Tried at Yongsan, Republic of Korea, 9-13 September 2014, before a general court-martial appointed by Commander, Eighth Army, Colonel Mark A. Bridges, Military Judge, presiding.</p>
--	---

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
ARMY COURT OF CRIMINAL APPEALS

Statement of the case

The convening authority referred one Charge with five specifications to trial by general court-martial. The specifications allege a violation of Article 120, UCMJ, by sexual contact, through making a "fraudulent representation that the sexual contact served a professional purpose." Charge Sheet.

Appellant plead not guilty, and was tried by a members' panel.

Prior to trial, the military judge denied a defense motion to dismiss Specifications 2, 4, 5, because there were no reasonable grounds to believe an offense had been committed.

Prior to trial on the merits the prosecution withdrew

Specifications 2 and 5, and the remaining specifications were renumbered accordingly.

Prior to the taking of evidence, counsel and the military judge addressed a motion that the specifications failed to state an offense. The military judge deferred ruling on the motion until the Rule for Courts-Martial (RCM) 917, Manual for Courts-Martial (2012) point, out of a sense of judicial economy. The military judge denied the defense RCM 917 motion, and deferred ruling on the motion for failure to state an offense, again out of a sense of judicial economy and also fairness to both parties. After the members announced findings, the defense made, and the military judge denied a motion for a finding of not guilty in accordance with *United States v. Griffith*, 27 M.J. 24 (C.M.A. 1988) (the military judge may enter a finding of not guilty if the evidence is legally insufficient). The military judge again deferred ruling on the defense motion for failure to state an offense until after a sentence was announced.

On 12 September 2014, the members found Appellant guilty of Specification 2 only, originally Specification 3. On 13 September 2014, the members adjudged a dismissal.

The military judge then dismissed the Specification for failure to state an offense, in accordance with RCM 907(b).

On 15 September 2014 (KST), the prosecution filed notice with the military judge that they intended to appeal his dismissal of the remaining specification for failure to state an offense.

Request for relief

The defense requests the court grant the following relief to Appellant.

a. That Appellant be allowed an additional 60 days to respond from the date Appellee files an Article 62, UCMJ, brief with this court.

b. That Appellant be permitted to file a response to Appellee's appeal and also Assignments of Error in accordance with Article 66, UCMJ, either independently or as a cross-appeal to Appellee's filing, within that 60 days.

c. If Appellant is allowed this additional time, Appellant has identified, at least the following issues that he wishes to assign as error and brief.

I.

Specifications 2, 4, and 5 lacked reasonable grounds to believe an offense was committed, the convening authority abused his discretion in referring these specifications to trial, and the military judge abused his discretion in declining to dismiss them. Appellant was prejudiced by having Specification 4 before the members.

II.

The charge and specification should be dismissed because trial counsel engaged in prosecutorial error when he argued in findings that Appellant was a "wolf in sheep's clothing," and where trial counsel argued, more than once, that the defense counsel was being "deceptive" with the members, that the military judge abused his discretion when he overruled an objection to trial counsel calling Appellant a wolf in sheep's clothing and the defense counsel deceptive, and where a motion for mistrial would have been fruitless in light of the military judge's overruling the defense objection to the argument.

III.

The members of this court cannot be personally and individually satisfied that the evidence is factually sufficient to support a finding of guilt, and regardless, the evidence is not legally sufficient. See, *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987).

IV.

A sentence to dismissal is inappropriately severe for one specification of sexual contact under the facts and circumstances of this case.

Reasons for granting relief

Granting Appellant's request will result in judicial economy, and effect Appellant's desire for a timely appeal. Appellant is not confined, and has consented to this request.

If this court denies the government appeal, Appellee will determine if they wish to appeal to the U.S. Court of Appeals for the Armed Forces.

If this court grants the government appeal, then Appellant's Article 66, UCMJ, brief of assignments of error is

timely before this court, the court may then proceed to decide those issues, and perhaps issue a joined or combined opinion.

At which point, Appellant will have timely access before this court, and more timely access to the U.S. Court of Appeals for the Armed Forces (CAAF) in the event that is necessary.

WHEREFORE, Appellant respectfully requests the court grant relief.



Philip D. Cave
Law Office
1318 Princess St.
Alexandria, VA 22314
703.298.9562
mljucmj@court-martial.com

CPT, JA
Army TDS - Pacific Rim
Area II, Yongsan Garrison,
Republic of Korea
DSN 315.738.4419
Vinayak.s.nain.mil@mail.mil

CERTIFICATE OF SERVICE

I served a copy of this motion on the United States and this court on __ September 2014.



Philip D. Cave

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing Notice of Appeal in the case of United States v. _____ was delivered electronically and in person to this Court on the 15th day of September 2014 at **1200** and the Defense on the 15th day of September 2014 at **1200**. This notice was provided within 72 hours of the Military Judge's ruling being appealed as required by R.C.M. 908.

CPT, JA
Trial Counsel

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (<i>Last, First, MI</i>)		2. SSN	3. GRADE OR RANK	4. PAY GRADE		
			1LT	O2		
5. Headquarters Support Company, Headquarters and Headquarters Battalion, Eighth Army, APO AP 96205			6. CURRENT SERVICE			
			a. INITIAL DATE	b. TERM		
			09 March 11	8 yrs		
7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED			
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL			None	
\$2,193.90	\$50.00	\$2,193.90				
			9. DATE(S) IMPOSED			

II. CHARGES AND SPECIFICATIONS

10. CHARGE I: VIOLATION OF THE UCMJ, ARTICLE 120.

SPECIFICATION 1: In that First Lieutenant U.S. Army, did, at or near U.S. Army Garrison – Yongsan, Republic of Korea, on or about 29 May 2013, commit sexual contact upon Captain to wit: touching with a stethoscope, the breasts of said Captain by making a fraudulent representation that the sexual contact served a professional purpose.

SPECIFICATION 2: In that First Lieutenant U.S. Army, did, at or near U.S. Army Garrison – Yongsan, Republic of Korea, on or about 4 June 2013, commit sexual contact upon Staff Sergeant to wit: touching with a stethoscope, the breasts of said Staff Sergeant by making a fraudulent representation that the sexual contact served a professional purpose.

SPECIFICATION 3: In that First Lieutenant U.S. Army, did, at or near U.S. Army Garrison – Yongsan, Republic of Korea, on or about 4 June 2013, commit sexual contact upon Sergeant C E. F to wit: touching with a stethoscope the breasts of said Sergeant by making a fraudulent representation that the sexual contact served a professional purpose.

(SEE CONTINUATION SHEET)

III. PREFERRAL

11a. NAME OF ACCUSER (<i>Last, First, MI</i>) RIESENBERGER, Daniel W.	b. GRADE O3	c. ORGANIZATION OF ACCUSER HSC, HHB, EIGHTH ARMY
d. SIGNATURE OF ACCUSED		e. DATE 22 Oct 13

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 22 day of October, 2013, 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.

BRANDON S. JONES

Typed Name of Officer

HSC, HHB, Eighth Army

Organization of Officer

O3

ide

Trial Counsel

*Official Capacity to Administer Oath
(See R.C.M. 307(b) – must be a commissioned officer)*

Signature

On 22 October, 2013, 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.)

Daniel W. Riesenberger
Typed Name of Immediate Commander

HSC, HHB, EIGHTH ARMY
Organization of Immediate Commander

O3

[Signature]
Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13.

The sworn charges were received at 1430 hours, 22 OCT 13 2013 at HHB, EIGHTH ARMY
Designation of Command or

Eighth Army, APO AP 96205

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

~~FOR THE~~

HEATHER J. CARLISLE
Typed Name of Officer

Commanding
Official Capacity of Officer Signing

O5
Grade

[Signature]
Signature

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY

b. PLACE

c. DATE

HQ's, Eighth Army

USAG-Y, KS

20140116

Referred for trial to the general Court-martial convened by Court-Martial Convening Order

Number 20, dated

7 September 2013, subject to the following instructions:² None

By Command of Lieutenant General Champoux
Command or Order

DONALD W. KRAMER
Typed Name of Officer

Senior Paralegal
Official Capacity of Officer Signing

E7

[Signature]
Grade

[Signature]
Signature

15.

On _____, 20____, I (caused to be) served a copy hereof on (each of) the above named accused.

Typed Name of Summary Court-Martial Officer

Grade or Rank of Summary Court-Martial Officer

[Signature]
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.

CONTINUATION SHEET, DD Form 458 –

Headquarters Support Company, Headquarters & Headquarters Battalion, Eighth Army, APO AP 96205

SPECIFICATION 4: First Lieutenant U.S. Army, did, at or near
U.S. Army Garrison – Yongsan, Republic of Korea, on or about 4 June 2013, commit
sexual contact upon Specialist to wit: touching with a stethoscope the
breasts of said Specialist and did so by making a fraudulent representation that
the sexual contact served a professional purpose.

SPECIFICATION 5: First Lieutenant U.S. Army, did, at or near
U.S. Army Garrison – Yongsan, Republic of Korea, on or about 3 July 2012, commit
sexual contact upon to wit: touching with
hands the breasts of said PFC and did so by making a fraudulent
representation that the sexual contact served a professional purpose.

(END OF CHARGES)