IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee,* v. JOSE MEDINA, Staff Sergeant (E-6), U.S. Marine Corps, *Appellant.*	*AMICUS CURIAE* BRIEF OF NATIONAL INSTITUTE OF MILITARY JUSTICE Crim. App. No. 200900053 USCA Dkt. No. 10-0262/MC

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE ARMED FORCES:

In accordance with Rule 26 of this Court's Rules of Practice and Procedure, the National Institute of Military Justice ("NIMJ") respectfully submits this brief as *amicus curiae*. For the reasons explained below, the Court should answer the granted issue in the affirmative.

Issue Granted

WHETHER THE LOWER COURT ERRED IN HOLDING THAT ARTICLE 120(c)(2), UCMJ, IS NOT FACIALLY UNCONSTITUTIONAL.

Interest of the Amicus

NIMJ is a District of Columbia nonprofit corporation organized in 1991. Its overall purposes are to advance the fair administration of military justice in the Armed Forces of the United States and to foster improved public understanding of

military justice. NIMJ participates actively in the military justice process through the filing of *amicus* briefs, rulemaking comments, its website (www.wcl.american.edu/nimj), and its publications program, including its *Guide to the Rules of Practice and Procedure for the United States Court of Appeals for the Armed Forces* (13th ed. 2010). NIMJ believes it is imperative that the Court have the benefit of views of amici outside the appellate divisions when addressing important issues regarding newly enacted criminal provisions such as that at issue here.

Jurisdiction, Statement of the Case, and Facts

This case is properly before the Court in accordance with Article 67(a)(3), Uniform Code of Military Justice (UCMJ). Petitioner has previously submitted statements of the case and of the facts which require no comment, especially in light of the facial challenge presented by the granted issue.

Summary of Argument

Because Article 120(c)(2), read in conjunction with Article 120(r) and Articles 120(t)(14) and (16), shifts the burden of proof on an element of the offense of aggravated sexual assault to the accused, Article 120(c)(2) is facially unconstitutional.

Law

The government has the burden under the Due Process Clause of the Fifth Amendment of proving beyond a reasonable doubt

every element of a crime. In re Winship, 397 U.S. 358, 364 (1970); United States v. Rodriguez-Rivera, 63 M.J. 372, 383 (C.A.A.F. 2006). However, the law may require an accused to shoulder the burden of persuasion on affirmative defenses, so long as this shifting does not encompass facts so key to a criminal offense that they must be "proved or presumed." Martin v. Ohio, 480 U.S. 228 (1987); Patterson v. New York, 432 U.S. 197, 215 (1977); Dixon v. United States, 548 U.S. 1, 7 (2006).

There is also a strong presumption that laws Congress passes are constitutional. United States v. Morrison, 529 U.S. 598, 607 (2000). However, ambiguous language in criminal statutes will be construed in favor of the accused. Staples v. United States, 511 U.S. 600, 619 n.17 (1994); United States v. Thomas, 65 M.J. 132, 135 (C.A.A.F. 2007) (internal citations omitted).

This Court reviews allegations of the constitutionality of federal statutes *de novo*. United States v. Neal, 68 M.J. 289, 296-297 (C.A.A.F. 2010); United States v. Disney, 62 M.J. 46, 48 (C.A.A.F. 2005).

Article 120(c)(2), UCMJ, defines aggravated sexual assault as follows:

> Any person who engages in a sexual act with another person of any age if that other person is substantially incapacitated or substantially incapable of appraising the nature of the sexual act or declining

> participation in the sexual act or communicating unwillingness to engage in the sexual act; is guilty of aggravated sexual assault and shall be punished as a court-martial may direct.

Article 120(r) lists aggravated sexual assault as an offense for which consent can be an affirmative defense. Subsection (t) defines "consent" and "affirmative defense." Notably, Article 120(t)(14)(B)(ii)(I) states that "[a] person cannot consent to sexual activity if substantially incapable of appraising the nature of the sexual conduct at issue due to mental impairment or unconsciousness resulting from consumption of alcohol..." A physical inability to decline to participate in the sexual activity or a physical inability to communicate such unwillingness to engage in the sexual activity also precludes "consent." Article 120(t)(14)(B)(ii), (iii).

The definition of "affirmative defense" assigns the burden of proving the defense to the accused. Article 120(t)(16). The accused must prove consent by a preponderance of the evidence, and then the prosecution must disprove the affirmative defense beyond a reasonable doubt. Id.

Argument

> BECAUSE IT IS LEGALLY IMPOSSIBLE FOR AN INDIVIDUAL WHO IS SUBSTANTIALLY INCAPACITATED TO CONSENT TO SEXUAL ACTIVITY, ARTICLE 120(c)(2) IS FACIALLY UNCONSTITUTIONAL.

The language of the "substantial incapacity" section of re-

vised Article 120 emphasizes the integral nature of "lack of consent" to proving the elements of the crime by including the requirement that the complainant be unable to communicate "unwillingness to engage in" or be incapable of "physically declining participation in" the charged sexual activity. Art. 120(t)(14)(B). That consent is completely incompatible with proving the "substantially incapable" element of the offense is made clear by the phrase "A person cannot consent to sexual activity if substantially incapable..." Id. By putting the burden of proving such consent on the accused, he must, of necessity, prove that the complainant was substantially capable of verbally, physically, or otherwise manifesting her unwillingness to engage in the sexual activity. That is the constitutional deficiency inherent in Article 120(c)(2). *See* Neal, 68 M.J. at 305-07 (Ryan, J., concurring in part and dissenting in part).

The offense of aggravated sexual assault did not exist, *per se*, under the UCMJ until October 1, 2007, when the sexual offenses previously scattered throughout the Code were consolidated into a new Article 120. *See* National Defense Authorization Act for Fiscal Year 2006, Div. A, subtit. E, § 552(a)(1), Pub. L. No. 109-163, 119 Stat. 3257 (2006). This new approach to sexual offenses in the military followed the first Cox Commission's recommendation to replace the sex offenses in the Code

with a comprehensive sexual misconduct article and Congress' mandate that the Department of Defense (DoD) submit ideas for modernizing its sexual assault code. *See* Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 571, 118 Stat. 1811, 1920-21 (2004); Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice (May 2001). DoD declined to do so, responding that the Code was sufficient to prosecute all sexual offenses. *See* Major Howard H. Hoege III, *"Overshift" The Unconstitutional Double Burden-Shift on Affirmative Defenses in the New Article 120*, Army Law., May 2007, at 3 n.16.

Notably, the new Article 120 deleted "lack of consent" from the list of elements the United States must prove for most sexual offenses. *Cf*. Article 120, UCMJ, Manual for Courts-Martial (2005 ed.); Neal, 68 M.J. at 297. This was part of a trend of shifting the focus of sexual assault cases from the complainant to the accused. Russell v. United States, 698 A.2d 1007, 1009 (D.C. App. 1997). A review of other state and federal statutes reveals a wide variety of element choices for sexual assault offenses, with a number jurisdictions retaining the "lack of consent" element as part of their statutory framework. See, e.g., Cal. Pen. Code § 261 (2010); Colo. Rev. Stat. 18-3-402 (2010); Conn. Gen. Stat. § 53a-70 (2010); Kan. Stat. Ann. § 21-3517

(2010).

Aggravated sexual assault in the new Article 120(c)(2) closely mirrors the offense of second degree sexual abuse found in the District of Columbia (D.C.) Code. D.C. Code Ann. § 22-3003 (2010). The D.C. Code lists consent as an affirmative defense to second degree sexual abuse, just as Article 120(t) does. D.C. Code Ann. § 22-3007 (2010). While the relevant D.C. Code section pertaining to affirmative defenses once included a requirement that "the defendant must establish [it] by a preponderance of the evidence," a 2009 amendment deleted this provision. Id., *see* Note referencing D.C. Law 18-88, "Omnibus Public Safety and Justice Amendment Act of 2009."

The D.C. sexual assault decisions yield mixed results in challenges to the defense of consent. In Russell, the District of Columbia Court of Appeals held that, because consent remained relevant to the government's burden of proof in a rape case, the affirmative defense language of the statute was constitutional, although failing to give an instruction on the role that consent continued to play on the question of force was erroneous. Shortly thereafter, the court decided Hicks v. United States, 707 A.2d 1301 (D.C. App. 1998). In Hicks, the defendant was charged with first degree sexual assault (comparable with classic rape under the UCMJ). Hicks, 707 A.2d at 1302. At trial

and on appeal, defense counsel contended that placing the burden of proving consent on the defendant unconstitutionally shifted the burden of proving force to the defense because "the consent defense is the flip side of an element of the crime." Id. at 1304. As in Russell, the court reversed the conviction, based on faulty jury instructions. Hicks, 707 A.2d at 1305; Russell, 698 A.2d at 1017.

The instructions given in the recent case of Mozee v. United States, also from D.C., reveal another important difference between affirmative defenses under D.C. law and the UCMJ. The trial judge there instructed the jury that, if the defense proved consent by a preponderance of the evidence, the jury had to find Mozee not guilty of the offense. Mozee v. United States, 963 A.2d 151, 158-59 (D.C. App. 2009). In contrast, under Article 120(t)(16), the government would still have the opportunity to prove an accused's guilt after the defense proved the affirmative defense by a preponderance of the evidence. Mozee, 963 A.2d at 158-59; *see also* Russell, 698 A.2d at 1011, 1012.

Incapacity to consent was not at issue in the D.C. cases, but it is essential to the challenge in the instant case. Simply put, there may be factual scenarios in which proving the affirmative defense of consent might not satisfy the force element

of the sexual misconduct, but that is beside the point when dealing with "substantial incapacity." That is because, while lack of consent is no longer an element of most sexual assault offenses under revised Article 120, it is undeniable that consent is related to the element of force, which remains part of the statutory framework. *See* Art. 120(t)(5), (7), and (14); Neal, 68 M.J. at 305 (Ryan, J., concurring in part and dissenting in part); Russell, 698 A.2d at 1008. This is particularly true when constructive force comes into play, as it does in cases arising under Article 120(c)(2). In those fact patterns, the force element necessary to convict is supplied by the sexual act itself. Art. 120(t)(14)(B).

Cases based on the new statute are only now beginning to percolate to the service courts. Accordingly, this Court's jurisprudence regarding the revised statute consists of one case, that of United States v. Neal, a scant three months ago. Neal, however, dealt with a section of Article 120 for which consent is not an affirmative defense under the new provision, thus limiting its relevance to the case at bar. Neal, 68 M.J. at 291, 298. While the scope of review was limited in Neal, the opinion is instructive in reiterating the Martin premise that evidence used to satisfy the burden of proving an affirmative defense which is also relevant to casting a reasonable doubt on the cri-

minality of the actions is, nevertheless, constitutionally permissible. Id. at 302. The difficulty is that the Martin holding does not extend to the legally impossible situation of a substantially incapable individual giving consent.

United States v. Crotchett, 67 M.J. 713 (N-M. Ct. Crim. App. 2009), an opinion which, of course, is not binding on this Court, is one of the few appellate cases dealing with the section of the new Article 120 at issue in the case at bar. In Crotchett, a divided *en banc* panel of the Navy-Marine Corps Court found Article 120(c)(2) facially constitutional. Crotchett, 67 M.J. at 714. The majority reasoned that the burden of proving the affirmative defense of consent did not compel the accused to prove that the complainant was capable of acceding to the sexual conduct, nor did the statutory construction relieve the government of the burden of proving beyond a reasonable doubt that the complainant was not capable of agreeing to the sexual conduct. Id. at 713, 716.

While the dissenters focus most of their efforts on the risks inherent in making such a ruling on the basis of a scantily developed record, they correctly note the majority's confusion of the affirmative defense of mistake of fact with consent. Id. at 717 (Maksym, J., dissenting in part and concurring in the result). Indeed, the majority's hypotheticals do not embody

scenarios involving actual consent. Id. Rather, they consist of fact patterns that merely raise the specter of mistaken belief that consent was given, which is a different defense. Id.

When the case at bar reached the service court, again the court's members were divided. The court held that the accused need not prove capacity to consent when providing evidence on the affirmative defense of consent. United States v. Medina, 68 M.J. 587, 589 (N-M. Ct. Crim. App. 2009). The majority reached this decision despite the statutory preclusion of a substantially incapacitated individual consenting to sexual acts. Art. 120(t)(14)(B). Because Appellant was charged under Article 120(c)(2), substantial incapacitation was a key element of the offense.

The dissent in Medina noted that an affirmative defense provides additional facts that turn otherwise criminal conduct into lawful action. Medina, 68 M.J. at 600 (Beal, J., dissenting in part and concurring in part); Wayne R. LaFave and Austin W. Scott, Jr. *Substantive Criminal Law* 51 (2d ed. Supp. 1996). Consequently, an affirmative defense generally admits that the elements of the crime are true. Medina, 68 M.J. at 600. Of course, given the definitions in the statute, in order to prove the affirmative defense of consent under Article 120(c)(2), the

defense must disprove the "substantial incapacity" element of the crime.

In sum, there is a paucity of case law on which to rely in deciding this constitutional challenge. It bears mentioning that, while any conviction of a criminal offense stigmatizes the accused, only murder looms larger than sexual offenses in the hierarchy of stigmatizing convictions. The stigma that comes with conviction is one reason our criminal justice system places the burden of proving all the elements of an offense on the prosecution. *See* Mullaney v. Wilbur, 421 U.S. 684 (1975); Speiser v. Randall, 357 U.S. 513, 525-26 (1958). It is also the reason it is so important to get the rewriting of criminal laws right.

In hindsight, perhaps it would have been wiser for DoD to have proposed its own revisions to the sexual offenses under the Code, as judges have not had kind words for the current configuration. *See* Neal, 68 M.J. at 305; Medina, 68 M.J. at 595. Just last week, a joint study done by the Heritage Foundation and the National Association of Criminal Defense Lawyers determined that Congress often criminalizes conduct without sufficiently establishing the requisite elements of the crime. *See* Brian Walsh and Tiffany Joslyn, Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law (May 5,

2010)(*http*://www.nacdl.org/withoutintent).

Despite this criticism, we do not make this argument lightly, especially given the presumption of constitutionality that attends all federal legislation. Morrison, 529 U.S. at 607. However, there is simply no way to read Article 120(c)(2) in conjunction with the applicable portions of Article 120(t) as validly allocating the burden of proving the elements of the offense of aggravated sexual assault. *See* United States v. Salerno, 481 U.S. 739, 745 (1987).

Conclusion

For the foregoing reasons, Article 120(c)(2) is facially unconstitutional because it shifts to the defense the burden of proving the element of capacity to competently consent. The decision below should therefore be reversed.

Respectfully submitted,

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May 10, 2010

CERTIFICATE OF FILING AND SERVICE

I certify that the original and seven copies of the foregoing brief amicus curiae were hand-delivered to the Court on May 10, 2010, and that copies were deposited in the U.S. Mail, postage prepaid, for first-class delivery, to each of the counsel: Colonel Louis Puleo, Director, Appellate Government Division, US Navy-Marine Corps Appellate Review Activity, Bldg. 58, Suite B01, 1254 Charles Morris Street SE, Washington Navy Yard, DC 20374; Captain Michael D. Berry, Navy-Marine Corps Appellate Review Activity, 1254 Charles Morris Street SE, Bldg. 58, Suite 100, Washington Navy Yard, DC 20374.

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