22 Sep 14

From: LT Paul T. Hochmuth, JAGC, USN, Detailed Defense Counsel
To: Commander, Navy Region Mid-Atlantic

Subj: MATTERS SUBMITTED BY THE ACCUSED ICO US V. IS2 DARIN G. LOPEZ, USN

Ref: (a) UCMJ, Article 60(c)
(b) R.C.M. 1105
(c) R.C.M. 1107(d)

Encl: (1) Transcript of LCpl H., USMC testimony from the Court-Martial

1. On 25 June 2014, IS2 Darin G. Lopez was found guilty at a General Court Martial by a military judge. IS2 Lopez was sentenced to three years of confinement and a Bad Conduct Discharge. Through counsel, he now respectfully requests that you to set aside the finding of guilty and dismiss the specification and charge.

2. As the Convening Authority, you have the absolute power to disapprove a sentence adjudged at court-martial for any reason or for no reason at all. United States v. Boatner, 43 C.M.R. 216 (1971) and Rule for Court-Martial 1107(c). R.C.M. 1107(c)(2) specifically allows you, as the Convening Authority, to set aside any finding of guilty and dismiss the specification and, if appropriate, the charge." This is a unique and valuable aspect of our military criminal justice system. United States v. Bono, 26 M.J. 240, 243 (C.M.A. 1988). It should be remembered that a granting of clemency is not reviewed by higher authority. The Defense understands that decisions of this type in sexual assault cases garner increased military and public scrutiny. Despite that, I request a keen evaluation of the evidence in this case in reaching your decision.

3. I have attached the testimony of LCpl H. from the Court-Marital and ask that you personally read it. Enclosure 1. Justice was not served in this case and IS2 Lopez now faces a Federal Conviction, Sex Offender Registration and a punitive discharge from the Naval service for the rest of his life, based upon insufficient evidence. The American legal system and that of the military has been set up to help ensure that the innocent are not found guilty, yet we all know that at times mistakes are made. In this case, you as the Convening Authority have the absolute power to correct this injustice. You have a case

before you in which there was not legal or factual sufficiency to convict. Legal sufficiency is whether any rational trier of fact could have found that the evidence met the essential elements of the charged offense, viewing the evidence in a light most favorable to the Government. *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987). The test used by the appellate court for factual sufficiency is whether they are convinced of IS2 Lopez's guilt beyond a reasonable doubt, allowing for the fact that they did not personally observe the witnesses. *Id.* at 325. The term "reasonable doubt" does not mean that the evidence must be free of any conflict. *United States v. Rankin*, 63 M.J. 552, 557 (N.M.Ct.Crim.App. 2006), *aff'd*, 64 M.J. 348 (C.A.A.F. 2007) (citation omitted). When weighing the credibility of a witness, this court, like a fact-finder at trial, examines whether discrepancies in witness testimony resulted from an innocent mistake, including lapses in memory, or a deliberate lie. *United States. v. Goode*, 54 M.J. 836, 844 (N.M.Crim.Ct.App 2001). Additionally, the members may "believe one part of a witness's testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979).

4. To convict IS2 Lopez of sexual assault at trial, the Government was required to prove the following: (a) that the appellant committed a sexual act upon LCpl H; and (b) that LCpl H was incapable of consenting to the sexual act due to impairment by alcohol and that condition was known or reasonably should have been known by IS2 Lopez.

5. In this case, we know a sexual act occurred as the defense stipulated to such before the trial even began. There were two condoms found matching the DNA of IS2 Lopez and LCpl H. However, we do not know if LCpl H was incapable of consenting to the sexual act. We also do not know if IS2 Lopez should have reasonably known that she was incapable of consenting. We do not know this because there is not any valid or credible evidence to show one way or the other. The Government produced three witnesses in this case. The first was SA Hallet from the U.S. Amry CID, who testified regarding a sketch of IS2 Lopez's apartment that was made, that two condoms that were found in the trash, that IS2 Lopez lived on the third floor, and there was no elevator at the apartment complex. Second, Ms. Ruiz (cab driver) testified that she picked up LCpl H the next morning, a male called for the cab, a male waived for her to wait until LCpl H walked downstairs, LCpl H was upset, LCpl H stated that she thought she was drugged and raped, Ms. Ruiz took LCpl to 7 Eleven where LCpl bought a soda and a pack of cigarettes for Ms. Ruiz, and Ms. Ruiz offered to take LCpl H to the hospital and

police and both were turned down by LCpl H. The third witness was LCpl H. When you read LCpl H's testimony you will notice a trend that she does not remember what happened. To summarize LCpl H's testimony: she remembers having three drinks at the bar, then waking up with IS2 Lopez having sex with her, him saying "I used a condom," the next morning the bed was wet, and that she thinks she threw up because she has a clear, sticky substance in her hair and on her. Her testimony is not credible. It is common for a witness to have some memory lapses, but not to the extent of LCpl H.

6. There are so many questions still left unanswered;-- questions that should have been answered for a just conviction to take place. To find that LCpl H was incapable of consenting and that IS2 Lopez should have reasonably known that she was incapable of consenting, the military judge needed proof of such elements. Instead, the military judge made the conclusion that LCpl H wet the bed, vomited, that IS2 Lopez said "Don't worry, I used a condom," and that LCpl H was unconscious due to her state of intoxication. There are many problems with these conclusions made by the military judge. The only evidence before the court regarding LCpl H's alcohol intake that night is that she had three drinks. There is no evidence regarding her speech, ability to walk, or ability to interact with others. We do not know what she was capable of doing that night because we do not have any evidence of it.

7. In addition, LCpl H said that she may have wet the bed, but there is no physical evidence that she did. We do not know how wet the bed was, if the sheets were soaked through, or if the bed was only a little wet. It could have been natural bodily fluid that develops due to intercourse or she could have been sweating. There is no evidence to say one way or another. Also, she did not say, "My legs were sticky from urine," "I could smell urine," or "I know I urinated in the bed." LCpl H says that she vomited; she describes the substance as clear, thick and sticky. Once again, this could be fluid from intercourse. She mentioned that she ate the night before, but she did not see any chunks of food in the substance. She never said, "I could smell vomit." If one was to vomit and then sleep in their vomit, it would stand to reason that they would have a distinct smell of vomit the next morning. In this case, there is no evidence of it. Once again, we do not have any physical evidence that either of these events took place.

8. The military judge made the conclusion that LCpl H was unconscious. Yet we only have evidence of memory loss, not that

she was unconscious. The Government did not call any medical personnel to testify to her state during the trial. In addition, there was not a single eye witness that could describe her physical condition. It is entirely possible that LCpl H was in a blackout state in which she was not recording memories but outwardly appeared willing and able to make decisions (i.e. consent to sexual activity). To make the conclusion that a person was unconscious versus blacked out without any supporting evidence is too great of a leap to make in the absence of any expert analysis on LCpl H's symptoms. The reason why this difference is so vital is because it goes to the reasonable doubt burden that the Government must overcome to prove that IS2 Lopez knew or reasonably should have known that LCpl H was incapable of consenting. If a person is blacked out, they could have sex, walk, talk, etc. without the other person ever knowing that they were in a blackout state. The Government, not the defense, bears the burden. In this case we have no evidence that indicates she was unconscious, and there remains many unanswered questions that cast doubt on the theory that she was unconscious: If LCpl H was unconscious, how did she make it out of the bar? How did she walk up two to three flights of stairs to IS2 Lopez's apartment? How did she get into the bed that night? There is no evidence that IS2 Lopez carried or dragged LCpl H out of the bar, up two-three flights of stairs and put her in his bed. Surely if IS2 Lopez carried her out of the bar, unconscious, there would be some eyewitness testimony to support this claim. There is none. The more probably explanation is that LCpl H's testimony is not credible, or that she was blacked out and not recoding memories during this portion of the evening. If she was blacked out, then IS2 Lopez would not have known it.

9. Lastly, there is the conclusion that IS2 Lopez said, "Don't worry, I used a condom." The only evidence of this comes from the testimony of LCpl H. Yet her memory is limited and unreliable. This conversation may not have happened or it could have happened the next morning after they woke up. If it did happen the next morning and LCpl H did not remember, that does not automatically mean that LCpl H was not able to consent, as the military judge stated, and that IS2 Lopez was aware that she was not able to consent. This is the only evidence the military judge specifically points to. Yet, such a statement does not make that point. At worst, it shows that he became aware *after the fact* that she does not remember what happened. It does not prove what he knew at the time of the sexual intercourse. The Government must prove that he knew or reasonably should have known that LCpl H was unable to consent. This is a vital legal

requirement. To believe that this conversation happened in the first place, we would have to find LCpl H credible. Yet LCpl cannot remember if she went to dinner with IS2 Lopez a week before this incident or not. She could not tell us what she had for dinner the night of the incident. She could not tell us how she left the bar or how she got to IS2 Lopez's apartment. She could not tell us where IS2 Lopez was the next morning. She just remembers his voice and that is it. This is a small apartment, even by LCpl H's own admission. She took a shower, dried her dress, sat on the couch in nothing but a towel, but does not remember seeing or talking to IS2 Lopez. She only remembers hearing his voice. She cannot remember what she talked to the cab driver about, or that they went to 7 Eleven. She cannot remember what happened at medical the day after the incident. She said that she had injuries, but she never showed the injuries to anyone, including medical. She does not remember IS2 Lopez telling the cab to wait for her to come downstairs. She does not remember IS2 Lopez calling a cab for her. She cannot tell us the type of shoes she was wearing the next day. If she was wearing heels, did she walk out of the bar, up the stairs to IS2 Lopez's apartment in heels? We do not know. If none of these things can be remembered, how can we know what part of her memory is accurate and what is made up, either intentionally or unintentionally, in order to fill in the gaps?

10. Prior to his court-martial, IS2 Lopez was never in any legal trouble, either prior to the military or while in the military. Two officers spoke to his good military character at the trial. This is a young man who is now sitting in the brig because a military judge made conclusions without a sufficient amount of evidence. If his conviction is not disapproved, IS2 Lopez will be a sex offender most likely for the remainder of this life, have a federal conviction and a punitive discharge from the Naval service. Justice can still be accomplished in this case. As the Convening Authority, you have the absolute authority and power to disapprove the finding of guilty. I ask that you make this decision and not wait to see what the Navy and Marine Court of Appeals does with the case. This is the only chance the Convening Authority has to take action and I ask that you take action on behalf of IS2 Lopez and do what is right and just.

11. This request is forwarded for inclusion in the record of trial. I respectfully request that this clemency request and any response be attached to the record of trial.

12. I greatly appreciate your consideration of this request, which I submit on behalf of IS2 Lopez. I can be reached at 850-452-5573, or by e-mail at paul.hochmuth@navy.mil.

Paul T. Hochmuth