

**Appendix A****General Court-Martial (Summer of 2000)**

(All names below are pseudonyms; citation omitted)

Specialist Taylor was accused of rape, forcible sodomy, adultery, and indecent acts with another. He claimed all acts were consensual. Before trial, he stipulated that he was married and the woman he had sex with was not his wife. Specialist Taylor pled not guilty to all charges and specifications, including adultery. The court-martial lasted two days before an enlisted-member panel.

The defense theory as to the charges of rape and forcible sodomy, as outlined in its opening statement and closing argument, was that the acts were consensual. The defense counsel argued the indecent act (placing his finger in her anus) did not occur. Finally, as to the “consensual offense” of adultery and lesser-included offense of sodomy, the defense strategy was to invoke jury nullification through voir dire, presentation of evidence, and argument. The defense presented a good soldier defense and raised the issue of mistake of fact as to consent with regard to the rape charge. The defense opened its case by stating:

In a “he said/she said” date rape case, it is almost always the case that only the participants will ever know what really happened between them. That is exactly the case here today. Only SPC Taylor and PVT Jones will ever know what happened between them in SPC Taylor’s quarters. Despite this, the defense is confident that after hearing the facts and circumstances surrounding PVT Jones’s decision to go to SPC Taylor’s quarters, to watch movies and drink with him, and the later CID investigation of her claim that she was raped, you will conclude that SPC Taylor did not rape PVT Jones.

What the defense asks you to pay particular attention to is PVT Jones’s activities before and after she had sex with SPC Taylor. Also, please pay particular attention to SPC Taylor’s conduct before and after he had consensual sex with PVT Jones. Finally, take into consideration the evidence produced by CID’s investigation and remember that if this outside evidence is inconclusive or contradicts with PVT Jones’s claims—well, remember SPC Taylor is presumed innocent. The burden of proof remains on the trial counsel to prove beyond a reasonable

doubt that SPC Taylor committed an offense under the Uniform Code of Military Justice.

You may have noticed the adultery charge on the flier. Specialist Taylor will take the stand and testify about the consensual sex he had with PVT Jones. Now, SPC Taylor is married and yet he has pled not guilty to the adultery charge. But remember, the burden remains on the trial counsel to prove each and every element of that offense, and all the other charged offenses, beyond a reasonable doubt. This is based on the facts as you determine them to be after hearing evidence in this court-martial, through law that you will receive from the military judge, and you exercising your own conscience.

The defense is confident that after you hear the evidence, receive the law, and apply your conscience to this case, you will be able to find SPC Taylor innocent of rape and not guilty to all charges and offenses.

The second day of trial, the defense completed its case by arguing the following in its closing argument:

In a “he said/she said” date rape case, only the participants will ever actually know exactly what happened between them. Specialist Taylor says the sex was consensual and that he did not place his finger in PVT Jones’s anus. Private Jones says the sex was forcible. She claims SPC Taylor forcibly undressed her, that there was a struggle, and that she fought and kicked as he ripped off her shirt. She claims she was raped. She says that during this rape, SPC Taylor committed forcible sodomy on her by holding her down and placing his mouth on her vagina, and that he also forced his finger into her anus.

The defense is confident that based on the evidence you will find that no struggle or rape occurred. Even though none of us were present, when we look at PVT Jones’s actions before and after she had sex with SPC Taylor, when we look at SPC Taylor’s actions before and after he had sex with PVT Jones, and when we look at the evidence discovered during CID’s investigation, we can tell that SPC Taylor is telling the truth. No struggle, no rape, no forcible sodomy, or indecent act occurred. When you analyze the evidence to determine the facts of this case, apply the

law given to you by the military judge, and exercise your conscience, you will be able to find SPC Taylor innocent of rape and forcible sodomy and not guilty to all the other charged offenses.

The burden of proof remains on the government to prove each and every element of each offense beyond a reasonable doubt. In this case, the prosecutor can't meet this burden. Let's take adultery as an example: Specialist Taylor told you the sexual activity between him and PVT Jones was consensual. He also told you he is married and his wife no longer lives with him. You can find SPC Taylor not guilty of adultery because under the law the prosecutor must prove that this consensual relationship somehow prejudiced the good order and discipline of the service. The CID agent who testified yesterday told you that if it weren't for the rape and forcible sodomy allegations, his office would never have investigated PVT Jones's story. In fact, he told you that CID regulations do not allow agents to investigate allegations of adultery or consensual sodomy standing alone. Under these facts, you can apply the law and your conscience and find SPC Taylor not guilty of adultery.

You heard the testimony of SPC Taylor's supervisors, co-workers, and subordinates. You heard me read affidavits from Sergeant First Class (SFC) Johnson and SFC Hearst. Both of these senior noncommissioned officers have known SPC Taylor for many years. Every witness, every one of them, told you the same thing. They told you SPC Taylor is honest, nonviolent, and law abiding.

Private First Class (PFC) Cable and SPC Booth both testified on behalf of SPC Taylor. Private First Class Cable was PVT Jones's roommate when she first made her allegations against SPC Taylor. Specialist Booth was PVT Jones's sponsor at the unit. Both PVT Jones's roommate and her sponsor took the stand and testified on behalf of SPC Taylor. They told you SPC Taylor is honest, nonviolent, and law abiding. But by taking the stand and testifying as defense witnesses, didn't they also tell you what they think about PVT Jones's allegations?

Private Jones wants you to believe she was drunk because she knows she did not fight or resist. She knows SPC Taylor did not use force when he had sex with her. That's what the evidence

shows. It also shows she was not drunk because the truth is SPC Taylor did not rape her.

So what is PVT Jones's motive to lie? Maybe her friends jumped to conclusions when she came back to the barracks at 9:00 a.m. the next morning. We know PVT Jones did not call the military police. We know her roommate, PFC Cable, who was the first person to talk to her that morning, did not call the police. It was another soldier, PVT Janice Smith, who took it upon herself and decided to call the police. Maybe once the police were involved, PVT Jones was simply too embarrassed to tell the truth.

Once PVT Jones made her allegations, she began to receive favorable treatment from her unit. She was able to take free leave and was transferred to easier duty. Remember, this is a soldier who rode her medical profile from basic training to her unit. She knew about getting easy duty.

Maybe PVT Jones was simply afraid of what her mother would think of her if she knew the truth. We know that when PVT Jones took her free leave she didn't go home to her mother. We know it was her mother who got involved and got the leave extended. We also know her mother wrote the command asking for her daughter to be transferred to the reserves, asking to get medical treatment for rape trauma through the civilian system rather than from the military, and asking for all her G.I. Bill college money.

We may never know why PVT Jones decided to lie, but one thing is clear; the evidence does not support her testimony. If she was raped, why did she pack and take an overnight bag to SPC Taylor's house? Why did she stay at his house for ten hours? If she was afraid, why didn't she call her best friend on her cell phone? Why didn't she leave and go upstairs to her sponsor's quarters? Remember, SPC Booth testified that she had had PVT Jones over to her home before. Specialist Taylor's quarters are on the first floor; if PVT Jones wanted to get away, why didn't she go out the patio doors or out a window? Why did SPC Taylor wear a condom if he was a rapist? If he was really a rapist, why did he bother to give his partner oral sex? Why did the sex take place in the bedroom and not out on the couch where the kissing

began? If PVT Jones's version of events is to be believed, why did the Army doctor who did the medical exams the next morning report there were no injuries to either SPC Taylor or PVT Jones? Why did the CID laboratory fail to find any damage or stretching on any of the clothing PVT Jones wore that night?

As you go back to deliberate, ask yourself, who brought you the doctor that did the medical exams? Who brought you the pictures that were taken at these exams? Who brought you the drinking glasses that were similar to the ones used that night? Who brought you the shirt PVT Jones says she heard tear that night? Who brought the CID lab reports on the clothing? Who brought you the lab reports on the fingernail scrapings? Who brought you the gin bottle similar to the one used that night? The defense brought you all of this evidence! Don't you wonder why the government didn't bring you this evidence? Don't you wonder why they didn't bring you any physical evidence? Don't you wonder why they didn't tell you about the tests CID ran? They didn't because these things didn't help their case. The evidence helps the defense, and the prosecution knew that! They refused to give you this important evidence because every bit of it hurts their case. It shows that their complaining witness, PVT Jones, lied. It shows you that SPC Taylor is telling the truth!

When you go back to the deliberation room, you will be in closed, secret session. You will weigh the facts, the law, and your conscience, and cast a secret, written ballot. When you cast your ballot, please use your authority to declare SPC Taylor innocent of rape and forcible sodomy and not guilty to all the other charged offenses.

After two and one-half hours of deliberation, the panel asked the military judge whether sodomy required prejudice to good order and discipline, like adultery. The military judge said that sodomy only required the act itself and that the prosecution did not have to prove any prejudice to the unit or the military service occurred as a result.

The panel returned twenty minutes later and found SPC Taylor not guilty of all offenses.

**Appendix B****BCD Special (Spring of 2000)**

(All names below are pseudonyms; citation omitted)

Sergeant Lanny was a military police officer who commanded a HMMWV that went off the road and overturned. Neither he nor his driver was injured in this one-vehicle accident. The two soldiers told their superiors that they were run off the road, when in fact the accident occurred because they attempted to hit a road marker. Sergeant Lanny was accused of dereliction of duty, making two false official statements, willful damage to military property of more than \$100, willful and wrongful damage to German property of less than \$100, wrongfully influencing the statement of a subordinate, solicitation to obstruct an investigation, and solicitation to destroy German property.

In attempting to have his case disposed of as an Article 15, a summary court-martial, or an administrative discharge, SGT Lanny provided his command with a written statement truthfully detailing what happened. Under Military Rule of Evidence 410, the military judge suppressed this statement. Sergeant Lanny pled not guilty to all charges and specifications. After a day of motions, the contest lasted two additional days before an enlisted-member panel.

The defense strategy of the case was to seek jury nullification and to present extenuation and mitigation evidence from voir dire through sentencing, if necessary. The defense also presented a good soldier defense and raised the issue of mistake of fact as to the dangerousness of attempting to hit the road marker.

The defense planted the seeds for jury nullification during voir dire by asking questions such as:

Is there any member who has been involved in a traffic accident?  
How did it feel?

Is there any member who has swerved off the road? How did it feel?

Sergeant Lanny was not the driver of the vehicle. If the military judge instructed you that the prosecution must prove beyond a reasonable doubt that SGT Lanny was the proximate cause of the

damage to government and German property, could you follow that instruction? (The military judge then read the instruction).

If the military judge instructs you that the defense of accident is a complete defense to the allegations regarding damage to government and German property, could you follow that instruction? (The military judge then read the instruction).

Is there any member who has had a friend, subordinate, neighbor, or family member who has caused a traffic accident?

Is there any member who has had a friend, subordinate, neighbor, or family member who has been accused of covering up the cause of a traffic accident?

Is there any member who has served on a military or civilian jury that decided a case involving allegations that someone caused a traffic accident?

Is there any member who has served on a military or civilian jury that decided a case involving allegations that someone covered up the cause of a traffic accident?

Is there any member who has referred court-martial charges alleging that someone caused or covered up the cause of a traffic accident?

Is there any member who has forwarded with recommendations charges alleging that someone caused or covered up the cause of a traffic accident?

Is there any member who has preferred court-martial charges alleging that someone caused or covered up the cause of a traffic accident?

Is there any member who has served as a summary court-martial officer in a case where someone was alleged to have caused or covered up the cause of a traffic accident?

Is there any member who has administered nonjudicial punishment for a soldier accused of causing or covering up the cause of a traffic accident?

Is there any member who has done an *Army Regulation 15-6* investigation on a traffic accident?

As it turned out, all members had been involved in investigating at least one traffic accident and had a relative or close friend that had been involved in an accident. None of the members had ever seen a traffic accident case that did not involve drugs or alcohol disposed of beyond the non-judicial punishment level.

The defense opened its case by stating:

The evidence will show that SGT Lanny is a top-notch duty performer. He is a motivated soldier and a dedicated noncommissioned officer. The charges against SGT Lanny grow from a one time display of poor judgment that was completely outside of SGT Lanny's character.

Private Brown was a brand new driver who had never worked with SGT Lanny before. She was his driver during an exercise where military police would go ahead of convoys, performing a reconnaissance mission, to see if the large tracked vehicles could get through. To do this for several units at the same time, the MPs would need to pass or "leap-frog" past convoys. Because the roads were narrow, and the tracked vehicles in the convoys and the HMMWVs the MPs drove were wide, MPs would need to pass using the shoulder of the road. You will hear testimony from SGT Lanny that he trained his drivers to safely leapfrog convoys, by having them practice driving on the shoulders or edges of the road when no convoys were around.

You might think this is an easy or clear-cut case. Maybe it would be easy to brief, or to do a report of survey on, or even write a bad NCOER or a letter of reprimand. But, in this setting—a court-martial—this is not an easy case. The government must bring evidence to court to prove SGT Lanny committed a crime under the Uniform Code of Military Justice. Evidence may conflict. It may raise issues in your mind. The defense believes the evidence will raise issues about:

What was the true cause of the accident? An omission by SGT Lanny or some other cause—like hitting a culvert hidden in high grass?

If there was an omission, was it truly willful, or simply an honest mistake or misjudgment?

Why did PVT Black and SGT Lanny try to hit the road marker in the first place? Were they lawfully hitting these poles in the course of their duties?

Did SGT Lanny and PVT Black damage any of these road markers? And, if so, did they specifically intend to cause damage?

At the scene of the accident did SGT Lanny really attempt to influence PVT Black's statement, or did PVT Black do this on her own?

If SGT Lanny did try to influence PVT Black's statement, what were his goals or intent in doing so?

Now, the facts are clear in some areas. This was a one-vehicle accident. A HMMWV went into a ditch. Private Black was the driver and SGT Lanny was the vehicle commander. This accident happened at low-speed. There were no significant injuries to anyone. This is not a DUI case; there was no alcohol or drugs involved in the accident.

In other areas, the facts are not as clear. Did SGT Lanny tell PVT Black to hit the pole? What caused the HMMWV to turn over? How did SGT Lanny's initial talk with SFC Tomy snowball into an investigation? Ultimately, what charges can the prosecution prove to you, the members, beyond any reasonable doubt?

The defense did not argue for jury nullification in its closing argument, choosing instead to focus on burdens of proof and the technicalities of the law. Sergeant Lanny was convicted of all charges and specifications except willful damage to military property of more than \$100 and willful and wrongful damage to German property of less than \$100. For the latter two offenses, SGT Lanny was convicted of the lesser-included offenses of

suffering military property to be damaged through neglect and attempted damage of German property.

The defense argued for a very lenient sentence, stating:

Sergeant Lanny is a good soldier. You know he is a good soldier because his driver, PVT Black, his peers, SGT Rolex and SGT Heinz, and his supervisors, SFC Jack and CPT Jefferson, all told you so. You will also have before you, in your deliberations, SGT Lanny's NCOER, his APFT scorecards, his weapons qualification records, and his awards. With these documents, you will be able to see for yourselves what a truly outstanding soldier SGT Lanny has been—and can continue to be.

Sergeant Lanny has never been in trouble before. He has never been offered nonjudicial punishment. He has not even had any negative counseling during his entire time on active duty. And remember, the military judge has instructed you that you can take into consideration the fact that Sergeant Lanny's multiple charges grew out of a single transaction.

Sergeant Lanny has extremely high rehabilitative potential. Now, he did choose to place the burden of proof on the trial counsel to prove the elements of each and every offense he was alleged to have committed. But, he did not B.S. this court. He took the stand, swore to tell the truth, and honestly told you what happened. Just now—in sentencing—he gave a statement and told you how sorry he is. Sergeant Lanny loves the Army. He wants to be retained and continue to serve his country.

Sergeant Lanny had the honesty and courage to admit his errors. Early in the investigation, he voluntarily waived his rights and confessed his wrongdoing to his platoon leader. At his first opportunity he apologized to his company commander, CPT Jefferson. It was at about this time he was told by his first sergeant that he would get a field-grade article 15 for the incident. Sergeant Lanny told you how he was planning on accepting this article 15 and wanted to soldier his way back into the good graces of the members of his unit.

To a large extent, SGT Lanny has already been punished for his wrongdoing. He told you about the shame he feels. He con-

fessed to his platoon later on the 30th of September, but did not have his case resolved until today, the 1st of March. For SGT Lanny, this meant six full months of uncertainty. We can all remember how it felt to cross your mother and hear her say, “Wait ‘till your Dad gets home.” Sergeant Lanny has had to wait for six months for Dad to come home! He has had to deal with his shame and that horrible “wait ‘till Dad gets home” feeling for six whole months!

A report of survey has already been completed. Sergeant Lanny and PVT Black have been held jointly liable for the loss of \$1451 to the U.S. Army. So, as far as financial loss to the government is concerned, it has already been addressed.

You heard both SFC Jack and CPT Jefferson talk about the impact of a federal criminal conviction on a military police officer. The bottom-line is simple—after a conviction, they can no longer serve in that capacity.

Then, there is the basic issue of fairness. Other noncommissioned officers in the company intentionally hit German road markers. Sergeant Rolex and SGT Sam both told you they also trained their drivers by instructing them to hit markers. Yet, they were never prosecuted in a trial by court-martial. Private Black, SGT Lanny’s driver, told you she willingly hit these road markers. Yet, she too was never prosecuted in a trial by court-martial. In fact, all three—SGT Rolex, SGT Sam, and PVT Black—received no punishment at all!

In his unsworn statement, SGT Lanny told you he knows he did wrong and that he would have willingly accepted an article 15 or a summary court-martial. He told you he knew a federal criminal conviction would strip him of his ability to serve as a military police officer, and that his deepest desire is to continue to serve. First Sergeant Nuk told you this was a consideration when he first recommended a field-grade article 15. Both the first sergeant and CPT Jefferson tried to keep this case within the unit rather than sending it to court-martial.

What is society’s interest in this case? Serving in Bosnia, we all learned that under the rules of engagement you only use the amount of force necessary to accomplish the mission. Well, the

military justice system is just like the rules of engagement. We only use the amount of force or punishment necessary to do justice!

Society generally recognizes five reasons to punish. First, to rehabilitate the accused. As we discussed earlier, SGT Lanny's rehabilitative potential is very, very high. Second, to punish the wrongdoer. Here, SGT Lanny has already been punished by the shame and uncertainty he felt in the six months leading up to this trial. Due to the conviction alone, he will also face the harsh punishment of being unable to serve as a military police officer. Simply put, he has been punished enough by the conviction. The third reason to punish is to protect society. This is why we build jails and prisons. We put murderers, rapists, and others who injure people in jail in order to protect the rest of us. No one needs to be protected from SGT Lanny. There is no need in this case to consider confinement. The fourth reason we punish soldiers who violate the UCMJ is to maintain good order and discipline. But, SGT Lanny was, both before and after the accident, a credit to his unit and the profession of arms. The HMMWV accident and subsequent misconduct grew out of a single transaction that in no way reflects SGT Lanny's normal good character. If his conduct was truly prejudicial to good order and discipline, then why did PVT Black, SGT Rolex and SGT Sam—members of the unit who also admitted to intentionally hitting road markers—not get disciplined in any way, shape, or form? Finally, the fifth reason society punishes wrongdoing is to deter similar acts in the future, by both SGT Lanny and others who might know of his misconduct. You heard SGT Lanny's testimony, and can judge for yourselves, but I think it's fair to say there is no danger of SGT Lanny ever doing anything like this again. Furthermore, it's safe to assume SGTs Rolex and Sam, PVT Black, and all the other members of SGT Lanny's company will not intentionally hit road markers in the future. As such, there is no need to punish SGT Lanny in order to discourage this type of conduct in the future.

When you go back into your closed, secret deliberations, please take the time to read and consider SGT Lanny's good soldier packet. The defense asks you to consider retaining SGT Lanny in the United States Army; to impose a punishment at the unit rather than confining him; to limit any reduction in rank to

rank of Specialist, not a complete reduction to the rank of private; and to not take any pay or allowances from him because money will be taken from him as part of the report of survey that has already addressed the government loss in this case.

The panel sentenced SGT Lanny to be reprimanded and reduced to the grade of specialist (E-4).