



The Third Air Force Center of Litigation Excellence presents ...

THE PERFECT PROOF

Every case needs a Proof Analysis. But putting a thorough and complete Proof Analysis together, one that sets the case for success if court-martial is the ultimate disposition and even if it is not, can be a chore, no doubt. But investing the time at the outset pays huge dividends as you grind forward towards the ultimate goal of every JAG – litigating at court-martial. So a team of experienced litigators in the Third Air Force family, Reserve and Active Duty litigators with hundreds of courts-martial under their belts, took the best Proof Analysis we could find and then spent a great deal of time perfecting it and creating a Template for you. Here's why ...

WHY WE PROOF: What is the key to “victory” in a court-martial? According to the *Compendium of Litigation Experience: A Litigator's How-To Guide to Litigation* [www.the-cole.com], “Mastery of the facts and evidence is the key to victory.” 100%. You are not going to master the facts if you do not know them and you will not know the facts if you do not invest the time now to dive as thoroughly as possible into them. A summary is not sufficient. A cut-and-paste from the OSI Report of Investigation narrative is not sufficient (and likely inaccurate). A paragraph summarizing what every witness has said, in no order and no narrative flow, is not sufficient. You need to invest the time now, and it will be an investment, to scrub all the evidence and put it into a coherent narrative that tells the story of the case. Then you take that story and apply it to the most plausible potential charges and by following the rest of the guidance in the attached as to various aspects of a complete Proof you ensure that you apply the correct elements, definitions, and specification language to those detailed facts. With that early investment, you will have a better sense of where the case is likely headed in terms of disposition and where to focus your and the investigator's efforts.

Once the narrative is done and you have determined the most plausible potential charges, completing the rest of the Proof Analysis becomes easy--you just reference in summary form the facts from the detailed Case Narrative that are relevant to a particular element. Every fact that becomes part of the boxes in the Elements analysis should be located in the narrative--you should be able to cut-and-paste from the Case Narrative into a box (though you will just want to summarize in the boxes). The benefit of this practice is comprehensible elements boxes that at a glance provide the key pieces of evidence supporting every element, which keys subsequent reviewers in to what is important and what the particular challenges of proving the case may be. The detailed Case Narrative also serves as a basis for the factual section of motions/responses, can be cut-and-pasted into a Sexual Assault Litigation Review if that is the disposition, and brings subsequent trial counsel and eventually senior/circuit trial counsel up to speed quickly and effectively. And by following the template as you proof the case, you are ready to push out quickly with required notices, corraling all the documentary and physical evidence you will need to support your case, and will have a long list of witnesses for your trial team to prepare for trial if that is the disposition. Doing all this, in a comprehensive Proof Analysis is also important for your professional reputation--though it does not happen in every case, often senior JAGs at HHQ will ask to review a proof analysis in the face of inquiries from Congress, media, Inspector Generals, and other stakeholders to which the JAGC must be responsive. A sloppy, incomprehensible proof analysis will not reflect well on your professionalism or reflect the seriousness of our investment in all our cases, but particularly those involving sex crimes and crimes of domestic violence.

TOP ISSUES: While we have your attention, we review every Proof Analysis generated in Third Air Force (and as you know we have stepped in to draft them for you on numerous occasions, **The Helpful NAF™**) and we tend to see the same defects in some that come our way. So in addition to all the tips in the attached, a few areas for improvement:

#1 [far and away]. If a penis penetrates a vulva, or mouth, or anus, we pretty much know the intent, you DO NOT need to allege “with intent to gratify sexual desire.” The model specification is difficult to follow, but if you have copied the definition of “sexual act” into your Proof Analysis as we suggest

in the attached it is obvious that you only need to establish that specific intent when the offense involves contact or is something that does not necessarily have a sexual intent (like a butt slap). If I had a dollar for every time I deleted the “intent to gratify” ...

#2. And then if I had a dollar for every time the specific-intent element for a sexual contact, non-penetrative, case is proofed as “with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of X.” Nope, it is intent not intents. Pick one. It is usually going to be “with intent to gratify his sexual desire,” but pick the one that the evidence supports. If the evidence supports different intents for different contacts, draft separate specifications.

#3. The Victim’s post-incident statements to “outcry” witnesses are initially hearsay and while they may come in to show effect on the listener which is of dubious usefulness, they are not initially admissible to prove the Art 120 elements. Now once the Defense attacks the Victim’s credibility, these witnesses can testify as to those statements and they can be treated as substantive evidence: MRE 801(d)(1)—prior consistent statements.

#4. Trying to get around this problem by reliance on excited utterance or present-sense impression (MRE 801(2) and (4)) is misplaced...the foundation for those exceptions will rarely be met in a typical sexual assault—think about it, analyze it, don’t count on it.

#5. Except in rare circumstances, do not plan to prove your case or parts of it (particularly that there was a sexual act) by reliance on the Accused’s statements to OSI. The rule of completeness and all that will not allow you to take the “we had sex, my penis penetrated her vulva” statement without the “but it was totally consensual, she even signed a contract” follow-on becoming admissible.

#6. Do not forget that Rape by Force is likely implicated in many non-consent (vice intoxic) sexual assault cases ... body weight, holding arms, grabbing/pinning all implicate the force element. Sexual Assault by lack of consent is not a LIO of Rape by Force, but they are not mutually exclusive either, so this is the rare time where charging IN THE ALTERNATIVE may be appropriate...at least analyze and proof rape.

#7. Also do not forget that the MCM is almost always outdated shortly after it is printed—as of today (August 2021) you will not find Article 128b and Article 117a in the Punitive Articles section—they are in the Appendix 2. And it will get worse come passage of the next NDAA as likely there will be other changes to the punitive articles that will not show up at all in the eMCM (the eBB is updated more often).

Just a few, lots of additional guidance in the attached. The facts, number of victims, and number of charges in the attached **3 AF COLE Template Proof Analysis Example**¹ resulted in a lengthy document. We wanted to give you a lengthy example so you could see a particularly good one (and give us room for comments). You undoubtedly will have cases that result in shorter documents, but that will not always be the case. Regardless, following the structure of the Template, and investing the time early in a case, will set you up for success as the case moves forward to disposition.

¹ There is also a blank Template in Microsoft Word format so you do not have to recreate the wheel. If you do not have it, feel free to reach out to 3AF.Ja@us.af.mil or Brian.Thompson.3@us.af.mil and we will get it to you.

United States v. Amn [REDACTED]

[REDACTED]th Security Forces Squadron ([REDACTED]), [REDACTED]

CTC/TC: Pending/Capt Smith
CDC/ADC: Pending/Capt Jones
SVCs: Capt Blue (DW); Capt Red (SH)

Last Updated: 2 June 2021
Forum: SPCM / GCM
Drafter: Capt Green

These cases are about real people. Not a requirement but using the Snip&Sketch tool to drop photos of the Victims, Accused, and maybe primary witnesses in the case gives that visual reminder that these case are more than just document files. Plus it forces you to learn how to use the S&S tool which is important for preparing trial-level exhibits and demonstrative aids.



Don't jump right into the event, remember the "before" info. Who are the players, what is/was the relationship. This relationship history in sex-assault cases is always going to be important and adding it upfront gives better context to what comes next. Also, that may not be "good" evidence as to prosecution – so what, the focus here is on putting together a Proof that is comprehensive and allows decision-making moving forward

Case Narrative: In November 2019, the Accused and Amn [REDACTED] (DW) were Security Force members with the [REDACTED]th Security Forces Squadron ([REDACTED] SFS). They met around 2 Nov 19 when a mutual friend (AIC [REDACTED]) introduced them outside the BX. [Vol3:68] Besides a brief encounter at "[REDACTED] Night" during that week (during which in passing the Accused handed her a drink), the Accused and DW had not had any social interaction prior to 9 Nov 19, and in fact had not even had any extended conversations. [Disk1, 17:30-20:30, Vol3:68] During the events described below, the Accused was married to another [REDACTED] SFS member who was deployed in November 2019. [Vol3:21]

On 9 Nov 19, a group of [REDACTED] SFS members that including the Accused and DW, as well as AIC [REDACTED], AIC [REDACTED], and AIC [REDACTED], gathered at Accused's residence in [REDACTED] before heading to a nightclub in [REDACTED] ([REDACTED]) for the evening, with the Accused as the designated driver for DW and AIC [REDACTED]. [D1, 20:30-21:20; 59:45] Though DW's testimony about the amount of alcohol she consumed that night is not consistent, and though alcohol consumption does not appear to have played a meaningful part of the subsequent assault, it appears DW consumed some alcohol before the group left for the nightclub. [Vol2:60]

After arriving at the nightclub around 2345 hours, there was minimal interaction between Accused and DW as Accused spent most of the evening attempting to hook up with AIC [REDACTED], who had just met that night; the two danced closely and kissed, but she refused when he insisted she come home with him that night. When the group later left the bar, AIC [REDACTED]'s wingman took steps to separate them (into separate cars) so AIC [REDACTED] could avoid the Accused's continued efforts to get her to come home with him. [Vol2:60, 75-79] Meanwhile, during their time at the nightclub, DW drank a mixed drink (Pineapple Ciroq) and a short time later a shot of Hennessy. [D1, 21:30-21:55]¹ The group left the nightclub at approximately 0200 hours with Accused driving DW and AIC [REDACTED]; after paying for the parking fee DW spent the drive back to the Accused's home sleeping in the front seat of the Accused's car. [D1, 22:15-22:45, Vol2:61] When they arrived at the Accused's home, the Accused went inside

Every fact in the Case Narrative should cite to some source. Create cites that are intuitive so subsequent reviewers can know where to look for the source document. Here the main sources are the Victim Interview [Disk1 & 2=D1&2] as well as the OSI Index [Volume 2, Entry 61=Vol2:61]. As you will use this detailed Case Narrative to cut-and-paste into other documents, having the cite to the source is an invaluable timesaver – nothing worse than having a killer fact detailed but no cite to where it came from and subsequent reviewers (or yourself) have to recreate the wheel and find that needle in the haystack. This is particularly true for your MRE 304(d)(1) notices, which have a special palce in this template Proof (below).

¹ AIC [REDACTED] later told OSI that DW consumed 4-5 alcoholic drinks during the relatively short time they were in the nightclub. [Vol2:60]

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[REDACTED]th Security Forces Squadron ([REDACTED]), [REDACTED]

while A1C [REDACTED] and DW went to their respective cars to drive home. [D1, 22:55] A1C [REDACTED] drove away but before DW did she sat in her car setting her GPS to drive home; while doing that the Accused sent her a message on Snapchat asking where she was going. [D1, 23:20; D2, 10:37]² She replied that she was going home. [D1, 23:32] The Accused responded “no you’re not” and about 10 second later approached the car, opened the door (which scared DW), reached for the keys, turned the car off, and then took the keys and walked back towards his house. [D1, 23:35-24:00] DW stepped out of the car, asked him for the keys back and the Accused replied: “no, you’re about to get some dick.” [D1, 24:04; D2, 10:55] DW replied, “No, I’m not, stop playing with me,” but the Accused ignored her and walked back inside his house. [D1, 24:05-20:15]



DW followed the Accused into his house and to his bedroom to retrieve her keys, but when she got there the Accused was laying on the bed just wearing his boxer shorts, and when she asked for her keys told DW that she had had a drink at the nightclub and did not need to be driving. [D1, 24:10-24:57] She relented, agreeing that she was too tired to drive home, decided to stay and sleep for two hours, and then head home. But she told the Accused that nothing was going to happen, that they were not going to have sex and warned him not to touch her. [D1, 24:58-25:23] The Accused responded, “We’ll see about that.” [D1, 25:23] She told him “I’m not joking with you,” to which he responded “Okay.” [D1, 25:35] With that, she went to the bathroom to clean her face/remove her makeup, removed her jean jacket (still wearing a sports bra) and jean-type joggers (remaining in her panties), and returned to the room and placed a pillow down the center of the bed as a barrier. She told the Accused not to cross over the pillow barrier; he responded by throwing the pillow(s) on the floor but she retrieved it (or them), put it back and again told him not to cross the barrier. [D1, 25:35-26:05; 53:05-53:22; D2, 6:30]. DW then climbed into bed (under the covers) on the edge of the king-sized bed. [D1, 53:45].

In the bed, the Accused hovered over her, pulled her towards the end of the bed, and then started to try to remove her panties. [D1, 26:05-26:41] DW tried to stop him and they engaged in a “tug of war”--though DW told him repeatedly to stop, that she was “serious,” he “thought it was funny” and told her to “stop playing.” [D1, 26:45-26:51] The Accused then became more aggressive (in a forceful way), pulled off her panties, threw them to the floor, and centered himself between her legs. [D1, 26:55-27:07; 58:00] He then quickly removed (or pulled own) his underwear and “with no hesitation” forcibly penetrated her vagina with his penis. [D1, 27:07-27:21; 56:30] DW repeatedly told him to stop, but he continued, repeatedly telling her to wait until he ejaculated (“wait until I cum,” “I haven’t come yet,” “hold on one second”). [D1, 27:21-27:59] The Accused also tried to kiss her, but she pushed his face away and after about a minute he stopped and told her, “Damn, can you come already.” [D1, 28:30-29:02] The Accused then laid on his back and told her to get on top of him; when she did not he grabbed her by the hips and forced her on top of him, again penetrating her vagina with his penis while he held onto her hips to prevent her from moving off. [D1, 29:00-29:55] At that point DW gave up trying to resist because “there really was no point.” [D1, 30:05] The Accused then stopped and told her to lay on her stomach and arch her back [D1, 30:20] She complied by moving onto her stomach but when he asked her to arch her back she said “no,” so he pushed her lower back down with one hand and grabbed her neck with the other and penetrated her vagina with his penis again. [D1, 30:20-31:15] The Accused did not wear a condom and eventually ejaculated inside of her. [D1, 31:20] She confronted him about why he did that and he replied that he thought she was on birth control; she responded “You didn’t even ask me if I wanted to have sex how would you even know if I was on birth control.” [D1, 31:45-32:06]

² During a SANE examination the next day, DW provided generally the same sequence of events and details as she later did in her 19 Nov 19 interview with OSI. The differences are relatively minor; she stated that she stayed parked there in her car to warm it up was it was really cold and also relayed the sequence as to the “no you’re about to get some dick” comment differently, stating that it was part of the Snapchat messaging. Vol 1:26-27.

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DW went to the bathroom where she cleaned herself up and then cried for about 20 minutes. [D1, 32:20-33:00; D2, 19:30] She then went back to the bedroom, where the Accused was asleep, found her clothes and her keys (which were sitting on the nightstand), and drove home. [D1, 33:00-33:40] When the Accused messaged her later, she asked him to get her Plan-B birth control but he refused. [D1, 34:00-34:40]

A few hours later (0800 hours morning of 10 Nov 19) DW texted AIC [REDACTED], but the two did not speak until 1100 hours. [Vol3:68] During that 1100 hours conversation, DW told her what had happened and the two agreed that DW should go to the ER, which they did, where she made an unrestricted report of sexual assault. [D2, 21:30-22:45, Vol2:61-62, Vol3:68]

OSI attempted to interview the Accused on 11 Nov 19, but he invoked his Article 31 rights and refused to make any statements. [Vol1:52]. A couple months after the event, however, AIC [REDACTED] asked the Accused what had happened that night and he agreed he and DW had had sex, but asserted it was consensual and conceded that DW had asked him to secure her Plan-B but he refused. [Vol3:68-69]. On 12 Nov 19, OSI secured search authorization for the Accused's home, executed it and seized bedding, clothes, and towels; via authorization, the Accused was subject to a SAFE examination as well and OSI sent samples from him and DW (and a recent, consensual, sexual partner of DW) to USACIL for DNA testing--that testing returned some results consistent with sexual contact between the Accused and DW. [Vol 1:47, 63-64; Vol 2:37-39; Vol3:60].

Victim #2 -- SH



A few weeks later (notably after the Accused was aware he was under investigation for sexual assault of DW), the Accused and [REDACTED] (SH), a [REDACTED] National, matched twice on Tinder; he quickly added her to his Snapchat contacts and they agreed to meet for sexual contact, to "give him head" (but not sexual intercourse as she told him she "was on her period"). [Int, 4:30-5:00, 9:48-11:45, 54:15] On likely 30 Nov 19 [a Saturday], at approximately 0600 hours the Accused messaged SH to meet up and at around 0700 hours the Accused picked up SH and her female friend ([REDACTED]) at [REDACTED]'s flat and the three drove to the Accused's home. [Int, 4:30-5:00, 13:20, 16:40, 55:00] Though the expectation was that the three would engage in some sort of sexual activity at the Accused's home, "basically a threesome" but mainly with [REDACTED] and the Accused, [REDACTED] "got a bad vibe" on the way and asked the Accused to take her back to her flat. [Int, 13:45, 55:16-17:15] [REDACTED] and the Accused had no communication before the pickup] When the group arrived at the Accused's home, before returning [REDACTED] to her flat, SH went inside to use the restroom; in the house, she consensually performed oral sex on the Accused for 10 seconds before the two of them returned to the Accused's car to drive [REDACTED] home and then the two of them planned to return to the Accused's home.³ [Int, 13:45, 17:15]

When they arrived back at the Accused house, he entered first with SH following behind. [Int, 20:00] When SH stepped into the house, the Accused turn and hit her in the face with his open hand, she told him "don't hit me," but he slapped her two more times; she hit him back and then he hit her again "really, really hard," hard enough to make her "dizzy." [Int, 5:57; 20:00-21:40] At that point she was "really scared" and "froze." [Int, 21:40-21:55] The Accused then "dragged" her to the sofa, laid her on her back, held her head with his fingers interlaced behind her head, and put his penis into her mouth; though SH seems to say this started consensually, the Accused became more aggressive (rough, choking her); this went on for "ages" (maybe 30 minutes) with her trying to push him off (weakly on his legs and his stomach) and during which she had difficulty breathing and felt like she was going to pass out. [Int, 22:00-25:45] This

³ On the drive back to [REDACTED]'s flat, the Accused accidentally drove his car into a ditch, where it was stuck. Eventually people passing by were able to help un-stuck the Accused's car and he and SH returned to his residence; during the effort to unstuck his car someone picked [REDACTED] up and took her home. [Int, 18:20-19:32]

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continued until he ejaculated. [Int, 27:30-27:55] After the Accused left the room momentarily (to his bedroom), SH stood up, but the Accused returned and handcuffed her hands behind her back and pushed her back down of the sofa, all the time with her asking him to “get them off me, please take them off, let me go.” [Int, 7:00, 28:00, 34:00] He laughed at her, claimed he did not have the keys, and spent time texting someone on Tender while she sat on the sofa restrained by the handcuffs, but eventually the Accused went to his bedroom to retrieve keys, and returned and took them off. [Int, 28:25, 33:00-34:30] SH asked him to take her home, but he refused saying he was tired and would take her later; SH had to work later that day so told the Accused she did not want to be around him and went into the bedroom to lie down. [Int, 36:00]

A few minutes later (perhaps 20) the Accused came to the bedroom, stood in the doorway and said “I want to fuck you now.” [Int, 7:00-7:30, 36:17] She refused (“no you’re not”), reminding him that she was on her period. [Int, 36:30] The Accused then said he wanted to have anal sex with her, but she again declined and they went back and forth maybe 10 times with him saying they were going to and her refusing (“yeah we are, no we’re not”). [Int, 7:30-45:45, 1:00:00] Nevertheless, he came to the side of the bed where she was laying on her side (more towards her stomach), pulled her leggings down to mid-thigh and penetrated her anus; he did not wear a condom or use any lubrication and the anal sex was very painful for SH--she repeatedly begged him to stop but he initially ignored her and forcefully (“really rough, hard”) continued to penetrate her. [Int, 37:30-38:00; 46:00] After some time, SH believes because she was crying from the pain, the Accused stopped, told her he was getting some lubrication and left the room to do so; she remained in the bed, frozen/“in pieces.” [Int, 47:30-48:15] The Accused returned with the lubricant, applied it, and continued to penetrate her anus until he ejaculated. [Int, 48:00-49:00] After he moved off of her, SH got up and shouted at him “to take [her] home now.” [Int, 48:40-48:55]⁴ The Accused did not speak to her, but he did drive her home telling her to “shut up” when she tried to talk to him and blowing smoke in her face from his vape pen. [Int, 48:55-49:50, 56:30-56:45] He dropped her off at home at approximately 1230 hours. [Int, 49:45-50:45] About two hours later she messaged her friend A1C [REDACTED] (CES) and told him things had gone “horribly”;⁵ they spoke via phone and she related the details of that morning; he encouraged her to report the assault to authorities, which she did not. [Int, 50:45-51:24; Vol 1A:4] Around the same time she messaged her sister and reported the same details to her. [Int, 51:30] After the authorities called her during the week after the assault, she also told her mother what had happened (who told her father), and later told a new boyfriend she had started dating in early 2020. [Int, 51:30-53:00] When she got home on [REDACTED], she noted (and documented) bruising on her legs which she attributed to the assault. [Int, 59:30]

Soon after speaking with SH, A1C [REDACTED] reported the assault to his chain of command, who eventually forwarded it to OSI and local law enforcement. When local law enforcement contacted SH during the week after the Saturday assault, she did not want to pursue criminal charges. [Vol1A:14-15] But she did describe the assaults generally as described above (though said there was no request for anal sex before that assault occurred), noted that she had been drinking before but “knew what she was doing” and noting her reluctance to report flowed from blaming herself from placing herself in that position and that she “is currently fighting for custody of her 6 yr old daughter and is worried that this will go against her as the father of her daughter will make an issue about her drinking and going with a man.” [Vol1A:15]. She eventually did agree to speak with agents of OSI, and repeated the series of events detailed above.

⁴ Earlier in the interview SH said the Accused had slept for some time after ejaculating and when he woke she asked him to take her home. [Int, 07:30-8:05] She also noted at the beginning of the interview that her memory of events is somewhat “foggy.”

⁵ A1C [REDACTED]’s recollection of events as described by SH essentially matches the version she described to OSI. He also notes that SH told him she had been drinking prior to meeting with the Accused on 30 Nov 19, but “was coherent.” Vol 1A:7. He also told OSI investigators that she was not sure to do about the assault as she was “worried about it effecting custody with her daughter.” Vol 1A:7. During her OSI interview, SH briefly mentioned she was involved in a court case “with her ex.” [Int, 1:09:20]

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[REDACTED]th Security Forces Squadron ([REDACTED]), [REDACTED]

Proposed Draft Charges:

All Charges and Specs need to go upfront so you and subsequent reviewers can see them in "flyer" form and get a sense if they make sense and whether they tell the story of the case standing alone. Do this last; cut-and-paste from the Elements Analysis below.

Charge I – SEXUAL ASSAULT, Article 120, UCMJ

Specification 1 [Sexual Assault, Article 120(b)(2)(A)]: In that AIRMAN [REDACTED], United States Air Force, [REDACTED]th Security Forces Squadron, [REDACTED] [REDACTED], did, at or near [REDACTED], on or about 9 November 2019, commit a sexual act upon Airman D [REDACTED] W [REDACTED], by penetrating her vulva with his penis, without her consent.

Specification 2 [Sexual Assault, Article 120(b)(2)(A)]: In that AIRMAN [REDACTED], United States Air Force, [REDACTED]th Security Forces Squadron, [REDACTED] [REDACTED], did, at or near [REDACTED], on or about 30 November 2019, commit a sexual act upon Ms. S [REDACTED] H [REDACTED], by penetrating her mouth with his penis, without her consent.

Specification 3 [Sexual Assault, Article 120(b)(2)(A)]: In that AIRMAN [REDACTED], United States Air Force, [REDACTED]th Security Forces Squadron, [REDACTED] [REDACTED], did, at or near [REDACTED], on or about 30 November 2019, commit a sexual act upon Ms. S [REDACTED] H [REDACTED], by penetrating her anus with his penis, without her consent.

If there are different mechanisms for committing the offense (particularly Art 120 and 128/128b offenses), important for you and subsequent reviewers to know specifically what mechanism you are alleging—that will guide choice of model spec, elements, max punishment. Particularly in the constantly changing environment of sexual offenses, precision in noting what version of the Article is the mechanism of the offense is crucial to making sure you are using the "right" version of the MCM.

Charge II – KIDNAPPING, Article 125, UCMJ⁶

Specification: In that AIRMAN [REDACTED], United States Air Force, [REDACTED]th Security Forces Squadron, [REDACTED] [REDACTED], did, at or near [REDACTED], on or about 30 November 2019, wrongfully confine and hold Ms. S [REDACTED] H [REDACTED] against her will.

Charge III – ASSAULT CONSUMMATED BY BATTERY, Article 128

Specification [Assault Consummated by Battery, Article 128(a)(3)]: In that AIRMAN [REDACTED], United States Air Force, [REDACTED]th Security Forces Squadron, [REDACTED] [REDACTED], did, at or near [REDACTED], on or about 30 November 2019, unlawfully strike Ms. S [REDACTED] H [REDACTED] in the face with his hand.

[NOTE: No charges for adultery, kidnapping of DW (by taking her keys), the troublesome interaction with high school girls, indecent recording (maybe MRE 413 but unlikely) – can discuss.]

⁶ This is for the handcuffs, could also be charged as an Article 128 assault, but Kidnapping improves the narrative. Again, discussion topic.

United States v. Amn [REDACTED]

[REDACTED]th Security Forces Squadron ([REDACTED]), [REDACTED]

Collection Point – Notices/Witnesses/Evidence Lists:

This should be self-explanatory, but just in case: once you have completed, or while you are completing, the detailed Case Narrative, filling out these charts forces you to start thinking strategically about trial and what you are going to need, how heavy of a lift the case is going to be in terms of the number of witnesses, and where you have evidentiary gaps. It also collects in one location the information you will need mechanically to move the case forward, particularly if it is your practice (hint: it should be) to start providing MRE Notices at preferral. As with most of the Proof Analysis, investing the time in this part now makes it easy to cut-and-paste this information into the Trial Plan document.

POTENTIAL WITNESSES				
<i>GOVERNMENT</i>				
Name	Role/Relevance	Associated Exhibits	Notes	Contact
<i>DEFENSE</i>				
Name	Role/Relevance	Associated Exhibits	Notes	Contact
<i>POTENTIAL EXPERTS</i>				
Field	Purpose		Notes	Potential Expert

We have separated the charts but the preference is yours. Some like all this information in one place; others like to have the MRE Notice charts tied to each draft Specification (and then we suggest cut-n-pasting those into this central location). Obviously, as with all of this Template edit/reorganize in the way that works best for you and your bosses.

This is a good place to highlight whether the witness is likely to need immunity to testify, any *Brady* disclosure that needs to be made, any availability issues you are aware of, additional counsel (SVCs/ADCs).



United States v. Amn [REDACTED]

[REDACTED]th Security Forces Squadron ([REDACTED]), [REDACTED]

EVIDENCE LIST		
What/Where	Relevance	Foundation/Admissibility

Couple things here. Again, move this down to the area for each draft Specification if that works better for you; having a separate chart like this helps to unclutter the analysis blocks in the Evidentiary Issues sections for each draft Specification—you can note it in the block and then detail it here. This chart is focused on documentary/physical evidence, whereas the discussion of admissibility of testimonial evidence should be the focus of the Evidentiary Issues sections for each draft Specification. Having a separate chart like this is useful for members of your trial team as they collect the evidence/reproduce copies of the same. Thus knowing “Where” the evidence is current located is useful. Foundation is all about how you mechanically plan to get the piece of evidence before the court, and admissibility is about the Rule of Evidence that allows this. Collecting this evidence here is particularly useful as you put together your “Motion to Pre-Admit” evidence: <https://www.the-cole.com/wp-content/uploads/2020/11/xAppendix-B-Motion-To-Pre-Admit.pdf>

NOTICES – MRE 304(d)	
Statement [w/citation]	Context

Any time someone says “The Accused told me ...” BOOM, MRE 304(d). This should be an easy chart. You just cut-n-paste from the detailed Case Narrative, with citation, what the Accused said (thus you’ll know where the statement comes from), and the Context (which is who is relating the Accused’s statement and whatever context is necessary; e.g., On 1 Mar Acc and SSgt Green were at a bar discussing their sexual conquests and the Acc made this statement.”)

NOTICES – MRE 404(b)			
Crimes, Wrongs, or Other Acts.	MRE 404(b)(1) Purpose	Mechanism of Admission	Notes

Just a quick reminder that MRE 404(b) applies to more than just other criminal stuff, it is any other stuff that is relevant to one of the MRE 404(b)(1) purposes -- motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. That the Acc went to church on Sunday probably is not a crime, but may be relevant to his opportunity to rob the drug store next door. Be creative (ethically of course)

Always cut-n-paste the model spec you used. Hew closely, but not slavishly, to it. Obvious you want to get the spec "right" (all the elements) but it also needs to be readable (remember the "flyer" perspective noted above, needs to tell a story). So if you need to add a couple words to make it clearer what the Accused did, do it. Big one, if you have male and female and it is clear who is who, use pronouns (e.g., "without her consent" vice "without the consent of Amn Sarah Jean."). Good trick I use in editing my writing, whenever you see the word "of" you likely can make the whatever more readable by using a pronoun or a possessive.

Charge I – SEXUAL ASSAULT, Article 120, UCMJ

Specification 1 [Sexual Assault, Article 120(b)(2)(A)]: In that [redacted], United States Air Force, [redacted] Security Forces Squadron, [redacted] [redacted], did, at or near [redacted], on or about 9 November 2019, commit a sexual act upon Airman D [redacted] W [redacted], by penetrating her vulva with his penis, without her consent.

Model Spec – In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, commit a sexual act upon _____, by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus),] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit: _____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], without the consent of _____.

MCM, Appendix 12.

Max Punishment – Forfeiture of all pay and allowances, and confinement for 30 years. Mandatory minimum – Dismissal or dishonorable discharge.
Alt/LIO: See Footnote re: charging Rape in lieu (or as an alternative to) each of the sexual-assault specs // Evidence does not support LIO for straight Article 128 assault consummated by battery

MCM, Appendix 12A. And do a quick Lexis search as what is or is not a LIO is not always obvious and the MCM Appendix is not completely up to date.

ELEMENTS [DEFINITIONS]	EVIDENCE	EVIDENTIARY ISSUES	PRELIMINARY TRIAL PREP
Article 120b.(2)(d)	ETS: 1 Jul 2022	<p>Show your work—that you've pulled the correct elements. Adding it here requires you to look them up and lets subsequent reviewers know where you got the ones you used. DO NOT pull from the Electronic Benchbook, go to the source document (MCM) ... and then backtrack to the eBB to compare.</p>	
Jurisdictional Matters: Status/Location/Date			
1. That the Accused committed a sexual act on DW ⁷	A. DW will testify the Accused penetrated her vagina with his penis and ejaculated inside of her.	A. None. Personal knowledge. Typical Victim issues: At various times, DW has reportedly made minor inconsistent statements in the way she has retold events. <u>But she has been consistent on the major details in each retelling of the events. To the extent Defense attacks her inconsistencies, and suggests they are intentional, think of her statements to SANE, AIC [redacted], and OSI as admissible under MRE 801(d)(1)—prior consistent statements. SANE noted she was "tearful" during examination, potentially (to the extent needed and you'd much rather simply rely on her direct testimony at trial rather than having to rehab her with prior consistent statements), but be ready to argue her statements to SANE</u>	1. POC: Capt XXX -- ECD: XX XXX Have prior consistent statement witnesses (SANE, Maj [redacted]; AIC [redacted]; case agent) prepped. 2. POC: Capt XXX -- ECD: XX XXX Review MRE 801(d)(1), 802(2) an 802(4) for potential admissibility argue 3. POC: Capt XXX -- ECD: XX XXX Discuss DW's level of intoxication with witnesses (and DW) at nightclub that night—to defeat Defense argument that she just had drunken sex and has post-

These are matters you need to establish as well. They likely flow from the rest of the evidence, but does not hurt to break them out in their own section. And you cannot track ETS enough.

⁷ Article 120(g)(1): The term "sexual act" means— (A) the penetration, however slight, of the penis into the vulva or anus or mouth.

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[REDACTED]th Security Forces Squadron ([REDACTED]), [REDACTED]

<p>1. The fact that satisfies the element is a summary of info from the Case Narrative (don't need to repeat all the testimony on it). 2. Use A -> A, B -> B structure to list the specific pieces of evidence supporting the element and the corresponding evidentiary issues. 3. Combine the evidentiary issues that apply to the fact, as well as the argument in response to it, in this one block, no need to break it out into two blocks. If you do this, you will see where there are holes in your argument on the evidentiary issues and this will inform the next block, Trial Prep Tasks.</p>		<p>are admissible under MRE 803(2) and (4)—unlikely but have argument ready if needed.</p> <p>Also, her relative level of intoxication is unclear and will be an issue as to her memory of events and her actions, OSI interview did not develop this issue. <u>Her BAC was zero during the SANF exam, but that was hours after and there appears to be some issues with her sample collection. But this does not appear to be a major problem. But important to get a clear sense of her alcohol consumption as at least AIC [REDACTED] indicates it was more substantial than she says. Also, does not seem likely, but worth asking those who were there that night about the Accused's level of alcohol consumption.</u></p>	<p>hangover regret (or at least revolve inconsistency in DW and AIC [REDACTED]'s statements regarding alcohol consumption).</p> <p>4. POC: Capt XXX -- ECD: XX XXXX Have court-reporter (if you have one) prepare a transcript of the two victim recorded interviews. Though almost no chance you'd offer the video interviews (and thus the transcript), it will help cut down prep time as you prepare for trial, particularly with SH as her accent and low talking makes her difficult to understand. And though testimony at trial won't be verbatim from those interviews, it'll be close so you can use a transcript to block out demonstrative aids (e.g., for closing).</p>
	<p>B. Accused conceded to AIC [REDACTED] sometime after 9 Nov that he had sex with DW (which he characterized as consensual)</p> <p>C. DNA testing of sample obtained from the Accused, DW (and DW's previous consensual sexual partner) are consistent with sexual contact between DW and the Accused.</p>	<p>B. Admissible, MRE 801(d)(2), but would not plan on using. Allows him to argue he believed it was consensual without having to take the stand. That'll be the argument through defense's questions anyhow, but better to stay away from using this unless it is REALLY needed, that defense makes a plausible argument they did not even have sex. This is so unlikely as to not be a real concern, just keep it in mind.</p> <p>C. Again, given DW's expected testimony, not necessary to have DNA evidence that they had sex (if members are not convinced based on her testimony the case is lost no matter what the DNA says). Would not expect to intro this evidence and thus not request experts for it (or approve a defense request for it). The Accused's statement to AIC [REDACTED] is better alternative evidence to the sexual act than this DNA evidence, and do not want to have to use that either.</p>	<p>Footnote drop for terms of art in specifications, like "sexual act," "consent," "grievous bodily injury," are better than a list of them at some other place in the Proof Analysis. Keeping them close to the analysis helps orient you to what is important and helps subsequent reviewers from having to flip around to compare definition to the evidence you say fits the term of art/element.</p>
<p>2. The Accused did so without DW's consent⁸</p>	<p>A. DW will testify that she had no prior intimate or romantic relationship with the Accused, barely knew him, did not spend time with him at the nightclub, had no conversation with him on the ride back to his home (and no</p>	<p>A. None. Personal knowledge. Typical Victim issues as described above. Obvious challenge here is the likely mistake of fact as to consent defense, but here that is no obstacle to preferral and likely referral—it is a trial-level</p>	<p>1. POC: [REDACTED] Clarify w/witnesses (AIC [REDACTED] in particular) whether the Accused's reputation was known to DW. 2. POC: Capt XXX -- ECD: XX XXXX Prep witnesses (AIC [REDACTED] in</p>

⁸ Article 120(g)(7)(A), (C): The term "consent" means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent. ... All the surrounding circumstances are to be considered in determining whether a person gave consent.

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[REDACTED] th Security Forces Squadron ([REDACTED]), [REDACTED]

	<p>conversation about coming into his house for any purpose), specifically told him “no” when he suggested they were going to have sex both outside, inside the house, and as she was getting into the bed (and manifested that lack of consent by building the pillow barrier) when he suggested they were going to have sex, physically attempted to stop him from removing her panties, told him “no” while he was penetrating her (him asking to wait until he came in response), told him she would not straddle him, and refused to arch her back when he penetrated her from behind.</p> <p>B. AIC [REDACTED] can testify about how they met shortly before 9 Nov 19 and the lack of interaction she witnessed between the two of them at the Accused’s house prior to leaving, in the car on the way to the nightclub, at the nightclub, or on the drive home. [Similar for other witnesses present at those times]</p>	<p>issue.⁹ <u>There is enough here to raise the defense: DW was aware of the Accused’s intent to have sex w/her and still agreed to stay, sleep in his bed, and removed clothing before getting into bed. Would expect them to raise DW’s level of intoxication (given that AIC [REDACTED] notes a relatively large number of drinks and DW conceded in face of him telling her she should not drive because of her alcohol consumption that she should not drive and she agreed) as blurring her memory about actual specifics. Needs development, but defense may be able to intro testimony that DW knew of the Accused’s reputation as a “player” and that informed her decision to enter the house and join him in bed.</u></p> <p>B. Personal Knowledge/Observation: Given the likely mistake of fact defense, important to establish DW’s lack of interaction with the Accused during that night. <u>That the Accused was primarily focused on hooking up with AIC [REDACTED] and in the end was frustrated in those attempts (leaving DW as his last available target for that night). Interaction and statements to others about his interest in AIC [REDACTED] relevant to his intent in his interactions with DW outside and inside his home (that he wanted to have sex with her, not that he was concerned about her ability to drive). Getting into that allows you to develop your likely them that she was not a person to the Accused but just a target of opportunity, with the “not a person” theme flowing nicely into his treatment of SH,</u></p>	<p>particular) ready to talk about the Accused’s efforts towards AIC [REDACTED] that night and his negative reaction to putting in the effort and it going for naught w/her</p> <p>3. POC: Capt XXX -- ECD: XX XXX Start preparing a demonstrative slide that list all the evidence that undercuts a mistake of fact defense.</p> <p>4. POC: Capt XXX -- ECD: XX XXX Develop character for truthfulness witnesses for DW and character for untruthfulness witnesses for the Accused (which should not be hard, even though there is virtually no chance he’ll testify but better to be prepared)</p>
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⁹ Essentially, “mistake of fact as to consent” means the Accused held, as a result of ignorance or mistake, an incorrect belief that the other person consented to the sexual conduct as alleged. The ignorance or mistake must have existed in the mind of the Accused and must have been reasonable under all the circumstances. To be reasonable, the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person consented. See *United States v. Greaves*, 40 M.J. 432 (C.M.A. 1994); R.C.M. 916(j).

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[REDACTED]th Security Forces Squadron ([REDACTED]), [REDACTED]

Charge I

Specification 2 [Sexual Assault, Article 120(b)(2)(A)]: In that AIRMAN [REDACTED], United States Air Force, [REDACTED]th Security Forces Squadron, [REDACTED] did, at or near [REDACTED], on or about [REDACTED], [REDACTED] H [REDACTED], by penetrating her mouth with his penis, without her consent.

Model Spec – In that [REDACTED] (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction) [REDACTED], by [penetrating [REDACTED]'s (vulva) (anus) (mouth) with [REDACTED]'s penis] [causing contact between [REDACTED]'s (vulva) (penis) (anus) with ([REDACTED]'s body part) (an object) to wit: [REDACTED], with an intent to [REDACTED] desire of [REDACTED]]., without the consent of [REDACTED].

Max Punishment – Forfeiture of all pay and allowances, and confinement for 30 years. Max Ait/LIO:

This is a good place to add other big-picture stuff. Whatever you need to highlight, likely some legal/caselaw issue, that subsequent reviewers need to key in on. For example, here's an example from Aviano (an Art 117a case):

Relevant Explanation/Instructions/Definitions: "Identifiable" is not yet defined.

Att. Notes: There are only 3 military cases citing to 10 U.S.C. 917a, but none address the issue of whether the victim is "identifiable." I started digging into the legislative history, but still trying to find any relevant info.

Broadening case law search to include non-military cases addressing distribution of intimate images, there is 2d District Court of Appeals case which addresses the meaning of "identifiable person."

In *People v. Johnson*, 234 Cal. App. 4th 1411, 1441-42, 184 Cal. Rptr. 3d 150, 859 (2015), the court reversed a case where an intimate video did not show the

ELEMENTS [DEFINITIONS]	EVIDENCE	EVIDENCE
Article 120b.(2)(d) Jurisdictional Matters: Status/Location/Date	ETS:	
1. That the Accused committed a sexual act on SH (mouth) ¹⁰	A. SH will testify that after the Accused hit her and dragged her to and laid her on the sofa, he placed his penis in her mouth while he forced her mouth until he ejaculated.	<p>A. None. Personal knowledge. Typical Victim issues, inconsistencies in recounting the sequence of events, undetermined amount of alcohol use by DW prior to the assault, DW's memory of events. Bigger problem here is that nothing to corroborate SH that this even happened. DW has been inconsistent in re-telling the essence of the assaults, as well as her memory of events. DW has been inconsistent in re-telling the essence of the assaults, as well as her memory of events. DW has been inconsistent in re-telling the essence of the assaults, as well as her memory of events.</p> <p>1. POC: Capt XXX -- ECD: XX XXXX Interview [REDACTED]—need to understand what the expectation of what was going to happen, how much of SH and the Accused's conversation she saw/overheard, even what they talked about in car (any talk of sex acts planning on happening or which had happened—i.e., the 10-second oral sex), information about what she and SH were doing the night before (sounds like they were out drinking somewhere)</p> <p>2. POC: Capt XXX -- ECD: XX XXXX Interview sister to determine if she made consistent statements to her about the assaults</p>

Using POC and ECD (Estimate Completion Date) allows this to be a living tasking document and informs next steps that you have identified as you put the Proof Analysis together. Flexibility here for personal preference, but these should be tasks needed to get to disposition decision as trial-level tasks generally should be in the separate Trial Plan document. Make a note of what those are as they come to mind, but just task with the POC and ECD pre-preferred tasks.

¹⁰ Article 120(g)(1): The term "sexual act" means—(A) the penetration, however slight, of the penis into the vulva or anus or mouth.

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[REDACTED]th Security Forces Squadron ([REDACTED]), [REDACTED]

			<p>3. POC: Capt XXX -- ECD: XX XXX Discuss with medical doctor the bruising and if it is consistent with the described assaults.</p> <p>4. POC: Capt XXX -- ECD: XX XXX Secure SH's Tender account "homepage" (what does it indicate about what she is looking for). Is there anything that would create in the Accused's mind an idea that this was rough sex/rape-fantasy role-playing.</p> <p>5. POC: Capt XXX -- ECD: XX XXX Review text messages pre- and post-event (SH herself in interview was embarrassed with what she had said to the Accused, doesn't sound like Accused acknowledge them at all).</p> <p>6. POC: Capt XXX -- ECD: XX XXX Secure court records, if possible, about her child custody matter...does it give her a motive to lie</p> <p>7. POC: Capt XXX -- ECD: XX XXX Find out if SH knows any other military members (perhaps they told the Accused she is "into" certain rough sex situations).</p> <p>8. POC: Capt XXX -- ECD: XX XXX Follow up to determine whether she has a victim's counsel of some sort—needs to be some discussions with her about the mistake-of-fact defense in relation to what happened that morning; if she understands the defense she (or [REDACTED]) might be able to enlighten us to some facts that the Accused may have known about that she hasn't mentioned yet</p> <p>9. POC: Capt XXX -- ECD: XX XXX It's probably in the file somewhere, but a relative size difference between the two would be useful to demonstrate the futility of physical efforts to push him off</p>
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United States v. Amn [REDACTED]

[REDACTED]th Security Forces Squadron ([REDACTED]), [REDACTED]

			<p>10. POC: Capt XXX -- ECD: XX XXX Defense will definitely attack her credibility—examine whether there are witnesses can call for a character for truthfulness presentation (MRE 608(a)).</p>
<p>2. The Accused did so without SH's consent¹¹</p>	<p>A. SH indicates the oral sex on the sofa started consensually, but the Accused became more aggressive (rough/chocking her with his penis to the extent she could not breath) and she attempted, weakly, to push him off of her but was unable to do so</p>	<p>A. None. Personal knowledge. Assuming get past the it-didn't-even-happen defense, would be a mistake-of-fact-as-to-consent defense (though those two would be incompatible but that won't stop defense from advancing them both, just relying on SH's testimony). Again, this is a trial-level issue (assuming SH is willing to see this through to trial). <u>But there is something missing here—this sounds like a clear rough-sex/rape-fantasy case (on Accused's part) but there doesn't seem to be any evidence to support the idea of that's what the Accused was "reasonably" expecting (see To-Do for some avenues to see if this will be an argument). Regardless, SH says she initially consented to the oral sex but that changed once the Accused became more aggressive. Couple issues—no clear break when the oral sex moved from consensual to non (maybe she will say she started pushing him away to make it clear)—need clarity here. But in the sequence of events he just hit her, apparently pretty hard, and then she consents to oral sex—raises an argument that the aggressiveness in the oral sex would not be obviously objectionable. Doesn't sound like she was able to manage much force to push back (understandable, but looking from the perspective of the Accused to say he reasonably didn't notice but the force she used was so minor). The OSI interview was not good on details of how they got from one place to another in the house, need to flesh that out. Frankly, as in most these cases, this all comes down to the credibility of her testimony (she needs to be appropriately prepped)</u></p>	

¹¹ Article 120(g)(7)(A), (C): The term "consent" means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent. ... All the surrounding circumstances are to be considered in determining whether a person gave consent.

United States v. Amn [REDACTED]

[REDACTED]th Security Forces Squadron ([REDACTED]), [REDACTED]

Charge I

Specification 3 [Sexual Assault, Article 120(b)(2)(A)]: In that AIRMAN [REDACTED], United States Air Force, [REDACTED]th Security Forces Squadron, [REDACTED] [REDACTED], did, at or near [REDACTED], on or about 30 November 2019, commit a sexual act upon Ms. S [REDACTED] H [REDACTED], by penetrating her anus with his penis, without her consent.

Model Spec – In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, commit a sexual act upon _____, by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus).] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit: _____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], without the consent of _____.

Max Punishment – Forfeiture of all pay and allowances, and confinement for 30 years. Mandatory minimum – Dismissal or dishonorable discharge.

ELEMENTS [DEFINITIONS]	EVIDENCE	EVIDENTIARY ISSUES	MISCELLANEOUS
Article 120b.(2)(d)			
Jurisdictional Matters: Status/Location/Date	ETS:		
1. That the Accused committed a sexual act on SH (anus) ¹²	A. SH will testify that she went to lie down after the Accused refused to drive her home until “later,” that he came into the room and asked for sex, which she refused because she was on her period, and then repeatedly asked for anal sex, which she repeatedly refused, and then the Accused pulled down her leggings and penetrated her anus with his penis.	A. Same Issues as Charge I, Spec 2 above	See To-Do List, Charge I, Spec 2 above
2. The Accused did so without SH’s consent ¹³	A. SH will testify she told the Accused when they first started planning to get together that she was on her period and would not have sex with him, repeated that repeatedly when he came to the bedroom door and requested sex and anal sex, that he pulled down her leggings	A. Same Issues as Charge I, Spec 2 above. If passed the it-didn’t-even-happen defense, assuming the members find SH credible, the mistake-of-fact-as-to-consent defense is not as strong. <u>Still the odd issues about what appears to be rough sex/rape fantasy case, but at this point even if the Accused is reasonably mistaken as to whether she consented to the oral sex, the conversation about no sex before they ever got together (her agreement to only</u>	

¹² Article 120(g)(1): The term “sexual act” means— (A) the penetration, however slight, of the penis into the vulva or anus or mouth.

¹³ Article 120(g)(7)(A), (C): The term “consent” means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent. ... All the surrounding circumstances are to be considered in determining whether a person gave consent.

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[REDACTED]th Security Forces Squadron ([REDACTED]), [REDACTED]

	<p>(rather than her removing them), that he did not use a condom or any lubricant, that it hurt, that she asked him to stop and was crying and he finally acknowledged that by stopping and getting lube, applying it and then continuing to penetrate her until he ejaculated.</p>	<p><u>perform oral sex</u>, her repeated verbal refusals to have any sex (vaginal or anal), that the Accused pulled her leggings down and inserted his penis without any lubrication (or a condom) and stopped at some point to get lubricant, undermines the reasonableness of a mistake-of-fact defense. Absent a surprise as to whether there was some reason the Accused reasonably believed she was into rough sex like this (which running the to-do list can help flesh out), decent case on this spec.</p>	
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United States v. Amn [REDACTED]

[REDACTED]th Security Forces Squadron ([REDACTED]), [REDACTED]

Charge II – KIDNAPPING, Article 125, UCMJ

Specification: In that AIRMAN [REDACTED], United States Air Force, [REDACTED]th Security Forces Squadron, [REDACTED], did, at or near [REDACTED], on or about 30 November 2019, wrongfully confine and hold Ms. S [REDACTED] H [REDACTED] against her will.

Model Spec: In that _____, (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, wrongfully (seize) (confine) (inveigle) (decoy) (carry away) and hold _____ (a minor whose parent or legal guardian the accused was not) (a person not a minor) against (his) (her) will.

Max Punishment – Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole.

ALT: Can consider a straight Art 128 assault charge here, but this charge better describes the entirety of that part of the morning interactions

ELEMENTS [DEFINITIONS]	EVIDENCE	EVIDENTIARY ISSUES	MISCELLANEOUS
Article 125b.(1)-(3)			
Jurisdictional Matters:Location/Date	ETS:		
1. That the Accused confined SH	<p>A. Victim will testify that the Accused brought a particular style of handcuffs, potentially from his bedroom, and then cuffed her hands together behind her back.</p> <p>B. Handcuffs [?]</p>	<p>A. Same Issues as Charge I, Spec 2 above, whether it happened or not depends on SH's testimony though again an attack on her testimony through cross allows prior-consistent statements.</p>	<p>1. POC: Capt XXX -- ECD: XX XXXX Clarity on handcuffs (B. in Evidentiary Issues—seized)? If not, is the description consistent with style he would have been issued as SFS mbr (if he would have been).</p> <p>2. POC: Capt XXX -- ECD: XX XXXX Review SH's statements to others and determine who she told about the handcuffs</p> <p>3. POC: Capt XXX -- ECD: XX XXXX Need SFS witness to testify the Accused was not on duty at the time of the assaults (30 Nov), didn't have authority to handcuff a British citizen off the installation, and otherwise had no authority to do that—also potentially need to identify the type of handcuff and how they worked (would set up a nice courtroom demo to show how confining/uncomfortable they would be if your hands are cuffed</p>

United States v. Amn [REDACTED]

[REDACTED]th Security Forces Squadron ([REDACTED]), [REDACTED]

			behind your back and you're pushed onto a sofa and have to sit there for some period of time) 4. POC: Capt XXX -- ECD: XX XXX No bruising on wrists? (Though I read this in someone's testimony). If not, need to explain why not as she was allegedly bruised by other assaults that night—the absence of bruises here gives Defense opportunity to argue didn't happen
2. The Accused then held SW against her will ¹⁴	A. Victim will testify that the Accused pushed her onto the sofa and ignored her pleas to be released and to be taken home. This continued for some period of time, until the Accused relented, got the key and un-cuffed her	A. Same Issues as Charge I, Spec 2 above, whether it happened or not depends on SH's testimony though again an attack on her testimony through cross allows prior-consistent statements	
3. The Accused did so wrongfully ¹⁵	A. Victim will testify that she did not consent to this B. WINTESS will testify that the Accused was not authorized to have or use these handcuffs outside his normal duty and that he was not on duty when this incident occurred.	A. Though she may have consented, or at least not initially objected to the handcuffs (explainable as she had just been sexually assaulted and reported herself as "frozen"), clearly manifested lack of consent by demanding to be released and taken home. B. HANDCUFF ISSUE – See To Do List	

¹⁴ Article 125c.(2): Held "means detained. The holding must be more than a momentary or incidental detention." Article 120c.(3): "Against that person's will" means that the victim was held involuntarily. The involuntary nature of the detention may result from force, mental or physical coercion, or from other means, including false representations. ... Evidence of the availability or nonavailability to the victim of means of exit or escape is relevant to the voluntariness of the detention, as is evidence of threats or force, or lack thereof, by the accused to detain the victim.

¹⁵ Article 125c.(5): "Wrongfully" means without justification or excuse.

United States v. Amn [REDACTED]

[REDACTED]th Security Forces Squadron ([REDACTED]), [REDACTED]

Charge III – ASSAULT CONSUMMATED BY BATTERY, Article 128

Specification [Assault Consummated by Battery, Article 128(a)(3)]: In that AIRMAN [REDACTED], United States Air Force, [REDACTED]th Security Forces Squadron, [REDACTED], did, at or near [REDACTED], on or about 30 November 2019, unlawfully strike Ms. S [REDACTED] H [REDACTED] in the face with his hand.

Model Spec: In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____ 20 __, unlawfully (strike) (_____)
_____ (on) (in) the _____ with _____.

Max Punishment – Bad conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

ELEMENTS [DEFINITIONS]	EVIDENCE	EVIDENTIARY ISSUES	MISCELLANEOUS
Article 125b.(2)			
Jurisdictional Matters: Status/Location/Date			
1. That the Accused did bodily harm to SH ¹⁶	A. SH will testify that as soon as she entered the home, the Accused turned and slapped her in the face (struck her with an open hand), she told him not to hit her, he did it again twice, she hit him back, and then he hit her again “really, really hard,” hard enough to make her “dizzy.”	A. All the issues discussed above (whether it happened and the weirdness about the rough-sex/rape-fantasy feel to it). Unclear how she hit him back and also unclear what if any conversation occurred between the two of them when this (and the subsequent “dragging” to the sofa) occurred.	See To-Do List above
2. That bodily harm was done unlawfully	A. The Accused was not acting under color of law (and even if so would have exceeded his mandate), nor was he defending himself ¹⁷ nor was this an accident	A. Need clarity on sequence of events/conversation. Self-defense on these facts is not available to the Accused (as the initial aggressor and degree of force)	
3. That bodily harm was done with force or violence ¹⁸	A. The Accused struck her repeatedly in the face, with substantial force, enough to make her “dizzy”	A. Same as above	

¹⁶ Article 128c.(1)(a): “Bodily harm” means an offensive touching of another, however slight.

¹⁷ Self-defense as a legal defense to a charge of assault requires that the Accused “apprehend, upon reasonable grounds, that bodily harm was about to be inflicted wrongfully on [him]; and [b]elieved that the force that [he] used was necessary for protection against bodily harm, provided that the force used by [him] was less than force reasonably likely to produce death or grievous bodily harm.” R.C.M. 916(e)(3)(A).

¹⁸ Article 128c.(3): “(a) *In general.* A battery is an assault in which the attempt or offer to do bodily harm is consummated by the infliction of that harm. ... (b) *Application of force.* The force applied in a battery may have been directly or indirectly applied.”

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Instructions/Miscellaneous:

3a-49-1. KIDNAPPING (ARTICLE 125)

The Electronic Benchbook is a must bookmark: <https://www.jagcnet.army.mil/EBB/> A must for Instructions, but it is Wikipedia for elements and model specs ... it is a good source, you probably can rely on it, but best to at least double check the source document (USC code section, MCM) ... my process is the opposite, go to the source documents to complete the Proof Analysis and then check the eBB to see if it is consistent (if not then I check to see where it, or I, went wrong). I like to go through the eBB and copy-n-paste particular relevant Instructions (I always copy-n-paste the Credibility instruction). You can use this section for that purpose, or whatever else you want to collect close out the Proof Analysis, with the caveat that if it is important in analyzing the facts and elements it probably should be at least referenced in the main part of the Proof somewhere (say a footnote highlighting there is more at the end of the Proof in this section).

(1) That (state the time and place alleged), the accused (seized) (confined) (inveigled) (decoyed) (carried away) (state the name of the alleged victim);

(2) That the accused then held (state the name of the alleged victim) against (his) (her) will; and

(3) That the accused did so wrongfully.

("Inveigle" means to lure, lead astray, or entice by false representations or other deceitful means. For example, a person who entices another to ride in a car with a false promise to take the person to a certain destination has inveigled the passenger into the car.)

("Decoy" means to entice or lure by means of some fraud, trick, or temptation. For example, one who lures a child into a trap with candy has decoyed the child.)

"Held" means detained. The holding must be more than a momentary or incidental detention. (For example, a robber who holds the victim at gunpoint while the victim hands over a wallet, or a rapist who throws his victim to the ground, does not, by such acts, commit kidnapping. On the other hand, if, for example, before or after such robbery or rape, the victim is involuntarily transported some substantial distance, as from a housing area to a remote area of the base or post, this may be kidnapping, in addition to robbery or rape.)

"Against the person's will" means that the victim was held involuntarily. The involuntary nature of the detention may result from force, mental or physical coercion, or from other means, including false representations. (If the victim is incapable of having a recognizable will, as in the case of a very young child or a mentally incompetent person, the holding must be against the will of the victim's parents or legal guardian.) (Evidence of the availability or nonavailability to the victim of some means of exit or escape is relevant to the voluntariness of the detention, as is evidence of threats or force, or lack thereof, by the accused to detain the victim.)

(The holding need not have been for financial or personal gain or for any other particular purpose.)

"Wrongfully" means without justification or excuse. (For example, a law enforcement official may justifiably apprehend and detain, by force if reasonably necessary, a person reasonably believed to have committed an offense.)

3a-44-2. SEXUAL ASSAULT (ARTICLE 120)

Sexual Assault by Threat/Fear, Fraudulent Representation, or Artifice

(1) That (state the time and place alleged), the accused committed (a) sexual act(s) upon (state the name of the alleged victim) by (state the alleged sexual act); and

(2) That the accused did so by

(a) threatening or placing (state the name of the alleged victim) in fear;

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(b) making a fraudulent representation that the sexual act served a professional purpose;

(c) inducing a belief by artifice, pretense, or concealment that the accused was another person.

Sexual Assault Without Consent

(1) That (state the time and place alleged), the accused committed (a) sexual act(s) upon (state the name of the alleged victim) by (state the alleged sexual act); and

(2) That the accused did so without the consent of (state the name of the alleged victim).

Sexual Assault When Victim is Asleep, Unconscious, or Otherwise Unaware

(1) That (state the time and place alleged), the accused committed (a) sexual act(s) upon (state the name of the alleged victim) by (state the alleged sexual act);

(2) That the accused did so when (state the name of the alleged victim) was asleep, unconscious, or otherwise unaware that the sexual act was occurring; and

(3) That the accused knew or reasonably should have known that (state the name of the alleged victim) was asleep, unconscious, or otherwise unaware that the sexual act was occurring.

Sexual Assault When the Victim is Incapable of Consenting

(1) That (state the time and place alleged), the accused committed (a) sexual act(s) upon (state the name of the alleged victim) by (state the alleged sexual act);

(2) That the accused did so when (state the name of the alleged victim) was incapable of consenting to the sexual act(s) due to (impairment by a drug, intoxicant, or other similar substance) (a mental disease or defect, or physical disability); and

(3) That the accused knew or reasonably should have known (state the name of the alleged victim) was incapable of consenting to the sexual act(s) due to (impairment by drug, intoxicant, or other similar substance) (a mental disease or defect, or physical disability).

"Sexual act" means:

(A) the penetration, however slight, of the penis into the vulva or anus or mouth;

(B) contact between the mouth and the penis, vulva, scrotum, or anus; or

(C) the penetration, however slight, of the vulva or penis or anus of another by any part of the body or any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(The "vulva" is the external genital organs of the female, including the entrance of the vagina and the labia majora and labia minora. "Labia" is the Latin and medically correct term for "lips.")

"Threatening or placing a person in fear" means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another person being subjected to the wrongful action contemplated by the communication or action.

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("Wrongful action," as used here, includes an abuse of military rank, position, or authority in order to engage in a sexual act with a victim. This includes, but is not limited to, threats to initiate an adverse personnel action or withhold a favorable personnel action unless the victim submits to the accused's requested sexual act. Superiority in rank is a factor in, but not dispositive of, whether a reasonable person in the position of the victim would fear that his or her noncompliance with the accused's desired sexual act would result in the threatened wrongful action contemplated by the communication or action.)

In proving that a person made a threat, it need not be proven that the person actually intended to carry out the threat or had the ability to carry out the threat.

The threat or fear in this case must be that the alleged victim or another person would be subjected to the wrongful action.

A "fraudulent representation" is a representation of fact, which the accused knows to be untrue, which is intended to deceive, which does in fact deceive, and which causes the other person to engage in the sexual act(s).

(The fraudulent representation that the sexual act served a professional purpose need not have been made by the accused to (state the name of the alleged victim). It is sufficient if the accused made such a fraudulent representation to any person, which thereby caused (state the name of the alleged victim) to engage in the sexual act.)

"Incapable of consenting" means the person is incapable of appraising the nature of the conduct at issue or physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act at issue.

Marriage is not a defense to this offense.

"Consent" means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent.

(A sleeping, unconscious, or incompetent person cannot consent.)

(A person cannot consent to force causing or likely to cause death or grievous bodily harm or to being rendered unconscious.)

(A person cannot consent while under threat or in fear.)

(A person cannot consent when believing, due to a fraudulent representation, that the sexual act served a professional purpose, or when believing, due to artifice, pretense, or concealment that the accused was another person.)

All the surrounding circumstances are to be considered in determining whether a person gave consent.

The evidence has raised the issue of whether (state the alleged victim's name) consented to the sexual conduct listed in (The) Specification(s) (_____) of (The) (Additional) Charge (____). All of the evidence concerning consent to the sexual conduct is relevant and must be considered in determining whether the government has proven (the elements of the offense) (that the sexual conduct was done by _____) (state the element(s) to which the evidence concerning consent relates) beyond a reasonable doubt. Stated another way, evidence the alleged victim consented to the sexual conduct, either alone or in conjunction with the other evidence in this case, may cause you to have a reasonable doubt as to whether the government has proven (every element of the offense) (that the sexual conduct was done by _____) (state the element(s) to which the evidence concerning consent relates).

"Consent" means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute

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consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent.

(A sleeping, unconscious, or incompetent person cannot consent.)

(A person cannot consent to force causing or likely to cause death or grievous bodily harm or to being rendered unconscious.)

(A person cannot consent while under threat or in fear.)

(A person cannot consent when believing, due to a fraudulent representation, that the sexual act served a professional purpose, or when believing, due to artifice, pretense, or concealment that the accused was another person.)

(A "competent person" is a person who possesses the physical and mental ability to consent.)

(An "incompetent person" is a person who is incapable of appraising the nature of the conduct at issue, or physically incapable of declining participation in or communicating unwillingness to engage in the sexual act at issue.)

All the surrounding circumstances are to be considered in determining whether a person gave consent.

The evidence has raised the issue of mistake of fact in relation to the offense(s) of (state the alleged offense(s)), as alleged in (the) specification(s) () of (the) (additional) Charge ().

There has been (evidence) (testimony) tending to show that, at the time of the alleged offense(s), the accused mistakenly believed that (state the name of the victim) consented to the sexual conduct alleged [] concerning (this) (these) offense(s).

Mistake of fact is a defense to (that) (those) charged offense(s). "Mistake of fact" means the accused held, as a result of ignorance or mistake, an incorrect belief that [the other person consented to the sexual conduct] [].

The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable, the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that [the other person consented to the sexual conduct] []. (Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. "Negligence" is the absence of due care. "Due care" is what a reasonably careful person would do under the same or similar circumstances.)

You should consider the inherent probability or improbability of the evidence presented on this matter. You should consider the accused's (age) (education) (experience) (), along with the other evidence in this case (including, but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The prosecution has the burden of proving beyond a reasonable doubt that the defense of mistake of fact did not exist. If you are convinced beyond a reasonable doubt that, at the time of the charged offense(s), the accused did not believe that [the alleged victim consented to the sexual conduct] [], the defense does not exist. Furthermore, even if you conclude the accused was under a mistaken belief that [the alleged victim consented to the sexual conduct] [], if you are convinced beyond a reasonable doubt that at the time of the charged offense(s) the accused's mistake was unreasonable, the defense does not exist.

There has been some evidence concerning the accused's state of intoxication at the time of the alleged offense. On the question of whether the accused's (ignorance) (belief) was reasonable, you may not consider the accused's intoxication, if any, because a reasonable (ignorance) (belief) is one that an ordinary, prudent, sober adult would have under the

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circumstances of this case. Voluntary intoxication does not permit what would be an unreasonable (ignorance) (belief) in the mind of a sober person to be considered reasonable because the person is intoxicated.

The evidence has raised the issue of voluntary intoxication in relation to the offense(s) of (state the alleged offense(s)). With respect to (that) (those) offense(s), I advised you earlier that the government is required to prove that the accused knew or reasonably should have known that (state the name of the alleged victim) was [asleep, unconscious, or otherwise unaware that the sexual act was occurring] [incapable of consenting to the sexual act(s) due to (impairment by a drug, intoxicant, or other similar substance) (a mental disease or defect, or physical disability)].

In deciding whether the accused had such knowledge, you should consider the evidence of voluntary intoxication.

The law recognizes that a person's ordinary thought process may be materially affected when under the influence of intoxicants. Thus, evidence that the accused was intoxicated may, either alone or together with other evidence in the case, cause you to have a reasonable doubt that the accused had the required knowledge.

On the other hand, the fact that the accused may have been intoxicated at the time of the offense(s) does not necessarily indicate that he/she was unable to have the required knowledge because a person may be drunk yet still be aware at that time of his/her actions and their probable results.

In deciding whether the accused had the required knowledge, you should consider the effect of intoxication, if any, as well as the other evidence in the case.

The burden of proof is on the prosecution to establish the guilt of the accused. If you are convinced beyond a reasonable doubt that the accused in fact had the required knowledge, the accused will not avoid criminal responsibility because of voluntary intoxication.

However, on the question of whether the accused "reasonably should have known" that (state the name of the person alleged) was [asleep, unconscious, or otherwise unaware that the sexual act was occurring] [incapable of consenting to the sexual act(s) due to (impairment by a drug, intoxicant, or other similar substance) (a mental disease or defect, or physical disability)], you may not consider the accused's intoxication, if any, because what a person reasonably should have known refers to what an ordinary, prudent, sober adult would have reasonably known under the circumstances of this case.

In summary, voluntary intoxication should be considered in determining whether the accused had actual knowledge that (state the name of the person alleged) was [asleep, unconscious, or otherwise unaware that the sexual act was occurring] [incapable of consenting to the sexual act(s) due to (impairment by a drug, intoxicant, or other similar substance) (a mental disease or defect, or physical disability)]. Voluntary intoxication should not be considered in determining whether the accused "reasonably should have known" that (state the name of the person alleged) was [asleep, unconscious, or otherwise unaware that the sexual act was occurring] [incapable of consenting to the sexual act(s) due to (impairment by a drug, intoxicant, or other similar substance) (a mental disease or defect, or physical disability)].

7-7-1. CREDIBILITY OF WITNESSES

You have the duty to determine the believability of the witnesses. In performing this duty you must consider each witness's intelligence, ability to observe and accurately remember, sincerity, and conduct in court, (friendships) (and) (prejudices) (and) (character for truthfulness). Consider also the extent to which each witness is either supported or contradicted by other evidence; the relationship each witness may have with either side; and how each witness might be affected by the verdict.

(In weighing (a discrepancy) (discrepancies) (by a witness) (or) (between witnesses), you should consider whether (it) (they) resulted from an innocent mistake or a deliberate lie.)

Taking all these matters into account, you should then consider the probability of each witness's testimony and the inclination of the witness to tell the truth.

(The believability of each witness's testimony should be your guide in evaluating testimony, not the number of witnesses called.)

(These rules apply equally to the testimony given by the accused.)

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7-14. PAST SEXUAL BEHAVIOR OF SEX OFFENSE VICTIM

Evidence has been introduced indicating that (state the name of the alleged victim) has engaged in past acts of (specify the specific instances of past sexual behavior) with (the accused) ([REDACTED]). This evidence should be considered by you (on the issue of whether (state the name of the alleged victim) consented to the sexual act(s) with which the accused is charged) (on the issue of whether or not the accused was the source of (semen) (and) (injury) to the victim) (and) ([REDACTED]).

7-11-2. PRIOR CONSISTENT STATEMENT—RECENT FABRICATION

You have heard evidence that (state the name of the witness(es)) made (a) statement(s) prior to trial that may be consistent with his/her/their testimony at this trial. If you believe that such (a) consistent statement(s) (was) (were) made, you may consider (it) (them) for (its) (their) tendency to refute the charge of (recent fabrication) (improper influence) (improper motives). You may also consider the prior consistent statement as evidence of the truth of the matters expressed therein.