

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee

v.

Sivar Y. COX

Private (E-1)

U.S. Marine Corps,

Appellant

BRIEF ON BEHALF OF APPELLANT

Crim. App. Dkt. No. 202400194

USCA Dkt. No. 26-0090/MC

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

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Issues Presented

I.

Whether the appellate defense counsel who represented Appellant before the lower court was ineffective.

II.

Whether Appellant's constitutional rights were violated when the military judge replaced the entire court-martial panel mid-trial pursuant to Article 29, Uniform Code of Military Justice.

III.

Did the military judge erroneously instruct the members in light of *United States v. Mendoza* and *United States v. Moore*?

Statement of Statutory Jurisdiction

This case is before this Court under its Article 67(a)(3), Uniform Code of Military Justice (UCMJ), jurisdiction.¹

Relevant Authorities

The Fifth Amendment to the United States Constitution provides in part:

“No person shall . . . be deprived of life, liberty, or property, without due process of law[.]”²

The Sixth Amendment to the United States Constitution provides in part:

“In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defence.”³

Article 29, UCMJ, provides in part:

If, after members are impaneled, the membership of the court-martial is reduced to . . . fewer than six members with respect to a general court-martial in a noncapital case . . . the trial may not proceed unless the convening authority details new members and, from among the members so detailed, the military judge impanels new members sufficient in number to provide [at least six but not more than eight members].

...

[T]he trial may proceed with the new members present after the evidence previously introduced is read or, in the case of audiotape,

¹ 10 U.S.C. § 867(a)(3) (2024).

² U.S. CONST. amend. V.

³ U.S. CONST. amend. VI.

videotape, or similar recording, is played, in the presence of the new members, the military judge, the accused, and counsel for both sides.⁴

Article 120, UCMJ, provides in part:

(b) SEXUAL ASSAULT.—Any person subject to this chapter who—

...

(2) commits a sexual act upon another person—

(A) without the consent of the other person; or

(B) when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring; or

(3) commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to—

(A) impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person; or

(B) a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person;

is guilty of sexual assault and shall be punished as a court-martial may direct.

...

(g) DEFINITIONS.—In this section:

...

(7) CONSENT.—

(A) 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

⁴ 10 U.S.C. § 829(d), (f) (2018).

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.

- (B) 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 or under the circumstances described in subparagraph (B) or (C) of subsection (b)(1).
- (C) All the surrounding circumstances are to be considered in determining whether a person gave consent.⁵

Rule for Court Martial (R.C.M.) 805(d)(1) states:

When after presentation of evidence on the merits has begun, a new member is impaneled under R.C.M. 912A, trial may not proceed unless the testimony and evidence previously admitted on the merits, if recorded verbatim, is read to or played for the new member in the presence of the military judge, the accused, and counsel for both sides, or, if not recorded verbatim, and in the absence of a stipulation as to such testimony and evidence, the trial proceeds as if no evidence has been presented.⁶

Introduction

What happened at Appellant's trial is unprecedented. The military judge dismissed the entire members panel and invoked Article 29, UCMJ, to impanel eight new members. He then instructed the new panel to listen to most of the Government's case through hard-to-hear audio recordings. And the Defense was

⁵ 10 U.S.C. § 920 (2018).

⁶ MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. II, R.C.M. 805(d)(1) (2019) [hereinafter MCM].

prohibited from asking questions of key witnesses in front of the new panel, leaving Appellant's rights to confrontation by the wayside. This Court should not endorse the military judge's novel application of Article 29 to fully replace a panel mid-trial. If it does so, then mistrials will be dead letter law and Article 29 will allow military judges to replace entire panels to conduct trials by audio recording.

Another error occurred when the military judge provided muddled instructions that caused reasonable doubt as to whether Appellant was convicted on a legally impermissible ground. Given the weakness in the Government's case and the dearth of evidence demonstrating the named victim was capable of consenting but did not consent, the instructions were prejudicial.

Despite the clear constitutional and instructional errors, previous appellate defense counsel failed to raise them before the lower court. He was ineffective, and because these issues would have been meritorious, his representation prejudiced Appellant.

Statement of the Case

A general court-martial panel of officer and enlisted members convicted Appellant of one specification of attempted sexual assault in violation of Article 80, UCMJ, and acquitted him of four specifications of sexual assault in violation of

Article 120, UCMJ.⁷ Appellant's court-martial adjourned on February 5, 2024, eight months before this Court issued its opinion in *United States v. Mendoza*.⁸

The military judge sentenced Appellant to fourteen months of confinement and a dishonorable discharge.⁹ The convening authority approved the sentence as adjudged, and the military judge entered the findings and sentence into judgment.¹⁰

Appellant brought forth a single Assignment of Error to the Navy-Marine Corps Court of Criminal Appeals (NMCCA): factual insufficiency.¹¹ The NMCCA rejected that claim and approved the findings and sentence.¹² Appellant then filed a motion for en banc reconsideration, requesting the Court's leave to brief the two substantive issues that are now before this Court.¹³ The Government opposed the motion.¹⁴ The NMCCA denied the motion without explanation.¹⁵

⁷ J.A. at 110-12, 116, 1104; 10 U.S.C. §§ 880, 920 (2018). At the close of evidence, the military judge dismissed one specification of sexual assault pursuant to R.C.M. 917. J.A. at 1014.

⁸ J.A. at 1105; *United States v. Mendoza*, 85 M.J. 213 (C.A.A.F. 2024) (decided Oct. 7, 2024).

⁹ J.A. at 113-15, 1105.

¹⁰ J.A. at 113-15.

¹¹ J.A. at 10-36.

¹² J.A. at 1-9.

¹³ J.A. at 65-82.

¹⁴ J.A. at 83-96.

¹⁵ J.A. at 97-99.

Statement of Facts

A. A night of drinking at a barracks smoke pit preceded the charged misconduct.

The alcohol-fueled chain of events that led to charges against Appellant began when the named victim invited her friend, Lance Corporal (LCpl) Augustin, to party with her and others at a nearby barracks smoke pit.¹⁶ The named victim testified that her “plan . . . was, you know, to get really intoxicated that night with [my friend, LCpl Augustin].”¹⁷

The named victim got very drunk.¹⁸ Appellant and three other partygoers, along with LCpl Augustin, helped her to her barracks room.¹⁹ A partygoer testified that the named victim was asleep and “was basically dead weight.”²⁰ The named victim, LCpl Augustin (who was also drunk), and Appellant remained in the barracks room while everyone else returned to the smoke pit.²¹

LCpl Augustin video-called her fiancé using Facetime and went into the barracks room bathroom, leaving Appellant and the named victim alone in the barracks room.²² When she came out, she saw Appellant kissing the named

¹⁶ J.A. at 466-67.

¹⁷ J.A. at 473.

¹⁸ J.A. at 172-73, 229-33, 284-87, 502-06.

¹⁹ J.A. at 177-79.

²⁰ J.A. at 180-81.

²¹ J.A. at 180-83, 510-11.

²² J.A. at 511-17.

victim.²³ LCpl Augustin testified that the named victim was not saying anything “at that time.”²⁴ LCpl Augustin did not intervene at all; she testified that she did not say anything or attempt to separate Appellant and the named victim.²⁵ Instead she got on the other bed in the room and “start[ed] crying.”²⁶ She testified that she turned the Facetime camera toward the named victim so her fiancé could see what was happening.²⁷ She testified that, sometime later, the named victim “grumble[d] and then also [said] ‘no.’”²⁸ The fiancé testified that the named victim was “moaning,” and later stated that the moaning sounded like “she was fighting it more.”²⁹

LCpl Augustin texted one of the partygoers to come help.³⁰ Four partygoers entered the barracks room.³¹ These four testified that the named victim did not appear to be awake, conscious, or coherent when they entered the barracks room.³²

²³ J.A. at 517-18.

²⁴ J.A. at 519.

²⁵ J.A. at 520-21, 547-51, 565-66.

²⁶ J.A. at 520; *see also* J.A. at 547-51, 565-66.

²⁷ J.A. at 521.

²⁸ J.A. at 519.

²⁹ J.A. at 776-77.

³⁰ J.A. at 525-26, 1110-11.

³¹ J.A. at 184, 237, 266.

³² J.A. at 186, 199, 237, 266, 298-99.

The Government charged Appellant and placed him in pretrial confinement.³³

B. After twelve government witnesses testified, the military judge dismissed the entire eight-member panel for cause. He then impaneled eight new members and had them listen to audio recordings of eleven of those witnesses.

The Government called fifteen witnesses in its case-in-chief.³⁴ The Government's twelfth witness was the named victim's friend, LCpl Augustin.³⁵ At the conclusion of her testimony, a member submitted a question asking, "[t]hat night, did Private Cox make—make any advancements towards you. If so, what and how was it? And what was your response?"³⁶ Both sides believed the question would elicit testimony about Appellant verbally propositioning LCpl Augustin.³⁷ The Defense objected to the question on Military Rules of Evidence (M.R.E.) 401, 403, and 404(b) grounds, but the military judge allowed the question to be asked as eliciting *res gestae* of the offense.³⁸

³³ J.A. at 110-12.

³⁴ J.A. at 101.

³⁵ J.A. at 131 (#1), 167 (#2), 226 (#3), 263 (#4), 279 (#5), 359 (#6), 388 (#7), 405 (#8), 434 (#9—Special Agent S.G., who took buccal swabs of Appellant's mouth), 440 (#10), 465 (#11—the named victim), 494 (#12—the named victim's friend, LCpl Augustin). The Government had only three witnesses to call after LCpl Augustin's testimony. J.A. at 768 (LCpl Augustin's fiancé), 815 (nurse examiner), 853 (DNA scientist).

³⁶ J.A. at 567.

³⁷ J.A. at 567-78.

³⁸ J.A. at 568-74; MCM, pt. III, Mil. R. Evid. 401, 403, 404(b).

The military judge asked the question in front of the Members and LCpl Augustin unexpectedly said “[h]e grabbed my arm and was trying to make me touch his penis.”³⁹ The Defense objected and moved for dismissal of the charges with prejudice.⁴⁰ The Defense also requested a mistrial as a less-desired alternative remedy, but later withdrew the request for a mistrial, arguing that the “only appropriate remedy is dismissal with prejudice.”⁴¹ Although the military judge deemed the testimony relevant pursuant to M.R.E. 404(b) and 413, he excluded it on M.R.E. 403 grounds.⁴² He denied this first Defense motion to dismiss with prejudice.⁴³

After the military judge directed the members to disregard this testimony, one member stated he was unable to do so.⁴⁴ The member further revealed that “multiple members” had discussed the excluded testimony while they were in the deliberation room during the break.⁴⁵ The Defense again moved for dismissal with prejudice.⁴⁶ The Defense argued that any lesser remedy, including a mistrial, would allow the Government to cure defects in its case and result in Appellant spending

³⁹ J.A. at 578.

⁴⁰ J.A. at 580-81.

⁴¹ J.A. at 587, 1113.

⁴² J.A. at 592-98; MCM, pt. III, Mil. R. Evid. 403, 404(b), 413.

⁴³ J.A. at 598.

⁴⁴ J.A. at 599.

⁴⁵ J.A. at 600.

⁴⁶ J.A. at 602-09.

additional time in pretrial confinement.⁴⁷ The military judge conducted voir dire of the entire member panel; all but one admitted to premature deliberation.⁴⁸ Before ruling on the second defense motion to dismiss with prejudice, the military judge, *sua sponte*, dismissed the entire panel for cause, citing R.C.M. 505(c)(2) (excusal of members for good cause after assembly) and R.C.M. 912(f)(1)(N) (member challenges and removal for cause).⁴⁹ In accordance with the original convening order, there were no alternate members impaneled.⁵⁰

Because the court-martial had no members and the military judge did not grant the defense motion to dismiss with prejudice, the convening authority then signed a new document titled “GENERAL COURT-MARTIAL CONVENING ORDER #1d-23” listing nineteen new members.⁵¹ Three days after he dismissed all the members, the military judge proceeded with a new venire.⁵²

⁴⁷ J.A. at 602-09.

⁴⁸ J.A. at 612-19.

⁴⁹ J.A. at 621; MCM, pt. II, R.C.M. 505(c)(2)(A) (“After assembly no member may be excused except: . . . [b]y the military judge for good cause shown on the record.”), 912(f)(1)(N) (“A member shall be excused for cause whenever it appears that the member: . . . [s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.”).

⁵⁰ J.A. at 105-07.

⁵¹ J.A. at 108 (Jan. 29, 2024) (“The following members are detailed to the General Court-Martial convened by General Court-Martial Convening Order 1-23.”), 623.

⁵² J.A. at 623.

Before the new venire entered the courtroom, the Defense again moved to dismiss the charges and specifications with prejudice.⁵³ The Defense reiterated the objection to impaneling a new member panel and sought to be heard on motions to dismiss with prejudice several more times throughout the trial.⁵⁴

The military judge informed the parties of his plan for bringing the new panel up to speed pursuant to Article 29(f).⁵⁵ He would play the recorded testimony of each witness for the new panel, and have each witness sit in the witness box while their testimony was played.⁵⁶ The military judge would allow the members to ask the witnesses questions, and would allow the parties to ask follow-up questions only.⁵⁷ The Defense objected, arguing that “putting the witnesses in the box and essentially having the members observe someone listening to their own testimony . . . [is] not the same thing as observing someone’s demeanor while

⁵³ J.A. at 624, 1115-30.

⁵⁴ J.A. at 628-29, 668-73; *see also* J.A. at 644 (“MJ: Okay. You have more than adequately preserved your record with respect to the fact that you don’t want to move forward. You’ve said that repeatedly on the record. I’m aware of your motion to dismiss. Understanding your motion to dismiss, the Court’s ruling is that we are proceeding with voir dire.”).

⁵⁵ J.A. at 626, 662-63.

⁵⁶ J.A. at 626, 662-63.

⁵⁷ J.A. at 626, 662-63.

they're giving testimony.”⁵⁸ The Defense asserted this violated Appellant's right “to confront the witnesses.”⁵⁹

After voir dire, the Defense renewed its opposition to playing the audio based on “confrontation and due process issues.”⁶⁰ It noted that the audio included “consistent[] . . . keyboard clacking from the court reporter” that would be “extremely distracting to anybody who's listening.”⁶¹ And it argued the audio “just doesn't reflect the reality of what happened in court and what we've all observed in front of the original members.”⁶²

Separately, the Defense objected to the witnesses listening to their own testimony from the stand because it provided the government witnesses an opportunity to “refresh[] their recollection” prior to answering questions from the members.⁶³ The Defense argued that allowing the witnesses to listen to their own testimony was not “contemplated by the rules” and would put the Defense “at a substantial disadvantage by having the government witnesses review a prior statement.”⁶⁴

⁵⁸ J.A. at 626.

⁵⁹ J.A. at 647.

⁶⁰ J.A. at 668.

⁶¹ J.A. at 669.

⁶² J.A. at 669.

⁶³ J.A. at 672.

⁶⁴ J.A. at 672-73.

The military judge denied the Defense's motion to dismiss with prejudice and did not rule on its separate objections to the government witnesses being permitted to listen to their testimony from the witness stand in front of the members.⁶⁵

The military judge ordered the court reporter to randomly assign numbers to the remaining members of the new venire, and impaneled eight members.⁶⁶ He provided the standard preliminary instructions to the impaneled members.⁶⁷ He then allowed the Government to distribute a printed version of its opening Powerpoint slides and instructed the court reporter to play the opening statements from both parties.⁶⁸

He instructed the Government's first witness from earlier in the court-martial to take the witness stand and reminded the witness that he was still under oath.⁶⁹ The Government played a recording of that witness' testimony while the witness remained in the witness box.⁷⁰ When an exhibit was published to the

⁶⁵ J.A. at 671-73.

⁶⁶ J.A. at 630-41, 664-67, 676-80, 1131.

⁶⁷ J.A. at 630-41 ("Members, please be seated. This court-martial is assembled. Members of the court, it is appropriate that I give you some preliminary instructions"), 676-79 ("Members, each of you may take notes throughout trial").

⁶⁸ J.A. at 679.

⁶⁹ J.A. at 680.

⁷⁰ J.A. at 679-81.

members in the recording, the military judge instructed the bailiff to publish the same exhibit to the new panel.⁷¹ Once the playing of the testimony was complete, the military judge solicited questions from the members and allowed the parties to ask follow-up questions to the members' questions, but they could not ask questions if the members did not.⁷²

The military judge followed a similar procedure for eleven of the Government's twelve previously recorded witnesses.⁷³ The new panel asked questions of nine Government witnesses, but they did not ask questions of the named victim.⁷⁴ One witness' testimony was not played—instead the Government introduced a stipulation of expected testimony for this witness at the end of the Government's case.⁷⁵ All but LCpl Augustin sat in the witness box while their recorded testimony was played.⁷⁶ The military judge declared LCpl Augustin “unavailable” within the meaning of M.R.E. 804(a)(4).⁷⁷ As a result, the new members panel never had the opportunity to observe the demeanor, or ask

⁷¹ J.A. at 680.

⁷² J.A. at 626, 662-63, 681-91.

⁷³ J.A. at 680-762.

⁷⁴ J.A. at 680-766.

⁷⁵ J.A. at 921. This witness was the special agent who took swabs from Appellant, and Appellant consented to the stipulation. J.A. at 434-61, 1112.

⁷⁶ J.A. at 680-767.

⁷⁷ J.A. at 763-65; MCM, pt. III, Mil. R. Evid. 804(a)(4). The Defense maintained its previous confrontation-clause objection, but did not object to her being deemed unavailable. J.A. at 764-65.

questions, of the only witness who was in the room with Appellant and the named victim at the time of the charged acts. Finally, three government witnesses fully testified in real time.⁷⁸ The new member panel observed three-quarters of the Government's case on the merits through non-interactive audio without observing the witnesses' demeanor while testifying.⁷⁹

C. The Government charged Appellant with sexually assaulting the named victim without her consent. The military judge instructed the panel that “a sleeping, unconscious, or incompetent person cannot consent.”

Appellant was acquitted of every charge and specification but one.⁸⁰ The sole specification of which Appellant was convicted alleged that he “attempt[ed] to commit a sexual act upon [the named victim] by penetrating her vulva with [his] penis *without the consent* of [the named victim].”⁸¹

When the military judge defined consent for “*all charges and specifications*,” he included that:⁸²

A sleeping, unconscious, or incompetent person cannot consent.

...

All of the surrounding circumstances are to be considered in determining whether a person gave consent. The evidence has raised the issue of whether [the named victim] consented to the sexual conduct listed in *all the charges and specifications*.⁸³

⁷⁸ J.A. at 768, 815, 853.

⁷⁹ J.A. at 680-762.

⁸⁰ J.A. at 113-15, 1104.

⁸¹ J.A. at 110 (emphasis added), 1104.

⁸² J.A. at 1031 (emphasis added), 1137.

⁸³ J.A. at 1032 (emphasis added), 1137.

The Defense did not object to this portion of the instructions.⁸⁴ The Government argued nearly exclusively that the named victim did not consent because she was asleep or unconscious.⁸⁵ Appellant's court-martial adjourned on February 5, 2024, eight months before this Court issued its opinion in *Mendoza*.⁸⁶

D. The appellate defense counsel who represented Appellant before the NMCCA failed to raise any issue regarding the entirely new member panel or the improper instructions.

Appellant filed his Brief and Assignment of Error on February 25, 2025, nearly five months after this Court decided *Mendoza*.⁸⁷ Appellant's prior appellate defense counsel only raised one assignment of error to the lower court: factual insufficiency.⁸⁸ The NMCCA affirmed the findings and the sentence.⁸⁹ After the lower court issued its opinion, the previous appellate defense counsel filed a motion for en banc reconsideration, identifying the confrontation and instructional errors.⁹⁰ The NMCCA summarily denied Appellant's motion without explanation, refusing to hear briefing on those issues.⁹¹

Additional facts are contained in the Argument section below.

⁸⁴ J.A. at 917, 1018.

⁸⁵ J.A. at 1050-71, 1097-1103.

⁸⁶ J.A. at 113-15, 1105; *Mendoza*, 85 M.J. 213 (decided Oct. 7, 2024).

⁸⁷ J.A. at 10-36.

⁸⁸ J.A. at 10-36.

⁸⁹ J.A. at 9.

⁹⁰ J.A. at 65-82.

⁹¹ J.A. at 81, 97-99.

Summary of Argument

A members-panel convicted Appellant of one specification alleging attempted sexual assault. He was acquitted of five specifications alleging various other sexual offenses. Before the lower court, previously assigned appellate defense counsel raised only factual insufficiency. After the lower court issued an opinion affirming the findings and sentence, that counsel sought reconsideration, admitting that he “failed” to bring forward two issues.⁹² Because there was a reasonable probability that the lower court would have reached a different result had those issues been properly identified, previously assigned appellate defense counsel was ineffective. This Court should substantively address the two underlying issues that the previous counsel failed to raise, thereby eliminating the need for remand to the lower court for further consideration.⁹³

Near the end of the Government’s case, one of the members informed the military judge that the panel prematurely deliberated. The military judge dismissed all the members, resulting in a members “court-martial” composed of zero members. The Defense moved for dismissal with prejudice, arguing there was no other adequate remedy. Instead of granting the Defense motion, the military judge, over defense objection, impaneled eight new members pursuant to Article 29,

⁹² J.A. at 81.

⁹³ *See United States v. Adams*, 59 M.J. 367, 372 (C.A.A.F. 2004).

UCMJ.⁹⁴ He then played the audio testimony of eleven government witnesses for the new panel to hear. The military judge established a novel procedure for implementing Article 29 by ordering the witnesses who previously testified to listen to their testimony from the witness stand while it was played for the new panel. The Defense objected to every aspect of this procedure and asserted it violated Appellant's constitutional rights to confrontation and due process.

During findings instructions, the military judge instructed the members that, for all charges where consent is at issue, they could find the named victim did not consent if she was asleep, unconscious, or incompetent. It was error for the military judge to instruct the members that this applied to all charges (including the attempted sexual assault without consent charge of which Appellant was ultimately convicted) without providing further clarification. This erroneous instruction prejudiced Appellant because the bulk of credible testimony did not support a without-consent theory of liability.⁹⁵

⁹⁴ 10 U.S.C. § 829 (2018).

⁹⁵ *Mendoza*, 85 M.J. at 822; *United States v. Moore*, 86 M.J. 308, 314-15 (C.A.A.F. 2026).

Argument

I.

Appellant's prior appellate defense counsel was ineffective for failing to raise two meritorious issues before the lower court.

Standard of Review

Claims of ineffective assistance of appellate counsel are reviewed de novo.⁹⁶

Discussion

In his motion for en banc reconsideration, prior appellate defense counsel acknowledged there were two additional issues that he “should have . . . raised in Appellant’s initial Brief and Assignment of Error, but . . . failed to do so.”⁹⁷ These were “the Confrontation Clause violation” and issues flowing from *Mendoza*.⁹⁸

“An accused has the right to effective representation by counsel through the entire period of review following trial, including representation before the Court of Criminal Appeals . . . by appellate counsel appointed under Article 70, UCMJ.”⁹⁹ The test for ineffective assistance of appellate counsel is the same as the test for ineffective assistance of trial defense counsel.¹⁰⁰ In both instances, the test requires

⁹⁶ *Adams*, 59 M.J. at 370.

⁹⁷ J.A. at 81.

⁹⁸ J.A. at 66, 73.

⁹⁹ *Adams*, 59 M.J. at 370 (quoting *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003)).

¹⁰⁰ *Id.* (citation omitted).

an appellant to prove his counsel's performance was deficient, and the deficiency resulted in prejudice.¹⁰¹

This Court applies a three-part test (based on *Strickland*'s two-prong test) to determine whether an appellate defense counsel was ineffective: (1) was there a "reasonable explanation for counsel's actions," (2) did the level of advocacy "fall measurably below the performance ordinarily expected of fallible lawyers," and (3) was there prejudice: "a reasonable probability that, absent the errors, there would have been a different result?"¹⁰²

First, in his motion for reconsideration of the lower court's opinion, the initial appellate defense counsel did not provide a reasonable explanation for his failure to raise the issues below.¹⁰³ In his brief before the lower court, though he detailed the military judge's invocation of Article 29 in a lengthy footnote, he inexplicably did not assign as an error the military judge's replacement of the entire panel mid-trial.¹⁰⁴ He provided no explanation for why he failed to do so in his motion for reconsideration, and instead admitted that he "did not, but should have, raised [it] as it involves Appellant's Sixth Amendment right to

¹⁰¹ *Id.* at 370 (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

¹⁰² *United States v. Palik*, 84 M.J. 284, 289 (C.A.A.F. 2024) (cleaned up) (citations and quotations omitted).

¹⁰³ J.A. at 81.

¹⁰⁴ J.A. at 24-25.

confrontation.”¹⁰⁵ As for the *Mendoza* instructional error, it appears that he did not recognize the issue until he reviewed several other post-*Mendoza* instructional error cases.¹⁰⁶ This explanation is not reasonable, given that the heart of the error stemmed from this Court’s clarification about theories of criminality in *Mendoza* and not from post-*Mendoza* instructional error cases.

Second, given that the primary role of appellate defense counsel is to bring assignments of error before courts of appeal, and given that the issues he failed to bring were not highly esoteric or hidden within the record, his performance fell “measurably below the performance ordinarily expected of fallible lawyers.”¹⁰⁷ The Article 29 full-panel replacement was completely unprecedented and formed the basis of myriad defense objections at trial—to not assign it as an error was performance well below that ordinarily expected of fallible lawyers. Furthermore, Appellant’s brief was filed only months after this Court’s impactful and widely-tracked decision in *Mendoza*. To not identify and assign the *Mendoza* issue until after the lower court issued its opinion was performance well below that ordinarily expected of fallible lawyers. Thus, the only remaining question is prejudice:

¹⁰⁵ J.A. at 66.

¹⁰⁶ J.A. at 66.

¹⁰⁷ *Palik*, 84 M.J. at 289 (cleaned up) (citations omitted).

whether there is a “reasonable probability” that the results would have been different.¹⁰⁸

A. Appellate defense counsel’s failure to allege error based on the mid-trial impanelment of an entirely new panel prejudiced Appellant.

There is a reasonable probability that the result would have been different at the lower court had appellate defense counsel identified and briefed the new members issue. The Defense preserved numerous objections to a new panel of members listening to the audio of the trial based on Appellant’s right to confrontation and due process.¹⁰⁹

This Court has previously stated that “a case could exist where Article 29[], UCMJ, would be unconstitutional as applied.”¹¹⁰ It is impossible for Article 29 to be more extensively applied than it was in this case, where the military judge leveraged Article 29 to replace every member of the first court-martial panel with an entirely new set of eight members.¹¹¹ The discussion of Issue II below demonstrates that Article 29 *was* applied unconstitutionally in this case because it undermined Appellant’s right to confront the witnesses against him before a court-

¹⁰⁸ *Id.*; *Strickland*, 466 U.S. at 694 (“A reasonable probability is a probability sufficient to undermine confidence in the outcome.”).

¹⁰⁹ J.A. at 580-81, 610, 624, 629, 643-44, 668-69 (“But that doesn’t alleviate the defense’s concerns . . . about the member’s inability to observe the demeanor of the witnesses during their examination.”).

¹¹⁰ *United States v. Vazquez*, 72 M.J. 13, 21 (C.A.A.F. 2013).

¹¹¹ J.A. at 621, 665-66.

marital panel. Therefore, there is a reasonable probability that, had appellate defense counsel brought the Article 29 issue before the lower court, there would have been a different result.¹¹²

B. The failure to bring an assignment of error based on the instructional error prejudiced Appellant.

This Court decided *Mendoza* nearly five months before prior appellate defense counsel filed his brief on Appellant's behalf.¹¹³ Over a month before ruling in Appellant's case, a different panel of the lower court ruled in *United States v. Grafton* that this exact instruction was improper as a matter of law for a charge of sexual assault without consent.¹¹⁴ There is little reason to believe that if the instructional error was raised the lower court would have ruled differently in Appellant's case.¹¹⁵ Therefore, there is a reasonable probability that, had appellate

¹¹² *Strickland*, 466 U.S. at 694; *Palik*, 84 M.J. at 289; *Adams*, 59 M.J. at 371-72.

¹¹³ J.A. at 10-36 (filed Feb. 25, 2025); *Mendoza*, 85 M.J. 213 (decided Oct. 7, 2024).

¹¹⁴ J.A. 1-9 (decided Sept. 24, 2025); *United States v. Grafton*, No. 202400055, 2025 CCA LEXIS 375 (N-M. Ct. Crim. App. Aug. 11, 2025), *review granted*, No. 26-0039/NA, 2026 CAAF LEXIS 185 (C.A.A.F. Feb. 18, 2026).

¹¹⁵ *Grafton*, 2025 CCA LEXIS 375; *c.f. United States v. Vanegasgonzalez*, No. 202500086, 2026 CCA LEXIS 298, at *15 (N-M. Ct. Crim. App. June 22, 2026) (finding no instructional error) ("This case is also distinguishable from *Grafton*. In *Grafton*, the Court found the instruction problematic particularly in light of the Government's argument that the victim was either unconscious or asleep throughout the sexual assault. Here, the facts are more akin to *Casillas* and *Moore*, in which there was evidence of non-consent both before and after the victim fell asleep and woke up."). The facts and arguments of this case, where there was little to no evidence that the named victim was capable of consenting but did not

defense counsel brought this instructional error before the lower court, there would have been a different result.¹¹⁶

Conclusion

This Court “has discretion to resolve . . . issues of law at [its] level or to remand a case for further proceedings at the Court of Criminal Appeals.”¹¹⁷ To efficiently reach a just result, this Court should grant substantive relief based on the two issues of law the previous appellant counsel failed to timely raise and the lower court refused to consider when they were raised late. Therefore, the appropriate remedy here is the same as for the two issues below—this Court should set aside the findings and sentence and authorize a rehearing on the charge of which Appellant stands convicted.

consent throughout the period of the alleged attempted assault, make this case more akin to *Grafton* than *Vanegasgonzalez*.

¹¹⁶ *Palik*, 84 M.J. at 289; *Strickland*, 466 U.S. at 694; *Adams*, 59 M.J. at 371-72.

¹¹⁷ *Adams*, 59 M.J. at 372.

II.

The military judge violated Appellant’s constitutional right to confrontation when he replaced the entire member panel and used Article 29(f) to present the new panel with the majority of the Government’s case through audio recordings.

Standard of Review

The “as-applied” constitutionality of a statute is a question of law reviewed de novo, and such a review requires a “fact-specific inquiry.”¹¹⁸

Discussion

This Court applies the test for as-applied constitutionality found in *United States v. Weiss*. Under *Weiss*, for an appellant to prevail in a constitutional challenge to a UCMJ statute, “the factors militating in favor of [the appellant must be] . . . so extraordinarily weighty as to overcome the balance struck by Congress.”¹¹⁹ Here, not a single member observed twelve of the Government’s fifteen witnesses’ full testimony. This violated Appellant’s extraordinarily weighty right to confront the witnesses against him. Appellant has therefore satisfied the *Weiss* test under the unique circumstances of this case.

¹¹⁸ *Vazquez*, 72 M.J. at 17 (citing *United States v. Ali*, 71 M.J. 256, 265 (C.A.A.F. 2012)); see also *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 289 (1921) (“A statute may be invalid as applied to one state of facts and yet valid as applied to another.”) (citations omitted).

¹¹⁹ *Vazquez*, 72 M.J. at 20; see also *Weiss v. United States*, 510 U.S. 163, 165 (1994); *Middendorf v. Henry*, 425 U.S. 25, 44, 47 (1976).

A. The factors militating in Appellant’s favor are quantitatively and qualitatively more weighty than in *United States v. Vazquez*.

This Court first analyzed Article 29’s constitutionality and as-applied constitutionality in *United States v. Vazquez*.¹²⁰ In *Vazquez*, in the middle of trial, trial defense counsel challenged one member for cause, breaking the minimum quorum necessary to proceed with a general court-martial.¹²¹ With the consent of trial defense counsel, two new members were impaneled in accordance with Article 29.¹²² Because trial defense counsel did not object, this Court tested the Article 29 procedure in *Vazquez* for plain error.¹²³ As part of the fact-specific inquiry *Weiss* requires, this Court noted that “Appellee’s acquiescence and complicity in every aspect of the procedures used did not create a record upon which to support an as-applied challenge.”¹²⁴ It also noted that the appellant’s right to confrontation was satisfied because “each witness testified under oath and in the presence of the accused and *four of the [six] final panel members*” and each witness was subject to cross-examination.¹²⁵

A fact-specific inquiry reveals sharp distinctions between the

¹²⁰ *Vazquez*, 72 M.J. at 17.

¹²¹ *Id.* at 15.

¹²² *Id.* In *Vazquez* the applicable rule was Article 29(b), 10 U.S.C. § 829(b) (2006). That rule is now generally reflected in Articles 29(d) and (f).

¹²³ *Id.* at 17.

¹²⁴ *Id.* at 19.

¹²⁵ *Id.* at 20 (emphasis added).

implementation of Article 29 in this case and in *Vazquez*:

<i>Vazquez</i>	<i>Cox</i>
Two of six panel members were added mid-trial. Four original members remained. ¹²⁶	Eight of eight panel members were added mid-trial. Zero original members remained. ¹²⁷
The Defense acquiesced at every stage. ¹²⁸	The Defense objected at every stage. ¹²⁹
Four panel members observed all witnesses. ¹³⁰	Zero panel members observed all witnesses. ¹³¹
All six panel members observed the live testimony of the victim's mother, the person who reported the offense. ¹³²	Zero panel members observed any testimony of the Government's two primary witnesses. ¹³³

In *Vazquez*, this Court cautioned that “a case could exist where Article 29[], UCMJ, would be unconstitutional as applied.”¹³⁴ Appellant's case is that case. Article 29's unprecedented wholesale use to replace the entire members panel is

¹²⁶ *Id.* at 15, 20.

¹²⁷ J.A. at 621, 664-67, 1131.

¹²⁸ *Vazquez*, 72 M.J. at 19.

¹²⁹ *See, e.g.*, J.A. at 624, 628-29, 668-73, 1115-30.

¹³⁰ *Vazquez*, 72 M.J. at 20.

¹³¹ J.A. at 621.

¹³² *Vazquez*, 72 M.J. at 16.

¹³³ J.A. at 760-66.

¹³⁴ *Vazquez*, 72 M.J. at 21.

outside the scope of the limited balance Congress struck where it intended the Article 29 procedures to be used in rare, limited, exigent circumstances.¹³⁵

B. The military judge misused Article 29 and applied it past its constitutional limits, violating Appellant’s confrontation rights.

1. The court-reporter pressed play, and Appellant was forced to “confront” a series of audio recordings.

Here, the audio recordings were not played to bring a panel member or two up to speed as in *Vazquez* or *United States v. Aikanoff* where a single ill panel member was replaced pursuant to Article 29.¹³⁶ In Appellant’s court-martial, the military judge replaced *the entire member panel*. This entirely new member panel did not watch three-fourths of the Government’s witnesses testify, including LCpl Augustin and the named victim, the only people in the room with Appellant during

¹³⁵ Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 6 Vanderbilt Law Review 169, 175 (1953) (chairman of the committee that drafted the UCMJ warned: “The Uniform Code in Article 29 . . . carries risk of abuse. If the Code were applicable only in peace time, this article could hardly be justified.”); accord *United States v. Grow*, 11 C.M.R. 77, 83 (C.M.A. 1953) (“Because the substitution of court members after arraignment is such a departure from the principles applicable to jury trials, and presents such a risk of abuse, we will view with circumspection any relief of a member after arraignment.”).

¹³⁶ *Vazquez*, 72 M.J. 21; *United States v. Aikanoff*, No. 20200423, 2022 CCA LEXIS 360, at *6 (A. Ct. Crim. App. June 15, 2022).

the charged offenses.¹³⁷ Instead, they listened to hours of hard-to-hear, keyboard-clack-filled testimony.¹³⁸

2. Appellant was not able to confront LCpl Augustin, the Government's star witness, in front of any member of the panel that convicted him.

The military judge deemed LCpl Augustin unavailable for the new panel.¹³⁹ Therefore LCpl Augustin did not sit in the room while the court played the recording of her testimony and she was not available to answer questions the members may have had.¹⁴⁰ Those were the very procedures the military judge deemed necessary to proceed with a full Article 29 panel replacement.¹⁴¹ But the military judge nevertheless allowed the trial to proceed down this unprecedented path.¹⁴²

¹³⁷ J.A. at 760-62, 766-67; *see Vazquez*, 72 M.J. at 22 (Baker, C.J., concurring) (commenting that, “where all or most of the witnesses have testified before the original court-martial panel prior to its reduction below quorum . . . [applying Article 29] could deprive [the newly appointed panel members] of information critical to making credibility determinations”).

¹³⁸ J.A. at 662-63, 669 (“I mean, you consistently hear keyboard clacking from the court reporter. It’s extremely distracting to anybody who’s listening.”).

¹³⁹ J.A. at 763-65.

¹⁴⁰ J.A. at 767.

¹⁴¹ *See* J.A. at 662-63, 674-75.

¹⁴² *See* J.A. 662-63, 674-75, 763-67; *Weiss*, 510 U.S. at 165. The military judge could have ordered a short continuance or made findings of fact as to the “probable duration of the illness” before finding the witness “unavailable,” but he did not. *See United States v. Cabrera-Frattini*, 65 M.J. 241, 245 (C.A.A.F. 2007) (“Where the absence of the witness results from illness, a court should also consider the nature of the illness and the probable duration of the illness.”) (citation omitted).

LCpl Augustin's absence was critical in this case where the named victim testified she didn't remember what happened. LCpl Augustin's absence was especially critical where she was the only government witness who testified she heard the named victim say "no."¹⁴³ In a case heavily reliant on witness credibility, the combined actions of replacing the entire panel and allowing the Government to present the core of its case through audio recordings violated Appellant's fundamental right to confrontation.

During live cross-examination in front of the original panel, the Defense significantly undermined LCpl Augustin's credibility as a witness. The Defense highlighted inconsistencies between her testimony at trial and her prior statements to the Naval Criminal Investigative Service (NCIS), and they got her to admit that she was so drunk that her car keys were taken from her.¹⁴⁴ The original panel, after observing her demeanor while she testified and was cross-examined, appeared skeptical of her version of events, and asked her questions about how intoxicated she was ("How many drinks do you think you had before going to the room?") and

¹⁴³ J.A. at 465-93, 519; *Vazquez*, 72 M.J. at 22 (Baker, C.J., concurring) ("[I]n he-said-she-said sex cases where there is no physical evidence, demeanor evidence could be determinative."); *see also* J.A. at 190-91, 220, 242, 262 (testimony that Appellant said the named victim consented).

¹⁴⁴ *See, e.g.*, J.A. at 538, 549-50. Though the Defense did not introduce direct evidence of LCpl Augustin's prior inconsistent statements to NCIS, LCpl Augustin's twenty-fold claims of "I don't remember" undermined her believability. *See* J.A. at 536-66.

inquired about her orientation on the bed (“[I] was just face down into the mattress”).¹⁴⁵ The members also asked, “At any time did you witness Private Cox’s genitals?” LCpl Augustin’s negative response (“No.”) weakened the inculcating nature of her text message (“He’s fucking Her”).¹⁴⁶ The original panel also clued into her hard-to-explain silence during the alleged assault, asking: “At any time during the situation, did you say ‘stop’ or try to talk with Private Cox?”¹⁴⁷

However, no member of the new panel that convicted Appellant was able to observe LCpl Augustin’s demeanor during her cross-examination, during her direct examination, or during her answers to the original panel’s questions. This left the new panel significantly less equipped to judge her credibility than the original panel.

3. Appellant was not allowed to confront the named victim in front of the all-new panel.

Although the named victim sat in the witness chair during the audio of her prior testimony, the new member panel did not ask her any questions.¹⁴⁸ Because the military judge only allowed the Defense to ask follow-up questions if the

¹⁴⁵ J.A. at 565.

¹⁴⁶ J.A. at 566, 1111.

¹⁴⁷ J.A. at 565-66.

¹⁴⁸ J.A. at 760-62.

members asked questions, the Defense was not given the opportunity to ask any questions of the named victim in front of the new panel.¹⁴⁹

There is no substitute for observing the named victim's demeanor while testifying.¹⁵⁰ The new members did not get to observe the named victim's demeanor when she testified that she made a mixed alcoholic drink for Appellant earlier in the night and later "scooped over and started talking to him."¹⁵¹ The named victim may have non-verbally indicated that she flirted with Appellant when she testified that she "scooped over" to him earlier in the night—and that demeanor could have led to reasonable doubt as to whether Appellant believed she consented to sexual intercourse shortly thereafter, undercutting proof of the specific intent of the charged attempt.

C. The military judge's application of Article 29 materially prejudiced Appellant's substantial rights.

The military judge's implementation of Article 29 prejudiced Appellant.¹⁵² In *California v. Green*, the Supreme Court held that a major purpose of the right to

¹⁴⁹ J.A. at 626, 662-63. *Compare* J.A. at 488-91 (cross examination of the named victim before the first panel, highlighting that the named victim originally believed she was in a car accident and had no recollection of a sexual assault) *with* J.A. at 760-62 (no opportunity for cross examination).

¹⁵⁰ J.A. at 670-73; *Vazquez*, 72 M.J. at 22 (Baker, C.J., concurring).

¹⁵¹ J.A. at 476, 486.

¹⁵² *See Vazquez*, 72 M.J. at 20; *Weiss*, 510 U.S. at 165; *Middendorf*, 425 U.S. at 44, 47.

confrontation is that it “permits the jury . . . to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.”¹⁵³ The Court explained the Confrontation Clause is not only essential to “testing the recollection and sifting the conscience of the witness,” but also ensures that he is compelled “to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.”¹⁵⁴ Later, in *Ohio v. Roberts*, the Supreme Court said all the purposes of confrontation are “interrelated,” and explained that a primary goal of confrontation is “to draw out discrediting demeanor to be viewed by the factfinder.”¹⁵⁵ Chief Judge Baker echoed these sentiments in his *Vazquez* concurrence.¹⁵⁶ He stated that, in certain cases, “demeanor evidence could be determinative,” and acknowledged that the “rote application of . . . Article 29[,] UCMJ, *could* deprive a defendant of a fair trial where all or most of the witnesses have testified before the original court-martial panel prior to its reduction below quorum.”¹⁵⁷

¹⁵³ *California v. Green*, 399 U.S. 149, 158 (1970); *see also Vazquez*, 72 M.J. at 22 (Baker, C.J., concurring).

¹⁵⁴ *Green*, 399 U.S. at 158 (quoting *Mattox v. United States*, 156 U.S. 237, 242-43 (1895)).

¹⁵⁵ *Ohio v. Roberts*, 448 U.S. 56, 63 & n.6 (1980) (citations omitted) *overruled on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004).

¹⁵⁶ *Vazquez*, 72 M.J. at 21-23 (Baker, C.J., concurring).

¹⁵⁷ *Id.* at 22 (emphasis in original).

Of the three government witnesses that testified fully before the new panel, only one had personal knowledge related to the incident—LCpl Augustin’s fiancé.¹⁵⁸ After observing LCpl Augustin’s fiancé’s demeanor while she testified, the panel appears to have not found her credible. As an example, LCpl Augustin’s fiancé testified that, through the video call, she “was able to see [Appellant] insert his penis into [the named victim’s] vagina.”¹⁵⁹ But Appellant was acquitted of Charge II, Specification 2 (“Sexual Assault without Consent,” for penetrating the named victim’s vulva with his penis without her consent) and Charge II, Specification 4 (“Sexual Assault of a Person who is Asleep,” for penetrating the named victim’s vulva with his penis when he knew or reasonably should have known she was asleep).¹⁶⁰ Furthermore, as noted above, Appellant was not given the opportunity to ask *any* questions of the Government’s two key witnesses in front of the new panel.¹⁶¹

The lower court acknowledged that the panel that convicted Appellant was “in only a slightly better position to judge most of the witnesses’ credibility than this [NMCCA] Court.”¹⁶² An appellate court should be in a much worse position to

¹⁵⁸ J.A. at 768 (LCpl Augustin’s fiancé), 815 (nurse examiner), 853 (DNA scientist).

¹⁵⁹ J.A. at 794-95; *see also* J.A. at 799.

¹⁶⁰ J.A. at 110-12, 1104.

¹⁶¹ J.A. at 760-67.

¹⁶² J.A. at 6.

judge credibility than a trial court—but here, in this trial consisting primarily of audio recordings, it was not.¹⁶³

The implementation of Article 29 also prejudiced Appellant’s overall trial strategy and due process rights.¹⁶⁴ The Defense listed nineteen ways in which it relied on the factfinder’s ability to observe the live witness testimony when preparing its case.¹⁶⁵ For example, the Defense relied on Appellant’s right to full confrontation when deciding “Whether to elect trial by members or trial by military judge” and “The speed at which questions were asked on cross examination” (implying the Defense would have conducted cross-examination more slowly so that the audio recording would be more clear).¹⁶⁶

In summary, because the military judge replaced the entire member panel, *no* factfinder observed the Government’s key witnesses’ testimony live.¹⁶⁷ Instead, *every* factfinder listened to audio of prior testimony pursuant to Article 29(f) for

¹⁶³ See *Anderson v. Bessemer City*, 470 U.S. 564, 566 (1985) (“When findings are based on determinations regarding the credibility of witnesses, [appellate review] demands even greater deference to the trial court’s findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener’s understanding of and belief in what is said.”).

¹⁶⁴ See *Vazquez*, 72 M.J. at 20 (citing *Maryland v. Craig*, 497 U.S. 836, 845 (1990)) (right to confrontation); *United States v. Bess*, 75 M.J. 70, 74 (C.A.A.F. 2015) (right to present a complete defense).

¹⁶⁵ J.A. at 1126-27.

¹⁶⁶ J.A. at 1126-27.

¹⁶⁷ J.A. at 621, 664-67, 1131.

eleven of the Government's fifteen witnesses. There is a significant probability that the lack of confrontation was the difference between a verdict of guilty and not guilty because (1) the witnesses provided conflicting testimony; (2) the named victim testified that she blacked out and does not remember whether she talked to Appellant about sex that night; and (3) Appellant was acquitted of all but one specification demonstrating that the factfinder did not believe in the Government's theory of the case.¹⁶⁸ As Appellant argued to the lower court, a "confused, chaotic, and alcohol-fueled chain of events" led to the charges—and had Appellant been able to properly confront all the Government's witnesses in front of the members, there is a reasonable probability that he would have been able to demonstrate reasonable doubt.¹⁶⁹ Therefore, the lack of confrontation was not harmless beyond a reasonable doubt, and the factors militating in Appellant's favor are so extraordinarily weighty as to overcome the balance Congress struck.¹⁷⁰

D. If the military judge's wholesale application of Article 29 is found to be permissible, then the well-established remedy of a mistrial will be available to military judges in name only whenever there is panel-wide prejudice.

Sustaining the military judge's actions would signal a sea-change in military jurisprudence where Article 29 would supplant the traditional mistrial as the

¹⁶⁸ J.A. at 113-15, 480-87, 1105; *see also* J.A. at 58-63.

¹⁶⁹ J.A. at 12.

¹⁷⁰ *Weiss*, 510 U.S. at 165.

appropriate remedy for panel-wide prejudice in nearly every case.¹⁷¹ It would never be “manifestly necessary”—a finding required to order a mistrial over defense objection—to declare a mistrial because Article 29 could just be applied in a wholesale fashion instead.¹⁷² There is no indication that Congress intended Article 29 to supplant a procedure that the Supreme Court has recognized as early as 1824, and has been applicable to courts-martial since, at least, the passage of the UCMJ in the early 1950s.¹⁷³

What happened here is nearly identical to what would happen if a mistrial were declared, but with less confrontation rights for the accused. For example, a document entitled “General Court-Martial *Convening Order* #1d-23” purported to detail nineteen new members to the existing court-martial.¹⁷⁴ Furthermore, the military judge treated the new panel as a new court-martial, stating “This court-

¹⁷¹ The mistrial, though not explicitly mentioned in the UCMJ, has applied to courts-martial since, at least, the adoption of the UCMJ. *See United States v. Stringer*, 17 C.M.R. 122, 135 (C.M.A. 1954) (“[W]e now rule that the law officer has—since the enactment of the Code—possessed the authority to declare a mistrial”).

¹⁷² MCM, pt. II, R.C.M. 915; *United States v. Cabrera*, 83 M.J. 562, 671 (N-M. Ct. Crim. App. 2023).

¹⁷³ *See United States v. Perez*, 22 U.S. 579, 580 (1824) (permitting a mistrial where there is a “manifest necessity for the act”); *Stringer*, 17 C.M.R. at 135; Paul E. Wilson, *Mistrials in Courts-Martial: A Study of the Evolution of the Judicial Character of the Military Judge*, 9 Wm. & Mary L. Rev. 327 (1967).

¹⁷⁴ J.A. at 108-09.

martial is assembled.”¹⁷⁵ Also, given that for at least two days the General Court-Martial established by Convening Order #1c-23 had no members, it ceased to exist as a members-court-martial (so the new venire was in every respect a new court-martial).¹⁷⁶

This Court has long recognized that our legal system values more than just “speed and efficiency.”¹⁷⁷ Accordingly, this Court should reject any wholesale application of Article 29 as doing so creates a mistrial-like scenario, but without full confrontation rights for the accused.

Conclusion

Accordingly, the military judge’s mid-trial replacement of the entire panel prejudiced Appellant’s right to confront the witnesses against him. This Court should therefore set aside the findings and sentence and authorize a rehearing on the charge of which Appellant was convicted.

¹⁷⁵ J.A. at 630.

¹⁷⁶ J.A. at 106-07, MCM, pt. II, R.C.M. 501(a)(1)(A)(ii).

¹⁷⁷ *United States v. Davis*, 85 M.J. 295, 305 (C.A.A.F. 2025) (quoting *Stanley v. Illinois*, 405 U.S. 645, 656 (1972)).

III.

The military judge's instructions were erroneous under *United States v. Mendoza* and *United States v. Moore*.

Standard of Review

Where the law has changed after trial, this Court reviews whether unobjected-to instructions are erroneous for plain error at the time of appeal.¹⁷⁸ Here, the Defense did not object to the instruction at trial. But this Court's *Mendoza* decision changed the law during Appellant's appeal.

Discussion

This Court addressed the legal and factual sufficiency of an appellant's sexual assault (without consent) conviction in both *Mendoza* and *United States v. Moore*.¹⁷⁹ The issue here involves the same underlying charge, but a different legal error. The heart of the error here is the military judge's erroneous instructions to the members.

¹⁷⁸ J.A. at 113, 917-20 (discussions about instructions); *Johnson v. United States*, 520 U.S. 461, 468 (1997) ("Where the law at the time of trial was settled and clearly contrary to the law at the time of appeal—it is enough that an error be 'plain' at the time of appellate consideration."); *United States v. Harcrow*, 66 M.J. 154, 158 (C.A.A.F. 2008) (reviewing for plain error); *United States v. Hale*, 78 M.J. 268, 273 (C.A.A.F. 2019) (reviewing an instructional issue for plain error); *Grafton*, 2025 CCA LEXIS 375, at *15 ("Despite the lack of objection, we conclude that this issue is . . . more appropriately treated as forfeiture.").

¹⁷⁹ *Moore*, 86 M.J. at 314-15; *Mendoza*, 85 M.J. at 822.

A. The military judge’s instructions were erroneous.

Generally, instructions that are “muddled [and] implicate ‘fundamental conceptions of justice’ under the Due Process Clause” are erroneous.¹⁸⁰ In *Moore*, this Court recently reiterated that the Government “cannot ‘prove the absence of consent under Article 120(b)(2)(A), UCMJ, by merely establishing that the victim was too intoxicated to consent.’”¹⁸¹ And it held the same prohibition “is true for sleep.”¹⁸²

Here, the sole specification of Charge I alleged Appellant “attempt[ed] to commit a sexual act upon [the named victim] by penetrating her vulva with [his] penis *without . . . [her] consent.*”¹⁸³ But the military judge’s instructions empowered the panel to convict Appellant under a theory that he had the specific intent to assault the named victim who did not consent because she was “sleeping, unconscious, or incompetent.”¹⁸⁴ He provided muddled instructions to the members, instructing them that “A sleeping, unconscious, or incompetent person cannot consent” *and* he instructed that this language applied to “all [the] charges and specifications,” including the charge of attempted sexual assault without

¹⁸⁰ *United States v. Hills*, 75 M.J. 350, 357 (C.A.A.F. 2016).

¹⁸¹ *Moore*, 86 M.J. at 314 (quoting *Mendoza*, 85 M.J. at 222).

¹⁸² *Id.*

¹⁸³ J.A. at 110-12.

¹⁸⁴ J.A. at 110-12, 1031-32.

consent.¹⁸⁵ The military judge did *not* instruct that, to find Appellant guilty of attempted sexual assault without consent, the panel would need to find beyond a reasonable doubt that Appellant had the specific intent to penetrate the named victim’s vulva while she was “capable of consenting [but] did not consent,” and he did not provide any other clarifying instruction.¹⁸⁶ Under *Mendoza* and *Moore*, the provided instructions are erroneous as applied to the facts here because there is a lack of evidence that the named victim did not consent before she was asleep, unconscious, or incompetent, and there is a lack of evidence she was awake and capable of consenting during the alleged attempt.

The members found Appellant guilty of Charge I and its specification. And the findings did not reflect what evidence they believe supported the “without consent” element.¹⁸⁷

B. The military judge’s instructions caused a legally flawed verdict.

A legally flawed verdict occurs when an instructional error leads to a conviction that could rest “on multiple theories of guilt [and] one of those theories is not unconstitutional, but is otherwise legally flawed.”¹⁸⁸ It arises “where the

¹⁸⁵ J.A. at 1031-32.

¹⁸⁶ *Mendoza*, 85 M.J. at 215; J.A. at 1022-49.

¹⁸⁷ J.A. at 1104. Appellant was found guilty on February 3, 2024.

¹⁸⁸ *Hedgpeth v. Pulido*, 555 U.S. 57, 60 (2008) (citing *Yates v. United States*, 354 U.S. 298 (1957)).

verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected.”¹⁸⁹

Here, it is impossible to tell if the panel convicted appellant of attempting to sexually assault the named victim (1) who was “sleeping,” (2) who was “unconscious,” (3) who was “incompetent,” or (4) who was “capable of consenting” and did not provide a “freely given agreement to the conduct at issue.”¹⁹⁰

Accordingly, there are four distinct theories of liability that could form the basis of Appellant’s conviction—but three of those theories are legally flawed because Charge I only alleges the fourth theory of liability (attempted sexual assault of someone capable of consenting that did not consent).¹⁹¹ Furthermore, a conviction under theories of liability (2) (unconscious) and (3) (incompetent) are not just legally flawed, they are constitutionally deficient due to lack of notice.¹⁹²

¹⁸⁹ *Black v. United States*, 561 U.S. 465, 470 (2010) (quoting *Yates*, 354 U.S. at 312).

¹⁹⁰ J.A. at 1031-32; *Mendoza*, 85 M.J. at 215.

¹⁹¹ J.A. at 110-12; *Hedgpeth*, 555 U.S. at 60 (citing *Yates*, 354 U.S. 298); *see also United States v. Sager*, 76 M.J. 158 (C.A.A.F. 2017) (holding that “asleep, unconscious, or otherwise unaware,” as contained in Article 120, are separate and distinct theories of criminal liability).

¹⁹² Appellant may have been on notice of the need to defend against an attempted sexual assault on someone who was asleep (because he was charged with committing such an assault in Charge II, Specification 4)—but he had no notice that he faced conviction for sexually assaulted someone who was “unconscious[] or incompetent.” J.A. at 1031-32.

Therefore, the military judge's instructions resulted in a legally flawed verdict, which must be tested for harmless error.¹⁹³

There was significant evidence that the named victim was sleeping, unconscious, or incompetent at the time of the charged assault. Therefore, the military judge should have *sua sponte* tailored a clarifying instruction for Charge I instead of enabling the panel to carefully follow his instructions *and* find appellant guilty on a legally impermissible ground.¹⁹⁴

C. Appellant was prejudiced because the constitutional instructional error was not harmless beyond a reasonable doubt.

When instructional error involves “constitutional dimensions,” the error is tested for prejudice under the harmless beyond a reasonable doubt standard.¹⁹⁵ The relevant inquiry is “whether it appears ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’”¹⁹⁶ Instructional errors that lead to legally flawed verdict errors are tested under the same standard.¹⁹⁷

¹⁹³ *Hedgpeth*, 555 U.S. at 60; *see also Yates*, 354 U.S. at 308.

¹⁹⁴ MCM, pt. II, R.C.M. 920(a) (“The military judge shall give the members appropriate instructions on findings.”); *Hale*, 78 M.J. at 274 (“This Court presume[s] that the panel followed the instructions given by the military judge.”).

¹⁹⁵ *Hills*, 75 M.J. at 357 (citations omitted).

¹⁹⁶ *Neder v. United States*, 527 U.S. 1, 15-16 (1999) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)); *see also Hills*, 75 M.J. at 357 (“The inquiry for determining whether constitutional [instructional] error is harmless beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the defendant’s conviction or sentence.”) (citations omitted).

¹⁹⁷ *Hedgpeth*, 555 U.S. at 60; *see also Yates*, 354 U.S. at 308.

Given the Government's evidence supporting uncharged theories of liability and the military judge's erroneous instruction, there is reasonable doubt as to whether the members convicted Appellant based on an uncharged theory of attempted sexual assault. Despite the charge of attempted sexual assault without the victim's consent, most of the Government's evidence supported a theory that the named victim was either unconscious, asleep, or incapable of consenting due to intoxication at the time of the incident.¹⁹⁸ Multiple witnesses testified that, prior to the charged assault, the named victim became so intoxicated she needed to be carried back to her barracks room.¹⁹⁹ Later, she was observed "laying on the floor" outside her room.²⁰⁰ A group of her fellow Marines tried to help her take a shower, but they could not move her because she was "basically dead weight."²⁰¹ Immediately after the incident, she still "wasn't moving."²⁰² When first responders arrived, she was still "unresponsive."²⁰³

Only two Government witnesses' testimony supported a theory of sexual assault "without the consent of the victim."²⁰⁴ LCpl Augustin testified that the

¹⁹⁸ J.A. at 172-75, 229-34, 284-87, 502-06.

¹⁹⁹ J.A. at 172-75, 229-34, 284-87, 502-06.

²⁰⁰ J.A. at 176.

²⁰¹ J.A. at 180-81.

²⁰² J.A. at 181-82.

²⁰³ J.A. at 368.

²⁰⁴ J.A. at 519, 777; *Mendoza*, 85 M.J. at 215.

named victim “grumbled” and said “no.”²⁰⁵ LCpl Augustin’s fiancé testified that, through a Facetime call, she heard the named victim in the background “make[] moaning sounds . . . [l]ike she was fighting it more.”²⁰⁶ But apparently the members found the testimony of LCpl Augustin and her fiancé unreliable because they acquitted Appellant of four of the five specifications that were before them including Specification 2 of Charge II that alleged sexual assault without consent.²⁰⁷

The panel’s sole guilty finding is consistent with them convicting Appellant based on the testimony of the witnesses who came to the barracks room and found the named victim effectively unconscious.²⁰⁸ Not one of those witnesses testified that the named victim was “capable of consenting [but] did not consent.”²⁰⁹

Furthermore, the Government primarily argued that Appellant was guilty because the victim was asleep and unable to consent at the time of the charged assault.²¹⁰ They argued that the named victim “was placed into bed, dead to the

²⁰⁵ J.A. at 519.

²⁰⁶ J.A. at 777.

²⁰⁷ J.A. at 1105. For example, as noted above, LCpl Augustin’s fiancé testified that she saw Appellant put his penis inside the named victim’s vagina, but the panel acquitted on those specifications. J.A. at 110-12, 794-95, 799.

²⁰⁸ J.A. at 181-82, 188, 237, 298.

²⁰⁹ *Mendoza*, 85 M.J. at 215; *see, e.g.*, J.A. at 188 (“She was just laying.”), 237 (“[The named victim] was just, kind of, like, laying—at the time, on the ground.”), 298 (“[Appellant was] trying to hold her body up.”).

²¹⁰ J.A. at 1050-72, 1097-1103.

world.”²¹¹ They stated that “minutes before the accused began to sexually assault her, she was lying, incoherent, on the ground” and that later, “she is not moving.”²¹² The Government did *not* argue the charged theory—that Appellant had the specific intent to assault a person who could consent, but did not.²¹³

Here, due to the erroneous instructions, there is reasonable doubt as to whether Appellant was convicted of the charged offense, or whether he was convicted of an uncharged and unnoticed theory of liability for attempting to sexually assault someone who was “unconscious[.]”²¹⁴ Accordingly, the military judge’s erroneous and muddled instructions were not harmless beyond a reasonable doubt because there is “reasonable doubt[] the error . . . contribute[d] to the defendant’s conviction or sentence.”²¹⁵

²¹¹ J.A. at 1050.

²¹² J.A. at 1054, 1057.

²¹³ The Government did *briefly* mention the testimony about non-consent in their closing argument, but that evidence was not their theory’s foundation and they did not link that evidence to the charged attempt. J.A. at 1058.

²¹⁴ J.A. at 1031-32.

²¹⁵ *Hills*, 75 M.J. at 357 (citations omitted); *see also Neder*, 527 U.S. at 10. Plain error also existed. To prevail under a plain error analysis, Appellant must show, “(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right.” *Harcrow*, 66 M.J. at 158 (quotation omitted). Applying the plain error test: (1) the instructions were muddled and they created a legally flawed verdict, (2) the error was plain or obvious, especially in light of *Sager*, 76 M.J. 158, decided years before this trial, and (3) the error materially prejudiced Appellant’s substantial right to fair notice and due process.

Conclusion

This instructional error was not harmless beyond a reasonable doubt. This Court should therefore set aside the findings and sentence and authorize a rehearing on the charge of which Appellant was convicted.

Respectfully submitted.

//s//

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I certify that the foregoing was filed electronically with this Court, and that copies were electronically delivered to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on July 30, 2026.

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