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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*	SUPPLEMENT TO PETITION FOR GRANT OF REVIEW 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*?

Introduction

Appellant was tried by members for one specification alleging attempted sexual assault and five specifications alleging various other sexual offenses. Very near the end of the Government's case, a key witness gave testimony the Military Judge deemed inadmissible. One of the members stated he could not put this testimony out of his mind and told the court that the members had been prematurely deliberating. The Military Judge dismissed all the members, and the Defense moved for dismissal with prejudice. Instead of granting the Defense motion or declaring a mistrial, the Military Judge, over defense objection, empaneled eight new members pursuant to Article 29, Uniform Code of Military Justice (UCMJ).[1] He then played the audio of the witnesses' testimony for the new panel to hear. The Defense objected to this procedure and asserted it violated Appellant's constitutional rights of confrontation and due process. Granting this petition will enable this Court to provide crisp guidance on the constitutional limits of Article 29 and ensure that a complete substitution of a members-panel does not become a routine way forward when a dismissal with prejudice or mistrial is manifestly necessary.

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[1] 10 U.S.C. § 829 (2024).

During findings instructions, the Military Judge instructed the members that, for all charges where consent is at issue, they can find the named victim did not consent if she was asleep, unconscious, or incompetent. The members found Appellant guilty of attempting to sexually assault the named victim without her consent. Because the bulk of credible testimony tended to show, if anything, that the named victim was asleep, unconscious, or too intoxicated to consent, it is unclear whether the members' finding was based on a "without the consent" theory of liability. This Court should grant review in this case to provide guidance to Military Judges on how to properly and precisely instruct members on a without consent sexual assault theory in accordance with *United States v. Mendoza*.

Before the lower court, previously assigned appellate defense counsel raised only factual insufficiency. After the court affirmed the findings and sentence, that counsel sought reconsideration. He specifically stated that he considered but did not raise issues related to the entirely new member panel, and that he overlooked the impact of *Mendoza* on Appellant's trial. He acknowledged that he should have brought both issues before the lower court. Failing to bring those issues constituted ineffective assistance of appellate counsel. This Court should grant review substantively, or, alternatively, grant, vacate, and remand to the lower court for analyses of these issues that the previous appellate defense failed to bring.

Statement of Statutory Jurisdiction

Appellant's approved sentence includes a punitive discharge.[2] The Navy-Marine Corps Court of Criminal Appeals (NMCCA) reviewed this case under Article 66(b), UCMJ.[3] Appellant invokes this Court's Article 67(a)(3), UCMJ, jurisdiction.[4]

Statement of the Case

The Government charged Appellant with one specification of attempted sexual assault in violation of Article 80, UCMJ, and five specifications of sexual assault in violation of Article 120, UCMJ.[5] The case was tried before a general court-martial consisting of officer and enlisted members.[6] At the close of evidence, the Military Judge dismissed one specification of sexual assault pursuant to Rules for Court-Martial (R.C.M.) 917.[7] The panel acquitted Appellant of the other four specifications of sexual assault and convicted him on the attempt specification.[8] The Military Judge sentenced Appellant to fourteen months of confinement and a

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[2] Entry of Judgment (Mar. 19, 2024).
[3] 10 U.S.C. § 866(b) (2024).
[4] 10 U.S.C. § 867(a)(3) (2024).
[5] Charge Sheet (Apr. 25, 2023); 10 U.S.C. §§ 880, 920 (2018).
[6] R. at 171; Entry of Judgment.
[7] R. at 2238.
[8] R. at 2361; Entry of Judgment.

dishonorable discharge.[9] The convening authority approved the sentence as adjudged, and the Military Judge entered the findings and sentence into judgment.[10]

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's friend invited the named victim to a party at a nearby barracks smoke pit.[11] The named victim testified that it was her "plan . . . to get really intoxicated that night with [my friend]."[12]

The named victim got very drunk.[13] Appellant and three other partygoers, along with the named victim's friend, helped her to her barracks room.[14] A partygoer testified that the named victim was asleep and "was basically dead weight."[15] The named victim, her friend (who was also drunk), and Appellant remained in the barracks room while the others returned to the smoke pit.[16]

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[9] R. at 2383; Entry of Judgment.
[10] Entry of Judgment.
[11] R. at 1011.
[12] R. at 1018.
[13] R. at 610-13, 697-702, 751-54, 1048-52.
[14] R. at 614, 617.
[15] R. at 618-19.
[16] R. at 618-21, 1056-57.

The named victim's friend video-called her fiancé using Facetime and went into the barracks room bathroom.[17] After about five minutes the friend exited the bathroom and saw Appellant kissing the named victim.[18] The friend testified that the named victim was not saying anything "at that time."[19] The friend did not intervene at all; instead she got on the other bed in the room and "start[ed] crying."[20] She testified that she turned the Facetime camera toward the named victim so her fiancé could see what was happening.[21] She testified that, sometime later, the named victim "grumble[d] and then also [said] 'no.'"[22] The fiancé testified that the named victim was "moaning," and later clarified that the moaning sounded like "she was fighting it more."[23]

The friend texted one of the partygoers to come help.[24] Four partygoers ran to the barracks room.[25] These four testified that the named victim did not appear to be fully awake or coherent when they entered the barracks room.[26]

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[17] R. at 1057-63.
[18] R. at 1063-64.
[19] R. at 1065.
[20] R. at 1066-67, 1098-1100, 1148-49.
[21] R. at 1067.
[22] R. at 1065.
[23] R. at 1895-96.
[24] R. at 1071-72; Prosecution Ex. 4.
[25] R. at 622, 705.
[26] R. at 624, 637, 705, 765-66.

The Government charged Appellant and placed him in pretrial confinement.[27]

B. Following the testimony of twelve government witnesses, the Military Judge dismissed the entire eight-member panel for cause. He then empaneled eight new members and had them listen to audio recordings of the previous testimony.

The Government called fifteen witnesses in its case-in-chief. The Government's twelfth witness was the named victim's friend.[28] At the conclusion of her testimony, a member submitted a question asking, "[t]hat night, did [Appellant] make—make any advancements towards you. If so, what and how was it? And what was your response?"[29] Both sides believed the question would elicit testimony about Appellant verbally propositioning the friend, but did not ask the witness outside the presence of the members.[30] The Defense objected to the question on Military Rules of Evidence (M.R.E.) 401, 403, and 404(b) grounds,

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[27] R. at 14; Charge Sheet.
[28] R. at 565 (#1), 605 (#2), 694 (#3), 731 (#4), 747 (#5), 844 (#6), 883 (#7), 900 (#8), 955 (#9—law enforcement agent who took buccal swabs of Appellant's mouth), 961 (#10), 1010 (#11—the named victim), 1040 (#12—the named victim's friend). The Government had only three witnesses to call after the friend's testimony. R. at 1887 (the friend's fiancé), 1963 (nurse examiner), 2000 (DNA scientist).
[29] R. at 1150.
[30] R. at 1150-61.

but the Military Judge allowed the question to be asked as eliciting *res gestae* of the offense.[31]

The Military Judge asked the question in front of the Members and the named victim's friend unexpectedly said "[h]e grabbed my arm and was trying to make me touch his penis."[32] The Defense objected and moved for dismissal with prejudice.[33] 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."[34] 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.[35] He denied this first Defense motion to dismiss with prejudice.[36]

After the Military Judge directed the members to disregard this testimony, one member stated he was unable to do so.[37] The member further revealed that

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[31] R. at 1151-57; MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. III, Mil. R. Evid. 401, 403, 404(b) (2019) [hereinafter MCM].
[32] R. at 1161.
[33] R. at 1164-65.
[34] R. at 1171 ("In the event that, the Court disagrees with that and says, dismissal with prejudice is never happening, we would ask for a mistrial."); Appellate Ex. LVII at 1.
[35] R. at 1233-39; MCM, pt. III, Mil. R. Evid. 403, 404(b), 413.
[36] R. at 1239.
[37] R. at 1272.

"multiple members" had prematurely deliberated while they were in the deliberation room during the break.[38] The Defense again moved for dismissal with prejudice, arguing that any lesser remedy, including a mistrial, would allow the Government to cure defects in its case and result in Appellant spending additional time in pretrial confinement.[39] The Military Judge voir dired the entire member panel; all but one admitted to premature deliberation.[40] Prior to ruling on the second Defense motion to dismiss with prejudice, the Military Judge dismissed the entire panel for cause, citing R.C.M. 505(c)(2) and R.C.M. 912(f)(1)(N).[41] There were no alternate members.

Because the court-martial had no members and the Military Judge had reserved ruling on the Defense motion to dismiss with prejudice, the convening authority signed a new "convening order" and all nineteen new member questionnaires were provided to the parties.[42] Three days after he dismissed all the

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[38] R. at 1273.
[39] R. at 1274-86.
[40] R. at 1288-95.
[41] R. at 1286, 1302; MCM, pt. II, R.C.M. 505(c)(2) ("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.").
[42] R. at 1304; General Court-Martial Convening Order #1d-23 (Jan. 29, 2024) (detailing nineteen new members to the existing court-martial); Appellate Ex. LXII (members questionnaires).

members, the Military Judge reconvened the court-martial.[43]

Before the new venire entered the courtroom, the Defense again moved to dismiss the charges and specifications with prejudice.[44] The Defense reiterated the objection to empaneling a new member panel and sought to be heard on motions to dismiss with prejudice several more times throughout the trial.[45] The Military Judge explained "ultimately, this Court did not declare a mistrial because after the members were excused, the basis for any prejudice at that point evaporated."[46]

The Military Judge informed the parties of his plan for bringing the new panel up to speed pursuant to Article 29(f). 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.[47] The Military Judge would allow the members to ask the witnesses questions, and would allow the parties to ask follow-up questions.[48] The Defense objected, arguing that "putting the witnesses in the box

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[43] R. at 1304.
[44] R. at 1307; Appellate Ex. LXIII.
[45] R. at 1315, 1326; *see also* R. at 1358 (Military Judge: "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."), 1747 (moving to dismiss after new members empaneled but before audio of testimony was played).
[46] R. at 1383.
[47] R. at 1309.
[48] R. at 1309.

and essentially having the members observe someone listening to their own testimony . . . [is] not the same thing as observing someone's demeanor while they're giving testimony."[49] The Defense also asserted this violated Appellant's right "to confront the witnesses."[50] After voir dire, the Defense renewed their opposition to playing the audio based on "confrontation and due process issues."[51] They noted that the audio included "consistent[] keyboard clacking from the court reporter" that is "extremely distracting to anybody who's listening"—and they 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."[52] The Military Judge denied Trial Defense Counsel's motion to dismiss with prejudice and did not rule on their separate objection to the government witnesses being permitted to listed to their own testimony from the witness stand in front of the members.[53]

The Military Judge ordered the court reporter to randomly assign numbers to the remaining members of the new venire, and he decided to empanel eight

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[49] R. at 1309-10.
[50] R. at 1361.
[51] R. at 1747.
[52] R. at 1748.
[53] R. at 1750-52 ("I mean, are the witnesses supposed to turn to the members and start nodding or shaking their head. I just think it's an odd practice and it's not something that [is] specifically contemplated by the rules.").

members.[54] The Military Judge called the members in, called the court to order, and proceeded with his plan.[55] He provided the standard preliminary instructions for impaneled members.[56] He then allowed the Government to distribute a printed version of their opening Powerpoint slides and instructed the court reporter to play the opening statements from both parties.[57]

Following the playing of opening statements, 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.[58] The Government played a recording of that witness' testimony while the witness remained in the witness box.[59] When an exhibit was published to the members in the recording, the Military Judge instructed the bailiff to publish the same exhibit to the new panel.[60] 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

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[54] R. at 1720-21, 1727, 1734; Appellate Ex. LXIV.
[55] R. at 1332-1343, 1779-2227.
[56] R. at 1332-1343 ("Members, please be seated. This court-martial is assembled. Members of the court, it is appropriate that I give you some preliminary instructions . . . . "), 1779-82 ("Members, each of you may take notes throughout trial . . . .").
[57] R. at 1782.
[58] R. at 1783.
[59] R. at 1782-84.
[60] R. at 1783.

any questions asked by the members.[61]

The Military Judge followed a similar procedure for eleven of the Government's twelve previously recorded witnesses.[62] One witness' testimony was not played—instead the Government introduced a stipulation of expected testimony for this witness.[63] All but the named victim's friend sat in the witness box while their recorded testimony was played.[64] The Military Judge declared the named victim's friend "unavailable" within the meaning of M.R.E. 804(a)(4).[65] As a result, the new members panel never had the opportunity to observe the demeanor of, or ask questions of, the only witness who was in the room with Appellant and the named victim at the time of the charged acts. 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—only three witnesses fully testified in real time.[66]

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[61] R. at 1784-94.
[62] R. at 1783-1886.
[63] R. at 1845, 1861. This witness was the law enforcement agent who took swabs from Appellant. R. at 955-61, 2080-83; Prosecution Ex. 8.
[64] R. at 1783-1886.
[65] R. at 1882-83; MCM, pt. III, Mil. R. Evid. 804(a)(4). The Defense maintained their previous objection under the confrontation clause, but did not object to her being deemed unavailable. R. at 1884.
[66] R. at 1887-2227.

C. Appellant was charged with sexually assaulting the named victim without her consent. When providing instructions about that specification, the Military Judge instructed the panel that "a sleeping, unconscious, or incompetent person cannot consent."

The sole specification for 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]."[67]

When the Military Judge defined consent for "*all charges and specifications*," he included that[68]

> *A sleeping, unconscious, or incompetent person cannot consent.* 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 apprizing the nature of the conduct at issue, or physically incapable of declining participation or in communicating unwillingness to engage in the sexual act at issue.
>
> 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*.[69]

Trial Defense Counsel did not object to this portion of the instructions.[70] Appellant's court-martial adjourned on 5 February 2024, eight months before this

[67] R. at 2361; Charge Sheet (emphasis added).
[68] R. at 2256 (emphasis added); Appellate Ex. LXXV at 6.
[69] R. at 2257 (emphasis added); Appellate Ex. LXXV at 6
[70] R. at 2116, 2243.

Court issued its opinion in *Mendoza*.[71] Appellant's case was docketed with the lower court on 24 June 2024 and Appellant filed his Brief and Assignment of Error on 25 February 2025, nearly five months after this Court decided *Mendoza*.[72]

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's prior appellate defense counsel only raised one assignment of error to the lower court: factual insufficiency.[73] The NMCCA affirmed the findings and the sentence.[74] After the lower court ruled, the previous appellate defense counsel filed a motion for en banc reconsideration, in which counsel identified the error of an entirely new panel and the improper instruction as to consent.[75] The NMCCA summarily denied Appellant's motion.[76]

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[71] R. at 2383; *United States v. Mendoza*, 85 M.J. 213 (C.A.A.F. 2014) (decided Oct. 7, 2024).
[72] Appellant's Brief (filed Feb. 25, 2025), *United States v. Cox*, No. 20240014, slip. op. (N-M. Ct. Crim. App. Sept. 24, 2025) (unpublished).
[73] *Id.*
[74] *Cox*, slip op. at 9.
[75] Appellant's Motion for En Banc Recons. (filed Oct. 24, 2025), *Cox*, slip. op. [hereinafter "Appellant's Motion for En Banc Recons."].
[76] Order Denying Appellant's Motion for En Banc Recons. (issued Nov. 12, 2025), *Cox*, slip op.

Reasons to Grant Review

I.

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

In his Motion for En Banc Reconsideration, prior appellate defense counsel admitted there were two additional issues that he "should have . . . raised in Appellant's initial Brief and Assignment of Error, but . . . failed to do so."[77] These were "the Confrontation Clause violation" and issues flowing from *Mendoza*.[78] The appellate defense counsel's failure to bring these issues before the NMCCA resulted in a lower court proceeding that departed far "from the accepted and usual course of judicial proceedings"—therefore, this Court should grant substantive review in accordance this Court's Rules of Practice and Procedure Rule 21(b)(5)(F).[79] In the alternative, this Court should grant, vacate, and remand to the lower court for analyses of the other issues presented in this Supplement.

"An accused has the right to effective representation by counsel through the entire period of review following trial, including representation before the Court of

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[77] Appellant's Motion for En Banc Recons. at 17.
[78] Appellant's Motion for En Banc Recons. at 2, 9.
[79] Rules of Practice and Procedure of the United States Court of Appeals for the Armed Forces (Sept. 26, 2025), Rule 21(b)(5)(F).

Criminal Appeals . . . by appellate counsel appointed under Article 70, UCMJ."[80] The test for ineffective assistance of appellate counsel is the same as the test for ineffective assistance of trial defense counsel.[81] In both instances, the test requires an appellant to prove his counsel's performance was deficient, and the deficiency resulted in prejudice.[82] Where appellate counsel is not "wholly absent," appellant bears the burden of demonstrating that, had his counsel raised the issues before the service court, there is a reasonable probability that the result would have been different.[83]

This Court applies a three-part test to determine whether counsel was ineffective: (1) was there a reasonable explanation for counsel's actions, (2) did the level of advocacy fall measurably below the performance of fallible lawyers, and (3) was there a reasonable probability that, absent the errors, there would have been a different result?[84] Here, there was no reasonable explanation for appellate defense counsel's failure to bring the issues before the lower court.[85] He admitted

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[80] *United States v. Adams*, 59 M.J. 367, 370 (C.A.A.F. 2004) (quoting *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003)).
[81] *United States v. Hullum*, 15 M.J. 261, 267 (C.M.A. 1983); *Adams*, 59 M.J. at 370.
[82] *Adams*, 59 M.J. at 370 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).
[83] *Id.* at 371-72.
[84] *United States v. Palik*, 84 M.J. 284, 289 (C.A.A.F. 2024) (citations omitted).
[85] *Id.*

as much in his Motion for En Banc Reconsideration.[86] Given that the primary role of appellate defense counsel is to bring assignments of error before courts of appeal, his performance fell "measurably below the performance ordinarily expected of fallible lawyers."[87] Thus, the only remaining question is prejudice: whether there is "a reasonable probability" that the results would have been different.[88]

A. The failure to bring an assignment of error based on the mid-trial empanelment of an entirely new panel pursuant to Article 29 prejudiced Appellant.

There is a reasonable probability that the results would have been different at the lower court had appellate defense counsel identified and briefed the issue created when the Military Judge used Article 29 to seat an entirely new panel, thereby allowing the Government to present its case by simply playing back audio of witness testimony. The Defense preserved this issue at trial, having objected numerous times.[89]

"[A] case could exist where Article 29[], would be unconstitutional as

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[86] Appellant's Motion for En Banc Recons. at 17.
[87] *Palik*, 84 M.J. at 289 (cleaned up) (citations omitted).
[88] *Id.*; *Strickland*, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.").
[89] R. at 1164-65, 1286, 1307, 1326, 1357-58, 1747-48 ("But that doesn't alleviate the defense's concerns . . . about the member's inability to observe the demeanor of the witnesses during their examination.").

applied."[90] The analysis of Issue II below demonstrates that Article 29 *was* applied unconstitutionally in this case. 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.[91]

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

This Court's docket reflects the unsettled nature of the law post-*Mendoza*. This Court decided *Mendoza* nearly five months before appellate defense counsel filed his brief on Appellant's behalf.[92] 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 same instruction was improper as a matter of law for a charge of sexual assault without consent.[93] There is little reason to believe that if the instructional error was raised the lower court would have ruled differently in Appellant's case.

Accordingly, this Court should grant review to substantially address this claim of ineffective assistance of appellate counsel, or in the alternative, grant,

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[90] *United States v. Vazquez*, 72 M.J. 13, 21 (C.A.A.F. 2013).
[91] *Palik*, 84 M.J. at 289; *Strickland*, 466 U.S. at 694; *Adams*, 59 M.J. at 371-72.
[92] Appellant's Brief, *Cox*, slip op. (filed Feb. 25, 2025); *Mendoza*, 85 M.J. 213 (decided 7 October 2024).
[93] *United States v. Grafton*, No. 202400055, 2025 CCA LEXIS 375 (N-M. Ct. Crim. App. Aug. 11, 2025); *Cox*, slip op. (decided September 24, 2025).

vacate, and remand to the lower court for analyses of the other below issues presented in this Supplement.

II.

The Military Judge violated Appellant's constitutional rights to confrontation and due process 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.

In *United States v. Vasquez*, this Court said that, "a case could exist where Article 29[], would be unconstitutional as applied."[94] Appellant's case is that case. This Court should use this case to establish clear guidelines on the use of Article 29. Military judges need to know when it is appropriate to apply Article 29, and when a mistrial or other remedy is the proper course of action. Additionally, this Court should grant review for two critical reasons outlined in this Court's Rules 21(b)(5)(A) and (F).[95] First, the NMCCA's statement that "the findings and sentence are correct in law," effectively "decided a question of law that has not been, but should be, settled by this Court."[96] Second, this ruling "sanctioned . . . a

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[94] *Vazquez*, 72 M.J. at 21. In *Vazquez* the applicable rule was Article 29(b), 10 U.S.C. § 829(b) (2006). That rule is now generally reflected in Article 29(d) and (f).
[95] Rules of Practice and Procedure of the United States Court of Appeals for the Armed Forces, Rule 21(b)(5)(A), (F).
[96] *Id.* at Rule 21(b)(5)(A); *Cox*, slip op. at 9.

[far] departure by a court-martial" from "the accepted and usual course of judicial proceedings."[97]

Article 29, provides in relevant 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 . . . . [T]he trial may proceed with the new members present after the evidence previously introduced is read or . . . played, in the presence of the new members, the military judge, the accused, and counsel for both sides.[98]

As for the rule related to mistrials, R.C.M. 915 provides that a military judge may:

> as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings.[99]

The discussion section of the Manual for Courts-Martial (MCM) provides examples of when a mistrial may be appropriate, including when "a curative instruction would be inadequate" and when "members engage in prejudicial misconduct."[100]

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[97] Rules of Practice and Procedure of the United States Court of Appeals for the Armed Forces, Rule 21(b)(5)(F).
[98] 10 U.S.C. § 829(d), (f) (2024).
[99] MCM pt. II, R.C.M. 915.
[100] MCM pt. II, R.C.M. 915 Discussion; *see also Vazquez*, 72 M.J. at 23 (Baker, C.J., concurring) (describing the excusal of one panel member as "a textbook example of an instance where grounds for a mistrial may have existed" when five government witnesses had already testified at the time of the excusal).

A. The Military Judge misused Article 29 and stretched it past its constitutional limits.

The Military Judge did not need to stretch Article 29 past its constitutional limits—he could have dismissed the charges with or without prejudice. This case is literally a textbook mistrial example: after hearing unfairly prejudicial testimony, "[a] curative instruction" proved inadequate for one member and "members engage[d] in prejudicial misconduct" by prematurely deliberating.[101] The entire panel was rightly excused, but instead of the correct dismissal route, the Military Judge took a shortcut and replaced the entire panel pursuant to Article 29. The Military Judge stated that "this Court did not declare a mistrial because after the members were excused, the basis for any prejudice at that point evaporated."[102] But the Military Judged failed to recognize that replacing the panel and playing recordings of witness testimony created new prejudice—it resulted in material prejudice to Appellant's rights to confrontation and due process.

This issue was not waived—Trial Defense Counsel never stated they preferred the imposition of Article 29 to a mistrial and they objected repeatedly to the Military Judge's chosen path forward.[103] Although it was error for the Military

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[101] R. at 1288-95, 1302; MCM pt. II, R.C.M. 915 Discussion.
[102] R. at 1383.
[103] *See, e.g.*, R. at 1326, 1357-58.

Judge to not dismiss the charges, the heart of this issue was his choice to push forward with an unconstitutional application of Article 29.

The Defense argued for dismissal with prejudice and opposed both a mistrial and the Military Judge's plan to seat an entirely new panel.[104] In arguing for dismissal with prejudice, the Defense explained they opposed a mistrial for two main reasons: (1) it would provide the Government an opportunity "to cure all of its defects in this case and do things differently" and (2) Appellant would need to await the new trial "in pretrial confinement."[105] Neither of those concerns are particularly unique to Appellant's case and may exist in other cases where a mistrial is considered.

The Military Judge had the authority to declare a mistrial, even over a Defense objection.[106] He should have done so, or dismissed the charges with prejudice, because a members-court-martial without any members would obviously cast "substantial doubt upon the fairness of the proceedings," as would playing the

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[104] R. at 1164-65, 1286, 1307, 1747.
[105] R. at 1280.
[106] MCM pt. II, R.C.M. 915(b) ("On motion for a mistrial or when it otherwise appears that grounds for a mistrial may exist, the military judge shall inquire into the views of the parties on the matter and then decide the matter as an interlocutory question."); *see also United States v. Donley*, 33 M.J. 44, 46 (C.M.A. 1991) ("It is well settled that a judge may declare mistrial over the objection of an accused if the record of trial reveals a 'manifest necessity.'").

audio testimony of eleven government witnesses for an entirely new panel.[107] Even though the Defense's view was against a mistrial, it is up to the Military Judge to decide whether a mistrial is necessary, and he must not abuse his discretion in doing so.[108] Plainly the Military Judge believed the problems with the first panel were so pervasive that they warranted a dismissal of every member.[109] How this did not lead to the obvious conclusion of a mistrial is unclear at best. Instead, the Military Judge marched knowingly into unprecedented territory by applying Article 29 to essentially re-start the trial. In so doing, he left Appellant's rights to confrontation and due process by the wayside.

If the Military Judge's actions are sustained, it would signal a sea-change in military jurisprudence, where Article 29 could supplant the traditional mistrial as a remedy for panel-wide prejudice. However, this expediency comes at the direct cost of an appellant's rights to confrontation and due process. This Court has long recognized that our legal system values more than just "speed and efficiency."[110]

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[107] R. at 171 (requesting a court-martial composed of members with one-third enlisted representation); MCM pt. II, R.C.M. 915.
[108] MCM pt. II, R.C.M. 915; *see United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008) ("An abuse of discretion occurs when the trial court's findings of fact are clearly erroneous or if the court's decision is influenced by an erroneous view of the law.").
[109] R. at 1302.
[110] *United States v. Davis*, 85 M.J. 295, 305 (C.A.A.F. 2025) (quoting *Stanley v. Illinois*, 405 U.S. 645, 656 (1972)).

Appellant asks this Court to reaffirm that principle by rejecting this novel and extreme application of Article 29, which prioritizes a convenient shortcut over the rights of the accused.

B. 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 *Vasquez* or *United States v. Aikanoff*.[111] In Appellant's court-martial the Military Judge replaced *the entire member panel*. This entirely new member panel did not get to watch three-fourths of the Government's witnesses testify.[112] Instead they had to listen to approximately eight hours of hard-to-hear, keyboard-clack-filled testimony.[113] This "testimony" included the direct and cross-

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[111] *Vazquez*, 72 M.J. 21; *United States v. Aikanoff*, No. 20200423, 2022 CCA LEXIS 360, at *6-7 (A. Ct. Crim. App. June 15, 2022) (One ill member was replaced pursuant to Article 29). The language of Article 29 suggests that its procedures contemplate small changes in the member panel vice an entirely new panel.

[112] *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.").

[113] R. at 1569, 1748 ("I mean, you consistently hear keyboard clacking from the court reporter. It's extremely distracting to anybody who's listening.").

examination of the named victim and of her friend, the only people in the room with Appellant during the charged offenses.[114]

1. **Appellant was not able to confront the named victim in front of the 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.[115] Because the Military Judge only allowed Trial Defense Counsel to ask follow-up questions if the members asked questions, Trial Defense Counsel were not given the opportunity to ask *any* questions of the named victim in front of the new panel.[116] Observing the named victim's demeanor as she listened to what was said is not the same as observing it while she was questioned.[117] For example, 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 and later "scooched over and started talking to him."[118]

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[114] R. at 1877, 1885-86.
[115] R. at 1877.
[116] *Compare* R. at 1033-36 (cross examination of the named victim before the first panel) *with* at 1877-78 (no opportunity for cross examination).
[117] R. at 1750-52; *Vazquez*, 72 M.J. at 22 (Baker, C.J., concurring).
[118] R. at 1021, 1031.

2. **Appellant was not able to confront the named victim's friend in front of the new panel.**

The only other witness in the room at the time of the charged acts was deemed unavailable for the new panel.[119] Therefore she was not sitting in the room while the recording of her testimony was played and was not available to answer questions the members may have had.[120] Her absence was critical in this he-said-her-friend-said case—especially where the friend is the only Government witness who testified she heard the named victim say "no."[121] 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 the appellant's fundamental rights to confrontation and due process.

C. **The Military Judge's application of Article 29 in this case materially prejudiced Appellant's substantial rights.**

In *California v. Green*, the Supreme Court held that a major purpose of the right to confrontation is that it "permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding

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[119] R. at 1882-83.
[120] R. at 1886.
[121] R. at 1065; *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* R. at 638-29, 688, 710, 730 (testimony that Appellant said the named victim consented).

the jury in assessing his credibility."[122] 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."[123] 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."[124] These sentiments were echoed by Chief Judge Baker in his concurrence in *Vazquez*.[125] 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 . . . ."[126]

Appellant was extraordinarily prejudiced by the implementation of Article 29 in this case.[127] Of the three witnesses that testified fully before the new panel,

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[122] *California v. Green*, 399 U.S. 149, 158 (1970); *see also Vazquez*, 72 M.J. at 22 (Baker, C.J., concurring).
[123] *Green*, 399 U.S. at 158 (quoting *Mattox v. United States*, 156 U.S. 237, 242-43 (1895)).
[124] *Ohio v. Roberts*, 448 U.S. 56, 63, 63 n.6 (1980) (citations omitted) *overruled on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004).
[125] *Vazquez*, 72 M.J. at 21-23 (Baker, C.J., concurring).
[126] *Id.* at 22.
[127] *Vazquez*, 72 M.J. at 20; *Weiss v. United States*, 510 U.S. 163, 165 (1994);

only one had personal knowledge related to the incident—the friend's fiancé.[128] And, after observing the friend's fiancé's demeanor while she testified, the panel appears to have not found her credible. As an example, the friend's fiancé testified that she saw Appellant put his penis inside the named victim's vagina.[129] 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.[130]

Furthermore, as noted above, Appellant's right to confront the named victim and the named victim's friend was severely curtailed because the named victim was not asked any questions in front of the members and her friend was not even available to answer any questions.

Middendorf v. Henry, 425 U.S. 25, 44, 47 (1976). The level of prejudice Appellant must demonstrate is related to the test laid out in *Weiss v. United States*, where the Supreme Court held that, 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." *Weiss*, 510 U.S. at 165.

[128] R. at 1887 (the friend's fiancé), 1963 (nurse examiner), 2000 (DNA scientist).

[129] R. at 1913-14, 1924-25.

[130] Charge Sheet; R. at 2361.

The implementation of Article 29 also prejudiced Appellant's overall trial strategy and due process rights.[131] Trial Defense Counsel listed nineteen ways in which they relied on the factfinder's ability to actually observe the witnesses when preparing their case.[132] For example, the Defense relied on Appellant's right to full confrontation when deciding "What witnesses to request," "Whether to elect trial by members or trial by military judge," and "What questions to ask on cross examination."[133]

In conclusion, because the Military Judge replaced the entire member panel, *no* factfinder observed the Government's key witnesses' testimony live. Instead, *every* factfinder simply listened to audio of prior testimony pursuant to Article 29(f) for eleven of the Government's fifteen witnesses. The lack of confrontation was not harmless beyond a reasonable doubt, rather, it may have been the difference between a verdict of guilty and not guilty because (1) the witnesses provided conflicting testimony; (2) the named victim testified that she does not "remember" whether she talked to Appellant about sex that night; and (3)

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[131] Other due process rights potentially implicated include the right to present a complete defense, and the right to a fair tribunal. *United States v. Bess*, 75 M.J. 70 (C.A.A.F. 2015) (right to present complete defense); *Vazquez*, 72 M.J. at 20 (citing *Weiss*, 510 U.S. 163, 178) (holding that the appointment of military judges without fixed terms does not violate due process).
[132] Appellate Ex. LXIII at 12-13.
[133] Appellate Ex. LXIII at 12-13.

Appellant was acquitted of all but one specification, demonstrating that the factfinder did not believe in the Government's theory of the case.[134] Accordingly, Appellant was prejudiced by this infringement of his constitutional rights, and this Court should grant review so that it can set aside and dismiss Appellant's conviction.

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[134] R. at 1032, 2361.

III.

The Military Judge's instructions were erroneous under *United States v. Mendoza* and *United States v. Moore.*

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*.[135] 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. This Court should grant review in accordance with Rule 21(b)(5)(B) because the NMCCA, in writing that "the findings and sentence are correct in law," "decided a question of law in a way that conflicts with applicable decisions [of this Court]."[136] Specifically, by not finding instructional error, the lower court's decision conflicted with the definition of "without the consent of the victim" outlined in *Mendoza* and reemphasized in *Moore*.

Because this case was tried before this Court decided *Mendoza*, the settled law at trial is "clearly contrary to the law at the time of appeal," so this Court

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[135] *United States v. Moore*, No. 25-0110, 2026 CAAF LEXIS 73, at *14-15 (C.A.A.F. Jan. 23, 2026); *Mendoza*, 85 M.J. at 822.
[136] *Cox*, slip op. at 9; Rules of Practice and Procedure of the United States Court of Appeals for the Armed Forces, Rule 21(b)(5)(B).

reviews the instructional issue for plain error "at the time of appellate consideration."[137]

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.[138] More specifically, 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.'"[139] And it held the same prohibition "is true for sleep."[140]

Here, the sole specification of Charge I alleged an attempted sexual assault "without the consent" of the named victim. But the Military Judge's instructions empowered the panel to convict Appellant under a theory that the named victim did not consent because she could not consent due to her being "sleeping, unconscious, or incompetent."[141] He provided muddled instructions to the

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[137] R. at 2116-19, 2243 (discussions about instructions); *Johnson v. United States*, 520 U.S. 461, 468 (1997); *United States v. Harcrow*, 66 M.J. 154, 158 (C.A.A.F. 2008); *see also Grafton*, 2025 CCA LEXIS 375, at *15 ("Despite the lack of objection, we conclude that this issue is not forfeited because *Mendoza* had not yet been decided.").
[138] *United States v. Hills*, 75 M.J. 350, 357 (C.A.A.F. 2016).
[139] *Moore*, 2026 CAAF LEXIS 73, at *9-10 (quoting *Mendoza*, 85 M.J. at 222).
[140] *Id.* at *10.
[141] Charge Sheet; R. at 2256-57.

members by instructing them that "A sleeping, unconscious, or incompetent person cannot consent" *and* he said that this language applied to "all [the] charges and specifications," including the charge of attempted sexual assault without consent.[142] Under *Mendoza* and *Moore*, these instructions are erroneous.

The members found Appellant guilty of Charge I and its specification. And the findings did not reflect what evidence they believe supported the "without the consent" element.[143]

B. 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.[144] "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."[145]

Given the Government's evidence, there is a reasonable probability the members convicted Appellant based solely on evidence that the named victim was

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[142] R. at 2256-57.
[143] R. at 2361. Appellant was found guilty on February 3, 2024.
[144] *Hills*, 75 M.J. at 357 (citations omitted).
[145] *Id. See also Neder v. United States*, 527 U.S. 1, 10 (1999) ("[An] erroneous instruction precludes the jury from making a finding on the *actual* element of the offense.").

unconscious or asleep even though that was not alleged in Charge I.[146] Despite the charge of attempted sexual assault without the consent of the victim, the majority of the Government's evidence supported a theory that the named victim was either asleep or incapable of consenting due to intoxication at the time of the incident.[147] 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.[148] Later, she passed out on the floor outside her room.[149] A group of her fellow Marines tried to help her take a shower, but they could not wake her.[150] She was "basically dead weight."[151] Immediately after the incident, she appeared to be unconscious.[152] When first responders arrived, she was still unresponsive.[153]

Only two Government witnesses' testimony supported a theory of "without the consent of the victim" sexual assault.[154] The named victim's friend testified that

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[146] The panel may have convicted Appellant of attempted sexual assault on a victim who is unconscious or asleep without a finding that Appellant *knew or reasonably should have known* that the named victim was asleep or unconscious (as required by the law).
[147] R. at 610-13, 697-702, 751-54, 1048-52.
[148] R. at 610-13, 697-702, 751-54, 1048-52.
[149] R. at 614.
[150] R. at 618.
[151] R. at 619.
[152] R. at 619-20.
[153] R. at 853.
[154] R. at 1065, 1896; *Mendoza*, 85 M.J. at 215.

the named victim "grumbled" and said "no."[155] The friend'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."[156] But apparently the members found the testimony of the friend and her fiancé unreliable because they acquitted Appellant of four of the five specifications that were before them.[157]

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 asleep, unconscious, or otherwise unaware.[158] Not one of those witnesses testified that the named victim was "capable of consenting [but] did not consent."[159]

Furthermore, the Government primarily argued that Appellant was guilty because the victim was asleep and unable to consent at the time of the charged

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[155] R. at 1065.
[156] R. at 1896.
[157] R. at 2361. For example, as noted above, the friend's fiancé testified that she saw Appellant put his penis inside the named victim's vagina, but the panel acquitted on those specifications. R. 1913-14, 1924-25, 2361; Charge Sheet, Charge II, Specification 2, 4 (alleging penetration of the vulva with Appellant's penis).
[158] R. at 622, 705.
[159] *Mendoza*, 85 M.J. at 215; R. at 624-25, 637, 739-40 ("[The named victim] was lying down with her back down, and [Appellant was] . . . basically, doing stuff to her."); R. at 765 ("[Appellant was] trying to hold her body up."); R. at 705 ("[The named victim] was just, kind of, like, laying—at the time, on the ground.").

assault.[160] They argued that the named victim "was placed into bed, dead to the world."[161] They stated that "minutes before the accused began to sexually assault her, she was lying, incoherent, on the ground" and that later, "she [was] not moving."[162] The Government did *not* argue that Appellant had the specific intent to assault a person who could consent, but did not.

Accordingly, the Military Judge's inaccurate instructions were not harmless beyond a reasonable doubt because there is a reasonable probability that Appellant was convicted of attempted sexual assault of a person who was asleep, unconscious, or otherwise unaware (without the "knew or reasonably should have known" element) rather than the actual charge of attempted sexual assault without consent.[163]

Conclusion

Appellant therefore respectfully requests that this Court grant review to address these issues. Granting on the issues will provide guidance on the

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[160] R. at 2276-98, 2323-29.
[161] R. at 2276.
[162] R. at 2280, 2283. The Government also did *briefly* mention the testimony about non-consent in their argument. R. at 2284.
[163] *See United States v. Sager*, 76 M.J. 158, 162 (C.A.A.F. 2017) (holding that "asleep," "unconscious," and "otherwise unaware" reflect three separate theories of liability); *Mendoza,* 85 M.J. 213.

constitutional limits of Article 29 and how to properly instruct on cases where an accused faces a charge of sexual assault without the consent of the named victim.

If this Court does not grant review to substantively review these issues, Appellant requests that it grant, vacate, and remand to the lower court for analyses of the second and third issues that the previous appellate defense counsel did not identify until after that court issued its ruling.

Respectfully submitted.

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Appendix

A. *United States v. Cox*, No. 202400194, slip op. (N-M. Ct. Crim. App. Sept. 24, 2025) (unpublished).

Certificate of Compliance

1. This brief complies with the type-volume limitations of Rule 21(b) because it contains 8,137 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in 14-point, Times New Roman font.

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Certificate of Filing and Service

I certify that I delivered the foregoing to the Court and opposing counsel on 23 February 2026.

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This opinion is subject to administrative correction before final disposition.

United States Navy-Marine Corps Court of Criminal Appeals

Before
DALY, HARRELL, and KORN
Appellate Military Judges

UNITED STATES
Appellee

v.

Sivar Y. COX
Private (E-1), U.S. Marine Corps
Appellant

No. 202400194

Decided: 24 September 2025

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judge:
Ryan C. Lipton

Sentence adjudged 29 July 2023 by a general court-martial tried at Marine Corps Base Camp Lejeune, North Carolina. Sentence in the Entry of Judgment: confinement for 14 months and a dishonorable discharge.

For Appellant:
Lieutenant Commander Christopher C. McMahon, USN

For Appellee:
Colonel Scott A. Wilson, USMC
Lieutenant Colonel Candace G. White, USMC

Judge KORN delivered the opinion of the Court, in which Chief Judge DALY and Senior Judge HARRELL joined.

This opinion does not serve as binding precedent but may be cited as persuasive authority under NMCCA Rule of Appellate Procedure 30.2.

KORN, Judge:

A general court-martial composed of members with enlisted representation convicted Appellant of one specification of attempted sexual assault in violation of Article 80, Uniform Code of Military Justice (UCMJ).[1] The military judge sentenced Appellant to be confined for 14 months and a dishonorable discharge.[2]

Appellant raises a single assignment of error: "[w]hether the evidence is factually insufficient to prove the overt act and the specific intent underlying Appellant's conviction for attempted sexual assault." We find that the evidence is factually sufficient and affirm the findings and sentence.

I. BACKGROUND

1. Facts of the case

A group of Marines had a party at a barracks smoke pit at Marine Corps Air Station New River, North Carolina. Lance Corporal Juliet,[3] who lived in a nearby barracks, invited her friend LCpl Alpha, who in turn brought Appellant to the party. Prior to the party, LCpl Juliet and Appellant had never met.

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[1] 10 U.S.C. §880. The military judge entered a finding of not guilty for one specification of Article 120, UCMJ, pursuant to Rule for Courts-Martial 917. The members found Appellant not guilty of the remaining four specifications of Article 120, UCMJ.

[2] Appellant was credited with 324 days of pretrial confinement.

[3] All names other than those of Appellant, the military judge, and counsel are pseudonyms.

Lance Corporal Juliet became highly intoxicated at the party. She was described by various witnesses as unable to stand,[4] unable to walk,[5] out of it,[6] and unresponsive.[7] Other partygoers, including Appellant, therefore carried her to her barracks room.[8] While being carried to her room, LCpl Juliet vomited on herself.[9]

After bringing LCpl Juliet to her room and placing her on her bed, most of the other individuals returned to the party, but Appellant and LCpl Alpha remained in LCpl Juliet's room.[10] Lance Corporal Alpha began video chatting with her fiancé, Ms. Charlie, and after a few minutes continued the chat in LCpl Juliet's bathroom.[11] A few minutes later, LCpl Juliet exited the bathroom while still video chatting with Ms. Charlie.[12] Upon exiting the bathroom, she discovered Appellant on top of LCpl Juliet kissing her.[13] Although highly intoxicated, LCpl Juliet made noises, said "no," and sounded like she was fighting.[14]

Although she believed that Appellant was sexually assaulting LCpl Juliet, LCpl Alpha felt unable to directly intervene.[15] Instead, she aimed her phone's camera at Appellant and LCpl Juliet so that Ms. Charlie could see what was happening.[16] While aiming the camera at Appellant and LCpl Juliet, LCpl Alpha also texted one of the Marines at the party, asking for help.[17] Both LCpl

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[4] R. at 610.

[5] R. at 1051.

[6] R. at 735.

[7] R. at 759.

[8] R. at 613, 1050-52.

[9] R. at 1051, 1053.

[10] R. at 1057.

[11] R. at 1057.

[12] R. at 1062-63.

[13] R. at 1063.

[14] R. at 1065, 1896.

[15] R. at 1066-67.

[16] R. at 1067.

[17] R. at 1070.

Alpha and Ms. Charlie observed Appellant on top of LCpl Juliet as she lay on the bed.[18]

After receiving LCpl Alpha's texts, four individuals ran the short distance from the party to LCpl Juliet's room.[19] Upon their arrival, the scene further devolved into chaos, and Appellant was dragged out of the room and attacked.[20] During this time, Appellant made a number of statements, including "I didn't do anything," "she wanted it," and "I don't want to go to jail."[21] While it is undisputed that LCpl Juliet's pants were down when the others arrived at her room,[22] the various witnesses provided inconsistent testimony regarding whether Appellant's pants were off,[23] unbuttoned and unzipped,[24] or whether he was "undoing his pants."[25]

2. Excusal of the Members

Appellant's court-martial took an unusual turn after the majority of the Government's witnesses had testified. After the military judge instructed the members to disregard an inadmissible fact that arose during LCpl Alpha's testimony, one of the members indicated that he could not follow the military judge's instruction.[26] The military judge questioned this member individually

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[18] R. at 1065, 1893.

[19] R. at 622-23.

[20] R. at 628.

[21] R. at 710.

[22] Appellant concedes this fact before this Court.

[23] R. at 1067, 1895.

[24] R. at 690.

[25] R. at 1834.

[26] R. at 1272.

and ultimately learned that the members impermissibly discussed the evidence and the case throughout the trial.[27] The military judge excused the entire panel and seated a new members panel, who listened to the recording of the previous testimony.[28]

II. DISCUSSION

1. Law

This "Court may consider whether a finding of guilty is correct in fact upon request of an appellant who makes a specific showing of a deficiency in proof."[29] If an appellant makes such a showing, this "Court may weigh the evidence and determine controverted questions of fact," providing "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence."[30] If this Court is "clearly convinced that the finding of guilty was against the weight of the evidence," we "may dismiss, set aside, or modify the finding, or affirm a lesser finding."[31]

An attempt offense under Article 80, UCMJ, requires "a specific intent to commit the offense, accompanied by an overt act which directly tends to accomplish the unlawful purpose."[32] The overt act must go beyond mere preparatory steps and be "a direct movement toward the commission of the offense."[33] The overt act must be a substantial step toward the commission of the crime,

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[27] R. at 1273.

[28] Appellant moved to dismiss the charges with prejudice and affirmatively declined to request a mistrial. The military judge denied Appellant's motion and proceeded with new members. Appellant has not challenged this procedure here. Therefore, the Court summarizes it only for the below discussion of the level of deference due to the factfinder.

[29] Art. 66(d)(1)(B), UCMJ, 10 U.S.C. § 866(d)(1)(B).

[30] *Id.*

[31] *Id.*

[32] *United States v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012) (quoting *Manual for Courts-Martial (MCM), United States*, pt. IV, para. 4.a.(a), c.(1)-(2)).

[33] *Id.*

and "must unequivocally demonstrate that the crime will take place unless interrupted by independent circumstances."[34]

2. Assuming Appellant has made a showing sufficient to trigger our factual sufficiency analysis, the evidence still demonstrates that his conviction is factually sufficient.

We start by noting that while we give appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence, we agree with Appellant that the appropriate deference in this case is minimal, as the substitute members received the majority of the testimony by listening to the audio recording of the witness examinations.[35] Therefore, these members were in only a slightly better position to judge most of the witnesses' credibility than this Court.

The specification alleged as follows:

> In that Private Sivar Y. Cox, U.S. Marine Corps, on active duty, did, on board Marine Corps Air Station, New River, North Carolina, on or about 17 March 2023, attempt to sexually assault [LCpl Juliet], U.S. Marine Corps, to wit: by attempting to commit a sexual act upon the said [LCpl Juliet] by penetrating her vulva with Private Cox' penis without the consent of [LCpl Juliet].[36]

The military judge instructed the members that in order to find Appellant guilty, they must be convinced beyond a reasonable doubt that "the accused did a certain overt act, that is, he removed [LCpl Juliet's] pants and removed his own pants."[37]

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[34] *United States v. Winckelmann*, 70 M.J. 403, 407 (C.A.A.F. 2011) (quoting *United States v. Goetzke*, 494 F.3d 1231, 1237 (9th Cir. 2007)) (internal quotation marks omitted).

[35] All but one of the witnesses who had previously testified sat on the witness stand as their testimony was played for the new members, who then had the opportunity to ask questions of the witnesses. The exception was LCpl Alpha, who the military judge found was unavailable to return to the witness stand.

[36] The charge sheet.

[37] R. at 2249.

Appellant argues that his conviction for attempted sexual assault is factually insufficient because the Government did not prove that Appellant removed his own pants, and therefore failed to prove he specifically intended to sexually assault LCpl Juliet. Appellant concedes that the evidence established that he removed LCpl Juliet's pants.

We must first consider whether Appellant has made a specific showing of a deficiency in proof.[38] Here, we will assume without deciding that by identifying that contradictory evidence existed regarding the state of Appellant's pants when he was discovered on top of LCpl Juliet in her bed, Appellant has identified a sufficient weakness in the evidence to initiate our factual sufficiency review.

This Court is unconvinced, however, by Appellant's identified weakness in the evidence. While Appellant puts a great deal of stock in the fact that the testimony is varied about his own state of undress, we do not. There were only two witnesses who had an extended opportunity to observe Appellant's actions with LCpl Juliet—LCpl Alpha and Ms. Charlie.[39] Both of those witnesses unequivocally described Appellant pulling down his own pants while he was on top of LCpl Juliet on her bed. While the Defense impeached both witnesses' testimony to a degree, this Court is convinced by their testimony that they saw Appellant pull down his pants. The fact that the other witnesses, who came upon an increasingly chaotic scene, provided inconsistent testimony about the state of Appellant's undress when they arrived at the room does not make us question the veracity or accuracy of LCpl Alpha's or Ms. Charlie's testimony.

Even assuming, arguendo, that this Court was unconvinced whether Appellant had pulled down his own pants, it would not produce the result advocated by Appellant. Appellant argues that if the evidence only shows that he removed LCpl Juliet's pants, the evidence would therefore be factually insufficient to prove his intent to sexually assault her because it supports equally plausible theories as well, such as that he intended to "merely" engage in foreplay or perform oral sex on her.[40] However, this Court is not limited in determining Appellant's intent based solely on the overt act instructed upon by the

[38] Art. 66(d)(1)(B), UCMJ, 10 U.S.C. § 866(d)(1)(B).

[39] Lance Corporal Juliet had no memory of the events in question.

[40] Appellant's Brief at 24.

military judge.[41] While intent can be proven by direct evidence, including the evidence that constitutes an overt act in an attempt charge, it can also be proven by circumstantial evidence.[42] And both the direct and circumstantial evidence of Appellant's intent is overwhelming.

Lance Corporal Juliet was highly intoxicated to the point where she had difficulty walking and communicating and had to be carried to her bed. Immediately prior to the events in question, she was nearly unconscious and covered in her own vomit. Appellant, who had never met LCpl Juliet prior to that day, helped carry her to her barracks room and remained with her and LCpl Alpha when the others returned to the party. After LCpl Alpha went to the bathroom for a few minutes, she returned to the room to find that Appellant had pulled down LCpl Juliet's pants and underwear and was on top of her in bed, while LCpl Juliet "grumbled," said "no," and made sounds "like she was fighting it more."[43] Based on what she observed, LCpl Alpha sent text messages to others at the party indicating that Appellant was trying to have sex with LCpl Juliet against her will. Upon arriving at the room and observing Appellant with LCpl Juliet, the others pulled him away and attacked him. Appellant then made numerous statements indicating his consciousness of guilt.

This Court is hard-pressed to envision more overwhelming direct evidence of an accused's intent to commit sexual assault than Appellant's actions of removing the pants of a highly intoxicated, extremely vulnerable near-stranger and climbing on top of her. And the circumstantial evidence demonstrating Appellant's intent (LCpl Alpha messaging for help based on her observations, the group's reaction upon seeing Appellant with LCpl Juliet, and Appellant's own statements) is equally compelling. We are thus convinced beyond a reasonable doubt of Appellant's intent to sexually assault LCpl Juliet.

This Court is therefore convinced that the evidence proves that Appellant is guilty beyond a reasonable doubt. He removed his own pants and LCpl Juliet's pants, both of which amounted to more than mere preparation and tended to effect the commission of sexual assault, and he did so with the specific intent to sexually assault LCpl Juliet.

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[41] *See United States v. Kearns*, 73 M.J. 177, 182 (C.A.A.F. 2014); *United States v. Jones*, 32 M.J. 430, 432 (C.M.A. 1991).

[42] *Id*.

[43] R. at 1065, 1896.

III. Conclusion

After careful consideration of the record and briefs of appellate counsel, we have determined that the findings and sentence are correct in law and that no error materially prejudicial to Appellant's substantial rights occurred.[44]

The findings and sentence are **AFFIRMED**.

FOR THE COURT:

MARK K. JAMISON
Clerk of Court

[44] Articles 59 & 66, UCMJ, 10 U.S.C. §§ 859, 866.