IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Anthony D. GRAFTON Yeoman Petty Officer Third Class (E-4) U.S. Navy, Appellant	BRIEF ON BEHALF OF APPELLANT USCA Dkt. No. 26-0039/NA Crim. App. Dkt. No. 202400055

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

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Issues Presented

I.

Whether the lower court erred when it found the Military Judge's instructions did not run afoul of this Court's decision in *United States v. Mendoza*.

II.

Whether it was error for the lower court to "reassess" a sentence that was never imposed.

Statement of Statutory Jurisdiction

The lower court had jurisdiction under Article 66(b)(3), UCMJ.[1] Appellant invokes this Court's jurisdiction under Article 67(a)(3), UCMJ.[2]

Relevant Authority

United States Constitution, Fifth Amendment, provides in part:

> No person . . . shall be deprived of life, liberty, or property, without due process of law[.][3]

Article 66, Uniform Code of Military Justice, provides in relevant part:

> (d) Duties.—
>
> (1) Cases Appealed by Accused.—
>
> (A) In General.—In any case before the Court of Criminal Appeals under subsection (b), the Court may act only with respect to the findings and sentence as entered into the record under section 860c of this title (article 60c). The Court may affirm only such findings of

[1] 10 U.S.C. § 866 (b)(1)(A) (2024).
[2] 10 U.S.C. § 867 (a)(3) (2024).
[3] U.S. CONST. amend. V.

guilty as the Court finds correct in law, and in fact in accordance with subparagraph

. . .

(f) Limits of Authority.—

(1) Set Aside of Findings—

(A) In General—if the Court of Criminal Appeals sets aside the findings, the Court—

(i) may affirm any lesser included offense; and

(ii) may, except when prohibited by section 844 of this title (article 44), order a rehearing.

(2) Set Aside of Sentence.—If the Court of Criminal Appeals sets aside the sentence, the Court may—

(A) modify the sentence to a lesser sentence; or

(B) order a rehearing.[4]

Article 120, Uniform Code of Military Justice, provides in relevant 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;

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

[4] 10 U.S.C. § 866 (2024).

(A) Impairment by any drug, intoxicant, or other similar substance, 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.[5]

Rule for Court-Martial (RCM) 1002, Manual for Courts-Martial (2019), in pertinent part provides:

(a) *Generally.* Subject to limitations in this Manual, the sentence to be adjudged is a matter within the discretion of the court-martial.

. . .

(d) *Noncapital cases.*

(1) *Sentencing by members.* In a general or special court-martial in which the accused has elected sentencing by members in lieu of sentencing by military judge under paragraph (b)(1), the members shall determine a single sentence for all of the charges and specifications of which the accused was found guilty.[6]

Statement of the Case

A general court-martial composed of members, convicted Appellant, contrary to his pleas, of two specifications of violating Article 120, UCMJ.[7] The court-martial sentenced Appellant to eight years' confinement, a dishonorable discharge, total forfeitures of pay and allowances, and reduction to the paygrade of

[5] 10 U.S.C. § 920 (2024).
[6] MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. II (2019).
[7] J.A. at 35.

E-1.[8] The Military Judge entered the findings and sentence into judgment.[9]

On appeal, the lower court found prejudicial error as to Specification 1, set aside that finding of guilty, and revived and affirmed the finding of guilty to the conditionally dismissed specification (Specification 2).[10] The lower court then declined to authorize a sentence rehearing, and sentenced Appellant to the same sentence as the members originally awarded.[11] The Government moved for reconsideration en banc, which the lower court denied.[12] This Court granted Appellant's timely petition for grant of review.

Statement of Facts

A. The Government charged Appellant, in the alternative, with two theories of criminal liability for a single act.

The charge and specifications in this case arose from a single sexual act that occurred after an evening of drinking at the barracks aboard Naval Station San Diego. After drinking to the point of intoxication, V.L., the accuser, left her friend's barracks room and was only sporadically reachable by phone for the next forty-five minutes.[13] The friend then received an incoherent call from V.L.,

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[8] J.A. at 35.
[9] *Id.*
[10] J.A. at 22.
[11] *Id.*
[12] J.A. at 29.
[13] J.A. at 91, 433-39. By the time of trial, V.L. was a civilian. The lower court addressed her by initials in its decision; this Brief follows the lower court's lead for continuity.

prompting her to look for V.L. in the building.[14] V.L.'s friend went to the elevator and, when it opened, she saw V.L., who "didn't seem conscious," lying on the floor and Appellant "on top of her."[15]

V.L. had no memory of anything that happened after she left her friend's barracks room and had a blood alcohol concentration likely over 0.3 percent at the time of the incident.[16] The Government charged Appellant with two specifications of sexual assault for this single incident under the alternative theories of sexual assault without consent and sexual assault on an incapacitated person.[17]

B. Before trial, the Government said it would argue to convict Appellant of one and not both specifications; during trial the Government focused primarily on intoxication.

During pretrial motions, the Defense moved to dismiss Specification 2 (incapacitation), arguing it was an unreasonable multiplication of charges.[18] The Government's position was that "charging in the alternative under contingencies of proof … is an appropriate strategy for the government. The Government intends to argue that the members should find [Appellant] guilty of one specification or the

[14] J.A. at 70, 439.
[15] J.A. at 71.
[16] J.A. at 110, 484.
[17] J.A. at 41.
[18] J.A. at 486-90.

other, but not both."[19] The Military Judge denied the Defense motion and allowed the Government to proceed to trial on both theories for the single assault.[20]

The Trial Counsel began his opening statement by informing the members that, on the night in question, V.L. "appeared clearly and visibly intoxicated."[21] During its case-in-chief, the Government expanded on the theme that V.L. was incapacitated during the sexual encounter, and therefore unable to consent.[22] For instance, it called lay witnesses who described V.L. as "staggering, like, she couldn't exactly get her balance" and "disheveled, messed up hair, kind of slurring her words."[23] The Government also introduced a video V.L.'s friend recorded showing V.L. in the elevator.[24] The Government called medical personnel who described V.L.'s extreme intoxication, and an expert witness in toxicology who opined that her blood alcohol concentration was likely over 0.3 percent when she was found in the elevator.[25]

V.L. testified that she had been drinking that evening and had no memory of the night after she left her friend's room.[26] The Trial Counsel never asked V.L. if

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[19] J.A. at 492.
[20] J.A. at 43-44.
[21] J.A. at 52.
[22] *See* J.A. at 293-97.
[23] J.A. at 157, 211.
[24] J.A. at 446.
[25] J.A. at 239-41, 264-72, 484.
[26] J.A. at 108-10.

she did or did not consent to sex with Appellant, and she gave no testimony in this regard.[27]

At the close of the Government's case, the Defense moved for findings of not guilty as to both specifications pursuant to R.C.M. 917.[28] Regarding Specification 1 (without consent), the Trial Defense Counsel argued that the Government had failed to present any evidence that V.L. did not consent.[29] In response, the Trial Counsel highlighted the evidence showing V.L. was asleep or unconscious, arguing it demonstrated she "was incapable of consenting because she was unresponsive."[30]

When pressed by the Military Judge to articulate factors other than V.L.'s physical condition to demonstrate lack of consent, the Trial Counsel noted that the two were strangers.[31] He then claimed, without citation to evidence, that V.L. would not have consented to having sex in the elevator with someone she had never met.[32]

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[27] J.A. at 103-53. No one asked V.L. if she would have consented or under what conditions she would or would not consent. *Cf. United States v. Mendoza*, 85 M.J. 213, 216 (C.A.A.F. 2024).
[28] J.A. at 289.
[29] J.A. at 291.
[30] J.A. at 292-93.
[31] J.A. at 294.
[32] J.A. at 294-95.

Considering this argument, the Military Judge asked "[i]s it she really didn't consent? Or is it she was incapable? Because I don't think you get to argue both."[33] The ensuing dialogue between the Military Judge and the Trial Counsel centered on the Government's assertion that V.L. looked unconscious and could not have consented.[34] The Trial Counsel agreed that "the crux of the government's theory" was that "non-consent [was] tied to the fact that [V.L.] was sleeping or unconscious."[35] And the Trial Counsel insisted that the evidence supported the charge of sexual assault without consent because V.L. appeared unconscious in the video, and because she "would not have consented."[36] Despite her reservations, the Military Judge denied the Defense's motion for a finding of not guilty.[37]

C. Changing course, the Government claimed Appellant could be convicted of both; also changing course, the Military Judge agreed; the members found Appellant guilty of both specifications.

Both parties submitted proposed findings instructions.[38] The Defense argued that the Government's proposed "consent" instruction for Specification 1 could not include the provision that "a sleeping, unconscious, or incompetent person cannot consent."[39] Counsel further argued it was improper for the Military Judge to

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[33] J.A. at 296.
[34] J.A. at 296-300.
[35] J.A. at 299-300.
[36] J.A. at 298.
[37] J.A. at 306.
[38] J.A. at 309-28, 494-503.
[39] J.A. at 319, 495.

instruct the members that they could find Appellant guilty of both specifications, citing this Court's ruling in *United States v. Sager* and the Coast Guard Court of Criminal Appeal's decision in *United States v. Weiser*.[40]

The Government opposed removing the language from the instruction, and contrary to its position during pretrial motions, argued that it was permissible for the members to find Appellant guilty of both specifications.[41] The Military Judge denied the Defense's motions.[42] The Military Judge instructed the members that "a sleeping, unconscious, or incompetent person cannot consent."[43] She also instructed them they could acquit Appellant on both specifications, convict him on both, or return mixed findings.[44]

During closing argument, the Trial Counsel focused on V.L.'s intoxication and her appearance of being asleep or unconscious. He reminded the members that "two hours after this assault" V.L.'s blood alcohol content was "0.287 percent" and that she "appears completely unconscious in the video[.]"[45] He explained

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[40] J.A. at 324-26, 495; *United States v. Sager*, 76 M.J. 158 (C.A.A.F. 2017) (finding "asleep, unconscious, or otherwise unaware" present different theories of criminal liability under Article 120); *United States v. Weiser*, 80 M.J. 635, 640 (C.G. Ct. Crim. App. 2020) (holding Article 120(b)(1), (2), and (3) present different/not overlapping theories of liability). The arguments were essentially what this Court later held in *Mendoza*.
[41] J.A. at 323-25, 492.
[42] J.A. at 319-21, 328.
[43] J.A. at 332, 337.
[44] J.A. at 43-44, 328, 504.
[45] J.A. at 342.

"[Appellant] is charged with two specifications of sexual assault. That is not for two distinct sexual assaults. Rather those are charged on different theories of criminal liability. What that means is that you can find [Appellant] guilty of either or both specifications."[46] He went on to argue "the government believes you have proof beyond a reasonable doubt that [Appellant] sexually assaulted [V.L.] . . . without her consent *and* while she was incapable of consenting due to her intoxication."[47] He said "the military judge has just instructed you that a sleeping, incompetent, or unconscious person cannot consent."[48] He followed: "The United States believes that the evidence shows beyond a reasonable doubt that [V.L.] was either completely unconscious or asleep while [Appellant assaulted her.]"[49]

The members found Appellant guilty of both specifications.[50] The Military Judge, at the Government's request and over Appellant's objection, conditionally dismissed the assault on an incapacitated person.[51] She explained to the parties:

> I am going to be conditionally dismissing Specification 2 [assault on an incapacitated person], in accordance with the request from the government. I will note for the record that in the government's closing argument, that "without consent" had to do with her being unconscious or asleep, which is a different theory of liability than "incapable of

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[46] J.A. at 344; *also* J.A. at 362.
[47] J.A. at 344 (emphasis added). Trial counsel's argument was the opposite of what he represented to the court in pretrial motions. J.A. at 492.
[48] J.A. at 353.
[49] J.A. at 353.
[50] J.A. at 35, 390.
[51] J.A. at 391-92. Appellant asked the military judge to dismiss the assault without consent charge. J.A. at 392.

> consenting, to wit, alcohol." And I just note that, in formulating my decision as to which to do.[52]

At the outset of the sentencing hearing, the Military Judge informed the members that they would be "sentencing solely on Specification 1 [non-consent]."[53] And that "Specification 2 [incapacity] [was] no longer in front of [them]."[54]

D. The lower court set aside the findings for Specification 1, revived and affirmed Specification 2, and sentenced Appellant, for the first time, on that specification.

Appellant asserted on appeal: (1) the Military Judge erred when she instructed the members that they could find Appellant guilty of both specifications and that "a sleeping or unconscious" person cannot consent; and (2) that the members' findings were legally impossible (mutually exclusive) and therefore void.[55] Appellant argued the appropriate remedy was to dismiss all charges and authorize a rehearing.

The lower court found instructional error as to the definition of consent for Specification 1 (non-consent), but not for Specification 2 (incapacity).[56] It found that the Military Judge did not err when she instructed the members that they could

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[52] J.A. at 392.
[53] J.A. at 395.
[54] J.A. at 395.
[55] Appellant raised other assignments of error that are not pertinent to the issues before this Court.
[56] J.A. at 11, 13.

return guilty findings for both specifications.[57] Having set aside the conviction of assault without consent (the specification on which the members sentenced Appellant), the lower court revived the conviction for the incapacity specification. In a two-to-one decision, it then "reassessed" the sentence for Specification 2 by imposing the sentence the members awarded for Specification 1.[58]

Summary of Argument

Appellant went into his trial knowing the charges were in the alternative and that the Government would seek conviction on one or the other, but not both. But at the end, the Military Judge let the Government change the game and argue for both. All the while the Defense also had to defend against two other theories of liability (asleep or unconscious), which were not charged but were argued by the Government and put to the members by the Military Judge. The Government's case was all about V.L. being incapable of consenting because she was intoxicated and her appearing to be asleep or unconscious. These facts negated any idea that V.L. could consent and chose not to do so. But the Defense had to try and argue against this legally impossible scenario, of which it did not have notice. Further, mutually exclusive verdicts are contrary to Supreme Court precedent.

To let either conviction stand, the lower court had to ignore the fact that the

[57] J.A. at 19-20.
[58] J.A. at 20-22. *But see* J.A. at 26-28.

specifications were mutually exclusive—that to prove sexual assault without consent necessarily disproved sexual assault on a person incapable of consent and vice versa. And the lower court had to speculate and assume what the members would have decided absent the errors and be confident beyond a reasonable doubt as to the assumptions. This Court has long rejected such speculation and should do so here.

The errors violated Appellant's constitutional right of due process and were substantially prejudicial. When members return a mutually exclusive verdict, the remedy is to dismiss both. Because the errors struck at the heart of what and how the members could reach findings of guilty, they were not harmless beyond a reasonable doubt.

Having found that the verdict was not mutually exclusive, the lower court compounded the problem by awarding a sentence. After it set aside the conviction on Specification 1, the lower court created a sentence for Specification 2. This violated Appellant's due process rights. The members did not consider Specification 2 at sentencing and so Appellant could not defend himself or present a case on Specification 2. The lower court overstepped its authority and sentenced Appellant without due process. This it cannot do.

Argument

I.

The lower court erred when it found the Military Judge's instructions did not run afoul of *United States v. Mendoza*.

Standard of Review

"Whether a panel was properly instructed is a question of law reviewed de novo."[59] When there is no objection to the instruction, the Court reviews for plain error.[60] The Defense did not object to the Specification 2 instructions, which are therefore reviewed for plain error.[61] The Defense did object to the findings instructions, which are subject to de novo review.

Discussion

Contrary to the Government's pretrial assurances, after the case on the merits, the Government reversed course and argued for two guilty findings that were mutually exclusive. Even the lower court acknowledged that "when two guilty findings are mutually exclusive, it generally cannot affirm either finding."[62]

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[59] *United States v. Hale*, 78 M.J. 268, 273 (C.A.A.F. 2019) (quoting *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011)); *United States v. Killion*, 75 M.J. 209, 214 (C.A.A.F. 2016).
[60] *Hale*, 78 M.J. at 273 (quoting *United States v. Tunstall*, 72 M.J. 191, 193 (C.A.A.F. 2013)).
[61] This issue was not waived because *Mendoza* had not been decided.
[62] *See* J.A. at at 20 (citing the Government's Brief at 66 and *United States v. Clark*, 20 C.M.A. 140 (C.M.A. 1970)).

The Government's reversal—to which the Military Judge acquiesced over Defense objection—made this trial fundamentally unfair. The Defense entered trial with an understanding that it was defending against *alternate* theories. After the close of evidence, it then had to pivot to defend against *both* theories in a scenario that the Supreme Court has found erroneous—allowing members to convict on two conflicting theories.[63] To affirm, the lower court had to speculate away any error and assume what the members would have done if they had been properly instructed.

This Court should reverse—Appellant should receive a fair trial where the Government is held to charging what the evidence supports. He should receive a fair trial where the members are not erroneously instructed on uncharged, confusing theories of liability and then also erroneously instructed that they can convict on mutually exclusive charged theories. The Court should not be satisfied with speculation as to what six, seven, or eight members would have done in a trial that did not happen. It should order that trial to happen so it can be done correctly and there can be confidence in the result and the preservation of due process.

A. Instructions must be clear, free of legal error, and not violate an accused's constitutional rights.

Appellate courts evaluate the Military Judge's instructions "in the context of

[63] *Milanovich v. United States*, 365 U.S. 551, 555 (1961) (finding instructional error to allow the jury to convict of both larceny and receiving).

the overall message conveyed to the members."[64] Instructions that are "muddled [and] implicate 'fundamental conceptions of justice' under the Due Process Clause" are erroneous.[65] Here the Military Judge's instructions were both muddled and implicated the Appellant's due process rights.

On Specification 1, the Military Judge instructed them on non-consent and that a sleeping or unconscious person could not consent. [66] On Specification 2, she instructed them on incapacity but also consent, including that a sleeping or unconscious person could not consent. [67] The Military Judge allowed the members to return findings of guilty to *both* the charged specifications even though proving one disproved the other.[68]

B. The Military Judge erred when she instructed the members on consent for Specification 2 (incapacity).[69]

Although the Defense asked for a different instruction than what the Military Judge gave for Specification 2, it did not object to most of the language. Because this Court's decision in *Mendoza* had not been issued, this Court should analyze

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[64] *United States v. Hills*, 75 M.J. 350, 357 (C.A.A.F. 2016) (quoting *United States v. Prather*, 69 M.J. 338, 344 (C.A.A.F. 2011) (internal quotation marks omitted).
[65] *Id.*
[66] J.A. at 331-33. Subsection (b)(2)(B) of Article 120 outlines criminal liability if the alleged victim is asleep, unconscious, or incompetent. *See Sager*, 76 M.J. 158.
[67] J.A. at 336-37. Subsection (b)(2)(B) of Article 120 outlines criminal liability if the alleged victim is asleep, unconscious, or incompetent. *See Sager*, 76 M.J. 158.
[68] J.A. at 504; *Mendoza*, 85 M.J. at 220.
[69] J.A. at 336-38.

this portion of the instructions for plain error.[70] Appellant has the burden to show "(1) error that is (2) clear or obvious and (3) results in material prejudice to his substantial rights."[71]

The instruction for Specification 2 alleging sexual assault by incapacity injected confusing instructions and told the members they could convict on the basis of incapacity using two uncharged theories of liability—asleep or unconscious.[72] She instructed the members:

> "Incapable of consenting" means a person is incapable of appraising the nature of the conduct at issue or physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act at issue.
>
> The evidence has raised the issue as to whether [V.L.] consented to the sexual conduct listed in Specification 2 of the Charge. All of the evidence concerning consent to the sexual conduct is relevant and must be considered in determining whether the government has proven the elements of the offense beyond a reasonable doubt. Stated another way, evidence the alleged victim consented to the sexual conduct, either alone or in conjunction with other evidence in this case, may cause you to have reasonable doubt as to whether the government has proven every element of the offense.
>
> "Consent" means a freely given agreement to the conduct at issue by a competent person.
>
> An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute

[70] J.A. at 11-13; *Hale*, 78 M.J. at 274.
[71] *Hale*, 78 M.J. at 274.
[72] J.A. at 336-38; *Sager*, 76 M.J. 158.

> consent. A current or previous dating, or social, or sexual relationship by itself, or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent.
>
> A sleeping, unconscious, or incompetent person cannot consent.
>
> A competent person is a person who possesses the physical and mental ability to consent. An incompetent person is a person who is incapable of appraising the nature of the conduct at issue or physically incapable of declining participation in, or communicating unwillingness to engage in the sexual act at issue.
>
> All the surrounding circumstances are to be considered in determining whether a person gave consent.[73]

The lower court's various justifications to uphold the instruction cannot be squared with *United States v. Mendoza* or *United States v. Casillas*, and this Court should find error in the instruction. Consent is not an element of incapacity, and by inserting not just consent, but also "asleep" or "unconscious," the Military Judge muddied the waters to an impermissible level. This Court cannot sustain a conviction where it cannot have confidence that the members convicted on the charged conduct.[74]

Citing *United States v. Bannister*, the Military Judge declined to give instructions on mistake of fact or involuntary intoxication for Specification 2.[75]

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[73] J.A. at 336-38; *cf.* J.A. at 495-96 (proposing tailored instructions).
[74] *See United States v. Girouard*, 70 M.J. 5 (C.A.A.F. 2011).
[75] J.A. at 329 (noting off-the-record discussion in R.C.M. 802 sessions); *United States v. Bannister*, No. 201600315, 2017 CCA LEXIS 361 (N-M. Ct. Crim. App. May 31, 2017).

She also denied the Defense's request to tailor the instructions.[76] Instead, she read a lengthy definition of consent.[77] She ended the Specification 2 instructions by stating that "[a]ll the surrounding circumstances are to be considered in determining *whether a person gave consent*."[78] The Government's burden, however, was to prove V.L. was *incapable* of consent. But "proof of incapacity to consent must preclude actual consent."[79] Thus the question of consent is "baked into" the elements, much like mistake of fact is "baked into" them, and the consent instruction should not have been given.[80] The instructions put consent center stage and lost focus on the actual elements.

The lower court found no error because it "d[id] not believe that the holding of *Mendoza* can be extended to require complete separation of the concepts of being impaired by alcohol to the point of being incapable of consenting to a sexual act, and being *unconscious due to consumption of alcohol, and therefore incapable of consenting to a sexual act*."[81] The lower court relied on *United States v. Toney*,

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[76] J.A. at 329-30.
[77] J.A. at 336-38.
[78] J.A. at 338 (emphasis added).
[79] *United States v. Teague*, 75 M.J. 636, 638 (Army Ct. Crim. App. 2016) (citing *Prather*, 69 M.J. at 343).
[80] *See Bannister*, 2017 CCA LEXIS 361, at *10 (quoting *Teague*, 75 M.J. at 638).
[81] J.A. at 12 (citing *United States v. Toney*, No. 20150565, 2017 CCA LEXIS 1 (Army Ct. Crim. App. Jan. 3, 2017), *aff'd* 76 M.J. 402 (C.A.A.F. 2017) (mem.)) (emphasis added). But this is exactly the separation drawn by the Military Judge. She conditionally dismissed Specification 2 because the Government relied on

in which the appellant was charged with, and convicted of, "asleep or unconscious" *and* incapacity.[82] The Army Court of Criminal Appeals (ACCA) deemed it an unreasonable multiplication of charges and merged them for findings before affirming the conviction and sentence.[83] Here, the lower court stretched the ACCA's decision in *Toney* to say V.L.'s incapacity was legally the same as if she were asleep or unconscious.[84]

There are two problems with this logic. First, Appellant was not charged with assaulting a sleeping or unconscious person, but the appellant in *Toney* was (and was also charged with incapacity). Second, the context of the Military Judge's instruction was not that V.L. was unconscious due to consumption of alcohol. Rather the context was that the members should consider whether V.L. consented to the sexual act and that "a sleeping, unconscious, or incompetent person cannot consent."[85] *Toney* is not on point.

In *United States v. Casillas*, this Court reiterated its rejection of the idea that "Article 120 creates broadly overlapping offenses that give the government

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unconscious or asleep for Specification 1, which she found "is a different theory of liability that 'incapable of consenting, to wit, alcohol.'" J.A. at 392.

[82] J.A. at 12-13 (discussing *Toney*, 2017 CCA LEXIS 1). *Toney*, 2017 CCA 1, at *2. The appellant in *Toney* also was not charged with a non-consent assault and there was no discussion of instructions defining consent. *Id*.

[83] *Toney*, 2017 CCA 1, at *5.

[84] J.A. at 12.

[85] J.A. at 336-37.

multiple ways to charge a criminal act."[86] Therefore, just as an accused may not be found guilty under a theory of non-consent by "merely establishing that the victim was too intoxicated to consent," he likewise may not be convicted under a theory of incapacitation by merely establishing that the victim was unconscious.[87]

The Military Judge's instruction on Specification 2 that restated the consent instruction, including that a person who is asleep, unconscious, or incompetent cannot consent, was error. That instruction had little to do with the charged specification alleging sexual assault by incapacity and should not have been given.[88] The lower court incorrectly held that the instruction was not erroneous. In light of *Mendoza* and its progeny, this Court should find the error was plain and obvious. Appellant was prejudiced by this error because the instructions sowed confusion and allowed the members to find Appellant guilty based on uncharged theories of liability.

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[86] *United States v. Casillas*, 86 M.J. 94, 100 (C.A.A.F. 2025) (citing *Mendoza*, 85 M.J. at 215).
[87] *Id.* at 101 (quoting *Mendoza*, 85 M.J. at 222).
[88] *See Prather*, 69 M.J. at 343 (discussing applicability of consent defense to sexual assault on an incapacitated victim under former version of Art. 120).

C. The Military Judge also erred when she instructed the members they could find Appellant guilty of both specifications.

> it seems apparent to me that the Government would be unable to charge both theories of sexual assault—without consent and incapacity—in the alternative without necessarily disproving one charge at trial in order to prove the other.

[89]

The Defense objected to the Military Judge allowing the members to find Appellant guilty of both specifications. Therefore, de novo review applies.[90]

The Government's alternative charging scheme was permissible; "nothing prevents [it] from charging a defendant with both offenses under inconsistent factual theories."[91] But it invited the exact problem Judge Sparks identified in *Mendoza*.[92] And as Appellant's trial unfolded, only the Defense seemed to understand that the Government did not have evidence of "without consent" as required by the elements of Specification 1.[93]

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[89] *Mendoza*, 85 M.J. at 231 (Sparks, J., concurring) (emphasis added).
[90] *Hale*, 78 M.J. at 273.
[91] *Mendoza*, 85 M.J. at 220.
[92] *Mendoza*, 85 M.J. at 231 (Sparks, J., concurring).
[93] *See United States v. Moore*, No. 25-0110, 2026 CAAF LEXIS 73, at *10, __ M.J. __ (C.A.A.F. Jan. 23, 2026) (affirming that the Government cannot prove absence of consent by merely establishing the victim is asleep or incapable of consent).

The evidence and the Government's theory in Appellant's case was always of a single assault perpetrated in one of two ways.[94] The lower court acknowledged this in its opinion, stating "The evidence admitted at trial to prove, and the gravamen of, the two specifications is the same – *indeed it was the same act*."[95] It was never a case of two assaults, one per theory charged.[96] To find Appellant guilty of both, the members would have to find that V.L. was simultaneously "capable of consenting, but d[id] not consent," *and* "incapable of consenting to the sexual act due to impairment."[97] This is quite impossible.

1. The specifications were mutually exclusive and the instruction that the members could convict on both was error.

Consistency in the verdict is generally not necessary.[98] But when the government brings two charges and proof of the first negates proof of the second—the charges are mutually exclusive.[99] "Evidence establishing the victim's incapacity necessarily disproves an allegation of sexual assault without consent. Thus, a closer look reveals that these two theories of criminality are legally

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[94] J.A. at 43-44, 344, 491-93.
[95] J.A. at 21 (emphasis added).
[96] J.A. at 20 (noting the Government's argument on appeal—that there were two crimes, one while V.L. was capable and did not consent, the other when she was incapable—was not its theory at trial).
[97] *Mendoza*, 85 M.J. at 220; *see also id.* at 229-31 (Sparks, J., concurring in part and dissenting in part) (explaining how these two provisions are incompatible and that proving one necessarily disproves the other).
[98] *Clark*, 20 C.M.A. at 144 (citations omitted).
[99] *Id.* at 142 (reviewing cases with mutually exclusive verdicts).

contradictory rather than overlapping."[100] In such a case the members should be instructed that they may find the accused guilty of either specification but not both.[101] When members are instructed they may find an accused guilty of two specifications that are mutually exclusive, and they return findings of guilty to both, the findings cannot stand.[102]

This is because "there is no way of knowing whether a properly instructed jury would have found [Appellant] guilty of [one or the other] (or, conceivably, of neither)."[103] Faced with mutually exclusive charges, when "evidence [is] sufficient to support a conviction for either [charge], the judge "should . . . instruct[] the jury that a guilty verdict [can] be returned upon either count but not both."[104] On appeal, "it is impossible to say what verdict would have been returned by a jury so instructed."[105]

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[100] *Mendoza*, 85 M.J. at 230 (Sparks, J., concurring).
[101] *Milanovich*, 365 U.S. at 555; *Clark*, 20 C.M.A. at 144 (citing *People v. Lombard*, 21 P.2d 955 (Cal. Dist. Ct. App. 1933)); *Mendoza*, 85 M.J. at 231 (Sparks, J., concurring).
[102] *Milanovich*, 365 U.S. at 555; *Clark*, 20 C.M.A. at 144.
[103] *Milanovich*, 365 U.S. at 555.
[104] *Id.* at 553-55 (finding defendant cannot be convicted of stealing and receiving the same goods; explaining what instructions should have been given).
[105] *Id.* at 555.

2. Appellant's right to due process was violated.

The erroneous instruction was also a due process violation because it drastically changed the conviction landscape.[106] The Defense went into trial understanding that the specifications were charged in the alternative and that the members would be instructed to choose one, or neither.[107] After the close of evidence, the Government and Military Judge changed the game. Now, Appellant could be convicted of both—even though they are mutually exclusive. At the end, the Defense had no choice but to do its best to argue against this new and legally incorrect scenario. This was fundamentally flawed and unfair.

D. The erroneous instructions were constitutional error and not harmless beyond a reasonable doubt.

Legally incorrect members' instructions implicate a substantial right and where such error implicates a constitutional right, the Government must prove the error was harmless beyond a reasonable doubt.[108] An accused must be on notice of what he is charged with and cannot be convicted "of an offense with which he has not been charged."[109]

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[106] U.S. CONST. amend. V.
[107] J.A. at 43-44, 491-93.
[108] *Killion*, 75 M.J. at 214; *United States v. Harcrow*, 66 M.J. 154, 160 (C.A.A.F. 2008); *see Girouard*, 70 M.J. at 11-12 (finding error to instruct on negligent homicide as lesser included offense of premeditated murder).
[109] *Girouard*, 70 M.J. at 10 (discussing an accused's Fifth and Sixth Amendment rights).

Because the error in this case is constitutional, Appellant's convictions must be reversed "unless it can be shown beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."[110] "An error is not harmless beyond a reasonable doubt when 'there is a reasonable possibility that the [error] complained of *might have* contributed to the conviction.'"[111] "[I]t is solely the Government's burden to persuade the court that constitutional error is harmless beyond a reasonable doubt."[112]

1. The Military Judge's instructions caused prejudice.

The Military Judge's instructional errors were not harmless beyond a reasonable doubt in two important ways. First, instructing the members that "a sleeping, unconscious, or incompetent person cannot consent" on Specification 2 (incapacity) was just as likely to improperly affect the members' decisions as the same instruction erroneously given on Specification 1 (non-consent).[113] The problem was compounded by the general and lengthy consent instructions for Specification 2, a charge alleging incapacity to consent. There is a reasonable

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[110] *United States v. Tovarchavez*, 78 M.J. 458, 463 (C.A.A.F. 2019) (quoting *Chapman v. California*, 386 U.S. 18 (1967)) (internal quotation marks omitted); *see also United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006).
[111] *Hills*, 75 M.J. at 357-58 (quoting *United States v. Moran*, 65 M.J. 127, 187 (C.A.A.F. 2007)) (emphasis added).
[112] *Killion*, 75 M.J. at 214 (citing *United States v. Bush*, 68 M.J. 96, 102 (C.A.A.F. 2009)).
[113] J.A. at 10-11.

possibility that the members conflated consent with incapacity to consent and found Appellant guilty of Specification 2 because they found that V.L. was unconscious.[114]

Second, the Military Judge improperly instructed the members they could find Appellant guilty of *both* specifications, even though the specifications presented incompatible theories of criminal liability.[115] Appellant was prejudiced because he was convicted of both specifications, which the law does not allow as discussed above. Appellant remains prejudiced because the lower court improperly reinstated the conviction for Specification 2, which it should have dismissed as discussed above.

2. The Government's presentation of its case and argument exacerbated the likelihood of prejudicial error caused by the erroneous instructions.

The Government argued that V.L. was incapacitated. It argued she was asleep or unconscious. The Government made *no* argument that while she was competent, she did not consent. In fact, the Government argued against V.L.'s competence—arguing that from the time she left her friend's barracks room, V.L. was drunk and incapacitated. None of the Government's case rested on the idea

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[114] Arguing Specification 2, the Trial Counsel invited the members to "[l]ook at how [V.L.] appears in the video . . . lying seemingly unconscious on the floor of that elevator[.]" J.A. at 360.

[115] *See* J.A. at 504 (Findings Worksheet); *Mendoza*, 85 M.J. at 220 (stating assault without consent and assault on an incapacitated person are inconsistent factual theories).

that V.L. was competent to consent and there was no evidence that V.L. did not consent.[116] The Trial Counsel noted only general circumstances and stated, without evidentiary support, that V.L. "would not consent."[117]

Armed with the Military Judge's erroneous instructions, the Trial Counsel argued that the members should find Appellant guilty of both, even though the Government alleged only one criminal act.[118] For Specification 1, the without consent specification, the Government argued "that the evidence shows beyond a reasonable doubt that [V.L.] was either completely unconscious or asleep" when Appellant assaulted her.[119] And for Specification 2, the Government argued both that V.L. did not have the capability to consent because she was intoxicated (which must negate Specification 1) and she appeared to be unconscious.[120]

The Government's case was never that while V.L. was competent, she did not consent. Its case was all about V.L. being drunk, asleep, and/or unconscious.[121]

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[116] *See Moore*, 2026 CAAF LEXIS 73, at *10-13 (outlining legal principles that relate to timing of non-consent, sexual acts, and a victim's state of being asleep).
[117] J.A. at 296-300 (arguing on R.C.M. 917 motion that V.L.'s non-consent tied to her being unconscious in the elevator and that she would not have consented to sex with Appellant); J.A. at 348 (arguing "no evidence that [V.L.] consented to have sex" with Appellant because they did not know each other and it was in the elevator).
[118] J.A. at 344, 357-59, 362; *see Casillas*, 86 M.J. at 101 (stating that sexual assault without consent "is not an umbrella offense").
[119] J.A. at 353.
[120] J.A. at 358-61.
[121] *See* J.A. at 296-300 (R.C.M. 917 argument).

3. It is impossible to know what the members would have decided if given proper instructions.

When the members walked into the deliberation room to debate Appellant's case, the instructions on which they relied were wrong. The Military Judge told them he could be guilty of both specifications. She told them that if they believed V.L. was asleep or unconscious, then she did not consent to the sexual activity.[122] And the Military Judge's instructions made consent a central part of Specification 2 and reiterated that if V.L. was asleep or unconscious, she could not consent.[123] All three were wrong.

It is pointless to speculate what the members actually relied on in reaching findings. It is equally pointless to assume what they would have determined given correct instructions.[124] What they decided happened was simply not possible—V.L. could not be incapable of consent and also not consent to the same sexual act.

The probability that the erroneous instructions contributed to the conviction is extremely high.[125] In fact, it is hard to imagine a scenario in which the instructions did *not* contribute to the conviction. If the members were given correct instructions, they could not have found Appellant guilty of both specifications. Appellant was prejudiced and the error was not harmless beyond a reasonable

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[122] J.A. at 332.
[123] J.A. at 336-38.
[124] *Girouard*, 70 M.J. at 12.
[125] *Hills*, 75 M.J. at 357-58.

doubt. There is more than a reasonable possibility these errors have contributed to the conviction.[126]

Conclusion

Where a guilty verdict on one count negates some fact essential to a finding of guilty on a second count, the charges are mutually exclusive and two guilty verdicts cannot stand.[127] In such a case, the trial judge should instruct the members that if they vote to convict, it must be of either but not both.[128] The problem, when such an instruction is not given, is that "there is no way of knowing [what] a properly instructed" members panel would have found.[129] This problem is magnified when the members are not required to convict unanimously. Perhaps the members, given the proper instructions, would have reached a certain verdict and even a certain sentence.[130] "But for a reviewing court to make those assumptions is to usurp the functions of . . . the [members]."[131]

Appellant respectfully requests this Court reverse the lower court's ruling, dismiss Specification 1 with prejudice, and dismiss Specification 2 without

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[126] *Hills*, 75 MJ at 357; *Killion*, 75 M.J. at 215.
[127] *Clark*, 20 C.M.A. at 144; *see also Mendoza*, 85 M.J. at 230 (Sparks, J., concurring).
[128] *Milanovich*, 365 U.S. at 554.
[129] *See Milanovich*, 365 U.S. at 555; *Clark*, 20 C.M.A. at 144. For the lower court to dismiss one specification and revive the other usurped the functions of the members and the Military Judge. *Milanovich*, 365 U.S. at 556.
[130] *Milanovich*, 365 U.S. at 555-56.
[131] *Id.* at 556.

prejudice to allow a fair rehearing with a properly noticed specification and a properly instructed panel.

II

The lower court had no authority to "reassess" a sentence the members never imposed.[132]

Standard of Review

"The scope of an appellate court's authority is a legal question this Court reviews de novo."[133]

Discussion

"The courts of criminal appeals are courts of limited jurisdiction, defined entirely by statute."[134]

A. A Court of Criminal Appeals may affirm or set aside findings or the sentence, and is limited to specific actions related to these courses of action.

A Court of Criminal Appeals (CCA) may take action only as to the findings and sentence in the Entry of Judgment.[135] Even if the CCA leaves findings intact it

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[132] This Issue Presented is raised in the alternative to Issue I.
[133] *United States v. Cardenas*, 80 M.J. 420, 422 (C.A.A.F. 2021) (quoting *United States v. English*, 79 M.J. 116, 121 (C.A.A.F. 2019)); *see also United States v. Brubaker-Escobar*, 81 M.J. 471, 474 (C.A.A.F. 2021) (citing *English*, 79 M.J. at 121).
[134] *Brubaker-Escobar*, 81 M.J. at 473 (quoting *United States v. Arness*, 74 M.J. 441, 442 (C.A.A.F. 2015) (citing *United States v. Politte*, 63 M.J. 24, 25 (C.A.A.F. 2006)).
[135] 10 U.S.C. § 866.

may take action on the sentence.[136] The CCAs may modify a sentence to a lesser one or order a rehearing.[137] In some circumstances the CCA may reassess the sentence.[138]

Under Article 66(f)(1), if the CCA sets aside findings, it "(i) may affirm any lesser included offense; and (ii) may . . . order a rehearing."[139] It may also reassess the sentence if the appellant remains convicted of other charges.[140] But it cannot set aside a conviction and leave its sentence intact.[141]

B. Setting aside the only conviction for which Appellant was sentenced necessarily set aside the sentence.

The members sentenced Appellant *only* on sexual assault without consent—a conviction that the lower court set aside.[142] The Military Judge conditionally dismissed the assault on an incapacitated person specification *before* the sentencing case.[143] She instructed the members that sexual assault without consent

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[136] 10 U.S.C. § 866(e), (f) (2024).
[137] 10 U.S.C. § 866(f) (2024).
[138] *United States v. Winckelmann*, 73 M.J. 11 (C.A.A.F. 2013); *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986).
[139] 10 U.S.C. § 866(f)(1)(A) (2024).
[140] *Winckelmann*, 73 M.J. 11.
[141] 10 U.S.C. § 866(f)(1)(B) (2024) ("If the Court of Criminal Appeals sets aside the findings and does not order a rehearing, the Court shall order that the charges be dismissed."). Sentences are necessarily tied to a conviction. 10 U.S.C. § 856 (2024).
[142] J.A. at 11.
[143] J.A. at 392-93, 395.

was the only charge before them for sentencing.[144] The members neither considered nor awarded a sentence for the specification of assault on an incapacitated person.

Because sentencing flows only from a conviction, it necessarily follows that when a CCA sets aside a conviction where the appellant was sentenced for only one charge and specification, the associated sentence is also extinguished.[145] Once extinguished, there is no sentence on which the CCA can act.[146]

The natural consequence of setting aside Appellant's conviction for sexual assault without consent was to set aside the sentence.[147] The lower court's authority to further act on Appellant's sentence was therefore foreclosed.[148] Dissenting from the lower court's en banc denial of the Government's motion for en banc reconsideration, three of the lower court's judges recognized these truths, writing: "Our decision in setting aside the findings for Specification 1 necessarily

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[144] J.A. at 395.
[145] R.C.M. 1001(a) (MCM 2019) (after findings of guilty are announced, the parties may present matters for an appropriate sentence); R.C.M. 1002(a) (MCM 2019) (sentence adjudged is "within the discretion of the court-martial."); R.C.M. 1002(d)(1) (MCM 2019) (members determine a single sentence); J.A. at 505-06.
[146] 10 U.S.C. § 866(f)(1)(B) (2024); *see United States v. Wall*, 79 M.J. 456, 460-61 (C.A.A.F. 2020) (stating that when the CCA sets aside the sentence approved by the convening authority and remands the case to the convening authority, the CCA's "authority to further act on the sentence until the case returned from the convening authority" is extinguished).
[147] J.A. at 29.
[148] *Wall*, 79 M.J. at 460-61.

also set aside the sentence for that Specification. As such there is no sentence for us to reassess for Specification 2[.]"[149] It is prejudicial error for a CCA to impose a sentence after it set aside the only conviction on which a sentence was imposed.[150]

C. The lower court exceeded its authority and deprived Appellant of due process of law when it awarded a sentence for a conviction without a sentencing hearing.

Appellant had a constitutional and statutory right to a sentencing hearing before the sentencing authority. Here, that means a sentencing hearing before members sentencing him on a conviction for sexual assault on an incapacitated person. Such a sentencing hearing did not occur, and no sentence can be imposed or affirmed until that hearing occurs.

Article 66 is clear that the CCA is a reviewing authority. It is not an authority in the first instance for either findings or sentencing.[151] In *United States v. English*, this Court found the ACCA exceeded its authority when it upheld the appellant's conviction by excepting certain language from the specification.[152] In doing so, the ACCA broadened the scope of the charge on appeal from the

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[149] J.A. at 29.
[150] *See United States v. Griego*, 80 M.J. 188, 188-89 (C.A.A.F. 2020) (citing *United States v. Gonzalez*, 79 M.J. 466 (C.A.A.F. 2020)); *Wall*, 79 M.J. 456 (finding prejudicial error for CCA to act on the appellant's sentence after it set aside the convening authority's action).
[151] *English*, 79 M.J. 116.
[152] *Id.*

narrow—and harder to prove—charge the Government alleged at trial.[153] The Court found this was "akin to the violation of due process that occurs when an appellate court affirms a conviction based on a different legal theory than was presented at trial."[154] This Court held that "[s]uch post hoc modification is an error of constitutional magnitude that 'offends the most basic notions of due process.'"[155] The same is true here.

Once the lower court dismissed Specification 1, there was no longer any sentence to be reassessed.[156] The sentencing authority (the member panel) had not even considered Specification 2 in the sentencing phase of the trial.[157] The lower court's justification that it could simply pick up the sentence from one specification and apply it to another may have logical appeal, but it is not grounded in the law. Appellant was not on notice that he faced sentencing on incapacitation. Yet, the lower court "reassessed" the sentence, citing *United States v. Winckelmann*.[158] But *Winckelmann* allows CCAs to reassess sentences when a

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[153] *Id.* at 119-20.
[154] *Id.* at 122 (citations omitted).
[155] *Id.* (quoting *United States v. Dunn*, 442 U.S. 100, 106 (1979)).
[156] J.A. at 29; *see United States v. Curtis*, 52 M.J. 166, 168 (C.A.A.F. 1999) (conditionally setting aside sentence to allow rehearing or reassessment did not mean there was "no sentence to be reassessed) (discussing *United States v. Gonzalez-Candelaria*, 27 M.J. 402, 402-03 (1988)); *see also* R.C.M. 1001(a), 1002(a), 1002(d)(1) (MCM 2019).
[157] J.A. at 395.
[158] J.A. at 20-22.

conviction remains for which the appellant *had been sentenced*.[159] Here, no such conviction remained.[160] The lower court majority simply sentenced Appellant for the first time on the incapacitation charge.[161] The CCA does not have initial sentencing authority.[162] This deprived Appellant of liberty and property based on a sentence awarded on paper, by appellate judges, when no hearing ever occurred.[163] The lower court's "post hoc modification . . . offends the most basic notions of due process."[164]

Conclusion

For these reasons the Court should set aside the sentence and order a sentence rehearing.

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[159] In *Winckelmann*, the appellate court dismissed several of the charges, but many remained without having to revive any charges the trial judge conditionally dismissed. 73 M.J. 11. Even so, appellate judges are less likely to know what members would have awarded than if sentencing is by military judge alone. *See United States v. Moffeit*, 63 M.J. 40, 43 (C.A.A.F. 2006) (Baker, J., concurring).
[160] J.A. at 29.
[161] J.A. at 26-27.
[162] J.A. at 27. The majority noted the logic of Senior Judge Harrell's point but relied on its decision in *United States v. Parker*, 75 M.J. 603, 619-20 (N-M. Ct. Crim. App. 2016). *Grafton*, No. 202400055, slip op. at 20, n.109. Senior Judge Harrell viewed *Parker* skeptically. J.A. at 28. A month and a half after deciding Appellant's case, the lower court denied the Government's motion for reconsideration en banc. Three lower court judges dissented, citing the need to revisit the court's rationale in *United States v. Parker*. J.A. at 29.
[163] "Where an appellant selected sentencing by members, there may be due process considerations if sentence reassessment is conducted by appellate judges." *Moffeit*, 63 M.J. at 43 (Baker, J., concurring).
[164] *English*, 79 M.J. at 122 (citation and internal quotation marks omitted).

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This brief complies with the type-volume limitations of Rule 24(c) because it contains fewer than 14,000 words. This brief also complies with the typeface and type style requirements of Rule 37 because it has been prepared in 14-point, Times New Roman font with one-inch margins on all four sides. Its word count is 9,381.

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I certify that I delivered the foregoing to this Court and opposing counsel on March 24, 2026.

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