IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, **Appellant**	)	**REPLY BRIEF ON BEHALF OF APPELLANT**
v.	)	
Staff Sergeant (E-6) **ISAC D. MENDOZA,** **United States Army,** **Appellee**	)	**Crim. App. Dkt. No. 20210647**
	)	**USCA Dkt. No. 25-0244/AR**

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

Certified Issue I

WHETHER APPELLANT'S CONVICTION SHOULD BE REVERSED FOR A DUE PROCESS VIOLATION?

Statement of Facts

Appellee filed a motion for tailored panel instructions on December 1, 2021. (JA 298). Specifically, Appellee's counsel stated, "without the tailored instruction, the parties are likely to erroneously argue that the mens rea required for sexual assault when the AV is incapable of consent applies to the charged offense of sexual assault without consent in fact." (JA 299).

On December 6, 2021, Appellee filed a military judge alone request. (JA 298). On the same day, the government responded to Appellee's motion clarifying the charging theory and an explanation regarding the plain reading of the statue. (JA 310). Because the forum changed from panel to military judge alone, the

military judge did not hear argument for Appellee's motion and there was not going to be an instructions conference. (JA 82). However, the military judge allowed Appellee's counsel to argue his concern during closing argument. (JA 82). The military judge expressed that he would take the argument into consideration when deliberating. (JA 82). But, in closing argument, Appellee argued merely that the government did not meet their burden and Appellee had a mistake of fact as to consent defense. (SA 01).

Law and Argument

A. The Standard of Review for Fair Notice is Plain Error.

When the issue of fair notice is raised for the first time on appeal, this Court reviews the forfeited issue for plain error. *United States v. Gonzalez*, __ M.J. ___, *4 (C.A.A.F. 2025) (citations omitted).

Because fair notice is raised for the first time on appeal, the issue is forfeited and reviewed for plain error. The record shows Appellee had actual and legal notice of the government's theory and defended against it; thus, no plain error occurred.

At trial, Appellee raised due process concerns via a request for tailored panel instructions that addressed a potential improper argument concern, not lack of notice. (JA 298). But Appellee's asserted concern—that a panel might conflate lack-of-consent with incapacity—became moot when he elected a military-judge-

alone trial on December 6, 2021. (JA 298). A military judge is presumed to know and follow the law. *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007). Moreover, when the military judge allowed Appellee to argue his due process concern in closing, he did not argue fair notice, instead he argued that the government did not establish the element of without consent as required under Article 120(b)(2)(A). (JA 271).

The record does not demonstrate that defense was surprised because during closing statements, Appellee's counsel argued, "[T]he government had complete control over the charging process and intentionally rejected the incapable variety of sexual assault in favor of the lack of consent variety of sexual assault. They could have even charged in the alternative. But once again, they chose to charge sexual assault without consent." (SA 01). The purpose of fair notice is to prevent surprise and ensure defense has an opportunity to raise relevant motions. Here, Appellee had both; Appellee knew what he had to defend against, and he had the ability to raise relevant motions.

Fair notice also exists where the statute and charge sheet make the criminal conduct clear. *United States v. Rocha*, 84 M.J. 346 (2024); *United States v. Jones,* 68 M.J. 465 (C.A.A.F. 2010). Here, Appellee had notice from:

1. The plain language of the charge sheet (sexual assault without consent);
2. The plain reading of the statute; and

3. The government's responsive pleading clarifying the theory in response to Appellee's motion.

Further, Appellee's chosen defense strategy was contesting consent and arguing mistake-of-fact, which indicates an awareness of the offense he was defending against.

Appellee was charged with, litigated, and convicted of sexual assault without consent under Article 120(b)(2)(A), UCMJ. Appellee identifies no ambiguity in the charge and no prejudice. Because the record shows no clear or obvious error000, Appellee's forfeited fair notice claim fails under plain error review.

To the extent this Court identified the primary due process concern in *Mendoza* I to be improper argument, this Court reviews prosecutorial misconduct and improper argument de novo. *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017). If there is no objection at trial, the appellant has the burden of establishing the prejudice. *United States v. Schroder*, 65 M.J. 49, 58 (C.A.A.F. 2007).

Similarly, if this Court considered the primary due process concern to be a matter of evidentiary sufficiency, questions of legal and factual sufficiency are reviewed de novo. *United States v. Rosario*, 76 M.J. 114 (C.A.A.F. 2017) (citation omitted). The Army Court completed their sufficiency review de novo and properly affirmed the conviction.

B. The Army Court did not err in rejecting the Government's Concession.

A government concession does not dictate a Court's judgment. Regardless of the government's position, the Army Court found legal and factual sufficiency, and the record supports a conviction for lack of consent—not incapacity.

A government concession "is not determinative of an appeal." *United States v. Emmons*, 31 M.J. 108, 110 (C.M.A. 1990). Although the government previously suggested remand, it simultaneously argued—and continues to argue—that the conviction is supported by legally and factually sufficient evidence. (Gov't Br. on Remand at 14–23). During the Government's concession, the government considered that procedurally, the Army Court should have performed a due process violation analysis as well as a legal and factually sufficiency analysis. Had the Army court found a due process violation, "the best practice for a service court of criminal appeals is to simply not comment on the legal and factual sufficiency of findings in a case where a remand is ordered." *United States v. Cooper*, 80 M.J. 644, 677 (N-M Ct. Crim. App. 2020) ("[T]he record is flawed enough in some way for a remand, so evaluating the legal and factual sufficiency is somewhat distorted through the prism of the legal error."). Nevertheless, this Court directed the Army Court to conduct a legal and factual sufficiency review and nothing else, and the Army Court complied. The Army Court's decision to proceed with sufficiency review without considering whether Appellee's due process right to fair notice was violated was a reasonable interpretation of this Court's remand order.

Prior to remand, this Court noted that a conviction based on inability to consent rather than absence of consent would raise due-process concerns. However, that is not what happened here. Appellee elected a judge-alone forum, argued consent and mistake-of-fact, and the military judge—presumed to follow the law—convicted based on lack of consent, not incapacity.

Thus, the government's past posture does not alter the legal sufficiency of the conviction. The record establishes proper notice and proper application of the statute; the conviction should be affirmed.

C. Remedy

The government relied on *Hills* when asking this Court to remand the case to authorize a rehearing under the belief that there was not an evidentiary sufficiency issue. *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016). If the evidence is found to be insufficient, the government is barred from further prosecuting the case and a rehearing is not authorized under Article 44, UCMJ. *See United States. v. Coe*, 2025 CCA LEXIS 419 (Army Ct. Crim. App. 2025) (Pond, S.J., dissenting) ("Article 66(f)(1)(A), UCMJ authorizes the court to order a rehearing when setting aside the findings under Article 66(f), UCMJ, except when prohibited by section 844 of this title (article 44)."). In contrast, "[t]he successful appeal of a judgment of conviction, on any ground *other than the insufficiency of the evidence* to support the verdict poses no bar to further prosecution on the same charge." *United States*

v. Scott, 437 U.S. 82, 90–91 (1978) (emphasis added). Thus, authorizing a rehearing would only be appropriate if there is sufficient evidence.

Conclusion

WHEREFORE, the government respectfully request this Honorable Court affirm the Army court's decision.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c)(1) because this brief contains **1,535** words.

2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at ***usarmy.pentagon.hqda-otjag.mbx.dad-accaservice@mail.mil*** on the 12th day of November 2025.

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