

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	ANSWER ON BEHALF OF
Appellee	)	APPELLEE
	)	
v.	)	Crim.App. Dkt. No. 202400194
	)	
Sivar Y. COX,	)	USCA Dkt. No. 26-0090/MC
Private First Class (E-2)	)	
U.S. Marine Corps	)	
Appellant	)	

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Issues Presented

I.

WHETHER THE APPELLATE DEFENSE COUNSEL WHO REPRESENTED APPELLANT BEFORE THE LOWER COURT WAS INEFFECTIVE.

II.

WHETHER APPELLANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE MILITARY JUDGE REPLACED THE ENTIRE COURT-MARTIAL PANEL MID-TRIAL PURSUANT TO ARTICLE 29, UNIFORM CODE OF MILITARY JUSTICE.

III.

DID THE MILITARY JUDGE ERRONEOUSLY INSTRUCT THE MEMBERS IN LIGHT OF *UNITED STATES V. MENDOZA* AND *UNITED STATES V. MOORE*?

Statement of Statutory Jurisdiction

The Entry of Judgment includes a sentence of a dishonorable discharge. The lower court had jurisdiction under Article 66(b)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(3). This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Relevant Authorities

The United States adopts the relevant authorities as set forth in Appellant's Brief. (*See* Appellant Br. at 2–4.)

Statement of the Case

A panel of members with enlisted representation sitting as a general court martial convicted Appellant, contrary to his Pleas, of attempted sexual assault, in violation of Article 80, UCMJ, 10 U.S.C. §880 (2019). The Military Judge sentenced Appellant to fourteen months confinement and a dishonorable discharge. The Convening Authority approved the Sentence as adjudged, and the Military Judge entered Judgment on the Findings and Sentence.

Statement of Facts

- A. The United States charged Appellant with attempted sexual assault, sexual assault, and abusive sexual contact.

The United States charged Appellant with sexual assault, abusive sexual contact, and in the alternative, attempted sexual assault in violation of Articles 80 and 120, UCMJ (2018); 10 U.S.C. §§ 880, 920 (2018). (Charge Sheet. Apr. 25, 2023.) For the Sole Specification of Charge I, attempted sexual assault, the United States charged Appellant with: “attempt[ing] to sexually assault [the Victim] . . . by attempting to . . . penetrate her vulva with [his] penis without [her] consent.” (Charge Sheet at 1.)

For Specification 1 of Charge II, sexual assault without consent, the United States charged Appellant with committing “a sexual act upon [the Victim] . . . “by causing contact between [his] mouth and [her] vulva, without [her] consent.” (Charge Sheet at 1.)

For Specification 2 of Charge II, sexual assault without consent, the United States charged Appellant with committing “a sexual act upon [the Victim] . . . “by penetrating [her] vulva with [his] penis, without [her] consent.” (Charge Sheet at 1.)

For Specification 3 of Charge II, sexual assault of a person who is asleep, the United States charged Appellant with committing “a sexual act upon [the Victim] . . . “by causing contact between [his] mouth and [her] vulva, when he knew or reasonably should have known [she] was asleep.” (Charge Sheet at 2.)

For Specification 4 of Charge II, sexual assault of a person who is asleep, the United States charged Appellant with committing “a sexual act upon [the Victim] . . . “by penetrating [her] vulva with [his] penis, when he knew or reasonably should have known [she] was asleep.” (Charge Sheet at 2.)

For Specification 5 of Charge II, abusive sexual contact, the United States charged Appellant with ““touch[ing] the groin of [the Victim] with an intent to gratify [his] sexual desire” and “without the consent of [the Victim].” (Charge Sheet at 2.)

B. Witnesses saw Appellant pull the Victim’s pants down and attempt to penetrate her vulva with his penis while she groaned and said “no.”

The Charges and Specifications arose from a barracks party where the Victim became so drunk that friends had to carry her back to her room after she vomited on herself. (J.A. 227–34, 267–69, 284–89, 504–05.) After putting the

Victim to bed, a fellow Marine—Lance Corporal A.A.¹—went into an adjoining bedroom and started a video call with her fiancée, Ms. Costanzer. (J.A. 510–24.)

While on the video call, Lance Corporal A.A. entered the Victim’s barracks room from the bathroom and saw Appellant laying on top of the Victim, pulling down her pants while the Victim was “grunting” and “saying ‘no,’” and. (J.A. 510–24.) Because of her own “past trauma from this sort of thing,” Lance Corporal A.A. “froze,” laid down on another bed in the same barracks room, and pointed her phone’s camera at the other bed. (J.A. 521–22.)

Through the phone, Ms. Costanzer then saw Appellant pulling down the Victim’s pants, pulling out his penis, and attempting to penetrate her. (J.A. 773–79.) At the same time, Lance Corporal A.A. text-messaged Corporal Ibarra for help. (J.A. 524–27, 1110–11.) Soon after, Corporal Ibarra, his wife and another Marine came into the room. (J.A. 529.) Immediately after entering the room, Corporal Ibarra’s wife saw Appellant “on his knees on the floor with her legs up, basically, doing stuff to [the Victim].” (J.A. 186.)

The Victim had no memory of the incident and only recalled waking up at the hospital. (J.A. 480.) While there, she underwent a sexual assault forensic examination. (J.A. 481, 834–45.) DNA testing of external genital swabs taken

¹ Name withheld to protect the witness’s privacy, related to a mental health issue described, *infra*.

during the exam showed male DNA consistent with Appellant's. (J.A. 834–45, 853–61, 881–92, 1106.)

C. The Military Judge dismissed the entire panel of Members and impaneled new Members under Article 29.

At trial, as discussed and cited in greater detail *infra*, a Witness accused Appellant of an act that could amount to an uncharged attempted sexual assault. When the Military Judge attempted a curative Instruction, the Members disclosed they had been discussing the case in violation of the Military Judge's earlier Order. This caused the Military Judge to dismiss the Members. Once the Convening Authority assigned new Members, the Military Judge impaneled them and proceeded with trial under Article 29, UCMJ.

1. Appellant argued "a mistrial is not appropriate." Appellant moved to dismiss the Charges and Specifications with prejudice after a witness unexpectedly testified about Appellant's uncharged misconduct.

The United States' twelfth witness, Lance Corporal A.A., unexpectedly alleged that Appellant "grabbed [her] arm and was trying to make [him] touch [her] penis." (J.A. 577.) As a result, Appellant moved to dismiss the Charges with prejudice. (J.A. 580–91.) As to a mistrial, Trial Defense Counsel argued:

A mistrial is not fair to Private Cox. There are—there are decisions that have to be made by the defense team of, you know, [i]f we can't get dismissal, do we want a mistrial? And the answer in the event that the Court doesn't award dismissal is, [m]istrial is not going to fix the problem. Mistrial could make things work worse, just in a different way. That's why a mistrial is not appropriate in this case, Your Honor.

In the event that the court disagrees with that and says, dismissal is never happening, we would ask for a mistrial. But that's not fair to Private Cox, Your Honor . . .

(J.A. 586–87.)

2. Appellant again moved to dismiss with prejudice after one of the Members disclosed the panel was discussing the case prematurely. Appellant supported dismissing the Members. Appellant opposed granting a mistrial.

After initially denying Appellant's Motion, the Military Judge questioned the Members. (*See* J.A. 599–600.) One Member said he could not be impartial and revealed that the Members were already discussing the case. (J.A. 599–600.)

In response, Appellant again moved to dismiss. (J.A. 601.)

As to a mistrial, Trial Defense Counsel argued:

A mistrial is a terrible, terrible thing for Private Cox. The witnesses have been tainted. The government has an opportunity to cure all of its defects in this case and do things differently. That shouldn't fall on Private Cox that something extremely unusual happened and unexpected happened.

And it's like the expression, "Tie goes to the runner." Here, the runner is Private Cox. He's in pretrial confinement. And he shouldn't have to stay in prison, in jail, awaiting a new trial that's going to be even less fair than this one.

(J.A. 607.) Trial Defense Counsel agreed with the Military Judge's assessment that they were "vehemently opposed" to a mistrial. (J.A. 610.)

The Military Judge dismissed the Member and then allowed Counsel to voir dire the remaining Members. (J.A. 609, 610–19.) After questioning the Members,

the Military Judge raised, sua sponte, challenges for cause for all the Members based on the premature deliberations. (J.A. 621.)

Trial Defense Counsel shared the same concerns and stated they had no objection to dismissing the Members. (J.A. 621.) The Military Judge then dismissed all the Members for actual or implied bias. (J.A. 622.) Under Article 29, the Military Judge halted proceedings until the Convening Authority detailed new members. (J.A. 622.)

3. Appellant withdrew his Motion for mistrial. Appellant again moved to dismiss the Charges and Specifications with prejudice.

After the Members were dismissed, Trial Defense Counsel informed the Military Judge, “After further communication with [Appellant] and supervisory counsel, the Defense withdraws its pending request for a mistrial as an alternative remedy to dismissal with prejudice.” (J.A. 1113.) They continued, “The only appropriate remedy is dismissal with prejudice.” (J.A. 1113.)

4. The Military Judge denied Appellant’s Motion to dismiss and identified Article 29 as an alternative remedy.

In denying Appellant’s renewed Motion to Dismiss and ordering the use of the procedures in Article 29, the Military Judge said the law required him to “consider[] lesser forms of relief” before ordering a mistrial over the Appellant’s objection. (J.A. 657) (*citing United States v. Cabrera*, 83 M.J. 562 (N-M. Ct. Crim. App. 2023), *In re Murillo v. Zimmerman*, No. 202200132, 2023 CCA

LEXIS 60 (N-M. Ct. Crim. App. Feb. 3, 2023)). Because Appellant opposed a mistrial, the Judge considered impaneling new members to be an alternative form of relief. (J.A. 657–61.)

5. The Military Judge played audio of eleven Witnesses’ testimony for the new Members, while each Witness was available for cross-examination and questioning.

The Convening Authority appointed new Members and—after Voir Dire and challenges—the Military Judge impaneled them. (J.A. 623–67.) The Military Judge then informed the Parties of the intended way forward. (J.A. 660.) The Military Judge provided,

The members are going to hear the audio of all the witness testimony except the portions for which this Court issued a curative instruction These new members will be given an opportunity to ask questions of these witnesses; that counsel in this case will be given the opportunity to ask follow-up questions within the scope of any members question; and the defense will have the opportunity to recall any government witnesses if it desires to do so.

(J.A. 660.)

Next, after the Military Judge impaneled the Members, he had each Witness sit on the stand while the court played an audio recording of the Witness’s prior testimony. (J.A. 679–80, 693, 702, 710, 719–21, 727, 732–33, 745, 761, 767.)

After each Witness’ testimony was replayed, the Members asked each of the witnesses additional questions. (J.A. 682, 687–88, 695, 704–07, 711–12, 716–17,

722–24, 728–29, 731, 733–34, 738–39, 747.) The only exceptions were Lance Corporal A.A. and the Victim.

Appellant did not recall any Government witnesses.

6. Lance Corporal A.A. was not present during the playing of her testimony. The Military Judge found her unavailable under Mil. R. Evid. 804(a) because she had attempted suicide and was hospitalized.

The only witness not present when the testimony was replayed was Lance Corporal A.A., who was not present when the court played a recording of her prior testimony. (J.A. 763–64, 767.) She had attempted suicide the night before and was kept in the hospital. (J.A. 763.)

The Military Judge found that she was unavailable under Mil. R. Evid. 804(a) due to the attempted suicide. (J.A. 763–65.) While Trial Defense Counsel maintained their objection to the Article 29 procedures on Confrontation Clause grounds, they stated that “regarding her status as an unavailable witness, we will have no objection, given her status at this time.” (J.A. 765.)

The Military Judge found her unavailability under Mil. R. Evid. 804(a) did not raise any Confrontation Clause issues as her former testimony was also admissible under Mil. R. Evid. 804(b)(1) and there had already been “ample direct and cross-examination.” (J.A. 765.)

D. The Military Judge instructed the Members, the Parties argued, and the Members made Findings.

1. Appellant never objected to the Military Judge's Instructions.

The Military Judge reviewed the proposed instructions with Counsel. (J.A. 1015–17.) Appellant objected to the language defining “the overt act or the attempt” as to Charge II, Specification 1, but had no other objections to the proposed instructions. (J.A. 1018.) The Military Judge gave a single definition of “consent” for all six Specifications, which included the phrase, “[a] sleeping, unconscious, or incompetent person cannot consent.” (J.A. 1032.) He also instructed, “[a]ll of the surrounding circumstances are to be considered in determining whether a person gave consent.” (J.A. 1032.)

2. The United States argued that the Victim said “no.”

In its closing argument, the United States addressed whether the Victim consented. (J.A. 1058.) Trial Counsel argued that two Witnesses “were able to hear an uncomfortable groaning—grumbling from the other bed.” (J.A. 1058.) And that one of the Witnesses “testified she was able to hear and [the Victim] say one word. She said ‘No.’” (J.A. 1058.) Trial Counsel asked rhetorically, “How could the accused have had any belief he had consent from someone who is groaning and saying no?” (J.A. 1058.)

3. The Members convicted Appellant of Charge I and its sole Specification which alleged an attempted sexual assault.

The Members convicted Appellant of Charge I and its sole Specification—attempted sexual assault without consent. (J.A. 1104.) The Members found Appellant not guilty of Charge II and its Specifications. (J.A. 1104.)

- E. Appellant raised a single Assignment of Error below, then raised both the Instruction and Confrontation Clause issues in a Motion for En Banc Reconsideration. The lower court denied the Motion to Reconsider.

Appellant’s Brief and Assignments of Error below included one assignment of error—that the evidence was factually insufficient. (J.A. 10–36.) The lower court ruled against him. *United States v. Cox*, No. 202400194, 2025 CCA LEXIS 452 (N-M. Ct. Crim. App. Sept. 24, 2025).

On October 24, 2025, Appellant filed an eighteen-page Motion for En Banc Reconsideration at the Court of Criminal Appeals, raising both arguments he makes at this Court: (1) that under *Grafton*, *Casillas*, and *Mendoza*, the “sleeping person cannot consent” Instruction was erroneous; and (2) that Trial Defense Counsel should have raised a Confrontation Clause violation and should have declared a mistrial given the Article 29 procedures at trial. (J.A. 65–82.) Around three weeks later, the lower court denied the Motion. (J.A. 97–99.)

Summary of Argument

Appellant cannot show that Appellate Defense Counsel was ineffective.

Appellate Defense Counsel raised the issues in a Motion to Reconsider before the Court and the ignored issues were not clearly stronger than the issue raised before the lower court. Further, even if Appellant demonstrates Appellate Defense Counsel was deficient, he was not prejudiced.

Appellant has failed to meet his heavy burden that the Article 29 procedures used were unconstitutional as applied. Appellant affirmatively opposed a mistrial, inviting the Military Judge to apply Article 29 as an alternative remedy. The Military Judge replaying the audio of previous testimony for the newly impaneled members was specifically authorized under Article 29. Ultimately, Appellant has not demonstrated his right to confront witnesses in this case was so extraordinarily weighty as to overcome the balance Congress struck in enacting Article 29.

Finally, Appellant waived instructional error in telling the Military Judge he had no objection to the instructions. Regardless, there was no instructional error. The Military Judge's Instructions were consistent with this Court's precedent and did not allow the Members to convict solely on an uncharged theory.

Argument

I.

APPELLATE DEFENSE COUNSEL WAS NOT INEFFECTIVE. HE MADE THE SAME ARGUMENTS IN EN BANC RECONSIDERATION. APPELLANT SUFFERED NO PREJUDICE BECAUSE HE FAILS TO SHOW A SUBSTANTIAL PROBABILITY OF A DIFFERENT RESULT EVEN IF RAISED IN HIS INITIAL BRIEFS.

A. The standard of review is de novo.

Courts review an appellate defense counsel's effectiveness de novo. *United States v. Adams*, 59 M.J. 367, 370 (C.A.A.F. 2004).

B. Appellant bears the burden to demonstrate both that Trial Defense Counsel were deficient, and that their deficiency resulted in prejudice.

“Claims that appellate defense counsel have rendered ineffective assistance are measured by the same test applicable to such claims lodged against a trial defense counsel.” *Adams*, 59 M.J. at 370 (citations omitted).

To establish ineffective assistance of counsel, an appellant must demonstrate “both (1) that his counsel’s performance was deficient, and (2) that this deficiency resulted in prejudice.” *United States v. Green*, 68 M.J. 360, 361 (C.A.A.F. 2020) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Appellant has the burden of demonstrating both parts of the *Strickland* test, including establishing the truth of factual matters underlying his claim. *See United States v. Polk*, 32 M.J.

150, 153 (C.M.A. 1991); *Denedo v. United States*, 66 M.J. 114, 129 (C.A.A.F. 2008), *aff'd*, 556 U.S. 904 (2009).

For the first prong, defense counsel enjoy “a strong presumption” that their “conduct falls within the wide range of reasonable professional assistance.” *United States v. Rose*, 71 M.J. 138, 143 (C.A.A.F. 2012) (quotation marks omitted). Counsel’s performance must objectively amount to incompetence under prevailing professional norms. *Harrington v. Richter*, 562 U.S. 86, 105 (2011); *see also United States v. Drewell*, 55 M.J. 131, 133 (C.A.A.F. 2001), and *United States v. Akbar*, 74 M.J. 364, 386 (C.A.A.F. 2015). Thus, “an appellant meets his burden on deficient performance when he demonstrates that his appellate counsel’s performance was so deficient that it fell below an objective standard of reasonableness.” *Adams*, 59 M.J. at 370.

“[I]t is possible to bring a *Strickland* claim based on counsel’s failure to raise a particular to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent.” *Smith v. Robbins*, 528 U.S. 259, 288 (2000) (citing *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1985)). “Significant issues which could have been raised should then be compared to those which were raised.” *Greer*, 800 F.2d at 646. “Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.” *Id.*

For the second prong, the errors in counsel’s performance must be “so serious as to deprive the [appellant] of a fair [appellate proceedings] . . . whose results is reliable.” *Id.* (citations omitted) (brackets in original). An appellant must show “a reasonable probability that, but for counsel’s error, there would have been a different result.” *United States v. Quick*, 59 M.J. 383, 386–87 (C.A.A.F. 2004) (citing *Strickland*, 466 U.S. at 694). That requires “a substantial, not just conceivable, likelihood of a different result.” *Bradley v. United States*, 71 M.J. 13, 17 (C.A.A.F. 2012) (quotations and citations omitted).

C. Appellant fails the first prong; he has failed to demonstrate his appellate counsel’s performance was so deficient that it fell below an objective standard of reasonableness.

Appellant fails to show his appellate counsel’s performance was so deficient for two reasons. First, the Record is insufficient to show that the lower court did not consider the merits of Appellant’s Motion for Reconsideration, where he raised the two issues he argues were ignored on Appeal. (J.A. 65–81.) In resolving an allegation of ineffective assistance of appellate counsel, this Court in *Adams* noted that the issues Appellant claims were not raised were included in a motion for reconsideration. *Adams*, 59 M.J. 367.

And while the United States believes a Motion for Reconsideration is generally an inappropriate vehicle to raise new issues for the first time, here Appellate Defense Counsel at the Service Court conceded he should have raised it

initial briefing, but brought the two issues to the lower court for reconsideration en banc, to ensure all judges would give consideration to the two new issues. (J.A. 65-82.) The en banc Motion would have been “transmitted to each judge of the court.” J. R. App. Proc. 27(b), (c).

But the lower court, despite all judges receiving the Motion, denied the Motion. (J.A. 97.) If we can presume the judges of the lower court considered Appellant’s arguments on their merits before denying the Motion, then Appellant fails to show his counsel’s performance deficient. Even if all judges of the lower court disregarded the merits of Appellant’s Motion, Appellant cannot show the ignored issues were “clearly stronger” than the sufficiency of the evidence argument raised before the lower court. *Greer*, 800 F.2d at 646; (J.A. 10–25).

As to the Article 29 issue, at trial Appellant “vehemently opposed” a mistrial. *See infra* Part II. Appellant cites no precedent supporting that Article 29 was unconstitutional as applied, and indeed, *Vazquez* supports the opposite conclusion. *See infra* Part II. As to the instructional issue, Appellant waived this issue at trial by stating he had no objection to the proposed instructions, but regardless, the instructions given were proper. *See infra* Part III. Appellant fails the first prong.

D. This Court can resolve the assigned error on the second prong because Appellant fails to show a substantial probability of a different result.

“If it is easier to dispose of an ineffective claim on the ground of lack of sufficient prejudice, that course should be followed.” *Adams*, 59 M.J. at 371 (quoting *Strickland*, 446 U.S. at 697). Appellant fails to demonstrate prejudice.

1. Even if raised below, a Confrontation Clause challenge would not have produced a different result because the Military Judge’s use of Article 29(f) did not violate Appellant’s Confrontation Clause rights.

Article 29(f) explains that when one or more members are replaced, “the trial may proceed with the new members present after the evidence previously introduced is . . . played, in the presence of the new members, the military judge, the accused, and counsel for both sides.” Art. 29(f). As discussed more fully *infra*, in *United States v. Vazquez*, 72 M.J. 13 (C.A.A.F. 2013), this Court held Article 29’s² procedure did not violate the Confrontation Clause where the trial court replaced two of six members, the appellant did not object, and “each witness [had] testified under oath and in the presence of the accused and four of the final panel members.” *Id.* at 16, 20; *see also United States v. Aikanoff*, No. 20200423, 2022 CCA LEXIS 360, at *2 (A. Ct. Crim. App. June 15, 2022); *United*

² *Vazquez* addressed a prior version of Article 29 that listed the procedure in subsection (b) instead of subsection (f). *Vazquez*, 72 M.J. at 16.

States v. Kmet, No. 38755, 2016 CCA LEXIS 339, at *7 (A.F. Ct. Crim. App. June 2, 2016); *United States v. Freeman*, 12 M.J. 542 (A.C.M.R. Sept. 28, 1981).

The Military Judge here provided more protections than Article 29(f) requires and more protections than provided by the *Vazquez* judge. Whereas in *Vazquez* the prior witnesses were entirely unavailable for in-court confrontation, here eleven of the twelve prior witnesses in Appellant's case sat on the witness stand while the Military Judge played a recording of their direct and cross-examination testimony. *Compare* (J.A. 680–767), *with Vazquez*, 72 M.J. at 16.

Moreover, here the Military Judge provided that the Members could ask follow-up questions, and permitted Appellant's counsel additional cross-examination based on their questions. (J.A. 660.) The Military Judge also allowed Appellant to recall any Government witness. (J.A. 660.) Further, one of the two percipient Witnesses to the attempted sexual assault testified and was cross-examined in front of the new panel. This procedure was closer to a routine trial than the Article 29 procedure in *Vazquez*—which this Court found satisfied both the Due Process and the Confrontation Clause. 72 M.J. at 21.

As a result, Appellant fails to demonstrate prejudice, thus fails the second *Strickland* prong. *See infra* Part II.

2. Even if raised below, a challenge to the Military Judge's Instructions would have failed because the instructions were proper under *Moore* and *Casillas*.

“A military judge . . . may not instruct the members that they may find the ‘without . . . consent’ element to be proved beyond a reasonable doubt based *solely* on evidence that the victim was asleep or incapacitated.” *United States v. Moore*, 86 M.J. 308, 313 (C.A.A.F. 2026). But “[i]f a rational trier of fact could find from the evidence *both* that the victim did not consent before falling asleep *and* that the sexual act subsequently occurred while the victim was asleep, the evidence is legally sufficient to prove the ‘without . . . consent’ element.” *Id.* In fact, “[n]othing in the article bars the Government from offering evidence of an alleged victim's intoxication to prove the absence of consent.” *Mendoza*, 85 M.J. 213, 222 (C.A.A.F. 2024); *see also Moore*, 86 M.J. at 313 (“All the surrounding circumstances are to be considered in determining whether a person gave consent.”) (citing Art. 120(g)(7)(C)).

Here, the Military Judge accurately instructed the Members that “[a] sleeping, unconscious, or incompetent person cannot consent.” (J.A. 1032). He also instructed that “All of the surrounding circumstances are to be considered whether a person gave consent.” (J.A. 1032.) He did not instruct the Members that they could convict based *solely* on the Victim’s unconsciousness or incapacity, which *Moore* prohibits. 86 M.J. at 313; (*See* J.A. 1032).

Nothing in *Moore* suggests a military judge must instruct the members to find that the victim “was ‘capable of consenting [but] did not consent.’” (*Cf.* Appellant’s Br. at 42 (quoting *Mendoza* 85 M.J. at 215)); *see* Section III., *infra*. As a result, Appellant fails the second *Strickland* prong. Because neither omitted issue would have succeeded, Appellant cannot establish *Strickland* prejudice. That same analysis also resolves Appellant’s separate constitutional challenge to the Military Judge’s use of Article 29(f).

E. If this Court finds the Record is sufficient to resolve the first and second prongs in favor of Appellant, the appropriate remedy is to remand to the lower court for briefing on the issues.

This Court in *Adams* found that it did not need to return the case to the lower court “because we conclude that any alleged deficiency by appellate counsel did not deprive Adams of a fair appellate review at the Court of Criminal Appeals.” 59 M.J. at 372. However, if this Court finds that the alleged deficiencies did deprive Appellant of fair appellate review, it should remand the case to the lower court for that review. *See e.g., Roe v. Delo*, 160 F.3d 416, 420 (8th Cir. 1998) (remanding for new appeal on ignored issues), *Mayo v. Henderson*, 12 F.3d 528, 537 (2d Cir. 1994) (conditionally granting writ unless opportunity to present new appeal given), *Mason v. Hanks*, 97 F.3d 887 (7th Cir. 1996) (same).

II.

THE MILITARY JUDGE'S APPLICATION OF ARTICLE 29 DID NOT VIOLATE APPELLANT'S DUE PROCESS RIGHTS OR RIGHT TO CONFRONT WITNESSES.

A. The standard of review is de novo.

Courts review the constitutionality of an act of Congress de novo. *United States v. Vazquez*, 72 M.J. 13, 17 (C.A.A.F. 2013) (citation omitted). To determine if a statute is unconstitutional “as applied,” courts conduct a “fact specific inquiry.” *Id.* (citation and quotations omitted).

B. Appellant cannot now object to the Military Judge's failure to sua sponte grant a mistrial, when Appellant rejected that remedy at trial.

1. Where a party invites the trial judge to take or avoid taking an action, the party cannot raise that issue as an error on appeal.

“[A] party may not complain on appeal of errors that he himself invited or provoked the [lower] court . . . to commit.” *United States v. Resch*, 65 M.J. 223, 239 (C.A.A.F. 2007) (quotation omitted); *see also United States v. Mills*, No. 18-10315, 767 Fed. Appx. 877, 880 (11th Cir. Apr. 8, 2019) (per curiam) (“It is a cardinal rule of appellate review that a party may not challenge as error a ruling or other trial proceeding invited by that party.”) (quoting *United States v. Ross*, 131 F.3d 970, 988 (11th Cir. 1997)). “Invited error does not provide a basis for relief.” *United States v. Eggen*, 51 M.J. 159, 162 (C.A.A.F. 1999) (citation omitted).

2. Whether a judge errs in not granting a mistrial *sua sponte* depends on the timing of the incident, identity of the factfinder, reasons for a mistrial, potential alternatives, and “most importantly,” the “desires of and impact on the defendant.”

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.” R.C.M. 915(a). “Declaration of a mistrial is a drastic remedy, and such relief will be granted to prevent a manifest injustice against the accused.” *United States v. Rushatz*, 31 M.J. 450, 456 (C.A.A.F. 1990). “A mistrial is an unusual and disfavored remedy which is a last resort only granted if other remedial action is insufficient to prevent a miscarriage of justice.” *United States v. McFadden*, 74 M.J. 87, 90 (C.A.A.F. 2015). “Because of the extraordinary nature of a mistrial, military judges should explore the option of taking other remedial action, such as giving curative instructions.” *Id.* (quoting *United States v. Ashby*, 68 M.J. 108, 122 (C.A.A.F. 2009)).

In determining whether a mistrial is appropriate, the military judge “shall inquire into the views of the parties on the matter and then decide the matter as an interlocutory question.” R.C.M. 915. The defendant “retains primary control over the course to be followed in the event of trial errors.” *United States v. Harris*, 51 M.J. 191, 196 (C.A.A.F. 1999) (quoting *United States v. Dinitz*, 424 U.S. 600, 609 (1976)). Thus, the military judge should consider the “timing of the incident, the

identify of the factfinder, the reasons for the mistrial, and potential alternative remedies; but most importantly, the desires of and the impact on the defendant.” *Harris*, 51 M.J. at 196 (citing *United States v. Donley*, 33 M.J. 44, 47 (C.M.A. 1971)).

Notably, the court in *Donley* found “no authority” that a trial judge errs in failing to “*sua sponte*, grant a mistrial over defense objection.” 33 M.J. at 46. In *Donley*, a member equivocated on whether he could disregard inadmissible testimony. *Id.* The military judge informed the defense counsel he would grant a mistrial unless defense objected. *Id.* The defense counsel objected. *Id.* On appeal, the court declined to find error in the military judge failing to declare a mistrial, *sua sponte*, where defense objected to a mistrial. 33 M.J. at 47

3. As in *Mills*, Appellant’s “vehement oppos[ition]” to, and withdrawal of his Motion for a mistrial, invited any error and this Court should decline to grant relief.

And in *Mills*, the prosecutor made arguably improper argument during rebuttal arguments. 879 Fed. Appx. at 879. The judge, inclined to grant a mistrial during deliberations, asked if the appellant’s previous request for a mistrial was “off the table.” *Id.* The appellant declined to request a mistrial and instead requested that the jury continue deliberating. *Id.* On appeal, the appellant argued the judge erred in failing to grant a mistrial. *Id.* at 880. The court, however, found the appellant could not challenge that decision on appeal when “the district court’s

decision not to declare a mistrial [was] because he invited that error—if error it was.” *Id.*

Similar circumstances exist here. Like in *Mills*, the Military Judge’s “decision not to grant the mistrial [was] because [Appellant] invited that error—if error it was.” 879 Fed. Appx. at 880. And this Court’s predecessor has found “no authority for the proposition that a judge erred because he did not, *sua sponte*, grant a mistrial over defense objection.” 33 M.J. at 47. The Military Judge, in accordance with R.C.M. 915 and precedent, inquired into Appellant’s views on a mistrial. (J.A. 584–87, 610, 655–58.) Appellant indicated he “vehemently opposed” a mistrial and affirmatively withdrew his Motion for a mistrial, arguing it would prejudice him because the Government would know the Defense’s strategy and he would continue to remain in pretrial confinement. (J.A. 610, 1113.) The Military Judge considered this in declining to grant a mistrial and identified Article 29 as an alternative way forward with the trial. (J.A. 657–58.)

In sum, to the extent Appellant argues that the “appropriate remedy” for “panel-wide prejudice” was a mistrial, this Court should decline to grant relief on those grounds. (Appellant Br. at 37–38.) The Military Judge inquired into—and considered—Appellant’s views at trial as to whether he wanted a mistrial. (J.A. 584–87, 610, 655–58.) Appellant made the strategic decision to oppose a mistrial and advocate that “the only appropriate remedy is dismissal with prejudice.” (J.A.

1113.) Appellant “should not now be allowed to retreat from that strategy because it was unsuccessful.” *United States v. Anderson*, 51 M.J. 145, 153 (C.A.A.F. 1999); *see also United States v. Harvey*, 67 M.J. 758, 764 (A.F. Ct. Crim. App. 2009) (“by specifically requesting the military judge not give the *Marcum* factors, the appellant, through trial defense counsel, invited any alleged error [in failing to instruct on the factors] and cannot be heard, under the invited error doctrine, to complain”).

C. Congress’s implementation of Article 29 reflects a constitutionally permissible balance between servicemembers’ rights and the military’s institutional needs.

1. Because the military is a specialized society whose mission is to fight wars, military courts-martial procedures often do not mirror civilian criminal trials.

The Supreme Court has long recognized that “it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.” *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955). This makes the military “a specialized society separate from civilian society.” *Parker v. Levy*, 417 U.S. 733, 743 (1974).

“[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty.” *Id.* (quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion)). When military personnel

responsible for fighting wars “are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served.” *Quarles*, 350 U.S. at 17.

For that reason, “military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts.” *Id.* “The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.” *Parker*, 417 U.S. at 758.

2. Congress bears “primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military,” and judicial deference is “at its apogee” when courts review that judgment.

The Constitution expressly grants Congress the authority “to make Rules for the Government and Regulation of the land and naval Forces.” U.S. Const., art. I, § 8, cl. 14. Congress has “plenary control” over matters pertaining to military discipline. *Weiss v. United States*, 510 U.S. 163, 177 (1994) (quoting *Chappell v. Wallace*, 462 U.S. 296, 301 (1983)).

Further, the Supreme Court has repeatedly reaffirmed that “Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military.” *Weiss*, 510 U.S. at 177 (quoting *Solorio v. United States*, 483 U.S. 435, 447–48 (1987)). The courts “are not the agencies which must determine the precise balance to be struck in this adjustment. The

Framers especially entrusted that task to Congress.” *Middendorf v. Henry*, 425 U.S. 25, 43 (1976) (quoting *Burns*, 346 U.S. at 140).

Therefore, judicial deference “is at its apogee” when courts review congressional decisions regarding “regulations, procedures, and remedies related to military discipline.” *Weiss*, 510 U.S. at 177 (citing *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)). When deciding a constitutional question pertaining to regulation of the military, courts “must be particularly careful not to substitute [their] judgment of what is desirable for that of Congress, or [their] own evaluation of evidence for a reasonable evaluation by the Legislative Branch.” *Rostker*, 453 U.S. at 68.

D. Considering these principles, Appellant bears the “heavy burden” of demonstrating that congressional action under the Make Rules Clause is unconstitutional.

Because Congress is expressly authorized by the Constitution to make rules for the governance of the “land and naval Forces,” U.S. Const. art. I, § 8, cl. 14, courts afford heightened deference to Congress’s chosen military-justice procedures, giving “particular deference” to congressional determinations made under that authority. *Weiss*, 510 U.S. at 177. Under this framework, a party challenging a congressionally enacted court-martial procedure must demonstrate that the factors favoring a different procedure are “so extraordinarily weighty as to overcome the balance struck by Congress.” *Id.* at 177–78. Appellant therefore bears “the heavy burden” of showing Article 29(f)’s Constitutional invalidity in

this facet of the military justice system as applied to him. *Vazquez*, 72 M.J. at 19 (quoting *United States v. Mitchell*, 39 M.J. 131, 137 (C.A.A.F. 1994)). He has not carried that burden here.

E. Appellant cannot meet his “heavy burden” to show that the interest in live witness demeanor is so extraordinarily weighty that it overcomes Congress’s balance in Article 29.

In military justice, due-process requirements may differ from their civilian counterparts, and courts afford “particular deference” to Congress’s determination of what process is due. *Weiss* 510 U.S. at 177. Thus, Appellant must do more than show that having every panel member personally observe each witness’s live demeanor might be preferable. He must show that the interest in that procedure is “so extraordinarily weighty as to overcome the balance struck by Congress.” *Id.* *Vazquez* applied that demanding standard to Article 29, recognizing that the statute “specifically authorizes” the procedures used when a panel falls below quorum and represents Congress’s judgment about the process due in that circumstance. 72 M.J. at 17, 19. Appellant cannot carry that heavy burden in light of Article 29’s longstanding history and the UCMJ’s safeguards for panel fairness.

1. For over seventy-five years, since the enactment of Article 29, Congress has never required that newly impaneled members receive evidence in the same manner as previously impaneled members.

In *Weiss*, the Court noted that “although Congress has on numerous occasions during our history revised the procedures governing courts-martial, it has never required tenured judges to preside over courts-martial or to hear immediate appeals therefrom.” 510 U.S. at 178.

The same is true here. Congress enacted the Uniform Code of Military Justice in 1950. Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 107 (1950). At enactment, Article 29 provided that if a general court-martial fell below five members, the court-martial may not proceed unless the convening authority detailed “new members sufficient in number to provide not less than five members.” *Id.* at 118. “When such new members have been sworn, the trial may proceed after the recorded testimony of each witness previously examined has been read to the court in the presence of the law officer, the accused, and counsel.” *Id.*

Since its enactment, Congress amended Article 29 four times. *See* Military Justice Act of 1968. Pub. L. No. 90-632, 82 Stat. 1335, 1337 (1968); Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393, 1394 (1983); The National Defense Authorization Act 2002, Pub. L. No. 107-107, 115 Stat. 1012, 1124 (2002); The National Defense Authorization Act 2017, Pub. L. No. 114-328, 130 Stat. 2000, 2903 (2016). Yet, across seventy-six years of enactment and four

amendments to Article 29, Congress has repeatedly endorsed and maintained a procedure for permitting previously sworn and examined testimony to be presented to new members. Congress added Article 29 procedures, including allowing military judges to use Article 29 after excusing members for “other good cause,” and permitting playing prior testimony to new members by “audiotape, videotape, or similar recording.” 10 U.S.C. § 829 (2018).

Thus, despite that “Congress has taken affirmative steps to make the system of military justice more like the American system of civilian justice,” Congress has “nonetheless chosen” to allow for recorded evidence to be provided to new court members after trial on the merits begins, consistent with constitutional notions of a fundamentally fair trial. *See Weiss*, 510 U.S. at 179.

The “historical maintenance of the military justice system” implementing Article 29 “suggests the absence of a fundamental fairness problem.” *Id.* This “historical fact . . . is a factor that must be weighed in this calculation.” *Weiss*, 510 U.S. at 179.

2. The Code sufficiently preserves impartiality despite allowing new members to receive evidence under Article 29.

The court in *Weiss* also found that “the applicable provisions of the UCMJ, and corresponding regulations . . . sufficiently preserve judicial impartiality so as to satisfy the Due Process Clause.” 510 U.S. at 179. Among those safeguards included statutory prohibitions on unlawful command influence, the statutory

allowance for challenges to military judges, and the fact that the system was overseen by this Court, composed of civilian judges serving fixed terms, that has “demonstrated its vigilance” in ensuring no improper influence is exercised over military judges. *Id.* at 180–81.

Like *Weiss*, there are a “number of safeguards in place to ensure impartiality” when Article 29 is applied. Article 25 ensures that any members detailed to a court-martial are “best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.” 10 U.S.C. § 825. Article 41 allows for an accused to challenge any detailed member for cause and exercise a peremptory challenge. 10 U.S.C. § 841. And like the institutional vigilance observed in *Weiss*, under Article 66, every service court “demonstrate[s] its vigilance” in ensuring a conviction is correct in fact, provided the accused makes a specific showing of a deficiency of proof. *Weiss*, 510 U.S. at 180–81; 10 U.S.C. § 866.

3. Against this backdrop of Article 29’s historical tradition and the additional procedural safeguards, Appellant fails to meet his “heavy burden” that Article 29, as applied in this case, violated his due process rights or constitutional right to confront witnesses.
 - a. The Confrontation Clause “reflects a preference for face-to-face confrontation at trial.”

The Confrontation Clause guarantees that “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”

U.S. Const. amend. VI. The Clause “reflects a preference for face-to-face confrontation at trial.” *Anderson*, 51 M.J. at 149 (quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980)). The “central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.” *Maryland v. Craig*, 497 U.S. 836, 845 (1990); *see also Davis v. Alaska*, 415 U.S. 308, 315–16 (1974) (“The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.”). And the Confrontation Clause “addresses that concern principally by affording a criminal defendant the right to confront appearing witnesses face to face and the right to conduct rigorous cross-examination of those witnesses.” *United States v. McKeeve*, 131 F.3d 1, 8 (1st Cir. 1997).

However, “while this right is fundamental, it is not absolute.” *Anderson*, 51 M.J. at 149 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)); *see also Craig*, 497 U.S. at 849 (“We have accordingly interpreted the Confrontation Clause in a manner sensitive to its purposes and sensitive to the necessities of trial and the adversary process.”). The Confrontation Clause is “generally satisfied when the defense is given a full and fair opportunity to probe and expose [testimonial] infirmities [such as forgetfulness, confusion, or evasion] through cross-examination, thereby calling to the attention of the factfinder the reasons for

giving scant weight to the witness’ testimony.” *Craig*, 497 U.S. at 847 (citations omitted) (brackets in original).

- b. Under *Vazquez* and *Aikanoff*, the Article 29 procedures used in this case did not make the reconstituted panel actually or apparently unfair.

In *Vazquez*, this Court upheld the military judge’s application of Article 29 as constitutional where the military judge impaneled two new members and had counsel read aloud the testimony of five of the six Government witnesses, including a child victim. 72 M.J. at 15–16. In *Aikanoff*, the Air Force Court of Criminal Appeals upheld the military judge’s application of Article 29 where the military judge had counsel replay audio of all the Government witnesses for the new panel member. 2022 CCA LEXIS 360, at *6, 13. Considering the fact-specific inquiry in these two cases, this Court should find Article 29 was constitutionally applied.

- i. Like in *Vazquez*, Article 29 authorized the procedures used and Appellant fails to identify a concrete basis in the Record for how the reconstituted panel was actually or apparently unfair.

In *Vazquez*, the five-member panel heard testimony from five of the six government witnesses, including the child victim. 72 M.J. at 15. Before the last witness testified, the appellee challenged—and the military judge dismissed—a member who realized he had a prior professional relationship with the final

witness. *Id.* Applying Article 29, the military judge had counsel read the testimony transcripts to two new members. *Id.* at 16. The lower court held the application of the R.C.M. implementing Article 29 was error. *Id.*

Reversing the lower court, the *Vazquez* court rejected the as-applied challenge to Article 29 for four reasons. First, the court abrogated decades of amorphous “military due process” precedent and reiterated that servicemembers do not enjoy due process protections “above and beyond the panoply of rights provided to them by the plain text of the Constitution, the UCMJ, and the MCM.” *Id.* at 19. Second, it held that Article 29 “specifically authorize[d] the procedures used in this case and represents Congress’s view of what process is due in the event the panel falls below quorum.” *Id.* Third, the *Vazquez* appellee failed to show at trial, or before the court, “how the members in his case were either actually unfair or appeared to be unfair.” *Id.* at 20. Fourth, “[a]s-applied, and with no contrary facts developed by Appellee at trial, Article 29(b), UCMJ, sufficiently satisfies the central concern of the Confrontation Clause.” *Id.*

Here, like *Vazquez*, the “fact-specific inquiry” demonstrates that Article 29 was not unconstitutional as applied. *See Vazquez*, 72 M.J. at 17 (quotation omitted). First, like *Vazquez*, the method of replaying the testimony by audio was specifically authorized by Article 29. And while here, unlike *Vazquez*, Appellant did not “acquiesce[] and compl[y] in every aspect of the procedures used,”

Appellant “did not create a record upon which to support an as-applied challenge.” 72 M.J. at 19. That is because, as shown *supra*, Appellant’s opposition to a mistrial invited the Military Judge to apply alternative remedies. *See supra* Section II.B.

Further as in *Weiss* and *Vazquez*, Appellant fails to show how the Members were “actually unfair or appeared to be unfair.” *Vazquez*, 72 M.J. at 20. Rather, Appellant identifies only a “*possibility*” in the Record that the new Members were unfair or appeared to be unfair because they could not fully assess witness demeanor, namely, one of the two percipient witnesses and the Victim. *Id.* (underline in original); (Appellant Br. at 30–33).

For example, Appellant speculates that the Victim “may have non-verbally indicated that she flirted with Appellant when testified that she ‘scooped over’ to him earlier in the night.” (Appellant Br. at 33.) As this Court did in *Vazquez*, it should again find generalized assertions and “possibility” insufficient to clear the “high bar” set in *Weiss*. 72 M.J. at 20.

- ii. Like in *Aikanoff*, replaying prior testimony with additional procedural protections does not render Article 29 unconstitutional in a witness-credibility case.

In *Aikanoff*, 2022 CCA LEXIS 360 (A. Ct. Crim. App. June 15, 2022), the military judge applied Article 29 procedures to replace a panel member after all the Government witnesses had testified. 2022 CCA LEXIS 360, at *6. The *Aikanoff*

court rejected the appellant's assertion that because this was a "he said, she said," case, the inability to observe the victim testify rendered Article 29 unconstitutional. *Id.* at *14. The court found the appellant received even more due process than in *Vazquez*, because the members listened to audio of testimony as opposed to having a transcript read to them. *Id.* at *13. Further, the new member could submit questions to the witnesses after hearing recorded testimony. *Id.* The *Aikanoff* court also noted that the members were able to examine inculpatory text messages. *Id.* at *14.

Finally, the *Aikanoff* court noted that despite all the Government witnesses having testified in the case-in-chief, the new members were able to observe the defense witnesses, including the appellant, and the Government's rebuttal witnesses. *Id.* at *14–15. Thus, despite the appellant having objected at trial, he failed to show that the factors militating in favor of his interest were so extraordinarily weighty as to render the Article 29 procedures unconstitutional. *Id.* at *15.

Here, like in *Aikanoff*, the Military Judge provided greater safeguards than supplied in *Vazquez*, which cut against the possibility the Members were unfair or appeared to be unfair. As in *Aikanoff*, the Military Judge replayed the testimony audio aloud, "as opposed to just hearing counsel read the transcript." 2022 CCA LEXIS 360, at *13; (J.A. 679–80, 693, 702, 710, 719–21, 727, 732–33, 745, 761,

767). And the new Members could submit—and did submit—questions to the witnesses after hearing the recorded testimony. 2022 CCA LEXIS 360, at *13; (J.A. 682, 687–88, 695, 704–07, 711–12, 716–17, 722–24, 728–29, 731, 733–34, 738–39, 747).

And like the text messages in *Aikanoff*, the panel was in an equally strong position as the dismissed panel to examine and weigh the text messages from Lance Corporal A.A. that she needed help because Appellant was “fucking [the Victim].” (J.A. 1110–11.) The panel also was in the same position to weigh physical evidence linking DNA from Appellant to external genital swabs from the Victim. (J.A. 1104–05.)

Finally, similar to *Aikanoff*, the new panel was still able to observe three Government witnesses, including one percipient Witness, and the Defense Witness. The second percipient Witness, discussed more fully *infra*, was declared unavailable, thus her testimony would have had the equivalent guarantees of trustworthiness under Mil. R. Evid. 804(a). Therefore, like in *Aikanoff*, the Members were not left to decide this case based solely on recorded evidence.

- iii. The Military Judge provided additional procedural safeguards than provided in *Vazquez* and *Aikanoff*.

Going further than *Vazquez* and *Aikanoff*, the Military Judge also allowed the Members to observe witness demeanor by having them seated in the witness box during the replaying of their testimony and having them subject to additional

questioning by Counsel within the scope of Members’ questions. (J.A. 660.) The Military Judge also made all the Government witnesses subject to recall by Appellant for further questioning. (J.A. 660.) He did not recall any witnesses. And unlike either *Aikanoff* or *Vazquez*, the percipient Witnesses to the attempted sexual assault were either cross-examined in front of the Members or had prior testimony admissible under a well-recognized hearsay exception.

- iv. Consistent with *Vazquez* and *Aikanoff*, introducing testimony without any witnesses observing demeanor is historically practiced and constitutionally acceptable.

Finally, the United States does not dispute that the “importance of the trier of fact observing witness demeanor” is a central concern of the Confrontation Clause. *See Vazquez*, 72 M.J. at 21. However, while “face-to-face confrontation in a courtroom setting . . . permits the trier of fact [to] better observe a witness’s demeanor this value is not absolute.” *McKeeve*, 131 F.3d at 9.

As in *Vazquez* and *Aikanoff*, each Witness had testified under oath and in the presence of Appellant, who had the opportunity to cross-examine each witness. Accordingly, the audio testimony was “subject ‘to rigorous testing in the adversary proceeding.” *Vazquez*, 72 M.J. at 21. (citing *Craig*, 497 U.S. at 845). While in *Vazquez* and *Aikanoff*, most panel members observed the prior testimony live, the court in *Vazquez* noted the historical practice and constitutional acceptance of testimony being admissible without any witnesses observing the demeanor of the

declarant. *Id.* at 21. And Congress has not limited how many members may be replaced under Article 29. Article 29 was constitutional as applied in this case.

4. Consistent with Article 29, and especially considering Mil. R. Evid. 804, replaying Lance Corporal A.A.’s prior testimony was “constitutionally unremarkable.”

Contrary to Appellant’s arguments, the Members’ inability to see Lance Corporal A.A. testify did not render Article 29 unconstitutional as applied. (See Appellant Br. 31–32.) It was “constitutionally unremarkable” to play her testimony in light of both Article 29 and Mil. R. Evid. 804. *Vazquez*, 72 M.J. at 21. And here, where the Military Judge found Lance Corporal A.A. to be unavailable under Mil. R. Evid. 804(a), a finding Appellant had no objection to at trial and does not argue otherwise on appeal, this Court should be convinced that replaying her testimony before the Members did not violate Appellant’s constitutional right to confront witnesses. (See Appellant Br. at 30–31.)

Further, the “[testimonial] infirmities” Appellant now highlights, “[such as forgetfulness, confusion, or evasion]” were “probe[d] and expose[d] . . . through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness’ testimony.” *Craig*, 497 U.S. at 847 (citations omitted) (brackets in original); (See Appellant Br. at 31–32.) Appellant highlights that Lance Corporal A.A. admitted to being intoxicated, that she did not witness Appellant’s genitals, and did not try to tell Appellant to stop. (Appellant Br. at 31–

32.) All of this was elicited on cross-examination and replayed for the new Members, who found Appellant not guilty of all Article 120 specifications. (J.A. 565–66, 1104.)

In sum, despite Appellant’s arguments that Article 29 was unconstitutional as applied because the Members could not observe one of the two percipient witnesses, it was “constitutionally unremarkable” to play the prior testimony, especially considering Lance Corporal A.A.’s unavailability. *Vazquez*, 72 M.J. at 21; (See Appellant Br. 31–32.) And the inconsistencies Appellant now highlights were tested in the adversarial process of cross-examination and conveyed to the Members, who acquitted Appellant of all Article 120 Specifications. The Members’ inability to see Lance Corporal A.A. testify did not render Article 29 unconstitutional as applied.

5. The Victim’s demeanor could not have carried the constitutional weight Appellant assigns to it because she had no memory of the attempted assault and the case did not turn on her live recollection.

In Judge Baker’s concurrence in *Vazquez*, he suggests that one scenario where Article 29 may be unconstitutional as applied is reading a transcript in a “he-said-she-said sex case where there is no physical evidence.” 72 M.J. at 22 (Baker, C.J., concurring). In such a situation, there be “critical” credibility information because “demeanor and tone of voice . . . bear . . . heavily on the

listener's understanding and belief." Appellant now argues the same. (Appellant Br. at 32–33.)

Here, unlike the scenario posed by Judge Baker and Appellant's argument on appeal, this was not a "he-said-she-said" case with no physical evidence and a reading of a transcript where the victim's credibility may be determinative. The Victim had no recollection of the attempted assault, and "woke up" in the hospital, where the last thing she remembered was sitting and drinking at a picnic table. (J.A. 480.) Instead, two percipient Witnesses, one of whom was cross-examined in front of the Members, and the other who was declared unavailable under Mil. R. Evid. 804, testified substantively to seeing the attempted sexual assault. (J.A. 510–24, 773–79.) There was also physical evidence linking Appellant's DNA to the Victim's external genital swabs. (J.A. 1104–05.) Finally, the Members heard audio of testimony, so the Victim's "tone of voice" was communicated to the Members. *See Vazquez*, 72 M.J. at 22 (Baker, C.J., concurring).

Thus, this was not a "he-said-she-said" case with no physical evidence. Rather, the Victim had no recollection of the attempted assault, and the percipient testimony of the attempt came from an unavailable Witness and another Witness who was cross-examined before the Members. The Members' inability to observe a victim testify who had no recollection of the attempted assault did not violate Appellant's constitutional rights. This Court should find Appellant has failed to

meet his “heavy burden” that Article 29 was unconstitutional as applied in this case.

III.

APPELLANT WAIVED INSTRUCTIONAL ERROR. EVEN IF THIS COURT CONDUCTS PLAIN ERROR REVIEW, UNDER *CASILLAS* AND *MOORE* AND CONSIDERING THE EVIDENCE PRESENTED AND ARGUED AT TRIAL, THE INSTRUCTIONS WERE CORRECT. EVEN IF THIS COURT FINDS INSTRUCTIONAL ERROR, APPELLANT CANNOT SHOW PLAIN ERROR OR THAT THE ERROR WAS MATERIALLY PREJUDICIAL.

- A. This Court determines waiver de novo. If an issue is forfeited, it is reviewed for plain error.

“This Court reviews de novo whether an accused has waived an issue.”

United States v. Blackburn, 80 M.J. 205, 209 (C.A.A.F. 2020). When appellant fails to object, the issue is forfeited, and the standard of review is plain error.

United States v. Powell, 49 M.J. 460, 463 (C.A.A.F. 1998).

“When a constitutional issue is reviewed for plain error, the prejudice analysis concerns whether the error was harmless beyond a reasonable doubt.”

United States v. Jones, 78 M.J. 37, 45 (C.A.A.F. 2018) (quoting *United States v. Payne*, 73 M.J. 19, 25–26 (C.A.A.F. 2014)).

B. Appellant waived this objection at trial.

1. Appellant waived his instructional claim when he agreed with the Military Judge that he had “no objections” to the Instructions.

“Waiver is the intentional relinquishment or abandonment of a known right.” *United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008) (quoting *United States v. Olano*, 507 U.S. 725, 732–33 (1993)).

An appellant waives his instructional objections “when counsel ‘affirmatively decline[s] to object’ and ‘offer[s] no additional instructions.’” a *United States v. Rich*, 79 M.J. 472, 476 (C.A.A.F. 2020) (quoting *United States v. Davis*, 79 M.J. 329, 332 (C.A.A.F. 2020)). The *Rich* appellant, for example, waived his instructional claim when he told the military judge he “[did] not have any other objections or suggested changes to the proposed instructions” even though he *had* made an “‘equivocal, non-specific, and half-hearted’” request for a mistake of fact instruction earlier in the proceedings. *Rich*, 79 M.J. at 476–77 (quoting *United States v. Rich*, 79 M.J. 572, 586 (A.F. Ct. Crim. App. 2019)).

Here, the Military Judge summarized an earlier off-the-record conference about instructions, explaining “Neither party had any objections to the instructions” he had “sent the parties . . . last night.” (J.A. 917.) Trial Defense Counsel agreed to the summary with “nothing to add.” (J.A. 920.) By doing so, he

put his “affirmative declin[ation]” on the record and waived the instructional objection he now raises. *Rich*, 79 M.J. at 476.

2. Knowing and voluntary waivers can apply to issues not conclusively yet resolved against the litigant. A change in the law does not invalidate a waiver unless the change “opens the door for a colorable assertion where it was not previously available.” If a change “opens the door,” courts treat the issue as forfeited.

Appellants *always* get the benefit of a change in law for forfeited issues subject to plain error review: “it is enough that an error be ‘plain’ at the time of appellate consideration.” *United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008) (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)).³

But a waiver can still bar review entirely even though the law has changed—so long as the appellant “intentional[ly] relinquish[ed] or abandon[ed] . . . a known right.” *Olano*, 507 U.S. at 733; *GenCorp, Inc. v. Olin Corp.*, 477 F.3d 368, 374 (6th Cir. 2007). A change in law only renders the waiver unknowing if the change in law between verdict and appellate review “open[s] the door for a colorable assertion where it was not previously available.” *Harcrow*, 66 M.J. at 157–58. In other words, the change-in-law exception only applies where “established adverse precedent” barred the litigant from making the argument at trial. *Wakefield v.*

³ Notably *Harcrow* and *United States v. Olano*, 507 U.S. 725, 733–34 (1993), both discuss the frequent confusion between the distinct concepts of waiver and forfeiture.

ViSalus, Inc., 51 F.4th 1109, 1119 (9th Cir. 2022) (quoting *GenCorp*, 477 F.3d at 374).⁴ If the issue presented an “open question” that the appellant could have raised if he wanted to, his waiver is still knowing and voluntary. *GenCorp*, 477 F.3d at 375.

GenCorp illustrates the concept. There, *GenCorp* did not raise a statutory interpretation argument in its appeal⁵ to the Sixth Circuit even though it presented an “open question” in the circuit. *GenCorp*, 477 F.3d at 371, 375. In the meantime, the Supreme Court granted certiorari in a Fifth Circuit case concerning the same issue and decided it in a way that benefitted *GenCorp*.⁶ *Id.* After losing its appeal, *GenCorp* filed a post-trial motion raising the asking for the benefit of the Supreme Court’s new statutory interpretation decision. 477 F.3d. at 371–72.

⁴ This Court’s language in *Tovarchavez* overstates the “change-in-law” exception, suggesting it is a bright-line rule that applies any time the law changes at all. *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019). But Courts have repeatedly described the “change-in-law” exception in relation to arguments that “[were] not previously available.” See e.g. *Harcrow*, 66 M.J. at 157–58; *United States v. Sweeney*, 70 M.J. 296, 304 (C.A.A.F. 2011), *United States v. Chittenden*, 896 F.3d 633 (4th Cir. 2018). In overstating the “change-in-law” exception, *Tovarchavez* cites *Griffith* and *Mullins*—neither of which address waiver. *Tovarchavez*, 78 M.J. at 462 (citing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (addressing which law applies on appeal after appellant preserved issue by objecting at trial); *United States v. Mullins*, 69 M.J. 113, 116–17 (C.A.A.F. 2010) (skipping waiver analysis and considering issue forfeited)).

⁵ *GenCorp* had raised the issue at the trial level but dropped it on appeal. *GenCorp*, 477 F.3d at 371.

⁶ *GenCorp* did attempt to resurrect the argument in its unsuccessful motion for rehearing en banc. *Id.* at 371.

Reviewing the post-trial motion, the Sixth Circuit found that GenCorp waived the statutory interpretation argument by failing to raise the argument in its original appeal. *Id.* at 372–76. The Sixth Circuit declined to apply the “change-in-law” exception because no “adverse, binding precedent” “would have prevented fresh review of the [statutory interpretation] issue on appeal.” *Id.* at 374. The court held the statutory interpretation “issue *was an open question* in [the Sixth Circuit].” *Id.* at 375; *see also Wakefield*, 51 F.4th 1109 (declining to apply “change-in-law” exception where party could have foreseen alleged change in law).

3. Assuming *Mendoza* is a change in the law, it did not overrule binding precedent that would have precluded Appellant’s objection to the Military Judge’s instruction.

Mendoza did not overrule any “adverse, binding precedent” which “would have prevented . . . review of” this instructional issue—it merely resolved “an open question.” *GenCorp*, 477 F.3d at 374. As far back as 2018, appellants were arguing exactly what *Mendoza* argued. *See e.g. United States v. Gomez*, No. 201600331, 2018 CCA LEXIS 167 (N-M. Ct. Crim. App. 2018); *see also United States v. Roe*, No. 20200144, 2022 CCA LEXIS 248 (A. Ct. Crim. App. Apr. 27, 2022); *United States v. Johnson*, No. 40257, 2023 CCA LEXIS 330, at *29 (A.F. Ct. Crim. App. Aug. 9, 2023). Because—at least after *United States v. Sager*—that argument presented an “open question.” *See United States v. Sager*, 76 M.J. 158,

162 (C.A.A.F. 2017) (“asleep,” “unconscious,” and “otherwise unaware” are “alternate theories of liability”); *see also Roe*, 2022 CCA LEXIS 248, at *24–30 (Walker, S.J. dissenting). So, even if *Mendoza* changed the law, it did not overrule any authority which would have precluded Appellant’s objection to the Instructions. Like *Rich*, Appellant waived his instructional claim.

C. If this Court extends the “change-in-law” exception to Appellant’s instructional claim, it should review for plain error.

To prevail, an appellant must show “(1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused.” *United States v. Davis*, 76 M.J. 224, 230 (CA.A.F. 2017). For plain error review, “we apply the law at the time of appeal, not the time of trial.” *Mullins* 69 M.J. at 116–17 (citing *Harcrow*, 66 M.J. at 159 (C.A.A.F. 2008)). If this Court applies the “change-in-law” exception to Appellant’s otherwise-waived claim, it should review for plain error.

D. The Military Judge did not plainly err in reading the statutory definition of “consent.”

1. A military judge is required to instruct on the elements of the offense and other explanations as may be necessary.

A military judge is required to instruct on the elements of a charged offense. R.C.M. 920(e)(1); Art. 51(c), UCMJ, 10 U.S.C. § 851(c). These instructions “should fairly and adequately cover the issues presented,” and should include “[s]uch other explanations, descriptions, or directions as may be necessary, and

which are properly requested by a party or which the military judge determines, sua sponte, should be given.” *United States v. Bailey*, 77 M.J. 11, 14 (C.A.A.F. 2017) (quoting R.C.M. 920(a) discussion; R.C.M. 920(e)(7)).

2. No court post-*Moore* has found reading the definition of “consent” violates *Mendoza*’s principles.

Article 120’s “without consent,” “asleep,” and “intoxicated” provisions establish three different theories of liability. *Moore*, 86 M.J. at 312; *Mendoza*, 85 M.J. at 218. So, “[a] military judge also may not instruct the members that they may find the ‘without . . . consent’ element to be proved beyond a reasonable doubt based *solely* on evidence that the victim was asleep or incapacitated.” *Moore*, 86 M.J. at 313 (emphasis in original). But military judges need not instruct the members to *ignore* “whether [the victim] was too intoxicated to consent” in nonconsent cases. *United States v. Casillas*, 86 M.J. 94, 101 (C.A.A.F. 2025).

This Court has never held that reading the statutory definition of “consent” violates *Mendoza*. Only two service court panels have—both in unpublished decisions issued without “the benefit of the CAAF’s further explanations in *Casillas* and *Moore*.” *United States v. Vanegasgonzalez*, No. 202500086, 2026 CCA LEXIS 298, at *14 (N-M. Ct. Crim. App. June 22, 2026); *United States v. Grafton*, No. 202400055, 2025 CCA LEXIS 375, at *14 (N-M. Ct. Crim. App. Aug. 11, 2025) (Pet. for Rev. granted at *United States v. Grafton*, No. 26-0039/NA,

2026 CAAF LEXIS 185, at *1 (C.A.A.F. Feb. 18, 2026)); *United States v. Maas*, No. 20230090, 2026 CCA LEXIS 62 (A. Ct. Crim. App. Jan. 13, 2026).⁷

In post-*Moore* decisions, other service panels have found no error. *Vanegasgonzalez*, 2026 CCA LEXIS 298, at *14; *United States v. Goines*, No. 20240592, 2026 CCA LEXIS 195, at *9 n.3 (A. Ct. Crim. App. Apr. 22, 2026) (“*Maas* was decided without the benefit of CAAF's decision in [*Moore*]”).

3. Instructing that “a sleeping, unconscious, or incompetent person cannot consent” was not error. It was consistent with *Moore* and the Military Judge clarified that Members should consider “all the surrounding circumstances.”
 - a. The Military Judge’s Instruction was consistent with *Moore*’s first and second principles.

“A military judge . . . may not instruct the members that they may find the ‘without . . . consent’ element to be proved beyond a reasonable doubt based *solely* on evidence that the victim was asleep or incapacitated.” *Moore*, 86 M.J. at 313. But “[i]f a rational trier of fact could find from the evidence *both* that the victim did not consent before falling asleep *and* that the sexual act subsequently occurred while the victim was asleep, the evidence is legally sufficient to prove the ‘without . . . consent’ element.” *Id.* In fact, “[n]othing in the article bars the Government from offering evidence of an alleged victim's

⁷ *Maas* found error but not prejudice as discussed *infra*.

intoxication to prove the absence of consent.” *Mendoza*, 85 M.J. at 222; *see also Moore*, 86 M.J. at 313 (“All the surrounding circumstances are to be considered in determining whether a person gave consent.”) (citing Art. 120(g)(7)(C)).

Nothing in *Moore* suggests a military judge must instruct members to find the victim “was ‘capable of consenting [but] did not consent.’”⁸ (*Cf.* Appellant’s Br. at 42 (quoting *Mendoza* 85 M.J. at 215).)

Here, the Military Judge accurately instructed the Members that “[a] sleeping, unconscious, or incompetent person cannot consent”. (J.A. 1032). He also instructed that “All of the surrounding circumstances are to be considered whether a person gave consent.” (J.A. 1032.) He did not instruct the Members that they could convict based *solely* on the victim’s unconsciousness or incapacity as more prohibits. (*See* J.A. 1032.)

⁸ Appellant cites *Hedgpeth* and *Sager* to argue “it is impossible to tell if the panel convicted appellant” of an uncharged theory. (Appellant’s Br. at 43.) *Hedgpeth* suggests a conviction “resting on multiple theories of guilt” is not necessarily error—only when “one of those theories” is “legally flawed.” *Hedgpeth v. Pulido*, 555 U.S. 57, 60 (2008). And in *Sager*, the verdict form itself was the problem—not just the military judge’s instructions. *United States v. Sager*, 76 M.J. 158, 159–60 (C.A.A.F. 2017). *Moore*, not *Sager* explains what constitutes instructional error in this context. *Moore*, 86 M.J. at 313.

- b. Even if one phrase in the Military Judge's Instructions arguably violated *Moore*'s first principle, the Instructions as a whole did not.

The *Vanegasgonzalez* court reasoned that even if

[t]he instruction that 'a sleeping person cannot consent' by itself could be read to permit the members to convict based solely on" the fact the victim was arguably asleep, "this instruction was caveated by the military judge's next instruction, 'All the surrounding circumstances are to be considered . . .'

Vanegasgonzalez, 2026 CCA LEXIS 298, at *14-15. This is consistent with the *Casillas* court's conclusion that telling members they are "not permitted to consider whether [a victim] was too intoxicated to consent" would "not [be] an accurate statement of the law." *Casillas*, 86 M.J. at 101; *see also Moore*, 86 M.J. at 313 (judge "may not instruct the members that they may find the 'without . . . consent' element to be proved . . . based *solely* on evidence that the victim was asleep or incapacitated.").

Here, as in *Vanegasgonzalez*, the Military Judge instructed that the Members must consider "all the surrounding circumstances," which mitigated any harm caused by explaining that "a sleeping, unconscious, or incompetent person cannot consent." (J.A. 1032.) Even if one portion of the Instructions *could* be read to violate *Moore*, the entirety of the Instructions could not.

4. Even if the instruction violated *Moore*'s second principle, Appellant was not prejudiced.

In *Maas*—an Army panel's pre-*Moore* decision—the court found instructional error but reasoned it was harmless beyond a reasonable doubt “the evidence was overwhelming that the victim was awake, conscious, and competent at the time of the offense.” *Maas*, 2026 CCA LEXIS 62, at *22. There, “the victim testified she remembered ‘*waking up*, becoming aware that [she] was on the bed on top of’” the appellant. *Id.*

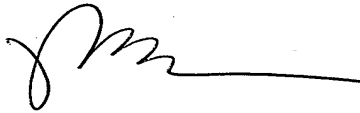
Here, the evidence demonstrated, and the United States argued, that two Witnesses “were able to hear an uncomfortable groaning—grumbling from the other bed.” (J.A. 776–77, 1058.) And that one of the Witnesses “testified she was able to hear [the Victim] say one word. She said ‘No.’” (J.A. 519–22, 1058.) Trial Counsel asked rhetorically, “How could the accused have had any belief he had consent from someone who is groaning and saying no?” (J.A. 1058.) As in *Maas*, this provided ample evidence the Victim was awake and competent enough to express her nonconsent when Appellant was attempting to sexually assault her. As a result, even if Appellate Defense Counsel had argued that the Instruction was erroneous, he would have been unable to demonstrate prejudice.

Conclusion

The United States respectfully requests that this Court affirm the findings and sentence as adjudged and approved below.



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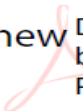
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