IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES
Appellee

v.

MICHAEL J. RICH
Senior Airman (E-4),
United States Air Force,
Appellant

USCA Dkt. No. 19-0425/AF

Crim. App. Dkt. No. ACM 39224

BRIEF ON BEHALF OF APPELLANT

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II.

IF MISTAKE OF FACT WAS NOT A SPECIAL DEFENSE "IN ISSUE," DID THE MILITARY JUDGE ABUSE HIS DISCRETION BY DENYING THE DEFENSE REQUEST FOR AN INSTRUCTION ON MISTAKE OF FACT?

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (hereinafter Air Force Court) reviewed this case pursuant to Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2016). This Honorable Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2016).

Statement of the Case

On December 19-21, 2016, Senior Airman (SrA) Michael Rich was tried at a general court-martial composed of officer members at Grand Forks Air Force Base, North Dakota. (JA at 52-53). Contrary to his plea, SrA Rich was convicted of one charge and one specification in violation of

Article 120(b)(1)(D), UCMJ, 10 U.S.C. § 920(b)(1)(D) (2016). (JA at 62, 214). Namely, SrA Rich was charged with committing a sexual act upon Airman First Class (A1C) CS, to wit: penetrating her vulva with his penis by inducing a belief by artifice, pretense, and concealment that he was another person. (JA at 50). The members excepted the words "artifice and pretense" and found SrA Rich not guilty of the excepted words. (JA at 214). SrA Rich was sentenced to a reprimand, to be reduced to the grade of E-2, to be confined for 60 days, and to be discharged from the service with a dishonorable discharge. (JA at 215). On March 22, 2017, the convening authority approved the sentence as adjudged. (JA at 48-49).

The Air Force Court, in a published opinion issued on September 26, 2018, set aside the findings and sentence in Appellant's case due to the military judge's "fail[ure] to instruct the court members on the affirmative defense of mistake of fact." (JA at 2). The government timely moved the Air Force Court to reconsider its opinion *en banc*, which the Court granted on November 20, 2018. (JA at 16). The Air Force Court then affirmed the findings and sentence by a vote of 4-4. (JA at 17).

Statement of Facts

The Underlying Allegation

On the night of February 19, 2016, A1C CS met up with SrA Rich and A1C BK at a bar. (JA at 69). SrA Rich and A1C BK had been at technical school together and became dorm suitemates and coworkers. (JA at 141). A1C CS first met SrA Rich and A1C BK on the same day in August 2015. (JA at 140). She developed a friendship with SrA Rich and a romantic relationship with A1C BK. (*Id.*)

During the early morning of February 20, 2016, A1C CS, A1C BK, and SrA Rich drank at the bar until about 0200 hours. (JA at 69). While at the bar, A1C CS and A1C BK got into an argument in front of their friends. (JA at 95). After the bar closed, the three went to SrA Rich's house and had another drink and talked. (JA at 70, 99). On the way to SrA Rich's house, A1C CS and A1C BK began to argue again. (JA at 98). The argument continued until SrA Rich went upstairs at roughly 0300 hours. (JA at 100-101, 70). A1C CS and A1C BK eventually went to sleep on the couch in SrA Rich's living room. (JA at 70).

SrA Rich had to wake up to go to Combat Arms Training and Maintenance (CATM) at 0400 hours. (JA at 72-73). SrA Rich had offered

A1C CS and A1C BK his bed for the night, but they declined. (*Id.*) They arranged that A1C CS and A1C BK would move to SrA Rich's bed once he had left for CATM. (JA at 101).

A1C CS was uncomfortable on the couch and unable to fall asleep. (JA at 73). After about 30 minutes of laying on the couch, A1C CS woke A1C BK up and told him to go upstairs to wake up SrA Rich. (*Id.*) A1C BK did so, and then returned downstairs to fall back asleep on the couch. (*Id.*) A1C CS woke A1C BK again to tell him to go upstairs and ensure that SrA Rich was awake. (*Id.*) A1C BK came back downstairs and reported that SrA Rich was in the shower. (JA at 74). A1C CS and A1C BK went upstairs, and A1C CS got into SrA Rich's bed. (JA at 74). A1C CS asked A1C BK if he was going to get into the bed with her, to which he said that he was going to go back downstairs. (*Id.*) A1C BK planned to wait until SrA Rich left before he returned upstairs to sleep in the bed. (*Id.*)

According to A1C CS, SrA Rich's room was very dark, but slightly illuminated from the moonlight through a window. (JA at 77). A1C CS felt someone tug at her pants as she was laying in SrA Rich's bed, but

she could not see who it was. (*Id.*) A1C CS did not expect that it was SrA Rich. (JA at 86).

She was wearing jeggings that were tight and difficult to remove.[1] (JA at 77). A1C CS testified that she said A1C BK's first name in a normal speaking tone, to which there was no response. (JA at 77-78). Because A1C CS "just wanted to sleep," she took off one leg of her pants and her underwear. (JA at 77; 110.)

A1C CS then "felt penetration in [her] vagina." (JA at 78). A1C CS said A1C BK's first name slightly louder and was "a little more agitated" than the previous time, but otherwise just laid there during the intercourse. (JA at 78-79). SrA Rich and A1C CS had sex for approximately five minutes, with A1C CS lying on her back and SrA Rich on top of her, positioned between her legs. (JA at 113). Afterwards, SrA Rich leaned down and kissed A1C CS. (JA at 79). A1C CS pushed SrA Rich off of her when she realized that it was not A1C BK. (*Id.*) A1C CS explained: "[SrA Rich] started to apologize. He was saying, '[o]h shit. I am so sorry. I am so sorry. I'm drunk. I thought you were my

[1] Jeggings are "jeans-like leggings made of denim." (JA at 3).

fiancée and not to tell [A1C BK]. He just said, 'Don't tell [A1C BK]. Don't tell [A1C BK].'" (JA at 80).

Later that morning, SrA Rich told a coworker, SSgt CP, that he had made a mistake or that something had happened that morning. (JA at 166-167). According to SSgt CP, based on what SrA Rich told him, "[SrA Rich] was expecting his fiancée; got in bed. And it wasn't who he was thinking it was. I don't know the actual moment of realization when that happened." (JA at 167).

A1C CS testified that the sexual intercourse between A1C CS and SrA Rich occurred differently than what would have happened with A1C BK. A1C BK would not have initiated sex by tugging at her pants when she was asleep; and there was no foreplay prior to the sexual intercourse with SrA Rich. (JA at 113, 123).

Court-Martial Instructions

On the first day of trial, the military judge indicated that he had received draft instructions from the parties, and asked SrA Rich's trial defense counsel whether he was going to ask for a mistake of fact instruction. (JA at 63). The defense counsel replied, "yes, sir." (*Id.*) The

initial draft instructions referenced by the military judge are not included in the record of trial. (JA at 41).

Later, during an Article 39(a) session to discuss instructions, the military judge stated his intention to instruct the members on the definition of consent. This prompted SrA Rich's trial defense counsel to follow through on his earlier statement and request an instruction on mistake of fact:

> MJ: Other than that, do you believe any defenses have been raised by the evidence that I should instruct on? Defense Counsel?
>
> DC: Your Honor, I have not had a chance to look at the instructions you sent out honestly. However, with regard to mistake of fact, we believe it would be an appropriate defense -- we believe it is wrapped into the charge itself, the way that it is charged. They have to prove that our client did not have a mistake of fact, so some language regarding mistake of fact may be appropriate. However, you may have already included it, and I just haven't looked at it.

(JA at 169). The military judge replied that he did not include it, stating, "I don't know if mistake of fact defense [*sic*] works in this fact pattern." (*Id.*) The discussion moved on to address several other instructions, continued over email that evening, and resumed the next morning. (JA at 176). The court did not readdress mistake of fact. (JA at 176-178).

Among the other instructions discussed was an instruction regarding concealment. (JA at 172). Originally, the military judge intended to instruct that "silence when the accused knows or should know that the victim is acting under misapprehension . . . might constitute concealment." (*Id.*) Defense counsel initially only objected to the "should know" language on the record, but followed up with an email to expand his earlier position and object to the instruction in its entirety. (JA at 172; 216). The military judge overruled the objection, indicating that the instruction was necessary in order to frame the evidence for the members. (JA at 176).

The military judge instructed the members that the elements of the offense were (1) that SrA Rich penetrated A1C CS's vulva with his penis; and (2) that SrA Rich "did so by inducing a belief by artifice, pretense, and concealment that the accused was another person." (JA at 180). The military judge further instructed: "'Concealment' is an act of refraining from disclosure or hiding to prevent discovery. Silence when the Accused knows that victim [*sic*] is acting under a misapprehension as to the accused's identity may constitute concealment." (*Id.*)

The military judge then addressed consent:

> The evidence has raised the issue of whether [A1C CS] consented to the sexual conduct listed in the Specification 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 that the sexual conduct was done by inducing a belief by artifice, pretense, and concealment that the accused was another person beyond a reasonable doubt. Stated another way, evidence the alleged victim consented to the sexual conduct, either alone or in conjunction with the other evidence in this case, may cause you to have a reasonable doubt as to whether the government has proven that the sexual conduct was done by inducing a belief by artifice, pretense, and concealment that the accused was another person.

(*Id.*) The military judge did not give the members an instruction on mistake of fact. (JA at 179-186).

Arguments by Counsel

In closing argument, trial counsel addressed whether SrA Rich had a mistake of fact as to the identity of A1C CS; that is, whether he believed he was having sex with his fiancée. (JA at 192; 195). Trial counsel stated that such a mistake "is simply ridiculous and makes no sense." (JA at 192). The government's focus was on SrA Rich's silence, but trial counsel also argued against SrA Rich's mistake of fact as to consent: "He puts his penis into her vagina. And then, a little louder this time, '[A1C BK].' Silence. No, 'I'm not [A1C BK]. No, 'I'm sorry.' No, 'Oh, I thought you were into this.' Nothing. Silence." (JA at 186).

The defense used a slideshow for its findings argument, which included a slide titled, "Mistake of fact as to Consent," with five points to support the argument the SrA Rich was operating under a belief that A1C CS consented. (JA at 224). While he touched on whether SrA Rich believed A1C CS to be his fiancée, trial defense counsel's focus throughout trial was showing A1C CS's actual consent or SrA Rich's mistake of fact as to her consent. (JA at 205). He argued in closing that "all of the reasons for consent are reasons that he too would believe, wait a second, she consented to this." *Id.*

Air Force Court Decisions

A panel of the Air Force Court issued a published decision on September 26, 2018, setting aside the findings and sentence in SrA Rich's case because the military judge failed to instruct the court members on mistake of fact. (JA at 15). On October 26, 2018, the government moved the Air Force Court to reconsider its decision *en banc*, which the Court granted on November 20, 2018. (JA at 16). The Air Force Court, *en banc*, affirmed the findings and sentence by a vote of 4-4 in a published decision on June 18, 2019. (JA at 17).

Summary of the Argument

The Air Force Court erred when it found that mistake of fact was not "in issue" as a special defense for offenses under Article 120(b)(1)(D), UCMJ. The Air Force Court found that mistake of fact as to consent was "baked into" the elements of sexual assault by false pretense, and therefore the instruction was not required. If mistake of fact is raised by the evidence, the question should be how a panel of members would evaluate the evidence. Instead, the Air Force Court rigidly determined that because the members found SrA Rich guilty, then they necessarily considered and discounted the evidence of mistake of fact as to consent without instruction on how to assess the evidence. Because a mistake of fact can negate the existence of a mental state essential to the crime, the elements of an offense under Article 120(b)(1)(D), UCMJ, cannot foreclose the availability of mistake of fact as a special defense "in issue."

Mistake of fact as to consent was "in issue" as a special defense in the specific factual context of SrA Rich's court-martial. The evidence raised that SrA Rich believed A1C CS knew his identity and was consenting to the sexual acts with him. This mistake of fact was a central component of the defense strategy, and the panel members could have

relied on that evidence to find that SrA Rich did not induce a belief by concealment that he was someone else. A specific instruction on mistake of fact was required under R.C.M. 920(e)(3) because it was a special defense "in issue" at SrA Rich's court-martial.

Even if mistake of fact was not "in issue" and therefore required under R.C.M. 920(e)(3), the defense requested an instruction on mistake of fact as to consent, and the military judge abused his discretion by omitting the instruction. At the first opportunity, defense counsel stated his intention to request instructions on consent and mistake of fact as to consent. Thereafter, the military judge included an instruction on consent in the instructions he emailed the parties, yet excluded mistake of fact as to consent. The military judge then told the parties "I don't know if [a] mistake of fact defense works in this fact pattern." (JA at 169). The military judge understood the defense to have requested instructions on consent and mistake of fact as to consent, and abused his discretion when he denied the request for an instruction on mistake of fact.

Argument

I.

THE COURT OF CRIMINAL APPEALS ERRED WHEN IT FOUND THAT MISTAKE OF FACT AS TO CONSENT IS NOT A SPECIAL DEFENSE "IN ISSUE" FOR THE OFFENSE OF SEXUAL ASSAULT BY INDUCING A BELIEF BY CONCEALMENT THAT APPELLANT WAS SOMEONE ELSE.

Standard of Review

"[T]his Court reviews the adequacy of the military judge's panel instruction de novo. *United States v. Killion*, 75 M.J. 209, 214 (C.A.A.F. 2016) (citing *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006)). Whether a required instruction on findings contained within R.C.M. 920(e) is reasonably raised by the evidence is a question of law reviewed de novo. *United States v. Davis*, 76 M.J. 224, 229 (C.A.A.F. 2017).

Law and Analysis

"Instructions on findings "*shall* include . . . [a] description of any special defense under R.C.M. 916 in issue." R.C.M. 920(e)(3) (2016). R.C.M. 916 addresses special defenses, including mistake of fact:

> [I]t is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense. If the ignorance or mistake goes to an element

> requiring . . . specific intent . . . or knowledge of a particular fact, the ignorance or mistake need only have existed in the mind of the accused.

R.C.M. 916(j)(1) (2016). "Mistake of fact is a special defense. It 'is a defense when it negatives the existence of a mental state essential to the crime charged.'" *United States v. Goodman*, 70 M.J. 396, 399 (C.A.A.F. 2011) (quoting 1 Wayne R. LaFave, Substantive Criminal Law § 5.6(a), at 395 (2d ed. 2003) (additional citation omitted). "Where a special defense is reasonably raised by the evidence, an instruction on that defense is required." *Davis*, 76 M.J. at 228. A special defense is "in issue" when "some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they chose." *United States v. Stanley*, 71 M.J. 60, 61 (C.A.A.F. 2012). "Whether an instruction on a possible defense is warranted in a particular case depends upon the legal requirements of that defense and the evidence in the record." *United States v. Jones*, 49 M.J. 85, 90 (C.A.A.F. 1998). This Court has held that when an affirmative defense is reasonably raised the military judge is "duty bound" to give an instruction. *Wolford*, 62 M.J. at 422.

A. Mistake of fact as to consent was a special defense "in issue" because it negated the existence of the mental state required to find SrA Rich guilty of the offense.

The Air Force Court relied on the language of R.C.M. 916(a) to determine that mistake of fact was not a defense "in issue" in SrA Rich's case:

> A "special defense" is a defense that does not deny that the accused committed the objective acts constituting the offense charged, but nevertheless denies in whole or part the accused's criminal responsibility for those acts. If a defense does deny the accused committed the acts that constitute the charged offense, such a defense may demonstrate the accused is not guilty of the charge, but it is not operating as a "special defense" as that term is used in R.C.M. 916 and R.C.M. 920(e)(3).

(JA at 35). The Air Force Court went on to state that a mistake of fact would have disproved an element of the charged offense, and that "[i]f the members had a reasonable doubt as to the existence of such a mistaken belief, applying the instructions the military judge provided them, they would have found Appellant not guilty of sexual assault." (JA at 37). This conclusion is contrary to this Court's precedent.

In *United States v. McDonald*, this Court found that mistake of fact was available as an affirmative defense to buying or attempting to buy stolen property; that is, required by R.C.M. 920(e) when raised by the

evidence. 57 M.J. 18, 20 (C.A.A.F. 2002). In that case, the appellant was charged with buying stolen property, and testified that he did not know the merchandise was stolen. *Id.* In order to convict him of the offense, the government was required to prove that the appellant knew the goods were stolen. *Id.* at 21. Even though the mistake of fact "would have disproved an element of the charged offense" (JA at 37), this Court held it was required instruction under R.C.M. 920(e). *See McDonald*, 57 M.J. at 20.

The statutory elements of sexual assault by false pretense are (1) that a person committed a sexual act upon another person; and (2) did so by inducing a belief by artifice, pretense, or concealment that the accused was another person. 10 U.S.C. § 920(b)(1) (2016). Because mistake of fact is a defense when it negates the existence of a mental state essential to the crime charged, the Air Force Court erred when it found that the elements Article 120(b)(1)(D) foreclosed mistake of fact as special defense "in issue." *See Goodman*, 70 M.J. at 399 (internal quotation marks and citation omitted).

At SrA Rich's court-martial, SrA Rich's "act" of refraining from explicitly identifying himself was not in dispute; rather, the entire case

turned on SrA Rich's state of mind during that act. The government's theory of guilt at trial was that A1C CS was acting under a preexisting, subjective misapprehension as to SrA Rich's identity, and SrA Rich's silence when A1C CS said her boyfriend's name induced a belief by concealment that he was someone else. SrA Rich did not actively misrepresent himself to A1C CS; if she had a misapprehension as to the identity of her sexual partner, it existed in her mind prior to SrA Rich's silence. SrA Rich is not responsible for bringing about A1C CS's misapprehension when A1C CS was in SrA Rich's bed, took off her own pants and underwear, and began having sex with SrA Rich. SrA Rich's failure to identify himself may have allowed A1C CS to carry on believing he was someone else, but such failure to act is only criminal if SrA Rich knew of A1C CS's mistaken belief in the first place.

SrA Rich's belief that A1C CS was consenting to the sexual act with him meant that SrA Rich "lacked the necessary *mens rea* to be criminally responsible for the offense." JA at 35; *see also Goodman*, 70 M.J. at 399. Mere silence cannot equate to "concealment" without the requisite *mens rea*. SrA Rich's knowledge, or lack thereof, that A1C CS was acting under a misapprehension as to his identity was the sole factor that determined

whether his silence was criminal. Because SrA Rich's mistake of fact as to consent would directly negate that knowledge, it was a special defense in issue, and the military judge was required to instruct on it under R.C.M. 920(e)(3).

B. The omission of an instruction on mistake of fact as to consent materially prejudiced SrA Rich.

When required instructional error is preserved, this Court tests for harmlessness. *See United States v. Davis*, 76 M.J. 224, 229 (C.A.A.F. 2017). If an instructional error is not preserved, this Court reviews for plain error, by determining whether there was error; whether the error was plain or obvious; and whether the error materially prejudiced a substantial right of the accused. *Davis*, 76 M.J. at 230.

Failure to provide correct and complete instructions to the panel before deliberations begin may amount to a denial of due process. *United States v. Killion*, 75 M.J. 209, 213 (C.A.A.F. 2016) (citation omitted). "A military judge is obligated to assure that the accused receives a fair trial . . . [which] includes the duty to provide appropriate legal guidelines to assist the jury in its deliberations." *Wolford*, 62 M.J. at 419 (internal quotation marks and citation omitted).

The military judge's omission of an instruction on mistake of fact as

to consent was not harmless. The members heard argument on two different mistakes of fact: (1) the fiancée argument that trial counsel set up in order to argue it as unreasonable, and (2) the mistake of fact as to consent, which was essential to SrA Rich's defense. The members were not instructed on how to consider either mistake of fact as to consent, and, without instruction, it is uncertain whether the members considered mistake of fact at all.

Furthermore, trial counsel's argument against SrA Rich's mistake of fact as to A1C CS's consent misled the panel into believing the mistake was required to be reasonable, when the mistake only had to be honest. Defense counsel argued that the fight between A1C CS and her boyfriend contributed to SrA Rich's belief that A1C CS would consent to sex with him. Trial counsel wanted the members to find SrA Rich's mistake unreasonable when he sarcastically responded:

> [T]his arguing, this heartbreaking argument, that apparently was so heartbreaking that they still laid down on the couch together when it was over. It was not, you sleep on the floor. I'm mad at you. Let's lay down on the couch together. And the last thing he says to her before he goes back downstairs was . . . as soon as he leaves, I'll come back up. They're so mad at each other that he gently takes her up the stairs, he says, go ahead. Go get up in Rich's bed. Really? That's the heartbreaking argument that's going to cause her to go have sex with another man?

(JA at 210). Even if the members believed SrA Rich had an honest mistake of fact as to A1C CS's consent, they were not instructed that such a mistake was a total defense to the charged conduct and SrA Rich should be found not guilty.

II.

EVEN IF MISTAKE OF FACT WAS NOT A SPECIAL DEFENSE "IN ISSUE," THE MILITARY JUDGE ABUSED HIS DISCRETION BY DENYING THE DEFENSE REQUEST FOR AN INSTRUCTION ON MISTAKE OF FACT.

Standard of Review

A military judge's denial of a requested instruction is reviewed for abuse of discretion. *See United States v. Carruthers*, 64 M.J. 340, 346 (C.A.A.F. 2007). "[A]n abuse of discretion involves far more than a difference in opinion. The challenged action must be found to be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997) (internal quotation marks and citation omitted).

Law and Analysis

Regardless of whether mistake of fact is an affirmative defense to sexual assault by inducing a belief that the accused is a different person,

the military judge abused his discretion in denying the defense's request for the mistake of fact instruction in SrA Rich's case. "Any doubt whether an instruction should be given should be resolved in favor of the accused." *United States v. DiPaola*, 67 M.J. 98, 100 (C.A.A.F. 2008) (citation omitted).

A. SrA Rich's defense counsel requested an instruction on mistake of fact as to consent.

SrA Rich's defense counsel twice requested the military judge give the standard instruction on mistake of fact as to consent, and the military judge abused his discretion in denying that request. "While there are no magic words dictating when a party has sufficiently raised an error to preserve it for appeal, of critical importance is the specificity with which counsel makes the basis for his position known to the military judge." *Killion*, 75 M.J.at 214.

Prior to opening statements, defense counsel unequivocally stated his intention to request instructions on consent and mistake of fact as to consent. (JA at 63). There was no further discussion of these instructions until after the close of evidence, when the military judge implicitly granted the defense request for an instruction on consent by including it in the instructions he emailed the parties, and indicated his denial of the

request for a mistake of fact instruction by excluding it. (*See* JA at 169). The military judge stated:

> I did include the consent discussion, which isn't necessarily a defense, but it is, at least something I think would be wise to instruct on. So, my plan is to instruct on it. Other than that, do you believe any defenses have been raised by the evidence that I should instruct on?

(JA at 169). SrA Rich's defense counsel – for a second time – requested that the military judge instruct on mistake of fact as to consent, to which the military judge replied, "I don't know if [a] mistake of fact defense works in this fact pattern." (JA at 169).

During this exchange, defense counsel's stated belief that mistake of fact as to consent was "wrapped into the charge itself" did not diminish his request for an instruction. (JA at 169). In fact, in the context of his conversation the military judge, defense counsel's point was simply that he wanted the instruction, regardless of whether mistake of fact was a special defense or an element of the offense.

Though "merely requesting an instruction is ordinarily not sufficient to preserve a claim of error," defense counsel was not required to continue bringing up the issue once the military judge stated that mistake of fact did not apply in SrA Rich's case. *United States v. Maxwell*,

45 M.J. 406, 426 (C.A.A.F. 1996). In the exchange prior to opening statements, the military judge understood that the defense wanted the members instructed on both consent and mistake of fact as to consent. The fact that the military judge included an instruction on consent indicates that he understood the exchange to be a request for instructions. Furthermore, it would be unreasonable for the military judge to believe that the defense simply abandoned its request for an instruction in this case, after it was requested on two separate occasions. The defense discussed a mistake of fact as to consent instruction at every opportunity until the military judge stated that it did not work for SrA Rich's case, and defense counsel's eventual closing argument featured SrA Rich's mistake of fact as to A1C CS's consent as a central issue.

B. The military judge's failure to give the defense-requested mistake of fact as to consent instruction was error, and the error materially prejudiced SrA Rich.

This Court has a three-pronged test to determine whether a military judge's failure to give a defense-requested instruction is error: "(1) [the requested instruction] is correct; (2) it is not substantially covered in the main [instruction]; and (3) it is on such a vital point in the case that the failure to give it deprived [the accused] of a defense or

seriously impaired its effective presentation." *Carruthers*, 64 M.J. at 346 (internal quotation marks and citation omitted). Defense counsel simply requested the standard instruction on mistake of fact for a specific intent element, which would not require him to draft particular language to send to the military judge. Such instruction is legally correct, and satisfies the first *Carruthers* prong.

The second *Carruthers* prong is met because the instructions given, even though they addressed consent, did not include any language about SrA Rich's mistake of fact as to consent. There appears to be no reason why the military judge would agree to give a consent instruction, but not a mistake of fact instruction. This demonstrates that the military judge made an arbitrary decision to deny the defense request for an instruction on mistake of fact, when he should have resolved his doubt in favor of SrA Rich. *See DiPaola*, 67 M.J. at 100.

Finally, mistake of fact was vitally important to SrA Rich's overall defense strategy, and the military judge's failure to give the defense-requested instruction seriously impaired the defense's presentation of its case. While a military judge may be able to assess the evidence of mistake of fact in a sexual assault by concealment, members are not.

Defense counsel discussed at length the issues of consent and mistake of fact as to consent during closing argument. Of its four-slide demonstrative aid for closing argument, one slide was dedicated to mistake of fact as to consent, which incorporated by reference the arguments from a previous slide. (JA at 224). That is, half of the visual aid presented to the panel pertained to mistake of fact as to consent. The government also argued against SrA Rich's mistaken belief that it was his fiancée in his bed, implying that it while it was reasonable for the complaining witness to believe that SrA Rich was someone else, it was not reasonable for SrA Rich to believe that the complaining witness was someone else. The members were not instructed on how to consider the mistake of fact as to consent, or that the mistake only had to be honest, as opposed to honest *and* reasonable.

Absent evidence to the contrary, it is presumed that the members who decided SrA Rich's case followed the military judge's instructions. *See United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000) (citations omitted). However, without instruction on mistake of fact as to consent, it is uncertain whether the members considered that theory at all. Notably, the members sentenced SrA Rich to confinement for 60 days,

reduction to E-2, a reprimand, and the mandatory dishonorable discharge. Where the members had a choice, their sentence reflects a low level of culpability on SrA Rich's part. The members very well could have believed that SrA Rich had an honest mistake of fact as to A1C CS's consent, but, because they were not properly instructed on that defense, felt obligated to find SrA Rich guilty.

WHEREFORE, SrA Rich respectfully requests that this Honorable Court set aside the findings and sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that I electronically filed a copy of the foregoing with the Clerk of Court on January 2, 2020, and that a copy was also electronically served on the Air Force Appellate Government Division on the same date.

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CERTIFICATE OF COMPLIANCE WITH RULES 21(b), 24(b) & 37

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