IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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


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MANUAL FOR COURTS-MARTIAL

## Errors Assigned

### I.

**WHETHER THE LOWER COURT ERRED WHEN IT FOUND THE MILITARY JUDGE'S INSTRUCTIONS DID NOT RUN AFOUL OF THIS COURT'S DECISION IN *UNITED STATES V. MENDOZA*.**

### II.

**WHETHER IT WAS ERROR FOR THE LOWER COURT TO "REASSESS" A SENTENCE THAT WAS NEVER IMPOSED?**

## Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 66(b)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(3) (2021). This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2021).

## Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of two Specifications of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2018). The Members sentenced Appellant to eight years of confinement, reduction to paygrade E-1, total forfeitures, and a dishonorable discharge. The Convening Authority took no action on the Findings and approved the Sentence as adjudged. The Military Judge entered the Judgment into the Record.

## Statement of Facts

A. The United States charged Appellant with two Specifications of sexual assault arising from a single incident.

The United States charged Appellant with sexually assault on September 5, 2022, by: "Specification 1 . . . penetrating [the Victim's] vulva with his penis . . . without consent," in violation of Article 120(b)(2); and, "Specification 2 . . . penetrating [her] vulva with his penis . . . "when [she] was incapable of consenting to the sexual act because she was impaired by an intoxicant, . . . alcohol, and [he] reasonably should have known of that condition." (J.A. at 41.)

B. The United States presented evidence.

The Specifications arose from an incident in which the Victim's friend became concerned about her, looked for her, and found Appellant on top of the Victim's unconscious, semi-nude body in a barracks elevator.

1. The Victim became intoxicated, received a new room key, and entered a barracks elevator.

Earlier in the evening, the Victim was drinking mimosas and watching movies with her friend, Ms. Perez, before becoming "a little upset" and leaving Ms. Perez's barracks room "pretty drunk" around 2200 hours. (J.A. 62–66.) The Victim said she felt "tipsy" "tingly" "sleepy and pretty tired." (J.A. 109–10.) Ms. Perez was not concerned about the Victim's safety at that time but started calling the Victim's phone at 2236 hours. (J.A. 67–69, 91, 433–39.)

The Victim would later testify she had "a slight memory of . . . someone blowing up [her] phone, maybe." (J.A. 115.) After ignoring a text message from Ms. Perez, the last thing the Victim remembered was pushing the elevator button. (J.A. 110.)

Ms. Bewely—a front desk watchstander in the barracks—recalled helping the "intoxicated, disheveled" Victim get a new room key around 2320 or 2325 hours. (J.A. 211.) Ms. Bewely's friend, Seaman Brooks, was with Ms. Bewely and testified that she saw "a girl stagger up to the front desk asking for a room key because she was locked out of her room" between 2310 and 2320. (J.A. 157–58.)

Ms. Perez called about twenty times with no answer before receiving a call from the Victim's phone at 2320 hours. (J.A. 69–70; 433–39.) Ms. Perez tried to speak to the Victim; the Victim did not say anything during the seven-minute call, but Ms. Perez heard moaning, which she thought sounded like sex. (J.A. 69–70.) The Victim testified on cross-examination that, at one point, she remembered seeing Ms, Perez's face on her phone while she was laying somewhere. (J.A. 137.)

2. The Victim's friend found her unconscious on the elevator floor with Appellant—a man she had never met—on top of her. Later DNA testing showed Appellant's DNA on the Victim's genitals.

After that call, Ms. Perez started looking for the Victim and "ran to the elevator, heading toward [the Victim's] room." (J.A. 70.) When the elevator

doors opened, she found the Victim "lying on the floor." (J.A. 70-71, 98–99.) The Victim's pants and underwear were off, she was not moving, and her eyes were closed. (J.A. 71–72.) The Victim "didn't seem conscious." (J.A. 71.)

Ms. Perez "saw a man just on top of her" moving "back and forth" with shorts on and "his groin area," but not his genitals, exposed. (J.A. 72–73.) Testing later showed Appellant's DNA on a swab taken from the Victim's vagina and found the Victim's DNA on swabs taken from Appellant's penis and scrotum. (J.A. 478–83.) A Sexual Assault Forensic Examination revealed various injuries to the Victim's genitals. (J.A. 255, 258, 470.)

A blood alcohol technician testified the Victim's blood alcohol concentration was between 0.303 to 0.329 at the time of the assault—high enough to cause a person to lose consciousness. (J.A. 269–70, 276.)

The Victim testified she had never met Appellant before and never interacted with him. (J.A. 116; 139–40.)

3. Multiple witnesses testified about the Victim's state of intoxication. Appellant admitted he "deserve[d] everything."

Appellant "immediately started to panic" and asked Ms. Perez if she was going to tell his command. (J.A. 73.) Ms. Perez took photos and recorded a video of Appellant attempting to put the Victim's shorts back on her motionless body as she confronted him. (J.A. 73, 78, 446.) Appellant identified himself during the confrontation. (J.A. 82–83.)

Seaman Brooks, who was returning to the duty desk because she had forgotten something there, opened the elevator door and saw the Victim, who she had seen earlier at the duty desk, "sprawled out on the floor, a girl with red hair talking on the phone, and a male standing in the back right corner." (J. A. 176.) The sprawled-out girl had a shirt and underwear on, but her underwear wasn't completely covering her private area; she was moving her head back and forth "really slowly." (J.A. 177–78.) Seaman Brooks sent a text to her friend about the scene in the elevator at 2333, then took another elevator down. (J.A. 187, 189.)

Ms. Bewely, the duty watchstander, observed the trio exit the elevator, Ms. Perez "yelling and screaming" and the Victim "[l]ifeless, like, she wasn't able to move herself." (J.A. 212, 214–16, 217.) She saw that the Victim had urinated on herself. (J.A. 215.) Seaman Brooks saw Appellant drag the Victim to a chair in the lobby. (J.A. 190.) The Victim "woke up" and said, "[G]et the fuck off me" and pushed Appellant with her arms. (J.A. 190–91.)

Paramedics and law enforcement arrived. (J.A. 215, 230.) The Appellant admitted to law enforcement, "I deserve everything that's coming to me, and I know what I did—or understand what I did." (J.A. 231.)

The Victim would later testify she remembered waking up in the hospital the next day. (J.A. 103.)

C. The United States argued both that that the Victim was incapacitated and that she did not consent. The Defense argued that she consented but did not remember.

In closing, the United States argued Appellant found the Victim intoxicated and chose to sexually assault her, both without her consent and when she was incapable of consenting due to intoxication by alcohol. (J.A. 341–49, 357–63.) The United States argued that the Members could find "without consent . . . and/or . . . that [t]he accused sexually assaulted [her] . . . while she was incapable of consenting." (J.A. 344.)

Arguing that the Victim did not consent, Trial Counsel posited that the Victim and Appellant did not know each other before the day of the incident. (J.A. 348.) "There is absolutely no evidence that she consented to have sex . . . ." (J.A. 348.) Trial Counsel noted the Victim could not recall the sexual assault and could not testify that she said "no" or manifested a lack of consent. (J.A. 348.) Trial Counsel noted that the Victim appeared "unconscious" in Ms. Perez's video and that Ms. Perez testified the Victims' body was "unresponsive." (J.A. 349; *see also* J.A. 71.)

Trial Defense Counsel argued that she was not too intoxicated to consent and that in fact she did consent, but "can't remember." (J.A. 363–86.)

D. The Military Judge instructed the Members.

Appellant argued that the Members should not be allowed to return guilty findings to both Specifications because of "impermissible overlap" and "different statutory schemes." (J.A. 326-27.) The United States argued "it is completely legally permissible for the members to" find Appellant guilty of both, but ultimately Appellant should only end up only convicted of one. (J.A. 325.) The Military Judge allowed the Members to find both, but if they did so, one of the Specifications would be withdrawn and dismissed. (J.A. 324, 328.)

As to Specification 1, the Defense asked that the Judge not instruct that "a sleeping, unconscious, or incompetent person cannot consent," and that consent must be given "by a competent person." (J.A. 318, 320, 495.) The Defense argued that these provisions were "not applicable" given the elements of Specification 1. (J.A. 495.)

For Specification 1, alleging assault without consent, the Military Judge instructed the Members: "Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent"; and, "A sleeping, unconscious, or incompetent person cannot consent." (J.A. 331–32.) The Military Judge instructed that "'consent' means a freely given agreement to the conduct at issue by a competent person." (J.A. 332.) Trial was in 2023 before this Court's *Mendoza* opinion, and the Military Judge did not instruct that the

Members would have to find that the Victim was "capable of consenting but d[id] not consent." *See United States v. Mendoza,* 85 M.J. 213, 220 (C.A.A.F. 2024).

For Specification 2, alleging assault when incapable of consenting, the Military Judge instructed the Members, "'Incapable of consenting' means a person is incapable of appraising the nature of the conduct at issue or physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act at issue." (J.A. 336.)

Consistent with the Defense Proposed Instructions, for Specification 2, the Judge defined "consent" as "a freely given agreement to the conduct at issue by a competent person" and instructed that "[a] sleeping, unconscious, or incompetent person cannot consent." (J.A. 337, 496.) The Judge instructed: "All the surrounding circumstances are to be considered in determining whether a person gave consent." (J.A. 338, 496.)

E. <u>The Members found Appellant guilty of both Specifications. The Military Judge conditionally dismissed Specification 2</u>.

The Members found Appellant guilty of both Specifications. (J.A. 390.) The Judge noted the United States had "from the very beginning . . . charged . . . in the alternative" and that if the Members "convicted on both . . . then one specification would be conditionally dismissed." (J.A. 391.) He asked, and Trial Counsel responded that the United States "does not oppose the military judge conditionally dismissing Specification 2, pending completion of appellate review

of Specification 1." (J.A. 391.) Trial Defense Counsel requested instead that Specification 1 be conditionally dismissed. (J.A. 392.)

The Military Judge conditionally dismissed Specification 2 pending completion of appellate review. (J.A. 392.) The Military Judge said, "I will note for the [R]ecord that in the [G]overnment's closing argument, that 'without consent' had to do with her being unconscious or asleep, which is a different theory of liability tha 'incapable of consenting, to wit, alcohol.'" (J.A. 392.)

F. The Members sentenced Appellant.

The Members sentenced Appellant to eight years' confinement, reduction to paygrade E-1, total forfeitures, and a dishonorable discharge. (J.A. 432.)

G. The lower court found the Instructions on Specification 1 violated *Mendoza*, but the Instructions on Specification 2 did not. The court then dismissed Specification 1, reinstated Specification 2 and reassessed the sentence.

On direct review at the lower court, Appellant argued the Military Judge's Instructions on both Specifications violated this Court's holding in *United States v. Mendoza,* 85 M.J. 213 (C.A.A.F. 2024). *United States v. Grafton*, No. 202400055, 2025 CCA LEXIS 375, at *12–25 (N-M. Ct. Crim. App. Aug. 11, 2025).

The lower court agreed that the Instruction for Specification 1, the "without consent" specification, violated *Mendoza,* but found no error as to Specification 2, the "incapable of consenting" Instruction *Id*. The lower court rejected Appellant's argument that the Military Judge erred by instructing the Panel it could

convict on both Specifications. *Id*. at *26–28. The court then dismissed Specification 1, reinstated Specification 2, and reassessed the Sentence, leaving it unchanged at eight years. *Id*. at *14–20, 28–30.

## Summary of Argument

The Military Judge correctly instructed the Members on Specification 2. First, the Instructions comport with *Mendoza* and *Moore*. Second, the Military Judge correctly declined to instruct that the two offenses are mutually exclusive. Finally, Appellant invited any error by requesting the Instructions actually given.

The lower court properly reassessed the sentence. Sentence "reassessment" here involves no dramatic change in the sentencing landscape, and the same underlying sexual misconduct, and this Court has endorsed reassessment for lesser included offenses that the Members did not sentence on. If, as Appellant claims, no sentence remained to reassess, a rehearing would not be constrained by the Members' earlier eight-year sentence.

## Argument

I.

THE MILITARY JUDGE CORRECTLY INSTRUCTED THE MEMBERS AS TO THE ELEMENTS OF SPECIFICATION 2, AND GAVE THE ADDITIONAL DEFINITIONAL INSTRUCTIONS REQUESTED BY APPELLANT. HER INSTRUCTIONS DID NOT VIOLATE *MENDOZA* AND NOTHING SUPPORTS THAT THESE TWO CRIMES, IN A NON-INSTANTANEOUS OFFENSE, ARE MUTUALLY EXCLUSIVE.

A. Member instructions are reviewed de novo.

"When deciding whether the military judge properly instructed a panel, this Court uses a de novo standard of review." *United States v. Bailey*, 77 M.J. 11, 14 (C.A.A.F. 2017) (citing *United States v. Schroder*, 65 M.J. 49, 54 (C.A.A.F. 2007)).

Whether an appellant has waived an issue and whether appellant invited error are questions of law which are reviewed de novo. *United States v. Davis,* 79 M.J. 329, 331 (C.A.A.F. 2020); *United States v. Martin*, 75 M.J. 321, 325 (C.A.A.F. 2016).

B. 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." *Bailey*, 77 M.J. at 14 (quoting R.C.M. 920(a) discussion; R.C.M. 920(e)(7)).

C. In *Mendoza* and *Moore,* this Court held that "without consent" is distinct from and cannot be proven solely by "incapable of consenting" or "asleep or incapacitated" evidence. In *Casillas,* it affirmed that evidence of intoxication is relevant to lack of consent. And the court affirmed that multiple Article 120 offenses can occur in a short time given changing states of capacity and competence.

*Mendoza,* reviewing the lower court's legal and factual sufficiency analysis, established that committing a sexual act on another person "without consent" is a different crime from committing a sexual act on someone who was "incapable of consenting," and that the United States cannot prove lack of consent "by merely establishing" that a victim was "too intoxicated to consent." *Mendoza*, 85 M.J. at 218–20, 222.

In *United States v. Moore*, another legal and factual sufficiency case, this Court extended *Mendoza* to another clause of Article 120, explaining: "[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." *United States v. Moore*, No. 25-0110, 2026 CAAF LEXIS 73, at *9 (C.A.A.F. Jan. 23, 2026) (emphasis in original). The *Moore* court reasoned further, however, that "if a victim *did not consent* to a sexual

act before falling asleep, and the victim later *could not consent* to a sexual act while asleep, then a sexual act . . . while the victim is asleep is 'without consent.'" *Id*. at *10 (emphasis in original). It also reasoned that no *Mendoza* violation occurs where "evidence shows that a victim was asleep when the sexual act began but awoke before the sexual act was complete and, while awake, did not consent to the ongoing sexual act." *Id.* at *12-13.

And in *Casillas*, this Court rejected an instruction that "would have foreclosed the panel from even *considering* the extent of the victim's intoxication" in a "without consent" case. *United States v. Casillas*, 86 M.J. 94, 101 (C.A.A.F. 2025) (emphasis in original).

*Mendoza*, *Casillas*, and *Moore* all concerned convictions under Article 120(b)(2)(A)—the statute's "without consent" provision. *Mendoza*, 85 M.J. at 215; *Casillas*, 86 M.J. at 100; *Moore*, 2026 CAAF LEXIS 73, at *5. This case, on the other hand, involves a conviction under Article 120(b)(3)(B), which criminalizes "sexual act[s] upon" people who are "incapable of consenting . . . due to" among other things "impairment by . . . an[] intoxicant" when "that condition is known or reasonably should be known by the [assailant]." (Charge Sheet; Entry of Judgment); 10 U.S.C. § 920(b)(3)(B). That is, this case presents the reverse situation, as Specification 2 is an "incapable of consenting" offense.

D. Invited error precludes appellate review of issues parties cause at trial then take advantage of on appeal.

"The doctrine of invited error has deep historical roots in the criminal justice system." *United States v. Noriega-Perez*, 792 Fed. Appx. 672, 674 (11th Cir. 2019). The doctrine "stems from the common sense view that where a party invites the trial court to commit error, he cannot later cry foul on appeal." *Id.* (*citing United States v. Brannan*, 562 F.3d 1300, 1306 (11th Cir. 2009)); *see also Johnson v. United States*, 318 U.S. 189, 200–01 (1943) ("we cannot permit an accused to elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at trial be reopened to him."). "The invited error doctrine prevents a party from 'creat[ing] error and then tak[ing] advantage of a situation of his own making [on appeal].'" *United States v. Martin*, 75 M.J. 321, 325 (C.A.A.F. 2016) (citations omitted).

"Invited error does not provide a basis for relief." *Id*. (quoting *United States v. Raya*, 45 M.J. 251, 254 (C.A.A.F. 1996)). Like waiver, "once it is determined that a defendant invites error, an appellate court will not review an error invited by a defendant." *Noriega-Perez*, 792 Fed. Appx. at 675 (internal quotations and citation removed).

E. In *Davis,* this Court found an appellant affirmatively waived objection to instructions given at trial. Appellant explicitly requested the Instructions the Military Judge gave, thus invited any error.

In *Davis*, this Court found that by "affirmatively declin[ing] to object to the military judge's instructions and offer[ing] no additional instructions," the appellant "'expressly and unequivocally acquiesc[ed]' to the military judge's instructions, [and] . . . waived all objections to the instructions, including in regards to the elements of the offense." *United States v. Davis,* 79 M.J. 329, 331 (C.A.A.F. 2020) (citations omitted). There, the judge gave an instruction providing definitions for the consent element of indecent recording under Article 120c, which on appeal the appellant claimed erroneously failed include a "knowing" mens rea. *Id.* at 330. But the *Davis* court found the appellant affirmatively waived any appellate review of that issue by waiving objection to the instructions at trial. *Id.* at 332.

Not only did Appellant waive objection to the Instruction given here—but Appellant invited any error by explicitly requesting the additional instructions about consent and who "cannot consent," that Military Judge gave, after he instructed on the elements of Specification 2. (Appellant Br. at 17; J.A. 337, 496); *see Martin,* 75 M.J. 327; *Raya,* 45 M.J. at 254.

F. Assuming the principles in *Mendoza*, *Moore,* and *Casillas,* extend to Article 120(b)(3)(A) ("incapable of consenting"), the Military Judge's Instructions were proper.

1. A victim's unconsciousness is relevant, but not dispositive, to prove "incapable of consenting" due to impairment by alcohol.

Under Article 120(b)(3)(A), the United States must prove:

(1) "That the accused committed a sexual act upon another person;"

(2) "That the other person was incapable of consenting to the sexual act due to . . . impairment by any . . . intoxicant;" and

(3) "That the accused knew or reasonably should have known of that condition."

Manual for Courts Martial, United States (2019) (MCM), pt. IV, para. 60b.(2)(f). As charged and instructed in this case, the intoxicant was alcohol. (Charge Sheet; J.A. at 968.)

A person is "incapable of consenting" when he or she "is . . . incapable of appraising the nature of the conduct at issue; or . . . physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act at issue." Art. 120(g)(8). An "unconscious . . . person cannot consent." Art. 120(g)(7)(A).

As this Court found in *Casillas,* evidence relevant to one offense under Article 120 might also be relevant to proof of another Article 120 crime; in *Casillas,* this Court found evidence of intoxication was relevant to proof of lack of consent. 86 M.J. at 101. Similarly here, evidence that the Victim was unconscious

as or asleep is relevant evidence to whether the Victim could not consent for any reason at all. Appellant explicitly requested that Instruction, permitting the members to find that multiple causes could have contributed to the Victim's inability to consent. (J.A. 337, 496.)

But the Military Judge did not merely instruct that the Members could find that the Victim could not consent due to being asleep, unconscious, or incompetent—had the Judge only provided that instruction, the Judge would have erred. Instead, the Military Judge here properly instructed on the elements of Specification 2: he instructed that to convict under Specification 2, the Members must find beyond a reasonable doubt the element that the Victim, in any event, "was incapable of consenting to the sexual act *due to the impairment by an intoxicant, alcohol*." (J.A. 336 (emphasis added).) That is, the Military Judge required that even if the Members found that at some point the Victim was asleep, unconscious, or incompetent, they could only convict if they found that the Victim was "incapable of consenting" because of "impairment by . . . alcohol." (J.A. 336.)

And, as the lower court noted, a person may be unconscious *because of* their alcohol impairment. *See Grafton*, 2025 CCA LEXIS 375, at *15. In *Hanabarger*, the court explained that "[a] pass-out . . . occurs when the level of alcohol reaches such a high level that the part of the brain that controls consciousness has literally shut down" and "those individuals have lost consciousness and would not be easily

roused." *United States v. Hanabarger,* No. 201900031, 2020 CCA LEXIS 252, at *33–34 (N-M. Ct. Crim. App. July 30, 2020).

2. The Military Judge, pursuant to the Defense Proposed Instructions, instructed the Members that a sleeping, unconscious, or incompetent person cannot consent.

As to the second element of Specification 2, the Military Judge followed Congress' statutory definition of the element of "incapable of consenting," and instructed the Members that: "'Incapable of consenting' means a person is incapable of appraising the nature of the conduct at issue or physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act at issue." (J.A. 335–36.) The Judge then gave the Instruction explicitly requested by Appellant and instructed that: "A sleeping, unconscious, or incompetent person cannot consent." (J.A. 337.)

First, the Military Judge instructed that the Members could not convict without finding, "beyond a reasonable doubt," that the victim was "incapable of consenting to the sexual act due to impairment by . . . alcohol." (J.A. 335.)

Second, the instruction about consent—requested by Appellant—did not detract from the instructions on the elements of Specification 2, but helped the Members differentiate between the United States' burden, and Appellant's argument that the Victim was not incapable of consenting, but instead actually consented: Appellant argued: "She consented. She just can't remember." (J.A.

364.) The instruction that Appellant requested correctly conveys that if the Victim were sleeping, unconscious, or incompetent—then Appellant's version of events could not be correct, as the Victim could not have consented if the Members found her sleeping, unconscious, or incompetent. (J.A. 337); Art. 120(g)(7); 10 U.S.C. § 920(g)(7)(B).

Third and finally, nothing in Appellant's requested Instruction required or suggested the Members could "find the ['incapable of consenting due to impairment by intoxicant'] element to be proved beyond a reasonable doubt based *solely* on evidence that the victim was asleep or [unconscious]." *See Moore*, 2026 CAAF LEXIS 73, at *9 (emphasis in original). Indeed, Congress requires that the Members find causation—that the "incapable of consenting" be "due to" impairment by alcohol.[1]

Even if the Members found that at various times the Victim was unconscious or asleep and determined that the Victim could not consent at those times—which Appellant newly on appeal claims is an error—the Military Judge nonetheless clearly required that *to convict,* the Members would have to find beyond a reasonable doubt that the Victim's inability to appraise the nature of the sexual act,

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[1] The Manual similarly requires not only incapacity, but also causation: the incapacity may be "due to . . . [i]mpairment by [a] drug, intoxicant, or similar substance" *or* "due to . . . "[a] mental disease or defect, or physical disability." MCM, pt. IV, para. 60b.(2)(f).

or to decline participation or communicate unwillingness, was *due to* intoxication by alcohol. (J.A. 336.) Nothing in the Instructions implied Members could convict *solely* because the Victim was asleep or unconscious at the time Appellant penetrated her vulva. (J.A. at 335–37); *see Moore*, 2026 CAAF LEXIS 73, at *9.

G. The plain statutory language, and *Moore,* make clear that Article 120(b)(2)(A) and Article 120 (b)(3)(A) do not create mutually-exclusive theories of liability, and that multiple crimes can occur over the course of a sexual assault. The Military Judge correctly instructed the Members could convict on both Specifications.

This Court has said "that the 'verdict on one count of an indictment cannot have the effect of determining factual issues under another count, even though the same evidence is offered in support of both counts.'" *United States v. Littlepage*, 10 C.M.A. 245, 247 (C.M.A. 1959) (quoting *Bryson v United States*, 238 F.2d 657, 663 (9th Cir. 1956)). *Cf. United States v. Rosario,* 76 M.J. 114, 117 (C.A.A.F. 2017) ("Defendants are generally acquitted of offenses, not of specific facts, and thus to the extent facts form the basis of other offenses, they remain permissible for appellate review.").

In *Heflin*, the Court held a person cannot be convicted for both stealing and receiving the same property under 18 U.S.C. § 2113 because "Congress was trying to reach a new group of wrongdoers, not to multiply the offense of the bank robbers themselves." *Heflin v. United States*, 358 U.S. 415, 420 (1959) ; *see also Milanovich v. United States*, 365 U.S. 551, 553–54, (1961).

This Court has not applied *Heflin* to Article 120. But it *has* recognized that multiple possible Article 120 crimes can occur during the same underlying sexual conduct, finding that evidence is: "legally sufficient to prove the 'without . . . consent' element" when "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." *Moore*, 2026 CAAF LEXIS 73, at *10 (emphasis in original). For example, in *United States v. Elespuru*, the court noted that "the evidence . . . supports a finding that [the victim] was substantially incapable of declining participation . . . and that, when she had moments of consciousness and lucidity, she made clear that she did not give permission." *United States v. Elespuru* 73 M.J. 326, 329–30 (C.A.A.F. 2014).

This Court's explanation in *Moore* is consistent with its observation in *Elespuru* that "given the nuances and complexity of Article 120, UCMJ, . . . charging in the alternative [is] an unexceptional and often prudent decision." *Id*. at 329–30. In those cases, "when 'a panel return[s] guilty findings for both,'" Military Judges must "either consolidate or dismiss a specification." *Id*. at 329 (*quoting United States v. Mayberry*, 72 M.J. 467, 467–68 (C.A.A.F. 2013)). *Moore* and *Elespuru* amount to a recognition that the two theories are not mutually exclusive, as Appellant claims. (Appellant Supp. Br. at 22–24).

Here, as *Moore* described, the evidence demonstrated "*both* that the victim did not consent before [becoming incapacitated] *and* that the sexual act subsequently occurred while the victim was [incapacitated]." *Moore*, 2026 CAAF LEXIS 73, at *10.

There was some evidence the Victim was capable of consenting but did not. With respect to capacity, she communicated her identification number and room number shortly before entering the elevator. (J.A. 211, 227.) And during a phone call while she was on the elevator, a friend heard moaning and thought it sounded like sex. (J.A. 98.) With respect to consent, the Victim had no prior relationship with Appellant and the Victim did not recognize Appellant after the assault. (J.A. 119, 139–40.) In fact, a witness saw her "kind of, like w[a]ke up" and say "'get . . . off of me'" while making pushing motions with her arms. (J.A. 190, 207.) And—as the United States argued in closing—a "dirty elevator" would be an unusual location for a consensual encounter. (J.A. 384.)

Yet there was also compelling evidence the Victim was incapable of consenting when Seaman Brooks and Ms. Perez saw her in the elevator. Seaman Brooks testified that she saw the Victim was intoxicated, and then fifteen-to-twenty minutes later, saw her unresponsive in the elevator, "sprawled out" without pants or underwear, with Appellant on top of her. (J.A. 157–58, 176.) Prosecution

Exhibit 3 showed the Victim unconscious as Appellant tried to push her underwear back up. (J.A. 446.)

As a result, it was not error to instruct the Members they could convict on both Specifications.

H. Appellant suffered no prejudice with respect to the consent definition.

Even if Appellant did not invite the error, he forfeited it. *United States v. Tovarchavez*, 78 M.J. 458, 468 (C.A.A.F. 2019).

Some instructional errors are non-constitutional, while others "raise[] constitutional implications." *United States v. Gibson*, 58 M.J. 1, 7 (C.A.A.F. 2003); *United States v. Davis*, 73 M.J. 268, 271 (C.A.A.F. 2014).

Courts test non-constitutional errors for "whether the instructional error had 'substantial influence' on the findings." *Gibson*, 58 M.J. at 7 (quoting *Kotteakos v. United States,* 328 U.S. 750, 765 (1946)).

Constitutional errors, on the other hand, are ones that violate a constitutional right of the accused. *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). If "an instructional error raises constitutional implications," courts have "traditionally tested the error for prejudice using a 'harmless beyond a reasonable doubt' standard." *Davis*, 73 M.J. at 271 (*quoting United States v. Dearing*, 63 M.J. 478, 482 (C.A.A.F. 2006)). "This standard is met where a court is confident that there was no reasonable possibility

that the error might have contributed to the conviction." *United States v. Upshaw*, 81 M.J. 71, 74 (C.A.A.F. 2021).

Here, Appellant suffered no prejudice even assuming that reading definitions requested by Appellant, explaining when a person "cannot consent," and defining "consent," were constitutional error. The evidence clearly established the Victim drank to the point of incapacity—she could not walk on her own and could barely communicate. Even without an extended definition of "consent" or the defense-requested language about "sleeping" or "unconscious" victims, the result would have been the same. With respect to Appellant's argument that the offenses were mutually exclusive, the lower court cured any error by dismissing the "without consent" specification. In other words, Appellant would be in the same position he is now—convicted of one offense—if the Military Judge had instructed the Members the offenses were mutually exclusive.

II.

APPLYING *WINCKELMANN* AND THIS COURT'S REASSESSMENT PRECEDENT, THE LOWER COURT HAD THE AUTHORITY TO REINSTATE APPELLANT'S CONVICTION UNDER ARTICLE 120(B)(3)(A) AND REASSESS THE SENTENCE.

A. This Court reviews sentence reassessment for abuse of discretion.

"This Court will set aside a sentence reassessment by a Court of Criminal Appeals only when necessary to correct an obvious miscarriage of justice or an

abuse of discretion." *United States v. Williams,* 84 M.J. 362, 364 (C.A.A.F. 2024) (internal citation removed).

B. Service Courts have the authority to reassess sentences.

Service courts' authority to reassess sentences arises from Congress's grant of authority to "affirm only the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d)(1)(A) (2018); 10 U.S.C. § 866(d)(1)(A) (2018); *Jackson v. Taylor*, 353 U.S. 569, 576–78 (1957). From its inception, that authority has been in tension with the concern that "reassessment" is really "an original imposition of sentence." *Jackson*, 353 U.S. at 581 (Brennan, J. dissenting).

In affirming service courts' power to reassess, however, the *Jackson* court recognized Congress's conclusion that a rehearing on sentence "would merely substitute one group of nonparticipants in the original trial for another." *Id*. at 580. The Court upheld reassessment as: (1) "Congress intended that the board of review should exercise [the] power" to reassess; and (2) ruling in favor of the appellant would have "had [the Court] strike down" unitary sentencing. *Id*. at 574–79.

The *Jackson* appellant had been sentenced to life imprisonment for rape and murder—the "*minimum* sentence . . . on the murder charge." *Jackson*, 353 U.S. at 581 (Brennan, J. dissenting). The Court rejected the appellant's argument that the

Army Board of Review could not have "reassessed" his sentence after it vacated the murder finding because the members had only considered the mandatory minimum for murder and had never "imposed [a sentence] on the attempted rape finding." *Id*. at 570–71.

And in *Wells*, this Court implicitly recognized a service court may "affirm [a] lesser [included] offense . . . and reassess the sentence" when it gave the lower court the option to do so after finding instructional error. *United States v. Wells*, 52 M.J. 126, 131–32 (C.A.A.F. 1999). So, applying *Wells*, the service court could reassess even though the members had neither convicted nor sentenced on the lesser included offense. *See id*. Taken together, *Jackson*, and *Wells* demonstrate that when a court of appeals "reassesses" a sentence it does not necessarily consider the same findings picture the members did.

Against that backdrop, this Court addressed how trial courts should handle offenses "charged . . . in the alternative for exigencies of proof" in *Elespuru*, 73 M.J. at 329. The military judge in that case "merged" the "specifications for sentencing," but this Court held he should have dismissed one instead before ultimately finding the error harmless based on the merger. *Id*. at 329–30. The *Elespuru* court recognized that—at least with respect to sentencing—there is no functional difference between conditionally dismissing one specification and merging the two. *See id*.

Nor should there be a difference at the appellate level when reassessing the sentence. As the Navy-Marine Corps Court of Criminal Appeals noted in *United States v. Parker*, "here words must take a back seat to evidence. And the import of the evidence adduced on the merits and at sentencing remains the same regardless of the terms used." 75 M.J. 603, 619 (N-M. Ct. Crim. App. 2016).

C. The Court should approve the sentence as adjudged below.

"[W]hen determining whether to reassess a sentence or order a rehearing," courts analyze "the totality of the circumstances presented" including the following factors: (1) whether the appellate court's ruling causes "dramatic changes in the penalty landscape and exposure," (2) whether "appellant chose sentencing by members or military judge alone," (3) whether "the nature of the remaining offenses capture the gravamen of criminal conduct within the original offenses and . . . whether significant or admissible circumstances addressed at the court-martial remain admissible and relevant to the remaining offenses," and (4) whether the appellate court "should have the experience and familiarity with to reliably determine what sentence would have been imposed at trial." *United States v. Winckelmann*, 73 M.J. 11, 15–16 (C.A.A.F. 2013); *s*ee also *Washington*, 84 M.J. at 365 (identifying the four "illustrative, although not exclusive, factors for the lower court to consider in determining whether to reassess.").

1. Here, the lower court properly applied the *Winckelmann* factors as there would be no dramatic change in the overall penalty landscape and the Members would see the same evidence.

a. There is no dramatic change in the penalty landscape given the maximum sentence remains the same.

The *Winkckelmann* court itself affirmed the lower court's reassessment where a series of appellate decisions had reduced the appellant's exposure from 115 years to "fifty-one years of confinement . . . limited by the thirty-one years adjudged at the original court-martial." *Winckelmann*, 73 M.J. at 13–14, 16.

This case presents conditions more favorable to sentence reassessment than *Winckelmann*. The *Winckelmann* appellant's exposure dropped by half, where the maximum punishment for these two specifications "is identical." *Id*.; *Grafton*, 2025 CCA LEXIS 375, at *29–30; *see also* MCM (2019 ed.) pt. IV, para 60.d.(3). Against the maximum exposure of thirty years of confinement, which remains the same, the Members awarded Appellant eight years of confinement. (J.A. 432.) Thus, this factor favors reassessment.

b. Appellant elected sentencing by Members.

"As a matter of logic, judges of the courts of criminal appeals are more likely to be certain of what a military judge would have done as opposed to members." *Winckelmann*, 73 M.J. at 16. Here, Appellant elected sentencing by members. (J.A. 391.)

While this factor would not normally favor reassessment, Specifications 1 and 2 both concerned "the same act" and the same evidence. *Grafton*, 2025 CCA LEXIS 375, at *30; (J.A. 41). Thus, this Court need not speculate as to what the Members would have sentenced. *See Winkelman*, 73 M.J. at 16. This factor also favors reassessment.

c. The sentencing evidence would have still been admissible against Appellant.

The *Winckelmann* court affirmed the lower court's reconsideration where all the remaining offenses "continued to reflect the gravamen of the original charges . . . use of the Internet to entice a child to have sex; obstruction of justice; and conduct unbecoming." *Winckelmann*, 73 M.J. at 16. Here, the Specifications were even closer—they involved the same underlying sexual act and the same evidence. *Grafton*, 2025 CCA LEXIS 375, at *30; (J.A. 41). The Members would have received the same Victim Impact Statement and Appellant's same extenuation and mitigation evidence because it concerned sexual assault and good military character and was not narrowed just to sexual assault without consent by a person capable of consenting. (*See* J.A. 396–418.)

Thus, all the same evidence would still have been admissible against Appellant. This factor favors reassessment.

d. The lower court was familiar with Article 120 violations.

This Court has sufficient experience with Article 120 violations to conduct a sentence reassessment. *See, e.g.*, *United States v. Codymiles*, 83 M.J. 635, 651–62 (N-M. Ct. Crim. App. 2023); *United States v. Sandoval*, No. 201800355, 2020 CCA LEXIS 114, at *34–36 (N-M. Ct. Crim. App. Apr. 13, 2020).

Thus, given its experience with cases involving these same offenses, the lower Court could reliably determine what sentence the Members would have adjudged had they sentenced on Specification 2. This factor favored reassessment.

Because three of the four *Winckelmann* factors favor reassessment, reassessment was appropriate and remand unnecessary.

2. The lower court did not abuse its discretion in reassessing the sentence and approving it as adjudged.

"When there has been error at the court-martial, the [court] must try to determine what the sentence would have been absent the error." *United States v. Jones*, 39 M.J. 315, 316 (C.A.A.F. 1994) (citing *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986)). This includes reassessing and affirming the approved sentence when the error did not affect sentencing. *See Sales*, 22 M.J. at 308.

The *Winckelmann* court affirmed the lower court's reassessment even where the appellant's total exposure dropped from 115 years to "fifty-one years of confinement . . . limited by the thirty-one years adjudged at the original court-martial." *Winckelmann*, 73 M.J. at 13–14, 16. Likewise, in *United States v.*

*Kolwyck*, the Navy-Marine Corps Court of Criminal Appeals affirmed the adjudged sentence despite the military judge's failure to merge assault charges because the presentencing evidence would have been the same and the adjudged sentence of fourteen months of confinement was well below the new maximum of five years. No. 201600210, 2016 CCA LEXIS 713, at *8–9 (N-M. Ct. Crim. App. Dec. 15, 2016); *see also Elespuru*, 73 M.J. 326 (appellant not prejudiced with regard to sentence where court set aside specification charged for exigencies of proof because military judge had merged specifications for sentencing).

Here, as in *Kolwyck* and *Winckelmann*, Appellant's original eight-year sentence for Specification 1 was well under the maximum of thirty years' confinement. (J.A. 420, 432.) Reinstating Appellant's Specification 2 did not change his maximum exposure at all. *See* MCM pt. IV (2019 ed.), para. 60.d.(2) (same maximum punishment for Article 120(b)(2)(A) and Article 120(b)(3)(A) violations). Thus, there is little reason to believe the Members' decision—after considering the same evidence—would have been different. *See Kolwyck*, 2016 CCA LEXIS 713, at *8–9. The lower court did not abuse its discretion.

D. <u>If there was no sentence to reassess below, then there is no limitation on punishment at the rehearing under Article 63</u>.

Article 63 governs rehearings and explains that at "a rehearing . . . no sentence in excess of or more severe than the original sentence may be adjudged." Art. 63(a), UCMJ (2024); 10 U.S.C. § 863(a) (2024). To illustrate, in *United*

*States v. Mitchell*, the service court set aside two specifications and ordered a rehearing on the remaining charges. *United States v. Mitchell*, 58 M.J. 446 (C.A.A.F. 2003). This Court held the new panel increased the sentence on rehearing in violation of Article 63 when it reduced the confinement term but imposed a dishonorable discharge instead of the previously-adjudged bad-conduct discharge. *Id*. at 448–49.

But if, as Appellant alleges, "[t]he members neither considered nor awarded a sentence for the specification of assault on an incapacitated person," then there is no "original sentence" and Appellant may now be sentenced on Specification 2 with no limitations except those in Article 120 or the Manual. (Appellant's Br. at 33); Art. 63(a), UCMJ (2024); 10 U.S.C. § 863(a) (2024). If this Court finds the lower court could not reassess the sentence, it must also find that a new sentencing authority is free to award a sentence in excess of eight years' confinement.

**Conclusion**

The United States respectfully requests that this Court affirm the lower court's Ruling.

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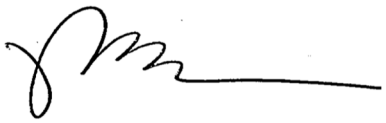

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I certify that I delivered the foregoing to the Court and served a copy on opposing counsel on April 31, 2026.

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