

**UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES
Appellee

v.

Anthony D. GRAFTON,
Yeoman Petty Officer Third Class
United States Navy, Appellant

No. 26-0039
Crim. App. No. 202400055

Argued May 20, 2026—Decided September 17, 2026

Military Judge: Andrea K. Lockhart

For Appellant: *Kimberly D. Barnes*, Esq. (argued).

For Appellee: *Lieutenant Commander Philip J. Corrigan*, JAGC, USN (argued); *Major Mary Claire Finnen*, USMC, and *Brian K. Keller*, Esq. (on brief); *Colonel Iain D. Pedden*, USMC.

Judge SPARKS delivered the opinion of the Court, in which Chief Judge MAGGS, Judge OHLSON, Judge HARDY, and Judge JOHNSON joined.

Judge SPARKS delivered the opinion of the Court.

At trial, the members found Yeoman Petty Officer Third Class (E-4) Anthony D. Grafton (Appellant) guilty, contrary to his pleas, of two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2018). Because the specifications were charged in the alternative, the military judge conditionally dismissed Specification 2 without prejudice to ripen into prejudice at the end of appellate review. Appellant was sentenced to a dishonorable discharge, eight years of confinement, forfeiture of all pay and allowances, and reduction to grade E-1. The convening authority took no action on the findings and approved the sentence. The United States Navy-Marine Corps Court of Criminal Appeals (CCA) set aside and dismissed Appellant's conviction for Specification 1 of the charge and reinstated his conviction for Specification 2. It then affirmed the existing sentence. *United States v. Grafton*, No. NMCCA 202400055, 2025 CCA LEXIS 375, at *30, 2025 WL 2305758, at *12 (N-M. Ct. Crim. App. Aug. 11, 2025) (unpublished). Appellant petitioned this Court and that petition was granted on February 18, 2026. *United States v. Grafton*, __ M.J. __ (C.A.A.F. 2026) (order granting review).

Appellant asks this Court to decide two questions:

- 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 "re-assess" a sentence that was never imposed.

For the reasons stated below, we conclude that the military judge's instructions complied with this Court's case law, including our decision in *United States v. Mendoza*, 85 M.J. 213 (C.A.A.F. 2024). However, we hold that the CCA lacked the authority to sentence Appellant on a newly reinstated specification for which no sentence had previously been imposed by the members. We therefore remand this case to the Judge Advocate General of the Navy for sentencing on Appellant's conviction for Specification 2.

I. Background

The charges in this case stemmed from an incident that occurred on September 5, 2022. VL and JP, both enlisted Navy sailors, were drinking in JP's barracks room while they watched movies together. VL got very drunk and left the room around 10:00 pm. She went to the lobby desk to get another key for her room. The desk staff and a witness from the lobby described her as "intoxicated," "disheveled," "slurring her words," and "staggering." JP kept trying to call VL who would not answer her phone. When VL finally called back, she did not say anything but JP heard moaning sounds. The call lasted seven minutes. Concerned, JP went to look for her friend.

JP testified that she summoned the elevator down the hall from her room. When the doors opened, she saw VL lying on the floor, seemingly unconscious. Her pants and underwear were off and there was a man on top of her. The man was Appellant. JP stated that "[h]e was laying on her, like missionary position, and I saw back and forth movement." In response to trial counsel's questions, JP testified that Appellant was "[e]ssentially, like, having sex with her."

JP began taking pictures and recording video of Appellant with her phone. The pictures and video, in which Appellant states his name and command, were admitted into evidence by the prosecution. In the video, VL is unconscious and naked from the waist down, and Appellant is trying to put her underwear back on. JP, VL, and Appellant then took the elevator to the first floor.

The front desk staff member testified that VL fell when she emerged from the elevator, that Appellant had to lift her into a chair, and that she appeared "lifeless, like, she wasn't able to move herself." The staff member called base police who also called an ambulance. She testified that VL yelled at the police when they arrived and did not want medical attention. Another witness from the lobby testified that, when VL woke up, she told Appellant, "get the fuck off me" and pushed him with her arms.

When the base police arrived, Appellant told them that, “I deserve everything that’s coming to me, and I know what I did—or I understand what I did.” The emergency medical personnel took VL to the hospital. A forensic sexual assault exam showed multiple lacerations in her vaginal area. A toxicology screen revealed that VL’s blood alcohol concentration had likely been over 0.3 percent at the time of the incident.

The Government charged Appellant in the alternative under contingencies of proof with two specifications of sexual assault under Article 120, UCMJ. Specification 1 alleged that Appellant penetrated VL with his penis “without the consent of [VL].” Specification 2 alleged Appellant penetrated VL’s vagina with his penis when VL “was incapable of consenting to the sexual act because she was impaired by an intoxicant, to wit: alcohol, and the accused reasonably should have known of that condition.”

VL testified at trial that she had no memory of events after leaving JP’s room and that she had never met Appellant before that night in the elevator. During VL’s testimony, the prosecution did not ask her if she consented and she did not provide any information as to consent.

The military judge instructed the members on the elements the Government was required to prove for them to convict Appellant on both Specification 1 and Specification 2. Her Specification 2 instructions stated that the evidence raised an issue as to whether VL may have consented to the sexual conduct. The military judge provided the members with a definition of consent drawn directly from the statute, including the fact that “[a] sleeping, unconscious, or incompetent person cannot consent.” Defense counsel had requested this instruction and did not object.

The military judge, under defense objection, also instructed the members that they could find Appellant guilty of both Specification 1 and Specification 2.

The members convicted Appellant of both specifications. Because the Government had charged the two

specifications in the alternative, the military judge conditionally dismissed Specification 2 on the condition that Specification 1 survived appellate review.

CCA Opinion

Mendoza was decided by this Court between Appellant’s court-martial and appellate review. Appellant asserted multiple assignments of error before the CCA, including challenging the legal and factual sufficiency of Specification 1 and whether the military judge’s instructions to the members were erroneous given this Court’s decision in *Mendoza. Grafton*, 2025 CCA LEXIS 375, at *2, 2025 WL 2305758, at *1. The lower court found that the military judge erred “when instructing the members, *in the specific context of Specification 1*, that a sleeping or unconscious person cannot consent such that they could find Appellant guilty as charged to sexual assault ‘without consent.’” *Id.* at *14, 2025 WL 2305758, at *6. It set aside the guilty finding for Specification 1. *Id.*, 2025 WL 2305758, at *6.

The CCA then examined whether the military judge erred when she included the sentence “‘a sleeping, unconscious, or incompetent person cannot consent’” as part of her instructions for Specification 2. *Id.*, 2025 WL 2305758, at *6. Defense counsel did not object to this part of the instruction. *Id.* at *14-15, 2025 WL 2305758, at *6. The lower court considered the issue forfeited rather than waived because *Mendoza* had not yet been decided at the time of trial, and it reviewed the issue for plain error. *Id.* at *15-17, 2025 WL 2305758, at *6.

The CCA found there was a “partial overlap” between Article 120(b)(2)(B) (victim asleep, unconscious, or otherwise unaware) and Article 120(b)(3)(A) (victim incapable of consenting due to impairment by any drug, intoxicant, or similar substance) because “a person can be so impaired by alcohol as to be unconscious.” *Id.* at *15, 2025 WL 2305758, at *6. It found no plain error on the part of the military judge. *Id.* at *16, 2025 WL 2305758, at *6. Because Specification 2 had been conditionally dismissed by the military judge, the CCA reinstated the guilty finding for

Specification 2 and found it legally and factually sufficient. *Id.* at *20-24, 2025 WL 2305758, at *7-8.

In addition, the lower court determined that Appellant was not put in a position where he had to defend against a charge, “asleep or unconscious,” for which he was not put on notice. *Id.* at *22, 2025 WL 2305758, at *9. It noted that whether Appellant could have been charged under an additional theory of liability did not impact the fact that he was on notice to defend against the theories of liability that were charged. *Id.* at *23, 2025 WL 2305758, at *9.

The CCA further found that the members’ decision to find Appellant guilty was not “legally or logically impossible.” *Id.* at *27, 2025 WL 2305758, at *11. Whether or not it was error to allow both specifications to go to the members, the setting aside of Specification 1 by the military judge made any error harmless beyond a reasonable doubt. *Id.* at *28, 2025 WL 2305758, at *11.

The lower court went on to affirm the existing sentence, reasoning that:

[A]ffirming the finding of guilty for Specification 2 and setting aside Specification 1 does not change the penalty landscape, as the maximum punishment for both is identical, and includes up to 30 years of confinement. Although Appellant was sentenced by members for Specification 1, we are confident that the sentence would have been the same if they had instead sentenced him for Specification 2. The evidence admitted at trial to prove, and the gravamen of the two specifications is the same—indeed it was the same act. And we are confident that we have sufficient experience and familiarity with sentencing in this type of case to reliably determine what sentence would have been imposed at trial.

Id. at *29-30, 2025 WL 2305758, at *11 (footnotes omitted).

II. Analysis

A. *Military Judge's Instructions*

Standard of Review

“Whether a panel was properly instructed is a question of law reviewed de novo.” *United States v. Hale*, 78 M.J. 268, 274 (C.A.A.F. 2019) (internal quotation marks omitted) (quoting *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011)). “Where there was no objection to the instruction at trial, we review for plain error.” *Id.* (internal quotation marks omitted) (quoting *United States v. Tunstall*, 72 M.J. 191, 193 (C.A.A.F. 2013)). “Under plain error review, this Court will grant relief only where (1) there was error, (2) the error was plain and obvious, and (3) the error materially prejudiced a substantial right of the accused.” *United States v. Sweeney*, 70 M.J. 296, 304 (C.A.A.F. 2011) (citing *United States v. Harcrow*, 66 M.J. 154, 158 (C.A.A.F. 2008)).

Defense counsel objected to the military judge’s instruction allowing the members to convict Appellant on both specifications, so that question will be reviewed de novo. However, defense counsel did not object to the military judge’s instructions on Specification 2. “To determine whether a failure to object was waiver or mere forfeiture, we look to the state of the law at the time of trial.” *Id.* We agree with the CCA that, despite the lack of objection, Appellant’s challenge to the military judge’s instructions on Specification 2 was forfeited because *Mendoza* had not yet been decided at the time of trial. *Grafton*, 2025 CCA LEXIS 375, at *15, 2025 WL 2305758, at *6. We therefore analyze this issue under the plain error standard.

Applicable Law

Article 120(b), UCMJ, governs sexual assault in the military and “defines multiple ways in which the Government may prove the offense.” *Mendoza*, 85 M.J. at 218. In relevant part, Article 120(b)(2) criminalizes committing a sexual act upon another person, “(A) without the consent of the other person; or (B) when the person knows or

reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring.” Article 120(b)(3)(A) criminalizes committing a sexual act upon another person “when the other person is incapable of consenting to the sexual act due to . . . impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person.”

Article 120(g)(7), UCMJ, defines consent as “a freely given agreement to the conduct at issue by a competent person.” Article 120(g)(7)(A). It states that “[a] sleeping, unconscious, or incompetent person cannot consent.” Article 120(g)(7)(B), UCMJ. The statute also provides that “[a]ll the surrounding circumstances are to be considered in determining whether a person gave consent.” Article 120(g)(7)(C), UCMJ.

In *Mendoza*, this Court clarified that “Article 120(b)(2)(A), UCMJ, and Article 120(b)(3)(A), UCMJ, create separate theories of criminal liability.” 85 M.J. at 215. The government “cannot charge one offense under one factual theory and then argue a different offense under a different factual theory at trial.” *Id.* at 220. “Doing so robs the defendant of his constitutional right to know what offense and under what legal theory he will be tried and convicted.” *Id.* (internal quotation marks omitted) (quoting *United States v. Riggins*, 75 M.J. 78, 83 (C.A.A.F. 2016)). However, this Court also made clear that a given set of circumstances can serve as either surrounding circumstances or a distinct theory of liability. *See id.* at 222 (stating that “our holding—that subsection (b)(2)(A) and subsection (b)(3)(A) create separate theories of liability—does not bar the trier of fact from considering evidence of the victim’s intoxication when determining whether the victim consented”).

In *United States v. Moore*, this Court further clarified the potential role of surrounding circumstances and established the legal principle that:

If 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 of Article 120(b)(2)(A), UCMJ. . . . [T]his . . . legal principle logically flows from Article 120(g)(7)(B), UCMJ, which states: “A sleeping, unconscious, or incompetent person cannot consent.” Put simply, 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 occurring while the victim is asleep is “without . . . consent.”

86 M.J. 308, 313 (C.A.A.F. 2026) (first and third alterations in original).

Discussion

Appellant argues that the military judge should not have given a consent instruction for Specification 2 because consent was not an element of Article 120(b)(3)(A). Including the phrase “[a] sleeping, unconscious, or incompetent person cannot consent” meant that defense counsel was forced to defend against two additional uncharged theories of liability, asleep or unconscious, which were argued by the Government and instructed upon by the military judge. The Government counters that the military judge’s consent instruction for Specification 2 was proper in the context of the entire instructions and in keeping with *Mendoza* and *Moore*.

Rule for Courts-Martial (R.C.M.) 920(e) states in relevant part that a military judge’s instructions on findings must include “[a] description of the elements of each offense charged”; a description of any special defenses raised by the evidence; and “[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.” R.C.M. 920(e)(1), R.C.M. 920(e)(3), R.C.M. 920(e)(7).

Here, not only did Appellant fail to object to the military judge’s Specification 2 consent instruction, including the provision that “[a] sleeping, unconscious, or incompetent

person cannot consent,” he requested that the military judge deliver it. Appellant asked that a definition of consent be included in the instructions for Specification 2, including the exact sentence he now objects to. Appellant argues that his requested instruction came before this Court’s decision in *Mendoza*, which changed the legal landscape. However, we find nothing in *Mendoza* that would preclude providing a consent instruction under the circumstances. Including a definition of consent was appropriate given defense counsel’s central argument that the victim did consent but just could not remember the charged act.

We also see no danger that, due to the consent instruction, the members might have mistakenly convicted Appellant simply because they believed VL was asleep or unconscious at the time of the assault. We evaluate a military judge’s instructions “in the context of the overall message conveyed to the [members].” *United States v. Prather*, 69 M.J. 338, 344 (C.A.A.F. 2011) (internal quotation marks omitted) (quoting *Humanik v. Beyer*, 871 F.2d 432, 441 (3d Cir. 1989)). The consent instruction was not delivered in a vacuum. The military judge also instructed the members on the elements required to prove incapable of consent due to impairment by alcohol. Nothing in the instructions implied that the members could convict solely because VL was asleep or unconscious at the time of the assault. Rather, the military judge’s instructions made clear to the members that, in order to convict Appellant, they had to be convinced “by legal and competent evidence beyond a reasonable doubt” that Appellant committed the sexual act, that he did so while VL was incapable of consenting due to impairment by alcohol, and that Appellant reasonably should have known she was incapable of consenting due to impairment.

Mendoza established that, for Article 120, UCMJ, offenses, the Government cannot charge one offense under one theory of liability and argue a different offense under a different theory of liability at trial. 85 M.J. at 220. We see no indication that the military judge’s instruction contributed to such a situation. “A sleeping, unconscious, or

incompetent person cannot consent” is part of the statutory definition of consent. It was relevant to the defense’s main argument that VL consented to their encounter. However, it was never offered to the members as a separate theory of liability under which they might convict. We agree with the CCA that:

[T]he fact that Appellant could also have been charged with an additional specification, also in the alternative with the other two, in no way diminishes the fact that he was on notice that he was charged with committing a sexual act without consent from V.L. and with committing a sexual act when V.L. was incapable of consenting when she was impaired by alcohol and Appellant reasonably should have known that.

Grafton, 2025 CCA LEXIS 375, at *23, 2025 WL 2305758, at *9. We therefore conclude that the military judge did not err in providing the consent instruction, including the sentence “[a] sleeping, unconscious, or incompetent person cannot consent,” for Specification 2.

Appellant also claims that the military judge erred in instructing the members that they could convict Appellant of both Specification 1 and Specification 2 even though they were charged in the alternative. His primary argument is that the two specifications were mutually exclusive because to prove sexual assault without consent necessarily disproves sexual assault when incapable of consent and vice versa. He believes that allowing the members to convict on both violated his due process and resulted in prejudice. He cites *Milanovich v. United States*, 365 U.S. 551, 555 (1961), in which the Supreme Court held that the trial judge should have instructed the jury that they could convict a defendant of either larceny of, or receiving the same stolen goods, but not both. The Government counters that, given our decision in *Moore*, the two specifications, though argued in the alternative, were not mutually exclusive because multiple crimes can occur over the course of a single assault.

“In some instances there may be a genuine question as to whether one offense as opposed to another is sustainable. In such a case, the prosecution may properly charge both offenses for exigencies of proof, a long accepted practice in military law.” *United States v. Elespuru*, 73 M.J. 326, 329 (C.A.A.F. 2014) (internal quotation marks omitted) (quoting *United States v. Morton*, 69 M.J. 12, 16 (C.A.A.F. 2010)). This Court has previously permitted members to convict on two specifications charged in the alternative as long as one of those specifications is consolidated or dismissed by the trial judge. In *Elespuru*, we allowed for guilty findings on two Article 120, UCMJ, specifications charged in the alternative provided one of those convictions was later dismissed by the military judge.¹ 73 M.J. at 329-30 (citing *United States v. Mayberry*, 72 M.J. 467, 467-68 (C.A.A.F. 2013)). We noted that “dismissal of specifications charged for exigencies of proof is particularly appropriate given the nuances and complexity of Article 120, UCMJ, which make[s] charging in the alternative an unexceptional and often prudent decision.” *Id.*

Having established that the military judge can instruct the members that they may convict on both specifications even when charged in the alternative, we turn to whether such an instruction was proper under the circumstances of this case. We do not agree with Appellant’s assertion that the two specifications put before the members were mutually exclusive. Under Specification 1, the Government had to prove beyond a reasonable doubt that VL did not consent to the sexual encounter. Specification 2 required that the Government prove beyond a reasonable doubt that VL was incapable of consent due to intoxication at the time of the assault and that Appellant reasonably should have known this.

Our recent decision in *Moore* established that the “without consent” element can be proven solely by the surrounding circumstances, even if a victim was not capable of

¹ The charges in question were abusive sexual contact and wrongful sexual contact. *Elespuru*, 73 M.J. at 328.

consent at the exact moment of the assault. 86 M.J. at 313. *Moore* involved a victim who was asleep when the sexual act occurred, but the same logic applies when a victim is unconscious or incapable of consent due to impairment by drugs and/or alcohol. Evidence that a victim did not consent before becoming incapable of consenting due to intoxication could be sufficient to establish a “without consent” theory of liability. It follows that an appellant could be found guilty of both sexual assault without consent because circumstantial evidence indicated the victim did not consent before the assault, and sexual assault when the victim was incapable of consent due to intoxication because evidence indicated she was incapable of consent at the exact time of the assault. These offenses each require different proof. In the present case, it would have been possible for the evidence to show both that VL did not consent before the sexual act and that she was incapable of consenting during the sexual act.

Mendoza established and *Moore* confirmed that the Government cannot rely solely upon one theory of liability to prove guilt under a separate theory of liability.

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. And on appeal, a CCA may not find that the evidence is factually sufficient to prove the “without . . . consent” element *solely* because the CCA finds that the evidence proved the victim was asleep or incapacitated.

Moore, 86 M.J. at 313 (second and third alterations in original). “[T]he government can offer . . . evidence of an alleged victim’s intoxication to prove the absence of consent. But it cannot prove the absence of consent under Article 120(b)(2)(A), UCMJ, by merely establishing that the victim was too intoxicated to consent.” *Id.* at 314 (second alteration in original) (internal quotation marks omitted) (quoting *Mendoza*, 85 M.J. at 222). However, *Mendoza* also clarified that the same evidence can be relevant to proving

more than one Article 120, UCMJ, offense. 85 M.J. at 222. Neither of these cases, nor any decision by this Court, has established that two separate theories of liability under Article 120, UCMJ, cannot be applicable to the same set of circumstances. Because there is no provision against the factfinder considering multiple specifications charged in the alternative and because the two specifications in question here were not mutually exclusive, the military judge did not err in instructing the members they could convict Appellant of both Specification 1 and Specification 2.

Appellant also claims there is a notice issue raised by charging in the alternative and then allowing both specifications to go to the members. We see no merit in this argument. Even if only one specification had gone before the members, defense counsel would not have known until the presentation of evidence which specification that would be. Either way, Appellant would have to defend against both specifications.

B. Sentence Reassessment

The scope of an appellate court's authority is a legal question this Court reviews de novo. *United States v. Brubaker-Escobar*, 81 M.J. 471, 474 (C.A.A.F. 2021) (citing *United States v. English*, 79 M.J. 116, 121 (C.A.A.F. 2019)). "The courts of criminal appeals are courts of limited jurisdiction, defined entirely by statute." *Id.* at 473 (internal quotation marks omitted) (quoting *United States v. Arness*, 74 M.J. 441, 442 (C.A.A.F. 2015)). Under Article 66, UCMJ, 10 U.S.C. § 866 (2018), when a CCA sets aside a sentence, it has the authority to "modify the sentence to a lesser sentence" or "order a rehearing." Article 66(f)(2)(A)-(B), UCMJ. This Court has further determined that a CCA may reassess an existing sentence in a situation where, based on the totality of the circumstances, it feels confident that it knows what that sentence would have been. *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013).

Appellant argues that the lower court improperly created a sentence for Specification 2, a specification which the members did not consider at sentencing, denying him

the chance to defend himself or present a sentencing case on that charge. In so doing, the CCA acted outside its authority and violated Appellant’s due process rights. The Government counters that the lower court properly reassessed the sentence because it involved the same underlying misconduct and no dramatic change in the sentencing landscape.

We conclude that the CCA exceeded its authority in applying the sentence adjudged for Specification 1 to Specification 2 instead of ordering a sentencing hearing. The CCA is a reviewing body and lacks the authority to sentence for the first time. The initial sentencing authority was the members panel. At the time of Appellant’s court-martial, R.C.M. 1002(d)(1) (2019 ed.),² in pertinent part, provided that “[i]n a general or special court-martial in which the accused has elected sentencing by members . . . the members shall determine a single sentence for all of the charges and specifications of which the accused was found guilty.” Therefore, a servicemember convicted of an offense at a court-martial must be sentenced in the first instance by an authorized trial-level sentencing authority.

In the present case, the members did not deliver a sentence for Specification 2. The military judge conditionally dismissed Specification 2 before sentencing and instructed the members that they were only sentencing on Specification 1. When the lower court set aside Appellant’s sole conviction for Specification 1, it set aside the sentence as well. If there is no longer a conviction, there is no longer a sentence. Even if the CCA thought it could assume the sentence would remain the same, it lacked the authority to award a sentence for this newly reinstated specification.

The CCA relied upon the factors that this Court provided in *Winckelmann* to assist the lower courts in determining whether to reassess a sentence or order a rehearing. *Grafton*, 2025 CCA LEXIS 375, at *28, 2025 WL

² R.C.M. 1002 has since been amended to eliminate sentencing by members in noncapital cases. R.C.M. 1002(b) (2024 ed.).

2305758, at *11. However, *Winckelmann* is clearly distinguishable. That case addressed whether the CCA could reassess the sentence for remaining convictions once a finding of guilty on a separate charge had been set aside. *Winckelmann*, 73 M.J. at 12. Here, the CCA did not reassess a sentence for a remaining conviction, but instead sentenced Appellant on Specification 2 for the first time. *Winckelmann* does not imply that the lower courts have such authority.

In addition, the CCA’s authority to reassess the sentence for a lesser included offense does not apply to a situation such as this one. See *United States v. Wells*, 52 M.J. 126, 131-32 (C.A.A.F. 1999) (authorizing a remand to the CCA “which may affirm the lesser offense . . . and reassess the sentence or order a rehearing”); *United States v. Jagow*, 19 C.M.A. 503, 504, 42 C.M.R. 105, 106 (1970) (holding that “the Court of Military Review may affirm the lesser included offense . . . and reassess the sentence”); *United States v. Rumpler*, 19 C.M.A. 479, 480, 42 C.M.R. 81, 82 (1970) (stating that “the Court of Military Review may affirm the lesser included offenses . . . and reassess the sentence”). A separate offense with different elements is not equivalent to a lesser included offense, the elements for which are a subset of the convicted offense.³ The CCA’s authority to reassess a sentence is limited to offenses or

³ A lesser included offense is “an offense that is necessarily included in the offense charged.” Article 79, UCMJ, 10 U.S.C. § 879 (2018). “This Article provides the statutory authority for a military judge to convict on, and an appellate court to affirm on, a lesser included offense.” *Riggins*, 75 M.J. at 82 (citing *United States v. Girouard*, 70 M.J. 5, 9 (C.A.A.F. 2011)). A lesser included offense is determined by using the elements test. *Id.* at 82-83. “If all of the elements of offense X are also elements of offense Y, then X is [a lesser included offense] of Y.” *Id.* at 83 (alteration in original) (internal quotation marks omitted) (quoting *Tunstall*, 72 M.J. at 194).

subsets of offenses for which an appellant has already been sentenced by the original sentencing authority.⁴

III. Conclusion

The first granted issue is answered in the negative. The findings of the United States Navy-Marine Corps Court of Criminal Appeals are affirmed.

The second granted issue is answered in the affirmative. The decision of the United States Navy-Marine Corps Court of Criminal Appeals as to the sentence is reversed and the sentence is set aside. The Court returns the record to the Judge Advocate General of the Navy. A sentencing hearing is authorized for Specification 2.

⁴ Both parties agree that, upon resentencing, no sentencing cap will exist based upon Appellant's previous sentence. Under Article 63(a), UCMJ, 10 U.S.C. § 863(a) (2018), a sentencing rehearing cannot adjudge a sentence "in excess of or more severe than the original sentence." However, because the new sentence adjudged will be the original sentence for Specification 2, the sentencing authority will be free to sentence in excess of that adjudged by the members for Specification 1.