IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee	**BRIEF ON BEHALF OF APPELLANT**
v.	Docket No. ARMY 20220052
Private (E-2) **MATTHEW L. COE** United States Army Appellant	Tried at Fort Benning, Georgia on 7 January and 1–3 February 2022, before a general court-martial appointed by Commander, U.S. Maneuver Center of Excellence, Lieutenant Colonel Trevor I. Barna, military judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignment of Error

WHETHER APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED WHERE APPELLANT WAS CHARGED WITH COMMITTING SEXUAL ASSAULT WITHOUT CONSENT, BUT THE GOVERNMENT EVIDENCE AND THEORY WAS SEXUAL ASSAULT WHILE INCAPABLE OF CONSENT.[1]

Statement of the Case

On 1–3 February 2022, a military judge sitting as a general court-martial found appellant, Private (E-2) Matthew L. Coe, contrary to his plea, guilty of one specification of sexual assault, in violation of Article 120, Uniform Code of

[1] Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant personally requests this court consider those matters set forth in the Appendix.

Military Justice [UCMJ], 10 U.S.C. § 920. (R. at 114, 690; Charge Sheet). The military judge acquitted appellant of one specification each of obstructing justice and false official statement. (R. at 690; Charge Sheet). The military judge sentenced appellant to reduction to the grade of E-1, confinement for twenty-four months, and a dishonorable discharge. (R. at 742). On 28 February 2022, the convening authority elected to take no action on the findings or sentence. (Action). The military judge entered judgment on 4 March 2022. (Judgment).

Statement of Facts

For the Specification of Charge I, the government charged appellant with a violation of Article 120, UCMJ:

> In that [appellant], did, at or near Fort Benning, Georgia, on or about 8 August 2021, commit a sexual act upon Private [redacted] by penetrating Private [redacted] vulva with [appellant's] penis, without the consent of Private [redacted]

(Charge Sheet).

In its opening, the government immediately emphasized the "severe[] intoxicat[ion]" of the alleged victim, Private First Class [PFC] [redacted] when appellant penetrated her vagina with his penis. (R. at 115). Intoxication was the theme of the government's opening, with repeated references to PFC [redacted] intoxication, referencing her apparent "lifeless body" and state of being "too drunk to give consent" and "super drunk." (R. at 115-20).

During its case-in-chief, the government called witnesses to describe an incident on 8 August 2021 of multiple soldiers, to include appellant and PFC [redacted] engaging in a variety of group and separate sexual acts at the beachhead of the Chattahoochee River near Fort Benning. (R. at 196, 199-200). Before any group sex occurred, PFC [redacted] and appellant engaged in consensual oral and vaginal sex within the woods near the beach. (R. at 264, 302, 508). Afterward, appellant, PFC [redacted] and PV2 Jacob [redacted] began consuming liquor on the beach. (R. at 201, 265, 300, 505). Appellant, PFC [redacted] and PV2 [redacted] and multiple other Soldiers then engaged in group sexual acts. Witnesses described PFC [redacted] level of intoxication as increasing throughout the group sexual acts. The government also introduced appellant's statements to further describe PFC [redacted] intoxication and establish the charged vaginal penetration.

The alleged victim had no memory of the vaginal penetration by appellant and said she was blacked out from consuming alcohol. (R. at 268-69). She also admitted that it was possible she indicated that she consented to sexual acts, but was unable to remember doing so because she was drunk. (R. at 336).

The government returned to its theme of intoxication in closing argument. The government quoted from appellant's statement and repeatedly asserted that appellant believed PFC [redacted] was "super drunk.". (R. at 649-57). The government

stated its theory of non-consent is that PFC [redacted] could not consent "when she is in this state." (R. at 652).

The defense noted in its closing "too incapacitated to consent is a charge, but that's not what was charged here." (R. at 668). The defense focused its argument on the government's failure to prove actual non-consent and the inadequacy of proving incapable of consent for the charged offense. (R. at 673-75). The defense also pointed out that convicting appellant for his charged offense under the government's intoxication theory lowers the government's burden and renders the incapable of consent section of the UCMJ a dead letter. (R. at 676-77).

Law and Argument

"The due process principle of fair notice mandates that an accused has a right to know what offense and under what legal theory he will be convicted. The Due Process Clause of the Fifth Amendment also does not permit convicting an accused of an offense with which he has not been charged." *United States v. Tunstall*, 72 M.J. 191, 192 (C.A.A.F. 2013). In accordance with the Fifth and Sixth Amendments, "each specification will be found constitutionally sufficient only if it alleges, 'either expressly or by necessary implication,' 'every element' of the offense, 'so as to give the accused notice [of the charge against which he must defend] and protect him against double jeopardy.'" *United States v. Turner*, 79

M.J. 401, 403 (C.A.A.F. 2020) (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994)).

Not consenting and not being able to consent are two separate and distinct legal concepts. Sexual assault without consent criminalizes committing a sexual act upon another person "without the consent of the other person." Article 120(b)(2)(A), UCMJ. Sexual assault while incapable of consenting criminalizes 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(b)(3)(A), UCMJ.

In *Riggins*, the Court of Appeals for the Armed Forces (CAAF) warned that the government's requirement to prove a set of facts that resulted in an alleged victim's legal inability to consent was *not* the equivalent of the government bearing the affirmative responsibility to prove the alleged victim did not, *in fact*, consent. *United States v. Riggins*, 75 M.J. 78, 84 (C.A.A.F. 2016).

To prove sexual assault without consent, the government was required to show 1) appellant committed a sexual act upon PFC [redacted] and 2) appellant did so without the consent of PFC [redacted] Manual for Courts-Martial, United States, pt. IV, para. 60.b.(2)(d) (2019 ed.) (MCM). The government did not charge, and therefore did not notify appellant, of an offense of sexual assault while incapable of consent

due to impairment by any intoxicant. This uncharged offense would require the government to prove: 1) appellant committed a sexual act upon PFC [redacted] 2) PFC [redacted] was incapable of consenting to the sexual act due to impairment by any intoxicant; and 3) appellant knew or reasonably should have known of that condition. MCM, pt. IV, para. 60.b.(2)(f).

In *Roe*, this court concluded Roe's due process rights were not violated under similar circumstances as appellant. *United States v. Roe*, ARMY 20200144, 2022 CCA LEXIS 248, at *14 (Army Ct. Crim. App. 27 Apr. 2022) (mem. op.).[2] The majority, over a strong dissent from Senior Judge Walker, found charging *without consent* does not preclude the government from introducing intoxication evidence as circumstantial evidence of the lack of actual consent. *Id*. at 16. However, the majority deferred on deciding whether *without consent* "can be proved *solely* through showing an inability to consent because of intoxication or some other reason." *Id*. at 17 (emphasis in original).

Finding the government's presentation of its case and theory focused on intoxication and lack of memory of the victim, Senior Judge Walker found a due process violation because "sexual assault charged by lack of consent requires affirmative proof of lack of consent beyond any evidence of a legal inability to consent. To hold otherwise renders the other theories of liabilities outlined in

[2] https://www.jagcnet.army.mil/ACCALibrary/cases/opinion/file/529

Article 120(b), UCMJ, as merely superfluous, would eviscerate the need for any other theories of liability, and runs contrary to our superior court precedent." *Id*. at 26, 29 (citing *United States v. Sager*, 76 M.J. 158 (C.A.A.F. 2017)) (Walker, J., dissenting).

This court should find charging appellant with sexual assault *without consent* but relying on evidence of an *inability to consent* violated appellant's due process rights. As the defense argued at closing, the government's theory and evidence sought to convict appellant based solely on PFC [redacted] level of intoxication.[3] Both the majority and dissent in *Roe* agree that it is the government's burden to affirmatively prove the victim did not consent for a charge of sexual assault *without consent*. Unlike in *Roe,* however, the evidence of intoxication does not circumstantially support a finding of affirmative non-consent. Instead, the government proceeded throughout trial on the theory that PFC [redacted] could not consent due to her intoxication, and therefore the charged sexual act was implicitly without consent. This tactic, in the context of appellant's case, impermissibly resulted in appellant's conviction without the government having to prove affirmative non-consent or the additional knowledge element for incapable

[3] While the government introduced some evidence concerning PFC [redacted] expressing non-consent, such expressions were not in the context of sexual acts between appellant and PFC [redacted] (R. at 269; Pros. Ex. 22).

of consent. Indeed, the purported victim admitted that she may have consented to sexual acts but was unable to remember doing so.

The government prosecuted appellant on an uncharged theory where the alleged victim was incapable of consent when the government only notified appellant of actual, affirmative non-consent. As a result, this violated appellant's due process right to fair notice.

Conclusion

WHEREFORE, the appellant respectfully requests this honorable court set aside his conviction and sentence.

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to the Army Court and Government Appellate Division on 29 December 2022.

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