IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.	**Docket No. ARMY 20220432**
Specialist (E-4) **RODRIGO L. URIETA** United States Army, Appellant	Tried at Fort Stewart, Georgia, on 22 April, 20 July and 22-25 August 2022, before a general court-martial convened by the Commander, 3d Infantry Division and Fort Stewart, Lieutenant Colonel Albert G. Courie III., Military Judge, presiding.

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

Assignments of Error[1]

I.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY DENYING THE DEFENSE CHALLENGE FOR CAUSE AGAINST SFC [redacted], WHO BELIEVED A SOLDIER WHO HIRED A CIVILIAN DEFENSE COUNSEL DID NOT BELIEVE IN HIS DEFENSE.

[1] The government reviewed the matters submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and respectfully submits that they lack merit. The government respectfully requests notice and opportunity to file a supplement brief should this court consider any of those matters meritorious.

II.

WHETHER APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED WHERE APPELLANT WAS CHARGED WITH COMMITTING SEXUAL ASSAULT AND ABUSIVE SEXUAL CONTACT WITHOUT CONSENT, BUT THE GOVERNMENT EVIDENCE AND THEORY WAS SEXUAL ASSAULT AND ABUSIVE SEXUAL CONTACT WHILE ASLEEP.

Statement of the Case

On 25 August 2022, an enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of sexual assault without consent, one specification of abusive sexual contact without consent, and false official statement, in violation of Articles 120 and 107 Uniform Code of Military Justice, 10. U.S. C. §§ 920 and 907 [UCMJ]. (Statement of Trial Results [STR]). The military judge sentenced appellant to eight months confinement and a dishonorable discharge. (STR). On 14 October 2022, the convening authority approved the adjudged sentence. (Action). The military judge entered judgment on 14 October 2022. (Judgment).

I. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY DENYING THE DEFENSE CHALLENGE FOR CAUSE AGAINST SFC [redacted], WHO BELIEVED A SOLDIER WHO HIRED A CIVILIAN DEFENSE COUNSEL DID NOT BELIEVE IN HIS DEFENSE.

Relevant Facts

During group voir dire, the assistant defense counsel asked, "has anyone here ever heard it said that if a Soldier hires civilian defense counsel, it must mean the Soldier is guilty?" (R. at 275). SFC [redacted] gave a positive response. (R. at 275). The assistant defense counsel continued, "Would anyone here hold it against [appellant], our Soldier, for having hired a civilian defense counsel?" (R. at 275). All panel members responded in the negative. (R. at 275).

During individual voir dire, the assistant defense counsel asked SFC [redacted] to elaborate on his answer. (R. at 382). SFC [redacted] responded "to me, hiring an outside civilian lawyer means that you don't trust your defense very much," means that "I wouldn't hold it against [the defense counsel] it's just a perception" issue. (R. at 382).

"In my experience, I have only ever seen people hire civilian counsel after they have already been through the trial and their lawyers had let them down – I wouldn't say let them down. They didn't get the outcome they were looking for,

so they went to retrial with a civilian lawyer, instead of a military [lawyer]." (R. at 383)

When asked by the military judge to clarify what SFC [redacted] meant by "you don't trust your defense very much," SFC [redacted] replied that he meant both the defense counsel and the case the defense counsel planned to present. (R. at 385).

The trial counsel directly asked SFC [redacted] if he believed appellant was guilty solely because he hired a civilian defense counsel. SFC [redacted] replied "I don't think it's an admission of guilt, or a thought of guilt…it is just unusual to me…[it has an] outside perception of, yes, when you hire a civilian attorney, that basically, you don't trust the system from the military standpoint—that you have to go outside the military to bring somebody in." (R. at 386).

The trial counsel again directly asked SFC [redacted] whether appellant's hiring of civilian defense counsel would negatively affect SFC [redacted]'s view of the appellant during trial. "[I]f you're selected and you're weighing the facts, and weighing the evidence, considering everything, are you going to hold it against [appellant] because he's hired a Civilian Defense Counsel…Will you consider that at all in reaching a finding during your deliberations?" SFC [redacted] replied, "Not at all…just the facts." (R. at 386).

Defense challenged SFC [redacted] for actual and implied bias during an Article 39a hearing. (R. at 398). The military judge stated that he considered the challenge for cause based on actual and implied bias, as well as the liberal grant mandate. (R. at 399). The military judge found no actual or implied bias on the part of SFC [redacted], and the military judge included the following rationale:

> My notes are also that, when pressed on it, he [SFC [redacted]] said -- considered what the government said – it was an outside perception that he believes that the public or others have, not that he personally holds that perception. And when specifically asked if he would hold it in any way against the accused, he said, not at all, he would just look at the facts of the case.

(R. at 399)

The military judge also stated, "I did consider the liberal grant mandate in all of those [panel members] when I considered both the actual and implied bias of each of the challenges." (R. at 400).

Standard of Review

A military judge's ruling on actual bias of a panel member is reviewed for abuse of discretion. *United States v. Nash*, 71 M.J. 83, 88 (C.A.A.F. 2012). Implicit bias challenges are reviewed using a "standard that is less deferential than

abuse of discretion, but more deferential than de novo review." *United States v. Hennis*, 79 M.J. 370, 385 (C.A.A.F. 2020).

Law

"As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel." *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001). Rule for Courts-Martial [R.C.M.] 912 (f)(1)(N) provides, "[a] member shall be excused for cause whenever it appears that the member . . . should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." Rule for Courts-Martial [R.C.M.] 912 "encompasses challenges based upon both actual bias and implied bias." *United States v. Elfayoumi*, 66 M.J. 354, 356 (C.A.A.F. 2008).

"Actual and implied bias are 'separate legal tests, not separate grounds for a challenge.'" *Nash*, 71 M.J. at 88 (quoting *United States v. Armstrong*, 54 M.J. 51, 53 (C.A.A.F. 2000)). "A military judge's determinations on the issue of member bias, actual or implied, are based on the 'totality of the circumstances particular to a case.'" *United States v. Terry*, 64 M.J. 295, 302 (C.A.A.F. 2007) (quoting *United States v. Strand*, 59 M.J. 455, 456 (C.A.A.F. 2004)). "The test for actual bias is whether any personal bias 'is such that it will not yield to the evidence

presented and the judge's instructions.'" *Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997) (quoting *United States v. Reynolds*, 23 M.J. 292, 294 (C.M.A. 1987). Because a challenge based on actual bias involves credibility judgments, and because the military judge has an opportunity to observe the demeanor of court members and assess their credibility during voir dire, a military judge's ruling on actual bias is afforded great deference." *United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007) (internal citations and quotations omitted).

Where "there is no actual bias, implied bias should be invoked rarely." *Wiesen*, 56 M.J. at 174 (internal citation and quotation omitted). "Implied bias addresses the perception or appearance of fairness of the military justice system." *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002). In testing for implied bias, this court considers "whether the risk that the public will perceive that the accused received something less than a court of fair, impartial members is too high." *United States v. Townsend*, 65 M.J. 460, 463 (C.A.A.F. 2008); *see United States v. Peters*, 74 M.J. 31, 34 (C.A.A.F. 2015) (holding "the core of [the] objective [implicit bias] test is the consideration of the public's perception of fairness in having a particular member as part of the court-martial panel"). "[A]n implied bias analysis is viewed through the eyes of a member of the public

watching the proceedings." *United States v. Hines*, 75 M.J. 734, 740 n.5 (Army Ct. Crim. App. 2016) (emphasis in original); *see also United States v. Woods*, 74 M.J. 238, 243 n.1 (C.A.A.F. 2015) (noting "resolving claims of implied bias involves questions of fact *and demeanor*, not just law") (emphasis added).

Courts may find implied bias when "regardless of an individual member's disclaimer of bias, 'most people in the same position would be prejudiced [i.e. biased].'" *United States v. Strand*, 59 M.J. 455, 459 (C.A.A.F. 2004) (quoting *United States v. Napolitano*, 53 M.J. 162, 167 (C.A.A.F. 2000)). A military judge who places his implied bias analysis on the record "warrants increased deference from appellate courts." *United States v. Dockery*, 76 M.J. 91, 96 (C.A.A.F. 2017) (citation omitted). Further, in *Clay*, the CAAF described the rarity of disturbing a military judge's properly considered ruling on implied bias:

> [W]here a military judge considers a challenge based on implied bias, recognizes his duty to liberally grant defense challenges, and places his reasoning on the record, instances in which the military judge's exercise of discretion will be reversed *will indeed be rare*. In such instances, what might appear a close case on a cold appellate record, might not appear so close when presented from the vantage point of a military judge observing members in person and asking critical questions that might fill any implied bias gaps left by counsel.

64 M.J. at 277 (emphasis added).

In the instant case, SFC [redacted] had a misinformed perception of the military criminal justice system. "There is no per se rule that requires a member's exclusion because of an initial erroneous view of the law." *Hines*, 75 M.J. at 741 (citing *Woods*, 74 M.J. at 244). In *Hines*, this court developed six non-exhaustive factors to evaluate "the totality of the circumstances" where "the military judge has denied an implied bias challenge for cause based on a members erroneous view of the law." 75 M.J. at 741. These factors include: (1) "whether there is evidence that the government caused or endorsed the member's erroneous view of the law"; (2) "the degree to which the member's misunderstanding is on a fundamental principle of law or instead reflects a mere technical legal misunderstanding"; (3) "the degree to which the member's erroneous view is strongly held"; (4) whether the military judge corrected the member's erroneous view of the law"; (5) "the importance of the legal issue in the question in the case"; and (6) "whether the member was the senior member of the panel." *Id.* at 743. Finally, even if this court determines the military judge erred in denying the defense's challenge, it should still consider whether appellant was prejudiced by the error. *Id.*

Argument

SFC [redacted] clearly stated he would consider legal definitions, apply the legal definitions to the facts of the case, and would not draw any negative inference toward the accused due the accused's decision to hire a civilian defense counsel [CDC]. (R. at 383, 385–86). Contrasted with the facts in *United States v. Colonrodriguez,* both the trial counsel and military judge asked SFC [redacted] follow-up questions to rehabilitate and correct his general perception of hiring a Civilian Defense Counsel. 2021 CCA LEXIS 560, at *19–23 (Army Ct. Crim. App. 22 Oct 2021) (mem. op.) (R. at 382, 385–86). Additionally, this case is different from *Colonrodriguez* in that the general public would not view this trial as unfair because SFC [redacted] had no unchallenged bias. (R. at 385–86) Lastly, this case differs from *Colonrodriguez* because this case was not a "close case" and the military judge was not obligated to dismiss SFC [redacted] under the liberal grant mandate. (R. at 385–86, 399).

The military judge did not err in denying the defense's challenge to SFC [redacted] because SFC [redacted] was not actually or impliedly biased. The military judge cited his consideration of the liberal grant mandate and placed a detailed analysis of the law to the facts on the record; therefore, "deference is surely warranted."

Downing, 56 M.J. at 422; *see also United States v. Quill*, ARMY 20160454, 2018 CCA LEXIS 390, at *21–22 (Army Ct. Crim. App. 10 Aug. 2018) (mem. op.) ("[T]he military judge included his analysis and plainly stated the liberal grant mandate as part of his decision. As such, we give more deference to his ruling than if he had failed to do so.").

A. SFC [redacted] was not actually biased.

The record does not support a conclusion that SFC [redacted] had a personal bias that would not yield to the evidence presented and the judge's instructions. Under the test set forth in *Napoleon,* the military judge was correct that SFC [redacted] had no personal bias against appellant.

B. SFC [redacted] was not impliedly biased.

This court should use the framework articulated in *Hines*, 75 M.J. at 741–42, to evaluate the totality of the circumstances and conclude the military judge correctly found no implicit bias in this case. (R. at 595–96). Here, the first, third, fourth, and sixth *Hines* factors favor no implied bias.

First, there is no evidence that "the government caused or endorsed the member's erroneous view of the law." *Id.* at 741. In fact, SFC [redacted] first provided the statement at issue in response to defense questioning. (R. at 275). Nothing in

the record indicates that SFC [redacted]'s perception came from trial counsel themselves. Further, SFC [redacted]'s perception of the CDC did not come from government-mandated training. *See United States v. Rogers*, 75 M.J. 270, 272 (C.A.A.F. 2016) (noting the panel member's misunderstanding of consent came from Coast Guard training). Finally, the government did not have "constructive notice" of SFC [redacted]'s views as SFC [redacted] voiced this perception for the first time in response to a voir dire question by defense counsel. *Woods*, 74 M.J. at 244. (R. at 275, 382, 385). Thus, this factor weighs against appellant's assertion that he is entitled to relief because the MJ erred in not excusing SFC [redacted] as an impliedly biased panel member.

Likewise, the third, fourth, and sixth *Hines* factors weigh against implied bias. SFC [redacted]'s perception that hiring a CDC meant that appellant did not trust his team or his case. Upon further questioning by counsel, SFC expressed that while hiring civilian counsel is "unusual" he would "not at all" hold appellant's decision to hire a CDC against appellant, and SFC [redacted] expressed in response to a question on the legal definition of consent that he would yield to the military judge's instructions. (R. at 382, 385–86, 399). Thus, like the panel member in *Hines*, there was no evidence that SFC [redacted]'s views were unyielding. 75 M.J. at

743. Additionally, in regard to the fourth factor, the trial counsel specifically asked SFC [redacted] if hiring a CDC was an admission of guilt. (R. at 386). SFC [redacted] replied no.[2] (R. at 386).

Finally, SFC [redacted] was not the senior member of the panel; there was a major as the senior member. (R. at 605). Taken together, these factors strongly weigh in favor of no implied bias.

Appellant argues that SFC [redacted]'s perception implicates the second and fifth *Hines* factors. 75 M.J. at 741–42. (Appellant's Br. at 8–9). Contrary to *Woods*, in which the panel member presumed the accused was guilty unless proven innocent, SFC [redacted]'s misinformed perception about defendants who retain outside counsel did not pertain to one of the "fundamental tenants" of criminal law. 74 M.J. at 244. Additionally, *Woods* differentiates these types of fundamental rights with legal technicalities. SFC [redacted] voicing the general perception that appellant might have little faith in the strength of his case or in his defense counsel to present that case is closer to a legal technicality easily overcome by the military judge's

[2] "I don't think it's an admission of guilt, or a thought of guilt, by hiring a civilian attorney. I just—it is unusual to me." (R. at 385–86).

correction and is not "importan[t] [to] the legal issue in question to the case." *Hines*, 75 M.J. at 741–42.

Consequently, when evaluating the totality of the circumstances, the *Hines* factors weigh in favor of no implied bias. There is no risk that a member of the public, watching the proceeding, would perceive that appellant "received something less than a court of fair, impartial members . . . ." *Woods*, 74 M.J. at 243–42 (quoting *United States v. Bagstad*, 68 M.J. 460, 462 (C.A.A.F. 2010)). The record does not support actual or implied bias on the part of SFC [redacted], and the military judge did not err when he denied appellant's challenge for cause.

II. WHETHER APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED WHERE APPELLANT WAS CHARGED WITH COMMITTING SEXUAL ASSAULT AND ABUSIVE SEXUAL CONTACT WITHOUT CONSENT, BUT THE GOVERNMENT EVIDENCE AND THEORY WAS SEXUAL ASSAULT AND ABUSIVE SEXUAL CONTACT WHILE ASLEEP.

Relevant Facts

Appellant and PV2 [redacted] first met and became friends on Tinder in 2021. (R. at 416). On 10 September 2021, PV2 [redacted] invited appellant to her barracks room to watch a movie on her phone. (R. at 418). PV2 [redacted] stated that she was already dressed in undergarments for comfort reasons. (R. at 419). Later in the evening,

PV2 [redacted] became sleepy, told the appellant that she wanted to go to sleep, and told appellant to stay over if he wished. (R. at 419). Appellant was wearing shorts when he climbed into bed with PV2 [redacted] to continue watching the movie on her phone. (R. at 419–20). After some time, PV2 [redacted] began to fall asleep. (R. at 421). PV2 [redacted] awoke to appellant groping her breasts. (R. at 421–22). PV2 [redacted] told appellant to stop and that she did not want this. (R. at 422–23). She then fell back asleep but awoke to appellant digitally penetrating her vagina. (R. at 423). Again, she told appellant to stop, which he did, and he began apologizing to PV2 [redacted]. (R. at 423). PV2 [redacted] fell back asleep. (R. at 424). She awoke again this time to appellant penetrating her vagina with his penis. (R. at 425). PV2 [redacted] became very uncomfortable because she "was being raped" by appellant. (R. at 425). While appellant initially contests that he actually penetrated her vagina with his penis, he admitted trying and failing three times to penetrate her with his penis. (Pros. Ex. 3, p.1). Appellant eventually admitted in a sworn statement to CID that he penetrated PV2 [redacted]'s vagina with his penis. (Pros. Ex. 4, p. 1).

On 13 September 2021 as well as on both 22 and 28 September 2021, appellant made a recorded statement to CID and two written statements. (R. at 519, 527, 538). In the recorded interview, the appellant admitted digitally

penetrating PV2 [redacted] after using his own pre-ejaculate for lubrication, thus obviating a need for a SAFE kit. (R. at 518–19). Of his own volition, appellant admitted in written statements to CID that he knew PV2 [redacted] was asleep when he penetrated her vagina with his penis. (R. at 541, Pros. Ex. 3, p. 2). Defense's argument that this testimony and admission were coerced was not persuasive at trial. (R. at 656).

Standard of Review

The "Courts of Criminal Appeals have a statutory mandate to 'conduct a de novo review of both legal and factual sufficiency of a conviction.'" *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017) (citation omitted). Questions of legal and factual sufficiency are reviewed de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law

This court reviews legal and factual sufficiency of court-martial convictions and only affirms findings of guilty that are correct in law and fact. Article 66(c), UCMJ; 10 U.S.C. § 866(c). This court employs an extremely deferential test when evaluating legal sufficiency. Under the test, "evidence is legally sufficient if, viewed in the light most favorable to the [g]overnment, a rational trier of fact *could*

have found the essential elements of the crime beyond a reasonable doubt." *United States v. Winckelmann*, 70 M.J. 403, 406 (C.A.A.F. 2011) (emphasis added). This court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Craion*, 64 M.J. 531, 534 (Army Ct. Crim. App. 2006); *Bright*, 66 M.J. at 365.

"The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is convinced of appellant's guilt beyond a reasonable doubt." *Craion*, 64 M.J. at 534 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). To sustain appellant's conviction, a court of criminal appeals "must find that the government has proven all essential elements and, taken together as a whole, the parcels of proof credibly and coherently demonstrate that appellant is guilty beyond a reasonable doubt." *United States v. Gilchrist*, 61 M.J. 785, 793 (Army Ct. Crim. App. 2005). Under this analysis, "[r]easonable doubt . . . does not mean the evidence must be free from conflict." *United States v. Rankin*, 63 M.J. 552, 557 (N.M. Ct. Crim. App. 2006).

A court applies "neither a presumption of innocence nor a presumption of guilt," but "must make its own independent determination as to whether the

evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). While weighing the evidence, a reviewing court must be mindful that it did not personally observe and hear the witnesses. Article 66, UCMJ; *Turner*, 25 M.J. at 325.

Due process "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) (citing *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011). internal citations omitted). A specification, therefore, must provide an accused both notice of the charge he is to defend against and shield him from double jeopardy. *United States v. Roe*, No. ARMY 20200144, 2022 CCA LEXIS 248 (Army Ct. Crim. App. 27 Apr. 2022) (mem. op.) (discussing *Turner*, 79 M.J. at 403). "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 tried and convicted." *United States v. Riggins*, 75 M.J. 78, 83 (C.A.A.F. 2016) (*citing United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010).

"Courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete."

United States v. Sager, 76 M.J. 158, 161 (C.A.A.F. 2017) (citing *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54, (1992)).[3] Consent is defined as "a freely given agreement to the conduct at issue by a *competent person*." *Manual for Courts-Martial, United States* (2019 ed.) [*MCM*], pt. IV, ¶60.a.(g)(7) (emphasis added). The MCM further defines "incapable of consent" as "a person who is (a) incapable of appraising the nature of the conduct at issue or (b) physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act at issue." *MCM*, pt. IV, ¶60.a.(g)(8). Evidence tending to show a person *could not* consent to the conduct at issue may be considered as part of the surrounding circumstances in assessing whether a person *did not* consent, and the military judge did not err in permitting trial counsel to employ this theory at Appellant's court-martial." *Roe*, 2022 CCA LEXIS 248 at *17–18, (adopting language from *United States v. Williams*, No. ACM 39746, 2021 CCA LEXIS 109 (A.F. Ct. Crim. App. Mar. 12, 2021) (unpub.). Proving the victim was asleep at

[3] "Canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Germain*, 503 U.S. at 253–54.

the time of the sexual act is "one of many permissible ways for the government to attempt to prove 'without consent.'" *Id.* at 14. By way of logic, if the government proves that a victim is asleep or unconscious and therefore legally incapable of consenting at the time of a sexual act, that is strong evidence that the victim did not, in fact, consent." *Id.* at 14.

"Only where the statute remains unclear, does the court look next to the legislative history." *Sager,* 76 M.J. at 161 (citing *United States v. Falk*, 50 M.J. 385, 390 (C.A.A.F. 1999) (cleaned up). The canon of surplusage dictates that "every word and every provision is to be given effect and that no word should be ignored or needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." *Sager,* 76 M.J. at 161.

Ignorance or a mistake of fact can be a defense when there is an incorrect belief of consent based on true circumstances. R.C.M. 916(j)(1). The circumstances must have actually been what the accused believed them to be. *Id.* When the mistake is to general intent or knowledge, it must have existed in the mind of the accused and be "reasonable under all the circumstances." *Id.*; *see also United States v. Willis*, 41 M.J. 435, 437 (C.A.A.F. 1995) (holding "that an honest

and reasonable mistake on the part of a servicemember as to the consent of a female is a valid defense to a charge.")

Factfinders "are expected to use their common sense in assessing the credibility of testimony as well as other evidence presented at trial." *United States v. Frey*, 73 M.J. 245, 250 (C.A.A.F. 2014). "In weighing and evaluating the evidence, [the factfinder is] expected to use [his] own common sense and [his] knowledge of human nature and the ways of the world. In light of all the circumstances in the case, [the fact finder] should consider the inherent probability or improbability of the evidence." Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 2-5-12 (29 February 2020) [Benchbook]. The elements of sexual assault (without consent) are: That the accused committed a sexual act upon another person; and (ii) that the accused did so without the consent of the other person. 10 U.S. Code § 920, *MCM*, pt. IV, ¶60.b.(2)(b)(i).

Argument

A. Appellant's conviction does not violate his due process rights.

Appellant was clearly on notice of the charges and theory that the government intended to prove at trial. Furthermore, the record is clear that defense counsel raised direct defenses to the government's charge and theory. There is no

prohibition to the government's means of proving their case. Ultimately, there is no due process violation in this case.

B. Appellant was on notice of the government's method of proving the sexual act was done without PV2 [redacted] consent.

The question this court need answer is whether appellant was on notice of the nature of the offense and the legal theory that would be used to try and convict him. *United States v. Riggins*, 75 M.J. 78, (C.A.A.F. 2016). The government clearly presented a theory that PV2 [redacted] did not consent and used, among other evidence, that she was not awake to consent as proof.[4] This is highlighted throughout the record of trial but most especially in government's closing. (R at 356–66.) The facts of this case are sufficiently clear that defense was aware and prepared to defend against the government's permissible use of evidence that tended to show PV2 [redacted] could not consent in order to prove that she did not consent.[5] *See*: *Roe*, 2022 CCA LEXIS 248, at *17–18. Appellant was charged

[4] Government also elicited testimony from PFC [redacted] that she told appellant "no," multiple times when he woke her with previous a[redacted]ses that night. (R. at 422–24). Appellant mentioned multiple times that PFC [redacted] was asleep when he was abusing her. (Pros. Ex. 3, 4).

[5] Contrary to appellant's assertion tha[redacted]e government offered no direct evidence of an expression of non-consent, PV2 [redacted] specifically testified that she did not

with a violation of 120(b)(2)(A). The charge sheet reflected the same at preferral and at referral. The accused waived his Article 32 preliminary hearing on 8 March 2022. (Article 32 Preliminary Hearing Memorandum, 7 April 2022, "SUBJECT: Advice on Disposition of Court-Martial Charges, *U.S. v. SPC Rodrigo L. Urieta*, E Company, 703d Brigade Support Battalion, 2d Armored Brigade Combat Team, 3d Infantry Division, Fort Stewart, GA 31314.") As the definition of consent in Article 120(g)(7) outlines that an *asleep*, unconscious, or incapable person cannot consent, it is permissible and reasonably foreseeable that the government can prove its case with evidence that the victim was incapable of consenting. There is no inherent due process violation by charging Article 120(b)(2)(A) and using evidence of being asleep to prove lack of consent. *Id.* at 14.

Appellant's counsel raised defenses against the government's theory through cross-examination of multiple CID agents to undermine the reliability of appellant's admissions. (R. at 522, 541–45). Throughout the defense's presentation of their case, to include opening statement, it is clear that appellant

---

consent to sexual activity with the accused and told him "no" multiple times after he woke her up. (R. at 422–24).

was on notice of the charge and theory and was presenting a defense of mistake of fact as to consent. (R. at 409–10, 602).

Appellant's contention that the government's use of evidence of PV2 [redacted] being asleep violates his due process rights is inconsistent with this court's recent decisions in *United States v. Roe, United States v. Coe,* and *United States v. Mendoza*, and the facts are similar in many ways. *United States v. Coe,* 2023 CCA LEXIS 354, (Army Ct. Crim. App. 17 Aug. 2023) (summ. op.) *United States v. Mendoza,* 2023 CCA LEXIS 198, (Army Ct. Crim. App. 8 May 2023) (mem. op.) Appellant was on notice for the charge of sexual assault without consent and the government permissibly used the evidence of PV2 [redacted] testimony that she was asleep, but after she awoke, she told appellant to stop multiple times. (R. at 421–26, Pros. Ex. 3, p.1, Pros. Ex. 4, p.1). By introducing evidence that appellant knew PV2 [redacted] was asleep when the abuses occurred, government demonstrated PV2 [redacted] was incapable of consent, just as in *Roe*. 2022 CCA LEXIS 248, at *17-18.[6] Similarly, only after the threat of DNA evidence contradicted his statement did the appellant, as in *Roe,* claim any penetration, whether digital or penile, occurred. *Id.*

[6] See also *Williams*, 2021 CCA LEXIS 109.

at *7-8. (R. at 541, Pros. Ex. 1). Most critically, the present case is similar to *Roe, Coe,* and *Mendoza* in that the issue of "without consent" was not *solely* decided through an inability to consent due to intoxication, consciousness, or ability to consent. *See: Roe*, 2022 CCA LEXIS 248, at *17–18, *Coe,* 2023 CCA Lexis 354 at *6–7, and *Mendoza,* 2023 CCA LEXIS 198, at *7–9. Rather, there is evidence beyond the victim's state of sleep, including PV2 [redacted] telling appellant to stop multiple times, her refusal to reciprocate appellant's sexual advances, PV2 [redacted] words and actions, and the testimony of third parties. (R. at 421–26, 462, Pros. Ex. 3, p.2). The similarities between the cases, from the victim's inability to consent because she was asleep, unconscious, or otherwise unaware, and the actions PV2 [redacted] made toward stopping appellant and repeatedly communicating non-consent when she did wake up, make the application of *Roe's* persuasive authority the most appropriate and consistent action. *See: Coe,* 2023 CCA Lexis 354 at *7.

C. The military judge's instruction was proper.

Appellant alleges the military judge gave an incorrect instruction. (App. Br. p. 15–16). Specifically appellant takes issue with the language, "…if you believe that [PV2 [redacted] was asleep during any of the alleged sexual conduct. There has been also been [sic] evidence tending to show that, at the time of the alleged offenses,

the accused mistakenly believed [PV2 [redacted] was awake. Mistake of fact is a defense to those charged offenses." (App. Br. p. 15–16).

The transcript of the R.C.M. 802 hearing clearly indicates that this language was added at the request of the defense, and that the government's objection was made to keep the language in question out of the instruction. (R. at 586–87). In fact, the verbatim text from the panel instructions reads, "If you believe that PV2 [redacted] was asleep during any of the alleged sexual conduct, there has also been evidence tending to show that, at the time of the alleged offense(s), the accused mistakenly believed PV2 [redacted] was awake." (App. Ex. XXIV, p. 4). Though this might seem a trivial distinction, the new sentence truncates the logic of appellant's argument that the military judge instructed the panel they could find appellant guilty if it disregarded evidence of appellant's mistake fact as to consent. As stated by defense counsel at trial, appellant requested that language be added to clarify to the panel that its analysis of consent did not stop "on the surface level." (R. at 587). The military judge added the language at the request of appellant, and this Court should uphold the decision.

[redacted]

Conclusion

WHEREFORE, the government respectfully requests this honorable Court affirm the findings and sentence.

[redacted]
CPT, JA
Appellate Attorney, Government
Appellate Division

[redacted]
CHASE C. CLEVELAND
MAJ, JA
Branch Chief, Government
Appellate Division

[redacted]
JACQUELINE J. DEGAINE
LTC, JA
Deputy Chief, Government
Appellate Division

[redacted]
CHRISTOPHER B. BURGESS
COL, JA
Chief, Government
Appellate Division

CERTIFICATE OF SERVICE U.S. v. URIETA (20220432)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at ***usarmy.pentagon.hqda-otjag.mbx.dad-accaservice@mail.mil*** on this 29th day of November 2023.

[redacted]

DANIEL L. MANN
Senior Paralegal Specialist
Government Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060-5546
[redacted]***@army.mil***