

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

v.

Private (E-2)

Matthew L. Coe

United States Army

Appellant

**MOTION FOR RECONSIDERATION
AND MOTION FOR
RECONSIDERATION BY THE
COURT *EN BANC***

Docket No. ARMY 20220052

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**

COME NOW the undersigned appellate defense counsel, under Rules 23,
27, and 31 of the Rules of Appellate Procedure, and move for reconsideration and
reconsideration by the court *en banc* of this court’s 17 August 2023 summary
disposition opinion. (Appendix A).

Appellant requests this court reconsider its decision *en banc* because this
court’s fractured decision in this case and others raises questions of exceptional
importance and consideration by the entire court is necessary to secure uniformity
of the court’s decisions.

Statement of the Case

On 29 December 2022 appellant submitted his brief to this court challenging the grounds that appellant's due process rights were violated when he was convicted of sexual assault under an uncharged theory of liability. Additionally, appellant challenged the factual sufficiency of his convictions in his matters submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). On 18 April 2023, the government filed its response. Appellant replied on 24 April 2023. This court rendered a fractured 2-1 decision on 17 August 2023, affirming the finding and sentence. The court served appellant's counsel the same day. (Appendix A)

In accordance with Rule 31 of the Rules of Appellate Procedure, appellant files this motion within the proscribed time limits. The Court of Appeals for the Armed Forces has not acquired jurisdiction over this case because appellant filed this motion fewer than thirty days from service of this court's decision. *See* Rule 31(a).

Grounds for Reconsideration and Reconsideration *En Banc*

This case should be reviewed *en banc* because it is of exceptional importance and the likelihood that this issue will come up again and again.

If this case stands, it will serve as a blank check, allowing the government to charge servicemembers under a broad statute with an overbroad definition of

“consent” that alleviates the government of its sole burden to prove every element of a crime beyond a reasonable doubt.

The majority opinion failed to consider the varied elements contained in the subsections of Article 120, UCMJ. While evidentiary overlap is permissible, when grouped with untailored, overly broad instructions and different elemental schemes, it can lead to the present situation where Article 120(b)(2)(B) and Article 120(b)(3)(A) are rendered meaningless.

1. The majority failed to address appellant’s due process claim that the panel likely convicted him of an uncharged crime.

At the heart of appellant’s argument in this case is that his due process rights to notice were violated because the government charged him with one crime (sexual assault without actual consent) but, due to the evidence presented, the elements, and the overly broad definition of consent, appellant was convicted of a different, uncharged crime (sexual assault where the alleged victim is incapable of consenting).

The majority ignored this straightforward argument. Instead, the court again engages in judicial law making. Citing the other fractured opinion *Roe*, the court allows for “additional evidence of lack of consent beyond intoxication level in this case” to be sufficient proof beyond a reasonable doubt for a lack of consent charge. *United States v. Roe*, ARMY 202200144, 2022 CCA LEXIS 248 (Army Ct. Crim. App. 27 April 2022).

As the dissenting judge in this case rightly notes, “because the Government’s evidence that the victim did not consent was weak, it used evidence that she was incapable of consenting to shore up the lack of consent element.” (App. A at 10) (Morris. J dissenting). This little bit of column A, little bit of column B approach impermissibly lowers the burden of proof in violation of appellant’s Due Process rights.

Further, the majority focused solely on the government’s ability to use evidence of intoxication to prove a lack of consent. In doing so, the majority fails to consider the surplusage canon argument. Controlling precedent *requires* clarity that an accused only be convicted of the crime for which he was charged. See *Schooner Hoppet v. United States*, 11 U.S. 389 (1813); *United States v. Rauscher*, 71 M.J. 225, 227 (C.A.A.F. 2012); *Stirone v. United States*, 361 U.S. 212, 217 (1960); *United States v. Vidal* 23 M.J. 310, 325 (C.M.A. 1987). “When two criminal statutes arguably apply to the same conduct, the narrower statute, as a rule, occupies the field.” *United States v. Cotia*, 785 F.2d 497, 502 (4th Cir. 1986) (citing *Busic v. United States*, 446 U.S. 398, 406 (1980)).

“The principle of statutory interpretation favoring enforcement of the specific over a more general statute criminalizing the same misconduct serves to resolve this question in favor of the accused soldier.” *United States v. Gross*, 73 M.J. 864 (Army Ct. Crim. App 2014) (cleaned up). This court should grant

appellant's motion to ensure this issue is appropriately addressed and to provide clarity to the field.

Proving that someone was highly intoxicated during sex may prove that the person was incapable of consenting, however, it does not complete the task of proving that they did not *in fact* consent or express consent. Nor does it disprove an honest and reasonable mistake of fact defense.

2. The Conviction Was Factually Insufficient

Allowing this charging scheme has caused appellate judges to read the record for factual sufficiency as if they were reading the facts in dramatically different cases.

Judge Morris found the conviction “against the weight of the evidence.” (App. Ex A, at 5). Here, the alleged victim agreed to participate in a group orgy by the river. She had consensual sex with appellant before drinking heavily and before others became involved. (App. Ex. A, at 7). When another female, also participating in the orgy broke off from the group, the alleged victim knee crawled over to her to encourage her to continue participating. (App. Ex. A, 9). At one point, after the sex had ended, she appeared to express remorse that she had cheated on her boyfriend, and most importantly, she conceded that she “could have said yes to the group.” (App. Ex. A, at 9)

The only indicia of non-consent highlighted by the majority was the alleged victim making the statement “I don’t want this,” and then telling the forensic nurse that she told “them,” “no, stop.” (App. Ex. A, at 3). The majority takes these non-specific statements that were not about appellant and spins it as some level of non-consent and when combined with the intoxication evidence gets to proof beyond a reasonable doubt.

The dissent, on the other hand, points out, the “I don’t want this” statement was made while the alleged victim was having sex with someone else – not appellant. (App. Ex. A, at 7). Those who observed the sex with appellant did not intervene because, “at least from their perspective it appeared the victim was enjoying the exchange.” (App. Ex. A, at 8).

The majority and defense look at the facts differently because they have a different view of what is required to meet the elements of the offense. For the majority mere indicia of non-consent, even if it was not proof beyond a reasonable doubt, even if it was not specific to appellant, despite evidence of enthusiastic participation, combined with intoxication evidence is enough. For the dissent, only proof of lack of consent beyond a reasonable doubt will suffice.

3. This Issue Will Come Up Again and Again

This is the third opinion this court has issued on this same issue in the last two years alone, all resulting in divided rulings. Beginning with *Roe*, ARMY

202200144, 2022 CCA LEXIS 248, and then again in *United States v. Mendoza*, ARMY 20210647, (Army Ct. Crim App. 8 May 2023) and now this case. More cases making this same argument will follow.

Further, with two different judges of this court being in the minority on this issue, a simple reshuffling of the panel composition of this court could result in an opinion holding the opposite view in a similar case.

This court must hear this case *en banc* and issue a precedential decision to put this issue to rest and provide guidance to the field.

Conclusion

The majority erroneously views this as a case about evidence rather than elements. The government had control over how they charged this case, and under the fundamental principles of justice, it must be held to its theory of culpability.

WHEREFORE, appellant, through undersigned appellate defense counsel, respectfully requests this court grant this motion for reconsideration and reconsideration by the court *en banc*.

PANEL NO. 3

MOTION FOR
RECONSIDERATION

GRANTED: _____

DENIED: _____


DATE: 06 December 2023

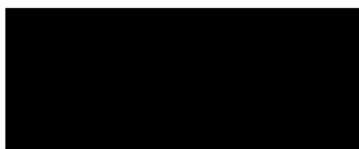
MOTION FOR RECONSIDERATION
BY THE COURT *EN BANC*


GRANTED: _____


DENIED: _____

DATE: 06 December 2023


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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army
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