IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee v. SGT (E-5) **TRENT V. GOINES**	**MOTION FOR RECONSIDERATION OF DENIAL OF MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF ON SPECIFIED ISSUES OUT OF TIME** Docket No. ARMY 20240529 Tried at Fort Riley, Kansas on 12 March, 31 July, 14 November, and 2-5 December by a general court-martial convened by Commander, 1st Infantry Division, Colonel Scott Oravec and Colonel Alex Pickands, military judges, presiding.

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

COMES NOW the undersigned appellate defense counsel, under Rules 23 and 24 of this court's Rules of Appellate Procedure and move for reconsideration of this court's 02 March 2026 denial of appellant's Motion to File Supplemental Brief on Specified Issues Out of Time.

On 12 March, 31 July, 14 November, and 2-5 December 2024 appellant was tried by a general court-martial (Enlisted Panel) at Fort Riley, Kansas. Appellant was convicted, contrary to his pleas, of one specification of Sexual Assault in violation of Article 120, UCMJ, 10 U.S.C.A. § 920. (R. at 608). The military judge sentenced appellant to be reduced to the grade of E-1, confined for 15

months, and dishonorably discharged. (R. at 664). The convening authority took no action on the findings and approved the sentence and disapproved appellant's request for waiver of automatic forfeitures. (Action). This court docketed appellant's case on 2 May 2025. (Referral and Designation of Counsel).

Appellant's counsel filed a brief on his behalf on 08 September 2025. The government (appellee) filed a brief on 07 January 2026. Appellant submitted a reply brief on 12 January 2026. This court specified issues on 11 February 2026, with a response from appellant due on 25 February 2026. Appellant filed a Motion to File Supplemental Brief Out of Time on 26 February 2026. This Court denied the Motion to File Supplemental Brief Out of Time on 2 March 2026.

Out of Time Explanation. Good cause exists to accept this pleading. Most importantly, this Court should have the benefit of the parties' input on the important specified issues. Similarly, appellant should have the benefit of briefing on these issues in a case where he has been convicted of an Article 120 offense and the government has agreed his conviction should be overturned. Undersigned counsel are filing this motion out of time due to a misunderstanding by Defense Appellate Division counsel as to when the brief was due. As Branch Chief, Defense Appellate Counsel is currently supervising two attorneys and managing his own case load with a combined case load of 35 cases. The brief was complete on 25 February 2026 and is attached to this motion as an appendix. There is no

prejudice to the appellee as their brief is not due until 14 days after appellant's brief is filed with the court.

Counsel apologizes to the court for missing the filing deadline. Counsel acted with reasonable diligence in responding to the Court's specified issues. Civilian counsel (Mr. Hockenberry) who did the primary drafting, had two other briefs due between this court's order on the specified issues and the due date and was in Court on 25 February 2026. On 10 February 2026, the date before the specified issue order, the NMCCA somewhat abruptly denied an EOT in a notably complex case, setting a final due date of 17 February 2026. As a result, Mr. Hockenberry spent 10-17 February 2026 briefing that case. Between 17-19 February 2026, Mr. Hockenberry drafted an AFCCA brief on an abbreviated deadline for an Article 62 appeal. Between 20-24 February 2026, Mr. Hockenberry drafted the brief on the specified issues in this case. On 25 February 2026, Mr. Hockenberry was in court.

Appellant prays this court reconsider its denial of appellant's Motion for Leave to File Supplemental Brief Out of Time and accept the attached Supplemental Brief on Specified Issues.

WHEREFORE, appellate defense counsel respectfully request that this court grant the instant motion.

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PANEL NO. 2

MOTION FOR RECONSIDERATION OF DENIAL OF MOTION TO FILE SUPPLEMENTAL BRIEF OUT OF TIME

GRANTED: [redacted]

DENIED: _____

DATE: 5 March 2026

MOTION TO FILE SUPPLEMENTAL BRIEF OUT OF TIME

GRANTED: [redacted]

DENIED: _____

DATE: 5 March 2026

APPENDIX

IN THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

UNITED STATES Appellee v. SGT (E-5) **TRENT V. GOINES** United States Army Appellant	**Supplemental Brief on Behalf of Appellant (Specified Issues)** Docket No. ARMY 20240529 Tried at Fort Riley, Kansas on 12 March, 31 July, 14 November, and 2-5 December by a general court-martial convened by Commander, 1st Infantry Division, Colonel Scott Oravec and Colonel Alex Pickands, military judges, presiding.

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

Specified Issues

I. CONSIDERING UNITED STATES v. DAVIS, 79 M.J. 329 (C.A.A.F. 2020), DID APPELLANT WAIVE ANY ERROR IN THE MILITARY JUDGE'S INSTRUCTIONS ON THE LAW?

II. IF APPELLANT DID NOT WAIVE ANY OBJECTION TO THE MILITARY JUDGE'S INSTRUCTIONS ON THE LAW, DID THE MILITARY JUDGE CORRECTLY INSTRUCT THE PANEL ON THE DEFINITION OF CONSENT CONSIDERING *UNITED STATES v. MOORE*?

III. WHETHER PRINCIPLES 1 AND 2, AS ARTICULATED IN *UNITED STATES v. MOORE* ALTERED THE ANALYSIS OF APPELLANT'S ASSIGNED ERRORS II, III, AND IV?

Statement of the Case

Adopted from appellant's original brief with the following addition: On 11 February 2026, this Court specified the above issues on its own motion.

Argument

I. CONSIDERING UNITED STATES v. DAVIS, 79 M.J. 329 (C.A.A.F. 2020), DID APPELLANT WAIVE ANY ERROR IN THE MILITARY JUDGE'S INSTRUCTIONS ON THE LAW?

1. Was Any Error Waived?

The error was not waived because trial defense counsel's failure to object resulted from an oversight and this Court should not presume competence given the accompanying claim of ineffective assistance of counsel (IAC).

An express waiver occurs when there is an "intentional relinquishment or abandonment of a known right," accomplished via affirmative action by the accused or the accused's counsel. *United States v. Malone*, __ M.J. __, No. 25-0140, 2026 LX 72966, at *9 (C.A.A.F. 20 Jan. 2026) (citations omitted). Affirmative action may occur when a defense counsel states that there is "no objection" to a proposed course of legal action – to include seeking no changes to a military judge's instructions. *Id.* (citing *United States v. Davis*, 79 M.J. 329, 330-32 (C.A.A.F. 2020)) (additional citations omitted).

In the five years since *Davis*, military practitioners have been wondering how to reconcile this framework with a scenario where defense counsel fails to

object because of an oversight. The CAAF's recent opinion in *Malone* provides clarification. The CAAF explains that, in the absence of an accompanying claim of IAC, appellate courts make "a presumption that defense counsel acted in a competent manner" – a presumption which influences the waiver analysis. *Id.* at *12 (citation omitted). As such, when IAC is *not raised*, courts will not be inclined to entertain arguments that a failure to object was an oversight, rather than a tactic. *Id.* *12-14. In *Malone*, IAC was not raised, so the CAAF presumed that "competent counsel would not overlook" the issue under discussion. *Id.* at *13. As such, the failure to object was interpreted as an intelligent waiver.

This case stands in contrast to *Malone*, as appellate raised ineffective assistance of counsel. (Appellant's Br. at 20-24). Appellant specifically raised that defense counsel's failure to ensure the panel was properly instructed resulted from an oversight. (Appellant's Br. at n.6). An oversight, by definition, is not intelligent and knowing. Indeed, by way of proffer, trial defense counsel told appellate defense counsel (1) there was no tactical reason for failing to object, (2) trial defense counsel were not cognizant of the change of caselaw (*Mendoza*) at the time of trial, and (3) if trial defense counsel had recognized the issue they would have objected. (Appellant's Br. at n.6).[1] Under these circumstances, this Court

[1] Of Course, this Court may wish to use its factfinding powers to confirm these proffers.

should not make the "presumption of competence" that allowed a finding of waiver in *Malone*.

In sum, the framework from *Malone* clarifies a dissidence between *Davis* and the definition of waiver that has loomed over military justice for some time. Under the clarified framework, this Court should not find waiver.

Finally, as also reinforced in *Malone*: "There is a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was an intentional relinquishment of a known right or privilege." *Id.* at *10 (quotation omitted). Instructional error as to the elements of a crime falls into this category, further cutting against a finding of waiver. *See United States v. Upham*, 66 M.J. 83, 86 (C.A.A.F. 2008) (instructional error as to the elements of a crime is tested for prejudice under the standard for constitutional error) (citation omitted).

2. Alternative Paths to Merits of the Issue

Assuming for the sake of argument that the instructional error was waived, there are alternative paths to the merits of the issue. First, IAC can function as a work-around to waiver. See *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quotation omitted). As such, even if the issue was waived, this Court should still consider the IAC claim, albeit under a strict framework. *Id.* Of note, this is distinct from the CAAF's point about IAC in *Malone*. As clarified in that case, a

claim of IAC is relevant to the merits of the waiver issue itself. As discussed above, if IAC is raised, the appellate Court may not find waiver in the first place. However, even if a court still found waiver, the underlying IAC claim would still be reviewable as an independent issue.

Second, the uncertainty under which theory appellant was convicted is another independent issue, related to, but distinct from pure instructional error. In the present case this uncertainty rests atop something of a three-pronged pedestal: (1) the nature of the evidence, (2) the lack of orientation of the panel in instructions, and (3) the intermixing of theories of liability in argument. While this uncertainty flows, in part, from the instructional error, this Court still must be confident appellant was convicted under a proper theory of liability. Appellant is not aware of any authority that this principle is impacted by the lack of objection to the instructions.

II. IF APPELLANT DID NOT WAIVE ANY OBJECTION TO THE MILITARY JUDGE'S INSTRUCTIONS ON THE LAW, DID THE MILITARY JUDGE CORRECTLY INSTRUCT THE PANEL ON THE DEFINITION OF CONSENT CONSIDERING *UNITED STATES v. MOORE*?

The military judge's instructions were erroneous, even after the CAAF's recent holding in *United States v. Moore*, __ M.J.__ , No. 25-0110, 2026 LX 52349 (C.A.A.F. 23 Jan. 2026). The CAAF reiterated the holding of *Mendoza* within its "first legal principle" in *Moore*. *Id.* at *9-10. Additionally, the CAAF explicitly

held that: "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." (alteration and emphasis in original). *Id.* at *9. Here, the military judge's instructions did just that. (R. at 556). The unqualified instruction that an incompetent person could not consent expressly allowed for a finding of "without consent" exclusively based on incapacity. Similarly, nothing in the military judge's instructions alerted the panel to the fact that the without consent element could not be established solely by a finding of incapacity. This instructional framework is expressly forbidden by *Moore*.

Zooming out slightly, the error in the military judge's instructions is further illustrated through the interplay of these instructions with the instructions on the very next page, regarding the defense of consent. (R. at 557). After instructing on the definition of consent, the military judge instructed: "The evidence has raised the issue of whether [redacted] consented to the sexual conduct listed in The Specification of The Charge." (R. at 557). Nothing in this instruction informed the panel that pre-incapacity consent would undermine a finding of guilt if the sexual act itself took place while the named victim was incapacitated. Similarly, nothing in this instruction informed the panel that a finding of nonconsent via incapacitation alone was insufficient. Indeed, even within the defense of consent

instruction, the military judge repeated the instruction that an incapacitated person could not consent. (R. at 556-57).

In a sense the framework provided by the instructions is even more lacking post-*Moore* because nothing in the instructions informed the panel about the "second legal principle" articulated therein. This, of course, is unsurprising because, unlike *Mendoza*, *Moore* had not yet been decided at the time of trial. But maintaining focus on the issue as originally raised, the military judge's instructions were erroneous pre-*Moore* and continue to be erroneous post-*Moore*.

III. WHETHER PRINCIPLES 1 AND 2, AS ARTICULATED IN UNITED STATES v. MOORE ALTERED THE ANALYSIS OF APPELLANT'S ASSIGNED ERRORS II, III, AND IV?

BLUF: Principle 1 of *Moore* does not change the analysis, but Principle 2 changes the analysis in places.

United States v. Moore is "consistent with *Mendoza*." 2026 LX 52349, at *11. The "first legal principle" is simply a reinforcement of *Mendoza*. *Id.* at *8-9 (The first legal principle *is* this Court's holding in *Mendoza*") (emphasis added). The "second legal principle" articulated in *Moore*, clarifies the application of *Mendoza* to a particular set of circumstances: where one party does not consent prior to falling asleep and the sexual act subsequently occurs while they are asleep. *Id.* at *10-12. As the "first legal principle" articulated in *Moore* is simply a

recitation of what preceded it, it does not change the analysis for A.E. II, III, and IV at all.

The "second legal principle," however, changes the analysis as it relates to one potential scenario raised by the evidence: that [redacted] did not consent prior to becoming incapacitated and that sexual intercourse took place while she was incapacitated. Post-*Mendoza* but pre-*Moore*, this scenario may have seemed inconsistent with guilt under a "without consent" theory, but *Moore* clarified that it is consistent with guilt under a "without consent" theory. The impact of this clarification on each of the assignments of error is addressed below.

1. Impact on A.E. II (Trial Counsel's Argument)

In the context of the military judge's instructions, trial counsel's argument was still error. The military judge's instructions informed the panel they could convict on the "without consent" element solely based on evidence of incapacity. (R. at 556-68). Within this framework, trial counsel's argument that [redacted] could have been passed out, blacked out, or asleep "invited the panel to convict on uncharged theories of liability." (Gov. Br. at 22); *see also* (R. at 597-98). Trial counsel told the panel that these possibilities were not the government's theory but still acknowledged they could not be excluded by the evidence, and still argued them as consistent with guilt. (R. at 597-98).

Trial counsel's unqualified statement: "she could have been passed out" invited the panel to convict on that basis alone. Directly before this statement, trial counsel acknowledged that one "can be blackout drunk and have a full conversation" and that "we don't actually know and can't determine if she was blackout." (R. at 598). But trial counsel's unqualified arguments about [redacted] being passed out or asleep discounted the importance of what might have been communicated during the preceding period of memory loss.

Under Principle 2 of *Moore*, the government could have properly pursued a theory of pre-incapacitation nonconsent, followed by incapacitation. However, the panel would have to be oriented to the proper framework to evaluate such a theory – which it was not here. Instead, both the miliary judge's instructions and trial counsel's argument allowed for conviction solely based on incapacity, regardless of what preceded it. Post-*Moore*, this is still error.

2. Impact on A.E. III (Instructions)

As addressed in Specified Issue II, *Moore* is "consistent with *Mendoza*" and explicitly states that: "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." (alteration and emphasis in original). *Id.* at *9-10. Here the military judge did just that – twice telling the panel, without qualification, that an incapacitated person

could not consent. (R. at 556, 558). Additionally, nothing in the military judge's instruction on the defense of consent informed the panel that pre-incapacity consent would undermine a finding of guilty if the sexual act itself took place while the named victim was incapacitated. (R. at 557-58).

3. Impact on A.E. IV (Basis of Verdict)

The military judge's instructions and trial counsel's argument both allowed a conviction solely based on a theory of incapacity, regardless of whether it was preceded by consent. There is no way to know whether some or all of the members convicted on such a theory. Even if only one member voted guilty on this basis, it would undermine the validity of the verdict. The uncertainty of the panel's verdict is increased by the uncertain state of the evidence. There was a great deal of ambiguity as to what specifically transpired on the night in question. When the facts are so ambiguous, the intermixing of permissible and impermissible theories of liability is particularly prejudicial.

The military judge's instructions, and trial counsel's arguments, allowed the panel to convict on either of two general possibilities:

1. The charged act took place while [redacted] was competent and not consenting; or
2. The charged act took place while [redacted] was incapacitated, regardless of what came before.

(R. at 556-58, 597-98). After *Mendoza*, but before *Moore*, one might assume that any scenario within the second category would be insufficient under a "without

consent" charging scheme. As clarified by *Moore*, however, a more granular analysis is required of the following sub-categories:

a. [redacted] did not consent before falling asleep and the act took place while she was asleep;

b. [redacted] did not consent before becoming too intoxicated to consent and the act took place while she was too intoxicated to consent;

c. [redacted] consented before falling asleep and the act took place while she was asleep; or

d. [redacted] consented before becoming too intoxicated to consent and the act took place while she was too intoxicated to consent.

Moore clarified that the first two sub-categories would fit within a "without consent" charging theory. However, the latter two sub-categories would not fit within the charged theory.

There is no way for this Court to know whether one or more members of the panel based their verdict on one of the latter, improper categories. The military judge's instructions would have allowed this error. Trial counsel's argument would have similarly allowed it. And the state of the evidence raised these categories as distinct possibilities. There was significant evidence from which a panel could infer pre-incapacitation consent. *See* (R. at 411-12) (prior statement from appellant that there was consensual sex); (R. at 444) (substantively admitted prior inconsistent statement from [redacted] that she had a clear memory of appellant's penis rubbing on her butt); *see also* (R. at 291) (prior statement from appellant that

there was consensual sexual activity short of intercourse)[2]; (R. at 228) (noting presence of third party – [redacted] – in the hotel room all night);[3] (R. at 403-04, 504, 509-12, 534) (blackout evidence and expert testimony).

Under the framework provided to the panel, the members could have accepted pre-incapacitation consent and still convicted, because nothing informed them that this was an improper theory of liability. Perhaps even more fundamentally, the panel was not required to grapple with this issue at all under the framework provided to them. They did not need to make any determination about pre-incapacity consent because it was irrelevant to the military judge's unqualified instructions that incapacity alone was enough to establish the "without consent" element, regardless of what may or may not have preceded the incapacity.

The CAAF's ultimate resolution of *Moore* – as well as the companion case of *Serjak* – is illustrative. In *Moore*, the CAAF remanded for a new factual sufficiency review, noting that AFCCA's failure to consider principles two and three was "understandable because the AFCCA rendered its decision before this

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[2] Of note, this statement logically may have been downplayed in that it was essentially an admission of infidelity by appellant to his former girlfriend.
[3] *See, e.g.*, *United States v. Whisenhunt*, No. ARMY 20170274, 2019 WL 2368568, at *2 (Army Ct. Crim. App. 3 Jun. 2019) (unpub. op.) (Noting the improbability that appellant would sexually assault the victim with sleeping third-parties close at hand, particularly when he took no steps, such as covering her mouth, to prevent an outcry).

Court clarified" those principles. 2026 LX 52349, at *16. Similarly, in *United States v. Serjak*, the CAAF remanded because: "We cannot be confident . . . the AFCCA properly understood the second legal principle because the AFCCA decided this case before this Court decided Moore." __ M.J. __, No. 25-0120, 2026 LX 84796, at *8 (C.A.A.F. 23 Jan. 2026). Just as CAAF could not be confident the CCA judges applied the proper framework to their factual sufficiency reviews, this Court cannot be confident the panel of layman properly applied the law to the facts when they not only lacked the guidance of *Moore* (Principle 2) but also lacked even the baseline guidance of *Mendoza* (Principle 1). It is unreasonable to expect laymen to be more astute at intuiting unarticulated legal principles than CCA judges. For that matter, the panel not only lacked the benefit of the relevant legal principles but was instructed in contravention of them. Under these circumstances, this Court should not be confident the verdict was properly obtained.

Conclusion

WHEREFORE, appellant respectfully requests this Honorable Court set aside the findings and the sentence.

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically filed with the Army Court and Government Appellate Division on March 3, 2026.

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Your pleading is in compliance with the Court's Rules of Practice and Procedure, and the pleading is accepted.

Very respectfully,

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