

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	APPELLANT’S SUGGESTION FOR RECONSIDERATION EN BANC
<i>Appellee,</i>)	
)	
v.)	
	)	Before a Special Panel
Airman (E-2))	
CODY L. KINDRED,	)	No. ACM 40607 (f rev)
United States Air Force,)	
<i>Appellant.</i>	)	19 March 2026

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

COMES NOW Appellant, Airman Cody L, Kindred, by and through his undersigned counsel, pursuant to Rules 27(b) and 31 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals and Rules 31.2 and 31.3 of this Court’s Rules of Practice and Procedure, and suggests reconsideration en banc.

No petition for grant of review or certificate for review has been filed with the Court of Appeals for the Armed Forces in this case. This Court retains jurisdiction over this case pursuant to Article 66(b)(3), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(3).

In accordance with Rule 31.2 of this Court’s Rules of Practice and Procedure, counsel note the following:

- (1) Appellant’s counsel received this Court’s decision on 24 February 2026. This suggestion for reconsideration en banc is, therefore, timely.
- (2) Appellant suggests en banc reconsideration of assignments of error V and I.¹
- (3) The basis for en banc reconsideration of the panel’s resolution of each of those assignments of error is set out below.

¹ This filing addresses assignment of error V before assignment of error I.

(4) No other court has acquired jurisdiction over this case.

Assignment of Error V

The special trial counsel committed prosecutorial misconduct during closing argument by indirectly commenting on Appellant's failure to testify, directly vouching for prosecution witnesses' credibility, and using personal pronouns while offering his personal opinion of the strength of the evidence.

As the Court of Appeals for the Armed Forces recently demonstrated in its opinion in *United States v. Matti*, __ M.J. __, No. 25-0148, 2026 CAAF LEXIS 189 (C.A.A.F. Feb. 17, 2026), the issue of improper closing argument is a recurring issue of significant importance to the military justice system. In this case, the panel overlooked a significant fact when it concluded that the special trial counsel did not unconstitutionally comment on Appellant's decision not to testify. *See United States v. Kindred*, No. ACM 40607 (f rev), 2026 CCA LEXIS 87, at *59–64 (C.A.A.F. Feb. 24, 2026). This Court should reconsider assignment of error V en banc and hold that the special trial counsel unconstitutionally commented indirectly or by inuendo on Appellant's decision not to testify and further hold that that constitutional error was not harmless beyond a reasonable doubt as to Charge II, Specifications 2, 3, and 4.

This case involved three female alleged victims and a male accused. The three female alleged victims testified; the male accused did not. In the first two paragraphs of the special trial counsel's closing argument as set out in the transcript, he told the members:

This is not a case like he said, she said. . . . [I]n some cases, you may only have the testimony of the two people who are in the room; or if the two people in the room are the only people who know what happened, you might only have the testimony of one. . . . There is undeniable evidence in this case, evidence that the defense cannot deny and has not refuted

Trial Tr. 1051–52. Under binding case law, that constitutes unconstitutional commentary on Appellant's decision not to testify. Moreover, the evidence supporting Charge II, Specifications 2 and 4 consisted solely of the uncorroborated testimony of DW.

As the Court of Appeals for the Armed Forces recently reemphasized in *Matti*, “[i]t is black letter law that a trial counsel may not comment directly, indirectly, or by innuendo, on the fact that an accused did not testify in his defense.” *Matti*, 2026 CAAF LEXIS 189, at *10 (alteration in original) (quoting *United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005) (quoting *United States v. Mobley*, 31 M.J. 273, 279 (C.M.A. 1990))). In *Carter*, the court observed that “applicable judicial precedent” establishes that a “[t]rial counsel may not argue that the prosecution’s evidence is unrebutted if the only rebuttal could come from the accused.” 61 M.J. at 33 (second quotation quoting Discussion, Rule for Courts-Martial (R.C.M.) 919(b), *Manual for Courts-Martial, United States (MCM)* (2002 ed.)); accord *United States v. Webb*, 38 M.J. 62, 66 (C.M.A. 1993); Discussion, R.C.M. 916(b), *MCM* (2019 ed.) The special trial counsel’s argument violated that clearly established rule.

In holding to the contrary, the panel’s decision overlooked a significant fact. In setting out the prosecution’s closing argument, the opinion inserts an ellipsis precisely where the special trial counsel stated, “There is undeniable evidence in this case, evidence that the defense cannot deny that has not been refuted” *Compare* Trial Tr. 1052, with *Kindred*, 2026 CCA LEXIS 87, at *53. That omitted language provides context confirming the unconstitutionality of the special trial counsel’s reference to “two people in the room” who “are the only people who know what happened” where the members “only have the testimony of one.”

The panel held that “in context,” the special trial counsel’s reference to situations where only one of the two people in a room who are the sole witnesses to what occurred testifies was not clear or obvious error. *Kindred*, 2026 CCA LEXIS 87, at *60. To

establish that “context,” the panel quoted portions of the special trial counsel’s comments from the third and fourth sentences *before* the “only have the testimony of one” sentence. *Id.* at *60–61 (quoting Trial Tr. 1051). Yet the panel neither quoted nor discussed what the special trial counsel said in the fourth sentence *after* the “only have the testimony of one” sentence: “There is undeniable evidence in this case, *evidence that the defense cannot deny that has not been refuted.*” Trial Tr. 1052 (emphasis added). The combination of the special trial counsel’s reference to “only have the testimony of one” and reference to the defense’s failure to refute the testimony constitutes precisely what binding case law forbids. *Carter*, 61 M.J. at 33 (“Trial counsel may not argue that the prosecution’s evidence is un rebutted if the only rebuttal could come from the accused.” (quoting Discussion, 919(b), *MCM*) (2002 ed.)).

Because the error is of constitutional magnitude, reversal is required unless the Government can establish beyond a reasonable doubt that the improper argument was harmless. *Id.* at 35. The Government cannot do so with respect to Specifications 2, 3, or 4 of Charge II. As to Specifications 2 and 4, which alleged various sexual assaults by Appellant against DW in South Korea, DW’s testimony was the sole evidence. The panel found that a similar scenario was sufficient to reverse the findings of guilty as the two alleged offenses involving AS, where the panel held that other comments by the special trial counsel did violate *Carter. Kindred*, 2026 CCA LEXIS 87, at *61, 63–64. The panel’s reasoning as to AS and the 21 June 2021 alleged offenses is equally applicable to DW and the South Korea alleged offenses: (1) The “testimony was the only substantial evidence with regard to the” offenses. *Id.* at *64. (2) “Appellant’s conviction on these offenses depended on the court members finding her account credible beyond a

reasonable doubt.” *Id.* (3) The special trial counsel’s “comments shored up what was arguably the greatest weakness with [the] testimony—that it was not corroborated by any other witnesses or physical evidence.” *Id.* As DW testified, never before 21 December 2022—almost nine months after the last charged incident in South Korea—did she make a report alleging Appellant sexually assaulted her in South Korea. Trial Tr. 650, 655. Nor did the prosecution introduce any physical evidence as to those specifications. The convictions for Specifications 2 and 4 of Charge II depended on DW’s word alone.

Moreover, there are two additional bases for determining that the error was not harmless beyond a reasonable doubt as to Specifications 2 and 4 of Charge II. First, when an Office of Special Investigations (OSI) agent contacted her in July 2022—more than three months after the last alleged offense in South Korea—DW made no allegations against Appellant; rather, she told the agent that Appellant was a good boyfriend and that they had a “really good relationship.” Trial Tr. 655, 714. Second, during his closing argument, the special trial counsel also argued that DW “sat here and took an oath and was as honest as she possibly could be with all of us.” Trial Tr. 1080. Although the panel’s opinion minimizes the significance of that statement, *Kindred*, 2026 CCA LEXIS 87, at *67–68, as *Matti* establishes, it was quintessential impermissible vouching. *Matti*, 2026 CAAF LEXIS 189, at *10–11. Indeed, the special trial counsel’s statement about DW’s honesty was very similar to a statement that *Matti* held was improper vouching: “[Y]ou have a credible witness. You have the victim, [C.C.], who came up here and took the stand and she was credible.” *Id.* at *11–12 (holding that statement, among others, was “not fair commentary but instead” an “instance[] of improper vouching” and was “clear and obvious error[]”). The special trial counsel’s combination of commentary on

Appellant's decision not to testify and vouching for DW's honesty precludes a determination of harmlessness beyond a reasonable doubt as to the convictions with no supporting evidence other than DW's word.

Nor can the Government carry its burden to demonstrate that the special trial counsel's unconstitutional commentary on Appellant's failure to testify was harmless as to Specification 3 of Charge II. While the prosecution presented physical evidence showing that Appellant and SJM engaged in anal intercourse, concluding that it constituted rape depended on the factfinder accepting SJM's testimony as true. But the Government faced serious difficulties in convincing the members that the evidence proved that offense beyond a reasonable doubt. Chief among these was the fact that during an interview with an OSI agent, when asked whether the act of anal sex that night was consensual, SJM responded, "I want to say, yes," adding that "I wasn't entirely sure due to the fact I was intoxicated and had spotty memory." Trial Tr. 489. The military judge admitted her statement to the OSI agent that "I want to say, yes," as substantive evidence. *Id.* at 1041. That is a considerable hurdle to overcome in a rape case.

Second, SJM was an untrustworthy witness. She admitted to consciously lying to an OSI agent during an initial investigation into the incident. Trial Tr. 440. She also admitted to making numerous false statements *under oath* during a motion hearing in this case. *Id.* at 469–74. And she admitted that she "had some memory problems" and "couldn't remember a lot of things" at a motion hearing conducted just four days before she testified on the merits. Trial Tr. 454. Given those significant challenges, it is not clear beyond a reasonable doubt that the special trial counsel's unconstitutional commentary

on Appellant's decision not to testify did not affect the members' verdict on Charge II, Specification 3.

For all of those reasons, as well as those set out in Appellant's opening and reply briefs, this Court should, en banc, hold that the special trial counsel unconstitutionally commented on Appellant's decision not to testify and set aside the findings of guilty to Charge II, Specifications 2, 3, and 4.

Assignment of Error I

The evidence supporting Charge II, Specification 3, which alleged that Appellant penetrated SJM's anus with his penis by first rendering her unconscious by strangling her with his hands, is factually insufficient to prove guilt beyond a reasonable doubt because when asked by law enforcement agents whether the anal sex was consensual, SJM replied "I want to say, yes," and added that she "wasn't entirely sure due to the fact [she] was intoxicated and had spotty memory."

Factual sufficiency review is a vital protection for a military accused. As the Court of Appeals for the Armed Forces has observed, it helps offset a military accused's lack of a core constitutional right enjoyed by criminal defendants in every other U.S. state and federal court: the right to be convicted only upon a unanimous verdict. *United States v. Anderson*, 83 M.J. 291, 299 (C.A.A.F. 2023), *cert. denied*, 144 S. Ct. 1003 (2024). This Court is the only entity that can provide Appellant with the protection of factual sufficiency review.

This is an extraordinary case from a factual sufficiency perspective: a case with a rape conviction despite the alleged victim's statement to a law enforcement agent that "I want to say, yes," the act was consensual, but "I wasn't entirely sure due to the fact I was intoxicated and had spotty memory." Trial Tr. at 489. The panel determined that, despite this and other evidence calling the verdict into question, the prosecution proved Charge II, Specification 3 beyond a reasonable doubt. *Kindred*, 2026 CCA LEXIS 87, at *25–31. In this extraordinary case, where

this Court represents Appellant’s only opportunity to seek relief on factual sufficiency grounds, the full Court should consider whether the prosecution proved rape beyond a reasonable doubt.

As Appellant’s briefs explained, SJM’s statement to an OSI agent that she wanted to “say, yes” to whether the anal intercourse was consensual combined with her self-described intoxication and spotty memory suggest a reasonable possibility that she experienced a fragmentary alcohol-induced blackout during which she engaged in consensual anal intercourse. Appellant’s Br. at 14; Appellant’s Reply Br. at 1–4. The panel countered, “The evidence does not suggest SM was so intoxicated that she likely experienced alcohol-induced fragmentary memory blackouts, as Appellant suggests.” *Kindred*, 2026 CCA LEXIS 87, at *39. That rejoinder is problematic for two reasons. First, SJM’s own testimony suggests that she drank enough to affect her memory and perception. During cross-examination, SJM volunteered that “I was intoxicated and had spotty memory” as her explanation for telling an OSI agent that she wanted to say yes, she consented, but was not entirely sure. Trial Tr. 489. She also testified that “we had been drinking a lot that night so I just don’t even think I fully processed what happened in the moment” when Appellant slapped her. *Id.* at 423. Second, for factual sufficiency purposes, the question is not whether anal sex occurring during a fragmentary alcohol-induced blackout was, in the panel’s word, “likely.” *Kindred*, 2026 CCA LEXIS 87, at *39. The fragmentary alcohol-induced blackout theory need not be “likely” to negate proof beyond a reasonable doubt. Rather, if it is a “real possibility,” it precludes affirmance. *See United States v. Meeks*, 41 M.J. 150, 157 n.2 (C.M.A. 1994) (approvingly citing Federal Judicial Center, Pattern Criminal Jury Instructions 17–18 (1987)); *United States v. McClour*, 76 M.J. 23, 26 (C.A.A.F. 2017); *see also United States v. Lewis*, No. 201900049, 2020 CCA LEXIS 199, at *25 (N-M. Ct. Crim. App.

June 8, 2020) (“If we believe there is a ‘real possibility’ that he is not guilty, there is reasonable doubt, and we cannot affirm Appellant’s conviction.”).

The panel’s opinion fails to offer a persuasive counter-explanation for SJM’s comment to an OSI agent that she wanted to say yes, the anal intercourse was consensual. The panel notes, “SM evidently had conflicting feelings after the incident, and at points she indicated she felt some responsibility for what occurred because she had told Appellant he could ‘do anything [he] wanted’ before he strangled her.” *Kindred*, 2026 CCA LEXIS 87, at *27. The panel immediately followed that sentence with its statement that “we are not clearly convinced SM’s comment during her OSI interview raises a reasonable doubt sufficient to overcome the evidence that Appellant penetrated her anus with his penis by first strangling her with his hands until she was unconscious.” *Id.* But SJM did not try to explain away her statement that she wanted to say yes, the anal sex was consensual by pointing to conflicting feelings or her statement to Appellant that he could do anything he wanted. Rather, she offered that explanation for her earlier intentional lie to an OSI agent about the alleged offense. Trial Tr. 440–41.

SJM twice testified that she told an OSI agent that she wanted to say yes, the anal sex was consensual. Trial Tr. 458, 489. The only explanation she gave was her interjection during cross-examination that she also told the OSI agent that “I wasn’t entirely sure due to the fact I was intoxicated and had spotty memory.” Trial Tr. 489.

By the time SJM told an OSI agent that she wanted to say yes, the anal sex was consensual, SJM was no longer conflicted concerning Appellant. She reinitiated contact with OSI after learning that Appellant was dating DW and just a day after sending Appellant screenshots of her message exchange with DW, accompanied by a clown face emoji and the words, “I guess you got caught” and “Keep your girlfriend out of my inbox. She knows you

cheated.” Trial Tr. at 486. SJM failed to offer any explanation for her statement that she wanted to say yes, the anal sex was consensual or that she “wasn’t entirely sure” other than the anal sex act might have been consensual. That raises reasonable doubt.

While the panel’s opinion also relies on the clarity of SJM’s testimony, *Kindred*, 2026 CCA LEXIS 87, at *26, there is substantial reason to doubt the *accuracy* of her testimony. Among other factors diminishing the credibility of SJM’s testimony on the merits, she had provided substantial testimony during an earlier motion hearing in this case that she later conceded was false, though she maintained that her falsehoods were unintentional. Trial Tr. 470–74. The panel “acknowledge[s] that providing false testimony, even if based on a mistaken belief at the time, certainly does not enhance a witness’s credibility.” *Kindred*, 2026 CCA LEXIS 87, at *30–31. But that testimony did not merely fail to enhance her credibility; it substantially detracted from it. SJM’s admittedly false testimony concerned highly salient points that one would not expect a witness to easily forget.

In reality, two days after the alleged anal rape, SJM and Appellant resumed communications, with her texting that she wanted to go to his dorm room and hang out. Trial Tr. 475–76. She, in fact, did visit Appellant at his dorm room “maybe twice, once or twice” after the alleged offense. *Id.* at 476. She sent Appellant messages calling him sweetheart and handsome and the two exchanged texts with heart emojis. *Id.* at 479. Eight days after the alleged offense, SJM and Appellant got into an argument because she was upset that he did not want to spend more time with him before an anticipated overseas transfer later that month. *Id.* at 477, 480. The two agreed to see a movie the next night and exchanged sexually charged messages. *Id.* at 481. The two were in Appellant’s dorm room together and SJM became upset when he did not allow her to spend the night as they had previously planned. *Id.* at 484–85. At the end of the month,

when her anticipated overseas transfer was canceled, SJM again became upset with Appellant because she perceived that he blew her off. *Id.* at 485.

In stark contrast to those facts, SJM admitted that she had previously falsely testified under oath that after the night of the alleged offense, she did not have any sort of interactions with Appellant. *Id.* at 471. She had also previously falsely testified under oath that she never saw him outside of work after the night of the alleged offense. *Id.* at 472. And she had previously falsely testified under oath that after the night of the alleged offense, she never went to Appellant's dorm room. *Id.* at 473. SJM attempted to explain the discrepancies by testifying that she "tr[ie]d to forget everything related to that situation as much as possible so I could try to live a normal life." *Id.* at 497. If so, it is not apparent why her post-forgetting testimony should be believed. Additionally, SJM admitted that at another hearing just four days before she testified on the merits, she had memory problems and could not remember a lot of things. Trial Tr. 454.

Given SJM's remarkable memory problems, there is grave doubt that her "clear testimony" on the merits was a product of her accurate remembrance of what occurred. It is a matter of common knowledge that "memory fades over time." *United States v. Alexander*, No. 24-CV-676, 2025 U.S. Dist. LEXIS 257786, at *25 (S.D.N.Y. Dec. 12, 2025). In conducting factual sufficiency review, this Court may apply "common sense and knowledge of the ways of the world." *United States v. Henderson*, No. ACM 40419, 2025 CCA LEXIS 172, *12 (A.F. Ct. Crim. App. Apr. 18, 2025) (citing *United States v. Green*, 52 M.J. 803, 805 (N-M. Ct. Crim. App. 2000)). Common sense tells us that memory does not improve over time; rather, it becomes vulnerable to contamination.

Scientific evidence in this case provides still more reason to doubt that the anal sex occurred as a result of Appellant strangling SJM. PDT, Ph.D., a forensic expert, testified that

once strangulation ceases, an individual regains consciousness within “[a] second or two.” *Id.* at 954. That evidence suggests it is unlikely that SJM would have remained unconscious from strangulation during the extended time period required for Appellant to remove her shorts, probably obtain and apply a lubricant, and engage in anal intercourse to the point of ejaculating a short time after he had previously ejaculated during vaginal intercourse. Trial Tr. 420, 427, 436–37, 460; Pros. Ex. 24 at 6. The panel’s opinion offers conjecture as to how it may have been possible for that to occur. *Kindred*, 2026 CCA LEXIS 87, at *28–29. The panel states that “Dr. PT acknowledged *inter alia* that a strangling victim could be unconscious for a minute or more without suffering permanent effects.” *Id.* But that scenario depended on pressure being repeatedly applied then released, allowing oxygen to enter the brain, followed by reapplying pressure for another short interval. Trial Tr. 959–60. It is improbable that Appellant would have been able to simultaneously engage in such strangle-release-strangle actions while simultaneously accomplishing the actions necessary to engage in anal intercourse. That improbability provides still more reason to doubt that the anal intercourse occurred while SJM was unconscious from strangulation rather than, as she suggested to an OSI agent, consensually.

This Court should be clearly convinced that the prosecution failed to prove Charge II, Specification 3 beyond a reasonable doubt as a result of the combination of: (1) SJM’s statement to an OSI agent that she wanted to say yes, the anal sex was consensual but she could not be sure because she was intoxicated and her memory was spotty; (2) SJM’s significant credibility problems; and (3) the improbability that strangulation would render her unconscious or insensible for the considerable time required for Appellant to engage in anal sex with her to the point of ejaculating for a second time that evening. For all of those reasons, as well as those set out in Appellant’s

opening and reply briefs, this Court should, en banc, set aside the finding of guilty to Charge II, Specification 3, as factually insufficient.

Respectfully submitted,

[Redacted]

Trevor N. Ward, Maj, USAF
Appellate Defense Counsel

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Appellate Defense Counsel

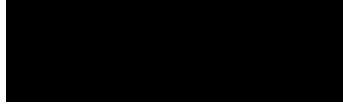
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Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 19 March 2026.

Respectfully submitted,



Dwight H. Sullivan
Air Force Appellate Defense Division

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	OPPOSITION TO APPELLANT’S
<i>Appellee,</i>	)	MOTION FOR
	)	RECONSIDERATION
v.)	
	)	ACM 40604 (f rev)
Airman (E-2))	
CODY L. KINDRED, USAF	)	Special Panel
<i>Appellant.</i>)	

**TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:**

Pursuant to this Court’s 30 April 2026 Order, the United States hereby opposes Appellant’s Suggestion for Reconsideration En Banc filed on 19 March 2026, which, per this Court’s Order, is also being considered by this Court as a motion for reconsideration. In his filing, Appellant suggests reconsideration *en banc* for Issues I and V from his original assignments of error brief. For Issue V, Appellant claims the panel “overlooked a significant fact when it concluded that the special trial counsel did not unconstitutionally comment on Appellant’s decision not to testify.” (App. Mot. at 2.) For Issue I, Appellant does not specifically claim the panel overlooked or misapplied any material legal or factual matter, but does cite to various portions of this Court’s factual sufficiency review of his case and pleads that “the full Court should consider whether the prosecution proved rape beyond a reasonable doubt.” (*See Id.* at 7-13.)

In both of his issues, Appellant rehashes arguments he previously made to this Court in his initial Assignments of Error brief, all of which this Court already thoroughly addressed in its decision. *See United States v. Kindred*, No. ACM 40607 (f rev), 2026 CCA LEXIS 87, at *59–64 (C.A.A.F. Feb. 24, 2026). While Appellant does make the small addition of United States v. Matti to his Issue V analysis, our superior Court’s decision in United States v. Matti, __ M.J. __,

No. 25-0148, 2026 CAAF LEXIS 189 (C.A.A.F. Feb. 17, 2026), did not change the legal landscape of this case or how this Court applied the law regarding improper closing arguments in its opinion. Moreover, Matti was released prior to this Court’s opinion in this case, and, considering this Court’s opinion repeatedly cites and references Matti, this Court has already reviewed Appellant’s case in light of that case. Here, a review of this Court’s opinion shows this Court did not overlook or misapply any issues related to improper argument or its factual sufficiency review of Appellant’s case. Thus, Appellant’s motion should be denied and this Court should not reconsider his case.

V.

APPELLANT HAS NOT DEMONSTRATED THIS COURT OVERLOOKED OR MISAPPLIED ANY SIGNIFICANT FACT IN ITS ANALYSIS OF THE SPECIAL TRIAL COUNSEL’S FINDINGS ARGUMENT.

Appellant argues this Court “overlooked a significant fact when it concluded that the special trial counsel did not unconstitutionally comment on Appellant’s decision not to testify.” (App. Mot. at 2, citing Kindred, at *59–64.) Appellant prays this Court should “reconsider assignment of error *V en banc* and hold that the special trial counsel unconstitutionally commented indirectly or by innuendo on Appellant’s decision not to testify and further hold that that constitutional error was not harmless beyond a reasonable doubt as to Charge II, Specifications 2, 3, and 4.” (Id. at 2.)

Just as he did in his original brief, Appellant renews his claim that the special trial counsel in this case provided “unconstitutional commentary on Appellant’s decision not to testify.” (Id.) Appellant contends that this Court’s decision “overlooked a significant fact” because “the opinion inserts an ellipsis precisely where the special trial counsel stated, ‘There is undeniable evidence in this case, evidence that the defense cannot deny that has not been refuted

...” (Id., comparing R. at 1052, with Kindred, at *53.) Appellant contends this “omitted language provides context confirming the unconstitutionality of the special trial counsel’s reference to ‘two people in the room’ who ‘are the only people who know what happened’ where the members ‘only have the testimony of one.’” (Id. at 3.)

However, it is Appellant’s own ellipsis in his motion that “overlooks a significant fact” as it relates to the *full* context and meaning of the special trial counsel’s closing argument in this case. In his motion, Appellant block quotes a portion of the special trial counsel’s closing argument as follows:

This is not a case like he said, she said. . . . [I]n some cases, you may only have the testimony of the two people who are in the room; or if the two people in the room are the only people who know what happened, you might only have the testimony of one. . . . There is undeniable evidence in this case, evidence that the defense cannot deny and has not refuted

(App. Mot. at 2, citing R. at 1051-52.)

The Government fully addressed this concern in its Answer to Appellant’s original brief to this Court by first providing this Court with the full quotation – free of any ellipsis – for the Court to review. (*See* Gov. Ans at 75.) That quotation reads as follows:

This is not a case like he said, she said. This is not a situation where can people get drunk, something happened, they wake up the next morning, and somebody looks back and says, you know what, whatever happened then, I wouldn’t have consented to that if I was sober, so maybe that wasn’t consensual. That’s not what this is about. This is not a situation when you look at the facts and evidence that we have in this court and we look at and say, you know, reasonable people could disagree of whether any of these three ladies wanted, consented to what was happening to them.

Now, Mr. Board President[sic], Ladies and Gentlemen of the Board[sic], you have been presented with a mountain of evidence, in-court sworn testimony from all three victims, testimony from a multitude of other witnesses. You have documentary, photographic, videographic, audio, medical, DNA forensic evidence; and when

you look at this evidence, it all has one common thread. It has one simple and terrible explanation, [Appellant]. He got intoxicated, he instilled fear, and he dominated three young women. ***Now, in some cases, you may only have the testimony of the two people who are in the room; or if the two people in the room are the only people who know what happened, you might only have the testimony of one.*** In this case, you don't have to just rely on the testimony of the one person – the one victim in the room because you have a lot more. In many cases, you might not have evidence of them reporting right away, evidence of pictures taken, of reports made, or statements made exactly immediately after it happened. But in this case, we do. ***There is undeniable evidence in this case, evidence that the defense cannot deny that has not been refuted*** in this case, and we'll go through it one at a time.

(R. at 1051-52.) (emphasis on portion of the special trial counsel's argument that Appellant quotes in his motion.)

Just as he did in his original brief (*see* App. Br. at 34), Appellant believes this is an “unconstitutional commentary on Appellant's decision not to testify.” (App. Mot. at 2.) However, as the Government explained at length in its Answer, that is not the case. Here, Appellant's highly-selective cherry-picked and ellipsis-filled quote of the special trial counsel's argument fails to consider the entire context of the argument. When read in context, the special trial counsel here was not trying to imply anything related to Appellant's right to testify. Instead, the special trial counsel first highlighted that Appellant's case was not a typical “he said, she said” case where “people get drunk, something happened,” the parties wake up the next morning, and there's a question as to whether an act was consensual.

As opposed to this typical “he said, she said” case, the special trial counsel argued that Appellant's case represented repeated and purposeful attacks on three women where “no reasonable person could disagree of whether any of these three ladies wanted, consented to what was happening to them.” Thus, when read in context, the special trial counsel's statement here was showing the complexity of Appellant's acts involving three women, and how this was not

simply a one-night, “he said, she said,” one-off type of sexual assault case. It had nothing to do with Appellant’s right to testify.

This fact is highlighted further by the special trial counsel’s next argument to the members that this case had a “mountain of evidence,” “testimony from all three victims,” “testimony from a multitude of other witnesses,” as well as “documentary, photographic, videographic, audio, medical, DNA forensic evidence.” (R. at 1051.) Again, when read in context, the special trial counsel’s point here was to further highlight why this case was not simply a “he said, she said” case, but instead included a bevy of evidence from multiple sources outside of the three victims. While the special trial counsel then noted that in some cases the panel only had the “testimony of one” of two people were in a room, the special trial counsel immediately followed up this statement by saying, “you don’t have to just rely on the testimony of the one person – the one victim in the room because you have a lot more,” adding that in this case the Government presented evidence of victims reporting incidents right away, as well as pictures, reports and statements made immediately after the acts occurred. (R. at 1052.)

Here again, these statements were not an “indirect” or “innuendo” comment on Appellant’s failure to testify, but instead was an argument by the special trial counsel that in this case, as opposed to a typical “he said, she said” case, the members did not have to “rely solely on the testimony of one person” (i.e., the victim). Instead, the special trial counsel was telling the members that they had multiple other pieces of evidence to rely upon, such a photos, other witness statements, and medical reports. These were no direct, indirect, or innuendo comments on Appellant’s rights. Although it was perhaps inartful to mention that the members only had the testimony of one person in the room, the comment could not fairly be understood to be saying that because the members had not heard from Appellant, he must be guilty. Instead, it is

clear that the special trial counsel was attempting to highlight that even if the victim was the only eyewitness who testified to the crime, her testimony was corroborated by a multitude of other evidence.

As our superior Court and this Court have recognized, the Supreme Court has emphasized that “a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations,” and that a “[a] statement that might appear improper if viewed in isolation may not be improper when viewed in context.” *See United States v. Cueto*, 82 M.J. 323, 333 (C.A.A.F. 2022) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 646-47 (1974)); *see also United States v. Tyson*, ACM 40617, 2026 CCA LEXIS 178 (A.F. Ct. Crim. App. Apr. 13, 2026). Here, since there was an alternate explanation for the special trial counsel’s statement, it did not amount to plain and obvious error.

While this Court chose not to include the sentence, “There is undeniable evidence in this case, evidence that the defense cannot deny that has not been refuted,” from its quoted language of the special trial counsel’s argument, it did not overlook this sentence. This Court had before it the full transcript from this case. Further, this Court also had the Government’s Answer in this case, which contained the special trial counsel’s full quotation – as opposed to the cherry-picked version provided by Appellant. Having this full passage before it, this Court evidently recognized the full context of the special trial counsel’s argument, and correctly concluded that “viewing these statements *in context*, we find no ‘clear or obvious’ error.” *See Kindred*, at *60. (emphasis added).

Still, Appellant claims prejudice because, with regard to Specifications 2 and 4 of Charge II involving DWM, the “panel found that a similar scenario was sufficient to reverse the findings

of guilty as the two alleged offenses involving AS, where the panel held that other comments by the special trial counsel did violate Carter.” (App. Mot. at 4, citing United States v. Carter, 61 M.J. 31, 33 (C.A.A.F. 2005).) However, the two scenarios or not similar or comparable.

Appellant is correct in that this Court did overturn convictions involving ACS because of statements made by the special trial counsel that involved the words “undeniable” and unrefuted.” However, yet again, context matters. The language which led to this Court overturning those convictions related to ACS involved the special trial counsel specifically and directly discussing ACS’s testimony before stating, “This is undeniable. This has not been refuted. There is nothing contradicting [ACS’s] testimony.” (R. at 1054.) This Court found that the special trial counsel “made these comments while delivering a summary of AS’s testimony,” and that “In context, whether intentional or not, STC’s argument that AS’s account was ‘undeniable’ because it was unrefuted and uncontradicted drew the members’ attention to, and exploited, the fact that Appellant did not testify.” Kindred, at *61.

The language Appellant currently takes issue with, however, is different. While the special trial counsel’s sentence included word “undeniable” and the phrase “not been refuted,” that sentence was immediately preceded by the special trial counsel saying the following:

In this case, you don’t have to just rely on the testimony of the one person – the one victim in the room because you have a lot more. In many cases, you might not have evidence of them reporting right away, evidence of pictures taken, of reports made, or statements made exactly immediately after it happened. But in this case, we do.

(R. at 1052.) This Court recognized this distinction in its opinion, stating:

With respect to the “people who are in the room” comment, in context, again STC was not highlighting the fact Appellant did not testify. Instead, he was making the point that—at least with respect to SM and DW—the Government offered much more evidence than simply the testimony of the victims, to include “testimony from a

multitude of other witnesses[,] . . . documentary, photographic,
video-graphic, audio, medical, [and] DNA forensic evidence”

Kindred, at *60. In this instance, the “undeniable” and “not been refuted” evidence the special trial counsel was talking about was the “evidence of pictures taken, of reports made, or statements made exactly immediately after it happened.” It was *not* a direct reference to a particular witness’s testimony – which was the very reason why this Court overturned convictions involving ACS. Appellant’s attempt to liken the two should prove unpersuasive to this Court. And again, considering the Supreme Court’s emphasis that a court “not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning,” this Court should continue to find no plain error in the senior trial counsel’s argument. *See Donnelly*, at 646-47 (1974).

Appellant next claims there are “two additional bases for determining that the error was not harmless beyond a reasonable doubt as to Specifications 2 and 4 of Charge II.” (App. Mot. at 5.) The first involves the fact that DWM “made no allegations against Appellant” when she first contacted the Air Force Office of Special Investigations (AFOSI), and that DMW described Appellant as a “good boyfriend.” (Id.) However, this is not new information and is certainly not information overlooked by this Court in its opinion. In fact, in reviewing Appellant’s factual sufficiency issues involving DMW, this Court stated, “Appellant notes that when OSI first contacted DW in July 2022 as part of their investigation of the SM incident, DW described him as a ‘good boyfriend’ and did not report any of his misconduct from Korea.” Kindred, at *33.

Furthermore, the Government’s Answer explains in detail why DMW called Appellant a “good boyfriend.” (Gov. Ans. at 107-109.) Again, context matters. Rather than recount that explanation here, the Government invites this Court to review the Government’s Answer

discussing this point and find that DMW's interaction with AFOSI is not cause for prejudice on this issue.

Finally, Appellant renews another complaint from his initial brief – the special trial counsel's statement that DMW “sat here and took an oath and was as honest as she possibly could be with all of us.” (App. Mot. at 5, citing R. at 1080.) Again, Appellant's cherry-picking of one sentence misconstrues the special trial counsel's context. There, the special trial counsel argued:

I also want to point out the defense counsel asked [DMW], “Hey, isn't it true that you didn't tell OSI about the specific instance in March of 2022 as your boyfriend was leaving Osan when he raped you there in that room?” And after viewing all those hours of footage and looking through all those hundreds of pages of text messages, she goes, “Yeah, I guess I didn't.” Do we expect her to remember that? And then when she had an opportunity to review the transcript from the actual interview I handed it to her and she read it and goes, “Oh, yeah, yeah, I did tell them about that.” She did tell them about these things. And slight changes in memory – even as she [did] here, she didn't remember telling about that until she looked at the transcript. So don't let yourself be persuaded that she must be lying simply because there are some things that happened before or she may have said before that she doesn't remember now. That means she is a human being. She ***sat here and took an oath and was as honest as she possibly could be with all of us.***

(R. at 1080.) (emphasis on portion cited by Appellant in his motion.)

Here, as the Government explained in its Answer, the special trial counsel was not “vouching” for DMW, but instead was explaining to the members why DMW (1) did not remember something she had previously said to AFOSI under the circumstances, (2) had recognized that she had said that once being reminded, and (3) why her misremembering this was simply her being human rather than being a “liar” as the defense had insinuated during the trial. As this Court correctly found in its opinion, “In context, it appears STC was inviting the

court members to conclude *from the evidence* that the witnesses were credible.” Kindred at *66.

Still, Appellant compares this one quoted sentence, devoid of any context in his filing, to statements made in Matti. However, the special trial counsel’s sentence here, when read in context, is much different than the statements made in Matti, which included a trial counsel calling a witness “credible,” and specifically telling the members in that case, “She’s telling the truth,” and “You know she’s telling the truth.” See Matti, 2026 CAAF LEXIS 189, at *10–12. The special trial counsel’s statement here is simply not comparable to those found in Matti.

Appellant then turns to SJM and claims prejudice relating to Specification 3 of Charge II. (App. Mot. at 6.) In doing so, Appellant again simply renews the same attacks on SJM as he did in his original brief to this Court. He first states, “Chief among these was the fact that during an interview with an OSI agent, when asked whether the act of anal sex that night was consensual, SJM responded, ‘I want to say, yes,’ adding that ‘I wasn’t entirely sure due to the fact I was intoxicated and had spotty memory.’” (Id. at 6, citing R. at 489.) Yet again, however, this Court did not overlook this fact, but instead addressed it head on in its opinion, specifically saying it was “not persuaded” by Appellant’s attack on this point, and finding as follows:

SM provided clear testimony that Appellant strangled her until she was unconscious. Her next memory was of Appellant shaking her and yelling at her to “wake up.” She described her panicked and distraught reaction to having been strangled unconscious, and Appellant’s violence and threats in response. In Appellant’s bathroom she took photos of her injuries and sent text messages and her location to SrA OA because she was afraid Appellant might kill her. Her testimony accounts for events from the point Appellant shook her awake until she fled from his dormitory room. At trial, the Government introduced witness testimony, the text messages, photographs, a medical report, and police body camera video and audio documenting SM’s injuries and evident distress following the incident. The evidence does not suggest a reasonable possibility that

Appellant and SM engaged in consensual anal sex that SM simply could not recall due to a fragmentary blackout.

Kindred, at *26-27. Having already correctly found Appellant’s argument unpersuasive as it relates to factual sufficiency, this Court should likewise find it unpersuasive for prejudice on this issue.

To this point, as discussed more in-depth below, whether SJM thought she might have consented to something she does not recall even happening is irrelevant because consent is not the issue with this specification – the real issue is whether the anal sex was initiated after Appellant rendered SJM unconscious. As the military judge instructed the panel, an unconscious person cannot consent. (R. at 1023.) Thus, even if SJM *thought* she might have consented despite her lack of memory of the anal sex, the law states that, based on these circumstances, SJM had no ability to consent. Since consent was not an issue for this strangulation specification, SJM’s statement to AFOSI – which again this Court has already analyzed – provides no prejudice to this issue.

Finally, Appellant again claims that SJM was simply an “untrustworthy witness,” arguing that she “admitted to making numerous false statements *under oath* during a motion hearing in this case,” and had “some memory problems.” (App. Mot. at 6.) Yet again, however, this Court has already reviewed this particular attack by Appellant against SJM and correctly found that “we are not clearly convinced these admissions by SM materially undermine the Government’s compelling evidence that on or about 7 June 2022, Appellant strangled SM into unconsciousness and then penetrated her anus with his penis.” Kindred, at *30-31. For the same reason, it does not give rise to prejudice as it relates to the special trial counsel’s closing argument in this case, which again – when read in context – related to the other evidence involved in this case, not whether or not Appellant testified in this case.

In all, Appellant simply rehashes the same unpersuasive arguments he made to this Court in his original brief while also attempting to analogize the statements at issue in Matti to the special trial counsel's statements in this case. However, as shown above, they are not comparable. Accordingly, this Court should find Appellant has failed to meet his burden for reconsideration and deny his motion.

I.

APPELLANT HAS NOT DEMONSTRATED THIS COURT OVERLOOKED OR MISAPPLIED ANY SIGNIFICANT FACT IN ITS FACTUAL SUFFICIENCY REVIEW OF CHARGE II, SPECIFICATION 3.

For this issue, Appellant does not specifically state the Court overlooked or misapplied any significant fact during its factual sufficiency review. Instead, Appellant seemingly just disagrees with the Special Panel's review of his case and specifically asks for the full Court, *en banc*, to review his case a second time – all while simply restating the same arguments that proved unpersuasive to the Special Panel in its decision on this case. Considering Appellant provides nothing new to this Court in his filing, this Court should deny his motion.

Appellant begins his motion by stating “As Appellant’s brief explained . . .” (App. Mot. at 8.) This language acknowledges outright that Appellant’s argument is just rehashing the same arguments he previously provided to this Court. He starts by citing his original brief and reply brief, stating, “SJM’s statement to an OSI agent that she wanted to ‘say, yes’ to whether the anal intercourse was consensual combined with her self-described intoxication and spotty memory suggest a reasonable possibility that she experienced a fragmentary alcohol-induced blackout during which she engaged in consensual anal intercourse.” (App. Mot. at 8, citing App. Br. at 14, App. Reply at 1-4.) Appellant then takes issue with this Court’s finding that the “evidence

does not suggest SM was so intoxicated that she likely experienced alcohol-induced fragmentary memory blackouts, as Appellant suggests.” (Appellant’s Mot. at 8, quoting Kindred, at *39.)

In doing so, much as he did in Issue V with the special trial counsel’s argument, Appellant fails to cite this Court’s entire finding on this matter – instead again cherry-picking one sentence devoid of context. This Court’s full discussion on SJM’s memory reads as follows:

As Appellant notes, SM testified she stated during an OSI interview she was unsure if the anal sex was consensual because she “was intoxicated and had spotty memory.” However, her testimony indicates the only significant period of time for which she lacked memory was the period of unknown duration from when Appellant strangled her into unconsciousness until he yelled and shook her awake. Her testimony otherwise generally accounts for the events of that night. ***The evidence does not suggest SM was so intoxicated that she likely experienced alcohol-induced fragmentary memory blackouts, as Appellant suggests.*** In addition to her generally coherent testimony regarding periods while she was conscious, she sent SrA OA text messages from Appellant’s bathroom that were articulate and correctly spelled; she successfully drove herself to SrA OA’s house, a journey of 30 or 35 minutes; and the police body camera recordings depict her as very distressed, but alert and not otherwise significantly impaired. Accordingly, we find Appellant’s suggestion that the biting occurred consensually during an alcohol-induced blackout unpersuasive.

Kindred, at *39-40. (emphasis on portion of this Court’s opinion that Appellant quotes in his motion.)

Here, this Court’s opinion explained in detail why any general “spotty memory” concern due to SJM’s alcohol intake that night was overcome by her coherent testimony about the whole of that evening, as well as other evidence showing her coherent state that night – namely the text messages she sent her friend, her driving ability, and police body camera recordings showing that SJM was “very distressed, but alert and not otherwise significantly impaired.” Id.

Appellant’s filing omits all of this additional commentary by this Court in its opinion, instead focusing on a sole sentence. And relying on this sole sentence, Appellant claims this

finding is “problematic for two reasons.” (App. Mot. at 8.) First, he argues that “SJM’s own testimony suggests that she drank enough to affect her memory and perception.” (Id.) Yet, as this Court opinion states, and as the Government responded to this same argument in its original Answer, while SJM did say she had a “foggy memory” and was “intoxicated,” there is no evidence in the record to indicate that she was ever had a “black out” due to alcohol. Further, Appellant’s attempt, yet again, to essentially blame SJM and her alcohol intake for any memory loss that night is remarkable considering Appellant is the one who choked SJM’s neck with two hands, leading her to lose consciousness and, thus, induce a complete memory loss for the time in which he strangled her. There was no “alcohol-induced blackout” here – only Appellant’s intentional and malicious strangling of his victim into complete unconsciousness.

Further, this Court’s opinion directly speaks to evidence outside of SJM’s memory (text messages and body camera footage) that point to SJM being coherent, alert, and attentive on the night in question. Appellant’s silence on the whole of this Court’s finding on this argument speaks volumes to the strength of his claim here. Put simply, the Court has already addressed this argument thoroughly, and Appellant has failed to show any need to reconsider it.

Appellant next cites to various cases that reference a pattern criminal jury instruction that states, “If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you *must* find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.” (App. Mot. at 8, citing United States v. Meeks, 41 M.J. 150, 157 n.2 (C.M.A. 1994) (citing Federal Judicial Center, Pattern Criminal Jury Instructions 17–18 (1987)); United States v. McClour, 76 M.J. 23, 26 (C.A.A.F. 2017).) Appellant argues that instead of

using the word “likely” when talking about Appellant’s memory blackout argument, it should have used the phrase “real possibility.” Id.

Yet, as shown above, this Court’s full finding on this matter – again, unmentioned by Appellant in his filing – shows Appellant’s contention about a “fragmentary alcohol-induced blackout” was both not likely and not a real possibility. As the Government has repeatedly argued and this Court found in its opinion, the *only* time SJM was ever “blacked out” was when Appellant placed his hands around her neck and choked her into unconsciousness. Other than that time period, the whole of the evidence shows SJM was awake and coherent. SJM recalled events both prior to and immediately after Appellants’ attack on her that night and evidence independent of her testimony – again, the text messages and body camera footage – show she was coherent in the immediately aftermath of Appellant’s attack. Whether calling Appellant’s claimed “fragmentary alcohol-induced blackout” not likely or not a real possibility, Appellant has failed to provide this Court any evidence that it overlooked or misapplied any factual matter related to this issue. Thus, reconsideration is not appropriate.

Next, Appellant again returns to his argument involving SJM telling an AFOSI agent “that she wanted to say yes, the anal intercourse was consensual.” (App. Mot. at 9.) He again argues that “SJM did not try to explain away her statement that she wanted to say yes, the anal sex was consensual by pointing to conflicting feelings or her statement to Appellant that he could do anything he wanted.” (Id.)

The Government already answered these arguments in its Answer. First, Appellant’s contentions again miss the point, since the real issue here is whether any anal penetration occurred while SJM was unconscious. The evidence shows anal sex was not initiated either

before Appellant choked her out or after she woke up, but instead was initiated after Appellant rendered SJM unconscious and while she remained unconscious.

Still, even if Appellant's arguments about SJM's answer to AFOSI was relevant, SJM addressed this in her cross-examination testimony where she admitted to making the statement to AFOSI, but also "expressed I wasn't entirely sure due to the fact I was intoxicated and had spotty memory." (R. at 488.) And again, SJM also said she did not recall the anal sex occurring, and that she assumed that it occurred while she was unconscious. (R. at 489.)

SJM's answer to AFOSI's question in this circumstance is understandable. Here, SJM unquestionably had no recollection of anal sex occurring, so it is natural that SJM may have thought she might have consented to something that she did not remember.

But again, whether SJM thought she might have consented to something she does not recall even happening is irrelevant because consent is not the issue with this specification – the real issue is whether the anal sex was initiated after Appellant rendered SJM unconscious. And, again, even if consent did matter, the evidence shows and the law holds that SJM could not and did not consent to anal sex that night. As noted above, before Appellant choked out SJM that night, no anal sex had occurred and there is no evidence that anal sex was even discussed. Additionally, when Appellant first began choking her, SJM told Appellant to "stop," which Appellant brushed off by saying she really wanted him to continue. Thus, prior to her being choked out, there was no consent from SJM for anal sex.

And this sentiment is exactly what this Court found when it stated that "we are not clearly convinced SM's comment during her OSI interview raises a reasonable doubt sufficient to overcome the evidence that Appellant penetrated her anus with his penis by first strangling her with his hands until she was unconscious." Kindred, at *27. Indeed, once Appellant's choking

began, the evidence shows that (1) before SJM was choked out, she had her black shorts on; (2) when she woke her black shorts were off; (3) after waking, SJM began hyperventilating, crying, and slid off the bed; and (4) SJM had no recollection of anal sex. Considering these factors, the only time anal sex could have occurred was *after* Appellant strangled her into unconsciousness. And, as the military judge instructed the panel, an unconscious person cannot consent. (R. at 1023.) Thus, even if SJM *thought* she might have consented despite her lack of memory of the anal sex, the law states that, based on these circumstances, SJM had no ability to consent. This Court's conclusion on this matter is consistent with the law, and Appellant has failed to show this Court overlooked or misapplied facts or law related to this issue. Thus, reconsideration is not warranted.

Next, just as he did in Issue V, Appellant again argues about SJM's prior testimony. (App. Mot. at 10.) However, as discussed above, this Court has already reviewed this particular attack by Appellant against SJM and correctly found that "we are not clearly convinced these admissions by SM materially undermine the Government's compelling evidence that on or about 7 June 2022, Appellant strangled SM into unconsciousness and then penetrated her anus with his penis." Kindred, at *30-31. While Appellant may not agree with this Court's resolution of his argument, he has failed to show how the panel overlooked or misapplied any significant facts related to this issue. Thus, reconsideration is not warranted.

Finally, Appellant returns to yet another argument he already made to this Court that the Special Panel found unpersuasive – the testimony of Dr. PDT and the effects of strangulation. (App. Mot. at 12.) Appellant takes issue with the Court's finding that "Dr. PT acknowledged *inter alia* that a strangling victim could be unconscious for a minute or more without suffering permanent effects," by calling it "conjecture." (Id., citing Kindred, at *28-29.)

Yet, in making this argument, Appellant again fails to cite this Court's entire opinion on this issue, which provides context to the sole sentence he actually cites in his motion. The full holding reads:

Again, we are not clearly convinced this evidence raises a reasonable doubt regarding the elements the Government was required to prove. A fair reading of Dr. PT's direct testimony is that she was describing the effects of a complete, rather than partial, interruption of blood flow to the brain. Moreover, on cross-examination, *Dr. PT acknowledged inter alia that a strangling victim could be unconscious for a minute or more without suffering permanent effects*; that once the subject regained consciousness it "may take them a minute to refocus" and become aware of their surroundings; that a period of unconsciousness could be extended by loosening and then reapplying pressure on the subject's neck; and that it was possible for someone to be raped while they were unconscious due to strangulation. Considering the evidence as a whole, we remain persuaded Appellant strangled SM until she was unconscious, and he accomplished the anal penetration by first rendering her unconscious.

Kindred, at *28-29. (emphasis on portion of this Court's opinion that Appellant quotes in his motion.)

This holding is not "conjecture." Instead, it is based on Dr. PT's testimony which Appellant failed to cite in his filing. During that testimony, Dr. PT agreed that just because someone had regained consciousness did not mean that they were aware of what was going on around them. (R. at 960.) Dr. PT also testified that even though someone might regain consciousness within a second or two of pressure being released, it still "may take them a minute to refocus." (R. at 960.) Thus, even after releasing his strangle hold on SJM, it could have taken SJM a minute to actually become aware of what was happening to her, which was plenty of time for Appellant to complete his anal rape of her. As the military judge instructed, once Appellant rendered SJM unconscious, there only had to be a penetration, *however slight*, once SJM was

unconscious for the rape to be completed. Given Dr. PT's testimony, Appellant had ample opportunity to complete his anal rape of SJM.

Moreover, Dr. PT also agreed that a person could repeatedly apply pressure to someone's neck, let go, and then reapply pressure so as to keep them in a state of either unconsciousness (by applying pressure) or unawareness (by releasing the pressure before applying it again) for more than a couple of minutes. (R. at 961.) This strangle-release-strangle again method would have also provided Appellant more than sufficient time to take off SJM's shorts and anal rape her until ejaculation.

Thus, while Appellant here renews his argument that "[i]t is improbable that Appellant would have been able to simultaneously engage in such strangle-release-strangle actions while simultaneously accomplishing the actions necessary to engage in anal intercourse,"¹ his own expert's testimony shows this very act was quite probable. Regardless, this Court has already addressed this issue, and Appellant has again failed to show the Court overlooked or misapplied any significant fact on this issue. Thus, reconsideration is not warranted.

CONCLUSION

Within his filing, Appellant requests *en banc* reconsideration no less than seven times. He never requests reconsideration from the panel. The reason for that is clear – his filing fails to persuasively argue the Special Panel reviewing his case overlooked or misapplied any legal or factual matter in the case. Instead, Appellant seeks a complete second review of his case by an *en banc* court because he does not agree with the Special Panel's decision in this case, and he does so by making the same arguments about the special trial counsel's statements and the same

¹ See App. Mot. at 12.

attacks on his victims that proved unpersuasive to the Special Panel during its review of this case.

Appellant's motion does make one new argument by trying to shoehorn our superior Court's decision in Matti into the analysis of this case. However, as detailed above, the holding in Matti does not change the landscape of the review of this case as the statements at issue do not rise to the level of those found in Matti. Furthermore, our superior Court's decision in Matti was released prior to this Court's decision in this case, and this Court has already reviewed this case in light of Matti. Thus, reconsideration is unwarranted.

Finally, the Government seeks to clarify one seeming misconception about its Motion for Reconsideration filed on 21 April 2026. In that motion, the Government repeatedly cited to *this Court's* current Rule 31(a), which states as follows:

(a) The Court may, in its discretion and on its own motion, enter an order announcing its intent to reconsider its decision or order in any case *not later than 30 days* after service of such decision or order on the appellate defense counsel or on the appellant, if the appellant is not represented by counsel, provided a petition for grant of review or certificate of review has not been filed with the United States Court of Appeals for the Armed Forces, or a record of trial for review under Article 67(b) has not been received by that Court. No briefs or arguments shall be received unless the order so directs.

A.F. Ct. Crim. App. R. 31(a). (emphasis added.) (*See* Gov. Mot. for Recon at 2 (“Rule 31(a) of this Court’s Rules), 4 (“pursuant to Rule 31(a) of this Court’s Rules), 5 (“this Court’s 30-day requirement in Rule 31(a)”), 8 (“this Court’s Rule 31(a)”))

In Appellant's Opposition to the Government's Motion for Reconsideration, Appellant states the “Government quotes an older, superseded version of JRAP 31(a).” (*See* App. Opp. at 2.) As shown above, that is not the case.

WHEREFORE, this Court should deny Appellant’s motion and not reconsider its 24 February 2026 decision in this case.

[REDACTED]

G. MATT OSBORN, Colonel, USAF
Appellate Government Counsel

[REDACTED]

[REDACTED]

MARY ELLEN PAYNE
Associate Chief, Government Trial and Appellate
Operations Division

[REDACTED]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 7 May 2026 via electronic filing.

[REDACTED]

G. MATT OSBORN, Colonel, USAF
Appellate Government Counsel

[REDACTED]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	APPELLANT’S REPLY TO THE
	)	GOVERNMENT’S OPPOSITION TO
	)	APPELLANT’S MOTION FOR
<i>Appellee,</i>	)	RECONSIDERATION
)	
v.)	
	)	Before a Special Panel
Airman (E-2))	
CODY L. KINDRED,	)	No. ACM 40607 (f rev)
United States Air Force,)	
<i>Appellant.</i>	)	12 May 2026

**TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:**

COMES NOW Appellant, Airman Cody L. Kindred, by and through his undersigned counsel, and pursuant to this Court’s order of 30 April 2026 replies to the Government’s Opposition to Appellant’s Motion for Reconsideration.

Introduction

After Appellant suggested en banc reconsideration, the original panel commendably decided to take a second look at this case. *United States v. Kindred*, No. ACM 40607 (f rev) (A.F. Ct. Crim. App. Apr. 30, 2026) (order). The Government asked this Court to reconsider, erroneously arguing that the panel’s decision was untimely. Government Motion for Reconsideration, filed 21 April 2026. The Government based its argument on a superseded provision of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals (JRAP). *Id.* at 2, 4–8. Despite having that error called to its attention,¹ the Government now insists that the superseded JRAP 31(a) remains in place as a rule of this Court. Gov’t Opp’n at 20. The Government is wrong. Its argument is premised on a basic misunderstanding of the two sets of

¹ Appellant’s Opposition to Government’s Motion for Reconsideration 1–2, filed 23 April 2026.

rules that govern practice before this Court. This Court acted well within its authority when it vacated its original opinion and ordered reconsideration.

It was not merely permissible, but also appropriate, for this Court to decide to take a second look at this case. This Court should deny the Government’s faulty motion to reconsider and proceed with that second look.

I.

The 30-day time limit for a Court of Criminal Appeals to *sua sponte* order reconsideration no longer exists.

Practice before this Court is governed by two sets of rules. First, Article 66(h), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(h), provides that the Judge Advocates General “shall prescribe uniform rules of procedure for Courts of Criminal Appeals.” They did so by issuing the JRAP, the current version of which is “amended through 17 May 2024.” *See* JRAP at cover page, https://afcca.law.af.mil/afcca_data/cp/1_-_joint_rules_of_appellate_procedure_amended_17_may_2024_2087113.pdf.

Second, JRAP 3 allows the Chief Judge of each of the four Courts of Criminal Appeals to “prescribe rules governing that Court’s practice.” This Court’s Chief Judge has done so. *See* A.F. Ct. Crim App. Rules of Practice and Procedure (effective 23 December 2020), https://afcca.law.af.mil/afcca_data/cp/afcca_rules_of_practice_and_procedure_effective_23_dec_2020.pdf.

As the cover page of this Court’s rules makes clear, those rules are “[p]ublished [t]ogether” with the JRAP. *Id.* at cover page. As the header above the table of contents indicates, the JRAP appear “in **Bold Type**.” *Id.* at i. Rule 31(a) appears on page 38 in bold type. *Id.* at 38. It is, therefore, part of the JRAP. This Court’s rules concerning reconsideration—A.F. Ct. Crim. App. R. 31.1, R. 31.2, and R. 31.3—follow in Roman type.

The version of JRAP 31(a) that is “[p]ublished [t]ogether” with this Court’s Rules has been superseded by the version that appears in the JRAP as amended through 17 May 2024. JRAP, https://afcca.law.af.mil/afcca_data/cp/1_-_joint_rules_of_appellate_procedure_amended_17_may_2024_2087113.pdf. That is the governing version of Rule 31(a). Unlike its predecessor, it does not impose a 30-day limitation upon a Court of Criminal Appeals’ *sua sponte* reconsideration of a decision or order. *See* JRAP 31(a).

The Government nevertheless insists that “*this Court’s* current Rule 31(a)” includes a 30-day limitation on *sua sponte* reconsideration. Gov’t Opp’n at 20 (emphasis in original). But the Government is overlooking the fact that Rule 31(a) appears in bold type and is, therefore, part of the JRAP rather than this Court’s rules. There is no Rule 31(a) in “*this Court’s*” rules. *Id.* (emphasis in original). And the current version of JRAP 31 does not impose the temporal limitation upon which the Government relies. Rather, JRAP 31(e) provides what is essentially a 60-day limitation on a Court of Criminal Appeals’ *sua sponte* reconsideration of a decision. Because this Court acted within that 60-day period, its 16 April 2026 order was timely.²

² Neither the Government’s 21 April 2026 motion for reconsideration nor its latest filing addresses this Court’s authority under JRAP 32 to suspend JRAP provisions, subject to JRAP 31(e)’s prohibition against reconsideration after the deadline for seeking review by the Court of Appeals for the Armed Forces has passed. Even if the old JRAP 31(a) remained in effect, JRAP 32 would have permitted this Court to *sua sponte* reconsider a decision after the 30-day mark.

II.

This Court’s 30 April 2026 reconsideration order was not only permissible, but appropriate.

A. This Court’s initial decision of Assignment of Error V warrants reconsideration.

Early in the prosecution’s closing argument, the special trial counsel made a quintessential implicit comment on the accused’s failure to testify. The discussion accompanying Rule for Courts-Martial (R.C.M.) 919 has long warned: “Trial counsel may not argue that the prosecution’s evidence is un rebutted if the only rebuttal could come from the accused.” Discussion, R.C.M. 919(b), *Manual for Courts-Martial, United States* (2024 ed.). The Court of Appeals for the Armed Forces has expressly observed that that warning “reflects applicable judicial precedent.” *United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005) (quoting *United States v. Mobley*, 31 M.J. 273, 279 (C.M.A. 1990)). Yet in this case, the special trial counsel did exactly what that law forbids when he told the members, “Now, in some cases, you may only have the testimony of the two people who are in the room; or if the two people in the room are the only people who know what happened, you might have the testimony of only one,” soon followed by, “There is undeniable evidence in this case, evidence that the defense cannot deny that has not been refuted in this case” Trial Tr. 1051–52.

Appellant’s opening brief quoted the first portion of that argument but not the second. Appellant’s Brief at 31, 34. This Court’s opinion also quoted the first portion of that argument but not the second. *United States v. Kindred*, No. ACM 40607 (f rev), slip op. at 25, 30, 2026 CCA LEXIS 87, at *51, *60 (A.F. Ct. Crim. App. Feb. 24, 2026). In fact, an ellipsis appears in this Court’s opinion at the precise point in the transcript where the sentence including “undeniable” and “has not been refuted” begins. *See id.*, slip op. at 25, 2026 CCA LEXIS 87, at

*51. In assessing the “context” of the special trial counsel’s statement that “you might have the testimony of only one” person in a room, this Court’s opinion considered language preceding the quoted statement. *See id.*, slip op. at 30, 2026 CCA LEXIS 87, at *60–61. That language preceded the quoted statement by the same length as the “undeniable” and “has not been refuted” statements followed it. *Id.* Thus, it would be appropriate to consider the “undeniable” and “has not been refuted” language in assessing the “testimony of only one” person in the room’s context.

It is especially appropriate for this Court to reconsider the impact of the “undeniable” and “has not been refuted” language on Assignment of Error V because, elsewhere, this Court’s opinion emphasized those same words when the special trial counsel later used them in connection with AS, the alleged kidnapping victim. *Kindred*, slip op. at 26, 2026 CCA LEXIS 87, at *52 (quoting the transcript at 1054, emphasizing, “*This is undeniable. This has not been refuted. There is nothing contradicting [AS’s] testimony.*”). This Court found that the special trial counsel’s characterization of AS’s testimony as undeniable and unrefuted violated *Carter*’s admonition “that trial counsel ‘may not argue that the prosecution’s evidence is unrebutted if the only rebuttal could come from the accused.’” *Id.*, slip op. at 31, 2026 CCA LEXIS 87, at *61 (quoting *Carter*, 61 M.J. at 33 (citation omitted)). Reconsideration is appropriate to assess the impact of the words “undeniable” and “has not been refuted” on page 1052 of the trial transcript—something this Court’s original opinion did not do and, in fairness, something Appellant’s brief did not ask this Court to do. The Government is thus wrong when it argues that Appellant’s suggestion for en banc reconsideration merely “rehashes arguments he previously made to this Court in his initial Assignments of Error brief, all of which this Court has already

thoroughly addressed in its decision.” Gov’t Opp’n at 1.³ Considering that language now would promote justice.

The Government also argues that the special trial counsel’s initial reference to “undeniable evidence . . . that the defense cannot deny that has not been refuted” is different than the special trial counsel’s use of similar language when discussing AS, the latter of which resulted in relief in this Court’s original opinion. Gov’t Opp’n at 7-8; *see Kindred*, slip op. at 31–32, 2026 CCA LEXIS 87, at *61–64. In fact, the special trial counsel’s initial use of that language was worse. There were three alleged victims in this case. All three testified; Appellant did not. Each alleged victim’s testimony addressed some events that occurred when she and Appellant were the only two people in the room. Thus, the special trial counsel’s initial statement concerning unrefuted evidence killed three birds with one stone. It was, therefore, even more prejudicial than use of similar language about AS alone.

For the foregoing reasons as well as those set out in Appellant’s suggestion for en banc reconsideration, it is appropriate for this Court to reconsider Assignment of Error V to determine the impact of the special trial counsel’s use of “undeniable” and “has not been refuted” following soon after his reference to two people being in a room and having the testimony of only one. Trial Tr. 1052. Upon doing so, this Court should conclude that the special trial counsel violated Appellant’s constitutional rights and that the Government cannot carry its burden to demonstrate that the error was harmless as to the findings of guilty to the lesser-included-offense of

³ The Government quoted the first two paragraphs of the special trial counsel’s closing argument in both its original answer and its latest filing. Gov’t Answer at 75–76, filed 17 September 2025; Gov’t Opp’n at 3-4. While the Government’s latest filing prints “There is undeniable evidence in this case, evidence that the defense cannot deny that has not been refuted” in italics and bold, Gov’t Opp’n at 4, that language was not emphasized in its answer brief. Gov’t Answer at 76. Rather, that language was a portion of the un-emphasized final sentence of a 318-word block quotation.

Specification 2 of Charge II or the findings of guilty to Specifications 3 and 4 of Charge II and Charges III and IV and their specifications. This Court should, therefore, deny the Government's motion to reconsider, reverse those findings of guilty, set aside the segmented confinement adjudged for those specifications and the dishonorable discharge, and authorize a rehearing. *See* Article 66(f)(1)(A)(ii), 10 U.S.C. § 866(f)(1)(A)(ii).

B. This Court's initial decision of Assignment of Error I warrants reconsideration.

SJM herself expressed doubt as to the circumstances under which she and Appellant engaged in anal sex. Upon deciding to cooperate with a law enforcement investigation of Appellant after learning that he had another girlfriend, SJM told an Air Force Office of Special Investigations (OSI) agent that she wanted to say the anal sex was consensual but she "wasn't entirely sure due to the fact I was intoxicated and had spotty memory." Trial Tr. 489. This Court should take a second look at the evidence concerning the anal rape offense to determine whether it presents a "real possibility"⁴ of an explanation other than that the anal sex was accomplished by Appellant first rendering SJM unconscious.

One passage from this Court's opinion particularly suggests the appropriateness of reconsideration. While discussing Charge V, Specification 4, the opinion stated, "The evidence does not suggest SM was so intoxicated that she likely experienced alcohol-induced fragmentary memory blackouts, as Appellant suggests." *Kindred*, slip op. at 20, 2026 CCA LEXIS 87, at *40. Something can be a "real possibility" without rising to the level of being "likely." *See Likely*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (12th ed. 2026) ("having a high probability of occurring or being true : very probable"). While Appellant maintains that an alcohol-induced fragmentary blackout is the possibility that fits best with SJM's account of the evening combined

⁴ *See United States v. Meeks*, 41 M.J. 150, 157 n.2 (C.M.A. 1994) (approvingly citing Federal Judicial Center, Pattern Criminal Jury Instructions 17–18 (1987)).

with Dr. PDT's expert testimony, that scenario need not be more likely than not to result in factual insufficiency. Rather, if a Court of Criminal Appeals "believe[s] there is a 'real possibility' that [an appellant] is not guilty, there is reasonable doubt, and [the court] cannot affirm Appellant's conviction." *United States v. Lewis*, No. 201900049, 2020 CCA LEXIS 199, at *25 (N-M. Ct. Crim. App. June 8, 2020).

The Government repeatedly protests that SJM's consent is irrelevant because Charge II, Specification 3, alleged that the anal sex was committed by first rendering her unconscious. Gov't Opp'n at 11, 15, 16. But SJM's comment to an OSI agent that she wanted to say the anal sex was consensual raises a real possibility that the anal sex was not committed by first rendering her unconscious. Rather, it suggests that she may have consensually engaged in anal sex while conscious but, as she explained to the OSI agent, did not remember with certainty "due to the fact I was intoxicated and had spotty memory." Trial Tr. 489.

That same statement also disproves the Government's assertion that "there is no evidence in the record to indicate that she was ever had [sic] a 'black out' due to alcohol." Gov't Opp'n at 14. SMJ's statement to a law enforcement agent that she "was intoxicated and had spotty memory" directly suggests an alcohol-induced fragmentary blackout—which consists of spotty memory due to intoxication. *See* Aaron M. White, *What Happened? Alcohol, Memory Blackouts, and the Brain*, 27 ALCOHOL RSCH. & HEALTH 186, 194 (2003) ("Fragmentary blackouts are episodes for which the drinker's memory is spotty, with 'islands' of memory providing some insight into what transpired . . ."). The Government also asserts that "SJM unquestionably had no recollection of anal sex occurring." Gov't Opp'n at 16. But that is not unquestionable. SJM's statement to the OSI agent that she wanted to say the anal sex was consensual but she "wasn't entirely sure" is consistent with an "'island' of memory providing some insight into what

transpired.” White, 27 ALCOHOL RSCH. & HEALTH at 194. Thus, SJM’s statement that she wanted to say the anal sex was consensual is consistent with some partial memory informing her that a scenario occurred suggesting that she and Appellant engaged in consensual anal intercourse.

The Government’s latest filing incorrectly contends that Dr. PDT’s testimony shows that the prosecution’s strangle-release-strangle scenario “was quite probable.” Gov’t Opp’n at 19. That assertion is notably unsupported by a citation to the record. In fact, Dr. PDT did not testify that such a scenario “was quite probable,” nor did the substance of her testimony suggest such a probability. Rather, her testimony indicates that it would be improbable for someone to remain unconscious unless consistent pressure is maintained on the neck. Trial Tr. 959. She also testified that someone who is strangled will lose bladder control in about 14 to 15 seconds, lose bowel control after 30 seconds, and suffer permanent damage or even death after one minute. *Id.* at 954, 959. There was no evidence that SJM urinated or defecated on herself, as would be expected had she been strangled for as little as 15 to 30 seconds. Additionally, Dr. PDT testified that someone who is strangled to the point of unconsciousness generally regains consciousness in a second or two, though it may take longer for the individual to “refocus.” *Id.* at 954–55, 960–61. It would have been well-nigh impossible for Appellant to engage in all the acts that would be required for him to perform anal intercourse to the point of ejaculation within 15 to 30 seconds—particularly if he kept one hand on SJM’s throat for that entire time.

The Government’s opposition confuses a possibility with a probability. *See id.* at 960–61. But the mere possibility of a scenario in which an individual strangles someone for no more than 13 seconds, then releases for 2 seconds, then restrangles for 13 seconds, etc., does not constitute proof beyond a reasonable doubt. Here, where to accomplish anal sex Appellant would have had

to first remove SJM's shorts, *see id.* at 427, then presumably apply some of the lubricant that was present, *see* Pros. Ex. 24 at 6, and then engage in intercourse long enough to ejaculate for the second time over a relatively brief time span, *see id.* at 420–21, that scenario becomes exceedingly improbable.

As explained in Appellant's suggestion for en banc reconsideration, the reliability of SJM's memory when she testified at Appellant's court-martial was highly problematic. *See* Appellant's Suggestion for Reconsideration En Banc 10–11, filed 19 March 2026. Her earlier inability while testifying under oath to remember facts that should be difficult to forget—such as her reinitiation of an intimate relationship with Appellant following the night of the alleged anal rape and her decision to cooperate with law enforcement only after learning that Appellant had another girlfriend, *see* Trial Tr. 471–74—casts grave doubt on the accuracy of her testimony on the merits. SJM's demonstrable unreliability as a witness, her statement even after choosing to cooperate with law enforcement that she wanted to say the act of anal sex was consensual, and Dr. PDT's testimony establishing the implausibility of SJM remaining unconscious due to strangulation throughout the anal intercourse combine to raise reasonable doubt as to Charge II, Specification 3.

This Court should, therefore, deny the Government's motion to reconsider, set aside that finding of guilty as factually insufficient, dismiss that specification with prejudice, and set aside the period of segmented confinement adjudged for that specification.

Respectfully submitted,

[REDACTED]

Trevor N. Ward, Maj, USAF
Appellate Defense Counsel

[REDACTED]

[REDACTED]

Dwight H. Sullivan
Appellate Defense Counsel

[REDACTED]

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 12 May 2026.

Respectfully submitted,

[REDACTED]

Dwight H. Sullivan
Air Force Appellate Defense Division

**UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS**

UNITED STATES	)	No. ACM 40607 (f rev)
<i>Appellee</i>)	
)	
v.)	
	)	ORDER
Cody L. KINDRED)	
Airman (E-2))	
U.S. Air Force)	
<i>Appellant</i>	)	Special Panel

On 19 March 2026, Appellant suggested this court reconsider en banc its 24 February 2026 decision in *United States v. Kindred*, No. ACM 40607 (f rev), 2026 CCA LEXIS 87 (A.F. Ct. Crim. App. 24 Feb. 2026) (unpub. op.). The Government did not respond to the motion.

In accordance with Rule 27(c) of The Joint Rules of Appellate Procedure for Courts of Criminal Appeals, Appellant’s motion was transmitted to each judge of the court who was present for duty and not disqualified from participation due to a conflict of interest. No participating judge requested a vote to determine whether the court should reconsider the opinion *en banc*.

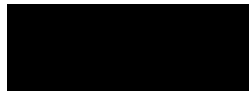
The panel of Chief Judge Johnson, Senior Judge Gruen, and Judge McCall voted 3–0 in favor panel reconsideration.

Accordingly, it is by the court on this 16th day of April, 2026,

ORDERED:

Appellant’s motion dated 19 March 2026 is **GRANTED**. Pursuant to A.F. CT. CRIM. APP. R. 31.2(c), this court’s opinion issued on 24 February 2026 is vacated and a new opinion will be issued in due course.

FOR THE COURT



CAROL K. JOYCE
Clerk of the Court

**UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS**

UNITED STATES	)	No. ACM 40607 (f rev)
<i>Appellee</i>)	
)	
v.)	
	)	ORDER
Cody L. KINDRED)	
Airman (E-2))	
U.S. Air Force)	
<i>Appellant</i>	)	Special Panel

On 19 March 2026, Appellant filed a document entitled, “Appellant’s Suggestion for Reconsideration En Banc.” Appellant stated the filing was made “pursuant to Rules 27(b) and 31 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals [(Joint Rules)] and Rules 31.2 and 31.3 of this Court’s Rules of Practice and Procedure.”

Joint Rule 31 permits a party to file a motion for reconsideration within 30 days of an order, decision, or opinion. Joint Rule 31(c) provides an opposing party may file an answer to a motion for reconsideration within seven days. Joint Rule 31(d) provides that “[i]f the Court announces its intent to reconsider, no briefs or arguments may be filed unless the Court so directs.”

Joint Rule 27 governs the circumstances under which “an appeal or other proceeding” before the court shall be considered or reconsidered by the court *en banc*. Joint Rule 27(b) permits a party to “suggest,” rather than move, that a proceeding be considered or reconsidered *en banc*. Joint Rule 27(b) further provides that “[n]o response may be filed to a suggestion for *en banc* consideration or reconsideration unless the Court so orders.”

The Government did not submit an answer to Appellant’s 19 March 2026 filing.

On 16 April 2026, this court issued an order which noted Appellant’s suggestion for reconsideration *en banc* had been transmitted to each judge who was present for duty and not disqualified, in accordance with Joint Rule 27(c), but that no judge had requested a vote to determine whether to reconsider the opinion *en banc*. However, the panel voted 3–0 in favor of reconsideration by the panel. Accordingly, the court “granted” the “motion” for reconsideration and vacated its prior opinion in this case.

On 21 April 2026, the Government moved for reconsideration of this court’s 16 April 2026 order granting reconsideration. The Government contends

Appellant only suggested reconsideration en banc, and not panel reconsideration. The Government further contends that under “Rule 31(a)” the court was outside the window in which to reconsider the opinion *sua sponte* because more than 30 days had elapsed since the release of the opinion. The Government further contended, in the alternative, “should this Court determine Appellant’s Suggestion was also a Motion for Reconsideration, this Court should still reconsider its Order and allow the Government time to respond to Appellant’s claims.”

On 23 April 2026, Appellant opposed the Government’s motion for reconsideration of this court’s 16 April 2026 order. Appellant contends the Government appears to be relying on an outdated version of Joint Rule 31(a), and that under the current version of Joint Rule 31(e), the court effectively has until 60 days after issuing an opinion to order reconsideration *sua sponte*.

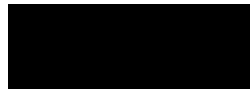
Under the particular circumstances of this case, the court finds good cause to permit the Government an additional opportunity to respond to the arguments put forward in Appellant’s 19 March 2026 filing. Given that Appellant’s 19 March 2026 filing was not styled as a motion for reconsideration, the Government evidently failed to appreciate Appellant was moving for reconsideration—to which the Government was permitted to respond without specific authorization from the court—as well as suggesting such reconsideration be by the court *en banc*. The court further finds good cause to permit Appellant the opportunity to reply to any further response from the Government. The court will make a final ruling on the Government’s motion for reconsideration after it receives such additional filings from the parties, if any.

Accordingly, it is by the court on this 30th day of April, 2026,

ORDERED:

Appellee may file a brief answering Appellant’s 19 March 2026 filing **not later than 7 May 2026**. Appellant may reply to any such brief **within seven days** of its filing. No further briefs will be permitted without leave from the court.

FOR THE COURT



CAROL K. JOYCE
Clerk of the Court

However, the Special Panel in this case then stepped outside of Appellant's Rule 27 request and proceeded to vote, as a panel, for reconsideration. Because this vote was not performed pursuant to a request of either party, but was instead done *sua sponte*, this vote was seemingly performed at the Panel's own discretion or on its own motion pursuant to Rule 31(a) of this Court's Rules. However, the Special Panel's resulting Order granting panel reconsideration was released on 16 April 2026, more than 30 days after its initial decision in this case – a timeframe which violates Rule 31(a).

Considering the above, this Court should reconsider its 16 April 2026 Order, deny Appellant's 19 March 2026 Suggestion, and find that the Special Panel's announcement of its intent to reconsider its decision was made out of time.

ISSUE FOR RECONSIDERATION

WHETHER THIS COURT MISAPPLIED ITS RULES AND GRANTED PANEL RECONSIDERATION IN VIOLATION OF RULE 31(a).

JURISDICTION

In accordance with Rules 15 and 31(b)-(c), this Court has the jurisdiction to consider this motion because the United States timely submitted a motion for reconsideration within thirty days of its 16 April 2026 receipt of the Court's 16 April 2026 Order.

STATEMENT OF FACTS

On 24 February 2026, this Court issued its opinion in this case, therein setting aside the findings of guilty and dismissing Charge III and its Specification and Charge IV and its Specification. United States v. Kindred, No. ACM 40607 (f rev), 2026 CCA LEXIS 87 (A.F. Ct. Crim. App. Feb. 24, 2026). This Court affirmed the remaining findings of guilt and reassessed Appellant's sentence. Id.

On 19 March 2026, Appellant filed his Suggestion, wherein Appellant “suggests reconsideration en banc.” (Id. at 1.) Throughout his 14-page filing, Appellant never requested or moved for panel reconsideration of his case – instead, he only repeatedly suggested *en banc* reconsideration. (See Id. at 1, 2, 7, 13.)

Rule 27 of this Court’s Rules specifically addresses suggestion for reconsideration of a proceeding *en banc*. The rule states, “A suggestion for *en banc* reconsideration must be made within the time prescribed by Rule 31 for filing a motion for reconsideration,” adding, “No response may be filed to a suggestion for *en banc* consideration or reconsideration unless the Court so orders.” Pursuant to this prohibition, the Government did not file a response to Appellant’s filing.

On 16 April 2026, this Court issued its Order granting panel reconsideration of Appellant’s case. (See Order.) In it, this Court stated, “On 19 March 2026, Appellant *suggested this court reconsider en banc* its 24 February 2026 decision.” (Id.) (emphasis added.) The Order also stated, “The Government did not respond to the motion,” but it did not acknowledge that this Court’s Rules specifically forbade the Government from filing a response to Appellant’s Suggestion.

The Order then detailed how Appellant’s Suggestion was processed in “accordance with Rule 27(c) of The Joint Rules of Appellate Procedure for Courts of Criminal Appeals,” and how “[n]o participating judge requested a vote to determine whether the court should reconsider the opinion *en banc*.” (Id.)

The Order then states that three judges of this case’s Special Panel “voted 3-0 in favor [of] panel reconsideration.”

Finally, the Order states that “Appellant’s motion dated 19 March 2026 is **GRANTED**,” and that, pursuant to Rule 31.2(c) of this Court’s Rules, the “court’s opinion issued on 24 February 2026 is vacated and a new opinion will be issued in due course.” (Id.) (emphasis in original.)

ARGUMENT

THIS COURT SHOULD RECONSIDER ITS DECISION TO GRANT PANEL RECONSIDERATION.

Standard of Review and Law

Per Rule 31.2(b) of this Court’s Rules, reconsideration will not be granted by this Court without a showing that one of the following grounds exists:

- (1) A material legal or factual matter was overlooked or misapplied in the decision;
- (2) A change in the law occurred after the case was submitted and was overlooked or misapplied by the Court;
- (3) The decision conflicts with a decision of the Supreme Court of the United States, the CAAF, another service court of criminal appeals, or this Court; or
- (4) New information is received that raises a substantial issue as to the mental responsibility of the accused at the time of the offense or the accused’s mental capacity to stand trial.

Analysis

Reconsideration is appropriate in this case as Appellant never moved for or requested panel reconsideration. Thus, when the Special Panel in this case *sua sponte* voted for panel reconsideration in this case, the Panel did so “in its discretion and on its own motion” pursuant to Rule 31(a) of this Court’s Rules. However, this Court did not “announc[e] its intent to reconsider its decision or order” in this case until *after* 30 days had passed since the Court issued its initial decision in this case, therein exceeding the 30-day requirement of Rule 31(a). Because

this Court's Order, and this Special Panel's announcement of its decision to reconsider this case, exceeds this Court's 30-day requirement in Rule 31(a), this Court should reconsider its Order, deny Appellant's 19 March 2026 Suggestion, and find that the Special Panel's announcement of its intent to reconsider its decision was made out of time.

- ***Appellant's 19 March 2026 Suggestion was not a motion seeking panel reconsideration under Rule 31, but instead was a suggestion for reconsideration of a proceeding en banc under Rule 27.***

Though Appellant's Suggestion references Rule 31, Appellant's filing is plainly a suggestion for reconsideration *en banc*, which is a filing governed by Rule 27 of both the Joint Rules of Appellate Procedure for Courts of Criminal Appeals and this Court's Rules. First, the filing itself is entitled *Suggestion for Reconsideration En Banc*. Next, Appellant's filing suggests *en banc* reconsideration eight times throughout his filing. (See Suggestion at 1, 2, 7, 13.) In contrast, Appellant Suggestion is not entitled a Motion for Reconsideration in any fashion, and never moves or requests panel reconsideration in this case – a request that would be based in Rule 31 of this Court's Rules.

In its Order, this Court recognized Appellant's Suggestion was grounded in Rule 27 of this Court's rules. First, the Court opened its Order by stating, "On 19 March 2026, Appellant ***suggested this court reconsider en banc*** its 24 February 2026 decision." (See Order.) (emphasis added.) Then, this Court used Rule 27 in processing Appellant's Suggestion. (Id.)

Finally, this Court's Rules recognize the distinct difference between a motion for panel reconsideration made under Rule 31 of this Court's Rules and a suggestion for reconsideration *en banc* made under Rule 27. Rule 31.3, entitled *Motion for Reconsideration with Suggestion for En Banc Consideration*, states, "If a party wishes the Court as a whole to reconsider a previous decision issued by a panel, one consolidated pleading may be submitted moving for

reconsideration and suggesting that the motion be considered—and the matter reconsidered, if granted—*en banc*.” This rule highlights that “moving for reconsideration” and “suggesting that the motion be considered . . . *en banc*” are separate filings – if not, there would be no need to “consolidate” them.

Here, Appellant never moved for panel reconsideration, but instead solely – and repeatedly – suggested *en banc* reconsideration in this case. Thus, when “No participating judge requested a vote to determine whether the court should reconsider the opinion *en banc*,” this Court should have denied Appellant’s Suggestion.

- ***While the Special Panel in this case had the power to sua sponte reconsideration its decision in its discretion and on its own motion, the Order announcing the Special Panel’s intent to reconsider its decision was entered more than 30 days after this Court’s decision in this case, therein exceeding the timeframe requirement of Rule 31.***

Considering Appellant never moved for or requested panel reconsideration of this case, the timeframes involved in Rule 31(b) do not apply, and this Court did not have the ability to grant reconsideration under this rule because neither party requested panel reconsideration.

Still, pursuant to Rule 31(a), the Special Panel in this case always had the ability, “in its discretion and on its own motion,” to reconsider its decision in this case irrespective of Appellant’s filing. This provision is seemingly what the Special Panel employed when it voted in favor of panel reconsideration despite having no request from either party in this case for panel reconsideration. However, Rule 31(a) requires that such an “order announcing its intent to reconsider its decision” be entered “not later than 30 days after service of such decision.” Here, the initial decision in this case was issued and served on 24 February 2026. The Order announcing the Special Panel’s intent to reconsider the case, however, was not entered until 16 April 2026, 51 days later.

Considering this Court's Order exceeds Rule 31(a)'s timeframe requirement, this Court should reconsider its Order since it violates the timeframe in which this Court must enter an announcement that a panel intends to reconsider its decision.¹

- ***Other Factual Issues Within the Court's Order***

Two additional factual matters warrant discussion regarding this Court's Order. First, as detailed previously, this Court's Order states, "The Government did not respond to the motion," referencing Appellant's Suggestion. (*See* Order.) However, the Government was foreclosed from responding to Appellant's Suggestion pursuant to this Court's Rule 27, which states, "No response may be filed to a suggestion for ***en banc* consideration or reconsideration** unless the Court so orders." (emphasis added). Thus, it is not that the Government did not respond to Appellant's filing, but instead that they *could not* respond based on Rule 27's prohibition. The United States would have filed a response if the rules had allowed it to or if this Court had offered the opportunity to respond. The United States respectfully asks this Court to amend the statement in its order saying that the Government did not respond to Appellant's Suggestion.

Second, this Court's Order states that "Appellant's motion dated 19 March 2026 is GRANTED." (*Id.*) However, for the reasons detailed above, Appellant's Suggestion was not granted. Appellant's Suggestion asked for one thing only – *en banc* reconsideration of this Court's opinion. However, as this Court's Order states, "No participating judge requested a vote to determine whether the court should reconsider the opinion *en banc*." As there is no *en banc* reconsideration, Appellant's sole request asking for that relief could not and has not been granted. This Court's Order should accurately reflect that Appellant's one and only request – *en*

¹ Though the Order is silent on the date in which the panel's vote for panel reconsideration actually took place, this vote likely also took place after Rule 31(a)'s 30-day timeframe since Appellant filed his Suggestion on 19 March 2026, 23 days after the release of this Court's decision.

banc reconsideration – has been denied.

- ***An alternate remedy should this Court determine Appellant’s Suggestion was also a Motion for Reconsideration***

As an alternative, should this Court determine Appellant’s Suggestion was also a Motion for Reconsideration, this Court should still reconsider its Order and allow the Government time to respond to Appellant’s claims.

When the Government received Appellant’s Suggestion, it took the filing for what and how Appellant choose to title the filing and name the file attached to his filing – that is, a suggestion for reconsideration *en banc*. The Government then followed this Court’s Rules relative to such a filing, which included being unable to file a response absent a Court order. However, if this Court now views Appellant’s Suggestion as a separate motion for panel reconsideration filed under Rule 31(b), this Court should provide the Government the requisite response time of seven days to respond to Appellant’s filing pursuant to Rule 31(c).

CONCLUSION

Here, Appellant never moved for panel reconsideration, but instead solely – and repeatedly – suggested *en banc* reconsideration in this case. Thus, when “No participating judge requested a vote to determine whether the court should reconsider the opinion *en banc*,” this Court should have denied Appellant’s Suggestion. Furthermore, while the Special Panel in this case always possessed the *sua sponte* ability to reconsider its decision on its own motion, the Court did not announce the Special Panel’s intent to reconsider the decision until well after the timeframe requirement of this Court’s Rule 31(a).

Based on the above, this Court should reconsider its 16 April 2026 Order, deny Appellant’s 19 March 2026 Suggestion, and find that the Special Panel’s announcement of its intent to reconsider its decision was made out of time. Alternatively, this Court should allow the

United States the opportunity to respond to Appellant's filing before ruling on it.

WHEREFORE, the United States respectfully requests this Honorable Court reconsider its 16 April 2026 Order.

[REDACTED]

G. MATT OSBORN, Colonel, USAF
Appellate Government Counsel

[REDACTED]

[REDACTED]

MARY ELLEN PAYNE
Associate Chief, Government Trial and Appellate
Operations Division

[REDACTED]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 21 April 2026 via electronic filing.

[REDACTED]

G. MATT OSBORN, Colonel, USAF
Appellate Government Counsel

[REDACTED]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	APPELLANT’S OPPOSITION TO
	)	GOVERNMENT MOTION FOR
<i>Appellee,</i>	)	RECONSIDERATION
)	
v.)	
	)	Before a Special Panel
Airman (E-2))	
CODY L. KINDRED,	)	No. ACM 40607 (f rev)
United States Air Force,)	
<i>Appellant.</i>	)	23 April 2026

**TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:**

COMES NOW Appellant, Airman Cody L. Kindred, by and through his undersigned counsel, and pursuant to Rule 31(c) of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals (JRAP) opposes the Government’s motion for reconsideration.

The Government’s reconsideration motion is predicated on a legal mistake. The version of JRAP 31(a) that forms the basis for the Government’s motion has been superseded. The current version of the JRAP, as amended through 17 May 2024, does not contain the language on which the Government relies.¹ This Court’s reconsideration procedure in this case fully complied with the current JRAP.

JRAP 31(a) as posted on this Court’s website provides, in its entirety, “The Court may, either upon motion or *sua sponte*, reconsider any order, decision, or opinion of the Court.” JRAP 31(a) (May 17, 2024), https://afcca.law.af.mil/afcca_data/cp/1_-

¹ The Government’s motion misdescribes the old JRAP 31(a) as “Rule 31(a) of this Court’s Rules.” Gov’t Motion at 2, 4; *see also id.* at 8 (“this Court’s Rule 31(a)”). The JRAP are jointly issued by the Judge Advocates General pursuant to Article 66(h), Uniform Code of Military Justice, 10 U.S.C. § 866(h). This Court’s Rules of Practice and Procedure are issued by the Chief Judge under the authority of JRAP 3. The JRAP and this Court’s Rules of Practice and Procedure are distinct. *See, e.g., United States v. Muller*, 79 M.J. 359, 360–61 (C.A.A.F. 2020).

joint_rules_of_appellate_procedure_amended_17_may_2024_2087113.pdf.

JRAP 31(e) provides a temporal limitation on this Court’s reconsideration authority: “the Court may *sua sponte* reconsider an order, decision, or opinion at any time, but in no instance beyond the deadline for filing a petition for review, certificate for review, or writ appeal with the United States Court of Appeals for the Armed Forces.” Because this Court granted reconsideration less than 60 days (i.e., the deadline for filing a petition for review or certificate for review) from the issuance of the original opinion on 24 February 2026, this Court acted within that temporal limitation.

The Government quotes an older, superseded version of JRAP 31(a) for the proposition that “Rule 31(a) requires that . . . an ‘order announcing [the Court’s] intent to reconsider its decision’ be entered ‘not later than 30 days after service of such decision.’” Gov’t Motion at 6. That 30-day period is no longer in Rule 31(a). Yet the Government’s motion relies on the superseded 30-day time limit seven times. *Id.* at 2, 4 (twice), 5, 6 (twice), 7 n.1. This Court did not err by failing to follow a superseded rule.

Even if JRAP 31(a) had not been amended, the Government’s argument would have lacked merit. In both the JRAP’s former and present iterations, JRAP 32 authorizes this Court to *sua sponte* suspend another JRAP provision. But there was no need to suspend Rule 31(a)’s 30-day limitation because it no longer exists.

This Court should summarily deny the Government’s motion seeking to enforce a superseded rule that would not have precluded this Court’s action even had it remained in force.

Respectfully submitted,

[REDACTED]

Trevor N. Ward, Maj, USAF
Appellate Defense Counsel

[REDACTED]

[REDACTED]

Dwight H. Sullivan
Appellate Defense Counsel

[REDACTED]

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 23 April 2026.

Respectfully submitted,

[REDACTED]

Dwight H. Sullivan
Air Force Appellate Defense Division

**UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS**

UNITED STATES	)	No. ACM 40607 (f rev)
<i>Appellee</i>)	
)	
v.)	
	)	ORDER
Cody L. KINDRED)	
Airman (E-2))	
U.S. Air Force)	
<i>Appellant</i>	)	Special Panel

On 19 March 2026, Appellant filed a document entitled “Appellant’s Suggestion for Reconsideration En Banc.” The Government did not submit a response to this filing.

On 16 April 2026, this court issued an order which noted Appellant’s suggestion for reconsideration en banc had been transmitted to each judge who was present for duty and not disqualified, in accordance with Joint Rule 27(c), but that no judge had requested a vote to determine whether to reconsider the opinion en banc. However, the panel voted 3–0 in favor of reconsideration by the panel. Accordingly, the court “granted” the “motion” for reconsideration and vacated its prior opinion in this case.

On 21 April 2026, the Government moved for reconsideration of this court’s 16 April 2026 order granting reconsideration. On 23 April 2026, Appellant opposed the Government’s motion for reconsideration.

On 30 April 2026, this court issued an order permitting the Government to “file a brief answering Appellant’s 19 March 2026 filing not later than 7 May 2026,” and permitting Appellant to reply to any such brief within seven days. The court’s order did not rule on the Government’s pending motion, but stated the court would “make a final ruling on the Government’s motion for reconsideration after it receives such additional filings from the parties, if any.”

The Government filed its brief on 7 May 2026, and Appellant filed his reply to the Government’s brief on 12 May 2026.

Accordingly, it is by the court on this 21st day of May, 2026,

ORDERED:

Appellee's Motion for Reconsideration dated 21 April 2026 is **DENIED**.

FOR THE COURT



CAROL K. JOYCE
Clerk of the Court