IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

NIKOLAS S. CASILLAS
Airman First Class (E-3),
United States Air Force,
Appellant.

USCA Dkt. No. 24-0089/AF

Crim. App. Dkt. No. ACM 40302

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANT

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Issues Presented[1]

I.

Whether Article 120(b)(2) and (g)(7), Uniform Code of Military Justice, 10 U.S.C. §§ 920(b)(2) and (g)(7), are unconstitutionally vague because they fail to put defendants on fair notice of the specific charge against them.

II.

As applied, whether Article 120(b)(2) and (g)(7), Uniform Code of Military Justice, 10 U.S.C. §§ 920(b)(2) and (g)(7), gave Appellant constitutional fair notice when the military judge denied defense counsel's request for a tailored jury instruction.

III.

Whether A1C Casillas's conviction for sexual assault without consent was legally sufficient.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d) (2018).[2] This Honorable Court has jurisdiction to review this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2018).

Relevant Authorities

The Due Process Clause of the Fifth Amendment, United States Constitution, provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."

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[1] Issue IV is omitted, as supplemental briefing was ordered only for Issues I-III.
[2] Unless otherwise noted, all references to the UCMJ are to the version in the *Manual for Courts-Martial, United States* (2019 ed.).

The Sixth Amendment of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be informed of the nature and cause of the accusation."

As the entirety of 10 U.S.C. § 920 (2018) is relevant to the facial challenge, the statute is reproduced in full in the appendix.

Statement of the Case

Airman First Class (A1C) Nikolas S. Casillas incorporates the statement of the case included in his initial assignments of error, as it has not changed. Br. on Behalf of Appellant at 2-3.

Statement of the Facts

A1C Casillas incorporates the statement of facts included with his initial assignments of error. Br. on Behalf of Appellant at 3, 5-10. A1C Casillas also incorporates the Government's recitation of the facts about the sexual encounter, which highlighted all the evidence tending to show S.F., the named victim, was asleep during the sexual act. Br. on Behalf of the United States at 3-5, 9-10. However, contrary to the Government's contention that "eventually" A1C Casillas stopped having sex with S.F. after she woke up, S.F. testified that when she woke up to being penetrated, "in the moment," she "froze." JA at 115. "In that moment," she just laid there. *Id*. She knew he penetrated her with his penis because "he was taking it out." *Id*. Then, "he just got up and left." *Id*.

Additionally, A1C Casillas offers the following additional facts, which are relevant to the supplemental briefing of Issues I-III.

A1C Casillas repeatedly denied that S.F. was sleeping or "passed out" when they had sex, saying she was moving, being funny, talking to him, and kissing him beforehand and that she was moaning and moving during the encounter. JA at 127-30, 132, 134, 137, 138, 350, 362. They also knew each other before that night, and S.F. told her friends she was interested in A1C Casillas. JA at 165, 167, 301, 373, 395. The sexual encounter happened after S.F. "made out" and kissed A1C Casillas, she went on a drive around the block alone with him, talked about intimate topics like self-harm ("cuts" on legs and arms) with him, and she told him to stay the night in her bed with her after turning on Grey's Anatomy to watch together. JA at 133, 135-36, 138, 147-48, 170, 173, 175, 178, 295-96, 374-75.

During its legal and factual sufficiency review, the AFCCA found S.F. "credibly testified that she woke to [A1C Casillas's] penis inside her vagina, and that she did not consent to that sexual act. Moreover . . . [A1C Casillas] admitted . . . the act occurred, and that at some point during the encounter she was no longer responsive." JA at 14. The AFCCA affirmed A1C Casillas's conviction for sexual assault without consent and did not discuss the due process issues implicated by the conviction. JA at 2.

On July 22, 2024, A1C Casillas submitted his initial briefing on Issues I-III. Br. on Behalf of Appellant at 14-44. Of the three issues, only Issue III explicitly mentioned *United States v. Mendoza*, __ M.J. __, 2024 CAAF LEXIS 590 (C.A.A.F. 2024). Issues I and II grappled with the same due process concerns underpinning *Mendoza*, but the source of the fair notice issue was tied to Article 120(g)(7), UCMJ, which provides the definition of consent. Br. on Behalf of Appellant at 14-42. *Mendoza* does not analyze this definition. When arguing Issue III, A1C Casillas asserted his case could be implicated by *Mendoza* if this Court ruled "without consent" means "consent in fact was required." Br. on Behalf of Appellant at 44. He suggested a new legal sufficiency review by the AFCCA would be required if that was the holding. *Id.* He also preserved the due process issue, tying it back to how the Government must prove what it charged. *Id*.

The Government filed its Answer Brief on August 21, 2024. Br. on Behalf of the United States. In responding to Issue III, the Government distinguished *Mendoza* by arguing the facts. *Id*. at 43-44. To the Government, *Mendoza* was an incapacity by intoxication case, rather than a consent and sleep case; therefore, A1C Casillas's conviction was "unaffected" by any result in *Mendoza*. *Id*. at 44. The Government disclaimed A1C Casillas's case being about alcohol at all: "S.F. unambiguously testified that she remembered what did and did not happen before she fell asleep, despite trial defense counsel's best efforts to portray her as being too intoxicated to

remember." *Id*. at 45 (citing JA at 194-95). The Government stated, "[A] rational trier of fact could then find that Appellant did not, in fact, have S.F.'s consent when he began penetrating her vulva as she slept." *Id*.

Additionally, throughout its brief, the Government hinted at a new theory on appeal about how S.F. woke up to being penetrated and then, at that moment, did not consent for the time she was awake after the penetration occurred. Br. on Behalf of the United States at 14, 32 (arguing how Article 120(b)(2)(A), UCMJ, ensures criminalization of "every minute of a nonconsensual sexual encounter"), 42 ("the facts showed that S.F. woke up at some point, at which point she could have (but did not) consented"). For the first time on appeal, the Government suggested there were two sexual assaults: one while S.F. was sleeping and one after she woke up. *Compare id*. at 14 (arguing "Appellant was charged with sexual assault without consent after he pulled down S.F.'s shorts as she was sleeping and penetrated her vulva with his penis, without her permission"), *with id*. at 42 (arguing S.F. could have consented after she woke up). The latter was never argued or presented at trial.

A1C Casillas's Reply Brief, filed on September 16, 2024, did not readdress Issue III, as it depended on the outcome of *Mendoza*.

On October 7, 2024, this Court issued its opinion in *Mendoza*. __ M.J. __, 2024 CAAF LEXIS 590. There, this Court held two subsections of Article 120, UCMJ, (b)(2)(A) and (b)(3)(A), establish separate theories of liability. *Id*. at *17. "Subsection

(b)(2)(A) criminalizes the performance of a sexual act upon a victim who is *capable of consenting but does not consent*." *Id*. (emphasis added). Separately, "[s]ubsection (b)(3)(A) criminalizes the performance of a sexual act upon a victim who is incapable of consenting to the sexual act" due to an intoxicant when the incapacity is "known or reasonably should be known by the accused." *Id*. at *18.

On October 29, 2024, this Court ordered additional briefing on Issues I-III to discuss the effects of *Mendoza* on A1C Casillas's case.

Summary of the Argument

Issue I

Mendoza does not alter the facial challenge to Article 120(b)(2)(A), UCMJ. In fact, it reenforces it. The Government is not allowed to charge one theory and then argue a different theory at trial. *Mendoza*, __ M.J. __, 2024 CAAF LEXIS 590, at *18. By extension, the definition of consent—which is the source of the Government's ability to switch theories—cannot allow the factfinder to convict on a theory not otherwise charged. Doing so would violate the accused's "constitutional 'right to know what offense and under what legal theory he will be tried and convicted.'" *Id*. (quoting *United States v. Riggins*, 75 M.J. 78, 83 (C.A.A.F. 2016)). Nothing in *Mendoza* corrects the interplay between subsections (b)(2)(A) and (g)(7) in Article 120, UCMJ. *Mendoza* identifies this issue as constitutional, works in part to stop it, but does not go far enough because the all-encompassing definition of

consent remains intact. This the reason that Article 120(b)(2)(A), UCMJ, remains facially invalid even after *Mendoza*.

Issue II

If this Court rules that Article 120(b)(2)(A), UCMJ, is facially constitutional, *Mendoza* dictates that at least in A1C Casillas's case, the Government tried and convicted him in violation of his due process right to fair notice. *Mendoza* is clear that the Government cannot charge one offense and then argue another. But this is what happened in A1C Casillas's case and was made possible through the definition of consent in the instructions.

The instruction for the definition of the consent as prescribed by Congress is the true source of the issue. By providing the complete definition of consent and then allowing the Government to argue any theory therein, the Government violated A1C Casillas's due process right to "be informed of the nature and cause of the accusation." U.S. CONST. amend. V; U.S. CONST. amend. VI. The Court should find as much here. Additionally, as argued initially, this Court should also hold that military judges must tailor the definition of consent to the theory—or theories—that the Government charged so an accused can be informed of, and adequately defend against, the charged offenses. Br. on Behalf of Appellant at 39-40.

Issue III

Mendoza dictates A1C Casillas's conviction should be set aside due to legal insufficiency. There is no evidence that after S.F. woke up, assuming that was her state, that she withheld consent. Rather, the evidence attempts to prove that A1C Casillas penetrated S.F.'s vulva while she was asleep or otherwise incapable of consenting. This was not the theory charged. Therefore, the Government failed to prove the offense. No new legal sufficiency analysis by the AFCCA is necessary because the AFCCA relied on S.F. being asleep or otherwise incompetent to affirm the conviction. This Court can find the AFCCA erred in its analysis and then set the conviction aside.

Should this Court find legal sufficiency, the due process issue remains outstanding as does the AFCCA's erroneous factual sufficiency analysis. If such is the position of this Court, then consistent with the doctrine of constitutional avoidance, A1C Casillas requests his case be sent back for a new factual sufficiency analysis as was done in *Mendoza*.

Argument

Issues I, II, and III are kept in the same order as the original brief. However, this Court does not have to resolve them in that order. This Court normally avoids constitutional issues when it is possible to resolve a case on other grounds. *Escambia Cty. v. McMillan*, 466 U.S. 48, 51 (1984) (noting "the Court will not decide a

constitutional question if there is some other ground upon which to dispose of the case"). As such, A1C Casillas urges this Court to resolve the legal sufficiency question first (Issue III). It should do so here for two reasons.

First, as outlined in Issue III below, this Court can determine legal sufficiency without remanding because it is clear the AFCCA's analysis is erroneous following *Mendoza.* The AFCCA erroneously relied on S.F. being asleep or otherwise being incompetent to affirm the conviction. *See* Section III, *infra*, at 31-32. This is a different theory of liability than the one charged. Based on the facts in the record, no reasonable factfinder could find S.F. was capable of consenting and withheld consent. *Id*. at 26-30. In *Mendoza*, the lower court's analysis was unclear about how the facts supporting the wrong theory had any relevance to the charged theory. *Mendoza*, __ M.J. __, 2024 CAAF LEXIS 590, at *23. Thus, the case was remanded for a new legal sufficiency review. *Id*. But here, due to the AFCCA's clear reliance on incapacity evidence and upon review of the remaining facts in the record, this Court can find the AFCCA erred: no reasonable fact finder could find S.F. could consent and decided not to. This Court can find A1C Casillas's conviction is legally insufficient without remanding. *See* Section III, *infra*, at 31-32.

Second, should this Court find A1C Casillas's conviction is legally *sufficient*, then like in *Mendoza*, his case should be remanded for a new *factual* sufficiency analysis rather than engaging in the constitutional issues at this time. The AFCCA

did not have the benefit of *Mendoza* and the legal landscape has changed dramatically. *Mendoza*, __ M.J. __, 2024 CAAF LEXIS 590, at *21-23. A1C Casillas is entitled to a proper factual sufficiency review in the first instance, regardless of the constitutional issues. *Mendoza*, __ M.J. __, 2024 CAAF LEXIS 590, at *59-60 (Maggs, J., concurring in part, dissenting in part). There is nothing preventing A1C Casillas from reraising, and this Court from regranting, the due process issues again should his conviction be reaffirmed. *See, e.g.*, *Bond v. United States*, 572 U.S. 844, 853-54 (2014) (demonstrating how the Supreme Court has done this exact thing).

With this in mind, A1C Casillas addresses how *Mendoza* impacts Issues I, II, and III in order, beginning with the facial constitutional challenge, as it frames the remaining issues presented.

I.

Article 120(b)(2)(A), UCMJ, remains facially unconstitutional following *Mendoza*. *Mendoza* did not analyze or correct the offending definition of "consent."

Standard of Review

The constitutionality of a statute is a question of law we review de novo. *United States v. Prather*, 69 M.J. 338, 341 (C.A.A.F. 2011) (citing *United States v. Disney*, 62 M.J. 46, 48 (C.A.A.F. 2005)).

Law and Analysis

Mendoza helps alleviate the facial infirmity of Article 120(b)(2)(A), UCMJ, but it does not change the unconstitutional interplay within in the statute. *Mendoza* answered whether there is a due process violation when the Government argues an uncharged theory of liability through the narrow lens of legal sufficiency. *Mendoza*, __ M.J. __, 2024 CAAF LEXIS 590, at *19 n.4. A1C Casillas's case asks a broader question about the statute itself. Specifically, how the definition of consent, as written by Congress in Article 120(g)(7), UCMJ, invites military judges to instruct on improper theories of liability in "without consent" cases and allows factfinders to unconstitutionally consider and convict on uncharged theories. The definition of consent is the underlying facial due process problem, which *Mendoza* leaves untouched.

Mendoza's holding is narrow. It only explicitly says two subsections of Article 120, UCMJ, are distinct theories of liability: (b)(2)(A) and (b)(3)(A). *Mendoza*, __M.J.__, 2024 CAAF LEXIS at *17. But, consistent with the arguments A1C Casillas presented initially, this Court should expand *Mendoza* and hold that every Article 120, UCMJ, subsection—and any subsection therein[3]—is a distinct theory of liability. Br. on Behalf of Appellant at 15-38; Reply Brief on Behalf on Appellant at 4-17. Lower courts are already interpreting *Mendoza* this way. *E.g.*,

[3] *United States v. Sager*, 76 M.J. 158, 161-62 (C.A.A.F. 2017).

United States v. Moore, No. ACM 40442 (f rev), 2024 CCA LEXIS 485, at *16-18 (A.F. Ct. Crim. App. Nov. 13, 2024) (finding a conviction legally insufficient where the evidence supported the victim was asleep, rather than competent to withhold consent). Holding all subsections under Article 120, UCMJ, are distinct legal theories is consistent with *Mendoza*'s reasoning, which echoes A1C Casillas's arguments about plain text, surplusage, and preventing the Government from circumventing mens rea requirements. *Mendoza*, __ M.J. __, 2024 CAAF LEXIS 590, at *14-17; Br. on Behalf of Appellant at 18-21, 27-37; Reply Br. on Behalf of Appellant at 4-15.

If each theory is a distinct theory of liability, as *Mendoza* supports, then the Government cannot "charge one offense under one factual theory and then argue a different offense and a different factual theory at trial." *Mendoza*, __ M.J. __, 2024 CAAF LEXIS 590, at *18. Doing so is constitutional error. *Id*. (quoting *Riggins*, 75 M.J. at 83). This broader holding helps stop some of the mischief produced by the statute, but it only governs the Government's actions, rather than correcting the due process violations the law itself creates. The definition of consent as defined by Congress still includes every theory of liability, whether read in total, or just in the first sentence through the word "competent." 10 U.S.C. § 922(g)(7) (2018). The Government argued as much in the first place:

> Article 120(b)(2) . . . . prohibits . . . having sex with another person "without the consent of the other person." 10 U.S.C. § 920(b)(2). And

> this prohibition—along with its attendant definition of "consent" as "freely given agreement to the conduct at issue by a competent person"—firmly establishes that a person who is "sleeping, unconscious, or incompetent" is *not* "freely agree[ing] to sexual activity." Therefore, having sexual intercourse with them is criminal.

Br. on Behalf of the United States at 21. *Mendoza* does nothing to alter this dynamic.

Following *Mendoza*, the statute's definition of the element of "consent" still permits the factfinder to find guilt on an alternative, uncharged theory, regardless of whether trial counsel argued a different theory or not. This is because a factfinder instructed on the definition of "consent" still receives the full definition since that remains the law. In this way, even after *Mendoza*, when Article 120(b)(2)(A), UCMJ, is defined by subsection (g)(7), the effect is a lack of fair notice of the charged theory of liability because "consent" remains equated to the various other independent, and often inconsistent, theories of liability.

This dynamic violates due process by denying an accused his right to know under what theory of liability he will be tried and convicted. *Mendoza*, __ M.J. __, 2024 CAAF 590, at *18; *see also, e.g.*, *Stirone v. United States*, 361 U.S. 212, 217 (1960) (demonstrating unconstitutional variance of proof from indictment); *Hedgpeth v. Pulido*, 555 U.S. 57, 58 (2008) (requiring harmless error analysis where a general verdict was returned when multiple theories of liability, one of which was improper, were instructed); *Stromberg v. California*, 283 U.S. 359 (1931) (reversing because "it [wa]s impossible to say under which clause of the [instruction] the conviction was

obtained"). A fundamental due process violation remains by allowing the Government to charge Article 120(b)(2)(A), UCMJ, and dodge proving all the required elements beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 362 (1970); *see Mendoza*, __ M.J. __, 2024 CAAF LEXIS 590, at *17 (discussing how charging (b)(2)(A) rather than (b)(3)(A) avoids proving the accused's mens rea otherwise required).

Mendoza does not permit military judges to ignore or parse the language Congress provided to define "consent." Rather, it suggests the statutory definition is lawful by explicitly citing (g)(7)(A) and (C), the first of which requires a person be "competent" to consent. *Mendoza*, __ M.J. __, 2024 CAAF LEXIS 590, at *13 (quoting Article 120(g)(7)(A), (C), UCMJ). Nothing in *Mendoza* instructs military judges to carve out "competent" or subsection (g)(7)(B) from the definition, both of which incorporate several theories of liability, including rape. Reply Br. on Behalf of Appellant at 6-13. Without additional interpretation by this Court evaluating the constitutionality of the definition of "consent," military judges cannot correct the due process concern. They are bound by this Court's precedent, which left intact a problematic statutory construct following *Mendoza*.

This creates a similar problem as to what followed *Prather*. In *Prather*, this Court held the statutory interplay in a previous version of Article 120, UCMJ, "result[ed] in an unconstitutional burden shift to an accused." 69 M.J. at 343. Then

this Court went one step further, holding "where the members were instructed consistent with the statutory scheme found in Article 120, UCMJ, the unconstitutional burden shift was not cured by standard 'ultimate burden' instructions." *Prather*, 69 M.J. at 344. No "instruction could have cured the error where the members already had been instructed in a manner consistent with the text of Article 120." *Id*. at n.9.

Following *Prather*, though, in *United States v. Medina*, this Court held that it was error to *not* instruct on the unconstitutional interplay where no explanation was put on the record. 69 M.J. 462, 465 (C.A.A.F. 2011). But this Court never held the statute was unconstitutional on its face in *Prather* or *Medina*. And this Court never provided an alternative interpretation of the statute to allow for a proper instruction. As Judge Baker noted in his concurrence "how military judges are supposed to now proceed in light of the Court's positions in *Prather* and *Medina*" is unclear. *Medina*, 69 M.J. at 466 (Baker, J., concurring in the result). "The only course left open, it appears, is for military judges to continue giving 'erroneous' instructions that nonetheless remove the prejudice embedded in Article 120, UCMJ, beyond a reasonable doubt." *Id*.

Mendoza creates the same problem by not considering the definition of consent and its role in providing fair notice in every Article 120(b)(2)(A), UCMJ, case. No part of the consent definition in the statute has been interpreted, but *Mendoza* suggests the definition of consent is problematic by the way it allows the factfinder to find

guilt based on another uncharged theory of liability. *Mendoza*, __ M.J. __, 2024 CAAF LEXIS 590, at *18. As with the *Prather-Medina* dynamic, instructing on the definition of consent as written would be constitutional error under *Mendoza*, but *not* instructing on the congressional definition would also be constitutional error. *Neder v. United States*, 527 U.S. 1, 15 (1999).

"What is needed at this stage . . . is clear guidance from this Court that can be applied in a uniform fashion throughout the armed forces." *Medina*, 69 M.J. at 466 (Baker, J., concurring in the result). Otherwise, *Mendoza* merely "construe[d] a criminal statute on the assumption that the Government will 'use it responsibly.'" *Dubin v. United States*, 599 U.S. 110, 131 (2023) (quoting *McDonnell v. United States*, 579 U.S. 550, 576 (2016)). This has never been justifiable. It remains, as the Government originally argued, that anyone charged with sexual assault without consent must be prepared to defend against *every* theory of liability enumerated by the statute because that is what is "contemplated by the definition of 'consent.'" Br. on Behalf of the United States at 25, 28.

Following *Mendoza*, the ability for the factfinder to convict on an uncharged factual theory under Article 120(b)(2)(A), UCMJ, is still possible through the definition of consent, but now, this Court has held doing so would be unconstitutional. There are two options following *Mendoza*: (1) find Article 120(b)(2)(A), UCMJ, facially unconstitutional, or (2) through statutory

interpretation, strike all or parts of subsection (g)(7). But the second option is not viable because it is not the province of this Court to rewrite the definition of the element of consent. *Medina*, 69 M.J. at 465 n.5. As the Supreme Court has noted, "the definition of the elements of criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Liparota v. United States*, 471 U.S. 419, 424 (1985). Therefore, the only available option is that Article 120(b)(2)(A), UCMJ, is facially unconstitutional following *Mendoza*. That is the only way to effectuate *Mendoza*'s reasoning that each subsection of Article 120, UCMJ, is a separate theory of liability without invading the legislature's function.

Therefore, A1C Casillas requests this Court set aside and dismiss the findings of guilt with prejudice and set aside the sentence.

II.

Following *Mendoza*, as applied to A1C Casillas, Article 120(b)(2)(A), UCMJ, remains unconstitutional because it did not provide him fair notice when the Government swapped theories based on the definition of consent.

Standard of Review

The constitutionality of a statute is a question of law we review de novo. *Prather*, 69 M.J. at 341 (citing *Disney*, 62 M.J. at 48).

Law and Analysis

Following *Mendoza*, A1C Casillas's as applied constitutional challenge to

Article 120(b)(2)(A), UCMJ, prevails. The statutory definition of consent allowed the trial counsel to argue several uncharged theories of liability, violating A1C Casillas's right to know under which legal theory he would be tried and convicted. A1C Casillas's case provides a framework for how *Mendoza* should be interpreted and applied going forward, particularly regarding instructions, the true source of the due process violation. Because of how A1C Casillas's due process rights were violated, the constitutional error is subject to harmless error review. Under this standard, his conviction must be set aside.

A. Through the statutory definition of consent, the Government was able to switch theories and argue an uncharged theory of liability in violation of A1C Casillas's constitutional right to fair notice.

First, as noted in the facial challenge analysis above, *Mendoza*'s narrow holding about subsections (b)(2)(A) and (b)(3)(A) extends beyond those two theories of liability, and includes, as relevant here, subsection (b)(2)(B), when a person is asleep. Subsection (b)(2)(A) cannot be read broadly to include the other theories of liability otherwise articulated in the statute. As discussed in *Mendoza* and in A1C Casillas's original brief and reply brief, this is because of the plain text, the canon against surplusage, *Sager*, 76 M.J. at 161, and the due process clause. *Mendoza*, __ M.J. __, 2024 CAAF LEXIS 590, at *11-18; Br. on Behalf of Appellant at 18-21, 27-37; Reply Br. on Behalf of Appellant at 4-15.

Consequently, "to avoid these concerns, and consistent with the language and

structure of Article 120, UCMJ," subsection (b)(2)(A) and subsection (b)(2)(B) *also* establish separate theories of liability. *Id*. at *17. "Subsection (b)(2)(A) criminalizes the performance of a sexual act upon a victim who is capable of consenting but does not consent." *Id*. Subsection (b)(2)(B) "criminalizes the performance of a sexual act upon a victim who is incapable of consenting to the sexual act due to" being asleep, unconscious, or otherwise unaware "when the victim's condition is known or reasonably should be known by the accused." *Id*. at *18; 10 U.S.C. § 920(b)(2)(B) (2018). "[T]he Government cannot . . . charge one offense under one factual theory and then argue a different offense and a different factual theory at trial." *Mendoza*, __ M.J. __, 2024 CAAF LEXIS 590, at *18. Doing so violates an accused's "constitutional 'right to know what offense and under what legal theory he will be tried and convicted.'" *Id*. (quoting *Riggins*, 75 M.J. at 83).

Here, the Government violated A1C Casillas's constitutional rights by arguing different theories of liability than the one it charged. Trial counsel consistently argued S.F. was asleep, not that S.F. was competent or capable of consenting:

- "You can consider how she described, awakened feeling Airman Casillas's . . . penis in her private region, in her vulva." JA at 473.
- "You have the witness that came up here and told you, I was asleep." JA at 474.
- "A sleeping, unconscious, or incompetent person cannot consent. Talking a little bit, moving a little bit, is not consent period dot." JA at 476.

- "You were responsive for a little while is the question. . . . Not when you see someone who is awake – who's sleeping, who you've been watching drink all night, is lying on the bed, asleep, a reasonable, sober, adult doesn't wake that person up to try to get them to have sex period dot." JA at 481.

- "Had to wake her ass up. A reasonably sober adult in this circumstance does not see someone sleeping and in words of A1 [sic] Casillas, wake their ass for sex." JA at 481.

- "And based on the evidence we have, just before we even get to talking about, it's fairly clear to establish that Airman Casillas view, [S.F.] was asleep, and he had to quote on quote 'wake her ass up' and then she was responsive for a little while and then it happened . . . ." JA at 482.

- "Think about the evidence you have about what [S.F.] was doing prior to the sexual assault, sleeping, in and out of consciousness, had to wake her up, penile penetration." JA at 483.

Trial counsel also argued incapacity, hinting at intoxication, but relying, again, mostly on S.F. being asleep:

- "You have to think, if someone can describe, recall, know exactly what's going on, consider that as to their state of intoxication. He's also describing Airman at or around the time of the charged conduct. Now let's think about this in context. You may have someone who [is] sober. You may have a someone who's had a couple drinks and maybe feeling a little giddy. You may have someone that may be perceived as drunk. You may have someone that may be not okay to drive, pretty bad shape. And you may have someone that is totally out of it, completely out of it." JA at 472.

- "A reasonably sober person, an adult exercising due care, does not have sex with somebody they knew to be completely out of it." JA at 481.

- "She wasn't dancing on tables. She wasn't in the kitchen making

dinner. She wasn't driving a car." JA at 483.

Additionally, the Government on appeal disclaims the intoxication argument, wholesale agreeing that S.F. being asleep was the primary theory. Br. on Behalf of the United States at 44-45. A1C Casillas concurs. Repeatedly, trial counsel emphasized S.F. was asleep or unresponsive (but not due to alcohol). JA at 473, 474, 481, 482, 483. The Government did exactly what *Mendoza* forbids: charged one offense under one factual theory and then argued a different offense and a different factual theory at trial. This is a violation of A1C Casillas's constitutional rights. *Mendoza*, __ M.J. __, 2024 CAAF LEXIS 590, at *18.

Second, this constitutional violation was furthered by the military judge's instructions. Here, before and after trial counsel argued, multiple instructions by the military judge invited the panel to convict on an inconsistent and uncharged theory of liability:

- "'Consent' means a freely given agreement to the conduct at issue by a competent person." JA at 459.
- "Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent." JA at 459.
- "A sleeping, unconscious, or incompetent person cannot consent." JA at 459.
- "A competent person is a person who possesses the physical and mental ability to consent." JA at 524.

- "An incompetent person is a person who is incapable of appraising the nature of the conduct at issue or physically incapable of declining participation in or communicating unwillingness to engage in a sexual act at issue." JA at 524.

Each of these instructions allowed the panel to convict on a theory different than the one charged. Reply Br. on Behalf of Appellant at 6-13. Even if the panel ignored both counsel's closing arguments, these instructions would have still sanctioned a conviction based on S.F. being asleep or incompetent, which are different theories of liability from consent. *See Mendoza*, __ M.J. __, 2024 CAAF LEXIS 590, at *17-18 (holding, at minimum, subsection (b)(2)(A), the "withholding consent" theory, and (b)(3)(A), an "incompetent" or "incapable" theory, are separate and inconsistent factual theories of liability); *see* Reply Br. on Behalf of Appellant at 4-6 (breaking the subsections down into three broad, non-overlapping categories). Without declaring which parts of the statute are unconstitutional or articulating what the definition of "consent" is for an Article 120(b)(2)(A), UCMJ, case, military judges will continue to read erroneous, unconstitutional instructions to the panel because of how the statute defines consent.

For example, here, the military judge denied the defense's special instruction driving at how being incapable of consenting due to intoxication was irrelevant because it was "an inaccurate statement of the law." JA at 70-72. Similarly, the military judge noted whether S.F. was intoxicated or asleep is a "surrounding circumstance." JA at 71; *see also* Br. on Behalf of the United States at 28-29, 37

(showing the Government using this same logic on appeal). Both reasons for denying the special instruction remain true today because, as discussed in Issue I, *Mendoza* does not say that the definition of consent as written by Congress for an Article 120(b)(2)(A), UCMJ, case is unconstitutional. It is the definition of consent that allows the factfinder to pick an uncharged theory of liability to convict upon. Clarifying what parts of the "consent" definition go to which theory of liability is necessary to avoid another *Prather-Medina* dynamic. *See United States v. Flanner*, 2024 CAAF LEXIS 578, *31 (C.A.A.F. 2024) (Ohlson, C.J., dissenting) ("The broader reality is that *this* Court bears responsibility for sowing seeds of legal confusion . . . .").

From this viewpoint, trial counsel's argument exacerbated the due process error created by the statute, rather than the other way around. Trial counsel's argument capitalized on the definitions invoking issues about competency or capacity, contravening the Government "stipulation" that capacity is not at issue in a "withholding consent" case. *Mendoza*, __ M.J. __, 2024 CAAF LEXIS 590, at *47-48 (Sparks, J., concurring in part, dissenting in part) ("[A] charge of sexual assault without consent is equivalent to the government stipulating that the victim was competent to consent under the circumstances alleged."). Ultimately, the error in this case governed by the statute and hammered home by the trial counsel in argument permitted the panel to convict on a different theory of liability than the one charged.

B. The Government cannot meet its burden that the constitutional error created in A1C Casillas's trial was harmless beyond a reasonable doubt.

Mendoza dictates that the switch in theories permitted by the definition of consent and capitalized upon by the trial counsel is constitutional error because the switch denies an accused fair notice. *Mendoza,* __ M.J. __, 2024 CAAF LEXIS at *18. Issue II as framed covers the entirety of this conduct, from the failure to tailor the instructions at the outset to the argument using the instructions to switch theories as it suits the evidence—and everything in between. The ability to switch theories to suit the evidence permeated the entire trial and defense counsel objected, knowing at least one of these theories (incapacity by intoxication) was not charged. JA at 70. This is a preserved constitutional error, which lends itself harmless error analysis.[4] *See Mendoza,* __ M.J. __, 2024 CAAF LEXIS 590, at *25 (Sparks, J., concurring in part, dissenting in part) (discussing how the violation of the due process right to fair notice by arguing an uncharged factual and legal theory of liability at trial is tested for "prejudice").

"[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967); *see United States v. Cole*, 84 M.J. 398, 404

[4] Although, A1C Casillas is *not* conceding that this error could be structural due to the impact the definition of consent has in every Article 120(b)(2)(A), UCMJ, case. If this Court finds structural error, automatic reversal is required. *United States v. Hasan*, 84 M.J. 181, 404 (C.A.A.F. 2024).

(C.A.A.F. 2024) (reaffirming the use of *Chapman*). For such errors, "the burden [is on] the government to 'show that the error was harmless beyond a reasonable doubt.'" *Hasan*, 84 M.J. at 220 (quoting *United States v. Tovarchavez*, 78 M.J. 458, 462 n.6 (C.A.A.F. 2019)). The Government cannot do so here.

It is clear the conviction relied, in part, if not wholly, on S.F.'s testimony of being asleep when the sexual act occurred. JA at 114-15, 187, 194-95. S.F. disclaimed memory issues, making sleep the predominant theory of liability—as opposed to incapacity by intoxication or blackout. JA at 194-95, 473-74, 481-83. She testified she "woke up" to being penetrated, explaining she fell asleep beforehand. JA at 114-15. She testified she knew she was being penetrated with A1C Casillas's penis because after she woke up, he was "taking it out." *Id.* S.F.'s testimony presented the theory she was asleep when the charged conduct occurred, not that she was awake or otherwise capable of consenting.

The heavy reliance on S.F.'s testimony coupled with A1C Casillas's statements about "waking [S.F.] up" make it impossible to conclude the swap in theories did not substantially affect the judgment. "The inquiry cannot be merely whether there was enough to support the result, apart from the phrase affected by the error. It is rather, even so, whether the error itself had substantial influence." *Cole*, 84 M.J. at 407 (quoting *Kotteakos v. United* States, 328 U.S. 750, 765 (1946)). The constitutional error drove the conviction where, here, there was no evidence presented about S.F.

having the capacity to consent. Rather, the Government attempted to prove a different crime, and it failed, as it should where the Government circumvented the mens rea requirements that would show A1C Casillas was not guilty under subsection (b)(2)(3) or any other theory.

Therefore, should this Court reach this secondary constitutional issue, this Court must set aside and dismiss the findings of guilt and set aside the sentence.

III.

A1C Casillas's conviction under Article 120(b)(2)(A), UCMJ, is legally insufficient because instead of proving S.F. withheld consent, the Government attempted to prove S.F. was asleep—the basis for a different offense under Article 120, UCMJ.

Standard of Review

Legal sufficiency is reviewed de novo. *Mendoza*, __ M.J. __, 2024 CAAF LEXIS 590, at *8. This Court considers "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id*. (quoting *United States v. Smith*, 83 M.J. 350, 359 (C.A.A.F. 2023)). Legal sufficiency review "impinges upon [panel] discretion only to the extent necessary to guarantee the fundamental protection of due process of law." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

Law and Analysis

To convict A1C Casillas of sexual assault in violation of Article 120(b)(2)(A),

UCMJ, the Government was required to prove beyond a reasonable doubt that A1C Casillas: (1) committed a sexual act upon S.F., and (2) that he did so "without the consent" of S.F. *Mendoza*, __ M.J. __, 2024 CAAF LEXIS 590, at *18-19. Accordingly, to convict A1C Casillas under a lack of consent theory the Government was required to show S.F. was capable of consenting but did not. *Id*. at *20-21.

Based on the evidence, the Government failed to prove S.F. could consent and chose not to consent by electing to elicit evidence that went to prove S.F. was asleep. S.F. testified that she "woke up" to being penetrated in her vagina. JA at 115. When she woke up, she was able to recognize she was being penetrated by A1C Casillas's penis because "he was taking it out." *Id*. S.F. and trial counsel made it clear that before S.F. "fell asleep," she did not give consent. Trial counsel asked: "Before falling asleep, did you tell Airman Casillas that he could pull your pants down?"; "Before falling asleep, did you tell Airman Casillas that you were okay with him putting his fingers inside your vulva?"; "Before falling asleep, did you tell Airman Casillas that it was okay for him to put his penis inside your vulva?" JA at 114. S.F. answered "no" to each question. *Id*.

But S.F. never indicated that after she woke up, A1C Casillas would have reasonably known she did not consent. S.F.'s lack of consent was based on her perception that she was asleep. JA at 114-16. According to her testimony, assuming she was asleep, she did nothing to communicate or suggest that she did not consent

after she woke up. *Id*. Based on her own account, she woke up to being penetrated, and then A1C Casillas took out his penis and "just got up and left." JA at 115. S.F. also testified about all the things she remembered occurred that night, continuing to insist that she was asleep, not that she had memory problems. JA at 175-79, 194-95.

Additionally, other witnesses confirmed S.F. was asleep before the sexual encounter that night. JA at 322, 324, 335. This included A1C Casillas, who said S.F. was sleeping at times throughout the night, that she woke up periodically, and that he woke her up or shook her throughout the night. JA at 129-30, 134, 137, 140, 249, 362. The Government attempted to prove the wrong offense, which all the evidence shows.

The "sleep theory" presented at trial renders the conviction legally insufficient per *Mendoza*. In *Mendoza*, a "withholding consent" case, the Government attempted to prove the wrong theory of liability through proving the victim was incapable of consenting due to intoxication. __ M.J. __, 2024 CAAF LEXIS 590, at *19-21. Similarly, here, the Government attempted to prove the wrong theory of liability through attempting to prove S.F. was asleep, i.e., incapable of consenting, rather than proving S.F. could consent and chose not to. Being asleep is the same type of incapacity or incompetence as being incapable of consenting due to intoxication. *United States v. Pease*, 75 M.J. 180, 184-86 (C.A.A.F. 2016). A person is incapable of consenting in either state. *Id*. Thus, in both *Mendoza* and here, the Government

elicited the wrong type of evidence to prove an uncharged theory. Furthermore, while in *Mendoza* the victim's intoxication level could go to her choice of whether to consent or not, here, S.F. being asleep disproves any ability for S.F. to consent in the first place. Consequently, A1C Casillas's conviction is legally insufficient because the Government attempted to prove the wrong crime and foreclosed itself from the theory of liability it charged in doing so.

On appeal, the Government half-heartedly argued a novel theory: there were two sexual assaults. This is not to be confused with the sexual assault A1C Casillas was acquitted of—penetrating S.F. with his finger without her consent. JA at 18. The Government argued that it could charge an "accused with violations of both Article 120(b)(2)(A) and (b)(2)(B)" in the situation where "an accused began committing a sexual act on a sleeping victim who then woke up, and the accused continued to have sex with that victim without their consent." Br. on Behalf of the United States at 32. On appeal, the Government argued that the conviction was legally sufficient because "S.F. woke up at some point, at which point she could have (but did not) consented." *Id*. at 42. Following *Mendoza*, this argument defies logic and the evidence.

Had there been two sexual assaults, the Government would have charged as much. *See* Brief on Behalf of the United States, *United States v. George*, USCA Dkt. No. 24-0206/AF (C.A.A.F. 2024) at 20-21 (arguing if the Government believed it could prove an offense, it would have charged the offense). "After all, '[i]t is the

Government's responsibility to determine what offense to bring against an accused. Aware of the evidence in its possession, the Government is presumably cognizant of which offenses are supported by the evidence and which are not.'" *Mendoza*, __ M.J. __, 2024 CAAF LEXIS 590, at *49 (Sparks, J., dissenting in part, concurring in part) (quoting *United States v. Morton*, 69 M.J. 12, 16 (C.A.A.F. 2010)). But, here, the Government did not charge two sexual assaults. It charged a single specification of A1C Casillas's penis penetrating S.F.'s vulva without consent. JA at 16. It also never argued there were two sexual assaults stemming from the same act at trial, which would have been odd in the face of S.F.'s testimony.

S.F.'s testimony was she woke up and A1C Casillas's penis was inside her. JA at 115. She knew it was his penis because he was "taking it out." *Id*. After he took it out, he "just got up and left." *Id*. There was no proof of a subsequent or an additional penetration—it was all one act that S.F. had the capacity to consent to in, what appears to be, one "moment" of time. JA at 115. Assuming S.F. was asleep, A1C Casillas did not "continue to have sex with [S.F.] without [her] consent" after she "woke up." Br. on Behalf of the United States at 32. Rather, according to S.F., A1C Casillas penetrated her, she woke up, and he removed his penis immediately. The Government's last-ditch effort on appeal to save this unlawful conviction fails.

Assuming the Government will try to salvage this conviction, though, the only way it could do so is by reneging on all its previous arguments about S.F. *not* being

blacked out. JA at 474, 476, 481-82; Br. on Behalf of the Government at 10, 44-45. But if that happens, this case turns into *Mendoza*, where it is unclear how evidence of S.F.'s intoxication, if any, factored into proof of the offense. *C.f. Mendoza*, __ M.J. __, 2024 CAAF LEXIS 590, at *20-21. The AFCCA did not engage with S.F.'s intoxication level, merely quoting A1C Casillas when he said S.F. was "unresponsive." JA at 14. But the record does not show that S.F. was "unresponsive" during the sexual act. Rather, A1C Casillas, without context, mentions that S.F. was "responsive for a little while. And after that [she] just [wasn't] talking, [wasn't] moving." JA at 130. This does not support a blackout theory but an incapacity via alcohol or sleep theory. Her "responsiveness" is not relevant to a theory where she is presumed to be competent to consent. If A1C Casillas's case becomes alcohol centric following *Mendoza*, this Court should remand, as it did in *Mendoza,* for a new legal and factual sufficiency analysis because the AFCCA did not consider the impact of alcohol at all.

However, if alcohol is not at issue, this Court can independently find the conviction legally insufficient without remanding. Unlike in *Mendoza*, the lower court's analysis is clear. The AFCCA affirmed the conviction because S.F. did not consent due to being asleep, not because she was capable of consenting and did not consent at the time of the sexual act. The AFCCA emphasized how S.F. testified she woke up to being penetrated. JA at 14. The lower court's opinion echoes S.F.'s

testimony that she "did not consent," while also adding that A1C Casillas "did not claim that he got S.F.'s consent." *Id*. Furthermore, the AFCCA highlighted "at some point during the encounter [S.F.] was no longer responsive," and quoted snippets of A1C Casillas's statements like, "she was out of it," "you might have not been completely there," "I had to wake her ass up," and "she was completely out of it." JA at 12-14. This portion of the AFCCA's analysis is based on capacity, not withholding consent. Even the AFCCA's reliance on S.F.'s testimony about how she "did not consent" goes to her capacity to consent because S.F. "did not consent" to being penetrated because she was *asleep* at the time, i.e., S.F. *could not* consent. The conviction was affirmed because the AFCCA found S.F. was sleep or incapable of consenting. Therefore, this Court does not have to send the case down for a new legal sufficiency analysis. Rather, A1C Casillas's conviction is legally insufficient because the Government did not prove what is charged, that S.F. was capable of consenting at the time of the offense and chose not to consent.

In the event this Court finds legal sufficiency, though, this Court should remand for a new factual sufficiency analysis because it is clear based on the AFCCA's analysis that the conviction was affirmed under a different theory than the one charged. A1C Casillas is entitled to have the AFCCA perform a proper factual sufficiency review in the first instance following this Court's review. *Mendoza*, __ M.J. __, 2024 CAAF LEXIS 590, at *21-23.

Therefore, A1C Casillas requests this Court set aside and dismiss the findings of guilt with prejudice and set aside the sentence.

Conclusion

A1C Casillas's case highlights the fair notice problem within Article 120(b)(2)(A), UCMJ, that was not resolved by *Mendoza*: the factfinder can convict based on any theory of liability otherwise enumerated under Article 120, UCMJ, because the statutory definition of consent, an element of the offense, remains unchanged. This Court should resolve this case under legal sufficiency, Issue III, because the Government did not prove what it charged. Should this Court find legal sufficiency, it should remand to the AFCCA for a new factual sufficiency analysis, like it did in *Mendoza*.

In the event this Court reaches the constitutional issues, A1C Casillas's conviction must be reversed. This is for one of two reasons. First, because Article 120(b)(2)(A), UCMJ, is facially unconstitutional due to its interplay with the definition of consent in subsection (g)(7). Second, because A1C Casillas's due process rights to fair notice were violated when the definition of consent erroneously permitted the panel to convict on uncharged theories of liability. The Government cannot overcome the burden of harmlessness beyond a reasonable doubt for this as-applied challenge following *Mendoza*.

No matter which issue this Court elects to resolve this case under, A1C Casillas's conviction should be set aside along with his sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Government Trial and Appellate Operations Division on December 9, 2024.

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CERTIFICATE OF COMPLIANCE WITH RULES 24(b) and 37

1. This brief complies with the type-volume limitation of Rule 24(b) because it contains 8,183 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word with Times New Roman 14-point typeface.

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Appendix

period while the accused was on temporary duty outside commuting distance might constitute culpable negligence.

(6) *Duty required*. The duty of care is determined by the totality of the circumstances and may be established by statute, regulation, legal parent-child relationship, mutual agreement, or assumption of control or custody by affirmative act. When there is no duty of care of a child, there is no offense under this paragraph. Thus, there is no offense when a stranger makes no effort to feed a starving child or an individual not charged with the care of a child does not prevent the child from running and playing in the street.

d. *Maximum punishment.*

(1) *Endangerment by design resulting in grievous bodily harm*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 8 years.

(2) *Endangerment by design resulting in harm*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(3) *Other cases by design*. Dishonorable discharge, forfeiture of all pay and allowances and confinement for 4 years.

(4) *Endangerment by culpable negligence resulting in grievous bodily harm*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(5) *Endangerment by culpable negligence resulting in harm*. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(6) *Other cases by culpable negligence*. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

e. *Sample specification*s.

(1) *Resulting in grievous bodily harm*.

In that_____(personal jurisdiction data), (at/on board—location) (subject-matter jurisdiction data, if required) on or about ____ 20 __, had a duty for the care of _____, a child under the age of 16 years and did endanger the (mental health) (physical health) (safety) (welfare) of said _____, by (leaving the said _____ unattended in (his) (her) quarters for over _____ (hours) (days) with no adult present in the home) (by failing to obtain medical care for the said_____'s diabetic condition) (_____), and that such conduct (was by design) (constituted culpable negligence) (which resulted in grievous bodily harm, to wit:_____) (broken leg) (deep cut) (fractured skull)).

(2) *Resulting in harm*.

In that _____ (personal jurisdiction data), (at/on board—location) (subject-matter jurisdiction data, if required) on or about _____ 20 __, had a duty for the care of _____, a child under the age of 16 years, and did endanger the (mental health) (physical health) (safety) (welfare) of said _____, by (leaving the said _____unattended in (his) (her) quarters for over _____ (hours) (days) with no adult present in the home) (by failing to obtain medical care for the said _____'s diabetic condition) (_____), and that such conduct (was by design) (constituted culpable negligence) (which resulted in (harm, to wit:_____) (a black eye) (bloody nose) (minor cut)).

(3) *Other cases*.

In that _____(personal jurisdiction data), (at/on board—location) (subject-matter jurisdiction data, if required) on or about _____ 20 __, was responsible for the care of _____, a child under the age of 16 years, and did endanger the (mental health) (physical health) (safety) (welfare) of said_____, by (leaving the said _____ unattended in (his) (her) quarters for over _____ (hours) (days) with no adult present in the home) (by failing to obtain medical care for the said _____'s diabetic condition) (_____), and that such conduct (was by design) (constituted culpable negligence).

60. Article 120 (10 U.S.C. 920)—Rape and sexual assault generally

[Note: This statute applies to offenses committed on or after 1 January 2019. Previous versions of Article 120 are located as follows: for offenses committed on or before 30 September 2007, *see* Appendix 20; for offenses committed during the period 1 October 2007 through 27 June 2012, *see* Appendix 21; for offenses committed during the period 28 June 2012 through 31 December 2018, *see* Appendix 22.]

a. *Text of statute.*

(a) RAPE.—Any person subject to this chapter who commits a sexual act upon another person by—

(1) using unlawful force against that other person;

(2) using force causing or likely to cause death or grievous bodily harm to any person;

(3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;

(4) first rendering that other person unconscious; or

(5) administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of that other person to appraise or control conduct;

is guilty of rape and shall be punished as a court-martial may direct.

(b) SEXUAL ASSAULT.—Any person subject to this chapter who—

(1) commits a sexual act upon another person by—

(A) threatening or placing that other person in fear;

(B) making a fraudulent representation that the sexual act serves a professional purpose; or

(C) inducing a belief by any artifice, pretense, or concealment that the person is another person;

(2) commits a sexual act upon another person—

(A) without the consent of the other person; or

(B) when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring;

(3) commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to—

(A) impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person; or

(B) a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person;

is guilty of sexual assault and shall be punished as a court-martial may direct.

(c) AGGRAVATED SEXUAL CONTACT.—Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (a) (rape) had the sexual contact been a sexual act, is guilty of aggravated sexual contact and shall be punished as a court-martial may direct.

(d) ABUSIVE SEXUAL CONTACT.—Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (b) (sexual assault) had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court-martial may direct.

(e) PROOF OF THREAT.—In a prosecution under this section, in proving that a person made a threat, it need not be proven that the person actually intended to carry out the threat or had the ability to carry out the threat.

(f) DEFENSES.—An accused may raise any applicable defenses available under this chapter or the Rules for Court-Martial. Marriage is not a defense for any conduct in issue in any prosecution under this section.

(g) DEFINITIONS.—In this section:

(1) SEXUAL ACT.—The term "sexual act" means—

(A) the penetration, however slight, of the penis into the vulva or anus or mouth;

(B) contact between the mouth and the penis, vulva, scrotum, or anus; or

(C) the penetration, however slight, of the vulva or penis or anus of another by any part of the body or any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(2) SEXUAL CONTACT.—The term "sexual contact" means touching, or causing another person to touch, either directly or through the clothing, the vulva, penis, scrotum, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person. Touching may be accomplished by any part of the body or an object.

(3) GRIEVOUS BODILY HARM.—The term "grievous bodily harm" means serious bodily injury. It includes fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injuries. It does not include minor injuries such as a black eye or a bloody nose.

(4) FORCE.—The term "force" means—

(A) the use of a weapon;

(B) the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or

(C) inflicting physical harm sufficient to coerce or compel submission by the victim.

(5) UNLAWFUL FORCE.—The term "unlawful force" means an act of force done without legal justification or excuse.

(6) THREATENING OR PLACING THAT OTHER PERSON IN FEAR.—The term "threatening or placing that other person in fear" means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another person being subjected to the wrongful action contemplated by the communication or action.

(7) CONSENT.—

(A) The term "consent" means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent.

(B) A sleeping, unconscious, or incompetent person cannot consent. A person cannot consent to force causing or likely to cause death or grievous bodily harm or to being rendered unconscious. A person cannot consent while under threat or in fear or under the circumstances described in subparagraph (B) or (C) of subsection (b)(1).

(C) All the surrounding circumstances are to be considered in determining whether a person gave consent.

(8) INCAPABLE OF CONSENTING.—The term "incapable of consenting" means the person is—

(A) incapable of appraising the nature of the conduct at issue; or

(B) physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act at issue.

b. *Elements.*

(1) *Rape*.

(a) *By unlawful force*.

(i) That the accused committed a sexual act upon another person; and

(ii) That the accused did so with unlawful force.

(b) *By force causing or likely to cause death or grievous bodily harm*.

(i) That the accused committed a sexual act upon another person; and

(ii) That the accused did so by using force causing or likely to cause death or grievous bodily harm to any person.

(c) *By threatening or placing that other person in fear that any person would be subjected to death, grievous bodily harm, or kidnapping*.

(i) That the accused committed a sexual act upon another person; and

(ii) That the accused did so by threatening or placing that other person in fear that any person would be subjected to death, grievous bodily harm, or kidnapping.

(d) *By first rendering that other person unconscious*.

(i) That the accused committed a sexual act upon another person; and

(ii) That the accused did so by first rendering that other person unconscious.

(e) *By administering a drug, intoxicant, or other similar substance*.

(i) That the accused committed a sexual act upon another person; and

(ii) That the accused did so by administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of that other person to appraise or control conduct.

(2) *Sexual assault*.

(a) *By threatening or placing that other person in fear.*

(i) That the accused committed a sexual act upon another person; and

(ii) That the accused did so by threatening or placing that other person in fear.

(b) *By fraudulent representation*.

(i) That the accused committed a sexual act upon another person; and

(ii) That the accused did so by making a fraudulent representation that the sexual act served a professional purpose.

(c) *By artifice, pretense, or concealment*.

(i) That the accused committed a sexual act upon another person; and

(ii) That the accused did so by inducing a belief by any artifice, pretense, or concealment that the accused was another person.

(d) *Without consent*.

(i) That the accused committed a sexual act upon another person; and

(ii) That the accused did so without the consent of the other person.

(e) *Of a person who is asleep, unconscious, or otherwise unaware the act is occurring*.

(i) That the accused committed a sexual act upon another person;

(ii) That the other person was asleep, unconscious, or otherwise unaware that the sexual act was occurring; and

(iii) That the accused knew or reasonably should have known that the other person was asleep, unconscious, or otherwise unaware that the sexual act was occurring.

(f) *When the other person is incapable of consenting*.

(i) That the accused committed a sexual act upon another person;

(ii) That the other person was incapable of consenting to the sexual act due to:

(A) Impairment by any drug, intoxicant or other similar substance; or

(B) A mental disease or defect, or physical disability; and

(iii) That the accused knew or reasonably should have known of that condition.

(3) *Aggravated sexual contact*.

(a) *By force*.

(i) That the accused committed sexual contact upon or by another person; and

(ii) That the accused did so with unlawful force.

(b) *By force causing or likely to cause death or grievous bodily harm*.

(i) That the accused committed sexual contact upon another person; and

(ii) That the accused did so by using force causing or likely to cause death or grievous bodily harm to any person.

(c) *By threatening or placing that other person in fear that any person would be subjected to death, grievous bodily harm, or kidnapping*.

(i) That the accused committed sexual contact upon another person; and

(ii) That the accused did so by threatening or placing that other person in fear that any person would be subjected to death, grievous bodily harm, or kidnapping.

(d) *By first rendering that other person unconscious*.

(i) That the accused committed sexual contact upon another person; and

(ii) That the accused did so by first rendering that other person unconscious.

(e) *By administering a drug, intoxicant, or other similar substance*.

(i) That the accused committed sexual contact upon another person; and

(ii) That the accused did so by administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of that other person to appraise or control conduct.

(4) *Abusive sexual contact*.

(a) *By threatening or placing that other person in fear*.

(i) That the accused committed sexual contact upon or by another person; and

(ii) That the accused did so by threatening or placing that other person in fear.

(b) *By fraudulent representation*.

(i) That the accused committed sexual contact upon another person; and

(ii) That the accused did so by making a fraudulent representation that the sexual act served a professional purpose.

(c) *By artifice, pretense, or concealment*.

(i) That the accused committed sexual contact upon another person; and

(ii) That the accused did so by inducing a belief by any artifice, pretense, or concealment that the accused was another person.

(d) *Without consent*.

(i) That the accused committed sexual contact upon another person; and

(ii) That the accused did so without the consent of the other person.

(e) *Of a person who is asleep, unconscious, or otherwise unaware the contact is occurring*.

(i) That the accused committed sexual contact upon another person;

(ii) That the other person was asleep, unconscious, or otherwise unaware that the sexual contact was occurring; and

(iii) That the accused knew or reasonably should have known that the other person was asleep, unconscious, or otherwise unaware that the sexual contact was occurring.

(f) *When the other person is incapable of consenting*.

(i) That the accused committed sexual contact upon another person;

(ii) That the other person was incapable of consenting to the sexual contact due to:

(A) Impairment by any drug, intoxicant or other similar substance; or

(B) A mental disease or defect, or physical disability; and

(iii) That the accused knew or reasonably should have known of that condition.

c. *Explanation.*

(1) *In general*. Sexual offenses have been separated into three statutes: offenses against adults (Art. 120), offenses against children (Art. 120b), and other offenses (Art. 120c).

(2) *Definitions*. The terms are defined in subparagraph 60.a.(g).

(3) *Victim sexual behavior or predisposition and privilege*. See Mil. R. Evid. 412 concerning rules of evidence relating to the sexual behavior or predisposition of the victim of an alleged sexual offense. See Mil. R. Evid. 514 concerning rules of evidence relating to privileged communications between the victim and victim advocate.

(4) *Scope of "threatening or placing that other person in fear*." For purposes of this offense, the phrase "wrongful action" within Article 120(g)(6) (defining "threatening or placing that other person in fear") includes an abuse of military rank, position, or authority in order to engage in a sexual act or sexual contact with a victim. This includes, but is not limited to, threats to initiate an adverse personnel action unless the victim submits to the accused's requested sexual act or contact; and threats to withhold a favorable personnel action unless the victim submits to the accused's requested sexual act or sexual contact. Superiority in rank is a factor in, but not dispositive of, whether a reasonable person in the position of the victim would fear that his or her noncompliance with the accused's desired sexual act or sexual contact would result in the threatened wrongful action contemplated by the communication or action.

d. *Maximum punishment.*

(1) *Rape*. Forfeiture of all pay and allowances and confinement for life without eligibility for parole. Mandatory minimum – Dismissal or dishonorable discharge.

(2) *Sexual assault*. Forfeiture of all pay and allowances, and confinement for 30 years. Mandatory minimum – Dismissal or dishonorable discharge.

(3) *Aggravated sexual contact*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(4) *Abusive sexual contact*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.

e. *Sample specification*s.

(1) *Rape*.

(a) *By force*.

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about_____ 20__, commit a sexual act upon _____ by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit:_____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], by using unlawful force.

(b) *By force causing or likely to cause death or grievous bodily harm*.

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction