IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	
Appellee,	)	BRIEF ON BEHALF OF
	)	THE UNITED STATES
v.	)	
	)	Crim. App. Dkt. No. 40302
	)	
Airman First Class (E-3)	)	USCA Dkt. No. 24-0089/AF
NIKOLAS S. CASILLAS	)	
United States Air Force	)	21 August 2024
Appellant.	)	

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INDEX OF BRIEF

TABLE OF AUTHORITIES

SUPREME COURT OF THE UNITED STATES

COURT OF APPEALS FOR THE ARMED FORCES

SERVICE COURTS OF CRIMINAL APPEALS

OTHER COURTS

STATUTES

OTHER AUTHORITIES

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Airman First Class (E-3) **NIKOLAS S. CASILLAS** United States Air Force *Appellant.*	)	USCA Dkt. No. 24-0089/AF

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

ISSUES PRESENTED

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 APPELLANT'S CONVICTION FOR SEXUAL ASSAULT WITHOUT CONSENT WAS LEGALLY SUFFICIENT.

IV.

IN A SEXUAL ASSAULT TRIAL, DID THE MILITARY JUDGE ABUSE HIS DISCRETION WHEN HE DENIED THE ACCUSED'S CHALLENGE FOR ACTUAL AND IMPLIED BIAS FOR A MEMBER WHOSE WIFE HAD BEEN RAPED.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(d), UCMJ. This Court has jurisdiction over this matter under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

On 18 March 2022, a general court-martial convicted Appellant, contrary to his plea, of one specification of sexual assault in violation of Article 120, UCMJ. (JA at 18.) The military judge sentenced Appellant to reduction in grade to E-1, total forfeiture of his pay and allowances, confinement for two years, and a dishonorable discharge. (Id.) The convening authority took no action on the findings and sentence. (Id.)

STATEMENT OF THE FACTS

The Misconduct

In July 2020, S.F. hosted a party attended by several people, including Appellant and a mutual friend, A1C H.C. (JA at 106, 109.) By the time the party began to wind down, S.F. was tired and "just wanted to lay down." (JA at 112, 173.) She changed, laid down next to her friend M.M. in bed, and turned on the TV. (JA at 113-14.) Though she tried to stay awake since there were still people at her house—including Appellant—she could not keep her eyes open and fell asleep. (JA at 114.)

Sometime later, S.F. awoke to find her shorts pulled down and Appellant penetrating her vagina with his penis, with M.M. nowhere to be seen. (JA at 115-16.) Shocked and unsure of what to do, she froze and "just laid there." (JA at 115.) Eventually, Appellant stopped, pulled S.F.'s shorts back up, and went to the bathroom. (JA at 115-16.) After he emerged, S.F. entered the bathroom, called her friend, and asked him to come "kick [Appellant] out." (JA at 117.)

Later that day, S.F. and her friends, including A1C H.C., gathered together, called Appellant via phone, and recorded the entire conversation. (JA at 117, 716.) During the conversation—which was later introduced as a prosecution exhibit at trial—S.F. confronted Appellant about the incident, saying:

> I was literally like passed out and then I like woke up to that. And then I just kind like laid there because I didn't

> even understand like what the fuck to even do or what was going on because my fucking pants were down and your dick was inside me.

(JA at 128.)

When Appellant suggested that S.F. was awake, she pushed back: "I wasn't though. I was asleep. Because I would have remembered because I wasn't like—like after I woke up, like I wasn't that drunk. I wasn't even really drunk after that." (JA at 129.) Appellant then acknowledged that S.F. had not been moving or talking and that he had to "shake [her] to wake [her] up." (JA at 129.)

Appellant then asked S.F. why she did not tell him to leave, to which she responded: "Because I woke up to that and it freaked me the fuck out. Honest to God. Like if you wake up to someone's dick inside of you, it's not very like, happy." (JA at 132.)

Over the course of the conversation, S.F. repeatedly mentioned the fact that she was "asleep" and "woke up to [the penetration of her vulva]." (Id. at 132-35.) In response, Appellant claimed he "thought [she] knew when [she] woke up because [she] didn't say anything about it." (JA at 137.) He then conceded that he "took it too far" and that S.F. "might have not been completely there." (JA at 138.) At some point, A1C H.C. also called Appellant. (JA at 225.) During this conversation—which A1C H.C. recorded—Appellant admitted to A1C H.C that

S.F. "was out of it;" that he "kept fucking with her;" and that he "had to wake her ass up." (JA at 225.)

After S.F. reported the incident, Appellant was charged with sexual assault without consent in violation of Article 120(b)(2)(A). (JA at 16.)

The Voir Dire of A.G.

In March 2022, a general court-martial convened to try Appellant's case. (JA at 18.) During voir dire, one of the prospective members, A.G., disclosed that his wife was a victim of a "rape" that was never reported to law enforcement or prosecuted by the authorities. (JA at 50-51.) A.G. estimated that the offense occurred in 1990, that he learned of it in 1992, and that he and his wife had discussed it "maybe two, three times" in the 30 years since then. (Id.)

A.G. acknowledged that the incident came to mind when he read the charges, but disclaimed the idea that it affected him personally "other than feeling bad for her and what she went through and trying to understand that." (JA at 51.) When asked whether the knowledge of his wife's experience might impact his ability to be a fair and impartial panel member, A.G. said, "I think I can be impartial, Your Honor." (JA at 52.) In explaining why, A.G. stated:

> I think that incident is separate from another incident—you know, this we've lived with for a long time and I think we've processed it. And I just think—I think I can separate that incident from basically any other incident that I might hear of or try to assess.

(JA at 52.)

The military judge then asked A.G. whether he would have difficulty telling his wife about a not-guilty verdict in a sexual assault case, to which A.G. replied: "I don't think I'd have a problem with that." (JA at 53.) When asked if his wife's experience would impact his sentencing determinations, A.G. said: "No, sir." (Id.) He reiterated that he could "separate different cases," and confirmed that he would be able to follow the military judge's instructions regarding the law and base his decisions only on the evidence presented at trial. (JA at 53.)

After the military judge concluded his questioning, trial defense counsel asked A.G. why he said he did not "think" an acquittal would impact his relationship with his wife. (JA at 54.) A.G. stated that he "didn't really focus on the word [he] was using," and explained that he did not want to make assumptions:

> You never know, right, when you're talking about [a] relationship with somebody else on what they might think, what they might--how they might act. I just don't want to assume that--that it won't affect her, that she won't have a different reaction than what I'm thinking.

(JA at 55.)

Trial defense counsel then asked A.G. if he hesitated because he was "thinking of an answer" of it was the result of "an emotional response there." (Id.) A.G. replied that he was "just thinking through the question and the answer, not necessarily emotional." (Id.)

At the conclusion of voir dire, trial defense counsel challenged A.G. for actual and implied bias, citing the fact that his wife was a victim of sexual assault; the fact that he "didn't know how she was going to react if she found out about a finding of not guilty in this particular case"; and the fact that he paused before answering certain questions. (JA at 57-59.)

The military judge denied the challenge on both grounds. (JA at 59.) With respect to actual bias, the military judge noted that A.G. "stated on multiple occasions that he would be able to set any of these issues aside, base his decisions in this case solely on the evidence presented at trial and would have no difficulty following the military judge's instructions." (JA at 60.) The military judge further opined:

> Though his demeanor was characterized as drastically long pauses; and, potentially, at least in this Court's interpretation of counsel's argument an indication that he was somehow emotionally impacted or less than truthful in his responses. The Court did not get that impression from his responses. The pauses in his responses to questions to this Court, they were more clearly indicative of his thoughtfulness of the questions asked, his desire to answer them as candidly as possible. The Court found him and his body language and his demeanor and his responses to the questions posed to be candid and credible.

(JA at 60.)

Next, regarding implied bias, the military judge noted that "there is no *per se* disqualification simply because somebody close to you at one point in their lives

have suffered a similar offense." (Id.) The military judge then opined that A.G.'s circumstances did not constitute grounds for an implied bias challenge, based on: (1) the fact that the incident occurred over 30 years ago; (2) the fact that A.G. and his wife only discussed it two or three times in the 30 years since; and (3) CMSgt A.G's answers to the court's questions, which indicated that he would be comfortable telling his wife about a not guilty verdict, would not let his knowledge of his wife's experience impact his sentencing determination, and could evaluate Appellant's case as a separate incident. (JA at 61.)

Of A.G.'s response that he felt bad for his wife and what she went through, the military judge noted that it was "not an unnatural human reaction and not one that would demonstrate a bias on the part of an individual such that their continued participation would cause damage to the perception of fairness in these proceedings." (JA at 61.) The judge closed by opining that he "[did] not find this to be a particularly close call such that the liberal grant mandate would come into play." (Id.) A.G. was later impaneled as a court member. (JA at 63.)

The Defense's Requested Special Instruction

After voir dire but prior to commencing trial on the merits, Appellant's trial defense counsel expressed concern that the government would present evidence on the merits that the victim was incapable of consenting due to intoxication. (JA at

65.) As a result, trial defense counsel requested a special instruction that read, *inter alia*, as follows:

> In this case, there is no allegation that A1C [S.F.] was too intoxicated to consent to sex. You are not permitted to consider whether she was too intoxicated to consent to sex. That is not an issue before you.

(JA at 547.)

The prosecution objected to the instruction as "being at odds" with case law and the Military Judges' Benchbook's standard instruction on consent. (JA at 68.)

In denying the requested instruction as "an inaccurate statement of the law," the military judge noted that "[w]hen the government charges an offense, as occurring with a lack of consent, they can argue fairly all the surrounding circumstances that comes from the definition of consent…includ[ing] an alleged victim's consumption of alcohol and the impact that that consumption of alcohol had on the alleged victim's ability to consent." (JA at 71-72.) He then indicated that he intended to give the standard instruction on consent, which he opined "sufficiently cover this area and make clear what the panel can and cannot or should and should not consider in making that determination." (JA at 71.)

The Government's Theory

During the findings phase, the prosecution presented, *inter alia*, S.F.'s testimony. (JA at 95-537.) During her direct examination, S.F. testified that she never consented to any of Appellant's actions:

> Q. Before falling asleep, did you tell [Appellant] that he could pull your pants down?
>
> A. No, sir.
>
> Q. Before falling asleep, did you tell [Appellant] that you were okay with him putting his fingers inside of your vulva?
>
> A. No, sir.
>
> Q. Before falling asleep, did you tell [Appellant] that it was okay for him to put his penis inside of your vulva?
>
> A. No, sir.

(JA at 114.)

On cross examination, trial defense counsel asked S.F. various questions that suggested she could not remember "a good number of things" as a result of being intoxicated. (JA at 175-194.) In response, S.F. responded that "[m]ost of them didn't occur." (JA at 194-95.) When trial defense counsel suggested that S.F. simply did not remember, she pushed back: "I do remember them not occurring." (JA at 194-95.)

Through S.F., the prosecution also introduced the recording she had made of her conversation with Appellant, in which she could be heard rebuffing his suggestions that she was awake: "I wasn't though. I was asleep." (JA at 129.) The prosecution's case-in-chief also included A1C H.C.'s recording of her own

conversation with Appellant, in which he could be heard admitting that S.F. was "out of it" and that he had to wake her up. (JA at 225.)

During closing argument, when explaining how the prosecution had met its burden on the element of consent, trial counsel stated:

> You have the witness that came up here and told you, I was asleep. Yet she told you I did not tell him he could take down my pants. I did not tell him he could penetrate my vulva with his fingers. I did not tell him that he could put his penis in my vulva. She told you that.

(JA at 474.)

Later on, trial counsel addressed the defense's theory of the case—which suggested that S.F. had blacked out and simply did not remember consenting to the sexual activity—and dismissed the blackout as "a red herring." (JA at 483.)

The military judge instructed the members that to find Appellant guilty of sexual assault without consent, they had to be "convinced by legal and competent evidence beyond a reasonable doubt of the following elements":

> (1) That on or about 10 July 2020, at or near Cheyenne, Wyoming, [Appellant] committed a sexual act upon Airman First Class [S.F.] by penetrating her vulva with his penis; and
>
> (2) That [Appellant] did so without the consent of Airman First Class [S.F.]

(JA at 458.)

The military judge also instructed the members that "mistake of fact is a complete defense to the charged offenses and must be considered by [them] in [their] evaluation of the evidence." (JA at 459.)

SUMMARY OF THE ARGUMENT

Issue I – Facial Challenge

"All the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden." Rose v. Locke, 423 U.S. 48, 50 (1975). Article 120(b)(2), UCMJ, unambiguously prohibits having sex with another person without their consent. Along with the definition of "consent"—"freely given agreement to the conduct at issue by a competent person"—the statute clearly establishes that a person who is "sleeping, unconscious, or incompetent" is *not*, at that moment, "freely agree[ing] to sexual activity," therefore having sexual intercourse with them is criminal. 10 U.S.C. § 920(g)(7).

That the statutory definition of "consent" implicates factual circumstances that may be relevant to other variations of sexual assault enumerated by Article 120, UCMJ, does not render the statute vague. It is simply a reflection of the need for statutes to be sufficiently broad to "adequately 'deal with untold and unforeseen variations in *factual* situations.'" United States v. Rocha, __ M.J. ___, No. 23-0134, 2024 CAAF LEXIS 250, at *12 (C.A.A.F. May 8, 2024) (quoting

Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340 (1952)). The comprehensive definition of "consent" puts servicemembers on notice that "only consensual sexual intercourse is innocent." United States v. McDonald, 78 M.J. 376, 381 (C.A.A.F. 2019). And by charging a sexual assault as "without consent," the prosecution is putting an accused on notice that he may be found guilty under any combination of circumstances or theories of liability captured in the definition of consent. Thus, Article 120(b)(2), UCMJ, provides sufficient notice and it not facially vague.

Further, the fact that Article 120(b)(2) overlaps with other statutory provisions neither renders it vague nor necessitates interpretation through multiple canons of construction, for the statute's meaning is plain and ambiguous—nonconsensual sex is criminal. And "[w]hen the words of a statute are unambiguous…judicial inquiry is complete." Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992). This is true even if there are redundancies which *might* be read as rendering one provision superfluous: "Although choosing the reading that reduces redundancies is a helpful rule when interpreting ambiguous text, it does not apply when the text's meaning is plain." Mercy Hosp., Inc. v. Azar, 891 F.3d 1062, 1068 (D.C. Cir. 2018). For as the Supreme Court has said, redundancies between statutes are not unusual and "so long as there is no 'positive repugnancy' between two laws, a court must give effect to both." Conn. Nat'l Bank, 503 U.S. at

253 (citation omitted). By giving effect to every provision of Article 120(b), this Court will ensure that the statutory scheme created by Congress has its intended effect: criminalizing every variation and every minute of a nonconsensual sexual encounter.

Issue II – As-Applied Challenge

Because Appellant was charged with committing a sexual act upon the victim "without consent," he was on notice that he would have to defend against the allegation that he had engaged in a sexual act while any of the conditions described in the statutory definition of "consent" at Article 120(g)(7), UCMJ, were present. Thus, the military judge's refusal to give a legally inaccurate instruction that was at odds with the statutory definition of consent cannot be said to violate Appellant's right to fair notice. That the military judge then gave instructions comported with the law as set forth in the statute also cannot be considered insufficient notice.

In determining the constitutionality of Article 120(b)(2)(A) as applied to Appellant, this Court must evaluate the sufficiency of notice "in the light of the conduct with which [Appellant] is charged." Parker v. Levy, 417 U.S. 733, 757 (1974). 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. (JA at 18.) Under these circumstances, it is difficult to

imagine a universe in which a person in Appellant's position would be unsure of how his conduct "fit[s] the definition" of an Article 120(b)(2)(A) offense, which criminalizes nonconsensual sex in every scenario. Elonis v. United States, 575 U.S. 723, 735 (2015). And because "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness," Levy, 417 U.S. at 756, Appellant's claim that Article 120(b)(2)(A), UCMJ, is unconstitutionally vague as applied to him is without merit.

Issue III – Legal Sufficiency

As a threshold matter, the mere possibility that the as-yet undecided case of United States v. Mendoza, 2023 CAAF LEXIS 699 (C.A.A.F. 2023) "may implicate [Appellant's] case" is not grounds for overturning his conviction.

Regardless of what the Court decides in Mendoza, Appellant's conviction is legally sufficient because the case against him is supported by (1) uncontroverted evidence that Appellant penetrated S.F.'s vulva with his penis; (2) S.F.'s unequivocal testimony that she never gave him permission to do so prior to waking up to the penetration; and (3) Appellant's own voice and words, describing how he "took it too far." Viewing this evidence in the light most favorable to the prosecution, "any rational trier of fact" could find the essential elements of sexual assault without consent beyond a reasonable doubt. United States v. Robinson, 77 M.J. 294, 297-298 (C.A.A.F. 2018). Indeed, the Air Force Court of Criminal

Appeals considered this evidence and reached the same conclusion. Thus, the evidence is legally sufficient to sustain Appellant's conviction for sexual assault without consent, and he is unentitled to relief of any kind.

Issue IV – Denial of the Challenge for Cause

"The fact that a court member's family member, friend, or relative was a victim of a crime similar to the crime charged is not a *per se* disqualification." United States v. Jefferson, 44 M.J. 312, 321 (C.A.A.F. 1996). Whether such a member requires excusal for actual or implied bias is a determination to be made based on the totality of the circumstances. United States v. Richardson, 61 M.J. 113, 118 (C.A.A.F. 2005).

Though A.G. had been personally exposed to sexual assault through his wife's experience as a victim of rape, the military judge reasonably concluded based on the totality of the circumstances that CSMgt A.G. harbored no actual bias, since he indicated he could set aside his *wife's* experience, base his decisions on the evidence presented at trial, and follow the judge's instructions on the law.

The military judge's reasoning for finding no implied bias and declining to apply the liberal grant mandate was similarly sound and warrants "an appropriate level of deference…in light of the fact that resolving claims of implied bias involves questions of fact and demeanor, not just law." United States v. Woods,

74 M.J. 238, 243 n.1 (C.A.A.F. 2015). This Court's current standard of review provides just that, and this Court should decline to amend it.

In denying the challenge for cause, the military judge noted that the offense occurred over 30 years prior, was never reported or prosecuted, and had only been discussed two or three times by the couple. Given that this Court reached a similar conclusion under similar facts in United States v. Terry, 64 M.J. 295, 302 (C.A.A.F. 2007), it was not error for the military judge to conclude that A.G. did not require excusal. Nor was it error for the judge to find that A.G.'s circumstances were not a close call that required application of the liberal grant mandate, given that this Court has previously reached the same conclusion regarding a member with comparable circumstances. *See* United States v. Keago, 84 M.J. 367 (C.A.A.F. May 9, 2024).

ARGUMENT

I.

ARTICLE 120(B)(2), UCMJ, IS NOT UNCONSTITUTIONALLY VAGUE BECAUSE IT PROVIDES ORDINARY SERVICE MEMBERS OF COMMON INTELLIGENCE FAIR NOTICE OF WHAT CONDUCT IS PROSCRIBED.

Additional Facts

The statutory text of Article 120(b)(2)(A), UCMJ, provides that "[a]ny person subject to this chapter who commits a sexual act upon another person without the consent of the other person… is guilty of sexual assault and shall be punished as a court-martial may direct."

The statute then defines "consent" as follows:

> (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.

10 U.S.C. § 920(g)(7).

Standard of Review

The constitutionality of a statute is a question of law and is reviewed de novo. United States v. Wright, 53 M.J. 476, 478 (C.A.A.F. 2000).

Law & Analysis

The Fifth Amendment provides that "[n]o person shall…be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. This due process guarantee requires that criminal statutes "give people of common intelligence fair notice of what the law demands of them." United States v. Davis, 139 S. Ct. 2319, 2325 (2019) (quotations omitted); "[A] defendant generally must know the facts that make his conduct fit the definition of the offense, even if he does not know that those facts give rise to a crime." Elonis, 575 U.S. at 735.

Where a statute fails to give fair notice or is "so standardless that it invites arbitrary enforcement," Johnson v. United States, 576 U.S. 591, 595 (2015), it is "void for vagueness." Colautti v. Franklin, 439 U.S. 379, 390 (1979). "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." Levy, 417 U.S. at 757 (citation omitted).

A facial vagueness challenge to a statute is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [statute] would be valid," United States v. Salerno, 481 U.S. 739, 745 (1987), or that the statute lacks a "plainly legitimate sweep." Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 (2008) (internal quotation marks omitted). The Supreme Court has "made facial challenges hard to win" for a reason. Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024). That is because "'facial challenges threaten to short circuit the democratic process' by preventing duly enacted laws from being implemented in constitutional ways." Id. at 2383 (quoting Wash. State Grange, 552 U.S. at 471). Thus, if "[a] general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction," and it will not be struck down as facially vague. United States v. Harriss, 347 U.S. 612, 618 (1954).

In raising a facial challenge to Article 120(b)(2)(A) and (g)(7), UCMJ, Appellant does not suggest that servicemembers "could not reasonably understand that [sexual assault without consent] is proscribed," Levy, 417 U.S. at 757, or that the statute is "unclear as to what fact must be proved." FCC v. Fox TV Stations, Inc., 567 U.S. 239, 253 (2012). Instead, he contends that the definition of "consent" is unconstitutionally vague because it implicates factual circumstances

that may be relevant to other variations of sexual assault enumerated by Article 120, UCMJ. (*See generally* App. Br. at 16-38.) For the reasons set forth below, Appellant's contentions lack merit, and he is unentitled to relief.

A. The statutory definition of "consent" provides fair notice of the different ways the crime of sexual assault without consent may be committed.

When a statute is unclear as to what must be proved, Fox, 567 U.S. at 253, such that a person "could not reasonably understand that his contemplated conduct is proscribed," Levy, 417 U.S. at 757 (citation omitted), courts have found insufficient notice.

Article 120(b)(2) is not that statute. It prohibits, in no uncertain terms, 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. 10 U.S.C. § 920(g)(7). There is nothing vague about these statutory provisions such that servicemembers would have to "guess at the meaning of the enactment." Winters v. New York, 333 U.S. 507, 515 (1948). Anyone "of common intelligence" who read it would understand that the law forbade them from committing sexual acts on someone cannot agree or disagree to sexual activity because they are: being rendered unconscious; already

unconscious; sleeping; incompetent; threatened; or subjected to force. Davis, 139 S. Ct. at 2325. Simply put, the statute is clear that "only consensual sexual intercourse is innocent." McDonald, 78 M.J. at 381.

By defining the various ways lack of consent may be shown, the statute makes clear "the facts that make [an accused's] conduct fit the definition of the offense." Elonis, 575 U.S. at 735. That a single factual element (e.g., lack of consent) may be proved multiple ways does not mean there is insufficient notice. Indeed, "legislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes." Schad v. Arizona, 501 U.S. 624, 636 (1991). And as the Supreme Court has recognized, "several possible sets of underlying brute facts [may] make up a particular element." Richardson v. United States, 526 U.S. 813, 817 (1999).

Similarly, the fact that the statutory definition of "consent" contains a sort of "catch-all" provision in subsection (g)(7)(C)—which provides that "[a]ll the surrounding circumstances are to be considered in determining whether a person gave consent"—does not render it vague, much less unconstitutionally vague. 10 U.S.C. § 920(g)(7)(C). For as this Court recently recognized, statutes must have the "requisite broadness to adequately 'deal with untold and unforeseen variations in *factual* situations.'" Rocha, 2024 CAAF LEXIS 250, at *12 (quoting Boyce Motor Lines, Inc., 342 U.S. at 340). By requiring the factfinder to consider "[a]ll

the surrounding circumstances," Article 120(g)(7), UCMJ, supplies the "requisite broadness" and accounts for the unfortunate reality that there is a multitude of ways sexual assault without consent might occur.

Appellant, for his part, contends that this statutory scheme violates fair notice requirements because it allow the prosecution to argue "uncharged theories of liability" that overlap with other parts of the statute. (App. Br. at 20.) But overlap between statutory subsections does not necessarily make the statute unconstitutionally vague. After all, "[r]edundancies across statutes are not unusual events in drafting." Conn. Nat'l Bank, 503 U.S. at 253 (citation omitted). "So long as overlapping criminal provisions clearly define the conduct prohibited … the notice requirements of the Due Process Clause are satisfied." United States v. Batchelder, 442 U.S. 114, 123 (1979). *See also* United States v. Ross, 948 F.3d 243, 247-48 (5th Cir. 2020) (overlap between criminal statutory provisions "is unremarkable and has no bearing on whether the statute is unconstitutionally vague") (internal quotations omitted); Edwards v. Butler, 882 F.2d 160, 163 (5th Cir. 1989) (Louisiana rape statute that enumerated two crimes with some overlap was not unconstitutionally vague where it "clearly define[d] the conduct prohibited and punishment authorized"). Here, Article 120(b)'s subsections clearly define the prohibited conduct—sexual acts with someone who has not freely agreed to the activity or is sleeping, unconscious, incompetent, in fear, or under threat or force

likely to cause grievous bodily harm—and therefore provide fair notice across the board. *See* 10 U.S.C. § 920(b).

However, the discrete theories of liability set forth in Article 120(b)'s subsections are not to be conflated with the *facts* that may be used to evaluate the element of consent in a prosecution for sexual assault without consent under Article 120(b)(2). Though the definition of consent allows the prosecution to prove the absence of consent using factual circumstances that might also be relevant in prosecutions under Article 120(b)(1) or (b)(3), this does not mean the prosecution can switch between Article 120(b)'s various theories of liability during trial. (See App. Br. at 24.) The military judge will always instruct on the same elements for a charge of sexual assault without consent: (1) that the accused committed a sexual act upon another person; and (2) that the accused did so without the consent of the other person. And implicit within the words "without consent" are the various definitions of what constitutes nonconsent.

But even assuming *arguendo* that the definition of "consent" contemplates several alternative theories of liability—versus mere factual considerations—there is still no notice problem, because "the requirement of notice to an accused may be met if the charge sheet 'make[s] the accused aware of any alternative theory of guilt.'" United States v. Miller, 67 M.J. 385, 389 n.6 (C.A.A.F. 2009) (citation omitted). By virtue of the comprehensive definition of "consent" in Article

120(g)(7), an accused whose charge sheet alleges that he committed a sexual act "without consent" would be on notice that he could be convicted on any of the overlapping "alternative theories" captured by the statutory definition. *See* Schad, 501 U.S. at 631-32 (citation omitted) ("We have never suggested that in returning general verdicts in such cases the jurors should be required to agree upon a single means of commission, any more than the indictments were required to specify one alone.") For the same reason, Appellant's assertion that the prosecution is allowed to present theories "never charged" is unavailing—every viable theory of liability contemplated by the definition of "consent" *is* charged when an accused is brought to trial for sexual assault "without consent." And despite Appellant's suggestions to the contrary, the justice system is no stranger to the concept of alleging multiple theories in a single count or specification. *See* Fed. R. Crim. Pro. 7(c)(1) (providing that a single count in an indictment may allege that the defendant committed the offense by *one or more specified means*).

Stated another way, if a servicemember sees "without consent' on a charge sheet, he knows the variety of circumstances (sleep, unconsciousness, incompetence, under threat, in fear, etc.) under which the alleged victim would have been unable to consent, and therefore would not have given consent. To combat the allegation on the charge sheet that the alleged victim did not consent, the servicemember knows he will need to defend against *any* of these – although

based on pretrial discovery, he will likely have an idea about which circumstances will be most relevant to his case. If the servicemember desires further clarification as to the circumstances at play, he can request a bill of particulars. *See* R.C.M. 906(b)(6). That Appellant did not do so in this case is evidence that he had sufficient notice of how he was alleged to have committed the crime.

Because Appellant challenges Article 120(b)(2) and (g)(7), UCMJ, as unconstitutionally vague on its face, "to succeed, [he] must demonstrate that the law is impermissibly vague in *all* of its applications." Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 497 (1982) (emphasis added). He has failed to do so—quite possibly because he *cannot* do so, for one hypothetical is all it takes to show that Article 120(b)(2) has clear, permissible applications. If a conscious, sober victim said "no" to an accused as he began to have sex with her, and he continued to do so, the crime of sexual assault without consent would be complete. It is precisely these situations that the statute is intended to cover. Considering the above, Appellant's facial challenge fails.

B. Variance is a fact-specific analysis that has no bearing on the facial constitutionality of Article 120(b)(2) or its definition of "consent."

Next, Appellant contends that the prosecution's ability to leverage the definition of consent results in "impermissible variance". (App. Br. at 24-27.) But this argument fails from the outset because the variance analysis is inherently case-specific—"variance between pleadings and proof" is assessed by examining the

evidence presented at trial and whether it "conform[s] strictly with the offense alleged in the charge." United States v. Allen, 50 M.J. 84, 86 (C.A.A.F. 1999). The case cited by Appellant, Stirone v. United States, 361 U.S. 212 (1960) perfectly illustrates this point. In Stirone, a commerce case in which the defendant was charged with interfering with the interstate transport of sand, the Supreme Court found variance because the judge also admitted evidence that the defendant might have interfered with the transport of steel and instructed the jury that they could return a finding of guilty on that basis (rather than the charged offense of interference with transport of sand). Id. The Court's analysis regarding variance was specific to the indictment, evidence, and instructions in that case—in no way does it deal with the sufficiency of the charged criminal statute writ large. *See generally* id. at 213-18. Put differently, the concept of variance has no place in a facial challenge to a statute. Accordingly, Appellant is unentitled to relief.

C. Article 120(b)(2)(A) is not misleading such that an accused's ability to defend themselves would be impaired.

Appellant next alleges that "[i]n Article 120(b)(2)(A) cases, an accused and defense counsel are both misled in their preparation for trial and denied the opportunity to defend against the charge." (App. Br. at 28.) In support of this position, Appellant advances three lines of argument in which he: (1) reiterates his argument about "the variance that Article 120(b)(2)(A) allows"; (2) asserts that the definition of consent "amounts to a mandatory presumption"; and (3) suggests that

the definition would hinder the defense's ability to request a mistake of fact instruction. For the reasons set forth below, these arguments lack merit.

1. Neither the introduction nor consideration of evidence of the surrounding circumstances of a sexual act constitutes "variance."

To start, as discussed above, Appellant's argument regarding variance is inapposite in the context of a facial challenge. By charging a sexual assault as "without consent," the prosecution is putting an accused on notice that he may be found guilty under any combination of circumstances outlined in the definition of consent—nothing prohibits an accused's defense counsel from preparing to defend against any and all theories that are implicated by the definition. If Appellant is suggesting that variety in the available modes of proof equates to variance, he would be incorrect. Introducing "all the surrounding circumstances" for the factfinder's consideration is not variance. The Supreme Court has recognized that "different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line.'" Schad, 501 U.S. at 631-32 (citation omitted); *see also* United States v. Brown, 65 M.J. 356, 359 (C.A.A.F. 2007) ("A factfinder may enter a general verdict of guilt even when the charge could have been committed by two or more means, as long as the evidence supports at least one of the means beyond a reasonable doubt.")

2. Article 120(g)(7)(B) is simply a statement of law.

Similarly unavailing is Appellant's contention that the definition of consent at Article 120(g)(7)(B), UCMJ amounts to a "mandatory presumption." (App. Br. at 29-30.) The definition of consent does not require the factfinder to "presume" any element of the crime, nor does it allow the military judge to instruct the factfinder on any such presumptions. *Cf.* Sandstrom v. Montana, 442 U.S. 510, 512 (1979) (jury instruction that "law presumed a person intended the ordinary consequences of his acts" unconstitutional because it shifted the burden of proof). Standing alone, evidence that a victim was asleep at some point and could not consent at that time may not be conclusive proof that they did not consent to the charged conduct, since "*all* the surrounding circumstances are to be considered in determining whether a person gave consent." 10 U.S.C. 920(g)(7)(C). If there is evidence the victim consented prior to falling asleep, a sexual act at issue might still be consensual. Thus, nothing about Article 120(g)(7)(B) relieves the prosecution of its burden to prove lack of consent as defined by the statute—it is simply a statement of substantive law and therefore does not constitute a "mandatory presumption."

3. A mistake-of-fact defense will always be available if it is sufficiently raised by the evidence.

Finally, this Court should be unconvinced by Appellant's exhortations that Article 120(g)(7) eradicates "congressionally enumerated mens rea protection."

(App. Br. at 30.) According to Appellant, an accused charged with sexual assault without consent would be deprived of the ability to request the "mistake of fact as to consent" instruction if the definition of "consent" is allowed to stand, because it allows the prosecution to "switch[] theories mid-trial." (*See* App. Br. 30-31.) Appellant is mistaken. The prosecution cannot "switch theories"—if the accused is charged with sexual assault without consent, then the factfinder will be instructed on the elements of that crime: that the accused committed a sexual act, and the accused did so without consent.[1] And since sexual assault without consent is a general intent crime, the mistake of fact defense will *always* available, provided it is raised by the evidence. *See* R.C.M. 916(j). Even if the prosecution introduces evidence of the victim's intoxication or incompetence, that will not change the availability of the mistake of fact defense to an accused, because it does not change the elements of the charged general intent offense. That the availability of the "mistake of fact" instructions depends on what is presented at trial only serves to underscore that it is a case's facts—not the statutory definition—that will

[1] If the prosecution charged an offense as occurring "without consent" under Article 120(b)(2)(A), and the military judge instructed on the elements of sexual assault upon a person when the accused knew or reasonable should have known the person was asleep under Article 120(b)(2)(B), the United States agrees that would be error. But that is not what happened in this case, nor has Appellant shown that is a common occurrence in military practice.

be dispositive.[2] *See* United States v. Prasad, 80 M.J. 23, 28 (C.A.A.F. 2020); *cf.* United States v. Willis, 41 M.J. 435, 438 (C.A.A.F. 1995) (holding that mistake-of-fact instruction is unwarranted where dispute only concerns the question of actual consent). Thus, this is not grounds for relief on a facial challenge.

D. The statute is unambiguous and requires neither interpretation through canons of construction nor application of the rule of lenity.

The Supreme Court has stated time and time again that courts "must presume that a legislature says in a statute what it means and means in a statute what it says there." Conn. Nat'l Bank, 503 U.S. at 254. And "[w]hen the words of a statute are unambiguous, then, this first canon is also the last." Id.

Such is the case here. The text of Article 120(b)(2)(A), UCMJ, is neither vague nor ambiguous. It clearly defines what conduct is criminal—having sex with another person without that person's freely given agreement. *See* Dubin v. United States, 599 U.S. 110, 139 (2023) (Gorsuch, J., concurring) (defining a vague statute as one that "does not satisfactorily define the proscribed conduct). There is nothing ambiguous about this prohibition, because there is no room for interpretation—nonconsensual sex is criminal in *every* scenario. *See* id. (defining an "ambiguous" statute as one that is "subject to two or more different interpretations"). Indeed, Appellant does not complain that he cannot understand

[2] Indeed, Appellant requested a mistake of fact instruction in this case, and the military judge provided it to the members. (JA at 549.)

what conduct Article 120, UCMJ criminalizes. Thus, this Court need not resort to other canons of construction—"judicial inquiry is complete." Conn. Nat'l Bank, 503 U.S. at 254.

Because the meaning of the statute is plain, this Court should hesitate to entertain Appellant's arguments regarding surplusage, regardless of the overlap between Article 120(b)(2)(A) and (b)(2)(B). (*See* App. Br. at 33.) "Although choosing the reading that reduces redundancies is a helpful rule when interpreting ambiguous text, it does not apply when the text's meaning is plain." Mercy Hosp., Inc. v. Azar, 891 F.3d 1062, 1068 (D.C. Cir. 2018) (citing Lamie v. United States Tr., 540 U.S. 526, 536 (2004)). "A little overlap, either by accident or design, is to be expected in any complex statutory scheme with interdependent provisions." Mercy Hosp., Inc., 891 F.3d at 1068.

Here, by giving effect to both Article 120(b)(2)(A) and Article 120(b)(2)(B), this Court will ensure that the statutory scheme created by Congress has its intended effect: criminalizing every variation and every minute of a nonconsensual sexual encounter. This is best illustrated by example. If 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, the prosecution could charge the accused with violations of both Article 120(b)(2)(A) and (b)(2)(B). But if the prosecution charged both, it would be accused of

duplicative charging. Article 120(b)(2)(A) exists to remedy this situation. Since Article 120(b)(2)(A)—sexual assault without consent—covers *both* halves of the illegal encounter, the prosecution could charge the accused with a single violation of sexual assault without forfeiting the opportunity to present evidence.

That the statutory scheme affords the prosecution the flexibility to decide between overlapping provisions in charging an accused does not mean they are invalid surplusage. As the D.C. Circuit has recognized, "Congress may use overlapping language to sweep up technicalities that more precise provisions may leave behind." Mercy Hosp., Inc., 891 F.3d at 1069. That is precisely what Congress has done in Article 120, UCMJ. That some surplusage may exist does not invalidate Congress's statutory scheme. Rather, it reflects the reality that an accused's crimes may violate the law in more ways than one, and that the prosecution—not the accused—should have discretion to decide how to hold him responsible. Batchelder, 442 U.S. at 125 ("[A] defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution.") Thus, "[w]hen Congress has created two Federal crimes, the Government may elect to prosecute on either." United States v. Picotte, 30 C.M.R. 196, 198 (U.S. C.M.A. 1961). "Whether to prosecute and *what charge* to file or bring … are decisions that generally rest in the prosecutor's discretion." Batchelder, 442 U.S. at 124.

Because the statute's meaning is plain, the rule of lenity—which provides that ambiguities in criminal statutes should be resolved in the accused's favor—also does not apply. Davis, 139 S. Ct. at 2333. Invocation of this rule requires more than merely "some ambiguity" or difficulty in decipherment. Wooden v. United States, 595 U.S. 360, 377 (2022) (Sotomayor, J., concurring). No such difficulty exists here. The fact that Article 120(b)(2)(A) overlaps with the other subsections of Article 120(b) is *not* grounds for applying the rule of lenity:

> The rule of lenity, which favors narrow construction of ambiguous criminal statutes, is of little import in choosing between the application of overlapping criminal statutes. In any case, absent a discriminatory motive on the part of prosecutors, "what charge to file … generally rests entirely in the prosecutor's discretion."

United States v. Newell, 658 F.3d 1, 29 (1st Cir. 2011) (quoting United States v. Bucci, 582 F.3d 108, 113 (1st Cir. 2009)).

Here, there is no ambiguity for the rule of lenity to resolve. Article 120(b)(2)(A)'s text leaves no doubt about what is prohibited—sexual assault without consent in all its permutations. Its overlap with other subsections of Article 120 does not make its meaning any less plain. Rather, the statutory scheme recognizes that an accused's conduct may be criminal in different ways and affords the prosecution appropriate discretion in deciding how to hold him responsible. Ultimately, it plainly states how an accused's conduct "fit[s] the definition of the

offense." Elonis, 575 U.S. at 735. Thus, there is sufficient notice and Appellant's facial challenge is without merit.

II.

AS APPLIED, ARTICLE 120(b)(2) AND (g)(7), UCMJ, 10 U.S.C. §§ 920(b)(2) AND (g)(7) GAVE APPELLANT CONSTITUTIONAL FAIR NOTICE, AND THE MILITARY CORRECTLY DENIED APPELLANT'S ERRONEOUS PROSPOSED INSTRUCTION.

Standard of Review

The constitutionality of a statute is a question of law and is reviewed de novo. Wright, 53 M.J. at 478. "Questions pertaining to the substance of a military judge's instructions, as well as those involving statutory interpretation, are reviewed de novo." United States v. Voorhees, 79 M.J. 5, 15 (C.A.A.F. 2019) (citation omitted). A military judge's denial of a requested instruction, on the other hand, is reviewed for abuse of discretion. United States v. Carruthers, 64 M.J. 340, 346 (C.A.A.F. 2007).

Law & Analysis

The test for vagueness asks whether a criminal statute "give[s] people of common intelligence fair notice of what the law demands of them." Davis, 139 S. Ct. at 2325. Determining the sufficiency of notice necessarily requires that a statute be examined "in the light of the conduct with which a defendant is

charged." Parker, 417 U.S at 757. "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." Id. at 756.

Under this framework, Appellant's as-applied challenge falls flat. The text of Article 120(b)(2)(A), UCMJ, would put any servicemember of "common intelligence," Davis, 139 S. Ct. at 2325, on notice that having sex with someone without their freely given agreement is criminal. And because this prohibition on nonconsensual sex *clearly* applies to Appellant's conduct—i.e., having sexual intercourse with S.F. without her agreement and while she was asleep—he cannot successfully challenge Article 120, UCMJ, for vagueness (either facially or as applied) and the analysis *should* end here. Parker, 417 U.S at 756,

But Appellant makes a different claim instead. Under the guise of a vagueness challenge, he alleges that the military judge erred by refusing to give a special instruction that "tailor[ed] the definition of 'consent' to the charged theory of liability," and thereby deprived him of fair notice. (App. Br. at 40.) This Court should be unpersuaded, not least because it is the charge sheet and statutory definitions that give a servicemember fair notice, rather than instructions given after trial on the merits.

But even if instructions could mean the difference between fair notice (or lack thereof), Appellant's claim would still fail because neither the military judge's refusal to give a legally inaccurate instruction nor his provision of instructions that

comport with the applicable law can be said to violate Appellant's right to "fair notice of what the law demands of [him]." Davis, 139 S. Ct. at 2325.

A. The military judge's refusal to give an instruction containing an incorrect statement of the law did not violate Appellant's right to fair notice.

As a preliminary matter, Appellant's claim—which is premised on the military judge's refusal instruct the members that they were "not permitted to consider whether [S.F.] was too intoxicated to consent to sex"—fails from the outset because the instruction was an "inaccurate statement of the law." (App. Br. at 41.) Though Appellant fixates on the fact that "there was no allegation on the charge sheet that S.F. was too intoxicated to consent," (id.), it is the *statute*—not the charge sheet—that sets forth the law. And here, the statute provides that "[a]ll the surrounding circumstances are to be considered in determining whether a person gave consent." 10 U.S.C. § 920(g)(7)(C). Because the defense's requested instruction directly contravened the statutory definition of consent by prohibiting the members from considering the circumstances surrounding the offense, the military judge rightfully refused to give it. *See* Carruthers, 64 M.J. at 346 (a judge's failure to give a requested instruction will only be error if, *inter alia*, the instruction was correct).

Given that the special instruction was properly denied, Appellant's claim that the denial deprived him of fair notice lacks merit. (App. Br. at 41.) But even if the instruction could have been given, any suggestion that Appellant did not

know he would have to defend against evidence of intoxication or S.F.'s sleeping state until the instruction was denied is self-defeating. The fact that trial defense counsel sought to preclude the factfinder's consideration of intoxication, before trial on the merits even began, (JA at 64-77; 547), proves that they were, in fact, on notice that intoxication is ordinarily among the "surrounding circumstances" to be considered in evaluating consent. *See* 10 U.S.C. § 920(g)(7)(C). Trial defense counsel's pursuit of the special instruction was undoubtedly prompted by the evidence, which was also littered with references to S.F. being asleep—another circumstance that the statute contemplates as being relevant to the issue of consent. *See* id. For Appellant to now claim that he was unaware he would have to defend against the fact of S.F.'s sleeping state—despite this evidence and the statutory definition of consent—would be difficult to believe.

B. The military judge's instructions did not add or substitute an unauthorized theory of liability.

Next, Appellant contends that he did not have fair notice because the military judge's instructions "matched Article 120(g)(7), authorizing a conviction on an uncharged theory of liability." (App. Br. at 41.)

This claim lacks merit first at foremost because fair notice has *everything* to do with the text of the challenged statute. It is the statute that provides primary notice of "the facts that make [Appellant's] conduct fit the definition of the offense." Elonis, 575 U.S. at 735. Thus, it should come as no surprise that the

military judge's definition of consent matched—word for word—the definition from the statute. *Compare* (JA at 549), *with* 10 U.S.C. § 920(g)(7). Due process demands that the military judge's instructions correctly convey the law. *Cf.* United States v. Killion, 75 M.J. 209, 211 (C.A.A.F. 2016) (finding constitutional error where the military judge instructions contained "incorrect statement of the law"). By suggesting that the military judge should have done otherwise, Appellant betrays a misunderstanding of the law.

Second, despite Appellant's suggestions to the contrary, the military judge's instructions did not add or substitute "an uncharged theory of liability," since the evidence presented at trial reflected the prosecution's theory that having sex with a sleeping person is one of several ways sexual assault could be perpetrated without consent (App. Br. at 41.) When the prosecution charged Appellant with sexual assault without consent, they were putting him on notice that under the statutory definition of "consent," there could be no "freely given agreement" at the point where a victim was sleeping, unconscious, or otherwise incompetent. Put differently, what Appellant calls an "uncharged" theory of liability is just one way the charged theory of liability may be proved.

To fully understand why Appellant's argument fails, it is useful to consider when and how a military judge's instructions might add an uncharged theory of liability. The case of United States v. Tunstall, 72 M.J. 191, 196 (C.A.A.F. 2013),

is instructive. In Tunstall, the military judge *sua sponte* instructed the members that the offense of "open and notorious" indecent acts was a lesser included offense of the charged offense of aggravated sexual assault. Id. at 193. In finding that this violated the appellant's right to fair notice, this Court cited the fact that (1) "open and notorious" was not a theory of liability for the offense of aggravated sexual assault, and (2) the military judge's instruction was "the *first* mention" of such a theory during the entirety of the trial. Id. at 195-96 (emphasis added).

This case is distinguishable from Tunstall. In no way did the military judge's instructions in this case introduce an uncharged theory of liability or concept. He properly instructed the members on the two elements of sexual assault "without consent" (Article 120(b)(2)(A) and not any other offense—he did not instruct on the elements of sexual assault by "threatening or placing a person in fear" (Article 120(b)(1)(A)), "fraudulent representation" (Article 120(b)(1)(B)), or upon a person "incapable of consenting" (Article 120(b)(3)), or any other offense not charged. *Compare* (JA at 548-49), *with* Department of the Army Pamphlet (D.A. Pam.) 27-9, *Military Judges' Benchbook*, para. 3A-44-2 (29 February 2020). The military judge's instructions meant that, regardless of the evidence introduced on the merits, the panel members still had to find that Appellant committed the sexual act without the victim having consented. The military judge also instructed on the defense of mistake of fact as to consent, as was appropriate for a general

intent crime. (JA at 549.) Thus, his instructions were appropriately tailored to the one overarching theory of liability with which the prosecution sought to convict Appellant—sexual assault without consent. (JA at 548-49). And unlike in Tunstall, the judge's instructions were *not* "the first mention" of the theory that having sex with a sleeping person might constitute sexual assault without consent. The very first time Appellant would have been exposed to this theory was the day after the assault, when S.F. called him and told him she "woke up to [the penetration]" and "didn't even understand…what was going on." (JA at 128.) The theory presented at trial was no different, and the military judge instructed the members accordingly. That the military judge's instructions were not to Appellant's liking does not mean he lacked fair notice regarding the theory of liability set forth therein.

In line with this theory of liability, the prosecution introduced evidence and argued that S.F. did not consent, not just that she was incapable of consenting. (JA at 474.) This speaks directly to what was charged on the charge sheet: that Appellant "commit[ted] a sexual act upon Airman First Class [S.F.] by penetrating her vulva with his penis, *without her consent*." (JA at 16) (emphasis added). The fact that there was additional evidence introduced on the merits about S.F. being asleep during part of the sexual assault was not variance— it was simply part of the "surrounding circumstances" that must be considered, per the statute, in evaluating

consent. See 10 U.S.C. § 920(g)(7). And the fact that the statute says a sleeping person cannot consent does not equal a mandatory presumption under the facts of this case—here, the facts showed that S.F. woke up at some point, at which point she could have (but did not) consented. Indeed, this shows why charging sexual assault "without consent" instead of "incapable of consenting" does *not* lower the prosecution's burden of proof. For the prosecution here had to prove more than just that S.F. was "incapable of appraising the nature of the conduct at issue"[3]—it had to show that she never consented to it. *See* 10 U.S.C. § 920(g)(8).

In this case, the military judge's instructions required the prosecution to prove beyond a reasonable doubt exactly what was on the charge sheet: that Appellant committed the sexual act without S.F.'s consent. Article 120(b)(2)(A) and (g)(7), as applied through the military judge's instructions, provided Appellant fair notice of what it means to commit a sexual act without consent, and he is unentitled to relief.

[3] "Incapable of consenting" means 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, the sexual act at issue." 10 U.S.C. § 920(g)(8).

III.

APPELLANT'S CONVICTION FOR SEXUAL ASSAULT WITHOUT CONSENT IS LEGALLY SUFFICIENT.

Standard of Review

This Court reviews legal sufficiency de novo. Article 66(d), U.C.M.J., 10 U.S.C. § 866(d); Robinson, 77 M.J. at 297.

Law & Analysis

The test for legal sufficiency is whether, "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." Robinson, 77 M.J. at 297-298. The legal sufficiency assessment "draw[s] every reasonable inference from the evidence of record in favor of the prosecution." Id. (emphasis added) (quoting United States v. Plant, 74 M.J. 297, 301 (C.A.A.F. 2015)). An assessment of legal sufficiency is limited to the evidence produced at trial. United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993).

Appellant contends that this Court should overturn his conviction because the as-yet undecided case of United States v. Mendoza, 2023 CAAF LEXIS 699 (C.A.A.F. 2023)—in which this Court is considering the legal sufficiency of another appellant's sexual assault conviction—"may implicate [his] case." (App. Br. at 44.) Besides being undecided, Mendoza should have no bearing on this

Court's decision in this case because it factually distinct, such that its outcome would be inconsequential to Appellant's conviction. The evidence in Mendoza suggested that the victim was intoxicated but still "coherent and actively participating in sexual acts." United States v. Mendoza, No. ARMY 20210647, 2023 CCA LEXIS 198, at *7 (A. Ct. Crim. App. May 8, 2023) (Walker, J., dissenting). Thus, the prosecution relied primarily on evidence of the victim's "*extreme* intoxication" at the time of the sexual act—of which she had no independent memory—to "carry its burden of proving sexual assault 'without consent.'" Id. Because of these facts and the appellant's claim of legal insufficiency, this Court may end up deciding whether the crime of sexual assault without consent requires proof that the accused *did not* have the victim's "freely given agreement" in fact, or if it can be proved by showing that the accused *could not* have "freely given agreement" because the victim was incapable of consenting. (*See* App. Br. at 44.)

But regardless of which way the Court comes out, Appellant's conviction would be unaffected because the prosecution in this case did not rely on evidence of S.F.'s intoxication to prove lack of consent. Instead, it relied on S.F.'s *unequivocal* testimony that she never gave Appellant permission to have sex with her, but woke up to find him doing so nonetheless. (JA at 114.) Accordingly, there is no "impermissible variance" between the pleadings (which charged sexual

assault without consent) and the proof (S.F.'s testimony that she never consented). Allen, 50 M.J. at 86. Evidence that S.F. was asleep during part of the sexual act was merely a circumstance that the trier of fact could consider in determining whether S.F. gave consent. It was not a variance in proof.

Further, unlike the victim in Mendoza—who did not have an independent recollection of the sexual assault due to her intoxication—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. (JA at 194-95.) Viewing this evidence in the light most favorable to the prosecution, "any rational trier of fact" could find that S.F. was not blackout drunk and accurately remembered that she never consented to sexual intercourse prior to falling asleep. By extension, 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. Robinson, 77 M.J. at 297-298. Indeed, the Air Force Court of Criminal Appeals considered all the same evidence and reached the same conclusion regarding lack of consent. (JA at 14.) The evidence is legally sufficient to sustain Appellant's conviction for sexual assault without consent regardless of how Mendoza is decided, therefore Appellant is unentitled to either to relief from this Court or to another legal sufficiency review by the lower court.

IV.

THE MILITARY JUDGE DID NOT ERR WHEN HE DENIED APPELLANT'S CHALLENGE FOR A MEMBER WHOSE WIFE HAD BEEN SEXUALLY ASSAULTED THREE DECADES PRIOR.

Standard of Review

"Courts generally recognize two forms of bias that subject a juror to a challenge for cause: actual bias and implied bias." United States v. Hennis, 79 M.J. 370, 384 (C.A.A.F. 2020). A military judge's ruling on actual bias is reviewed for an abuse of discretion. Id. A ruling on implied bias is reviewed pursuant to a standard that is "less deferential than abuse of discretion, but more deferential than de novo review." United States v. Dockery, 76 M.J. 91, 96 (C.A.A.F. 2017) (citation and quotations omitted).

Citing the dissent in Keago, 84 M.J. at 367, Appellant now suggests this Court should review implied bias de novo. (App. Br. at 45.) In so doing, he offers no analysis regarding the stare decisis factors. (*See generally* App. Br. at 45-48.) Given that Appellant has not provided this Court with a good reason to overrule its own precedent, this Court should—as it did once already in Woods—decline to amend its standard of review, which "affords an appropriate level of deference to the military judge," 74 M.J. at 243 n.1, and recognizes that "[d]uplication of the trial judge's efforts in the court of appeals would very likely contribute only

negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources." Anderson v. Bessemer City, 470 U.S. 564, 574-75 (1985).

Law & Analysis

"[A]n accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel." United States v. Commisso, 76 M.J. 315, 321 (C.A.A.F. 2017) (quoting United States v. Wiesen, 56 M.J. 172, 174 (C.A.A.F. 2001)). This right is enforced through "inquiry into both the actual bias and implied bias of potential members" during voir dire, Terry, 64 M.J. at 302, and the adjudication of challenges for cause, which provides for the excusal of those who "[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." R.C.M. 912(f)(1)(N). "Challenges for actual or implied bias are evaluated based on a totality of the circumstances." Richardson, 61 M.J. at 118.

Here, Appellant takes issue with the military judge's denial of his challenge for cause of A.G., who he believes should have been excused because his wife was a victim of sexual assault some 30 years prior. (App. Br. at 45-57.) But as this Court has repeatedly recognized, "[t]he fact that a court member's family member, friend, or relative was a victim of a crime similar to the crime charged is not a *per se* disqualification." Jefferson, 44 M.J. at 321; United States v. Miles, 58 M.J. 192, 195 (C.A.A.F. 2003); United States v. Daulton, 45 M.J. 212, 218 (C.A.A.F. 1996).

And as discussed below, the totality of the circumstances demonstrate that the military judge did not err in denying the challenge of A.G. for actual and implied bias.

A. The military judge reasonably concluded there was no actual bias based on A.G.'s responses and demeanor. [4]

"Actual bias is personal bias which will not yield to the military judge's instructions and the evidence presented at trial." United States v. Nash, 71 M.J. 83, 88 (C.A.A.F. 2012). It is "the existence of a state of mind that leads to an inference that the person will not act with entire impartiality." Hennis, 79 M.J. at 384. The existence of actual bias is a question of fact to be decided by the military judge "on the basis of the responses of the member and any other evidence presented at the court-martial." United States v. Velez, 48 M.J. 220, 224 (C.A.A.F. 1998). The question is "essentially one of credibility and therefore largely one of demeanor." United States v. Reynolds, 23 M.J. 292, 294 (C.M.A. 1987) (citing Patton v. Yount, 467 U.S. 1025, 1038 (1984)).

With respect to actual bias that may stem from a member's exposure to "a crime similar to the one to be litigated before them," this Court has noted that "regardless of a member's prior exposure to a crime, it is often possible for a

[4] Though Appellant styles this assignment of error as pertaining, in part, to actual bias, his analysis does not address the matter with any specificity. (*See* App. Br. at 49-54.) Accordingly, the United States addresses it generally, *arguendo*.

member to rehabilitate himself before the military judge by honestly claiming that he would not be biased." Terry, 64 M.J. at 303. Such is the case here. A.G. unequivocally indicated "multiple times" that he could set aside his *wife's* experience, base his decisions on the evidence presented at trial, and follow the judge's instructions on the law. (JA at 53, 60.) The military judge relied on these responses, as well as his assessment of A.G.'s demeanor—which he found "candid and credible"—to conclude that there was no actual bias. (JA at 60.)

In taking issue with the military judge's determination, Appellant—who asserts that A.G. "hesitated, paused, [and] stumbled over his words" when responding to questions about his wife (App. Br. at 50)—implies that A.G.'s demeanor should have been interpreted as a sign of actual bias. But given that appellate courts are not required to accept an appellant's view of the record of trial or the inferences which might be reasonably drawn therefrom, United States v. Rounds, 30 M.J. 76, 80 (C.M.A. 1990), this Court should decline to adopt Appellant's skewed interpretation of the record.

Instead, this Court should look to the military judge, whose assessment of A.G.—unlike Appellant's—is "entitled to great deference." Reynolds, 23 M.J. at 294. After all, by this Court's own account, the military judge is "in the best position to judge the sincerity and truthfulness of the challenged member's responses on voir dire." United States v. Youngblood, 47 M.J. 338, 341 (C.A.A.F.

1997). And here, after personally observing A.G., the military judge rejected the suggestion that his demeanor and responses indicated he was emotionally compromised:

> Though his demeanor was characterized as drastically long pauses; and, potentially, at least in this Court's interpretation of counsel's argument an indication that he was somehow emotionally impacted or less than truthful in his responses. The Court did not get that impression from his responses. The pauses in his responses to questions to this Court, they were more clearly indicative of his thoughtfulness of the questions asked, his desire to answer them as candidly as possible. The Court found him and his body language and his demeanor and his responses to the questions posed to be candid and credible.

(JA at 60).

This Court has "regularly found the absence of actual bias when the military judge reported that following voir dire she was satisfied with the honesty of the member and convinced that the member was neither 'inflexible' nor resistant to the evidence or the military judge's instructions." Terry, 64 M.J. at 303. Because the military judge here did precisely that, this case should be no exception.

That the military judge "did not follow-up with what [Appellant believes] would have been the most helpful question" does not change this calculus. (App. Br. at 51.) To start, this Court has noted that it "[does] not expect record dissertations but, rather, a clear signal that the military judge applied the right law." United States v. Downing, 56 M.J. 419, 422 (C.A.A.F. 2002). Here, the

military judge's questioning sufficiently indicates that he understood what mattered to his analysis—the extent of A.G.'s exposure to a similar crime as well as his ability to set that aside in favor of the evidence and the law.

More importantly, as the party making the challenge, it was Appellant—not the military judge—who bore the burden of establishing bias. Wiesen, 57 M.J. at 49; R.C.M. 912(f)(3). Put differently, it was not the military judge's duty to pre-emptively rehabilitate a member and foreclose their excusal for cause. *See* United States v. McFadden, 74 M.J. 87, 90 (C.A.A.F. 2015) (noting that a military judge has discretionary authority, but no duty, to *sua sponte* excuse a member). By suggesting otherwise, Appellant puts the cart before the horse.

For this reason, Appellant's reliance on United States v. Smart, 21 M.J. 15, 19 (C.M.A. 1985), for the proposition that the military judge erred by failing to conduct further inquiry is inapt. In finding error in the denial of a defense challenge for cause of a member who had been victim of the same offense with which the accused was charged, this Court explained that "[t]he problem lies with [the member's] answers to questions about whether he could disregard his past experiences as a victim." Id. Specifically, the member's statements that: (a) he did *not* believe he could disregard outside influences and his personal experiences, and (b) he would not "consider" the full range of punishments available, i.e. no punishment. Id. at 20. The Court opined that based on these responses, the

military judge "should have excused him or should have assured that the record contained answers which adequately rehabilitated him." Id.

No such problem exists here. Unlike the member in Smart, who responded, "I think it would," when asked if his personal experiences would influence his decision, Smart, 21 M.J. at 16, A.G. affirmed that he could set aside his personal experience and decide Appellant's case based only on the evidence presented at trial. (JA at 53.) That he did not want to make assumptions about his wife's potential reaction to the case does not diminish this unambiguous statement of confidence in his own ability to "separate different cases" and be impartial. (JA at 53-55.) Moreover, at no point did A.G. demonstrate an "inflexibility" as to guilt, innocence, or sentence because of his personal experiences. *Cf.* Smart, 21 M.J. at 20. Rather, A.G.'s responses to the military judge's questions indicated that he could "yield to the military judge's instructions and the evidence presented at trial." Nash, 71 M.J. at 88. Accordingly, the military judge did not abuse his discretion in finding no actual bias, and Appellant is unentitled to relief.

B. The totality of the circumstances demonstrates there was no implied bias.

Implied bias is "bias attributable in law to the prospective juror regardless of actual partiality." United States v. Wood, 299 U.S. 123, 134 (1936). The test for implied bias asks "whether the risk that the public will perceive that the accused received something less than a court of fair, impartial members is too high."

Keago, 84 M.J. at 367 (citation omitted). "Implied bias exists when most people in the same position as the court member would be prejudiced." Dockery, 76 M.J. at 96 (citation omitted).

Although the liberal grant mandate dictates that judges should "liberally" grant challenges for implied bias in "close cases," United States v. Clay, 64 M.J. 274, 277 (C.A.A.F. 2007), where there is no actual bias, implied bias should be invoked "rarely." Wiesen, 56 M.J. at 174 (quoting United States v. Rome, 47 M.J. 467, 469 (1998)). Such is the case here. Considering the particular facts of this case—on which the military judge found no actual bias—this Court should be "reluctant to impute implied bias [to A.G.] as a matter of law." Jefferson, 44 M.J. at 321.

This Court's decision in Terry is instructive in this regard. 64 M.J. at 304. In Terry, this Court examined the denial of challenges for cause of two different members—Maj H and Capt A—whose romantic partners had been victims of sexual assault and reached two different conclusions about implied bias based on the totality of their respective circumstances. Id.

In finding that the military judge did not err by finding no implied bias on the part of Maj H—who initially appeared uncomfortable discussing the fact that his wife was sexually assaulted in her teens—this Court noted, *inter alia*, that the passage of time, lack of law enforcement involvement, and minimal discussion

between the couple about the incident "tend[ed] to ameliorate his exposure to the crime, dispelling the appearance of implied bias":

> [T]he crime against Maj H's wife took place at least ten, and perhaps as many as twenty years, prior to the court-martial and, significantly, before Maj H even knew his wife. It was never reported to law enforcement, nor was it cause for his wife to receive any counseling. As a couple they had spoken about the event only a few times, and the subject had not been broached for at least five years.

Id.

This Court further concluded that "taking the record of Maj H's voir dire as a whole," the military judge "justifiably described" Maj H's initial hesitation as "emanating from his concern for his wife's reputation in the community, rather than any distress he personally suffered due to his wife's experiences." Id.

By contrast, this Court found that the military judge erred by denying the challenge for Capt A—whose ex-girlfriend was raped by someone else while she and Capt A were taking a break—given the strength of his connection to the victim. Id. at 304-305. The Court opined that "most people in Capt A's circumstance would be hard pressed with such a background to sit impartially in a rape case," given that Capt A's responses indicated that he was: (1) "familiar with the details of the rape" and its aggravating circumstances, including the fact that it resulted in a pregnancy; (2) "incensed" by the fact that his "very close friend" had been hurt; (3) personally affected in that the victim broke up with him afterward

because she felt "unworthy"; and (4) acutely involved with the victim—even after their relationship ended—through the birth her son, who she named after Capt A. Id. at 305.

The juxtaposition of Maj H and Capt A in Terry provides the perfect litmus test for this case. The dissimilarity of CMSgt A.G's circumstances to Capt A's and the parallels to Maj H's, taken together, compel the conclusion that the military judge reasonably denied the challenge of A.G. for implied bias. Unlike Capt A, A.G. did not know many details about his wife's incident and denied that it affected him personally. Instead, A.G.'s circumstances are analogous to those of Maj H—his wife was sexually assaulted several decades years prior to the court-martial; the incident was never reported or prosecuted; and the couple discussed it only two or three times in the 30 years since the incident. And much like how Maj H's hesitation to discuss his wife's experience was "justifiably" attributed to his concern for her reputation, Terry, 64 M.J. at 304, the military judge in this case fairly interpreted A.G.'s hesitation to assume how his wife would feel about a sexual assault case as "indicative of his thoughtfulness of the questions asked, [and] his desire to answer them as candidly as possible." (JA at 60.) In the same vein, the military judge justifiably described A.G.'s "feeling bad" for his wife as "not an unnatural human reaction." (JA at 61.)

In Keago, this Court noted that "[a] military judge who cites the correct law and explains his implied bias reasoning on the record will receive greater deference (closer to the abuse of discretion standard)." 84 M.J. at 367. The military judge in this case did precisely that—he cited the correct law and explained his decision in a lengthy and detailed ruling, thus demonstrating that he understood how to apply the law to the facts. Accordingly, the military judge's decision should be reviewed with "greater deference (closer to the abuse of discretion standard)." Keago, 84 M.J. at 367.

Under that lens and in light of this Court's decision in Terry, it was not error for the military judge to conclude that A.G. did not require excusal for implied bias, for it was within "the range of choices reasonably arising from the applicable facts and the law." United States v. Frost, 79 M.J. 104, 109 (C.A.A.F. 2019). Considering the totality of A.G.'s circumstances and his responses during voir dire, there was minimal risk that a reasonable member of the public would "perceive that the accused received something less than a court of fair, impartial members." Keago, 84 M.J. at 367.

C. The Court's jurisprudence demonstrates that A.G.'s circumstances do not warrant application of the liberal grant mandate.

Besides validating that A.G.'s circumstances do not require excusal for implied bias, the fact that in Terry, this Court did not think Maj H required excusal also lends support to the military judge's conclusion that the challenge for the

similarly situated A.G. was "[not] a particularly close call such that the liberal grant mandate would come into play." (JA at 61.)

Appellant, who disagrees, suggests his case is akin to Miles, a drug-use court-martial in which this Court found that the military judge erred by not applying the liberal grant mandate to excuse a member whose nephew died because of his mother's cocaine use. 58 M.J. at 195. This Court should be unpersuaded. In Miles, it was not just the challenged member's exposure to a similar crime, but the surrounding circumstances that tipped the scale—namely, the fact that the challenged member "described this tragedy in an article for the base newspaper that was scheduled to be published shortly after the court-martial," and trial counsel's observation that it was "evidently" a "very traumatic experience." Id. These circumstances, in the Court's view, "would have added to the serious doubts in the minds of a reasonable observer about the fairness of the trial." Id.

Comparable circumstances do not exist here. Unlike the member in Miles, who was actively contending with his personal exposure to drug abuse, A.G. simply possessed a passive awareness of what had happened to his wife. The similarities between this case and Miles start and end with the simple fact of the members' respective exposures to crimes similar those charged—and that exposure alone is not enough to require invocation of the liberal grant mandate.

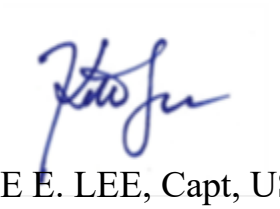
That application of the liberal grant mandate was not required is further reinforced by this Court's recent decision in Keago, 84 M.J. at 367, in which the Court reviewed a military judge's denials of challenges for cause of several members, including one whose wife had been raped in high school. Id. As in this case and Terry, 64 M.J. at 304, the incident involving the Keago member's wife occurred over a decade prior to the court-martial, was never reported to law enforcement, and was not discussed in detail by the couple. 84 M.J. at 367. But unlike Maj H or A.G., the member in Keago harbored strong personal feelings because of his wife's experience: "[He] stated that he had always found sex crimes to be distasteful and cringeworthy, but learning of his wife's rape strengthened those feelings and made them 'more personal.'" Id.

Despite this, this Court did not state that it found any error with the military judge's denial of the challenge for this member. *See* id. at *11-18 (finding error in the military judge denying two other challenges for cause). This suggests that without more, neither a member's exposure to the same kind of crime nor his strong negative feelings about the crimes are sufficient to make a challenge for cause a "close case" in the Court's eyes. Clay, 64 M.J. at 277. In other words, the bar is not so low that *any* member disfavored by the defense warrants excusal through the liberal grant mandate.

A.G. was not the first court member in a sex crime case to have family that was victimized in a sexual crime, nor will he be the last. *See* Terry, 64 M.J. at 304; Keago, 84 M.J. at 367. Given that this Court's jurisprudence demonstrates that not every such member requires excusal, it was reasonable for the military judge to conclude—based on A.G.'s responses, demeanor, and the law—that A.G.'s circumstances did not present a "close call such that the liberal grant mandate would come into play." (JA at 61.) Accordingly, Appellant is unentitled to relief.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the findings and sentence in this case.



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means to the Court and Air Force Appellate Defense Division on 21 August 2024.

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