IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. **ISAC D. MENDOZA** Staff Sergeant (E-6) United States Army, Appellant	REPLY BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20210647 USCA Dkt. No. 23-0210/AR

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Granted Issue

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

Argument

The government framed the first half of their brief about legal sufficiency; however this puts the proverbial cart before the horse. The government's legal sufficiency argument *only* has merit if this Court first accepts their argument about the statutory construction of Article 120(b). This Court should reject the government's statutory interpretation argument.

A. Ambiguity and Surplusage

1. Different Terms Used Throughout the Statute

Contrary to what the government claims, this *is* a case where the statute uses terms differently within. (Gov't Br. at 24). While the definition of consent indeed uses "incompetent," it is unclear why the government is so confident the definition of "incapable"—which takes account *Pease*—was incorporated into the consent definition of incompetent. (Gov't Br. at 24). Simply put, the government contends the statute is clear and unambiguous. However, the statute contains different terms contained in different paragraphs, yet the government still alleges they mean the same thing.

Article 120 uses different definitions for "incapable" versus "incompetent." "Incapable" is not in the definition of consent, but the government argues this is not a case where the statute uses terms differently within—this is incorrect.[1] If the terms incapable and incompetent are both intended to be consistent with *Pease*, Congress would have used the same term. It did not.

Further, this Court must take into account congressional changes to the UCMJ. In the 2011 version of Article 120 Aggravated Sexual Assault, the

[1] Compare Article 120(g)(7)(A) with Article 120(g)(7)(B) and Article 120(g)(8)(A).

definition of "Consent" *did* incorporate incapacity and what became the *Pease* Standard, but the current version does not.

"The term "consent" means words or overt acts indicating a freely given agreement to the sexual conduct at issue by a competent person. . . . A person cannot consent to sexual activity if —

(B) substantially incapable of —

(i) appraising the nature of the sexual conduct at issue due to —

(I) mental impairment or unconsciousness resulting from consumption of alcohol, drugs, a similar substance, or otherwise." *United States v. Prather*, 69 M.J. 338, 341 (C.A.A.F. 2011) quoting Article 120(t)(14) UCMJ (2011).

The current definition of consent does not include incapable of consenting due to intoxication like the old version did. Instead, Congress wrote "incompetence" into the current statute as well as Article 120(b)(B) fraudulent representation and Article 120(b)(C) inducing a belief, but notably left "incapable of consenting" out. Contrary to the government argument, incapacity due to intoxication seems to have been written out of the current definition of consent.

Even if *Pease* "incapacity" is somehow still incorporated into the definition of consent, appellant should still prevail, because the military judge had no way to know that the *Pease* standard applies in a "without consent" case—which the government asserts for the first time in this case. While we can assume the

military judge knows the law, we cannot assume he knows law that has never been established by statute or caselaw.

Similarly, the government's argument the Uniform Code of Military Justice (UCMJ) is full of "[c]rimes with overlapping evidence and elements" is without merit. (Gov't Br. FN 16). The government offers, "[a]t times the exact same conduct can be charged a variety of ways using different theories of liability with the UCMJ, e.g., extramarital sexual conduct." (Gov't Br. FN 16). This is wrong—when crimes have overlapping elements, they are often lesser included offenses. Otherwise, they require a different, unrelated, element to convict. *See United States v. Riggins*, 75 M.J. 78, 85 (C.A.A.F 2016).

For example, extramarital sexual conduct is only at issue in cases where one of the parties is married—a separate and unrelated element. Just like assault consummated by battery is not a lesser included offense of Article 120 sexual assault when placed in fear, sexual assault when the victim is incapable of consenting is not a lesser included offenses sexual assault without consent. *Id*.

Nor does the statute at issue have the same elements among its various theories. Without consent requires the government to affirmatively prove non-consent, incapable of consent requires incapacity, and asleep, unconscious or otherwise unaware all have their own elements as well. Article 120(b), UCMJ.

2. Sager is Applicable

The government's argument that the alleged victim was incapable of consenting due to impairment is permissible, on its own as circumstantial evidence to prove the alleged victim was sexually assaulted without consent is similar to the argument this Court rejected in *United States v. Sager, 76 M.J. 158, 161 (C.A.A.F. 2017).* The government again claims incapable of consenting is not an alternate theory of criminal liability but rather an "overlapping" way to prove without consent. (Gov't Br. at 27)

The consequence of the government's argument is the incapacity theory of sexual assault is surplusage and merely a method to prove without consent.

The government cannot distinguish *Sager* from the instant case. It claims *Sager* is different because in "*Sager*, this Court reasoned that where three separate and distinct words were used and separated by the disjunctive 'or' Congress clearly did not intend a surplusage." (Gov't Br. at 23).

That Congress would not intend the three modalities of sexual assault when the victim is incompetent within Article 120(b)(2)(B) *not* to be surplusage as evidenced only by the disjunctive "or," but *would* be comfortable drafting a statute where Article 120(b)(2)(A), Article 120(b)(2)(B) and Article 120(b)(3)(A) which are broken out with separate enumeration and separate definitions but were meant to mean the same thing, makes no sense. If asleep, unconscious and otherwise

unaware are distinct, and not overlapping, then each theory of Article 120(b) must be *at least* equally distinct and not overlapping.

3. Titles and Common Understanding

In response to appellant's surplusage and specificity arguments, the government offers a Supreme Court case from the 1970's, *United States v. Batchelder* for the proposition it is permissible for the prosecution to select which statute to charge when aimed at the same conduct. *Batchelder* is distinguishable. That case addressed two statutes both criminalizing a felon in possession of a firearm with nearly identical statutory language but containing different maximum sentences. *United States v. Batchelder*, 442 U.S. 114 (1979).

Crucially, the Supreme Court found deference is owed to the prosecutor when two statutes prohibit "*exactly the same conduct." Id. at* 124 (emphasis added). In the instant case, the two parts of Article 120b *do not* prohibit "exactly the same conduct." One addresses sex when the person cannot consent because they are too intoxicated, and the other is sex with a person when that person expresses they do not consent. By comparison, Congress used language in 120(b) which is different throughout the statutory scheme, when compared to the two statutes in *Batchelder,* which were nearly identical. 442 U.S. 114, 116 n.2, 4.

More applicable is *Dubin*, decided last year by the Supreme Court. *Dubin v. United States*, 599 U.S. 110 (2023) (holding defrauding Medicaid was not also prosecutable as aggravated identity theft).

In *Dubin,* the Supreme Court cautioned that "a statute's meaning does not always turn solely on the broadest imaginable definitions of its component word." *Id*. at 143. This is particularly true "in assessing the reach of a federal criminal statute." *Id*. A holding that "without consent" encompasses every type of sexual assault would countenance the broadest imaginable reading of those terms.

Further, the Court noted "the title of a statute and the heading of a section are 'tools available for the resolution of a doubt' about the meaning of a statute." *Id.* The Court reasoned that to be convicted of "aggravated identity theft," "identity" must be a crucial component of the commission of the crime. *Id.* Likewise, the separate titles of the sections of Article 120b are persuasive evidence that the conduct necessary to prove each should play the "central role" what the headline requires. *Id.* (Gorsuch., J concurring). Applying the principle from *Dubin* to this case demonstrates that incapacity due to intoxication cases should be proven using intoxication evidence. Without consent cases should be proven with evidence about whether the alleged victim consented or not.

Last, the Supreme Court observed a criminal statute must give "fair warnings" in the language that the "common world will understand." *Id.* The

Court reasoned members of the public were not given fair warning that they committed identity theft when they committed Medicaid fraud because the person's identity is only an ancillary issue. In appellant's case where the sex act is not contested, just like *Dubin* where the fraud was not contested, sex is the ancillary issue common to both sexual assault without consent and sexual assault when the victim is incapacitated due to alcohol.

A service member is on notice that if they have sex with a drunk person, they may have committed a sexual assault due to incapacitation, but they are not on notice that they committed a sexual assault without consent. This is evidenced by appellant's own statements, in which he says he was concerned about the victim's level of intoxication, but conversely offers how much the alleged victim participated in the sex. (JA 83, 164-66). It is clear from the record appellant was concerned he committed the "incapable of consenting" offense and not the "without consent" offense because that is the "common world" understanding of those offenses.

B. Legal Sufficiency

1. Insufficient Circumstantial Evidence

The government argued sexual assault without consent was proven via circumstantial evidence—which, citing *King*, they claim, is common in cases where the offenses are normally committed in private. (Gov't Br. at 11), *United*

States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019). *King,* is inapplicable. There, child pornography allegations were proven through the circumstantial evidence that they existed on King's devices. But sexual assault cases are different from child pornography cases because sexual assault cases involve a tangible victim. Because the victim is present, direct and circumstantial evidence of affirmative non-consent looks differently than it would in *King*.

For example, direct evidence in a sexual assault without consent case is evidence that the alleged victim said "no." Circumstantial evidence is evidence that the alleged victim expressed "no" through other words or actions. This type of evidence is not *usually* lacking, as the government claims. (Gov't Br. at 11).

Contrary to the government's contention, even some of the cases they cite actually *did* have evidence related to affirmative non-consent. For example, in *Weiser,* the alleged victim testified she pushed Weiser away during the sex. *United States v. Weiser*, 80 M.J. 635 (C.G. Ct. Crim. App. 2020). In *Flores,* the victim testified when she realized Flores had his mouth on her vagina, she "did not want him touching her vagina with his mouth, so she immediately got up, started crying, grabbed her things, and left the room as soon as she could." *United States v. Flores*, 82 M.J. 737, 744 (C.G. Ct. Crim. App. 2022).

Proof beyond a reasonable doubt requires at least *a single* fact related to affirmative non-consent in order to deem a conviction for sexual assault without consent legally sufficient.

2. No Affirmative Proof of Non-Consent

The problem with the government's circumstantial evidence sufficiency argument is it only potentially proves the *absence* of consent. It falls short of the "[g]overnment bearing the affirmative responsibility to prove that [the alleged victim] *did not, in fact, consent*." *Riggins*, 75 M.J. at 84 (emphasis in original). The government makes this error because they erroneously allege "without" is not "controversial" and assume that the crime of sexual assault without consent is the equivalent of the absence of consent. (Gov't Br. at 22). But "without" is controversial—because if it is reduced to only the absence of consent it is inconsistent with *Riggins* and the presumption of innocence.

On the other hand, sexual assault when the victim is incapable of consenting due to impairment, just like sexual assault when placing the alleged victim in fear, does not have the constitutional problem. Whether their purported victim consented or not is not at issue when the government alleges, and proves consent *never* could have been given.[2] R*iggins,* 75 M.J. at, 84.

[2] The government unsuccessfully attempts to distinguish *Riggins* "inability to consent" versus "without consent" issue from the "placing a victim in fear" theory of liability. "This theory does not incorporate the "competent person" term that is

The government emphasis five facts—(1) appellant's passive agreement during interrogation that the alleged victim did not say "yes"; (2) After sex the alleged victim went into the bathroom and closed the door; (3) the lack of a prior romantic history between appellant and the alleged victim; (4) appellant's story changed; and (5) the alleged victim's claim that she would never have sex with a tampon in. (Gov't Br. at 12-14). The government implored this Court to ignore the facts related to consent—provided by appellant, which the government deemed "self-serving," even though those facts align with the circumstances. (Gov't Br. at 16).

None of the government's favorite facts relate to whether the alleged victim expressed some form of "no" or expressed a desire not to participate in the sexual act when it occurred. *At best*, the government may call into question appellant's claim the alleged victim vigorously participated in intercourse, but say nothing about whether the government *affirmatively* proved the victim did not consent. That is the constitutional problem. The government's theory, and what it employed at trial assumes every sexual interaction is non-consensual unless and until the defense introduces evidence there was consent, and even then, the

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at issue in this case, because of course a person who is under duress can still be competent." (Gov't Br. FN 24). It is unclear why the government believes a person under duress is competent to consent or why they ignore the "freely given" language in the statute which would make placing in fear similarly superfluous to without consent.

government argues that evidence should be disregarded as "self-serving." For example, if the entirety of a fact pattern is two people met, and had sex, under the government's proposed rule sexual assault without consent occurred—there is an "absence" of evidence about consent.

Here, the evidenced established the alleged victim flirted with appellant, kissed his ear, and went back to his room. (JA 91; 99; 104; 110; 112; and 213). In his mind, the alleged victim consented in fact. Potentially, appellant committed a crime, and that could explain his less than forthcoming explanations to CID, but that crime was not sexual assault without consent.

Finally, the government's emphasis on the alleged victim's claim she would not have sex with a tampon in invites this court to make dangerous precedent and criminalize regret. What stops a sexual assault without consent case premised on a victim's allegation that they would never have sex with a minority, a person of the same sex, or any other group? Moreover, the Army Court below refused to rely on this fact in its determination of legal sufficiency, because the court below gave it no weight this Court should likewise ignore this fact.

Unless this Court overturns its precedent in *Riggins*, requiring the government to affirmatively prove the victim did not in fact consent, the facts of this case are legally insufficient.

C. Notice

1. *Riggins* is Dispositive

At its essence, the government's is arguing that the defense was on notice to defend against incapacity, despite being charged with without consent because incapacity is captured within the "ordinary meaning" of without consent. (Gov't Br. at 28).

But the defense was only aware that the government might try to *impermissibly* prove without consent through incapacitation. It was why the trial defense counsel sought the special instruction eliminating the competent language from the definition of consent. (SA 11). The government's entire argument to survive the Rule for Courts-Martial 917 motion was that the alleged victim was incapable of consenting, and therefore she was not competent, thus there was evidence presented to support the without consent charge. (JA 208).

Simply because the defense counsel was prepared does not mean they were on notice to alleviate due process concerns. As this Court explained in *Riggins,* it is the "elements test" that puts an appellant on notice that when he is charged of a greater offense he must defend against the lesser included offense. *Riggins*, 75 M.J. at 84. But when an offense *is not* a lesser included offense the defense is not on notice. *Id.* Sexual assault when the victim is incapable of consenting is not a

lesser included offense of without consent or vice versa. Thus, the notice was deficient.

2. Pease

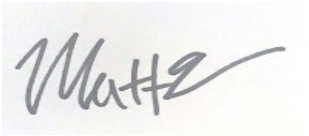
This Court has done the work of granting and deciding cases charged under an incapable of consent theory and explained, in detail, what is necessary to overcome a legal sufficiency challenge to a conviction under that theory. *See e.g. United States v. Robinson*, 77 M.J. 294, 299 (C.A.A.F. 2018) (finding legal sufficiency where the victim consumed five or six mixed alcoholic beverages at a single party, nearly drove into a stop sign when she tried to drive away, vomited in the kitchen sink in her barracks, and had a trashcan next to her bed and Robinson acknowledged the alleged victim was "probably too intoxicated to consent to sex"); *United States v. Smith*, 83 M.J. 350, 359 (C.A.A.F. 2023) (finding legal sufficiency where witnesses described the alleged victim as the most intoxicated anyone had seen her, slurring her speech, falling over, too drunk to unlock her phone, and urinating in her bed).

The field is on notice of what those cases require. This Court should not allow the government to undermine that precedent and nullify them. When an appellant has potentially committed a sexual assault on an incapacitated victim, the government should simply be required to charge and prove the correct crime. If however, an incapacitated victim also said, or evidenced, "no" then the

government could rightly charge "without consent." No such evidence of affirmative non-consent was offered in this case.

Conclusion

This Court must find the facts legally insufficient and set aside the findings and sentence.



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Certificate of Compliance with Rules 24(c) and 37

1. This Reply Brief on Behalf of Appellee complies with the type-volume limitation of Rule 24(c) because it contains 2908 words.

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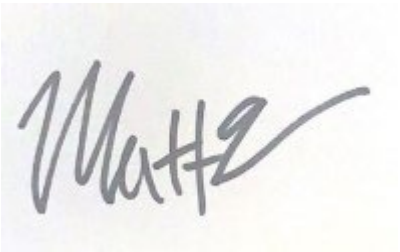
I certify that a copy of the foregoing in the case of United States v. Mendoza, Crim. App. Dkt. No. 20210647, USCA Dkt. No. 23-0210/AR was electronically filed with the Court and Government Appellate Division on January 12, 2024



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