IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee,

v.

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

USCA Dkt. No. 24-0089/AF

Crim. App. Dkt. No. ACM 40302

BRIEF ON BEHALF OF APPELLANT

SPENCER NELSON, Maj, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 37606
Appellate Defense Division
1500 Perimeter Road, Ste 1100
Joint Base Andrews, MD 20762
Phone: (240) 612-4773
Email: spencer.nelson.1@us.af.mil

SAMANTHA CASTANIEN, Capt, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 37280
Appellate Defense Division
1500 Perimeter Road, Ste 1100
Joint Base Andrews, MD 20762
Phone: (240) 612-4770
Email: samantha.castanien.1@us.af.mil

Counsel for Appellant

INDEX

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

STATUTES

SUPREME COURT CASES

COURT OF APPEALS FOR THE ARMED FORCES AND COURT OF MILITARY APPEALS CASES

SERVICE COURTS OF CRIMINAL APPEALS CASES

FEDERAL COURT CASES

RULES AND OTHER AUTHORITIES

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

TO THE HONORABLE 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 A1C CASILLAS' 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 (Air Force Court) reviewed this case pursuant to Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d).[1] This Honorable Court has jurisdiction to review this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

STATEMENT OF THE CASE

On March 18, 2022, contrary to his plea, enlisted and officer members in a General Court-Martial, at F.E. Warren Air Force Base, WY, convicted A1C Casillas of one specification of sexual assault, in violation of Article 120, UCMJ, 10 U.S.C. § 920 [hereinafter "Article 120"]. Joint Appendix (JA) at 537. The Military Judge sentenced A1C Casillas to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for two years, and to be dishonorably discharged from the service. JA at 18. The Convening Authority took no action on the findings, took no action on the sentence, and denied Appellant's request for deferment of reduction

[1] Unless otherwise noted, all references to the UCMJ, the Military Rules of Evidence, and the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.).

in grade and adjudged forfeitures. *Id*. On December 15, 2023, the Air Force Court affirmed the findings and sentence. JA at 002.

STATEMENT OF FACTS

A1C Casillas met S.F. at a party where S.F. became intoxicated, and S.F. claimed she woke up to A1C Casillas penetrating her vulva with his penis. JA at 003. The Government elected to charge A1C Casillas with only one offense, alleging that he penetrated S.F.'s vulva "*without [her] consent.*" JA at 016. The Government did not charge A1C Casillas with sexual assault based on S.F. being asleep, incapable of consenting, or any other theory of liability. *Compare* JA at 16 *with* 10 U.S.C. §§ 920(b)(2)(B), 920(b)(3)(A).

1. A Panel Member Remembered "Fairly Quickly" that his Wife was Raped

During voir dire, one of the panel members, A.G., disclosed that his *wife* was victim of an offense similar to the one A1C Casillas was charged with. JA at 050. He described the offense as "[s]o, but, basically, it was called rape." *Id.* The offense involved force, was committed by someone that A.G.'s wife knew, and it involved alcohol. JA at 050-51.

Although A.G. said the offense happened to his wife in 1990, he said that when he opened the flyer, the offense with his wife came to his mind "fairly quickly." JA at 051. He explained that the incident had affected him personally because of his "feelings for her and what she went through." *Id.* He felt "bad for her

and what she went through." *Id.* A.G. explained that he and his wife had to live with the incident for a long time and it required processing. JA at 052. As part of his military duties, A.G. never had to evaluate allegations of sexual assault—he had "been fortunate." *Id.* A.G. answered the Military Judge's rehabilitation questions. JA at 052-54. A.G. told the Military Judge he did not "think" he would have a problem telling his wife a not guilty verdict. JA at 053. When Defense Counsel followed-up about his qualification of "I think," A.G. answered:

> A. Well, yeah, I hate to assume anything, how she might feel, but-- so, if I may, not to give too long of an answer, but she's a social worker; so I know she-- she deals with these--you know, kind of sensitive issues, if you will. So, I just--I think our relationship, you know, that--that it just wouldn't--I know I said "I think." I didn't-- I guess I didn't really focus on the word I was using. I know words mean things. So that's interesting that I said "I think." I just--You never know, right, when you're talking about 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.
>
> Q. And I just noticed a little bit of hesitation.
>
> A. Right.
>
> Q. Is that you thinking of an answer or is there an emotional response there?
>
> A. I think I'm thinking of the answer because that was an interesting point that you brought up. So I think I'm just thinking through the question and the answer, not necessarily emotional.

JA at 055. Neither the Military Judge nor the Defense Counsel asked A.G. additional questions. *Id.*

Defense Counsel challenged A.G. for both actual and implied bias. JA at 057. Defense Counsel argued, *inter alia*, that "there was an extremely long pause" when A.G. answered the question about telling his wife about the verdict and "it's the fact

that it's his wife" that makes the issue problematic. JA at 057-58. The Defense Counsel explained:

> [A]nd though it occurred a long time ago, there are concerns with someone *in that type of intimate relationship* where he had a long pause, he was unable to answer for his wife, he didn't know how she was going to react if she found out about a finding of not guilty in this particular case.

JA at 059 (emphasis added).

The Military Judge denied the challenge for cause under actual and implied bias. *Id.* The Military Judge noted that A.G. answered his rehabilitation questions satisfactorily and that he viewed A.G.'s demeanor not as emotional, but as "more clearly indicative of his thoughtfulness of the questions asked." JA at 060. The Military Judge ruled that this was not implied bias because the rape happened 30 years ago, A.G. has only discussed the incident with his wife two to three times, and anybody would have feelings for their wife. JA at 060-61. The Military Judge characterized A.G.'s response as him having "absolutely no problem telling his wife" about a not guilty verdict. JA at 061. The Military Judge said he considered the liberal grant mandate and did "not find this to be a particularly close call." *Id.*

2. Defense Counsel Requested a Tailored Instruction to Clarify the Government's Charging Theory

Prior to trial on the merits, the Defense Counsel raised the issue of "fair notice." JA at 069. The Defense Counsel explained that the Government's anticipated evidence focused on S.F.'s intoxication and thereby whether S.F. was

"capable of consenting due to intoxication," a "completely separate offense [from the one charged]. It has separate elements." JA at 065. The Defense Counsel argued that the evidence the Government wanted to introduce "trigger[ed] a special instruction in addition to the standard instructions." *Id.* The proposed instruction would have included, in part, "In this case, there is no allegation that [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 Government responded with two main points. JA at 067. First, that the special instruction was "at odds with" the standard instruction. *Id.* Second, that the definition of "consent" means a "voluntary agreement by a competent person." *Id.* (paraphrasing 10 U.S.C. § 920(g)(7)). The thrust of both points was that the "evidence of intoxication or substantial intoxication are part of the circumstances that can be considered by the members in determining whether a person is competent, [and] therefore able to give consent to a sexual occasion." JA at 068.

Both parties cited to case law. JA at 067-69. The Defense Counsel clarified its position stating, "I'm not saying that evidence of intoxication, because it exists in the evidence, doesn't come in. That is not my position." JA at 070. The Defense Counsel then elaborated that the Government "cannot argue" incapable of consenting due to alcohol "because it is not a charged offense and it is not at issue in this court-martial." *Id.* The Defense Counsel concluded with:

> But, the government can't also then argue this completely separate offense that has different elements, that has different instructions as far as involuntary intoxication vice just simply mistake of fact as to consent. It's a different offense and they didn't charge it, it's not at issue. It's not on the charge sheet at all in this case.

Id. The Military Judge denied the Defense Counsel's request for a special instruction. JA at 071. The Military Judge's rationale was that the instruction was an inaccurate statement of the law and that the other standard instructions covered the issue of consent. JA at 072. The Military Judge stated that the Government can argue everything in the definition of "consent" that comes from the "electronic Benchbook definition of consent." JA at 071. He went on to say, "the current Benchbook instructions that relate to consent sufficiently cover this error and make clear what the panel can and cannot or should and should not consider." *Id.* Later in the trial, the Defense Counsel renewed their objection twice. JA at 284, 448-49.

The first sentence of the Government's opening statement was that A1C Casillas had sex with A.F., a fellow Airman who was not talking, could barely keep her eyes open, who is not moving." JA at 095.

3. The Government Focused on the Military Judge's Instructions and Non-charged Theories in its Closing Argument

The Government started its closing argument with, "the instructions the Military Judge provided you, that's your context, that's your roadmap, that's the analysis." JA at 470. The Military Judge gave the members a nearly verbatim definition of "consent" as contained in Article 120(g)(7). JA at 549. When the

Government analyzed its first piece of evidence, it asked the members to "think about this particular exhibit in the context of intoxication." JA at 471. It then described S.F.'s intoxication level:

> You may have someone who [is] sober. You may have a someone [*sic*] who's had a couple drinks and maybe feeling a little giddy. You may have someone that may be perceived as drunk. You may have someone that may be not okay to drive, pretty bad shape. And you may have someone that is totally out of it, completely out of it.

JA at 472. The Government then asked the members to "[r]eview all of the evidence, think about all the evidence, through a lens of that." *Id.*

In arguing through this "lens," the Government stated that S.F. "came up here and told you, I was asleep." JA at 474. It replayed Prosecution Exhibit 5 for the members, where a witness who told A1C Casillas, "And like you didn't even ask her, like, you knew she was drunk, like, you knew she was not all there to give the consent." JA at 475. It then replayed Prosecution Exhibit 2, a recording of S.F. and A1C Casillas on the phone, when S.F. said, "I know I was – I just passed out, like, I couldn't even really give consent or like anything, or like say anything." JA at 476. The Government argued the standard instruction to the members that "['a] sleeping, unconscious, or incompetent person cannot consent.['] Talking a little bit, moving a little bit, is not consent period dot." *Id.* (quoting 10 U.S.C. § 920(g)(7)).

The Government transitioned to reasonable mistake of fact. *Id*. The Government told the members that the mistake must be reasonable, and then added

that they could "consider what he was looking at, how this night was going, what he's observing, and how she was behaving." JA at 480. The Government then played Prosecution Exhibit 2 where S.F. stated, "I wasn't really moving, like, (indiscernible). I don't remember being (indiscernible) out and waking up to it and then you pulled up my pants." JA at 481. The Government used that evidence to argue:

> Would a reasonably sober person, in that circumstance, exercising due care . . . have sex with someone who responded for a little while. No, not a chance. Not when you see someone who is awake – who's sleeping, who you've been watching drink all night, is lying on the bed, asleep, a reasonable, sober, adult doesn't wake that person up to try to get them to have sex period dot.

Id. The Government then emphasized that A1C Casillas said, "I kept fucking with her like I told you . . . . To wake her ass up. But I don't know. She was totally out of it." *Id.* The Government told the members that a reasonable person, "an adult exercising due care, does not have sex with somebody they knew to be completely out of it." *Id.* To sum up that portion of its argument, the Government concluded, "[I]t's fairly clear to establish that [in] Airman Casillas[']s view, [S.F.] was asleep, and he had to quote on quote [*sic*] 'wake her ass up' and then she was responsive for a little while and then it happened." JA at 482.

The Government then switched to a new line of argument—blacking out versus passing out "through the lens of [the forensic psychologist's] testimony." *Id.* The Government noted that the forensic psychologist "talked about [how] people

can fly a plane in a blackout. People can be fueling cars in a blackout." JA at 483. The Government urged the members to "[t]hink about the evidence you have about what [S.F.] was doing prior to the sexual assault, sleeping, in and out of consciousness, had to wake her up, penile penetration. She wasn't dancing on tables. She wasn't in the kitchen making dinner. She wasn't driving a car." *Id.* The Government contended that the blackout theory was "a red herring. It's something to trick you up because the law is clear, it's crystal clear, you don't get a free pass because your victim is in a blackout." *Id.*

During deliberations, a panel member submitted a question to the Military Judge. JA at 522. The question was, "[W]hat is the definition of competent and incompetent we should use in reference to the definition of consent?" *Id.* The Military Judge took the definitions of those terms from *United States v. Pease*, 75 M.J. 180 (C.A.A.F. 2016). *Id*.

SUMMARY OF THE ARGUMENT

Issue I

"To succeed in a typical facial attack," an appellant must show that "no set of circumstances exists under which [Article 120(b)(2)(A) and (g)(7)] would be valid or that the statute lacks any plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 472 (2010) (quotations and citations omitted). Article 120(b)(2)(A) is facially unconstitutional because the broad definition of "consent" allows the

Government to charge one theory and then elicit evidence during trial on any other theory it prefers—exemplified by the Government's actions in this case. The single, super-sized definition of "consent" spanning at least four different theories of liability under Article 120(b)(2) enables this and is the reason that this section is facially invalid.

Because the Government can jump from theory to theory without sticking to its charging decision, an accused is never given fair notice. Thus, Article 120(b)(2)(A) can never provide fair notice because it "hand[s] responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide." *United States v. Davis*, 588 U.S. 445, 451 (2019). Regardless of what crime was charged, Article 120(g)(7) allows "prosecutors and courts to make it up" as the trial progresses. *Sessions v. Dimaya*, 584 U.S. 148, 175 (2018) (Gorsuch, J., concurring). Because there is no fair notice, "[t]his denie[s] [an appellant] the opportunity to defend against the charge." *United States v. Marshall*, 67 M.J. 418, 421 (C.A.A.F. 2009) (quotation and citation omitted).

Issue II

If this Court rules that Article 120(b)(2)(A) is facially constitutional, then it should find it to be unconstitutional as applied to A1C Casillas. At trial, the Defense Counsel requested a reasonable, tailored instruction stating that the Government had

not charged a "too intoxicated to consent" theory. The Military Judge denied the tailored instruction as being a misstatement of the Benchbook and the law.

This Court should find that the Military Judge erred in denying the instruction and thus, Article 120(b)(2)(A) as applied was unconstitutional because there was no fair notice. This Court should hold that whatever theory the Government charges, it must stick to that theory throughout trial. And if the Government does not hold to its charging decision, such variance violates the right to "be informed of the nature and cause of the accusation." U.S. Const. amend. V; U.S. Const. amend. VI. This Court should also hold that military judges must tailor the definition of consent to the theory—or theories—that the Government charged so an accused can be informed of the charge against him and adequately defend against it.

Issue III

This Court granted review in *United States v. Mendoza*, No. 23-0210/AR, 2023 CAAF LEXIS 699 (C.A.A.F. Oct. 10, 2023), which covers the overlapping issues of how the Government can charge, prove, and then argue alleged crimes under Article 120. If this Court rules that the Government must prove the absence of consent in fact, then this Court should remand for a new legal sufficiency review. If not, this Court should hold that a case is legally insufficient when the Government materially varies from the charging theory by introducing and arguing evidence for a theory that it did not charge.

Issue IV

As a threshold matter, A1C Casillas asks this Court to use a de novo standard of review instead of the "standard that is less deferential than abuse of discretion, but more deferential than de novo review." *United States v. Hennis*, 79 M.J. 370, 385 (C.A.A.F. 2020). Regardless of the standard used, this Court should rule in A1C Casillas' favor for two reasons.

First, the Military Judge asked the standard rehabilitation questions with "predictable answers" that led to "problematic responses" given the nature of A.G.'s marital relationship. *United States v. Keago*, No. 23-0021, 2024 CAAF LEXIS 256, at *16 (C.A.A.F. May 9, 2024). Although "the burden of establishing grounds for a challenge for cause rests upon the party making the challenge," the Military Judge has a duty to develop "a factual record . . . that will demonstrate to an objective observer that notwithstanding the relationships at issue, the accused received a fair trial." R.C.M. 912(f)(2)(3); *United States v. Richardson*, 61 M.J. 113, 120 (C.A.A.F. 2005). In this case, the Military Judge failed to ask any follow-up questions when A.G. hesitated, paused, and never answered the important question regarding his beliefs about what his wife would think as a rape victim if he sat on the panel.

Second, a military judge's failure to apply the liberal grant mandate is a stand-alone error. *See United States v. Leonard*, 63 M.J. 398, 400 (C.A.A.F. 2006). The fact that A.G.'s *wife* was physically raped is exactly "the kind of bond that would

undermine the fairness of a proceeding or raise the prospect of appearing to do so." *United States v. Peters*, 74 M.J. 31, 35 (C.A.A.F. 2015). A sexual assault trial with evidence involving alcohol, being judged by a panel member whose mind leapt "fairly quickly" upon viewing the flyer to the decades-old rape of his wife also involving alcohol, is the exact issue that causes substantial doubt as to the legality, fairness, and impartiality of a court-martial. JA at 051.

This Court should hold that where the spouse of a panel member has been the victim of the same crime that the accused is charged with, the Military Judge must develop a detailed record—without unanswered questions or hesitation from the member—to justify the Military Judge's failure to invoke the liberal grant mandate.

ARGUMENT

I.

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.

Standard of Review

This Court reviews questions of statutory interpretation de novo. *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017).

Law and Analysis

1. Article 120(b)(2)(A) and (g)(7) are Facially Unconstitutional Because the Definition of Consent in (g)(7) Consumes Article 120's Charging Theories, Thus Failing to Give Fair Notice

a. An Accused is Entitled to Fair Notice of the Specific Charge Against Him

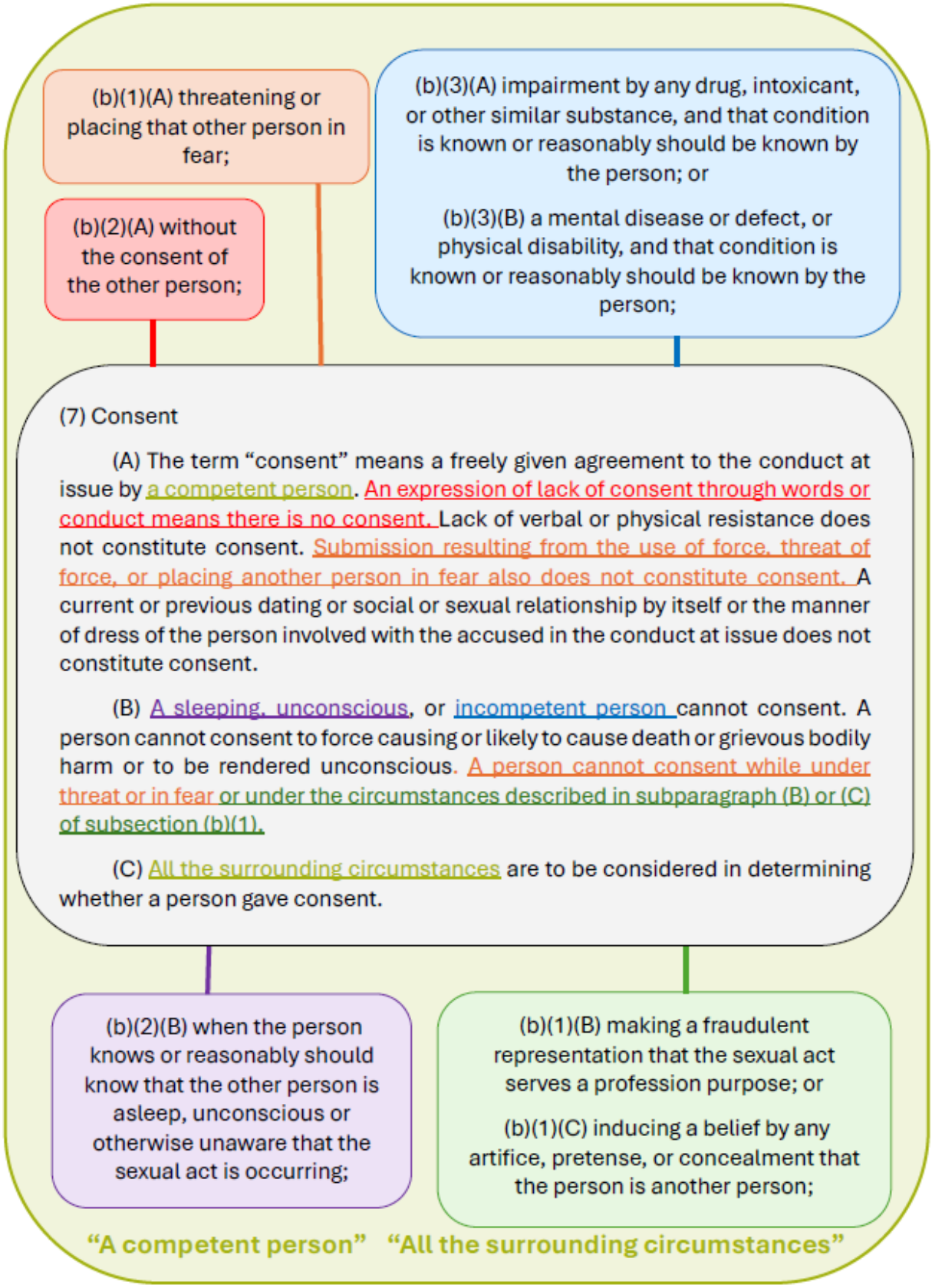
"In all criminal prosecutions, the accused shall enjoy the right to . . . be informed of the nature and cause of the accusation." U.S. CONST. amend. VI. In all courts, state or federal, "[n]o principle of procedural due process is more clearly established than that notice of the *specific* charge, and a chance to be heard in a trial of the issues raised by *that* charge." *Cole v. Arkansas*, 333 U.S. 196, 201 (1948) (emphases added). In several cases, this Court has also embraced the principle of fair notice of the charge against an accused: "*the defense is entitled to rely on the charge sheet*" because "the due process principle of fair notice mandates that an accused has a right to know what offense and under what legal theory he will be convicted." *United States v. Simmons*, 82 M.J. 134, 140 (C.A.A.F. 2022) (cleaned up); *United States v. Tunstall*, 72 M.J. 191, 192 (C.A.A.F. 2013) (cleaned up). And, there can be no question that the Sixth Amendment right to notice applies in the military:

> The Fifth Amendment provides that no person shall be 'deprived of life, liberty, or property, without due process of law,' and the Sixth Amendment provides that an accused shall 'be informed of the nature and cause of the accusation,' U.S. CONST. amend. VI. Both amendments ensure the right of an accused to receive fair notice of what he is being charged with.

United States v. Girouard, 70 M.J. 5, 10 (C.A.A.F. 2011). Indeed, the "answer to [this] question must reflect the importance that we attach to the concept of fair notice as the bedrock of any constitutionally fair procedure." *Lankford v. Idaho*, 500 U.S. 110, 120-21 (1991).

b. This Case Demonstrates that There is no set of Circumstances Under Which Article 120(b)(2)(A) and (g)(7) are Valid Because the Definition of "Consent" Prevents Fair Notice

Article 120(b)(2)(A) cannot provide the requisite fair notice because the global definition of "consent," contained in subsection (g)(7), includes every charging theory under subsection (b) (sexual assault). The following infographic is a visual demonstrate of how the definition of "consent"—and specifically "competent person" and "all surrounding circumstances"—consume the charging theories:


(b)(1)(A) threatening or placing that other person in fear;
(b)(2)(A) without the consent of the other person;
(b)(3)(A) impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person; or
(b)(3)(B) a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person;
(7) Consent
(A) The term "consent" means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent.
(B) A sleeping, unconscious, or incompetent person cannot consent. A person cannot consent to force causing or likely to cause death or grievous bodily harm or to be 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.
(b)(2)(B) when the person knows or reasonably should know that the other person is asleep, unconscious or otherwise unaware that the sexual act is occurring;
(b)(1)(B) making a fraudulent representation that the sexual act serves a profession purpose; or
(b)(1)(C) inducing a belief by any artifice, pretense, or concealment that the person is another person;
"A competent person" "All the surrounding circumstances"

This Court has stated that subsection (b)(2)(B) of Article 120, which is a single, enumerated provision "simply separated by commas" is three "separate theories of liability." *Sager*, 76 M.J. at 162; *see also* Oral Argument at 19:10, *Mendoza*, 2023 CAAF LEXIS 699 (No. 23-0210/AR). Thus, since the other sections of Article 120(b) are separately enumerated and separated by semi-colons, there are at least nine different theories of liability under Article 120(b). The elephantine definition of "consent" covers every theory of liability.

"To succeed in a typical facial attack," an appellant must show that "no set of circumstances exists under which [Article 120(b)(2)(A) and (g)(7)] would be valid or that the statute lacks any plainly legitimate sweep." *Stevens*, 559 U.S. at 472 (quotations and citations omitted). "The first step in the proper facial analysis is to assess the [] laws' scope. What activities, by what actors, do the laws prohibit or otherwise regulate?" *Moody v. NetChoice, LLC*, Nos. 22-277, 22-555, 2024 U.S. LEXIS 2884, at *24 (July 1, 2024).[2] Here, the scope of the law is relatively simple: to criminalize sexual conduct according to specific theories that Congress enumerated.

[2] Counsel recognizes that *Moody* is a First Amendment case. However, the test is ultimately the same for a fair notice issue and *Moody* provides an appropriate analytical framework to analyze a facial challenge. *See Johnson v. United States*, 576 U.S. 591, 636, 135 S. Ct. 2551, 2580 (2015) ("Thus, in a due process vagueness case, we will hold that a law is facially invalid only if the enactment is impermissibly vague in *all* of its applications.") (quotation and citation omitted).

The second and final step in a facial challenge reveals the heart of A1C Casillas' facial challenge: "The next order of business is to decide which of the *laws' applications* violate [fair notice], and to measure them against the rest." *Moody*, 2024 U.S. LEXIS 2884, at *25 (emphasis added); *see also City of Los Angeles v. Patel*, 576 U.S. 409, 418 (2015) ("[W]hen assessing whether a statute meets this [unconstitutional-in-all-applications] standard, the Court has considered only applications of the statute in which it actually authorizes or prohibits conduct."). Whenever Article 120(b)(2)(A) is applied (i.e., the "laws' applications") the broad definition of "consent" allows the Government to evade fair notice by presenting and arguing evidence on a theory—or theories—that it never charged.

At least three arguments result in the impermissible stretching of the "law's application," all of which result in a violation of fair notice. *Moody*, 2024 U.S. LEXIS 2884, at *25. First, any special instruction requested to limit the definition of "consent" to the facts of the case is "at odds with" the standard instruction on "consent." *See*, *e.g.*, JA at 067. Second, that "consent" means a "voluntary agreement by a *competent* person." *Id.* (emphasis added). The definition of "competent" allows the Government to present a case on inducement (Article 120(b)(1)), lack of consent or inability to consent (Article 120(b)(2)), or incapability of consent due to an impairment (Article 120(b)(3)). Any uncharged theory of

liability is viable because a person is not "competent" if they are induced through fear, if they are asleep, or if they impaired due to intoxication or a mental defect.

Third, subsection (g)(7)(c), the "surrounding circumstances," allows argument on any uncharged theory of liability such as inducement (i.e., fear), inability to consent (i.e., sleep), or incapability (i.e., alcohol). These "are part of the circumstances that can be considered by the members in determining whether a person is competent, [and] therefore able to give consent to a sexual occasion." JA at 068.

A1C Casillas' case displays all three of these issues. For example, by charging A1C Casillas under the "without the consent of the other person" theory, the definition of "consent" permitted the Government to introduce, highlight, and argue evidence for four additional, separate theories of liability under Article 120. First, the Government asked the members to think about the evidence "in the context of intoxication" because you "may have someone that is totally out of it, completely out of it." JA at 471-72. Then the Government argued that S.F. was "lying on the bed, asleep" and that A1C Casillas had to "wake her ass up." JA at 481.

Notably, the Defense Counsel both correctly and incorrectly forecasted the Government's desire to try different theories; the trial defense team only asked for an instruction—that the Military Judge denied—on one theory, which would have told the members that this was not a "too intoxicated to consent" case. JA at 547. As

evidenced by a failure to request a specialized instruction on sleeping, the Defense Counsel was not on notice that the Government would elicit so much evidence on S.F. being asleep or "unconscious." As evidenced by the members requesting a definition for "competent" and incompetent," it is likely that the members understood and agreed with the Government's attempt to change the theory of liability. JA at 556.

While A1C Casillas' case highlights the lack of fair notice (and reveals the as applied challenge discussed *infra*), the overexpansive nature of the "consent" definition frequently arises and has been fully sanctioned on review. [3] This Court is

[3] *United States v. Roe*, ARMY 20200144, 2022 CCA LEXIS 248, *15 (A. Ct. Crim. App. Apr. 27, 2022) ("We simply disagree that this statutory language requires the government to charge a particular theory of liability where the victim's intoxication is at issue. The fact that there is evidentiary overlap between all three theories of liability at issue here is not unusual in the criminal law."); *United States v. Coe*, No. ARMY 20220052, 2023 CCA LEXIS 354, at *6 (A. Ct. Crim. App. Aug. 17, 2023) ("Although *Roe* was a nonbinding memorandum opinion, we agree with both the reasoning and holding of that case, and find it to be dispositive here."); *United States v. Flores*, 82 M.J. 737, 744 (C.G. Ct. Crim. App. 2022) (First, presenting evidence of the effects of alcohol on a putative victim is permissible in a 'did not consent' case and does not, by itself, transform it into a 'could not consent' case—as long as we can be satisfied that the Government prosecuted the case under a 'did not consent' theory."); *United States v. Williams*, No. ACM 39746, 2021 CCA LEXIS 109, *57 (A.F. Ct. Crim. App. Mar. 12, 2021) ("We see nothing infirm with the proposition that a person did not consent because that person could not consent by virtue of being incapable of consenting; therefore, inability to consent provides strong evidence of a person's lack of actual consent."); *United States v. Horne*, No. ACM 39717, 2021 CCA LEXIS 261 (A.F. Ct. Crim. App. May 27, 2021) (finding that charging bodily harm, but arguing incapable of consent is permissible); *United States v. Weiser*, 80 M.J. 635, 642 (C. G. Ct. Crim. App 2020) ("[W]e are satisfied that Appellant was properly charged, tried, and convicted, without variance, of

also aware of an aspect of this problem because it granted review in *Mendoza*, 2023 CAAF LEXIS 699.

c. The Constitutionality of Article 120(b)(2)(A) Cannot Rest on the Restraint of the Government, Military Judges, or CCAs who have Sanctioned this Behavior

Military judges, like the one in this case, deny special instructions which seek to limit the definition of consent to the charging document and facts of the case. For example, the Military Judge in this case reasoned:

> The Court does not find the instruction as written to be an accurate statement of the law . . . When 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 that is included in the Manual for Courts-Martial and the electronic Benchbook definition of consent; that can include an alleged victim's consumption of alcohol and the impact that that consumption of alcohol had on the alleged victim's ability to consent . . . . And so the requested instruction is denied both as being an inaccurate statement of the law and being fairly covered by other instructions the Court intends to give, that being the issue of consent.

JA at 071-72.

---

sexual assault by causing bodily harm and thus was not deprived of due process."); *United States v. Gomez*, No. 201600331, 2018 CCA LEXIS 167, *10 (N-M. Ct. Crim. App. Apr. 4, 2018) (finding no error when "appellant argues he was charged with sexual assault and abusive sexual contact alleging bodily harm but prosecuted and convicted of those offenses under a different legal theory--that the putative victim was incapable of consenting due to impairment by alcohol.").

Some of these cases fall under the 2016 version of the *MCM*; however, the Government made similar arguments by charging a "bodily harm" theory, but then arguing a different theory under Article 120.

Even if the Government were to argue that it would not engage in this behavior ex ante, that argument would be unavailing. The constitutionality of a statute does not rest on the Government's promises of restraint:

> The Government makes a familiar plea: There is no reason to mistrust its sweeping reading, because prosecutors will act responsibly. To this, the Court gives a just-as-familiar response: We cannot construe a criminal statute on the assumption that the Government will use it responsibly. To rely upon prosecutorial discretion to narrow the otherwise wide-ranging scope of a criminal statute's highly abstract general statutory language places great power in the hands of the prosecutor.

Dubin v. United States, 599 U.S. 110, 131 (2023) (cleaned up). If this Court trusts the Government with the broad power of Article 120(b)(2)(A) and (g)(7) by ruling in its favor, the incentive structure is clear: The Government will charge "without consent" in every case because it could introduce any evidence it wanted—and then argue any theory of liability.

When Judge Maggs asked about this possibility, the Government deflected, saying, "There are certainly hypotheticals and that is not this case before the Court today." Oral Argument at 23:06, *Mendoza*, 2023 CAAF LEXIS 699. When pressed again by Chief Judge Ohlson if an affirmation on legal sufficiency was a "sub rosa" imprimatur of the Government's switching theories (which other prosecutors would copy), the Government argued its action was permissible because the circumstances surrounding the charge can be considered. *Id.* at 27:00. In other words, "yes,"

because subsection (g)(7)(C)'s "surrounding circumstances" language allows a switch in theories. *See*, *e.g.*, JA at 549

In sum, for a facial challenge, "the question in such a case is whether a law's unconstitutional applications are substantial compared to its constitutional ones. To make that judgment, a court must determine a law's full set of applications, evaluate which are constitutional and which are not, and compare the one to the other." *Moody*, 2024 U.S. LEXIS 2884, at *14. Under the current version of Article 120(b)(2)(A), there cannot be a constitutional application of the law because the Government can always change its charging theory mid-trial because of the structure of Article 120 allows it to do so. Thus, any weighing of unconstitutional applications versus constitutional ones will always fall in favor of an accused because he will never put be on fair notice under Article 120(b)(2)(A) and (g)(7) while either subsection survives.

2. The Result of the Government's Behavior is the Opposite of Fair Notice: Impermissible Variance

"It is ancient doctrine of both the common law and of our Constitution that a defendant *cannot be held to answer a charge not contained in the indictment brought against him*. This stricture is based at least in part on the right of the defendant to notice of the charge brought against him." *Schmuck v. United States*, 489 U.S. 705, 717-18 (1989) (citations omitted) (emphasis added). Federal courts have recognized two ways a prosecutor can erroneously depart from a charge:

> An *amendment* of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecutor or court after the grand jury has last passed upon them. A *variance* occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment.

Gaither v. United States, 413 F.2d 1061, 1071 (D.C. Cir. 1969). In cases where the Government exploits the capacious definition of "consent," as Article 120(b)(2)(A) and (g)(7)'s text affords, a variance occurs. The Government has "left unaltered" the charge sheet, but "the evidence [it] offered at trial proves facts material different from those alleged" in the charge sheet. *Id.*

The Supreme Court has prohibited such variances. In *Stirone v. United States*, the Government charged the accused with unlawfully interfering with interstate commerce for moving *sand* between various points in the United States. 361 U.S. 212, 213 (1960). However, over the defense counsel's objection—like in this case—the judge "permitted the Government to offer evidence of an effect on interstate commerce not only in sand brought into Pennsylvania from other States but also in *steel* shipments." *Id.* at 214 (emphasis added). The Supreme Court condemned the Government's variance in no uncertain terms:

> And the addition charging interference with steel exports here is neither trivial, useless, nor innocuous. While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error.

Id. at 217. The same rationale the Supreme Court used to prohibit variance applies to servicemembers. The Government violates an accused's Article 32 rights, and A1C Casilla's in this case, because "a preliminary hearing shall be held before referral of charges" and the purpose of the hearing is to determine "whether or not the *specification* alleges an offense." Article 32(a)-(2), UCMJ, 10 U.S.C. § 832(a)-(2).[4] In this case, the Government never brought the different, uncharged theories of liability to an Article 32 hearing.

Like the Supreme Court, this Court has been unequivocal that variance is prohibited. "[T]he Due Process Clause of the Fifth Amendment also does not permit convicting an accused of an offense with which he has not been charged." *Tunstall*, 72 M.J. at 192 (*quoting Girouard*, 70 M.J. at 10). This Court in *Tunstall* prohibited the government from switching theories: "As Tunstall was neither charged with nor on notice of the offense of indecent acts under the 'open and notorious' theory until the military judge's instruction, he was not on fair notice to defend against that offense and his due process rights were violated." *Id.* at 196. *See also United States v. Teffeau*, 58 M.J. 62, 66 (C.A.A.F. 2003) ("A variance between pleadings and proof exists when evidence at trial establishes the commission of a criminal offense by the

[4] *United States v. Nickerson*, 27 M.J. 30, 31-32 (C.M.A. 1988) ("The same standard is appropriate for the *military equivalent of the indictment by grand jury, the pretrial investigation* provided in Article 32.") (emphasis added)

accused, but the proof does not conform strictly with the offense alleged in the charge.") (quoting *United States v. Allen*, 50 M.J. 84, 86 (C.A.A.F. 1999)).

Although made in the context of amending the time frame on the charge sheet, this Court's rationale for prohibiting major a change applies in this context as well:

> "The military is a notice pleading jurisdiction." *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011). Stating on a charge sheet the date of an alleged offense with a certain degree of specificity and accuracy is required. Moreover, such a step is essential to the fundamental fairness of the criminal justice process because it provides an accused with adequate and *proper notice of the government's proffer of evidence*, and thereby informs the accused of what he or she needs to defend against at trial. In this context, we note that *it is the government that controls the charge sheet from the inception of the charges through the court-martial itself.*

Simmons, 82 M.J. at 141 (emphasis added). Amending the dates in the charge sheet provoked the aforementioned response from this Court. A change that "adds . . . an offense" and one that is "likely to mislead the accused as to the offense charged" should equally compel this Court to denounce the Government's behavior because it is a violation of due process, Supreme Court precedent, and the Rules for Courts-Martial. R.C.M. 603(a).

3. An Accused Cannot Exercise his Due Process Right of Defending Himself with the Impermissible Variance that Article 120 Permits

"Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused." *Dunn v. United States*, 442 U.S. 100, 106 (1979). This Court has generally echoed that principle by

stating, "Fundamental due process demands that an accused be afforded the opportunity to defend against a charge before a conviction on the basis of that charge can be sustained." *Teffeau*, 58 M.J. at 67. In the Article 134, UCMJ, context, this Court has said, "[T]he principle of fair notice requires that an accused know to which clause he is pleading guilty and against which clause or clauses he must defend." *United States v. Ballan*, 71 M.J. 28, 34 (C.A.A.F. 2012) (citations omitted).

As it specifically relates to variance, this Court has explained that variance prejudices an accused in two ways: "[1] misleading him 'to the extent that he has been unable adequately to prepare for trial,' or [2] denying him 'the opportunity to defend against the charge.'" *Marshall*, 67 M.J. at 420 (finding a material variance prejudiced appellant such that the military judge's finding by exceptions and substitutions had to be overturned). In 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.

There are specific examples—some demonstrated in this case—on how the defense is unable to adequately prepare for trial because of the variance that Article 120(b)(2)(A) allows. First, the different theories of liability have different elements that the Government must prove and an accused must defend against. Elements "must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." *Jones v. United States*, 526 U.S. 227, 232

(1999). But proof of "inability" to consent is not the same as lack of consent in fact; they are different elements. This Court explained this subtle distinction:

> [F]or both of the Article 120, UCMJ, offenses charged in the instant case a '[l]ack of verbal or physical resistance or submission resulting from . . . placing another person in fear does not constitute consent.' Article 120(g)(8)(A), UCMJ. However, the fact that the Government was required to prove a set of facts that resulted in LCpl MS's *legal inability to consent* was not the equivalent of the Government bearing the affirmative responsibility to prove that LCpl MS *did not, in fact, consent*.

United States v. Riggins, 75 M.J. 78, 84 (C.A.A.F. 2016); *see also Schmuck*, 489 U.S. at 718 ("The elements test, in contrast, permits lesser offense instructions only in those cases where the indictment contains the elements of both offenses and thereby gives notice to the defendant that he may be convicted on either charge."). The Defense Counsel in this case correctly pointed out to the Military Judge that the elements make a difference in how the Government must meet its burden of proof and how the Defense Counsel would have to defend the case. JA at 070.

As it relates to elements, the Government gets an advantage when it switches theories: a conclusive presumption which eases its burden of proof on the theory it actually charged. For example, instead of having to prove that the victim consented, the Government can rely on subsection (g)(7) which the Military Judge will instruct to the members: A "sleeping, unconscious, or incompetent person cannot consent." *See*, *e.g.*, JA at 549. This amounts to a mandatory presumption. This is problematic because it affects "not only the strength of the 'no reasonable doubt' burden but also

the placement of that burden; it tells the trier that he or they *must* find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts." *Cnty. Court v. Allen*, 442 U.S. 140, 157 (1979); *see also In re Winship*, 397 U.S. 358, 364 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). As such, the members do not have to independently assess whether the victim actually refused consent. This hamstrings the Defense's ability to raise mistake of fact as to knowledge of the named victim's state, as discussed next. Stated differently, the Defense loses the congressionally enumerated mens rea protection.

Second, mistake of fact as to consent would be available under some theories (i.e., without consent), but not others (incapacitation due to impairment). As such, if the Government charges a without consent theory, defense counsel will anticipate that instruction in its trial preparation. However, when the government switches theories mid-trial, the defense's counsel's preparation is blunted if not completed extinguished.

Third, and related, some theories of liability under Article 120(b) are specific intent crimes (inducement) while others are general intent crimes (without consent). Knowing which mens rea applies is crucial because, "[t]he existence of a mens rea is

the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Dennis v. United States*, 341 U.S. 494, 500 (1951). Knowing the mens rea while preparing for trial is important because "the usual presumption that a defendant must know the facts that make his conduct illegal should apply." *Staples v. United States*, 511 U.S. 600, 619 (1994). In addition to driving trial preparation, the mens rea of the charge drives what instructions are given or not given to the members. For example, a favorable voluntary intoxication instruction would not be given for a general intent crime, but one could be given for a specific intent crime since voluntary intoxication can negate the ability to form specific intent. *See generally Modern Status of the Rules as to Voluntary Intoxication as Defense to Criminal Charge*, 8 A.L.R.3d 1236, *2 ("[A]lthough as to a certain group of offenses, where specific intent is a necessary element, if the intoxication was such as to preclude the formation of such intent, the fact of intoxication may be shown to negative [sic] this element.").

The Supreme Court has observed that if an accused is charged under a particular section of a law, but not another, the uncharged section "does not impose upon the defendant a duty to defend" themselves from the uncharged section. *Cole,* 333 U.S. at 200 n.4. This Court should likewise hold that if the Government charges a particular theory of liability under Article 120, it cannot switch theories because

an appellant is under no duty defend against it nor can he do so properly without fair notice.

4. Multiple Cannons of Statutory Interpretation Weigh in Favor of Finding Article 120(b)(2)(A) and (g)(7) Facially Unconstitutional

"Our legal system must regain a mooring that it has lost: a generally agreed-on approach to the interpretation of legal texts." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, xxvii (2012) [hereinafter "*Reading Law*"]. The generally agreed-on approach are the canons of statutory interpretation because they are "the considered expression of intelligent human beings" and they "promote clearer drafting." *Id.* at 51.

"It is a fundamental tenet of statutory construction to construe a statute in accordance with its plain meaning." *United States v. Mooney*, 77 M.J. 252, 255 (C.A.A.F. 2018) (quoting *Loving v. United States*, 62 M.J. 235, 240 (C.A.A.F. 2005)). This is known as the "ordinary meaning" canon, *Sager*, 76 M.J. at 161, and acknowledges that "Congress 'says in a statute what it means and means in a statute what it says there.'" *Hartford Underwriters Ins. Co. v. Union Planters Bank N.A.*, 530 U.S. 1, 6 (2000) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992)). Unless the plain reading of the text is absurd, courts are to enforce statutes according to their terms. *Id.* (citations and quotations omitted). Indeed, "[w]hen the words of a statute are unambiguous, then, this first canon is also the last." *Connecticut Nat. Bank*, 503 U.S. at 253-254.

Here, the plain language of Article 120(b)(2)(A) and (g)(7) results in the facially unconstitutional deprivation of fair notice discussed *supra*, to include the problematic swapping and cutting of elements with other offenses enumerated under Article 120(b). Looking at that broader context, the following four canons of statutory interpretation support the interpretation that Article 120(b)(2)(A) and (g)(7) are facially unconstitutional while the fifth (constitutional-doubt canon) will be shown to be inapplicable.

a. The Surplusage Canon

"If possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." *Reading Law*, at 174. The surplusage canon is "strongest when an interpretation would render superfluous another part of the same statutory scheme." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013). If this Court rules that Article 120(b)(2)(A) and (g)(7) are facially constitutional, it will render superfluous every theory of liability that Congress enumerated under subsection (b). Such a ruling would, in effect, take the military justice system back to the pre-2007 Article 120 because the Government would only charge "without consent" because it would be allowed to elicit evidence and argue any theory under subsection (b), generally with less burdensome elements of proof.

b. Negative-Implication Canon

"The expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*)." *Reading Law*, at 107. "When Congress includes particular language in one section of a statute but omits it from a neighbor, we normally understand that difference in language to convey a difference in meaning." *Bittner v. United States*, 598 U.S. 85, 94 (2023). Here, Congress wrote separate theories of liability throughout Article 120(b). As such, it meant for them to "convey a difference in meaning." *Id.*; *see also Sager*, 76 M.J. at 162. Notably the "more specific the enumeration, the greater force of the canon." *Reading Law*, at 108. With the exception of Article 120(b)(2)(A) at issue here, Congress was extremely specific with its enumerated prohibitions under Article 120(b); the words Congress used in subsection (b) show that the prosecutor cannot amalgamate the separate provisions of subsection (b) into one super-theory of guilt by simply relying on the definition of "consent." *See also infra Associated Words Canon* (discussing even though "consent" appears more than once, as a theory and a definition, the full definition should be parsed for each theory).

c. General/Specific Canon

"If there is a conflict between a general provision and a specific provision, the specific prevails (*generalia specialibus non derogant*)." *Id.* at 183. Here, Article 120(g)(7) is the general provision while the enumerated theories of liability are the

specific provisions. This canon would dictate that this Court should find that the general provision is facially unconstitutional and that Congress' enumerated theories of liability limit the general definition of consent. Stated formalistically, "[T]he general and specific legal doctrine may mingle without antagonism, the specific being construed simply to impose restrictions and limitations on the general." *Id.* at n.1 (quoting Joel Prentiss Bishop, *Commentaries on the Written Laws and Their Interpretations* § 112a, at 106-107 (1882)).

d. Associated-Words Canon

"Associated words bear on another's meaning (noscitur a sociis)." *Reading Law*, at 195. This canon also means "a word is known by the company it keeps." *McDonnell v. United States*, 579 U.S. 550, 569 (2016) (quotations and citations omitted). Meaning, Article 120(b)(2)(A) and "consent" should be interpreted and limited in accordance with each other individual theory of guilt under Article 120, not as an umbrella term that the Government can use to argue theories it did not charge. This makes sense because "words are given meaning by their context." *Reading Law*, at 195. This canon "is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *McDonnell*, 579 at 569. (quotations and citations omitted). On many

occasions, the Supreme Court has defined "identical language" differently according to each subsection of a statute.[5]

e. The Constitutional-Doubt Canon

"A statute should be interpreted in a way that avoids placing its constitutionality in doubt." *Reading Law*, at 247. Certainly, the Government will rely on this canon to argue that this Court should not "rock the boat" to find Article 120(b)(2)(A) unconstitutional. *Granfinanciera v. Nordberg*, 492 U.S. 33, 95 (1989) (Blackmun, J., dissenting). However, the rationale that once supported this doctrine is now considered "dubious" because "[t]he modern Congress sails close to the wind

---

[5] "We have several times affirmed that identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute. *See, e.g., FAA* v. *Cooper*, 566 U.S. 284, 292-293 (2012)) ("actual damages" has different meanings in different statutes); *Wachovia Bank, N. A.* v. *Schmidt*, 546 U.S. 303, 313-314 (2006) ("located" has different meanings in different provisions of the National Bank Act); *General Dynamics Land Systems, Inc.* v. *Cline*, 540 U.S. 581, 595-597 (2004) ("age" has different meanings in different provisions of the Age Discrimination in Employment Act of 1967); *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001) ("wages paid" has different meanings in different provisions of Title 26 U.S.C.); *Robinson*, 519 U.S., at 342-344 ("employee" has different meanings in different sections of Title VII of the Civil Rights Act of 1964); *Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, 478 U.S. 804, 807-808 (1986) ("arising under" has different meanings in U.S. Const., Art. III, §2, and 28 U.S.C. §1331); *District of Columbia* v. *Carter*, 409 U.S. 418, 420-421 (1973) ("State or Territory" has different meanings in 42 U.S.C. §1982 and §1983); *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433-437 (1932) ("trade or commerce" has different meanings in different sections of the Sherman Act)."

Yates v. United States, 574 U.S. 528, 537 (2015).

all the time. Federal statutes today often all but acknowledge their questionable constitutionality." *Reading Law*, at 248. Regardless of the rationale, "It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues *if* a reasonable alternative interpretation poses no constitutional question." *Gomez v. United States*, 490 U.S. 858, 864 (1989) (emphasis added). In this case, there is no "reasonable alternative interpretation" to Article 120. The Government's interpretation, as evinced by its actions in multiple cases, shows that is prosecutors will run roughshod over due process fair notice if this Court allows it.

5. The Rule of Lenity Applies and Supports a Finding that Article 120(b)(2)(A) and (g)(7) are Unconstitutional

A "fair warning requirement" is the cannon of strict construction, or rule of lenity. *United States v. Lanier*, 520 U.S. 259, 266 (1997). The rule of lenity "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *Id.* Stated differently, "when [a] choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Bass*, 404 U.S. 336, 347 (1971) (citation omitted). The rule of lenity applies to ambiguities in the scope and breadth of criminal statutes: "[A]mbiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *Davis*, 588 U.S. at 464. If this Court has any remaining doubt as to the constitutionality of Article 120(b)(2)(A) and

(g)(7), this Court should use the rule of lenity to ensure that all accused, including A1C Casillas, are given fair notice.

In conclusion, this Court should not hesitate in using lenity to find that Article 120(b)(2)(A) does not provide constitutional fair notice. The Supreme Court recently struck down 18 U.S.C. § 924(c) because it "provides no reliable way to determine which offenses qualify as crimes of violence and thus is unconstitutionally vague." *Davis*, 588 U.S. at 448. This was notable because it had been enacted "33 years" prior and had been used in "tens of thousands of federal prosecutions" *Id.* at 465 (citing to and quoting Kavanaugh, J., dissenting). In assailing the dissent, the majority underscored the importance of fair notice in our republic:

> [T]he dissent seems willing to consign "'thousands'" of defendants to prison for "years—potentially decades," not because it is certain or even likely that Congress ordained those penalties, but because it is merely "possible" Congress might have done so. In our republic, a speculative possibility that a man's conduct violated the law should never be enough to justify taking his liberty.

Id. at 468. Given that the Supreme Court struck down a statute as unconstitutionally vague that was used in "*tens of thousands*" of criminal cases over 33 years, this Court should be much less concerned in doing the same for a statute that has been in existence for less than six years.

WHEREFORE, A1C Casillas respectfully requests that this Honorable Court find Article 120(b)(2)(A) and (g)(7) to be facially unconstitutional and overturn his conviction.

II.

AS APPLIED, ARTICLE 120(b)(2) AND (g)(7), UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. §§ 920(b)(2) AND (g)(7), DID NOT GIVE APPELLANT CONSTITUTIONAL FAIR NOTICE WHEN THE MILITARY JUDGE DENIED DEFENSE COUNSEL'S REQUEST FOR A TAILORED JURY INSTRUCTION.

Standard of Review

This Court reviews questions of statutory interpretation de novo. *Sager*, 76 M.J. at 161. "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). This Court reviews a military judge's decision to include a requested instruction for an abuse of discretion. *United States v. Condon*, 77 M.J. 244, 245 (C.A.A.F. 2018).

Law and Analysis

A1C Casillas requests that this Court consider the Law and Analysis from Issue I for this Issue. Assuming, *arguendo*, this Court does not find Article 120(b)(2)(A) and (g)(7) to be facially unconstitutional, this Court should find that it was unconstitutional as applied to A1C Casillas. This Court has essentially three options: 1) affirm this case which will let this constitutional issue continue to fester; 2) hold that Article 120(b)(2)(A) is facially unconstitutional; or 3) hold that the Military Judge erred by failing to tailor the definition of "consent" to the charged

theory of liability.[6] Holding that military judges need to tailor their instructions to the facts and the charge is the most palatable and reasonable option before this Court.[7]

Article 120(b)(2)(A) and (g)(7), as applied, are unconstitutional for several reasons. First, the Government sought to convict A1C Casillas on theories that it never charged, as discussed and argued in Issue I.

Second, the Military Judge rejected the Defense's efforts, through a requested instruction, to ensure the trial comported with the charged offense. JA at 547. "The military judge shall give the members appropriate instructions on findings." R.C.M. 903(a). Furthermore, "[i]nstructions *should be tailored* to fit the circumstances of the case, and should fairly and adequately cover the issues presented." *Id.* at Discussion (emphasis added). The instructions on findings "shall" include "[s]uch

[6] Technically, a fourth option exists: Avoid the constitutional issues by ruling in A1C Casilla's favor on his voir dire issue. However, given the plethora of CCA cases that contain these same constitutional issues, this Court should decide whether the Government can engage in this behavior.

[7] It is also worth noting that an additional way the Government could have avoided this issue was to charge A1C Casillas, in the alternative, with different theories of criminal liability. *United States v. Morton*, 69 M.J. 12, 16 (C.A.A.F. 2010) ("In some instances there may be a genuine question as to whether one offense as opposed to another is sustainable. In such a case, the prosecution may properly charge both offenses for exigencies of proof, a long accepted practice in military law.").

other explanations, descriptions, or directions as may be necessary and which are properly requested by a party or which the military judge determines, *sua sponte*, should be given." R.C.M. 903(e)(7).

Article 120(b)(2)(A) and (g)(7), as applied, did not give fair notice to A1C Casillas because the Military Judge gave an instruction that matched Article 120(g)(7), authorizing a conviction on an uncharged theory of liability, and denying the Defense Counsel's request for a tailored instruction. This resulted in an impermissible variance and permitted a mandatory presumption about consent.

Third, the Defense's requested instruction was correct. The Military Judge ruled that the requested instruction was "an inaccurate statement of the law." JA at 072. The Military Judge is incorrect. The relevant portion of the requested instruction stated, "In this case, there is no allegation that [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. It is true that there was no allegation on the charge sheet that S.F. was too intoxicated to consent. As such, this *was* "not an issue before" the members. Certainly, the Military Judge could have edited the language, but the thrust of the instruction was accurate.

The instruction also passed this Court's test on discretionary instructions. *United States v. Bailey*, 77 M.J. 11, 14 (C.A.A.F. 2017) (citing *United States v. Carruthers*, 64 M.J. 340, 345-46 (C.A.A.F. 2007)). First, as discussed above, the

requested instruction was correct in that the Government did not charge "too intoxicated to consent." Second, the "main instruction" did not cover the "requested material" because the main instruction was unconstitutionally overbroad. *Id.* Third, the instruction was "such a vital point"—constitutional fair notice—that failing to give it deprived A1C Casillas of "a defense or seriously impaired its effective presentation." *Id.* (quotation and citation omitted).

Fourth, if this Court disagrees that the Defense's proposed instruction was correct, the instruction that the Military Judge gave was incorrect because it was overbroad. The upshot of the Defense's request was clear: a narrow, tailored instruction that comported with the charge. The Military Judge, however, instructed the members on the broad definition of "consent" contained in subsection (g)(7) which allowed them to convict A1C Casillas on a different theory than it charged. The Military Judge could have tailored an instruction with language that he believed followed the law, but he gave the global, super-sized definition of "consent" which permitted the Government to violate fair notice as discussed in Issue I. Thus, the Government did not have to prove incapable of consent under the "without consent" theory that it otherwise would have had to prove; rather, the Government was able to argue other, uncharged theories and rely on inability to consent—a lower burden of proof.

By ruling in A1C Casillas' favor, this Court will remind military judges, "[T]hat the Benchbook is not binding as it is not a primary source of law, [but] the Benchbook is intended to ensure compliance with existing law." *United States v. Riley*, 72 M.J. 115, 122 (C.A.A.F. 2013). The Military Judge in this case blindly followed the "electronic Benchbook definition of consent." JA at 071. While the Military Judge's desire to follow the law was laudable, the Defense Counsel laid out the constitutional concerns in plain terms, such as, "it's a completely separate offense," "it has separate elements," it "triggers a special instruction," and "fair notice." JA at 065, 069. The Military Judge could have avoided this issue by simply tailoring the definition of "consent" to the facts at hand, like the Defense requested: "In this case, there is no allegation that [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.

WHEREFORE, A1C Casillas requests that this Honorable Court find Article 120, as applied to him, to be unconstitutional and overturn his conviction.

III.

A1C CASILLAS' CONVICTION FOR SEXUAL ASSAULT WITHOUT CONSENT WAS NOT LEGALLY SUFFICIENT.

This Court granted review in *Mendoza* on the issue of "whether appellant's conviction for sexual assault without consent was legally sufficient." 2023 CAAF LEXIS 699. Specifically, Staff Sergent Mendoza alleged the relevant provision "is

ambiguous" because "it is unclear if sexual assault 'without consent' means that the accused did not have the consent in fact of the alleged victim, or if it means the accused party could not have the consent of the alleged victim under these facts because they were incapable of consenting." Brief for Appellant at 11, *Mendoza*, 2023 CAAF LEXIS 699. This Court should rule in A1C Casillas' favor for two reasons.

First, the *Mendoza* ruling may implicate A1C Casillas' case. If this Court rules that "without consent" means an accused did not have the consent in fact of the victim, then the Air Force Court should do a new legal sufficiency review in light of *Mendoza*'s ruling.

Second, and also related to *Mendoza,* this Court should hold that a conviction is not legally sufficient when there is impermissible variance. A1C Casillas asks that this Court consider the arguments made for Issue I for this issue as well. Like this Court did in *United States v. Reese*, this Court should agree with "[t]he defense's primary arguments that the change was major" because "[the gathering of evidence and argument] altered the means of committing the offense and that the change was not fairly included in the original specification." 76 M.J. 297, 300 (C.A.A.F. 2017). To so hold would be in line with the Sixth Amendment, *Stirone*, R.C.M. 603, and this Court's caselaw.

WHEREFORE, A1C Casillas respectfully requests that this Honorable Court find his Article 120 to be legally insufficient and overturn his conviction.

IV.

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

Standard of Review

This Court reviews a military judge's decision with respect to actual bias for an abuse of discretion. *Hennis*, 79 M.J. at 384 (citation omitted).

Traditionally, this Court has reviewed a military judge's decision with respect to implied bias under a "standard that is less deferential than abuse of discretion, but more deferential than de novo review." *Id.* at 385 (citation omitted). While a Military Judge's credibility assessment "is useful and warrants great deference on the issue of actual bias, it is not dispositive on the issue of implied bias." *United States v. Daulton*, 45 M.J. 212, 218 (C.A.A.F. 1996).

However, A1C Casillas asks this Court to disregard its current standard for implied bias and apply de novo review. *United States v. Keago*, No. 23-0021, 2024 CAAF LEXIS 256, at *19 (C.A.A.F. May 9, 2024) (Sparks, J., dissenting) ("We should admit that we are not affording any discretion to the military judge and review implied bias conclusions de novo."); *Id.* (Maggs, J., dissenting ("[R]econsideration

of the test for implied bias, the liberal grant mandate, and the standard of review might benefit the military justice system.").

"[T]he fundamental notion behind a standard of review is that of defining the relationship and power shared among judicial bodies." 1 *Federal Standards of Review* § 1.01. The test for deciding what standard of review to use when there is both law and fact "all depends on whether answering it entails primarily legal or factual work." *U.S. Bank Nat'l Ass'n v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 396 (2018). There are two reasons that using de novo review makes sense for the military justice system and that the question to be resolved is more akin to legal work than a factual question.

First, as Judge Sparks noted, this Court is in a better position than a trial judge "to determine how the public would view the appearance of the members' impartiality." *Keago*, 2024 CAAF LEXIS 256, at *21. In formalistic terms, "one judicial actor is better positioned than another to decide the issue in question." *Miller v. Fenton*, 474 U.S. 104, 114 (1985). As a "federal appellate court" this Court's "primary function [is] as an expositor of law." *Id.* at 114. And even though changing the standard of review may be novel for this Court, the underlying debate is not; one approach dictates that "the courts could decide that unclear law-fact characterizations in the grey area, if close calls, henceforth will be called *law* and left to appellate courts." 1 *Federal Standards of Review* § 2.13.

Furthermore, a change to a de novo standard is consistent with the "unchallenged superiority of the [trial] court's factfinding ability." *Salve Regina Coll. v. Russell*, 499 U.S. 225, 233 (1991). There are no real public spectators that a military judge sees, speaks with, or polls when making the determination of what a hypothetical "public" would think. The public's perception does not "involve[] the credibility of witnesses and therefore [does not] turn[] largely on an evaluation of demeanor." *Miller*, 474 U.S. at 114. Rather, this Court has the "institutional advantages" to know what a hypothetical public would be thinking about the military justice system. *Salve Regina Coll.*, 499 U.S. at 233.

Of course, the Military Judge will see the demeanor and hear from the challenged member; however, the crux of the decision is having the appropriate sight picture to understand what the hypothetical public is and what they would perceive from the member sitting on the panel. For this reason, deciding the question "entails primarily legal" work. *U.S. Bank Nat'l Ass'n*, 583 U.S. at 396. And, as the military's highest appellate court, this Court is much "better positioned" than a military judge to determine what is, in essence, a legal call. *Miller*, 474 U.S. at 114.

There is a practicality for this Court to consider as well: It has the audio recording of the voir dire. So, although this Court cannot see what the military judge saw, it can hear the long pauses of panel members (JA at 716), it can hear the "I just think that I can" responses (JA at 052, 058), and it can hear the interactions between

the member and all the trial participants, including the Military Judge. Thus, factors that would normally weigh in favor of a military judge deciding this question are neutral, or weigh in favor of this Court conducting a de novo review.

The second reason a de novo standard of review is appropriate are the "certain unique elements in the military justice system . . . [that] present[] perils that are not encountered elsewhere." *Peters*, 74 M.J. at 34 (quoting *United States v. James*, 61 M.J. 132, 139 (C.A.A.F. 2005)). This Court has appropriately recognized that the accused only receives one peremptory challenge and that the member pool is selected by the Government. *Id.* A1C Casillas asks this Court to formally recognize one more: The military justice system is now the only criminal law jurisdiction in the United States that has non-unanimous verdicts. Although this Court did not create the non-unanimous system, it gave non-unanimous verdicts its imprimatur. *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023), *cert. denied*, 144 S. Ct. 1003 (Feb. 20, 2024). This Court is "better positioned" to weigh these "unique elements" and how a member of the hypothetical public would feel being tried by a non-unanimous, Government-selected venire with only one peremptory challenge. *Miller*, 474 U.S. at 114.

Law and Analysis

The right to an impartial panel is "one touchstone" of a fair trial and it lies "at the very heart of due process." *McDonough Power Equip. v. Greenwood*, 464 U.S.

548, 554 (1984); *Smith v. Phillips*, 455 U.S. 209, 224 (1982). "A member shall be excused for cause whenever it appears that the member . . . should 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).

1. The Military Judge did not ask "any Clarifying Questions" to Justify A.G.'s Placement on the Panel

Central to the right of an impartial panel is the need to "conduct a full *voir dire* to determine challenges for cause and peremptory challenges." *United States v. Jefferson*, 44 M.J. 312, 322 (C.A.A.F. 1996). The Military Judge determines the "nature and scope of the examination" of the members. R.C.M. 912(b)(2) (Discussion). "A challenge for cause is a contextual judgment that is determined through the totality of the factual circumstances." *United States v. Bagstad*, 68 M.J. 460, 463 (C.A.A.F. 2010). Recently, in *United States v. Keago*, this Court justified its finding that the Military Judge erred in failing to use the liberal grant mandate because "the military judge never asked any clarifying questions or offered any corrections about the[] issues that might have filled the gaps left by trial and defense counsel." 2024 CAAF LEXIS 256, at *18. This is the precise issue that happened in this case, specifically when A.G. never answered the last question given to him with what he thought his wife would think about him sitting on the panel. JA at 055. Because A.G. was married to a victim of a rape involving alcohol, he was not *per se* disqualified, but his additional inquiry was warranted. *See United States v. Brown*,

34 M.J. 105, 110-11 (C.M.A. 1992), *overruled on a separate issue*, *United States v. Reese*, 76 M.J. 297 (C.A.A.F. 2017).

Here, the Military Judge conducted the voir dire himself and permitted counsel to ask additional questions when he was finished. JA at 050-54. But his management of the voir dire, his questions (or lack thereof), and his follow-up to issues raised were insufficient for two reasons.

a. A.G. Paused, Stumbled, and Never Answered the Central Question

First, when A.G. answered Defense Counsel's question, A.G. hesitated, paused, stumbled over his words, and then said: "you never know, right when you're talking about relationship with somebody else on what they might think, what 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 055. Defense Counsel said he noticed a "little bit of hesitation" and A.G. agreed with that observation. *Id*. A.G. then said, "I think I'm thinking of the answer because that was an interesting point your brought up." *Id.* This Court has previously denounced member answers that "were painfully honest but less than resounding" and it should do so in this case as well. *Daulton*, 45 M.J. at 218 (finding that a military judge abused his discretion for a member who said, "I believe so" if she could be separate her family's experiences from the accused's when "[b]oth her sister and her mother had been sexually abused by her grandfather.").

Despite A.G. saying, "I think I'm thinking" of the answer to the interesting point that the Defense Counsel just raised, the Military Judge did not follow-up with what would have been the most helpful question: So, after thinking about the Defense Counsel's "interesting point" and the relationship with your wife, knowing that you recognized that you cannot "assume that [] it won't affect her," how do you feel about sitting on this panel? It appears the Defense Counsel did not ask A.G. this question—or any others—because he thought A.G.'s previous answer disqualified him from serving on the panel. *See* JA at 057. Regardless, because the Military Judge conducted voir dire, it was arguably his duty to ask this question and develop the record. It was also his duty to ensure that A1C Casillas received a fair trial. *Voorhees*, 79 M.J. at 14 (citation omitted). In his challenge to A.G., Defense Counsel argued that "there was an extremely long pause to answer that question. And it didn't appear to just simply be thinking about the answer to question, it genuinely seemed like a concerned hesitation." JA at 057.

The Military Judge's failure to follow-up with A.G. on this specific question is akin to cases where this Court has found Military Judges erred. In *Richardson*, this Court ruled that the discovery of professional relationships on the panel, and the Defense Counsel's implied bias challenge, "warranted further inquiry." 61 M.J. 113, 120 (C.A.A.F. 2005). This Court explained:

> [W]here such situations are identified, ***military judges should not hesitate to test these relationships for actual and implied bias. And a factual record should be created*** that will demonstrate to an objective observer that notwithstanding the relationships at issue, the accused received a fair trial. Member voir dire is the mechanism for doing so.

Id. (emphasis added). This Court held that the Military Judge erred. *Id.*

In *United States v. Smart*, Captain Harrison, a panel member, disclosed that he was a victim of the same offense of which the accused was charged. 21 M.J. 15, 19 (C.M.A. 1985). The Court explained, "The military judge did not explore the implications of these answers in seeking to determine Captain Harrison's fitness to serve." *Id.* The problem was also that Capt Harrison did not assert "his lack of bias in a confident or unequivocal manner." *Id.* (quotation and citation omitted). The Court recognized, "We are aware that the liberal voir dire of court members which often occurs may lure a member into replies which are not fully representative of his frame of mind." *Id.* at 20. The Court then ruled, "In light of Harrison's earlier responses to the questions by defense counsel, the military judge either should have excused him or *should have assured that the record contained answers which adequately rehabilitated him*." *Id.* (emphasis added).

Given the importance of the marital relationship, A.G.'s hesitation, and his concession that he "just [doesn't] want to assume that--that it won't affect her," the

Military Judge failed to create an adequate record for A.G.'s placement on the panel. JA at 055. The Military Judge did not rehabilitate him.[8]

b. The Military Judge Asked Questions with "Predictable Answers" that led to "Problematic Responses" Given the Nature of A.G.'s Relationship

The second reason the Military Judge's voir dire was insufficient is because the questions he initially asked were cursory—especially given his duty to conduct "further inquiry in light of defense counsel's challenges." *Richardson*, 61 M.J. at 120. In *Keago*, this Court stated that "a potential panel member's predictable answers to leading questions are not enough to rebut the possibility of bias, especially when some of those questions lead to more problematic responses." 2024 CAAF LEXIS 256, at *16 (citation omitted). The answers that A.G. gave should have prompted to the Military Judge to ask more questions.

His questions were also insufficient given the nature of the husband-and-wife relationship. The law recognizes that "[n]o union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family." *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015). Marriage is the "keystone of our social order," it is "sacred to those who live by their religions and offers unique

[8] A.G. also answered affirmatively to knowing someone in the legal office and to the fact that he had heard during military trainings that if you "have a drink, you cannot consent." JA at 036-37. He also stated that his wife was a social worker and that he had "been fortunate" to have never dealt with sexual assault issues in the military. JA at 052, 055. The Military Judge did not follow-up on the affirmative answers or the statements, compounding his primary error. *Id.*

fulfillment to those who find meaning in the secular realm," and it creates "the most important relation in life." *Id.* at 656-57, 669; *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

Against this backdrop, it is not hard to see that a husband sitting on a sexual assault panel when his wife was raped could cause tension in the marriage, making the husband partial to the wife. This is especially true when the facts of the case are analogous to the wife's rape: a sexual offense involving alcohol and some amount of force. The marriage component, and the influence the spouse could have on the panel member throughout the trial, is precisely why the Military Judge should have granted the Defense challenge under the liberal grant mandate. Or, in the alternative, why the Military Judge should have developed the factual record to justify the placement of a husband on the panel whose wife had been raped.

2. The Military Judge Erred by not Applying the Liberal Grant Mandate

In *Keago*, this Court "reaffirm[ed] the Court's statements about the applicability of the liberal grant mandate." 2024 CAAF LEXIS 256, at *12. A military judge's failure to apply the liberal grant mandate is a stand-alone error. *See id*. at *12-13 ("[W]hen a case is close, the liberal grant mandate prohibits military judges from denying the challenge."); *Leonard*, 63 M.J. at 400 ("Also we hold that the military judge abused his discretion and violated the liberal grant mandate as to a causal challenge and improperly denied Appellant's causal challenge of the second

panel member based on implied bias."); *United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007) ("military judges are enjoined to be liberal in granting defense challenges for cause."); *Peters*, 74 M.J. at 34 ("The military judge is also mandated to err on the side of granting a challenge."); *Smart*, 21 M.J. at 21 ("The proper course of action is to give heed to the mandate for liberality in passing on challenges and to consider alternatives which will avoid the occasions for challenge and reduce the inconvenience when challenges must be sustained.").

The Military Judge said he did "not find this to be a particularly close call such that the liberal grant mandate would come into play." JA at 061. The facts and legal background, as discussed above, belie the Military Judge's conclusion. This was a very close call and the textbook example of when the liberal grant mandate should have been applied.

In addition to the arguments made throughout this issue, this Court should consider two points. First, the liberal grant mandate comes "from a long-standing recognition of certain unique elements in the military justice system including limited peremptory rights and the manner of appointment of court-martial members [that] presents perils that are not encountered elsewhere." *Peters*, 74 M.J. at 34. Here, that concern exists not only because the Defense Counsel used their sole peremptory challenge on another member, but also because the convening authority detailed the members. And, it goes without saying, the military-justice system does not have the

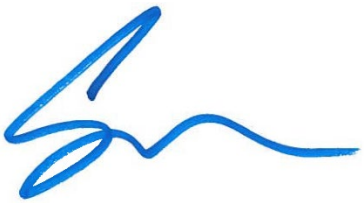
protection of unanimous verdicts like our federal and state counterparts. *Anderson*, 83 M.J. at 300.

Second, the cases where this Court overturned the selection of a panel member for implied bias are similar to this case. In *United States v. Miles*, a cocaine case, a panel member disclosed that his 10-year-old nephew died from complications of his mother's cocaine use during pregnancy (in response to the same question that was asked in this case). 58 M.J. 192, 193 (C.A.A.F. 2003). When the panel member initially saw the charges, it "triggered memories of his nephew's illness and death" in part because he was writing an article about the experience. *Id.* The member said he would be able to put aside the experience, decide the case solely on the facts, and that nothing would weigh on his conscience. *Id.* at 193-94. This Court held that in denying the challenge for cause, the Military Judge abused his "limited" discretion and "violated the liberal-grant mandate." *Id.* at 195.

The case here is just as strong, if not stronger than *Miles*. First, the accused's crime and the crime that affected the member in *Miles* were the same, which is analogous to the present case. Second, the relationship between the A.G. and the crime victim in this case—the wife—is stronger than the relationship in *Miles*. In *Miles*, it was the member's nephew. That relationship would not have any of the heightened concerns of a marriage. Third, like *Miles*, A.G. was "triggered" when he read the flyer and his wife came to his mind "fairly quickly." JA at 051; *Miles*, 58

M.J. at 193. Fourth, like the member in *Miles*, A.G. disclaimed any problems in deciding the case impartially. Fifth, unlike *Miles* which was a guilty plea, this was a litigated findings case, which raised the stakes for A1C Casillas. Factually, other cases support finding error as well. *See Peters*, 74 M.J. at 34 (CAAF explaining that "this is a close case" where a member had a professional relationship with trial counsel, the military judge said the member was "truthful" and "he can be an impartial panel member," and the military judge had even considered the liberal grant mandate); *Daulton*, 45 M.J. at 214, 218 (in a child sexual abuse case, finding error when the military judge denied a challenge for cause for a member whose mother and sister (as a child) had been sexually abused, who expressed shock initially but was "over it now," and answered with "I believe so" when asked if she separate those experiences from the case).

WHEREFORE, A1C Casillas respectfully requests that this Honorable Court find that the Military Judge erred in not removing the member and overturn his conviction.



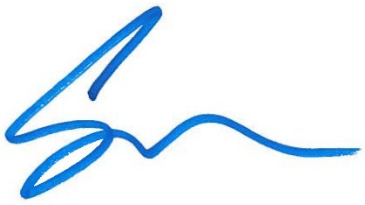
SPENCER NELSON, Maj, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 37606
Appellate Defense Division
1500 Perimeter Road, Ste 1100
Joint Base Andrews, MD 20762
Phone: (240) 612-4773
Email: spencer.nelson.1@us.af.mil

SAMANTHA CASTANIEN, Capt, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 37280
Appellate Defense Division
1500 Perimeter Road, Ste 1100
Joint Base Andrews, MD 20762
Phone: (240) 612-4770
Email: samantha.castanien.1@us.af.mil

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that I electronically filed a copy of the foregoing with the Clerk of Court on July 22, 2024, and that a copy was also electronically served on the Government Trial and Appellate Operations Division on the same date.



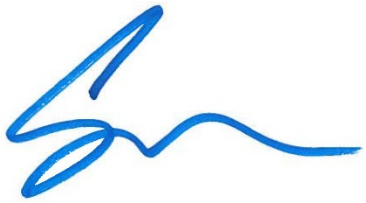
SPENCER R. NELSON, Maj, USAF
U.S.C.A.A.F. Bar No. 37606
Appellate Defense Division
1500 Perimeter Road, Ste 1100
Joint Base Andrews, MD 20762
Phone: (240) 612-4770
Email: spencer.nelson.1@us.af.mil

Counsel for Appellant

CERTIFICATE OF COMPLIANCE WITH RULES 24(b) & 37

This brief complies with the type-volume limitation of Rule 24(b) of no more than 14,000 words because it contains 13,901 words.

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



SPENCER R. NELSON, Maj, USAF
U.S.C.A.A.F. Bar No. 37606
Appellate Defense Division
1500 Perimeter Road, Ste 1100
Joint Base Andrews, MD 20762
Phone: (240) 612-4770
Email: spencer.nelson.1@us.af.mil

Counsel for Appellant