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

REPLY BRIEF ON BEHALF OF APPELLANT

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ARGUMENT

I. Article 120(b)(2)(A) is facially unconstitutional because it does not provide fair notice to defendants of the specific charge against them.

A. The Government conflates fair notice of the crime with fair notice of the theory of liability charged.

When Article 120(b)(2)(A), Uniform Code of Military Justice (UCMJ),[1] "without consent," is charged, the accused does not have fair notice of the theory of liability. This is because the definition of "consent" in Article 120(g)(7) is so broad that it includes all theories of liability enumerated under Article 120. An accused is entitled to rely on the charge sheet because "[f]ew 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) (emphasis added). Under this due process protection, an accused has a right to know "under what legal theory he will be convicted." *United States v. Tunstall*, 72 M.J. 191, 192 (C.A.A.F. 2013). Simply, "[it] is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to *convict him upon a charge that was never made*." *Cole v. Arkansas*, 333 U.S. 196, 201 (1948) (emphasis added).

The Government creates a strawman, arguing that Airman First Class (A1C)

[1] All references to the UCMJ and the Rules for Courts-Martial (R.C.M.) are to the versions contained in the *Manual for Courts-Martial*, United States (2019 ed.) (*MCM*) unless otherwise noted.

Casillas's argument fails because he was on notice that sexual assault is a crime. Br. on Behalf of the United States at 21, 22, 31, 34, 36 [hereinafter Ans.]. But as the Government simultaneously admits, this is not A1C Casillas's argument. Ans. at 23, 31, 36. Rather, an accused does not have notice because the definition of consent under the statute allows the Government to swap theories at trial to circumvent congressionally enumerated offenses that have different elements and different defenses, but that are, by the plain language of (g)(7), partially incorporated into Article 120(b)(2)(A). As the Government admits, anyone charged with sexual assault without consent must be prepared to defend against *any* theory of liability otherwise enumerated by the statute. Ans. at 25, 28. This allows the Government to switch theories mid-trial—or, as here, mid-appeal. This Court recently chastised the Government for a similar strategy:

> We pointedly reject the contention by the Government that, as a general rule, it is "reasonable for the government to wait until [a victim] testifie[s] before deciding whether the dates of the charged offense[s] need[] to be corrected based upon the evidence adduced at trial." Brief for Appellee at 40, *United States v. Simmons*, No. 21-0069 (C.A.A.F. June 21, 2021). This cavalier approach to investigating, charging, and preparing a court-martial case is inconsistent with the government's due process notice obligations toward an appellant, as well as the tenets of fair play inherent in the military justice system.

United States v. Simmons, 82 M.J. 134, 140 (C.A.A.F. 2022). This "cavalier approach" by the Government at trial, and now on appeal, to switch theories and justify a conviction for an offense never charged is violative of due process.

As an overall example of this tactic, at A1C Casillas's court-marital, the Government swapped theories throughout trial. First, the Government charged that A1C Casillas penetrated S.F.'s vulva without her consent. JA at 16. It then argued the sexual act, penetration of her vulva, occurred because S.F. was asleep. JA at 474, 476 (arguing that "[a] sleeping, unconscious, or incompetent person cannot consent"). Later, the Government argued that the victim was incapacitated through alcohol and, therefore, could not consent. JA at 476, 483. In addition, the Government seemingly argued S.F. never actually consented to the penetration by words or actions. JA at 474, 476.

On appeal, the Government argued three theories: sleep, lack of consent prior to sleep, and lack of consent after S.F. woke up. Ans. at 36, 38-39, 41-42, 45. For the first time on appeal, the Government suggests there were *two* sexual assaults, the penetration while sleeping and the continued penetration without consent after S.F. woke up. Ans. at 32, 42. At trial, lack of consent after penetration was never the theory.

The Government's brief creates more confusion as to what theory A1C Casillas was supposed to be on notice to defend against rather than clarifying how the plain language of Article 120(b)(2)(A) constitutionally "criminaliz[es] every variation and every minute of a nonconsensual sexual encounter." Ans. at 32. Even on appeal, Article 120(b)(2)(A) allows the Government to switch theories of liability.

B. Article 120(b) is a poorly written statute, but it ultimately has seven distinct, non-overlapping theories of liability grouped into three different categories.

As this Court has pointed out before, there is a difference between expressing lack of consent and the legal state of being unable to consent. *United States v. Riggins*, 75 M.J. 78, 84 (C.A.A.F. 2016). Congress makes this distinction as well, through the varied forms of liability enumerated. When looking at the construction of this statute, Article 120(b) is broken into three broad categories: (1) consent through "fraud," meaning a person *can* consent and *gave* consent, but consent was wrongfully derived (theories enumerated under Article 120(b)(1)); (2) "withholding" consent, i.e., consent was not *given* (theory enumerated as Article 120(b)(2)(A)); and (3) "incapable" of consenting, i.e., a person *cannot* consent (theories enumerated under Article 120(b)(3) *and* Article 120(b)(2)(B)). "Without consent" is the only theory of liability in the "withholding" consent category because a sleeping, unconscious or otherwise unaware person cannot consent—they are incapable of consenting. Under this understanding of the statute, Article 120(b) is grouped wrong—Article 120(b)(2)(A) should be its own category while Article 120(b)(2)(B) concerning when a person is "asleep, unconscious, or otherwise unaware" should be incorporated under Article 120(b)(3).

Considering Article 120(b)(2)(B) as a part of the "incapable" theories is consistent with this Court's interpretation of "competent person," as derived in *United States v. Pease*, 75 M.J. 180, 184-86 (C.A.A.F. 2016). In that case, this Court

validated defining "competent person" through the "incapable" of consent theories, including "sleep, unconscious, or otherwise unaware." *Id*. at 184-85.

Thinking about Article 120(b) as three categories with distinct enumerated theories of liability mirrors several state statutes currently in effect. *E.g.*, ALASKA STAT. §§ 11.41.410, 11.41.420; IND. CODE ANN. § 35-42-4-1; ME. REV. STAT. ANN. tit. 17-A, § 253; MD. CRIM. LAW CODE ANN. § 3-301.1 (effective Oct. 2024); N.H. REV. STAT. ANN. § 632-A:2; N.J. STAT. ANN. § 2C:14-2; S.D. CODIFIED LAWS § 22-22-1; TENN. CODE ANN. § 39-13-503; VT. STAT. ANN. tit. 13, § 3252. Although, most state statutes currently in effect do not have an independent "withholding" consent category; instead, "without consent" is either (1) the only category, (2) a header to all or some categories, or (3) just embedded as part of other independent theories. *E.g.*, CAL. PEN. CODE §§ 261, 289; CONN. GEN. STAT. ANN. §§ 53a-70, 53a-71; D.C. CODE §§ 22-3002, 3003; KAN. STAT. ANN. § 21-5503; N.D. CENT. CODE ANN. §§ 12.1-20-03, 12.1-20-04; R.I. GEN. LAWS § 11-37-2; VA. CODE ANN. § 18.2-61.

Conceptualizing the statute this way reveals, Article 120(b) has three categories of liability that, on their face, are not "redundant" or "overlapping." *Contra.* Ans. at 23, 32-33. They are distinct, and intentionally so. That there are three distinct categories ("fraud," "withholding consent," and "incapable") highlights how Article 120(b)(2)(A) is unconstitutional because (1) facially, the statute does not provide an accused notice of the charging theory, and (2) as applied, it did not provide

A1C Casillas notice of the charging theory. The Government can switch theories mid-trial based on the statute's definition of consent, which allows the Government to circumvent knowledge elements in other theories of liability that would otherwise negate criminality.

C. The definition of consent removes the distinction between the theories of liability, allowing the Government to change theories in the middle of prosecuting a case.

The definition of consent in Article 120(g)(7) demonstrates that Article 120(b)(2)(A) acts as a catch-all that does not put the accused on notice of the theory of liability the Government is pursuing and allows circumvention of certain defenses in other theories of liability, thereby lowering the Government's burden of proof. *See In re Winship*, 397 U.S. 358, 364 (1970) ("[T]he 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."). Almost every part of the definition of consent allows the Government to glide between theories of liability.

1. *"The term consent means a freely given agreement to the conduct at issue by a competent person."*

Article 120(g)(7)'s inclusion of "competent person" puts "incapable of consenting" at issue in every "without consent" case. *See Pease*, 75 M.J. at 184-85 (C.A.A.F. 2016) (using the "incapable" theories to define competent). While this definition for consent is like a few other jurisdictions, "competency" is not

incorporated in those. *E.g.*, ALASKA STAT. § 11.41.445(c); ME. REV. STAT. ANN. tit. 17-A, § 251(E-1); S.D. CODIFIED LAWS § 22-22-1.5; VT. STAT. ANN. tit. 13, § 3251(3). In those states, "competency" sexual assault cases are separate theories of liability from "withholding" consent cases. ALASKA STAT. §§ 11.41.410, 11.41.40; ME. REV. STAT. ANN. tit. 17-A, § 253; S.D. CODIFIED LAWS § 22-22-1; VT. STAT. ANN. tit. 13, § 3252. Even if no other part of Article 120(g)(7) was provided to define consent, this one sentence always allows the Government to switch theories at any time.

While not pertinent for the facial challenge, it is helpful to see how this played out in in A1C Casillas's case. A panel member asked what the definition of competent and incompetent was, and the military judge read Article 120(g)(8), the definition for incapable of consenting, citing *Pease* as justification. JA at 522. By charging "without consent," any "incapable" theory is invoked without all the protections Congress afforded, particularly *knowledge* of the state of incapability (i.e., sleep or intoxicated to the point of physical incapability). Article 120(b)(3)(A), UCMJ; *see also Pease*, 75 M.J. at 182 ("[I]n order to find Appellee guilty, they had to be convinced . . . [the victims] were 'incapable of consenting to' the sexual activity 'due to impairment by an intoxicant, and that the condition was known or reasonably should have been known by' Appellee.").

2. *"An expression of lack of consent through words or conduct means there is not consent. Lack of verbal or physical resistance does not constitute consent."*

This section of the definition does not trigger any concerns for a "withholding

consent" theory. It does not conflate or unconstitutionally incorporate any other theory of liability. It is also seen in other jurisdictions. *E.g.*, ALASKA STAT. § 11.41.445(c).

3. *"Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent."*

This definition is troubling. "Submission resulting from the use of force" is not an element of sexual assault; it is an element of rape. Article 120(a)(1), UCMJ. Perhaps because consent, or mistake of fact as to consent, is a defense to rape, "submission" derived from force is included in the definition. Article 120(f), UCMJ; R.C.M. 916(j); *see also United States v. McDonald*, 78 M.J. 376, 380 (C.A.A.F. 2019) (finding rape and sexual assault are general intent crimes, "with the ability to raise a mistake of fact defense"). However, "use of force" is not relevant to sexual assault "without consent." The fact that an element of rape is incorporated into the definition of consent suggests rape by use of force, specifically "the use of such physical strength . . . as is sufficient to overcome, restrain, or injure a person" is the same as "without consent" in Article 120(b)(2)(A). *See infra* Section I.E (discussing this further to rebut the Government's "conscious, sober" person hypothetical). When the Government can increase the severity of the crime by eliciting the elements of rape without charging rape, "without consent" does not put an accused on notice of the theory of liability.

This is best demonstrated by how a "normal" rape-liability case would be

charged. Instead of charging a rape theory under Article 120(a) and putting the accused on notice of a lesser included offense through the charging language (like Article 120(b)(2)(A), without consent through force), the Government can avoid specifying the type of force used through simply charging Article 120(b)(2)(A). "Unlawful force" is equivalent to "without consent," just as "sleep" or "impairment by intoxicant," are too. The definition allows the Government to charge a "rape" case as sexual assault, making a "typical" rape case easier to prove and dodging otherwise required specificity as to the force used. For a "non-typical" rape case, the definition allows the Government to aggravate the crime without putting the accused on notice the Government will be eliciting, proving, and arguing about unlawful force.

Next, "threat of force, or placing another person in fear" is a theory of liability captured in the "fraud" theories. This definition is logically irrelevant for a "withholding" consent case and operates to circumvent elements. First, "fraud" theories are about *giving* consent, just under unlawful or false inducement. Under a "withholding" consent theory, this definition becomes nonsensical; the whole point is the victim *withheld* consent, not that it was *given* under coercive conditions. Second, this portion of the definition invokes the distinct theory of liability concerning "fraud" by fear, Article 120(b)(1)(A). By using Article 120(b)(2)(A) instead of the more specific theory, the "wrongful act" element is eliminated, i.e., the accused's communication or action sufficient to cause reasonable fear. Under Article

120(b)(A)(2), that element would be eliminated by the victim's testimony about being afraid, regardless of the communication or act by the accused.

4. *"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."*

This section of the definition does not trigger any concerns for a "withholding consent" theory. It does not conflate or unconstitutionally incorporate any other theory of liability. It is also seen in other jurisdictions. *E.g.*, ALASKA STAT. § 11.41.445(c).

5. *"A sleeping, unconscious, or incompetent person cannot consent."*

This part of the consent definition for Article 120(b)(2)(A) clearly does not fit. This is a reference to the "incapable" theories, not the "withholding" consent theory. Again, though, because of the definitions employed, this means in any Article 120(b)(2)(A) case, the Government can switch its theory to one of competency without notice and lower its burden of proof. *See infra* at Section II (showing how this happened in A1C Casillas's case for the as-applied challenge).

6. *"A person cannot consent to force causing or likely to cause death or grievous bodily harm or to being rendered unconscious."*

This is another definition related to rape. Article 120(a)(2), UCMJ. It is irrelevant for the elements and definitions of sexual assault. Nevertheless, the Government could use this to switch theories or lower its burden. Take, for example, a case with bondage, or dominant and submissive partners, where the victim and

accused routinely engage in forceful (but otherwise consensual) sex. Using the "without consent" theory for this kind of fact pattern eliminates the defense of consent, or mistake of fact as to consent, available under R.C.M. 916(j)(1) and Article 120(f) because, according to the statute, "a person cannot consent to force . . . likely to cause . . . grievous bodily harm or to being rendered unconscious." Article 120(g)(7)(B), UCMJ.

This means that this definition stands in direct conflict with Article 120(f) and *United States v. McDonald*, which permit mistake of fact as to consent to be raised. 78 M.J. at 380. As when the "incapable" theories are incorporated into Article 120(b)(2)(A) and eliminate the knowledge element and associated mistake of fact defense or voluntary intoxication defense, this definition for consent for Article 120(b)(2)(A) also permits circumvention of an otherwise available defense: mistake of fact as to consent. Once again, this lowers the Government's burden by ensuring it does not have to prove consent or disprove an affirmative defense—something the defense cannot even raise under this theory. *Contra.* Ans. at 29-30 (arguing the affirmative defense of mistake of fact can still be raised).

7. *"A person cannot consent while under threat or in fear or under the circumstances described in subparagraph (B) or (C) of subsection (b)(1)."*

This section is about the "fraud" theories of sexual assault. However, by virtue of how it is written, the definition eliminates the "fraud" category by saying consent is not possible, ever, under these conditions. That is illogical; the "fraud" theories

center on how the accused induced consent, meaning the "fraud" theories require a victim to *give* consent, rather than *withhold* it or be *incapable* of giving it.

Aside from being illogical, no reasonable prosecutor would charge the "fraud" theories when those offenses are incorporated into the definition of consent under Article 120(b)(A)(2). This definition allows the Government to switch theories at its discretion and circumvent proving the accused's actions, lowering the Government's burden. *See supra* Section I.C.3 (discussing the fear definition).

8. *All the surrounding circumstances are to be considered in determining whether a person gave consent.*

On its face, there is nothing wrong with this final definition for consent. But the plain language is about whether a person *gave* consent. As discussed, *giving* consent is only possible in the "fraud" and "withholding" theories. It is not relevant to the incapable theories because a person is *incapable* of *giving* consent under those conditions. However, by providing this definition in a "withholding" consent case, the Government is able to argue all the theories whenever they choose.

In A1C Casillas's case, the military judge used this part of the definition to justify denying the defense limiting instruction, noting whether S.F. was intoxicated or asleep is a "surrounding circumstance." JA at 71. The Government agrees and adopts that position on appeal. Ans. at 28-29, 37. However, if that is true, then the Government can introduce new theories through this "catch-all" definition, and the accused does not have fair notice of which theory the Government is pursuing. This

is true even when a sleeping person cannot *give* consent. Perhaps this is why on appeal the Government interestingly argues S.F. did not give consent after she woke up when sexual intercourse was already happening, to avoid this problem of her being unable to "give" consent while sleeping. Ans. at 42. But this is yet another theory of liability—not argued at trial—that A1C Casillas was not on notice to defend against, especially when S.F. testified that he was "taking [his penis] out" when she woke up. JA at 115. Effectively, on appeal, the Government is arguing that it charged one second of sex where S.F. withheld consent after waking. Ultimately, this final "catch-all" definition continues to show how the Government can change its theory at any time, depriving an accused of fair notice.

D. The plain language of Article 120 reveals Article 120(b)(2)(A) violates the canon against surplusage by consuming every other theory of liability.

The canon against surplusage makes it clear that Article 120(b)(2)(A) is not supposed to render every other theory meaningless or remove elements from other theories. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012). Rather, every word is to be given effect. *Id*. As such, by explicitly enumerating different theories of liability, like the "fraud" and "incapable" theories, Congress intended those theories, when pursued, to have additional or different elements for a reason. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

However, by virtue of the definition of consent, Article 120(b)(2)(A) renders all other theories superfluous and eliminates their various elements and associated defenses. This lowers the Government's burden and contravenes the plain language of what Congress has otherwise provided. *See In re Winship*, 397 U.S. at 364; *Morissette v. United States*, 342 U.S. 246, 275 (1952) (discussing how a presumption about an element is unconstitutional when it allows the factfinder to assume intent where it would be illogical to do so, like when someone is too drunk to know someone else is asleep). To put the accused on notice of the charge against him, the Government must do its due diligence and charge the crime fit to the circumstances; that is how to comport with due process and avoid rendering the "fraud" and "incapable" theories into surplusage.[2]

Furthermore, this is not a situation where Article 120(b)(2)(A) is a "single count in an indictment alleg[ing] the defendant committed the offense by one or more specified means." Ans. at 25 (citing Fed. R. Crim. Pro. 7(c)(1)). No "means" are specified other than "withholding" consent. As when this Court analyzed Article 134, UCMJ, simply charging Article 134 without specifying which clause—service discrediting or violation of good order and discipline—does not satisfy fair notice due

[2] While there is no limiting prosecutorial principle directing the Government to charge the specific theory versus the general theory, Constitutional due process directs such action. *See* U.S. Const. amend. VI (protecting an accused's right to be "informed of the nature and cause of the accusation"); *Dunn*, 442 U.S. at 106 (recognizing an accused has a right to be heard on the *specific* charge).

process requirements. *United States v. Medina*, 66 M.J. 21, 27 (C.A.A.F. 2008); *United States v. Miller*, 67 M.J. 385, 389 (C.A.A.F. 2009).

The same is true here. Charging "without consent" does not (1) incorporate all the other charging theories specifically enumerated *with different elements* nor (2) create a theory of liability that is a *greater offense* for all other theories. All the other theories are not lesser-included offenses of Article 120(b)(2)(A) as written. *See United States v. Armstrong*, 77 M.J. 465, 469-470 (C.A.A.F. 2018) (discussing the elements test); *see also United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010) (holding under previous versions of the UCMJ, sexual assault by bodily harm could be a lesser included of rape by force). Otherwise, Article 120(b)(2)(A) would render all the other theories of liability redundant surplusage in a way that was not intended by Congress by virtue of their different elements.

E. <u>There is no set of circumstances where "without consent" operates to put the accused on notice.</u>

The Government offers the scenario where a "conscious, sober victim said 'no'" to propose a circumstance where the statute would put an accused on notice of the nature of the charge. Ans. at 26. This hypothetical does not save the "without consent" theory. There is not a circumstance where a conscious, sober adult says no and "force," "physical strength as is sufficient to overcome" or "injure" a person, is not applied to effectuate a sexual act. Article 120(a)(1), (g)(4), UCMJ. This means while the Government could charge sexual assault without consent, it can pivot at any

time to aggravate the crime to prove rape by force (Article 120(a)(1)) because "it is the *statute*—not the charge sheet—that sets forth the law." Ans. at 37.

As noted earlier, this is because the definition makes it easier to prove a fact pattern that should be charged under rape (Article 120(a)), without, in fact, charging rape or putting an accused on notice of any lesser included offenses. *See supra* Sections I.C.3, I.C.6. The Government does not have to wed itself to a particular enumerated theory about force, but instead can argue any type of force elicited from the victim to prove a "withholding" consent case, even though in doing so, it has proven rape by the statute's definition. Charging "without consent" allows the Government to prove and then argue rape, a different and aggravating crime, because that is how the statute is defined.

This tactic is comparable to the effects of variance. *United States v. Teffeau*, 58 M.J. 62, 66 (C.A.A.F. 2003) (discussing how variance is corrected by exceptions and substitutions but cannot "substantially change the nature of the offense or to increase the seriousness of the offense or the maximum punishment for it"). Variance concerns misleading an accused such that he is unable to prepare for trial. *United States v. Allen*, 50 M.J. 84, 86 (C.A.A.F. 1999). Article 120(b)(2)(A) operates in the same way by telling the accused he must be prepared for any theory because (g)(7) lets the Government change theories mid-trial to suit the evidence. This convenient strategy violates the due process clause.

Understandably, the Government likes how Article 120(b)(2)(A) and (g)(7) operate this way. After all, it is much easier to charge and convict an accused in this manner; the Government can match the victim's testimony on the fly and eliminate otherwise troublesome elements as the evidence allows. *See generally United States v. Richard*, 82 M.J. 473, 2022 CAAF LEXIS 637, *15-16 (C.A.A.F. 2022) (hinting the prosecution elects to charge Article 134, UCMJ, cases as "service discrediting" because it is easier to prove). Thus, as defined by Congress, Article 120(b)(2)(A) is unconstitutional because it fails to provide notice of the theory the accused has to defend against.

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

II. As applied to A1C Casillas, Article 120(b)(2)(A) is unconstitutional because it did not provide him fair notice.

For the as-applied challenge, all the same concerns from Section I, *supra*, are present. The statute allows the Government to change theories mid-trial by charging the "catch-all," "without consent" provision. This challenge is not about the instructions, *per se*; it is about how the Government manipulated an overly broad statute to ensure a conviction for a different theory of liability, with different elements, than what was charged. *Contra.* Ans. at 37-40 (discussing the military judge's instructions under the statute rather than the statute itself and notice of the theories of liability therein).

In A1C Casillas's case, the trial defense counsel considered this an alcohol case, where S.F. was blacked out but was capable of consenting. JA at 99. Trial defense counsel *had* to consider the case this way because knowledge was not an element to be proven; instead, only indicators of consent. JA at 458-59. The initial request for an instruction and discussion reveals that. JA at 70. The defense wanted S.F.'s capacity to consent off the table for consideration. But the military judge denied the defense instruction about incapacity because Article 120(g)(7) contradicts it for a "withholding" consent case. JA at 71-72. Thereafter, the military judge failed to excise the portions of (g)(7) that were not relevant for a "withholding" case because Article 120(b)(2)(A) coupled with (g)(7) requires the issue of competency to always be present, without the protection Congress otherwise afforded in the other theories of liability. *See United States v. Medina,* 69 M.J. 462, 465 (C.A.A.F. 2011) (holding it was error for the military judge to provide an instruction inconsistent with the statute, even if the military judge affirmatively severed a portion of the statute on constitutional grounds); *United States v. Prather,* 69 M.J. 338, 344 n.8 (C.A.A.F. 2011) ("The statutory scheme at issue in this case places military judges in an impossible position. . . . [T]o provide an instruction that accurately informed the panel . . . the military judge would have to ignore the plain language of Article 120, UCMJ.").

Upon providing these instructions required by the statute, the

unconstitutionality of Article 120(b)(2)(A) is evidenced by the Government's ability to pursue whatever theory is most likely to produce a conviction, without proper notice. When S.F. testified, she disclaimed memory issues, said she never provided consent before she fell asleep, and "woke up" to the sexual act occurring. JA 111-16, 175, 194-95. This case instantly transformed into an "incapable" via sleep case, despite S.F. and her friends accusing A1C Casillas's of having sex with S.F. when she was too drunk to consent. JA at 130, 138, 140, 347, 349-350, 363.

But the Government, at trial and on appeal, can argue this case was never about alcohol, but about sleeping. JA at 481-83; Ans. at 38-39, 41, 45. This was, and is, convenient, considering only A1C Casillas's statements on the recordings could be used as evidence.[3] For example, the statement about how he had to "wake her ass up" was without context, but it was heavily leveraged by the Government after S.F. made it clear this case was not about alcohol, but about her falling asleep. JA at 112-15, 270, 273-74, 481-82. This is in contrast with what other witnesses thought at the time on the recordings: that S.F. was too drunk. *See, e.g.*, JA at 349-50 ("But you knew she was too drunk to doing [sic] anything, Casillas."). There was no notice as to what

[3] The Government, on appeal, uses S.F.'s and other individual's statements on these recordings to bolster S.F. and the idea the defense should have been aware this was a sleep case. Ans. at 3-4, 10, 25-26, 38. But none of the statements on the recordings make any theory clearer when S.F. appears to conflate being "passed out" with being too drunk. JA at 132, 138 140. Ultimately, it does not matter. Under Article 120(b)(2)(A), the Government can pick and choose its theory as the evidence comes out at trial, as it did here.

theory the Government would pursue until it was too late to defend against.

As a result of that uncharged switch in theory sanctioned by Article 120(g)(7), A1C Casillas does not now, and did not then, get to defend himself with the mens rea Congress provided him for an incapable of consenting case—that he *knew or reasonably should have known when he was intoxicated* that S.F. was asleep. R.C.M. 916(j), (l)(2); *compare* Article 120(b)(2)(A), UCMJ, *with* Article 120(b)(2)(B), UCMJ. That element and defense were circumvented by the Government charging "without consent." All trial defense counsel could argue was the general intent mistake of fact as to consent, which could not take into consideration A1C Casillas's level of intoxication. R.C.M. 916(l)(2). While the Government could argue any theory, trial defense counsel's theory could not adjust; it remained about alcohol—S.F. came out of an alcohol blackout during sex—and had to because A1C Casillas had disclaimed S.F. was asleep during what he thought was consensual sex. JA at 488-89.

It is unclear whether A1C Casillas was convicted because the panel believed S.F. was asleep, intoxicated, or simply withheld consent. Presumably, had the Government done its due diligence, it would have been clear from the beginning this was a sleep case, and the Government would have charged it as such. But based on the statute, such specificity—or diligence—was not required. Neither discovery notices nor bills of particular solve this problem. Article 120(b)(2)(A) in conjunction

with (g)(7) would still permit switching to any theory of liability while excluding otherwise enumerated elements for those theories.

"There are simply no instructions that could guide members through this quagmire, save an instruction that disregards [several] provision[s]." *Prather*, 69 M.J. at 345. In a case like this, military judges should limit evidence and argument to what it means to *give* consent, not whether a person *can* give consent. Arguments about sleeping or being too intoxicated to be mentally capable are simply not relevant to this charging scheme. Competency is not an issue in this charging scheme. In cases like A1C Casillas's, the instructions should be as such:

> The term "consent" means a freely given agreement to the conduct at issue. 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. 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. All the surrounding circumstances are to be considered in determining whether a person gave consent.

That is it. However, this is not the statute, and military judges would have to ignore the language Congress provided to comply with due process. This would be error, as the Government highlights. Ans. at 38-39; *see also Medina*, 69 M.J. at 465 ("[I]n the absence of a legally sufficient explanation, it was error for the military judge to provide an instruction inconsistent with the statute.").

To avoid this instructional error from repeatedly arising, this Court would have to rewrite the definition of consent because "competent" is in the first sentence of the

definition. This Court has been unwilling to rewrite the law in the past and should not do so now. *Medina*, 69 M.J. at 465 n.5 (citing *United States v. Stevens*, 559 U.S. 460 (2010)); see *also Prather*, 69 M.J. at 343 (finding a portion of an earlier version of Article 120 unconstitutional). Therefore, the unconstitutional consequences of the interplay between Article 120(b)(2)(A) and (g)(7) dictate finding that Article 120(b)(2)(A) is unconstitutional on its face, rather than support merely excising portions of the definition Congress included. *But see generally United States v. Booker*, 543 U.S. 220 (2005) (explaining when severance and excision are necessary and how to effectuate such principles). Ultimately, fixing this "quagmire" is Congress's purview, not this Court's responsibility. Either way, if this Court elects to modify the statute, it should find Article 120(b)(2)(A) unconstitutional as applied to A1C Casillas because the Government did not provide fair notice of its theory of liability when it charged "without consent."

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

III. The military judge erred when he denied the defense challenge for cause against A.G.

While the issue presented includes an actual bias challenge, the focus of A1C Casillas's argument is on implied bias. A.G. stated he could follow the military judge's instructions and he would yield to them. JA at 53-54. However, under a totality of the circumstances, A.G.'s presence on the panel raised the risk that an

outside observer would believe A1C Casillas did not receive a fair and impartial panel.

A. Even if there is no actual bias, implied bias can and should be found where warranted.

The Government's argument that this Court should be "reluctant" to find implied bias is a misunderstanding of implied bias challenges in the military justice system. Ans. at 53. Unlike the civilian sector where peremptory challenges exist to a greater extent, the defense in the military justice system receive one. *Compare* Fed. R. Crim. Pro. 24(b), *with* R.C.M. 912(g)(1). In such a system, where the Government picks the venire and unanimous verdicts are not required, the liberal grant mandate serves to protect the accused. *United States v. Peters*, 74 M.J. 31, 34 (C.A.A.F. 2015). The law quoted by the Government "is not a reflection of a legal doctrine expressing judicial reticence or disdain for the finding of implied bias. Instead . . . where there is no finding of actual bias, implied bias must be independently established." *United States v. Clay*, 64 M.J. 274, 277 (C.A.A.F. 2007). This Court has "not hesitated to find implied bias where warranted." *Id.* (citing *United States v. Leonard*, 63 M.J. 398, 403 (C.A.A.F. 2006); *United States v. Wiesen*, 56 M.J. 172, 177 (C.A.A.F. 2001)); *e.g.*, *United States v. Keago*, 84 M.J 367, 2024 CAAF LEXIS 256, at *18 (C.A.A.F. 2024).

B. This is a close case where A.G. should have been excused for implied bias given the liberal grant mandate.

It is important to reiterate that while the military judge receives some deference under the current standard for implied bias, this Court does not rely wholly on the military judge. *Keago*, 2024 CAAF LEXIS 256, at *11-12 (citing *United States v. Rogers*, 75 M.J. 270, 275 (C.A.A.F. 2016)). This Court can consider the audio of A.G.'s responses to hear A.G.'s hesitancy and compare it with the military judge's reasoning to find the military judge erroneously concluded this was not a close call. Additionally, when compared to the challenged members in *United States v. Terry*, A.G. is more similar to Capt A, whom should have been struck for implied bias, than Maj H, whom was properly on the panel. 64 M.J. 295, 304-05 (C.A.A.F. 2007). *Contra.* Ans. at 53-55.

In listening to A.G., the tone of A.G.'s voice changed as the topic turns to his wife, becoming quiet and reticent. JA at 716, Video and Audio (Disc), A.G. Voir Dire Audio Clip, at 00:29 – 00:48 [hereinafter A.G. Voir Dire Audio]. Far from being concerned about his wife's reputation, like Maj H in *Terry*, A.G. seemed more emotionally concerned, like Capt A in *Terry*. 64 M.J. at 304-05. He also cut the military judge off during his question about whether the rape was a physical, forceful event. A.G. Voir Dire Audio at 1:29-1:33; JA at 50. His tone strongly suggested an emotional involvement with his wife's rape and that he was aware of details that neither the military judge nor counsel attempted to clarify. This is particularly

concerning where A.G. acknowledged that alcohol was involved in the rape, making his wife's situation very similar to A1C Casillas's case. JA at 51.

After explaining how he was personally affected by his wife's rape through "trying to understand" what she went through, the military judge asked a yes or no question: "Do you think that knowledge of what your wife went through, your knowledge of that matter might impact your ability to be a fair and impartial panel member in a case that involves an allegation of sexual assault?" JA at 52. After a seven second pause, instead of saying no, A.G. replied, "I think I can be impartial." A.G. Voir Dire Audio at 5:16 – 5:23.

This is hardly the unequivocal summary the military judge provided: "He indicated . . . his knowledge of his wife's situation would not impact the . . . findings determinations;" "it would not impact him." JA at 61. For actual bias, A.G. indicated that he could yield to the instructions, much like Capt A in *Terry* who also unequivocally agreed that his personal experience would not affect his impartiality. *Compare Terry*, 64 M.J. at 301, *with* JA at 53-54. However, for an implied bias determination, A.G. never made the strong statement the military judge believed occurred. Rather, each of his answers about being fair and impartial in findings were preceded by "I think." JA at 52-53. These feeble answers risked the public would perceive that A1C Casillas received something less than a court composed of fair, impartial members. This shows, at a minimum, a close case of implied bias.

The Government heavily relies on *Terry* to argue the opposite, but A.G. gave just as concerning responses as Capt A. Both A.G. and Capt A were "familiar with the details of the rape. [They were] aware of exactly when the crime occurred, the circumstances of who assaulted her, and how the rapist had managed to gain access to her." *Terry*, 64 M.J. at 304; JA 50-51. While Capt A knew of specific aggravating circumstances, *he offered* those to the court, whereas A.G. gave short yes or no answers and only elaborated when requested. *Compare Terry*, 64 M.J. at 300, *with* JA at 50-51. In *Terry*, when Maj H and Capt A were asked how these situations affected them or the victims they knew, they were clear in their responses: Maj H said the victim had reconciled and that the incident did not impact her, and Capt A described his anger and how the victim felt. *Terry*, 64 M.J. at 299-301. A.G. made no such clear or unequivocal statements when describing the impact the rape had on him and his wife. JA at 50-52.

Here, the military judge stopped short of cleansing the problematic responses by jumping to predictable leading questions. JA at 53. He also seemed to acknowledge that the problematic responses were predictable. JA at 61 (referring to the responses as "what I'd imagine any of our responses would be" and "not an unnatural human reaction"). Pieces of his analysis are absolute, whereas A.G.'s responses are not. To explain why he "thought" he could be impartial, A.G. made statements about "liv[ing] with it for a long time and I think we've processed it." JA

at 52. His use of the word "we" indicated a personal effect on him, despite what he said previously. In this way, his answers were inconsistent. Coupled with his demeanor and tone, A.G. objectively appeared to be personally affected by what happened to his wife such that a member of the public would be concerned A1C Casillas failed to receive a fair trial.

Considering A.G.'s problematic and inconsistent responses, his tone, and his equivocal statements, this was a close call. The military judge erred in not applying the liberal grant mandate to excuse A.G.

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

CONCLUSION

A1C Casillas's case highlights the fair notice problem within Article 120(b)(2)(A): any theory of liability can be argued despite only one "catch-all" theory being charged. The ability to pursue any theory by only charging "without consent" circumvents elements, eliminates defenses, and contravenes the military justice system's emphasis on fair play. As the Government helpfully points out, this is because of how Article 120(b)(2)(A) is written. The only way to cure this unconstitutional dynamic is to find pieces of the statute unconstitutional, either facially or as applied. Even if this Court finds for A1C Casillas on the panel member issue, it should not avoid the constitutional question because, in any retrial, the

Government can repeat this unconstitutional tactic. JA 557-715. Ultimately, A1C Casillas's conviction should be set aside along with his sentence.

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Government Trial and Appellate Operations Division on September 16, 2024.

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CERTIFICATE OF COMPLIANCE WITH RULES 24(b) AND 37

1. This brief complies with the type-volume limitation of Rule 24(b) because it contains 6,969 words.

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

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