IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	
Appellee,	)	SUPPLEMENTAL BRIEF ON
	)	BEHALF OF THE UNITED STATES
v.	)	
	)	Crim. App. Dkt. No. 40302
	)	
Airman First Class (E-3)	)	USCA Dkt. No. 24-0089/AF
NIKOLAS S. CASILLAS	)	
United States Air Force	)	9 December 2024
Appellant.	)	

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

ISSUES PRESENTED

I.

WHETHER ARTICLE 120(b)(2) AND (g)(7), UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. §§ 920(b)(2) AND (g)(7), ARE UNCONSTITUTIONALLY VAGUE.

II.

AS APPLIED, WHETHER ARTICLE 120(b)(2) AND (g)(7), UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. §§ 920(b)(2) AND (g)(7), GAVE APPELLANT CONSTITUTIONAL FAIR NOTICE WHEN THE MILITARY JUDGE DENIED DEFENSE COUNSEL'S REQUEST FOR A TAILORED JURY INSTRUCTION.

III.

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

INTRODUCTION

This case—neither the first nor last of its kind—features an accused perpetrating a sexual assault on a victim who was both capable and incapable of consenting at different points during the same sexual act.

The statutory scheme designed by Congress accounts for such hybrid scenarios. The comprehensive definition of "consent" applicable to Article 120(b)(2)(A), UCMJ—which criminalizes the performance of a sexual act upon another person without their consent—contemplates the possibility of fact-patterns like this case, where the victim (1) did not consent to sexual activity prior to falling asleep, (2) could not consent when the sexual act began since she was asleep, and (3) again did not consent upon awakening as the sexual act was ongoing.

Appellant's case is a textbook example of why this Court's decision in United States v. Mendoza, No. 23-0210, 2024 CAAF LEXIS 590 (C.A.A.F. Oct. 7, 2024), should be limited to its facts. Absent an inclusive interpretation of "without consent," enabling the factfinder to evaluate the entire scope of the accused's conduct would require the United States to charge him with multiple violations of Article 120, UCMJ, for a single hybrid incident. Thus, Congress created the

"without consent" offense, which provides notice to a servicemember that he cannot perpetrate a sexual act without consent and that he cannot gain consent in certain circumstances—such as when a person is sleeping, unconscious, placed in fear, etc.

Considering the above, this Court should find that Article 120(b)(2)(A) and (g)(7) are not unconstitutionally vague either facially or as applied, and that Appellant's conviction for sexual assault without consent is legally sufficient.

STATEMENT OF STATUTORY JURISDICTION

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

STATEMENT OF THE CASE

On 18 March 2022, a general court-martial convicted Appellant, contrary to his plea, of one specification of sexual assault in violation of Article 120, UCMJ. (JA at 18.) The military judge sentenced Appellant to reduction in grade to E-1, total forfeiture of his pay and allowances, confinement for two years, and a dishonorable discharge. (Id.) The convening authority took no action on the findings and sentence. (Id.) On 15 December 2023, the AFCCA affirmed the findings and sentence. (JA at 1.) Subsequently, this Court granted review and ordered briefs on four issues, which Appellant and the United States filed on 22

July 2024 and 21 August 2024, respectively. (*See* App. Br., Ans. Br.) On 29 October 2024, after deciding United States v. Mendoza, No. 23-0210, 2024 CAAF LEXIS 590 (C.A.A.F. Oct. 7, 2024), this Court ordered supplemental briefing regarding the effect of its decision in Mendoza on Issues I, II, and III.

STATEMENT OF THE FACTS[1]

S.F. Goes to Sleep Without Agreeing to Sexual Activity

In July 2020, S.F. hosted a party at her apartment, which Appellant attended at the invitation of SrA H.C., one of S.F.'s friends. (JA at 109, 137.) Over the course of the night, S.F. and Appellant had conversations "here and there," and even shared a kiss. (JA at 111.) But as the party wound down and S.F. prepared to go to sleep, she decided that she did not want Appellant to stay the night. (JA at 173, 322, 349.) At some point after changing and laying down in bed, S.F. spoke to SrA H.C.—who had left earlier—via phone and informed her that she did not want Appellant to stay at her apartment. (JA at 112-14, 178, 321-22, 349.) At the time of the phone call, Appellant was next to S.F. (JA at 178, 349.)

Based on this phone call, SrA H.C. returned to S.F.'s apartment to pick Appellant up. (JA at 179, 324.) By the time she arrived, S.F. was "half asleep" in her bed. (JA at 179, 324.) After a "mumbled conversation" with SrA H.C., S.F.

[1] The United States incorporates its statement of facts from its original brief.

agreed Appellant could stay because she did not want anyone to "drink and drive." (JA at 175, 179, 324.) S.F., who "woke up for a minute" after this interaction, then watched TV for several minutes before eventually falling asleep. (JA at 175-76, 335.) Prior to falling asleep, S.F. never told Appellant that she was willing to engage in sexual activity:

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

(JA at 114.)

As S.F. drifted off in the other room, SrA H.C. told Appellant to go home. (JA at 325, 335, 363.) Appellant refused and insisted on staying. (Id.) SrA H.C. warned Appellant: "[S.F.] is drunk do not try and make a move on her." (JA at 363.) Appellant promised SrA H.C. that he "[was] not going to try anything unless [S.F.] wanted to." (JA at 349.) After twenty minutes of unsuccessfully trying to

convince Appellant to leave, SrA H.C. left S.F.'s apartment. (JA at 348-49, 353.) By this time, S.F. was asleep. (JA at 335.)

S.F. Awakes to Vaginal Penetration

Later that night, S.F. awoke to Appellant penetrating her vagina with his penis. (JA at 115-16.) Shocked and unsure of what to do, she froze and "just laid there" without saying anything or doing anything to reciprocate. (JA at 115.) When S.F. later described this moment during her testimony, trial counsel asked, "Did you consent to this?" and S.F. responded: "No." (JA at 116.)

Eventually, Appellant stopped, pulled S.F.'s shorts back up, and went to the bathroom. (JA at 115-16.) Immediately after Appellant exited the bathroom, S.F. went inside, called a friend, and asked him to come "kick [Appellant] out of [her] apartment." (JA at 116-17.)

Appellant Acknowledges that S.F. Was Silent Upon Waking Up

Through S.F., the prosecution introduced a recording she had made of a phone conversation with Appellant in the hours after the sexual assault, during which she confronted him about the incident. (JA at 117, 129, 716.)

> I was literally like passed out and then I like woke up to that. And then I just kind like laid there because I didn't even understand like what the fuck to even do or what was going on because my fucking pants were down and your dick was inside me.

(JA at 128.)

During this conversation, Appellant admitted he was aware of the moment S.F. awoke and her subsequent silence: "I really thought you knew when you woke up because you didn't say anything about it." (JA at 137.)

In a subsequent conversation with SrA H.C.,[2] when asked how the sexual activity started, Appellant acknowledged that he pulled down S.F.'s pants, "started fingering," and eventually "ended up having sex with her." (JA at 350, 362.) Appellant claimed that S.F. was "just moaning" and that he thought S.F. was "up" as a result. (Id.) He did not say that he asked S.F. if he could have sex with her or that S.F. verbalized any type of agreement. (*See generally* JA at 127-145, 346-370.)

Both Counsel Argue About Consent in Closing

After the presentation of the evidence, the military judge instructed the members on the statutory elements of sexual assault without consent and that "mistake of fact is a complete defense to the charged offenses and must be considered by [them] in [their] evaluation of the evidence." (JA at 459.) The judge further instructed that "[t]he prosecution has the burden of proving beyond a reasonable doubt that the defense of mistake of fact did not exist." (JA at 460.)

---

[2] This conversation was recorded and introduced as a prosecution exhibit. (JA at 346-370.)

During closing argument, counsel for both the prosecution and defense focused on the issue of consent. (JA at 469-502.) In arguing the lack of consent, trial counsel emphasized that consent was "a freely given agreement," (JA at 474, 476), and highlighted S.F.'s testimony about never consenting:

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

(JA at 474.)

Then, to discredit Appellant's suggestion that he thought it was "okay" because S.F. "moved a little bit, just talk[ed] a little bit," trial counsel reminded the members that "lack of verbal or physical resistance does not constitute consent," and argued that "[t]alking a little bit, moving a little bit, is not consent." (JA at 476.) Trial counsel further discounted the possibility that Appellant had a reasonable mistake of fact as to consent by pointing out that Appellant did not seem mistaken, given that he admitted he "shouldn't have done what [he] did." (JA at 479.)

In response, trial defense counsel argued that S.F. had been blacked out—not asleep—and that she had, in fact, consented during this time. (JA at 489.) To make this argument, trial defense counsel highlighted perceived inconsistencies between S.F.'s testimony about being asleep and other witnesses' testimony that

suggested S.F. had been awake. (JA at 494.) Trial defense counsel then leaned on evidence that S.F. and Appellant kissed and flirted at some point during the party to argue that there was "actual consent." (JA at 496.) In arguing that there was "actual consent," trial defense counsel never argued that Appellant asked for consent to sex or that S.F. verbalized it. (*See generally* JA at 488-500.) Trial defense counsel also argued that, alternatively, Appellant had a reasonable mistake of fact as to consent, and cited the kissing, flirting, and S.F.'s moaning. (JA at 497.) The members subsequently convicted Appellant of the sexual assault without consent as charged. (JA at 537.)

The Air Force Court Affirms Appellant's Conviction

On appeal, the AFCCA found that Appellant's conviction for sexual assault without consent was legally and factually sufficient. (JA at 14.) In explaining its decision, the Court noted that "SF credibly testified that she woke to Appellant's penis inside her vagina, and that she did not consent to that sexual act," and that Appellant admitted the act occurred, but "did not claim that he got SF's consent." (Id.) Based on this evidence, the Court was personally convinced of Appellant's guilt beyond a reasonable doubt and opined that a rational factfinder would have been as well. (Id.)

This Court Decides United States v. Mendoza

On 7 October 2024, this Court decided the case of United States v. Mendoza, in which the appellant challenged the legal sufficiency of his conviction for sexual assault without consent on the grounds that the prosecution: (1) failed to introduce "affirmative" evidence of nonconsent; and (2) violated his due process rights by arguing that the victim was incapable of consenting due to alcohol intoxication, despite charging him under Article 120(b)(2)(A) (sexual assault without consent) and not Article 120(b)(3)(A) (sexual assault upon a person incapable of consenting). 2024 CAAF LEXIS 590, at *10-11.

Though the Court disagreed with the first argument and reiterated that the prosecution could meet its burden of proof with circumstantial evidence, it agreed with the second argument and held that Article 120(b)(2)(A) and Article 120(b)(3)(A) created separate theories of liability. Id. at *17-18. In so holding, the Court opined that the Government's interpretation of subsection (b)(2)(A)—under which every sexual assault upon a victim who is incapable of consenting would also qualify as a sexual assault without consent—would render subsection (b)(3)(A) "mere surplusage." Id. at *16. The Court expressed concern that interpreting subsection (b)(2)(A) and (b)(3)(A) as overlapping theories of liability "would allow the Government to circumvent the mens rea requirement that Congress specifically added to the offense of sexual assault of a victim who is

incapable of consenting." Id. at *16. Thus, the Court differentiated between the two subsections as follows:

> Subsection (b)(2)(A) criminalizes the performance of a sexual act upon a victim who *is capable of consenting but does not consent*. Subsection (b)(3)(A) criminalizes the performance of a sexual act upon a victim who is incapable of consenting to the sexual act due to impairment by any drug, intoxicant, or other similar substance when the victim's condition is known or reasonably should be known by the accused.

Id. at *17-18 (emphasis added).

The Court indicated that the Government could charge an accused with both offenses and allow the factfinder to decide whether the victim was capable or incapable of consenting, but could not "charge one offense under one factual theory and then argue a different offense and a different factual theory at trial" because such an approach "robs the defendant of his constitutional 'right to know what offense and under what legal theory he will be tried and convicted.'" Id. at *18 (citing United States v. Riggins, 75 M.J. 78, 83 (C.A.A.F. 2016)).

In remanding the case for a new review by the CCA, the Court noted (1) the prosecution's reliance on evidence of the victim's incapacity due to intoxication to prove the absence of consent, and (2) the lack of clarity regarding how this evidence factored into the decisions of the factfinder or the CCA. Id. at *20-21. While the Court recognized that "[n]othing in the article bars the Government from offering evidence of an alleged victim's intoxication to prove the absence of

consent," it emphasized that the Government could not prove the absence of consent "by *merely* establishing that the victim was too intoxicated to consent." Id. at *22.

SUMMARY OF THE ARGUMENT

Issue I – Facial Challenge

Facial challenges to statutes "'threaten to short circuit the democratic process' by preventing duly enacted laws from being implemented in constitutional ways." Moody v. NetChoice, LLC, 144 S. Ct. 2383, 2383 (2024). Appellant's claim that Article 120, UCMJ, is facially unconstitutional because it permits conviction on uncharged theories of liability is no exception, and this Court should decline to entertain it.

To start, Appellant's facial challenge fails because the different subsections of Article 120, UCMJ, are not as interchangeable at trial as he suggests—for most subsections, the absence of "consent" as an element eliminates the danger that a servicemember charged with sexual assault without consent will be convicted on a different uncharged theory, such as sexual assault by threat or upon someone who is asleep. *See* 10 U.S.C. § 920(b)(1), (b)(2)(B).

Rather than allowing the prosecution to switch theories at trial, the comprehensive definition of consent recognizes that statutes must be sufficiently broad to "adequately 'deal with untold and unforeseen variations in factual

situations,'" United States v. Rocha, 84 M.J. 346, 351 (C.A.A.F. 2024) (quoting Boyce Motor Lines, Inc, 342 U.S. at 340 (1952)), such as the hybrid fact pattern in Appellant's own case.

Indeed, these hybrid fact patterns are precisely why "the United States is free to prosecute under any applicable statute without regard to which statute is most specifically tailored to the facts alleged." United States v. Schaffner, 715 F.2d 1099, 1102 (6th Cir. 1983). Otherwise, it would have no choice but to charge an accused with two specifications of sexual assault under two separate theories of liability, when it could have charged just one.

Finally, to the extent subsections (b)(2)(A) and (g)(7) raised constitutional concerns, this Court, through Mendoza, proved that Article 120(b)(2)(A) can be "made constitutionally definite by a reasonable construction of the statute." United States v. Harriss, 347 U.S. 612, 618 (1954). Accordingly, Appellant's facial challenge fails, and he is unentitled to relief.

Issue II – As-Applied Challenge

Because "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness," Parker v. Levy, 417 U.S. 733, 756 (1974), Appellant's as-applied challenge fails. Article 120's prohibition on nonconsensual sex, in all its forms, clearly applies to Appellant's conduct, and any suggestion that

he did not know what theory of liability he needed to defend against lacks merit considering the below.

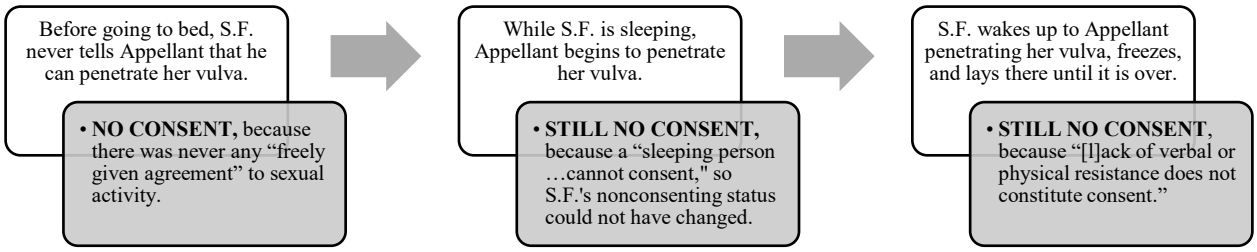
Here, the charged offense and underlying statute—Article 120(b)(2)(A)—unambiguously put Appellant on notice that he was accused of committing a sexual act upon S.F. without her consent. 10 U.S.C. § 920(b)(2)(A). The statutory definition of consent further informed him that because he could not gain consent while a person was sleeping, unconscious, or incompetent, he could not defend against the charge by claiming S.F. consented while she was asleep. 10 U.S.C. § 920(g)(7).

At trial, when the prosecution presented evidence that S.F. was asleep for part of the sexual act, Appellant countered by introducing expert testimony about alcohol-induced blackouts. (JA at 401-43.) Then, at the close of findings, the military judge instructed the factfinder that they had to find that the sexual act was perpetrated "without consent," beyond a reasonable doubt. During the closing arguments that followed, Appellant used the testimony about alcoholic blackout to argue that rather than being asleep, S.F. had been blacked out and had consented—thus demonstrating his awareness of the centrality of consent to his defense.

Viewed in light of the above, any suggestion that Appellant (a) did not know what theory of liability to defend against, or (b) was unprepared to defend against the principle that a sleeping person cannot consent rings hollow.

Issue III – Legal Sufficiency

Mendoza does not affect the legal sufficiency of Appellant's conviction because the case against him is supported by: (1) testimony that S.F. did not want Appellant to stay the night, but let him only for safety reasons; (2) S.F.'s uncontroverted testimony that she never gave Appellant permission to penetrate her, either before she went to sleep or after she woke up; (3) evidence that Appellant knew that he did not have S.F.'s consent as evidenced by his promise to SrA H.C. that he was "not going to try anything unless [S.F.] wanted to"; (4) evidence that S.F. awoke to Appellant's penetration of her vulva ; and (5) evidence indicating Appellant knew S.F. was awake and not saying anything. (JA at 115-16, 137, 349-50, 362.) These facts demonstrated the continued absence of consent, from start to finish:



Viewing this evidence in the light most favorable to the prosecution, "any rational trier of fact" could find the essential elements of sexual assault without consent beyond a reasonable doubt. United States v. Robinson, 77 M.J. 294, 297-298 (C.A.A.F. 2018).

Finally, AFCCA cited evidence regarding the absence of consent—rather than evidence that S.F. was asleep or incapacitated—in finding Appellant's conviction legally and factually sufficient. Thus, the evidence is legally sufficient to sustain Appellant's conviction for sexual assault without consent, and he is unentitled to relief of any kind.

ARGUMENT

I.

THIS COURT'S DECISION IN MENDOZA DOES NOT SUPPORT THAT ARTICLE 120(B)(2) OR (G)(7), UCMJ, ARE UNCONSTITUTIONALLY VAGUE.

Additional Facts

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

The statute then defines "consent" as follows:

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

> manner of dress of the person involved with the accused in the conduct at issue does not constitute consent.
>
> (B) A sleeping, unconscious, or incompetent person cannot consent. A person cannot consent to force causing or likely to cause death or grievous bodily harm or to being rendered unconscious. A person cannot consent while under threat or in fear or under the circumstances described in subparagraph (B) or (C) of subsection (b)(1).
>
> (C) All the surrounding circumstances are to be considered in determining whether a person gave consent.

10 U.S.C. § 920(g)(7).

Standard of Review

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

Law & Analysis

Due process requires that criminal statutes "give people of common intelligence fair notice of what the law demands of them." United States v. Davis, 139 S. Ct. 2319, 2325 (2019) (quotations omitted). A statute is "void for vagueness" if "one could not reasonably understand that his contemplated conduct is proscribed." Parker, 417 U.S. at 757 (citation omitted).

To win a facial vagueness challenge to a statute, "the challenger must establish that no set of circumstances exists under which the [statute] would be valid," United States v. Salerno, 481 U.S. 739, 745 (1987), or that the statute lacks a "plainly legitimate sweep." Wash. State Grange v. Wash. State Republican

Party, 552 U.S. 442, 449 (2008) (internal quotation marks omitted). Facial challenges are designed to be "hard to win" because they "'threaten to short circuit the democratic process' by preventing duly enacted laws from being implemented in constitutional ways." Moody, 144 S. Ct. at 2383 (quoting Wash. State Grange, 552 U.S. at 471). Thus, if "[a] general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction," and it will not be struck down as facially vague. Harriss, 347 U.S. at 618.

In Appellant's original brief with this Court, he challenged Article 120(b)(2)(A) and (g)(7) as unconstitutionally vague on the basis that the definition of "consent" implicates factual circumstances that may be relevant to other variations of sexual assault enumerated by Article 120, UCMJ. (*See generally* App. Br. at 16-38.) This Court should be unpersuaded, for as set forth below, Article 120(b)(2)(A) and (g)(7) can be made "constitutionally definite by a reasonable construction of the statute." Harriss, 347 U.S. at 618.

A. Subsections (b)(2)(A) and (g)(7) give servicemembers notice of what is prohibited and how certain facts may affect their defense.

First, this Court should consider that not all theories of liability under Article 120, UCMJ raise the same issues as in Mendoza. While the two subsections at issue in Mendoza—(b)(2)(A) (without consent) and (b)(3)(A) (incapable of consent)—both involve the overlapping concept of consent, the other subsections

of Article 120(b) do not. *See* 10 U.S.C. § 920(b). Subsections (b)(1) (threatening, fear, fraudulent representation, artifice, etc.) and (b)(2)(B) (asleep, unconscious, otherwise unaware) contain *no* reference to the concept of consent. Thus, unlike in Mendoza, there is not the same surplusage analysis between those sections and section (b)(2)(A) (without consent).

In Mendoza, there was concern that although the appellant was charged under subsection (b)(2)(A) (without consent), he might have been convicted under a subsection (b)(3)(A) (incapable of consenting) theory of liability. 2024 CAAF LEXIS 590, at *17. But this same concern does not exist for subsections (b)(1) or (b)(2)(B). Where subsection (b)(2)(A) is charged, assuming the military judge instructs on all the elements of a "without consent" offense, a servicemember cannot be convicted under a section(b)(1) or (b)(2)(B) theory of liability, since those theories do not have consent as an element or consideration.

For example, consider a military judge who instructs the panel that they must find beyond a reasonable doubt that the accused committed a sexual act upon a victim without her consent. The judge also instructs that a sleeping person cannot consent. If the panel returns a guilty verdict, the accused cannot claim he was actually convicted under a subsection (b)(2)(B) (committing a sexual act upon a sleeping person) theory of liability, because the members found the accused guilty of the extra "without consent" element not included anywhere in section

(b)(2)(B). Rather than being convicted under subsection (b)(2)(B) (sexual assault on a sleeping person), the servicemember was convicted of a different offense that had some overlap with subsection (b)(2)(B), but ultimately required proof of an additional element. As a result, Appellant's fears that servicemembers will be convicted of a different theory from that on the charge sheet are unfounded for most theories of liability under Article 120. And considering the "reasonable presumption that Congress did not intend [an interpretation of a statute] which raises serious constitutional doubts," Clark v. Suarez Martinez, 543 U.S. 371, 381 (2005), this Court should be unpersuaded that subsection (b)(2)(A) permits conviction on an uncharged theory of liability.

It is not difficult to interpret Article 120(b)(2)(A) and (g)(7) "in a way that avoids placing [their] constitutionality in doubt." United States v. Kohlbek, 78 M.J. 326, 332 (C.A.A.F. 2019) (citation omitted). Article 120(b)(2)(A) provides notice of what conduct is forbidden—a sexual act committed upon another person without the consent of the other person. Article 120(g)(7) then defines consent and provides notice of circumstances under which a servicemember cannot gain consent from the other person, e.g. when that other person is "sleeping, unconscious, or incompetent" or has been placed "under threat or in fear." Together, these portions of the statute (1) lay out the elements of the offense an accused must defend against (a sexual act perpetrated without consent) and (2)

notify an accused of ways he may not defend against those elements (such as by claiming consent was given while the victim was asleep or under threat). The definition of consent in Article 120(g)(7) is important. Without it, servicemembers in Appellant's situation might incorrectly believe that they can gain consent while a victim is asleep, even where the victim never gave consent before falling asleep. Through its statutory definition of consent in Article 120, UCMJ, Congress gave notice that is not the case. Any servicemember reading the entirety of Article 120 would understand that committing a sexual act upon a sleeping person is forbidden.

There is nothing unconstitutional about this construction of the statute. A servicemember knows what is forbidden and what is not an available means to defend against a charge. If the military judge appropriately instructs the members that they must find beyond a reasonable doubt that the accused perpetrated the sexual act "without the consent of the other person," the members will be presumed to follow those instructions, and the government will not have "switched theories" at trial—especially to a theory of liability that does not encompass the element of consent. And by highlighting circumstances where a servicemember cannot gain consent, this statutory scheme accounts for situations where a victim unequivocally did not consent but might have been both capable of consenting and incapable of consenting at different times during the same sexual act. This formulation allows the government to account for the entire scope of a sexual act

without having to charge the accused with two specifications of sexual assault under two separate theories of liability. It also protects the accused from ending up with two sexual assault convictions, when he might only have had one.

Mendoza does not change this analysis because it acknowledged that subsection 120(g)(7)(C) requires that "all the surrounding circumstances" be considered in evaluating the existence or nonexistence of consent. *See* 2024 CAAF LEXIS 590, at *22 (citing 10 U.S.C. § 920(g)(7)(C)). This requirement reflects the need for statutes to be sufficiently broad to "adequately 'deal with untold and unforeseen variations in factual situations.'" Rocha, 84 M.J. at 351 (quoting Boyce Motor Lines, Inc, 342 U.S. at 340 (1952)). Not all sexual assaults are perpetrated under the same conditions. A sexual encounter may be nonconsensual from start to finish, or it may start consensually and become nonconsensual partway through. A victim may be capable of consenting for parts of the encounter but incapable of consenting at others. Some victims may resist or verbalize nonconsent, while others may say and do nothing at all. And in those cases where there is no "positive action or response"—such as verbal or physical resistance—from the victim, it is the other surrounding circumstances that will tell the factfinder whether there was a lack of consent. United States v. Webster, 40 M.J. 384, 386 (C.A.A.F. 1994) ("[P]roof of a 'manifestation of lack of consent' does *not* require 'some positive' action or response by the victim.")

But requiring the factfinder to consider the "all the surrounding circumstances" in evaluating consent does not just serve the prosecution—it also serves the accused, both as a sword and shield. As this Court noted in Mendoza, an accused can leverage the "surrounding circumstances" as a sword to undermine the prosecution's case—just as the prosecution can offer evidence of an alleged victim's intoxication to prove the absence of consent, the defense can "offer[] the same evidence to show reasonable doubt." 2024 CAAF LEXIS 590, at *22 (citing Article 120(g)(7)(C)). Those same circumstances might also be the accused's shield against criminal liability, because they may support a defense of mistake of fact as to consent. *See* Department of the Army Pamphlet (D.A. Pam.) 27-9, *Military Judges' Benchbook*, para. 3A-44-2 (29 February 2020) ("The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under *all the circumstances*.")

Far from being unconstitutionally vague, Article 120's comprehensive definition of consent provides detailed notice to servicemembers of the various facts that may be used to determine whether a sexual act was committed without consent. That the statute permits consideration of such facts does *not* mean the prosecution can switch theories of liability—rather, it reflects the reality that there may be "untold and unforeseen variations" of sexual assault without consent that do not fit neatly into a single category or fact-pattern. Rocha, 84 M.J. at 351.

Indeed, this is another reason why Article 120(b)(2)(A) (without consent) exists as a broad option for charging an accused.

B. The Government's decision to charge an accused under subsection (b)(2)(A) does not lessen its burden of proof regarding mens rea.

In Mendoza, this Court expressed concern that interpreting subsection (b)(2)(A) (without consent) as covering the theory of liability enumerated at subsection (b)(3)(A) (incapable of consenting), "would allow the Government to circumvent the mens rea requirement that Congress specifically added to the offense of sexual assault of a victim who is incapable of consenting." 2024 CAAF LEXIS 590, at *16. While this may have been a concern under the particular facts of Mendoza, which was a judge alone case with no panel instructions, this Court should decline to presume that every prosecution with a hybrid fact pattern poses the same problem.

When an accused's conduct violates more than one statute, it is "entirely" within the prosecution's discretion to decide "what charge to file or bring." Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978). Deciding what charge to file requires "carefully weighing the benefits of a prosecution against the *evidence needed to convict*." Bond v. United States, 572 U.S. 844, 865 (2014) (emphasis added). This necessarily results in an examination of "which offenses are supported by the evidence and which are not." United States v. Elespuru, 73 M.J. 326, 329 (C.A.A.F. 2014) (quoting United States v. Morton, 69 M.J. 12, 16

(C.A.A.F. 2010)). If there is a "genuine question as to whether one offense as opposed to another is sustainable," the prosecution may charge both offenses for exigencies of proof. Elespuru, 73 M.J. at 329.

If the prosecution is permitted to charge an accused with two offenses based on exigencies of proof, it logically follows that it is also permitted to simply charge the offense that is better "supported by the evidence." Id. Put differently, the United States is free to prosecute the crime that is easier to prove. *See* Douglas v. Jacquez, 626 F.3d 501, 508 (9th Cir. 2010) ("It is axiomatic that the government enjoys prosecutorial discretion to charge the defendant with the greater or the lesser offense.").

Considering this framework, this Court should be unpersuaded by any suggestion that charging subsection 120(b)(2)(A) (without consent) always lowers the Government's burden of proof by circumventing mens rea requirements in other subsections. (App. Br. at 30, 42); *see also* Mendoza, 2024 CAAF LEXIS 590, at *17. This argument presumes that when an accused's conduct is criminal in more ways than one, the Government is required to prosecute the accused using the narrower statutory offense, which is simply not true: "[T]he United States is free to prosecute under any applicable statute without regard to which statute is most specifically tailored to the facts alleged." United States v. Schaffner, 715 F.2d 1099, 1102 (6th Cir. 1983).

In the context of Article 120, UCMJ, this means that when a sexual assault has a hybrid fact pattern that could be charged either as "without consent" or under one of the more fact-specific subsections of Article 120, UCMJ, it is *not* obligated to prosecute under the subsection that is more "specifically tailored to the facts alleged." Id. Nor is it obligated to charge under a subsection that requires any particular mens rea. Id. Rather, the prosecution may charge the accused under either or both subsections—meaning an accused could be guilty of both sexual assault without consent *and* sexual assault upon a person who is sleeping or incapacitated based on a single hybrid incident. *See* Elespuru, 73 M.J. at 329. That one of those convictions would then have to be "consolidate[d] or dismiss[ed]" proves that it does not matter *which* subsection the prosecution chooses to charge—only that it picks at least one it can prove. Id.

Moreover, while it is true that subsection (b)(2)(A) does not require proof of a specific mens rea, that does not mean the prosecution does not have to prove a mens rea at all. As this Court observed in United States v. McDonald, "the structure of the [Article 120] statute implies a general intent mens rea," with "the ability to raise a mistake of fact defense." 78 M.J. 376 (C.A.A.F. 2019). Thus, the prosecution still must prove beyond a reasonable doubt that an accused has "the general intent to do the wrongful act itself." Id.

C. To the extent subsections (b)(2)(A) and (b)(3) raised constitutional concerns, Mendoza remedied those issues.

Appellant's assertion that Article 120(b)(2)(A) is unconstitutionally vague and "renders superfluous every theory of liability enumerated…under subsection (b)"[3] also fails *because* of Mendoza. In holding that Article 120 (b)(2)(A) "criminalizes the performance of a sexual act upon a victim who is capable of consenting but does not consent," this Court observed that no part of Article 120, UCMJ, "forecloses [the] interpretation that subsection (b)(2)(A) presumes that the victim was capable of consenting." 2024 CAAF LEXIS 590, at *14, *17. This construction of Article 120(b)(2)(A) avoids "relegating [any of the other subsections] to mere surplusage without any purpose or effect." Id. at *16. Thus, Mendoza proves that Article 120(b)(2)(A) can be "made constitutionally definite by a reasonable construction of the statute." Harriss, 347 U.S. at 618.

Under this Court's construction of Article 120(b)(2)(A), Appellant cannot "demonstrate that the law is impermissibly vague in *all* of its applications." Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 497 (1982) (emphasis added). A single hypothetical is all it takes to show that Article 120(b)(2)(A) has clear, permissible applications that would be obvious to "people of common

[3] *See* App. Br. at 33.

intelligence." Davis, 139 S. Ct. at 2325. If a conscious, sober victim says "no" to an accused as he begins to have sex with her, but he continues to do so and the victim opts not to resist, the crime of sexual assault without consent would be complete. Indeed, this a textbook example of how "[s]ubsection (b)(2)(A) criminalizes the performance of a sexual act upon a victim who is capable of consenting but does not consent." Mendoza, 2024 CAAF LEXIS 590, at *17. Considering this, Appellant's facial challenge to Article 120(b)(2)(A) fails.

In sum, Congress crafted Article 120, UCMJ in such a way as to allow the government flexibility when charging hybrid fact patterns where a victim may be both capable and incapable of consenting during the same sexual act. Nonetheless, the statute gives comprehensive notice of what conduct is proscribed and how an accused may or may not defend against any particular theory of liability. A military judge's instructions on the elements and this Court's admonitions in Mendoza prevent the government from switching theories of liability at trial. Since appropriate safeguards are available, this Court should not prevent Article 120, UCMJ from being implemented in a constitutional way. *See* Moody, 144 S. Ct. at 2383.

II.

AS APPLIED, ARTICLE 120(b)(2) AND (g)(7), UCMJ, 10 U.S.C. §§ 920(b)(2) AND (g)(7) GAVE APPELLANT CONSTITUTIONAL FAIR NOTICE, AND THE MILITARY JUDGE'S DENIAL OF APPELLANT'S PROPOSED INSTRUCTION REMAINS CORRECT EVEN AFTER MENDOZA.

Additional Facts

Prior to trial on the merits, trial defense counsel requested a special instruction that read, *inter alia*, as follows:

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

(JA at 547.)

The military judge denied the requested instruction as "an inaccurate statement of the law," and noted that "[w]hen the government charges an offense, as occurring with a lack of consent, they can argue fairly all the surrounding circumstances that comes from the definition of consent…includ[ing] an alleged victim's consumption of alcohol and the impact that that consumption of alcohol had on the alleged victim's ability to consent." (JA at 71-72.)

After the presentation of the evidence, the military judge gave the standard instruction on consent, which he opined "sufficiently cover this area and make

clear what the panel can and cannot or should and should not consider in making that determination." (JA at 71.)

Standard of Review

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

Law & Analysis

In asserting that Article 120(b)(2)(A) and (g)(7) are vague as applied to him, Appellant contends that the military judge's refusal to give a special instruction that "tailor[ed] the definition of 'consent' to the charged theory of liability," deprived him of fair notice. (*See* App. Br. at 40.) But determining the sufficiency of notice necessarily requires that the *statute*—not a judge's instructions after trial on the merits—be examined "in the light of the conduct with which a defendant is charged." Parker, 417 U.S at 757. And because "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness," id. at 756, Appellant's claim falls flat. For Article 120(b)(2)(A)'s unambiguous prohibition

on nonconsensual sex clearly applies to Appellant's conduct—having sex with S.F. while she was awake and nonconsenting. Similarly, Article 120(g)(7)(B)'s caveat that a "sleeping, unconscious, or incompetent person cannot consent," clearly applies to the circumstances in this case, where sexual intercourse began while S.F. was asleep and unable to consent. Appellant could not gain consent from S.F. during that period of time. Accordingly, the analysis *should* end here.

But even if instructions could mean the difference between fair notice (or lack thereof), Appellant's as-applied challenge still fails because: (1) even without the special instruction, Appellant had fair notice of which theory of liability he needed to defend against, given that the prosecution's charging scheme and evidence focused on sexual assault without consent; (2) the statutory definition of consent put Appellant on notice as to what he could and could not claim in his defense; and (3) the instructions issued by the judge ensured that the prosecution could not switch theories of liability and the factfinder could only convict Appellant on the theory charged. Thus, the judge's refusal to give the special instruction did not violate Appellant's right to "fair notice of what the law demands of [him]." Davis, 139 S. Ct. at 2325.

A. Even without the instruction, Appellant had fair notice that he had to defend against the theory that he had sex with S.F. without her consent.

Even without the special instruction, Article 120(b)(A) and (g)(7) were constitutional as applied to Appellant because the prosecution's theory at trial was

that S.F. did not consent, *not* that she was "too intoxicated to consent" or that she was simply asleep. (*See generally* JA 469-486); *cf.* Mendoza, 2024 CAAF LEXIS 590, at *18 (where prosecution charged sexual assault without consent but focused on incapacity at trial). From the moment the prosecution charged Appellant using subsection (b)(2)(A) to the moment trial counsel argued lack of consent in closing, Appellant was always on notice of "what offense and under what legal theory he [would] be tried and convicted." Id. at *18.

This is not a situation where the prosecution "charge[d] one offense under one factual theory and then argue[d] a different offense and a different factual theory at trial." Mendoza, 2024 CAAF LEXIS 590, at *18. After charging Appellant with sexual assault without consent, the prosecution put on a case that established the following: (1) S.F. did not consent to sex before falling asleep; (2) Appellant knew that he did not have consent by the time S.F. was asleep, as evidenced by his promise to SrA H.C. that he was "not going to try anything unless [S.F.] wanted to"; (3) Appellant began penetrating S.F. as she slept; (4) S.F. awoke to the penetration and did not consent; and (5) Appellant knew that S.F. woke up and did not say anything. (JA at 115-16, 137, 349-50, 362.)

All this evidence spoke directly to what was charged: that Appellant "commit[ted] a sexual act upon [S.F.] by penetrating her vulva with his penis, *without her consent*." (JA at 16) (emphasis added). And as a result, that is what the

prosecution argued in closing. In contrast to Mendoza, trial counsel in this case did not rely solely on evidence that S.F. was asleep or drunk at times to prove the absence of consent. Indeed, trial counsel never argued that S.F. was "too intoxicated to consent." (*See generally* JA 469-486.) Thus, any suggestion that the special instruction was necessary to eliminate "too intoxicated to consent" as a theory of liability is unpersuasive, because this theory was not before the members in the first place.

Instead, trial counsel pointed first and foremost to S.F.'s testimony about never consenting: "[S]he told you I did not tell him he could take down my pants … I did not tell him that he could put his penis in my vulva. She told you that." (JA at 474.) Given the prosecution's focus on lack of consent—as opposed to any other theory of liability enumerated in Article 120—this Court should be unconvinced by Appellant's assertions either that the statute permitted the prosecution to switch theories at trial, or that he did not know which theory he needed to defend against.

B. The statutory definition of consent, as instructed upon by the judge, put Appellant on notice as to what he could and could not claim in his defense.

That Appellant had fair notice of the theory of liability under which he would be convicted is further evidenced by his own defense strategy, which focused on both actual consent and reasonable mistake of fact regarding the same. This strategy—which sought to disprove not only the absence of consent, but also

to disprove that S.F. was asleep in the first place—is proof that the statutory definition of consent (as instructed upon by the judge) gave Appellant fair notice that he could not obtain consent while a person was "sleeping, unconscious, or incompetent." 10 U.S.C. § 920(g)(7)(B); *see also* Campbell v. Kendall, No. 22-5228, 2024 U.S. App. LEXIS 7181, at *4 (D.C. Cir. Mar. 26, 2024) (concluding that military judge properly instructed members that a "sleeping, unconscious, or incompetent person cannot consent" in a case that required proof of nonconsensual sexual contact).

Specifically, the defense strategy—arguing that S.F. consented while blacked out—shows that Appellant understood: (1) he did not have S.F.'s consent before she fell asleep; (2) a sleeping person cannot consent; (3) therefore, he *still* did not have S.F.'s consent when he began penetrating her as she slept; and (4) to avoid conviction, he needed to make the factfinder think that S.F. might have been awake and consenting, or that he reasonably thought S.F. was awake and consenting. But to do this, Appellant needed to an alternative explanation for S.F.'s testimony that the next thing she remembered after going to sleep was "[Appellant's] penis inside of [her]." (JA at 115, 164.)

This is where subsection (g)(7)(C) came into play. Just as the statutory definition of consent put Appellant on notice that he could not claim to have obtained S.F.'s consent while she was asleep, it also informed him that he could

use "all the surrounding circumstances" to argue that S.F. had been awake and consenting. *See* 10 U.S.C. § 920(g)(7)(B)-(C); *see* Mendoza, 2024 CAAF LEXIS 590, at *22 ("[N]othing bars the defense from offering [intoxication] evidence to sow reasonable doubt."). Appellant's trial defense counsel leveraged this statutory latitude to introduce expert testimony about alcohol-induced blackouts, which he later used to argue that S.F. never went to sleep at all and instead consented during a blackout that ended halfway through the sexual act.

Considering this, the military judge's denial of a special instruction that would have limited the factfinder's consideration of "all the surrounding circumstances" was proper. (JA at 71-72); Mendoza, 2024 CAAF LEXIS 590, at *22 (noting that the holding "does *not* bar the trier of fact from considering evidence of the victim's intoxication when determining whether the victim consented"). As written, the defense's requested instruction would have been misleading and the equivalent of allowing the defense to put one foot on the scale, for it sought to manipulate the factfinder's independent evaluation of potential intoxication evidence by limiting the conclusions that could be drawn therefrom to those favorable to Appellant. Such one-sided use of evidence would have been misleading and contrary to the court-martial's "truth-seeking function." United States v. Custis, 65 M.J. 366, 371 (C.A.A.F. 2007). Thus, the military judge's

decision to disallow the requested instruction did not deprive Appellant of fair notice.

C. The military judge's instructions ensured that Appellant could only be convicted under the charged theory of liability.

Contrary to Appellant's assertions otherwise, the military judge's instructions—which described the elements and definitions for sexual assault without consent as set forth by the statute—neither lowered the prosecution's burden of proof nor allowed it to switch theories. (*See* App. Br. at 41-42.)

As discussed previously, the absence of a specific mens rea in subsection (b)(2)(A) does not mean the prosecution did not have to prove a mens rea at all. The prosecution still had to prove beyond a reasonable doubt that Appellant had "the *general* intent to do the wrongful act itself." McDonald, 78 M.J. at 380. That the required mens rea was general instead of specific does not mean the prosecution had a "lower burden of proof," especially given the availability of the defense of mistake of fact as to consent—which the prosecution had to *disprove* beyond a reasonable doubt.

Under these circumstances, even if a switch in theories was possible, it would have been meaningless. Here, where the evidence raised mistake of fact as to consent, the judge's instruction on mistake of fact operated as the equivalent of the specific mens rea element from other subsections such as (b)(2)(B) (asleep, unconscious, otherwise unaware) and (b)(3)(A) (incapable of consenting). To have

a reasonable mistake of fact, Appellant would have had to have reasonably believed S.F. was awake, since a sleeping person cannot consent. Requiring the prosecution to *disprove* Appellant's "reasonable" belief that S.F. was awake and consenting was functionally no different from requiring it to *prove* that he "knew or reasonably should have known" that S.F. was asleep. (JA at 460); *cf.* 10 U.S.C. § 920(b)(2)(B), (b)(3)(A)).

This instruction on mistake of fact was only justified because there were facts that suggested S.F. might have been awake and capable of consenting. These factual nuances demonstrate why Article 120(b)(2)(A) (without consent) may be the most appropriate charging scheme for sexual assaults where the victim was asleep or incapacitated for only a portion of the act. In a case like this with a mixed fact pattern—where the evidence indicates that the victim was capable and incapable of consenting at various times throughout the sexual act—charging sexual assault without consent enables the prosecution to hold Appellant accountable for the entirety of the sexual assault in the most efficient manner possible. If this case had been charged as sexual assault upon a person who is asleep (subsection (b)(2)(B)), evidence that penetration occurred while S.F. was awake and nonconsenting would *not* be probative of the charged crime. But because this case was charged as sexual assault without consent (subsection

(b)(2)(A)), evidence that penetration occurred while S.F. was asleep could properly be used to prove the charged crime, as discussed further in Issue III.

D. Conclusion

Based on the charge sheet and underlying statute, any accused in Appellant's position would have known that he had to defend against the allegation that he had sex with S.F. without her consent. (*See* JA at 16; *cf.* 10 U.S.C. § 920(b)(2)(A)). Upon reading the charge sheet together with the statutory definitions regarding consent, Appellant would have also known that, as part of his defense, he could not claim that S.F. consented while she was asleep. *See* 10 U.S.C. § 920(g)(7)(B). The military judge's denial of the special instruction did nothing to affect Appellant's notice on these fronts. Rather, the military judge's insistence on instructing the factfinder on the law as set forth in the statute ensured that the prosecution could not—and did not—switch theories of liability during trial. Considering the above, Appellant's claim that subsections (b)(2)(A) and (g)(7) failed to give him fair notice of the theory of liability under which he would be tried rings hollow. Article 120, UCMJ is constitutional as applied to Appellant, and he is unentitled to relief.

III.

MENDOZA DOES NOT AFFECT THE LEGAL SUFFICIENCY OF APPELLANT'S CONVICTION FOR SEXUAL ASSAULT WITHOUT CONSENT.

Standard of Review

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

Law & Analysis

The test for legal sufficiency is whether, "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Robinson, 77 M.J. at 297-298. The legal sufficiency assessment "draw[s] every reasonable inference from the evidence of record in favor of the prosecution." Id. (emphasis added) (quoting United States v. Plant, 74 M.J. 297, 301 (C.A.A.F. 2015)). An assessment of legal sufficiency is limited to the evidence produced at trial. United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993).

In his original brief, Appellant asserted that this Court's then-pending decision in Mendoza would impact the legal sufficiency of his case. (App. Br. At 44.) This assertion had no merit then and has no merit now, for Appellant's case is factually distinct. More so than in Mendoza, the conviction in this case was supported by evidence that S.F. did not consent while she was "capable of

consenting," which the AFCCA later cited in affirming Appellant's conviction for sexual assault without consent. Thus, Appellant's conviction is legally sufficient, and he is unentitled to relief.

A. The evidence showed that S.F. was capable of consenting at various stages but did not do so.

In contrast to Mendoza, the prosecution's presentation in this case focused on the charged theory of liability—sexual assault without consent in violation of Article 120(b)(2)(A), UCMJ. Instead of relying "merely" on evidence of S.F.'s intoxicated or sleeping state, Mendoza, 2024 CAAF LEXIS 590, at *22, the prosecution presented evidence regarding the absence of consent.

First and foremost was S.F.'s unequivocal testimony that she never gave Appellant permission to have sex with her either before she fell asleep or after she woke up. (JA at 114, 116.) S.F.'s lack of consent is further supported by other circumstantial evidence, such as her decision-making as it pertained to Appellant staying at her apartment. Before falling asleep and while Appellant was next to her, S.F. told SrA H.C. that she did not want Appellant to stay the night. (JA at 322.) Viewed in the light most favorable to the prosecution, this is tantamount to a declaration of no consent—no reasonable person would interpret S.F.'s desire for Appellant to leave her apartment as an invitation to have sex with her in that very same apartment. Robinson, 77 M.J. at 297-298.

That S.F. subsequently changed her mind about Appellant staying did *not* mean she was suddenly consenting to the possibility of sexual activity, given the circumstances under which she agreed Appellant could stay. S.F. did not change her mind because Appellant personally requested permission to stay and engage in sexual activity—rather, she changed her mind after SrA H.C. asked her about it. (JA at 324.) Later, she explained that it was because she did not want anyone to "drink and drive." (JA at 114.) This demonstrates that in the minutes before she fell asleep, S.F. was capable of "freely giv[ing] agreement" to things and being selective about it. *See* 10 U.S.C. § 920(g)(7)(A). Thus, the fact that she did *not* freely agree to sexual activity while awake—despite being capable of doing so—means she fell asleep in a nonconsenting state. This conclusion is further reinforced by the evidence of Appellant and SrA H.C.'s conversation as S.F. slept in her room—the fact that Appellant promised SrA H.C. that he "[was] not going to try anything *unless [S.F.] wanted to*" indicates that he knew he did not yet have S.F.'s consent. (JA at 349) (emphasis added).

This means that when Appellant began penetrating S.F.'s vulva as she slept, she *still* had not consented—because a sleeping person cannot consent. 10 U.S.C. § 920(g)(7)(B). Thus, S.F.'s prior nonconsenting state could not have changed between the time she fell asleep, and the time Appellant began to assault her. Put another way, evidence that S.F. was asleep for part of the sexual act proved the

continued absence of "freely given agreement," as opposed "merely establishing that the victim [could not consent]." 10 U.S.C. § 920(g)(7)(A); Mendoza, 2024 CAAF LEXIS 590, at *22.

But once S.F. woke up to Appellant penetrating her vulva, she again became capable of consenting. And once again, she did not consent—instead, she "just laid there" without reciprocating. (JA at 115.) This is corroborated by Appellant's own acknowledgment that S.F. "didn't say anything" when she woke up. (JA at 137.) And because the law says "[l]ack of verbal or physical resistance does not constitute consent," any "rational trier of fact" could use this evidence to find that S.F. was capable of consenting and did not do so. 10 U.S.C. § 920(g)(7)(A). S.F.'s actions immediately after the sexual assault—going into the bathroom to call a friend for help, having Appellant removed from her apartment, and confronting him about the incident—further cement the conclusion that she did not consent.

Overall, viewing all the evidence in the light most favorable to the prosecution, "any rational trier of fact" could find that S.F. did not consent prior to the sexual act, could not consent when the act began, and did not consent upon waking up to the act still going on—in other words, they could find a *continuous* lack of consent, during the entire course of the sexual act from start to finish. As a result, Appellant's conviction for sexual assault without consent is legally sufficient. To find otherwise would be to conclude that instead of existing in a

state of nonconsent until consent is freely given, people exist in a state of consent until consent is affirmatively withdrawn. But as evidenced by the fact that "[l]ack of verbal or physical resistance does not constitute consent," that is *not* the law. 10 U.S.C. § 920(g)(7)(A).

B. AFCCA affirmed Appellant's conviction based on evidence of nonconsent, not sleep or intoxication.

Unlike in Mendoza, where the CCA's opinion presented an "an open question whether it improperly considered the evidence of [the victim]'s intoxication as proof of [her] inability to consent and therefore proof of the absence of consent," 2024 CAAF LEXIS 590, at *22, no such question exists here.

To start, the AFCCA did not rely on or discuss evidence of S.F.'s intoxication in finding Appellant's conviction legally and factually sufficient. (JA at 14.) Nor did the AFCCA base its decision entirely on the fact that S.F. was asleep for part of the sexual assault. (Id.) Instead, the AFCCA relied on evidence that proved both the sexual act and the absence of consent:

> SF credibly testified that she woke to Appellant's penis inside her vagina, and that she did not consent to that sexual act. Moreover, when SF confronted Appellant later that day, Appellant admitted to SF that the act occurred, and that at some point during the encounter she was no longer responsive. Appellant did not claim that he got SF's consent for the sexual act.

(JA at 14.)

Like the prosecution's case at trial, the AFCCA's decision on appeal focused on the charged theory of liability—sexual assault without consent—and the evidence that supported it. It did not conflate two different theories of liability. Thus, neither remand nor relief is necessary, and this Court should affirm Appellant's conviction as legally sufficient.

CONCLUSION

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

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means to the Court and Appellate Defense Division on 9 December 2024.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(b)

This brief complies with the type-volume limitation of Rule 24(b) because:

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Attorney for the United States (Appellee)

Dated: 9 December 2024