IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellant*, v. Airman First Class (E-3) **WILLIAM C.S. HENNESSY** United States Air Force *Appellee*.	)))))))))	UNITED STATES' REPLY BRIEF Crim. App. Dkt. No. 40439 USCA Dkt. No. 25-0112/AF 20 June 2025

UNITED STATES' REPLY BRIEF

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Appellant	)	REPLY BRIEF
	)	
v.	)	
	)	Crim. App. No. 40439
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WILLIAM C.S. HENNESSY	)	USCA Dkt. No. 25-0112/AF
United States Air Force	)	
Appellee.	)	20 June 2025

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

Pursuant to Rule 22(b)(3) of this Court's Rules of Practice and Procedure, the United States hereby replies to Appellee's Answer (Ans. Br.) to the United States' brief in support of the certified issue (Gov. Br.), filed on 22 May 2025.

ARGUMENT

The Air Force Court of Criminal Appeals (AFCCA) erroneously interpreted United States v. Mendoza, No. 23-0210, 2024 CAAF LEXIS 590 (C.A.A.F. Oct. 7, 2024), as (1) disallowing any evidence of nonconsent that does not occur at the beginning of a sexual act, which led AFCCA to disregard relevant evidence of KE's manifestations of nonconsent before, during, and after the incident; and (2) reading in a non-statutory element regarding the victim's capacity. This failure to apply "correct legal principles," United States v. Thompson, 83 M.J. 1, 4 (C.A.A.F. 2022), and "erroneous consideration of the elements of the offense,"

United States v. Leak, 61 M.J. 234, 241 (C.A.A.F. 2005), resulted in the set-aside of a conviction that the lower court had, just months earlier, found factually sufficient. Because Appellee's defense of this outcome is premised on the same erroneous interpretation of Mendoza, this Court should reject his arguments and conclude that AFCCA erred.

A. AFCCA erroneously interpreted Mendoza as disallowing evidence of nonconsent that does not occur at the beginning of a sexual act.

In defending AFCCA's erroneous interpretation of Mendoza, Appellee points to the fact that the lower court cited this Court in distinguishing between the "without consent" and "incapable of consenting" theories of liability. (*See* Ans. Br. at 21.) But there is a difference between merely citing[1] something versus interpreting it.[2] While AFCCA did correctly recite this Court's holding from Mendoza, it incorrectly interpreted it as a license to disregard relevant evidence of nonconsent—both before and after initiation of the sexual act—simply because there was some evidence that the victim may have been incapacitated or asleep when the sexual act began. Despite evidence demonstrating that KE was "capable

[1] Cite, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/citing (last visited Jun. 16, 2025) ("to quote by way of example, authority, or proof").

[2] *Interpret*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/quotation (last visited Jun. 16, 2025) ("to conceive in the light of individual belief, judgment, or circumstance").

of consenting, but did not consent," in the hours preceding the assault (when she repeatedly rebuffed Appellee's advances) and in the moments after waking up mid-sex (when she turned her head and faked sleep to get Appellee to stop), AFCCA set aside Appellee's conviction based on the "absence of evidence" surrounding the *initiation* of penetration. In so doing, AFCCA revealed the fundamentally flawed paradigm in which it operates: one where nonconsent is relevant only when it is contemporaneous with the start of the sexual act, and only if there was an affirmative verbal or physical expression of nonconsent. As set forth below, this constitutes a failure to apply "correct legal principles," and warrants reversal. Thompson, 83 M.J. at 4.

1. *AFCCA failed to recognize that even under Mendoza, "all the surrounding circumstances" continue to be relevant on the issue of consent.*

In distinguishing sexual assault "without consent" from sexual assault upon persons "incapable of consenting," this Court described the former as "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. But this Court never said that a conviction for sexual assault "without consent" could only be sustained upon proof that the victim was capable of consenting and did not consent at the exact moment the sexual act *began*. Id.

Instead, this Court made it a point to note that the factfinder could still consider "*all* the surrounding circumstances"—not just those surrounding the start

of the sexual encounter or those divorced from evidence of intoxication—in determining whether a victim consented. Id. at *22 (citing 10 U.S.C. § 920(g)(7)(C)) (emphasis added). That is what the law requires. Article 120 does not say that the surrounding circumstances "may" or "can" be considered—it unequivocally commands that they "*are* to be considered." 10 U.S.C. § 920(g)(7)(C) (emphasis added). In other words, the law recognizes that a capable person can manifest nonconsent before, during, and/or after a sexual act—and Mendoza did nothing to change this.

The lower court misunderstood this crucial point. By setting aside Appellee's conviction based on the "absence of evidence" regarding KE's capacity and consent at the time the sexual act began—despite finding the conviction factually sufficient months earlier based on evidence of KE's nonconsent before, during, and after penetration—AFCCA misapprehended both Mendoza and its unchanged duty to consider "all the surrounding circumstances." 10 U.S.C. § 920(g)(7)(C). For Appellee to be legally penetrating KE at the time she woke up (or regained her faculties) and realized what was going on, she needed to have consented at some point. AFCCA could only answer that question by evaluating "all the surrounding circumstances." Yet AFCCA failed to follow this common sense approach, and disregarded the evidence that KE rebuffed Appellee earlier in

the night, was disturbed once she realized the sex was going on, and at that point, did not manifest consent to what was occurring.

2. *AFCCA failed to consider direct evidence that KE manifested nonconsent upon awaking to vaginal penetration.*

In true butterfly-effect fashion, AFCCA's error in interpreting Mendoza begot another. The lower court's apparent belief that Mendoza requires proof of conscious nonconsent at the beginning of sex led it to disregard evidence that KE feigned sleep upon waking up to penetration in an attempt to get Appellee to stop. This error is indefensible under any standard of review. By ignoring evidence of nonconsent that manifested *during the sex act* because of the "absence of evidence" regarding what happened as the sex act began, AFCCA effectively took the untenable position that sex can only be deemed nonconsensual if a person is affirmatively nonconsenting when sex begins.

The implications of this position are dire. In hybrid cases such as this one, where the victim was either asleep or incapacitated when the sexual act began, but later regained her senses and became "capable of consenting," the victim will never be able to overcome the "absence of evidence" regarding the start of sexual activity. Appellee seeks an overly broad reading of Mendoza that disallows *any* consideration of a victim's intoxication or sleeping state if the case is charged as sexual assault without consent. (*See* Ans. Br. at 22.) This simply does not align with the statutory language of Article 120(g)(7) that requires the factfinder to

consider all of the surrounding circumstances in determining whether the victim gave consent. The factfinder must be able to consider the state of the evidence before, after, and at the beginning of the sexual act as a whole to decide the issue of consent. If the victim did not consent before the sexual act began, could not consent at the moment the act began, and did not consent later while the act was ongoing, then Appellee is guilty of committing sexual assault without consent per the language of the statute. The fact that it is unclear whether KE was blacked out, incapacitated, or asleep for part of the assault should not sway the outcome. (*See* Ans. Br. at 24.) Indeed, mixed fact-patterns like these are why the prosecution needs discretion to charge such cases under the "without consent" theory of liability—because while the prosecution cannot prove whether the victim was asleep or incapable when she remembers nothing, it *can* prove that she never gave consent at any other point (to include during the sex act).

In defending AFCCA's decision to overlook evidence of KE's nonconsent, Appellee asserts that the fact that he stopped after KE woke up and feigned sleep is "not evidence of someone who would have had sex with her while she appeared to be asleep or even intoxicated to the point of being passed out." (Ans. Br. at 27.) Put differently, Appellee implies that the fact that he ceased penetrating KE when she pretended to be asleep and unresponsive is evidence that he only started penetrating her because she appeared to be awake and responsive. Perhaps in a

vacuum, this argument might hold some water. But the law does not evaluate consent in a vacuum. *See* 10 U.S.C. § 920(g)(7)(C). That is why Appellee's reasoning, like AFCCA's fails—because it suffers from a pointed ignorance of all the other circumstantial evidence of KE's nonconsent, such as her clear aversion to "moving too fast," repeated rejections of Appellee's physical advances, and express declination of an invitation to go back to one of their rooms together. When "all the surrounding circumstances" are properly considered, the evidentiary significance of KE's reaction to waking up mid-penetration becomes clear. AFCCA's failure to recognize it was error.

B. By interpreting Mendoza in this way, AFCCA presumed this Court read in an element regarding the victim's capacity.

AFCCA's erroneous interpretation of Mendoza and attendant demand for proof that "KE was, at the time of the sexual act, capable of consenting, but did not consent," suggest that the lower court believes this Court read in an element regarding the victim's capacity, which is not required by the statute. (JA at 32-34.) This, in and of itself, is error.

Why? "The short answer is that Congress did not write the statute that way." United States v. Naftalin, 441 U.S. 768, 773 (1979) (declining to require proof of injury to purchaser in fraud cases where statute did not require it). And because "[i]t is the legislature, not the Court, which is to define a crime," United States v. Wiltberger, 18 U.S. 76, 95 (1820), "in determining what facts must be

proved beyond a reasonable doubt the [legislature's] definition of the elements of the offense is usually dispositive." McMillan v. Pennsylvania, 477 U.S. 79, 85 (1986).

Thus, courts "resist reading words or elements into a statute that do not appear on its face," Fischer v. United States, 603 U.S. 480, 508, 144 S. Ct. 2176, 2196 (2024) (citing Bates v. United States, 522 U.S. 23, 29 (1997)), especially when other congressional enactments demonstrate that "when Congress wanted to make [a particular fact] an element of an offense, it knew how to do so." United States v. Culbert, 435 U.S. 371, 378 (1978) (declining to read in "racketeering" element, where term did not appear in statute at issue but appeared in others); *see also* Russello v. United States, 464 U.S. 16, 23 (1983). On the rare occasions that courts have read in an element, they have been explicit about it. *See, e.g.,* United States v. X-Citement Video, 513 U.S. 64, 78, 115 S. Ct. 464, 472 (1994) (extending "knowingly" mens rea requirement to age of minors depicted in sexually explicit material); Staples v. United States, 511 U.S. 600, 619 (1994) (reading in requirement for proof that a defendant knew of a weapon's automatic firing capability to sustain conviction for possession of such a weapon).

Against this backdrop, AFCCA's error becomes apparent. As written by Congress, Article 120(b)(2)(A), UCMJ, does not require proof of the victim's capacity as an element of the offense. *Cf.* 10 U.S.C. § 920(b)(3) (requiring proof

of the victim's incapacity). In interpreting this same subsection, this Court never stated that a conviction for sexual assault "without consent" required the Government to prove the victim's capacity beyond a reasonable doubt. *See generally* Mendoza, 2024 CAAF LEXIS 590; *cf.* Staples, 511 U.S. at 619 ("[T]o obtain a conviction, the Government should have been required to prove that petitioner knew of the features of his AR-15 that brought it within the scope of the Act."). By nevertheless interpreting Mendoza as requiring proof that "the [victim] was, at the time of the sexual act, capable of consenting, but did not consent," (JA at 34), AFCCA effectively presumed that this Court *implied* an additional element into subsection (b)(2)(A).

But the idea that this Court would read in an element without explicitly saying so is inconceivable, considering this Court's reluctance to change law by implication. *See* United States v. Hasan, 84 M.J. 181, 206 (C.A.A.F. 2024) ("[O]verruling by implication is disfavored."). If overruling a prior decision (which is entirely within this Court's power to do) by implication is "disfavored," id., it stands to reason that creating an additional element (which veers into the "legislative, not judicial," function) by implication would be even *more* disfavored. United States v. Evans, 333 U.S. 483, 486 (1948); *see also* In re Ames Dep't Stores, 127 B.R. 744, 753 (Bankr. S.D.N.Y. 1991) (courts "should not imply an additional non-bargained-for term" when construing bankruptcy statute). Just as

there is "no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes," United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543 (1940), so too is the case with this Court's precedent. By reading in an element that is neither contained in the statute nor explicitly required by this Court's opinion in Mendoza, AFCCA erred.

C. The evidence, not trial counsel's argument, is determinative of factual sufficiency.

Appellee could not have said it better: "It does not matter what trial counsel argued, *it only matters what the evidence showed*." (Ans. Br. at 27) (emphasis added). That trial counsel alluded to "blackout" and "incapacitation" while arguing "all the surrounding circumstances" does not change what the evidence showed. *See* 10 U.S.C. § 920(g)(7)(C). Here, the evidence showed that KE—who was uninterested in sex with Appellee and repeatedly rebuffed his advances during the hours preceding the assault—was (a) awake and aware (i.e., capable of consenting) for at least part of the sexual penetration, and (b) nonconsenting, as evidenced by the fact that she panicked upon awaking to penetration, faked sleep to get Appellee to stop, and was deeply upset by the incident, which she reported the same day. Appellee's conviction for sexual assault without consent is factually sufficient based on this evidence, which establishes that for at least part of the sexual act, KE was "capable of consenting and did not give consent."

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court find that AFCCA erred in applying Mendoza and remand for a new factual sufficiency review.

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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, the Air Force Appellate Defense Division, and civilian appellate defense counsel on 20 June 2025.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(b)

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

This brief contains 2564 words.

This brief complies with the typeface and type style requirements of Rule 37.

/s/ Kate E. Lee, Maj, USAF

Attorney for the United States (Appellant)

Dated: 20 June 2025