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' BRIEF IN SUPPORT OF THE CERTIFIED ISSUE Crim. App. Dkt. No. 40439 USCA Dkt. No. 25-0112/AF 10 April 2025

UNITED STATES' BRIEF IN SUPPORT OF THE CERTIFIED ISSUE

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v.	)	
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WILLIAM C.S. HENNESSY	)	USCA Dkt. No. 25-0112/AF
United States Air Force	)	
Appellee.	)	10 April 2025

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

CERTIFIED ISSUE

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED IN APPLYING UNITED STATES V. MENDOZA, __ M.J. __ (C.A.A.F. 2024) TO FIND APPELLEE'S SEXUAL ASSAULT CONVICTION FACTUALLY INSUFFICIENT.

RELEVANT AUTHORITIES[1]

In relevant part, 10 U.S.C. § 866(d)(1) provides that:

> *Cases appealed by accused*. In any case before the Court of Criminal Appeals under subsection (b), the Court may act only with respect to the findings and sentence as entered into the record under section 860c of this title (article 60c). The Court may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and

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

> determines, on the basis of the entire record, should be approved. In considering the record, the Court may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

In relevant part, 10 U.S.C. § 920(b) provides that:

> *Sexual assault*. Any person subject to this chapter [10 USCS §§ 801 et seq.] who—
>
> (1) commits a sexual act upon another person by—
>
> (A) threatening or placing that other person in fear;
>
> (B) making a fraudulent representation that the sexual act serves a professional purpose; or
>
> (C) inducing a belief by any artifice, pretense, or concealment that the person is another person;
>
> (2) commits a sexual act upon another person—
>
> (A) without the consent of the other person; or
>
> (B) when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring; or
>
> (3) commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to—
>
> (A) impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person; or

(B) a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person;

is guilty of sexual assault and shall be punished as a court-martial may direct.

In relevant part, 10 U.S.C. § 920(g) provides that:

(7) *Consent*.

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

(B) A sleeping, unconscious, or incompetent person cannot consent. A person cannot consent to force causing or likely to cause death or grievous bodily harm or to 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.

(8) *Incapable of consenting*. The term "incapable of consenting" means the person is—

> (A) incapable of appraising the nature of the conduct at issue; or
>
> (B) physically incapable of declining participation in, or communicating unwilling[n]ess to engage in, the sexual act at issue.

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

A general court-martial convicted Appellee of one specification of sexual assault and two specifications of abusive sexual contact in violation of Article 120, UCMJ. (JA at 53-54.) The court-martial sentenced Appellee to a dishonorable discharge, confinement for 34 months, reduction to the grade of E-1, and a reprimand. (JA at 54.)

On appeal, Appellee raised six assignments of error before AFCCA, including one challenging the legal and factual sufficiency of his sexual assault conviction. (JA at 2.) On 20 August 2024, AFCCA affirmed the findings and modified the sentence based on excessive post-trial delay. (JA at 2.) Appellee moved for reconsideration, which AFCCA denied. (JA at 24.)

Following the issuance of this Court's opinion in United States v. Mendoza, No. 23-0210, 2024 CAAF LEXIS 590 (C.A.A.F. Oct. 7, 2024), AFCCA vacated its

original opinion. (Id.) On 25 November 2024, AFCCA found Appellee's conviction for sexual assault without consent factually insufficient based on its application of Mendoza. (JA at 25.) AFCCA set aside the finding of guilty and dismissed the specification with prejudice. (JA at 35.) On 26 December 2024, the United States moved AFCCA to reconsider. (JA at 38.) On 10 January 2025, AFCCA denied the motion for reconsideration. (JA at 49.)

On 5 March 2025, the Deputy Judge Advocate General of the Air Force, performing the duties of the Judge Advocate General, certified for review the issue now before this Court. The certificate for review was timely filed on 11 March 2025.

STATEMENT OF THE FACTS

KE Repeatedly Rejects Appellee's Physical Advances

In summer 2019, Appellee and KE connected on social media. (JA at 170.) On 8 June 2019, after approximately a week of messaging back and forth, KE agreed to hang out with Appellee in his dorm room on Spangdahlem Air Base. (JA at 170-72.)

Upon KE's initial arrival, the two sat on the couch and watched TV. (JA at 173.) Eventually, they transitioned to talking to each other. (Id.) As they conversed, Appellee scooted closer to KE until they were only "inches" apart and grabbed her hand. (JA at 173-74.) KE thought Appellee was "moving too fast"

given that it was their first time meeting in person, and did not reciprocate the gesture but continued their conversation. (JA at 174.)

As KE was talking, Appellee leaned in to kiss her. (Id.) KE noticed and thwarted Appellee by "lean[ing] the opposite direction." (JA at 175.) Several minutes later, undeterred by his unsuccessful first attempt, Appellee again tried to kiss KE. (Id.) This time, he succeeded in kissing her on the lips. (Id.) But the kiss did not last long. (Id.) As Appellee grabbed KE's face with his hand mid-kiss, KE pulled away. (Id.) Feeling "uncomfortable and awkward," KE left shortly thereafter and returned to her own room. (JA at 176-77.)

Sometime later that day, Appellee messaged KE and apologized: "I'm sorry if I was moving too fast." (JA at 176.) He then asked her if they could "start over" and if she was willing to meet him for a concert at the Enlisted Club ("E-Club") later that evening. (Id.) Feeling better about Appellee based on his apology, KE, who wanted to attend the concert but did not have anyone to go with, agree d to accompany Appellee and his friends. (JA at 176-77.)

Around dinnertime, KE joined Appellee and his friends at a table in the E-Club. (JA at 178.) As the evening progressed, Appellee and KE stayed together as they moved around the E-Club. (JA at 179-180.) At some point, while they were sitting by the bar, KE received a call from her brother. (JA at 183-84.) As KE spoke to her brother over the phone, Appellee started rubbing her back. (JA at

184.) Feeling "weirded out," KE brushed Appellee's hand off. (JA at 184-85.) At another point, while they were sitting at a table near the DJ booth, Appellee asked KE: "So my room or yours?" (JA at 183.) In rebuffing Appellee, KE responded: "*You go to yours and I'll go to mine*." (Id.) (emphasis added).

At the end of the evening, Appellee offered to give KE a piggyback ride as they left the E-Club. (JA at 186.) Tired, drunk, and not thinking about the fact that Appellee did not know where she lived, KE agreed. (JA at 185-86, 219.)

KE Awakes to Vaginal Penetration

The next thing KE remembered was waking up to find herself on Appellee's bed, naked from the waist down with her legs on his shoulders as Appellee penetrated her vagina with his penis. (JA at 186-87.) Realizing she "didn't know how [they] got to that point," KE panicked and "decided to fake sleep to get him to stop." (JA at 189.) Without saying anything, she closed her eyes and turned her head to face the wall. (Id.) Appellee noticed and tried to get KE's attention, calling her name before saying, "Oh no." (Id.) Appellee then shook KE's shoulder in an attempt to get her to open her eyes. (Id.) When KE did not respond and kept her eyes shut, Appellee stopped what he was doing and went to the restroom. (JA at 190, 232.) KE then sat up and began to gather her things so she could leave. (JA at 190-91, 234.)

As KE tried to leave, Appellee—who was back in the room—asked her if he had done something wrong. (JA at 234.) Reluctant to "alert" Appellee to the possibility that something was wrong, KE responded in the negative before leaving his room. (JA at 234-35.) Afraid that Appellee "might come after [her] if he heard [her] running," KE walked out of his room and continued walking down the stairs. (JA at 193.) Upon reaching the ground floor, KE broke into a run. (Id.)

KE Reports the Sexual Assault

After running to her dorm building, KE cried and began "freaking out." (Id.) Not knowing who to call, KE, who was "scared," "confused," and "angry," unsuccessfully attempted to reach her friend SL. (JA at 147, 193.) Panicked, KE then called a different friend, KB, who agreed to meet KE outside her dorm building. (JA at 194.)

As KB approached KE, he noticed that she had "red eyes…like she had just got done crying." (JA at 75-76.) KE, who had been trying to "keep [her] cool," broke into tears again and said to KB, "I just got raped." (JA at 77, 195.) As KB tried to console her, KE called SL again because she "felt like [she] needed a female to help [her]." (JA at 78, 112-13, 195.) Approximately 15 minutes later, SL arrived and escorted KE, who was "crying very intensely," to her room, where KE told SL and LV, another friend, what had happened. (JA at 112-14, 119, 150, 195-96, 279.)

Around midnight, KE reported the incident to the Sexual Assault Response Coordinator (SARC), after which she submitted to a forensic examination by a sexual assault medical forensic examiner. (JA at 198-202, 303-319.) Months later, when KE saw Appellee at the E-Club, she cried and hid in a restroom to avoid him. (JA at 204-05.)

Appellee is Tried and Convicted of Sexual Assault without Consent

At trial, during the prosecution's case-in-chief, trial counsel asked KE if she wanted to have sex with the accused back in June 2019, to which she responded: "No." (JA at 206.) After a defense cross-examination that implied KE might have consented while drunk, the prosecution asked KE to explain why she believed she did not consent. (JA at 280.) KE testified: "I don't see how I would have been okay with sex happening later on if I wasn't okay with the kissing earlier on." (Id.)

The defense presented expert testimony from a forensic psychologist about alcoholic blackouts—a "memory disturbance that's brought on by a unique consumption pattern of alcohol"—and how people "can do complex behaviors in a blackout and then not remember them later." (JA at 328-330.) The expert distinguished blackouts from being "passed out," that is, unconscious as a result of consuming too much alcohol. (JA at 329.) When asked by the defense whether someone could engage in consensual sex while blacked out, the expert responded affirmatively. (JA at 340.)

In closing argument, trial counsel opened his discussion on the element of consent by reminding the members: "You judge consent based on all of the surrounding circumstances." (JA at 360.) After noting that KE was "blackout drunk," trial counsel urged the members look at the surrounding circumstances:

> All the surrounding circumstances from that night tell you she did not consent to him. She didn't want him holding her hand; she didn't want him kissing her face; she didn't want him holding her face; she didn't want him rubbing her back; she doesn't want him buying her drinks. She doesn't want him having sex with her. Based on all the surrounding circumstances, there was no freely given agreement by a competent person.

(JA at 360-61.)

Trial counsel then highlighted how KE "pretend[ed] like she fell asleep" when she woke up and realized what Appellee was doing to her: "Ladies and gentlemen, he does not get a medal because he stopped when he thought the girl was finally comatose." (JA at 362.)

The defense responded by portraying KE as "interested" in Appellee and highlighting inconsistencies between her retellings of the assault to various people to support their argument that she had consented, or alternatively, that there was a reasonable mistake of fact as to consent. (JA at 382-386.) Citing the fact that KE "wasn't chugging these drinks…wasn't slamming them at the bar…wasn't taking any shots," (JA at 389-390), trial defense counsel discounted the idea that KE was incapacitated by alcohol, such that she could not consent: "Airman [KE] didn't

black out that night. She had consensual sexual intercourse with [Appellee] and then regretted it." (JA at 391.)

AFCCA Affirms Appellee's Sexual Assault Conviction

On appeal, Appellee asserted, *inter alia*, that his conviction for sexual assault "without consent" of KE was (1) legally insufficient because "the Government's theory of criminality was that [he] committed sexual assault upon a person incapable of consenting due to impairment by an intoxicant rather than sexual assault without consent,"[2] and (2) factually insufficient because his reaction to KE closing her eyes suggested he had a mistake of fact as to consent. (JA at 10-11.) AFCCA disagreed with both contentions. (Id.)

In rejecting Appellee's argument that his conviction was legally insufficient, AFCCA pointed to the plain language of the specification, the evidence presented in support of the offense, and the military judge's instructions as proof that everyone was "aware that the criminal theory at issue (in fact, the central issue) in this trial was whether [Appellee] committed the conduct without KE's consent." (JA at 10.) In AFCCA's view, the prosecution's evidence regarding the offense and the military judge's instructions on the same "eviscerate[d] any concern that

[2] While Appellee raised a separate assignment of error alleging that his due process rights were violated because he was "convicted of a theory of criminality not on the charge sheet," AFCCA determined that the issue did not warrant discussion or relief. (JA at 2.)

[Appellee] was convicted of a theory of criminal liability not squarely and appropriately before the members." (JA at 10-11.)

The Court then went on to opine that Appellee's conviction was factually sufficient: "We are convinced of the [Appellee's] guilt beyond a reasonable doubt." (JA at 11.) In concluding that the encounter was nonconsensual and that any mistake of fact as to consent would have been "unreasonable under the circumstances," AFCCA cited the fact that KE (a) "repeatedly rebuffed [Appellee]'s physical advances," and (b) unequivocally suggested they go their separate ways when Appellee asked, "So my room or yours?" (Id.) AFCCA further observed that KE's actions after the sexual assault—running away and immediately confiding in her friends—and the results of the forensic examination "substantially corroborate[d] her testimony." (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 partially 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 which theory of liability applied, 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.

AFCCA Reconsiders and Sets Appellee's Conviction Aside

After this Court's decision in Mendoza, AFCCA *sua sponte* reconsidered its original opinion, vacated it, and issued a new one. (JA at 24-25.) This time, the lower court—which appeared to interpret Mendoza as requiring proof beyond a

reasonable doubt of KE's capacity to consent—set aside Appellee's sexual assault conviction as factually insufficient because it was "not convinced beyond a reasonable doubt that KE was, at the time of the sexual act, capable of consenting, but did not consent." (JA at 33-35.) The lower court pointed to the absence of evidence "illuminating what actually occurred" between the moment KE accepted the piggyback ride and the moment she woke up to penetration, while also citing the expert's testimony that KE might have experienced either an alcoholic "blackout" or "pass out." (JA at 34.)

AFCCA did not address Appellee's previous assignment of error alleging that his sexual assault conviction was premised on a theory of liability not on the charge sheet. In the court's view, the issue was "moot" based on its determination that the conviction was factually insufficient. (JA at 25.)

SUMMARY OF THE ARGUMENT

"We are convinced of the Appellant's guilt beyond a reasonable doubt." (JA at 11.) After considering the statutory elements of Article 120(b)(2)(A), UCMJ, the Air Force Court found Appellee's conviction for sexual assault without consent factually sufficient. But only a few months later, AFCCA set that same conviction aside based on this Court's decision in Mendoza, which the lower court interpreted as creating a requirement that the lower court to be "convinced beyond a

reasonable doubt that KE was, at the time of the sexual act, capable of consenting, but did not consent." 2024 CAAF LEXIS 590, at *17-18; (JA at 34.)

The lower court's application of Mendoza is error for several reasons. First and foremost, Mendoza is inapplicable because the prosecution in this case did *not* switch theories of liability at trial—the pleadings, the proof, and the presentation were clearly focused on proving that KE did not consent. *Cf.* 2024 CAAF LEXIS 590, at *18. Second, the lower court's application of Mendoza—interpreting it as requiring it to read in an element found nowhere in the statute—violates the constitutional principle of separation of powers. The power to define criminal offenses and their elements is entrusted to Congress. U.S. CONST. art. I, § 8, cl. 10. As it relates to sexual assault without consent under the Code, Congress has exercised that power to craft a statute that, on its face, does not require proof of the victim's capacity to consent. *See* United States v. Neal, 68 M.J. 289, 301 (C.A.A.F. 2010); 10 U.S.C. § 920(b)(2)(A). Given that "[f]ederal courts have no constitutional authority to re-write the statutes Congress has passed based on judicial views about what constitutes 'sound' or 'just' criminal law," Xiulu Ruan v. United States, 597 U.S. 450, 471 n.* (2022) (Alito, J., concurring in the judgment), it was error for AFCCA to presume that this Court's decision in Mendoza was intended to create a requirement for proof of a fact not required by the statute—especially considering that the opinion never says so.

By differentiating between the fact-patterns that are criminalized by subsection (b)(2)(A) versus (b)(3)(A), Mendoza provided charging guidance for avoiding due process concerns, filtered through the lens of the "cardinal principle" of statutory interpretation—the requirement for courts to "give effect, if possible, to every word" of a statute. Loughrin v. United States, 573 U.S. 351, 358 (2014). But the opinion never stated that it was adding an element to be proven. AFCCA's failure to recognize this resulted in an "erroneous consideration of the elements of the offense," United States v. Leak, 61 M.J. 234, 241 (C.A.A.F. 2005), which produced the paradoxical outcome before this Court: a conviction that was factually sufficient, and then suddenly not.

Besides being premised on an erroneously read-in element, AFCCA's factual sufficiency determination also suffered from a failure to properly consider relevant evidence. Namely, direct evidence of KE's nonconsent upon waking up to the sexual act, as well as circumstantial evidence establishing that KE was uninterested in intimacy before the sexual assault and deeply upset by it afterwards. By opining that there was insufficient proof that KE was "capable of consenting but did not consent"—despite evidence that KE was awake, aware, and nonconsenting for at least part of the sexual act—AFCCA betrayed a misunderstanding of consent and effectively implied that nonconsent is only relevant when it is expressed contemporaneously with the initiation of the sexual

act, or affirmatively through verbal or physical refusal of some kind. Relatedly, the lower court failed to recognize that convictions may be based on circumstantial evidence. *See* United States v. Hart, 25 M.J. 143, 147 (C.M.A. 1987) (affirming a conviction based on circumstantial evidence). Through its disregard for all the circumstantial evidence of KE's nonconsent before and after the sexual act, AFCCA effectively demanded direct evidence of affirmative expressions of nonconsent—something this Court has explicitly said is not required. Mendoza, 2024 CAAF LEXIS 590, at *10

Considering the above, this Court should find that AFCCA erred in its application of Mendoza to the factual sufficiency review in this case. Further, this Court should exercise its authority under Article 67(e), UCMJ, to remand this case to AFCCA for a new factual sufficiency review.

ARGUMENT

THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED IN APPLYING UNITED STATES V. MENDOZA, __ M.J. __ (C.A.A.F. 2024) TO FIND APPELLEE'S SEXUAL ASSAULT CONVICTION FACTUALLY INSUFFICIENT.

Standard of Review

This Court reviews a CCA's factual sufficiency determination for "the application of 'correct legal principles,' but only as to matters of law." United States v. Thompson, 83 M.J. 1, 4 (C.A.A.F. 2022) (citing United States v. Clark,

75 M.J. 298, 300 (C.A.A.F. 2016)). While this Court will not review a factual sufficiency determination if it is "based solely on an appraisal of the evidence," United States v. Thompson, 9 C.M.R. 90, 92 (C.M.A. 1953), it is "statutorily obligated" to do so if the CCA's determination "was reached after an erroneous consideration of the elements of the offense." Leak, 61 M.J. at 241.

Law & Analysis

Article 66(d)(1), UCMJ, vests the Courts of Criminal Appeal (CCA) with the power to review the factual sufficiency of court-martial convictions and to "affirm only such findings of guilty … as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." 10 U.S.C. § 866(d)(1).

Here, despite initially affirming Appellee's conviction for sexual assault without consent as factually sufficient, AFCCA later reversed course based on a perceived deficiency of proof related to whether "KE was, at the time of the sexual act, capable of consenting, but did not consent." (JA at 11, 34.) This paradoxical outcome is the product of AFCCA's retrospective application of Mendoza. But as set forth below, this application of Mendoza was error that warrants reversal because: (1) Mendoza does not control here, since the prosecution did not rely solely on evidence of KE's intoxication to prove lack of consent; (2) AFCCA engaged in an "erroneous consideration of the elements of the offense," Leak, 61

M.J. at 241, when it read in an element regarding the victim's capacity that is found nowhere in the statute; and (3) AFCCA incorrectly implied that expressions of nonconsent are only relevant when made contemporaneously with the initiation of the sexual act. Accordingly, this Court should find that AFCCA erred and remand for a new factual sufficiency review.

A. Mendoza is inapplicable to this case, where the prosecution used more than just evidence of KE's intoxication to prove lack of consent.

In Mendoza, this Court grappled with the due process issues posed by the prosecution's attempt to prove the absence of consent simply through proof of the victim's incapacity—a strategy that, in the Court's view, amounted to "charg[ing] one offense under one factual theory and then argu[ing] a different offense and a different factual theory at trial." 2024 CAAF LEXIS 590, at *18. But those concerns do not apply here.

Unlike in Mendoza, the victim's intoxication was just one of several circumstances that the Government used to prove the absence of consent. *Cf.* 2024 CAAF LEXIS 590, at *22. After charging Appellee with sexual assault without consent, the prosecution put on a case which established that KE: (1) met Appellee in-person for the first time on the day of the assault; (2) repeatedly spurned Appellee's advances all day; (3) explicitly declined Appellee's suggestion that they go back to one of their rooms together by telling him, "You go to yours and I'll go to mine"; (4) awoke to unwanted sexual penetration and feigned sleep in an

attempt to get Appellee to stop; (5) did not think she would have consented while blacked out, given that she "wasn't [even] okay with the kissing"; (6) did not want to have sex with Appellee that day; (7) was deeply upset by the fact that a sexual act occurred once she realized what was happening; and (8) reported the incident the same day.

All this evidence spoke directly to what was charged: that Appellee "commit[ted] a sexual act upon [KE] by penetrating her vulva with his penis, *without her consent*." (JA at 50) (emphasis added). And as a result, that is what the prosecution argued in closing. Although trial counsel did, at one point, argue that KE was "blackout drunk" and therefore "not a competent person," that was not the *only* thing he pointed to on the issue of consent. (JA at 360). After urging the members to "look at all of the surrounding circumstances," trial counsel highlighted evidence about the many things KE "didn't want"—not least of which was that she "[didn't] want [Appellee] having sex with her"—as evidence that there was no consent. (*See* JA at 360-61); *cf.* Mendoza, 2024 CAAF LEXIS 590, at *4 (victim did not recognize the appellant when she awoke in her bedroom after the sexual act). Trial counsel rounded out his discussion by reminding the members that KE was awake, aware, and nonconsenting for part of the assault: "[R]emember what she said when she gets in that room and she realizes what he's

doing to her—her defensive mechanism is to pretend like she fell asleep." (JA at 362.)

In response, the defense argued that there had been consent: "[KE] didn't black out that night. She had consensual sexual intercourse with [Appellee]." (JA at 391.) Asserting that "there was nothing about what happened in that room that was non-consensual," trial defense counsel attempted to portray KE as a woman who waffled between two men ("her crush" and Appellee); chose one (Appellee) for "a night of consensual sex"; promptly regretted it because she was about her crush; and falsely reported that the encounter was nonconsensual as a result. (JA at 382, 384, 386, 388, 391.)

After hearing from both sides and being instructed that they could not convict Appellee unless they were convinced beyond a reasonable doubt that he committed the sexual act "without the consent of [KE]," the members found Appellee guilty of sexual assault without consent. (JA at 341,399.)

Considering both parties' singular focus on the issue of consent, as well as the absence of indication that the members deviated from the military judge's instructions, this Court should rest assured that the court-martial convicted Appellee on the theory of liability on the charge sheet, and nothing else. United States v. Taylor, 53 M.J. 195, 198 (C.A.A.F. 2000) ("Absent evidence to the contrary, this Court may presume that members follow a military judge's

instructions.") This is especially true considering the lower court's original opinion, which concluded that "the evidence presented supports Appellant's conviction for sexual assault without KE's consent," before proceeding to cite all of the circumstantial evidence of nonconsent. (JA at 10-11.)

That the members—and initially, the lower court—concluded there was proof beyond a reasonable doubt of sexual assault "without consent" based on the surrounding circumstances is *not* a due process violation. 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, 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"), and informs the servicemember that "[a]ll the surrounding circumstances are to be considered in determining whether a person gave consent." *See also* Mendoza, 2024 CAAF LEXIS 590, at *22 ("To be clear, our holding…does not bar the trier of fact from considering evidence of the victim's intoxication when determining whether the victim consented.") Here, Appellee was prosecuted for and convicted of sexual assault "without consent" in precisely the manner the statute contemplates—through consideration of "[a]ll the surrounding circumstances." 10 U.S.C. § 920(g)(7)(C). Accordingly, there is no due process

violation, and by extension, AFCCA had no reason to deviate from the plain language of subsection (b)(2)(A) in determining whether Appellee's conviction was factually sufficient.

B. AFCCA erred by reading in an element, i.e., that the victim was capable of consenting, that is not required by statute.

Besides failing to recognize that Mendoza is inapplicable, AFCCA erred during its factual sufficiency review—which requires it to "make its own independent determination as to whether the evidence constitutes proof of each *required element* beyond a reasonable doubt," United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002) (emphasis added)—when it read in an element regarding the victim's capacity, even though no such proof is required by statute.

Required elements are those that are "listed in the statute that defines the crime." Richardson v. United States, 526 U.S. 813, 817 (1999). And the power to define criminal offenses and their elements is entrusted to Congress, "particularly in the case of federal crimes, which are solely creatures of statute." U.S. CONST. art. I, § 8, cl. 10; Liparota v. United States, 471 U.S. 419, 424 (1985). Thus, "[i]n 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).

Because defining the elements of a crime is a "legislative, not judicial," function, United States v. Evans, 333 U.S. 483, 486 (1948), judges "must uphold

legislative choices in this regard, made as they are by our elected representatives." United States v. Kennedy, 682 F.3d 244, 260 (3d Cir. 2012). This separation of powers matters, because as the Supreme Court recently observed: "If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives." Bostock v. Clayton Cty., 590 U.S. 644, 654-55 (2020). This Court recently echoed the same admonition, United States v. Valentin-Andino, __ M.J. __, No. 24-0208/AF, slip op. at 9 (citing Bostock, 590 U.S. at 654-55), thus underscoring its understanding that "it is for Congress to define criminal offenses and their constituent parts." United States v. Jones, 68 M.J. 465, 468 (C.A.A.F. 2010); *see also* United States v. Roderick, 62 M.J. 425, 432 (C.A.A.F. 2006) (declining to "create an element that is unsupported by the statute").

Considering the above, AFCCA erred by assuming that Mendoza created a read-in element regarding the victim's capacity, despite no indication that Congress intended to require such proof in "without consent" cases.

1. *Congress did not make proof of the victim's capacity a required element of sexual assault without consent.*

When a statute includes certain language in one provision but excludes it in another, "it is generally presumed that Congress act[ed] intentionally and purposely in the disparate inclusion or exclusion." Russello v. United States, 464

U.S. 16, 23 (1983) (citation omitted). Thus, when Congress specifies an element in one subsection and does not repeat it in the neighboring one, courts avoid assuming that the omitted element was meant to apply:

> We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.

Jama v. Immigration & Customs Enf't, 543 U.S. 335, 341 (2005).

The Supreme Court's analysis in United States v. Culbert, where it examined an appellate court's attempt to read in an element not mentioned anywhere in the statute, is instructive in this regard. 435 U.S. 371, 373 (1978). At issue in Culbert was a circuit court decision holding that convictions under the Hobbs Act[3] required proof not only that a defendant "violated the express terms of the Act" but also that his conduct constituted "racketeering," since the Act was a codification of an older

[3] The relevant section of the Hobbs Act provided that:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $ 10,000 or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951 (1976 ed.).

anti-racketeering law. Id.; United States v. Culbert, 548 F.2d 1355, 1357 (9th Cir. 1977) (citing United States v. Yokley, 542 F.2d 300, 301 (6th Cir. 1976)). In rejecting this interpretation, the Supreme Court focused on the fact that the term "racketeering" appeared nowhere in the statute. Culbert, 435 U.S. at 372. The Court pointed out that "when Congress wanted to make racketeering an element of an offense, it knew how to do so," citing the legislature's enactment of the Organized Crime Control Act of 1970, in which it defined "racketeering activity" as an element of a statutory offense. Id. at 378 n.8. Thus, the fact that Congress—which was "concerned about clearly defining the acts prohibited under the bill"—did *not* mention "racketeering" in the Hobbs Act was "strong evidence that Congress did not intend to make 'racketeering' an element of a Hobbs Act violation." Id. at 373, 378.

This logic applies equally to the statute at issue here. Article 120(b)(2)(A), UCMJ, defines sexual assault without consent as consisting of two elements: (1) that the accused committed a sexual act on another person, and (2) that he did so without the consent of the other person. 10 U.S.C. § 920(b)(2)(A). In defining sexual assault without consent, Congress did *not* make the victim's capacity to consent an element of the offense. The concept is mentioned nowhere in subsection (b)(2)(A). *See* 10 U.S.C. § 920(b)(2)(A). Had Congress wanted to, it could have—it certainly "knew how to do so," Culbert, 435 U.S. at 378 n.8, given

that it made the victim's capacity (or more precisely, lack thereof) an element in another part of the same statute. *See* 10 U.S.C. § 920(b)(2)(A); *cf.* 10 U.S.C. § 920(b)(3). Specifically, in subsection (b)(3), Congress criminalized the commission of a sexual act "upon another person when the other person is incapable of consenting to the sexual act" due to impairment by drugs or intoxicants, or mental or physical disability. 10 U.S.C. 920(b)(3). Congress could have used similar language to prohibit "commit[ting] a sexual act upon another person [***who is capable of consenting***], without the consent of the other person." 10 U.S.C. § 920(b)(2)(A). That it did not is "strong evidence" that Congress did *not* intend for the victim's capacity to be an element of "without consent" cases. Culbert, 435 U.S. at 373.

Since Congress has "broad authority to regulate the conduct of members of the armed forces, including the power to define the elements of offenses committed by servicemembers," Neal, 68 M.J. at 304, the elements it chose should have been "dispositive" in determining which facts required proof beyond a reasonable doubt for AFCCA's factual sufficiency review. McMillan, 477 U.S. at 85. By interpreting Mendoza as reading an element into the offense, AFCCA erroneously assumed that this Court cast aside its qualms about creating elements that are unsupported by statute, Roderick, 62 M.J. at 432, and impermissibly transformed itself "from expounders of what the law *is* into policymakers choosing what the

law *should be*." Epic Sys. Corp. v. Lewis, 584 U.S. 497, 511 (2018) (emphasis added). But as discussed below, this Court was simply explaining "what the law is" and how it should be applied. Id.

2. *Mendoza should not be construed as creating a requirement for proof beyond a reasonable doubt that the victim was "capable of consenting."*

At the heart of the issue in this case is AFCCA's misapprehension of this Court's holding that "[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. The lower court interpreted this to mean that "without consent" cases require "[proof] beyond a reasonable doubt that [the victim] was, at the time of the sexual act, capable of consenting, but did not consent." (JA at 34.) But a careful reading of this Court's opinion does not require that interpretation.

One of this Court's primary concerns in Mendoza was its duty, under the "cardinal principle" of statutory interpretation, to "give effect, if possible, to every word" of Article 120(b), UCMJ. 2024 CAAF LEXIS 590, at *16 (citation omitted); Loughrin, 573 U.S. at 358. Through Article 120(b)'s subsections, Congress defined various sexual assault offenses using "different sets of elements." Alleyne v. United States, 570 U.S. 99, 132 (2013). This Court's discussion in Mendoza simply reflects its efforts to "respect that legislative judgment" by differentiating between subsections so that one ("incapable of consenting") is not

subsumed by the other ("without consent"). Id. In holding that "[s]ubsection (b)(2)(A) criminalizes the performance of a sexual act upon a victim who is capable of consenting but does not consent," this Court was not necessarily reading in an element. Mendoza, 2024 CAAF LEXIS 590, at *17. Rather, it appears that the Court was providing charging guidance to avoid due process concerns.

The Court's opinion essentially instructs the Government that fact-patterns involving victims who are "[i]ncapable of appraising the nature of the conduct, or physically incapable of declining participation in, or communicating unwillingness to engage in the sexual act" should be charged as "incapable of consenting" cases under subsection (b)(3)(A), because Congress created that subsection specifically for this class of victims. The opinion further warns the Government that if it charges sexual assault "without consent" under the neighboring subsection (b)(2)(A), it cannot prove the absence of consent "by *merely* establishing that the victim was too intoxicated to consent." Mendoza, 2024 CAAF LEXIS 590, at *22 (emphasis added). Otherwise, subsection (b)(3)(A)'s prohibition on committing sexual acts on incapacitated persons would be "relegated to mere surplusage without any purpose or effect." Id. at *16.

Ultimately, this Court's opinion should not be construed as requiring proof beyond a reasonable doubt that the victim was "capable of consenting, but did not consent." Nowhere in the opinion did this Court explicitly say proof of this fact

was a required element. *See generally* Mendoza, 2024 CAAF LEXIS 590, at *11-24; *cf.* Culbert, 435 U.S. at 374 (finding that court of appeals read an element into the Hobbs Act when it held that prosecution had to prove not only the statutory elements, also that defendant's conduct constituted "racketeering"). Considering the above, this Court should find that AFCCA's second factual sufficiency determination—which hinged entirely on the assumption that Mendoza read in an element regarding the victim's capacity to consent—was premised on "erroneous consideration of the elements of the offense," and reverse. Leak, 61 M.J.

C. AFCCA erred in its application of the law regarding consent and circumstantial evidence.

Besides being premised on "erroneous consideration of the elements of the offense," Leak, 61 M.J, AFCCA's factual sufficiency determination also suffers from a twofold failure to apply the "correct legal principles." Thompson, 83 M.J. at 4. In describing the purported deficiency of proof, AFCCA noted that there was "no evidence presented illuminating what actually occurred" between the time KE accepted the piggyback ride and the time she woke up to sexual intercourse. (JA at 34.) Per the lower court, "in the absence of evidence related to that time period, we are not convinced beyond a reasonable doubt that KE was, at the time of the sexual act, capable of consenting, but did not consent." (Id.) But as set forth below, AFCCA's reasoning—which effectively ignored all the circumstantial evidence presented—is flawed because it: (1) implies consent is relevant only

when the sexual act begins, and (2) suggests that an affirmative verbal or physical expression of nonconsent is required.

1. *By disregarding evidence that KE was awake and nonconsenting for part of the sexual assault, AFCCA failed to appreciate that under Article 120(b)(2)(A), consent must exist at all times.*

In opining that it was not "convinced beyond a reasonable doubt that KE was, at the time of the sexual act, capable of consenting, but did not consent," AFCCA revealed a deep misunderstanding of how consent works. (JA at 34.)

To start, the lower court completely overlooked the fact that when KE eventually came to and realized that Appellee was having sex with her, she panicked and decided to "fake sleep to get him to stop." (JA at 189.) This evidence indicates that KE understood what was happening to her and was not agreeable to it, given that she wanted the sex to cease. Even under the lower court's erroneous interpretation of Mendoza, Appellee's conviction would be factually sufficient based on this testimony, which establishes that for at least part of the sexual assault, KE was "capable of consenting and did not give consent."

By ignoring this evidence, AFCCA effectively suggests that expressions of consent or nonconsent are only relevant when they are contemporaneous with the *initiation* of the sexual act. Under this framework, evidence of nonconsent in the middle of the sexual act (e.g., if one participant changed their mind mid-intercourse and asked their partner to stop) would be irrelevant. Similarly,

evidence of the victim's prior expressions of nonconsent—such as evidence that she rebuffed the accused's advances, declined an invitation to go back to his room, and generally had zero sexual interest in him—would become irrelevant unless it occurred seconds before the sexual act began. This proposition is error. Mendoza does not say that this is the case, and the statute's plain language defies any such interpretation. *See generally* 2024 CAAF LEXIS 590; 10 U.S.C. § 920.

As set forth in the statute, consent is "a freely *given* agreement to the conduct at issue," the existence of which (or lack thereof) is determining by considering "[a]ll the surrounding circumstances." 10 U.S.C. §§ 920(g)(7)(A)-(C). The law is clear that people do not exist in a perpetual state of consent, since consent must be "*given*." 10 U.S.C. § 920(g)(7)(A) (emphasis added). Rather, it is the opposite—a person exists in a state of nonconsent until consent is "freely given." By extension, this means consent is relevant at all times during a sexual act. For as long as the "conduct at issue" is ongoing, there must be "freely *given* agreement" for it to be legal. Id. (emphasis added). And when, as in this case, there is no evidence of what occurred as the sexual act began, it is important for the factfinder to consider "[a]ll the surrounding circumstances" from the minutes, hours, and days both before and after the sexual act to assess the victim's nonconsenting state. 10 U.S.C. § 920(g)(7)(C). While the probative value of such

evidence may differ depending on how far removed in time it is from the sexual act, it nevertheless must be considered. AFCCA erred by failing to recognize this.

2. By ignoring circumstantial evidence of nonconsent before and after the sexual assault, AFCCA was demanding direct evidence.

In deciding this case based on the lack of information regarding "what actually occurred" while KE was either blacked out or passed out (i.e., asleep or unconscious), AFCCA failed to recognize that the absence of evidence about this timeframe was conclusive proof of nothing—which meant the surrounding circumstantial evidence should have been that much more important in its analysis. Here, the circumstantial evidence established that KE was uninterested in physical intimacy before the sexual assault, disturbed and nonconsenting upon waking up to it, and deeply upset by it afterwards. By disregarding this evidence during its second factual sufficiency review, AFCCA erred.

At trial, KE testified that she did not want to have sex with Appellee that day and that she did not think she would have consented to it. (JA at 782.) This was supported by evidence that KE "repeatedly rebuffed Appellant's physical advances," (JA at 11)—not reciprocating when he grabbed her hand; leaning away from him to avoid being kissed; pulling away from him when he eventually did manage to kiss her; shrugging his hand off when he tried to rub her back; and turning down an invitation to his room by telling him, "You go to yours and I'll go to mine." (JA at 173-185.) This is tantamount to an advance declaration of no

consent—no reasonable person would interpret KE's rejection of physical touch, all day long, as a sign that she was willing to engage in the ultimate form of physical intimacy later the same day. Indeed, the lower court initially reached the same conclusion: "[R]eview of the evidence presented in this case convinces us that if Appellant did have a mistake of fact as to consent, such a belief would be unreasonable under the circumstances. (JA at 11.) Put differently, the circumstantial evidence established beyond a reasonable doubt that as far as KE could remember, she was in a nonconsenting state.

The fact that KE later accepted a piggyback ride from Appellee because she was tired does not warrant a conclusion that she subsequently consented to sexual activity with him. Nor does the fact that KE was drunk and could not remember anything from this timeframe. Given that "alcohol may affect a person's memory and inhibitions *without* depriving [her] of volition," United States v. Baran, 22 M.J. 265, 270 (C.M.A. 1986), the odds that someone who repeatedly expressed aversion to Appellee's physical touch and believed him to be "moving too fast" would suddenly have a 180-degree change of heart—simply because she was intoxicated—seem low. And though not impossible, that slim possibility does not automatically negate the other evidence of nonconsent: "While the Government has a heavy burden of persuasion, it need not prove its case to a mathematical certainty." United States v. Kloh, 27 C.M.R. 403, 406 (C.M.A. 1959).

This is especially true considering KE's reaction upon waking up and becoming capable of consenting—closing her eyes and turning her head to "fake sleep to get [Appellee] to stop." (JA at 189.) What KE did after Appellee stopped—flee his room, cry in a bathroom, call her friends for help, report the assault, and submit to a sexual assault forensic examination—is similarly relevant to determining lack of consent, as is her emotional reaction to seeing Appellee months later. "[U]sing common sense and knowledge of human nature," it is difficult to conclude that someone who had such a vehement reaction upon realizing the sexual act was occurring had freely consented to it just minutes before, blacked out or not. *See* R.C.M. 918(c), Discussion. It is equally difficult to conclude that such evidence would be irrelevant to determining whether KE might have consented. And this is where AFCCA went wrong.

That there is no information about "what actually occurred" between the piggyback ride and the time KE opened her eyes to find Appellee penetrating her does not mean that the above evidence is rendered legally insufficient to carry the burden of proof. *See* Hart, 25 M.J. at 147. As this Court has recognized, "the ability to rely on circumstantial evidence is especially important in cases, such as here, where the offense is normally committed in private." United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019). By disregarding essentially all the prosecution's evidence—which established a *continuous* lack of consent from

prelude to aftermath—AFCCA implied that direct evidence of nonconsent (such as an affirmative verbal or physical expression refusal), contemporaneous with the initiation of the sexual act, was necessary to sustain a conviction under subsection (b)(2)(A). This is an erroneous proposition that defies decades' worth of jurisprudence holding that a conviction may be based on circumstantial evidence. Desert Palace, Inc. v. Costa, 539 U.S. 90, 100, 123 S. Ct. 2148, 2154 (2003) ("[W]e have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required."). As this Court reiterated in Mendoza: "[T]he absence of direct evidence of an element of an offense does not prevent a finding of guilty for that offense from being [factually] sufficient." 2024 CAAF LEXIS 590, at *11.

As evidenced by the lower court's first factual sufficiency review, the information that was available "proved that KE did not consent to sex with Appellant and disproved that Appellant had a reasonable mistake of fact as to consent." (JA at 11.) Given that the evidence in question did not change between AFCCA's first review (when it found Appellee's conviction factually sufficient using the statutory elements) and its second (when it found the conviction factually insufficient based on a misinterpretation of Mendoza), this Court should find that AFCCA's application of Mendoza was error.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court find that AFCCA erred and remand the case 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 10 April 2025.

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