IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*	)	**BRIEF IN SUPPORT OF THE CERTIFIED ISSUE**
v.	)	Crim. App. No. 40442
Airman (E-2) **NICHOLAS J. MOORE** United States Air Force *Appellant.*	)	USC Dkt. No. 25-0010/AF
	)	9 April 2025

BRIEF IN SUPPORT OF THE CERTIFIED ISSUE

THOMAS J. ALFORD, Lt Col, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34441

MARY ELLEN PAYNE
Associate Chief
Government Trial and
Appellate Operations Division
United States Air Force
Court Bar No. 34088

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and
Appellate Operations Division
United States Air Force
Court Bar No. 35837

MATTHEW D. TALCOTT, Col, USAF
Director
Government Trial and
Appellate Operations Division
United States Air Force
Court Bar No. 33364

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

ISSUE CERTIFIED

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 LEGALLY AND FACTUALLY INSUFFICIENT.

INTRODUCTION

The Government charged Appellee with sexual assault under Article 120(b)(2)(A), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920(b)(2)(A) (2018) —sexual assault without consent. At trial, the Government presented direct evidence that the victim, AB, never gave consent to the sexual act: AB testified that she never consented to the sexual act and that upon waking to the sexual act in

progress, she immediately shoved Appellee off her and exclaimed, "What the fuck are you doing?" Despite this affirmative expression of nonconsent, the Air Force Court of Criminal Appeals (AFCCA) concluded that the Government had proved the case under a "sleeping victim" theory in Article 120(b)(2)(B) rather than the "without consent" theory charged and found the conviction both legally and factually insufficient. In doing so, AFCCA mistakenly held that the evidence was insufficient because "the Government offered no evidence that AB was capable of consenting and did not consent." The court's flawed legal and factual conclusions reflect a fundamental misinterpretation of United States v. Mendoza, No. 23-0210, 85 M.J. __, 2024 CAAF LEXIS 590 (C.A.A.F. 7 October 2024), and impose an additional element not required under Article 120(b)(2)(A), UCMJ. Because AFCCA's legal reasoning conflicts with the statute and controlling precedent, its decision should be reversed.

STATEMENT OF STATUTORY JURISDICTION

AFCCA reviewed this case under Article 66(d)(1)(B), UCMJ, 10 U.S.C § 866(d)(1)(B) (2021). This Court has jurisdiction to review this case under Article 67(a)(2), UCMJ, 10 U.S.C § 867(a)(2) (2021).[1]

[1] Unless otherwise noted, all references to the UCMJ are to the versions in the Manual for Courts-Martial, United States (2019 ed.) (MCM).

RELEVANT AUTHORITIES

Article 120(b)(2)(A), UCMJ (sexual assault without consent), states, in relevant part:

> (b) SEXUAL ASSAULT.—Any person subject to this chapter who—
>
> (2) commits a sexual act upon another person—
>
> (A) without the consent of the other person;
>
> is guilty of sexual assault and shall be punished as a court-martial may direct.

10 U.S.C. § 920(b)(2)(A).

Article 120(b)(2)(B), UCMJ (sexual assault while the victim is asleep, unconscious, or otherwise unaware), states, in relevant part:

> (b) SEXUAL ASSAULT.—Any person subject to this chapter who—
>
> (2) commits a sexual act upon another person—
>
> (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;
>
> is guilty of sexual assault and shall be punished as a court-martial may direct.

10 U.S.C. § 920(b)(2)(B).

Article 120(g)(7), UCMJ 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).

STATEMENT OF THE CASE

Appellee, Airman Nicholas J. Moore, was tried by a general court-martial composed of officer and enlisted members at Hill Air Force Base, Utah. Contrary to his plea, he was convicted of one specification of sexual assault in violation of Article 120(b)(2)(A), UCMJ, for committing a sexual act (digital penetration) upon AB, without her consent. (JA at 13.) A military judge alone sentenced Appellee to a dishonorable discharge, confinement for 18 months, forfeiture of all pay and allowances, and reduction to the grade of E-1. (JA at 14.) The convening

authority took no action on the findings and approved Appellee's sentence in its entirety. (JA at 16.)

On appeal, AFCCA set aside Appellee's conviction, finding the evidence of his guilt legally and factually insufficient. *See* United States v. Moore, No. ACM 40442 (f rev), 2024 CCA LEXIS 485, at *18 (A.F. Ct. Crim. App. 13 Nov. 2024) (unpub. op.). (JA at 1-10.) AFCCA relied exclusively on this Court's opinion in Mendoza, reasoning that the Government had charged Appellee under one theory—Article 120(b)(2)(A) (sexual assault without consent)—but proved the charged offense using a different theory—Article 120(b)(2)(B) (sexual assault when the victim is asleep). (JA at 9-10.) AFCCA concluded that the Government failed to prove that the victim was "capable of consenting and did not consent," rendering his conviction both legally and factually insufficient. (Id.)

The Deputy Judge Advocate General of the Air Force, performing the duties of the Judge Advocate General, certified this case to this Court under Article 67(a)(2), UCMJ, for review to determine whether AFCCA erred in applying Mendoza to find Appellee's conviction legally and factually insufficient. The Government requests that this Court find Appellee's conviction legally sufficient and remand the case to AFCCA for a new factual sufficiency review under Article 66(d)(1)(B), UCMJ.

STATEMENT OF FACTS

On 8 February 2022, AB, a twenty-year-old Airman, invited a group of friends, including Appellee, to her dormitory for dinner. (JA at 26, 29.) The group included two other male servicemembers, Airman First Class (A1C) KA and Senior Airman (SrA) BM. (JA at 29.) The group socialized, ate dinner, and watched television before A1C KA and SrA BM left for the night at approximately 2200 hours. (JA at 29-31.) Appellee remained behind, continuing to watch television with AB. (JA at 33.) Up to this point, Appellee and AB were merely friends and had not engaged in any romantic relationship. In addition, AB never engaged in any flirtatious behavior toward Appellee, nor had Appellee made any previous advances toward her. (JA 34-35.)

Appellee and AB sat next to each other on a small couch in her dormitory, continuing to watch television. (JA at 33.) At some point, Appellee reclined sideways on the couch, placing his legs over AB's lap. (JA at 40.) AB, who was wearing sweatpants, a tank top, a bra, and underwear, eventually fell asleep. (Id.) After feeling an unusual sensation while asleep, initially believing she needed to urinate, AB awoke to discover that Appellee's fingers were inside her vagina. (JA at 42-43.) She also quickly realized her tank top and bra had been removed by Appellee, and that Appellee had pulled down her sweatpants to her thighs. (JA at 43.)

Once she was fully awake, AB was lying on her right side, facing the back of the couch, while Appellee was positioned behind her. (JA at 44-45.) Appellee's right arm was wrapped around her chest, and his left arm was positioned behind her, with his hand underneath and between her legs. (JA at 44.) Appellee was also kissing or biting her left ear, and still had his fingers inserted into her vagina. (Id.) Once she realized what was occurring, AB physically pushed Appellee off her body and yelled, "What the fuck are you doing?" to which Appellee replied, "You're right, you're right." (JA at 45-46.) AB observed that Appellee had removed his pants, though he was still wearing underwear. (Id.) Appellee tossed a blanket over AB. (JA at 97.) When AB then told Appellee to leave, Appellee asked if they could discuss the situation in the morning, but AB insisted he leave, and Appellee eventually complied. (JA at 46.)

After Appellee left her room, AB immediately donned a hooded shirt and ran barefoot to SrA BM's dormitory, which was located about two minutes away in the same building. (JA at 47.) On her way there, AB called SrA BM and attempted to explain what had just happened to her. (JA at 48.) When she arrived at SrA BM's door, AB was crying and visibly upset and further explained to him that she "had fallen asleep on the couch and … had woken up to [her] shirt and bra being off and being touched by [Appellee]." (JA at 49-50.) This prompted SrA BM to contact the Sexual Assault Prevention and Response (SAPR) office. (JA at 50.) AB then

underwent a sexual assault forensic examination at the medical clinic at approximately 0100 hours. (JA at 51-52.)

Later that morning, AB reported for duty at 0715 hours and immediately informed her flight chief, Master Sergeant (MSgt) RS, of the incident. (JA at 54.) AB expressed her intent to file an unrestricted sexual assault report, and, later that day, at approximately 1600 hours, she reported the incident to the Office of Special Investigations (OSI). (JA at 4.)

While at OSI, AB sent a message to Appellee via the social media application Snapchat, stating:

> I don't understand how you could do that. I fell asleep on the couch, I thought I could trust you Nick. Wtf I shouldn't have to worry about you taking my shirt off and putting your hand down my pants. I don't understand what you were thinking, I really thought I could trust you Nick.

(JA at 225.)

Appellee responded at 1811 hours, after AB had already left OSI, replying, "I don't know what I was thinking either. I know an apology won't be enough." (JA at 225; *see also* JA at 298.)

At Appellee's trial, AB testified she was a "heavy sleeper" since she grew up "in a big household with a lot of kids running around" and was therefore "used to sleeping through noise." (JA at 41.) She also admitted on cross-examination by trial defense counsel that, on occasion, she engaged in conversations while half-asleep

that she would not recall the following day. (JA at 65.)

When asked directly during her testimony if she ever consented to Appellee putting his fingers inside her, AB responded, "No, sir." (JA at 63, 119.)

The Government's opening statement highlighted AB's actions before, during, and after the incident, her lack of consent to any sexual act prior to her falling asleep (AB and Appellee "are friends and she trusts him," (JA at 18)); her express nonconsent immediately upon waking up with Appellee's fingers inside her vagina ("She pushed him off" and said, "Get the fuck out," (JA at 19)); and her words and actions after the incident, which demonstrated that she had not consented to any sexual act (AB called BM immediately "while she's on the way up to his room. She's sobbing. She's in hysterics," (Id.)). The Government's closing argument highlighted AB's sleep at the beginning of the sexual act, but trial counsel also asked the members to consider AB's reactions immediately upon waking up. (JA at 183.) Trial counsel argued that Appellee's reaction of covering AB's naked body with a blanket showed that "he doesn't have consent to do that" and made no sense if "this had been consensual sexual activity" and AB "had been the one to undress herself." (Id.)

Trial defense counsel's strategy in opening statement, during witness testimony, and in closing argument was to challenge the credibility of AB's account. Defense counsel highlighted inconsistencies in AB's statements and raised the

possibility that she had been in a half-asleep state or awake during her interactions with Appellee and consented during that time. (*See, e.g.*, JA at 196, 198, 218.) In addition, trial defense counsel argued that AB affirmatively consented, or Appellee had a reasonable mistake of fact as to her consent. (JA at 218.) Prior to concluding, defense counsel emphasized that it was clear Appellee "would have thought he had consent. And considering the factors you have in front of you, that would have been reasonable." (Id.)

SUMMARY OF ARGUMENT

AFCCA erred in setting aside Appellee's conviction by expanding the holding in United States v. Mendoza, 2024 CAAF LEXIS 590, improperly reweighing the evidence using a legally flawed view of that case, and imposing an extra element not found in the statute. The Government properly charged Appellee under Article 120(b)(2)(A), UCMJ (sexual assault without consent), and presented legally and factually sufficient evidence demonstrating that AB did not consent before, during, or after sleeping.

Unlike Mendoza, where the Government charged one theory, but attempted to prove another, the Government here consistently pursued a theory of nonconsent under Article 120(b)(2)(A), UCMJ. Its case was based on Appellee's own incriminating statements, as well as direct and circumstantial evidence showing that AB never gave consent before falling asleep, awoke as the nonconsensual sexual act

was happening, physically and verbally resisted the ongoing sexual act, and promptly reported the offense. AFCCA's expansion of Mendoza to find this case legally insufficient was thus misplaced because no charging mismatch occurred. This Court should hold that Mendoza does not apply to cases where the Government endeavors to prove the absence of consent through multiple means – and not solely by proving the victim was incapable of consent.

Additionally, AFCCA seemingly concluded that the government was required to prove beyond a reasonable doubt an extra element of the offense: that the victim was, at all times during the sexual act, "capable of consenting," despite Article 120(b)(2)(A), UCMJ, only requiring proof that the victim did not consent. This erroneous interpretation contradicts the statutory text which (1) defines consent as a "freely given agreement to the conduct at issue by a competent person," (2) states that nonconsent can be expressed through words or conduct, (3) incorporates that "a sleeping person … cannot consent," and (4) states that all the surrounding circumstances are to be considered in determining whether the victim gave consent. *See* Article 120(g)(7), UCMJ. But even if Mendoza heightened the Government's burden of proof in such cases by requiring that it affirmatively prove the extra element of "capable of consenting," the Government nonetheless proved by overwhelming evidence that AB awoke, was capable of consenting, and did not consent to the ongoing sexual act in this case.

Finally, AFCCA incorrectly read Mendoza to prevent the Government from proceeding under a "without consent" theory of liability where a victim is asleep at any point during the sexual act, regardless of the surrounding circumstances of the wrongful conduct. AFCCA's factual sufficiency review was therefore predicated on an unduly broad view of Mendoza, where the appellant had been charged under a "without consent" legal theory but may have been found guilty under an "incapable of consent" factual basis. Here, Appellee was charged under a "without consent" legal theory but was convicted using facts that included evidence of AB's affirmative lack of consent, in addition to the fact that she was asleep for part of the sexual act. In the end, the concerning circumstances in Mendoza were not present here, and AFCCA should not have used Mendoza to overturn Appellee's conviction.

Accordingly, this Court should find Appellee's conviction legally sufficient and remand this case to AFCCA for a new factual sufficiency review using a correct interpretation of Mendoza.

ARGUMENT

THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED IN APPLYING UNITED STATES V. MENDOZA, 85 M.J. __ (C.A.A.F. 2024), TO FIND APPELLEE'S SEXUAL ASSAULT CONVICTION LEGALLY AND FACTUALLY INSUFFICIENT.

Standard of Review

This Court reviews legal sufficiency de novo. *See* United States v. Robinson, 77 M.J. 294, 287 (C.A.A.F. 2018) (citation omitted) (affirming sexual assault charge as legally sufficient). "The test for legal sufficiency is whether, after 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." United States v. Rosario, 76 M.J. 114, 117 (C.A.A.F. 2017) (affirming the lower court's finding of legal sufficiency).

Under Article 66(d)(1)(B), UCMJ, a Court of Criminal Appeals (CCA) now conducts a review that gives the trial court "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence," and must be "clearly convinced the finding of guilty was against the weight of the evidence." This Court may review whether a CCA applied "correct legal principles" in conducting its factual sufficiency review. United States v. Thompson, 83 M.J. 1, 4 (C.A.A.F. 2022) (citation omitted); *see also* United States v. Harvey, 85 M.J. 127, 129 (C.A.A.F. 2024) (same). Accordingly, the scope, applicability, and meaning of Article 66(d), UCMJ, is a matter of statutory interpretation that this Court reviews de novo. *See* United States v. McAlhaney, 83 M.J. 164, 166 (C.A.A.F. 2023) (affirming the sufficiency of the CCA's sentence appropriateness analysis under Article 66(d), UCMJ).

This Court reviews de novo a CCA's interpretation of a statute or rule, *see* United States v. Kohlbek, 78 M.J. 326, 330-31 (C.A.A.F. 2019) (interpreting lower court's application of Mil. R. Evid. 707), as well as a CCA's understanding of an applicable precedent, *see* United States v. Baier, 60 M.J. 382, 385 (C.A.A.F. 2005) (remanding a case for a new review of sentence appropriateness when the CCA recited an incorrect legal standard). When the "record reveals that a CCA misunderstood the law, this Court remands for another factual sufficiency review under correct legal principles." Thompson, 83 M.J. at 4.

Law and Analysis

AFCCA erred in setting aside Appellee's conviction for sexual assault by misapplying Mendoza and improperly imposing an additional burden on the Government under Article 120(b)(2)(A), UCMJ. The Government properly charged Appellee under Article 120(b)(2)(A) (without consent). And it proved its case by presenting evidence of nonconsent via proof of the victim's lack of expression of consent before falling asleep, her state of being asleep, her immediate verbal and physical resistance upon awakening to the ongoing sexual act, her prompt reporting, and Appellee's own incriminating statements.

AFCCA's decision should be reversed because: (1) Mendoza does not control here, since the Government did not shift legal theories of criminal liability; (2) even if Mendoza applies to fact patterns where a victim is asleep, it does not mandate that

the Government charge Article 120(b)(2)(B), UCMJ (while asleep), when the entirety of the facts supports a lack of consent theory under Article 120(b)(2)(A), UCMJ (without consent); (3) AFCCA improperly added elements to the offense not found in the statute by requiring proof beyond a reasonable doubt that the victim was capable of consenting; (4) based on the above, the evidence was legally and factually sufficient to support Appellee's conviction under a proper application of Mendoza.

I. Mendoza Does Not Render Appellee's Conviction Legally Insufficient.

A. Mendoza Does Not Apply in Cases Like This, Where the Government Does Not Shift Theories of Criminal Liability.

In Mendoza, this Court reviewed the legal sufficiency of a sexual assault conviction charged as "without consent" under Article 120(b)(2)(A), UCMJ. 2024 CAAF LEXIS 590, at *2. The appellant in Mendoza engaged in the sexual act exclusively while the victim was in a "black-out" state due to alcohol intoxication. Id. at *4-5. The victim remembered nothing in between drinking outside the barracks on the night of the incident and the next morning when the appellant – whom she did not recognize – knocked on her door to return her shoes. Id. at *4. The appellant made a statement to law enforcement saying that the victim was incapable of consenting, but did not say that she had ever verbally or physically withheld consent. Id. at *6. Other witnesses and video footage confirmed the victim's intoxication, and some witnesses observed the victim acting flirtatiously with the appellant. Id. at *7.

Although the Government charged the misconduct in Mendoza under a "without consent" theory, this Court highlighted that the Government attempted to prove the appellant's conduct solely under a different theory of liability—Article 120(b)(2)(C), UCMJ, which covers sexual acts performed when the victim is incapable of consenting. Id. at *3-4. Because the Government "presented significant evidence of [the victim's] extreme intoxication and argued that [her] inability to consent established the absence of consent," this Court found that the "Government's approach—which conflated two different and inconsistent theories of criminal liability—raise[d] significant due process concerns." Id. at *3-4.

The Court reached its conclusion regarding Article 120(b), UCMJ, using the "surplusage canon, which requires 'that, if possible, every word and every provision is to be given effect and that no word should be ignored or needlessly be given an interpretation that causes it to duplicate another provision or have no consequences." Mendoza, 2024 CAAF LEXIS 590, at *12 (quoting United States v. Sager, 76 M.J. 158, 161 (C.A.A.F. 2017)). Considering that canon, and the possibility that the Government could "circumvent the [knew or reasonably should have known] mens rea requirement … to the offense of sexual assault of victim who is incapable of consenting," this Court surmised that Article 120(b)(2)(A) (without consent) and 120(b)(3)(A) (incapable of consenting) "establish[ed] separate theories of liability." Id. at *16-17. This Court stated that subsection (b)(2)(A) criminalized the

performance of a sexual act upon a victim who is "capable of consenting" but does not consent, while subsection (b)(3)(A) criminalizes the performance of a sexual act upon a victim who is incapable of consenting due to intoxication. Id. at *17-18. To prevent notice issues in the future, this Court suggested that the Government charge "both offenses under inconsistent factual theories and allow[] the trier of fact to determine whether the victim was capable or incapable of consenting" when faced with a similar factual circumstance. Id. at *18 (citing United States v. Elespuru, 73 M.J. 326, 330 (C.A.A.F. 2014)). This Court concluded by emphasizing that "what the Government cannot do is charge one offense under one factual theory and then argue a different offense and a different factual theory at trial." Id.

But in this case, the Government did not prove Appellee's misconduct using a factual theory not charged. Although the victim in this case was indeed asleep during a portion of the sexual act, the totality of the evidence adduced by the Government at trial demonstrated that the accused engaged in the sexual act without the victim's consent. Further, no due process problem exists where trial defense counsel's entire strategy at trial was to show that the victim was awake during, and consented to, the sexual act, and that Appellee himself believed the victim was consenting. Finally, the statutory definition within Article 120(g)(7)(B), UCMJ which adds further clarity to the phrase "without the consent of" under Article 120(b)(2)(A), states that a "sleeping … person cannot consent." Whether the victim

was sleeping at any point before or during the sexual act is one of "all the surrounding circumstances" that Article 120(g)(7)(C) mandates be considered "in determining whether a person gave consent." AFCCA failed to consider this provision in its analysis, effectively ignoring that the statutory "consent" definition itself contemplates a sleeping victim. And in doing so, AFCCA seemed to suggest that a sleeping victim case could never be charged under the "without consent" theory of liability, regardless of the surrounding circumstances. Yet discarding this important definition defies the plain text of the statute and unnecessarily restricts the Government's ability to charge hybrid fact patterns like this one.

1. The Government Did Not Prove Appellee's Misconduct Solely by Establishing that AB was Asleep.

This Court should hold that Mendoza does not control in this case or others when the Government pursues a factual theory consistent with the one charged. In this case, the fact AB was asleep for some portion of the sexual assault was only one of several factors that the Government used to prove AB's lack of consent. Accordingly, the Government did not prove the absence of consent "by *merely* establishing that the victim" was asleep. *Cf.* Mendoza, 2024 CAAF LEXIS 590, at *22 (emphasis added).

As examples, during the Government's direct examination of AB, her lack of consent was a central theme to trial counsel's questioning regarding the sexual act. AB testified:

- She had never previously been romantic with Appellee. (JA at 34.)
- She did not flirt with Appellee prior to falling asleep, nor had Appellee made any previous advances toward her. (JA at 34-35.)
- The relationship with Appellee had only ever been "platonic." (JA at 35.)
- She woke up "feeling like [she] had to use the restroom," but soon realized "[Appellee] was inside of" her, using his fingers to penetrate her. (JA at 42-43.)
- She felt when "[Appellee] removed his hands . . . [and] felt his fingers come out of" her. (JA at 43.)
- She also "felt [Appellee] bite or kiss … [her] ear" while at the "same time … his fingers were in [her] vaginal area . . . penetrating [her] vulva." (JA at 44-45.)
- "It hadn't taken long for [her] to realize what had happened and react and [wake] up." (JA at 45.)
- Upon realizing that Appellee was digitally penetrating her, AB physically pushed Appellee off her body. (Id.)
- She asked him, "What the fuck are you doing?" and yelled at Appellee to leave. (Id.)
- Appellee responded, "You're right, you're right," and quickly left. (Id.)
- She immediately reported the incident to her friend, and then to her flight chief, SAPR, and OSI. (JA at 47-48, 49-56.)

In fact, the Government closed its direct examination of AB by directly asking her the question "did you ever consent?" to which AB responded, "No, sir." (JA at 63.)

Much of the evidence and testimony elicited by the Government throughout the rest of its case-in-chief again focused on the lack of consent as demonstrated by AB's (1) platonic relationship with Appellee (*see, e.g.*, JA at 123), (2) consistent

reporting of the sexual assault (*see, e.g.*, JA at 145), and (3) reaction after the sexual assault (*see* JA at 125, 143, 147-48). AB's sleep was central to the testimony of AB's boyfriend, but that was raised primarily to refute the defense's tactic on cross-examination up to that point in the trial, which was to imply that AB could not have slept through the beginning of the sexual act and that she consented while awake or in a half-sleep state. (JA at 162-63.)

The Government's case here presented a marked difference from the evidence adduced in Mendoza. In Mendoza, the victim could not testify about her interactions with the appellant before or during the sexual act, and witness testimony suggested she may have been flirting with the appellant earlier in the night. There was no evidence of an affirmative act of nonconsent. Mendoza, 2024 CAAF LEXIS 590, at *4-7. But in Appellee's case, AB could testify that there was no flirtation with Appellee before she fell asleep, that she never consented to the sexual act, and that she actively resisted upon waking up to the ongoing act. The Government here presented direct evidence of lack of consent, and as a result, the cases presented to the trier of fact simply were not comparable.

While trial counsel's closing argument did place significant emphasis on AB being asleep at the beginning of the sexual act and on a sleeping person's inability to consent (JA at 572), that was not trial counsel's sole focus. Trial counsel also emphasized how AB's relationship with Appellee and the rest of her friend group

was "strictly platonic," and there were "never any weird flirtations," "nothing sexual," and "nothing romantic." (JA at 177.) Speaking of the sexual act itself, trial counsel surmised that AB had fallen asleep for nearly an hour but asked the members to consider her angry reaction upon awakening to discover she was being digitally penetrated by Appellee. (JA at 179-82.) Trial counsel then described Appellee's response, which was to say, "You're right, you're right" and cover AB's naked body with a blanket. (JA at 179-82.) Trial counsel argued that Appellee's response to AB's outburst made no sense "if this had been a consensual activity," and AB had undressed herself, commenting that Appellee "[didn't] have consent to do that." (JA at 179-82.) The Government also focused heavily on AB's immediate reporting of the incident, and how this supported her credibility and assertion that the encounter was non-consensual. (JA at 183-84.) Importantly, trial counsel also addressed mistake of fact as to consent by asking the members, "Did he actually, genuinely think that he had consent when he did that?" (JA at 186.)

In sum, the totality of the Government's case, from the evidence elicited to trial counsel's argument, focused on "all the surrounding circumstances" showing that Appellee committed the sexual act without AB's consent – exactly the offense stated on the charge sheet. The Government did not "charge one offense under one factual theory and then argue a different offense and different factual theory at trial," which was the concern in Mendoza. 2024 CAAF LEXIS 590, at *18.

2. No Due Process Violation Occurred When the Defense's Strategy Focused on Showing that the Victim Consented.

Unlike Mendoza, no notice or due process issue exists where defense counsel was not blindsided with a shifting theory of liability. To start, trial defense counsel never expressed any concerns with the Government's charging scheme, evidence, or arguments, and never asserted that they were unprepared or unable to defend against the charged offense at trial. Indeed, Article 120(g)(7), UCMJ itself put Appellee and his defense counsel on notice that they could defend against the subsection (b)(2)(A) offense of sexual assault without consent by showing that the victim consented – but they could not endeavor to do so by showing that the victim gave consent during any period when she was asleep.

In turn, trial defense counsel's theory throughout the trial was that it was impossible for AB to have slept through the encounter, and that therefore, AB had actually been awake, had consented, and was lying about being asleep to cover up a second infidelity from her boyfriend. For example, defense counsel argued in closing argument that, "when [AB] realize[d] things have gone a little too far with one of her friends . . . she goes into damage control" to hide another instance of infidelity from her boyfriend. (JA at 203.) Defense counsel also challenged the notion that AB was a heavy sleeper, suggesting that there was "no way" AB slept through Appellee's sexual advances. Further, counsel elicited from AB that she "[c]ould have been [asleep for] a very short time" (JA at 66), in addition to

prompting AB to admit that it was "possible [Appellee] asked for consent" while she was "half-asleep" (JA at 102-03.) Then in closing argument, trial defense counsel argued that AB "agrees, it's possible she could have had a conversation about this, *consented,* and just straight up not-remembered." (JA at 218.) (emphasis added). And trial defense counsel contended that AB's emotional reaction after the incident stemmed from her guilt for violating her relationship (in other words, consenting to the sexual act) and fear from "repercussions of that action." (JA at 203.) In so doing, trial defense counsel attempted to refute any notion that AB had given consent and suggested that she was either lying or was mistaken about the incident.

If the Government had tried to shift theories of liability and convict Appellee solely under Article 120(b)(2)(B) (while asleep), then the defense would not have needed to argue that AB consented. The defense could gain an acquittal merely by establishing that there was reasonable doubt that AB was sleeping at all during the sexual act, since that is one of the essential elements of the offense. The fact that defense counsel specifically argued that AB had consented, was engaging in "damage control," and felt guilty showed that they understood what theory of liability the Government was pursuing. And the fact that trial defense counsel argued that AB both was awake and had consented showed that they understood how to defend against a statute that both criminalizes a sexual act perpetrated without consent and explains that a sleeping person cannot give consent. Appellee was in

no way "robbed" of his due process right to fair notice. *Cf.* Mendoza, 2024 CAAF LEXIS at *9, *18.

B. Mendoza Does Not Mandate that the Government Charge Article 120(b)(2)(B) in All Cases Where a Victim is Sleeping During Some of the Sexual Act.

In cases where a victim sleeps during some portion of the sexual assault, Mendoza does not and should not mandate that the Government charge and elicit facts only relating to Article 120(b)(2)(B), UCMJ (while asleep). After all, in Mendoza, the Court underscored that its holding did "not bar the trier of fact from considering evidence of a victim's intoxication when determining whether the victim consented." Mendoza, 2024 CAAF LEXIS 590, at *22 (citing Article 120(g)(7) ("All the surrounding circumstances are to be considered in determining whether a person gave consent."). Similarly, here, the surrounding circumstances of the sexual act, including that AB was for some time asleep, must be—by statute—considered by the factfinder in determining whether AB consented. *See* 10 U.S.C. § 920(g)(7).

An overly-expansive view of Mendoza would pigeon-hole the Government into pursuing a legal theory that may not encompass the entirety of an accused's conduct. If the Government risks a "Mendoza issue" any time it elicits or argues the surrounding circumstances in an Article 120(b)(2)(A), UCMJ (without consent) case, which could include that a victim was sleeping at some point during an encounter, the Government would be forced to charge any such case under Article

120(b)(2)(B), UCMJ (while asleep). And they would be forced to do so even where, as here, the lack of consent was evident before the victim went to sleep and was expressly communicated during the sexual assault.

Although this Court's opinion in Mendoza suggested the Government could charge an accused with two offenses in the alternative under "inconsistent factual theories," 2024 CAAF LEXIS 590, *18, that proves an unsatisfactory solution for the facts of Appellee's case. Here, Appellee was very likely guilty of both Article 120(b)(2)(A) (without consent) and Article 120(b)(2)(B) (while asleep). And charging in the alternative may have served to undermine the certainty of the Government's own case in front of the members (it is not difficult to imagine a defense counsel effectively arguing, "even the Government doesn't know what happened!"). But in any event, this Court has never held that charging both offenses is a requirement to demonstrate legal sufficiency when the surrounding circumstances support either charge.

Given the Government's traditional and substantial prosecutorial discretion, this Court should afford the Government significant leeway in how it chooses to proceed at trial when the entirety of an accused's misconduct encompasses more than one theory of criminal liability. *See* Elespuru, 73 M.J. at 329 (it is the Government's responsibility to determine what offense to bring against an accused) (citation omitted). Even if the evidence supported both theories of sexual assault,

the Government may, for tactical or strategic reasons, choose to only charge one offense when (1) the evidence more strongly supports one offense than the other; (2) charging both offenses (or both in the alternative) would confuse the issues; (3) the evidence regarding one theory is more aggravating than the other. *See generally* United States v. Campbell, 71 M.J. 19 (C.A.A.F. 2012) (discussing the interplay between unreasonable multiplication of charges and prosecutorial discretion).

For example, in a case where it was unclear whether a victim was (1) asleep or (2) awake and in an alcohol-induced blackout when a sexual act began, but at some point, the victim gained awareness and actively resisted, the government might reasonably prefer to charge the offense under Article 120(b)(2)(A), sexual assault without consent. *See* United States v. Batchelder, 442 U.S. 114, 123 (1979) ("Whether to prosecute and what charge to file or bring … are decisions that generally rest in the prosecutor's discretion.") This Court should not second guess those charging decisions so long as the Government does not attempt to prove an offense *solely* by proving the occurrence of a different offense.

Further, if this Court were to require that the Government charge both offenses essentially "to be safe," it could also have the practical effect of increasing an accused's punitive exposure in sexual assault cases. And that punitive exposure may, or may not, be merged by the military judge during sentencing. *See* R.C.M. 906(b)(12), 1003(c)(1)(C).

That the statute permits consideration of all the surrounding circumstances, including sleep, 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. *See* United States v. Rocha, 84 M.J. 346, 351 (C.A.A.F. 2024). A sexual encounter may be nonconsensual from start to finish, or it may start consensually and become nonconsensual partway through. A victim may consent for parts of the encounter but sleep during others. The structure of Article 120, UCMJ reflects Congress's desire to cover a broad range of circumstances. *See* Mercy Hosp., Inc. v. Azar, 891 F.3d 1062, 1069 (D.C. Cir. 2018) ("Congress may use overlapping language to sweep up technicalities that more precise provisions may leave behind.") The statute should be interpreted with enough flexibility to enable prosecution of all these variations. Otherwise, the military justice system risks situations such as these, where Appellee is not being held accountable despite AB being so offended by the nonconsensual sexual act Appellee was perpetrating that she physically shoved him off of her.

At bottom, the Government should not have been required to charge Appellee under a sleeping victim theory in order to prove the underlying misconduct. The mere fact that the victim was asleep during the initiation of the misconduct does not bind the Government's hands regarding its charging decisions, because that fact was

one of many of the surrounding circumstances that the Government used to prove that AB did not give consent to Appellee's wrongful digital penetration. In Mendoza, this Court condemned any attempt by the Government to 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). This Court should hold that Mendoza does not apply when the Government presents a multi-pronged case for a subsection (b)(2)(A) (without consent) charge that establishes more evidence of nonconsent than just the victim's incapacity to consent – especially when the Government offers direct evidence of the victim's nonconsent. Where (1) the Government takes that multi-pronged approach and (2) the members are properly instructed in accordance with Article 120(g)(7) that they must consider *all* the surrounding circumstances in deciding whether the victim "gave consent," there is no due process concern that the Government has "switched theories" from the charge on the charge sheet.

Here, the Government did not prove the absence of consent by merely establishing that AB was asleep and thus unable to consent. AFCCA's conclusion that Mendoza rendered Appellee's conviction legally insufficient was, therefore, erroneous.

C. AFCCA Erred by Improperly Adding the Element of "Capable of Consenting" to the Offense Charged.

In reaching its legal insufficiency determination in this case, the Court below noted "the Government offered no evidence that AB was capable of consenting and did not consent." (JA at 9.) The Court's conclusion is not just factually wrong, but the conclusion is legally incorrect insofar as it added an additional element to the offense charged not included in the statute. This Court should clarify that Mendoza did not intend to blanketly add an "capable of consenting" element to Article 120(b)(2)(A) (without consent) that the government would have to prove beyond a reasonable doubt.

1. *The Surplusage Concerns Identified in Mendoza do not Apply to the Offenses of Sexual Assault Without Consent and Sexual Assault on a Sleeping Person.*

There is no element stating the victim must be "capable of consenting" in the plain statutory language of Article 120 (b)(2)(A). But in Mendoza, this Court believed that unless it interpreted subsection (b)(2)(A) only to apply to victims who were capable of consenting, then there would be surplusage concerns with subsection (b)(3)(A) (incapable of consenting). Id. at *16. Otherwise, "every sexual act committed upon a victim who is incapable of consenting under subsection (b)(3)(A) would also qualify as a sexual assault under subsection (b)(2)(A) [without consent] because the victim did not consent." Id. Indeed, during the oral argument for Mendoza, this Court asked government appellate counsel if he could think of a

scenario where the government would have to charge under the theory of "incapable of consenting" or "while asleep," rather than "without consent." (Oral Argument at 23:05, United States v. Mendoza (C.A.A.F. Mar. 5, 2024) (No. 23-0210)). The government could not provide such a scenario that seemed to satisfy the Court.

But this concern does not exist in cases with sleeping victims. One theory of liability under Article 120, subsection (b)(2)(A) (without consent) requires proof of the element of lack of consent and asserts that a sleeping person cannot consent. In contrast, the other theory, subsection (b)(2)(B) (while asleep) requires no proof of consent at all. This statutory scheme reflects that there is a difference between the concept that a person cannot *give* consent to a sexual act *while* she is sleeping and the concept that it is a strict liability crime to knowingly have sex with a sleeping person, regardless of whether they ever gave consent.[2] As a result of this distinction, there are factual scenarios with sleeping victims where the government would prefer to charge under a "while asleep" theory of liability under subsection (b)(2)(B).

Imagine a fact pattern where the alleged victim testifies that she consented to and had sex with an accused before falling asleep. She did not want to continue having sex if she fell asleep, but she failed to communicate that to the accused.

[2] If there were a complete overlap between subsections (b)(2)(A) and (b)(2)(B), one would expect subsection (b)(2)(A) or the definition of "consent" to say that "sexual conduct with a sleeping person is, by law, committed without consent," or something to that effect.

According to her testimony, she said nothing one way or the other about whether the accused could continue if she fell asleep. The accused made a statement to law enforcement admitting that he had sex with the victim after she fell asleep. But the accused also claimed that before the victim fell asleep, she affirmatively told the accused that he could continue with the sexual act in the event she fell asleep. In such circumstances, the government would undoubtedly prefer to charge under subsection (b)(2)(B), sexual assault on a person who is asleep, to eliminate the question of consent all together.

Since there are factual scenarios involving sleeping victims that are better charged under subsection (b)(2)(B) (while asleep), then there is no reason to read the additional element of the victim being "capable of consenting" into subsection (b)(2)(A) (without consent) to differentiate the two or prevent surplusage. In fact, reading into subsection (b)(2)(A) that the victim must be capable of consenting creates other surplusage issues not considered in Mendoza. If Congress intended for subsection (b)(2)(A) (without consent) to presume the victim is capable of consenting, then there would have been no reason for the definition of "consent" in subsection (g)(7) to say that a sleeping person cannot consent.[3] Paradoxically,

[3] The definition of consent in subsection (g)(7) cannot relate to subsection (b)(2)(B), sexual assault on a person who is asleep, unconscious, or unaware, because that subsection has no element of consent.

inclusion of that language would mean that Congress wrote "a sleeping person . . . cannot consent" into the definition of consent to indicate circumstances under which an accused must be *acquitted* of sexual assault without consent. This would represent a strikingly odd way to draft a statute, especially when Congress then instructs the factfinder that "all the surrounding circumstances" – presumably including whether the victim was asleep – "are to be considered in determining whether a person gave consent." Article 120(g)(7)(C). Instead, the better interpretation is that, for a "without consent" offense, Congress wanted the factfinder to be able to consider whether the victim was asleep at some point, and therefore unable to give consent during that time, as one of the circumstances relevant to deciding whether she made a freely given agreement to the conduct at issue.[4] *See* Campbell v. Kendall, No. 22-5228, 2024 U.S. App. LEXIS 7181, at *4 (D.C. Cir. Mar. 26, 2024) (unpub. op.) (military judge properly instructed that a "sleeping,

[4] Subsection (g)(7)'s reference to a victim being unable to consent "under the circumstances described in subparagraph (B) or (C) of subsection (b)(1)," also demonstrates that Congress intended some overlap between the various subsection of Article 120. Since, like subsection (b)(2)(B) (while asleep), subsections (b)(1)(B)(fraudulent representation of professional purpose) and (b)(1)(C) (inducement of belief that a person is another) contain no element of consent, subsection (g)(7), defining consent, has no application to those subsections. By including reference to those subsections in subsection (g)(7), Congress therefore signaled that it wanted circumstances criminalized in other section of the statutes to be consider by the factfinder in determining whether a victim gave consent in offense charged under subsection (b)(2)(A) (without consent).

unconscious, or incompetent person cannot consent" in a case requiring proof of nonconsensual sexual contact).

2. There is No Evidence that Congress Intended Article 120(b)(2)(A) to Include, as an Element, that the Victim was "Capable of Consenting."

On the other hand, even if there were a degree of overlap or surplusage between subsections (b)(2)(A) (without consent) and (b)(2)(B) (while asleep), that still would not give this Court reason to read an additional element of "capable of consenting" into subsection (b)(2)(A) for sleeping victim cases. A given fact pattern might not fit squarely into any other subsection of Article 120, and having a broader offense under subsection (b)(2)(A) (without consent) would give the government more flexibility to prosecute unique circumstances that Congress intended, one-way-or-another, to be criminal. "The fact that the different subparagraphs of [a statute] may overlap to a degree is no reason to reject the natural reading of a statute. Congress may choose a belt-and-suspenders approach to promote its policy objectives . . ." McEvoy v. IEI Barge Servs., 622 F.3d 671, 677 (7th Cir. 2010).

Indeed, that "belt-and-suspenders approach" appears to be the impetus behind the 2019 amendment to Article 120, UCMJ that criminalized specifically a sexual act committed "without the consent of the other person." National Defense Authorization Act for Fiscal Year 2017, 114 P.L. 328, §5430. Prior to 2019, Article 120, UCMJ criminalized sexual assault by "causing bodily harm" to another person – with bodily harm including "any nonconsensual sexual act." 10 U.S.C. §

920(b)(1)(B) (2012). Like the current version of Article 120, UCMJ, the previous version included in the statutory definition of consent that "a sleeping, unconscious, or incompetent person cannot consent. 10 U.S.C. § 920(g)(8)(B) (2012). The congressionally-mandated Judicial Proceedings Panel (JPP) that was tasked with reviewing Article 120 recommended replacing the "bodily harm" language with "without the consent of the other person." Judicial Proceedings Panel, Report on Article 120 of the Uniform Code of Military Justice (2016) at 6.[5] The JPP commented that the change "would create a baseline theory of liability for *any* sexual act or sexual contact committed without a victim's consent." Id. at 6, 11. (emphasis added).

The JPP's report contained no suggestion that the new sexual assault "without consent" offense was intended to include as an element that the victim was "capable of consenting." In fact, the JPP noted that its Subcommittee had determined that the concept of "bodily harm" was "useful for cases in which a sexual act . . . has been committed without a victim's consent, especially in cases in which the alleged victim *has little or no recollection of the incident owing to impairment* . . ." Id. at Appendix A at 29. (emphasis added). The Subcommittee recommended replacing the term "bodily harm" with "without the consent of the other person" merely to clarify that

[5] Available at https://dacipad.whs.mil/images/Public/10-Reading_Room/04_Reports/01_JPP_Reports/03_JPP_Art120_Report_Final_20160204.pdf (last visited 9 April 2025).

no further bodily harm or physical injury, apart from nonconsent, must be shown. Id. Thus, the 2019 amendment to Article 120 contemplated that cases with significantly impaired victims who had no memory of the encounter might still be charged as sexual assault without consent. Simply put, there is no support in the natural reading of Article 120, nor in its legislative history, for adding an element of "capable of consenting" into subsection (b)(2)(A). *See* Gen. Dynamics Land Sys. v. Cline, 540 U.S. 581, 606 (2004) (Scalia, J, dissenting) ("Although the statute is clear, and hence there is no need to delve into legislative history, this history merely confirms that the plain reading of the text is correct.").

3. Other Courts Shun the Judicial Practice of Adding New Elements not Included in a Statutory Offense.

Federal courts generally agree that it is inappropriate for a court to add an element to an offense or otherwise deviate from the literal language of a statute. *See, e.g.*, Gunderson v. Amazon.Com, 2023 U.S. Dist. LEXIS 238923, at *15 (N.D. Ill. Oct. 31, 2023) (quoting Cothron v. White Castle Sys. Inc., 216 N.E.3d 918, 928 (Ill. 2023)) ("courts cannot rewrite a statute to create new elements or limitations not included by the legislature"); United States v. Pryba, 900 F.2d 748, 760 (4th Cir. 1990) (to adopt appellants' position would add an element to RICO conspiracy charge that Congress did not direct); Doe v. Trump, 288 F. Supp. 3d 1045, 1081 (W.D. Wash. 2017) (noting the impermissible addition of an element to a definition); ACLU v. Miller, 977 F. Supp. 1228, 1233 (N.D. Ga. 1997) (rejecting a defendant's

request to add words into a statute because courts must follow the literal language of the statute unless it produces a contradiction or absurdity).

Various state courts have reached similar conclusions when reviewing both civil and criminal statutes. *See, e.g.*, Ga. Pines Cmty Serv. Bd. v. Summerlin, 282 Ga. 339, 340 (Ga. 2007) (improper to add element to a statute that the legislature did not include); State v. Hosier, 157 Wn. 2d 1, 9 (Wash. 2006) (declining to add an element to the offense of communication with a minor for immoral purposes); State v. Kerr, 470 A.2d 670, 674 (Vt. 1983) (refusal to add an element to the plain language of the statute prohibiting the carrying of a weapon while committing a felony). And even this Court has recently cited the Supreme Court's admonition that "[i]f judges could add to, remodel, update, or detract from . . .statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statues outside the legislative process reserved for the people's representatives." United States v. Valentin-Andino, ___ M.J. ___, No. 24-0208/AF (C.A.A.F. 31 March 2025) slip op. at 9 (citing Bostock v. Clayton Cnty., Georgia, 590 U.S. 644, 654-55 (2020).

In the end, adding a "capable of consenting" element to Article 120(b)(2)(A) (without consent) is unnecessary to differentiate it from many other theories of liability under Article 120. Plus, adding the element would create its own surplusage issues and would unreasonably restrict the government's charging options without

clear congressional intent to do so. This Court should clarify that it did not intend its Mendoza opinion to have such an effect. Rather, it should clarify that Mendoza's holding is limited: it merely stands for the proposition that, in order to comply with due process notice requirements, where the evidence *only* supports that the victim was incapable of consenting due to intoxication, the government cannot charge and proceed under a "without consent" theory of liability. This Court should also clarify that this restriction does not apply to other subsections of Article 120, like (b)(2)(B) (while asleep), that do not present the same surplusage and due process concerns.

In this case, the Government offered substantial evidence demonstrating that AB had not consented prior to or during the sexual act, and that she expressly communicated her lack of consent at some point while the sexual act was ongoing. Mendoza and Article 120(b)(2)(A), UCMJ, required nothing more. In sum, AFCCA erred by concluding that the Government needed to prove that AB was awake and capable of consenting throughout the entirety of the sexual act to sustain the legal sufficiency of Appellee's conviction.

D. A Rational Trier of Fact Could Have Found the Essential Elements of Sexual Assault Without Consent Beyond a Reasonable Doubt.

The court below concluded that no "rational trier of fact could have found the essential elements of the crime as charged beyond a reasonable doubt." (JA at 9.) It found that "the Government offered no evidence that AB was capable of consenting and did not consent." (Id.) The court further asserted that the Government's

evidence was limited to AB being asleep and therefore not capable of consenting when the sexual act occurred, and that the Government's closing argument focused solely on AB being incapable of consenting because she was asleep. (JA at 9-10.) AFCCA's assertions are incorrect. The Government presented significant evidence of nonconsent other than AB's being asleep and did not argue that AB's being asleep was the sole reason that Appellee was guilty. And even if the Government did have to prove beyond a reasonable doubt that AB was capable of consenting and did not consent, they did just that.

"The test for legal sufficiency is whether, after 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." Id. (citations omitted). The appellate question for this legal sufficiency test is whether "a reasonable factfinder reading the evidence one way could have found all the elements of the offense beyond a reasonable doubt." United States v. Oliver, 70 M.J. 64, 68 (C.A.A.F. 2011).

Even assuming the Government had to prove AB was capable of consenting as an additional element of the offense, AFCCA's legal sufficiency conclusion did not view the evidence in the light most favorable to the prosecution. By finding that the Government failed to show that AB was capable of consenting, the lower Court here improperly ignored the continuous nature of the sexual act and seemed to

conclude that AB had to be capable of consenting throughout the entire sexual act to sustain a conviction under a nonconsent theory. This error was compounded when the Court found that "the Government offered no evidence that AB was capable of consenting and did not consent," (JA at 9) despite AB's testimony that she awoke during the sexual act, understood what was going on, and expressed her lack of consent with both words and actions.

AFCCA also erred by asserting that "the Government's closing argument was focused solely on the fact that AB was incapable of consenting because she was . . . asleep while the sexual act occurred." (JA at 10.) Trial counsel did focus much of his closing argument on AB being asleep. But that was not the only argument he made. Trial counsel highlighted how AB's relationship with Appellee and the rest of her friend group was "strictly platonic," there was "nothing sexual," and "nothing romantic," and there were "never any weird flirtations." (JA at 177.) These facts tended to show that AB *did not* consent to sexual activity on the night of the incident, and trial counsel would have had no reason to mention them if he was trying to support a conviction solely by arguing that AB *could not* consent because she was asleep. Trial counsel also asked the members to consider that AB woke up during the sexual assault and that her reaction was to ask Appellee "what the fuck" he was doing and to tell him to "get out." (JA at 182.) Trial counsel then argued that when Appellee said, "you're right, you're right" and tried to cover AB with a blanket, it

showed "[h]e doesn't have consent to do that." As trial counsel explained, Appellee's actions would make no sense if AB "had been the one to undress herself," and "this had been a consensual activity." (JA at 183.) In other words, trial counsel was asserting that AB and Appellee's actions immediately after the sexual act proved that AB never gave consent. Again, if trial counsel had only been proceeding under the theory that AB was asleep, he would not have had to argue that the evidence showed that AB did not "undress herself."

Even so, arguments of counsel are not evidence. United States v. Sewell, 76 M.J. 14, 19 (C.A.A.F. 2017). What matters is, first, that the Government presented evidence to the members that AB never agreed to the sexual conduct and, in fact, affirmatively demonstrated her nonconsent; and second, that the members were properly instructed on the correct theory of liability. Here the military judge correctly instructed the members that they must find beyond a reasonable doubt that the sexual act occurred without AB's consent, that "an expression of lack of words or conduct means there is no consent," that a sleeping person cannot consent, and that "all the surrounding circumstances must be considered in determining wither a person gave consent." (JA at 166.) *See* United States v. Ober, 66 M.J. 393, 405 (C.A.A.F. 2008) (citing Chiarella v. United States, 445 U.S. 222, 236 (1979)) (finding that a theory of liability was adequately presented to the members in accordance with Supreme Court requirements when the theory was referenced in the

charging document and presented through testimony during the course of the trial). Here, a reasonable factfinder considering the evidence presented and following those instructions could have determined beyond a reasonable doubt that AB did not consent to the sexual act.

AFCCA's recent holding in United States v. Boren, No. ACM 40296 (f rev), 2025 CCA LEXIS 103, at *16 (A.F. Ct. Crim. App. 19 Mar. 2025) (unpub. op.) , directly contradicts its holding in this case, in addition to demonstrating AFCCA's flawed legal and factual sufficiency reasoning. In Boren, the victim, who had rebuffed the appellant's romantic advances in the past, similarly "awoke to the feeling of Appellant touching her vagina with his fingers through her clothing." Id. at *16. After she was awakened, "the touching stopped." Id. The victim also testified, like AB here, that "she did not want Appellant to touch her vagina and that she did not, at any point, consent to him touching her vagina." Id. at *17. Moreover, as the Government did in this case, "[t]he Government presented testimony and documentary evidence regarding [the victim's] negative reaction to the unwanted touching and the text conversations [the victim] had with Appellant that occurred a few days after the incident." Id.

Yet, unlike in this case, the Court dispensed with the appellant's arguments that his conviction was legally and factually sufficient because of Mendoza, and that the appellant should have been "tried under a different theory of abusive sexual

contact." Id. at *18. The Court found that the "Government needed to prove lack of consent, and they did." Id. *18-19. The Court also noted that "the Government established that [the victim] did not consent to being touched by Appellant at any point prior to falling asleep on the night of the incident." Id. Ultimately, the Court found the conviction both legally and factually sufficient. Id. at *19-20.

The facts here are similar to, though more evidently wrongful, than those present in Boren. Prior to the sexual act here and while AB was fully awake, she did not express to Appellee—through any words or actions—that she consented to any sexual act. Her actions prior to falling asleep demonstrate this: she remained fully clothed; she never showed any signs of flirting with, or attraction to, Appellee; neither of the two made any sexual advances toward one another; and AB was so unmoved by the activity with Appellee up to that point that she fell asleep. The evidence showed there was no freely given agreement to any sexual act. Her "default" state, therefore, which continued into her sleeping state, was that of no consent. While asleep, AB remained in the same "no consent" state since a "sleeping . . . person cannot consent." Article 120(g)(7)(B), UCMJ. Appellee then began the sexual act while AB remained in that "no consent" state. But immediately upon her awakening (and more pronounced than the victim's reaction in Boren), AB yelled at Appellee, "What the fuck are doing?" (JA at 45.) This unmistakably verbal communication of her lack of consent occurred contemporaneously with Appellee's

continued digital penetration of AB's vulva. *See* Boren, 2025 CCA LEXIS 103, at *17-18 ("the Government presented ample evidence to establish [the victim] was awake and capable of consenting when the *actus reus*—the touching her vulva with his hand … was occurring."). If that were not enough to demonstrate AB's lack of consent to the sexual act, she also physically pushed Appellee off her and demanded that he leave her room. (JA at 45.) Like the victim in Boren, AB "was capable of recognizing what was happening, who was doing it, and was able to take action to prevent [him] from continuing to touch her vagina." 2025 CCA LEXIS 103, at *17-18. Because the facts in this case are even more egregious than those present in Boren, which was upheld notwithstanding legal and factual sufficiency challenges, the result here should be no different.

In sum, the Court below mistakenly concluded that the Government "proved the charged offense on a different factual theory—sexual assault when Appellee knew or should have known the victim was asleep" under Article 120(b)(2)(B), UCMJ. (JA at 9.) AFCCA was simply wrong because a conviction under Article 120(b)(2)(B) (while asleep) requires no proof beyond a reasonable doubt of lack of consent. And if the government "switched theories at trial" to Article 120(b)(2)(B) it makes little sense then why the Government offered substantial evidence and argument regarding AB's lack of consent to the sexual act. Nor does it make sense why trial defense counsel advanced a theory at trial that AB had actually consented.

Moreover, the military judge instructed the members that they had to find the element of lack of consent beyond a reasonable doubt. Since members are presumed to follow the military judge's instruction, United States v. Washington, 57 M.J. 394, 403 (C.A.A.F. 2002), by convicting Appellee, the members unequivocally found an extra element not required by Article 120(b)(2)(B), UCMJ (while asleep). In short, Appellee was convicted of sexual assault without consent as charged, not sexual assault on a sleeping person.

AFCCA's cursory conclusion that no rational factfinder could find beyond a reasonable doubt that AB did not consent, and that the Government offered no evidence that AB consented, was incorrect, and failed to draw every reasonable inference from the evidence of record in favor of the prosecution. Accordingly, this Court should find Appellee's conviction for sexual assault legally sufficient.

II. In Conducting Its Factual Sufficiency Review, AFCCA Misapplied Mendoza.

The CCA's determination that Appellee's conviction was factually insufficient was based on a flawed view of Mendoza: "for the same reasons [as legal sufficiency], after giving the appropriate deference to the factfinder, we are also clearly convinced the findings of guilty are against the weight of the evidence and therefore factually insufficient as well." (JA at 10.) In so doing, AFCCA failed to heed this Court's clarifying guidance in Mendoza—that the trier of fact is not barred from considering all the surrounding circumstances to determine whether the victim

consented. *See* Mendoza, 2024 CAAF LEXIS 590, at *22. Here, those surrounding circumstances include that AB did not give consent before falling asleep, could not give consent at the time the sexual act began, and then expressed her nonconsent verbally and physically once she woke up. *Cf.* Boren, 2025 CCA LEXIS 103, at *19-20 ("[we are ourselves] convinced of the [appellant's] guilt beyond a reasonable doubt."). Since AFCCA based its legal and factual sufficiency analysis on a legally incorrect view of Mendoza, the appropriate remedy is to remand this case back to the CCA for a new factual sufficiency review. Id. at *23.

CONCLUSION

This Court found in Mendoza that Article 120(b), UCMJ, creates separate theories of liability. It did not go so far as to hold that each of these theories created discrete, "stovepiped" charging options for the Government that never overlap, regardless of the factual circumstances. Nor did it require that the Government charge one subsection versus another when the evidence and surrounding circumstances substantially support a nonconsent legal theory. Congress drafted Article 120(b), UCMJ, to provide flexibility that would cover myriad and hybrid factual scenarios, like the one here, where the victim did not express consent prior to sleep, was sexually assaulted as she slept, and, once she woke up to realize that Appellee was still sexually assaulting her, affirmatively expressed her nonconsent. A holistic reading of Article 120 demonstrates that Congress intended this conduct

to be criminal. In various sections, Article 120 makes clear that a servicemember is prohibited from committing a sexual act upon a victim who is sleeping or who does not give consent. Where the evidence produced at trial established beyond a reasonable doubt that AB never gave consent to the sexual act and was asleep for part of it, it is a miscarriage of justice not to hold Appellee accountable – especially where trial defense counsel expressed no confusion at trial about how to defend against the charge. AFCCA's legal and factual sufficiency review, which was predicated entirely on an incorrect legal interpretation of this Court's decision in Mendoza, was thus deeply flawed.

Therefore, this Court should find Appellee's conviction for sexual assault legally sufficient and remand the case back to AFCCA for a new factual sufficiency review.

THOMAS J. ALFORD, Lt Col, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34441

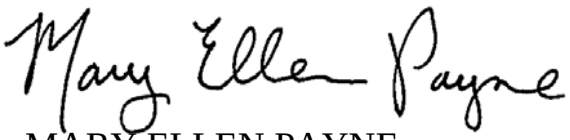
MARY ELLEN PAYNE
Associate Chief
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34088

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 35837

MATTHEW D. TALCOTT, Colonel, USAF
Director
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 33364

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 9 April 2025.



MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
United States Air Force
1500 Perimeter Road, Suite 1190
Joint Base Andrews, Maryland 20762
(240) 612-4800
Mary.payne.5@us.af.mil
Court Bar No. 34088

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/s/
MARY ELLEN PAYNE
Attorney for USAF, Government Trial and Appellate Operations Division

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