IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*	)	**UNITED STATES' REPLY BRIEF**
v.	)	Crim. App. No. 40442
Airman (E-2) **NICHOLAS J. MOORE** United States Air Force *Appellant.*	)	USC Dkt. No. 25-0010/AF
	)	21 May 2025

UNITED STATES' REPLY BRIEF

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

Pursuant to Rule 22(b)(3) of this Honorable Court's Rules of Practice and Procedure, the United States replies to Appellee's Answer (Ans. Br.) to the United States' brief in support of the certified issue (Gov. Br.), filed on 9 April 2025.

ARGUMENT

a. This Court has jurisdiction to review the certified issue.

Appellee challenges this Court's jurisdiction on two main grounds. First, he claims Major General Rebecca Vernon, the Air Force Deputy Judge Advocate General, who signed and forwarded the certification for review, may not have been properly performing the duties of the Judge Advocate General (TJAG) when she did so. (Ans. Br. at 4-5.) Second, he claims that because of the removals of other Services' Judge Advocates General, those individuals may not have been properly

notified of the certification in accordance with Article 67(a)(2), UCMJ, 10 U.S.C. §867(a)(2) (2021). (Id.) Appellee's claims are unavailing.

The Deputy Judge Advocate General is statutorily mandated to perform the duties of TJAG if the office is vacant or if TJAG is absent. 10 U.S.C. § 9037(d)(2). In signing and forwarding the certificate for review in Appellee's case, Maj Gen Vernon is entitled to a presumption that she properly assumed and performed the duties of TJAG, as required by statute. United States Postal Serv. v. Gregory, 534 U.S. 1, 10 (2001); *see also* United States v. Mark, 47 M.J. 99 (C.A.A.F. 1997). Appellee has not pointed to anything that would overcome that presumption of regularity.

Likewise, the United States is entitled to a presumption of regularity with respect to complying with the "appropriate notification" requirements in Article 67(a)(2) and United States v. Downum, 85 M.J. 115 (C.A.A.F. 2024). *See* FDA v. Wages & White Lion Invs., L.L.C., 145 S. Ct. 898 (2025). Appellee has provided no evidence to overcome the presumption that Maj Gen Vernon, performing the duties of TJAG, properly routed notification of the potential certification to the Government Appellate Division Chief of each respective service. *See* Downum, 85 M.J. at 166. Moreover, the notification requirement in Article 67(a)(2) is nonjurisdictional. While the notification requirement was added "to ensure that each Judge Advocate General has an opportunity to provide input on the decision

to appeal cases that have the potential for impacting the law that affects all the services," its addition did "not alter the jurisdiction of [this Court] over these cases nor would it limit the discretion or authority of a Judge Advocate General to certify issues." MILITARY JUSTICE REVIEW GROUP, PART I, UCMJ RECOMMENDATIONS 624-26 (2015).

In this case, the United States timely filed a certificate for review under Article 67(a)(2) that substantially complied with the format in this Court's Rules for Practice and Procedure.[1] The prerequisites for this Court's jurisdiction have been met.

b. The Air Force Court erred in its application of United States v. Mendoza, No. 23-0210, 85 M.J. __, 2024 CAAF LEXIS 590 (C.A.A.F. 7 October 2024).

Appellee suggests that whether his due process rights were violated is not encompassed within the certified issue (Ans. Br. at 16), but he is mistaken. In its opinion, the Air Force Court of Criminal Appeals (AFCCA) summarized Appellee's argument as being "that his conviction was legally sufficient because the Government violated his due process rights by conflating two different theories

[1] The template for a certificate for review in this Court's Rules does not require the certificate to state whether the other services have been notified or to whom the notification was made. *See* United States Court of Appeals for the Armed Forces, RULES OF PRACTICE AND PROCEDURE, Rule 22 (1 October 2024, as amended through 17 April 2025).

of criminal liability under Article 120, UCMJ[2] during his court-martial." (JA at 4.) The Court then said it agreed. (Id.) In other words, the Court found Appellee's conviction legally insufficient, at least in part, because a due process violation occurred. The certified question of whether AFCCA erred in applying Mendoza to find Appellee's conviction legally and factually insufficient therefore encompasses the question of whether a due process violation occurred.

1. Article 120(b)(2)(A) (without consent) and Article 120(b)(2)(B) (while asleep) are separate theories of liability, but here the United States pursued the former, not the latter.

No due process violation occurred in Appellee's case, because the Government did not switch theories of liability at trial. Appellee misses the major distinction between this case and Mendoza. (Ans. Br. at 15) ("The holding of Mendoza applies equally to cases where the Government charges sexual assault without consent and then argues lack of consent is met because the victim was asleep.") Mendoza involved the overlap between the theories of liability in Article 120(b)(2)(A) (without consent) and Article 120(b)(3) (incapable of consenting). 2024 CAAF LEXIS 590 at *3-4. Each of those theories requires proof of an element related to consent.

[2] 10 U.S.C. § 920 (2018).

Article 120(b)(2)(A) (without consent)	The accused committed the sexual act without the **consent** of the other person. Manual for Courts-Martial, United States, (MCM) Part IV, para. 60b.(2)(d)(2019 ed.).
Article 120(b)(3) (incapable of consenting)	The other person was incapable of **consenting** to the sexual act. The accused knew or should have reasonably known of the condition. Id. at para. 60b.(2)(f)

But the two theories of liability potentially at issue in this case do not have the same kind of overlap at issue in Mendoza. Article 120(b)(2)(A) (without consent) requires an element related to consent, but Article 120(b)(2)(B) (while asleep) contains no element related to consent at all. It is a strict liability offense to commit a sexual act upon a sleeping person, irrespective of consent, provided the sleeping condition is known or reasonably should have been known.[3]

[3] *Cf.* United States v. Riggins, 75 M.J. 78, 84 (2016) (where the government charges a subsection of Article 120 not implicating consent, the government has "effectively removed from the equation at trial any issue of consent," and the accused is "not notice that he need[s] to, or even [can] defend against the charges by contesting the issue of consent").

Article 120(b)(2)(A)	The accused committed the sexual act without the **consent** of the other person. Id. at para. 60b.(2)(d).
Article 120(b)(2)(B)	The accused committed the sexual act when the other person was asleep. The accused knew or reasonably should have known the person was asleep. [No element involving consent] Id. at para. 60b.(2)(e)

This distinction is crucial because it means that, under the circumstances here, the Government could not have charged one offense and then pursued a different offense at trial, which was this Court's concern in Mendoza. 2024 CAAF LEXIS at *18. Assuming that the members were properly instructed on the elements of an Article 120(b)(2)(A) offense – including the element of lack of consent – the members could not have "switched theories" and convicted Appellee under an Article 120(b)(2)(B) "while asleep" theory that does not include an element of consent. Since the members in Appellee's case were properly instructed, there is no danger that they convicted Appellee of an Article 120(b)(2)(B) (while asleep) offense, instead of an Article 120(b)(2)(A) (without consent) offense.

A close examination of subsection (b)(2)(A) compared to subsection (b)(2)(B) reveals the key differences between the two theories of liability. Subsection (b)(2)(A) (without consent) relies on the statutory definition of consent in Article 120(g)(7). The formulation in Article 120(g)(7) – that a sleeping person *cannot* consent, with consent being a verb – leaves open the possibility that the victim might consent to the sexual act before falling asleep, rendering the sexual act non-criminal. For example, a partner could say to the accused, "I will engage in this sexual act with you, but I'm very tired. If I fall asleep during the sexual act, you may continue." Assuming the accused followed those directives, the government would be hard-pressed to say that the sexual act occurred without consent. And the Government would be hard-pressed to argue that the accused did not honestly and reasonably believe that the consent continued after the partner fell asleep. Although the partner could not give consent while she was sleeping, she could and did consent before the sexual act. The accused would be not guilty of sexual assault without consent under Article 120(b)(2)(A). Yet the accused would be guilty under the strict liability theory criminalized in subsection (b)(2)(B) (while asleep).

Stated another way, Article 120(g)(7) only stands for the proposition that consent cannot be *given* when the victim is asleep. It does not mean that all sexual acts committed while the victim was asleep were per se nonconsensual and per se

criminal. In contrast, while Article 120(b)(2)(B) contains no mention of "consent," it does make clear that sexual acts committed while the victim was asleep and should have been known to be asleep, are per se criminal.

Under the above factual scenario, where the partner consented in advance to sex while asleep, the Government could not obtain a conviction under subsection (b)(2)(A) (without consent) by proving the elements of subsection (b)(2)(B) (while asleep). Proving that the victim was asleep and that the accused knew it would not prove beyond a reasonable doubt that the victim did not consent. The same is also true here. The Government could not have proved its case *only* by showing that the victim was asleep during part of the sexual act and the accused knew it. Since subsection (b)(2)(A) (without consent) leaves open the possibility that individuals might give consent to a sexual act that occurs while they are sleeping, in every case involving a sleeping person charged under that theory, the government must also exclude that possibility.

And indeed, that is what the government did here. The Government presented evidence at trial that the victim did not consent to the sexual act before falling asleep. Trial counsel elicited that prior to AB falling asleep, her relationship with Appellee had been strictly platonic and there had been no flirting or romantic overtures from either party that night. (JA at 34-35.) Trial counsel

asked AB if she "ever" consented to Appellee putting his fingers inside of her. (JA at 63.) AB testified that she had not.[4] (Id.)

In his answer brief, Appellee claims that the Government "exclusively" pursued a theory that AB was incapable of consenting because she was asleep. (Ans. Br. at 16, 31.) This simply is not the case. As explained above and in the United States' opening brief, the Government presented substantial evidence that AB did not give consent to the sexual act – not just that she was sleeping when it began. (Gov. Br. at 18-19.) If the Government had truly been pursuing a theory of liability under Article 120(b)(2)(B) (while asleep), it would have had no need to elicit evidence that AB never consented. Nor would it have had to elicit any evidence that AB and Appellee had a purely platonic relationship and nothing romantic had transpired before she fell asleep. In fact, such evidence would have been irrelevant to the charged theory of liability, since a subsection (b)(2)(B) (while asleep) offense, has no element of consent.

In light of the above, to the extent AFCCA found that the Government switched or conflated theories of liability at trial, the court was simply incorrect. The government prosecuted the theory that was on the charge sheet, introducing

[4] Appellee's contention that AB's testimony "only demonstrates that she *would not* have consented" (Ans. Br. at 27) is unavailing. A commonsense understanding of this question and answer is that there was no point at which AB ever gave consent to Appellee digitally penetrating her. AB was certainly competent to testify as to whether she ever gave consent to Appellee before falling asleep or after waking up.

evidence that AB never gave consent before, during or after being asleep. They prosecuted that theory in accordance with the statutory language of Article 120(b)(2)(A) and 120 (g)(7), by presenting "all the surrounding circumstances" – including AB being asleep for part of the sexual act. The Government therefore did not "put forth a theory of liability that would fall outside the contours of the charged provision of the UCMJ." (Ans. Br. at 24.)

Not only did the Government prosecute the case in accordance with Article 120(b)(2)(A) (without consent), but the members were also correctly instructed on the elements of Article 120(b)(2)(A). As the Supreme Court has said, "[i]f a jury instruction requires the jury to find guilt on the elements of the charged crime, a defendant will have had a meaningful opportunity to defend against the charge." Musacchio v. United States, 577 U.S. 237, 243-44 (2016) (internal citation omitted). Appellee had that meaningful opportunity to defend against the charged elements here, which he did by arguing that AB had been awake during the sexual encounter and consented. (JA at 203, 218.)

2. The United States' charging decision did not allow it to circumvent any mens rea requirement; it required the United States to prove the offense charged which implicated its own mens rea.

It also cannot fairly be said that the Government "circumvented" any mens rea requirement in this case with its decision to charge Appellee under Article 120(b)(2)(A) (without consent). (*See* Ans. Br. at 19, 20.) The Government simply

had to prove a different offense than Article 120(b)(2)(B) (while asleep). It had to prove that the sexual act occurred without AB's consent – an extra element (and concept) contained nowhere in Article 120(b)(2)(B). Further, the Government had to prove some mens rea element, since it had to prove beyond a reasonable doubt that Appellee did not honestly or reasonably believe that AB had consented. (JA at 166-67.) *See* Efstathiadis v. Holder, 752 F.3d 591, 597-98 (2d Cir. 2014) ("sexual assault statutes sometimes do not specify a mens rea as to consent, when in operation, a recognized mistake of fact defense acts as a proxy for mens rea in this context."). If anything, the Government made its burden more onerous under this set of facts by charging under an Article 120(b)(2)(A), without consent, theory. Here, the Government chose the theory of liability that most accurately captured the totality of Appellee's conduct, that involved perpetrating a sexual act upon AB both while she was asleep and without ever gaining her consent. Pursuing this theory of liability did not violate Appellee's due process rights.

3. When prosecuting an Article 120(b)(2)(A) (without consent) offense, it is proper for the Government to present all the circumstances surrounding the sexual act, even if the circumstances include that the victim was asleep for part of the sexual act.

Appellee seems to be advocating for a rule that if the Government charges an offense as "without consent" under Article 120(b)(2)(A), it cannot present any evidence that the victim was asleep or argue that the victim's sleeping state informs whether she gave consent. (Ans. Br. at 25.) This rule would be

inconsistent not only with the plain language of the statute, but with Mendoza itself. Article 120(g)(7) says that "all the surrounding circumstances are to be considered in determining whether a victim gave consent" and that provision contemplates that a victim's sleeping state is one of those circumstances to be considered. ("A sleeping . . . person cannot consent.") The Government does nothing infirm by introducing and asking the members to consider evidence of a victim's sleep as a circumstance surrounding the sexual act. Based on the plain language of the statute, that is what Congress intended. Mendoza even agreed that its opinion did not bar the Government from offering evidence of the victim's state of intoxication to prove the absence of consent, nor did it bar the members from considering it. 2024 CAAF LEXIS 590 at *22. The same reasoning applies to evidence of the victim's sleeping state.[5] What Mendoza appears to disallow is the Government charging an offense as Article 120(b)(2)(A) (without consent) and then *only* offering evidence of the victim's sleeping state to prove lack of consent. Id. That is not what happened here, since the Government also introduced

[5] Even if the United States had been required to charge Appellee under both Article 120(b)(2)(A) (without consent) and Article 120(b)(2)(B) (while asleep) to capture the entirety of his conduct, it would still be incongruous to suggest that the members could not consider that AB was asleep during part of the sexual act when determining whether AB ever gave consent. Requiring the factfinder to ignore that fact would prohibit the members from considering "all the surrounding circumstances," which would contravene the statutory directive in Article 120(g)(7).

evidence that the victim did not consent before falling asleep and affirmatively demonstrated nonconsent upon waking up. (*See* Gov. Br. at 18-21.)

As long as the government also introduces evidence of nonconsent other than sleep and the members are properly instructed on the elements of Article 120(b)(2)(A), this Court should not be concerned about a due process violation. This remains true even if the Government introduces evidence that a sexual assault victim was asleep during all or part of the sexual act. There is no reason to believe that the members will disregard the instruction to consider "all of the surrounding circumstances" in determining whether the victim gave consent. Once they are told to consider "all of the surrounding circumstances," then it is the members' duty to "decide[] the weight to be given all the evidence in reaching [their] verdict." Santiago Sanchez Defuentes v. Dugger, 923 F.2d 801, 805 (11th Cir. 1991). *See also* JA at 171. ("The final determination as to the weight or significance of the evidence . . . in this case rests solely upon you.") The members are "free to choose among reasonable constructions of the evidence." United States v. Rudisill, 187 F.3d 1260, 1267 (11th Cir. 1999). If the members give a considerable amount of weight, or even the most weight, to the fact that the victim was asleep, that should still raise no due process concerns, so long as they consider *all* of the evidence as required by statute. Appellee and similarly situated servicemembers were on notice based on the plain language of Article

120(b)(2)(A) and 120 g)(7) that the members could consider all the surrounding circumstances in determining whether the victim gave consent, and whether the victim was asleep was one of those circumstances to be considered. If the members followed the military judge's instructions, as they are presumed to do, United States v. Washington, 57 M.J. 394, 403 (C.A.A.F. 2002), that is exactly what happened in this case.

In sum, the United States prosecuted the case against Appellee in full accordance with Article 120(b)(2)(A) and 120(g)(7), as charged. The Government presented all the circumstances surrounding the sexual act, including that AB was asleep during part of the act, that she did not give consent before falling asleep, and that she affirmatively expressed nonconsent upon awakening. The members were instructed to consider all these surrounding circumstances in determining whether AB gave consent. The plain language of the statute gave Appellee notice that he could be prosecuted in this manner, including that the members could consider AB's sleeping state in determining whether she gave consent. AFCCA erred in its legal and factual sufficiency review by finding something untoward about the prosecution of this case and did so by overextending this Court's holding in Mendoza. Based on the overwhelming evidence that AB never gave consent, the members correctly found Appellee guilty of sexual assault without consent. 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.

CONCLUSION

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.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means to the Court and the Air Force Appellate Defense Division on 21 May 2025.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(b)

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

This brief contains 3004 words.

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

/s/ Mary Ellen Payne, USAF

Attorney for the United States (Appellant)

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