IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	**UNITED STATES'**
Appellee	)	**BRIEF IN SUPPORT OF**
	)	**THE CERTIFIED ISSUE**
v.	)	
	)	Crim. App. No. 40392
Airman First Class (E-3)	)	
ISAAC J. SERJAK	)	USC Dkt. No. 25-0120/AF
United States Air Force	)	
Appellant.	)	23 April 2025

UNITED STATES' BRIEF IN SUPPORT OF THE CERTIFIED ISSUE

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UNITED STATES, *Appellant* v. Airman First Class (E-3) ISAAC J. SERJAK, United States Air Force *Appellee*	) UNITED STATES') BRIEF IN SUPPORT OF) THE CERTIFIED ISSUE)) Crim. App. No. 40392))) USCA Dkt. No. 25-0120/AF)

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 FACTUALLY INSUFFICIENT.

INTRODUCTION

The government charged and convicted Appellee of committing sexual assault without consent under Article 120(b)(2)(A), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920(b)(2)(A) (2018). For that offense, the plain statutory language requires the government to prove only (1) that the accused committed a sexual act upon another person; and (2) that the sexual act occurred

"without the consent of the other person." Id. At trial, the government presented evidence, not in dispute here, that Appellee had sexual intercourse with the victim, JM, who was very intoxicated. The government also presented direct evidence that JM never consented to this sexual act before falling asleep in Appellee's dorm room. Although JM did not remember what happened after she fell asleep, the government also presented circumstantial evidence that JM had scratched Appellee's body in multiple places during a struggle that also resulted in a chair being broken.

Yet, despite this evidence that JM both never gave consent and then affirmatively demonstrated nonconsent, the Air Force Court of Criminal Appeals (AFCCA) found Appellee's conviction for sexual assault "without consent" factually insufficient because the government failed to prove a fact not required by the plain language of the statute: that JM was "capable of consenting." (JA at 22, 25) Applying United States v. Mendoza[1] to overturn Appellee's sexual assault conviction, AFCCA explained that the record did not establish whether JM "had the capacity to consent as a 'competent' person." (JA at 25.) AFCCA's decision seems to interpret Mendoza to say that despite JM's physical resistance to the sexual attack, she may have been too drunk for Appellee to be guilty of sexual assault without consent. Such a surprising analysis reflects a misinterpretation of

[1] No. 23-0210, 85 M.J. __, 2024 CAAF LEXIS 590 (C.A.A.F. 7 October 2024)

Mendoza and seemingly imposed an additional element not required under Article 120(b)(2)(A). Because AFCCA's legal reasoning conflicts with the plain language of the statute, this Court should reverse the decision and remand for a new factual sufficiency review.

STATEMENT OF STATUTORY JURISDICTION

AFCCA reviewed this case under Article 66(d)(1)(B), UCMJ, 10 U.S.C § 866(d)(1)(B) (Supp. II 2020). This Court has jurisdiction to review this case under Article 67(a)(2), UCMJ, 10 U.S.C § 867(a)(2) (Supp. II 2020).[2]

RELEVANT AUTHORITIES

Article 120(b) UCMJ 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;
>
> (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] Unless otherwise noted, all references to the UCMJ are to the versions in the Manual for Courts-Martial, United States (2019 ed.) (MCM).

Article 120(b)(3), UCMJ states, in relevant part:

> (b) SEXUAL ASSAULT.—Any person subject to this chapter who—
>
> > (3) commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to—
> >
> > > (A) impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person; or
> >
> > > (B) a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person;
>
> is guilty of sexual assault and shall be punished as a court-martial may direct.

10 U.S.C. § 920(b)(3).

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 was tried by a general court-martial composed of officer and enlisted members at Royal Air Force Mildenhall, United Kingdom. (JA at 82.) Contrary to his pleas, he was convicted of one specification of assault consummated by a battery against BWH in violation of Article 128, UCMJ, 10 U.S.C. § 928 (2018), and one specification of abusive sexual contact against HIC in violation of Article 120, UCMJ.[3] (JA at 82-83.)

Relevant to the specified issue, contrary to his pleas, Appellee was also convicted of:

- one specification of sexual assault in violation of Article 120, UCMJ, for penetrating JM's vulva with his penis without her consent.

- one specification of making a false official statement in violation of Article 107, UCMJ for falsely telling his First Sergeant that *he* had been sexually assaulted by JM.

(JA at 83-84.)

[3] Appellee was acquitted of three other specifications. (Id.)

A military judge sentenced Appellee to a dishonorable discharge, confinement for 54 months and 100 days, total forfeitures, and reduction to the grade of E-1. (JA at 84.) The convening authority took no action on the findings but granted Appellee's request to waive automatic forfeitures. (Id.)

On appeal, applying Mendoza, 2024 CAAF LEXIS 590, AFCCA found the evidence of Appellee's guilt for sexually assaulting JM factually insufficient. United States v. Serjak, No. ACM 40392, 2024 CCA LEXIS 524 (A.F. Ct. Crim. App. 11 Dec. 2024) (unpub. op.). (JA at 1-28.) The court therefore set aside Appellee's sexual assault conviction, dismissed the specification with prejudice, set aside the sentence, and remanded the case to the convening authority, who was authorized to order a rehearing on the sentence. (JA at 28.) The government requested reconsideration of AFCCA's decision, which AFCCA denied. (JA at 54.)

The Deputy Judge Advocate General of the Air Force, performing the duties of the Judge Advocate General, timely certified this case to this Court under Article 67(a)(2), UCMJ, for review.

STATEMENT OF FACTS

Initiation of the investigation into the sexual encounter between Appellee and JM

In February 2021, two female airmen, BWH and HIC, made sexual assault allegations against Appellee. (JA at 112-14.) Appellee's First Sergeant gave him no contact orders with these two airmen. (JA at 114.) About three days after being issued the no contact orders, Appellee called his First Sergeant around 0730 or 0800 and said that some events had happened the night prior, and Appellee wanted to talk to the First Sergeant so "he could get ahead of everything." (JA at 115.) Appellee claimed that he had invited a drunk female airman (later identified as JM) back to his dorm room and that he had tried to help her sober up, offering her Tylenol and water. (JA at 116.) The two fell asleep, but when Appellee woke up around 0300, the female airman pressured him to have sex, despite his protestations that she was too drunk. (Id.) Appellee claimed she kissed him against his will and successfully pressured him into having sex. (JA at 136, 140.) Appellee's First Sergeant told him that the encounter was a sexual assault, and it would have to be reported. (JA at 118.)

Later that day, Appellee submitted to a Sexual Assault Forensic Examination. (JA at 462-475). During the exam, he told the nurse examiner a story much like what he had told his First Sergeant, including that he had invited the female airman to talk and offered her water and Tylenol before they both fell

asleep. (JA at 465.) He added that during the sexual encounter, the female airman dug her nails into him a few times and that afterward, she got up and took a shower. (Id.) During the exam, pictures were taken of scratches that Appellee had sustained on his chest, side, back, and upper thigh. (JA at 476-90.)

After Appellee's report and before conducting a subject interview of JM, the Office of Special Investigations (OSI) interviewed AC, a friend who had been with Appellee and JM on the night of the encounter. AC told OSI that JM had been very intoxicated that night, that JM had no recollection of what happened, and that JM's tampon had been pushed deeper inside her that night. (JA at 156-57; 380-81.) At that point, OSI began to question whether Appellee was truly the victim in the encounter. (Id.)

OSI initially interviewed JM as a suspect, advising her of her Article 31, UCMJ rights. (JA at 157.) After hearing JM's account, including her own description of her tampon being pushed deeper inside her, OSI formally viewed JM as the victim of the investigation, rather than the suspect. (JA at 157-58.)

Events on the night of the charged sexual assault

In February 2021, JM went out to a party with some friends, including AC. (JA at 172-73.) Appellee was the group's designated driver. (JA at 213.) By all accounts, JM drank a large quantity of alcohol on the night of the incident. (JA at 176, 184-85, 218, 224, 1044-45.) She had not met Appellee before that night. (JA

at 212.) JM and Appellee were never formally introduced on the night of the incident and interacted very little. (JA at 176, 213, 216, 222-23.) They were not observed flirting at any point. (JA at 177, 183-84.) On the drive back from the party, JM and AC were kissing in the backseat of the car. (JA at 179, 220-21.) While the car stopped at JM's friend's house so JM could retrieve some belongings, Appellee told AC that he wanted to make romantic overtures toward JM. (JA at 180.) AC told Appellee that was not a "good idea" because JM was "drunk." (Id.) JM testified that throughout the night she was not doing anything that Appellee could have perceived as her flirting with him. (JA at 222-23.)

At the end of the night, Appellee parked in the dormitory parking lot, the partygoers parted ways, and JM began walking alone back to her room. (JA at 225.) She then heard Appellee calling her name and asking her to "come here." (Id.) According to dormitory video footage, this occurred around 0321. (JA at 364, 492.) JM turned around and walked back to Appellee because she was concerned there might be an emergency with one of her friends. (JA at 225.) Appellee guided JM inside his dorm room, saying "come in here, come in here." (JA at 226.) JM described herself as "extremely intoxicated" at this point. (Id.) Appellee told JM to sit on his bed, and she did. Appellee got JM water. (JA at 227.) Appellee then pulled up his desk chair and sat directly in front of JM and told her that kissing AC was not the type of person JM was. (Id.) JM was taken

aback because at that point she "didn't even know his name." (Id.) She got upset, started crying, and replied that Appellee did not know her at all. Appellee told her to calm down and pushed her down onto her left side and told her to go to sleep. (JA at 228, 267.) JM laid her head down and remembered falling asleep, wearing all her clothes. (Id.) She specifically remembered closing her eyes on the bed. (JA at 291.)

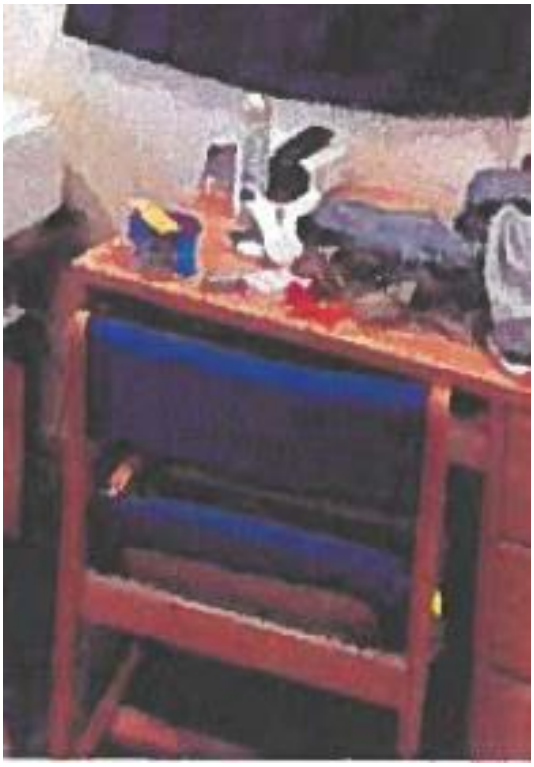
When JM awoke, she was wearing a different sweatshirt, her hair was wet, and there was a hood over her head. She was naked from the waist down. (JA at 229.) Appellee was in bed behind her and did not appear to be wearing any clothes. (JA at 230-31.) JM went into the bathroom and found that her tampon "was pushed very, very far up inside of" her. (JA at 237.) JM testified that she did not "normally have sex while menstruating." (Id.) When JM reentered Appellee's room, she noticed that the room was "like destroyed." Her clothes were everywhere, and the desk chair that Appellee had been sitting in in front of her was broken – specifically the seat was broken down. (JA at 239.) JM put her pants back on, but not her shoes, and left his room. (JA at 240-41.) According to video footage from the dorms, JM returned to her own room around 0632. (JA at 493.)

JM admitted that there were periods of the night of the incident that she did not remember, and she was blacked out. (JA at 269-70, 273.) JM did not remember any sexual act with Appellee, scratching him, her clothes coming off, or

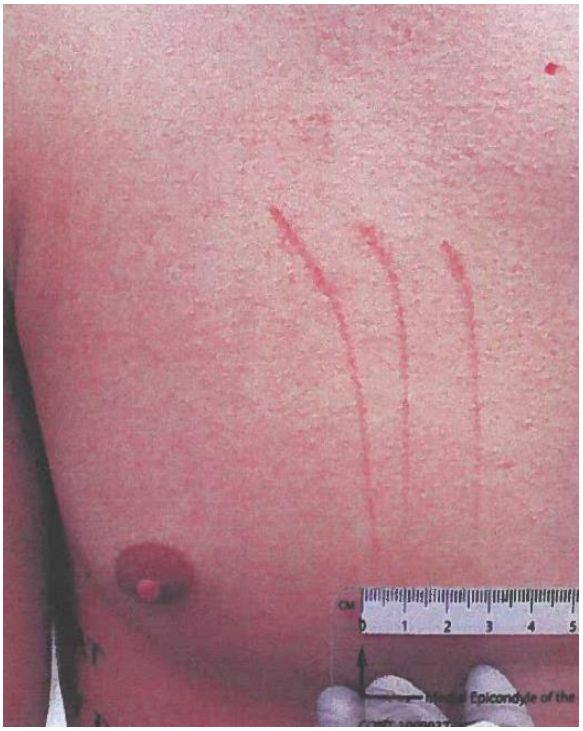
how her hair got wet. (JA at 242.) On direct examination, JM testified that when she had fallen asleep, she was not at all attracted to Appellee, did not want to kiss him or have sex with him, and just wanted to sleep. (Id. at 243, 293.)

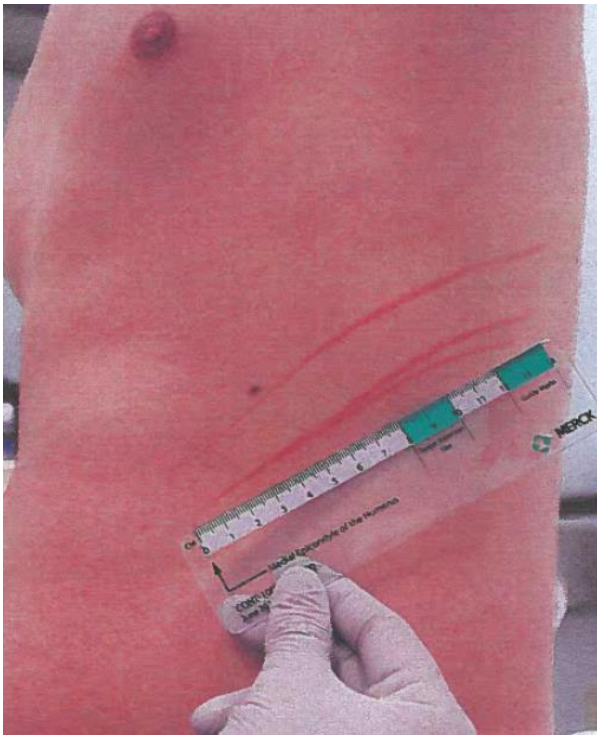
Additional evidence presented by the parties

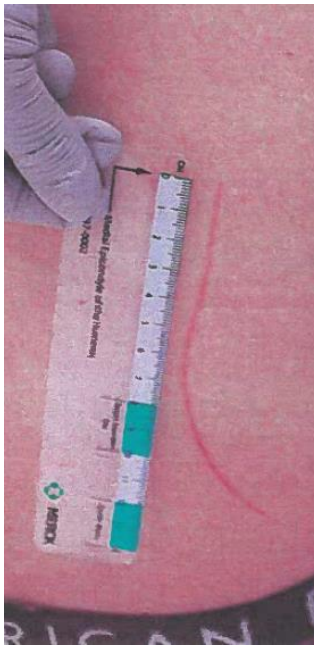
In its case in chief, the government introduced photos taken of Appellee's dorm room a few weeks after his report of sexual assault. (JA at 153.) Two of the photos showed the broken chair described by JM during her testimony. (JA at 460-61, cropped for emphasis).



The government also introduced photos of the scratches documented on Appellee's body during his forensic exam. (JA at 480, 483, 486, 489.)







In their case in chief, the defense presented testimony from Dr. SN, a forensic psychologist. (JA at 304.) Dr. SN testified that an alcohol-induced blackout was a level of intoxication where a person loses a significant piece of memory. (JA at 320.) Individuals in a blackout are not aware that they are blacked out, and can walk, talk, have conversations, and engage in sexual intercourse. (JA at 323.) After the alcohol has cleared their system, they cannot remember those actions. (Id.) Dr. SN also explained that an outside observer cannot tell whether someone else is in a blackout state. (JA at 331.) A person who is blacked out might say they were asleep, even though they were actually blacked out. (JA at 358.) But Dr. SN admitted on cross-examination that someone who remembers laying down and closing her eyes may have fallen asleep rather than blacked out. (JA at 342.)

The military judge's instructions

When discussing instructions, the military judge announced that for the offense against JM, he would instruct that a "sleeping, unconscious, or incompetent person cannot consent" and then give the definition of an "incompetent person." (JA at 384.) The defense replied, "We agree, your honor." (Id.) The next day, the military judge asked if the partes objected to the final version of the findings instructions, and the defense responded, "No, your honor." (JA at 385.)

The military judge instructed the members that they must find beyond a reasonable doubt (1) that Appellee penetrated JM's vulva with his penis and (2) that Appellee "did so without the consent of [JM]." (JA at 405.) The military judge also provided these definitions:

- "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.
- A sleeping, unconscious, or incompetent person cannot consent.
- All the surrounding circumstances are to be considered in determining whether a person gave consent.
- A "competent person" is a person who possesses the physical and mental ability to consent.
- An "incompetent person" is a person who is incapable of appraising the nature of the conduct at issue, or physically incapable of declining participation in or communicating unwillingness to engage in the sexual act at issue.

(JA at 406-07.)

Regarding consent, the military judge also instructed:

> The evidence has raised the issue of whether [JM] consented to the sexual act . . . All of the evidence concerning consent to the sexual act is relevant and must be considered in determining whether the government has proven the elements of the offense beyond a reasonable doubt. Stated another way, evidence the alleged victim consented to the sexual act, either alone or in conjunction with the other evidence in the case, may cause you to have

> a reasonable doubt as to whether the government has proven every element of the offense alleged . . .

(Id.)

The military judge then gave a mistake of fact instruction, telling the members that they must find beyond a reasonable doubt either that Appellee did not believe JM was consenting to the sexual act or that Appellee's mistaken belief that JM consented was unreasonable. (JA at 409.)

Arguments of counsel at trial

In closing argument, trial counsel highlighted the "context before [JM] goes to sleep:" specifically, the lack of flirting and interactions between Appellee and JM on the night of the incident, JM's being upset when Appellee confronted her in his room about kissing AC, and JM's memory of her head hitting the pillow and going to sleep. (JA at 420.) Trial counsel explained that those facts were what the government had "to prove [Appellee] committed a sexual act and did so without [JM's] consent." (Id.)

Although trial counsel made a few references to whether JM was capable of consenting, (JA at 418, 422.) he also argued that the scratches on Appellee showed how JM was "trying to get away while [Appellee's] having sex with her," and that scratches down Appellee's back and on his side "make sense," because "she's fighting wherever she can" and is "fighting against him." (JA at 426.)

Trial counsel also posited that JM was likely either too intoxicated[4] to consent or asleep when the sexual act started, but either way Appellee did not have her consent – nor would have a reasonable person have thought so, since Appellee had never really talked to JM before, and she had been crying in his room. (JA at 429.) Trial counsel concluded by saying the members had more than enough circumstantial evidence to find that Appellee "committed a sexual act against [JM] without her consent." (JA at 430.)

Beginning in opening statement, trial defense counsel asserted that JM was in an alcohol-induced blackout, and that she had told Appellee she wanted to have sex. (JA at 105-06.) Trial defense counsel continued that theme in closing argument, arguing that JM was in an alcohol-induced blackout and had consented to sex with Appellee, and that just because she did not remember consenting did not make the incident a sexual assault. (JA at 442.) He noted that video cameras showed JM "walking fine" at 3:20 am and 6:30 am, on either end of the period when the sexual encounter occurred. (JA at 445.) Trial defense counsel criticized the government for putting forth two theories: either that JM was fighting back or

[4] Trial defense counsel objected to one suggestion that JM was incapable of consenting because "[t]his isn't charged as an incapable of consenting due to alcohol" case. Trial counsel responded that it was something the members could consider because it was "part of the instructions," and the military judge overruled the objection. (JA at 429.) Trial counsel then told the members that whether JM was incapable of consenting was "one of those circumstances" the members should consider. (Id.)

was passed out in a drunken stupor. The defense argued that since even the government did not know what happened, there was reasonable doubt. (JA at 1355.)

In rebuttal, trial counsel acknowledged that he may have "communicated a little poorly" when he said that either way Appellee was guilty. (JA at 449.) He then clarified his theory of the case, saying he would "tell you right now a fight happened in there," that "there was a struggle," and that JM "was likely blacked out." (JA at 456.) He reiterated that "we know there was a struggle" because of the scratches on Appellee and the broken chair shown in Prosecution Exhibit 5. (JA at 457.) He finished discussing the alleged offense by saying that Appellee had tried to have sex with the girl he had told AC he was interested in, JM fought back, and she "probably went and took a shower to try and shower off what he had done to her." (Id.)

AFCCA's decision

In overturning Appellee's conviction, AFCCA cited Mendoza, asserting "our superior court recently held that when charging under [Article 120(b)(2)(A)], the government must prove the victim was capable of consenting but did not consent." (JA at 22.) The court then recognized that JM "did not testify she consented to the penetration . . . as she did not make a 'freely given agreement' to the sexual intercourse." (JA at 25.) But the court said that "whether she had the capacity to

consent as a competent person is not in the record before us." (Id.) AFCCA acknowledged that Appellee had made a statement that JM had initiated the sex but found his statement "inconsistent with the remainder of the evidence" before the court. And further, AFCCA found that Appellee's statement did "not specifically address the issue of whether [JM] had sufficient capacity to consent, and did in fact, consent." (Id.) As a result, AFCCA found Appellee's conviction for sexual assault factually insufficient. (Id.)

Despite overturning Appellee's conviction for sexually assaulting JM, AFCCA still upheld as factually sufficient Appellee's conviction for making a false official statement to his First Sergeant claiming that JM had sexually assaulted him. (JA at 26-27.)

SUMMARY OF ARGUMENT

In United States v. Mendoza, 2024 CAAF LEXIS 590 at *22, this Court held that in a case charged under Article 120(b)(2)(A) (sexual assault without consent), the government cannot prove the absence of consent solely by presenting evidence that the victim was incapable of consenting. But AFCCA erred in overturning Appellee's conviction for committing sexual assault without consent under Article 120(b)(2)(A) by improperly applying Mendoza during its factual sufficiency review. AFCCA erred by (1) applying Mendoza even though the government did not shift theories of liability at trial; (2) applying Mendoza even

though the government properly charged Appellee's hybrid fact-pattern under Article 120(b)(2)(A) (without consent); and (3) adding an extra-textual element to Article 120(b)(2)(A) that the government had to prove beyond a reasonable doubt.

Unlike in 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) (without consent). The government introduced evidence and argued that JM did not give consent to sex before falling asleep in Appellee's room, and that she eventually demonstrated her nonconsent by fighting back against him, scratching him in four places, and breaking a chair. And the defense showed no confusion about how to defend against the government's theory. It presented evidence and argument that JM could consent to the sexual act even in her drunken state and that she, in fact, consented. AFCCA's expansion of Mendoza to find this case factually insufficient was therefore misplaced because the government pursued the charged theory of liability, and no due process violation 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 consenting.

Based on the hybrid factual scenario in this case, involving evidence of sleep, intoxication, and physical resistance, the government properly charged

Appellee under Article 120(b)(2)(A), UCMJ (sexual assault without consent). The plain language of Article 120(b)(2)(A) and (g)(7) contemplates that the factfinder will use "all of the surrounding circumstances" to determine whether a victim gave consent to a sexual act. By statute, those circumstances include whether a victim was "sleeping, unconscious, or incompetent." Article 120(g)(7). What is more, the history of Article 120(b)(2)(A) shows that it was intended to be a "baseline theory of liability for *any* sexual act . . . committed without a victim's consent." Judicial Proceedings Panel, Report on Article 120 of the Uniform Code of Military Justice (2016) at 6. (emphasis added).[5] This Court should clarify that Mendoza does not preclude the government from charging hybrid fact-patterns under Article 120(b)(2)(A) (without consent), so long as the government does not "prove the absence of consent by merely establishing that the victim was too intoxicated to consent." Mendoza, 2024 CAAF LEXIS 590, at *22.

Next, AFCCA incorrectly concluded that, after Mendoza, the government was required to prove beyond a reasonable doubt an extra element of the offense: that the victim was "capable of consenting." Adding this element into Article 120(b)(2)(A) (without consent) conflicts with the plain statutory language. Since subsection (b)(2)(A) does not overlap perfectly with every other theory of liability

[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 23 April 2025).

under Article 120, adding an element creates the danger that the statute will no longer capture some misconduct that Congress intended to criminalize. Adding an element also raises unanswered questions about how the new element is implemented in practice, since the statutory text can provide no guidance. For example, *when* in relation to the sexual act will it suffice for the victim to have been "capable of consenting"? And such ambiguities aside, federal courts generally avoid the practice of adding an element to a statute because "[t]he definition of the elements of a criminal offense is entrusted to the legislature." Staples v. United States, 511 U.S. 600, 604 (1994) (internal citations omitted).

Considering the above, this Court should clarify that it did not intend Mendoza to add an extra-textual element into the statutory offense of sexual assault without consent under Article 120(b)(2)(A). Rather than effectively altering the statutory text of Article 120, this Court can ensure avoidance of the due process concerns from Mendoza in future cases through other means. This Court can specify that, in a case charged under Article 120(b)(2)(A), if the government fails to offer any evidence of absence of consent other than incapacity evidence, a military judge may grant a motion for a finding of not guilty under Rule for Courts-Martial (R.C.M. 917) or a Court of Criminal Appeals may find the conviction legally insufficient under Article 66(d)(1).

But even if Mendoza heightened the government's burden of proof in Article 120(b)(2)(A) cases by requiring that it affirmatively prove the extra element of "capable of consenting," the government here presented compelling evidence that JM physically resisted Appellee's attack. One who actually expresses nonconsent to a sexual act surely must have been "capable of consenting." AFCCA did not analyze the evidence of physical resistance at all during its factual sufficiency review, showing that the court either failed to consider all the surrounding circumstances or misunderstood the law. Either way, AFCCA applied incorrect legal principles during its factual sufficiency review.

Since AFCCA used incorrect legal principles throughout its factual sufficiency analysis, this Court should vacate its decision and remand this case for a new factual sufficiency review using a correct interpretation of Mendoza.

ARGUMENT

THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED IN APPLYING MENDOZA TO FIND APPELLEE'S SEXUAL ASSAULT CONVICTION FACTUALLY INSUFFICIENT.

Standard of Review

This Court reviews a CCA's factual sufficiency determination for "the application of 'correct legal principles,' but only as to matters of law." United States v. Thompson, 83 M.J. 1, 4 (C.A.A.F. 2022) (citing United States v. Clark, 75 M.J. 298, 300 (C.A.A.F. 2016)). While this Court will not review a factual

sufficiency determination if it is "based solely on an appraisal of the evidence," United States v. Thompson, 9 C.M.R. 90, 92 (C.M.A. 1953), it is "statutorily obligated" to do so if the CCA's determination "was reached after an erroneous consideration of the elements of the offense." United States v. Leak, 61 M.J. 234, 241 (C.A.A.F. 2005). 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

a. Mendoza's holding should not apply in cases where the government pursues the charged theory of liability and does not try to prove absence of consent solely through evidence of the victim's incapacity.

Mendoza presented a unique fact-pattern, and its holding should be limited to cases with similar facts, rather than be extended to all cases charged under Article 120(b)(2)(A) (without consent). In Mendoza, this Court reviewed the legal sufficiency of a sexual assault conviction charged as "without consent" under Article 120(b)(2)(A). 2024 CAAF LEXIS 590, at *2. The appellant in Mendoza engaged in the sexual act while the victim was blacked out due to alcohol. 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 later told law enforcement that the victim was incapable of consenting, but did not

say she 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 believed 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.

This Court reached its conclusion 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." Id. at *12 (quoting United States v. Sager, 76 M.J. 158, 161 (C.A.A.F. 2017)). Considering that canon, this Court concluded 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 emphasized 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.

Yet the same due process concerns are not at play every time the government charges Article 120(b)(2)(A) (without consent) and introduces evidence of the victim's sleep, unconsciousness, incompetence, or incapacity. In many cases, the government will be doing just what Article 120 contemplates: proving the absence of consent by asking the factfinder to consider "all the surrounding circumstances." Mendoza itself acknowledges this point, saying "[n]othing in the article bars the Government from offering evidence of an alleged

victim's intoxication to prove the absence of consent." 2024 CAAF LEXIS 590, at *22.

That the statutory provision permits consideration of all the surrounding circumstances, including sleep, unconsciousness, or incompetence, does not mean the government can switch theories of liability – even if some of those circumstances may overlap with other theories of liability under the same statute. 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). The operative question is whether the statutory provision provides fair notice of what conduct is proscribed and whether the government aligns its case with the statutory provision at trial. *See* United States v. Batchelder, 442 U.S. 114, 123 (1979) ("So long as overlapping criminal provisions clearly define the conduct prohibited and the punishment authorized, the notice requirements of the Due Process Clause are satisfied.").

Here, Article 120(b)(2)(A) provided Appellee notice of what conduct is forbidden: a sexual act committed upon another person without the consent of the other person. Article 120(g)(7) then defines consent and provided Appellee notice of circumstances under which he could not gain consent from the other person (e.g., when that other person is "sleeping, unconscious, or incompetent"). And

Article 120(g)(7) informed Appellee that "[a]ll the surrounding circumstances are to be considered in determining whether a person gave consent." Thus, the plain language of Article 120(g)(7) puts servicemembers, such as Appellee, and defense counsel on notice that circumstances such as sleep, unconsciousness, and incompetence will be relevant to determining whether a victim gave consent. Given the notice provided by the statute itself, it would be unreasonable for any defense counsel to claim she could not defend against evidence that the victim was asleep, unconscious, or incompetent as part of a sexual assault without consent charge under Article 120(b)(2)(A). And quite reasonably, trial defense counsel in this case never made such a claim.

In Mendoza, this Court was concerned with the government relying *solely* on the victim's incapacity to consent to show the absence of consent. 2024 CAAF LEXIS 590, at *22. In this Court's view, taking that tact implicates a separate theory of liability under Article 120 and deprives an accused of notice as to what theory the government will pursue at trial. Id. at *18. But 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 or circumstantial 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)(C) 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. A holding otherwise would defy the plain text of the statute and unnecessarily restrict the government's ability to charge hybrid fact-patterns like this one.

In this case, the government did not put on a case similar to Mendoza, and the defense demonstrated that it was well prepared to defend against the offense as charged. Thus, this Court should decline to extend the holding of Mendoza to this case.

1. No due process violation occurred because the government pursued the charged theory of liability and did not prove Appellee's guilt solely by establishing that JM could not consent.

Here, the government did not prove the absence of consent "by merely establishing that the victim was too intoxicated to consent." *Cf.* Mendoza, 2024 CAAF LEXIS 590, at *22. Instead, the government launched a multi-pronged attack that presented the totality of the circumstances surrounding the sexual act. The government elicited that JM and Appellee had never met before the night of the incident and barely interacted that night. (JA at 212, 222-23.) JM never flirted with Appellee, and in fact, was kissing someone else in Appellee's car. (JA at 177-84.) JM only went into Appellee's room because she was concerned that he

was calling out to her because one of her friends was in trouble. (JA at 225.) She started crying in Appellee's room because she was upset with the things he was saying to her because he was a stranger who did not know her. (JA at 227-28.)

Trial counsel elicited a detailed recitation of the events in Appellee's room before JM fell asleep, none of which included JM consenting to sex. In fact, JM testified that at the time she fell asleep she was not attracted to Appellee, just wanted to go to sleep, and did not want to have sex with Appellee. (JA at 293.) And Appellee's version of events even corroborated that JM had not consented to sex before she initially fell asleep in his room. (JA at 465.)

The government did present evidence that JM was so intoxicated that she did not remember some events of the night, including the sexual act with Appellee. (JA at 242.) But it also presented circumstantial evidence that JM had expressed nonconsent by physically resisting the sexual act. The government elicited that upon waking up in the morning, JM noticed that the room looked "destroyed" and a chair had been broken, which suggested that there had been a struggle in Appellee's room. (JA at 239.) They corroborated JM's testimony with photos of the broken chair. (JA at 460-61.) The government also introduced photos showing that the day after the encounter, Appellee had long scratches on four parts of his body, again suggesting that there had been a struggle between JM and Appellee. (JA at 478-89.)

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, JM could testify that there was no flirtation with Appellee that night, that she remembered their interactions before she fell asleep, and that she did not want to have sex with Appellee upon falling asleep. And the government presented circumstantial evidence of an affirmative, physical act of nonconsent. As a result, the cases presented to the factfinder here and in Mendoza simply were not comparable.

A review of trial counsel's closing argument shows that he did not rely entirely or even mostly on JM's intoxication to prove lack of consent. At the beginning of his argument about JM, trial counsel highlighted the lack of interactions and flirtation between JM and Appellee and how she was upset with him before going to sleep. (JA at 419.) He explained that the "context" before JM went to sleep was part of the government's proof that the sexual act occurred without JM's consent. (JA at 420.) According to trial counsel, no matter how low her inhibitions might have been, JM would not have taken a "180 degree turn" from being angry with Appellee and crying to saying she wanted to have sex with

him. (JA at 428.) Trial counsel also discussed the scratches on Appellee, describing them as wounds that showed JM had fought against Appellee. (JA at 426.)

Trial counsel mentioned that JM may have been too intoxicated to consent or asleep at the beginning of the sexual act. (JA at 429.) But after an overruled objection, he echoed the military judge's instructions, clarifying that JM's capacity to consent was "*one* of those circumstances" the members should consider. (Id.) (emphasis added). Trial counsel closed his argument by correctly identifying the elements of the charged offense and saying that "more than enough" circumstantial evidence showed Appellee committed a sexual act on JM "*without her consent.*" (JA at 430.) (emphasis added). Then in rebuttal, trial counsel responded to a challenge from trial defense counsel that even the government did not know what happened in Appellee's room. Trial counsel clarified the government's theory of the case: JM was likely blacked out but fought back against Appellee scratching him and breaking a chair in the struggle. (JA at 456.) In other words, the government's ultimate theory was that JM affirmatively expressed nonconsent to the sexual act – an argument that aligned with the military judge's instruction that "[an] expression of lack of consent through words or conduct means there is no consent." (JA at 412.)

To the extent the government elicited evidence or argued about JM being asleep or incapable of consenting, it did so in the context of asking the members to consider all the surrounding circumstances of the sexual act. Mendoza, in fact, ratifies this approach. 2024 CAAF LEXIS 590, at *22 ("To be clear, our holding…does not bar the trier of fact from considering evidence of the victim's intoxication when determining whether the victim consented.") Yet the government simultaneously asked the members to consider other circumstances, including evidence that JM showed and had no sexual interest in Appellee before falling asleep and evidence that she had expressed nonconsent by fighting back against Appellee. Thus, Appellee was prosecuted for and convicted of sexual assault "without consent" in exactly the manner the statute contemplates—through consideration of "[a]ll the surrounding circumstances." Article 120(g)(7)(C). 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 fear in Mendoza. 2024 CAAF LEXIS 590, at *18.

Even if trial counsel mis-stepped during argument, 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 JM never agreed to the sexual act 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 arguments of counsel are not evidence and that they must find beyond a reasonable doubt that the sexual act occurred without JM's consent, that "an expression of lack of words or conduct means there is no consent," that a sleeping or incompetent person cannot consent, and that "all the surrounding circumstances must be considered in determining wither a person gave consent." (JA at 406, 509.) *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)) (a theory of liability was adequately presented to the members when the theory was referenced in the charging document and presented through testimony during the trial). Here, a reasonable factfinder considering the evidence presented and following those instructions could have determined beyond a reasonable doubt that JM did not consent to the sexual act.

Since the due process concerns in Mendoza were not at play, AFCCA had no reason to deviate from the plain language of subsection (b)(2)(A) in determining whether Appellee's conviction was factually sufficient.

2. No due process violation occurred because the defense was not misled about how to defend against the charged offense.

Unlike in Mendoza, no notice or due process issue exists where defense counsel was not blindsided by a shifting theory of liability. To start, trial defense counsel in Appellee's case never asserted that they were unprepared or unable to

defend against the charged offense against JM at trial. Indeed, Article 120(g)(7), UCMJ itself put Appellee and his defense counsel on notice that they could defend against a subsection (b)(2)(A) (without consent) offense 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 incompetent.

Since the government introduced Appellee's statements to his First Sergeant and the nurse examiner claiming to be the victim of a sexual assault, the defense unsurprisingly adopted Appellee's version of events, and proceeded under the theory that JM had initiated and consented to the sexual act. The defense theorized that JM had been in an alcohol-induced blackout, and they introduced expert testimony that a person can engage in sexual intercourse while in a blackout. Since an expert cannot testify to whether any particular victim actually consented, the obvious purpose of this expert testimony was to show that JM was competent to consent even while highly intoxicated. Offering this evidence demonstrated that the defense understood that to defend against the "without consent" charge by showing that JM consented, Article 120(g)(7) would also require them to show that JM was competent to consent.

Trial defense counsel further argued that JM had told Appellee that she had sobered up enough to have sex, and the defense also introduced video evidence and argued that JM had been "walking fine" before and after the sexual encounter. (JA

at 450, 492-93.) Trial defense counsel asserted, "just because you don't remember what you are doing[,] what you are consenting to at the moment doesn't make a sexual assault." (JA at 442.) Moreover, the military judge instructed the members that the evidence at trial had raised the issue of whether JM had consented to the sexual act, that the evidence must be considered, and that it might cause the members to have reasonable doubt as to whether the government had proven every element of the offense. (JA at 406-07.) This instruction aligned exactly with the defense theory of the case.

Trial defense counsel's strategy of arguing JM's affirmative consent showed that they understood what theory of liability the government was pursuing. And the fact that trial defense counsel argued that JM was "walking fine" and told Appellee she was sober enough to have sex demonstrated that the defense understood how to defend against a statute that both criminalizes a sexual act perpetrated without consent and explains that an incompetent person cannot give consent. Appellee was not "robbed" of his due process right to fair notice. *Cf.* Mendoza, 2024 CAAF LEXIS at *9, *18. *See also* Murtishaw v. Woodford, 255 F.3d 926, 954 (9th Cir. 2001) (defendant's "actions at trial" in response to the prosecution's evidence showed he had actual notice of the government's theory of liability).

In sum, the government did not attempt to prove JM's absence of consent solely through evidence that JM was incapable of consenting. The defense was not misled by the government's theory of liability, and therefore, no due process violation occurred. As a result, Mendoza should not apply here, and AFCCA erred by using Mendoza to find Appellee's sexual assault conviction factually insufficient.

b. The government properly charged this offense under Article 120(b)(2)(A) (without consent) because Mendoza does not preclude charging under that theory in hybrid scenarios involving sleep, intoxication, and physical resistance.

Since Mendoza involved a fact-pattern where the evidence only showed the victim was highly intoxicated during the sexual act, the opinion does not account for hybrid scenarios where a victim could be asleep, incompetent to consent, and expressing affirmative nonconsent all during the course of the same sexual act. It follows that this Court should be cautious about extending Mendoza's holding to cover hybrid situations like this one and thereby limiting the government's charging options for sexual assault cases.

Both the plain language and the origin of Article 120(b)(2)(A) (without consent) make clear that Congress intended that provision to be used to charge hybrid fact-patterns, such as the one in this case. A 2019 amendment to Article 120, UCMJ specifically criminalized a sexual act committed "without the consent of the other person." National Defense Authorization Act for Fiscal Year 2017,

114 P.L. 328, §5430. Before 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). Based on the plain language of this 2019 amendment, Congress expressed an intent to criminalize a sexual act committed without a victim's consent – and that the factfinder must determine whether the victim gave consent using "*all* of the surrounding circumstances." Article 120(g)(7)(C) (emphasis added). According to Congress, the "surrounding circumstances" would include whether a victim was "sleeping, unconscious, or incompetent" and whether the victim made "an expression of lack of consent through words or actions." Article 120(g)(7)(A)-(B).

The 2019 amendment, replacing the "bodily harm" language with "without the consent of the other person," was instigated by the congressionally-mandated Judicial Proceedings Panel (JPP) that was tasked with reviewing Article 120. JPP, Report on Article 120 of the Uniform Code of Military Justice (2016) at 6. 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. (emphasis added). 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). And, more specifically, the Subcommittee approvingly recognized the prosecutorial practice of charging under a bodily harm theory "in cases in which the victim has little or no recollection of the incident but can affirmatively state that a perpetrator engaged in a sexual act . . . with the victim without consent." Id. at 44. The Subcommittee recommended replacing the term "bodily harm" with "without the consent of the other person" merely to clarify that no further bodily harm or physical injury, apart from nonconsent, must be shown. Id. But the history of the 2019 amendment confirms that the amendment contemplated that hybrid fact-patterns that include a highly impaired victim with no memory of the crime can be charged as "without consent" offenses.

An overly-expansive view of Mendoza would thwart the intentions of the 2019 amendment. It 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) (without consent) case, which could include that a victim was sleeping or possibly incompetent at some point during an encounter, the government would be forced to charge any such case under Article 120(b)(2)(B) (while asleep) or Article 120(b)(3) (incapable of consenting). 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 later communicated during the sexual assault.

The factual scenario in Appellee's case illustrates the hazards of extending Mendoza too far. AFCCA's opinion suggests that the government charged under the wrong theory of liability, but what theory would have been more appropriate? Both JM and Appellee confirmed that JM fell asleep in his room at some point and that no consent had been given before then. And circumstantial evidence showed that JM physically resisted at some point. But given JM's lack of memory after falling asleep and Appellee's dubious account, a few factual scenarios were possible:

1. penetration began while JM was asleep, and then she woke up and physically resisted;

2. penetration began while JM was awake, and she immediately physically resisted; or

3. penetration began while JM was awake but not competent enough to immediately resist; but when she eventually regained more of her faculties she did physically resist.

Based on the available facts, the evidence was inconclusive to prove beyond a reasonable doubt that JM was asleep during the sexual act in violation of Article 120(b)(2)(B). Since there was evidence that JM actually "communicat[ed] unwillingness to engage in" the sexual act, the evidence was also inconclusive to show beyond a reasonable doubt that JM was incapable of consenting to the sexual

act under Article 120(b)(3). *See* Article 120(g)(8)(B) (defining "incapable of consenting"). But what the government could prove beyond a reasonable doubt was that JM did not consent under Article 120(b)(2)(A). She did not consent before falling asleep – since she testified that at that point, she had no desire to have sex with Appellee. She did not consent while asleep, because legally she could not. She likewise did not consent if she was at any point too incompetent to consent, because legally she could not. And, of course, evidence that she actively resisted Appellee was "an expression of lack of consent through . . . conduct" that meant there was no consent. *See* Article 120(g)(7). All the surrounding circumstances established that the sexual act occurred without JM's consent, and so Article 120(b)(2)(A) was the appropriate way to charge Appellee's offense.

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. Where the evidence supported beyond a reasonable doubt one theory (without consent), but not the others (asleep and incapable of consenting), the government should not have been forced to charge an additional offense it could not prove. It was better for the government to charge under the one available theory of liability that made clear that it was criminal to have sex with JM whether she was sleeping, incompetent to consent, or expressing a lack of

consent, so long as all the surrounding circumstances showed that JM did not give consent. That theory of liability, sexual assault without consent under subsection (b)(2)(A), was exactly what the government charged. There is nothing untoward or unconstitutional about a statutory offense that serves as a "catch-all" or "baseline" theory of liability to encompass hybrid scenarios involving sexual misconduct. "Congress could have decided that the ability to charge one crime instead of two was a valuable, perhaps necessary tool for prosecutors that warranted creating a new crime." United States v. Mohammed, 693 F.3d 192, 1999 (D.C. Cir. 2012).

The structure of Article 120 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 for perpetrating a nonconsensual sexual act despite evidence that JM actively resisted the sexual act by scratching Appellee's body in four places.

In Article 120(b)(2)(A) (without consent) cases such as Appellee's, where the government presents a hybrid fact-pattern involving sleep, potential

incompetence, and affirmative nonconsent, the concerns present in Mendoza do not exist. The instruction, in accordance with the statute, for the members to consider all the surrounding circumstances in deciding whether the victim "gave consent" eliminates the due process concerns that the government will switch from a "without consent" theory to a "sleeping victim" or "incapable of consenting" theory. To this end, this Court should not apply Mendoza to preclude the government from charging hybrid fact-patterns under Article 120(b)(2)(A).

In the end, the government appropriately charged this case as a sexual assault without consent under Article 120(b)(2)(A) based on the available facts. Since there is no argument that the government should have or actually did pursue a different theory of liability, AFCCA erred by using Mendoza in its factual sufficiency review.

c. AFCCA erred by improperly adding the element of "capable of consenting" to the charged offense.

In reaching its factual insufficiency determination in this case, AFCCA observed that after Mendoza, when charging under the theory of sexual assault without consent under Article 120(b)(2)(A) "the Government must prove the victim was capable of consenting but did not consent." (JA at 22.) The court also found that "whether [JM] had the capacity to consent as a 'competent person' is not in the record before us." (JA at 25.) AFCCA's conclusion was legally incorrect insofar as it added an additional element to the offense charged not

included in the statute. In Mendoza, this Court never explicitly stated that it had added an "capable of consenting" element to Article 120(b)(2)(A) that the government would have to prove beyond a reasonable doubt. This Court should take the opportunity now to clarify that it did not intend to do so, and so AFCCA's application of an additional element in its factual sufficiency analysis was error.

1. The surplusage concerns identified in Mendoza do not apply to all theories of liability under Article 120.

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). 2024 CAAF LEXIS 590 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 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. 5 March 2024) (No. 23-0210)). The government could not provide a scenario that seemed to satisfy the Court.

But these surplusage concerns do not exist for all other theories of liability under Article 120. While adding an element to Article 120(b)(2)(A) (without consent) may help differentiate it from Article 120(b)(3) (incapable of consenting), such practice would be inconsistent with the plain language of the entirety of the statute. And since not all Article 120 theories of liability are surplusage with subsection 120(b)(2)(A), adding an element creates the danger that the statute will no longer capture some misconduct that Congress intended to criminalize.

To see that there are no surplusage concerns between Article 120(b)(2)(A) and other Article 120 theories of liability, take for example, cases involving 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.[6] As a result of this distinction, there are factual scenarios with sleeping

[6] 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.

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. 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 if she fell asleep. In such circumstances, the government would no doubt 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 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.

2. Adding a "capable of consenting" element to Article 120(b)(2)(A) would make parts of Article 120(g)(7) 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)(B) to say that a sleeping person cannot consent.[7] Paradoxically, 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).

If the factfinder must find that the victim was capable of consenting for a "without consent" offense, then the factfinder is, in effect, not allowed to consider "all the surrounding circumstances" of the sexual conduct. This interpretation would defy the plain language Congress chose for the statute. 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

[7] 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.

relevant to deciding whether she made a freely given agreement to the conduct at issue.

3. There is no evidence that Congress intended Article 120(b)(2)(A) to include, as an element, that the victim was "capable of consenting."

Even if there is some overlap or surplusage between subsections (b)(2)(A) (without consent) and some other theories of liability under Article 120, that still would not give this Court reason to read an additional element of "capable of consenting" into subsection (b)(2)(A). 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 have been the impetus behind the 2019 amendment to Article 120, UCMJ that criminalized specifically a sexual act committed "without the consent of the other person." The Judicial Proceedings Panel established that the new "without consent" offense "would create a baseline theory of liability for *any* sexual act . . . committed without a victim's consent" – not just those acts committed when the victim was

capable of consenting. JPP, Report on Article 120 of the Uniform Code of Military Justice (2016) at 6 (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 "bodily harm" theory of liability that the "without consent" offense was intended to adapt and supersede 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). 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.").

4. Adding a "capable of consenting" element to Article 120(b)(2)(A) would create logistical concerns unanswered by Mendoza.

Not only is there no textual or historical support for adding an element into

Article 120(b)(2)(A), doing so creates logistical concerns for its implementation. First, does the addition of an element to the statute mean that all previous specifications under Article 120(b)(2)(A) did not state an offense if they omitted the element that the victim was "capable of consenting?" *See* United States v. Crafter, 64 M.J. 209, 211 (C.A.A.F. 2006) ("A specification states an offense if it alleges, either expressly or by implication, every element of the offense, so as to give the accused notice and protection against double jeopardy.").

Second, if the victim must be "capable of consenting" to the sexual act, at what point much she demonstrate this capability? For example, would it be sufficient that JM was capable of consenting to the sexual act before falling asleep, but did not? Here, the evidence showed that before falling asleep, JM was of sound enough mind to have a discussion with Appellee and to become offended by his words. And the evidence showed she never gave consent before falling asleep. If the factfinder could not consider JM's capacity to consent and lack of consent before falling asleep, then the factfinder has been prevented from considering "all the surrounding circumstances," in contravention of Congress's requirement in Article 120(g)(7)(C). Relatedly, must JM be capable of consenting for the entirety of the sexual act? Or is it sufficient if JM was capable of consenting and did not consent during part of the sexual act? If Mendoza intended to add an element to Article 120(b)(2)(A), it did not answer these questions. The logistical difficulties

in implementation weigh heavily against interpreting Mendoza to add an additional element into subsection (b)(2)(A).

5. 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. After all, "[o]nly the people's elected representatives in the legislature are authorized to make an act a crime." United States v. Davis, 588 U.S. 445, 451, (2019). To that end, "[t]he definition of the elements of a criminal offense is entrusted to the legislature." Staples, 511 U.S. at 604 (quoting Liparota v. United States, 471 U.S. 419, 424 (1985)). Even though the Supreme Court has sometimes read a mens rea element into statutes that do not contain one, that practice is traced to the "longstanding presumption . . . that Congress intends to require a defendant to possess a culpable mental state." Xiulu Ruan v. United States, 597 U.S. 450, 457-58 (2022) (internal quotation omitted). That same presumption is not at play in interpreting Article 120, UCMJ, since mens rea is not the issue. And, even so, the practice of reading in a mens rea to a statute has been recently criticized by some Justices when it is used to override the intentions of Congress. Id. at 471 n.* (Alito, J., concurring in the judgment) ("[f]ederal courts have no constitutional authority to re-write the statutes Congress has passed based on judicial views about what constitutes 'sound' or 'just' criminal law").

Outside the mens rea context, there appears to be little support for the judicial addition of elements to statutes. *See*, 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 a 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). 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, would create significant questions about its implementation, 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, 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.

6. Instead of adding an element to Article 120(b)(2)(A), this Court's due process concerns from Mendoza can be avoided through R.C.M. 917 and appellate review.

Rather than add an extra-textual element into Article 120(b)(2)(A), this Court could address the due process concerns in Mendoza simply by specifying that a conviction under Article 120(b)(2)(A) is legally insufficient if the government fails to introduce any evidence of the absence of consent other than that the victim is incapable of consenting. In such situations, the military judge could grant a motion for a finding of not guilty under R.C.M. 917. *See* R.C.M. 917(a) ("The military judge, on motion by the accused or sua sponte, shall enter a finding of not guilty of one or more offenses charged . . . if the evidence is insufficient to sustain a conviction of the offense affected."). Or, on appeal, a

Court of Criminal Appeals could set aside the conviction as legally insufficient. *See* Article 66(d)(1). Such authority would protect an accused from being prosecuted for a different theory of liability under Article 120, rather than the charged "sexual assault without consent" offense under Article 120(b)(2)(A).

At bottom, this Court should clarify that Mendoza did not add an additional element to Article 120(b)(2)(A) and should find that AFCCA erred in its factual sufficiency analysis by interpreting Mendoza to have done so.

d. AFCCA's misapplication of Mendoza in its factual sufficiency review warrants reversal and remand.

In performing a factual sufficiency review under Article 66(d)(1)(B), AFCCA first determines whether an accused made a specific showing of deficiency of proof. If the appellant has made such a showing, AFCCA may weigh the evidence and determine controverted questions of fact subject to appropriate deference to the fact that the members saw and heard the witnesses and other evidence; then, if AFCCA is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may set aside the finding. Id.

AFCCA erred in its factual sufficiency analysis by misapplying Mendoza and by reading an element into Article 120 (b)(2)(A). In focusing only on whether JM had the capacity to consent, AFCCA failed to follow the statutory guideline from Article 120(g)(7)(C) that the factfinder must consider "all the surrounding circumstances" in determining whether the victim gave consent.

When evaluating the circumstances surrounding the sexual act, AFCCA should have noted that JM and Appellee's accounts overlapped in key respects: JM was very intoxicated that night. Appellee initiated talking with JM after they returned to the dorms. He offered her water, and JM fell asleep in Appellee's dorm room at some point. There was no discussion of sex before JM fell asleep. JM woke up with her hair wet, which corresponded with Appellee's claim that she took a shower after the sexual act. Further, Appellee's statement that the two had sex was corroborated by JM finding her tampon impacted inside her, a fact that JM had reported to AC even before OSI interviewed JM. This statement to AC therefore occurred before JM knew she was under investigation and would have had any motivation to lie.

Based on the corroborated evidence, JM gave Appellee no indication of consent to sex before falling asleep. The rest of the evidence supported that at some point after JM initially fell asleep, Appellee had sex with her. Whether or not JM was asleep when the sexual act started, at some point she gained awareness and actively resisted Appellee, scratching him on the inner thigh, back, chest, and side. Appellee's desk chair was also broken during the struggle. JM took a shower and eventually left around 0632.

Knowing that JM had not consented to sex and that he now had scratches on his body and fearing that JM would remember what happened, Appellee called his

First Sergeant at around 0730 or 0800. Aware that he had already been accused of sexual assault by two other women, this time Appellee relayed to his First Sergeant that he wanted to get out in front of something. He falsely reported being sexually assaulted by JM to explain the encounter. Appellee's story of an unwanted sexual advance by JM was unbelievable considering he had expressed sexual interest in JM to AC earlier in the night; he had been the one to coerce JM into his dorm room; and with scratches all over his body, he had a motive to lie about the encounter. The only plausible reason for Appellee's report to his First Sergeant was that Appellee had done something wrong, knew it, and was trying to shift the blame.

All these circumstances supported that JM did not consent before she fell asleep, she could not consent at any point when she was asleep, and that at some point she expressed lack of consent by scratching Appellee in multiple places. Yet AFCCA overturned Appellee's conviction for committing sexual assault without JM's consent, not because the government did not meet the statutory elements, but because the government did not adequately prove that JM was *capable* of consenting. In other words, despite actively resisting the sexual attack, JM may have been, in AFCCA's estimation, too incapacitated for Appellee to be guilty of sexual assault without consent. This is a perverse outcome and cannot be what Congress intended in formulating Article 120. It is irrational to have to tell a

sexual assault victim that her expression of nonconsent was insufficient to hold the perpetrator accountable because she consumed too much alcohol before being attacked.

AFCCA did not discuss the evidence that JM had fought back by scratching Appellee as part of its factual sufficiency analysis. This means either that AFCCA failed to consider all the circumstances, as required under Article 120(g)(7)(C), or that AFCCA mistakenly believed that evidence of physical resistance was insufficient to show capacity to consent. Either way, AFCCA erred in its application of the law. Even if Mendoza required that the government prove beyond a reasonable doubt that JM had been capable of consenting to the sexual act, surely evidence that she affirmatively and physically *did not* consent was relevant to her capability to do so. Because AFCCA failed to analyze this crucial fact, this Court cannot be confident that AFCCA correctly understood and applied the law.

Since AFCCA based its factual sufficiency review on incorrect legal principles, this Court should vacate its decision and remand this case for a new factual sufficiency review. Thompson, 83 M.J. at 4. To ensure compliance with Mendoza, this Court should direct AFCCA to evaluate whether the government offered to the factfinder any evidence of nonconsent other than JM's incapacity to consent. If the government did so, then AFCCA can and must weigh all the

available circumstances in determining whether the court is clearly convinced that Appellee's sexual assault conviction "was against the weight of the evidence." Article 66(d)(1)(B).

CONCLUSION

The evidence here established that JM never consented to sex with Appellee before falling asleep in his room. And whether JM was asleep or merely blacked out when the sexual assault began, JM eventually physically resisted Appellee. A holistic reading of Article 120 reveals that Congress intended Appellee's 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, incompetent, who does not give consent, or who expresses nonconsent through her conduct. Where the evidence produced at trial established beyond a reasonable doubt that JM never gave consent to the sexual act, 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 factual sufficiency review was based on an incorrect interpretation of Mendoza, and therefore, this Court should vacate AFCCA's decision and remand the case for a new factual sufficiency review.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, civilian appellate defense counsel, and the Air Force Appellate Defense Division on 23 April 2025.

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