IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' MOTION FOR RECONSIDERATION
v.	)	Before Special Panel
Airman First Class (E-3) **WILLIAM C.S. HENNESSY,** United States Air Force, *Appellant.*	)	No. ACM 40439 26 December 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

The United States, pursuant to Rules 23.1, 23.3(k), and 31.2 of this Honorable Court's Rules of Practice and Procedure, submits this Motion to Reconsider regarding this Honorable Court's Opinion dated 25 November 2024. Pursuant to Rule 31.2(b)(1), the United States avers the Court misapprehended the law and the facts in reaching its Opinion. Specifically, the Court of Appeals for the Armed Forces (CAAF) opinion in United States v. Mendoza, __ M.J. __, No. 23-0210, 2024 CAAF LEXIS 590 (C.A.A.F. 7 October 2024), did not impact the factual sufficiency of Appellant's conviction for the sexual assault without consent of victim K.E. Appellant's conviction was factually sufficient because, when she was conscious and capable of consenting to sex with Appellant, she did not consent. The Court's Opinion misapprehended the facts, because it emphasized there was no evidence of what happened directly leading up to the sexual assault – implying that the victim might have consented or given Appellant the reasonable mistake of fact that she consented – when there are no facts in the record to support such possibilities. And there was more than sufficient evidence that the victim had rejected Appellant's advances and did not consent to having sex.

STATEMENT OF FACTS[1]

1. Appellant's Abusive Sexual Contact of Victim's K.G. and I.E.

In addition to the sexual assault of Victim K.E., he was also convicted of abusive sexual contact of victims K.G. and I.E. (R. at 1142.) In March 2018, Appellant went to K.G.'s dorm room on Spangdahlem Air Base, Germany, and, without her consent, touched her buttocks. (R. at 820, 827.) And on 4 July 2019, while I.E. was on Spangdahlem Air Base to watch fireworks with her friends, Appellant pulled I.E.'s face towards his face to try and kiss her two or three times, but she pulled away, and he touched her buttocks without her consent. (R. at 880, 892-93.) Later that night, Appellant again tried to kiss I.E., again touched I.E.'s buttocks without her consent, pulled his pants down, and tried to force I.E.'s hand onto his penis. (R. at 897, 899-901.)

2. Appellant's Sexual Assault of Victim K.E.

While watching television together on 8 June 2019 in Appellant's dorm room, K.E. pulled away when Appellant tried to kiss her and again when he forcefully kissed her. (R. at 667-71.) After K.E. left Appellant's dorm room, he apologized, so she agreed to meet up with him later that night at a concert on base. (R. at 672-74.)

At the concert, when Appellant asked K.E., "So my room or yours?" K.E. responded, "You go to yours and I'll go to mine." (R. at 676, 679.) Appellant replied, "Okay," but neither left the concert at that time (Id.) When K.E. received a call, Appellant rubbed her lower to middle back, but K.E. nudged him off. (R. at 680.) At the end of the evening, K.E., who had no prior experience with alcohol, was feeling drunk or buzzed. (R. at 681.) Appellant offered to give K.E. a piggyback ride, and she agreed, believing the piggyback ride would be to drop her off at her room. (R. at 682.)

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[1] The United States incorporates its statement of facts from its original brief.

K.E.'s next recollection after getting onto Appellant's back at the concert was waking up in Appellant's room with his penis inside of her, having sex with her. (R. at 682, 684.) K.E. panicked and pretended she was asleep to get Appellant to stop, closing her eyes and turning her head to face the wall. (R. at 685.) Appellant called K.E.'s name and said, "Oh, no." (R. at 686.) Appellant tried to wake K.E. up and then stopped penetrating her, got up, and walked away. (R. at 686.)

Later that evening, K.E. reached out to friends and told them that Appellant had raped her. (R. at 689-93.) She then reported to the Sexual Assault Response Coordinator (SAPR) and received a forensic medical examination for sexual assault. (R. at 693-95.)

During closing argument, the prosecution clearly argued, consistent with the Specification involving the sexual assault of K.E., that Appellant had sexual intercourse with her without her consent. (R. at 1078-79, 1091-92.)

3. This Court's 20 August 2024 Opinion and Its Findings regarding Sexual Assault of K.E.

In the Court's initial opinion in Appellant's case, United States v. Hennessy, No. ACM 40439, 2024 CCA LEXIS 343 (A.F. Ct. Crim. App. 20 August 2024), this Court found the plain language of the sexual assault specification alleged Appellant committed the crime against K.E. "without her consent," and the military judge correctly instructed the members. Id. at *18. Thus, this Court held, "The evidence presented on the charged sexual assault offense, and the correct military judge's instructions, eviscerate any concern that Appellant was convicted of a theory of criminal liability not squarely and appropriately before the members." Id. at 19. In rejecting a mistake of fact defense, this Court found such a belief would be unreasonable because K.E. "repeatedly rebuffed Appellant's physical advances from the first time they met each other in

person." Id. at 20. The Court concluded that "[t]he evidence proved that K.E. did not consent to sex with Appellant…." Id.

4. This Court's 25 November 2024 Opinion

On 9 October 2024, in light of Mendoza, this Court *sua sponte* reconsidered its 30 September 2024 denial of Appellant's 19 September 2024 motion for reconsideration, granted the motion, vacated its 20 August 2024 opinion, advised that a new opinion would be issued in due course, and directed that no additional briefs be filed.

On 25 November 2024, this Court issued its opinion in which it found Appellant's conviction for the sexual assault of K.E. factually insufficient, and it set aside the conviction for the sexual assault of K.E. United States v. Hennessy, No. ACM 40439, 2024 CCA LEXIS 503 (A.F. Ct. Crim. App. 25 November 2024).

Standard of Review

This Court reviews issues of factual sufficiency *de novo*. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law

The test for factual sufficiency for Appellant's 2019 crime is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the Court is convinced of the [appellant]'s guilt beyond a reasonable doubt. United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000) (internal citation omitted).

DISCUSSION

1. The Mendoza Opinion

On 7 October 2024, CAAF decided the case of United States v. Mendoza, in which the appellant challenged the legal sufficiency of his conviction for sexual assault without consent on

the grounds that the prosecution: (1) failed to introduce "affirmative" evidence of non-consent; and (2) violated his due process rights by arguing that the victim was incapable of consenting due to alcohol intoxication, despite charging him under Article 120(b)(2)(A) (sexual assault without consent) and not Article 120(b)(3)(A) (sexual assault upon a person incapable of consenting). 2024 CAAF LEXIS 590, at *10-11.

Though CAAF disagreed with the first argument and reiterated that the prosecution could meet its burden of proof with circumstantial evidence, it agreed with the second argument and held that Article 120(b)(2)(A) and Article 120(b)(3)(A) created separate theories of liability. Id. at *17-18. In so holding, CAAF opined that the Government's interpretation of subsection (b)(2)(A) -- under which every sexual assault upon a victim who is incapable of consenting would also qualify as a sexual assault without consent -- would render subsection (b)(3)(A) "mere surplusage." Id. at *16. CAAF expressed concern that interpreting subsection (b)(2)(A) and (b)(3)(A) as overlapping theories of liability "would allow the Government to circumvent the *mens rea* requirement that Congress specifically added to the offense of sexual assault of a victim who is incapable of consenting." Id. at *16. Thus, CAAF differentiated between the two subsections as follows:

> Subsection (b)(2)(A) criminalizes the performance of a sexual act upon a victim who *is capable of consenting but does not consent*. Subsection (b)(3)(A) criminalizes the performance of a sexual act upon a victim who is incapable of consenting to the sexual act due to impairment by any drug, intoxicant, or other similar substance when the victim's condition is known or reasonably should be known by the accused.

Id. at *17-18 (emphasis added).

CAAF indicated that the Government could charge an accused with both offenses and allow the factfinder to decide whether the victim was capable or incapable of consenting, but could not "charge one offense under one factual theory and then argue a different offense and a different

factual theory at trial" because such an approach "robs the defendant of his constitutional 'right to know what offense and under what legal theory he will be tried and convicted.'" Id. at *18 (citation omitted).

In remanding the case for a new review by the Court of Criminal Appeals (CCA), CAAF noted (1) the prosecution's reliance on evidence of the victim's incapacity due to intoxication to prove the absence of consent, and (2) the lack of clarity regarding how this evidence factored into the decisions of the factfinder or the CCA. Id. at *20-21. While CAAF recognized that "[n]othing in [Article 120] bars the Government from offering evidence of an alleged victim's intoxication to prove the absence of consent," it emphasized that the Government could not prove the absence of consent "by *merely* establishing that the victim was too intoxicated to consent." Id. at *22.

In a recent case with similar facts to Appellant's case, United States v. McTear, ARMY 20220531, 2024 CCA LEXIS 489 (A. Ct. Crim. App. 13 November 2024) (unpub. op.), the Army CCA found no "Mendoza problems." Id. at *4. In McTear, the "super drunk" victim woke up in bed with the appellant and told him to go to a different bed, told him to stop touching her, and swatted his hand away. Id. at *4-5. Later, she woke up to the appellant's penis leaving her vagina. Id. at *2-3, 5. Comparing the case to Mendoza, the Army CCA emphasized:

> [I]n this case, the evidence clearly proved the victim, through words and conduct, expressed her lack of consent to appellant before the sexual assault. While the victim may have been in and out of sleep at the time of the offense, the victim's clear manifestations of her lack of consent provide overwhelming evidence that she did not consent to the sexual act.

2024 CCA LEXIS 489, at *6.

2. Appellant's Conviction for the Sexual Assault of K.E. Was Factually Sufficient

As a starting point, it is essential for this Court to consider that, despite its holding in Mendoza, CAAF did not find the conviction legally insufficient. Instead, it remanded the case

back to the Army CCA to consider legal and factual sufficiency. Thus, even though the majority of evidence showed that the victim was incapable of consenting, CAAF acknowledged that evidence still might be legally and factually sufficient to support the conviction. In fact, one of the judges deemed the conviction to be legally sufficient. *See* Mendoza, at *56 (Maggs, G., concurring in part and dissenting in part) ("I would hold that the evidence is legally sufficient . . . ."). Here the evidence of non-consent was much stronger than in Mendoza. The evidence included multiple instances of the victim rebuffing Appellant's romantic advances before the sexual act, and the victim's affirmative action of non-consent during the sexual act (that is, the victim turned her head and pretended to be asleep). As a result, this Court should not take Mendoza as a *per se* direction that all cases with similar issues should be found legally and factually insufficient.

Further, in contrast to Mendoza, the prosecution's presentation in this case focused on the charged theory of liability—sexual assault without consent in violation of Article 120(b)(2)(A), UCMJ. Instead of relying "merely" on evidence of K.E.'s intoxicated or sleeping state, Mendoza, 2024 CAAF LEXIS 590, at *22, the prosecution in Appellant's case presented evidence regarding the absence of consent. As this Court emphasized in its 20 August 2024 opinion in finding Appellant's conviction was factually sufficient, K.E. demonstrated that she did not consent to sexual intercourse:

> K.E. repeatedly rebuffed Appellant's physical advances from the first time they met each other in person. Furthermore, K.E. rebuffed Appellant when he asked, "So my room or yours?" K.E. responded, "You go to yours and I'll go to mine." The evidence proved that K.E. did not consent to sex with Appellant and disproved that Appellant had a reasonable mistake of fact as to consent.

2024 CCA LEXIS 343, at *20.

In its first opinion, this Court rejected Appellant's argument that he was convicted of the theory of criminality for sexual assault upon a person incapable of consenting due to impairment by an intoxicant, and confirmed that the plain language of the specification and the military judge's instructions to the court members relied upon the lack of consent theory. Id. at *18.

In this Court's 25 November 2024 opinion, however, it erroneously focused exclusively on times when K.E. was not capable of consent, emphasizing, "There was no evidence presented illuminating what actually occurred between these events [the piggyback ride at the concert and the sexual intercourse in Appellant's dorm room]." The Court's opinion discussed a possible alcohol "black-out," and then concluded, "In the absence of evidence related to that time period, we are not convinced beyond a reasonable doubt that K.E. was, at the time of the sexual act, capable of consenting, but did not consent." However, the expert did not opine K.E. had blacked out instead of passed out. And during closing argument, even the defense argued that K.E. had *not* been in a black-out. (R. at 1122 ("[K.E.] didn't black out that night.").) And in pointing to the possibility of consent during a hypothetical blackout, the Court did not sufficiently weigh the facts proving K.E. was capable of consenting to sexual intercourse, but did not do so, (1) at various times in Appellant's dorm room, (2) at the concert, and (3) after K.E. woke up in Appellant's dorm room again, with his penis inside of her.

When Appellant tried to initiate intimacy before K.E. lost consciousness that night, she did not consent. When Appellant was penetrating her as she was unconscious, she still had not consented. And when K.E. woke up to Appellant penetrating her, she did not consent. Thus, evidence that K.E. was asleep for most of the sexual act proved the *continued* absence of "freely given agreement," as opposed "merely establishing that the victim [could not consent]." 10 U.S.C. § 920(g)(7)(A); Mendoza, 2024 CAAF LEXIS 590, at *22. That K.E. feigned unconsciousness,

then ran away from Appellant's room, immediately and emotionally relayed the sexual assault to friends, went to the SAPR Coordinator, and subjected herself to a forensic physical examination, all demonstrate her credibility and lack of consent to the sexual assault.

As is unfortunately common in sexual assaults, perpetrators commit sexual assaults on victims who are both capable and incapable of consenting at different points during the same set of events. The statutory scheme designed by Congress accounts for such hybrid scenarios. The comprehensive definition of "consent" applicable to Article 120(b)(2)(A), UCMJ—which criminalizes the performance of a sexual act upon another person without their consent—contemplates the possibility of fact-patterns like this case, where the victim (1) did not consent to sexual activity prior to falling asleep, (2) did not consent when the sexual act began since she was asleep, and (3) again did not consent upon awakening as the sexual act was ongoing.

Appellant's case is a textbook example of why this Court's decision in Mendoza, where the government uses intoxication as the only evidence of a lack of consent, should be limited to such facts. Absent an inclusive interpretation of "without consent," enabling the factfinder to evaluate the entire scope of an accused's conduct, would require the United States to charge an accused with multiple violations of Article 120, UCMJ, for a single hybrid incident. Thus, Congress created the "without consent" offense, which provides notice to a servicemember that he cannot perpetrate a sexual act without consent and cannot gain consent in certain circumstances—such as when a person is sleeping, unconscious, placed in fear, etc. Mendoza does not affect the factual and legal sufficiency of Appellant's conviction, because the facts demonstrated the continued absence of consent, from start to finish. Given her repeated rejection of Appellant before the sexual act began, there was no evidence that K.E. gave consent beforehand when she was capable of doing do. That state of non-consent persisted as the sexual act began, because K.E. was either

asleep, unconscious, or incompetent and could not give consent. Then, when K.E. awoke or regained consciousness and became capable of consenting, she still did not make a freely given agreement to the ongoing sexual act. Instead, she turned her head and pretended to be asleep in an attempt to get Appellant to stop. Analyzing the sexual act as a whole, K.E. never gave consent to it, including during periods when she was capable of doing so. The totality of the circumstances shows that Appellant perpetrated the sexual act without K.E.'s consent. The government was consistent in charging, proving, and arguing that Appellant did so without K.E.'s consent, never arguing that he committed the crime because K.E. was incapable of consenting. This Court should reconsider its findings and find the conviction factually sufficient.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court reconsider its 25 November 2024 Opinion and find Appellant's conviction for sexual assault without consent to be factually sufficient.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division (Capt Michael J. Bruzik) on 26 December 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**APPELLANT'S OPPOSITION TO**
Appellee	)	**RECONSIDERATION**
	)	
v.	)	Before Panel No. 3
	)	
Airman First Class (E-3)	)	No. ACM 40439
WILLIAM C. S. HENNESSY	)	
United States Air Force	)	31 December 2024
Appellant	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Appellant, Airman First Class (A1C) William C. S. Hennessy, by and through his undersigned counsel, opposes Appellee's motion for reconsideration.[1] (Appellee Ans.). Appellee argues that the Court of Appeals for the Armed Forces (CAAF) decision in *United States v. Mendoza*, __ M.J. ___, No. 23-0210, 2024 CAAF LEXIS 590 (C.A.A.F. Oct. 17, 2024) does not impact the factual sufficiency in this case—the charge was sexual assault without consent. (Appellee Ans. at 1). Yet, Appellee's position in its motion is in stark contrast with its argument in its Answer to Appellant's assignments of error:

Appellee's Answer to Appellant's assignments of error.

> This circumstantial evidence, combined with the panic K.E. felt when she awoke and discovered Appellant having sexual intercourse with her, supported the finding that K.E. did not consent to sexual intercourse with Appellant. (R. at 685.)
> . . .
> Instead, these facts are consistent with Appellant having sexual intercourse with an individual who did not consent, and who was asleep during the sexual intercourse. K.E. testified that she *woke* to sexual intercourse. (R. at 682.) (emphasis added).

[1] As of the date of this filing, neither of Appellant's counsel have been served by Appellee directly with its request and the undersigned counsel are unaware of any other counsel with an established attorney-client relationship with Appellant. *See* JT. CT. CRIM. APP. R. 13(b) (2024 ed.) (requiring service upon all counsel of record at or before the day of filing).

(Appellee Ans. at 10). In this argument, Appellee concedes that the Government's theory of guilt was based on K.E. being asleep—stated another way—of being incapable of consenting. Appellee further advances the argument as to both sleep and incapacitation:

> Trial counsel may argue evidence presented at trial (that a person could not consent because they were either asleep or incapacitated) even though such evidence may also appear to support a different theory of liability than what was charged (that a person did not in fact consent).

(Appellee Ans. at 12.). Compare that recitation with Appellee's current motion before this Honorable Court:

Appellee's Motion for Reconsideration

Appellee references the unpublished opinion of a sister service in *United States v. McTear*, ARMY 20220531, 2024 CCA LEXIS 489 (A. Ct. Crim. App. Nov. 13, 2024), which is inapt. Another panel of this Court or a sister service court's decision on factual or legal sufficiency is not precedent given the CAAF's decision in *Mendoza*. Yet Appellee implies that *McTear* is precedential enough to be dispositive. (Appellee Mot. Recon. at 6). Given *Mendoza* is precedent over *McTear*, Rule 31.2(b)(1), of the Air Force Rules of Practice and Procedure controls. There is no evidence in the Court's reconsideration post-*Mendoza* that the Court overlooked or misapplied a material factual matter.

The Appellee argues that "As is unfortunately common in sexual assaults, perpetrators commit sexual assaults on victims who are both capable and incapable of consenting at different points during the same set of events. The statutory scheme designed by Congress accounts for - such hybrid scenarios." (Appellee Mot. Recon. at 9). There is no longer a controlling precedent for that argument. The argument supports finding that the Government continues to conflate separate theories into a mega-spec. The final paragraph of argument confirms that the Government accused Appellant of assault without consent but proceeded on a theory that "K.E. was either asleep, unconscious, or incompetent and could not give consent." (Appellee Mot. Recon. at 9-10).

The Appellee argues that the United States must now "charge an accused with multiple violations of Article 120, UCMJ, for a single hybrid incident." (Appellee Mot. Recon. At 9). That may be correct—it is called charging for contingencies of proof.

Appellee's Failure to Establish a Basis for Reconsideration

Reconsideration is a disfavored recourse for litigants. The federal First Circuit Court of Appeal's precedent is that "reconsideration is an extraordinary remedy which should be used sparingly." *U.S. ex rel. Ge v. Takeda Pharm. Co.*, 737 F.3d 116, 127 (1st Cir. 2013) (internal quotation and citation omitted). Thus, a district court may **only** grant a reconsideration if there is a "manifest error of law, [...] newly discovered evidence, or in certain other narrow situations [such as a change in controlling law]." *United States v. Villodas-Rosario*, No. 14-663(RAM), 2024 U.S. Dist. LEXIS 230729, at *5 (D.P.R. Dec. 19, 2024) (internal quotation and citations omitted). "Stated another way, a motion for reconsideration is not properly grounded in a request for a district court to rethink a decision it has already made, rightly or wrongly." *Moran Vega v. Rivera-Hernandez*, 381 F. Supp. 2d 31, 36 (D.P.R. 2005). Bottom line is "motions for reconsideration should only be exceptionally granted." *United States v. Pena Fernández*, 394 F. Supp. 3d 205, 208 (D.P.R. 2019) (citations omitted).

This case now concerns factual and legal sufficiency, not the legal interpretation of a rule of evidence or a suppression motion. *United States v. Hennessy*, ACM 40439, 2024 CCA LEXIS 503, at *3 (A.F. Ct. Crim. App. Nov. 25, 2024). In vacating its original opinion, considering *Mendoza*, and issuing a new written opinion, this Court publicly announced that the guilty verdict was not supported by sufficient evidence beyond a reasonable doubt and set aside the verdict as to the sexual assault conviction—the appellate version of announcing the findings. *Id.* That finding is and should be considered final. At trial, the factfinders do not have the authority to reconsider

findings of not guilty after they were announced in open court. A factual insufficiency decision of the panel here should similarly be treated as final and non-reviewable for factual sufficiency, or at least the court should apply a heightened standard for granting reconsideration on a factual sufficiency issue.

Nothing suggests the panel failed to consider "circumstantial evidence," and the allegation the panel misapplied the law regarding the use of circumstantial evidence is unsupported. Rather, the panel meticulously balanced all the evidence, including what Appellee argues as circumstantial evidence, to find factual insufficiency. After all, appellate courts often summarize the evidence and facts. *United States v. Thompson*, 83 M.J. 1, 4-5 (C.A.A.F. 2022) ("In determining whether a CCA has applied correct legal principles, [the CAAF] starts with the rule that the 'CCAs are presumed to know the law and follow it.' . . . . The CCAs often summarize the content and nature of relevant evidence when conducting a factual sufficiency review.").

WHEREFORE: A1C Hennessy respectfully requests that this Honorable Court deny Appellee's Motion for Reconsideration.

Respectfully submitted,

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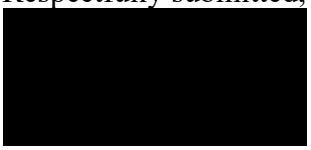
CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 31 December 2024.

Respectfully submitted,



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