No. _____

IN THE

Supreme Court of the United States

NIKOLAS S. CASILLAS, et al.,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A "Yates" error occurs when a general verdict is supportable on one theory of liability but not on another, and it is impossible to tell which theory the jury used to convict. *Black v. United States*, 561 U.S. 465, 470 (2010) (quoting *Yates v. United States*, 354 U.S. 298, 312 (1957)); *see Skilling v. United States*, 561 U.S. 358, 414 (2010) (reasoning that *Yates* errors are reviewed for harmlessness). While Petitioners' cases were pending on appeal, the Court of Appeals for the Armed Forces (CAAF) decided that two statutory theories of liability for sexual assault were legally distinct. *United States v. Mendoza*, 85 M.J. 213, 218-20 (C.A.A.F. 2024). In one of the Petitioners' cases, the CAAF expanded that holding: the Government cannot prove sexual assault "without consent" (10 U.S.C. § 920(b)(2)(A)) by proving a complainant did not consent because he or she was asleep at the time—a distinct theory of liability (10 U.S.C. § 920(b)(2)(B)). Pet.App.12a (citing *Mendoza*, 85 M.J. at 220). Both holdings rested on how the Government could not charge one theory and then argue another without violating a defendant's right to fair notice. *Id.* But by addressing one due process issue, the CAAF created another: a *Yates* error.

These cases raise the following question:

Were the factfinders able to convict Petitioners on an invalid alternate theory of liability after being instructed on the statutory definition of consent?

PARTIES TO THE PROCEEDING

This Rule 12.4 petition consolidates direct appeals from two service members convicted by courts-martial. Petitioners are Airman First Class (A1C) Nikolas S. Casillas, United States Air Force, and Specialist Three (Spc 3) Devin W. Johnson, United States Space Force. Respondent in each case is the United States.

CORPORATE DISCLOSURE STATEMENT

No nongovernmental corporations are parties to this proceeding.

RELATED PROCEEDINGS

Other than the direct appeals that form the basis for this petition, there are no related proceedings for the purposes of Rule 14.1(b)(iii).

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INTRODUCTION

The CAAF recently held that the Government cannot charge sexual assault, 10 U.S.C. § 920(b), under one enumerated theory of liability and then argue another enumerated theory without violating the accused's due process rights. *Mendoza*, 85 M.J. at 220 (citing *United States v. Riggins*, 75 M.J. 78, 83 (C.A.A.F. 2016)). Previously, the Government used sexual assault without consent, 10 U.S.C. § 920(b)(2)(A), as an "umbrella offense that include[d] every other type of sexual assault in which the victim [was] incapable of consenting." Pet.App. 9a-10a. In *Mendoza*, the CAAF put the Government on notice that this charging tactic is not lawful. Sexual assault without consent under 10 U.S.C. § 920(b)(2)(A) is a distinct theory of liability from sexual assault upon a person who is asleep under 10 U.S.C. § 920(b)(2)(B). Pet.App. 12a. Thus, if the Government charges a defendant under 10 U.S.C. § 920(b)(2)(A), it "cannot prove lack of consent by establishing that the victim was asleep at the time of the act." *Id.* Rather, the Government must prove beyond a reasonable doubt that the victim was capable of consenting and did not consent. *Mendoza*, 85 M.J. at 220. But through *Mendoza*'s holding and its application, the CAAF created a *Yates* error.

A *Yates* error occurs when a conviction rests on multiple theories of guilt and one of those theories is "legally flawed." *Hedgpeth v. Pulido*, 555 U.S. 57, 60 (2008) (per curiam) (citing *Yates*, 354 U.S. 298). Here, the statutory definition of consent, captured in 10 U.S.C. § 920(g)(7), conflates multiple theories of liability on its face through the statutory definition of consent. "Consent" requires a "competent" person and a "sleeping, unconscious, or incompetent person

cannot consent." 10 U.S.C. §§ 920(g)(7)(A), (B). Without any caveat, the statutory definition instructs the factfinders that they can find no consent in a "without consent" case by finding the victim was asleep or otherwise incompetent. But "incompetence" is a legally impermissible theory of liability under a "without consent" case. Pet.App.12a (citing *Mendoza*, 85 M.J. at 220).

For Petitioners, when the panel members (the military justice system's equivalent of a jury) were instructed on the statutory definition of consent, the instruction told the members they could convict on an invalid alternative theory of liability: sleep. In reviewing Petitioners' cases post-*Mendoza*, the CAAF did not recognize or address the constitutional issue stemming from the consent instruction. Without further interpretation of the statutory definition of consent as an instruction, *Yates* errors will persist and Petitioners will have been convicted in violation of their constitutional rights.

Petitioners ask this Court to grant plenary review to decide whether their convictions were "flawed," followed by a remand to the CAAF for the harmless-error analysis. *Skilling*, 561 U.S. at 414 (citing *Yates*, 354 U.S. 298). In the alternative, Petitioners request this Court grant certiorari, vacate the CAAF's opinions affirming their convictions, and remand Petitioners' cases to the CAAF for consideration of the *Yates* error and harmlessness in the first instance.

PETITION FOR A WRIT OF CERTIORARI

A1C Nikolas S. Casillas, United States Air Force, and Spc 3 Devin W. Johnson, United States Space Force, respectfully petition for a writ of certiorari to review the decisions of the CAAF.

OPINIONS BELOW

In A1C Casillas's case, the Air Force Court of Criminal Appeal's (AFCCA's) decision is unreported. It is available at 2023 CCA LEXIS 527, 2023 WL 8678806, and is reproduced at pages 19a-41a. The CAAF's decision is pending publication in *West's Military Justice Reporter*. It is available at 2025 CAAF LEXIS 692, 2025 WL 2446502, and reproduced at pages 1a-17a. The CAAF's denial of a timely petition for reconsideration is also pending publication in *West's Military Justice Reporter*. It is available at 2025 CAAF LEXIS 814, 2025 WL 2970996, and reproduced at page 18a.

In Spc 3 Johnson's case, the AFCCA's decision is unreported. It is available at 2023 CCA LEXIS 330, 2023 WL 5112140, and is reproduced at pages 60a-98a. The CAAF's decision is pending publication in *West's Military Justice Reporter*. It is available at 2025 CAAF LEXIS 499, 2025 WL 1762856, and reproduced at pages 42a-58a. The CAAF's denial of a timely petition for reconsideration is also pending publication in *West's Military Justice Reporter*. It is available at 2025 CAAF LEXIS 545, 2025 WL 2307855, and reproduced at page 59a.

JURISDICTION

Petitioners were sentenced with punitive discharges, entitling them to automatic, direct appellate review. 10 U.S.C. § 866(b)(3). The CAAF granted review in both cases. 10 U.S.C. § 867(a)(3). In A1C Casillas's case, the CAAF issued its opinion on August 20, 2025. A timely petition for reconsideration was filed and denied on September 26, 2025. No extension request was filed at this Court. In Spc 3 Johnson's case, the CAAF issued its decision on June

24, 2025. A timely petition for reconsideration was denied on July 14, 2025. The Chief Justice extended the time for filing a petition for writ of certiorari to, and including, December 11, 2025. For both cases, this Court's jurisdiction rests on 28 U.S.C. § 1259(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment, in pertinent part, provides: "No person . . . shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

Article 120, UCMJ, 10 U.S.C. § 920, in pertinent part, provides:

> (b) Sexual assault. Any person subject to this chapter [10 USCS §§ 801 et seq.] who— . . .
>
> > (2) commits a sexual act upon another person—
> >
> > > (A) without the consent of the other person; or
> > >
> > > (B) when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring; or
>
> . . . .
>
> (d) Abusive sexual contact. Any person subject to this chapter [10 USCS §§ 801 et seq.] who commits or causes sexual contact upon or by another person, if to do so would violate subsection (b) (sexual assault) had the sexual contact been a sexual act, is guilty of abusive

sexual contact and shall be punished as a court-martial may direct.

. . . .

(g) Definitions. In this section:

(1) Sexual act. The term "sexual act" means—

(A) the penetration, however slight, of the penis into the vulva or anus or mouth;

. . .

(C) the penetration, however slight, of the vulva or penis or anus of another by any part of the body or any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(2) Sexual contact. The term "sexual contact" means touching, or causing another person to touch, either directly or through the clothing, the . . . buttocks of any person, with an intent to . . . arouse or gratify the sexual desire of any person. Touching may be accomplished by any part of the body or an object.

. . . .

(7) Consent.

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

> consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent.
>
> (B) A sleeping, unconscious, or incompetent person cannot consent. A person cannot consent to force causing or likely to cause death or grievous bodily harm or to being rendered unconscious. A person cannot consent while under threat or in fear or under the circumstances described in subparagraph (B) or (C) of subsection (b)(1).
>
> (C) All the surrounding circumstances are to be considered in determining whether a person gave consent.
>
> (8) Incapable of consenting. The term "incapable of consenting" means the person is—
>
> (A) incapable of appraising the nature of the conduct at issue; or
>
> (B) physically incapable of declining participation in, or communicating unwillingess [sic] to engage in, the sexual act at issue.

STATEMENT OF THE CASE

Before *Mendoza* was decided, both Petitioners were convicted under a "without consent" theory of liability, as enumerated by 10 U.S.C. § 920(b)(2)(A). A1C Casillas was charged and convicted of sexual assault under 10 U.S.C. § 920(b)(2)(A). Spc 3 Johnson was charged and convicted of abusive sexual contact under the theory of liability enumerated under 10

U.S.C. § 920(b)(2)(A).[1] The theory of liability under 10 U.S.C. § 920(b)(2)(A) proscribes committing a sexual act, or a sexual contact, against an individual without his or her consent. But both Petitioners' cases involved the complainants being asleep and waking up at some point during the charged sexual encounter.

A. A1C Casillas's Court-Martial

In A1C Casillas's case, the complainant testified that she fell asleep and "woke up" to being penetrated by A1C Casillas's penis. Pet.App. 5a. She testified that she knew she was being penetrated with A1C Casillas's penis because in the moment she woke up, he was "taking it out." CAAF.JA 115. The complainant confronted A1C Casillas after the event, which revealed how she was "out of it," "passed out," and that she "woke up" and "laid there because [she] didn't even understand . . . what was going on." CAAF.JA 128, 225. The complainant was awake for one moment, and in that one moment, she did not express lack of consent, but rather "just laid there" while A1C Casillas removed his penis from her vagina. CAAF.JA 115.

A1C Casillas was charged with penetrating the complainant's vulva without her consent. 10 U.S.C. § 920(b)(2)(A). The Government did not charge any other theory of liability for this act. Trial defense counsel moved for a special instruction to eliminate from the panel's consideration whether the complainant was "too intoxicated to consent to sex," Pet.App. 11a, because significant portions of the evidence indicated the complainant may have been

[1] Abusive sexual contact is criminalized under 10 U.S.C. § 920(d) but incorporates the theories of liability for sexual assault in 10 U.S.C. § 920(b).

"blacked out" due to alcohol rather than asleep. CAAF.JA 65, 70. Trial defense counsel asserted the Government could not argue the complainant was incapacitated from alcohol "because incapacity is not a charged offense and it is not at issue in this court-martial." CAAF.JA 70. But the military judge denied this instruction, calling it inaccurate and a misstatement of law. CAAF.JA 72, 455.

The military judge later read the members the definition of consent provided by 10 U.S.C. §§ 920(g)(7)(A) and (B): "'Consent' means a freely given agreement to the conduct at issue by a competent person. . . . A sleeping, unconscious, or incompetent person cannot consent. All the surrounding circumstances are to be considered in determining whether a person gave consent." CAAF.JA 459. After a panel member asked what the definition of "competent and incompetent person" was, the military judge provided another instruction: "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 a sexual act . . . ." CAAF.JA 524.

B. Spc 3 Johnson's Court-Martial

Spc 3 Johnson was charged with three allegations under 10 U.S.C. § 920: one for touching the complainant's buttocks without consent, pursuant to 10 U.S.C. §§ 920(b)(2)(A) and (d), and two for touching the complainant while she was asleep pursuant to 10 U.S.C. §§ 920(b)(2)(B) and (d). Pet.App. 61a, 66a. Spc 3 Johnson was only convicted of the "without

consent" allegation for touching the complainant's buttocks.

The Government believed there were two possible factual bases for conviction on the "without consent" offense. Pet.App. 83a. The first was when Spc 3 Johnson touched the complainant in the kitchen when she was baking. Pet.App. 64a. The complainant told him to watch himself, and Spc 3 Johnson apologized, saying touching her was an accident. *Id.* The second basis was when Spc 3 Johnson and the complainant were asleep on an air mattress together. Pet.App. 65a-66a. The complainant alleged Spc 3 Johnson's "arm and hand were down the back of her pants when she woke up," clarifying that he "used his left hand to go into the back of [her] pants and into [her] underwear.'" Pet.App. 82a.

As with A1C Casillas, the military judge instructed the members on the definition of consent:

> "Consent" means a freely-given agreement to the conduct at issue by a competent person. A "competent person" is a person who possesses the physical and mental ability to consent. A sleeping, unconscious, or incompetent person cannot consent. An "incompetent person" is a person who lacks either the mental or physical ability to consent because he or she is asleep, unconscious, or impaired by an intoxicant.

Trial Tr. at 996-97. The military judge also defined "freely-given agreement:" "[A] person first possesses the cognitive ability to appreciate the nature of the conduct in question and then possesses the mental and physical ability to make and to communicate a decision regarding that conduct to the other person." *Id*. at 997. He concluded with: "All the surrounding

circumstances are to be considered in determining whether a person gave consent." *Id.*

Prior to closing arguments, the panel members asked two questions about whether the "without consent" allegation covered the sleeping incident on the air mattress. Pet.App. 82a. The Government asserted yes, the "without consent" charge could cover either the kitchen or air mattress touch and the Government's primary theory of liability was that the touching occurred on the mattress. Pet.App. 82a-83a. The defense counsel objected to the military judge explaining the Government's two theories of liability to the panel members. Pet.App. 83a. The military judge brought up the general verdict rule with counsel and explained the verdict would be valid so long as the members determined the elements were met under either theory of liability. Trial Tr. at 1017-18. Following this discussion, the military judge offered to instruct the members they had to determine whether the elements of the offense were met at any time that day, but would not specify the factual bases, leaving it up to counsel to argue that. Pet.App 83a-84a. Trial defense counsel agreed to this instruction. Pet.App 83a.

The military judge declined to remove from the panel's consideration the incident where the complainant was asleep because it was a "surrounding circumstance" of the offense the panel could take into consideration as to whether there was consent. Trial Tr. at 1028; *see* 10 U.S.C. § 920(g)(7) (defining consent to include consideration of the "surrounding circumstances"). While expressing skepticism as to whether this was accurate, the military judge felt precedent prevented him from instructing otherwise. *Id.*

He then advised the members of the elements and definitions consistent with his previous instructions and added, "It's for both parties to argue whether or not they think those circumstances are here under the facts of this case. Ultimately, all the surrounding circumstances are to be considered in determining whether a person gave consent." Pet.App. 84a.

C. The CAAF decided *Mendoza* and distinguished the "without consent" theory of liability.

While Petitioners' cases were pending at the CAAF, the CAAF decided *Mendoza*. 85 M.J. 213. In *Mendoza*, the Government charged the appellant with sexual assault without consent under 10 U.S.C. § 920(b)(2)(A) but then "presented significant evidence" of the complainant's intoxication at trial, arguing her "inability to consent established the absence of consent." *Id*. at 216. Subsection (b)(3)(A) of 10 U.S.C. § 920 is an incapacity theory of liability that criminalizes committing a sexual act when an individual is incapable of consenting due to an intoxicant. *Id*. at 215. The Government did not charge this theory of liability. *Id.*

In interpreting 10 U.S.C. § 920, the CAAF held that "consistent with the language and structure of Article 120, UCMJ, we hold that subsection (b)(2)(A) and subsection (b)(3)(A) establish separate theories of liability." *Id*. at 220. "The Government's approach—which conflated two different and inconsistent theories of criminal liability—raises significant due process concerns." *Id*. at 215. The Government cannot "charge one offense under one factual theory and then argue a different offense and a different factual theory at trial." *Id*. at 220. "Doing so robs the defendant of his

constitutional 'right to know what offense and under what legal theory he will be tried and convicted.'" *Id.* (citing *Riggins*, 75 M.J. at 83).

D. Petitioners argued that the panel members may have convicted them on an incorrect legal theory due to the consent instruction.

Following *Mendoza*, the CAAF ordered additional briefing in A1C Casillas's case. *United States v. Casillas*, __ M.J. __, 2024 CAAF LEXIS 666 (Oct. 29, 2024). Consistent with *Mendoza*, A1C Casillas argued that the theory of liability covering incapacity due to sleep, 10 U.S.C. § 920(b)(2)(B), is a distinct theory of liability. Suppl. Br. on Behalf of Appellant at 11-12, *United States v. Casillas*, No. 24-0089, __ M.J. __, 2025 CAAF LEXIS 692 (Aug. 20, 2025). Additionally, A1C Casillas highlighted that the switching of theories was not based only on the Government's argument at trial, but also the statutory definition of consent as instructed to the members. *Id.* at 13, 21-23. A1C Casillas asserted, both facially and as applied, that the instructions in his case allowed the panel members to convict him of an improper theory of liability. *Id.* During briefing, he did not cite *Yates*, but he did cite *Hedgpeth* and *Stromberg v. California*, 283 U.S. 359 (1931). *Id.* at 13.

The CAAF dismissed the facial challenge, holding, "With the government now on notice that Article 120(b)(2)(A), UCMJ (sexual assault without consent), is not an umbrella offense that includes every other type of sexual assault in which the victim is incapable of consenting, . . . there are many circumstances under which Article 120, UCMJ, can be validly applied." Pet.App. 9a-10a. Then, the CAAF addressed only the

fair notice issue in the as-applied challenge: "Appellant's argument fails because [the complainant] awoke during the sexual assault, creating a period when Appellant was penetrating her vulva with his penis while she was awake and capable of consenting." Pet.App. 10a. Because this was "exactly the offense and factual theory that the Government charged," the CAAF found nothing in the definition of consent (10 U.S.C. § 920(g)(7)) that "prohibited the Government from proving that" A1C Casillas committed the charged act "at least for a brief time after [the complainant] awoke." *Id.*

After the CAAF solidified *Mendoza*'s holding in A1C Casillas's case and found sleep was also a separate theory of liability under 10 U.S.C. § 920, A1C Casillas petitioned the CAAF for reconsideration, arguing the CAAF created a *Yates* error through its holding. Appellant's Pet. for Recons., *United States v. Casillas*, No. 24-0089, __ M.J. __, 2025 CAAF LEXIS 814 (C.A.A.F. Sep. 26, 2025). Because the definition of consent, as statutorily prescribed, conflated two distinct theories of liability in his case—without consent and sleep—there was no way to know under which theory of liability the panel convicted him based on the facts of his case. *Id.* The CAAF denied his petition for reconsideration. Pet.App. 18a.

Spc 3 Johnson raised several issues challenging whether his conviction was lawful when it was unclear what conduct constituted the "without consent" offense: the kitchen touch or the air mattress touch. Pet.App. 61-62a. One of those issues was based on the general verdict rule. *See* Pet.App. 62a ("[W]hether Appellant's conviction is ambiguous . . . ."). While the CAAF did not grant on the general verdict issue, the CAAF granted on another issue: whether Spc 3

Johnson's conviction triggered an unconstitutional deprivation of his Second Amendment rights that the military appellate courts had jurisdiction to review and correct. Suppl. to the Pet. for Grant of Review, *United States v. Johnson,* 84 M.J. 343 (C.A.A.F. Mar. 29, 2024), *vacated*, 85 M.J. 147 (C.A.A.F. Sep. 24, 2024).

When *Mendoza* was issued, Spc 3 Johnson's case was being briefed by the parties. Appellant's Motion to Remand in Lieu of Oral Argument, *United States v. Johnson*, No. 24-0004, __ M.J. __, 2025 CAAF LEXIS 499 (C.A.A.F. June 24, 2025) [hereinafter Motion to Remand]. He raised in briefing, argued in motions, and asserted at oral argument that the CAAF needed to answer whether his conviction was valid post-*Mendoza.* Appellant's Pet. for Recons. at 3-4, *United States v. Johnson*, No. 24-0004, __ M.J. __, 2025 CAAF LEXIS 545 (C.A.A.F. July 14, 2025) [hereinafter Johnson Pet. for Recons.]. He argued that because it was unknown under which theory of liability he was convicted, whether the complainant was asleep or she was capable of consenting and did not consent, he was convicted unlawfully. *Id.* at 3-4.

The CAAF did not address whether Spc 3 Johnson's conviction was still valid post-*Mendoza* when it found there was no jurisdiction to correct the firearm prohibition in his case. Pet.App. 42a-55a. Spc 3 Johnson then filed a petition for reconsideration asking the CAAF to take up the new issue triggered by *Mendoza.* Johnson Pet. for Recons. Spc 3 Johnson argued the same issue as A1C Casillas: the instructions allowed the panel to convict on a sleep theory of liability, which is impermissible post-*Mendoza*, rather than the legally permissible theory that the complainant was capable of consenting and

did not consent. Johnson Pet. for Recons. The CAAF denied his petition for reconsideration. Pet.App. 59a.

REASONS FOR GRANTING THE PETITION

I. Changes in the law while Petitioners cases were on appeal created an unresolved constitutional violation, a *Yates* error, that should have resulted in reversal of their convictions.

In addressing various constitutional issues in Petitioners' cases, the CAAF created and then overlooked a glaring constitutional problem: the statutory definition of consent, as instructed in both Petitioners' cases, created a *Yates* error.

Casillas cemented that there was a substantive change in that law that each theory of liability under 10 U.S.C. § 920(b) was distinct and not overlapping. Pet.App. 9a. Yet neither Spc 3 Johnson, whose case preceded *Casillas*, nor A1C Casillas himself, received the benefit of this change that shows their convictions were unconstitutional.

A. *Yates* errors are a symptom of the general verdict rule that occur when a conviction is supportable on one theory of guilt instructed to the panel but not on another.

Ordinarily, "when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged." *Turner v. United States*, 396 U.S. 398, 420 (1970). This is the general verdict rule, which "is based on the presumption that the verdict attaches to each of the several alternative theories charged." *Id.* Because the verdict attaches to all theories, the verdict may stand

despite trial errors "if any one of the counts is good and warrants the judgment." *Griffin v. United States*, 502 U.S. 46, 49 (1991) (quoting *Claassen v. United States*, 142 U.S. 140, 146 (1891)).

But there is an exception to the general verdict rule. "[W]here the [general] verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected," there is reversable error. *Yates*, 354 U.S. at 312 (citing *Stromberg*, 283 U.S. at 367-68). While an unconstitutional theory of liability suffices, *Stromberg*, 283 U.S. at 370, *Yates* "extended [*Stromberg*'s] reasoning to a conviction resting on multiple theories of guilt when one of those theories is . . . otherwise legally flawed." *Hedgpeth*, 555 U.S. at 60. Today, the "*Stromberg* rule" is commonly referred to as a "*Yates* error," due to its expansion and further modification.[2]

The reasoning behind expanding *Stromberg* to the broader basis for reversal under *Yates* is sound. As this Court noted, "Jurors are not generally equipped

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2 *See, e.g.*, *United States v. Vavic*, 139 F.4th 1 (1st Cir. 2025) (using the term "*Yates* error"); *Mendez v. United States*, No. 21-1536, 2022 U.S. App. LEXIS 34606, at *7 (2d Cir. Dec. 15, 2022) (calling the instruction in this case a "so-called '*Yates* error'"); *United States v. Pitt*, 482 F. App'x 787, 791-92 (4th Cir. 2012) (analyzing a "*Yates* error" under plain error review); *United States v. Galecki*, 89 F.4th 713, 740 (9th Cir. 2023) (characterizing "amply proved conduct simply 'fail[ing] to come within the statutory definition of the crime'" as subject to the "*Yates* legal-error rule"); *see also United States v. Kurlemann*, 736 F.3d 439, 44-50 (6th Cir. 2013) ("When a jury is instructed that it may convict on one of two legal theories, one erroneous and one proper, the possibility that it could choose to convict on the permissible theory does not necessarily save a general guilty verdict from reversal.").

to determine whether a particular theory of conviction submitted to them is contrary to law—whether, for example, the action . . . fails to come within the statutory definition of the crime." *Griffin*, 502 U.S. at 59. When that happens and jurors are "left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error." *Id.* Under such a circumstance, jurors "may render a verdict on the basis of the legally invalid theory without realizing that, as a matter of law, its factual findings are insufficient to constitute the charged crime." *People v. Gerber*, 126 Cal. Rptr. 3d 688, 705 (Cal. Dist. Ct. App. 2011).

B. In both cases here, a *Yates* error was created and then overlooked.

Mendoza, as reenforced by *Casillas*, made each theory of liability in 10 U.S.C. § 920(b) distinct. Pet.App. 12a (citing *Mendoza*, 85 M.J. at 220). Sexual assault without consent, 10 U.S.C. §920(b)(2)(A), is not an "umbrella" theory of liability. Pet.App. 9a-10a. If the Government charges 10 U.S.C. § 920(b)(2)(A), then it must prove that the victim was capable of consenting and did not consent. *Id.* at 220. Being incapable of consenting or being asleep is not the legal equivalent of an individual who "did not consent." *Id.*; Pet.App. 12a (citing *Mendoza*, 85 M.J. at 220). Interpreting the statute otherwise would render the rest of the theories of liability enumerated by Congress surplusage and allow the Government to circumvent the mens rea element in the other theories. *Mendoza*, 85 M.J. at 219-20.

Both Petitioners were charged with committing a sexual act "without consent" under what was then-

considered the "umbrella" theory of liability. Pet.App. 7a, 61a. At trial, the Government argued that Petitioners committed the charged conduct upon the complainants when the complainants were asleep, and, thus, did not consent. *See* Pet.App. 10a (noting the Government "referenced repeatedly at trial" the sexual assault began when the complainant was asleep); *see* Br. on Behalf of Appellant at 12-14, *United States v. Johnson*, No. ACM 40257, 2023 CCA LEXIS 330 (Aug. 9, 2023) (citing the Government's closing argument).

Post-*Mendoza*, this argument is unlawful. But Government counsel's arguments at trial are not the only constitutional problem. The definition of consent is the reason the Government was able to argue this switch in theories in the first place. The statutory definition of consent operates to conflate multiple theories of liability when only one is lawful under the charging scheme. And, while both Petitioners' cases show how this is so, Spc 3 Johnson's case demonstrates it best because the military judge explained away this very concern through the general verdict rule.

a. Spc 3 Johnson's case reveals how 10 U.S.C. § 920(b)(2)(A) operated as a catch-all theory to support a general verdict, which today, is a *Yates* error.

The panel members asked two questions after receiving instructions that reveal the general verdict and *Yates* error here. First, whether the "without consent" allegation was "only the event in the kitchen, or [was] it anytime in the evening. For example, are we determining whether he touched her buttocks without consent, with a sexual desire, while they were

on the air mattress?" Trial Tr. at 1016. Second, referring to the same allegation, "must the element of consent come from capable, absence of consent, or can it come from incapacity to consent?" *Id.* at 1020. Both questions asked whether the panel could find a sexual act occurred "without consent" when the complainant was incapable of consenting because she was asleep on the air mattress rather than only when she was awake in the kitchen.

The definition of consent that the members had received invited these questions. The first part of the instruction was that "consent" must be given by a "competent person." *Id.* at 976. The second part of the instruction equated incompetence to sleep. "A sleeping . . . or incompetent person cannot consent," because an "incompetent person . . . lacks either the mental or physical ability to consent because he or she is asleep." *Id.* at 997. Finally, the military judge instructed the members that "[a]ll the surrounding circumstances are to be considered in determining whether a person gave consent." *Id.* These three definitions, read together and without caveat, mean that a sexual assault "without consent" can occur when the complainant is asleep. As shown by the plain language of the instructions, the definition of consent conflated the theories of liability under 10 U.S.C. § 920(b) and did not make clear that the complainant being "incompetent," i.e., asleep, was an impermissible legal basis for a conviction in a "without consent" case. Pet.App. 12a (citing *Mendoza*, 85 M.J. at 220).

When these questions arose after the instructions were read, the military judge explained that if the Government argued both the touch in the kitchen and the touch on the air mattress to prove the charged

conduct, then this would be a permissible general verdict. *Id.* at 1017-18. He explained that "when there are two legally cognizable theories of liability . . . that one member could have thought that it was the oven and one member could have thought that it was the air mattress," the verdict is valid "so long as there's proof beyond a reasonable doubt to establish both of those." *Id.* at 1017. Pre-*Mendoza*, the military judge's explanation was accurate. When 10 U.S.C. § 920(b)(2)(A) was considered an "umbrella" theory of liability, the other theories enumerated in the statute and captured in the statutory definition of consent could support a general verdict that included "without consent" due to sleep or incompetence.

Nevertheless, the military judge expressed concerns about how allowing the Government to pursue a theory of liability that the complainant was asleep may be impermissible based on the statutory structure and the canon against surplusage. *Id.* at 1028. These concerns were ultimately the basis for the CAAF's decisions in *Casillas* and *Mendoza*, but the military judge had the benefit of neither at the time. *Mendoza*, 85 M.J. at 219-20; Pet.App. 12a (citing *Mendoza*, 85 M.J. at 220). Instead, he noted that but for caselaw at the time, he "would have come to a contrary conclusion" about the surplusage doctrine. Trial Tr. at 1028. Ultimately, the military judge did not alter the instruction for how the panel could determine liability under a "without consent" case. *Id.* His instructions to the panel reflected his conclusion about the general verdict rule and binding precedent.

Spc 3 Johnson's case epitomizes how the consent instruction invited confusion on what the lawful basis for conviction under the charging scheme could be pre-

Mendoza and *Casillas*, evidencing a clear *Yates* error today.

b. A1C Casillas's case had the same problem: a *Yates* error occurred due to the statutorily driven consent instruction.

Viewing the facts available to the panel in concert with the instructions given shows the *Yates* error in A1C Casillas's case. Unlike in Spc 3 Johnson's case, there were not two distinct sexual acts, but rather one act punctuated by the complaint's capacity to consent. As the CAAF described, there was only "a brief time" where the complainant was awake and capable of consenting after she woke up and A1C Casillas was still committing a sexual act upon her. Pet.App. 10a. That later timeframe was the only legal basis for conviction, rather than when she was asleep. Pet.App. 12a-13a. It is this dynamic that created two sexual assaults under different theories of liability.

To convict, the panel was required to find penetration occurred "without consent," as defined in Spc 3 Johnson's case. CAAF.JA 548-49 (referencing 10 U.S.C. §§ 920(g)(7)(A), (B)). The panel was told a sleeping person cannot consent. *Id.*

The instructions prompted a question from the panel: "[W]hat is the definition of competent and incompetent we should use in reference to the definition of consent?" CAAF.JA 552. The military judge instructed the panel that an "incompetent person" 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." CAAF.JA 556. This final instruction was like the one given in Spc 3

Johnson's case: an "incompetent person . . . lacks . . . the mental or physical ability to consent." Trial Tr. at 997.

As with Spc 3 Johnson, these three definitions without caveat dictated that a sexual assault "without consent" could occur when the complainant was asleep. But today, *Mendoza* prohibits convicting A1C Casillas under that theory of liability because it was not charged; "without consent" is not legally equivalent to the complainant being asleep. Pet.App. 12a (citing *Mendoza*, 85 M.J. at 220). Yet the instructions conflated the theories of liability under 10 U.S.C. § 920(b) without making clear to the panel that the complainant being "incompetent" is not a legal basis for a "without consent" guilty verdict.

When an instructional issue was raised to the CAAF, the CAAF narrowed its analysis and holding to only fair notice, mirroring the granted issue. Pet.App. 3a n.2. "[The complainant] awoke during the sexual assault, creating a period when [A1C Casillas] was penetrating her vulva with his penis while she was awake and capable of consenting. This is exactly the offense and factual theory that the Government charged, giving [him] sufficient notice . . . ." Pet.App. 10a. But this conclusion overlooked the underlying problem with the verdict: two theories of liability were instructed on—but one of those theories was invalid. *See* Pet.App. 9a (acknowledging that "now," post-*Mendoza*, the Government is on notice that 10 U.S.C. § 920(b)(2)(A), is not an "umbrella offense"). Though the CAAF found that A1C Casillas had the constitutionally required notice for the Government's theory of liability, nothing about the CAAF's analysis recognized or addressed the impact the instructions had on the *factfinder*.

C. The CAAF failed to consider how *Mendoza* created a *Yates* error in both cases and permitted Petitioners to be convicted in violation of a constitutional right.

In both Petitioners' cases, the panel members "may [have] render[ed] a verdict on the basis of the legally invalid theory without realizing that, *as a matter of law*, its factual findings [were] insufficient to constitute the charged crime." *Gerber*, 126 Cal. Rptr. 3d at 705 (emphasis added). Despite this, the CAAF's opinion in *Casillas* only addressed fair notice—whether the Government's argument blind-sided the defendant. Pet.App. 6a-13a The CAAF did not consider the ultimate source of the due process concerns post-*Mendoza*: the instructions allowed the factfinder to convict on an invalid legal theory, independent of the Government's argument.

"Fair notice," as analyzed in *Casillas*, is not the Government's only due process obligation. "The Due Process Clause [also] requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." *Patterson v. New York*, 432 U.S. 197, 210, (1977). In Petitioners' cases, the Government may have "amply proved" a type of sexual assault, but that "amply proved conduct simply 'fails to come within the statutory definition of the crime.'" *Galecki*, 89 F.4th at 740 (citing *Griffin*, 502 U.S. at 59). Furthermore, if the Government proves its case under a theory of liability not captured under the charging scheme, there is a *Yates* error if the factfinder was permitted to convict under that invalid theory. *See, e.g.*, *Vavic*, 139 F.4th at 19-20 (holding the jury could have found that a "thing of value" for a bribery charge was "a payment to the bank account for

the [school] water polo team," which was proven conduct, but not a legal basis for a conviction under the charging scheme).

The CAAF's analysis overlooked the fundamental problem: properly instructing the factfinder. When factfinders can rely upon a legally invalid theory to convict, "there is no reason to think that their own intelligence and expertise will save them from that error." *Griffin*, 502 U.S. at 59. As the panel member questions in both cases reveal, the members were considering the legal bases of conviction through the meaning of a "competent person." But, in both cases, if the complainant was asleep, that could not be the legal basis for "without consent." Pet.App. 12a (citing *Mendoza*, 85 M.J. at 220).

While fair notice to the *defendants* may have existed, Pet.App. 10a, that does not save the *factfinders* from convicting on an invalid theory of liability that was instructed to them. Jurors are presumed to "attend closely the particular language" of instructions and "'strive to understand, make sense of, and follow them." *Samia v. United States*, 599 U.S. 635, 646 (2023) (quoting *United States v. Olano*, 507 U.S. 725, 740 (1993)). In doing so here, the instructions could have misled them into convicting on an invalid theory.

The service Courts of Criminal Appeals (CCAs) have recognized this problem. The Navy-Marine Corps Court of Criminal Appeals (Navy-Marine Corps Court) recently held that "the military judge erred when instructing the members . . . that a sleeping or unconscious person cannot consent such that they could find Appellant guilty as charged to sexual assault 'without consent.'" *United States v. Grafton*,

No. 202400055, 2025 CCA LEXIS 375, at *14 (N-M. Ct. Crim. App. Aug. 11, 2025). The Navy-Marine Court recognized a *Yates* error because the definition of consent, without any caveat, tells the panel that the members can convict when a named victim is sleeping. *Id.* This alternate theory of liability is "invalid" post-*Mendoza* and *Casillas*. *Hedgpeth*, 555 U.S. at 58 (first citing *Stromberg*, 283 U.S. 359; and then citing *Yates*, 354 U.S. 298).

Multiple judges on the CCAs have highlighted that the "full" definition of consent cannot be given in courts-martial after *Mendoza*. *See, e.g.*, *United States v. Coe*, No. ARMY 20220052, 2025 CCA LEXIS 419, at *57 (A. Ct. Crim. App. Aug. 28, 2025) (Murdough, J., dissenting) (noting that "*Mendoza* appears to read an additional element into [10 U.S.C. § 920](b)(2)(A) that is at odds with the statutory text"); *Grafton*, No. 202400055, 2025 CCA LEXIS 375, at *34 (Harrell, S.J., concurring in part and dissenting in part) (noting the instruction "'[a] sleeping, unconscious, or incompetent person cannot consent' is irreconcilable with the CAAF's interpretation of [10 U.S.C. § 920](b)(2)(A) in *Mendoza*"). Their concerns signal a *Yates* error: factfinders in sexual assault "without consent" cases may be convicting on an invalid theory of liability if the complete statutory definition of consent is instructed to them, as had occurred in Petitioners cases. *See Coe*, No. ARMY 20220052, 2025 CCA LEXIS 419, at *28-29 (noting that without the "benefit" of *Mendoza* "the trial judge may have erroneously believed appellant could be convicted either due to a lack of consent or due to the victim's inability to consent in the first instance").

Casillas shows the propriety of these concerns. It is true "[n]othing in Congress's definition of consent in

Article 120(g)(7), UCMJ, prohibited the Government from proving that—at least for a brief time after [the complainants] awoke—Appellant[s] committed the charged sexual act upon [them] and that [they] did not consent to that act." Pet.App. 10a. But it is equally true that nothing in Congress's definition of consent prohibited the panels from finding that, for the time before the complainants awoke, Petitioners committed the charged sexual acts upon them "without their consent" because the complainants were asleep. The panels in Petitioners cases did not get an appropriately tailored instruction explaining that to convict under the charging scheme, the complainants had to be "capable of consenting but [did] not consent." *Mendoza*, 85 M.J. at 220. Nor did Petitioners get the benefit of any court's review of this issue. *See* Pet.App. 18a, 59a (denying Petitioners' requests for reconsideration on the *Yates* error). Had Petitioners received the same review as the appellants in *Grafton* and *Coe*, the result would have been different.

D. Review of the *Yates* error would dictate reversal.

Whether under de novo or plain error review, the Government would be required to show the *Yates* errors were harmless beyond a reasonable doubt to avoid a new trial. *Hedgpeth*, 55 U.S. at 61; *Chapman v. California*, 386 U.S. 18, 24 (1967); *see United States v. Tovarchavez*, 78 M.J. 458, 460 (C.A.A.F. 2019) (holding "where a forfeited constitutional error was clear and obvious" the *Chapman* standard applies). The Government cannot meet this burden because no court could conclude beyond a reasonable doubt that the "verdict would have been the same absent the error." *Neder v. United States*, 527 U.S. 1, 17 (1999).

This is because post-*Mendoza*, the Government would have had to prove the complainants did not consent *after* they woke up. Pet.App. 10a.

In both Petitioners' cases, there was not overwhelming evidence to support the "without consent" theory of liability. Instead, there was only a moment when the complainants were awake and the sexual act was still on-going. CAAF.JA 115 (showing for A1C Casillas, the complainant woke up as he was removing his penis); Trial Tr. at 444-46 (showing for Spc 3 Johnson, the complainant woke up with his "left arm reaching into her pants . . .[for] a few seconds"). Much of the other evidence focused on the complainants being asleep, either through Petitioners' statements or the complainants' explanation for why they did not consent. Pet.App. 40a-41a, 79a-80a.

Because the cases centered around the complainants being asleep and there were only seconds when they were awake while the sexual act or contact was still on-going, the Government would not be able to carry its burden to establish "beyond a reasonable doubt" that the jury would have convicted Petitioners of "sexual assault without consent" even if the sleep theory of liability had been excised. *Neder*, 527 U.S. at 17. This is particularly true where these two theories of liability are "legally contradictory rather than overlapping;" a finding for one barred a finding for the other. *Mendoza*, 85 M.J. at 230-31 (Sparks, J., concurring in part and dissenting in part and in the judgment). Based on the limited evidence, no court would be convinced beyond a reasonable doubt that Petitioners would have been convicted but for the complainant's incompetence due to sleep. The *Yates* errors here are not harmless beyond a reasonable doubt and deserve review. This is

especially so because the CAAF's decision in *Mendoza* decided an important federal question on the theories of liability in 10 U.S.C. § 920(b) in a way that, upon application, conflicts with this Court's decision in *Yates*.

CONCLUSION

The *Yates* errors in Petitioners' cases evolved from the CAAF's decision and application of *Mendoza*. Both issues were tied to the granted issues in each case, but the *Yates* errors were still overlooked. Because the errors are not harmless beyond a reasonable doubt and would prevail under any standard of review, this Court should grant the petition to settle what is a pervasive due process problem stemming from the CAAF's interpretation of 10 U.S.C. § 920 and the definition of consent. Alternatively, this Court can grant, vacate, and remand Petitioners' cases to the CAAF with specific instructions to address the *Yates* error in the first instance.

Respectfully submitted,

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