IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Private (E-1) **KIASHAUN J. WILLIAMS-CLARK,** United States Army, Appellant	**MOTION FOR LEAVE TO FILE SUPPLEMENTAL CITATIONS OF AUTHORITY** Docket No. ARMY 20230185 Tried at Fort Stewart, Georgia on 15 February, 14 March, and 21–24 March before a general court-martial convened by Commander, 3d Infantry Division and Fort Stewart, Lieutenant Colonel Albert G. Courie III and Lieutenant Colonel Amy S. Fitzgibbons, Military Judges, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Pursuant to Rules 23.4 and 25.5(a) of this honorable court's Rules of Appellate Procedure, the undersigned appellate government counsel requests leave and files the instant motion for supplemental citations of authority for the following reasons:

1. On 23 January 2026, the Court of Appeals for the Armed Forces [CAAF] decided *United States v. Moore*, *United States v. Serjak*, and *United States v. Hennessy*, two months after appellee filed their brief on 11 November 2025.

2. These recent opinions directly articulate legal principles governing Article 120(b)(2)(A) that are applicable to the assignments of error in this case.

3. In *Moore*, CAAF identified "three legal principles that may resolve disputes about the legal and factual sufficiency of evidence to prove the 'without…consent' element." *United States v. Hennessy*, __ M.J. __, 2026 CAAF LEXIS 72, slip op. at 6 (C.A.A.F 23 Jan. 2026) (citing *United States v. Moore*, __ M.J. __, 2026 CAAF LEXIS 73, slip op. at 6–7 (C.A.A.F. 23 Jan. 2026).

a. Principle 1: The Mendoza Baseline: "[T]he Government cannot…prove absence of consent under Article 120(b)(2)(A), UCMJ by *merely* establishing that the victim was incapable of consenting at the time of the sexual act." *Moore*, __ M.J. at ___, slip op. at 6 (quoting *United States v. Mendoza*, 85 M.J. 213, 222 (C.A.A.F. 2024) (emphasis in original). Additionally, "[W]e see no distinction between being unable to consent because of intoxication and being unable to consent because of sleep in this context." *Moore*, __ M.J. at ___, slip op. at 7.

b. Under *Moore*, CAAF has extended *Mendoza*'s reasoning beyond intoxication cases to sleep cases. *Id*. Like *Mendoza*, the government cannot walk into court and say words to the effect of, "She was asleep. Sleeping people can't consent, therefore this is 'without consent.'" *Cf. Mendoza*, 85 M.J. at 222. The above reasoning is merely establishing incapacity, not the 'without consent' element.

c. Principle 2: No Consent Before Sleep: "If a rational trier of fact could find from the evidence both that the victim did not consent before falling asleep and that the sexual act subsequently occurred while the victim was asleep, the evidence is legally sufficient to prove the 'without…consent' element of Article 120(b)(2)(A), UCMJ." *United States v. Serjak*, __ M.J. __ 2026 CAAF LEXIS 74, slip op. at 6 (C.A.A.F. 23 Jan. 2026) (citing *Moore*, __ M.J. at ___, slip op. at 8); *see Hennessy*, __ M.J. at ___, slip op. at 6.

d. In appellee's brief filed 11 November 2025, undersigned government counsel argued that Article 120(b)(2)(A) and (b)(2)(B) are mutually exclusive categories based on the victim's capacity to consent. (JA 045) ("if both subsections applied to the same conduct involving sleeping victims, Congress' delineation of separate subsections would be rendered superfluous."). *Moore* now provides a direct answer to this reasoning.[1] *Moore*, __ M.J. at ___, slip op. at 9. However, appellee's conclusion that the charge and specification is not fatally ambiguous is still correct. Here, the evidence of non-consent across the entire night supports the conviction.

[1] "There is no surplusage problem because to prove a violation of Article 120(b)(2)(A), UCMJ, the government must prove a fact—namely, that the victim did not consent before falling asleep—that the government would not have to prove to establish a violation of Article 120(b)(2)(B), UCMJ."

e. Principle 3: Waking During the Act (*Casillas*): "[E]vidence may be legally sufficient to prove [the] 'without…consent' element if the evidence shows that the victim was asleep when the sexual act began but awoke before the sexual act was complete and, while awake, did not consent to the ongoing sexual act." *Moore*, __ M.J. at ___, slip op. at 10 (citing *Casillas*, 86 M.J. 94, 102 (C.A.A.F. 2025)).

f. Undersigned government counsel argued there were two separate assaults, and that the victim awoke but was not in an aware-but-not-consenting state, different than the victim in *Casillas*. (JA 047). Under *Moore*, Principle 2 now highlights that the evidence can still support a conviction under (b)(2)(A) if the victim didn't consent before falling asleep. *Moore*, __ M.J. at ___, slip op. at 9. Additionally, after *Moore*, if the victim is deemed awake like *Casillas*, both penetrations support (b)(2)(A) under Principle 3. *Moore*, __ M.J. at ___, slip op. at 10.

g. Undersigned government counsel argued two separate acts delineated by the surplusage principle on brief; however, the key point remains that the criminality is distinguishable from *Wilson* and *Walters*—two sexual acts across the entire night. *Cf. United States v. Wilson*, 67 M.J. 423, 425 (C.A.A.F. 2009) (military judge excepted "divers occasions" language, CAAF could not conclude whether the bathroom rape or the bedroom rape formed the basis of the conviction

in a child sexual abuse case where the rapes spanned multiple years); *cf. United States v. Walters*, 58 M.J. 391, 396 (panel members substituted "divers occasion" language for "one occasion" but did not reflect the specific instance of conduct upon which the modified findings were based). Here, there are two penetrations, and the government could have charged these separately, but used its discretion to only charge one. Appellant's argument, taken to its logical conclusion, would result in his acquittal because he assaulted the victim too many times and for too long.

4. As part of its 2026 term, this court has also issued opinions that serve as persuasive authority regarding ambiguous verdicts and post-*Mendoza* convictions. *United States v. Smith*, ARMY 20230482, slip op. at 15–20 (Army Ct. Crim. App. 30 Dec. 2025) (mem. op.); *United States v. Antepara*, ARMY 20220562, slip op. at 4–7 (Army Ct. Crim. App. 15 Jan. 2026) (mem. op.).

a. In Judge Arguelles' concurring opinion in *Smith*, he outlined the narrow holding in *Walters* as it pertained to 'divers occasion' language. *Smith*, slip op. at 16.[2] He also distinguished between the principles of unanimity of fact versus unanimity of theory, citing that CAAF appears to have rejected the distinction. *Id.*

[2] "Appellant is correct there was evidence that he and the victim kissed two separate times, specifically in the shack and in the latrine, despite the specification alleging only a single kiss…[H]owever, the maltreatment specification in this case did *not* allege that appellant kissed the victim on more than one occasion. Slip op. at 16.

at 17–19 ("unanimity of fact, which refers to multiple and distinct acts of the same type of criminal conduct charged as a single offense."). Judge Arguelles' concurrence also mentions the permissibility of general verdicts. *Smith*, slip op. at 19. Like the two kisses in *Smith* (one kiss in the shack and one kiss in the latrine), the two sexual acts here represent multiple instances of the same 'without consent' offense.

b. In *Antepara*, the majority opinion generally outlines the three principles found in *Moore*: Principle 1 (the victim can "both [have] capacity and lack [] capacity at different times of the assault"); Principle 2 ("intoxication did not preclude RR's capacity to consent."); and Principle 3 ("[m]uch like the victim in *Casillas*, RR awoke to the assault…[she] did not consent before being penetrated."). *Antepara*, slip op. at 7.

5. In preparation for oral argument and additional research after the latest CAAF and ACCA opinions, undersigned counsel discovered relevant law that were not set forth in appellee's brief.

a. *United States v. Piolunek*, 74 M.J. 107 (C.A.A.F. 2015) applies the general verdict rule and found the evidence was sufficient for nineteen of the twenty-two admitted child pornography images in a possession and receipt conviction.

b. *United States v. Brown*, 65 M.J. 356, 359 (C.A.A.F. 2007) found that a factfinder may enter a general verdict of guilt, "even when the charge could have been committed by two or more means."

c. *United States v. Vidal*, 23 M.J. 319, 325 (C.M.A. 1987) explains the ambiguity argument: "It makes no difference how many members choose one act or the other, one theory of liability or the other." *Cf. United States v. Elmore*, ARMY 20220345, 2024 CCA LEXIS 270, at *2 (Army Ct. Crim. App. 2 July 2024) (summ. disp.) (affirms two separate specifications for digital and penile penetration occurring during the same continuous assault).

d. *United States v. Batres*, ARMY 20220223, 2024 CCA LEXIS 358, at *1–*2, *7–*13 (Army Ct. Crim. App., 23 Aug. 2024) (mem. op.) holds that three different types of acts (penile-vaginal, penile-oral, battery) constituted separate acts even if arguably the same transaction. The *Batres* analysis is probative for what specifications must run concurrently at sentencing. *Id.* at *12–*13. In *Batres*, the majority focused on the actus reus being different for each criminal act. *Id.* at *8. Here, there are two instances of penile-vaginal penetration.

e. *United States v. Leipart*, 85 M.J. 35, 42 (C.A.A.F. 2024) holds that trial counsel's improper closing argument (where no defense objection is made) is afforded plain error review. The military judge is also presumed to know the law. *Id.* at 42–43.

f. *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2019) explains that waiver is the intentional relinquishment or abandonment of a known right. The Court found the appellant affirmatively declining to object to the military judge's instructions was waiver. Here, appellant's failure to request specific findings or object to particularity at trial constitutes waiver under this court's and CAAF's precedent.

Conclusion

WHEREFORE, the government respectfully requests this honorable court grant the instant motion.

[redacted]
MEGHAN E. MOORE
CPT, JA
Appellate Attorney, Government
Appellate Division

MOTION FOR LEAVE TO FILE
SUPPLEMENTAL CITATIONS
OF AUTHORITY

Panel No. 3

GRANTED: _____

DENIED: _____

DATE: _____

CERTIFICATE OF SERVICE

UNITED STATES v. KIASHAUN J. WILLIAMS-CLARK 20230185

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at ***usarmy.pentagon.hqda-otjag.mbx.dad-accaservice@army.mil*** on the 9th day of February, 2026.

[redacted]

MEGHAN E. MOORE
CPT, JA
Government Appellate Division