

**DEPARTMENT OF THE AIR FORCE
TRIAL JUDICIARY**

UNITED STATES

v.

CAPT JACOB R. WULFSON
[REDACTED]

DEFENSE MOTION FOR
APPROPRIATE RELIEF –
MULTIPLICIOUS CHARGES &
UNREASONABLE MULTIPLICATION
OF CHARGES

20 January 2026

MOTION

NOW COMES the Accused, Capt Jacob R. Wulfson (Capt Wulfson), by and through counsel, and pursuant to Rule for Court-Martial (R.C.M.) 906(b)(12) and applicable case law, respectfully requests this Honorable Court dismiss either Specification 1 or 2 of Charge II as multiplicitious, or secondarily, dismiss either Specification 1 or 2 of the Charge as an unreasonable multiplication of charges. In the alternative, the Defense requests that Specifications 1 and 2 of Charge II be merged for findings and sentencing as an unreasonable multiplication of charges. The Defense requests an Article 39(a) session for this matter.

SUMMARY

Capt Wulfson is charged with two separate specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ). However, both specifications concern the same underlying sexual act but are charged under different subsections of Article 120, UCMJ, as separate and distinct theories of criminal liability: (1) Article 120(b)(1)(B) (“without consent”), and (2) Article 120(b)(3)(A) (“incapable of consenting due to impairment by a drug”). Given both specifications under Charge II arise from the same criminal act, the specifications are multiplicitious pursuant to *United States v. Coleman*, 79 M.J. 100 (C.A.A.F. 2019) and *United States v. Forrester*, 76 M.J. 479 (C.A.A.F. 2017) and constitute an unreasonable multiplication of charges under R.C.M. 906(b)(12) and *United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001). As such, one of the Specifications of Charge II should be dismissed, or, alternatively, both specifications should be merged for purposes of findings and sentencing.

FACTS

Factual Background

1. In September 2024, Capt Wulfson and [REDACTED] met on the dating application, Tinder. Attachment 1. After sharing messages back and forth on Tinder, they exchanged phone numbers and began communicating over the messaging application WhatsApp. Attachment 1.
2. Throughout the next several months, Capt Wulfson and [REDACTED] messaged each other regularly on WhatsApp. Although they initially discussed their day-to-day events with one another, the content

of their conversations quickly turned sexual, as they both expressed a desire to meet and have sexual intercourse. Capt Wulfson and [REDACTED] were unable to arrange an in-person meeting until 1 December 2023.

3. On 1 December 2023, Capt Wulfson messaged [REDACTED] and asked if she wanted to come to his residence that evening. Attachment 2. [REDACTED] agreed, and they both expressed interest in having sexual intercourse that night. *Id.* However, [REDACTED] laid out “ground rules” for Capt Wulfson to follow before she arrived at his residence:

No means no when said. No hands on my throat. Ever. Condoms please. And if you know you have hsv2 please god tell me, I have an immune condition. A cold sore from someone put me in the hospital and I’ve had chickenpox now 9 time [sic]. It’s not a joke. Unlike most people I ask as I do need to avoid it like the literal plague...Blunt, I know. But I need to be...

Id.

4. Upon [REDACTED]’s arrival at Capt Wulfson’s residence, they began to drink whiskey. Attachment 3. After consuming approximately a glass and a half whiskey and engaging in small talk, Capt Wulfson and [REDACTED] transitioned to Capt Wulfson’s bedroom where they engaged in consensual kissing and fondling on his bed while naked. *Id.*

5. According to [REDACTED] the next thing she knew was that Capt Wulfson was on top of her, penetrating her vulva with his penis. Attachment 3. Allegedly, Capt Wulfson placed his hand over her mouth with one hand, pinned her arms back, and proceeded to choke her with his free hand. *Id.* Although she does not know what caused it, [REDACTED] then blacked out or otherwise lost consciousness. *Id.*

6. When [REDACTED] regained consciousness, she awoke in Capt Wulfson’s shower several hours later with the water running over her. Attachment 3. At this point, Capt Wulfson began to, or continued to, care for her. *Id.* [REDACTED] stayed at Capt Wulfson’s residence until the following afternoon on 2 December 2023 when he drove her back to her residence. *Id.*

7. During her interview with agents from the Office of Special Investigation (OSI) on 3 December 2023, [REDACTED] maintained that she did not consume enough alcohol to have “blacked out” during the alleged sexual assault, nor did she consume any drugs, prescribed or otherwise, that evening that could have caused her to lose consciousness. Attachment 4 at 00:30– 00:58. She informed the OSI agents that she had submitted to a urinalysis drug screening while at the hospital and that it would come back showing no drugs in her system. *Id.* at 03:33-00:42.

8. On 23 January 2024, the Air Force Medical Examiner System (AFMES) Division of Forensic Toxicology received [REDACTED]’s urine sample for analysis. Attachment 6. On 20 February 2024, AFMES published its toxicology report, which showed that [REDACTED]’s urine contained, among other substances, etizolam. *Id.* Etizolam is a benzodiazepine similar to Valium and Xanax. Attachment 7. However, it is illegal in the United States and the [REDACTED] and is only available by prescription in India, Japan, and Italy. *Id.* Etizolam is up to ten times stronger than Valium and Xanax, and its adverse effects include drowsiness, sedation, muscle weakness, fainting, and confusion. *Id.*

9. Having received this information, OSI agents asked [REDACTED] through her assigned Victims' Counsel (VC), for a follow-up interview to discuss AFMES' findings. Attachment 8. However, [REDACTED]'s VC told agents that [REDACTED] would sit for re-interview as long as they did not ask any questions about the toxicology report and its findings. *Id.* Not wanting to give up a chance for a second interview, OSI agreed and did not discuss the toxicology report at all with [REDACTED]. *Id.*

Procedural Background

10. This case is the second iteration of charges brought against Capt Wulfson regarding the alleged incident on 1 December 2023. In the first iteration, Lt Col Lisa M. Wotkowicz, Chief Special Trial Counsel, District 5, Office of Special Trial Counsel (OSTC), preferred one charge and one specification of failure to obey a lawful order in violation of Article 92, UCMJ (Charge I); one charge and one specification of sexual assault in violation of Article 120, UCMJ (Charge II); and one charge and one specification of domestic violence by strangulation in violation of Article 128b, UCMJ (Charge III).

11. On 12 November 2024, the first of three preliminary hearings into the charges against Capt Wulfson was held pursuant to Article 32, UCMJ. On 21 November 2024, the Preliminary Hearing Officer (PHO) issued his report where he recommended the Government pursue a different charging theory for Charge II in light of *United States v. Mendoza*, 85 M.J. 213 (C.A.A.F. 2024), and *United States v. Moore* (2024 CCA LEXIS 485). The PHO recommended the Government pursue a specification of Article 120 under the theory that the alleged victim, [REDACTED] was incapable of consenting to the sexual act due to physical disability under Article 120(b)(3)(B), reasoning that there is evidence that [REDACTED] was "physically incapable of declining participation in or communicating unwillingness to engage in the sexual act at issue" when the accused applied pressure to her throat making her unable to speak." Attachment 9. The PHO also recommended the hearing be reopened so Capt Wulfson could be properly informed of the uncharged offense being investigated and afforded an opportunity for representation, cross-examination, and presentation of evidence if the Government intended to pursue an Article 120(b)(3)(B) offense. *Id.*

12. On 22 January 2025, a second Article 32 hearing was held to consider an additional specification of Article 120, specifically under the charging theory of Article 120(b)(3)(B). However, the Government instead provided the PHO with an additional specification under the charging theory that Capt Wulfson sexually assaulted [REDACTED] when she was incapable of consenting because she was impaired by the drug Etizolam. Attachment 10.

13. On 21 February 2025, the PHO issued his second report where he found there was probable cause for the Article 120(b)(3)(B) specification and recommended that it be referred to a general court-martial, or at a minimum in the alternate with the Article 120(b)(1)(B) specification. Attachment 10. The PHO declined to analyze the Article 120(b)(3)(A) specification explaining that this was beyond the limited scope of the reopened hearing. However, the PHO did opine,

While I did not enlarge the hearing to consider theories of criminal liability under Article 120(a)(5) (Rape by administering a drug or intoxicant) or Article 120(b)(3)(A) (Sexual assault against a person incapable of consent due to impairment), and remain convinced that the preliminary hearing would need to be reopened in order for the government to properly refer such charges, I find

insufficient evidence to order such a reopening. Specifically, victim's forceful testimony about not having been drugged and having lost consciousness as the result of asphyxiation, combined with the utter lack of evidence regarding the accused's access to or possession of Etizolam, make it *improbable*, absent additional evidence, that the government could obtain or sustain a conviction on either ground of criminal liability detailed in Article 120(a)(5) or Article 120(b)(3)(A), respectively.

Attachment 10.

14. On 3 March 2025, Lt Col Wotkowicz preferred two additional specifications of sexual assault in violation of Article 120 (Additional Charge): (1) alleging the complainant was incapable of consenting due to a physical disability; and (2) alleging the complainant was incapable of consenting due to being impaired by an intoxicant. On 5 March 2025, Lt Col Wotkowicz referred all charges and their specifications (including all three Article 120 specifications) to trial by general court-martial. Trial was set to begin on 6 October 2025.

15. On 29 September 2025, the Government filed a motion to continue because their AFMES expert, who would ostensibly testify in support of the Government's etizolam theory, could not travel to the [REDACTED] for trial. Attachment 11. On 2 October 2025, the court denied the Government's motion, holding in part that, while denial of the continuance could possibly affect the verdict as to the specification under Article 120(b)(3)(A), the Government had two other criminal liability theories on which a panel could convict under Article 120, UCMJ. Attachment 12. Fundamentally, the court's ruling prevented the Government from bringing forward its etizolam theory at trial. The military judge ordered the trial to begin on 6 October 2025 as scheduled. *Id.*

16. However, on 3 October 2025, the Office of Special Trial Counsel (OSTC) withdrew and dismissed charges, only to immediately re-prefer substantially the same charges and specifications anew. In a memorandum dated 3 October 2025, OSTC noted that their decision to withdraw and dismiss charges was purely to preserve its ability to present its etizolam theory and thus preserve the possibility of a conviction under Article 120(b)(3)(A) at a later date. Attachment 13. Of note, OSTC decided not to re-prefer the specification under Article 120(b)(3)(B) (incapacity due to physical disability). See DD Form 458, Charge Sheet, dated 3 October 2025.

17. On 3 October 2025, Lt Col Wotkowicz preferred the following charges and specifications upon Capt Wulfson: one charge with one specification of willfully disobeying a superior commissioned officer in violation of Article 90, UCMJ; one charge with one specification of sexual assault without consent and one specification of sexual assault due to drug impairment in violation of Article 120, UCMJ; and charge with one specification of strangulation in violation of Article 128b, UCMJ. See DD Form 458, Charge Sheet, dated 3 October 2025.

18. On 15 November 2025, the charges and their specifications were referred to trial by general court-martial. DD Form 458, Charge Sheet, dated 3 October 2025. This case is docketed for trial at [REDACTED], with trial currently scheduled to begin on 13 April 2026.

Charge and Specifications

19. Specifications 1 and 2 of Charge II were referred on 15 November 2025 as follows:

In that CAPTAIN JACOB R. WUFLSON, United States Air Force, did, at or near [REDACTED], on or about 1 December 2023, commit a sexual act upon [REDACTED] by penetrating her vulva with his penis, without her consent.

In that CAPTAIN JACOB R. WULFSON, United States Air Force, did at or near [REDACTED] on or about 1 December 2023, commit a sexual act upon [REDACTED] by penetrating her vulva with his penis, when she was incapable of consenting to the sexual act because she was impaired by a drug, to wit: etizolam, and the accused knew of that condition.

See DD Form 458, Charge Sheet, dated 3 October 2025.

BURDEN

20. "[T]he burden of persuasion on any factual issue the resolution of which is necessary to decide a motion shall be on the moving party." R.C.M. 905(c)(2). "[T]he burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by a preponderance of the evidence." R.C.M. 905(c)(1). As the moving party, the Defense bears the burden in this motion.

LAW

21. "Multiplicity and unreasonable multiplication of charges are two distinct concepts." *United States v. Roderick*, 62 M.J. 425, 433 (C.A.A.F. 2006). Multiplicity is a constitutional doctrine and refers to the protection against double jeopardy while unreasonable multiplication of charges addresses prosecutorial overreaching based on a reasonableness standard. *Id.* (citing *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001)); *United States v. Campbell*, 71 MJ 19, 23 (C.A.A.F. 2012).

Multiplicity

22. R.C.M. 907(b)(3)(B) authorizes dismissal of a specification if it is multiplicitious with another specification and the interests of justice require dismissal. *See also Blockburger v. United States*, 284 U.S. 299 (1932); *United States v. Teters*, 37 M.J. 370 (C.M.A. 1993).

23. In *Campbell*, the Court of Appeals for the Armed Forces (C.A.A.F.) held, "there is only one form of multiplicity, that which is aimed at the protection against double jeopardy as determined using the Blockbuster/Teters analysis." (*Campbell*, 71 M.J. at 23, referring to *Blockburger v. United States*, 284 US 299 (1932), and *United States v. Teters*, 37 M.J. 370 (CMA 1993)).

24. In *United States v. Coleman*, C.A.A.F. explicitly stated this analysis involved a three-step inquiry (79 M.J. 100, 103 (C.A.A.F. 2019)):

a. Determine whether the charges are based on separate acts. If so, the charges are not multiplicitious because separate acts may be charged and punished separately. *Id.* (citing *United*

States v. Neblock, 45 M.J. 191, 197 (C.A.A.F. 1996) and *Ebeling v. Morgan*, 237 US 625, 629-30 (1915)).

b. Because the charges are based upon a single act, determine whether Congress made "an overt expression of legislative intent" regarding whether the charges should be viewed as multiplicitous. *Id.* (citing *Teters*, 37 M.J. at 376).

c. Where there is no overt expression of congressional intent, infer Congress's intent "based on the elements of the violated statutes and their relationship to each other." *Id.* (citing *Teters*, 37 M.J. at 376-77). Specifically, if each statute requires proof of an element not contained in the other, it may be inferred that Congress intended for an accused to be charged and punished separately under each statute. *Id.* (citing *Teters*, 37 M.J. at 377) (other citations omitted).

25. In *United States v. Smith*, the Air Force Court of Criminal Appeals explained:

The purpose of the multiplicity doctrine is to avoid imposing multiple convictions on an accused for what is essentially one offense. It is grounded in the Double Jeopardy Clause of the Fifth Amendment and focuses on whether Congress intended that an accused be subject to multiple convictions and punishment for what is essentially one act. If Congress is silent, we employ pleadings-elements test. Offenses are not multiplicitous when proof of each one requires proof of some fact which the other does not.

United States v. Smith, 50 M.J. 813, 814 (A.F. Ct. Crim. App. 1999).

26. In *United States v. Neblock*, C.A.A.F. explained:

The Double Jeopardy Clause of the Fifth Amendment provides, "...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Article 44(a), UCMJ, 10 USC § 844(a), similarly states: "No person may, without his consent, be tried a second time for the same offense." These provisions of law have been construed, *inter alia*, to prohibit a person from being twice punished at a single trial for the same offense, contrary to the will of Congress. Finally, it has been held that two convictions or findings of guilty for the same offense at a single trial are double punishment and a violation of the above legal authorities, again, unless authorized by Congress.

United States v. Neblock, 45 M.J. 191, 194-95 (C.A.A.F. 1996) (citations omitted) (emphasis in original).

27. In *United States v. Rice*, C.A.A.F. explained:

The double jeopardy prohibition applies only where "the same act or transaction" is involved. In examining whether two statutory crimes are the "same offense" for purposes of the Fifth Amendment, courts apply the test articulated in *Blockburger*: "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied . . . is whether each provision requires proof of a fact which the other does not." Under *Blockburger*, if two offenses have the same

elements, those offenses are the “same offence” and “double jeopardy bars . . . successive prosecution.” Courts determine whether two offenses are the same through a “strict facial comparison of the elements.”

United States v. Rice, 80 M.J. 36, 40 (C.A.A.F. 2020) (citations omitted).

28. Courts have also gone beyond the mechanical application of *Blockburger*, holding that multiplicity can appear in other ways. For example, when there are multiple charges of the same violation of the same offense predicated on one single act of conduct.

One instance of multiplicity . . . occurs when “charges for multiple violations of the same statute are predicated on arguably the same criminal conduct.” To resolve this “species” of multiplicity, the Court “must first determine the ‘allowable unit of prosecution,’ . . . which is the *actus reus* of the defendant.” This question is significant for the purposes of determining a maximum sentence; R.C.M. 1003(c)(1)(C) provides that “[w]hen the accused is found guilty of two or more offenses, the maximum authorized punishment may be imposed for *each separate offense*.”

United States v. Forrester, 76 M.J. 479, 485 (C.A.A.F. 2017) (emphasis in original).

Unreasonable Multiplication of Charges

29. R.C.M. 307(c)(4) states, “what is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person.”

30. C.A.A.F. explained the reasoning behind this doctrine in *United States v. Foster*:

There is another elementary concept of justice which none of us should forget, when one act of an accused violates several penal statutes. It is that there is prosecutorial discretion to charge the accused for the offense(s) which most accurately describe the misconduct and most appropriately punish the transgression(s) *United States v. Teters* notwithstanding, military judges must still exercise sound judgment to ensure that imaginative prosecutors do not needlessly “pile on” charges against a military accused. A fair result remains not only the objective, but indeed the justification of the military justice system. Under *Teters*-like guidance . . . civilian judges have managed to accomplish these ends for years, with very few problems.

United States v. Foster, 40 M.J. 140, 144.n4 (C.M.A. 1994) (overruled on other grounds by *United States v. Miller*, 67 M.J. 385 (C.A.A.F. 2009)) (citations omitted).

31. “[T]he prohibition against unreasonable multiplication of charges has long provided courts-martial and reviewing authorities with a traditional legal standard—reasonableness—to address the consequences of an abuse of prosecutorial discretion in the context of the unique aspects of the military justice system.” *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001); *see also United States v. Anderson*, 68 M.J. 378 (C.A.A.F. 2010).

32. The language of R.C.M. 307(c)(4) makes clear that this issue turns on whether the multiplied charges are based on “[w]hat is substantially one transaction.” R.C.M. 307(c)(4). In this context, “[a] ‘transaction’ generally means ‘a series of occurrences or an aggregate of acts which are logically related to a single course of criminal conduct.’” *United States v. Grubb*, 34 M.J. 532, 535 (A.F. Ct. Crim. App. 1991).

33. Under the test adopted in *Quiroz*, trial courts consider four factors to determine if the charging of multiple specifications constitutes an unreasonable multiplication of charges:

- a. Is each charge and specification aimed at distinctly separate criminal acts?
- b. Does the number of charges and specifications misrepresent or exaggerate the accused’s criminality?
- c. Does the number of charges and specifications unreasonably increase the accused’s punitive exposure?
- d. Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

Quiroz, 55 M.J. at 338.

34. The *Quiroz* factors “are not ‘all-inclusive’ . . . Nor is any one or more factors a prerequisite. Likewise, one or more factors may be sufficiently compelling, without more, to warrant relief on unreasonable multiplication of charges based on prosecutorial overreaching.” *United States v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012).

35. If a court finds that charges have been unreasonably multiplied, R.C.M. 906(b)(12) provides remedies.

- a. For findings, “the appropriate remedy shall be dismissal of the lesser offenses or merger of the offenses into one specification.” R.C.M. 906(b)(12)(A).
- b. For sentencing, “the remedy shall be that the terms of confinement for the affected specifications will run concurrently, as set forth in R.C.M. 1002(b)(2)(B)(iii). A ruling on this motion ordinarily should be deferred until after findings are entered.” R.C.M. 906(b)(12)(B).

36. Dismissal is an appropriate remedy if the charging scheme significantly exaggerates an accused’s criminality. As the Court of Military Appeals noted:

[Q]uite apart from any sentence that is imposed, each separate criminal conviction typically has collateral consequences, in both the jurisdiction in which the conviction is obtained and in other jurisdictions . . . The number of convictions is often critical to the collateral consequences that an individual faces . . . Furthermore, each criminal conviction itself represents a pronouncement by the State that the defendant has engaged in conduct warranting the moral condemnation of the community. Because a criminal conviction constitutes a formal judgment of condemnation by the community, each additional conviction imposes an additional stigma and causes additional damage to the defendant’s reputation.

ARGUMENT

Specifications 1 and 2 of Charge II Are Multiplicious

37. Specifications 1 and 2 of Charge II describe conduct from the same act or transaction, constitute the same offense under *Coleman*, and therefore constitute an unconstitutional multiplicity of charges. Here, Specifications 1 and 2 are clearly based on the same act: Capt Wulfson allegedly penetrated [REDACTED]'s vulva with his penis on or about 1 December 2023. Moreover, the elements for both specifications are the same, with the only difference being the non-consent factor (whether the alleged sexual assault was due to a lack of consent or through [REDACTED]'s inability to consent). Under *Coleman*, the two statutory crimes here are the same offense, they are not distinct statutory provisions, and they have the same elements. The Defense therefore passes the first *Coleman* hurdle.

38. Additionally, the second *Coleman* factor, whether Congress made "an overt expression of legislative intent" that the charges should be viewed as multiplicious, weighs heavily in favor of the Defense. The Government charged the same sexual act under two separate subsections of Article 120(b), UCMJ: Article 120(b)(1)(B) ("without consent") and Article 120(b)(3)(A) ("incapable of consenting due to impairment by a drug"). Neither the text of Article 120 nor its explanatory notes demonstrate that Congress intended to authorize multiple punishments for alternative theories of lack of consent from a single sexual act, be it incapable of consenting, through impairment, or otherwise. In fact, based on the construction of Article 120(b), it appears that Congress envisioned the exact opposite scenario. The text of Article 120(b) proffers a single offense: sexual assault. Subsections (1) through (3) simply provide alternative theories as to how a penetrative sexual act could be non-consensual: through artifice; through lack of actual consent or while asleep or unconscious; or through impairment by intoxication or mental or physical defect. These subsections are not qualified, then, as separate and distinct acts for which an accused could be found guilty, but rather describe the modalities of proving a single, non-consensual penetrative sexual act. The text of Article 120 also contains no language to demonstrate any Congressional intent for a single sexual act to result in multiple punishments based on mutually exclusive consent theories. As the *Coleman* court made clear, "Where Congress has not clearly authorized cumulative punishments, courts must infer legislative intent from the structure and elements of the offense." 79 M.J. at 103. Provided Congress was completely silent on this issue and did not *clearly* authorize cumulative punishments, the Defense passes the second *Coleman* hurdle.

39. Furthermore, the Defense overcomes the third *Coleman* hurdle despite the different elements required for the specifications of Charge II because the underlying actus reus between the two specifications is the same. As the *Coleman* court instructed, when legislative intent is silent, as it is here, courts should look at the elements of the charged offenses and their relationship to each other to infer if Congress intended for an accused to be charged and punished under each statute. Facially, Article 120(b)(1)(B) and Article 120(b)(3)(A) require proof of an element not contained in the other in that the former requires a showing of lack of consent and the latter requires a showing of an inability to give consent due to drug impairment. During this analysis, generally courts look to the *Blockburger* test to determine whether each provision requires proof of a fact

which the other does not. If taken in a vacuum, the *Blockburger* test could result in a finding that Congress could have intended for these statutes to be charged and sentenced separately. However, the factual predicate for each specification is in reality an alternate theory of proof as to how the underlying sexual act was not consensual rather than a fundamentally separate and distinct act.

40. As previously discussed, both specifications are charged under the same statutory provision, Article 120, UCMJ, but use different vehicles to prove [REDACTED]'s lack of consent. Neither specification requires proof of a different sexual act, nor does either specification envision a separate sexual act from the other. The actus reus in both specifications – Capt Wulfson's penetration of [REDACTED]'s vulva with his penis – is identical. The difference between the specifications is the Government's theory as to why that actus reus was wrongful. The specifications, then, do not state separate crimes, but rather serve as a way for the Government to present competing evidence at trial as to why or how penetration was non-consensual.

41. Moreover, Congress did not draft Article 120(b)(1)(B) and Article 120(b)(3)(A) as separate offenses or authorize cumulative punishments for overlapping theories under the same actus reus. Instead, these provisions represent interchangeable theories of criminal liability for a singular sexual act, differentiated only by the route through which non-consent is established. If taken together, the Government's dual theories of criminal liability would be impossible to exist in space time. [REDACTED] could not simultaneously object to the sexual act (without consent) and also be so incapacitated as to be unable to communicate unwillingness due to drug impairment. Charging these mutually exclusive theories of liability for the same penetrative offense invites precisely the kind of multiplicity the Double Jeopardy Clause is designed to prevent. As the *Teters* court has made clear, where Congress is silent, courts must not infer an intent to authorize multiple punishments absent clear statutory differentiation. Therefore, the Defense is able to pass the third *Coleman* hurdle.

42. However, even if the court found that the specifications as drafted were not multiplicitous under *Coleman*, the specifications are multiplicitous under the legal theory posited in *Forrester*. As the *Forrester* court explained, *Blockburger*'s rigid definition of multiplicity does not take into account different "species" of multiplicity. Instead, *Forrester* explains that there is more than one instance of multiplicity, one such being multiple charges under the same statute predicated on the same criminal conduct. That is precisely the case here, as the alleged criminal conduct in this case is Capt Wulfson's alleged penetration of [REDACTED]'s vulva with his penis on or about 1 December 2023. However, this actus reus, the singular "allowable unit of prosecution," is split between the Government's two competing legal theories as to how the sexual act was non-consensual. The Government does not allege separate sexual acts occurring at different times, involving different conduct, or separated by an intervening circumstance. Both specifications stem from the same sexual act at the same time, at the same place, in the same location, involving the same individuals. The Government's only distinction between the two is its competing legal theories as to how the penetration was wrongful, i.e. non-consensual. Based on *Forrester*, then, the fact that the language of each statute is not identical is not relevant here. Instead, what matters is whether the actus reus and degree of culpability is the same between the two, which it is in this case. Congress did not intend to permit the Government to multiply charges based solely on its uncertainty about which theory of non-consent the factfinder may ultimately find most consistent with the state of the evidence. As such, both specifications are multiplicitous under *Forrester*.

Specifications 1 and 2 Constitute an Unreasonable Multiplication of Charges

43. Even if the specifications are not multiplicitious, they do represent an unreasonable multiplication of charges under *Quiroz*.

44. To begin, in filing this motion, Capt Wulfson has effectively objected at trial and therefore meets the first prong of *Quiroz*.

45. Second, a singular criminal act forms the basis of both specifications, being that Capt Wulfson allegedly penetrated [REDACTED]'s vulva with his penis on or about 1 December 2023. There is no allegation of additional acts, changes in location or time, or any intervening conduct. The only distinction between the two is the competing theories as to how the sexual act was non-consensual. This second *Quiroz* factor therefore sides squarely with Defense

46. Third, as both specifications are based on the same physical conduct, charging two different theories as to how a sexual act was non-consensual misrepresents and exaggerates Capt Wulfson's alleged criminality. Given that each of the specifications are aimed at the same criminal act, doubling the alleged wrongfulness of one singular action is an unreasonable multiplication of charges. Accordingly, the third *Quiroz* factor falls in favor of the Defense.

47. Fourth, the Government's charging scheme unreasonably increases Capt Wulfson's criminal exposure. As both specifications are for the same Article and sub-offense under the UCMJ, they carry the same punitive exposure: mandatory dismissal, total forfeitures, and 30 years in confinement. This results in a potential exposure of 60 years in confinement despite both specifications arising from the same criminal act. As such, the fourth *Quiroz* factor weighs in favor of the Defense.

48. Finally, two specifications for the same physical altercation are evidence in and of itself of prosecutorial overreaching and abuse in the drafting the charges. While the Government may argue that the specifications are drafted in the alternative, looking to the procedural history of this case provides a conscious and escalating pattern of duplicative charging that rises to the level of prosecutorial overreach.

49. During the first iteration of this case, the Government preferred, in pertinent part, three specifications under Article 120, UCMJ, against Capt Wulfson: Article 120(b)(1)(B) (without consent), Article 120(b)(3)(A) (incapable of consenting due to impairment), and Article 120(b)(3)(B) (incapacity due to physical disability).

50. During the initial Article 32 hearing in November 2024, the PHO explicitly recommended that the Government amend its charging theory under Article 120 to proceed under Article 120(b)(3)(B), incapacity due to physical disability, a charge which has since been withdrawn and dismissed. This recommendation was based on the state of the evidence and recent case law, specifically *United States v. Mendoza*, and *United States v. Moore*. However, the PHO warned that any additional theory would require opening the hearing to afford Capt Wulfson due process. This ultimately led to a second Article 32 hearing that had the limited scope of considering the charging theory under Article 120(b)(3)(B). Despite this, the Government chose to introduce a new and distinct incapacity theory based on the existence of etizolam in [REDACTED]'s system during the hearing.

In doing so, the Government failed to properly put the Defense on notice of that new charging theory, and the PHO declined to enlarge the hearing to consider it. However, the PHO explained in his report:

While I did not enlarge the hearing to consider theories of criminal liability under Article 120(a)(5) (Rape by administering a drug or intoxicant) or Article 120(b)(3)(A) (Sexual assault against a person incapable of consent due to impairment), and remain convinced that the preliminary hearing would need to be reopened in order for the government to properly refer such charges, I find insufficient evidence to order such a reopening. Specifically, victim's forceful testimony about not having been drugged and having lost consciousness as the result of asphyxiation, combined with the utter lack of evidence regarding the accused's access to or possession of Etizolam, make it *improbable*, absent additional evidence, that the Government could obtain or sustain a conviction on either ground of criminal liability in Article 120(a)(5) or Article 120(b)(3)(A).

See Attachment 10.

51. Instead of heeding the PHO's recommendation and electing a single, consistent charging theory, the Government charged three specifications under Article 120 for separate theories of criminal liability. Three specifications under Article 120, UCMJ, were referred to a general court-martial on 5 March 2025. Then, when the Government realized on the eve of trial it could not bring its etizolam theory to trial absent its AFMES expert, it attempted to continue the proceedings, which the court denied. However, rather than proceed on the remaining theories of criminal liability under Article 120, the Government instead withdrew and dismissed the charges only to immediately re-prefer in order to preserve its etizolam theory for trial at a later date. Given this sequence of events, Capt Wulfson was entitled to a third Article 32 hearing, which was held on 10 November 2025. This time, however, the newly appointed PHO recommended referral of all charges and specifications to a general court-martial. OSTC referred the charges on 15 November 2025.

52. This procedural history reflects the Government's deliberate decision to layer multiple specifications for the same criminal act after receiving not only a clear recommendation from a PHO that at least one of their charging theories failed to meet the referral standard (Article 120(b)(3)(A)), but also after a court ruling prevented them from bringing forward that very same theory. In doing so, the Government fails to show a good-faith pursuit of alternate charging theories as well as an abuse of charging discretion. The Government could argue that they did get a recommendation from a PHO to refer the present charges to a general court-martial, and as such, their charging scheme was not an act of prosecutorial overreach and was done in good faith. However, this argument would be short-sighted, as it took the Government three tries to find a PHO who could agree with their charging scheme. That argument would also fail to acknowledge the fact that the Government proceeded with the Article 120(b)(3)(A) specification despite a recommendation against it and never had any intention of withdrawing and dismissing that specification in earnest. In fact, the Government laid out in its own memorandum that their decision to withdraw and dismiss the original charges was done only because it could not bring the etizolam theory supporting the Article 120(b)(3)(A) specification to trial in October 2025. The fact that a PHO eventually recommended referral of that specification would not have changed the

Government's charging decision in November 2025 when it referred the charges anew, just as it did not affect the Government's decision to refer the charges and specifications in March 2025. As such, the procedural history of this case demonstrates prosecutorial overreach and abuse in the drafting of the charges. The fifth *Quiroz* factor therefore weighs in favor of the Defense.

53. After weighing all the *Quiroz* factors, it is clear that the Government's current charging scheme is an unreasonable multiplication of charges. Accordingly, this court should exercise its discretion under R.C.M. 906(b)(12) and dismiss one of the specifications of Charge II or, alternatively, merge the specifications for findings and sentencing.

Conclusion

54. Specifications 1 and 2 of Charge II are multiplicitious because they charge two statutory crimes that are the same offense under *Coleman* and are also multiplicitious because they charge multiple violations for the same criminal conduct under *Forrester*. Allowing two separate specifications for the same criminal act would violate the Fifth Amendment and be contrary to existing jurisprudence.

55. If Specifications 1 and 2 of Charge II are found not to be multiplicitious, they are still an unreasonable multiplication of charges. Under *Quiroz*, charging two separate specifications that are based on a single criminal act constitutes an unreasonable multiplication of charges. Here, the Prosecution does not find a single *Quiroz* factor in their favor, as the preponderance of the evidence shows that the specifications are not aimed at distinct criminal acts, they misrepresent and exaggerate criminality, unreasonably increase punitive exposure, and there is evidence of prosecutorial overreach in drafting the charges.

RELIEF REQUESTED

WHEREFORE, the Defense respectfully requests this Honorable Court dismiss either Specification 1 or 2 of Charge II as multiplicitious, or secondarily, dismiss either Specification 1 or 2 of Charge II as an unreasonable multiplication of charges. In the alternative, the Defense requests that Specifications 1 and 2 of Charge II be merged for findings and sentencing as an unreasonable multiplication of charges. The Defense requests an Article 39(a) session for this matter.


ASHLEY M. HARTSHORN, Capt, USAF
Defense Counsel

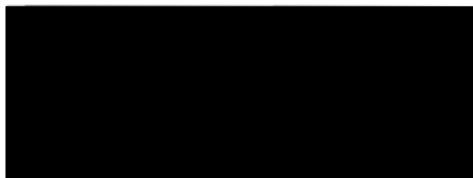
13 Attachments:

1. Excerpt of AFOSI ROI, dated 8 March 2024, 3 pages
 2. Excerpt of AFOSI ROI, dated 8 March, 1 page
 3. Excerpt of AFOSI ROI, dated 8 March, 1 page
- 

6. Excerpt from AFMES Toxicology Report, dated 20 February 2024, 2 pages
7. Drug Enforcement Agency (DEA) Etizolam Fact Sheet, dated March 2025, 1 page
8. [REDACTED]
9. Preliminary Hearing Officer's Report, dated 21 November 2024, 18 pages
10. Preliminary Hearing Officer's Report, dated 29 January 2025, 20 pages
11. Government Motion for Appropriate Relief, dated 29 September 2025, 5 pages
12. Court Ruling on Government Motion for Continuance, dated 2 October 2025, 7 pages
13. OSTC Memorandum on Decision to Withdraw and Dismiss Charges, dated 3 October 2025, 2 pages

CERTIFICATE OF SERVICE

I certify that I have served a true copy (via email and e-filing) of the above on the Military Judge and Trial Counsel on 20 January 2026.



ASHLEY M. HARTSHORN, Capt, USAF
Defense Counsel