IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

CHASE M. THOMPSON,
Airman First Class (E-3),
United States Air Force,
Appellant.

USCA Dkt. No. 22-0098/AF

Crim. App. Dkt. No. ACM 40019

REPLY BRIEF ON BEHALF OF APPELLANT

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Pursuant to Rule 19(a)(7)(B) of this Honorable Court's Rules of Practice and Procedure, Airman First Class (A1C) Chase M. Thompson, the Appellant, hereby replies to the Government's Answer (Answer) concerning the granted issue, filed May 13, 2022.

ARGUMENT

1. **The Government and Appellant both agree the Air Force Court of Criminal Appeals misapplied the law; therefore, this Court should remand with direction to reconsider Appellant's case under the correct legal framework.**

This case marks the rare occasion in which the parties concur in their answer to the granted issue. The Air Force Court of Criminal Appeals (Air Force Court) clearly erred "by requiring that Appellant introduce direct evidence of his subjective belief to meet his burden for a mistake of fact defense[.]" *United States v. Thompson*, ___ M.J. ____, USCA Dkt. No. 22-0098/AF, Order Granting Review (C.A.A.F. March 14, 2022). On nine separate occasions in its brief, the Government describes the pertinent portion of the Air Force Court's opinion as either "incorrect," "mistaken," or reflecting a "misstatement" of the law. *See* Answer at 7, 9, 11, 16, 22. A1C Thompson and the Government agree that the law did not impose a requirement upon A1C Thompson "to testify to meet the burden of establishing his defense." Answer at 8. More importantly, A1C Thompson and the Government further agree the lower court erred "when it suggested 'direct evidence' was required to show that [A1C Thompson] had a subjective belief that VP was at least 16 years

old." Answer at 11. Given this agreement, summary remand to the Air Force Court is appropriate.

The Government urges a different course. It speculates that despite the presence of an agreed upon legal error which infected the lower court's analysis, "applying the correct rule would not have changed the outcome of AFCCA's legal and factual sufficiency analysis." Answer at 16. Therefore, in its measure, "[t]here is no need for this Court to remand this case to AFCCA for a new Article 66 review." Answer at 24.

Rather than accept the Government's invitation to speculate as to how the Air Force Court would have performed its unique statutory responsibility under the correct legal framework, this Court should remand so that A1C Thompson can receive a complete and *proper* factual sufficiency review of his case under Article 66, UCMJ—as is his "substantial right." *United States v. Chin*, 75 M.J. 220, 222 (C.A.A.F. 2016). That is precisely what this Court did mere months ago when it determined that the Navy-Marine Corps Court of Criminal Appeals applied the wrong legal standard during the course of its Article 66, UCMJ, review. *See United States v. Metz*, 82 M.J. 45 (C.A.A.F. 2021). The Government offers no convincing reason why this Court should do otherwise in this case. Indeed, remand is particularly appropriate here because the Air Force Court's *legal* error directly implicated its *factual sufficiency* review.

2. This Court has no charge to conduct its own factual sufficiency review; only service Courts of Criminal Appeals possess this unique statutory authority.

Remand is all the more appropriate here given that service Courts of Criminal Appeals (CCAs) have the statutory mandate to review cases for legal *and factual* sufficiency whereas this Court can only review cases for *legal* error. *Compare* Article 66(d)(1), UCMJ *with* Article 67(c)(4), UCMJ; *see also United States v. Clark*, 75 M.J. 298, 300 (C.A.A.F. 2016) (reiterating that this Court has held it retains "the authority to review factual sufficiency determinations of the CCAs for the application of 'correct legal principles,' but only as to matters of law"); *United States v. Ashby*, 68 M.J. 108, 124 (C.A.A.F. 2009) (the Court of Appeals for the Armed Forces "is limited to errors of law").

The Government's Answer, however, seemingly does not appreciate that this Court "may not reassess a lower court's fact-finding." *United States v. Leak*, 61 M.J. 234, 241 (C.A.A.F. 2005). This is perhaps best evidenced by the fact that the Government devotes three pages and an entire section of its brief to arguing that, as a factual matter, "the Government presented evidence proving Appellant knew VP was under 16." *See* Answer at 16 – 19. This contention cannot be squared with the Air Force Court's decision to dismiss A1C Thompson's child pornography charge and specification for factual insufficiency based upon the Government's failure to prove that A1C Thompson knew VP was under the age of 18 at the operative time—

let alone 16. *See* JA at 12. And while the Air Force Court determined that "it is quite probable that Appellant did in fact become aware *at some point* in their brief relationship that VP was under the age of 18" it came to this conclusion in part "[b]ased on VP's statements to AFOSI agents that *she told Appellant she was 16 years old* . . . ." *Id*. (emphasis added). Accordingly, commensurate with its factual sufficiency review, the Air Force Court determined that VP reported to law enforcement that she told A1C Thompson she was *16 years old*. JA at 006. This factual determination by the Air Force Court only further reinforces Appellant's ultimate position.

While much of the Government's Answer is devoted to resurrecting factual arguments the Air Force Court dismissed, at no point does the Government even mildly insinuate that the Air Force Court's factual findings were clearly erroneous. Nor could it. As this Court unanimously reiterated just days ago, a lower court's factual finding is only clearly erroneous if there is either no evidence to support it or "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Horne*, ___ M.J. ___, Dkt. No. 21-0360/AF, slip op. at *5 (C.A.A.F. May 13, 2022) (quoting *United States* v. *Criswell*, 78 M.J. 136, 141 (C.A.A.F. 2018)). There is no reason for this Court to reject the Air Force Court's factual findings made commensurate with its conclusion that A1C Thompson's child pornography conviction was factually

insufficient, as they are not clearly erroneous. *See* Opening Br. at 14 (quoting *United States v. Best*, 61 M.J. 376, 381 (C.A.A.F. 2005) for the proposition that "the findings of fact made by a court below are accepted unless clearly erroneous."). Therefore, the Government's factual arguments are not just unpersuasive; before this Court they are altogether inapposite.

3. Appellant's burden to establish a reasonable mistake of fact as to age defense did not require him to personally introduce any evidence.

At various points in its Answer, the Government seems to suggest that Appellant's burden of raising his mistake of fact as to age defense actually required him to *introduce* evidence. *See* Answer at 11 ("Appellant did not present *any* evidence – direct or circumstantial – demonstrating his honest, but mistaken, belief as to VP's age"); *id*. at 13 ("Yet regardless of AFCCA's observation, AFCCA correctly concluded Appellant failed to meet the burden of his affirmative defense because he failed to present *any* evidence of his subjective belief"); *id*. at 14 ("Despite Appellant's ability to present direct or circumstantial evidence of his actual belief as to VP's age, Appellant failed to provide any such evidence"); *id*. at 15 ("But Appellant proffered no such evidence"); *id*. at 16 ("Since Appellant failed to present any evidence (direct or circumstantial) of his inner conviction as to VP's age, AFCCA rightly determined he did not meet his burden of establishing the mistake of fact as to age defense"); *id*. at 23 ("Appellant failed to present any evidence of his subjective belief as to VP's age"). To the extent the Government is

advancing an argument that A1C Thompson's burden required him to *personally introduce* evidence to prevail on this affirmative defense, the Government is wrong.

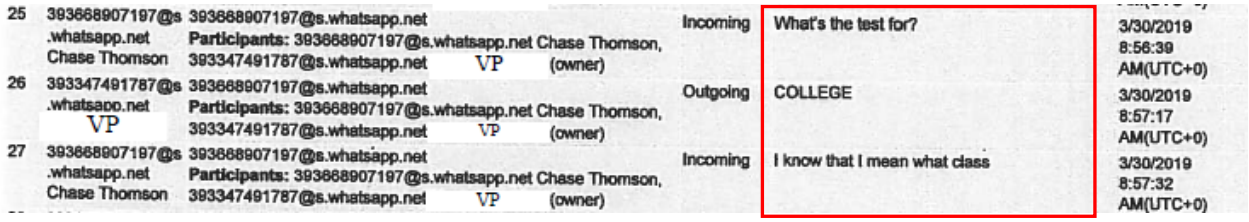
As A1C Thompson noted in his initial submission, an affirmative defense may "be raised by evidence presented by the defense, the prosecution, or the court-martial." Opening Br. at 18 (quoting R.C.M. 916(b)(3), Discussion). That is, an accused is free to rely upon any and all evidence introduced at trial in raising an affirmative defense; there is no requirement that he must actually sponsor, present, or introduce the evidence he intends to rely upon. It is of no consequence whatsoever whether such evidence is stamped as a Prosecution or Defense exhibit—all that matters is whether there *is* an evidentiary basis upon which to ground the defense.

While an accused seeking to raise an affirmative mistake of fact as to age defense in an Article 120b, UCMJ, prosecution may bear the burden of persuasion, that does not mean he is required to actually *introduce* such evidence in order to prevail. A burden of persuasion merely "require[s] an accused to affirmatively prove by some standard of proof that he came within the exception." *United States v. Brewer*, 61 M.J.425, 431 (C.A.A.F. 2005). A1C Thompson was free to rely on any and all evidence introduced at trial to meet his burden of persuading the trier of fact that, by a preponderance of the evidence, he reasonably believed VP had attained the age of 16 years of age. And he did just that by relying in no small part upon the evidence introduced by the Government and through cross-examination of the

Government's witnesses. To the extent the Government's own evidence and witnesses gave rise to a mistake of fact as to age defense, A1C Thompson was perfectly free to—and did—capitalize upon these matters in meeting his burden of persuasion.

4. The WhatsApp messages introduced at trial provide concrete examples of A1C Thompson's subjective belief that VP was at least 16 years old.

In arguing for this Court to affirm a factual sufficiency review premised upon an incorrect legal predicate, the Government offers several scenarios as to how it believes A1C Thompson could have theoretically met his burden. Specifically, it posits two hypothetical means by which he could purportedly "have circumstantially illustrated his state of mind as to VP's age" such that he could have prevailed in raising this affirmative defense without having to testify. Answer at 15. The first hypothetical is "if Appellant texted VP asking her who she intended to vote for in this year's election, that might have circumstantially showed he believed she was 18." *Id*. While the WhatsApp messages which were introduced at trial may not have contained any discussions about voting in an election, they *do* include this exchange:



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26	393347491787@s.whatsapp.net VP	393668907197@s.whatsapp.net Participants: 393668907197@s.whatsapp.net 393347491787@s.whatsapp.net	VP	Chase Thomson, (owner)	Outgoing	COLLEGE	3/30/2019 8:57:17 AM(UTC+0)
27	393668907197@s.whatsapp.net Chase Thomson	393668907197@s.whatsapp.net Participants: 393668907197@s.whatsapp.net 393347491787@s.whatsapp.net	VP	Chase Thomson, (owner)	Incoming	I know that I mean what class	3/30/2019 8:57:32 AM(UTC+0)

See JA at 154.

This exchange serves as strong circumstantial proof that A1C Thompson subjectively believed VP was at least 16 years old. Indeed, it is the functional equivalent to the "voting" hypothetical the Government offers. These messages, introduced into evidence at trial, not only show VP telling A1C Thompson that she is taking a test for "COLLEGE" but more importantly they show A1C Thompson expressing his subjective belief that he *knows* she is taking a college test. The only question in his mind is *what* college class her test concerns. His exact words are "I know that I mean what class." JA at 154. Therefore, contrary to the Government's assertion that A1C Thompson "cannot point to a single statement by him that reflects his actual belief that VP was at least 16" (Answer at 15-16), the foregoing WhatsApp exchange serves as a concrete example demonstrating just that.[1] Especially given that VP's Bumble profile separately claimed she was an "undergrad" in "college" (JA at 215-16), A1C Thompson established by a preponderance of the evidence that he reasonably believed VP was at least 16 years old. Simply put, his WhatsApp message stating that he *knew* VP was studying for a college test sufficiently established his subjective belief. There is no functional difference between this factual scenario and the voting hypothetical the government offers.

[1] A1C Thompson repeatedly cited to this particular WhatsApp conversation in his initial submission. *See* Opening Br. at 4, 29. His trial defense counsel likewise emphasized this exchange in his closing argument. JA at 135. And the Air Force Court took specific note of the fact VP told A1C Thompson she was taking a college class in its opinion. JA at 013.

The second hypothetical the Government offers regarding how Appellant could have established his mistaken belief is if "a witness testified that he had observed Appellant taking VP to an over-18 bar or club . . . ." Answer at 15. But again, A1C Thompson did one better. As the Air Force Court observed, the WhatsApp messages showed that VP and A1C Thompson discussed how, at the time, VP was "leaving Italy to go to London and Germany for weeks at a time when someone under 18 years old would presumably have been in school." JA at 013. Moreover, the two even discussed taking a trip to Cape Town, South Africa with one another. JA at 180-81. This was hardly fantastical talk; VP said "I'm so serious [heart emoji] let's go" and A1C Thompson responded back by saying "So am I." JA at 181. VP also told Appellant she had already planned to travel to Cape Town in the coming months, and would therefore "already know where to go . . . ." JA at 180. If evidence that A1C Thompson intended to take VP to an 18 and older club were enough to establish a subjective belief on his part—as the Government suggests that it would be—then surely evidence that the two planned to travel to an altogether different continent would meet that bar as well.

5. Because the parties agree the Air Force Court erred in requiring direct evidence, this Court need not address the Government's theoretical arguments that are not presented here.

Finally, because the Government agrees that the Air Force Court was wrong to insist upon direct evidence from A1C Thompson, this concession has largely

mooted the need to take up Appellant's Fifth Amendment argument. Both sides agree that the Air Force Court was wrong because the law does not require direct evidence. A1C Thompson made clear in his Opening Brief that he did "not contest that it is constitutionally permissible to allocate to a defendant the burden of proving an affirmative defense." Opening Br. at 12 (internal quotations omitted). The crux of A1C Thompson's Fifth Amendment argument was that to the extent the Government maintained the Air Force Court was correct to insist upon the need for direct evidence, the Fifth Amendment foreclosed such a position. But because the Government agreed the Air Force Court erred in this respect, this particular matter is effectively moot. The single point of emphasis which bears repeating, however, is that to the extent the Air Force Court held A1C Thompson's decision not to testify against him during its factual sufficiency review in determining whether he met his burden, this was error. *See generally* Opening Br. at 26-30.[2]

[2] To be sure, A1C Thompson maintains that Congress cannot create a statutory scheme which in effect *requires* an accused to testify in order to satisfy his burden of proof for an affirmative defense. *See* Opening Br. at 30-32. The Government does not directly address this precise contention in its Answer, but insists that there may be case-by-case situations in which an accused's testimony may be the only compelling evidence to establish subjective belief, and that this would not render a Fifth Amendment violation. Answer at 22. That is a different matter entirely because it focuses upon the available evidence in a given case, not the legislative scheme itself. None of the case law the Government cites supports the notion that Congress can require an accused to testify in order to invoke an affirmative defense. In any event, because both parties agree that the Air Force Court erred in its application of the law, it is unnecessary to address the nuances of hypothetical scenarios which are not actually at issue.

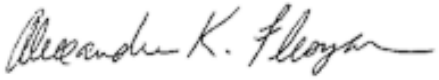
Despite agreeing that the Air Force Court erred in this particular case, "the government contends there may still be scenarios in which an accused may need to testify in order to show his subjective belief." Answer at 20. As this is not such a case, the Government's hypothetical concerns are best left addressed for another day. Even the Government acknowledges that there is now no real reason to consider this Fifth Amendment angle given the agreement between the parties on the more narrow question:

> In this case, the law does not require Appellant to testify in order to meet the burden of his defense. But *should* the facts and circumstances of this case be such where Appellant's testimony was the only compelling evidence to show his subjective belief of VP's age, then it *would* not be a Fifth Amendment infringement for Appellant to have to testify to present that evidence.

Answer at 22 (emphasis added). Rather than having this Court conjure hypothetical situations not presented here, and because the parties agree the Air Force Court erred on more narrow grounds, it is now unnecessary for this Court to go down the Government's theoretical road in order to grant A1C Thompson the relief he seeks. As the Supreme Court has expressed, "[i]t is not a habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Burton v. United States*, 196 U.S. 283, 295 (1905). And "a desire to reshape the law does not provide a legitimate basis for issuing what amounts to little more than an advisory opinion that, at best, will have the precedential value of pure dictum . . . ." *Hudson v. United States*, 522 U.S. 93, 112 (1997) (Scalia, J., concurring).

WHEREFORE, A1C Thompson respectfully requests this Honorable Court remand the case to the Air Force Court of Criminal Appeals for renewed consideration under Article 66, UCMJ, under the correct legal standard.

Respectfully Submitted,



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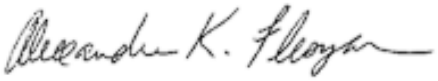
CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Appellate Government Division on May 23, 2022.

Respectfully Submitted,



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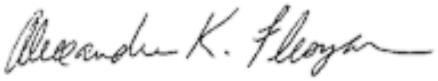
CERTIFICATE OF COMPLIANCE WITH RULES 24(d) and 37

1. This brief complies with the type-volume limitation of Rule 24(c) because it contains 3,173 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word Version 2016 with Times New Roman 14-point typeface.

Respectfully Submitted,



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