IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellant,

v.

ZACHARY C. ROCHA,
Airman (E-2),
United States Air Force,
Appellee.

USCA Dkt. No. 25-0157/AF

Crim. App. Dkt. No. 40134 (rem)

BRIEF ON BEHALF OF APPELLEE

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Certified Issues

I.

Did the Air Force Court of Criminal Appeals fail to follow this Court's remand instruction by analyzing the purported *Lawrence v. Texas*, 539 U.S. 558 (2003), liberty interest as "masturbation in solitude, in secret, and in private," instead of "privately engag[ing] in sexual activity with a childlike sex doll"?

II.

Did the Air Force Court of Criminal Appeals err in its application of *Lawrence v. Texas*, 539 U.S. 558 (2003) and *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004) to find Appellee's conviction factually insufficient?

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) reviewed Airman (Amn) Zachary C. Rocha's case, pursuant to Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d).[1] This Court has jurisdiction under Article 67(a)(2), UCMJ, 10 U.S.C. § 867 (a)(2).[2]

[1] Unless otherwise noted, all references to the UCMJ and Rules for Courts-Martial (R.C.M.s) are to the version published in the *Manual for Courts-Martial*, *United States* (2019 ed.) (MCM). 10 U.S.C. § 866 has since been amended in 2021 (effective Dec. 27, 2023 and applicable to offenses that occur after that date) and 2022 (applicable only to matters submitted on or after Dec. 23, 2022). None of these amendments are applicable in this case.

[2] 10 U.S.C. § 867 has since been amended in 2021 (effective Dec. 27, 2023, and applicable to offenses that occur after that date). This amendment is not applicable in this case.

Relevant Authorities

In relevant part, Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) provides:

> (1) CASES APPEALED BY ACCUSED.— . . . The Court may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, the Court may weigh the evidence, judge the credibility of witness, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

In relevant part, Article 67(c)(4), UCMJ, 10 U.S.C. § 867(c)(4), provides:

> (4) The Court of Appeals for the Armed Forces shall take action only with respect to matters of law.

In relevant part, Article 134, UCMJ (Indecent conduct) provides:

> b. *Elements*.
> (1) That the accused engaged in certain conduct;
> (2) That the conduct was indecent; and
> (3) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.
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> c. *Explanation*.
> (1) "Indecent" means that form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.

Statement of the Case

On March 19, 2021, a panel of officer members sitting as a general court-martial convicted Amn Rocha, contrary to his pleas, of one charge and one

specification of indecent conduct, in violation of Article 134, UCMJ, 10 U.S.C. § 934.[3] The military judge sentenced Amn Rocha to reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for ninety days, and a bad-conduct discharge.[4]

Amn Rocha raised several errors to the AFCCA.[5] After the AFCCA set aside the findings and sentence and dismissed the charge and specification with prejudice based on a lack of fair notice, The Judge Advocate General (TJAG) certified the case for review.[6]

On May 8, 2024, this Court concluded "that the presidentially enumerated language of indecent conduct under Article 134 was sufficient by itself to provide fair notice that [Amn Rocha's] conduct was criminally sanctionable."[7] This Court reversed the AFCCA's decision and remanded the case to the lower court to:

> (1) determine whether [Amn Rocha] had a constitutionally protected liberty interest under *Lawrence v. Texas* . . . to privately engage in sexual activity with a childlike sex doll; and (2) address any other issues previously raised by [Amn Rocha] before the [AFCCA] that were mooted by the lower court's prior decision to overturn the conviction.[8]

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[3] Joint Appendix (JA) at 239.
[4] JA at 240.
[5] JA at 002.
[6] JA at 002, 012, 013; *United States v. Rocha*, No. 23-0134/AF, 2023 CAAF LEXIS 181, at *1 (C.A.A.F. Mar. 31, 2023).
[7] *United States v. Rocha*, 84 M.J. 346, 352 (C.A.A.F. 2024).
[8] *Id*.

This Court noted that the fair notice issue was "entirely separate" from whether Amn Rocha's behavior is constitutionally protected.[9] This Court explained it was remanding the case "with instructions to determine, in the first instance, whether [Amn Rocha's] behavior is constitutionally protected."[10]

On January 15, 2025, the AFCCA set aside the findings and sentence and dismissed with prejudice the charge and specification based on a constitutionally protected liberty interest and factual insufficiency.[11]

After the AFCCA denied the Government's motion for reconsideration,[12] Major General Rebecca Vernon, purportedly Performing the Duties of The Judge Advocate General, certified the case for review.[13]

Statement of Facts

A. The Dorm Inspection: "I didn't know if it was illegal or not."

In May 2019, the Mountain Home Air Force Base (AFB) commander ordered a morale and welfare inspection for the dormitory ("dorm") rooms on base.[14] While inspecting Amn Rocha's single-occupancy bedroom, Technical Sergeant (TSgt) LM found a lifelike doll on Amn Rocha's bed.[15] The doll was fully clothed and did not

[9] *Id*. at 352 n.4.
[10] *Id*.
[11] JA at 042.
[12] JA at 084.
[13] Certificate for Review, May 5, 2025.
[14] JA at 278, 141.
[15] JA at 095.

have hair.[16] It was made of silicone, had realistic skin tones, was an anatomically correct female, and was approximately three or four feet tall.[17] The second inspector who saw the doll "didn't know if it was illegal or not," so he had the Air Force Office of Special Investigations (OSI) come into Amn Rocha's room to "review" it.[18] The OSI agents called the legal office to discuss the doll because they also were not sure "if [the doll] was against any MCM . . . [or] rule[,]" or if it was illegal.[19]

B. The OSI Interview: "It's embarrassing."

Amn Rocha spoke to OSI agents about his sex doll and sexual habits.[20] Amn Rocha most likely suffered from depression and had been hospitalized for suicidal ideations.[21] His default emotion was sad.[22] He did not fit in at work.[23] Amn Rocha was lonely and would talk to the body pillows on his bed.[24] After a while, he got sad talking to them.[25] Amn Rocha's decision to buy a doll was an "emotional" one, to give him something that is "like a person [to] take care of," and to give him a sense of belonging.[26] He also wanted something that was "more than

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[16] JA at 103, 108.
[17] JA at 103, 161-62.
[18] JA at 097.
[19] JA at 103, 108, 261.
[20] JA at 147.
[21] JA at 259.
[22] JA at 176.
[23] JA at 117.
[24] JA at 163.
[25] *Id*.
[26] JA at 200.

just a cup with some sponges" to masturbate with.[27] However, he did not think of the doll as a "sex" doll per se.[28]

Amn Rocha never specifically looked for a *child* doll.[29] Rather, he looked for a mini-sex doll because he lived in the dorms and he needed something that would not take up a lot of space.[30] Amn Rocha explained that from a "logical point of view . . . you can't really do much with a -- like life size, fully fledged, adult sized doll, you know, it's very bulky, it's hard to move."[31] Amn Rocha purchased a doll from a website that did not describe the doll as a child, but it was apparent from the pictures that the doll looked like a child.[32] Amn Rocha had the doll shipped to a colleague who lived off base because the website would not ship the doll to a Post Office Box and he thought it would be better not to have the doll shipped to a military installation.[33] The colleague brought the package to base and gave it to Amn Rocha approximately two to three weeks before the dorm inspection.[34]

There was never a time Amn Rocha pictured the doll as a real child.[35] However, Amn Rocha named his doll, watched television with it, and would brush

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[27] JA at 199.
[28] JA at 206.
[29] JA at 205.
[30] JA at 199.
[31] JA at 159.
[32] *Id*.
[33] JA at 117, 151.
[34] JA at 118, 178.
[35] JA at 203.

its hair.[36] He clothed the doll and talked to it.[37] He would pose the doll around his room, giving it a book to read, so he could pretend it was reading.[38] Sometimes he would put the doll in his bed and other times he would put it in a chair with a blanket.[39] Amn Rocha developed "some sort of connection" with the doll, but it did not feel "like a real connection."[40] Amn Rocha felt that all this was "embarrassing" and that if someone saw the doll in his room they would "get some weird idea."[41] Amn Rocha never took the doll outside of his dorm room and never spoke to anyone about it.[42]

Amn Rocha was reluctant to tell OSI about his masturbation habits and the doll, but OSI insisted.[43] At the time of the dorm inspection, Amn Rocha was twenty years old, had strong sexual urges, and would get erections.[44] These erections would get "annoying" so he would try to get blood flowing to other parts of his body or he would masturbate so the erections would go away.[45]

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[36] JA at 155.
[37] JA at 155, 175.
[38] JA at 203.
[39] JA at 160.
[40] JA at 171.
[41] JA at 155, 171.
[42] JA at 162, 167.
[43] JA at 166-67, 173, 177.
[44] JA at 253, 170.
[45] JA at 169-70.

C. Amn Rocha: "I can't see myself doing that to an actual child."

Amn Rocha admitted that he kissed and cuddled the doll.[46] He also admitted sticking his penis inside its vaginal and anal opening on three separate occasions.[47] However, he said, "I was never like, damn that looks kind of good . . . the purpose is not really like, oh, yeah, look at that sexy butt" and he "couldn't imagine doing that to an actual person."[48] Amn Rocha never ejaculated inside the doll.[49] He explained that using the doll to masturbate actually made him sad, "[b]ecause I thought to myself, what if this was a life, what if this was real, and, yeah, it's sad, so I stopped. I felt dirty."[50] He stated, "I can't see myself doing that to an actual child."[51]

D. Amn Rocha: "I think child pornography is actual child abuse."

Amn Rocha stuck his penis inside the doll on two more occasions because of the "fact that it was just a doll."[52] However, the experience "turned real" and Amn Rocha "had to stop."[53] Amn Rocha said, "I felt bad because I did like it up until [the] point where I started thinking about if it were like, say, somebody's

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[46] JA at 168.
[47] JA at 175-78.
[48] JA at 175, 172.
[49] JA at 181.
[50] JA at 201.
[51] *Id*.
[52] *Id*.
[53] JA at 202.

daughter and I kind of felt like disgusted with myself, you know. . . . It was more like, if this was my daughter, I wouldn't have somebody doing this, I would kill them."[54] Amn Rocha clarified that he never pictured the doll as a real child, and he was never into it as if the doll were a real child.[55] When asked, he said he never viewed pornography during these experiences: "No. In the first place, I don't really like actual pornography. And I think child pornography is actual child abuse. . . . And it kind of seems strange that I have, basically what is a child sex doll, yet that being said, I think child pornography with a real child involved is just disgusting."[56]

E. The military judge instructed on a single *United States v. Marcum*[57] factor.

At the conclusion of the Government's case at Amn Rocha's court-martial, trial defense counsel made an oral R.C.M. 917 motion.[58] Defense counsel argued that Amn Rocha's conduct was permissible under *Lawrence*[59] and *Marcum*;[60] that there was no aggravating factor in the case; that owning the doll was not illegal; and masturbation was not illegal.[61] The military judge denied defense counsel's motion and found that "[t]he only aggravating circumstance . . . raised by the evidence at

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[54] *Id*.
[55] JA at 203.
[56] *Id*.
[57] 60 M.J. 198 (C.A.A.F. 2004).
[58] JA at 208.
[59] *Lawrence v. Texas*, 539 U.S. 558 (2003).
[60] 60 M.J. 198.
[61] JA at 208-10.

this point is that [Amn Rocha] engaged in sexual acts with a sex doll with the physical characteristics of a female child in order to simulate sexual acts with a minor."[62]

The military judge instructed the panel members on the elements and definitions of the offense of indecent conduct, in violation of Article 134, UCMJ, 10 U.S.C. § 934.[63] The military judge then instructed the panel members,

> This provision is not intended to regulate wholly private consensual sexual activity. In the absence of an aggravating circumstance, private consensual sexual activity, including masturbation with or without any nonliving object, is not punishable as indecent conduct. The government has asserted the existence of the following aggravating circumstance to prove the alleged conduct is indecent: *[Amn Rocha] engaged in sexual acts with a sex doll with the physical characteristics of a female child, to simulate sexual acts with a minor*.
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> *To find [Amn Rocha] guilty of this offense, you must be convinced of the existence of this aggravating circumstance beyond a reasonable doubt.*[64]

F. The AFCCA found Amn Rocha's conviction was factually insufficient.

Relevant to this appeal, Amn Rocha raised the following issues to the AFCCA: 1) whether private masturbation with a doll is constitutionally protected; and 2) whether his conviction is factually sufficient.[65] After the AFCCA reviewed Amn Rocha's case a second time, it found that Amn Rocha "had a constitutionally

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[62] JA at 217.
[63] JA at 219-29.
[64] JA at 220 (emphasis added).
[65] JA at 026.

protected liberty interest to privately engage in sexual activities with his doll" and that his "conviction was not factually sufficient."[66]

The AFCCA first addressed this Court's opinion in this case, stating it was "endeavor[ing] to follow [this Court's] remand guidance."[67] It noted, however, an area of concern: that this Court's majority opinion reads as if it "found as fact that the doll had 'the physical characteristics of a prepubescent child.'"[68] The AFCCA acknowledged that while the Courts of Criminal Appeals (CCAs) may determine questions of fact, this Court may not.[69] Because the AFCCA had not yet made a finding "concerning whether the doll was a representation of a child," it interpreted this Court's factual language in its opinion regarding the physical characteristics of the doll to be merely an expansion of the language from the specification of which Amn Rocha was convicted.[70]

The AFCCA next addressed the issues raised under *Lawrence*, as well as factual sufficiency. In finding Amn Rocha's "conduct—masturbation, in solitude, in secret, and in private living quarters—should warrant the *Lawrence* liberty protection," the lower court explained that it was not dissuaded merely because "these facts are different than the facts in *Lawrence*" or because of the "ostensibly

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[66] JA at 027.
[67] JA at 028.
[68] *Id.* (citing *Rocha*, 84 M.J. at 348, 351).
[69] JA at 029 (comparing 10 U.S.C. § 867 (2018) with 10 U.S.C. § 866 (2018)).
[70] *Id*. (citing JA at 003 n.5).

childlike appearance of the doll."[71] The AFCCA reasoned that "the focal point of *Lawrence* was private, consensual sexual activity, not merely fostering intimate relationships."[72] The AFCCA continued, noting it was not persuaded that *Lawrence* "protect[s] sexual activity done consensually with another but [does] not protect comparable conduct done alone where consent is not an issue."[73] The lower court declared that Amn Rocha's conduct did not involve any factors that would take it outside of the protections afforded under *Lawrence* and therefore, found his conduct "falls within the *Lawrence* liberty interest."[74]

The AFCCA then, as part of its factual sufficiency review, evaluated whether Amn Rocha's conduct involved "certain criteria (*Marcum* factors) 'that remove sexual activity from the scope of *Lawrence*'s protected interest.'"[75] The lower court noted that the "most prominent theme in application of the *Marcum* factors is military nexus, to include commission of military offenses."[76] It specifically "consider[ed] *Marcum* factors raised in this case and appl[ied] them in [its] factual sufficiency analysis."[77] This included the single *Marcum* factor the military judge identified and instructed on at trial, as well as other "Government-asserted *Marcum*

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[71] JA at 034.
[72] JA at 035.
[73] *Id*.
[74] *Id*.
[75] JA at 037 (citing *United States v. Castellano*, 72 M.J. 217, 218 (C.A.A.F. 2013)).
[76] JA at 038 (citations omitted).
[77] *Id*.

factors."[78]

The AFCCA contended it was "not convinced [Amn Rocha] was pretending he was having sexual intercourse with a child."[79] The lower court referenced Amn Rocha's statements that "he was not sexually interested in children," "he stopped his sexual conduct when the thought of it being a real person, child or not, came to his mind," and that "a larger doll would be bulky and hard to move in a small dorm room."[80] The AFCCA was also "not convinced the only rational interpretation of the evidence in this case is that the doll resembled a child and not a young-looking adult," and therefore, it did not "find that [Amn Rocha] simulated sexual acts with a child."[81]

The lower court ultimately held that the "nature of the object with which [Amn Rocha] masturbated does not take the conduct outside the *Lawrence* liberty interest."[82] The lower court also "consider[ed] potential discredit to the service" and still "found that [Amn Rocha's] conduct . . . should warrant the *Lawrence* liberty protection."[83]

Finally, the lower court asserted that "[t]he fact that the conduct charged in

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[78] *Id*.
[79] *Id*.
[80] *Id*.
[81] *Id*.
[82] *Id*.
[83] *Id*.

this case occurred in [Amn Rocha's] dorm bedroom does not 'affect the nature and reach of the *Lawrence* liberty interest.'"[84] It explained that the "military nexus here is thin" and "[i]f one concludes Airmen do not enjoy a *Lawrence* liberty interest in their private dorm room, then private masturbation—with or without a sex toy or some other inanimate object—could be subject to criminal sanction as an immoral sexual act."[85]

Ultimately, the AFCCA found that "[a]t most, [Amn Rocha's] conduct involves a lifelike sex doll that *may* resemble a child,"[86] it was "not persuaded [Amn Rocha's] conduct simulated or normalized sexual abuse of a child,"[87] and it was "not convinced any *Marcum* factor applies in this case to remove a constitutionally protected liberty interest in solitary, secret masturbation in one's private space."[88] The lower court "determined the evidence [did] not support all the elements, including that [Amn Rocha's] conduct was both indecent, and under the circumstances, of a nature to bring discredit upon the armed forces."[89]

Summary of the Argument

This Court affords a CCA significant deference when assessing the CCA's

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[84] JA at 040 (citing *Marcum*, 60 M.J. at 207).
[85] JA at 041.
[86] *Id*. (emphasis added).
[87] *Id*.
[88] *Id*.
[89] JA at 042.

factual sufficiency determination. This Court may review the lower court's decision for the application of correct legal principles,[90] but this Court does not conduct its own factual sufficiency review.[91] Only when a CCA "act[s] without regard to a legal standard or otherwise abuse[s] its discretion" will this Court disrupt a CCA's action to disapprove findings.[92]

This Court directed the AFCCA to determine whether Amn Rocha's behavior is constitutionally protected, and to address any other issues raised by Amn Rocha that had been previously mooted by the lower court's prior decision.[93] Here, the AFCCA followed this Court's remand instructions. The AFCCA correctly determined that Amn Rocha "had a constitutionally protected liberty interest to privately engage in sexual activities with his doll"[94] and that his "conduct—masturbation, in solitude, in secret, and in private living quarters—should warrant the *Lawrence* liberty protection."[95] The lower court then correctly applied *Lawrence*

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[90] *United States v. Thompson*, 83 M.J. 1, 4 (C.A.A.F. 2022) (citation modified); *see United States v. Leak*, 61 M.J. 234, 241 (C.A.A.F. 2005) ("[I]t is within this Court's authority to review a lower court's determination of factual insufficiency for application of correct legal principles. At the same time, this authority is limited to matters of law; we may not reassess a lower court's [factfinding].").
[91] *See* 10 U.S.C. § 867(c)(4) (2018); *see also United States v. Mendoza*, 85 M.J. 213, 222 (C.A.A.F. 2024) ("[T]his Court does not review the factual sufficiency of convictions when we review cases under Article 67, UCMJ." (citation modified)).
[92] *United States v. Nerad*, 69 M.J. 138, 147 (C.A.A.F. 2010).
[93] *Rocha*, 84 M.J. at 352, 352 n.4.
[94] JA at 027.
[95] JA at 034.

to its factual sufficiency analysis because it was not convinced beyond a reasonable doubt any *Marcum* factor was met.

Even if this Court determines *Lawrence* does not apply in this case, Amn Rocha's conduct was still constitutionally protected. And the AFCCA concluded, as part of its factual sufficiency analysis, that Amn Rocha's conduct was not service discrediting. Regardless of whether this Court would come to a different outcome, the AFCCA's determination was not an abuse of discretion.

This Court should find that the AFCCA did not err in its factual sufficiency analysis, answer the first certified question in the positive and the second certified question in the negative, and affirm the decision of the AFCCA.

Argument

I.

The Air Force Court of Criminal Appeals correctly followed this Court's remand instructions.

Standard of Review

Whether a lower court properly interpreted and complied with legal authority is a question of law and is reviewed *de novo*.[96]

[96] *See United States v. St. Blanc*, 70 M.J. 424, 427 (C.A.A.F. 2012) ("[I]nterpretation of UCMJ and R.C.M. provisions and the military judge's compliance with them are questions of law, which we review *de novo*.").

Law and Analysis

The AFCCA thoughtfully explained in its opinion how it followed the entirety of this Court's remand guidance, taking into account its statutory authority and this Court's.[97] The Government's argument to the contrary, faulting the AFCCA for not adopting verbatim this Court's use of "childlike" in its decretal paragraph,[98] ignores the rest of this Court's earlier decision and those distinct authorities.

"On a remand from this Court, a [CCA] 'can only take action that conforms to the limitations and conditions prescribed by the remand.'"[99] A subordinate court "has no power or authority to deviate from the mandate issued by [a superior] appellate court."[100] However, "the intent and scope of [an appellate court's] mandate is not governed solely by the terms in [the] decretal paragraph."[101] Indeed, "[t]he opinion delivered by the [superior appellate court], at the time of rendering its decree, may be consulted to ascertain what is intended by its mandate."[102]

This Court instructed the AFCCA to:

> (1) determine whether [Amn Rocha] had a constitutionally protected liberty interest under *Lawrence* . . . to privately engage in sexual activity with a childlike sex doll; and (2) address any other issues

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[97] JA at 028-30.
[98] U.S. Br. in Support of the Certified Issues (Gov't Br.) June 11, 2025, at 17-22.
[99] *United States v. Riley*, 55 M.J. 185, 188 (C.A.A.F. 2001) (citing *United States v. Montesinos*, 28 M.J. 38, 44 (C.M.A. 1989)).
[100] *Briggs v. Pa. R. Co.*, 334 U.S. 304, 306 (1948) (citations omitted).
[101] *United States v. McMurrin*, 72 M.J. 697, 703 (N-M. Ct. Crim. App. 2013) (citations omitted).
[102] *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895).

> previously raised by [Amn Rocha] before the [AFCCA] that were mooted by the lower court's prior decision to overturn the conviction.[103]

Prior to issuing the remand instructions, this Court acknowledged that "whether [Amn Rocha's] conduct was constitutionally protected" is an "entirely separate issue" from "whether [he] had fair notice," which was then the only issue before this Court.[104] This Court then emphasized that "it is not the role of this Court to decide this matter *prior to the CCA employing its factfinding authority*."[105] The Court then explained it was "remand[ing] the case to the CCA with instructions to determine, in the first instance, *whether [Amn Rocha's] behavior is constitutionally protected*."[106]

Although this Court used the language "childlike sex doll" in its opinion, this Court recognized that it did not have authority to make a factual determination about whether the doll at issue was "childlike."[107] Rather, only the CCAs have factfinding powers under Article 66, UCMJ, and only once the AFCCA had utilized its factfinding powers could this Court then consider the question of constitutionally-

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[103] *Rocha*, 84 M.J. at 352.
[104] *Id*. at 352 n.4.
[105] *Id*. (emphasis added) (referencing 10 U.S.C. § 867 (2018); 10 U.S.C. § 866 (2018)).
[106] *Id*. (emphasis added).
[107] *Id*.; *see United States v. Jacinto*, No. 24-0144, 2025 CAAF LEXIS 388, at *4 (C.A.A.F. May 19, 2025) ("This Court cannot engage in factfinding on its own."). If anything, it seems this Court's use of the word "childlike" in its opinion may have been tied to the certified issue, which posited as a matter of fact that the doll at issue was a "child sex doll."

protected conduct under *Lawrence*.[108]

In returning the case to the AFCCA to exercise that factfinding authority, this Court also instructed the lower court to address any other issues previously raised by Amn Rocha which had been mooted by the lower court's original decision, to include factual sufficiency. That is just what the AFCCA did.

As illustrated below, the AFCCA complied with this Court's remand guidance:

This Court's decretal paragraph:	**The AFCCA's conclusion:**
[D]etermine whether [Amn Rocha] had a constitutionally protected liberty interest under *Lawrence* . . . to privately engage in sexual activity with a childlike sex doll[.][109]	We find [Amn Rocha] had a constitutionally protected liberty interest to privately engage in sexual activities with his doll.[110]

The AFCCA's conclusion is nearly identical to this Court's decretal paragraph. Additionally, the AFCCA's decision was further consistent with the procedural posture of Amn Rocha's case on remand and the context of this Court's opinion. While the AFCCA's conclusory statement is not specific to *Lawrence*, it is clear from the lower court's opinion that it based Amn Rocha's liberty interest under *Lawrence*. And although this Court's framed question reads more as a facial challenge under *Lawrence*, the AFCCA conclusion is a case-specific, as-applied determination, as required by *Marcum*.[111]

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[108] *Rocha*, 84 M.J. at 352 n.4.
[109] *Id*. at 352.
[110] JA at 027.
[111] *See Marcum*, 60 M.J. at 202.

The AFCCA answered the question asked by this Court, despite the Government's argument to the contrary.[112] The Government insists the AFCCA failed to follow this Court's guidance because it did not adopt the word "childlike" from this Court's decretal paragraph.[113] Not only does this ignore this Court's opinion, but it is internally inconsistent. It is as if the Government is trying to assert that if it frames the issue the way it wants enough times—a "child sex doll" in the first certified instance, and "childlike" in the decretal paragraph and certified issue here—it will somehow circumscribe the powers of the AFCCA under Article 66, UCMJ.

Defining the sex doll that Amn Rocha used to engage in sexual activity as "childlike" required a factual determination about the physical appearance of the doll.[114] Although the Government suggests that the "doll's relative size and appearance were undisputed,"[115] this ignores the fact that the lower court previously had not yet made a "finding concerning whether the doll was a representation of a child."[116] And only the AFCCA could make that determination, in accordance with its authority under Article 66, UCMJ. Thus, the AFCCA could not be bound by this Court's use of the word "childlike" in its remand order.

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[112] Gov't Br. at 18.
[113] *Id*. at 17-22.
[114] JA at 029 (citing JA at 002-3).
[115] Gov't Br. at 22.
[116] JA at 029 (citing JA at 003 n.5).

This Court directed the AFCCA to determine whether Amn Rocha's conduct is constitutionally protected.[117] That is exactly what the AFCCA did. The lower court "consider[ed] carefully both the letter and the spirit of the mandate taking into account [this Court's] opinion and the circumstances it embraces."[118] As such, the lower court correctly followed this Court's remand instructions.

II.

The Air Force Court of Criminal Appeals did not err in its application of *Lawrence* and *Marcum* to Amn Rocha's case, and its factual sufficiency determination was not an abuse of discretion.

Standard of Review

This Court "does not review the factual sufficiency of convictions when [it] review[s] cases under Article 67, UCMJ."[119] Rather, "[r]eview of the factual sufficiency of the evidence is a special power and duty that Article 66(d)(1), UCMJ, confers only on the [CCAs]."[120] Although this Court "retain[s] the authority to review factual sufficiency determinations of the CCAs for the application of correct legal principles,"[121] it "shall take action only with respect to matters of law."[122]

When a CCA disapproves findings as factually insufficient, this Court

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[117] *Rocha*, 84 M.J. at 352 n.4 (emphasis added).
[118] *United States v. Dávila-Félix*, 763 F.3d 105, 109 (1st Cir. 2014) (quotations omitted).
[119] *Mendoza*, 85 M.J. at 222.
[120] *Thompson*, 83 M.J. at 3 (citation omitted).
[121] *Id.* at 4 (citation modified); *see Leak*, 61 M.J. at 241.
[122] 10 U.S.C. § 867(c)(4) (2018).

"accept[s] the CCA's action unless in disapproving the findings the CCA clearly acted without regard to a legal standard or otherwise abused its discretion."[123] "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous."[124]

Whether a "conviction must be set aside in light of the Supreme Court's holding in *Lawrence* is a constitutional question reviewed *de novo*."[125] This Court uses a "contextual, as applied analysis, rather than [a] facial review."[126]

Law and Analysis

A. Amn Rocha's due process claim is that his conduct was private and constitutionally protected.

The second certified issue combines two issues that Amn Rocha raised before the AFCCA: 1) that his conduct was constitutionally protected, and 2) that his conviction was factually insufficient.[127] Although Amn Rocha made a due process claim under *Lawrence*, more broadly he asserts, as he did at trial and on appeal to the AFCCA, that his conduct was private and constitutionally protected.[128]

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[123] *Nerad*, 69 M.J. at 147; *see Mendoza*, 85 M.J. at 222.
[124] *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010) (citation modified).
[125] *Marcum*, 60 M.J. at 202 (citation omitted).
[126] *Id*. at 205.
[127] JA at 026.
[128] JA at 263-67, 208, 026.

The Government seeks to escape the protections afforded to Amn Rocha by the Constitution by framing the issue as a new fundamental right specific to "childlike" sex dolls.[129] The Government is correct insofar as the Constitution does not explicitly talk about sex dolls, childlike or otherwise. But such hyperspecificity is not required when the right claimed by Amn Rocha is well-established: the right to engage in private, consensual sexual activity.[130] Amn Rocha did not assert a *new* fundamental right for the lower court to recognize; rather, he asserted that his conduct fell within the rights afforded him under the Constitution. And Amn Rocha does not need to adopt the Government's characterization of the doll as "childlike" to assert that his private conduct was constitutionally protected. The Government's attempt to narrowly frame the liberty interest should leave this Court unconvinced.

Relying on the evidence in the record of trial, the lower court correctly analyzed whether Amn Rocha's conduct was constitutionally protected under *Lawrence*. The Government argues that the AFCCA failed to "carefully describe the liberty interest at issue" because the it did not "analyze [Amn Rocha's] purported liberty interest in the context of the conduct charged."[131] But as this Court explained in *Marcum*, the *Lawrence* framework "argues for contextual, as applied analysis,

[129] Gov't Br. at 28-29.
[130] *Lawrence*, 539 U.S. at 578.
[131] Gov't Br. at 29.

rather than facial review"[132] and courts must "consider the application of *Lawrence* to [a servicemember's] conduct"[133]—not the charged offense, as the Government suggests.[134] Given that the AFCCA was not convinced that the only rational interpretation was that Amn Rocha's doll resembled a child and not a young-looking adult,[135] the court also did not need to adopt the Government's characterization of the doll in determining whether Amn Rocha's conduct was constitutionally protected.

Although *Washington v. Glucksberg*[136] insisted "that liberty under the Due Process Clause must be defined in a most circumscribed manner" and "that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach [the Supreme Court] has used in

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[132] *Marcum*, 60 M.J. at 205.
[133] *Id*. at 206.
[134] Gov't Br. at 29. Although the *Marcum* test asks whether "the conduct that the accused was found guilty of committing was of a nature to bring it within the [*Lawrence*] liberty interest," CCAs look to the evidence in the record to assess whether there is a *Lawrence* protected liberty interest. *See, e.g.*, *United States v. Useche*, 70 M.J. 657, 660 (N-M. Ct. Crim. App. 2012) (beginning its analysis under *Marcum* with "whether the oral sodomy between the appellant and RM" was within the *Lawrence* protected liberty interest); *United States v. Truss*, 70 M.J. 545, 548 (A. Ct. Crim. App. 2011) (first holding the military judge's general and special findings were legally and factually sufficient, and then analyzing the *Lawrence* constitutional issue); *United States v. Christian*, 61 M.J. 560, 562 (N-M. Ct. Crim. App. 2005) (referencing the *Marcum* test, the CCA explained it is a "framework to determine whether [a UCMJ offense] is constitutional as applied to the facts of a given case").
[135] JA at 039.
[136] 521 U.S. 702 (1997).

discussing other fundamental rights, including marriage and intimacy."[137] Rather, on multiple occasions, the Supreme Court has "inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right."[138] Similarly here, the right to engage in private, consensual sexual conduct should be analyzed in its comprehensive sense. In doing so, the AFCCA correctly found there was no sufficient justification (using the factors identified in *Lawrence*) to exclude Amn Rocha's conduct from this right.

B. The AFCCA correctly determined that Amn Rocha's conduct was constitutionally protected under *Lawrence*.

Servicemembers are protected by the Due Process Clause.[139] "The Supreme Court and this Court have long recognized that [servicemembers] do not leave constitutional safeguards and judicial protection behind when they enter military service."[140] The Due Process Clause "extend[s] to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[141] "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion

[137] *Obergefell v. Hodges*, 576 U.S. 644, 671 (2015).
[138] *Id*.; *see Loving v. Virginia*, 388 U.S. 1 (1967), *Zablocki v. Redhail*, 434 U.S. 374 (1978), and *Turner v. Safley*, 482 U.S. 78 (1987).
[139] *United States v. Meakin*, 78 M.J. 396, 401 n.4 (C.A.A.F. 2019).
[140] *Marcum*, 60 M.J. at 205 (citation modified).
[141] *Obergefell*, 576 U.S. at 663.

into matters so fundamentally affecting a person."[142]

In *Lawrence*, the Supreme Court considered "whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause."[143] The Court held that people "are entitled to respect for their private lives" and their "right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."[144]

In *Marcum*, this Court applied *Lawrence* to the military for the first time.[145] This Court acknowledged that "[w]hile servicemembers clearly retain a liberty interest to engage in certain intimate sexual conduct, this right must be tempered in a military setting based on the mission of the military, the need for obedience of orders, and civilian supremacy."[146] The *Marcum* Court delineated three factors to evaluate in determining whether a servicemember's private, consensual sexual activity may be criminalized: 1) whether the "conduct was of a nature to bring it within the *Lawrence* liberty interest[;]" 2) whether the "conduct nonetheless encompassed any of the behavior or factors that were identified by the Supreme Court as not involved in *Lawrence*[;]" and 3) whether there are "additional factors

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[142] *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *see Stanley v. Georgia*, 394 U.S. 557, 564 (1969).
[143] *Lawrence*, 539 U.S. at 564.
[144] *Id*. at 562.
[145] *Id.* at 198.
[146] *Id*. at 208 (citation modified).

relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest."[147]

In *Goings*, this Court reaffirmed the holding that "wholly private and consensual sexual activity, without more, falls within *Lawrence*"[148] and "private consensual sexual activity is not punishable as an indecent act absent aggravating circumstances."[149] As such, Amn Rocha's sexual activity with an inanimate object, in solitude, in secret, and in a private living place, is conduct that falls within the *Lawrence* liberty interest.

Although *Lawrence* does not protect all sexual conduct,[150] the liberty interest does not turn on the presence of two consenting adults.[151] It is plainly nonsensical to argue that servicemembers have less of a right to engage, privately, in sexual conduct with oneself than sexual conduct with another person.[152] It is equally illogical to think that, merely because an act does not involve another person, it does not fall within the privacy interest protected by *Lawrence*. Under one of the

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[147] *Id*. at 207.
[148] 72 M.J. 202, 206 (C.A.A.F. 2013); *accord Rocha*, 84 M.J. at 360 (Johnson, J. dissenting) (citing *Lawrence*, 539 U.S. at 578).
[149] *Goings*, 72 M.J. at 202.
[150] *Meakin*, 78 M.J. at 403.
[151] *See Lawrence*, 539 U.S. at 562 ("Liberty presumes an autonomy of *self* that includes freedom of thought, belief, expression, and certain intimate conduct." (emphasis added)).
[152] *See id*. at 578 ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the *individual*." (emphasis added)).

Government's theories,[153] that would mean that Amn Rocha would only have protection under *Lawrence* had he been engaging in some kind of sexual activity with a sex doll *and* another consenting adult. This is not what *Lawrence* stands for.

This Court has recognized that *Lawrence* "grounded its analysis in a fundamental liberty interest to form intimate, meaningful, and personal bonds that manifest themselves through sexual conduct"[154] and the "focal point of the constitutional protection involved an act of sexual intimacy between two individuals in a wholly private setting without more."[155] But *Lawrence* also turned on the right "to engage in private conduct in the exercise of their liberty,"[156] "the right to make certain decisions regarding sexual conduct,"[157] and "the emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[158] The fact that Amn Rocha's conduct did not involve another person should not remove it from the focal point of *Lawrence*. As the AFCCA explained in its opinion, it does not make sense to "construe *Lawrence* to protect sexual activity done consensually with another but not protect comparable conduct done alone."[159]

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[153] Gov't Br. at 30-31.
[154] *Meakin*, 78 M.J. at 403.
[155] *Goings*, 72 M.J. at 206.
[156] *Lawrence*, 539 U.S. at 564.
[157] *Id*. at 565.
[158] *Id.* at 572.
[159] JA at 035.

The AFCCA correctly determined that Amn Rocha's conduct was constitutionally protected under *Lawrence*. The AFCCA concluded there were no aggravating factors present in his case that would remove his conduct from the *Lawrence* liberty interest.[160] Amn Rocha's conduct did not involve minors, there was no issue with consent or capacity to consent, and it did not involve persons in a situation where consent might not be easily refused.[161] There was no injury to a person, no open or public conduct, and the conduct did not involve prostitution.[162] Amn Rocha's conduct was private sexual activity with an inanimate doll, alone in his single-occupancy dorm room, and it did not encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*.[163]

C. The AFCCA correctly applied *Lawrence* to its factual sufficiency analysis because there were no *Marcum* factors present in Amn Rocha's case.

Under *Marcum*, a servicemember's constitutionally protected conduct under *Lawrence* may not be criminalized unless there are "additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest."[164] Here, the AFCCA correctly applied *Lawrence* to its factual sufficiency

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[160] *See* JA at 035, 038-41.
[161] *See Lawrence*, 539 U.S. at 578.
[162] *See id*.
[163] *See id*.; *Marcum*, 60 M.J. at 207.
[164] *Marcum*, 60 M.J. at 207.

analysis because it was not convinced beyond a reasonable doubt that any *Marcum* factor was met.

1. The AFCCA's factual determination that no *Marcum* factor was met was not an abuse of discretion.

In *United States v. Castellano*, this Court held that "whether a *Marcum* factor exists is a determination to be made by the trier of fact based on the military judge's instructions identifying facts or factors that are relevant to the constitutional context presented."[165] The "presence of a *Marcum* factor is a matter of critical significance because it distinguishes between what is permitted and what is prohibited."[166] This Court also recognized:

> [W]here . . . an otherwise unconstitutional criminal statute is construed in such a way as to limit its reach to conduct that may constitutionally be subject to criminal sanction, the facts under that 'saving construction' have constitutional significance. These facts are critical to a conviction as, absent such facts, the conduct is not criminal . . . Therefore, they must be determined by the trier of fact.[167]

At Amn Rocha's trial, the military judge instructed the members of only one *Marcum* factor: "[Amn Rocha] engaged in sexual acts with a sex doll with the physical characteristics of a female child, to simulate sexual acts with a minor."[168] The military judge also instructed the panel members, "In the absence of an

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[165] *Castellano*, 72 M.J. at 223.
[166] *Id*. at 222 (cleaned up).
[167] *Id*. at 222-23 (citations omitted).
[168] JA at 217, 220.

aggravating circumstance, private consensual sexual activity, including masturbation with or without any nonliving object, is not punishable as indecent conduct," and, "To find [Amn Rocha] guilty of this offense, you must be convinced of the existence of *this aggravating circumstance* beyond a reasonable doubt."[169]

In conducting its factual sufficiency review, the AFCCA had to assess "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of [the AFCCA were] themselves convinced of [Amn Rocha's] guilt beyond a reasonable doubt."[170] The AFCCA did not abuse its discretion in finding the *Marcum* factor asserted at trial was not met.

The lower court explained it was "not convinced [Amn Rocha] was pretending he was having sexual intercourse with a child."[171] The court weighed the evidence in the record, to include photographs of the doll[172] and testimony regarding the doll,[173] and ultimately concluded it was "not convinced the only rationale interpretation of the evidence . . . is that the doll resembled a child and not a young-looking adult."[174] Furthermore, the AFCCA did "not find that [Amn Rocha]

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[169] JA at 220 (emphasis added).
[170] *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).
[171] JA at 039.
[172] JA at 244-51.
[173] JA at 095-97, 102-03, 108, 128, 141, 144.
[174] JA at 039.

simulated sexual acts with a child."[175] Even if this Court were to come to a different conclusion, the AFCCA did not abuse its discretion in finding the asserted *Marcum* factor was not met.

The lower court also addressed whether the "nature of the object with which [Amn Rocha] masturbated" takes the "conduct outside the *Lawrence* liberty interest."[176] The AFCCA correctly explained that the prosecution "did not prove, or even allege, that the doll was illegal to possess either outright, or as a depiction of child pornography."[177] And the record does not contain any evidence that a dorm regulation prohibited masturbation or possession of sex toys.

The Government's assertion that the "childlike nature" of the doll takes it out of the *Lawrence* liberty interest is problematic. That aspect alone cannot be proof that Amn Rocha was "simulat[ing] sexual acts with a minor" because that assumes that any time a person engages in sexual activity with a "childlike" sex doll, they are having thoughts of engaging in sexual acts with a minor. The Supreme Court has made clear that "[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men's minds"[178] and "[w]hatever the power of the [Government] to control public dissemination of ideas inimical to the public

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[175] *Id*.
[176] *Id*.
[177] *Id*.
[178] *Stanley*, 394 U.S. at 565.

morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."[179]

There are no "additional factors *relevant solely in the military environment* that affect the nature and reach of" Amn Rocha's protected liberty interest.[180] There were no other participants involved in the sexual conduct.[181] Amn Rocha did not show anyone the doll or share what he did with the doll.[182] The Government professes that a member of the public would be horrified to know about Amn Rocha's doll[183] but when the doll was discovered in Amn Rocha's room, neither the NCO who saw it nor the OSI agent with whom he consulted knew if it was even illegal to own—it was not.[184] Amn Rocha kept the doll, and engaged in the charged conduct, in his single-occupancy dorm bedroom, unseen and unaware by anyone.[185] The doll was found only as a result of the health and welfare inspection, and his conduct with the doll was uncovered only as a result of his

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[179] *Id*. at 566.
[180] *Marcum*, 60 M.J. at 207 (emphasis added). Arguably, under *Castellano*, no additional *Marcum* factors, other than the single *Marcum* factor presented at trial, should be considered at this stage of Amn Rocha's appeal. *See* 72 M.J. at 222-23. Furthermore, this Court has consistently and repeatedly emphasized that it does not have factfinding authority and it "shall take action only with respect to matters of law." 10 U.S.C. § 867(c)(4); *see Leak,* 61 M.J. at 241; *see also Thompson*, 83 M.J. at 4; *Mendoza,* 85 M.J. at 222.
[181] JA at 162, 167.
[182] *Id*.
[183] Gov't Br. at 44, 53.
[184] JA at 097, 103.
[185] JA at 162, 167.

statements to investigators after they discovered the doll.[186] The AFCCA considered all of the evidence and found no *Marcum* factor was met in this case.[187]

2. Amn Rocha's conduct occurring in a single-occupancy dorm room does not affect the nature and reach of the *Lawrence* liberty interest.

The mere fact that Amn Rocha engaged in the charged conduct in his dorm bedroom is not a military-specific factor that demands that his conduct be forbidden. Amn Rocha's private sexual conduct had no impact on other persons living in the dorms.[188] He was not "noisy, abusive, violent, or unclean," nor did he cause any other welfare issues that would justify the regulation of this behavior.[189] As the AFCCA explained in its decision of Amn Rocha's case, "If one concludes Airmen do not enjoy a *Lawrence* liberty interest in their private dorm room, then private masturbation—with or without a sex toy or some other inanimate object—could be subject to criminal sanction as an immoral sexual act."[190] Taking the Government's argument—"that [Amn Rocha's conduct] occur[ing] in a military dorm room . . . could adversely affect the military's reputation" and therefore meets the requirements as a *Marcum* factor[191]—to its logical conclusion results in drastic consequences. If the sole military nexus is committing the act in a private dorm

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[186] JA at 278, 095, 147.
[187] JA at 041.
[188] *See United States v. McCarthy*, 38 M.J. 398, 403 (C.M.A. 1993).
[189] *Id*.
[190] JA at 40-41.
[191] Gov't Br. at 46.

bedroom, then suddenly any sexual behavior—to include private, consensual sexual activity between two adults—could be criminalized simply because it happened in a private dorm room.

This Court has rejected that notion, even before *Lawrence* was decided.[192] In *Izquierdo*, this Court held that a servicemember engaging in sexual activity with another adult, privately in his barracks room without anyone else present, was not sufficient, as a matter of law, to meet the threshold for "open and notorious" sexual conduct to sustain a conviction for indecent acts under Article 134, UCMJ.[193] Had this Court determined that simply because the sexual activity occurred in the barracks room it brought discredit upon the armed forces, then this Court could have sustained the conviction as "service discrediting" regardless of whether the aggravating circumstance that the conduct was "open and notorious" was met. But "Article 134[, UCMJ,] is not intended to regulate the wholly private moral conduct of an individual"[194] and "simple fornication is not an offense in military law."[195] Simply because private, consensual sexual activity—whether between two adults or an adult and a sex toy—occurred in a military dorm room is not sufficient, by itself,

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[192] *See United States v. Izquierdo*, 51 M.J. 421, 423 (C.A.A.F. 1999).
[193] *Id*.
[194] *United States v. Berry*, 20 C.M.R. 325, 330 (C.M.A. 1956) (citing *United States v. Snyder*, 4 C.M.R. 15, 19 (C.M.A. 1952)) (quotations omitted).
[195] *Berry*, 20 C.M.R. at 330.

to make the conduct service discrediting. This fact alone cannot be sufficient to meet the *Marcum* factor threshold.

3. There is no reasonably direct and palpable connection between Amn Rocha's conduct and the miliary mission.

This Court has not directly addressed the connection needed between private consensual sexual conduct, protected by a *Lawrence* liberty interest, and the military mission when the conduct is alleged to be "service discrediting." However, this Court faced a similar issue, in the context of protected speech under the First Amendment, in *United States v. Wilcox*.[196] It acknowledged that "the Supreme Court upheld Article 134, UCMJ, against constitutional attack for vagueness and overbreadth *in light of* the narrowing construction developed in military law through the precedents of this Court and limitations within the [MCM] itself."[197] "As such, a limited Article 134, UCMJ, does not make every 'irregular or improper act' a court-martial offense *and* does not reach conduct that is only indirectly or remotely prejudicial to good order and discipline."[198]

The *Wilcox* Court applied the same requirement used under a "prejudicial to good order and discipline" theory of criminal liability and applied it to the "service discrediting" theory of liability.[199] It held that "a direct and palpable connection

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[196] 66 M.J. 442, 448 (C.A.A.F. 2008)).
[197] *Id*. at 447 (citing *Parker v. Levy*, 417 U.S. 733, 752-61 (1974)).
[198] *Wilcox*, 66 M.J. at 447 (emphasis in original) (citations omitted).
[199] *Id*. (emphasis added).

between speech and the military mission or military environment is also required for an Article 134, UCMJ, offense charged under a service discrediting theory.[200] This Court recently reaffirmed this principle in *United States v. Grijalva*, explaining that "this requirement exists to strike the proper balance . . . between the essential needs of the armed services and the right to speak out as a free American."[201]

The Due Process Clause privacy interest here is directly analogous to the First Amendment free speech interests in *Wilcox*. As such, this Court should require a similar connection to the military when constitutionally protected private, consensual sexual conduct is charged as an indecent act under Article 134, UCMJ, and the theory of criminal liability is service discrediting.

Here, Amn Rocha's activity with the doll—in private, in secret, and in solitude—could not cause any direct or adverse impact to the "good name of the service."[202] The fact that Amn Rocha engaged in sexual activity with the doll in his dorm room is not enough to be a direct and palpable connection to the military mission or environment. Nor is it sufficient to merely reason that someone might have disapproved of Amn Rocha's private sexual conduct to achieve a direct and palpable connection to the military mission or environment. If it were, "the entire universe of servicemember [private, consensual sexual conduct] would be held to

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[200] *Id*. at 448-49.
[201] 84 M.J. 433, 436 (C.A.A.F. 2024) (citation modified).
[202] *See United States v. Sanchez*, 29 C.M.R. 32, 33-34 (C.M.A. 1960).

the subjective standard of what some member of the public, or even many members of the public, would find offensive" and "impos[ing] criminal sanctions under Article 134, UCMJ, would surely be both vague and overbroad."[203]

Avoiding disapproval of private sexual conduct is not unique to the military environment or mission and instead, the Government's argument contradicts the heart of *Lawrence*.[204] The Supreme Court reconciled that the Texas legislature's "conceptions of right and acceptable behavior" did not allow the state to "enforce [its] views on the whole society through the operation of the criminal law."[205] "[T]he fact that the [Government] has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[206] Just as the "Texas statute [in *Lawrence*] 'further[ed] no legitimate state interest which [could] justify its intrusion into the personal and private life of the individual,'" the Government has no legitimate military interest to justify its intrusion.[207]

The AFCCA correctly interpreted the requirements under *Marcum*, thoughtfully considered the evidence and the Government's arguments, and ultimately concluded it was "not convinced any *Marcum* factor applies in this

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[203] *See Wilcox*, 66 M.J. at 448-49.
[204] 539 U.S. at 577; Gov't Br. at 44, 53.
[205] *Lawrence*, 539 U.S. at 571.
[206] *Id*. at 577 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).
[207] *Id*. at 578.

case."[208] Despite the Government's assertion that it "presented ample evidence" to meet a *Marcum* factor,[209] the AFCCA found otherwise. This decision, having interpreted and applied the correct legal principles, was not an abuse of discretion. As such, Amn Rocha's conduct was not removed from the constitutional protections under *Lawrence* and could not be criminalized as indecent conduct.

D. Even if *Lawrence* does not apply, Amn Rocha's conduct was still constitutionally protected.

This Court held in *Goings* that when the charged conduct "does not fall directly within the focal point of *Lawrence*," and is allegedly "service discrediting" under clause 2 of Article 134, UCMJ, then "the burden of demonstrating that such conduct should nonetheless be constitutionally protected rests with the defense at trial."[210] If this Court concludes Amn Rocha's conduct does not fall directly within the focal point of *Lawrence*, Amn Rocha still demonstrated at trial that his conduct should be constitutionally protected. Amn Rocha's trial defense counsel filed a pre-trial motion alleging Amn Rocha's conduct was constitutionally protected and made an oral motion under R.C.M. 917 at the conclusion of the Government's findings case.[211] The defense counsel argued that Amn Rocha's conduct was done in private, with an inanimate object that was not illegal to own, in the privacy of his single-

[208] JA at 041.
[209] Gov't Br. at 42.
[210] 72 M.J. at 207.
[211] JA at 263-67, 208.

occupancy dorm bedroom, and without any other military member or person having knowledge of his conduct.[212] The *Goings* requirement was met. For the reasons explained below, Amn Rocha's conduct was constitutionally protected, and the Government lacks a legitimate interest in prohibiting his conduct.

This Court views indecency as synonymous with obscenity,[213] and "obscene material is unprotected by the First Amendment."[214] However, laws regulating obscenity must be "carefully limited."[215] The mere categorization of something as "obscene" is "insufficient justification for such a drastic invasion of personal liberties" guaranteed by the First Amendment.[216] And laws regulating obscenity do not "reach into the privacy of one's own home."[217] As such, the First Amendment prohibits making private possession of obscene material a crime.[218]

These constitutional protections afforded under the First Amendment do "not automatically apply to servicemembers."[219] Constitutionally protected conduct "could still qualify as . . . bringing discredit upon the military."[220] But in order for

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[212] JA 263-67, 208-16.
[213] *United States v. Moore*, 38 M.J. 490, 492 (C.A.A.F. 1994).
[214] *Miller v. California*, 413 U.S. 15, 23 (1973).
[215] *Id*. at 24.
[216] *Stanley*, 394 U.S. at 565.
[217] *Id*.
[218] *Id*. at 566-67.
[219] *United States v. Byunggu Kim*, 83 M.J. 235, 239 (C.A.A.F. 2023).
[220] *Id*.

the Government to prohibit service discrediting conduct, there must be a "reasonable basis for the military regulation of [the] conduct."[221]

Amn Rocha's conduct falls within the constitutional protections afforded within the home. Amn Rocha's "home" was his single-occupancy dorm bedroom, in which he did not share with another person.[222] Although this Court has held that "[a servicemember] has less of an expectation of privacy in his shared barracks room than a civilian does in his home[,]"[223] this diminished privacy interest only extended to *shared* barracks rooms. The Government's argument that Amn Rocha's single-occupancy dorm room was never "wholly private" is unpersuasive.[224] Amn Rocha "did not share his room, and therefore, his conduct did not lose its protected, private character in this case merely because it occurred in a military dorm room."[225]

Amn Rocha's conduct is not removed from constitutional protections solely because it was sexual in nature. "Wholly private moral conduct of an individual" is not criminal under Article 134, UCMJ, absent some aggravating circumstance.[226]

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[221] *United States v. Rollins*, 61 M.J. 338, 345 (C.A.A.F. 2005).
[222] JA at 095, 141.
[223] *United States v. Bowersox*, 72 M.J. 71, 76 (C.A.A.F. 2013).
[224] Gov't Br. at 47. *See Izquierdo*, 51 M.J. at 423 (holding that a servicemember engaging in sexual activity with another adult, privately in his barracks room, without anyone else present, was not sufficient, as a matter of law, to meet the threshold for "open and notorious" sexual conduct to sustain a conviction for indecent acts.)
[225] *Rocha*, 84 M.J. at 360 (Johnson, J., dissenting).
[226] *Berry*, 20 C.M.R. at 330 (citing *Snyder*, 4 C.M.R. at 19) (quotations omitted).

And if servicemembers may engage in "simple fornication" without penalty under military law,[227] then it only makes sense that Amn Rocha's private sexual activity with an inanimate object should also be free from criminalization.

In *United States v. Moon*, this Court maintained that possession of obscene images for one's sexual gratification "does not itself remove such images from First Amendment protection."[228] And recently, in *Kim*, this Court discerned that the First Amendment was implicated where a servicemember pled guilty to indecent conduct for searching the internet for "rape sleep" and "drugged sleep" videos and told the military judge that watching such videos reminded him of his abuse of his stepdaughter.[229] These cases demonstrate that Amn Rocha's conduct did not lose constitutional protections merely because he engaged in private sexual activity with a doll that may resemble a child. The Government must still prove "why the otherwise protected [conduct is] . . . service discrediting in the military context."[230]

The Government did not meet this burden. The AFCCA considered the Government's arguments that Amn Rocha's conduct was service discrediting and rejected them separate from the *Lawrence* analysis.[231] None of the "surrounding

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[227] *Berry*, 20 C.M.R. at 330.
[228] 73 M.J. 382, 389 (C.A.A.F. 2014).
[229] 83 M.J. at 237-38.
[230] *Moon*, 73 M.J. at 389.
[231] JA at 040.

circumstances," as the Government calls them,[232] were wrongful or illegal and at most, are only remotely connected to the charged conduct. There is no basis to disturb the AFCCA's factual sufficiency conclusion about the weakness of the prosecution's presentation that failed to show beyond a reasonable doubt that Amn Rocha's conduct was of a nature to discredit the service.

Additionally, the Government has not demonstrated a reasonable basis to regulate Amn Rocha's conduct.[233] The Government's purported interest in "protecting the physical and psychological well-being of minors"[234] is not rationally related to prohibiting the private sexual activity with a sex doll that may resemble a child. Nor does it justify "intrusion into the personal and private life of the individual."[235] The Government's identification of states which have passed laws prohibiting the possession of child sex dolls[236] is not compelling in Amn Rocha's case because he was not charged with possessing the doll.[237] Furthermore, the Government previously conceded in its brief to this Court that "[c]hild sex dolls were

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[232] Gov't Br. at 42-44.
[233] *See Rollins*, 61 M.J. at 345.
[234] Gov't Br. at 35.
[235] *Lawrence*, 539 U.S. at 578.
[236] Gov't Br. at 37.
[237] It is arguable that these state laws are unconstitutional, and the First Amendment could extend a form of protection under the Court's obscenity and child pornography cases in *Miller*, 413 U.S. 15, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), and *Williams v. United States*, 553 U.S. 285 (2008).

not explicitly banned by federal or state laws as of May 2019, when [Amn Rocha] engaged in his convicted conduct."[238]

The Government's assertion that the "use of [child sex] dolls normalize[s] the thoughts and behaviors towards children considered by society to be undesirable and dangerous"[239] ignores what the lower court considered compelling evidence—that Amn Rocha professed he "[could not] see [himself] doing that to an actual child"[240] and even explained that he believed "child pornography with a real child involved is just disgusting."[241] Anytime Amn Rocha began to think of the doll as real, he "stopped" because he felt "dirty."[242] While the Government argues that sexual activity with a child sex doll may be the "precursor" to "satisfying pedophilic desires,"[243] "the causal link is contingent and indirect."[244] "The prospect of crime . . . by itself does not justify laws suppressing protected [conduct]."[245] The "mere tendency of" sexual activity with a child sex doll "to encourage unlawful acts is not a sufficient reason for banning it."[246]

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[238] U.S. Br. in Support of the Certified Issue, at 39-40 n.12, *United States v. Rocha*, 84 M.J. 346 (C.A.A.F. 2024) (No. 23-0134/AF).
[239] Gov't Br. at 35-36 (citation modified).
[240] JA at 201.
[241] JA at 203.
[242] JA at 201.
[243] Gov't Br. at 36.
[244] *Free Speech Coalition*, 535 U.S. at 250.
[245] *See id*. at 245.
[246] *See id.* at 253.

Amn Rocha's sexual activity with the doll in private, in his single-occupancy dorm room, did not involve a minor, had no impact on a minor, and is not "intrinsically related" to the sexual abuse of minors.[247] Accordingly, the Government's purported interest is not rationally related to prohibiting Amn Rocha's conduct. As part of its factual sufficiency analysis, the AFCCA considered, and was left unconvinced, that Amn Rocha's conduct was of a nature to bring discredit upon the armed forces. The AFCCA's factual sufficiency determination was not an abuse of discretion, and the lower court correctly concluded that Amn Rocha had a constitutionally protected liberty interest to privately engage in sexual activities with his doll. Accordingly, the AFCCA's decision should be affirmed.

[247] *See id.* at 250.

Conclusion

Courts have a "judicial duty to interpret the Constitution" and "an enduring part of [that] judicial duty" is the "identification and protection of fundamental rights."[248] "That responsibility, however, has not been reduced to any formula."[249] Rather, courts are to "exercise reasoned judgment in identifying interests of the person so fundamental that the [Government] must accord them its respect."[250] "History and tradition guide and discipline this inquiry, but do not set its outer boundaries . . . That method respects our history and learns from it without allowing the past alone to rule the present."[251]

The charged offense that Amn Rocha was convicted of does "no more than prohibit a particular sexual act."[252] But its penalty and purpose "have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home."[253]

The AFCCA followed this Court's remand instructions to determine whether Amn Rocha's conduct was constitutionally protected. In doing so, the AFCCA applied the correct legal principles from *Lawrence* and *Marcum* during its factual

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[248] *Obergefell*, 576 U.S. at 663-64.
[249] *Id*. at 664.
[250] *Id*.
[251] *Id*.
[252] *Lawrence*, 539 U.S. at 567.
[253] *Id*.

sufficiency review of Amn Rocha's case. *Marcum* factors are a decision for the trier of fact, and the AFCCA's factual decisions regarding the evidence were not an abuse of discretion. Even if this Court concludes *Lawrence* does not apply, Amn Rocha's conduct was still constitutionally protected and the AFCCA did not abuse its discretion in finding Amn Rocha's conduct was not service discrediting. This Court should answer the first certified question in the positive and the second certified question in the negative, and affirm the decision of the AFCCA.

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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 the Air Force Government Trial and Appellate Operations Division on July 23, 2025.

CERTIFICATE OF COMPLIANCE WITH RULES 24(b) AND 37

This brief complies with the type-volume limitation of Rule 24(b) because it contains 12,639 words.

This brief complies with the typeface and type style requirements of Rule 37.

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