

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES)	SUPPLEMENT TO THE PETITION
Appellee)	FOR GRANT OF REVIEW
)	
v.)	Crim. App. Dkt. No. 20240125
)	
PRIVATE FIRST CLASS (E-3))	USCA Dkt. No. 26-0172/AR
CHARLES H. CUNNINGKIN,)	
United States Army)	
Appellant)	

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

Issue Presented

**WHETHER THE ARMY COURT ERRED IN APPLYING
INCORRECT LEGAL PRINCIPLES IN CONDUCTING ITS
FACTUAL SUFFICIENCY REVIEW**

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals [Army Court] had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, [UCMJ] 10 U.S.C. § 866. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On March 7, 2024, a panel composed of officer and enlisted members, sitting as a general court-martial, convicted appellant, Charles H. Cunningkin, contrary to his pleas, of one specification of sexual assault (without consent), and

one specification of abusive sexual contact (without consent), both in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920.

On the same day, a military judge sentenced appellant to confinement for 38 months and to be dishonorably discharged from the service.¹ (R. at 540).

On March 22, 2024, the staff judge advocate (SJA) signed his clemency advice, and the convening authority took no action on the findings and the adjudged sentence. (SJA Clemency Advice; Action). On March 26, 2024, the military judge entered the judgment of the court. (Judgment).

On February 25, 2026, the Army Court affirmed the findings and sentence. (Appendix A).

Appellant was notified of the Army Court's decision, and appellant personally filed a timely Petition under Rule 20 of this Court's Rules of Practice and Procedure on April 8, 2026.

The Judge Advocate General of the Army designated the undersigned military counsel to represent appellant, who hereby enter their appearance and file this Supplement to the Petition for Grant of Review under Rule 21.

¹ The military judge sentenced appellant to consecutive terms of confinement as follows:

The Charge, Specification 1	36 months
The Charge, Specification 3	2 months

(R. at 1081).

Statement of Facts

On the evening of July 3-4, 2021, Appellant and Victim 1 ('SPC JP') attended a house party together after spending part of the day at his off-post apartment in Hope Mills, North Carolina. They later returned to Appellant's apartment in separate vehicles. (R. at 579, 641-42). SPC JP attended the party with Appellant after accepting his invitation to spend the day with him. (R. at 560, 579). At the time, SPC JP's on-and-off boyfriend, SPC FG, was on leave out of state. (R. at 710). While SPC FG testified that he and SPC JP were in a dating relationship as of July 3-4, 2021, SPC JP testified that she and SPC FG had decided to take a break and were more akin to "best friends" at the time. (R. at 710, 560, 563). Both agreed they were in frequent contact on the day of and into the evening SPC JP spent with Appellant, although SPC JP did not tell SPC FG that she was with Appellant until the next day. (R. at 640, 711, 720).

Appellant met SPC JP months prior to July 2021 through work, at their respective assignments in the G-1/S-1. (R. at 557-58). They had previously spent time together outside of work, and Appellant had expressed interest in a romantic relationship with SPC JP. (R. at 557-58).

Later in the evening on July 3, 2021, at approximately 2300, SPC JP called SPC FG from Appellant's room, offered him several non-specific apologies, and then stopped communicating with him until the next day when she returned his

calls via Facetime from the balcony at Appellant's apartment. (R. at 712, 721-22). SPC JP's self-professed level of intoxication upon returning to Appellant's apartment late at night and going to bed was a three on a scale of one to ten. (R. 583).

SPC JP testified that, upon their return to Appellant's apartment after the house party, she "completely" forgot about her plan to get a ride back to her barracks with another Soldier and indicated that she got into the same bed as Appellant, or he got into the same bed as her, at least three separate times. (R. at 585, 593, 648, 665). She also testified that Appellant attempted to perform oral sex on her without her consent, then left the room. (R. at 590, 593). During that time, she remained in bed and called her on-and-off boyfriend – SPC FG. (R. at 593). She further testified that Appellant reentered the room and that she fell asleep again before being awakened by Appellant penetrating her vulva with his penis without her consent. (R. at 593-97).

Following these interactions between Appellant and SPC JP, which formed the basis for Specification 1, SPC JP slept through the night with Appellant in his bed, remained there, and finally accepted a ride back to her barracks from Appellant only later the following morning after they had watched a TV show together. (R. at 643, 700, 721-22, 603). That morning, SPC JP indicated to

Appellant and to Appellant's friend that she did not remember anything about having sex with Appellant the previous night. (R. at 603, 705).

Reasons to Grant Review

Under the amended Article 66, Uniform Code of Military Justice (UCMJ), a CCA “may consider whether the finding[s] [are] correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof.” *See* Article 66(d)(1)(B)(i); *Harvey*, 85 U.S. at 130. Once appellant shows a factual deficiency, the CCA may evaluate the evidence while giving “. . . (1) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and (2) appropriate deference to findings of fact entered into the record by the military judge. *Id.*

In *Harvey*, this court also declined to define the phrase, “specific showing of a deficiency in proof” because that point was not in controversy in that case. 85 M.J. at 130.

This court should take this case to adopt and provide a mechanism to enforce the standard identified by the Navy-Marine Corps Court of Criminal Appeals, that under the new Article 66, a CCA should still conduct a factual sufficiency review when the appellant identifies, “a weakness in the evidence admitted at trial to support an element (or more than one element) and explain why, on balance, the

evidence (or lack thereof) admitted at trial contradicts a guilty finding. *United States v. Harvey*, 83 M.J. 685, 693 (N-M. Ct. Crim. App. May 23, 2023).

This court should also require that when a CCA performs its review, subject to this court's review on further appeal, it must clearly indicate whether or not a factual sufficiency review was conducted and include at least a cursory analysis of the alleged deficiency in proof in the context of the balance of the evidence, and apply legal principles to its factual sufficiency decision. Otherwise, appellants with a specific factual sufficiency challenge to their convictions: 1) will not know whether the CCA's Art. 66 factual sufficiency review function was carried out, 2) assuming arguendo that it was, will not know whether it was done properly, and 3) will have no recourse to this court.

As it stands, when a CCA provides no reasoning for its decision on factual sufficiency, its decision is in effect infallible, and only by expounding on a single legal principle or idea does it risk this court's intervention. A CCA should be subject to a greater degree of scrutiny in exercising its authority under Article 66 and should be required to explain what it is doing and provide a rationale subject to this court's review. There is no reason why an absence of legal principles should be afforded a higher degree of deference by this court than incorrect ones.

Issue Presented

WHETHER THE ARMY COURT ERRED IN APPLYING INCORRECT LEGAL PRINCIPLES IN CONDUCTING ITS FACTUAL SUFFICIENCY REVIEW

Additional Facts

In his brief to the Army Court, appellant requested a factual sufficiency review and made a specific showing of a deficiency in proof – that numerous inconsistencies and instances of stonewalling by the complaining witness on cross examination constituted a weakness in the evidence admitted at trial such that, on balance, the evidence contradicted a finding of guilty beyond a reasonable doubt. (Appendix C). In its answer, the government suggested that the appellant had not made a specific showing of a deficiency in proof and argued that the Army Court should not even conduct a factual sufficiency review, let alone find factual insufficiency. (Appendix D). Appellant’s reply brief before the Army Court again identified specific deficiencies in proof and argued that a factual sufficiency review was required under the new Art. 66 standard, as explained by this court in *United States v. Harvey*. 85 M.J. 127, 130 (C.A.A.F. 2024). (Appendix E).

The Army Court’s per curiam affirmance, in full, stated, “[o]n consideration of the entire record, including consideration of the issues personally specified by the appellant, we hold the findings of guilty and the sentence, as entered in the

Judgment, correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.” (emphasis in original) (Appendix A).

Several key parts of SPC JP’s testimony are discredited or contradicted by other witnesses. For example, SPC FG, a prosecution witness, testified that he and SPC JP were in fact dating on July 3-4, 2021, and had not agreed to take a break in their relationship. (R. at 709-10). SPC FG testified as to his experience that SPC JP omitted all mention of appellant initially, ignored his calls, and declined several opportunities to receive a ride back to her barracks room, adding that he felt she was not forthcoming with him, hid details, and failed to answer many of his questions (R. at 720, 722, 724, 725) – questions that he posed from his perspective as SPC JP’s boyfriend. In fact, SPC FG and SPC JP continued to date for over two years following the events of July 3-4, 2021, and neither SPC FG or SPC JP testified about when they resumed dating if in fact they had taken a break in their relationship. (R. at 709). SPC FG testified that he thought SPC JP cheated on him with Appellant. (R. at 728).

SPC FG testified that when SPC JP called him from Appellant’s bed during the period when Appellant had stepped out of the room, SPC JP was crying and apologizing to him (R. at 712), a conversation that SPC JP herself described on direct as telling SPC FG that, “everything was okay, that I was fine.” (R. at 594). On cross examination, SPC JP denied any recollection of herself apologizing to

SPC FG. (R. at 677). SPC FG also testified that SPC JP at one point told him that Appellant had broken her romper (R. at 718), but SPC JP testified that she did not remember when it ripped or how it was removed from her body while she was in Appellant's bed. (R. at 655, 682).

That SPC JP's testimony is contradicted on such important points, by another Government witness no less, and that her memory is so suspiciously selective, undermines her character for truthfulness to the point that the CCA should not have been convinced that the Government proved a lack of consent to the required standard, and instead should have been clearly convinced that the weight of the evidence did not support a guilty finding. In any event, even if the CAA was convinced by the evidence, its opinion should state whether or not a factual sufficiency review was part of its analysis.

SPC JP's unreliable and uncooperative testimony is especially problematic given that the "principal evidence against" appellant came primarily from SPC JP's testimony. *Harvey*, at 129. The dearth of other evidence of non-consent presented by the government tends to demonstrate that the weight of the evidence does not support a finding that the Government met its burden of proving non-consent beyond a reasonable doubt. The Sexual Assault Medical Forensic Examiner (SAMFE) Ms. Erika Doss' testimony was presented to the panel, and she testified to the examination's being consistent with both consensual and non-consensual

sexual activity as well as consistent with no sexual activity having taken place. (R. at 745-47). A DNA report was marked for identification by the prosecution but not admitted because it did not contradict the defense theory of the case, that sex occurred but that it was consensual in nature.

Under direct examination by the trial counsel, SPC JP's memory was almost entirely unencumbered, and only a handful of times did she fail to recall mostly minor details asked of her. (R. at 561, 582, 596, 601, 604). Yet when defense counsel asked for details probing inconsistencies in her testimony, SPC JP answered "I don't remember" over 80 different times. (R. at 632-701). Despite indicating that she was a 3 out of 10, with 10 being extremely drunk, SPC JP claimed not to remember several key details, including whether she flirted with, hugged, or kissed Appellant on the night in question. (R. at 647-48). SPC JP denied that her memory was refreshed even after being shown her own text messages. (R. at 697). At one point, SPC JP answered, "I don't remember" to fourteen consecutive questions from the trial defense counsel about her choices while in Appellant's bedroom and about the nature of her relationship with SPC FG. (R. at 680-82).

Regarding SPC JP's reputational concerns, she refused to acknowledge or claimed not to remember whether, prior to reporting a sexual assault to CID, her roommate had asked if she and Appellant had "hooked up." (R. at 699). Regarding

her accounts of the sexual act itself, SPC JP claimed not to remember telling either the SAMFE or CID that she and Appellant had switched positions more than once due to discomfort she felt at various points. (R. at 672, 675).

Standard of Review

This court may review whether a Court of Criminal Appeals (CCA) applied “correct legal principles” in performing its factual sufficiency review. *Harvey*, 85 M.J. at 129. This court will not overturn a lower court’s factual findings unless they are clearly erroneous or unsupported by the record. *United States v. Katso*, 74 M.J. 273, 279 (C.A.A.F. 2015).

Law and Argument

The Army Court has interpreted *Harvey* to mean that Article 66 requires it to perform a factual sufficiency when – and only when – an appellant asserts an error and makes a specific showing of a deficiency in proof. *United States v. Brassfield*, 85 M.J. 523, 527 (Army Ct. Crim. App. 2024) (referring to these as the two trigger conditions which must be met). In *Brassfield*, the Army Court’s opinion analyzed this issue and found on the facts of that case that appellant’s testimony plus minor inconsistencies in the victims’ testimony did not amount to, “a specific deficiency of proof.” *Id.*

In a subsequent memorandum opinion, the Army Court remarked on the absence of guidance from this court since *Harvey* as to what constitutes a “showing

of a deficiency.” *United States v. Smith*, 2025 CCA LEXIS 608, at *10 (Army Ct. Crim. App. 30 Dec. 2025). In lieu of this court’s guidance, the Army Court has adopted its own interpretation of *Harvey* in combination with that of the Navy-Marine Corps Court of Criminal Appeals in order to define a specific deficiency. See *United States v. Valencia*, 85 M.J. 529, 535 (N.M. Ct. Crim. App. 2024, aff’d 2025 CAAF LEXIS 966 (C.A.A.F. 24 Nov. 2025)) (holding that a general disagreement with a verdict falls short and requiring the identification of a weakness in the evidence admitted at trial to support an element and an explanation of why on balance a guilty finding is contradicted).

When the Army Court says they will only conduct a factual sufficiency review when this court’s “two trigger conditions” are met, then whenever an appellant satisfies the first condition by requesting a review, any declination by the CCA to conduct a factual sufficiency review should be accompanied by a legal analysis of the second condition. Otherwise, this court’s Article 66 guidance in *Harvey* is unenforceable, because it simply melts away so long as the CCA remains silent on the topic.

When an appellant asserts an error and shows a specific deficiency in proof, the CCA’s analysis should state whether and why, in their view, the second of two trigger conditions is met, or if not, why not. Only then is review possible regarding the Army Court’s legal analysis regarding whether or not to conduct a factual

sufficiency review pursuant to Article 66. Only then can this court ensure that correct legal principles are applied and that this court's factual sufficiency standard is upheld. *See Harvey*, at 129.

At issue here are the dual concerns that appellant does not know if the Army Court conducted a factual sufficiency review as he requested, and this court cannot review those legal principles applied by the Army Court where no analysis supports its factual sufficiency review, if any. Further, whether the Army Court's factual findings were clearly erroneous is also an open question, because the per curiam opinion makes no factual findings beyond the words, "correct in . . . fact." A review of the Army Court's short form affirmances suggests that this language is boilerplate and is included in its decisions even when a factual sufficiency review is not requested by an appellant, and therefore presumably not done by the Army Court. *See, e.g. United States v. Miles*, 2026 CCA LEXIS 158 (Army Ct. Crim. App. 31 Mar. 2026).

This court should require that, whether or not a CCA performs a factual sufficiency review, subject to this court's review on further appeal, it must clearly indicate whether or not such a review was conducted. That requirement should also demand the inclusion of at least a cursory legal analysis of the asserted specific showing of a deficiency in proof, weighed against the balance of the evidence, and the application of legal principles to its factual sufficiency determination.

As it stands, this appellant, and others with a specific factual sufficiency challenge to their convictions: 1) will not know whether the CCA's Art. 66 factual sufficiency review function was carried out, 2) assuming arguendo that it was, will not know whether it was done properly, and 3) will have no recourse to this court.

This leads to perverse incentives, whereby a CCA can provide no reasoning for its decision on factual sufficiency, making its decision in effect infallible. Only by expounding on a single legal principle or idea does it risk this court's intervention on further appeal. A CCA should be subject to a greater degree of scrutiny in exercising its authority under Article 66. A CCA should be required to explain what it is doing and to provide a rationale subject to this court's review. There is no reason why an absence of legal principles should be afforded a higher degree of deference by this court than incorrect ones. The current CCA interpretation of the new Article 66 and of *Harvey* restricts this court's capacity to review for sufficiency pursuant to Article 67 and is a detriment to petitioners before this court.

Conclusion

WHEREFORE, appellant respectfully requests this Court grant his petition for review.²



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² Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant respectfully requests this court consider the information provided in Appendix B.

Certificate of Compliance with Rules 24(c) and 37

1. This Supplement to the Petition complies with the type-volume limitation of Rule 24(c) because it contains 3,290 words.
2. This Supplement to the Petition complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

A handwritten signature in black ink, appearing to read "Pat McHenry". The signature is written in a cursive, slightly slanted style.

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APPENDIX A

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
WILLIAMS, COOPER, and SCHLACK
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist CHARLES H. CUNNINGKIN
United States Army, Appellant

ARMY 20240125

Headquarters, 82d Airborne Division
Tyler J. Heimann, Military Judge
Colonel David J. Krynicki, Staff Judge Advocate

For Appellant: Colonel Philip M. Staten, JA; Major Amir R. Hamdoun, JA; Captain Patrick McHenry, JA (on brief); Colonel Frank E. Kostik, Jr., JA; Lieutenant Colonel Kyle Sprague, JA; Lieutenant Colonel Peter Ellis, JA; Captain Patrick McHenry, JA (on reply brief).

For Appellee: Colonel Richard E. Gorini, JA; Major Elizabeth G. Van Dyck, JA; Captain Melissa D. Zigrang, JA (on brief).


25 February 2026

DECISION

Per Curiam:

On consideration of the entire record, including consideration of the issues personally specified by the appellant, we hold the findings of guilty and the sentence, as entered in the Judgment, correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.

FOR THE COURT:


JAMES W. HERRING, JR.
Clerk of Court

APPENDIX B

Appendix B: *Grostefon* Matters

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant, through appellate defense counsel, personally requests that this court consider the following matters:

- I. WHETHER APPELLANT’S CONVICTION TO SPECIFICATION 1 OF THE CHARGE IS LEGALLY SUFFICIENT WHERE THE COMPLAINING WITNESS ON CROSS EXAMINATION STATED, “I DON’T REMEMBER”, OR WORDS TO THAT EFFECT, MORE THAN 80 TIMES**

Standard of Review

This court reviews de novo the legal sufficiency of the evidence. *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019). “The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *United States v. Gutierrez*, 73 M.J. 172, 175 (C.A.A.F. 2014) (internal quotation marks omitted) (quoting *United States v. Bennett*, 72 M.J. 266, 268 (C.A.A.F. 2013)).

Law and Argument

Appellant’s conviction to Specification 1 of The Charge is legally insufficient because no rational factfinder could have found that the government proved the non-consent element of Article 120 to the required standard of proof. The panel members in appellant’s court-martial deliberated for less than two hours on a Thursday

evening at the conclusion of a complex four-day court-martial concerning three sexual assault or abusive sexual contact specifications involving two separate victims. (R. at 1001). That appellant and SPC JP had sexual intercourse was not a point in controversy, but whether the government proved that SPC JP did not consent was in serious doubt. While the panel is charged with making credibility determinations, it was simply not possible for a rational panel to determine that SPC JP's testimony was credible enough to satisfy the burden in light of her highly selective and deficient memory and when key pieces of her testimony were directly contradicted by her on-and-off boyfriend at the time, and by other fact witnesses.

Several key parts of SPC JP's testimony are discredited or contradicted by other witnesses. For example, SPC FG, a prosecution witness, testified that he and SPC JP were in fact dating on July 3-4, 2021, and had not agreed to take a break in their relationship. (R. at 709-10). SPC FG testified as to his experience that SPC JP omitted all mention of appellant initially, ignored his calls, and declined several opportunities to receive a ride back to her barracks room, adding that he felt she was not forthcoming with him, hid details, and failed to answer many of his questions (R. at 720, 722, 724, 725) – questions that he posed from his perspective as SPC JP's boyfriend. In fact, SPC FG and SPC JP continued to date for over two years following the events of July 3-4, 2021, and neither SPC FG or SPC JP testified about when they resumed dating if in fact they had taken a break in their

relationship. (R. at 709). SPC FG testified that he thought SPC JP cheated on him with Appellant. (R. at 728).

SPC FG testified that when SPC JP called him from Appellant's bed during the period when Appellant had stepped out of the room, SPC JP was crying and apologizing to him (R. at 712), a conversation that SPC JP herself described on direct as telling SPC FG that, "everything was okay, that I was fine." (R. at 594). On cross examination, SPC JP denied any recollection of herself apologizing to SPC FG. (R. at 677). SPC FG also testified that SPC JP at one point told him that Appellant had broken her romper (R. at 718), but SPC JP testified that she did not remember when it ripped or how it was removed from her body while she was in Appellant's bed. (R. at 655, 682).

That SPC JP's testimony is contradicted on such important points, by another Government witness no less, and that her memory is so suspiciously selective, undermines her character for truthfulness to the point that this Court cannot be convinced that the Government proved a lack of consent to the required standard.

SPC JP's unreliable and uncooperative testimony is especially problematic given that the "principal evidence against" appellant came primarily from SPC JP's testimony. *Harvey*, at 129. The dearth of other evidence of non-consent presented by the government tends to demonstrate that the weight of the evidence does not

support a finding that the Government met its burden of proving non-consent beyond a reasonable doubt. The Sexual Assault Medical Forensic Examiner (SAMFE) Ms. Erika Doss' testimony was presented to the panel, and she testified to the examination's being consistent with both consensual and non-consensual sexual activity as well as consistent with no sexual activity having taken place. (R. at 745-47). A DNA report was marked for identification by the prosecution but not admitted because it did not contradict the defense theory of the case, that sex occurred but that it was consensual in nature.

Under direct examination by the trial counsel, SPC JP's memory was almost entirely unencumbered, and only a handful of times did she fail to recall mostly minor details asked of her. (R. at 561, 582, 596, 601, 604). Yet when defense counsel asked for details probing inconsistencies in her testimony, SPC JP answered "I don't remember" over 80 different times. (R. at 632-701). Despite indicating that she was a 3 out of 10, with 10 being extremely drunk, SPC JP claimed not to remember several key details, including whether she flirted with, hugged, or kissed Appellant on the night in question. (R. at 647-48). SPC JP denied that her memory was refreshed even after being shown her own text messages. (R. at 697). At one point, SPC JP answered, "I don't remember" to fourteen consecutive questions from the trial defense counsel about her choices

while in Appellant's bedroom and about the nature of her relationship with SPC FG. (R. at 680-82).

Regarding SPC JP's reputational concerns, she refused to acknowledge or claimed not to remember whether, prior to reporting a sexual assault to CID, her roommate had asked if she and Appellant had "hooked up." (R. at 699). Regarding her accounts of the sexual act itself, SPC JP claimed not to remember telling either the SAMFE or CID that she and Appellant had switched positions more than once due to discomfort she felt at various points. (R. at 672, 675).

Because of these significant credibility issues, a rational factfinder, considering all evidence in the light most favorable to the prosecution, could not have found the second element of Article 120(b)(2)(A), requiring the Government to prove SPC JP's lack of consent to the sexual act.

II. WHETHER THE MILITARY JUDGE ERRED BY ALLOWING IN A NONCONSENSUAL AUDIO RECORDING CONTAINING APPELLANT'S POTENTIALLY INCULPATORY RESPONSES TO QUESTIONING, TAKEN BY ANOTHER SERVICEMEMBER, DURING AND IN AID OF A LAW ENFORCEMENT INVESTIGATION, IN VIOLATION OF APPELLANT'S ARTICLE 31(b), UCMJ RIGHTS.

ADDITIONAL FACTS

On October 29, 2021, after a sexual assault investigation into Appellant's conduct with SPC JP had begun and word of it had spread throughout the unit, Appellant walked with and then rode in a vehicle with SPC JK (SGT JK at the time

of trial), who was both an acquaintance of his and a friend of SPC JP. (R. at 775). Unbeknownst to Appellant, SPC JK began to record their conversation regarding SPC JP's allegations against Appellant. (R. at 777-78). This recording was later admitted at trial and played in its entirety in open court over a defense hearsay objection. (Pros. Ex. 9). At the time, Appellant and SGT JK were both Specialists. SGT JK became an NCO on October 1, 2023, and Appellant was later reduced to E-3. (R. at 814).

Before this, SGT JK and SPC JP had come to know each other personally during their time on TDY together in Guam. (R. at 824). After making the recording, SGT JK later kissed and went on dates with SPC JP (R. at 841) and saw her as a potential future girlfriend at the time he collected this evidence. (R. at 823-24). SGT JK was well aware of the rumors surrounding SPC JP and Appellant and discussed with SPC JP the embarrassment and negative impact on her emotionally from the fact that people around the barracks, CQ, and the unit generally were discussing what happened between SPC JP and Appellant. (R. at 827-28). SGT JK also spoke to SPC JP about reporting via the Army's Sexual Harassment/Assault Response and Prevention program, or 'SHARP'. (R. at 828).

SGT JK was in contact with her prior to and after making the recording, and he told her that he would take the video file to his First Sergeant. (R. at 832).

STANDARD OF REVIEW

The voluntariness of a confession is a question of law that an appellate court reviews *de novo*. *United States v. Nelson*, 82 M.J. 251, 255 (C.A.A.F. 2021).

When there is a motion to suppress a statement on the ground that rights' warnings were not given, this court reviews the military judge's findings of fact on a clearly erroneous standard and reviews conclusions of law *de novo*. *United States v. Swift*, 53 M.J. 439, 446 (C.A.A.F. 2000) (citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). While this objection may be waived pursuant to MRE 304(f), this Court should consider piercing waiver.

LAW

Article 31(a) of the UCMJ provides that no person subject to the UCMJ may “compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.” 10 U.S.C. § 831(a). Article 31(b), UCMJ then requires a rights' warning, and states that those subject to the UCMJ may not, “interrogate, or request any statement from the accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement and that any statement made by him may be used as evidence against him in a trial by court-martial.” 10 U.S.C. § 831 (b); *see also United States v. Flanner*, 85 M.J. 163,172 (C.A.A.F. 2024).

The C.A.A.F. has required rights' warnings if two conditions are met: (1) the person being interrogated is a suspect at the time of the questioning, and (2) the person conducting the questioning is participating in an official law enforcement investigation. *Swift*, 53 M.J. at 446. Whether a person is a suspect is an "objective question answered by considering all the facts and circumstances at the time of the interview to determine whether the military questioner believed or reasonably should have believed that the servicemember committed an offense." *Id.* (quoting *United States v. Good*, 32 M.J. 105, 108 (CMA 1991)). Questioning by a military superior in the immediate chain of command will normally be presumed to be for disciplinary purposes. *Id.*

Whether the questioning was part of a law enforcement investigation is determined by "assessing all the facts and circumstances at the time of the interview to determine whether the military questioner was acting or could reasonably be considered to be acting in an official law enforcement or disciplinary capacity." *Id.* At times it can also be appropriate to consider the subjective view, looking at what the investigator, in fact, believed, and deciding if the investigator considered the interrogated person to be a suspect. *United States v. Metz*, 84 M.J. 421, 426 (C.A.A.F. 2023).

MRE 304(a) provides that an involuntary statement from the accused, or any evidence derived therefrom, is inadmissible at trial; a confession is involuntary if it

was obtained in violation of the self-incrimination privilege or Due Process Clause of the Fifth Amendment to the United States Constitution, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement. *United States v. Lewis*, 78 M.J. 447 (C.A.A.F. 2018).

ARGUMENT

Appellant's Article 31(b) rights were violated by then SPC JK's and 1SG Garcia's combined efforts to interrogate him, record his incriminating statements, and to assist in an active law enforcement investigation in which Appellant was already the only suspect, without first informing him of his rights.

Considering all the facts and circumstances, SGT JK plainly wanted to assist in the law enforcement investigation into Appellant's conduct with SPC JP. He was friends with SPC JP and spoke to her on the day he made the recording. (R. at 832, 836). He testified that he did not consider Appellant a friend and did not understand why Appellant would confide in him. (R. at 817). He admitted to trying to turn the video into his First Sergeant and then turning it in to CID when the video file was too large to send via text message, and he admitted to using an accusatory and aggressive tone when questioning and recording Appellant. (R. at 832). He acknowledged that the only thing Appellant ever told him was that he and SPC JP were drunk and that they had sex and that he would be surprised if she remembered it. (R. at 816, 833-34).

1SG Garcia, by sending SGT JK to CID, lent credence to his investigative efforts and imbued SGT JK's apparently rogue interrogation of Appellant with the imprimatur of authority. By directing SPC JK, 1SG Garcia sanctioned the improper questioning and created another basis by which the military judge erred by admitting the video. Objectively, under *Good*, and subjectively, under *Metz*, a reasonable interpretation of the actions of SPC JK and 1SG Garcia would be that they considered Appellant a suspect in the sexual assault of SPC JP.

Next, SPC JK and 1SG Garcia could reasonably be considered to be acting in a law enforcement or disciplinary capacity. While no one appears to have told SPC JK to interrogate or record Appellant, SPC JK was at the time a service member himself subject to the UCMJ and bound by Article 31(b). While SPC JK was not a military superior to Appellant, 1SG Garcia was, and both of them combined to interrogate and then to endorse such tactics by sending SPC JK to CID to aid in the investigation, as intended.

In conjunction with the other flawed evidence presented by the prosecution, the recorded interrogation is materially prejudicial in that it arguably reflects a guilty conscience and would impact whether a rational factfinder could be convinced of Appellant's guilt beyond a reasonable doubt. At no point does Appellant acknowledge having non-consensual sex with SPC JP, instead referring only

whether she remembered “it,” meaning the consensual sexual activity between himself and SPC JP, which had occurred while the two had both been drinking.

At one point Appellant asks SGT JK, “if she didn’t remember about it, then what’s the point of digging up the dirt just for her to be like okay I’m gonna SHARP you now.” (Pros. Ex. 9). This reflects Appellant’s initial understanding of SPC JP’s memory, based on SPC JP’s now-abandoned position that she in fact did not remember them having sex. Introducing the recorded audio to the panel, however, risks confusion and may unfairly read into Appellant’s tone and misinterpret such brief snippets of conversation, failing to appreciate the distinction and hearing only panic.

III. WHETHER TRIAL DEFENSE COUNSEL WERE INEFFECTIVE FOR FAILING TO MOVE TO SUPPRESS, BASED ON ARTICLE 31(b), SGT JK’S SECRET AUDIO RECORDING OF APPELLANT, RATHER THAN MERELY OBJECTING BASED ON HEARSAY

The CAAF has consistently held that “when a claim of ineffective assistance of counsel is premised on counsel's failure to make a motion to suppress evidence, an appellant must show that there is a reasonable probability that such a motion would have been meritorious.” *Metz*, 84 M.J. at 428 (citation modified). Applying the arguments in *Grostefon* Issue I above, there is a reasonable probability that Appellant’s motion to suppress would have succeeded based on SPC JK’s being

subject to the UCMJ, his intention to aid a law enforcement investigation, and his stated belief that Appellant was a suspect at the time of the questioning. (R. at 777).

IV. WHETHER A GENERAL APOLOGY FOR “WHATEVER HAPPENED” CAN SERVE AS ADEQUATE ‘OTHER EVIDENCE’ OF APPELLANT’S GUILT WHERE EVIDENTIARY PROBLEMS PLAGUED THE GOVERNMENT’S CASE.

Months after the events described in Specification 1, SPC JP texted Appellant to ask him about each of their memories regarding July 3-4, 2021. In response to SPC JP’s statement, “Yeah, I remember it. It kind of hurts to be honest. I guess I expected an apology from you eventually for how it happened after I kept saying that I didn’t want to,” Appellant responded, “Well for whatever happened I apologize. I understand if you want [sic] wanna be friends anymore.” (Pros. Ex. 2). The C.A.A.F. has indicated that non-specific apologies of this nature do not unassailably establish consciousness of guilt, specifically because they could also have been “statements from someone who knows they have acted inappropriately, but not criminally.” *United States v. Tovarchavez*, 78 M.J. 458, 468 (C.A.A.F. 2019) (concerning a very similar apology and the harm to appellant caused by an erroneous propensity instruction in light of all other evidence admitted against him). Considering that these long-delayed texts were some of the only other evidence corroborating SPC JP’s unreliable testimony, the interrogation video recorded by SPC JK and admitted despite Appellant’s 31(b) rights, and hearsay statements attributed to SPC JP by SPC FG without a defense objection, this underscores the

cumulative impact of the issues and highlights the factual and legal insufficiency of Specification 1 of The Charge.

V. WHETHER PROSECUTION EXHIBIT 9 SHOULD HAVE BEEN EXCLUDED BECAUSE IT REFERS TO SPC JP'S INABILITY TO REMEMBER AND THEREFORE HER INABILITY TO CONSENT – RATHER THAN HER NON-CONSENT – A CHARGE NOT AT ISSUE UNDER *UNITED STATES V. MENDOZA*, 2024 CAAF LEXIS 590.

VI. WHETHER APPELLANT'S TRIAL DEFENSE COUNSEL WERE INEFFECTIVE FOR NOT OBJECTING TO CRITICAL HEARSAY STATEMENTS WHICH SERVED TO CORROBORATE THE ACCOUNT OF THE COMPLAINING WITNESS ON THE ULTIMATE QUESTION.

Trial counsel asked SPC FG on direct testimony about the phone conversation he had with Victim 1 (SPC JP) the morning after she alleged that she was sexually assaulted by Appellant. Trial defense counsel heard and did not object to the following corroborating testimony:

Assistant Trial Counsel: What, if anything, did she say happened the night before?

SPC FG: She had told me that she had too much to drink and she needed to find a place to lay down. Later on, she told me that Cunningkin had walked in the room, laid down next to her, started talking to her and had sex with her.

ATC: And how did she describe whether or not she wanted the sex to occur?

SPC FG: She told me she was trying to fight him off.

(R. at 715).

VII. WHETHER THE SENTENCE IMPOSED BY THE MILITARY JUDGE WAS INAPPROPRIATELY SEVERE.

VIII. WHETHER APPELLANT'S CONVICTION AS TO SPECIFICATION 3 OF THE CHARGE IS FACTUALLY AND LEGALLY SUFFICIENT WHERE THE COMPLAINING WITNESS AND SEVERAL PROSECUTION WITNESSES ACKNOWLEDGE BEING SEVERELY IMPAIRED BY DRUGS AND ALCOHOL AND MR. MCCRAY, A MORE SOBER WITNESS, DISCOUNTED THEIR TESTIMONIES.

IX. WHETHER PROSECUTORIAL MISCONDUCT PREJUDICED APPELLANT – EITHER BY INFLAMING THE PASSIONS OF THE COURT MEMBERS, DISCUSSING FACTS NOT IN EVIDENCE, OR EXPRESSING PERSONAL OPINIONS AS TO THE TRUTH OR FALSITY OF CERTAIN TESTIMONY

X. WHETHER IMPROPER ARGUMENT BY THE PROSECUTION AT CLOSING ARGUMENT PREJUDICED APPELLANT, SPECIFICALLY WHERE TRIAL COUNSEL ALLUDED TO SGT JK'S PERCEPTION THAT APPELLANT "INSINUATED" THAT HE COMMITTED A SEXUAL ASSAULT WHEN THE MILITARY JUDGE HAD ALREADY SUSTAINED AN OBJECTION TO SGT JK'S CHARACTERIZATIONS THAT APPELLANT "HOPED" SPC JP WOULDN'T REMEMBER THE SEX AND THAT HE WOULDN'T GET IN TROUBLE, AND WHERE SGT JK ADMITTED THAT APPELLANT IN REALITY SAID ONLY THAT HE WOULD BE "SURPRISED" IF SPC JP REMEMBERED THE SEX. (R. AT 775, 801-809, 957, AE XXXV, AE XXXVI).

XI. WHETHER MS. AL AND SPC FG TESTIFYING AT SENTENCING AS CRIME VICTIMS WAS IN VIOLATION OF R.C.M. 1001(C) AND PREJUDICIAL TO APPELLANT'S RIGHTS. (R. AT 1041, 1023).

XII. WHETHER APPELLANT WAS PREJUDICED BY IMPROPER SPILLOVER ARGUMENT BY THE PROSECUTION AT SENTENCING, AFTER THE MILITARY JUDGE EXPRESSLY GRANTED A DEFENSE MOTION TO PRECLUDE THE GOVERNMENT FROM ARGUING THAT THE DEFENDANT HAD ACTED PURSUANT TO A COMMON

PLAN, SCHEME, OR *MODUS OPERANDI* (R. 1070; App. Ex. IV, IV-A, V, XIII).

XIII. WHETHER APPELLANT WAS PREJUDICED BY IMPROPER SPILLOVER ARGUMENT BY THE PROSECUTION ON REBUTTAL, AFTER THE MILITARY JUDGE EXPRESSLY GRANTED A DEFENSE MOTION TO PRECLUDE THE GOVERNMENT FROM ARGUING THAT THE DEFENDANT HAD ACTED PURSUANT TO A COMMON PLAN, SCHEME, OR *MODUS OPERANDI* (R. 986; App. Ex. IV, IV-A, V, XIII).

XIV. WHETHER APPELLANT WAS PREJUDICED WHEN THE TRIAL COUNSEL ARGUED FACTS NOT IN EVIDENCE, CLAIMING THAT MR. MCCRAY SAID HE SAW APPELLANT TOUCHING MS KB'S CHEST AFTER HE HAD IN FACT TESTIFIED, "SO I TECHNICALLY DIDN'T SEE ANYTHING" AND "LOOKED LIKE IT WAS AROUND HER TORSO, CHEST AREA" (R. AT 537, 540, 946, 959).

XV. WHETHER *MENDOZA* IS IMPLICATED WHEN SGT JK TESTIFIED THAT SPC JP TOLD HIM THAT HER MEMORY OF THE NIGHT WAS IMPACTED AFTER DRINKING WITH APPELLANT BUT SPC JP LATER TESTIFIED AT TRIAL THAT SHE WAS ONLY A 3 OUT OF 10 DRUNK. (R. AT 826).

APPENDIX C

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,

Appellee

v.

Private First Class (E-3)

CHARLES H. CUNNINGKIN

United States Army,

Appellant

**BRIEF ON BEHALF OF
APPELLANT**

Docket No. ARMY 20240125

Tried at Fort Bragg¹, North Carolina, on 18 January, 2 and 27 February, and 4-8 March 2024, before a general court-martial appointed by the Commander, 82d Airborne Division, Lieutenant Colonel Tyler J. Heiman, military judge, presiding.

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

ASSIGNMENT OF ERROR²

I. WHETHER APPELLANT'S CONVICTION TO SPECIFICATION 1 OF THE CHARGE IS FACTUALLY AND LEGALLY SUFFICIENT WHERE THE COMPLAINING WITNESS ON CROSS EXAMINATION STATED, 'I DON'T REMEMBER,' OR WORDS TO THAT EFFECT, MORE THAN 80 TIMES

¹ At the time of Appellant's court-martial, Fort Bragg was referred to as Fort Liberty.

² Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Appellant respectfully requests this court consider the information provided in the Appendix.

STATEMENT OF THE CASE

On 7 March 2024, an enlisted panel sitting as a general court-martial convicted appellant, Private First Class Charles H. Cunningkin, contrary to his pleas, of one specification of sexual assault (without consent) and one specification of abusive sexual contact (without consent), both in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 [UCMJ].³ (R. 1004; Charge Sheet). On 8 March 2024, the military judge sentenced appellant to confinement for 38 months and to be dishonorably discharged from the service.⁴ (R. 1081).

On 22 March 2024, the convening authority approved the findings and adjudged sentence. (Convening Authority Action). On 26 March 2024, the military judge entered Judgment. (Judgment of the Court). This court docketed appellant's case on 31 July 2024. (Referral and Designation of Counsel).

³ The Government charged abusive sexual contact in the alternative, and the panel found appellant not guilty of one specification of abusive sexual contact (asleep or unconscious) in violation of Article 120, UCMJ, 10 U.S.C. § 920.

⁴ The military judge sentenced appellant to consecutive terms of confinement as follows:

The Charge, Specification 1	36 months
The Charge, Specification 3	2 months

(R. 1081).

STATEMENT OF THE FACTS

On the evening of 3-4 July 2021, Appellant and Victim 1 ('SPC JP') attended a house party together after spending part of the day at his off-post apartment in Hope Mills, North Carolina. They later returned to Appellant's apartment in separate vehicles. (R. at 579, 641-42). SPC JP attended the party with Appellant after accepting his invitation to spend the day with him. (R. at 560, 579). At the time, SPC JP's on-and-off boyfriend, SPC FG, was on leave out of state. (R. at 710). While SPC FG testified that he and SPC JP were in a dating relationship as of 3-4 July 2021, SPC JP testified that she and SPC FG had decided to take a break and were more akin to "best friends" at the time (R. at 710, 560, 563). Both agreed that they were in frequent contact on the day of and into the evening SPC JP spent with Appellant, although SPC JP did not tell SPC FG that she was with Appellant until the next day. (R. at 640, 711, 720).

Appellant met SPC JP months prior to July 2021 through work, at their respective assignments in the G-1/S-1. They had previously spent time together outside of work, and Appellant had expressed interest in a romantic relationship with SPC JP. (R. at 557-58).

Later in the evening on 3 July 2021, at approximately 2300, SPC JP called SPC FG from Appellant's room, offered him several non-specific apologies, and

then stopped communicating with him until the next day when she returned his calls via Facetime from the balcony at Appellant's apartment. (R. at 712, 721-22). SPC JP's self-professed level of intoxication upon returning to Appellant's apartment late at night and going to bed was a three on a scale of one to ten. (R. 583).

I. WHETHER APPELLANT'S CONVICTION TO SPECIFICATION 1 OF THE CHARGE IS FACTUALLY AND LEGALLY SUFFICIENT WHERE THE COMPLAINING WITNESS ON CROSS-EXAMINATION STATED, 'I DON'T REMEMBER,' OR WORDS TO THAT EFFECT, MORE THAN 80 TIMES

ADDITIONAL FACTS

SPC JP testified that upon their return to Appellant's apartment after the house party, she "completely" forgot about her plan to get a ride back to her barracks with another Soldier and indicated that she got into the same bed as Appellant, or he got into the same bed as her, at least three separate times. (R. at 585, 593, 648, 665). She also testified that Appellant attempted to perform oral sex on her without her consent, then left the room. (R. at 590, 593). During that time, she remained in bed and called her on-and-off boyfriend – SPC FG. (R. at 593). She further testified that Appellant reentered the room and that she fell asleep again before being awakened by Appellant penetrating her vulva with his penis without her consent. (R. at 593-97). Following these interactions between

Appellant and SPC JP, which formed the basis for Specification 1, SPC JP slept through the night with Appellant in his bed, remained there, and finally accepted a ride back to her barracks from Appellant only later the following morning after they had watched a TV show together. (R. at 643, 700, 721-22, 603). That morning, SPC JP indicated to Appellant and to Appellant's friend that she did not remember anything about having sex with Appellant the previous night. (R. at 603, 705).

STANDARD OF REVIEW

In a factual sufficiency review under the recently amended Article 66, this Court “may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof.” Article 66(d)(1)(B), UCMJ. Once the showing is made, this court “may weigh the evidence and determine controverted questions of fact subject to — (1) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and (2) appropriate deference to [any] findings of fact entered into the record by the military judge.” *Id.* As a result, if this Court “is clearly convinced that the finding of guilty was against the weight of the evidence, the [c]ourt may dismiss, set aside, or modify the finding, or affirm a lesser finding.” *Id.*

The CAAF concluded “appropriate deference” implies “that the degree of deference will depend on the nature of the evidence at issue,” such that this Court might give high deference when assessing fact witness testimony and low deference when assessing documents, videos, or other objective evidence. *United States v. Harvey*, 85 M.J. 127, 130 (C.A.A.F. 2024). “The statute affords the CCA discretion to determine what level of deference is appropriate, and [CAAF] will review a CCA’s decision only for an abuse of discretion.” *Id.* at 131.

In a factual sufficiency review, though, the “beyond a reasonable doubt” standard asks the same question – that is, whether there is a fair and rational hypothesis other than guilt. *United States v. Billings*, 58 M.J. 861, 869 (Army Ct. Crim. App. 2003); *United States v. Whisenhunt*, 2019 CCA LEXIS 244, *6 (Army Ct. Crim. App. 3 June 2019) (summ. disp.) (citations omitted).

This court reviews questions of legal sufficiency *de novo*. See Article 66(d)(1)(A), UCMJ (2024 ed.).

LAW AND ARGUMENT

1. Factual Sufficiency

Article 120(b)(2)(A), UCMJ requires the Government to prove two elements: (1) that a penetration, however slight, of SPC JP’s vulva by the Appellant’s penis, occurred, and (2) that it happened without the consent of SPC

JP. This Court is authorized to act “if the finding of guilty was not sufficiently supported by the evidence presented at trial (i.e., not supported beyond a reasonable doubt).” *Harvey*, 85 M.J. at 131. For this Court to be clearly convinced that the finding of guilty was against the weight of the evidence, two requirements are necessary: first, that the evidence as this Court has weighed it, does not prove that the Appellant is guilty beyond a reasonable doubt, and that this Court must be clearly convinced of the correctness of this decision. *Id.*, at 132.

In this case, one deficiency of proof is that there is a highly plausible, fair and rational hypothesis other than guilt – that SPC JP decided to cheat on her boyfriend as an act of revenge for his prior infidelity, later regretted the decision when news of the sexual activity spread within the unit, and subsequently fabricated a sexual assault allegation against Appellant to preserve both her relationship with SPC FG and her reputation more broadly. (R. at 718, 723, 699).

Specifically, several key parts of SPC JP’s testimony are discredited or contradicted by other witnesses. *See United States v. Young*, 2024 CCA LEXIS 383, *9 (Army Ct. Crim. App. 13 September 2024) (summ. disp.) (noting the degree of deference given to the fact that the trial court saw and heard the witnesses but nonetheless finding factually insufficient and dismissing a failure-to-go specification where a complaining witness’ testimony was directly contradicted

by other fact witnesses). For example, SPC FG, a prosecution witness, testified that he and SPC JP were in fact dating on 3-4 July 2021, and had not agreed to take a break in their relationship. (R. at 709-10). SPC FG testified as to his experience that SPC JP omitted all mention of Appellant initially, ignored his calls, and declined several opportunities to receive a ride back to her barracks room, adding that he felt she was not forthcoming with him, hid details, and failed to answer many of his questions (R. at 720, 722, 724, 725) – questions that he posed from his perspective as SPC JP’s boyfriend. In fact, SPC FG and SPC JP continued to date for over two years following the events of 3-4 July 2021, and neither SPC FG or SPC JP testified about when they resumed dating if in fact they had taken a break in their relationship. (R. at 709). SPC FG testified that he thought SPC JP cheated on him with Appellant. (R. at 728).

SPC FG testified that when SPC JP called him from Appellant’s bed during the period when Appellant had stepped out of the room, SPC JP was crying and apologizing to him (R. at 712), a conversation that SPC JP herself described on direct as telling SPC FG that, “everything was okay, that I was fine.” (R. at 594). On cross examination, SPC JP denied any recollection of herself apologizing to SPC FG. (R. at 677). SPC FG also testified that SPC JP at one point told him that Appellant had broken her romper (R. at 718), but SPC JP testified that she did not

remember when it ripped or how it was removed from her body while she was in Appellant's bed. (R. at 655, 682).

That SPC JP's testimony is contradicted on such important points, by another Government witness no less, and that her memory is so suspiciously selective, undermines her character for truthfulness to the point that this Court cannot be convinced that the Government proved a lack of consent to the required standard.

SPC JP's unreliable and uncooperative testimony is especially problematic given that the "principal evidence against" Appellant came primarily from SPC JP's testimony. *Harvey*, at 129. The dearth of other evidence of non-consent presented by the government tends to demonstrate that the weight of the evidence does not support a finding that the Government met its burden of proving non-consent beyond a reasonable doubt. The Sexual Assault Medical Forensic Examiner (SAMFE) Ms. Erika Doss' testimony was presented to the panel, and she testified to the examination's being consistent with both consensual and non-consensual sexual activity as well as consistent with no sexual activity having taken place. (R. at 745-47). A DNA report was marked for identification by the prosecution but not admitted because it did not contradict the defense theory of the case, that sex occurred but that it was consensual in nature.

Under direct examination by the trial counsel, SPC JP's memory was almost entirely unencumbered, and only a handful of times did she fail to recall mostly minor details asked of her. (R. at 561, 582, 596, 601, 604). Yet when defense counsel asked for details probing inconsistencies in her testimony, SPC JP answered "I don't remember" over 80 different times. (R. at 632-701). Despite indicating that she was a 3 out of 10, with 10 being extremely drunk, SPC JP claimed not to remember several key details, including whether she flirted with, hugged, or kissed Appellant on the night in question. (R. at 647-48). SPC JP denied that her memory was refreshed even after being shown her own text messages. (R. at 697). At one point, SPC JP answered, "I don't remember" to fourteen consecutive questions from the trial defense counsel about her choices while in Appellant's bedroom and about the nature of her relationship with SPC FG. (R. at 680-82).

Regarding SPC JP's reputational concerns, she refused to acknowledge or claimed not to remember whether, prior to reporting a sexual assault to CID, her roommate had asked if she and Appellant had "hooked up." (R. at 699). Regarding her accounts of the sexual act itself, SPC JP claimed not to remember telling either the SAMFE or CID that she and Appellant had switched positions more than once due to discomfort she felt at various points. (R. at 672, 675).

A Court of Criminal Appeals (CCA) conducting a factual sufficiency review should take interest when a complaining witness displays a seemingly incompetent memory during cross examination. *See United States v. Masa*, NAVY 201800314, 2020 CCA LEXIS 4, at *22 (N-M. Ct. Crim. App. 13 Jan. 2020) (setting aside and dismissing with prejudice a sexual assault conviction where the complaining witnesses claimed over fifty times to be unable to remember pertinent facts). In *Masa*, the Navy Court was deeply concerned with the complaining witness' lack of credibility owing to her "claiming time and again to not remember so many important facts and even routine matters, and then routinely stating that her own recorded responses would not help refresh her memory." *Id.* at 26. In clarifying that the stress of trial "must never justify anything less than truthful responses to every question asked, the Navy Court found, "we are left to conclude either that her ability to recall was deficient on cross-examination to the point of legal incompetence or her memory lapses were feigned." *Id.*

Post-*Harvey*, in evaluating factual sufficiency, while there is an added hurdle for the defense to point out a deficiency of proof, and a requirement for this Court to be "clearly convinced," of the rightness of its own action before finding a conviction factually insufficient, the ultimate questions for this Court remain whether there is a fair and rational hypothesis other than guilt and whether the

evidence as this Court has weighed it, has proven each element of the offense beyond a reasonable doubt.

Here the second element of Article 120(b)(2)(A), requiring the Government to prove SPC JP's lack of consent to the sexual act is in serious doubt. *See United States v. Gilpin*, 2019 CCA LEXIS 515, at *23-24 (N-M. Ct. Crim. App. 30 Dec. 2019)(“whatever expert testimony either side presented concerning sleep behavior, intoxication, or counter-intuitive victim behavior, we find the simpler explanation of ill-advised, drunken consensual sex a serious possibility that we cannot ignore – and certainly do not consider it a fanciful doubt or ingenious conjecture”)(internal quotation marks omitted). Appellant does not need to prove that SPC JP in fact consented to the sexual act, he must only show that the Government failed to adequately rule out a more plausible explanation — that SPC JP willingly engaged in sex with Appellant, later regretted the decision, and in effort to preserve both her relationship and her reputation among her peers, alleged sexual assault.

2. Legal Sufficiency

The test for legal sufficiency is “whether, considering the evidence in a light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.” *United States v. Walters*, 58 M.J.

391 (C.A.A.F. 2003); *United States v. Pabon*, 42 M.J. 404, 405 (C.A.A.F. 1995) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Applying many of the factual sufficiency arguments above, Appellant's conviction to Specification 1 of The Charge is also legally insufficient because no rational factfinder could have found that the government proved the non-consent element of Article 120 to the required standard of proof. The panel members in Appellant's court-martial deliberated for less than two hours on a Thursday evening at the conclusion of a complex four-day court-martial concerning three sexual assault or abusive sexual contact specifications involving two separate victims. (R. at 1001). That Appellant and SPC JP had sexual intercourse was not a point in controversy, but whether the government proved that SPC JP did not consent was in serious doubt. While the panel is charged with making credibility determinations, it was simply not possible for a rational panel to determine that SPC JP's testimony was credible enough to satisfy the burden in light of her highly selective and deficient memory and when key pieces of her testimony were directly contradicted by her on-and-off boyfriend at the time, and by other fact witnesses.

CONCLUSION

Based on the foregoing Assignment of Error, this Court should set aside and dismiss Specification 1 of The Charge.



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Appendix: Matters Submitted Pursuant to *United States v. Grostefon*

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant, through appellate defense counsel, personally requests that this court consider the following matters:

I. WHETHER THE MILITARY JUDGE ERRED BY ALLOWING IN A NONCONSENSUAL AUDIO RECORDING CONTAINING APPELLANT'S POTENTIALLY INCULPATORY RESPONSES TO QUESTIONING, TAKEN BY ANOTHER SERVICEMEMBER, DURING AND IN AID OF A LAW ENFORCEMENT INVESTIGATION, IN VIOLATION OF APPELLANT'S ARTICLE 31(b), UCMJ RIGHTS.

ADDITIONAL FACTS

On 29 October 2021, after a sexual assault investigation into Appellant's conduct with SPC JP had begun and word of it had spread throughout the unit, Appellant walked with and then rode in a vehicle with SPC JK (SGT JK at the time of trial), who was both an acquaintance of his and a friend of SPC JP. (R. at 775). Unbeknownst to Appellant, SPC JK began to record their conversation regarding SPC JP's allegations against Appellant. (R. at 777-78). This recording was later admitted at trial and played in its entirety in open court over a defense hearsay objection. (Pros. Ex. 9). At the time, Appellant and SGT JK were both Specialists. SGT JK became an NCO on October 1, 2023, and Appellant was later reduced to E-3. (R. at 814).

Before this, SGT JK and SPC JP had come to know each other personally during their time on TDY together in Guam. (R. at 824). After making the recording, SGT JK later kissed and went on dates with SPC JP (R. at 841) and saw her as a potential future girlfriend at the time he collected this evidence. (R. at 823-24). SGT JK was well aware of the rumors surrounding SPC JP and Appellant and discussed with SPC JP the embarrassment and negative impact on her emotionally from the fact that people around the barracks, CQ, and the unit generally were discussing what happened between SPC JP and Appellant. (R. at 827-28). SGT JK also spoke to SPC JP about reporting via the Army's Sexual Harassment/Assault Response and Prevention program, or 'SHARP'. (R. at 828).

SGT JK was in contact with her prior to and after making the recording, and he told her that he would take the video file to his First Sergeant. (R. at 832).

STANDARD OF REVIEW

The voluntariness of a confession is a question of law that an appellate court reviews *de novo*. *United States v. Nelson*, 82 M.J. 251, 255 (C.A.A.F. 2021).

When there is a motion to suppress a statement on the ground that rights' warnings were not given, this court reviews the military judge's findings of fact on a clearly erroneous standard and reviews conclusions of law *de novo*. *United States v. Swift*, 53 M.J. 439, 446 (C.A.A.F. 2000) (citing *United States v. Ayala*, 43 M.J. 296, 298

(C.A.A.F. 1995)). While this objection may be waived pursuant to MRE 304(f), this Court should consider piercing waiver.

LAW

Article 31(a) of the UCMJ provides that no person subject to the UCMJ may “compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.” 10 U.S.C. § 831(a). Article 31(b), UCMJ then requires a rights’ warning, and states that those subject to the UCMJ may not, “interrogate, or request any statement from the accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement and that any statement made by him may be used as evidence against him in a trial by court-martial.” 10 U.S.C. § 831 (b); *see also United States v. Flanner*, 85 M.J. 163,172 (C.A.A.F. 2024).

The C.A.A.F. has required rights’ warnings if two conditions are met: (1) the person being interrogated is a suspect at the time of the questioning, and (2) the person conducting the questioning is participating in an official law enforcement investigation. *Swift*, 53 M.J. at 446. Whether a person is a suspect is an “objective question answered by considering all the facts and circumstances at the time of the

interview to determine whether the military questioner believed or reasonably should have believed that the servicemember committed an offense.” *Id.* (quoting *United States v. Good*, 32 M.J. 105, 108 (CMA 1991)). Questioning by a military superior in the immediate chain of command will normally be presumed to be for disciplinary purposes. *Id.*

Whether the questioning was part of a law enforcement investigation is determined by “assessing all the facts and circumstances at the time of the interview to determine whether the military questioner was acting or could reasonably be considered to be acting in an official law enforcement or disciplinary capacity.” *Id.* At times it can also be appropriate to consider the subjective view, looking at what the investigator, in fact, believed, and deciding if the investigator considered the interrogated person to be a suspect. *United States v. Metz*, 84 M.J. 421, 426 (C.A.A.F. 2023).

MRE 304(a) provides that an involuntary statement from the accused, or any evidence derived therefrom, is inadmissible at trial; a confession is involuntary if it was obtained in violation of the self-incrimination privilege or Due Process Clause of the Fifth Amendment to the United States Constitution, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement. *United States v. Lewis*, 78 M.J. 447 (C.A.A.F. 2018).

ARGUMENT

Appellant's Article 31(b) rights were violated by then SPC JK's and 1SG Garcia's combined efforts to interrogate him, record his incriminating statements, and to assist in an active law enforcement investigation in which Appellant was already the only suspect, without first informing him of his rights.

Considering all the facts and circumstances, SGT JK plainly wanted to assist in the law enforcement investigation into Appellant's conduct with SPC JP. He was friends with SPC JP and spoke to her on the day he made the recording. (R. at 832, 836). He testified that he did not consider Appellant a friend and did not understand why Appellant would confide in him. (R. at 817). He admitted to trying to turn the video into his First Sergeant and then turning it in to CID when the video file was too large to send via text message, and he admitted to using an accusatory and aggressive tone when questioning and recording Appellant. (R. at 832). He acknowledged that the only thing Appellant ever told him was that he and SPC JP were drunk and that they had sex and that he would be surprised if she remembered it. (R. at 816, 833-34).

1SG Garcia, by sending SGT JK to CID, lent credence to his investigative efforts and imbued SGT JK's apparently rogue interrogation of Appellant with the imprimatur of authority. By directing SPC JK, 1SG Garcia sanctioned the improper

questioning and created another basis by which the military judge erred by admitting the video. Objectively, under *Good*, and subjectively, under *Metz*, a reasonable interpretation of the actions of SPC JK and 1SG would be that they considered Appellant a suspect in the sexual assault of SPC JP.

Next, SPC JK and 1SG Garcia could reasonably be considered to be acting in a law enforcement or disciplinary capacity. While no one appears to have told SPC JK to interrogate or record Appellant, SPC JK was at the time a service member himself subject to the UCMJ and bound by Article 31(b). While SPC JK was not a military superior to Appellant, 1SG Garcia was, and both of them combined to interrogate and then to endorse such tactics by sending SPC JK to CID to aid in the investigation, as intended.

In conjunction with the other flawed evidence presented by the prosecution, the recorded interrogation is materially prejudicial in that it arguably reflects a guilty conscience and would impact whether a rational factfinder could be convinced of Appellant's guilt beyond a reasonable doubt. At no point does Appellant acknowledge having non-consensual sex with SPC JP, instead referring only whether she remembered "it," meaning the consensual sexual activity between himself and SPC JP, which had occurred while the two had both been drinking.

At one point Appellant asks SGT JK, “if she didn’t remember about it, then what’s the point of digging up the dirt just for her to be like okay I’m gonna SHARP you now.” (Pros. Ex. 9). This reflects Appellant’s initial understanding of SPC JP’s memory, based on SPC JP’s now-abandoned position that she in fact did not remember them having sex. Introducing the recorded audio to the panel, however, risks confusion and may unfairly read into Appellant’s tone and misinterpret such brief snippets of conversation, failing to appreciate the distinction and hearing only panic.

II. WHETHER TRIAL DEFENSE COUNSEL WERE INEFFECTIVE FOR FAILING TO MOVE TO SUPPRESS, BASED ON ARTICLE 31(b), SGT JK’S SECRET AUDIO RECORDING OF APPELLANT, RATHER THAN MERELY OBJECTING BASED ON HEARSAY

The CAAF has consistently held that “when a claim of ineffective assistance of counsel is premised on counsel's failure to make a motion to suppress evidence, an appellant must show that there is a reasonable probability that such a motion would have been meritorious.” *Metz*, 84 M.J. at 428 (citation modified). Applying the arguments in *Grostefon* Issue I above, there is a reasonable probability that Appellant’s motion to suppress would have succeeded based on SPC JK’s being subject to the UCMJ, his intention to aid a law enforcement investigation, and his stated belief that Appellant was a suspect at the time of the questioning. (R. at 777).

III. WHETHER A GENERAL APOLOGY FOR “WHATEVER HAPPENED” CAN SERVE AS ADEQUATE ‘OTHER EVIDENCE’ OF APPELLANT’S GUILT WHERE EVIDENTIARY PROBLEMS PLAGUED THE GOVERNMENT’S CASE.

Months after the events described in Specification 1, SPC JP texted Appellant to ask him about each of their memories regarding July 3-4, 2021. In response to SPC JP’s statement, “Yeah, I remember it. It kind of hurts to be honest. I guess I expected an apology from you eventually for how it happened after I kept saying that I didn’t want to,” Appellant responded, “Well for whatever happened I apologize. I understand if you want [sic] wanna be friends anymore.” (Pros. Ex. 2). The C.A.A.F. has indicated that non-specific apologies of this nature do not unassailably establish consciousness of guilt, specifically because they could also have been “statements from someone who knows they have acted inappropriately, but not criminally.” *United States v. Tovarchavez*, 78 M.J. 458, 468 (C.A.A.F. 2019) (concerning a very similar apology and the harm to appellant caused by an erroneous propensity instruction in light of all other evidence admitted against him). Considering that these long-delayed texts were some of the only other evidence corroborating SPC JP’s unreliable testimony, the interrogation video recorded by SPC JK and admitted despite Appellant’s 31(b) rights, and hearsay statements attributed to SPC JP by SPC FG without a defense objection, this underscores the

cumulative impact of the issues and highlights the factual and legal insufficiency of Specification 1 of The Charge.

IV. WHETHER PROSECUTION EXHIBIT 9 SHOULD HAVE BEEN EXCLUDED BECAUSE IT REFERS TO SPC JP'S INABILITY TO REMEMBER AND THEREFORE HER INABILITY TO CONSENT – RATHER THAN HER NON-CONSENT – A CHARGE NOT AT ISSUE UNDER *UNITED STATES V. MENDOZA*, 2024 CAAF LEXIS 590.

V. WHETHER APPELLANT'S TRIAL DEFENSE COUNSEL WERE INEFFECTIVE FOR NOT OBJECTING TO CRITICAL HEARSAY STATEMENTS WHICH SERVED TO CORROBORATE THE ACCOUNT OF THE COMPLAINING WITNESS ON THE ULTIMATE QUESTION.

Trial counsel asked SPC FG on direct testimony about the phone conversation he had with Victim 1 (SPC JP) the morning after she alleged that she was sexually assaulted by Appellant. Trial defense counsel heard and did not object to the following corroborating testimony:

Assistant Trial Counsel: What, if anything, did she say happened the night before?

SPC FG: She had told me that she had too much to drink and she needed to find a place to lay down. Later on, she told me that Cunningkin had walked in the room, laid down next to her, started talking to her and had sex with her.

ATC: And how did she describe whether or not she wanted the sex to occur?

SPC FG: She told me she was trying to fight him off.

(R. at 715).

VI. WHETHER THE SENTENCE IMPOSED BY THE MILITARY JUDGE WAS INAPPROPRIATELY SEVERE.

VII. WHETHER APPELLANT’S CONVICTION AS TO SPECIFICATION 3 OF THE CHARGE IS FACTUALLY AND LEGALLY SUFFICIENT WHERE THE COMPLAINING WITNESS AND SEVERAL PROSECUTION WITNESSES ACKNOWLEDGE BEING SEVERELY IMPAIRED BY DRUGS AND ALCOHOL AND MR. MCCRAY, A MORE SOBER WITNESS, DISCOUNTED THEIR TESTIMONIES.

VIII. WHETHER PROSECUTORIAL MISCONDUCT PREJUDICED APPELLANT – EITHER BY INFLAMING THE PASSIONS OF THE COURT MEMBERS, DISCUSSING FACTS NOT IN EVIDENCE, OR EXPRESSING PERSONAL OPINIONS AS TO THE TRUTH OR FALSITY OF CERTAIN TESTIMONY

IX. WHETHER IMPROPER ARGUMENT BY THE PROSECUTION AT CLOSING ARGUMENT PREJUDICED APPELLANT, SPECIFICALLY WHERE TRIAL COUNSEL ALLUDED TO SGT JK’S PERCEPTION THAT APPELLANT “INSINUATED” THAT HE COMMITTED A SEXUAL ASSAULT WHEN THE MILITARY JUDGE HAD ALREADY SUSTAINED AN OBJECTION TO SGT JK’S CHARACTERIZATIONS THAT APPELLANT “HOPED” SPC JP WOULDN’T REMEMBER THE SEX AND THAT HE WOULDN’T GET IN TROUBLE, AND WHERE SGT JK ADMITTED THAT APPELLANT IN REALITY SAID ONLY THAT HE WOULD BE “SURPRISED” IF SPC JP REMEMBERED THE SEX. (R. AT 775, 801-809, 957, AE XXXV, AE XXXVI).

X. WHETHER MS. AL AND SPC FG TESTIFYING AT SENTENCING AS CRIME VICTIMS WAS IN VIOLATION OF R.C.M. 1001(C) AND PREJUDICIAL TO APPELLANT’S RIGHTS. (R. AT 1041, 1023).

XI. WHETHER APPELLANT WAS PREJUDICED BY IMPROPER SPILLOVER ARGUMENT BY THE

PROSECUTION AT SENTENCING, AFTER THE MILITARY JUDGE EXPRESSLY GRANTED A DEFENSE MOTION TO PRECLUDE THE GOVERNMENT FROM ARGUING THAT THE DEFENDANT HAD ACTED PURSUANT TO A COMMON PLAN, SCHEME, OR *MODUS OPERANDI* (R. 1070; App. Ex. IV, IV-A, V, XIII).

XII. WHETHER APPELLANT WAS PREJUDICED BY IMPROPER SPILLOVER ARGUMENT BY THE PROSECUTION ON REBUTTAL, AFTER THE MILITARY JUDGE EXPRESSLY GRANTED A DEFENSE MOTION TO PRECLUDE THE GOVERNMENT FROM ARGUING THAT THE DEFENDANT HAD ACTED PURSUANT TO A COMMON PLAN, SCHEME, OR *MODUS OPERANDI* (R. 986; App. Ex. IV, IV-A, V, XIII).

XIII. WHETHER APPELLANT WAS PREJUDICED WHEN THE TRIAL COUNSEL ARGUED FACTS NOT IN EVIDENCE, CLAIMING THAT MR. MCCRAY SAID HE SAW APPELLANT TOUCHING MS KB'S CHEST AFTER HE HAD IN FACT TESTIFIED, "SO I TECHNICALLY DIDN'T SEE ANYTHING" AND "LOOKED LIKE IT WAS AROUND HER TORSO, CHEST AREA" (R. AT 537, 540, 946, 959).

XIV. WHETHER *MENDOZA* IS IMPLICATED WHEN SGT JK TESTIFIED THAT SPC JP TOLD HIM THAT HER MEMORY OF THE NIGHT WAS IMPACTED AFTER DRINKING WITH APPELLANT BUT SPC JP LATER TESTIFIED AT TRIAL THAT SHE WAS ONLY A 3 OUT OF 10 DRUNK. (R. AT 826).

APPENDIX D

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,

Appellee

**BRIEF ON BEHALF OF
APPELLEE**

v.

Docket No. ARMY 20240125

Specialist (E-4)

CHARLES H. CUNNINGKIN,

United States Army,

Appellant

Tried at Fort Bragg,¹ North Carolina, on 18 January, 2 and 27 February, and 4-8 March 2024, before a general court-martial convened by the Commander, 82d Airborne Division, Lieutenant Colonel Tyler J. Heiman, military judge, presiding.

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

Assignment of Error²

WHETHER APPELLANT'S CONVICTION TO SPECIFICATION 1 OF THE CHARGE IS FACTUALLY AND LEGALLY SUFFICIENT WHERE THE COMPLAINING WITNESS ON CROSS EXAMINATION STATED, 'I DON'T REMEMBER,' OR WORDS TO THAT EFFECT, MORE THAN 80 TIMES.

¹ At the time of appellant's trial, the installation was named Fort Liberty. Effective 10 February 2025, the installation was officially redesignated as Fort Bragg: https://armypubs.army.mil/epubs/DR_pubs/DR_a/ARN43136-AGO_2025-06-000-WEB-1.pdf.

² The government reviewed the matters submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and respectfully submits that they lack merit. Should this court consider any of those matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

Statement of the Case

On 7 March 2024, an enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of sexual assault (without consent) (Specification 1 of The Charge) and one specification of abusive sexual contact (without consent), in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 [UCMJ].³ (R. at 1004; Charge Sheet). The military judge sentenced appellant to confinement for thirty-eight months and a dishonorable discharge. (R. at 1081). On 22 March 2024, the convening authority approved the findings and adjudged sentence. (Action). On 26 March 2024, the military judge entered judgment. (Judgment).

Statement of Facts

On 3 July 2021, appellant and victim (Specialist [SPC] JP) spent time together during the day at appellant's off-post apartment. (R. at 578). Later that evening, appellant and SPC JP attended a house party together and then returned to appellant's apartment. (R. at 579, 641-42). Appellant and SPC JP knew each other through work. (R. at 557-58). The weekend of 3 July 2021, SPC JP's on-and-off boyfriend (SPC FG) was on leave out of state. (R. at 710). Specialist JP testified that at the time of the sexual assault, she was on a break with SPC FG; SPC FG

³ Unless otherwise stated, all references to the UCMJ and Rules for Courts-Martial [R.C.M.] are to the versions in the Manual for Courts-Martial, United States (2019 ed.) [MCM] [with 2020 and 2021 amendments].

testified they were in a dating relationship at that time. (R. at 562, 710). Specialist JP remained adamant during her testimony that she and SPC FG were not dating at the time the sexual assault occurred. (R. at 676-81). When defense asked about her “boyfriend,” in reference to SPC FG, SPC JP corrected the attorney numerous times: “[SPC FG] who was my ex-boyfriend,” “I didn’t have a boyfriend then,” and “I didn’t have a boyfriend, ma’am.” (R. at 676-77, 680-81).

When she returned to appellant’s apartment that evening, SPC JP assessed her level of intoxication was “a 3” on “a scale of 1 to 10 with 10 being the most intoxicated” and appellant’s level of intoxication was about “a 6 or 7.” (R. at 583, 585). Once SPC JP and appellant were in appellant’s bedroom, appellant attempted to spread her legs open; she thought he was trying to perform oral sex. (R. at 590). She “told him ‘no’ repeatedly, and [she] said [she] didn’t want to do this.” (R. at 592). Appellant responded that “it was okay” and that he just “wanted [her].” (R. at 592). Appellant then left the bedroom to take a phone call. (R. at 593). While appellant was gone, SPC JP called SPC FG at around 2300, while she was still in appellant’s bedroom, and said “I’m sorry” to SPC FG. (R. at 712). SPC FG said SPC JP was crying on the call and sounded “sad.” (R. at 712). This corroborates SPC JP’s recollection of the same phone call, as she stated that she called SPC FG and “at this point I was crying, I guess, to [SPC FG] ... he could hear that.” (R. at 593). After a brief conversation, SPC JP ended the phone call. (R. at 595, 712-13).

Specialist FG tried calling SPC JP back several times but was unable to reach her until the following morning. (R. at 603).

Appellant then reentered the bedroom; SPC JP was wrapped in a blanket, “turned around and face[d] away from Cunningkin,” and fell asleep. (R. at 596-97). When SPC JP woke up, she was on her back and appellant was on top of her with “his penis inside me.” (R. at 596-97). Specialist JP told appellant “no” and “stop” multiple times and tried to use her hands to push him off of her. (R. at 597-98). Specialist JP saw appellant was not wearing a condom; appellant said it was “fine.” (R. at 597-98). Appellant then told SPC JP that this was revenge on her ex-boyfriend; SPC JP had confided in appellant that SPC FG had cheated on her. (R. 597-98). Afterwards, appellant said “sorry” to SPC JP and asked her if she was going to report him. (R. at 598).

The next morning, on 4 July 2021, SPC JP woke up in appellant’s bed. (R. at 603). Specialist JP got up, went to appellant’s balcony, and video called SPC FG. (R. at 603). Specialist FG thought SPC JP seemed “out of it” and that she looked like “something had happened.” (R. at 713-14). After ending the video call, SPC JP went back inside where appellant’s friend was already awake and she engaged in small-talk with him. (R. at 603). Specialist JP did not disclose to appellant’s friend what had happened between her and appellant the previous night, since “it wasn’t something [she] was ready to talk about at the time.” (R. at 603). Appellant woke

up and joined SPC JP and his friend in the living room to watch television before SPC JP asked appellant to drive her home. (R. at 603-04).

On 6 July 2021, the next duty day, SPC JP went to the battalion aid station to “get tested for STDs [sexually transmitted diseases], STIs [sexually transmitted infections], or anything in that nature.” (R. at 607, 667). Later that day, SPC JP received a Sexual Assault Forensic Examination (SAFE) at Womack Army Medical Center. (R. at 607; Pros. Ex. 10). Specialist JP initially made a restricted report of her sexual assault that was changed to an unrestricted report when her “chain of command was alerted of it.” (R. at 618, 706).

In the weeks following the sexual assault, SPC JP and appellant exchanged text messages, in which SPC JP told appellant “I kept saying that I didn’t want to,” to which appellant responded “[w]ell for whatever happened I apologize” and “I understand if you want [sic] wanna be friends anymore.” (R. at 490; Pros. Ex. 2).

Assignment of Error

WHETHER APPELLANT’S CONVICTION TO SPECIFICATION 1 OF THE CHARGE IS FACTUALLY AND LEGALLY SUFFICIENT WHERE THE COMPLAINING WITNESS ON CROSS EXAMINATION STATED, ‘I DON’T REMEMBER,’ OR WORDS TO THAT EFFECT, MORE THAN 80 TIMES.

Standard of Review and Law

A. Factual Sufficiency

In any case in which every finding of guilty entered into the record is for an offense that occurred on or after 1 January 2021, the court may consider whether the findings of guilty are correct in fact upon appellant’s request only if appellant makes a specific showing of a deficiency in proof. Article 66(d)(1)(B), UCMJ, 10 U.S.C. § 866(d)(1)(B) (2021); *United States v. Harvey*, 85 M.J. 127, 130 (C.A.A.F. 2024); *see generally* Pub. L. No. 116-283, 134 Stat. 3611-12. Only if appellant has made such a showing—assertion of error and showing of deficiency—may the court weigh the evidence and determine controverted questions of fact. UCMJ art. 66(d)(1)(B); *Harvey*, 85 M.J. at 130.⁴

In weighing the evidence, the court affords “appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence and findings of fact entered into the record by the military judge.” UCMJ art. 66(d)(1)(B).

“Appropriate deference” will depend on the nature of the evidence at issue.

⁴ “Although it was long settled that the service courts applied a ‘de novo’ standard of review under the earlier versions of Article 66(d), UCMJ . . . the proper label for the standard of review under the newly amended Article 66(d)(1)(B), UCMJ, is more difficult to describe . . . Although this Court explained how the new standard should be construed and applied in *Harvey*, we declined to place a label on it, neither endorsing nor rejecting the continued use of the phrase ‘de novo’ to describe the standard of review.” *United States v. Downum*, __ M.J. __, *10-*11 (C.A.A.F. 2025).

Harvey, 85 M.J. at 130. “For example, a CCA [Court of Criminal Appeals] might determine that the appropriate deference required for a court-martial’s assessment of the testimony of a fact witness, whose credibility was at issue, is high because the CCA judges could not see the witness testify.” *Harvey*, 85 M.J. at 131. When courts of criminal appeal review a conviction, however, such deference does not create a presumption that an appellant is in fact guilty. *Harvey*, 85 M.J. at 132.

If the court is clearly convinced that the finding of guilt was against the weight of the evidence, the court may dismiss, set aside, or modify the finding, or affirm a lesser finding. UCMJ art. 66(d)(1)(B). This court must satisfy two requirements to be “clearly convinced:” (i) that the evidence, as the court has weighed it, does not prove that the appellant is guilty beyond a reasonable doubt and (ii) of the correctness of this decision. *Harvey*, 85 M.J. at 132.

B. Legal Sufficiency

Questions of legal sufficiency are decided de novo. *United States v. Csiti*, 85 M.J. 414, 419 (C.A.A.F. 2025) (additional citations omitted). A conviction is legally sufficient “if any rational fact-finder . . . could have found all essential elements of the offense beyond a reasonable doubt.” *Csiti*, 85 M.J. at 419 (internal citations omitted). Legal sufficiency review requires courts to consider “the evidence in the light most favorable to the prosecution.” *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017). Though reviewed de novo, this is a deferential

standard: while considering legal sufficiency, the courts must “draw every reasonable inference from the evidence in the record in favor of the prosecution.” *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001).

During its legal sufficiency review, the court considers all available facts within the record and is “not limited to [an] appellant’s narrow view of the record.” *United States v. Cauley*, 45 M.J. 353, 356 (C.A.A.F. 1996). In analyzing legal sufficiency, our superior court “has long recognized that the government is free to meet its burden of proof with circumstantial evidence.” *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019). “[T]he ability to rely on circumstantial evidence is especially important in cases . . . where the offense is normally committed in private.” *Id.* The “standard for legal sufficiency involves a very low threshold to sustain a conviction.” *Id.*

C. Sexual Assault (Without Consent)

Article 120(b)(2)(A), UCMJ, as charged, requires the Government to prove two elements: (1) that a penetration, however slight, of the penis into the vulva occurred, and (2) that it happened without the consent of the other person.

Argument

A. Appellant failed to make a specific showing to trigger a factual sufficiency review.

Article 66(d)(1)(B), UCMJ, does not authorize a court-martial’s unqualified re-litigation. Attacking the victim’s credibility and memory—which was already

assessed at trial—does not qualify as a “specific deficiency in proof” as required under Article 66. Appellant’s claimed deficiency is a hypothesis other than guilt—that SPC JP fabricated her testimony to preserve her relationship with SPC FG and her reputation. (Appellant’s Br., p. 7). Yet as appellant notes, at trial, defense focused on calling witnesses who attempted to contradict SPC JP’s testimony. (R. at 710, 728, 856-57). The record clearly shows that defense presented this theory at trial, which the panel considered and ultimately rejected. The trigger for a factual sufficiency review has not been met when the asserted deficiency in proof merely argues for a second assessment of victim credibility and testimony.

B. The evidence was factually sufficient to establish sexual assault without consent.

Assuming arguendo the court finds appellant has asserted a specific deficiency in proof, this court must afford “appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence” and “findings of fact entered into the record by the military judge.” Article 66(d)(1)(B)(ii), UCMJ.

Neither party contests the fact that appellant and SPC JP had sexual intercourse. The second element of the offense, that the penetration occurred without SPC JP’s consent, is established through SPC JP’s testimony and SPC FG’s testimony. Specialist FG received a phone call from SPC JP that evening on 3 July 2021 where he heard SPC JP crying and he testified that she sounded “sad.”

(R. at 712). Specialist JP explained that when she called SPC FG, “at this point [she] was crying,” but had “told him that everything was ok” because she “didn’t want him to worry because he was on leave...and spending time with his family.” (R. at 593-94).

Specialist JP stated that at one point in the evening after her phone call with SPC FG, she fell asleep in appellant’s bed and then woke up to appellant “with his penis . . . inside of me” and she told him “no” and to “stop” and attempted to push him away. (R. at 597-98). After appellant assaulted her, he then said “sorry” to her and asked her if she was going to report him. (R. at 598). Specialist FG also stated SPC JP Facetimed him the next morning and that she seemed “out of it” and she looked like “something had happened.” (R. at 713-14).

Specialist JP sought medical treatment the following duty day at the battalion aid station, as she “was experiencing some physical pain when [she woke up to appellant] raping [her].” (R. at 607). Specialist JP asked to get tested for STDs and STIs. (R. at 607). A SAFE exam was conducted on 6 July 2021. Text messages between SPC JP and appellant were exchanged in the weeks following the assault, in which SPC JP tells appellant “I kept saying that I didn’t want to,” to which appellant responds by apologizing for “whatever happened” and understands if SPC JP does not want to be friends anymore. (R. at 490; Pros. Ex. 2).

Appellant contends his conviction is not factually sufficient as SPC JP

frequently responded on cross-examination, “I don’t remember,” or words to that effect. A thorough and complete review of SPC JP’s testimony at trial, when considered in context, negates appellant’s argument. At the time of trial, nearly three years had passed since the sexual assault. (R. at 556, 560). This understandably might render minor details surrounding the event more difficult to recall by all parties, including SPC JP.

What SPC JP *does* remember about the sexual assault—the details surrounding waking up in appellant’s bed with appellant on top of her, penetrating her with his penis—was sufficient for the panel to find the offense occurred. (R. at 597). Her lack of memory regarding minute details on cross-examination—whether or not she told SPC FG that appellant drove her home the morning after the sexual assault; whether a certain text message that SPC JP sent to a friend while she was at the house party was sent before or after appellant threw up—did not fatally damage SPC JP’s credibility in the eyes of the fact finders. (R. at 640-41).⁵ The panel is owed “appropriate deference to the fact that [they] saw and

⁵ This case is distinguished from *United States v. Masa*, NAVY 201800314, 2020 CCA LEXIS 4 (N-M. Ct. Crim. App. 13 Jan. 2020) in that SPC JP’s lack of memory during her testimony was in regard to minor details not fatal to the legal or factual sufficiency of the conviction; in *Masa*, the victim was unable to recall facts relevant to the offenses, including whether or not the accused had “put his hands around [her] neck” during the assault, leading the court to conclude “either her ability to recall was deficient . . . to the point of legal incompetence or her memory lapses were feigned.” *Masa*, NAVY 201800314, 2020 CCA LEXIS at *25, 26.

heard the witnesses and other evidence and findings of fact entered into the record by the military judge.” UCMJ art. 66(d)(1)(B).

While other evidence at trial seemingly contradicted SPC JP’s testimony, such as SPC FG’s testimony that he and SPC JP were dating at the time of the assault or SPC JP’s testimony that she does not remember if her roommate at the time had asked her if she and appellant had “hooked up,” proof beyond a reasonable doubt does not require that the evidence be free from all conflict. (R. at 699); *United States v. Trigueros*, 69 M.J. 604, 612 (Army Ct. Crim. App. 2010). Specialist JP was adamant throughout her testimony that at the time of the sexual assault, she was not in a dating relationship with SPC FG, discrediting appellant’s theory that she had a motive to fabricate. (R. at 676-81). Additionally, SPC JP’s lack of memory as to what a particular individual had or had not asked her about and what she may have then disclosed to CID is not indicative of lack of factual sufficiency regarding the offense.

C. The evidence was legally sufficient to establish sexual assault without consent.

The “standard for legal sufficiency involves a very low threshold to sustain a conviction.” *King*, 78 M.J. at 218 (C.A.A.F. 2019) (citing *United States v. Navrestad*, 66 M.J. 262, 269 (C.A.A.F. 2008)) (Effron, C.J., joined by Stucky, J., dissenting). Considering the evidence in a light most favorable to the prosecution,

a reasonable fact finder could have found all the essential elements of Specification 1 of The Charge beyond a reasonable doubt. “‘Reasonable doubt’ does not mean that the evidence must be free from any conflict . . .” *King*, 78 M.J. at 221. Rather, the standard for legal sufficiency “gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.” *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011) (internal quotations and citations omitted). Further, appellant’s conviction of Specification 1 is legally sufficient because a rational factfinder could have found that the government proved the non-consent element of Article 120 to the required standard of proof.

Any rational panel could determine that SPC JP’s testimony was credible and that her testimony was sufficient to prove the non-consent element of Article 120. Specialist JP stated that her level of intoxication upon arriving back at appellant’s apartment on the evening of 3 July 2021 was a three out of ten and recalls numerous details surrounding the assault later that evening. (R. at 583). A rational factfinder could find SPC JP’s testimony credible because the alcohol consumed earlier that evening would not have significantly impacted her memory, and her lapses in memory of minute details almost three years after the sexual assault were reasonable. SPC JP also testified that appellant’s level of intoxication was “like a 6 or 7” and that she chose to stay with appellant in his bedroom

because she “was worried that because he had been drinking he would choke on his own vomit.” (R. at 585). A factfinder could rationally conclude that SPC JP’s memory from that evening is a more reliable and accurate source of information. Additionally, SPC JP testified numerous times that she was not in a romantic relationship with SPC FG on the night of 3-4 July 2021 and that at that time she did not have a boyfriend. (R. at 562). Therefore, it is also reasonable for a factfinder to conclude that SPC JP would not have had a motive to fabricate a sexual assault allegation against appellant in this case, as she would not have been concerned with preserving any romantic relationship with SPC FG or with preserving her reputation more broadly.

During her testimony, SPC JP did respond to numerous questions by stating that she did not remember certain details from the night of the assault. In no way does this negate that testimony of what she does recall, especially when considering “the evidence in the light most favorable to the prosecution.” *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2011). The details that SPC JP *does* remember—waking up to appellant penetrating her vulva with his penis, telling the appellant “no,” “stop,” and “get off me” multiple times, trying to push appellant off her—establish for a rational factfinder all the elements of sexual assault without consent. (R. at 592-97, 600).

Conclusion

WHEREFORE, the government respectfully requests This Honorable Court affirm the findings and sentence.



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APPENDIX E

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**REPLY BRIEF ON BEHALF OF
APPELLANT**

v.

Docket No. ARMY 20240125

Private First Class (E-3)

CHARLES H. CUNNINGKIN,
United States Army,

Appellant

Tried at Fort Bragg¹, North Carolina, on 18 January, 2 and 27 February, and 4-8 March 2024, before a general court-martial appointed by the Commander, 82d Airborne Division, Lieutenant Colonel Tyler J. Heiman, military judge, presiding.

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

On 16 July 2025, appellant filed his initial brief. On 13 November 2025, this court accepted the government’s answer brief. This is appellant’s reply.

In its brief, the government contends that specifically described concerns regarding incompetent memory and lack of credibility, displayed during the testimony of the complaining witness, do not constitute sufficiently specific deficiencies in proof under the amended Article 66, Uniform Code of Military Justice (UCMJ). (Gov. Br. at 8). This court “may consider whether the finding[s] [are] correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof.” *See* Article 66(d)(1)(B)(i). Once appellant

¹ At the time of Appellant’s court-martial, Fort Bragg was referred to as Fort Liberty.

shows a factual deficiency, this court may evaluate the evidence while giving “. . . (1) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and (2) appropriate deference to findings of fact entered into the record by the military judge. *Id.*

A. The “specific showing of a deficiency in proof” standard was not described by the CAAF in *Harvey*, but it is intended to be a low threshold which simply permits a factual sufficiency review by this court, when two conditions are met.

The Court of Appeals for the Armed Forces (CAAF) in *United States v. Harvey* recently agreed that a factual sufficiency review at the Court of Criminal Appeals level under Article 66 now requires an appellant to “. . . (1) assert[] an assignment of error, and (2) show[] a specific deficiency in proof. *Harvey*, 85 M.J. 127, 130 (C.A.A.F. 2024). In that case, the CAAF also expressly declined to define the phrase, “specific showing of a deficiency in proof” because both parties already agreed in that case that appellant had satisfied that initial burden. *Id.* Before the Navy-Marine Corps Court of Criminal Appeals (NMCCA), the court and parties in *Harvey* agreed that appellant’s pointing out one issue with quality of a surveillance video and two issues with the complaining witness’ credibility, in aggregate, “met the threshold requirement and made a specific showing of a deficiency in proof under Article 66(d)(1)(B)(i). *United States v. Harvey*, 83 M.J. 685, 693 (N-M. Ct. Crim. App. May 23, 2023).

The government's brief conflates legal and factual sufficiency and goes beyond the position advanced by the government in *Harvey*. (Gov. Br. at 8-9). *See Harvey*, 83 M.J. at 691 (“[c]omplete absence of evidence on an element of a charged offense would, of course, render a conviction legally insufficient because a reasonable factfinder could not find all the essential elements beyond a reasonable doubt. . . [t]he parties in this case substantially agree on this point.”); *see also* Rule For Courts-Martial (R.C.M.) 917.

This court should conduct a factual sufficiency review under the new Article 66 when the appellant identifies, “a weakness in the evidence admitted at trial to support an element (or more than one element) and explain[s] why, on balance, the evidence (or lack thereof) admitted at trial contradicts a guilty finding.” *Harvey*, 83 M.J. at 691.

Qualifying for a factual sufficiency review is not dispositive of the merit of an issue on appeal for appellant – it is merely a threshold matter that looks to whether the two “trigger conditions” described above are satisfied. *Harvey*, 85 M.J. at 130. Congress did not intend for the service courts of criminal appeals to regularly refuse to conduct appeals based on factual sufficiency, but rather intended only to make factual sufficiency reviews non-automatic by requiring an appellant to indicate a particular problem with the proof of guilt in his court-martial. *Id.* (overruling precedent which stated that a factual sufficiency review is ‘always

required’ but nowhere suggesting that factual sufficiency reviews will be rare). The new Article 66 emerged from a New York criminal procedure statute and came into being in a manner, “that reflects military practice since 1948” and was “[s]imilar to current practice” at the time the reforms were adopted.² Mil. Just. Rev. Group, Report of the Military Justice Review Group: Part I: UCMJ Recommendations (2015), Rec. 66.2. Factual sufficiency reviews should not be confused with legal sufficiency, whereby an unmet element might trigger a motion for a finding of not guilty under MRE 917.

B. CCAs were already under an obligation to show deference to the trial court prior to the modification to Article 66.

The government cites the new Article 66 standard under which this court affords, “appropriate deference to the fact that the trial court heard the witnesses . . .” (Gov. Br. at 9); Article 66 (d)(1)(B)(ii)(I), UCMJ; 10 U.S.C. § 866 (d)(1)(B)(ii)(I). Rather than being somehow insufficiently specific to qualify for a factual sufficiency review as the government argues earlier in its brief, it appears that the plain language of the statute expressly describes the CCAs weighing the

² The New York law required of an appellate court conducting a factual sufficiency review: (1) the court “must determine whether an acquittal would not have been unreasonable” and (2)[i]f so, the court must weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions. Based on the weight of the credible evidence, the court then decides whether the jury was justified in finding the defendant guilty beyond a reasonable doubt. *See* NY Crim. Proc. Law 470.15; *see also People v. Danielson*, 9 N.Y.3d 633, 644 (N.Y.C.A. 2006).

credibility of witnesses, and envisions that such matters are intrinsic to the resolution of ‘controverted questions of fact.’

Explaining that the appropriate standard of review for a CCA to apply on a factual sufficiency review under the new Article 66 can no longer be fairly called *de novo*, the CAAF recently added clarity and substance to the standard set out in its *Harvey* opinion. See *United States v. Downum*, 2025 CAAF LEXIS 828 (C.A.A.F. Sep. 30, 2025), at *13. (“service courts should cite and follow this Court’s guidance in *Harvey*, 85 M.J. at 130-32 . . .”). In essence, CAAF reads Article 66 to permit service courts to use their discretion to determine the appropriate level of deference regarding both *witnesses* and *other evidence*, and states that it will review a CCA’s decision only for an abuse of that discretion. *Harvey*, 85 M.J. at 131.

The old version of Article 66, UCMJ allowed CCAs to “weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.” Article 66(d)(1), UCMJ; 10 U.S.C. § 866 (d)(1)(2018). The new version of Article 66, UCMJ instructs CCAs to “weigh the evidence and determine controverted questions of fact,” while giving “appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence.” Article 66 (d)(1)(B)(ii)(I), UCMJ. While the language has been altered, CAAF acknowledges in *Downum* that the CAAF’s

jurisprudence and Article 66 have long been, and remain, at odds, but acknowledges that service courts are nonetheless familiar with the concept of affording deference to the trier of fact, even when in the past the CCAs referred to their “awesome, plenary, *de novo* power of review.” *Downum*, at *10-13 (quoting *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002)).

C. Distinguishing Appellant’s Case from a Recent Case Declining to Conduct a Factual Sufficiency Review

In *Myers*, the appellant, in asking for a factual sufficiency review post-*Harvey* had conceded that certain language in the specification was factually “indisputable,” and this court found that certain other language in the specification was not “required to sustain” appellant’s conviction. *United States v. Myers*, 2024 CCA LEXIS 535, at *14, 17 (Army Ct. Crim. App. Dec. 16, 2024). This is not such a case. Appellant does not concede that factual circumstances here established a lack of consent, and the “without the consent” language contained in Specification 1 of The Charge is necessary to sustain appellant’s conviction.

In conducting its analysis, this court in *Myers* did not express an understanding of the two triggers to a factual sufficiency represented even a moderately high threshold, but rather based its conclusion that a factual sufficiency review would not necessarily be warranted on the unique facts of that appeal. *Id.* at 14.

D. The NMCCA’s decision in *Masa* turned on the victim’s pervasive and all-encompassing lack of credibility and deficient memory.

The government argued that *Masa* is distinguishable from appellant’s case because that case dealt with the victim’s inability to recall facts “relevant to the offenses,” and picked one fact of many from a lengthy transcript portion included in the court’s opinion. (Gov. Br. at note 5). This distinction ignores three realities: (1) that the victim here was also unable to recall significant facts and details relevant to the issue of consent, (2) that in *Masa* and appellant’s cases the victims’ memories were both remarkably intact on direct examination and conspicuously absent on cross-examination, and (3) that the victim in *Masa* was also broadly unable or unwilling to recount “so many important facts and even routine matters” in a manner comparable to the victim in this case. The NMCCA relied on as much in its reasoning and did not indicate that its ruling was based on any one non-responsive answer or subset of answers nor its particularized significance. *See Masa*, at *26.

E. SPC JP’s Testimony and Memory are Appropriate Topics for this Court’s Factual Sufficiency Review as they Relate to the Factual Question of Consent or Non-consent

Appellant’s brief points out in the record numerous incongruous details and irregularities of varying degrees of significance with SPC JP’s testimony which, when considered in aggregate, can ultimately affect the credibility determinations of the fact finder but also the credibility determinations of this court – witness

testimony that this court may review with “appropriate deference” given to the panel. Even giving such deference, in its totality SPC JP’s testimony lacks credibility to a degree that causes the finding of guilty to be against the weight of the evidence.

The government refers to SPC JP’s adamantness at trial about not having a boyfriend at the time of the offense (Gov. Br. 3), but in SPC JP’s SAFE report she told Ms. Doss, the SAMFE, that SPC JP told appellant, “[t]hat I couldn’t because I have a boyfriend.” (Pros. Ex. 10, p.5). The government also points out that SPC JP sought medical attention at the battalion aid station on 6 July 2021 (Gov. Br. at 10) – two days after the events at issue – but SPC JP’s own testimony makes less clear that her initial purpose in seeking medical attention was to complete a SAFE kit as opposed to simply getting tested for sexually transmitted diseases. (R. at 707).

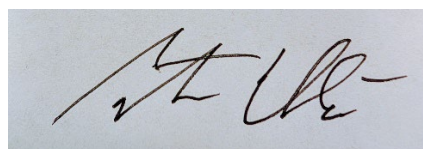
Finally, as a matter of clarification regarding the timeline, the government refers to the text message exchange between appellant and SPC JP constituting Prosecution Exhibit 2 (wherein SPC JP says, “I kept saying that I didn’t want to” and wherein appellant apologizes for “whatever happened”) as occurring “in the weeks following the assault,” (Gov. Br. at 10), but in reality the self-executed pre-textual messages carried out by SPC JP did not occur until the day before SPC JP’s interview with CID on 29 October 2021 – nearly four months after the fourth of July in question.

Conclusion

For the reasons above, appellant respectfully requests this honorable court set aside and dismiss Specification 1 of The Charge.



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Cunningkin, Crim App. Dkt. No. 20240125, USCA Dkt. 26-0172/AR was electronically with the Court and Government Appellate Division on May 12, 2026.

A handwritten signature in black ink, appearing to read "Pat Mchenry".

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