2 October 2025

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	
Appellant,	)	BRIEF IN SUPPORT OF
	)	THE CERTIFIED ISSUES
v.	)	
	)	Crim. App. Dkt. No. 40563
Senior Airman (E-4)	)	
BRANDON B. HUNT	)	USCA Dkt. No. 25-257/AF
United States Air Force	)	
Appellee.	)	

BRIEF IN SUPPORT OF THE CERTIFIED ISSUES

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TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

CERTIFIED ISSUES

I.

CAN A COURT OF CRIMINAL APPEALS FIND A CONVICTION FACTUALLY INSUFFICIENT UNDER ARTICLE 66, UCMJ, 10 U.S.C. § 866 BASED ON A MATTER NOT RAISED AS A "DEFICIENCY IN PROOF" BY THE APPELLANT?

II.

DID THE AIR FORCE COURT OF CRIMINAL APPEALS ERR BY FINDING APPELLEE'S CONVICTION FACTUALLY INSUFFICIENT BASED ON MISTAKE OF FACT AS TO CONSENT, WHEN APPELLEE DID NOT IDENTIFY OR ARGUE MISTAKE OF FACT AS TO CONSENT AS A DEFICIENCY IN PROOF IN HIS APPEAL?

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d). Article 67(a)(2), UCMJ, provides that this Court shall review the record in "all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review."

RELEVANT AUTHORITIES

Article 66(d)(1)(B), UCMJ, defines the test for a service court to review a conviction for factual sufficiency, stating as follows:

> (B) Factual sufficiency review.
>
> > (i) In an appeal of a finding of guilty under subsection (b), the 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.
> >
> > (ii) After an accused has made such a showing, the Court may weigh the evidence and determine controverted questions of fact subject to –
> >
> > > (I) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and
> > >
> > > (II) appropriate deference to findings of fact entered into the record by the military judge.
> >
> > (iii) If, as a result of the review conducted under clause (ii), the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.

Article 120(b), UCMJ, states, in relevant part:

> (b) SEXUAL ASSAULT. – Any person subject to this chapter who –
>
> (2) commits a sexual act upon another person –
>
> (A) without the consent of the other person;
>
> (B) when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring;
>
> is guilty of sexual assault and shall be punished as a court-martial may direct.

10 U.S.C. § 920(b).

STATEMENT OF THE CASE

From 17-20 July 2023, at a general court-martial at Seymour-Johnson Air Force Base, North Carolina, a panel of officer and enlisted members convicted Appellee of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2018). (JA at 196.) The military judge sentenced Appellee to confinement for nine months, reduction to the grade of E-1, a reprimand, and a dishonorable discharge. (JA at 197.)

On appeal, the Air Force Court of Criminal Appeals (AFCCA) held that Appellee's sexual assault conviction was factually insufficient. United States v. Hunt, No. ACM 40563, 2025 CCA LEXIS 215 (A F. Ct. Crim. App. May 16, 2025) (unpub. op.). (JA at 001-017.) The court therefore set aside Appellee's

sexual assault conviction and dismissed the specification with prejudice. (JA at 017.) The government requested reconsideration of AFCCA's decision, which AFCCA denied. (JA at 371.)

The Deputy Judge Advocate General of the Air Force, performing the duties of The Judge Advocate General, timely certified this case to this Court under Article 67(a)(2), UCMJ, for review.

STATEMENT OF FACTS

- ***Testimony Regarding the Sexual Assault***

MM, a certified nurse assistant, met Appellee on the Tinder dating app. (JA. at 027.) MM testified that the two talked for a few days, and then met on 22 April 2022. On the evening of 22 April, MM's friend Ms. NW was going on a date, and MM asked Appellee if he would like to go out for a few drinks with the other couple. (JA at 29.) The two couples went out drinking, including stopping at multiple bars.

After a bit, the two couples returned to MM's apartment. MM testified she wanted to change into pajamas and that the four were all going to play a card game. MM testified she went to her room and Appellee followed her. The two began kissing, took their clothes off and began having sex. (JA at 031.) MM testified the two took off their own clothes and testified, "No" when asked if she had any problem with any of that happening.

MM testified the two were in the missionary position having vaginal sex and then changed positions to where she was laying on her stomach and Appellee was on top of her. (JA at 032.) MM described what happened next during her testimony:

> He – we were having vaginal intercourse. He pulled out of me, and he brought up having anal, and I said "I have never done that. I am not into that." He said that he would take it easy and he would take it slow. I said "Okay, but if I say stop, then we stop." As soon as I started to feel it go inside of me, I said "Stop," and I said "Stop, please, stop. I don't like it. It hurts." He said "Shhh, shhh, shhh, it feels good." I kept saying "Stop," and that is when he put his hand over my mouth and he – I could feel him – his head was like beside my shoulder, and he was pushing his body weight down on me.

(Id.) MM testified the anal penetration went on for a few minutes before it stopped, and that she told Appellee to stop multiple times. (JA at 032-033.) MM testified she told Appellee to stop "in a loud tone," adding that she was "saying it loud enough to where he could hear me," and that there "was no background noise." (JA at 035.) When asked if Appellee was fully penetrating her, MM testified "It felt like he was. I don't know how far in he was, but it felt like he was very far in." (Id.) MM testified, "He was just saying 'It feels good. It will feel good.'" (Id.)

MM testified that pain was what was first going through her mind, and that she "was a little scared because I wasn't sure how long it was going to last. Then

at one point, I kind of went numb, I stopped thinking. I blanked out. I just felt like I was just there." (JA at 033.) MM continued, "I was scared. I was upset. I wasn't sure – up to this point, everything was okay, so I wasn't really sure what he was capable of doing, so I wasn't sure when he was going to be done." (Id.) MM testified it was "painful to the point where I could feel myself crying but I wasn't, and it made my body go numb from the pain." (JA at 035.)

MM testified as to her efforts to get away from Appellee as well:

> I started to pull myself out from under him using my headboard of my bed, and I – he came with me. Every time I would pull myself, he would pull himself up. After like twice of pulling myself up, he did get off of me. That is when I rolled over and sat on my side of the bed.

(JA at 034.) Once out from underneath Appellee, MM testified she "sat in the fetal position and covered myself up with my blanket, and I started into the bathroom." (Id.) Meanwhile, Appellee was "pulling on my right arm, and he kept saying 'Come snuggle with me, come cuddle with me, come lay with me.'" (Id.) MM testified she told Appellee "No" and to stop touching her.

MM testified she then got up, went to her closet, got dressed, and then told Appellee "I think you should go home." (JA at 035.) Appellee then got angry, saying he had been drinking and "that I had invited him over to stay the night." (JA at 035-036.) MM testified she responded by going to the living room to get her friend, Ms. NW. MM took Ms. NW to the bathroom and told her everything

that happened. MM testified, "I can't remember if I went into detail with her that night, but I know I told her enough to where she wanted him out as well." (JA at 036.)

Ms. NW testified that when MM came out of her bedroom that night she was "very distraught, shaky," crying, and "was really shaken up." (JA at 112.) Ms. NW testified, "She told me that she had consented to having vaginal sex with him, and then he had flipped her over on her stomach and started having anal intercourse with her, and she kept telling him to stop and he wouldn't stop." (JA at 113.) Ms. NW said MM was crying, hyperventilating, shaking, and "could barely get a word out." (Id.) Ms. NW also said that MM told her that Appellee had "put his hand over her mouth so she couldn't talk." (JA at 114.)

Ms. NW then went to talk to Appellee. However, Appellee would not leave. (JA at 037.) Ms. NW stated that Appellant "started yelling, getting very angry towards me, and told me that [MM] was crazy and that she had agreed to it." (JA at 114.) Ms. NW also agreed on cross-examination that Appellee said, "I did stop." (JA at 123.) Eventually MM called 911 and "told them that I needed the cops to come to my house. I told them that there was a guy there, and that I had been anally raped." (JA at 040.)

During the call, MM said the following:

> I met this guy. We had been talking for a little while, and we went out drinking tonight. I was planning on sleeping

> with him, whatever. We come back to my house, and he basically raped me. I told him to stop when he tried to do anal, and he would not stop. Now, he is refusing to get out of my house.

(JA. at 056.) When asked during the 911 call if she was strangled or choked, MM responded as follows:

> No. Nothing, like, everything was fine, and he kept saying, like, I am just going to – it is so gross to say on the phone – but he kept saying, like, "I am just going to stick it in your ass," and was, like, "Please don't. I don't do that," and he was like "No, I am going to. It will be fine. I will go easy," and I was, like, "Please don't."

(JA at 058.) Later, MM said on the 911 call, "I said yes, to sex, like regular sex, not anal." (JA at 061.)

MM agreed on cross-examination that she told the police officer that night that Appellee said "I am going to stick it in your ass" or words to that effect, that she said "something along the lines of 'No, I have never done that,'" that Appellee said it would be fine and he would take go easy, and that she said, "Okay, but if I say stop, then stop." (JA at 076.)

On cross-examination, MM again stated that she initially consented to anal sex "under the stipulations that if I say, no, stop – that he would stop." (JA at 074.) Also on cross-examination, MM acknowledged that she told Air Force Office of Special Investigations (AFOSI) agents "no" when asked if Appellee had at any point asked her for anal sex of if she had told him he could perform anal sex. (JA

at 081.) When asked, "You said to the OSI agents in May, 'He never asked, and I told him I didn't like it when he tried,' correct," MM replied, "Yes." (Id.)

On redirect examination, MM and the trial counsel had the following exchange about whether Appellee ever asked for permission to have anal sex that night:

> TC: Defense counsel also asked you a bunch of questions about whether [Appellee] asked permission to penetrate your anus. I believe in the 9-1-1 call, you said – this is what he said "I am going to stick it in your ass." Is that what he said?
>
> MM: Yes.
>
> TC: Would you characterize that as [Appellee] asking permission?
>
> MM: No.
>
> TC: And is that truthfully what he did say?
>
> MM: Yes.
>
> TC: Did he ever at any point ask you "[MM], may I perform anal sex?" or something to that effect?
>
> MM: No.

(JA at 095-096.) MM also again testified that she did not want Appellee to continue to penetrate her anus and that she told him to stop. (JA at 097.)

Officer FN responded to the 911 call that night. (JA at 138.) Officer FN explained what MM told him that night:

> Well, once I got in there, I asked [MM] what was going on, and she told me that she had met [Appellee] and had been out drinking and that during the course of the night they had talked about having sex and that they both went back to her house – or her apartment and was going to have sex, and [Appellee] asked her if he could have anal sex with here, and she said, yes, I would have anal sex with him, but I had never done it before, but I did say we could do it. She said that when he was doing it, it started hurting, so she told him to stop, and did not stop. He kept doing it. She said she told him again to stop, and he didn't stop. She said she told him three times to stop, and then she started – she said she started crying, and he eventually did stop.

(JA at 139-140.)

On cross-examination, Officer FN and Appellee's civilian defense counsel had the following exchange:

> CDC: With the relationship of the – you just testified that you asked her if she wanted to file charges. The information that you had when you asked that question was that they had agreed to have sex with each other, correct?
>
> Officer FN: Yes, sir.
>
> CDC: That they had agreed to have anal sex even though she had never done that before, correct?
>
> Officer FN: Yes, sir.
>
> CDC: That she allowed [Appellee] to begin anal sex, correct?
>
> Officer FN: Yes, sir.
>
> CDC: And that after a few minutes, it began to hurt her, so she asked him to stop, correct?

Officer FN: Yes, sir.

CDC: And he did not stop right away, correct?

Officer FN: Yes, sir.

CDC: She had to ask him two more times, correct?

Officer FN: Yes, sir.

CDC: And in fact, you – when you asked her that question of – or she said that I told him – she said I had [to] say stop three times, correct?

Officer FN: Yes.

(JA at 146-147.)

At the close of the Government's case, MM was recalled to answer questions by the panel members. On cross-examination, Appellee's civilian defense counsel asked, "Isn't it true that you told [Officer FN] that you allowed [Appellee] to begin the anal sex; and after a few minutes, it began to hurt, so she [sic] asked him to stop?" (JA at 106.) MM responded, "I don't remember exactly what I told the police, but I know that it was not a few minutes, it was shorter than that." (Id.)

On redirect examination, MM was asked, "[W]hen did you tell [Appellee] to stop? How long had he inserted his penis into your anus?" (Id.) MM responded, "It was right after he did." (Id.)

The morning after the incident, Appellee initiated a conversation with MM via text messages. (JA at 090.) When MM messaged, "Thanks for not stopping when I asked you to. I really appreciate it," Appellee responded, "I did. I fucking did." (Id.)

- ***Mistake of Fact Defense Discussion at Trial***

At trial, the first mention of the mistake of fact as to consent defense occurred at the close of findings as instructions were being discussed. (JA at 158.) There, the military judge noted the defense's request for the mistake of fact as to consent instruction, but stated, "I don't think that the evidence presented throughout this particular Court brought up anything that would reasonably raise the use of a mistake of fact as to consent instruction. My thought process was to take it out." (Id.) Appellee's trial defense counsel agreed, stating, "Your Honor, I think that it doesn't address the key issue in this case which is withdrawal of consent and whether that was responded to with a stopping of the intercourse." As to the standard mistake of fact as to consent instruction, Appellee's trial defense counsel continued, "I don't think that this captures the facts of the case. I agree with [the] Court on that." (Id.)

When asked if he was "okay with the Court taking that out," Appellee's trial defense counsel responded, "Yes, Your Honor." (JA at 158-59.) Notably, as discussed more below, Appellee, in his brief to AFCCA, continued to agree with

this sentiment, stating, "During an initial discussion of instructions, the military judge and defense agreed the standard mistake of fact as to consent instruction was not particularly applicable to the facts as alleged." (JA at 219.)

Instead, trial defense counsel presented the trial court with a special instruction, arguing therein that "the central issue in this case is the withdrawal of consent and whether [Appellee] reasonably complied with that withdrawal of consent – excuse me – withdrawal of consent and whether he complied and the period of time in which it took him to comply or not." (JA at 161.)

After discussion between the parties and the military judge, the defense withdrew its initial special instruction and replaced it with what the military judge described as a "sort of . . . tailored instruction of the mistake of fact." (JA at 170.) The defense counsel now argued that "the reason that the mistake of fact comes in is that there's testimony that [MM] said, 'Stop, stop, stop,' that there was an indeterminate amount of time between the 'stop' and that that is unknown and has to be resolved by the panel." (JA at 170-71.) Appellee's counsel continued, "But certainly there is a reasonable inference that the panel could find that she said 'stop' and he was ignorant of it, mistaken about it, until the second 'stop' or until he heard it and did stop." (JA at 171.)

The Government objected to the tailored instruction, but had no objection to the military judge providing the standard mistake of fact as to consent

instruction, stating that "there is so much consent involved in this case, I don't want to preclude the defense from being able to argue and Your Honor instructing them on this so they can make that argument that maybe he didn't hear these multiple times that she claimed that she did tell him to stop." (Id.)

The military judge denied the defense's tailored instruction, but stated, "unlike sort of my thought yesterday that there is no evidence that reasonably raised mistake of fact as to consent in this particular case, I am willing to add the generalized instruction that I placed in there yesterday." (JA at 175.) The defense responded that if the tailored instruction was not given, they would ask that the general mistake of fact instruction be given. (JA at 175-176.)

Later, the military judge provided the members the standard mistake of fact as to consent instruction to the members. (JA at 177.)

Although AFCCA's opinion stated, "At trial, and on appeal, the Government does not address the affirmative defense of mistake of fact as to consent," during the Government's findings argument, the trial counsel specifically mentioned the mistake of fact as to consent defense during closing argument. (JA at 181-182.)

Trial defense counsel, however, never addressed the defense. The findings argument of Appellee's trial defense counsel spans across eight pages of transcript. (JA at 185-193.) At no point did Appellee's counsel mention the

words "honest" or "mistake," the phrase "mistake of fact," or specifically argue that Appellee had an honest and reasonable mistake of fact as to MM's consent to continue to engage in anal intercourse after she had revoked consent. (*See* Id.)

- ***Appellee's Assignments of Error Brief to AFCCA***

On appeal, Appellee raised two factual sufficiency issues, Issues III and IV. (*See* JA at 232-237.) Issue III, which spans three pages of Appellee's brief, centered on the definition of the word "penetrating." (JA at 232.) Appellee stated, "The resolution of this issue hinges on the interpretation of the word 'penetrating' as used in the charging language," and argued that "[i]f, as appell[ee] submits, this word means *entry*, then the evidence is clearly insufficient, and the conviction must be set aside." (Id.) Essentially, Appellee argued he committed the act of penetration when he first penetrated MM's anus while he still had her consent and that the penetration was complete before MM withdrew her consent. Appellee provided AFCCA multiple definitions of the word "penetration" and argued "that the best interpretation of 'penetrating' refers to the act of entry." (JA at 234.) Appellee then concluded, "As the entry in this case was indisputably consensual, the evidence does not satisfy the elements as charged." (Id.)

Issue IV, which also spans three pages of Appellee's brief, centered on "credibility issues with the Government evidence," where Appellee focused solely

on MM's testimony, credibility, and alleged "prior inconsistent statements." (JA at 235-237.) Appellee argued MM had prior inconsistent statements, namely whether she told Appellee to stop "right after" anal intercourse began or whether the act continued for a few minutes before it became painful and MM asked Appellee to stop. (JA at 235, *referencing* JA at 229.) Appellee claimed this presented a "reasonable hypothesis that excludes guilt: that after an extended duration of consensually engaging in the charged act, the act ceased promptly upon her withdrawal of consent." (JA at 235.) Appellee also argued MM lied to AFOSI during its investigation and that this supposed lie "should give [AFCCA] extreme pause that appell[ee] stands convicted based on the testimony of a witness who admits to lying to OSI about so pivotal an issue as whether consent was sought and obtained." (JA at 237.)

Nowhere in these two issues was the phrase "mistake of fact," or the words "honest" or "mistake," ever mentioned. Neither issue contained any mention or discussion of the mistake of fact as to consent defense or attempted to argue that Appellee had an honest or reasonable mistake of fact as to consent. Likewise, neither issue alleged the Government failed to disprove the mistake of fact as to consent defense beyond a reasonable doubt. At no point did Appellee ever identify "mistake of fact" as the specific deficiency in proof that he was attempting to show to meet his burden under Article 66(d)(1)(B)(i).

In fact, the word "mistake" appeared in Appellee's brief only five times, each of which is highlighted below:

1. The first use occurs when, as noted above, Appellee highlights that at trial both "the military judge and defense agreed the standard mistake of fact as to consent instruction was not particularly applicable to the facts as alleged." (JA at 219, *citing* JA at 158.)

2. Appellee notes that his trial defense counsel was "attempting to tailor the mistake of fact as to consent instruction to better capture the post-penetration withdrawal of consent scenario." (JA at 220, *citing* JA at 170-171.)

3. Appellee notes that the military judge provided the "standard consent and mistake of fact as to consent instructions." (JA at 221.)

4. Appellee again notes that the panel "was given only the standard mistake of fact as to consent instruction." (JA at 224.)

5. Appellee again notes that "the parties and the military judge agreed, at least in part, that the standard instructions did not capture the facts as presented," and that the "military judge directly stated as much regarding the standard mistake of fact as to consent instruction." (JA at 225, *citing* JA at 158.)

The first three uses of the word "mistake" came in the "Statement of Facts" section of Appellee's brief, while the latter two came with Issue I of Appellee's brief (which is an instruction issue). None of these uses, however, involved any argument that Appellee had an honest or reasonable mistake of fact as to consent or that the Government failed to disprove the mistake of fact as to consent defense beyond a reasonable doubt or that this was the specific deficiency in proof that Appellee was alleging.

- ***Appellee's Reply Brief to AFCCA***

Appellee's reply brief to AFCCA did not contain the phrase "mistake of fact," or the words "mistake" or "honest." The brief also did not contain any argument that Appellee had an honest or reasonable mistake of fact as to consent or that the Government failed to disprove the mistake of fact as to consent defense beyond a reasonable doubt.

As to Issue III, Appellee clarified that his claimed deficiency in proof related to his contention that the word "penetrating" meant "entry," and that "the proof is deficient because the entry in this case was explicitly acknowledged by the victim to have occurred consensually." (*See* JA at 329.)

As to Issue IV, Appellee stated that he "largely rest[ed] on his initial brief," while making two "brief points," neither of which involved any discussion about the mistake of fact as to consent defense. (JA at 330-331.)

- ***AFCCA's Opinion***

AFCCA overturned Appellee's conviction based on Issue IV. (JA at 002.) AFCCA stated that Appellee "alleges that the central issue in this case was the withdrawal of consent and its aftermath," adding, "More specifically, Appell[ee] alleges the Government failed to disprove the real possibility that the charged sexual act ceased promptly upon MM's withdrawal of consent, citing MM's inconsistent statements." AFCCA stated that Appellee "suggests the Government

failed to prove that Appell[ee] had the clear ability to avoid criminality by stopping the act after MM said stop." Id.

At two points in its opinion, AFCCA criticized the Government for not "address[ing] the affirmative defense of mistake of fact as to consent," stating, "neither trial counsel nor government counsel on appeal substantively address this defense or how the Government has disproved Appell[ee]'s honest and reasonable mistake of fact as to consent beyond a reasonable doubt."[1] (JA at 011, 014.)

Finding that Appellee's claim triggered a factual sufficiency analysis because "Appell[ee] alleged both 'an assertion of error' and made 'a showing of deficiency in proof,'" AFCCA concluded that "there is a real possibility that Appell[ee] held both an honest and reasonable mistake of fact as to MM's consent during the charged sexual act, and that the Government has failed to disprove this defense beyond a reasonable doubt." (JA at 011-012.)

SUMMARY OF ARGUMENT

When Congress decided to amend the former Article 66(d)(1), UCMJ, it provided new requirements that must be met by an appellant to warrant a factual sufficiency review. One of those requirements is to make a "specific showing of a deficiency in proof" within a claimed assignment of error.

[1] As noted above, the trial counsel did, however, discuss the mistake of fact as to consent defense during closing argument. (*See* JA at 181.)

Congress also limited a Court of Criminal Appeals' (CCA's) power in both when and how it could perform a factual sufficiency review. The amended Article 66 states that a CCA can perform a factual sufficiency review only after an appellant meets their two trigger requirements, and then can only "weigh the evidence and determine controverted questions of fact." *See* Article 66(d)(1)(B)(i)-(ii), UCMJ.

Considering the plain language of the statute and the legislative intent in limiting a CCA's factual sufficiency review authority under the amended Article 66(d)(1)(B)(i), this Court should determine a CCA is limited in its factual sufficiency review to only matters specifically raised within an appellant's "specific showing of a deficiency in proof."

Once making such a holding, this Court should further hold that AFCCA failed in its application of the amended Article 66, UCMJ, when it found Appellee's sexual assault conviction factually insufficient based on matter not raised as a "specific showing of a deficiency in proof" by Appellee. Specifically, AFCCA overturned Appellee's conviction due to factual insufficiency based on a finding solely involving the mistake of fact as to consent defense, a matter Appellee neither identified or argued at all in either his Assignments of Error brief or Reply brief to AFCCA, and did not raise as a "specific showing of a deficiency in proof." Accordingly, this Court should overturn AFCCA's opinion in this case

and return it for a proper factual sufficiency review in accordance with the confines of the amended Article 66, UCMJ.

ARGUMENT

I.

A COURT OF CRIMINAL APPEALS CANNOT FIND A CONVICTION FACTUALLY INSUFFICIENT UNDER ARTICLE 66, UCMJ, BASED ON A MATTER NOT RAISED AS A "SPECIFIC SHOWING OF A DEFICIENCY IN PROOF" BY AN APPELLANT.

Standard of Review

Article 67(c)(1)(C), UCMJ, authorizes this Court to act with respect to findings "as affirmed, dismissed, set aside, or mod[i]fied by the Court of Criminal Appeals as incorrect in fact." This Court may review whether a Court of Criminal Appeals (CCA) applied "correct legal principles" to a factual sufficiency review. United States v. Thompson, 83 M.J. 1, 4 (C.A.A.F. 2022) (*quoting* United States v. Clark, 75 M.J. 298, 300 (C.A.A.F. 2016)). This Court reviews de novo a CCA's interpretation of a statute. United States v. Harvey, 85 M.J. 127, 129 (C.A.A.F. 2024) (*citing* United States v. Kohlbek, 78 M.J. 326, 330-31 (C.A.A.F. 2019). And "when the record reveals that a CCA misunderstood the law, this Court remands for another factual sufficiency review under correct legal principles." Id., *citing* Thompson, 83 M.J. at 4.

Law and Analysis

Whereas the former Article 66(d)(1), UCMJ, required service courts to conduct a *de novo* review of factual sufficiency in every case,[2] the amended Article 66(d)(1)(B)(i), UCMJ, eliminates that duty absent an appellant (1) asserting an assignment of error, and (2) a specific showing of a deficiency in proof. *See* Harvey, 85 M.J. at 130. This Court determined that the amended statute did not require, or even allow, CCA's to review the factual sufficiency of a case unless those two express trigger conditions were met. Id.

The next question thus becomes whether a CCA's ensuing factual sufficiency review is limited to an appellant's "specific showing of a deficiency in proof." For the reasons set forth below, the answer to that question is yes.

Under the amended Article 66(d)(1)(B)(i), UCMJ, once a CCA has found a "specific showing of a deficiency in proof," this Court should determine that a CCA is limited in its ensuing factual sufficiency review to only that claimed deficiency in proof. To find otherwise would undermine the plain language of the statute itself and the legislative intent in amending the CCA's factual sufficiency review.

[2] *See, e.g.,* United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

- *The plain language of Article 66(d)(1)(B) placed new requirements on an appellant and required a specific trigger for review*

"The first step [in statutory interpretation] is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent." United States v. Valentin-Andino, 85 M.J. 361, 364-65 (C.A.A.F. 2025) (*quoting* Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 450 (2002) (citations omitted) (internal quotation marks omitted)

The former Article 66(d)(1) did not require an appellant to show anything in order to receive a full factual sufficiency review from a CCA. The former statute also provided no specific triggers that must be met before a CCA could perform a factual sufficiency review. Instead, that statute mandated that CCA's conduct a *de novo* factual sufficiency review in every case. *See, e.g.,* Washington, 57 M.J. at 399.

As this Court found in Harvey, the amended Article 66(d)(1)(B)(i) placed a newfound onus on an appellant to not only raise a factual sufficiency review, but to also make a "specific showing of a deficiency in proof." Only after finding those two triggering actions were met could a CCA then perform a factual sufficiency review. However, the plain language of the statute confines a CCA's factual sufficiency review further by stating that "after an accused has made such a

showing" a CCA may only weigh the evidence and determine "controverted questions of fact." *See* Article 66(d)(1)(B)(i).

Thus, these new factual sufficiency review requirements not only placed a new burden on an appellant, but also changed both when and how a CCA could perform a factual sufficiency review of a case.[3] In doing so, the amended statute narrowed the previously unfettered ability of a CCA to review a case for factual sufficiency and, as both the Army Court of Criminal Appeals (ACCA) and AFCCA have held, thus made it more difficult for an appellant to prevail on appeal. *See* United States v. Scott, 84 M.J. 583, 585 (A.C.C.A. 2024); United States v. Csiti, No. ACM 40386, 2024 CCA LEXIS 160, *21 (A.F. Ct. Crim. App. Apr. 29, 2024) (unpub. op.), *aff'd*, 85 M.J. 414 (C.A.A.F. 2025).

- *The Amended Article 66(d)(1)(B)(i) Shows Clear Congressional Intent to Narrow Factual Sufficiency Review*

Amending Article 66 in this fashion displayed a clear intent from Congress to narrow any factual sufficiency review by a CCA to a particular, focused, and "specific" claim, as opposed to the generalized and open-book review employed by

[3] While the previous version of Article 66(d), UCMJ, included the phrase "controverted questions of fact," the Government contends that under the new construct and context of the amended Article 66(d)(1)(B), a CCA's ability to review "controverted questions of fact" is now stovepiped under the new requirement for an appellant to show a "specific showing of a deficiency in proof." The only "controverted questions of fact" for a CCA to review under this new construct are those *specific* deficiencies in proof actually raised by an appellant.

CCAs in the past. Replacing their past ability to review factual sufficiency *sua sponte* or based on arguments not specifically raised by an appellant, Congress now required two specific triggers be met before a CCA could even begin its factual sufficiency review.

Notably, the impetus for Congress to amend Article 66, UCMJ, came after the Military Justice Review Group (MJRG) recommended reforms to the automatic factual sufficiency review previous employed by CCAs. In their 2015 report, the MJRG recommended an amended Article 66, UCMJ, to "provide statutory standards for factual sufficiency review." *See* Office of the General Counsel, Dep't of Defense, Report of the Military Justice Review Group 610 (Dec. 22, 2015), https://ogc.osd.mil/Links/Military-Justice-Review-Group/.

The MJRG opined that the changed would "modernize military appellate practice" by "[p]roviding for *review of issues identified by an accused* regarding factual sufficiency *when the appellant makes a sufficient showing to justify relief*." Id. at 8. (emphasis added.) The MJRG stated its proposal would "[p]rovide for factual sufficiency review only when appellant raises the issue for the court's review and makes an appropriate showing that the court should dismiss the findings (through amendment to Article 66)." Id. at 35.

The MJRG proposed that the amended statute "require[s] the accused to raise any factual sufficiency issues regarding the findings and would authorize the

Courts of Criminal Appeals to dismiss a finding that it is clearly convinced is contrary to the weight of the evidence." Id. at 610. The MJRG further recommended that while CCA's would retain the authority to "weigh the evidence" and "determine controverted questions of fact," appellants would now need to "identify deficiencies in the proof." Id. at 619. This would result in the CCA's exercising any factual sufficiency review "through standards that are more deferential to the factfinder at trial and more reviewable by higher courts." Id.

The MJRG's justification for this proposal is poignant in that it limits a CCA's previously unfettered ability to review a case for factual sufficiency to only a "review of issues identified by an accused." And it only allows set aside when the accused "makes an appropriate showing that the court should dismiss the findings." This language provides clarification from the MJRG that it envisioned a CCA's ability to review a case for factual sufficiency to be limited *to only* those specifically identified deficiencies in proof and *not* the entire record.

Further, while the Government recognizes this Court's past reservation in relying on legislative history,[4] this Court has recognized Congress adopted the MJRG's 2015 recommendations to amend other portions of the UCMJ. *See* United States v. Wheeler, 85 M.J. 70, 74 (C.A.A.F. 2024). Furthermore, considering that

[4] *See*, for example, United States v. Avery, 79 M.J. 363, 369 fn. 8 (C.A.A.F. 2020) (*quoting* Azar v. Allina Health Servs., 139 S. Ct. 1804, 1814 (2019) where the Supreme Court reminded that "legislative history is not the law.").

the amended Article 66, UCMJ, includes much of the same language and triggering framework proposed by the MJRG, this Court should be convinced Congress adopted not only the proposals provided by the MJRG, but also the restrictive intent of the MJRG's proposal on the CCAs ability to perform a factual sufficiency review.

With this framework in mind, the legislative history of the amendments to Article 66(d) supports the most sensible interpretation of plain language: that the CCA may only set aside findings based on a deficiency of proof identified by the appellant. It makes little sense that Congress would have intended to allow a CCA, after finding a "specific showing of a deficiency in proof," to then perform a factual sufficiency review on the entire record, irrespective of an appellant's claims. Indeed, requiring an appellant to make a "specific showing of a deficiency in proof" would serve no purpose if a CCA could then review the entire record. If that is what Congress actually intended, it could have simply amended the statute to instruct the CCA to conduct a full factually sufficiency review upon the request of an appellant. Or Congress could have included a more general requirement that the appellant make a "showing of a deficiency of proof." However, Congress did not stop at that point but instead added in the second trigger requiring an appellant to further make a "*specific* showing of a deficiency in proof." The added requirement of a "specific" showing signals that Congress intended to cabin a

CCA's review to specific issues identified by the appellant and not to any issue the CCA might find to have been raised by the record.

This view is further supported by Congress omitting the phrases "on the basis of the entire record" and "considering the record" from the amended Article 66, UCMJ. The prior version of Article 66(d) stated that "The Court may affirm only such findings of guilty . . . as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, the Court may weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact."

In contrast, the amended Article 66 states that "the Court may affirm only such findings of guilty as the Court finds correct in law, and in fact [as prescribed in Article 66(d)(1)(B)]." The amended statute makes no reference to "considering the record" when it discusses "weigh[ing] the evidence and determ[ing] controverted questions of fact." Specifically, the amended Article 66(d)(1)(B)(ii) removed the phrase "In considering the record," and replaced it with the language "After an accused has made such a showing." As a result, the CCA may now only "weigh the evidence and determine controverted questions of fact" after an accused has made his specific showing of a deficiency in proof.

As the Supreme Court has said, "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub*

silentio to enact statutory language that it has earlier discarded in favor of other language." INS v. Cardoza-Fonseca, 480 U.S. 421, 442-43 (1987); s*ee also* Nalley v. Nalley, 53 F.3d 649, 652 (4th Cir. 1995) ("When the wording of an amended statute differs in substance from the wording of the statute prior to amendment, we can only conclude that Congress intended the amended statute to have a different meaning.").

If Congress had wanted a CCA to review the entire record in its factual sufficiency review, it could have retained some reference to "the record" or "the entire record" from the prior version of the statute." Instead, in the amended statute, the reference to weighing the evidence and determining controverted questions of fact is only made in relation to the accused's showing of a deficiency in proof. Congress's discarding of references to the "record" indicates that it intended to limit a CCA's ability to review a factual sufficiency claim to *only* the specific "deficiency in proof" alleged by an appellant. This Court should not read into the statute an authorization for the CCA to review the entire record for factual sufficiency when Congress removed references to reviewing the record from the prior version of the statute. *See also* Gkiafis v. Steamship Yiosonas, 342 F.2d 546, 552 (4th Cir. 1965) ("In its task of construing a statute a court is no more free to interpolate a word that the legislature has removed by amendment than it would have been warranted in ignoring that word before the amendment was made.")

In light of the above, the only logical process intended by Congress for this new factual sufficiency construct is as follows: (1) an appellant raises factual sufficiency as an issue; (2) an appellant makes a further "specific showing of a deficiency in proof;" (3) the CCA determines an appellant has made such a showing; and (4) the CCA then reviews the case but *only* with respect to the specific deficiency in proof alleged by an appellant (i.e., the "controverted questions of fact"). This formulation makes sense because logically a CCA should not be "*clearly* convinced" that the finding of guilt is against the weight of the evidence based on grounds that the appellant himself did not even believe were convincing enough to raise.

- *The Navy-Marine Corps Court of Criminal Appeals (NMCCA) and AFCCA's Chief Judge Support This Interpretation of Congressional Intent*

While this Court has also not yet addressed what constitutes a "specific showing of a deficiency in proof,"[5] NMCCA has held that "a general disagreement with a verdict falls short of a specific showing of a deficiency in proof, and thus will not trigger a full factual sufficiency analysis." United States v. Valencia, 85 M.J. 529, 535 (N-M. Ct. Crim. App. 2024).[6] Instead, NMCCA held "an appellant

[5] *See* Harvey, 85 M.J. at 130.

[6] This Court has granted review of the NMCCA's decision on the following issue: Whether the lower court erred when it concluded Appellant's claim of factual insufficiency did not trigger a factual sufficiency review under Article 66, UCMJ.

must identify 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." Id.

The NMCCA's analysis here supports the view that a CCA's review of factual sufficiency after finding a specific showing of a deficiency in proof is limited to that specific showing. Again, it is incongruous that Congress would, on the one hand, require an appellant to "identify a weakness in the evidence" to even trigger a factual sufficiency review, but then, on the other hand, allow a CCA to review the entirety of the record outside of that identified weakness in making a factual sufficiency determination.

The Chief Judge of AFCCA also recently expressed his opinion that CCAs are constrained in their factual sufficiency review of a case to only to "specific showing of a deficiency in proof" offered by an appellant. In his dissenting opinion in United States v. Slayton, No. ACM 40583, 2025 CCA LEXIS 427, *37 (A.F. Ct. Crim. App. Sept. 8, 2025) (unpub. op.), AFCCA's Chief Judge noted that under the current version of Article 66(d)(1)(B), UCMJ, "the precondition for a CCA to review factual sufficiency of a conviction is that the appellant "makes a specific showing of a deficiency of proof," and that "[o]nly after the appellant

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See United States v. Valencia, 2025 CAAF LEXIS 202, *1 (C.A.A.F. 14 March 2025).

makes such a showing may the CCA proceed with the factual sufficiency review." Id. The Chief Judge surmised, "In my view, given the requirement that the appellant identify a 'specific deficiency' for review, it is that asserted deficiency the CCA reviews with respect to the factual sufficiency of the conviction." Id.

AFCCA's Chief Judge then referenced AFCCA's decision in this case directly and expressed his disagreement with the outcome, stating, "I recognize another panel of this court evidently reached a different conclusion in its unpublished opinion in [Hunt]," adding that the panel "found the conviction factually insufficient on a basis the appellant evidently had not asserted on appeal." Id. at fn. 6. The Chief Judge concluded, "To the extent Hunt stands for the proposition that a CCA may set aside a conviction as factually insufficient on a specific basis not asserted by the appellant, I respectfully disagree with my esteemed colleagues." Id.

In sum, given the plain language of the amended Article 66, UCMJ, as well as the legislative intent implicit in Congress amending the former Article 66, UCMJ, this Court should find that a CCA cannot find a conviction factually insufficient under Article 66, UCMJ, based on a matter not raised as a "specific showing of a deficiency in proof" by an appellant. As stated above, to allow a CCA free reign to examine the factual sufficiency of *every* aspect of an appellant's conviction, including aspects of the conviction that are *not raised* as "specific

showing of a deficiency in proof," would essentially revert a CCA's review power back to the previous Article 66(d) and undermine the intent to amend Article 66, UCMJ.

II.

AFCCA ERRED BY FINDING APPELLEE'S CONVICTION FACTUALLY INSUFFICIENT BASED ON MISTAKE OF FACT AS TO CONSENT BECAUSE APPELLEE DID NOT IDENTIFY OR ARGUE MISTAKE OF FACT AS TO CONSENT AS A DEFICIENCY IN PROOF IN HIS APPEAL.

Standard of Review

The standard of review is the same as in Issue I above.

Law and Analysis

Assuming this Court finds a CCA cannot find a conviction factually insufficient under Article 66, UCMJ, based on a matter not raised as a "specific showing of a deficiency in proof" by an appellant, this Court should further find that AFCCA erred in its application of Article 66, UCMJ, in this case. Here, AFCCA based its factual insufficiency finding on the mistake of fact as to consent defense, a matter Appellee neither identified or argued at all in either his Assignments of Error brief or Reply brief to AFCCA, let alone claim as a "specific showing of a deficiency in proof." Accordingly, this Court should vacate AFCCA's opinion in this case and return it for a proper factual sufficiency review in accordance with the confines of the amended Article 66, UCMJ.

Moreover, considering Appellant never raised the mistake of fact as to consent defense to AFCCA in his initial appeal, that issue should be deemed waived on remand and he should thus be foreclosed in raising it once this case is returned to AFCCA. *See* United States v. Husband, 312 F.3d 247, 251 (7th Cir. 2002) ("any issue that could have been but was not raised on appeal is waived and thus not remanded") (*citing* United States v. Morris, 259 F.3d 894, 898 (7th Cir. 2001) ("Parties cannot use the accident of remand as an opportunity to reopen waived issues."); United States v. Parker, 101 F.3d 527, 528 (7th Cir. 1996) ("A party cannot use the accident of a remand to raise in a second appeal an issue that he could just as well have raised in the first appeal.")).

- ***Appellee raised no "specific showing of a deficiency in proof" related to a mistake of fact as to consent defense in its brief to AFCCA, and AFCCA erred by relying on an unraised argument to find factual insufficiency.***

AFCCA overturned Appellee's conviction because it determined that "there is a real possibility that Appell[ee] held both an honest and reasonable mistake of fact as to MM's consent during the charged sexual act, and that the Government has failed to disprove this defense beyond a reasonable doubt." (JA at 012.) However, as shown above, Appellee never mentioned the mistake of fact as to consent defense[7] in either his initial or reply appellate brief to this Court, let alone

[7] As noted above, the words "honest" and "mistake" do not appear in either of Appellee's factual sufficiency issues.

raised a "specific showing of a deficiency in proof" related to that defense. Instead, in his two briefs to AFCCA, Appellee claimed his conviction was factually insufficient because of the definition of the word "penetrating" (Issue III) and because of MM's credibility and supposed inconsistent statements (Issue IV) that supported the defense argument that Appellee had stopped as soon as MM said to. (JA at 232, 235-237.) Appellee never argued in his brief that he had an honest and reasonable mistake of fact as to consent, and never argued that the Government failed to disprove the mistake of fact as to consent defense.

Appellee's lack of argument on appeal regarding the mistake of fact as to consent defense should not be surprising considering his non-reliance on this very defense at trial. As noted above (and as highlighted in Appellee's own brief to this Court), both the military judge and Appellee's trial defense counsel agreed that the standard mistake of fact as to consent defense instruction did not fit the particular set of facts present in this case. (*See* JA at 158-159; *see also* JA at 219.)

Indeed, both the military judge and Appellee's own counsel were correct in this respect because there was no evidence raised that Appellee honestly believed MM continued to consent after she repeatedly told him to "stop." Appellee did not testify, and so never testified that he honestly or reasonable believed MM continued to consent after she said "stop." Instead, as Appellee continually

highlighted to AFCCA in his brief, the issue in this case was how soon Appellee stopped after MM said "stop."

At trial, while discussing instructions, Appellee's counsel stated, "the central issue in this case is the withdrawal of consent and whether [Appellee] reasonably complied with that withdrawal of consent." (JA at 161.) During his findings argument, Appellee's trial defense counsel never mentioned the words "honest" or "mistake," the phrase "mistake of fact," or specifically argued that Appellee had an honest and reasonable mistake of fact as to MM's consent to continue to engage in anal intercourse after she had revoked consent. (*See* JA at 185-193.)

Then, in his brief to AFCCA, Appellee stated that he "consistently maintained that he stopped when asked" and argued that a "reasonable hypothesis" in this case was that Appellee "ceased" his act "promptly upon her withdrawal of consent." (JA at 235.) In fact, Appellee essentially conceded in his brief that he had no honest or reasonable mistake of fact on this issue by specifically stating that he "consistently maintained that he stopped when asked." Thus, there was never any claim in Appellee's appeal about any confusion as to whether or not MM said "stop," the way in which she said or phased the word "stop," or whether Appellee understood what MM meant when she said "stop."

In sum, before AFCCA, Appellee never argued (1) that he held an honest and reasonable mistake of fact as to MM's consent, or (2) that the Government failed to disprove this defense. As a result, in his multiple briefs to AFCCA, Appellee never made a "specific showing of a deficiency in proof" as to the mistake of fact defense, which, as this Court has found, is a required trigger to be met before any factual sufficiency review can even commence by a CCA. *See* Harvey, 85 M.J. at 130.

Within its opinion, AFCCA did find that Appellee had made "an assertion of error" and "a showing of deficiency in proof," as shown in the following passage:

> Appell[ee] has made a request for a factual sufficiency review. At trial and in his brief on appeal, Appell[ee] alleges that the central issue in this case was the withdrawal of consent and its aftermath. More specifically, Appell[ee] alleges the Government failed to disprove the real possibility that the charged sexual act ceased promptly upon MM's withdrawal of consent, citing MM's inconsistent statements. Appell[ee] also asserts that "[s]topping was a defense" and—quoting the Government's brief—suggests the Government failed to prove that Appell[ee] had the clear ability to avoid criminality by stopping the act after MM said stop.
>
> We find Appell[ee]'s claim is sufficient to trigger a factual sufficiency analysis because Appell[ee] alleged both "an assertion of error" and made "a showing of deficiency of proof." Harvey, 85 M.J. at 130.

(JA at 011-012.)

AFCCA first erred by only requiring Appellant to make "a showing of a deficiency in proof," rather than "a *specific* showing of a deficiency in proof," as required by the statute. But also noticeably missing from this passage is the phrase "mistake of fact," or the words "honest, "reasonable," or "mistake." AFCCA's recitation of Appellee's supposed "deficiency in proof" is not "specific" to the mistake of fact as to consent defense, and indeed does not even mention the defense at all. This passage further does not cite any instance in which Appellee ever alleged a "specific showing of a deficiency in proof" related to the defense, which is understandable considering Appellee never raised this issue in either of his two factual sufficiency issues.

Instead, what AFCCA found as a "deficiency in proof" in his case has no relation to the mistake of fact as to consent defense. For instance, AFCCA first states, "At trial and in his brief on appeal, Appell[ee] alleges that the central issue in this case was the withdrawal of consent and its aftermath. More specifically, Appell[ee] alleges the Government failed to disprove the real possibility that the charged sexual act ceased promptly upon MM's withdrawal of consent, citing MM's inconsistent statements." Id.

Nothing in this recitation of Appellee's argument, however, invokes the mistake of fact as to consent defense. Instead, Appellee's entire contention here is that he ceased immediately upon being told to stop. Inherent in that argument

is that Appellee *did* know and understand that MM was not consenting, and that he *did* stop. In fact, Appellee argued this exact point in his AFCCA brief, claiming it was "a reasonable hypothesis that . . . after an extended duration of consensually engaging in the charged act, the act ceased promptly upon her withdrawal of consent." (*See* JA at 235.) This argument is actually the opposite of Appellee mistakenly believing that he had consent and is not indicative of any honest or reasonable mistake of fact as to consent.

Yet, despite Appellee's overt contention that he stopped immediately upon being told stop, AFCCA's opinion took an irrelevant and unnecessary turn to discussing the meaning of "stop," by stating that it would "tread carefully in this area of the law as phrases like 'Don't stop' and 'Don't, stop!' separate the innocent acts from the criminal acts." (JA at 012.) Then, in a footnote, AFCCA discussed the "ambiguity of the word 'stop' in withdrawn-consent cases," and stated, "In the throes of passion where consensual penetration has occurred, the word 'stop' may have several meanings including but not limited to 'stop moving' or 'stop going further' or 'stop the act and withdraw.'" (JA at 015.)

However, AFCCA's discussion and the various phrasing of the word "stop" was not relevant in this case because Appellant never alleged that he was confused, or had an honest or reasonable mistake of fact as to MM's use of the word "stop." Appellee obviously understood this would have been an unavailing

argument because MM told Appellee, while he was trying to convince her to engage in anal intercourse, "Okay, but if I say stop, then we stop." (JA at 032.) Considering this, MM's use of the word "stop," no matter the context, would have provided a reasonable person notice that she no longer consented to the activity. In any case, AFCCA's focus on the meaning and effect of the word "stop," when Appellee never raised any issue relating to his understanding of the word, only further highlights how far afield AFCCA's factual sufficiency review ran past Appellee's actual "deficiency in proof" claims.

Next, in characterizing Appellant's showing of a deficiency in proof, AFCCA stated "Appell[ee] also asserts that '[s]topping was a defense' and—quoting the Government's brief—suggests the Government failed to prove that Appell[ee] had the clear ability to avoid criminality by stopping the act after MM said stop." (JA at 011.) Notably, AFCCA's quote from Appellee – "stopping was a defense" – comes from within Issue I of Appellee's reply brief, which is an instruction issue. This quote does not come from within either of Appellee's factual sufficiency issues. Thus, Appellee never made this argument as a "specific showing of a deficiency in proof" within his two factual sufficiency issues.

Even still, a suggestion that Appellee could not have avoided criminality after MM said "stop" does not implicate the mistake of fact defense either.

Instead, Appellee's argument was simply that he stopped when MM said stop, and centered on whether he had the physical ability to stop the act in order to avoid criminality. His argument, however, never alleged that Appellee was confused or mistaken as to whether or not MM said stop. Instead, the argument hinged upon the assertion that Appellee *knew* that MM said to stop, and he complied.

Rather than focusing on the deficiencies Appellee actually raised, AFCCA overturned the verdict because it held "there is a real possibility that Appell[ee] held both an honest and reasonable mistake of fact as to MM's consent during the charged sexual act, and that the Government has failed to disprove this defense beyond a reasonable doubt," an argument that was never raised by Appellee. Since AFCCA misinterpreted the statutory language and its review powers under Article 66, UCMJ, this Court should find AFCCA erred and overturn its opinion in this case.

- ***Since Appellee never raised an issue or argument related to a mistake of fact as to consent defense, there was no "controverted questions of fact" related to the defense for AFCCA to review, which, again, shows AFCCA erred by relying on an unraised argument to find factual insufficiency.***

In addition to misinterpreting Article 66(d)(1)(B)(i) with relation to Appellee making a "specific showing of a deficiency in proof," AFCCA also misinterpreted Article 66(d)(1)(B)(ii), which states that "[a]fter an accused has made such a showing, the Court may weigh the evidence and determine

controverted questions of fact." *See* Article 66(d)(1)(B)(ii). (emphasis added.) Again, Appellee never argued at trial or to AFCCA that (1) that he held an honest and reasonable mistake of fact as to consent, or (2) that the Government failed to disprove this defense. Thus, with respect to the mistake of fact as to consent defense, there are no "controverted questions of fact" for AFCCA to review. All parties agreed that the evidence showed that Appellee knew that MM was no longer consenting when she told him to "stop." Considering that this defense was not a "controverted question of fact" because Appellee never raised it, AFCCA was in error to even weigh the evidence in this case as it related to that defense, let alone then completely rely on this unraised and unargued defense to overturn Appellee's conviction. Since AFCCA again misinterpreted the statutory language and its review powers under Article 66, UCMJ, this Court should overturn AFCCA's opinion and remand the case for a new factual sufficiency review.

AFCCA's misunderstanding of the amended Article 66, UCMJ, is highlighted further in its chastising of the Government for not addressing the mistake of fact as to consent defense in its response to Appellee's brief. Twice in its opinion, AFCCA chastised the Government for not "address[ing] the affirmative defense of mistake of fact as to consent," stating, "neither trial counsel nor government counsel on appeal substantively address this defense or how the

Government has disproved Appell[ee]'s honest and reasonable mistake of fact as to consent beyond a reasonable doubt." (JA at 014.)

AFCCA is partially correct on this point – the Government did not address the mistake of fact as to consent defense in its answer brief to AFCAA.[8] However, AFCCA failed to mention why the Government did not address the defense – namely because Appellee *never raised* the issue of mistake of fact as to consent on appeal or ever alleged it as a "specific showing of a deficiency in proof." Given the new Article 66 standard putting the onus on an appellant to make a specific showing of a deficiency in proof, it would make little sense for the Government to address an issue not even raised by an appellant. Had Appellee event hinted at an argument related to this defense, the Government would have squarely addressed the matter and explained exactly why the evidence proved beyond a reasonable doubt that Appellee had no honest and reasonable mistake of fact as to MM's consent. Yet, Appellee never raised the issue, so the Government did not address it. AFCCA's opinion seems to indicate that the Government must guess at what aspects of an appellant's conviction AFCCA might find issue with and brief that, even when an appellant does not raise the issue in his brief.

[8] As noted above, the trial counsel did, however, discuss the mistake of fact as to consent defense during closing argument. (*See* JA at 181.)

Since Appellee never raised mistake of fact, the Government had no opportunity to offer counterarguments to the grounds on which AFCCA ultimately overturned the case. AFCCA's opinion delved into various "real possibility" scenarios to support its conclusion that Appellee had a reasonable and honest mistake of fact as to consent. For example, AFCCA dismissed MM's testimony, which was corroborated by an immediate outcry statement to NW, that Appellee covered her mouth after she told him to stop the anal intercourse. The court found a "real possibility that instead of Appell[ee] covering MM's mouth and continuing with the sexual act post-withdrawal of consent, Appell[ee] told MM it will 'feel good' only *before* he started penetration while he was convincing her to initially consent." (JA at 016.) (emphasis in original.) Had Appellee argued this idea as a deficiency in proof in his brief, the Government would have been able to counterargue that there is *no* evidence whatsoever in that record supporting that Appellee put his hand over MM's mouth *before* she told him to stop. But the Government had no way of knowing it needed to rebut this alleged, unraised, and unargued, "real possibility" in its brief to AFCCA.

Considering the heightened standard of the amended Article 66(d) (which requires an appellant to make such a "specific showing of a deficiency in proof" before a CCA can even begin a factual sufficiency review) versus the former Article 66(d)(1), UCMJ (which required a CCA to review *all* cases *de novo* for

factual sufficiency whether raised by an appellant or not), AFCCA's view of its factual sufficiency review powers are at odds with the plain language reading of the amended Article 66(d). As a result, AFCCA erred in its factual sufficiency review of this case. Accordingly, this Court should vacate AFCCA's opinion and remand the case for a new factual sufficiency review in line with the standards imposed by the amended Article 66, UCMJ.

- ***Appellee's Reply to the Government's Motion for Reconsideration at AFCCA further highlights he never specifically raised the mistake of fact as to consent issue.***

As it does now, the Government argued in a motion for reconsideration that AFCCA erred in its application of the amended Article 66, UCMJ, when it overturned Appellee's conviction based on an issue not specifically raised by Appellee. (*See* JA at 333-359.) In his reply to the Government's Motion for Reconsideration filed at AFCCA, Appellee dismissed this crucial distinction as "merely semantics." (*See* JA at 363-366.) In doing so, however, Appellee seemingly acknowledged that he did not specifically, and explicitly, raise the mistake of fact as to consent issue in his briefs to AFCCA. Instead, Appellee stated he "clearly raised a specific deficiency in proof relating to his prompt cessation after recognizing MM had withdrawn consent and this Court based its finding of factual insufficiency on the same deficiency in proof." (JA at 366.)

But despite the reply brief's efforts to broaden Appellee's showing of a "deficiency in proof," his original claims had nothing to do with mistake of fact. Appellee argued that MM's inconsistent statements and lack of credibility supported the alternate hypothesis that "after an extended duration of consensually engaging in the charged act, the act ceased *promptly* upon her withdrawal of consent." (JA at 235.) (emphasis added). Appellee made no claim in that sentence (or anywhere else) that there was a period where MM was not consenting, but he mistakenly believed she was. Rather, he argued he promptly stopped as soon as MM withdrew consent.

Appellee's arguments in his brief stand in stark contrast to AFCCA's finding of a "real possibility that Appell[ee] used due care but was not aware MM withdrew consent and therefore unknowingly proceeded with the sexual act for some duration without her consent until he heard and understood her withdraw consent, and stopped." (JA at 015.) This was never Appellee's contention at trial or on appeal. Instead, Appellee has always argued that MM said stop, he understood her, and immediately did stop. Here again, AFCCA's findings have no correlation to the arguments actually presented to them by Appellee.

Even more glaring in Appellee's answer to the Government reconsideration motion was his inability to explicitly state that he specifically raised the issue of mistake of fact as to consent defense within his factual sufficiency issue. Instead,

Appellee said the issues he did raise were "the same issues at heart as to whether Appell[ee] had a mistake of fact as to continuing consent," while again stating the Government's objection to AFCCA's opinion is "mere semantics." (JA at 363, 366.)

However, the express wording of the amended Article 66(d) requires a "specific showing of a deficiency in proof." This is not an issue of "mere semantics," but one of sound principles of statutory interpretation. *See* Platt v. Union Pacific R. Co., 99 U.S. 48, 58 (1879) (". . . the admitted rules of statutory construction declare that a legislature is presumed to have used no superfluous words. Courts are to accord a meaning, if possible, to every word in a statute.") Here, Congress provided "specific" statutory language detailing a requirement that an appellant must provide an explicit and precise argument as to exactly what weakness is present in his case.

Indeed, if Congress had wished for this showing of a deficiency in proof to be more generalized or overbroad, it would have not included the word "specific." However, because Congress included that word, Appellee must now be held to that expressed standard and should be required to specifically state his "deficiency in proof." He should not be allowed to allege victim credibility issues and inconsistent statements, and then, after the fact, claim those allegations are "the same issues at heart" as to the previously unraised mistake of fact as to consent

issue. Such a view would reward *non-specific* claims and undermine the entire purpose in amending Article 66. But Appellee had an opportunity to specifically raise as a "specific showing of a deficiency in proof" the mistake of fact as to consent defense within his briefs to AFCCA – briefs which included *two* factual sufficiency issues. But he did not. Congress intended to put a significant onus on the appellant before he could gain relief for factual insufficiency. But AFCCA essentially nullified that onus by determining that it could overturn a conviction for any reason – even one for which Appellant did not even attempt to meet his onus of establishing a deficiency in proof.

In sum, none of Appellee's arguments were a "specific showing of a deficiency in proof" related to the defense of mistake of fact as to consent, and AFCCA erred by overturning Appellee's conviction based solely on that defense. Accordingly, this Court should vacate AFCCA's opinion and remand the case for a new factual sufficiency review in line with the standards imposed by the amended Article 66, UCMJ.

CONCLUSION

The plain language of, and the legislative intent behind, the amended Article 66(d)(1)(B)(i), UCMJ, shows that a CCA's ability to review a conviction for factual sufficiency should be limited to only the "specific showing of a deficiency in proof" alleged by an appellant. Determining the alternative – namely that a

CCA has free reign to examine *every* aspect of an appellant's conviction, including aspects of the conviction that are *not raised* as a "specific showing of a deficiency in proof" – would be antithetical to Congress's clear intent to limit a CCA's power both on when and how it can perform a factual sufficiency review under the amended statute.

Further, based on this ruling, this Court should find AFCCA erred in its interpretation of amended Article 66, UCMJ, when it found Appellee's sexual assault conviction factually insufficient based on matter not raised as a "specific showing of a deficiency in proof" by Appellee.

The Government therefore respectfully requests this Court find that AFCCA erred as a matter of law in its factual sufficiency review and exercise its authority under Article 67(e), UCMJ, to direct The Judge Advocate General to return the record in this case to AFCCA for further review in accordance with this Court's decision.

Finally, considering Appellant never raised the mistake of fact as to consent defense to AFCCA in his initial appeal, that issue should be deemed waived on remand, and Appellee should thus be foreclosed in raising it once this case is returned to AFCCA. *See* Husband, 312 F.3d at 251.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 2 October 2025.

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