13 November 2025

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

UNITED STATES' REPLY BRIEF

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

Pursuant to Rule 22(b)(3) of this Honorable Court's Rules of Practice and Procedure, the United States replies to Appellee's Answer (Ans. Br.) to the United State' brief in support of the certified issues (Gov. Br.).

ARGUMENT

- *Appellee's "Preliminary Considerations"*

From an opening standpoint, Appellee contends that the "United States Government's official position is that he should be labeled as criminal and a sex offender for the rest of his life based on a procedural technicality." (Ans. Br. at 10.) Appellee is incorrect. Here, the Government simply requests that the Air Force Court of Criminal Appeals (AFCCA) follow the plain language and intent of the amended Article 66(d)(1)(B)(i), UCMJ. This argument is not based on a

"procedural technicality," but instead on a stated requirement within the amended statute.

Moreover, Article 67(c)(1)(c) expressly 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*." (emphasis added.) The import of this section is that Congress wanted this Court to act as a check on factual insufficiency findings by a Court of Criminal Appeals (CCA).[1] The Government's certification of this case is exactly what was intended by this Article 67(c)(1)(c) – asking this Court to check AFCCA's factual insufficiency finding to ensure AFCCA applied "correct legal principles" and that its finding comports with Congress's intent on both how and when a CCA can review for factual sufficiency. *See* United States v. Harvey, 85 M.J. 127, 129 (C.A.A.F. 2024).

Congress's amendments to Article 66 and Article 67 reflected a concern that the CCAs may have been exercising their factual sufficiency review authority too broadly or otherwise inappropriately. In light of these amendments, one might

[1] The history of the 2021 NDAA supports Congress's desire for this Court to have the authority to scrutinize a CCA's decision to overturn a conviction for factual insufficiency. Earlier versions of the NDAA included a provision that would have required an en banc CCA to review a panel's factual insufficiency determination. H.R. Rep. No. 116-617, at 1605 (2020) (Conf. Rep.) In the final version of the bill, Congress removed that provision and substituted the provision allowing for CAAF's review of the CCA's legal insufficiency determination. Id. Regardless, Congress obviously intended that a CCA panel's factual insufficiency finding would not be the last word on the matter.

expect that Congress would disdain a CCA setting aside a conviction on grounds that an appellant did not even deem important enough to raise as a specific "deficiency in proof." After all, if an issue was not compelling enough for an appellant to identify and raise as specific deficiency in proof, how could it be adequate to "clearly convince" a CCA that the finding of guilt was against the weight of the evidence? In this case, AFCCA's failure to follow the procedural requirements of Article 66 reflects the unsound nature of its factual insufficiency determination. Since the United States believes that AFCCA's misunderstanding of Article 66 led it to overvalue a weak and unsupported mistake of fact argument – and therefore to improperly overturn a justly-obtained conviction – it is consistent with the pursuit of justice for the United States to pursue this appeal. [2]

Given that Congress solidified this Court's ability to review a CCA's factual insufficiency determination but maintained the requirement that this Court only act with respect to matters of law, *see* Article 67(c)(4), naturally, one of the main things left to review is whether a CCA followed proper procedures in conducting its factual sufficiency review. As this Court stated in United States v. Csiti,

[2] As is evident from the United States' motion for reconsideration at AFCCA, the United States disagrees with how AFCCA weighed the evidence in this case and believes that AFCCA should not have been "clearly convinced" that the finding of guilty was against the weight of the evidence. However, this Court cannot review the CCA's weighing of the evidence, so the United States does not advance those arguments here. *See* United States v. Leak, 61 M.J. 234, 245 (C.A.A.F. 2005).

"Article 67(c)(4), UMCJ, would not prevent this Court from deciding whether a CCA has followed the requirements of Article 66, UCMJ, in conducting a factual sufficiency review because compliance with a statute is a matter of law." 85 M.J. 414, 418 n.4 (C.A.A.F. 2025). There is nothing untoward about the government asking this Court to exercise its authority under Article 67(c)(1)(c) to review the lower court's procedures in overturning a conviction. Indeed, Congress envisioned such a process to ensure that AFCCA did not abuse its discretion in reviewing for factual sufficiency.

Next, Appellee seemingly admits that he did not raise the mistake of fact as to consent defense as a "specific showing of a deficiency in proof" when he states, "Even if the government got its remand, the Air Force Court's rules would allow for additional briefing, and the defense would no doubt use that briefing to specifically articulate the deficiency now claimed missing by the government." (An. Br. at 8, 11.) Here, Appellee admits that he did not "specifically articulate" the mistake of fact as to consent defense, and thus, admits that it was not raised as a "specific showing of a deficiency in proof" within his factual sufficiency issues.

Additionally, within his admission, Appellee believes the two certified issues are moot because, if remanded, he could just newly "specifically articulate" – for the first time – the mistake of defense as to consent as a specific showing of a deficiency in proof. (Id.)

However, as noted in the Government's initial brief, since Appellee 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.")).

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.

Appellee argues that while the amended Article 66(d)(1) "establishes a gate through which a CCA must pass before conducting factual sufficiency review of a finding of guilty," it "does not constrain the CCA to that gate's aperture once it is open." (Ans. Br. at 37.) Appellee contends there is no connection "between the triggering mechanism (Article 66(d)(a)(B)(i)) and the scope of review Article 66(d)(a)(B)(ii))." (Id. at 40.) Appellee also argues the "government's approach

would be hugely impractical" because it would invite defense appellant appellate divisions to "rais[e] every possible deficiency in order to 'cover all the bases' and secure a broader review" and cause confusion at the service courts. (Id. at 42-44.) Appellee is mistaken.

Appellee's first contention is misplaced from the beginning since it states that a "CCA must pass" through a gate before it can conduct a factual sufficiency review, a notion that seemingly implies the burden falls on a CCA to trigger a factual sufficiency review. That notion is incorrect. The onus for the new factual sufficiency requirements falls onto an appellant to justify a factual sufficiency review by a CCA.

Indeed, it is an appellant who must unlock and pass through the factual sufficiency review gate by (1) raising a factual sufficiency issue; and (2) then making a "specific showing of a deficiency of proof." *See* Article 66 (d)(1)(B)(i). In this construct, it is an appellant's burden – and an appellant's alone – to set the stage and provide a CCA a "specific" basis for why his conviction is factually insufficient.

Appellee is further incorrect in claiming that, once the flood gates are open, a CCA is given free rein to review anything it wishes as it relates to factual sufficiency. This is inaccurate as well since, after "specific showing of a

deficiency of proof" is made, a CCA is then limited to perform a factual sufficiency review only on "controverted questions of fact." Id.

Undoubtedly, if an appellant raises an issue as a "specific showing of a deficiency of proof," then there are resulting "controverted questions of fact" to review and determine flowing directly from that "specific showing." However, if an appellant *does not* raise an issue as a "specific showing of a deficiency of proof," there are no controverted questions of fact for that issue and, thus, no controverted questions of fact for a CCA to review. To "controvert" means "to dispute or contest." Controvert, Black's Law Dictionary (11th ed. 2019). A question – such as whether an appellant had a reasonable mistake of fact as to consent – cannot be "controverted" if it is not specifically disputed or contested, or otherwise raised, by the appellant on appeal.

Using Appellee's gate metaphor, an appellant unlocks the factual sufficiency gate by raising an issue and making a "specific showing of a deficiency of proof." However, contrary to Appellee's position, that gate is then only opened to the "controverted questions of fact" related to that specific showing – nothing more.

This process – which is consistent with Congress' intent in amending Article 66 in the first place – provides a connection between an appellant's burden to trigger a factual sufficiency review and the constraints a CCA then has in conducting that factual sufficiency review. This view is consistent with the

Military Justice Review Group's (MJRG) position that this change would "[p]rovid[e] for review of issues ***identified by an accused*** regarding factual sufficiency *when the appellant makes a sufficient showing to justify relief*." *See* Office of the General Counsel, Dep't of Defense, Report of the Military Justice Review Group 8 (Dec. 22, 2015), https://ogc.osd.mil/Links/Military-Justice-Review-Group/. (emphasis added.) 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.

Another overarching point demonstrating this logical interpretation of this new framework is the Article 66(d)(1)(B)(iii) requirement that a CCA be "clearly convinced that the finding of guilty was against the weight of the evidence" before overturning a finding for factual insufficiency. In this construction, if an appellant does not believe that a deficiency in proof is important enough to raise, then that supposed deficiency should then not be enough to ***clearly convince*** a CCA that the finding of guilty is against the weight of the evidence.

With this framework and requirements in mind, the most sensible interpretation of the amended Article 66 process is that the CCA may only set aside findings based on a deficiency of proof identified by the appellant. Appellee's contention that Article 66 (d)(1) allows the proverbial flood gates of

unfettered review to open outside the confines of the "specific showing of a deficiency in proof" raised by an appellant is supported neither by the plain language of the of the statute nor the Congressional intent behind it.

Appellee also attempts to use the Supreme Court's ruling in Kamen v. Kemper Fin. Servs., 500 U.S. 90, 99 (1991), to further his argument that there is "nothing in the statutory language that describes how CCAs will conduct factual sufficiency reviews that suggests the CCA is limited to the specific showing of deficiency in proof that served as its bridge to be able to conduct factual sufficiency review." (Ans. Br. at 38-39.) Noting the Kamen Court's holding that "When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law," Appellee contends that "when the issue of factual sufficiency is before a Court of Criminal Appeals, it is not limited to the defense's theory of insufficiency." (Id.)

Here, however, Congress specifically constrained factual sufficiency review authority provided to CCAs and also specifically defined how a CCA can conduct its factual sufficiency review. Indeed, within the construct of the amended Article 66, Congress curtailed a CCA's ability to review a factual sufficiency claim to the particular theories – i.e., the specific showing of a deficiency of proof – advanced by an appellant. Thus, AFCCA was not at liberty to use any "independent power"

to, *sua sponte*, identify additional theories outside of Appellee's claims. Yet, AFCCA did just that by reviewing the mistake of fact as to consent defense when it was never raised by Appellee. In doing so, it did not "apply the proper construction of governing law." *See* Kamen, 500 U.S. at 99. Finally, to this point, the first part of Appellee's Kamen quote is crucial – "When an issue or claim is properly before the court . . . ." Id. Here again, Appellee never raised the mistake of fact as to consent defense as a "specific showing of a deficiency of proof." Thus, consistent with the amended Article 66's framing, that issue was never "properly before the court." Id.

Finally, as to Appellee's "policy and practical concerns," no matter the outcome of this case, if a defense counsel, in good faith, believes a "specific showing of a deficiency in proof" can be made in a particular case, that counsel should be raising it irrespective of this Court's ruling in this case. Appellee seems to imply that an adverse ruling to his position would cause a deluge of additional "voluminous filings" to "cover all bases" – an assertion that seems to imply this Court's decision would invite frivolous and/or bad-faith filings at the CCA level.

Yet, an appellate defense counsel's obligation to advocate for clients is constrained by their counteracting ethical duty to not raise frivolous issues on appeal. Service instructions highlight this professional responsibility duty, stating, "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue

therein, unless there is a basis in law and fact for doing so, which includes a good faith argument for an extension, modification or reversal of existing law." *See* Air Force Instruction 51-110, *Professional Responsibility Program* (11 December 2018), Rule 3.1; Army Regulation 27-26, *Army Rules of Professional Conduct for Lawyers* (26 March 2025), Rule 1.3.

Here again, this Court's decision in this case does not impact whether an appellant can make a "specific showing in a deficiency of proof" in any particular case. If defense appellate divisions and appellate defense counsel believe such a showing can be made in good faith in a particular case, they should already be raising it – irrespective of this case's outcome.

Finally, Appellee's litany of hypothetical questions attempts to obscure the clarity of the statute itself. For instance, Appellee asks, "What if the defense raised four deficiencies about a given specification but the CCA identified a fifth?" and "How would the CCA cabin-off unraised deficiencies when fulfilling its mandate to determine if a conviction was against the weight of the evidence?" (Ans. Br. at 43.)

Here again, the direction from the statute – and from this Court's prior ruling in Harvey – is that an appellant must raise the deficiency of proof. *See* Article 66(d)(1)(B)(i); Harvey, 85 M.J. at 129. If an appellant does not raise a deficiency, a CCA should thus be foreclosed from considering, *sua sponte*, unraised

deficiencies by an appellant – a procedure Congress specifically did not intend, considering it removed the CCA's unfettered factual sufficiency review authority in the amended Article 66.

Appellee next questions whether a CCA is "limited to the language used by the defense" and "limited to the same analysis engaged in by the defense?" (Ans. Br. at 43.) Again, that answer is yes. Article 66 requires an appellant to make a "specific showing of a deficiency of proof." Thus, considering the statutory requirement for a "specific showing," words here matter, and a CCA should be limited to the specific deficiencies raised by an appellant.

In sum, while Appellee calls the Government's approach "extremely cumbersome,"[3] the practical process of this framework is actually quite simple: (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. This approach follows the plain

[3] *See* Ans. Br. at 44.

language of the amended Article 66, UCMJ, as well as the legislative intent implicit in Congress amending the former Article 66, UCMJ. Accordingly, 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.

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 SPECIFIC DEFICIENCY IN PROOF IN HIS APPEAL.

To begin, and as discussed above, Appellee seemingly admits the he did not raise the mistake of fact as to consent defense as a "specific showing of a deficiency in proof" when he states, "Even if the government got its remand, the Air Force Court's rules would allow for additional briefing, and the defense would no doubt use that briefing to specifically articulate the deficiency now claimed missing by the government." (An. Br. at 8, 11.) Here, Appellee admits that he did not "specifically articulate" the defense, and thus, admits that it was not raised at a "specific showing of a deficiency in proof" within his factual sufficiency issues.

The Government agrees that 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, thus, AFCCA erred by relying on an unraised argument to find factual insufficiency.

Appellee claims the Government's argument is really just an "objection" to "semantic" and argues this "Court should not elevate word choice above substance." (Ans. Br. at 9, 24.) However, specific word choice is exactly what the statute requires since it states that an appellant must make a "specific showing of a deficiency of proof." Here, if Appellee wanted to raise the mistake of fact as to consent defense as a deficiency of proof, he should have specifically done so. But he did not.

Instead, Appellee only attacked the definition of the word "penetration and the credibility and inconsistent statements of MM in his factual sufficiency issues – attacks that bear no resemblance to the mistake of fact as to consent defense. Indeed, an attack on MM's credibility focuses on the actions and statements of MM, while an attack on the mistake of fact as to consent defense would require focus on whether Appellee had an honest and reasonable mistake of fact as to consent – something that was not discussed at all by Appellee in his briefs to AFCCA.

Next, Appellee states the he "did use the same words," because he "specifically argu[ed] both at trial and on appeal that the military judge should have given a modified 'mistake of fact as to consent' instruction to cover this

same dynamic." (Ans. Br. at 9.) However, this argument was made within an issue in Appellee's original brief to AFCCA (Issue I) asking whether the military judge erred in giving a specific instruction related to post-penetration withdrawal. (*See* JA at 221-227.)

Appellee never mentioned the mistake of fact to consent defense in either of his two factual sufficiency issues presented to AFCCA (Issues III and IV). (*See* JA at 232-237.) Thus, it was not raised as a "specific showing of a deficiency of proof" as required by the statute.

Within the "Additional Facts" section of his brief, Appellee continually cites to his initial AFCCA brief in an attempt to show his brief "largely mirrored the Air Force Court's opinion." (See Ans. Br. at 18-21, *citing* JA at 220-227.) He then claims that "the defense alleged the evidence was factually insufficient to preclude '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.'" (Ans. Br. at 19-20, quoting JA at 235).[4]

However, while Appellee here quotes a portion of his factual sufficiency argument from his initial AFCCA brief, he fails to quote the initial part of that paragraph, which reads as follows:

[4] Appellee's brief here cites to the JA at 223. However, this quotation appears at 235, not 223.)

> As outlined in A.E. II, ***MM's prior inconsistent statements*** indicating the charged act continued consensually for "a few minutes" before it became painful and she asked appellant to stop and that, when she did ask appellant to stop, she "said 'Stop, Stop, Stop,' pushed him off, and the sex ended[.]" These ***two prior inconsistent statements, individually and collectively***, present 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.) (emphasis added.)

Appellee's argument there was about MM's prior inconsistent statements, not about any honest or reasonable mistake of fact as to consent held by Appellee at that time. Moreover, this argument was about how quickly Appellee stopped, not whether he was mistaken as to whether or not he should stop or whether or not he was confused by what MM said.

This mirrors the defense's tactics at trial. There, Appellee's trial defense asked for a "sort of . . . tailored instruction of the mistake of fact," stating ""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 170-71.) Thus, Appellee's counsel recognized the mistake of fact as to consent defense as a potential defense in this case. However, even after the military judge provided the standard mistake of fact as to consent instruction to the member, Appellee's counsel never addressed the

defense in closing argument. (*See* JA. a 177, 185-93.)

Instead, the defense chose a different strategy in closing argument – namely that Appellee "did stop when he heard it." (JA at 191.) This strategy was likely chosen because the defense recognized the members would more willing believe this, rather than the notion that Appellee could have been mistaken as to consent after MM repeatedly said stop "in a loud tone." (JA at 035.) And the strategy further made sense considering Appellee's statements acknowledging that he heard MM say "stop." (JA at 090, 123.) Appellee then continued this trend on appeal. There, Appellee could have argued to AFCCA that he was mistaken as to the meaning of MM saying stop, but, he did not. Instead, Appellee claimed he was not guilty because he stopped "promptly" after MM told him to stop. (*See* JA at 235.)

Appellee's brief to this Court is notable – and distinct from his AFCCA filings – in that, for the first time, he uses the words "honest" and "mistake" in discussing this issue. As discussed in the Government's initial brief, the words "honest" and "mistake" did not appear in either of Appellee's factual sufficiency issues within his AFCCA brief. The absence of these words again highlight how Appellee never mentioned the mistake of fact as to consent defense in either his initial or reply appellate brief to this Court, let alone raised a "specific showing of a deficiency in proof" related to that defense.

But even now, Appellee makes no substantive argument that he actually held an honest mistake of fact in this instance. Instead, Appellee argues that the "core contention (that [Appellee] might reasonably have believed he still had consent up until he stopped) was put before the Air Force Court." (Ans. Br. at 25.) Appellee also states, "It is not surprising that there may be variations in terminology when discussing a legally and factually unusual issue such as this." (Id.)

However, the mistake of fact as to consent defense is a well-defined concept in sexual assault cases. It is neither unusual nor difficult to articulate. Moreover, Appellee's claim of "variations" in this well-defined concept is difficult to understand. Indeed, the terminology for a mistake of fact as to consent defense does not waiver, as the defense has long required both a subjective honest *and* objective reasonable mistake of fact as to consent. *See* United States v. Hibbard, 58 M.J. 71, 75 (C.A.A.F. 2003). There is no variation in this terminology or the requirement for both the honest and reasonable aspects of this defense.

And here, Appellee never alleged either in his AFCCA briefs. Even now, before this Court, Appellee only claims a "core contention" related to what he "might reasonably have believed" – he is yet again completely silent as to what he honestly believed, and openly acknowledges – by omission – that this "honest

component" was not a "core contention" of his argument before AFCCA. (*See* Ans. Br. at 25.)[5]

Appellee next takes issue with the Government's contention that "Appellee's entire contention here is that he ceased *immediately* upon being told to stop." (*See* Ans. Br. at 32, quoting Gov. Br. at 38.) However, that assertion was based on Appellee's own words 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.)

Appellee's argument here, however, only further highlights why mistake of fact as to consent played no role in his claims to AFCCA – he has never claimed any confusion as to whether 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." Instead, Appellee – over and over again – claims that he "stopped when asked." (*See* Ans. Br. at 20-22, citing JA at 224, 317, 320.) In a footnote to his

[5] As noted in the Government's original brief, 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 and even in his brief to this Court, the issue in this case was how soon Appellee stopped after MM said "stop." (*See* Ans. Br. at 34-35.)

brief to this Court, Appellee further acknowledges that this was a "common theme [that] runs throughout the defense briefs." (Id. at 20.)

Here, there are two scenarios – neither of which raise the mistake of fact as to consent defense. One – Appellee's version – has Appellee stopping "promptly" after MM told him to stop. Importantly, by claiming that he promptly stopped as soon as MM withdrew consent, Appellee does not claim that there was a period where MM was not consenting, but he mistakenly believed she was. Thus, there is no mistake of fact as to consent because Appellee acknowledges that he heard the word "stop" and complied since – inherent in that argument – is the notion that Appellee *did* know and understand that MM was not consenting, and that he *did* stop. This argument is actually the opposite of Appellee mistakenly believing that he had consent. His argument – even in his brief to this Court – focuses on how soon he physically stopped – not whether he was mistaken as to whether or not he should stop.

The other scenario – MM's version – is that MM told Appellee to stop and Appellee not only did not stop, but responded to her "stop" statement by saying, "Shhh, shhh, shhh, it feels good," and then placing his hand over her mouth. (JA at 189.) Here again, there is no mistake of fact as to consent here. Under this scenario, Appellee heard MM say stop, recognized what she meant, and responded directly to the "stop" request by taking the exact opposite approach –

that is, by telling her to "shhh," and putting his hands over her mouth. Again, this reaction would actually be the exact opposite to a mistake of facts as to consent defense since Appellee acknowledged the word stop and took actions in direct defiance of that request.

In either scenario, the facts show the word "stop" was used and that Appellee recognized it – this is not a "controverted question of fact." In one scenario, he complied with the request, and in one scenario he openly defied it. Neither presents an honest or reasonable mistake of fact as to consent. Instead, what the two scenarios do hinge on is MM's credibility – the very issue Appellee actually did raise as a specific deficiency in his AFCCA briefs.

Finally, Appellee argues that the Government has "not challenged the Air Force Court's application of the mistake of fact as to consent framework," that the framework is now the "law of the case," and that the government waived this issue. (Ans. Br. at 35.) Appellee's contention here is confusing, especially considering the Government, following AFCCA's decision, moved AFCCA to reconsider (and reconsider *en banc*) its decision, which was followed by The Judge Advocate General certifying two issues to this Court – one of which directly alleges that AFCCA erred in its factually insufficiency finding "based on mistake of fact as to consent." There is no waiver.

Furthermore, while Appellee claims there was "some uncertainty as to how to describe this deficiency within the unusual legal framework of as post-penetration withdrawn consent case," the mistake of fact as to consent defense is no different under the facts of this case. As AFCCA noted in a footnote, "there could be a claim that verbal or nonverbal communications withdrawing consent during a consensual sexual act may not have been clearly conveyed and understood." (JA at 013, citing United States v. Rouse, 78 M.J. 793, 798 (A. Ct. Crim. App. 2019).) This is an unmistakable reference to the well-established mistake of fact as to consent defense, which AFCCA then held "also applied in withdrawn-consent cases." (JA at 012.)

Then, AFCCA based its entire holding on this well-established defense, finding "a real possibility that [Appellee] 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." (JA at 15.)

However, Appellee had never argued that he was "not aware MM withdrew consent" or that he "unknowingly proceeded with the sexual act for some duration without her consent until he heard" MM say stop. Instead, Appellee argued to AFCCA (1) that MM was inconsistent on how soon she told Appellee to stop (i.e., either very soon after penetration or after a few minutes of penetration); (2) that

Appellee "consistently maintained that he stopped when asked;" (3) and that he "ceased promptly upon her withdrawal of consent." (*See* JA at 223, 235.) Then, in his AFCCA reply brief, Appellee argued that "there was significant evidence that Appell[ee] stopped when asked." (JA at 317.)

Nor did Appellee ever alleged on appeal that he did not hear MM say "stop." Instead, he maintained he heard her say "stop," and did "promptly" stop." In fact, as Appellee readily admits in his brief, "There was nothing interfering with sound transmission in the apartment." (Ans. Br. at 7, citing JA at 92.) This strategy on appeal coincided with statements Appellee made to NW ("I did stop") and to MM the following day ("I did. I fucking did."). (JA at 090, 123.)

Yet, AFCCA's finding strayed far away from Appellee's argument and, instead, reversed his conviction on a mistake of fact as to consent theory that was never raised by Appellee and that was contrary to Appellee's own contention. 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. Accordingly, this Court should find that 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.

Further, considering Appellee 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 13 November 2025.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

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Date: 13 November 2025