IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellant

v.

Senior Airman (SrA) (E-4)
BRANDON B. HUNT,
United States Air Force,
Appellee

APPELLEE'S ANSWER

Crim.App. Dkt. No. ACM 40563

USCA Dkt. No. 25-0257/AF

TO THE JUDGES OF THE COURT OF APPEALS FOR THE ARMED FORCES

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Index

Table of Authorities

Issues Presented

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 (Air Force Court) reviewed this case pursuant to Article 66, Uniform Code of Military Justice (UCMJ); 10 U.S.C. § 866.[1] The government contends this Court has jurisdiction to review this case pursuant to Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2).[2] Appellee understands this Court is considering jurisdictional challenges in similarly situated cases related to the authority of the certifying officer and demonstrating compliance with the sister

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[1] The version of Article 66, UCMJ, as codified in the 2018 edition of United States Code and as amended by the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542(b), 134 Stat. 3388, 3611 (2021), and the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 544, 136 Stat. 2395, 2582 (2022), applied in this case. Unless otherwise noted, all other references to the UCMJ and Rules for Courts-Martial (R.C.M.s) are to the version published in the MCM 2019 ed.

[2] The current version of Article 67, UCMJ, applies to this case. National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 539C(a), 135 Stat. at 1699.

service notifications. This Court must satisfy itself as to jurisdiction as a prerequisite to deciding a case, with the burden of establishing jurisdiction on the appealing party.

Relevant Authorities

Article 66(d), UCMJ, 10 U.S.C. § 866(d) (2022):

> (d) DUTIES. —
>
> (1) Cases Appealed by Accused.—
>
> . . .
>
> (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.

Statement of the Case

On July 17-20, 2023, SrA Hunt was tried by a general court-martial composed of officer and enlisted members at Seymour-Johnson Air Force Base, North Carolina. (JA at 20). SrA Hunt was convicted, contrary to his pleas, of one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920. *Id.* The military judge sentenced SrA Hunt to be reprimanded, reduced to the grade of E-1, confined for nine months, and dishonorably discharged. (JA at 197). The convening authority took no action on the findings and disapproved the adjudged reprimand. (JA at 20).

The Air Force Court set aside SrA Hunt's sole conviction as factually insufficient. (JA at 17). The government moved for reconsideration. (JA at 333). The Air Force Court denied reconsideration. (JA at 371). This certification followed.

Statement of Facts

SrA Hunt and MM matched via the dating application Tinder in April 2022. (JA at 27). After exchanging text messages for some time, MM invited SrA Hunt to visit her and stay the night (about two hours away from Seymour Johnson) after they went on a double date with another couple. (JA at 28). MM had to go to work for about two hours that evening but invited SrA Hunt to stay at her apartment while she was gone. (JA at 29). At MM's invitation, SrA Hunt – who had brought his dog –

stayed at MM's apartment with his dog and MM's dog while MM went to work. (JA at 29).

When MM returned from work, her friend NW came over, and the group went out drinking. (JA at 29). NW was accompanied by her boyfriend (identified only as "Tony"). (JA at 28-30). The group went to three bars and bought some beer to bring back to MM's apartment. (JA at 29-30). At the bars, MM and SrA Hunt were very "flirty" and "cuddly," kissed, and "seemed really into each other." (JA at 111).

Upon returning the apartment, MM and SrA Hunt went into MM's bedroom where they consensually kissed, consensually removed their clothing, and consensually started having sexual intercourse. (JA at 30-31). MM removed her own clothing and had no problem engaging in sexual intercourse with SrA Hunt. (JA at 31). After consensual vaginal intercourse with MM laying on her back, MM testified that they switched positions and vaginal intercourse continued with her on her stomach. (JA at 31). After a time of vaginal intercourse with MM on her stomach, SrA Hunt asked for consent to engage in anal intercourse. (JA at 32). MM initially expressed hesitation but then agreed to try it. (JA at 32). MM reported giving consent by saying "Okay, but if I say stop, then we stop." (JA at 32). MM testified that, "right after" after the anal intercourse began consensually, she said stop but SrA Hunt continued, and used his hand to cover her mouth. (JA at 32-33, 106). MM testified that SrA Hunt continued for "a few minutes" though she could

not remember how long exactly. (JA at 32). MM testified that she then made two attempts to pull herself out from underneath SrA Hunt, after which he got off her, and she then sat on the side of the bed. (JA at 34). MM acknowledged a prior inconsistent statement to the responding officer that she "said 'Stop, Stop, Stop,' pushed him off, and the sex ended[.]" (JA at 93).

In tension with her trial testimony that she told SrA Hunt to stop "right after" beginning the charged act, MM reported to the responding police officer that the anal sex continued for "a few minutes" before it became painful, and she asked SrA Hunt to stop. (JA at 146) ("after a few minutes, it began to hurt her, so she asked him to stop[.]"). When confronted with this inconsistency from her testimony, MM did not deny telling the police officer that the consensual anal sex continued for "a few minutes," but maintained that it did not actually last for a few minutes, it was shorter than that. (JA at 106). On re-direct, MM repeated that she asked for the anal sex to stop "right after" it started. (JA at 106).

MM reported to the responding officer that she told SrA Hunt to stop three times. (JA at 146-47). MM did not explain how far apart these three times were. (JA at 147). The responding officer tried to get MM to provide a timeframe for her withdrawal of consent and the subsequent cessation of the act, but MM "wouldn't" give him one. (JA at 147).

After the sexual encounter stopped, MM got dressed and asked SrA Hunt to leave. (JA at 35). She then walked into the living room where NW and Tony were on the couch. (JA at 36). MM and SrA Hunt were alone in MM's bedroom for approximately 45 minutes before MM went back into the living room. (JA at 112). MM testified she asked NW to come into the bathroom with her. (JA at 36). Once in the bathroom, MM told NW that SrA Hunt had assaulted her and said she wanted SrA Hunt gone. (JA at 36; JA at 113-14). MM did not reveal to NW that she had initially agreed to engage in consensual anal sex with SrA Hunt. (JA at 123). MM instead told NW "she had consented to having vaginal sex with [SrA Hunt], 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).

NW left the bathroom and confronted SrA Hunt, telling him that "she said to stop, and he didn't stop" and "that he needed to leave." (JA at 114). SrA Hunt disputed the accusation, saying that MM was crazy and that MM "had agreed to it[.]"). (JA at 114). On cross, NW acknowledged that she told OSI that SrA Hunt even more specifically denied the accusation, saying "I did stop." (JA 123). When SrA Hunt did not leave, MM first called a friend (who was unable to come over) and then the police. (JA at 37). It appears SrA Hunt's refusal to leave stemmed from not wanting to drive while impaired. *See* (JA at 140) ("I am impaired. I can't drive nowhere.").

In contradiction to her trial testimony, MM told the 911 operator that she did not acquiesce to SrA Hunt's request for consent to try anal intercourse. (Pros. Ex. 3; JA at 59). She reported that she had "said, yes, to sex, like regular sex, not anal." (Pros. Ex. 3; JA at 61). MM later acknowledged this statement was not true. (JA at 99). MM later told OSI SrA Hunt had not asked for consent to engage in anal intercourse and she had never told him he could perform anal sex. (JA at 81). MM admitted on cross that her statement to OSI also "was not the truth[.]" (JA at 81). On recross, MM reiterated that she "did not tell the truth" to either the 911 operator or OSI. (JA at 99-100). MM also told her mother about the charged events but stated that SrA Hunt had made her have anal sex – and did not reveal that she had originally consented to the anal sex. (R. at 308-09).

The next morning, SrA Hunt initiated a text conversation with MM. (JA at 90). After some back and forth, MM confronted SrA Hunt stating: "Thanks for not stopping when I asked you to. I really appreciate it." (JA at 90). SrA Hunt denied the accusation, replying that he did stop when she asked him to ("I did. I fucking did."). (JA at 90).

There was nothing interfering with sound transmission in the apartment. (JA at 92). During the charged sexual assault, NW and Tony were on the couch in the living room, which was adjacent to the bedroom wall. (JA at 92, 116). MM acknowledged she had not yelled for them to help, despite being in the adjacent

room. (JA at 92). NW did not hear any shouting or any sounds of a struggle, despite being "just one wall away" from the charged assault. (JA at 116).

Summary of Argument

In this appeal, the government takes the extraordinary position that a servicemember's factually insufficient criminal conviction should be preserved on procedural grounds. Civilian appellate defense counsel cannot help but express grave concern with the policy and optics of the United States government adopting this position.

This Court may find the certified issues moot because, practically speaking, any action which this Court might take with respect to the certified issues would not materially alter the situation presented with respect either to the accused or the government. 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. Either way, the end result will be the same.

Of the two certified issues, the second issue is dispositive on the merits, because the defense *did* identify and argue the deficiencies in proof relied upon by the Air Force Court to find the conviction legally insufficient. The defense and Air Force Court analyses were very similar. Certainly the core issue – that the evidence failed to preclude the real possibility that SrA Hunt stopped anal penetration upon

realizing consent had been withdrawn – was the same in the defense briefs and the Air Force Court's decision. The government's objection is semantic – alleging that the defense did not describe this deficiency as "mistake of fact as to consent" – instead using more generic language related to the credibility or lack thereof of MM as she described the actions of SrA Hunt after consent was withdrawn. This Court should not elevate word choice above substance. Moreover, the defense actually did use the same words – specifically arguing 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. It was the government who opposed this instruction both at trial and on appeal. Either way, whether described as mistake of fact as to consent – or just stopping upon realizing consent had been withdrawn – in the context of a withdrawn consent case these word choices both go the same issue. The government below seems to have understood this legal framework and itself invoked the same caselaw cited by the Air Force Court. As this issue overwhelmingly favors the defense and is dispositive, the defense will brief it first.

If this Court reaches the first issue, the plain meaning of Article 66(d)(1)(B)(ii), UCMJ does not restrict a Court of Criminal Appeal's (CCA's) factual sufficiency review to the specific deficiencies in proof raised by SrA Hunt to trigger review under Article 66(d)(1)(B)(i), UCMJ. If the government feels the statute should be re-written (again), the legislature can re-write it to say what it wants

it to say. The government reads impractical restrictions into the rule that simply do not appear in the statutory text. In addition, the government's interpretation of factual sufficiency review under Article 66(d)(1)(B), UCMJ confuses the triggering mechanism under Article 66(d)(1)(B)(i), UCMJ with the scope of the CCA's review under Article 66(d)(1)(B)(ii), UCMJ. To the extent this Court looks beyond the plain meaning of the text to policy considerations, those further undermine the convoluted framework the government asks this Court to establish. Therefore, this Court should affirm the Air Force Court decision.

Argument

Given the government's position on the certified issues, a few preliminary considerations are appropriate. First, it must be addressed that the government is advocating for the preservation of a servicemember's factually insufficient criminal conviction on what amounts to procedural grounds. Brandon Hunt is an American citizen who volunteered for military service. It is extraordinary 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. Civilian appellate defense counsel cannot help but express grave concern with the policy and optics behind such a position. The government may wish to consider whether it can maintain its position consistent with its obligation to pursue justice over winning. *Berger v. United States*, 295 U.S. 78, 88 (1935).

Second, this Court should examine the scope of the certified issues and what, if any, impact their resolution would have on the ultimate position of the parties. When certified issues would "not materially alter" the ultimate position of the parties, this Court's longstanding practice has been to summarily dispose of them. *See United States v. Gilley*, 34 C.M.R. 6, 6–7 (C.M.A. 1963) (holding the questions presented moot because "[p]ractically speaking, any action which we might take with respect to the certified issues would not materially alter the situation presented with respect either to the accused or the Government"). Similarly, as this Court recently reinforced, it does not issue advisory opinions. *B.M. v. United States*, 84 M.J. 314, 317 (C.A.A.F. 2024).

This Court may find the certified issue moot because any action which this Court might take with respect to the certified issues would not materially alter the situation presented with respect either to the accused or the government. 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. Either way, the end result will be the same. While the government contends the matter is now forever waived, it cites no military precedent for such a proposition, and this waiver framework would cut drastically against the scope and purpose of Article 66 review. *See* (Gov.

Br. at 34). If this Court agrees, it may wish to summarily dispose of the certified issues as moot.

If this Court disagrees that the certified issues are moot in their entirety, the resolution of Issue II in appellee's favor would still moot Issue 1. As such, the defense will brief this issue first and, for the sake of judicial economy, this Court may be inclined to consider it first.

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?

Standard of Review

"When this Court reviews a service court's factual sufficiency analysis, we ask whether the court applied 'correct legal principles' in performing its factual sufficiency review." *United States v. Downum*, __ M.J.__ (C.A.A.F. October 2, 2025), slip. op. at 5 (quoting *United States v. Harvey*, 85 M.J. 127, 129 (C.A.A.F. 2024)). This Court reviews de novo a CCA's interpretation of a statute. *Harvey*, 85 M.J. at 12) (citing *United States v. Kohlbek*, 78 M.J. 326, 330-31 (C.A.A.F. 2019)). When the record reveals that a CCA misunderstood the law, this Court remands for another factual sufficiency review under correct legal principles. *Harvey*, 85 M.J. at

129 (citation omitted).[3]

Additional Facts

The government's objection is that the Air Force Court's analysis deviated too far from that raised in the defense briefs. As such, a comparison between the Air Force Court's analysis and the analysis in the defense briefs is required. Such an analysis reveals they are remarkably similar.

1. Key Facts Emphasized by the Air Force Court Decision.

The Air Force Court examined the inconsistent statements MM had made about the charged events. (JA at 3-5). MM made inconsistent statements in a 911 call – indicating that she had never consented to the charged act to begin with. (JA at 3-4). The responding officers tried to get MM to give a timeframe for her requests to stop and SrA Hunt stopping, but MM wouldn't give them this information. (JA at 4). MM gave a significantly inconsistent statement to her friend, NW, stating that SrA Hunt had flipped her over and began anal sex without consent. (JA at 4-5). MM gave her mother an inconsistent story about what happened, again omitting that she had consented to the charged act. (JA at 5). MM made a sworn statement to OSI,

[3] Because the lower Court's resolution of the factual sufficiency review in favor of SrA Hunt mooted the remainder of their Article 66 review, a remand in this case would properly provide for a new Article 66 review in total.

explicitly denying that she had given consent for anal sex – a statement she admitted at trial was "not the truth." (JA at 5).

The Air Force Court further examined SrA Hunt's various exculpatory statements – including his statements to NW that MM had agreed to the charged act and that he had stopped, and his text messages to MM the next day reiterating that he had stopped when she asked him to. (JA at 6).

2. Air Force Court's Explanation of the Framework for Mistake of Fact as to Consent in Withdrawn Consent Cases.

The Air Force Court then engaged in a lengthy discussion and of the legal framework for post-penetration withdrawn consent cases – none of which the government challenges as inaccurate. (JA at 8-10, 12-13). After surveying prior cases, the Air Force Court clarified the framework as to consent and mistake of fact as to consent in such cases:

> We further hold that in a withdrawn-consent case, an accused is guilty of sexual assault without consent when the Government proves beyond a reasonable doubt that an accused continues the charged sexual act after the revocation of consent by the victim. We find that the defense of mistake of fact as to consent, if reasonably raised by the evidence, also applies in withdrawn-consent cases and that the Government continues to bear the burden to prove that, in such circumstances where consent was given and then withdrawn, the accused did not have an honest and reasonable mistake of fact as to consent for the continued sexual act.

(JA at 12-13) (footnote omitted).

3. Air Force Court's Analysis.

Within this framework, the Air Force Court found the evidence failed to preclude the possibility that SrA Hunt stopped with reasonable diligence when asked, summing up their conclusions thusly:

> After conducting our factual sufficiency review, we agree with Appellant that the Government has failed to carry its burden of proof as it relates to MM's consent, MM's withdrawal of consent, and the aftermath.

(JA at 12).

The Air Force Court pointed out that the evidence established that MM had revoked consent. (JA at 13). However, the Air Force Court explained the evidence was insufficient to prove that the remainder of the government's case:

> The remaining facts are, at best, confusing, or, at worst, in conflict as to how the revocation of consent occurred and was understood. The Government's own witnesses substantively testified to various durations of the alleged nonconsensual act as well as inconsistent actions by Appellant and MM related to the withdrawn-consent interaction. This ambiguity matters because the facts surrounding the revocation of consent are relevant to the analysis of both the charged sexual act, consent, and the defense of mistake of fact as to consent. Significant inconsistencies in or patent refusals to clarify details on revocation or unwanted sexual acts seriously undercut the Government's burden to prove this case beyond a reasonable doubt. While this is true in every sexual assault case, we emphasize need for clarity and precision, particularly in withdrawn consent cases where consent, and only consent, separates the criminal actor from the innocent.

(JA at 13-14).

While the Court did not describe in detail the instructional issues raised on trial and appeal by the defense – to include an explicit instruction for tailored

instruction as to how mistake of fact as to consent operated in a post-penetration withdrawal of consent sexual assault case (presumably because the instructional issue was mooted by the finding of factual insufficiency), it did note "the miliary judge giving [the mistake of fact as to consent] instruction to members after a trial defense counsel request and after finding it reasonably raised by the evidence." (JA at 14).

The Air Force Court pointed to evidence raising both the subjective and objective prongs of mistake of fact as to consent, then turned to a discussion of whether the government had carried its burden of proof. (JA at 14-15). To the crucial latter point, the Air Force Court framed the question as: "Appellant's belief MM consented to the charged sexual act would become patently unreasonable if he heard MM tell him to stop the penetration, and then continued the charged sexual act." (JA at 15) (footnote omitted). The Air Force Court noted that, while it was "a real possibility Appellant heard MM say 'stop' and continued the charged sexual act . . . we do not find the Government proved beyond a reasonable doubt that continuation of the sexual act without consent was the only real possibility." (JA at 15). As such: "There was also a real possibility that Appellant 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 15).

The Air Force Court acknowledged that some of MM's previously examined statements conflicted with such a conclusion and raised the possibility that SrA Hunt continued for a longer duration, "where reasonableness of the mistake may diminish." (JA at 16). But this was not the only possibility raised by the conflicting evidence:

> However, we agree with Appellant that the evidence presented an alternate real possibility that when Appellant, using due care, heard MM withdraw consent for the sexual act, Appellant immediately stopped.

(JA at 16). In support of the latter possibility, the Air Force Court again pointed to SrA Hunt's actions, and in particular his substantively admitted statements that he did stop when asked. (JA at 16). The Air Force Court also pointed to MM's inconsistent statements. (JA at 16). MM's inconsistent statements were independently relevant, because "while MM's versions of events that evening varied, Appellant's never did." (JA at 16). Additionally, "certain versions of MM's own statements" affirmatively supported a conclusion that SrA Hunt stopped on a much shorter duration that MM portrayed at trial. (JA at 16).

> MM's report to police on the night in question was that MM said "stop, stop, stop," to Appellant and that MM had to "push him off" and then Appellant stopped. Nothing in this near-contemporaneous report suggested Appellant talked to MM after her saying "stop" or that Appellant covered her mouth and continued the sexual act. When asked by police on the night in question, MM overtly refused to say how far apart the "stops" were or how long this interaction withdrawing consent lasted.

(JA at 16).

Summing up, the Air Force Court stated it was "left clearly convinced the evidence 'does not prove that the appellant is guilty beyond a reasonable doubt,' as to the events surrounding the withdrawn consent and the aftermath, even when considering and giving appropriate deference to the fact that the members heard and saw the witnesses testify." (JA at 17).

4. Defense Briefing

An analysis of defense briefs shows that it largely mirrored the Air Force Court's opinion. The defense emphasized the same key facts as the Air Force Court. (JA at 216-19). Like the Air Force Court, the defense examined multiple inconsistent statements MM had made about the charged events. (JA at 216-18). Also like the Air Force Court, the defense examined SrA Hunt's various exculpatory statements – including his statements to NW that MM had agreed to the charged act and that he had stopped, and his text messages to MM the next day reiterating that he had stopped when she asked him to. (JA at 217-19).

Also, like the Air Force Court opinion, the defense briefs also grappled extensively with the legal framework for post-penetration withdrawn consent cases, highlighting that the defense had requested a tailored instruction that would inform the panel:

> If the government alleges that [MM] withdrew her consent, the government must prove that [MM] reasonably communicate[d] her withdrawal of consent

> to the Accused before or during intercourse. The government must also prove that the Accused did not stop;

(JA at 220). Similarly, the defense also requested an instruction that would "tailor the mistake of fact as to consent instruction to better capture the post-penetration withdrawal of consent scenario." (JA at 220). "Alternatively, if the court declined to adopt the defense-proposed language, defense counsel requested the military judge craft appropriate language, as long as the issue was addressed by the instructions." (JA at 220). These instructions and the defense arguments on them – both at trial and on appeal – were largely consistent with the Air Force Court's framework for evaluating mistake of fact as to consent in post-penetration withdrawn consent cases. As the defense summed it up in the first sentence of its argument: "The central issue in this case was the withdrawal of consent and its aftermath." (JA at 223). Along these same lines, the defense brief stated:

> As the facts played out at trial, it was largely undisputed that (1) the anal sex began consensually, (2) post-penetration, MM withdrew consent, and (3) at some point thereafter appellant stopped. The controversy revolved around the specific timeline: how long the consensual act lasted before the withdrawal of consent – and how long after the withdraw of consent appellant stopped.

(JA at 223). As the defense put it, "a central defense" at trial was "that appellant stopped with appropriate diligence when asked." (JA at 227).

Within this framework, 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." (JA at 223). Of note, the defense did not challenge the factual sufficiency of the evidence proving SrA Hunt and MM had sex, or that MM withdrew consent. (JA at 223) (". . .it was largely undisputed that (1) the anal sex began consensually, (2) post-penetration, MM withdrew consent. . . ."). Rather, the defense contention was simply that the evidence did not preclude the possibility that SrA Hunt stopped upon realizing MM had withdrawn consent. (JA at 235). In support of such a possibility, the defense pointed to MM's inconsistent statements as a credibility issue (JA at 237), and that some of MM's statements themselves could be read to indicate that SrA Hunt stopped much quicker than she portrayed at trial. (JA at 235). The defense later pointed out "There was significant evidence that Appellant stopped when asked," citing MM's prior statements indicating a more contemporary cessation and SrA Hunt's statements to MM via text and NW in person that he had stopped when asked. (JA at 317).[4] The defense also pointed to SrA Hunt's statements that he did stop as additional affirmative evidence of such a theory. (JA at 223, 317).

Not only did the defense raise the factual deficiency found by the Air Force Court, it was the central theme of the defense factual arguments. It is difficult to

[4] Indeed, this common theme runs throughout the defense briefings.

even count how many times the defense raised it because it was such a common refrain throughout the defense briefings.[5]

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[5] *See* (JA at 223) ("The central issue in this case was the withdrawal of consent and its aftermath."); (JA at 223) ("The controversy revolved around the specific timeline: how long the consensual act lasted before the withdrawal of consent – and how long after the withdraw of consent appellant stopped."); (JA at 223) (noting that SrA Hunt's prior statements were affirmative evidence that he stopped when asked); (JA at 224) (noting the need for instructions on "how to evaluate *the sufficiency of compliance* when a withdrawal of consent happens mid-act.") (emphasis in original); (JA at 225) (noting that the standard instructions could "be interpreted to mean that an initially consensual act becomes nonconsensual upon an expressed lack of consent which, in the absence of any temporal orientation, and in conjunction with the surrounding instructions, would mean that the innocent conduct would *immediately* become criminal.) (emphasis in original); (JA at 225) (noting it "cannot be right" that "innocent conduct would *immediately* become criminal" after a post-penetration withdrawal of consent); (JA at 225, n.4) ("The *instantaneous* transition of innocent to criminal conduct would deprive the actor of any ability to avoid criminality and enable any sexual participant to instantly transform their partner into a sex offender by a sudden withdrawal of consent.") (emphasis in original); (JA at 227) (noting that "a central defense" at trial was "that appellant stopped with appropriate diligence when asked."); (JA at 229) (describing "the heart of the controversy" as "the timeline of the consensual act, subsequent withdrawal of consent, and appellant's cessation."); (JA at 229-30) (noting that MM's statement to the responding officer that she "said 'Stop, Stop, Stop,' pushed him off, and the sex ended" was important because it "arguably presented a complete defense."); (JA at 230) (noting that a "more contemporaneous cessation than MM's trial testimony, would have given the panel a reasonable hypothesis besides guilt."); (JA at 230) noting that MM's statements to the responding officer "went to the very heart of the controversy."); (JA at 231) (noting that MM's statements to the responding officer raised the possibility "that once MM said stop, she moved from under him and the sex stopped."); (JA 231) (describing the latency between the withdrawal of consent and SrA Hunt's cessation as "the crucial events that transpired between the withdrawal of consent and appellant stopping."); (JA at 235) (arguing the evidence was insufficient because it "present[ed] 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 315-16) (noting that

Law and Analysis

1. The Defense and Air Force Court Analyses were Very Similar

The Air Force Court did not err in finding SrA Hunt's conviction factually insufficient because the factual deficiency raised by the defense is one and the same with the factual deficiency found by the Air Force Court. The defense briefings emphasized the same key facts as the Air Force Court's opinion, put forth a similar framework of evaluating the sufficiency of SrA Hunt's response to the withdraw of consent, and engaged in a remarkably similar analysis as to how the evidence fit that framework. Based thereon, the defense highlighted over 20 times the same deficiency as relied upon by the Air Force Court: that the evidence failed to preclude the possibility that SrA Hunt stopped with due diligence when he realized that MM

MM's statements to the responding officer "sounds a lot like what the government describes as Appellant's 'ability to avoid criminality by . . . stopping his sexual act and removing himself from her body.'"); (JA 316) (noting that the crucial issue in controversy was "the post-penetration withdrawal of consent and the sufficiency of Appellant's response to it."); (JA at 316) ("The government does not dispute Appellant's argument that an initially consensual act cannot *immediately* become criminal upon a post-penetration withdrawal of consent.") (emphasis in original); (JA at 316) (describing "the withdrawal of consent and the sufficiency of Appellant's cessation" as "the central issue in the case. . . ."); (JA 317) (noting that "there was significant evidence that Appellant stopped when asked."); (JA at 317) (noting that SrA Hunt's prior statements were affirmative evidence that he stopped when asked); (JA at 320) ("Here, an issue presented – indeed the primary issue presented – was whether Appellant's cessation of sexual activity in response to the withdrawal of consent was sufficient to avoid criminal liability."); (JA at 322) (noting that "on the facts of this case, the questions at issue involved the granular details of the withdrawal of consent and Appellant's response to it.").

had withdrawn consent. In fact, the Air Force Court itself tied its analysis pretty tightly to SrA Hunt's briefing:

> *Appellant 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. *Appellant also asserts* that "[s]topping was a defense" and—quoting the Government's brief—suggests the Government failed to prove that Appellant had the clear ability to avoid criminality by stopping the act after MM said stop.

(JA at 11) (emphasis added); *see also* (JA at 12) ("After conducting our factual sufficiency review, *we agree with Appellant* that the Government has failed to carry its burden of proof as it relates to MM's consent, MM's withdrawal of consent, and the aftermath.") (emphasis added).

2. The Core Issue was the Same

Both the Air Force Court and the defense viewed the core issue as the same: did SrA Hunt continue for "minutes" after the withdrawal of consent – as MM alleged at trial – or did he stop upon realizing she had withdrawn consent? Both the Air Force Court and the defense highlighted that this distinction was the difference between guilt and innocence. And both the Air Force Court and the defense concluded that the evidence failed to preclude the real possibility that SrA Hunt stopped upon realizing consent had been withdrawn.

3. The Government's Distinction is Semantic and Artificial

The artificial distinction the government seems asserts is that the Air Force Court characterized the deficiency as a failure to disprove mistake of fact as to consent while, according to the government, SrA Hunt did not use the term "mistake of fact as to consent" in arguing the factual insufficiency.

The government's distinction falls flat with review of the defense briefs and the Air Force Court decision. Both the Air Force Court and the defense agree that MM initially consented. Both agree that MM withdrew consent. Both agree that the evidence failed to preclude the possibility that SrA Hunt stopped promptly thereafter. Within this framework, there is a period – albeit a potentially brief period – where MM was not consenting but the sexual act was still occurring. This would *always* be the case in *every* withdrawn consent case. The defense specifically raised this dynamic both at trial and on appeal, pointing out that a withdrawal of consent could not immediately transform an innocent act into a sexual assault. Rather, there must be an opportunity to stop upon realizing consent has been withdrawn. On the facts of this case, SrA Hunt did stop – and the only question was whether he stopped promptly upon realizing consent had been withdrawn, or whether he impermissibly continued after realizing consent had been withdrawn.

There must have been a period – presumably a short one – where consent had been withdrawn but SrA Hunt had not yet realized it had been withdrawn. Then,

upon realizing consent had been withdrawn, SrA Hunt was obligated to stop – and he did stop. One way to put this is that he mistakenly believed consent continued during the latency period. Another way to put it is that he stopped upon realizing consent had been withdrawn. These are one and the same. The defense clearly asserted that the evidence showed SrA Hunt stopped when told to stop, and that this scenario was inconsistent with guilt.

In practical terms, that is exactly the scenario in which an honest and reasonable mistake-of-fact as to consent exists – i.e., any continued penetration was not deliberate non-consent but due to miscommunication or delay in comprehension. It is not surprising that there may be variations in terminology when discussing a legally and factually unusual issue such as this. But the core contention (that SrA Hunt might reasonably have believed he still had consent up until he stopped) was put before the Air Force Court. The Air Force Court did not invent a new deficiency; rather, it zeroed in on the very crux of reasonable doubt in this case – the timing and understanding of the withdrawn consent while the initially consensual anal penetration occurred.

4. The Government's Argument that Defense Failed to Raise Mistake of Fact as to Consent is Inaccurate.

While it is unsurprising that different lawyers may articulate defenses in slightly different terms, it is not accurate, as the government attempts to portray, that the defense never raised mistake of fact as to consent at trial or on appeal. As raised

in SrA Hunt's Air Force Court brief, the defense at trial specifically requested an instruction that would "tailor the mistake of fact as to consent instruction to better capture the post-penetration withdrawal of consent scenario." (JA at 220).

The specific instruction the defense proposed was:

The evidence has raised the issue of mistake of fact in relation to the offense of sexual assault, as alleged in the specification of the charge.

There has been evidence tending to show that, at the time of the alleged offense, MM consented to anal sex with the accused and, at some point during the anal sex act, MM withdrew her consent to anal sex, and the accused stopped performing the act of anal sex. There is evidence tending to show the accused mistakenly believed that MM 's consent continued until the moment he heard her withdraw consent, and he stopped.

Mistake of fact is a defense to that charged offense. "Mistake of fact" means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person continued to consent to the sexual conduct.

The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable, the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person had not withdrawn consent to the sexual conduct. Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. "Negligence" is the absence of due care. "Due care" is what a reasonably careful person would do under the same or similar circumstances.

You should consider the inherent probability or improbability of the evidence presented on this matter. You should consider the accused's age, education, experience, along with the other evidence in this case including, but not limited to that MM was engaged in consensual anal sex for some period of time before withdrawing consent.

The prosecution has the burden of proving beyond a reasonable doubt that the defense of mistake of fact did not exist. If you are convinced beyond a reasonable doubt that, at the time of the charged offense, the accused did not believe that the alleged victim consented to the sexual conduct, the defense does not exist. Furthermore, even if you conclude the accused was under a mistaken belief that the alleged victim consented to the sexual conduct, if you are convinced beyond a reasonable doubt that at the time of the charged offense the accused's mistake was unreasonable, the defense does not exist.

Modified from DA PAM 27-9, *Military Judge's Benchbook*, 3A-44-2, Note 7

Appellate Ex XIV
Marked Page __348__
Page 1 of 1

(JA at 200).

At a subsequent Article 39(a), the defense discussed, in detail, how the facts of this case interplayed with mistake of fact as to consent:

> MJ: Thank you. So what I would like to let's discuss is the proposed instruction by the defense. After reviewing it, it looks like it is sort of a tailored instruction of the mistake of fact. Defense Counsel.
>
> CivDC: Yes, Your Honor. We believe this instruction is reasonably necessary and is raised by the evidence because of several facts. First, there is evidence that on two occasions the accused, when confronted with the accusation that he had not stopped when -- stopped anal sex when she said stop, both occasions he said, "I did stop" or "I did. I did F-ing stop." One to which was the night before, or the early morning hours, and then one at approximately eight a.m. through a text message. And the reason that the mistake of fact comes in is that there's testimony that Ms. MM said, "Stop, stop, stop," that there was an indeterminate amount of time between the "1 stop" and that that is unknown and has to be resolved by the panel. 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. So for those reasons, we think that it's important to have the mistake of fact, because it more fully captures the potential findings, or a finding that the panel could reach as a reasonable outcome. So we believe that it is necessary from the evidence, and we would ask that it be given.
>
> MJ: Thank you, Defense Counsel.

(JA at 170-171). Defense counsel continued:

> CivDC: Just that the -- you know, the first sentence that trial counsel responded to, that is the facts of the case. I mean, there was anal sex, consensual anal sex, and at some point the anal sex consent was withdrawn and then the accused stopped. Now, the question would be the length of time and what happened between those two points. *That is the whole case*.

(JA at 172). (emphasis added)

The government opposed the defense mistake of fact as to consent instruction at trial – tying the concept of stopping when asked to the mistake of fact as to consent defense (JA at 170) and the military judge ultimately denied the defense's tailored mistake of fact as to consent instruction. (JA at 175).

The military judge offered to give, and ultimately gave, the standard mistake of fact as to consent instruction and defense counsel stated they would rather have the standard mistake of fact as to consent instruction than nothing at all, but maintained that their preference would be "for the tailored instruction for mistake of fact, which encompasses a withdrawal of consent issue." (JA at 175-76).

On appeal, the defense maintained that the denial of the mistake of fact as to consent instruction proposed by defense counsel was error – because it tied the central issue in the case – the withdraw of consent and its aftermath – to a legal theory that the panel could have understood more clearly. (JA at 223-27).

In fact, the mistake of fact as to consent framework that the defense put forth at trial – and continued to advocate on appeal – is very similar to the mistake of fact framework ultimately employed by the Air Force Court. (*Compare* JA at 200, *with* JA at 12-13). In the unlikely event that this Court adopts the government's proposal that an appellant can only trigger factual sufficiency review by using the exact same words as the Air Force Court, in this case, *the defense did use the same words*.

It was the that government opposed the defense's mistake of fact as to consent framework, both at trial and on appeal. It was only after the military judge denied the mistake of fact as to consent framing proposed by the defense, at the request of the government, that the defense arguably adjusted its terminology (though the defense never faltered on the underlying point: that SrA Hunt stopped when he realized consent had been withdrawn). Now the government faults the defense from not using the term "mistake of fact as to consent" – but it was the government itself at trial that rejected the defense's application of this term to the unusual facts of this case.

Going even farther, the defense specifically forecast the issue of defining the framework for evaluating the sufficiency of an accused's response to a post-penetration withdrawal of consent in its factual insufficiency assignment of error on this very topic. The defense noted that the panel was not given particularly clear instructions on how to evaluate SrA Hunt's cessation after the withdrawal of consent:

> Similarly, given the lack of instructions on this issue, it is difficult to know how much to defer to a panel that was not provided a legal framework to evaluate the unusual issue of a post-penetration withdrawal of consent.

(JA at 236). As such, the defense specifically requested "[The Air Force] Court should state what standard it uses to evaluate this issue in its factual sufficiency

review." (JA at 236). The Air Force Court did just that, adopting a framework very similar to that proposed by the defense at trial and on appeal.

5. Stopping Promptly upon Realizing Consent had been Withdrawn is Functionally the Same as Mistake of Fact as to Consent.

As framed by both the defense and the Air Force Court, stopping upon realizing consent had been withdrawn was functionally the same as a mistake of fact as to consent. The government clearly recognized this as well – both at trial and on appeal. At trial, while opposing the defense instruction that would label stopping when asked to mistake of fact as to consent, trial counsel clearly indicated that he understood that stopping upon realization was a defense. (JA at 170) ("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."). On appeal, the government continued to acknowledge that stopping was a defense. (JA at 276) ("Here, MM's expression of lack of consent was her firmly telling Appellant to stop. At that point, Appellant had the clear ability to avoid criminality by simply doing what MM said – stopping his sexual act and removing himself from her body."). Indeed, the government's Air Force Court brief goes on to mockingly accuse the defense of trying to "contort" these concepts by maintaining – as it did at trial – that they should have been explained via a mistake of fact as to consent instruction that was tailored to the context of withdrawn consent. (JA at 276). Now the government faults the

defense for supposedly failing to characterize these same concepts in a manner the government itself argued was unnecessary. (JA at 276). It was *the government*, both at trial and on appeal, that opposed the defense's characterization of stopping when asked as a form of mistake of fact as to consent. Now the government says Brandon Hunt's factually insufficient conviction should stand because the defense did not use the term enough times.

6. The Government Below Understood the Legal Framework, and Itself Invoked Caselaw Consistent with the Air Force Court's Analysis

Not only did the defense below invoke a framework very similar to that employed by the Air Force Court, so did the government. The government directed the Air Force Court's attention to *United States v. Rouse*, 78 M.J. 793 (A. Ct. Crim. App. 2019). (JA at 273, 274, 293, 294, 295). The government even specifically urged the Air Force Court to "adopt the Army Court's reasoning" from *Rouse*. (JA at 295). The *Rouse* case, repeatedly relied upon by the government, addressed withdrawal of consent and, as the Air Force Court noted, acknowledged the possibility that the evidence could raise the defense of mistake of fact as to consent. (JA at 13). The Air Force Court used this framework in its own analysis, adopting *the government's* invitation to apply this law to the issues the government understood to be at issue. The Air Force Court did a proper review here, employing the law cited by the government itself in its briefing, albeit adverse to the government's position.

7. The Government Attempts to Strawman the Defense Argument to only that SrA Hunt Stopped Immediately.

In a transparent example of using a strawman, the government contends that "Appellee's entire contention here is that he ceased *immediately* upon being told to stop. (Gov. Br. at 38) (emphasis added). But even a cursory review of the defense briefs demonstrates this is not so. *See, e.g.*, (JA at 223) ("The controversy revolved around the specific timeline: how long the consensual act lasted before the withdrawal of consent – and how long after the withdraw of consent appellant stopped."); (JA at 224) (noting the need for instructions on "how to evaluate *the sufficiency of compliance* when a withdrawal of consent happens mid-act.") (emphasis in original); (JA at 225) (noting that the standard instructions could "be interpreted to mean that an initially consensual act becomes nonconsensual upon an expressed lack of consent which, in the absence of any temporal orientation, and in conjunction with the surrounding instructions, would mean that the innocent conduct would *immediately* become criminal.) (emphasis in original); (JA at 225) (noting it "cannot be right" that "innocent conduct would *immediately* become criminal" after a post-penetration withdrawal of consent); (JA at 225, n.4) ("The *instantaneous* transition of innocent to criminal conduct would deprive the actor of any ability to avoid criminality and enable any sexual participant to instantly transform their partner into a sex offender by a sudden withdrawal of consent.") (emphasis in original); (JA at 227) (noting that "a central defense" at trial was "that appellant

stopped *with appropriate diligence* when asked.") (emphasis added); (JA at 229) (describing "the heart of the controversy" as "the timeline of the consensual act, subsequent withdrawal of consent, and appellant's cessation."); (JA at 229-30) (noting that MM's statement to the responding officer that she "said 'Stop, Stop, Stop,' pushed him off, and the sex ended" was important because it "arguably presented a complete defense."); (JA at 230) (noting that a "*more contemporaneous* cessation than MM's trial testimony, would have given the panel a reasonable hypothesis besides guilt.") (emphasis added); (JA 231) (describing the latency between the withdrawal of consent and SrA Hunt's cessation as "the crucial events that transpired between the withdrawal of consent and appellant stopping."); (JA at 235) (arguing the evidence was insufficient because it "present[ed] 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.") (emphasis added); (JA 316) (noting that the crucial issue in controversy was "the post-penetration withdrawal of consent and the sufficiency of Appellant's response to it."); (JA at 316) ("The government does not dispute Appellant's argument that an initially consensual act cannot *immediately* become criminal upon a post-penetration withdrawal of consent.") (emphasis in original); (JA at 316) (describing "the withdrawal of consent and the sufficiency of Appellant's cessation" as "the central issue in the case. . . ."); (JA at 320) ("Here, an issue presented – indeed

the primary issue presented – was whether Appellant's cessation of sexual activity in response to the withdrawal of consent was *sufficient* to avoid criminal liability.") (emphasis added); (JA at 322) (noting that "on the facts of this case, the questions at issue involved the granular details of the withdrawal of consent and Appellant's response to it.").

Contrary to the government's disingenuous assertion before this Court, SrA Hunt's contention was never limited to the idea that he *immediately* ceased. To the contrary, the defense has consistently maintained that requiring an immediate cessation would be unworkable because, given the inherent latency in perceiving and responding to a withdraw of consent, an actor would have no realistic course to avoid criminal liability. *See* (JA at 225, 316). Rather than an unrealistic *immediate* cessation, SrA Hunt has argued he "ceased promptly" and "stopped with appropriate diligence when asked." (JA at 227, 235). Even under the defense theory, there was inevitably *some* period between the withdrawal of consent and SrA's cessation. The question is whether, during that period, he was consciously continuing over MM's objection. This is the precise question raised throughout the defense briefs – and it is the same issue upon which the Air Force Court decided the case.

The distinction is an important one – and it is obvious what the government is trying to do. The only way the government can distinguish the deficiency raised by the defense from mistake of fact as to consent is to eliminate altogether the period

between the withdrawal of consent and SrA Hunt's stopping. In the case of a literally *immediate* cessation, there would be no latency period in which the mistake of fact as to consent to exist. But this has never been SrA Hunt's argument.

8. Law of the Case and Waiver

As described *ad nauseum* above, SrA Hunt argued vigorously at the Air Force Court that he had the opportunity to avoid criminality by stopping after the withdrawal of consent – and the evidence raised the possibility that he did just that. *See* (JA at 223 224 225, 225 n.4, 227, 229, 230, 231, 235, 315, 316, 317, 320, 322). In its Air Force Court brief, the government concurred that SrA Hunt "had the clear ability to avoid criminality by simply doing what MM said – stopping his sexual act and removing himself from her body." (JA at 276).

The Air Force Court, citing the same evidence, put forth a framework of mistake of fact as to consent that – in the unique context of post-penetration withdrawn consent cases – applies to the same underlying factual issue (the opportunity to avoid criminality by stopping after the withdrawal of consent).

The government has not challenged the framework put forth by the Air Force Court – making it law of the case. By engaging with the substance of this issue in its briefs before the Air Force Court and not challenging the Air Force Court's application of the mistake of fact as to consent framework, the government waived this issue. Or, at the very least, the government demonstrated that it equally

understood below what it now affects to be ignorant of – that these analyses are the one in the same.

9. Conclusion

The underlying deficiency raised by the evidence was consistent throughout the defense briefings and the Air Force Court opinion. While MM testified at trial that SrA Hunt continued for an extended period of time after she withdrew consent, this theory was undercut by other evidence suggesting that SrA Hunt stopped promptly upon the withdrawal of consent being communicated. Evidence supporting the latter conclusion included SrA Hunt's denials and certain versions of MM's prior inconsistent statements. MM's other inconsistent statements also undermined the credibility of the version she told at trial.

At worst there was some uncertainty as to how to describe this deficiency within the unusual legal framework of as post-penetration withdrawn consent case. Though even this is not really true as the defense at trial and on appeal maintained the military judge should have given a "mistake of fact as to consent" instruction that addressed this exact dynamic within the context of a withdrawn consent scenario. Either way, it does not change the fact that it was the same underlying deficiency in proof that was consistently under discussion by both the defense and Air Force Court (and, for that matter, the government). If anything, it is unsurprising

that novel charging theories have a less developed or uniform lexicon of legalese surrounding them.

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?

Standard of Review

Adopted from A.E. II, above.

Law and Argument

1. The Second Certified Issue is Dispositive

As argued above, the defense squarely raised the same underlying deficiencies that resulted in the Air Force Court's finding of factual insufficiency. If this Court agrees on that issue, then this issue will be moot.

2. The "New" Article 66

Factual sufficiency review in this case is governed by the version of Article 66(d)(1)(B), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d)(1)(B), enacted by section 542(b) of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388, 3611–12 (2021) (hereinafter NDAA for FY 2021). Clause (B) of Article 66(d)(1) has not been amended since. That clause establishes a gate through which a CCA must pass before conducting factual sufficiency review of a finding of guilty but does not constrain the CCA to that gate's aperture once it is open.

Subclause (i) of Article 66(d)(1)(B) permits a CCA to "consider whether [a finding of guilty] is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof." The purpose of the "specific showing" language is apparent: it avoids allowing the defense to obtain factual sufficiency review by making a mere boilerplate allegation of factual insufficiency in every case with a contested finding of guilty, thereby *de facto* retaining the CCA's *sua sponte* "obligation to independently determine whether the findings are factually sufficient" that existed before the NDAA for FY 2021's enactment. *United States v. Hutchison*, 55 M.J. 574, 577 (C.G. Ct. Crim. App.), *reaff'd en banc*, 56 M.J. 684 (C.G. Ct. Crim. App. 2001), *aff'd*, 59 M.J. 250 (C.A.A.F. 2004).

3. Article 66(d)(1)(B)(i) is Only a Triggering Mechanism for Factual Sufficiency Review.

The plain reading of Article 66(d)(1)(B)(i) is that in order for a CCA to be able to conduct a factual sufficiency review, an accused must (1) make a request; and (2) make a specific showing of a deficiency in proof, because that is what it says. Simply put, if an appellant wants to assert his or her conviction is factually insufficient he or she must ask the CCA to review the specific deficiency in proof. Once an appellant has met the threshold for factual sufficiency review (making a specific showing of "a" deficiency in proof), the CCA has crossed the bridge into clause (ii) which describes how the CCA will conduct factual sufficiency reviews. 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. *See* Article 66(d)(1)(B)(ii), 10 U.S.C. § 866(d)(1)(B)(ii) (having no tie or reference to clause (i)'s requirement for a specific showing of a deficiency in proof to the two ways a CCA will weigh the evidence and determine controverted questions of fact). This plain reading of the text is in line with Supreme Court precedent 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." *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 99 (1991). Consistent with this core principle of American jurisprudence, when the issue of factual sufficiency is before a Court of Criminal Appeals, it is not limited to the defense's theory of insufficiency.

4. The Government's Analysis

While the government purports to ground its analysis in plain meaning, it reads *a lot* into the statutory language that does not actually appear in the language. As this Court recently emphasized, when Article 66's plain language does not impose a given requirement on the CCA's, this Court will not impose it. *United States v. Valentin-Andino*, 85 M.J. 361, 367 (C.A.A.F. 2025). Doing so would "risk amending statutes outside the legislative process reserved for the people's representatives." *Id.* (quoting *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 654-

55 (2020)). This Court should adhere to those same principles here. If Congress wants to add the restrictions the government seeks, it is free to do so.

In places, the government seems to blur the lines between the triggering mechanism (Article 66(d)(a)(B)(i)) and the scope of review Article 66(d)(a)(B)(ii)), but there is nothing in the statutory language that makes the connection the government adds.

The government's final argument, that failure to adopt its reading "would essentially revert a CCA's review power back to the previous Article 66(d) and undermine the intent to amend Article 66, UCMJ," is particularly hard to understand. (Gov. Br. at 32-33). As examined at length by this Court and the CCA's, the new Article 66 has many differences from the old one. Declining to add the government's additional requirement here, which appears nowhere in the text, would certainly not revert Article 66 back to its original scope.

The statute's plain language refutes the government's argument that factual sufficiency review is limited to the scope of an appellant's specific showing. Once a specific showing has been made under subclause (i), subclause (ii) lists two limits to a CCA's factual sufficiency review. A CCA must conduct its factual sufficiency review "subject to": (1) "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence"; and (2) "appropriate deference to findings of fact entered into the record by the military judge." Subclause (ii) does not say that

a CCA's factual sufficiency review is "subject to the scope of the accused's specific showing of a deficiency in proof." *Expressio unius est exclusio alterius*. *United States v. Vanzant*, 84 M.J. 671, 676 (A.F. Ct. Crim. App. 2024), *aff'd*, __ M.J. __, No. 24-0182/AF, 2025 CAAF LEXIS 830 (C.A.A.F. Oct. 1, 2025). Or, in this case, *expressio duorum est exclusio alterius*. By expressly providing two limitations on the Courts of Criminal Appeals' performance of factual sufficiency review but not providing a limitation based on the scope of the accused's initial specific showing of deficiency in proof, Congress eschewed any such additional limitation. Although Congress could have written the limitation the government seeks to create into Article 66(d)(1)(B)(ii), it chose not to. Because it wrote two *other* limitations into that subclause with no indication that it intended other, unspecified limitations to apply, those two limitations occupy the field.

5. Caselaw on an Analogues Question of Statutory Interpretation

The Supreme Court's decision in *Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163 (1993), is on point in reinforcing the proper construction of the statutory text. There, the issue was "whether a federal court may apply a 'heightened pleading standard'—more stringent than the usual pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure—in civil rights cases alleging municipal liability under Rev. Stat. § 1979, 42 U. S. C. § 1983." *Id.* at 164. In concluding that the answer was no, the Court observed that Federal Rule

of Civil Procedure 9(b) imposes "a particularity requirement in two specific instances." *Id.* at 168. The Court concluded that Rule 9(b)'s inclusion of those two specific instances indicated the absence of any additional particularity requirement: "Thus, the Federal Rules do address in 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983. *Expressio unius est exclusio alterius*." *Id.* So too, here, Article 66(d)(1)(B)(ii)'s expression of two limitations on the Courts of Criminal Appeals' factual sufficiency review authority without including a limitation based on the scope of the accused's initial showing excludes any such factor from the statutory scheme.

6. Policy and Practical Concerns

While this issue can be resolved as a matter of statutory interpretation, it at least warrants mention that the government's approach would be hugely impractical.

First, the defense appellate divisions would no doubt respond by raising every possible deficiency in order to "cover all bases" and secure a broader review – resulting in unnecessarily voluminous filings that would obscure rather than illuminate the main points of contention.

It would also make the CCA's scope of review difficult to determine and apply. There is often overlap between various deficiencies in proof, and it may be hard to determine where one deficiency stops and another starts. What if the defense

raised four deficiencies about a given specification but the CCA identified a fifth? Would the CCA be prohibited from exploring it? How would the CCA cabin-off unraised deficiencies when fulfilling its mandate to determine if a conviction was against the weight of the evidence? Would it only consider the weight of the evidence as if the unraised deficiency didn't exist? What if a particular deficiency was not raised in an appellant's brief, but was raised at oral argument – would that suffice? As a result, would defense counsel over-request oral argument in order to further bolster their written submissions?

If, as the government alleges here, the defense did not use the exact same language as the CCA might prefer, is the CCA limited to the language used by the defense? Is the CCA similarly limited to the same analysis engaged in by the defense? This would largely turn the CCAs into a "yes or no" rubber stamp on defense briefs, that either wholly adopted or rejected the defense framing, down to the technicalities and legalese, and deprive the CCA of the authority to conduct an independent analysis. As an example, what would such a review look like in this case? Could the CCA consider the same evidence and issue, but only analyze it using terms specifically appearing in the defense brief? To the extent the CCA had adhered to government's proposed framework below – would it have been prohibited from overturning the conviction even though it was clearly convinced the

conviction was against the weight of the evidence? Or could it still have overturned the conviction but only by confining itself strictly to terms used in the defense briefs?

This framework is extremely cumbersome. It is difficult to define much less apply. This Court would be flooded with government appeals alleging a CCA cited a fact or factor not raised in a defense brief. This would result in exhaustive briefing before this Court, comparing the briefs below with the CCA's opinion (a tedious exercise, as illustrated above). All in the service of the government's attempt to ensure factually insufficient convictions are preserved on procedural technicalities. This would be a horrible system, and this Court should not set it up.

7. Conclusion

Applying the Supreme Court's *Kamen* holding to the context of this case, when a factual sufficiency "claim is properly before the court" because the Article 66(d)(1)(B)(i) gate has been passed, "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." 500 U.S. at 99. This Court should not conclude that Congress inverted the normal relationship between courts and advocates without clear statutory language to that effect. Article 66(d)(1)(B) includes no such clear language.

Conclusion

WHEREFORE, appellee respectfully requests this Court affirm the Air Force Court's opinion.

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