IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

DANIEL R. CSITI,
Staff Sergeant (E-5),
United States Air Force,
Appellant.

USCA Dkt. No. 24-0175/AF

Crim. App. Dkt. No. 40386

BRIEF ON BEHALF OF APPELLANT

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III.

Whether the lower court erroneously interpreted and applied the amended factual sufficiency standard under Article 66(d)(1)(B), UCMJ.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d) (effective Jan. 1, 2021). This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (effective Jan. 1, 2021).[1]

[1] The 2024 edition of the UCMJ governs the AFCCA's, and this Court's, ability to exercise jurisdiction over this matter, pursuant to the William M. (Mac) Thornberry National Defense Authorization Act (NDAA) for Fiscal Year 2021, Pub. L. 116-283, § 542, 134 Stat. 3388, 3612–13 (2021).

Relevant Authorities

In relevant part, Article 66(d)(1)(B), UCMJ, 10 U.S.C. § 866(d)(1)(B) (effective Jan. 1, 2021) provides:

> (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.

In relevant part, Article 67(c)(1), UCMJ, 10 U.S.C. § 867(c)(1) (effective Jan. 1, 2021) provides:

> (c)(1) In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to—
> (A) the findings and sentence set forth in the entry of judgment, as affirmed or set aside as incorrect in law by the Court of Criminal Appeals;
> (B) a decision, judgment, or order by a military judge, as affirmed or set aside as incorrect in law by the Court of Criminal Appeals; or
> (C) the findings set forth in the entry of judgment, as affirmed, dismissed, set aside, or modified by the Court of Criminal Appeals as incorrect in fact under section 866(d)(1)(B) of this title (article 66(d)(1)(B)).

Statement of the Case

On July 27, 2022, a military judge sitting as a general court-martial convicted Staff Sergeant (SSgt) Daniel R. Csiti, contrary to his pleas, of one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920.[2] The military judge sentenced SSgt Csiti to a dishonorable discharge, two years of confinement, total forfeiture of all pay and allowances, and reduction to the lowest enlisted grade.[3] The convening authority took no action on the findings and sentence of the court-martial.[4] On April 29, 2024, the AFCCA affirmed the findings and sentence.[5]

Statement of Facts

A. SSgt Csiti told AH her body was perfect; she responded with "show me," and removed her pants and underwear.

On May 21, 2021, SSgt Csiti babysat AH's son at her house so AH could go out to dinner with two friends, NA and NS.[6] At dinner, AH drank a few glasses of wine and consumed a large pizza and a salad.[7] AH asked NA for a ride home.[8] SSgt Csiti helped AH carry a pizza inside when she returned home.[9] AH

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[2] JA at 173, 003. Unless otherwise stated, all references to the UCMJ are to the version published in the *Manual for Courts-Martial*, *United States* (2019 ed.).
[3] JA at 174, 003.
[4] JA at 007.
[5] JA at 185.
[6] JA at 014, 175.
[7] JA at 020, 055-58, 096.
[8] JA at 059.
[9] JA at 104, 178 (Clip 10 at 06:42-06:49).

remembered getting to her house, being in her kitchen, and talking with SSgt Csiti.[10] AH drank a few "hard seltzer" alcoholic beverages while hanging out with SSgt Csiti.[11]

At some point, SSgt Csiti helped AH upstairs to go to bed.[12] A couple minutes later, AH went back downstairs and continued talking with SSgt Csiti.[13] While in her kitchen, AH leaned the chair she was sitting in, causing it to tip over, hit the wall, and leave a dent in her wall.[14] SSgt Csiti and AH then moved to AH's couch and began making jokes about AH's boyfriend and discussing body-image issues.[15]

AH said that "[her] body was not even that great."[16] SSgt Csiti told AH her body was perfect.[17] AH said, "show me," and removed her pants and underwear.[18] SSgt Csiti and AH kissed.[19] SSgt Csiti then performed oral sex on AH for approximately one minute when AH stopped him, saying she "needed to pee."[20] SSgt Csiti helped AH put her pants and underwear back on.[21] AH said she no longer

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[10] JA at 104.
[11] JA at 021, 061.
[12] JA at 178 (Clip 6 at 01:19-01:47); JA at 183 (02:35-03:35).
[13] JA at 178 (Clip 6 at 01:19-01:47); JA at 183 (02:35-03:35).
[14] JA at 178 (Clip 6 at 01:59-02:15); JA at 183 (04:00-04:13).
[15] JA at 178 (Clip 6 at 02:17-03:11; Clip 10 at 03:13-03:31); JA at 183 (04:37-04:42).
[16] JA at 183 (04:42-04:52); *see also* JA at 178 (Clip 6 at 03:12-03:19).
[17] JA at 178 (Clip 6 at 03:19-03:24); JA at 183 (04:53-04:58).
[18] JA at 178 (Clip 6 at 03:24-03:36); JA at 183 (04:58-05:07).
[19] JA at 183 (05:17-05:21).
[20] JA at 178 (Clip 6 at 03:43-03:57; Clip 10 at 03:54-04:06), JA at 183 (05:21-05:45).
[21] JA at 178 (Clip 6 at 03:58-4:10; Clip 10 at 04:07-04:14), JA at 183 (05:45-05:53).

needed to go the bathroom, but she was tired.[22] She laid down on the couch and fell asleep.[23]

The next morning, AH found SSgt Csiti downstairs, asleep on the couch.[24] She asked him to stay at her house to help with her son because she was hungover.[25] SSgt Csiti stayed at AH's house into the evening, until AH told SSgt Csiti, "I release you" and told him he could leave.[26]

B. SSgt Csiti was AH's best friend—her "go-to," "emotional support" guy.

SSgt Csiti and AH's close friendship began in 2017.[27] SSgt Csiti was "there for [AH]" as a "very good emotional support person."[28] When AH's husband left her after she became pregnant, SSgt Csiti stepped in to help support AH throughout her pregnancy.[29] SSgt Csiti babysat AH's son and picked him up from childcare.[30] He was AH's "go-to" guy.[31] When she asked him for help, he would always say "yes," even going so far to adjust his schedule to make it work to help her.[32] The

[22] JA at 178 (Clip 6 at 04:13-04:19; Clip 10 at 04:14-04:27), JA at 183 (05:54-06:12).
[23] JA at 178 (Clip 6 at 04:19-04:23; Clip 10 at 04:14-04:27), JA at 183 (05:54-06:12).
[24] JA at 067-68.
[25] JA at 068.
[26] JA at 069.
[27] JA at 009.
[28] JA at 011.
[29] JA at 011, 040.
[30] JA at 041.
[31] JA at 041.
[32] JA at 041.

only time SSgt Csiti ever said "no" to AH was when it was something completely outside of his control.[33]

C. AH had a history of alcohol abuse.

AH had a history of alcohol abuse.[34] She was a heavy drinker with a high tolerance for alcohol.[35] She would drink to the point of intoxication multiple times a week.[36] She regularly experienced blackouts and gaps in her memory due to her alcohol consumption.[37] When AH drank alcohol, her judgment would be impaired, and she would do things that were out of her character.[38] Often, AH's friends would tell AH she did or said something while she was drunk, and she had no memory of it.[39] Even though AH did not have a memory of what her friends told her occurred, she did not doubt that she had said or done those things.[40]

There were times throughout AH's friendship with SSgt Csiti when AH was intoxicated and she would dance erotically with SSgt Csiti.[41] In 2018, AH danced erotically with SSgt Csiti at a nightclub, putting her hands on his hips, his shoulders,

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[33] JA at 041.
[34] JA at 044, 075-76.
[35] JA at 044, 074, 076.
[36] JA at 044, 074.
[37] JA at 044, 074.
[38] JA at 081.
[39] JA at 077.
[40] JA at 077, 081.
[41] JA at 053, 128-32.

his buttocks, and at one point, wrapping her leg around his body.[42] Additionally, AH gave SSgt Csiti lap dances in 2018 and 2019.[43]

SSgt Csiti frequently stayed the night at AH's house.[44] This often occurred when AH had been drinking.[45]

D. AH recorded conversations with SSgt Csiti about their sexual encounter on May 21, 2021.

A week after their sexual encounter, AH invited SSgt Csiti over for dinner.[46] AH was "pretty intoxicated" during their dinner.[47] At one point, AH and SSgt Csiti had a conversation about SSgt Csiti performing oral sex on AH the previous week.[48] According to AH, she "[did not] know how [they] entered that conversation," but she was "shocked" because she "[did not] know about [the sexual encounter]."[49] During their conversation, SSgt Csiti recounted what happened in the evening on May 21, 2021. AH was upset and SSgt Csiti expressed regret. He stated he "[knew he] should have walked away" but AH "took [her] pants and [her] panties off."[50] AH recorded the conversation with SSgt Csiti.[51]

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[42] JA at 129-32.
[43] JA at 053, 128-29.
[44] JA at 041.
[45] JA at 042.
[46] JA at 023.
[47] JA at 024.
[48] JA at 024-25.
[49] JA at 023-25.
[50] JA at 178 (Clip 10 at 06:20-06:28)
[51] JA at 024; *see* JA at 178.

The following day, on May 29, 2021, AH and SSgt Csiti again discussed their sexual encounter of May 21, 2021.[52] SSgt Csiti explained that in hindsight, he regretted his actions, stating it was "[his] fault for not telling [himself] 'no,' and to just back away from that instead."[53] AH recorded this conversation with SSgt Csiti as well.[54]

Both recordings were admitted as Prosecution Exhibits at SSgt Csiti's trial.[55] AH testified that she did not have any memories of the sexual encounter of May 21, 2021.[56]

E. The AFCCA said the factual sufficiency question was a "close one," but found SSgt Csiti's convictions legally and factually sufficient.

The AFCCA reviewed SSgt Csiti's conviction for legal and factual sufficiency.[57] The court determined that the Government "introduced sufficient evidence of [SSgt Csiti's] guilt to meet the 'very low threshold' for legal sufficiency."[58] The court acknowledged that AH "could not remember [the sexual act]" and the Government "could not prove [AH's] blood alcohol level."[59] The court also "recognize[d] [SSgt Csiti's] version of events, if entirely true, suggests [AH]

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[52] JA at 183.
[53] JA at 183 (08:29-08:46).
[54] JA at 035-36; *see* JA at 183.
[55] JA at 027-29, 036-37.
[56] JA at 062.
[57] JA at 188-95.
[58] JA at 191 (citation omitted).
[59] JA at 191.

was not so impaired by alcohol that she was incapable of consenting."[60] Nevertheless, the court determined that the "trier of fact could properly believe one part of [SSgt Csiti's] statement while disbelieving another part" and "a rational trier of fact could find the elements of the offense proven beyond a reasonable doubt."[61]

In reviewing the issue of factual sufficiency, the AFCCA concluded SSgt Csiti's case was "a close one," however in "applying the new statutory standard," it was "not clearly convinced the military judge's findings of guilty were against the weight of the evidence."[62]

Summary of the Argument

Congress amended Article 67, UCMJ, to grant this Court the authority to review and act on a lower court's factual sufficiency rulings.[63] In doing its own review, this Court will see that SSgt Csiti's conviction is factually and legally insufficient because AH was capable of consenting, and did consent, to sexual activity with SSgt Csiti.

If this Court concludes it does not have the authority to conduct its own factual sufficiency review, and it determines SSgt Csiti's conviction is legally sufficient, then it should remand the case to AFCCA for a new factual sufficiency review

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[60] JA at 191.
[61] JA at 192.
[62] JA at 192, 195.
[63] 10 U.S.C. § 867 (effective Jan. 1, 2021).

because the lower court erroneously interpreted and applied Article 66(d)(1)(B), in light of *United States v. Harvey*.[64]

Argument

I.

The Court of Appeals for the Armed Forces has statutory authority to decide whether a conviction is factually sufficient.

Standard of Review

This Court reviews questions of statutory construction *de novo*.[65]

Law and Analysis

This Court has the statutory authority to decide whether SSgt Csiti's conviction is factually sufficient. Pursuant to Article 67(c)(1)(C), UCMJ, this Court may act with respect to "the findings set forth in the entry of judgment, as affirmed, dismissed, set aside, or modified by the Court of Criminal Appeals as incorrect in fact under section 866(d)(1)(B) of this title (article 66(d)(1)(B))."[66] Thus, this Court may act with respect to any findings, reviewed by the AFCCA pursuant to 10 U.S.C. § 866(d)(1)(B), and affirmed as factually sufficient—which is what happened here.

This Court should look at the statute's plain and unambiguous language.

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[64] *United States v. Harvey*, __ M.J. __, 2024 CAAF LEXIS 502 (C.A.A.F. Sep. 6, 2024).
[65] *Harvey*, 2024 CAAF LEXIS 502, at *3 (citing *United States v. Kohlbek,* 78 M.J. 326, 330-31 (C.A.A.F. 2019)).
[66] 10 U.S.C. § 867(c)(1)(C) (effective Jan. 1, 2021).

"Unless the text of a statute is ambiguous, the plain language of a statute will control unless it leads to an absurd result."[67] "It is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms."[68] The language grants this Court the authority to act with respect to findings, as reviewed and decided upon by Court of Criminal Appeals (CCAs) as to the findings' factual sufficiency. This is a change from the previous Article 67(c)(1), UCMJ, where there were only subsections (A) and (B).[69] This new language, added to the Article as a separate subsection, demonstrates Congress' intent to grant this Court a new authority.

The new language is also different from the language in Article 67(c)(1)(A), which states this Court may act with respect to the "findings and sentence . . . as affirmed or set aside as incorrect in law" by the CCAs. The old language allowed the Court to review and act on the findings only if the lower court affirmed them as legally sufficient or set aside as not legally sufficient ("incorrect in law"). This Court could not act on a CCA's decision pertaining to factual sufficiency (except to ensure the lower court applied the correct legal principles in its factual sufficiency

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[67] *United States v. Schell*, 72 M.J. 339, 343 (C.A.A.F. 2013) (internal quotations omitted).
[68] *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004) (internal quotations and citations omitted).
[69] 10 U.S.C. § 867(c)(1) (2018).

review).[70] The newly added language in (c)(1)(C) now grants this Court the authority to act with respect to findings that are affirmed, dismissed, set aside, or modified by CCAs under 10 U.S.C. § 866(d)(1)(B). Congress specifically stated, in the statute, that this new review by this Court is for any action a CCA takes pursuant to Article 66(d)(1)(B)—whether the CCA affirms, dismisses, sets aside, or modifies the findings.

This Court "assume[s] that Congress is aware of existing law when it passes legislation."[71] Under the old Article 67, this Court "retain[s] the authority to review factual sufficiency determinations of the CCAs for the application of 'correct legal principles,' but only as to matters of law."[72] It is reasonable to assume that Congress was aware of this Court's limitations with regards to factual sufficiency under the previous Article 67, UCMJ.[73] If Congress intended for this Court to retain only the authority to review factual sufficiency determinations for the application of correct legal principles, it did not need to make any changes to Article 67, UCMJ.

"[W]hen Congress acts to amend a statute, [courts] presume it intends its

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[70] *United States v. Mendoza*, __ M.J. __, 2024 CAAF LEXIS 590 at *21 (C.A.A.F. Oct. 7, 2024).
[71] *United States v. McDonald*, 78 M.J. 376, 380 (C.A.A.F. 2019) (quoting *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990)) (internal quotations omitted).
[72] *Mendoza*, 2024 CAAF LEXIS 590, at *21.
[73] "It is reasonable to assume that Congress was aware of the existence of such military law when performing its constitutional task to make laws for the armed forces." *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979).

amendment to have real and substantial effect."[74] Thus, when Congress amended the United States Code to include this new language, it intended the change in the statute to have real and substantial effect—granting this Court the authority to review, and act on, CCAs' factual sufficiency determinations. For this Court to review a CCA's factual sufficiency determination to conclude whether the CCA came to the correct outcome, this Court must conduct its own factual sufficiency review of the case. If it is to correct, or affirm, a lower court's factual sufficiency determination, it only makes sense that this Court would conduct a new weighing of the evidence and come to its own conclusion as to whether it is "clearly convinced that the finding of guilty was against the weight of the evidence."[75]

Under Article 66(c)(1)(C), this Court has the new authority to decide whether SSgt Csiti's conviction is factually sufficient, and this Court should use the same standard defined in *United States v. Harvey* to conduct its factual sufficiency review. SSgt Csiti respectfully requests that this Court conduct a factual sufficiency review of his case.

[74] *Stone v. Immigration and Naturalization Serv.*, 514 U.S. 386, 397, 115 S. Ct. 1537, 131 L. Ed. 2d 465 (1995).
[75] *Harvey*, 2024 CAAF LEXIS 502, at *12.

II.

Appellant's conviction for sexual assault is factually and legally insufficient because AH was capable of consenting—and did consent—to sexual activity with Appellant.

Standard of Review

This Court reviews the legal sufficiency of convictions *de novo*.[76] This Court has not set forth the standard of review for factual sufficiency for Article 67, UCMJ, 10 U.S.C. § 867 (effective Jan. 1, 2021). This Court should conduct a factual sufficiency review using the standard of review articulated in *United States v. Harvey*.[77]

Law and Analysis

SSgt Csiti's conviction for sexual assault is factually and legally insufficient because AH was capable of consenting, and did consent, to sexual activity with SSgt Csiti. Even if AH did not consent, SSgt Csiti had a reasonable mistake of fact that AH consented to sexual activity. If this Court finds that AH was incapable of consenting, SSgt Csiti could not reasonably have known AH was incapable of consenting.

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[76] *United States v. Smith,* 83 M.J. 350, 359 (C.A.A.F. 2023) (citation omitted).
[77] 2024 CAAF LEXIS 502, at *7-12.

A. AH demonstrated she was capable of consenting, and did consent, to sexual activity with SSgt Csiti.

i. AH had the motor control and cognitive function to begin and end sexual activity with SSgt Csiti.

Notwithstanding her drinking, AH walked and talked like she was giving consent to the brief oral sex that occurred on the night in question. She made her way downstairs on her own and invited SSgt Csiti to comment on her body, lamenting that her body was not that great.[78] SSgt Csiti's attraction was clear when he told AH her body was perfect.[79] AH's responsive invitation to sexual activity was far from subtle: "Show me." AH immediately followed up her "show me" by removing her pants and underwear to show SSgt Csiti what she wanted.[80] AH demonstrated consent through her words and actions.

Consent is a "freely given agreement to the conduct at issue by a competent person."[81] A competent person is "a person who possesses the physical and mental ability to consent."[82] A "freely given agreement" occurs when a person "first possess[es] the cognitive ability to appreciate the nature of the conduct in question, then possess[es] the mental and physical ability to make and to communicate a

[78] JA at 183 (04:42-04:52); *see also* JA at 178 (Clip 6 at 03:12-03:19).
[79] JA at 178 (Clip 6 at 03:19-03:24); JA at 183 (04:53-04:58).
[80] JA at 178 (Clip 6 at 03:24-03:36); JA at 183 (04:58-05:07).
[81] Article 120(g)(7)(A), UCMJ, 10 U.S.C. § 920(g)(7)(A).
[82] *United States v. Pease*, 75 M.J. 180, 184-85 (C.A.A.F 2016).

decision regarding that conduct to the other person."[83] The UCMJ defines "incapable of consenting" as "incapable of appraising the nature of the conduct at issue; or physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act at issue."[84]

AH demonstrated, through her words and actions over the course of the evening, that she was capable of consenting to sexual activity. AH's testimony established that she could make decisions, she understood her surroundings, and she knew what was going on in the relevant timeframe.[85] She remembered drinking and eating dinner with her friends at the restaurant.[86] Demonstrating executive function, she knew she should not drive due to her consumption of alcohol and asked NA for a ride.[87] She remembered getting to her house and being in her kitchen with SSgt Csiti.[88] She testified that she may have remembered being in her living room, talking with SSgt Csiti, and seeing the television was on.[89] Then AH claimed she

[83] *Pease*, 75 M.J. at 184-85.
[84] Article 120(g)(8), UCMJ, 10 U.S.C. § 920(g)(8); *see Pease,* 75 M.J. at 185 (concluding that "incapable of consenting" means lacking the cognitive ability to appreciate the sexual conduct in question or lacking the mental or physical ability to make or communicate a decision about whether the alleged victim agrees to the conduct.)
[85] JA at 055-59, 061-62.
[86] JA at 055-58.
[87] JA at 058-59.
[88] JA at 059.
[89] JA at 061-62.

did not remember the remainder of events of that evening.[90]

Testimony from NA, and the recordings of SSgt Csiti and AH's conversations, fill in the gaps in AH's testimony. This evidence further illustrates AH was capable of consenting, and did consent, to sexual activity with SSgt Csiti. NA described AH as "tipsy" and "coherent" as they left the restaurant.[91] AH was not stumbling, and she was able to walk to NA's car.[92] On the drive from the restaurant to AH's house, AH was coherent and moved her head to the beat of the music being played in the car.[93] When AH got out of NA's car at her house, she was "tipsy," but not drunk, and AH was capable of walking unassisted from the car to her front door.[94]

When AH returned home, she talked with SSgt Csiti for approximately an hour.[95] After SSgt Csiti helped AH go upstairs to go to bed, she went back downstairs unassisted.[96] AH was coherent enough to lean in one of her chairs while she talked more with SSgt Csiti, eventually causing the chair to fall and dent AH's wall.[97] AH and SSgt Csiti sat on AH's couch, made jokes about AH's boyfriend, and discussed body image issues.[98]

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[90] JA at 062, 079-81.
[91] JA at 096.
[92] JA at 099.
[93] JA at 100.
[94] JA at 104.
[95] JA at 178 (Clip 6 at 00:30-01:26); JA at 183 (02:24-03:14).
[96] JA at 178 (Clip 6 at 01:29-01:47); JA at 183 (03:23-03:35).
[97] JA at 178 (Clip 6 at 01:59-02:15); JA at 183 (04:00-04:13).
[98] JA at 178 (Clip 6 at 02:17-03:24); JA at 183 (04:37-04:58).

AH was mentally and physically capable of having these conversations with SSgt Csiti. She was also mentally and physically capable of making and communicating a decision to engage in sexual conduct with SSgt Csiti. When SSgt Csiti told AH her body was perfect, AH said "show me."[99] AH then took off her pants and underwear—on her own.[100] In this moment, AH was fully capable of appraising the nature of her conduct and SSgt Csiti's conduct. She and SSgt Csiti kissed for a few moments. SSgt Csiti then performed oral sex on AH for approximately one minute before she pushed him away, and he immediately stopped.[101] AH demonstrated she was aware and in control. She was physically capable of declining participation in, and communicating her unwillingness to engage in, any sexual act with SSgt Csiti. When AH pushed SSgt Csiti away and said she needed to use the restroom, SSgt Csiti stopped, asked if AH wanted to get dressed, and helped AH put her clothes back on.[102]

ii. <u>AH's history of alcohol abuse shows she is high functioning when intoxicated.</u>

The possibility that AH may have been in a blackout does not mean she was incapable of consenting. "Intoxication, standing alone, does not indicate one is

[99] JA at 178 (Clip 6 at 03:24-03:36); JA at 183 (04:58-05:07).
[100] JA at 178 (Clip 6 at 03:24-03:36); JA at 183 (04:58-05:07).
[101] JA at 178 (Clip 6 at 03:43-03:57); JA at 183 (05:17-05:45).
[102] JA at 178 (Clip 6 at 03:58-4:10); JA at 183 (05:45-05:53).

sufficiently impaired to be incapable of consenting to sexual activity."[103] AH admitted that she has a high tolerance for alcohol.[104] She also agreed it was "not uncommon" for AH's friends to tell her something had occurred—whether that be something she said, something she did, or a decision she made—while AH was drunk that AH had no memory of.[105] AH acknowledged that when those situations occurred, she did not doubt that she had said or done those things she could not remember.[106] AH also admitted that when she is drinking, her judgment is impaired and she does things that are out of her character.[107]

iii. AH's request for sexual intimacy demonstrated her consent.

AH and SSgt Csiti were best friends.[108] SSgt Csiti was AH's "go to" and "emotional support" friend.[109] Throughout the duration of their friendship, SSgt Csiti routinely cared for and supported AH and her son.[110] SSgt Csiti almost always said "yes" to AH when she asked him for help, and the only time he said "no" to her was when it was something completely outside of his control.[111] It is no surprise then, that when AH requested SSgt Csiti "show [her]" that her body is

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[103] *Smith*, 83 M.J. at 360, n.4 (C.A.A.F. 2023) (citations omitted).
[104] JA at 076.
[105] JA at 077-78.
[106] JA at 078, 081.
[107] JA at 081.
[108] JA at 051.
[109] JA at 011, 041.
[110] JA at 011, 040-41.
[111] JA at 041.

perfect, and she took off her pants and underwear on her own, that SSgt Csiti gave in to AH's request. When AH made this request, she was fully capable of appraising the nature of the sexual conduct she was choosing, on her own volition, to engage in with SSgt Csiti.

In this case, the Government did not meet their burden of introducing sufficient evidence to prove beyond a reasonable doubt that AH was incapable of consenting to sexual activity. Rather, the evidence demonstrates that AH was capable of consenting, and did consent, to sexual conduct with SSgt Csiti on May 21, 2021.

B. Even if AH did not consent, SSgt Csiti had a reasonable mistake of fact that AH consented to sexual activity.

Based on AH's conduct, SSgt Csiti had a reasonable mistake of fact as to consent. Through SSgt Csiti's lens, AH was a willing and capable participant in the sexual activity. She communicated to him what she wanted when she wanted it. From his perspective, AH demonstrated she was aware and in control. When AH communicated her unwillingness to continue engaging in the sexual activity, by telling SSgt Csiti to stop, he listened and immediately stopped. SSgt Csiti's conviction is legally and factually insufficient because he reasonably believed AH had consented to sexual activity with him.

AH admitted that when she drank alcohol, her judgment would be impaired,

and she would do things that were out of her character.[112] There were times throughout her friendship with SSgt Csiti when she engaged in sexualized behavior with SSgt Csiti, to include dancing erotically with him and giving him lap dances.[113] Based on AH's previous behavior with SSgt Csiti, and her interactions with him on May 21, 2021, a rational trier of fact could conclude that SSgt Csiti had a reasonable and honest mistake of fact as to consent.

C. SSgt Csiti could not reasonably have known AH's level of intoxication.

SSgt Csiti was not present with AH throughout the entire evening. There was no evidence introduced at trial to suggest SSgt Csiti knew how much alcohol AH consumed that evening, nor is the record clear as to how many drinks AH consumed.[114] The fact that NA drove AH home would not have caused SSgt Csiti to "reasonably have known" AH's intoxication level. A person may decide not to drive home after having just one drink, especially when they must pass through a military checkpoint as AH would have had to do to get on base to her home.[115] Nor does it support that SSgt Csiti knew or reasonably should have known that AH was too drunk to consent.

When AH returned home from the restaurant, she was "tipsy," but not drunk,

[112] JA at 081.
[113] JA at 053, 128-32.
[114] JA at 020, 058, 096.
[115] JA at 058-59.

and capable of walking unassisted from the car to her front door.[116] SSgt Csiti was able to observe AH's behavior and physical demeanor because he helped AH carry in a pizza.[117] AH continued to have conversations with SSgt Csiti throughout the remainder of the evening.[118] No evidence was introduced at trial to suggest SSgt Csiti had any reason to doubt AH's capacity to have these conversations or make decisions for herself.

After SSgt Csiti helped AH upstairs to go to bed, AH went back downstairs on her own.[119] It was reasonable that SSgt Csiti would interpret AH's ability to walk down her stairs, by herself, as AH having the mental and physical capacity to choose to engage in sexual activity with SSgt Csiti shortly thereafter.

AH took off her pants and underwear, on her own.[120] No evidence was introduced at trial to suggest AH struggled or fell when she took off her clothes. It was reasonable that, when SSgt Csiti saw AH take off her own clothes, and requested that he "show [her]," he believed she was asking him to engage in sexual activity with her. It was also reasonable for SSgt Csiti to believe AH had the cognitive ability to make and communicate a decision about whether to engage in sexual activity with

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[116] JA at 104.
[117] JA at 101, 104. JA at 178 (Clip 10 at 06:42-06:49).
[118] JA at 178 (Clip 6 at 00:30-03:24; Clip 10 at 03:24-03:44), JA at 183 (02:24-04:58).
[119] JA at 178 (Clip 6 at 01:29-01:47); JA at 183 (03:23-03:35).
[120] JA at 178 (Clip 6 at 03:24-03:36); JA at 183 (04:58-05:07).

him.

SSgt Csiti later acknowledged to AH that he knew "[she was] drunk" and expressed his own regret about the situation.[121] But being drunk does not mean a person is incapable of consenting.[122] And merely knowing AH was drunk was not sufficient to prove that SSgt Csiti knew or reasonably should have known AH's level of intoxication or whether she was incapable of consenting. AH's behavior and physical demeanor around SSgt Csiti demonstrated otherwise. Furthermore, hindsight and regret a week later does not transform the experience into something other than what it was: two capable, consenting individuals engaging in sexual activity.

Based on the evidence presented at trial, SSgt Csiti could not reasonably have known AH's level of intoxication or any potential inability to consent to sexual activity on May 21, 2021.

D. The trier of fact cannot fill in the gaps.

The AFCCA recognized that "[SSgt Csiti's] version of events, if entirely true, suggests [AH] was not so impaired by alcohol that she was incapable of

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[121] JA at 183 (04:16-04:25).

[122] *See United States v. Bodoh,* 78 M.J. 231, 237 (C.A.A.F. 2019) (noting it is a "false premise that a person who is intoxicated is inherently incapable of consenting to sexual acts"); *see also United States v. Rogers*, 75 M.J. 270, 273 (C.A.A.F. 2016) (correcting the erroneous "belief that if someone was too drunk to remember that they had sex, then they were too drunk to consent to having sex").

consenting."[123] In fact, what SSgt Csiti explained in the recordings, introduced by the Government, suggests "[AH] was able to appreciate the nature of the sexual act and that [AH] was capable of declining participation."[124] The lower court then tried to explain that the military judge could have believed "one part of [SSgt Csiti's] statement"—i.e. that he performed a sexual act on AH—"while disbelieving another part"—i.e. that she demonstrated her ability to appreciate the nature of the sexual act and her ability to consent.[125]

The problem with this theory is if the military judge had, in fact, disbelieved SSgt Csiti's account of what occurred between him and AH, then there would be no evidence regarding the facts and circumstances leading up to the alleged offense at all. AH claimed that she—drunk or sober—would never have allowed SSgt Csiti to kiss her or to perform oral sex on her.[126] But this is based on what AH believed in her later-in-time sober state of mind, and was also refuted by AH's own admissions that she does things "out of character" for her.[127] Regardless of what she thought she would, or would not, have done while intoxicated, she could not say what

[123] JA at 191.
[124] JA at 191.
[125] JA at 192. Of note, SSgt Csiti had no motive to lie or fabricate what occurred between him and AH. AH surreptitiously recorded her conversations with SSgt Csiti on May 28-29, 2021. He had no interest in protecting himself or lying, therefore no part of his statements should be disregarded.
[126] JA at 084.
[127] JA at 081.

actually occurred that night between her and SSgt Csiti because she had no memory of it.[128] The military judge would be left with AH's testimony that she does not remember what happened, and SSgt Csiti's statement that he performed a sexual act on AH. But there would be no evidence regarding AH's ability to consent, SSgt Csiti's knowledge regarding whether she could consent, and whether AH did, in fact, act in a way that would indicate she was consenting to the activity with SSgt Csiti.

The trier of fact, and appellate courts, cannot make up facts or fill in the gaps. This Court "[a]ssum[ed] without deciding that some additional evidence is required, beyond the [trier of fact] disbelieving the accused," to find him guilty of an offense.[129] If the military judge disbelieved SSgt Csiti's account of the evening related to AH's actions and participation in the sex act, and believed only his testimony that the act itself occurred, then there were no facts for the judge to rely on to convict SSgt Csiti beyond a reasonable doubt.

In this case, the Government did not meet their burden at trial of introducing sufficient evidence to prove beyond a reasonable doubt that AH was incapable of consenting to sexual activity. AH was capable of consenting, and did consent, to sexual activity with SSgt Csiti. Even if this Court finds AH did not consent, SSgt

[128] JA at 062, 079-81.
[129] *United States v. Nicola*, 78 M.J. 223, 228 (C.A.A.F. 2019).

Csiti had a reasonable mistake of fact as to consent. Furthermore, SSgt Csiti could not reasonably have known AH's intoxication level or any inability to consent to sexual activity. This Court should be clearly convinced the findings of guilty for sexual assault were against the weight of the evidence and SSgt Csiti's conviction factually insufficient. Furthermore, the evidence is legally insufficient to convict. No reasonable factfinder could conclude that the Government met its burden to prove beyond a reasonable doubt that SSgt Csiti sexually assaulted AH.

SSgt Csiti respectfully requests that this Court set aside the findings and sentence and dismiss the Charge and Specification 1.

III.

The lower court erroneously interpreted and applied the amended factual sufficiency standard under Article 66(d)(1)(B), UCMJ.

Standard of Review

This Court reviews questions of statutory construction *de novo*.[130]

Law and Analysis

The AFCCA erroneously interpreted and applied the amended factual sufficiency standard under Article 66(d)(1)(B), UCMJ.[131] The AFCCA stated this case was a "close one," but in "applying the new statutory standard," it found the

[130] *Harvey*, 2024 CAAF LEXIS 502, at *3 (citing *Kohlbek,* 78 M.J. at 330-31).
[131] 10 U.S.C. § 866(d)(1)(B) (effective Jan. 1, 2021).

evidence "factually sufficient to sustain [SSgt Csiti's] conviction."[132] The court offered no other analysis to explain why or how it came to that conclusion.

A. The AFCCA erroneously interpreted Article 66(d)(1)(B), UCMJ.

The AFCCA erroneously interpreted the language "appropriate deference" in Article 66(d)(1)(B), UCMJ, to be a "more deferential standard" in comparison to the old factual sufficiency standard under the previous Article 66, UCMJ.[133] This interpretation of Article 66(d)(1)(B), UCMJ, is in conflict with this Court's decision in *United States v. Harvey*.[134]

This Court stated that "appropriate deference" implies that the degree of deference will depend on the nature of the evidence at issue and the statute affords the CCA discretion to determine what level of deference is appropriate.[135] However, the AFCCA's interpretation implies that CCAs must afford a factfinder *more deference* than is required under Article 66(d)(1)(B)(ii)(I), UCMJ. Furthermore, the AFCCA believes it is not completely deprived of "the power to determine the credibility of witnesses," but it is silent as to whether it can determine the credibility of "other evidence" offered at trial.[136] Had the AFCCA not been bound by some belief it had to give more deference based on its erroneous interpretation of the

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[132] JA at 192.
[133] JA at 193-94.
[134] __ M.J. __, 2024 CAAF LEXIS 502 (C.A.A.F. Sep. 6, 2024).
[135] 2024 CAAF LEXIS 502, at *8.
[136] JA at 193-94.

statute, it is likely that the AFCCA would have found SSgt Csiti's conviction factually insufficient.[137]

While this Court concluded that it is up to the CCAs to determine what level of deference to give a court-martial's assessment of the testimony and evidence, it is unclear if the AFCCA would have given the military judge less deference in this case, if it believed it could. The lack of clarity in the AFCCA's opinion requires this case to be remanded so the AFCCA can conduct a new factual sufficiency review and give the military judge only the amount of deference it believes is appropriate in accordance with *Harvey*.

The lower court also interpreted the language "clearly convinced" and "against the weight of evidence" as requiring more than what this Court explained in *Harvey*. This Court adopted the interpretation that "clearly convinced" is "a 'state of confidence.'"[138] But the AFCCA said it "must not only find the weight of the evidence does not support the conviction; [the court] must be clearly convinced this is the case."[139] It is not clear what the lower court meant by "clearly convinced this is the case," but it implies something more than a "state of confidence." The AFCCA's interpretation inevitably imposes a higher standard for factual sufficiency

[137] The AFCCA called this case a "close one" with regards to its factual sufficiency review. JA at 192.
[138] 2024 CAAF LEXIS 502, at *11.
[139] JA at 195.

than what this Court set out in *Harvey*.[140]

B. The AFCCA erroneously applied Article 66(d)(1)(B), UCMJ.

The AFCCA's erroneous interpretation of Article 66(d)(1)(B), UCMJ, led to an erroneous application in its factual sufficiency review. The AFCCA gave too much deference to the military judge regarding AH's credibility and testimony and failed to appropriately weigh the evidence presented at trial. The AFCCA afforded "appropriate deference to the military judge, in light of the findings," and "presume[d] AH generally . . . testified credibly" at trial.[141] The lower court's opinion brushed over the fact that AH lied on the stand during the trial.[142] Furthermore, the AFCCA was silent as to whether it gave any deference to the military judge regarding other witness testimony (i.e. NA's testimony regarding AH's behavior when leaving the restaurant) or if the court considered that testimony at all.

The AFCCA also erred because it did not explain how it came to its conclusion that it was "not clearly convinced the military judge's findings of guilty were against the weight of the evidence."[143] The only explanation the lower court provided in its factual sufficiency review was about the deference it gave to the military judge

[140] 2024 CAAF LEXIS 502, at *9-12.
[141] JA at 194.
[142] JA at 195, 112-14.
[143] JA at 195.

regarding AH's testimony. Based on that deference, it presumed AH's testimony about the convicted sexual assault was credible, including "her shock at what [SSgt Csiti] admitted doing to her" and "her certainty that she would not have consensually engaged in sexual activity with [SSgt Csiti]."[144] There is no analysis regarding the lower court's weighing of the recorded conversations during which SSgt Csiti described AH's behavior and how she demonstrated her capacity to consent.

Although the lower court explained, in its legal sufficiency review, that a "trier of fact could reasonably interpret other evidence as indicating AH would not have . . . behaved in the manner [SSgt Csiti] claimed,"[145] the AFCCA is silent as to its own independent review of the evidence.[146] This illustrates that the lower court likely did not conduct its own weighing of the evidence and rather afforded too much deference to the military judge and his findings. At best, it is not clear what the lower court did and therefore, the AFCCA must complete a new factual sufficiency review and clearly explain its rationale.[147]

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[144] JA at 194. The lower court did not discuss incapacitation based on alcohol in its factual sufficiency review. It relied solely on AH's "certainty that she would not have consensually engaged in sexual activity with" SSgt Csiti. In light of *United States v. Mendoza*, the lower court erred in its factual sufficiency review. *See Mendoza*, 2024 CAAF LEXIS 590 at *17-18, *21-22.

[145] JA at 192.

[146] JA at 193-95.

[147] "This Court also has remanded when it is 'an open question' whether a CCA's review under Article 66(d)(1), UCMJ, was 'consistent with a correct view of the law.'" *United States v. Thompson*, 83 M.J. 1, 4 (C.A.A.F. 2022) (quoting *United States v. Nerad*, 69 M.J. 138, 147 (C.A.A.F. 2010)).

Conclusion

This Court has the authority to review and act on a lower court's factual sufficiency rulings.[148] SSgt Csiti respectfully requests that this Court conduct a factual and legal sufficiency review of his case. In doing so, this Court will see that SSgt Csiti's conviction is factually and legally insufficient because AH was capable of consenting, and did consent, to sexual activity with SSgt Csiti.

If this Court declines to conduct its own factual sufficiency review, and it determines SSgt Csiti's conviction is legally sufficient, then SSgt Csiti respectfully requests that this Court remand this case to the AFCCA to conduct a new factual sufficiency review.

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[148] 10 U.S.C. § 867 (effective Jan. 1, 2021).

CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and the Air Force Government Trial and Appellate Operations Division on December 6, 2024.

CERTIFICATE OF COMPLIANCE WITH RULES 24(b) AND 37

This brief complies with the type-volume limitation of Rule 24(b) because it contains 9,154 words.

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

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