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

REPLY BRIEF ON BEHALF OF APPELLANT

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I.

This Court has statutory authority to decide whether a conviction is factually sufficient.

Article 67(c)(1)(C), Uniform Code of Military Justice (UCMJ), grants this Court the authority to review, and act on, findings which are affirmed, dismissed, set aside, or modified by a Court of Criminal Appeals (CCA) pursuant to Article 66(d)(1)(B).[1] "The Supreme Court has 'stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then[the] first canon [of statutory construction] is also the last: judicial inquiry is complete.'"[2] The language in Article 67(c)(1)(C)[3] is plain and unambiguous.

But if this Court concludes the language in Article 67(c)(1)(C) is ambiguous, then this Court should look to the canons of statutory construction for guidance.[4] In doing so, this Court will see that the word "affirmed" in section (c)(1)(C) means "affirmed as correct in fact." Furthermore, this Court will see that the authority to

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[1] 10 U.S.C. § 867(c)(1)(C). Unless otherwise stated, all references to the United States Code (U.S.C.) contained herein refer to the U.S.C. effective Jan. 1, 2021.
[2] *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992)).
[3] All references to Articles 66 and 67 contained herein refer to the UCMJ.
[4] *See United States v. Custis*, 65 M.J. 366, 370 (C.A.A.F. 2007) ("It is a well established rule that principles of statutory construction are used in construing the *Manual for Courts-Martial*.").

review a CCA's factual sufficiency ruling is an exception to the clause "shall only act with respect to matters of law," in Article 67(c)(4). As such, this Court has the authority to conduct its own factual sufficiency review.

A. This Court may review a CCA's factual sufficiency determination, regardless of whether the CCA found the findings were correct or incorrect in fact.

Congress enacted a new subsection under Article 67(c)(1). This new subsection, (c)(1)(C), expands the scope of this Court's authority to review, and act on, findings in a case, regardless of whether the CCA found the findings were correct or incorrect in fact.

The Government acknowledged that section (c)(1)(C) "appears to permit this Court to review a CCA's factual sufficiency determination."[5] The Government also endorsed that "Congress intended to give this Court some greater power that it did not have before."[6] But the Government asserts that this Court may only conduct a review when a CCA has found the findings to be factually insufficient.[7] This is incorrect.

Section 542(c) of the 2021 National Defense Authorization Act (NDAA), which instituted the change in Article 67 is specifically titled "Review by United

[5] Gov't Br. 10.
[6] Gov't Br. 17.
[7] *Id.*

States Court of Appeals for the Armed Forces of Factual Sufficiency Rulings."[8] Had Congress wanted this Court to review only findings which were found by a CCA to be factually insufficient, section 542(c) of the NDAA would have been titled indicating as such Instead, Congress used all-encompassing language in the title, and specifically included the word "affirmed" in section (c)(1)(C).

The word "affirmed," as used in section (c)(1)(C) means *affirmed*. The statute does not state "affirmed a lesser finding," as the Government suggests.[9] The Government's leap from "affirmed" to "affirmed a lesser finding" does not even make sense in the context of section (c)(1)(C). If Congress intended for the word "affirmed" to mean "affirmed a lesser finding," it would have said so. Instead, Congress was explicit that this Court's review applies when a CCA has affirmed, dismissed, set aside or modified findings under Article 66(d)(1)(B)—the specific section that grants a CCA the power to conduct a factual sufficiency review.

Congress also could have limited this Court's authority to only review a CCA's factual sufficiency decision under Article 66(d)(1)(B)(iii).[10] That would have directed this Court to only review cases where a CCA found the findings to be

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[8] William M. (Mac) Thornberry National Defense Authorization Act (NDAA) for Fiscal Year 2021, Pub. L. 116-283, § 542(c), 134 Stat. 3388, 3612–13 (2021).
[9] Gov't. Br. 15.
[10] "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." 10 U.S.C. § 866(d)(1)(B)(iii).

factually insufficient, and where the CCA had dismissed, set aside, or modified the findings (or affirmed a lesser finding as the Government contends[11]). But Congress did not make that limitation.

While it is clear that this Court may act on findings which are affirmed by a CCA under Article 66(d)(1)(B), this Court must make sense of the language "incorrect in fact" in section (c)(1)(C). Certainly, a CCA cannot affirm findings which are incorrect in fact. However, the canon against surplusage requires all portions of a statute be given meaning.[12] Furthermore, Congress specifically included the language "the findings . . . as affirmed, dismissed, set aside, or modfied [sic] by the [CCA] . . . *under section 866(d)(1)(B)*."[13] This indicates that section (c)(1)(C) is specifically referring to findings which are either correct or incorrect in fact, since a CCA's review under Article 66(d)(1)(B) is limited to factual sufficiency. It is likely that Congress intended for the language "incorrect in fact" to be referencing those findings which are dismissed, set aside, or modified by a CCA and not "affirmed."

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[11] Gov't. Br. 15.

[12] *See Reiter v. Sonotone Corp*., 442 U.S. 330, 339 (1979) (citation omitted) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012). ("If possible, every word and every provision is to be given effect. None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.").

[13] 10 U.S.C. § 867(c)(1)(C) (emphasis added).

The word "affirmed" in Article 67(c)(1)(C) refers to findings which are affirmed by a CCA as "correct in fact." Article 67(c)(1)(A) already covers findings which are affirmed as correct in law. And although the language of section (c)(1)(A) does not explicitly state "affirmed as *correct in law*," this Court has only ever been able to act on findings affirmed (as correct in law) or set aside (as incorrect in law) in the past.[14] Thus, the "affirmed" language in (c)(1)(C) is not referring to findings which are "correct in law" and must be referring to findings which are "correct in fact."

The legislative history for this statute should not be used as authoritative evidence of congressional intent, as the Government attempts,[15] given that it "come[s] from a single report issued by a committee whose members make up a small fraction of . . . the two Houses of Congress."[16] Legislative history may shed light on what was discussed during conference of the NDAA, but it does not change what the law says. What a group of Members of Congress may have intended with a single amendment in the NDAA is not the same as what the entire body of Congress voted on, and passed, as legislation. Congress passed the NDAA that included the word "affirmed" in the "new subparagraph" of Article 67.[17] And the

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[14] *United States v. Harvey*, __ M.J. __, 2024 CAAF LEXIS 502, at *3 (C.A.A.F. Sep. 6, 2024); *United States v. Thompson*, 83 M.J. 1, 4 (C.A.A.F. 2022).
[15] Gov't. Br. 15.
[16] *ABC, Inc. v. Aereo, Inc.*, 573 U.S. 431, 458 (2014) (Scalia, J., dissenting).
[17] Pub. L. 116-283, § 542(c), 134 Stat. 3388, 3612–13 (2021).

word "affirmed" does not mean anything other than *affirmed.*[18] As such, this Court's expanded scope under Article 67(c)(1)(C) includes cases in which a CCA affirms the findings of a case as correct in fact.

B. Article 67(c)(1)(C) is an exception to Article 67(c)(4).

Notwithstanding the new addition of (c)(1)(C) to the statute, Article 67 still maintains section (c)(4), which states that this Court "shall take action only with respect to matters of law." This creates a conflict between the two sections.

A "fundamental canon of statutory construction" is to read the words of a statute "in their context and with a view to their place in the overall statutory scheme."[19] "A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, *if possible*, all parts into [a] harmonious whole."[20]

This is a time where it is not possible to harmonize two independent provisions of a statute. Under the previous Article 67, this Court had the "authority to review factual sufficiency determinations of the CCAs for the application of

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[18] *See* SCALIA & GARNER, *supra* note 12, at 140 ("Words are to be given the meaning that proper grammar and usage would assign them."), 170 ("A word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning.").
[19] *United States v. McPherson*, 73 M.J. 393, 399 (C.A.A.F. 2014) (quoting *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000)).
[20] *Id.* (quotations omitted) (emphasis added).

correct legal principles, but only as to matters of law."[21] Harmonizing (c)(1)(C) and (c)(4) under the new Article 67, as the Government suggests,[22] affects no change in the law and makes section (c)(1)(C) redundant of what this Court already has the authority to do.

This Court "assume[s] that Congress is aware of existing law when it passes legislation."[23] And "when Congress acts to amend a statute, [courts] presume it intends its amendment to have real and substantial effect."[24] 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.

In this case, where two provisions of a statute are in conflict, this Court can use the specific over general canon of statutory construction to resolve the conflict. "Ordinarily, where a specific provision conflicts with a general one, the specific governs."[25] When a "general permission or prohibition is contradicted by a specific prohibition or permission," the contradiction is eliminated when "the specific

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[21] *United States v. Mendoza*, __ M.J. __, 2024 CAAF LEXIS 590, at *21 (C.A.A.F. Oct. 7, 2024) (citation and quotations omitted).
[22] Gov't. Br. 10.
[23] *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 (1990)).
[24] *Stone v. Immigration and Naturalization Serv.*, 514 U.S. 386, 397 (1995).
[25] *Edmond v. United States*, 520 U.S. 651, 657 (1997) (citation omitted); *see* SCALIA & GARNER, *supra* note 12, at 183 ("If there is a conflict between a general provision and a specific provision, the specific provision prevails.").

provision is construed as an exception to the general one."[26]

Section (c)(1)(C) is specific. It explicitly grants this Court the authority to review, and act, in cases where a CCA affirms, dismisses, sets aside, or modifies the findings of a case under Article 66(d)(1)(B) (the specific section that grants a CCA the authority to conduct a factual sufficiency review). It is more specific than (c)(1)(A) and (B) and is also more specific than (c)(4). Section (c)(4) is a general prohibition on this Court acting with respect to matters that are not law.

When instituting new language in statutes, drafters may overlook the need to modify the current statute to align with the new language.[27] That does not invalidate the newly added language or this Court's power to act in the way set out in Article 67(c)(1)(C). This Court should read section (c)(1)(C) as an exception to section (c)(4) to resolve the conflict between the two provisions.

C. This Court may conduct its own factual sufficiency review.

Article 67(c)(1)(C) grants this Court the expanded authority to review, and act on, CCAs' factual sufficiency determinations by conducting its own factual

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[26] *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012).
[27] *See, e.g.*, *United States v. Hirst*, 84 M.J. 615, 617-20 (N-M Ct. Crim. App. 2024) (summarizing how Congress amended Article 69, UCMJ, in the Military Justice Act of 2016, which, when read in tandem with Article 65, UCMJ, "resulted in statutory language that was meaningless nonsense," and concluding the amended Article 69, UCMJ, contained a scrivener's error); *United States v. Parino-Ramcharan*, 84 M.J. 445, 451 (C.A.A.F. 2024) (concluding Article 69(c)(1)(A), UCMJ, 10 U.S.C. § 869(c)(1)(A) (2018) contained a scrivener's error).

sufficiency review.

Congress knew this Court's authority and limitations with respect to reviewing a CCA's factual sufficiency determination, under the previous Article 67. As the Government correctly pointed out, "Congress intended to give this Court some greater power than it did not have before."[28] But keeping this Court's review of a CCA's factual sufficiency determination the same (as the Government declares[29]) would not give this Court any greater power than it previously had.

This Court already has the authority to conduct an abuse of discretion review when a CCA makes a discretionary decision.[30] Reading (c)(1)(C) to only grant the Court the authority to conduct an abuse of discretion review (as the Government submits[31]) does not grant this Court any "greater power than it previously had."

If section (c)(1)(C) is to effect real, substantial change in the law, it makes sense that Congress intended for this Court to conduct its own factual sufficiency review. If it is to correct, or affirm, a lower court's factual sufficiency determination, this Court must 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

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[28] Gov't Br. 17.
[29] Gov't. Br. 10.
[30] *See United States v. Nerad*, 69 M.J. 138, 147 (C.A.A.F. 2010) ("To be clear, when a CCA acts to disapprove findings that are correct in law and fact, we accept the CCA's action unless in disapproving the findings the CCA clearly acted without regard to a legal standard or otherwise abused its discretion.").
[31] Gov't Br. 17.

against the weight of the evidence."[32]

Under Article 67(c)(1)(C), this Court has the expanded 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 review. SSgt Csiti respectfully requests that this Court conduct a factual sufficiency review of his case.

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.

SSgt Csiti's conviction is factually and legally insufficient. AH was capable of consenting, and did consent, to sexual activity with SSgt Csiti. Even if AH could not consent, SSgt Csiti could not reasonably have known AH was incapable of consenting.

Because the Government declined to address—let alone dispute—the factual insufficiency of SSgt Csiti's conviction, the arguments from SSgt Csiti's opening brief are not repeated here. But the Government mischaracterized the evidence and, when viewed properly, no rational trier of fact could find he committed sexual assault beyond a reasonable doubt.

[32] *Harvey*, 2024 CAAF LEXIS 502, at *12.

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

AH was capable of consenting to sexual activity with SSgt Csiti. After AH returned from dinner with her friends, she engaged in conversation with SSgt Csiti in her home and eventually invited him to engage in sexual activity with her.[33] She walked down her stairs, unassisted, and took off her own clothes.[34] She even pushed SSgt Csiti away when she wanted to stop the sexual activity.[35] Any rational trier of fact would have concluded the government had not proven AH was incapable of consent due to alcohol impairment.

The Government overreached in characterizing the evidence as AH "need[ing] assistance to move from place to place in her house,"[36] leaping past the extensive evidence that AH had no such need. AH never testified that she needed help moving around anywhere, let alone her house.[37] That absence of "need[ing] assistance" was reinforced by NA. Rather, in NA's telling, AH was able to walk to his car, and later into AH's own home, and was not stumbling.[38] Later in the night, AH climbed down her stairs, without any assistance from SSgt Csiti.[39] So the

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[33] JA at 104, 178 (Clip 6 at 01:19-03:11), 183 (02:35-5:21).
[34] JA at 178 (Clip 6 at 01:19-03:36), 183 (02:35-05:07).
[35] JA at 178 (Clip 6 at 03:43-03:57), 183 (05:21-05:45).
[36] Gov't Br. 27.
[37] JA at 008-90.
[38] JA at 099, 104.
[39] JA at 178 (Clip 6 at 01:19-01:47); JA at 183 (02:35-03:35).

Government grabs hold of SSgt Csiti's statements that he helped AH a few times throughout the night,[40] without any evidence or testimony that SSgt Csiti's aid was "needed," and employs it as a broad brush that covers over all other facts.

The Government then seeks to bolster its contention about AH's intoxication by injecting a "quick succession" to the timing of AH's three-to-five alcoholic seltzers upon returning home.[41] However, no evidence was presented that AH drank these spiked seltzers (containing about five percent alcohol[42]) "in quick succession." In fact, no evidence was presented as to the timing of any the events on the night in question after AH returned home from dinner.

Despite the Government's efforts to squeeze more drinks into less time, the record is not clear exactly how many drinks AH had on the night in question or across what amount of time AH had the alcoholic drinks. But even if AH had the six-to-nine drinks across the entire night (as the Government contends[43]), AH had a high tolerance for alcohol (as the Government ignores).[44] AH had a history of alcohol abuse and was a habitual heavy drinker.[45] Her body could tolerate multiple alcoholic drinks. The lack of clarity around how much alcohol AH consumed and

[40] JA at 178 (Clip 6 at 01:19-01:47); JA at 183 (02:35-04:17).
[41] Gov't Br. 28.
[42] JA at 061.
[43] Gov't Br. 27.
[44] *Id*.
[45] JA at 044, 074-76.

over what timeline, combined with AH's admitted high tolerance for alcohol, would create reasonable doubt for any rational trier of fact as to AH's inability to consent.

The facts about the night in question after AH returned home come almost exclusively from SSgt Csiti's recorded statements. His statements clearly illustrate AH was physically and mentally capable of appraising the sexual conduct at issue and declining participation, should she have wanted to. Nevertheless, even if the factfinder disregarded these recorded statements, there still was not enough evidence for any rational trier of fact to find AH was incapable of consent beyond a reasonable doubt.

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

SSgt Csiti's conviction is also legally insufficient because there was not evidence from which a rational factfinder could find that SSgt Csiti reasonably should have known of AH's alcohol consumption or any inability to consent.

Faced with a record filled with consistent recitations about how AH was walking on her own, talking on her own, and deciding to engage in sexual activity on her own, the Government narrowly focuses on its own spin of SSgt Csiti's statements. Perhaps these statements would be enough for a rational factfinder to rely, except that the statements claimed by the Government differ from what SSgt Csiti actually said. The Government asserts SSgt Csiti described AH as

"falling over drunk"[46] and that AH "drunkenly tipped over in her dining room chair."[47] But SSgt Csiti never said these words. These were two independent observations by SSgt Csiti—that AH was "drunk"[48] and that she "lean[ed] funny and a stool fell over"[49]—and the Government's characterization merges them together to a causation to which SSgt Csiti never subscribed: drunkenness.

The Government also claims to have found a clear admission by SSgt Csiti as to his understanding of AH's condition, when the record is, in fact, quite opaque. SSgt Csiti never used the words "fucked up" to describe AH's intoxication, as the Government suggests.[50] Rather, while referencing their sexual encounter, AH said to SSgt Csiti, "I don't even remember any of this. I must have been fucked up."[51] SSgt Csiti replied, "Yeah."[52] Illustrating the "reason why courts disfavor compound questions posed to witnesses during trial,"[53] it is not clear from AH's two-part statement and SSgt Csiti's one-word response whether SSgt Csiti was merely acknowledging AH's statement, agreeing with AH that she did not remember the night in question, agreeing that she was "fucked up" that night, or agreeing to both.

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[46] *See* Gov't Br. 27 (claiming "Appellant described [AH] as falling over drunk").
[47] *See* Gov't Br. 29 (claiming SSgt Csiti "said . . . [AH] drunkenly tipped over in her dining room chair denting the wall").
[48] JA at 183 (04:20-04:22).
[49] JA at 178 (Clip 6 at 01:59-02:15), 183 (04:00-04:13).
[50] Gov't. Br. 31.
[51] JA at 183 (04:21-04:29).
[52] JA at 183 (04:29-04:34).
[53] *Atunnise v. Mukasey*, 523 F.3d 830, 835 (7th Cir. 2008) (citation omitted).

SSgt Csiti clearly believed AH was capable of consenting when she took off her own clothes and invited him to engage in sexual activity with her by saying "Show me."[54] Viewing all the evidence in the light most favorable to the government, a rational factfinder could not have found AH was incapable of consenting to sexual activity with SSgt Csiti or that SSgt Csiti reasonably should have known that AH was incapable of consenting due to alcohol impairment. 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.

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

The Air Force Court of Criminal Appeals (AFCCA) erroneously interpreted the factual sufficiency standard in Article 66(d)(1)(B). The AFCCA expressly agreed with the Navy-Marine Corps Court of Criminal Appeals' (NMCCA) assertion in *United States v. Harvey*[55] that "appropriate deference," as used in Article 66(d)(1)(B)(ii), is "a more deferential standard" than the old factual sufficiency standard.[56] While the AFCCA stated that "the significance of the

[54] JA at 178 (Clip 6 03:24-03:36), 183 (04:58-05:07).
[55] *United States v. Harvey*, 83 M.J. 685, 692 (N-M Ct. Crim. App. 2023).
[56] JA at 193.

credibility of particular witnesses or testimony will vary depending on the circumstances of the case,"[57] this was still under the umbrella of a "more deferential standard." This indicates that the AFCCA believed it had to give more deference to the factfinder than it would have had to do under the old factual sufficiency standard.

This Court addressed the NMCCA's conclusion that the changes to Article 66(d)(1) "impose a 'higher standard' than the former version's de novo requirement."[58] This Court explained that "appropriate deference" implies "that the degree of deference will depend on the nature of the evidence at issue," and that Article 66(d)(1) "affords the CCA discretion to determine what level of deference is appropriate."[59] Thus, it is not, outright, a "higher standard." Yet, the AFCCA took a flexible standard about deference and made it a per se heightened deference.

The Government endeavors to safeguard the lower court's decision by narrowing the AFCCA's concurrence with the NMCCA's "more deferential" approach to being only in part.[60] But the AFCCA did not say "we partially agree" with the NMCCA, or words to that effect. Instead, both "point unmistakably in the same direction,"[61] and it is only the Government that finds the uniformity in the two opinions indicative that the AFCCA actually meant to "march[] resolutely the

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[57] JA at 194.
[58] *Harvey*, 2024 CAAF LEXIS 502, at *6.
[59] *Id.* at *6-7.
[60] Gov't Br. 42.
[61] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 596 (2007) (Stevens, J., dissenting).

other way" towards propriety.[62]

Article 66(d)(1) does not require a "more deferential standard." Rather, the statute allows a CCA to determine, on a case-by-case basis, what it believes is the appropriate amount of deference to give to a factfinder when weighing the evidence.[63] This is not how the AFCCA interpreted the statute, and as such, the lower court's interpretation was incorrect.

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

The AFCCA's erroneous interpretation of Article 66(d)(1)(B) led to an erroneous application in its factual sufficiency review. Operating under the umbrella of "a more deferential standard," the lower court deferred significantly to the military judge when weighing the evidence.[64] At a minimum, it is unclear if the AFCCA would have given the military judge in SSgt Csiti's case less deference, if it believed it could.

The Government asserts that this is not the case, claiming that the AFCCA demonstrated it need not defer to the military judge when evaluating certain evidence by labeling SSgt Csiti's recorded statements "vital."[65] But the only time the AFCCA used the word "vital" in its opinion was when it referenced the complainant's

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[62] *Id.*
[63] *Harvey*, 2024 CAAF LEXIS 502, at *6-7.
[64] JA at 194.
[65] Gov't Br. 44. The Government did not provide a pin cite for the AFCCA's labeling of SSgt Csiti's recorded statements "vital."

credibility, and explained that in a case like SSgt Csiti's, the complainant's "credibility is arguably less vital" than in a case where a complainant could testify about witnessing the offense. Despite the lower court's brief acknowledgment that AH falsely testified on the stand, and that SSgt Csiti's audio recordings were available to them "in the same form in which they were provided to the military judge," the AFCCA still felt compelled to give significant deference to the military judge "in light of the findings."[66]

Even if this Court concludes the AFCCA was not operating under the assumption that it must give the military judge more deference than it felt was appropriate, this Court cannot know if the AFCCA conducted "a new weighing of the evidence," as was directed in *Harvey*.[67] The AFCCA failed to provide any analysis explaining whether it conducted a new, independent weighing of the evidence, how it did that, and 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."[68]

This is concerning, given that the lower court called this case's factual

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[66] *See* JA at 194 ("Nevertheless, affording appropriate deference to the military judge, in light of the findings, we presume AH generally . . . testified credibly with respect to . . . 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.").
[67] *Harvey*, 2024 CAAF LEXIS 502, at *8.
[68] JA at 195.

sufficiency question a "close one."[69] The lower court indicated that it was only because of the "new statutory standard" that it found SSgt Csiti's conviction factually sufficient. But the key question is not new. It is the same as it ever was: whether the evidence evinced guilt beyond a reasonable doubt.[70]

Despite this facial appearance of error, the Government asserts that the AFCCA did not abuse its discretion (as the Government claims the standard should be) because of the limited factual sufficiency analysis in the lower court's opinion.[71] But at a minimum, this Court still maintains the authority to review factual sufficiency determinations for the application of correct legal principles.[72] When a CCA does not "identify the basis for its action" with regards to its factual sufficiency determination, "failure to do so makes it difficult to determine whether a CCA's exercise of its [Article 66(d)] power was made based on a correct view of the law."[73] In the past, this Court has "remanded cases when there is an 'open question' whether the CCA's factual sufficiency analysis applied correct legal principles"[74] and did so as recently as October 2024.[75] In this case, if the AFCCA's analysis left such an

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[69] JA at 192.
[70] *Harvey*, 2024 CAAF LEXIS 502, at *11.
[71] Gov't Br. 50.
[72] *Harvey*, 2024 CAAF LEXIS 502, at *3.
[73] *Nerad*, 69 M.J. at 147 (C.A.A.F. 2010).
[74] *Mendoza*, 2024 CAAF LEXIS 590, at *21-22 (citing *Thompson*, 83 M.J. at 5; *Nerad*, 69 M.J. at 147).
[75] *Mendoza*, 2024 CAAF LEXIS 590, at *22-23.

open question, the result should be the same.

The AFCCA's erroneous interpretation of Article 66(d)(1)(B) led to an erroneous application in its factual sufficiency review. Should this Court decide not to conduct its own factual sufficiency review, and determines that SSgt Csiti's conviction is legally sufficient, SSgt Csiti requests this Court remand his case to the AFCCA for a new factual sufficiency review.

Conclusion

This Court has the authority to review and act on a lower court's factual sufficiency rulings.[76] 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. SSgt Csiti respectfully requests that this Court set aside the findings and sentence and dismiss the Charge and Specification 1.

[76] 10 U.S.C. § 867(c)(1)(C).

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.

Respectfully submitted,

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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 January 23, 2025.

CERTIFICATE OF COMPLIANCE WITH RULES 24(b) AND 37

This brief complies with the type-volume limitation of Rule 24(b) because it contains 5,891 words.

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

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