IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellant*, v. Airman (E-2) **ZACHARY C. ROCHA** United States Air Force *Appellee*.	)))))))))	UNITED STATES' REPLY BRIEF Crim. App. Dkt. No. 40134 USCA Dkt. No. 25-0157/AF 6 August 2025

UNITED STATES' REPLY BRIEF

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UNITED STATES, *Appellant*	)	UNITED STATES' REPLY BRIEF
v.	)	
	)	Crim. App. No. 40134
Airman (E-2) **ZACHARY C. ROCHA** United States Air Force *Appellee.*	)	USCA Dkt. No. 25-0157/AF
	)	6 August 2025

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

Pursuant to Rule 22(b)(3) of this Court's Rules of Practice and Procedure, the United States hereby replies to Appellee's Answer (Ans. Br.) to the United States' brief in support of the certified issue (Gov. Br.), filed on 23 July 2025.[1]

ARGUMENT

"The doctrine of judicial self-restraint requires [courts] to exercise the utmost care whenever [they] are asked to break new ground" in the field of substantive due process rights. Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992). In keeping with this principle, this Court provided the Air Force Court of Criminal Appeals (AFCCA) with a "careful description" of the purported liberty

[1] Unless otherwise noted, all references to the UCMJ, punitive articles, Military Rules of Evidence, and the Manual, are to the Manual for Courts-Martial, United States (2019 ed.).

interest at issue in this case, Washington v. Glucksberg, 521 U.S. 702, 721 (1997), by instructing it to determine "whether Appellee had a constitutionally protected liberty interest under Lawrence v. Texas, 539 U.S. 558 (2003), to privately engage in sexual activity with a *childlike* sex doll." (JA 018) (emphasis added).

By broadly concluding that Appellee had a liberty interest in "masturbation in private and in solitude," AFCCA failed to adhere to this Court's specific mandate. The inevitable byproduct of the lower court's mischaracterization of Appellee's conduct as "masturbation" was the subsequent determination that private "masturbation" deserves constitutional protection under Lawrence. AFCCA's decision is premised on an erroneous view of the law, and Appellee's defense of the lower court is no different. As set forth below, Appellee misunderstands judicial hierarchy and the inapplicability of Lawrence's protections to "sexual acts with a sex doll with the physical characteristics of a female child." (JA 086.) Accordingly, this Court should reject his arguments and conclude that AFCCA erred.

I.

BY ANALYZING APPELLEE'S CONDUCT AS "MASTURBATION" INSTEAD OF "SEXUAL ACTIVITY WITH A CHILDLIKE SEX DOLL," AFCCA FAILED TO FOLLOW THIS COURT'S SPECIFIC REMAND MANDATE.

A. This Court's authority to review matters of law authorized it to "carefully" describe the purported liberty interest in its remand order.

In defending AFCCA's failure to analyze the Lawrence interest as specified by this Court, Appellee cites this Court's lack of factfinding authority and the absence of a factual finding by AFCCA as support for the proposition that the lower court "could not be bound by this Court's use of the word 'childlike' in its remand order." (Ans. Br. at 18-20.) This argument fails because it is incompatible with the concept of judicial hierarchy. *See* United States v. Montesinos, 28 M.J. 38, 44 (C.M.A. 1989) ("A court that had no control over inferior tribunals or authorities would really not be a court.").

Nothing in the Code or our nation's jurisprudence supports the idea that a lower court cannot be bound by a superior court's mandate. In fact, the law unequivocally states the opposite: "[A]n inferior court has no power or authority to deviate from the mandate issued by an appellate court," Briggs v. Pa. R. Co., 334 U.S. 304, 306 (1948), which is "controlling as to matters within its compass." Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 168 (1939). Thus, where a superior court's mandate contains explicit instructions, the lower court cannot act on

matters that are "not encompass[ed]" therein—it "can only take action that conforms to the limitations and conditions prescribed by the remand." United States v. Riley, 55 M.J. 185, 188 (C.A.A.F. 2001) (quoting United States v. Montesinos, 28 M.J. 38, 44 (C.M.A. 1989)); *see also* United States v. Loredo-Torres, 164 F. App'x 523, 524 (5th Cir. 2006) (specific mandate requires lower court to "confine its review to the limitations established by the…remand order").

This case is no exception. Here, this Court mandated that AFCCA determine whether Appellee had a protected Lawrence liberty interest in "sexual activity with a *childlike* sex doll." (JA 018.) This narrow directive "does not encompass" a finding by the lower court that masturbation—a broader and more generic category of behavior—is constitutionally protected. *See* Riley, 55 M.J. at 189 (mandate with specific instructions to clarify a previous finding "does not encompass" overturning that finding and substituting a new one). That this Court chose to specify the purported Lawrence liberty interest instead of remanding with general directions to resolve all outstanding assignments of error (which included the Lawrence issue) should have indicated to the lower court that its review was being cabined.

Appellee, for his part, contends that this Court's lack of factfinding authority precluded it from cabining AFCCA's review in this manner, and suggests that "the rest" of this Court's opinion gave AFCCA license to ignore the specific language.

(Ans. Br. at 17-21.) This Court should be unpersuaded. Just as a specific mandate cannot be inferred from a general one, United States v. McMurrin, 72 M.J. 697, 703 (N-M. Ct. Crim. App. 2013)[2], neither can a general mandate be inferred from a specific one—especially where the mandate relates to an issue squarely within the superior court's jurisdiction. The applicability of Lawrence is a question of law that was raised to this Court during its first review under Article 67(a)(2).[3] Thus, the responsibility to articulate a "careful description of the asserted fundamental liberty interest," Glucksberg, 521 U.S. at 721, fell "within [this Court's] compass." Sprague, 307 U.S. at 168. In other words, this Court's lack of factfinding authority neither rendered it powerless to describe the asserted liberty interest as "sexual activity with a *childlike* sex doll," nor relieved AFCCA of its responsibility to analyze the issue on those terms. By nevertheless analyzing Appellee's conduct as "masturbation," AFCCA failed to appropriately "confine its review," and erred as a result. Loredo-Torres, 164 F. App'x at 524.

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[2] At issue in McMurrin was an appellant's claim that the CCA's mandate setting aside a guilty finding and dismissing the underlying charge "implied [dismissal with] prejudice." 72 M.J. at 703. In rejecting this argument, the CCA noted that its mandate was general in nature, and that the rest of its opinion "made no limitation, express or otherwise, on the subject of reprosecution." Id.

[3] *See* United States v. Rocha, 84 M.J. 346, 352 n.4 (C.A.A.F. 2024) ("Appellee devotes a substantial portion of his brief to asserting that his behavior is constitutionally protected under Lawrence.").

B. This Court was entitled to embrace the military judge's findings of fact to describe the doll as "childlike."

In answering constitutional questions, appellate courts adopt a military judge's findings of fact unless they are clearly erroneous. United States v. Easton, 71 M.J. 168, 171 (C.A.A.F. 2012). Here, in his ruling on the constitutional issue encompassed by Appellee's motion to dismiss,[4] the military judge found as fact that the doll was "approximately 35 inches in length, *had the appearance of a child*, was an anatomically correct female doll, and had openings in the mouth, vagina, and anus." (JA 279) (emphasis added). These findings were never deemed clearly erroneous by AFCCA. (*See generally* JA 025-042.) Indeed, how could they be? The record contains *no* suggestions that the doll was adult-sized, that it had the characteristics of an adult (such as fully-developed breasts), or that anyone mistook it for an adult. On the contrary, the record contains multiple instances of testimony and evidence—including Appellee's own recorded admissions—describing the doll in comparative terms using words like "looked like a child," "the size of a toddler," and "child sex doll." (JA 128, 131, 141 203.) Under these circumstances, it would be unreasonable to deem the military judge's description of the doll's observable, physical characteristics "clearly erroneous," for the CCA

[4] At trial, Appellee filed a motion to dismiss the charge involving the doll on the grounds that it failed to state an offense and "the alleged conduct is constitutionally protected by the liberty interest created…in Lawrence v. Texas." (JA 263.)

"may not exercise its factfinding power in a manner contrary to what 'all reasonable men' would conclude." United States v. Townsend, 49 M.J. 175, 180 n.11 (C.A.A.F. 1998) (citing United States v. Bunting, 6 C.M.A. 170, 175 (1955)).

Though Appellee suggests that the doll's appearance was disputed since the lower court "had not yet made a finding concerning whether the doll was a *representation* of a child," this proves unpersuasive, because it conflates the objective physical appearance of an item with what it may be subjectively intended to represent. (Ans. Br. at 20) (emphasis added). Whether the doll has the *physical appearance* of a child is distinct from whether it was intended to be a *representation* of one. Regardless of whether the doll was subjectively intended to be a representation of a "child," it could objectively be described as having the physical appearance of one based on its size and anatomical characteristics, as set forth by the military judge.

Considering the above, in ordering AFCCA to consider the constitutional issue initially ruled upon by the military judge, this Court was entitled to embrace the military judge's findings of fact regarding the doll in describing it as "childlike." (JA 279; *cf.* JA 018) (emphasis added). In fact, the lower court should have done the same. Its failure to do so led to AFCCA erroneously failing to follow this Court's remand order.

C. This Court's description of the doll as "childlike" reflects that the existence of a liberty interest must be evaluated in light of the conduct charged.

Constitutional challenges to convictions are evaluated in light of the conduct alleged on the charge sheet. *See* United States v. Smith, 85 M.J. 283, 287-88 (C.A.A.F. 2024) (declining to consider appellant's unruly conduct in determining whether conviction for breach of the peace was unconstitutional because the Government "chose to charge Appellant…based solely on his speech"). And because the Government "controls the charge sheet," id.,[5] the language it uses does, in fact, "circumscribe the powers of the AFCCA" to some degree. (Ans. Br. at 20.) Just as the CCA cannot revise the charge to find an accused guilty, United States v. English, 79 M.J. 116, 122 (C.A.A.F. 2019) (CCA cannot affirm guilty findings on more expansive set of facts than those charged and litigated at trial), neither can the CCA revise the charge to set him free.

Here, because Appellee was charged with "engaging in sexual acts with a sex doll with the physical characteristics of a female child," the lower court had an obligation to analyze the Lawrence liberty interest on these terms. (JA 086.) By broadly describing Appellee's conduct as "masturbation" instead—and then concluding that it was constitutionally protected, such that it could not be subject

[5] *See also* United States v. Reese, 76 M.J. 297, 301 (C.A.A.F. 2017); United States v. Simmons, 82 M.J. 134, 141 (C.A.A.F. 2022); United States v. Leese, No. 25-0024, 2025 CAAF LEXIS 440, at *8 (C.A.A.F. June 4, 2025).

to criminal sanction—AFCCA effectively amended the charge mid-appeal. Like a prosecutorial attempt to amend the charge sheet mid-trial, this is "inconsistent with the…tenets of fair play inherent in the military justice system." United States v. Simmons, 82 M.J. 134, 140 (C.A.A.F. 2022).

If an appellant or CCA could re-brand convicted conduct however they pleased—i.e., in general terms likely to implicate constitutional liberty interests, as is the case here—behavior that was properly prosecuted as criminal at trial could end up being "constitutionally protected" on appeal. For example, a servicemember convicted of communicating a threat night have his conviction reversed on First Amendment grounds if he asked the court to focus solely on the excited nature of his speech while ignoring the fact that it would objectively make someone feel threatened. U.S. CONST. amend. I. A parent's conviction for child abuse might be reversed if he asked the court to focus only on his parental right to "make decisions concerning the care, custody, and control of their children," while ignoring his child's broken arm. *See* Troxel v. Granville, 530 U.S. 57, 66 (2000). These examples illustrate the dangers of allowing AFCCA and Appellee to dictate how conduct should be classified for purposes of determining whether it is constitutionally protected.

The government controls the charge sheet and here chose to charge Appellee with committing sexual acts with a sex doll "with the physical characteristics of a

female child," not with mere "masturbation." AFCCA never made a specific finding that the doll did not have "the physical characteristics of a female child." Although AFCCA referred to "[t]he ostensibly childlike appearance of the doll" and said "[w]e are not convinced the only rational interpretation of the evidence . . .is that the doll resembled a child and not a young-looking adult," those statements fall short of finding that the doll did not objectively possess the physical characteristics of a child. (JA 034, 039.) The doll at issue was about 35 inches tall (just around three feet), had undeveloped breasts, had no pubic hair, and had a vaginal opening. These are "the physical characteristics of a female child." Multiple witnesses described the doll as resembling a child. Appellee himself described the doll as "a doll of a child" and "basically . . . a child sex doll." (JA 159, 203.) Given the facts in the record, to find that the three-foot tall, undeveloped doll did not have the physical characteristics of a female child would have been contrary to what all reasonable men and women would conclude. Bunting, 6 C.M.A. at 175. Indeed, AFCCA never made such a finding. As a result, the court had no reason to deviate from the language of the Court's remand order and should have evaluated the purported liberty interest in terms of the conduct charged, rather than something else. Failure to do so was error in light of this Court's remand. Although this Court could remand to AFCCA for a proper

review of the constitutional question, this Court should decide this important constitutional question on its own.

II.

AFCCA ERRONEOUSLY APPLIED LAWRENCE AND MARCUM IN FINDING APPELLEE'S CONVICTION FACTUALLY INSUFFICIENT.

A. AFCCA erred by concluding that Lawrence protects sexual acts with a childlike sex doll.

In defending AFCCA's determination that his conduct was constitutionally protected under Lawrence, Appellee mischaracterizes the conduct at issue as "sexual activity with an inanimate object, in solitude, in secret, and in a private living place." (Ans. Br. at 27.) Echoing AFCCA, Appellee goes on to assert that "it does not make sense to 'construe Lawrence to protect sexual activity done consensually with another but not protect comparable conduct done alone.'" (Ans. Br. at 28; JA 035.)

But this argument fails first and foremost because it has no basis in law. Neither AFCCA nor Appellee can direct this Court to *any* legal authority that would support the extension of Lawrence's protections to sexual activity with a childlike sex doll. (*See* JA 025-042; Ans. Br.) The absence of such authority is due, no doubt, to the fact that "sexual acts with a sex doll with the physical characteristics of a female child" is *not* comparable to the private consensual acts that are "instrumental" to the "meaningful, personal bonds" with which Lawrence

is concerned. United States v. Meakin, 78 M.J. 396, 403 (C.A.A.F. 2019). Lawrence does not include "any and all behavior touching on sex within its purview," nor does it create a fundamental right to engage in private sexual conduct. Meakin, 78 M.J. at 403; *see also* United States v. Goings, 72 M.J. 202, 206 (C.A.A.F. 2013) (noting that Lawrence "did not establish a presumptive constitutional protection for all offenses arising in the context of sexual activity"). Thus, the mere fact that Appellee's conduct involved some sort of private sexual act does not mean it falls within the Lawrence zone of liberty.

Yet that is effectively what AFCCA and Appellee suggest. By invoking the right to "engage in private conduct" and "make certain decisions regarding sexual conduct" to justify Appellee's conduct—without actually explaining *why* the conduct "warrant[s] the Lawrence liberty protection," (JA 034)—AFCCA and Appellee diminish the liberty interest by treating it as a right to sexual privacy, "when it is really about the right to form meaningful, personal bonds that find expression in sexual intimacy." Meakin, 78 M.J. at 403 (quoting United States v. Stagliano, 693 F. Supp. 2d 25, 38 (D.D.C. 2010)). This unsupported extension of Lawrence's protections is error, especially considering the government's legitimate interest in prohibiting conduct like Appellee's, which "desensitize[s] the user" to pedophilic behavior. Congressional Record Vol. 164, No. 98, June 13, 2018, pgs H5119-H51; (*see* Gov. Br. at 34-39.)

While this sort of concern was deemed insufficient to justify a perceived infringement on the *constitutional right* to free speech, Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002),[6] it is enough to take Appellee's conduct outside the bounds of the Lawrence liberty interest, because there is neither an enumerated constitutional right nor a judicially recognized fundamental right to engage in "sexual acts with a childlike sex doll." Appellee, for his part, suggests that his behavior might be protected by the First Amendment right to free speech. (*See* Ans. Br. at 40, n. 237.) This argument is unavailing, as it stretches the meaning of "speech" too far. "'Speech' requires the purposeful communication of the speaker's own message." Shurtleff v. City of Bos., 596 U.S. 243, 268 (2022). Private sexual activity with a "childlike sex doll" does not constitute a "purposeful communication" such that it could be protected as speech. Id. It is a narrow category of sexual behavior that falls outside Lawrence's protections.

B. Because Lawrence does not apply, AFCCA erred by applying Marcum.

As a preliminary matter, because there is no Lawrence liberty interest in "sexual acts with a childlike sex doll," AFCCA erred by reaching United States v.

[6] "The Government submits further that virtual child pornography whets the appetites of pedophiles and encourages them to engage in illegal conduct. This rationale cannot sustain the provision in question. The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." Ashcroft, 535 U.S.at 253.

Marcum, 60 M.J. 198 (C.A.A.F. 2004), at all.[7] The lower court further compounded that error by concluding that none of the Marcum factors warranted taking Appellee's conduct outside the Lawrence zone of liberty. In defending this determination, Appellee avers that the court reached its conclusions after "weigh[ing] the evidence in the record," and that it therefore did not abuse its discretion. But this fails to account for the fact that AFCCA either disregarded or did not consider certain evidence.

In averring that it was (a) "not convinced [Appellee] was pretending he was having sexual intercourse with a child,"[8] and (b) "not convinced the only rational interpretation of the evidence in this case is that the doll resembled a child and not a young-looking adult," AFCCA cited the fact that Appellee claimed not to be sexually interested in children; that he "stopped his sexual conduct when the thought of it being a real person, child or not, came to his mind"; and his professed desire for a smaller doll because "a larger doll would be bulky." (Id.) But this reasoning (and Appellee's defense of the same) is flawed because it disregards all the evidence that supports the opposite conclusion.

[7] The Government agrees with the amicus' contention that the first two prongs of Marcum are repetitive and unnecessary. (See Ami. Br. at XX.)
[8] The military judge identified this as an aggravating circumstance under Marcum.

To start, the lower court's opinion does not account for the fact that no one who actually saw the doll—the First Sergeant, the Office of Special Investigations (OSI) agent, and Appellee himself—ever described it as being adult-like or believed it was an adult sex doll.[9] The First Sergeant and OSI agent both testified that it looked like a child, and Appellee asserted that it was "*obvious*" that it was a "child sex doll." (JA 127-130, 141, 144, 159, 203) (emphasis added). The opinion is similarly silent on the fact that Appellee named the doll "Adele" after childhood friend (as opposed to an adult one) and bathed and dressed it the way one might care for a child. (JA 154.) Last, but not least, AFCCA's opinion omits any mention of "Lollies"—that is, the "characters depicting underage girls" that Appellee admitted to thinking about when he had sex with the doll, which was itself meant to be a "Lolli." (JA 182-84; 196-97; 252 at 2:03:16.)

This is problematic given that the appearance of the doll, Appellee's actions with the doll, and Appellee's self-professed interest in "Lollies" were facts upon which the trial judge relied in (a) denying a defense motion under R.C.M. 917, and (b) instructing the members on the aggravating circumstance that needed to be

[9] The members also had access to the physical doll to evaluate whether it had the physical characteristics of a female child. In fact, during closing argument, trial counsel asked the member to lift up the doll to see how it felt "like the weight of a child that size." (JA 226.) The Government moved AFCCA to examine the doll for itself, which AFCCA declined to do. (JA 077-078, 084.)

proved under Marcum. (JA 217, 220.) Considering this, AFCCA abused its discretion by neglecting to discuss this evidence when evaluating the Marcum factors.

Similarly problematic is the lower court's determination that the service-discrediting nature of Appellee's conduct did not warrant applying Marcum to find that his conduct was unprotected by Lawrence. (JA 040.) Appellee defends this determination by citing the fact that "[t]he doll was found only as a result of the health and welfare inspection, and his conduct with the doll was uncovered only as a result of his statements to investigators after they discovered the doll." (Ans. Br. at 32-33.) This argument is unpersuasive, as it ignores the "totality of the circumstances," a common-sense approach to evaluating service-discrediting conduct and the new test proposed by the amicus. (*See* Ami. Br. at 14-17.)

Here, the totality of the circumstances demonstrates that: Appellee sought out what was "obvious[ly]" a "child sex doll" for the purpose of engaging in sex with it; ordered one from China and had it shipped to an off-base residence because he believed it was "not good to have something like that on a military base"; named it "Adele" after a friend from middle school; had vaginal and anal sex with the doll on multiple occasions; thought about cartoon depictions of underage girls ("Lollies") while having sex with the doll; and went as far as thinking about "Adele" being a real child. The circumstances also demonstrate

that those who discovered the doll during a readiness inspection were shocked by its childlike appearance. And if the mere presence of the doll was "shock[ing]," (JA 130), it is likely that most reasonable members of the public would be aghast if they witnessed or heard about Appellee committing sexual acts on the doll.

This would inevitably damage the military's "reputation with the civilian community," United States v. Padgett, 48 M.J. 273, 278 (C.A.A.F. 1998), and by extension, the public's "support for the institution," as well as its inclination for "voluntary participation" in the armed forces. United States ex rel. Okerlund v. Laird, 473 F.2d 1286, 1290 (7th Cir. 1973). This, in turn, could negatively impact "the substantial Government interest in raising and supporting the Armed Forces," and national security as a whole. Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 67 (2006). Considering the above, the military's compelling interest in "maintaining the good name of the military establishment," United States v. Lockwood, 15 M.J. 1, 9 (C.M.A. 1983), warrants prohibiting such conduct. (*See* Gov. Br. at 46-57.)

C. Appellee's conduct is not constitutionally protected whatsoever.

In asserting that his conduct is constitutionally protected even if Lawrence does not apply, Appellee relies on First Amendment jurisprudence regarding obscene materials to argue that his "falls within the constitutional protections afforded within the home," on the basis that "this Court views indecency as

synonymous with obscenity." (Ans. Br. at 40-41.) But this premise suffers from a fundamental flaw—it fails to recognize the difference in the type of acts that are at issue. Appellee was not charged with simply possessing or viewing a "childlike sex doll," the way one might possess or view obscene materials. He was charged with engaging in sexual activity with the doll—an entirely different category of behavior that takes his conduct outside the protections afforded by First Amendment jurisprudence, to the extent they apply at all. (*See* Gov. Br. at 49-50.)

Relatedly, Appellee suggests that this Court should apply its framework from United States v. Wilcox, 66 M.J. 442, 448 (C.A.A.F. 2008)—which requires a "direct and palpable connection to the military environment" when prosecuting speech under Article 134, UCMJ—to the prosecution of "private consensual sexual conduct" as an indecent act. (Ans. Br. at 37-38.) This Court should decline to do so. Speech, unlike sexual activity (especially with a child sex doll), is a fundamental right enshrined in our Constitution. U.S. CONST. amend. I; *cf.* Meakin, 78 M.J. at 403 (noting that Lawrence did not conclude that general right to engage in private sexual conduct would be fundamental). And when the law infringes on such fundamental rights, courts apply stricter tests. *See, e.g.,* Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 499 (1982) ("If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply."). That is why the Wilcox requirement exists: "[O]ur

national reluctance to inhibit free expression dictates that the connection between the statements or publications involved and their effect on military discipline be closely examined." Wilcox, 66 M.J. at 448 (citation omitted).

Private sexual activity with a child sex doll, on the other hand, is not a comparable fundamental right. Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 815-16 (11th Cir. 2004) ("[I]t is a strained and ultimately incorrect reading of Lawrence to interpret it to announce a new fundamental right"). Though Lawrence protects some private sexual conduct, it "did not announce a fundamental right of adults to engage in all forms of private consensual sexual conduct." Muth v. Frank, 412 F.3d 808, 818 (7th Cir. 2005). Thus, Appellee's assertion that "[his] conduct did not lose constitutional protections merely because he engaged in private sexual activity with a doll that may resemble a child," has the law backwards. (Ans. Br. at 42.) The reality is that Appellee's conduct was not protected to begin with, hence his burden to "develop facts at trial that show why his interest should overcome the determination of Congress and the President that the conduct be proscribed." Goings, 72 M.J. at 207. Since Appellee has not demonstrated why any court should recognize his interest in engaging in sexual acts with a childlike sex doll, he has failed to meet that burden. Thus, his conduct is rightfully proscribed as indecent and service-discrediting.

D. AFCCA's factual sufficiency review was based on an incorrect view of the law.

In concluding that Appellee's conduct was not service discrediting, the lower court cursorily dismissed the Government's arguments regarding the nature of Appellee's conduct. (JA 040.) Appellee points to this as evidence that "[t]he AFCCA considered the Government's arguments that [his] conduct was service discrediting and rejected them separate from the Lawrence analysis." (Ans. Br. at 42.) This is an overstatement, because the lower court's analysis in this regard was inextricably interwoven with its belief that Lawrence should apply: "Even considering potential discredit to the service, we have found that [Appellee]'s conduct—masturbation, in solitude, in secret, and in private—should warrant the Lawrence liberty protection." (JA 040.) As a result, AFCCA's overall conclusion that the evidence "does not support all the elements, including that [Appellee's] conduct was both indecent, and under the circumstances, of a nature to bring discredit upon the armed forces," was tainted by its Lawrence analysis. (JA 042.) Indeed, it seems probable that AFCCA found Appellee's conduct not to be indecent or service discrediting *because* AFCCA (incorrectly) believed the conduct was constitutionally protected.

AFCCA did not explain specifically why it found that Appellee's behavior was not indecent or service discrediting, as those terms are defined in Article 134, UCMJ. The "failure to do so makes it difficult to determine whether [AFCCA's]

exercise of its Article 66[d], UCMJ, power was made based on a correct view of the law." United States v. Nerad, 69 M.J. 138, 147 (C.A.A.F. 2010).

Since AFCCA's conclusion about the sufficiency of the elements followed its lengthy discussion of its incorrect belief that Appellee's conduct was constitutionally protected, this Court cannot be sure that AFCCA evaluated those elements based on a correct view of the law. AFCCA's determination to review the constitutional issue in the context of private masturbation rather than the charged conduct with a sex doll with the physical characteristics of a female child, also raises the question of whether the court "simply disagree[d] that certain conduct . . . should be criminal." Id. As this Court recognized in Nerad, remand to the CCA for a new factually sufficiency review is appropriate when it is "an open question" whether the CCA's Article 66 review "was consistent with a 'correct view of the law.'" Id. After all, a CCA should not be able to insulate its factual sufficiency review from review by this Court by portraying an issue as one of fact, rather than one of law. United States v. Leak, 61 M.J. 234, 242 (C.A.A.F. 2005) (CCA may not "defeat review by labeling a matter of law, or a mixed holding of law and fact, as a question of fact").

Because AFCCA's conclusions related to factual sufficiency here appear to be premised on the erroneous application of legal principles—as opposed to determinations of "pure fact"—this Court has the "power and authority and…duty"

to review them. United States v. Sell, 11 C.M.R. 202, 209 (C.M.A. 1953); United States v. Beatty, 64 M.J. 456, 459 (C.A.A.F. 2007) (when the Court has questioned whether the factual sufficiency review involved consideration of something improper, this Court has remanded.). And when it does, it should conclude that AFCCA erred.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court find that AFCCA erred in its application of Lawrence and Marcum, and remand the case for a new factual sufficiency review using correct legal principles.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means to the Court and the Air Force Appellate Defense Division on 6 August 2025.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(b)

This brief complies with the type-volume limitation of Rule 24(b) because:

This brief contains 5250 words.

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

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Dated: 6 August 2025