4 June 2025

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellant*	)	UNITED STATES' REPLY BRIEF
v.	)	
	)	Crim. App. No. 40392
Airman First Class (E-3) **ISAAC J. SERJAK** United States Air Force *Appellee.*	)	USCA Dkt. No. 25-0120/AF
	)	4 June 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 Honorable Court's Rules of Practice and Procedure, the United States replies to Appellee's Answer (Ans. Br.) to the United States' brief in support of the certified issue (Gov. Br.).

ARGUMENT

THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED IN APPLYING UNITED STATES V. MENDOZA, 85 M.J. __, 2024 CAAF LEXIS 590 (C.A.A.F. 7 OCTOBER 2024) TO FIND APPELLEE'S SEXUAL ASSAULT CONVICTION FACTUALLY INSUFFICIENT.

Appellee contends that the Air Force Court of Criminal Appeals (AFCCA) did not use Mendoza in conducting its factual sufficiency review of Appellee's conviction for sexually assaulting JM without her consent, in violation of Article 120(b)(2)(A), UCMJ; 10 U.S.C. §920(b)(2)(A) (2018). He claims that AFCCA

"simply referenced Mendoza regarding the issue of legal sufficiency of the evidence" but "made no mention of Mendoza when deciding factual insufficiency." (Ans. Br. at 3.) Since, according to Appellee, AFCCA did not apply Mendoza, Appellee argues that "the lower court's factual sufficiency review did not constitute an abuse of discretion or violate correct legal principles." (Ans. Br. at 5-6.) Appellee's argument proves unpersuasive.

a. If a Court of Criminal Appeals used incorrect legal principles in conducting its factual sufficiency review, this Court may reverse and remand for a new factual sufficiency review.

This Court has a limited ability to review a Court of Criminal Appeals' (CCA's) factual sufficiency determination under Article 66(d)(1)(B); UCMJ; 10 U.S.C. §866(d)(1)(B) (Supp. II 2022). "[I]t is within this Court's authority to review a lower court's determination of factual insufficiency for application of correct legal principles." United States v. Leak, 61 M.J. 234, 241 (C.A.A.F. 2005). But this Court's "authority is limited to matters of law," and it "may not reassess a lower court's fact-finding." Id. "Although a [CCA] has broad fact-finding power, its application of the law to the facts must be based on a correct view of the law." United States v. Weatherspoon, 49 M.J. 209, 212 (C.A.A.F. 2012). In the past, this Court has reversed a CCA's factual sufficiency review when the lower court misapprehended the elements of an offense. United States v. Thompson, 9 C.M.R.

90, 94 (1953) This Court remanded that case to the CCA for a new factual sufficiency review using the correct elements. Id.

As this Court more recently explained, "when the record reveals that a CCA misunderstood the law, this Court remands for another factual sufficiency review under correct legal principles." United States v. Thompson, 81 M.J. 1, 4 (C.A.A.F. 2022). This Court has also remanded cases for new Article 66(d)(1) review when "it is 'an open question' whether a CCA's review . . . was 'consistent with a correct view of the law.'" Id. (quoting United States v. Nerad, 69 M.J. 138, 147 (C.A.A.F. 2010)). Nothing about this Court's recent opinion in United States v. Csiti, ___ M.J. ____, 2025 CAAF LEXIS 349, *2 (C.A.A.F. 8 May 2025), which held that this Court cannot conduct its own factual sufficiency review, purported to alter this Court's existing precedent on how it may review the legal soundness of a CCA's factual sufficiency determination.

b. Contrary to Appellee's claims, AFCCA applied Mendoza in conducting its factual sufficiency review of Appellee's sexual assault conviction.

Reviewing the entirety of AFCCA's opinion below, the court unmistakably found Appellee's sexual assault conviction factually insufficient based on its (incorrect) interpretation of Mendoza. AFCCA first discussed Mendoza under the "Offenses" subheading of the "Law" section of its opinion. (JA at 22.)) The court stated, "our superior court recently held that when charging under [a sexual assault

without consent] theory, the Government must prove the victim was capable of consenting but did not consent." (JA at 22.) The lower court interpreted Mendoza to mean that "in cases where sexual assault is charged as without consent, evidence of a victim's level of intoxication may be relevant and admissible . . . However, it is improper to use this evidence 'as proof of [a victim's] inability to consent and therefore proof of the absence of consent' in these cases." (Id.)

It is true that the AFCCA opinion does not specifically cite Mendoza in its "Analysis" section when addressing factual sufficiency. But the context of the opinion makes clear that the Court was applying what it perceived to be the legal principles from Mendoza, as articulated in its "Law" section. AFCCA's "Analysis" section contains multiple references to whether JM was "capable of consenting," as discussed in Mendoza. First, AFCCA commented that, during her testimony, "JM did not explain whether [her] alcohol consumption caused her **capacity to consent** to be affected." (JA at 25.) (emphasis added). And "[t]here was no expert testimony offered at trial regarding what effect, if any, this alcohol had on [JM]." (Id.) Next, AFCCA expressed its view that the record contained no evidence as to "whether [JM] had the **capacity to consent** as a 'competent' person." (Id.) (emphasis added). And then the court stated that other evidence presented did "not specifically address the issue of whether [JM] had sufficient **capacity to consent** . . ." (Id.) (emphasis added).

AFCCA did not describe that the government's evidence was deficient in any other way. In fact, AFCCA observed that JM "did not testify she consented to the penetration of her vulva by [Appellee]'s penis as she did not make a 'freely given agreement' to the sexual intercourse." (Id.) In other words, the lower court acknowledged that JM's testimony supported that she did not give consent to the sexual conduct. The court also found that although Appellee claimed that JM had initiated the sexual intercourse, "this statement is inconsistent with the remainder of the evidence before us." (Id.) Again, this revealed that AFCCA disbelieved Appellee's claim that JM consented because the rest of the evidence at trial showed otherwise.[1] The only sensible interpretation of AFCCA's opinion is that the court found the evidence factually insufficient because the government did not prove that JM was *capable of consenting* – which reflected the holding AFCCA gleaned from Mendoza. (*See* JA at 22) ("our superior court recently held that when charging under this theory, the Government must prove the victim was capable of consenting but did not consent").

[1] Further reinforcing that AFCCA disbelieved Appellee's account of events, the court found Appellee's false official statement conviction, under Article 107, UCMJ, for falsely reporting that JM sexually assaulted him to be factually sufficient. (JA at 26-27.)

c. Not only did AFCCA apply Mendoza while conducting its factual sufficiency review, AFCCA applied it incorrectly.

As detailed in the United States' opening brief, AFCCA's opinion raises significant questions about whether it applied Mendoza correctly during its factual sufficiency review. First, it is questionable whether AFCCA should have applied Mendoza at all in an Article 120(b)(2)(A) (sexual assault without consent) case where the government presented evidence and argued that the victim expressed nonconsent by physically resisting the attack. (*See generally* Govt. Br. at 23-42.) Mendoza held that the government cannot prove absence of consent under Article 120(b)(2)(A) "*merely* by establishing that the victim was too intoxicated to consent." 2024 CAAF LEXIS 590 at *22. But that was not what happened in Appellee's case. Instead, the government's case focused primarily on the fact that JM did not consent to sex before falling asleep in Appellee's room and then had physically resisted the attack by scratching Appellee in four places on his body and breaking a chair. (*See generally* Govt. Br. at 23-42.) Under such circumstances, Mendoza should have been inapposite.

Second, AFCCA appears to have incorrectly applied Mendoza to require the government to prove beyond a reasonable doubt an element – that JM was capable of consenting – that is not part of the plain statutory language of Article 120(b)(2)(A) (sexual assault without consent). The Mendoza opinion did not expressly state that it was creating an additional, extra-textual element of "capable

of consenting" that the government had to prove beyond a reasonable doubt. Nor should Mendoza have done so, since "[i]t is the legislature, not the Court, which is to define a crime and ordain its punishment." United States v. Wiltberger, 18 U.S. 76, 95 (1820).

Even though the United States' opening brief discussed the issue at length (*see generally* Govt. Br. at 23-42.), Appellee's brief offers no argument on whether Mendoza, in fact, created a new element for Article 120(b)(2)(A) (without consent) offenses that the government must prove beyond a reasonable doubt. Given how many times AFCCA's opinion mentions JM's "capacity to consent," the existence or nonexistence of "capacity to consent" as an element is an essential issue in this case. And it directly relates to whether AFCCA properly interpreted and applied Mendoza when conducting its factual sufficiency review. Neither the plain language of Article 120(b)(2)(A) nor Mendoza creates a "capacity to consent" element, and thus AFCCA erred by applying one. Compounding that error, AFCCA's solitary focus on JM's "capacity to consent" seemingly caused the court to disregard the government's evidence that JM affirmatively expressed nonconsent to the sexual act. AFCCA's factual sufficiency analysis of whether the sexual act occurred without JM's consent was faulty without discussion of that crucial fact, since Article 120(g)(7) requires the factfinder to consider "all the surrounding circumstances" in determining whether a victim gave consent.

d. Since AFCCA based its factual sufficiency review on an incorrect interpretation of Mendoza and an incorrect understanding of the elements of a sexual assault without consent offense, remand for a new factual sufficiency review is appropriate.

The United States is not asking this Court to perform its own factual sufficiency review of Appellee's case; it is requesting this Court to vacate AFCCA's decision and remand for "another factual sufficiency review under correct legal principles." Thompson, 81 M.J. at 4. Such a remand is appropriate given that (1) AFCCA's application of the law to the facts was based on an incorrect view of the law, and (2) AFCCA misunderstood the elements of the offense. Weatherspoon, 49 M.J. at 212; Thompson, 9 C.M.R. at 94.

While Appellee claims that AFCCA did not even apply Mendoza during its factual sufficiency review, that argument is belied by the context of the entire opinion. Here, "AFCCA's language creates at least 'an open question' about whether the court applied the correct rule." Thompson, 83 M.J. at 5. Thus, remand is appropriate. On remand, this Court should instruct AFCCA (1) not to apply Mendoza during its legal or factual sufficiency review if AFCCA finds that the government introduced evidence that JM expressed nonconsent to the sexual act, not merely evidence that JM was incapable of consenting; and (2) not to treat JM's "capacity to consent" as an element for the government to have proven beyond a reasonable doubt during its legal or factual sufficiency review. Instead, AFCCA should review "all the surrounding circumstances" to determine the

sufficiency of the evidence establishing that the sexual intercourse at issue occurred without JM's consent. *See* Article 120(g)(7).

CONCLUSION

This Court should vacate AFCCA's decision and remand 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, civilian appellate defense counsel, and the Air Force Appellate Defense Division on 4 June 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 1801 words.

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

/s/ Mary Ellen Payne, USAF

Attorney for the United States (Appellant)

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