IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellant,

v.

WILLIAM C.S. HENNESSY,
Airman First Class (E-3),
United States Air Force,
Appellee.

USCA Dkt. No. 25-0112/AF

Crim. App. Dkt. No. 40439

BRIEF ON BEHALF OF APPELLEE

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Certified Issue

Whether the Air Force Court of Criminal Appeals erred in applying *United States v. Mendoza*, __ M.J. __ (C.A.A.F. 2024) to find Appellee's sexual assault conviction factually insufficient.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) reviewed Airman First Class (A1C) Hennessy's case pursuant to Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d). The AFCCA issued its opinion in this case on August 20, 2024. JA at 001. On September 19, 2024, A1C Hennessy moved for the AFCCA to reconsider its decision. JA at 024. The Government opposed the motion and on September 30, 2024, the AFCCA denied the motion. *Id.* On October 9, 2024, after this Court published its opinion in *United States v. Mendoza*, No. 23-0210, __ M.J. __, 2024 CAAF LEXIS 590 (C.A.A.F 2024), the AFCCA sua sponte reconsidered its denial of A1C Hennessy's motion for reconsideration. *Id.* The AFCCA vacated its original opinion in this case. *United States v. Hennessy*, No. ACM 40439, 2024 CCA LEXIS 494 (A.F. Ct. Crim. App. Oct. 9, 2024) (order). On November 25, 2024, the AFCCA issued its new opinion setting aside the guilty finding of Specification 2 of the Charge and the sentence and authorized a rehearing. JA at 023-25. Then, the Government filed a motion for reconsideration on December 26, 2024. JA at 038. A1C Hennessy opposed the motion and the AFCCA denied the motion on January 10, 2025. JA at 049.

In February 2025, the Air Force Judge Advocate General (JAG), Lieutenant General (Lt Gen) Charles Plummer, and the Army JAG, Lt Gen Joseph Berger, were purportedly fired.[1] On March 5, 2025, Major General (Maj Gen) Rebecca Vernon, the Air Force Deputy Judge Advocate General (DJAG), held a "[The Judge Advocate General] Dialogue" for members of the Air Force's JAG Corps. *United States v. Moore*, Motion to Compel Production of Post-Trial Discovery, April 22, 2025. During this dialogue, Maj Gen Vernon stated Lt Gen Plummer was "on leave pending retirement" or words to that effect. *Id.* On March 5, 2025, Maj Gen Vernon signed a Certificate for Review of the AFCCA's decision in A1C Hennessy's case; Maj Gen Vernon's signature included the title, "Performing The Duties of The Judge Advocate General." *United States v. Hennessy*, Certificate for Review, March 5, 2025. The Certificate of Review did not state whether appropriate notification to the other JAGs and the Staff Judge Advocate (SJA) to the Commandant of the Marine Corps had occurred.[2] *Id.* On

[1] Lolita C. Baldor, *Hegseth says he fired the top military lawyers because they weren't well suited for the jobs*, AP NEWS, Feb. 24, 2025, https://apnews.com/article/pentagon-hegseth-firing-chairman-lawyers-6bead3346b1210e45e77648e6cbc3599.

[2] *See* 10 U.S.C. § 867(a)(2) (emphasis added) (This Court "shall review the record in all cases reviewed by a Court of Criminal Appeals which the JAG, *after appropriate notification to the other JAGs and the SJA to the Commandant of the Marine Corps*, orders sent to the Court of Appeals for the Armed Forces for review."); *cf. United States v. Downum*, 85 M.J. 115, 117 (C.A.A.F. 2024) (concluding the certificate for review in that case did not need to be amended since

March 11, 2025, the Government filed the Certificate of Review with this Court. *United States v. Hennessy*, USCA Dkt. No. 25-0112, 2025 CAAF LEXIS 183 (C.A.A.F. Mar. 11, 2025).

On April 4, 2025, A1C Hennessy's appellate defense counsel served a discovery request on the Air Force Government Trial and Appellate Operations Division. *United States v. Hennessy*, Motion to Compel Production of Post-Trial Discovery at 8, April 17, 2025. On April 10, 2025, the Government responded to the discovery request and denied all requested discovery. *Id.* at 11. On April 17, 2025, A1C Hennessy, through his appellate defense counsel, filed a motion with this Court to compel the production of post-trial discovery. *United States v. Hennessy*, Motion to Compel Production of Post-Trial Discovery, April 17, 2025. On April 24, 2025, the Government filed an opposition to A1C Hennessy's motion to compel the production of post-trial discovery. *United States v. Hennessy*, Opposition to Mot. to Compel Production of Post-Trial Discovery, Apr. 24, 2025.

A1C Hennessy challenges whether this Court has jurisdiction to review the certified issue under Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2). Questions of jurisdiction are reviewed de novo. *United States v. Williams*, 85 M.J. 121, 124 (C.A.A.F. 2024). This Court's jurisdiction is limited to military cases presented

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"the initial certificate for review correctly stated that appropriate notification had been sent" to the other JAGs and the SJA to the Commandant of the Marine Corps).

under specific circumstances. 10 U.S.C. § 867. Pursuant to Article 67(a)(2), UCMJ, only a JAG may order a case reviewed by a Court of Criminal Appeals (CCA) be sent to this Court for review, and only after appropriate notification to the other JAGs and the SJA to the Commandant of the Marine Corps. 10 U.S.C. § 867(a)(2).

It is not clear what the status was of the Air Force JAG on the day the Air Force DJAG, Maj Gen Vernon, signed the Certificate of Review in A1C Hennessy's case, and whether she had the authority to certify A1C Hennessy's case to this Court for review. A serious issue of constitutional law arises if the Secretary of Defense purported to remove the Air Force JAG—a general officer appointed by the President with the advice and consent of the Senate. *See* U.S. CONST. art. II, § 2, cl. 2. To the extent that Lt Gen Plummer was not, in fact fired, or alternatively that the Secretary of Defense's purported action was ultra vires, Lt Gen Plummer, rather than Maj Gen Vernon, would seem to have been the Air Force JAG when this case was certified to this Court and thereby deprived Maj Gen Vernon of the authority to do so.

It is also not clear what the status was of the JAGs of the Army and Navy around the time that notification regarding certification would have occurred (if it occurred). This calls into question whether the appropriate individuals were notified, in accordance with Article 67(a)(2), UCMJ.

"Federal courts are courts of limited jurisdiction," and they "possess only that

power authorized by the Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted). The Supreme Court presumes that "a cause lies outside this limited jurisdiction." *Id.* "The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception." *Ctr. for Constitutional Rights v. United States*, 72 M.J. 126, 128 (C.A.A.F. 2013) (quotations and citations omitted). If the Government did not comply with its statutory requirement to appropriately notify the other JAGs and the SJA to the Commandant of the Marine Corps prior to certifying A1C Hennessy's case, then this Court does not have jurisdiction to review the certified issue. 10 U.S.C. § 867(a)(2) (2024). Additionally, if Lt Gen Plummer was still serving in the JAG duty position, and a vacancy in the JAG position did not exist, on March 5, 2025, then the Air Force DJAG did not have the authority to certify A1C Hennessy's case to this Court for review. *Id.*; 10 U.S.C. § 9037 (2024). The opaque nature of the purported firings of two JAGs and the resulting impact on the certification process and authorities calls into question whether the requisite compliance was satisfied here. There is additionally the adverse public perception of how fairly managed the military justice system is.

This Court has stated that it "must always satisfy itself that it has jurisdiction" and its jurisdiction is "strictly confined by statute." *United States v. Jacobsen*, 77

M.J. 81, 85 (C.A.A.F. 2017) (citations omitted); *see United States v. Downum*, 85 85 M.J. 115, 116 (C.A.A.F. 2024) ("This Court . . . has an independent duty to determine whether it has jurisdiction."). In other words, this Court "must exercise [its] jurisdiction in strict compliance with authorizing statutes." *Ctr. for Constitutional Rights*, 72 M.J. at 128. A1C Hennessy, through his appellate defense counsel, took steps to identify the answer to the outstanding question of jurisdiction, but this Court denied his motion to compel production of post-trial discovery. *United States v. Hennessy*, Order, May 14, 2025. As the party asserting this Court's jurisdiction, the Government still bears the burden of proving jurisdiction. *Guardian Life Ins. Co. of Am.*, 511 U.S. at 377.

Unless and until the Government demonstrates it complied with Article 67(a)(2), UCMJ, A1C Hennessy challenges whether this Court has jurisdiction to review the certified issue in his case.[3]

Relevant Authorities

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

> CASES APPEALED BY ACCUSED.—In any case before the Court of Criminal Appeals under subsection (b), the Court may act only with respect to the findings and sentence as entered into the record under section 860c of this title (article 60c). The Court may affirm only such

[3] A1C Hennessy invites the Court to consider an adverse inference against Appellant for what appears to be an assertion that all events happened are subject to the presumption of regularity in governmental affairs. *See* A1C Hennessy's Motion for Appellate Discovery, Appellant's Answer, and A1C Hennessy's Reply to the Answer.

findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, the Court may weigh the evidence, judge the credibility of witness[(sic)], and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

In relevant part, Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2), provides:

(a) The Court of Appeals for the Armed Forces shall review the record in—

> (2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General, after appropriate notification to the other Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps, orders sent to the Court of Appeals for the Armed Forces for review[.]

In relevant part, Article 67(c)(2)&(4), UCMJ, 10 U.S.C. § 867(c)(2)&(4), provides:

> (2) In a case which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces, that action need be taken only with respect to the issues raised by him.
> . . .
>
> (4) The Court of Appeals for the Armed Forces shall take action only with respect to matters of law.

In relevant part, Article 120(b), UCMJ, 10 U.S.C. § 920(b)(2), provides:

(b) SEXUAL ASSAULT. Any person subject to this chapter who—

> (1) commits a sexual act upon another person by—
>
> > (A) threatening or placing that other person in fear;
> >
> > (B) making a fraudulent representation that the sexual act serves a professional purpose; or
>
> (2) commits a sexual act upon another person—

(A) without the consent of the other person; or

(B) when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring;

(3) commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to—

(A) impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person; or

(B) a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person;

is guilty of sexual assault and shall be punished as a court-martial may direct.

In relevant part, Article 120(g)(7)-(8), UCMJ, 10 U.S.C. § 920(g)(7)-(8), provides:

(7) CONSENT. Any person subject to this chapter who—

(A) The term "consent" means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent.

(B) A sleeping, unconscious, or incompetent person cannot consent A person cannot consent to force causing or likely to cause death or grievous bodily harm or to being rendered

unconscious. A person cannot consent while under threat or in fear or under the circumstances described in subparagraph (B) or (C) of subsection (b)(1).

(C) All the surrounding circumstances are to be considered in determining whether a person gave consent.

(8) INCAPABLE OF CONSENTING—The term "incapable of consenting" means the person is—

(A) incapable of appraising the nature of the conduct at issue; or

(B) physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act at issue.

Statement of the Case

On February 9, 2022, a panel of enlisted members sitting as a general court-martial convicted A1C William C. S. Hennessy, contrary to his pleas, of sexual abusive contact with KG, sexual assault upon KE, and, on divers occasions, abusive sexual contact with IE in violation of Article 120, UCMJ, 10 U.S.C. § 920. JA at 053, 399. The military judge sentenced A1C Hennessy to a dishonorable discharge, 34 months'[4] confinement, reduction to the grade of E-1, and a reprimand. JA at 053-54. The convening authority denied A1C Hennessy's deferment requests, took no action on the findings, and approved the sentence in its entirety. JA at 024.

[4] The military judge sentenced the A1C Hennessy to 30 months for Specification 2. He sentenced him to one month for Specification 1 and three months for Specification 3—all to be served consecutively.

Statement of Facts

The Government charged A1C Hennessy with sexually assaulting KE "without her consent." JA at 050.

A. KE testified she "woke up" to A1C Hennessy having sex with her and then she "faked sleep" at which point he stopped, called her name twice, and shook her. When she continued to pretend to be asleep, he left.

A1C Hennessy and KE first met through Instagram[5] when A1C Hennessy direct messaged her. JA at 170. They had previously matched on Tinder.[6] *Id.* The two exchanged SnapChat[7] information and continued talking for about a week. JA at 170-71. They made plans to meet in person at A1C Hennessy's dorm to "hang out." JA at 171-72. KE met A1C Hennessy at his dorm on June 8, 2019 around 3 p.m. – 4 p.m. JA at 172. When A1C Hennessy held KE's hand with interlaced fingers, she did not pull away. JA at 174. The first time A1C Hennessy leaned forward to kiss KE she leaned the opposite direction. JA at 174-75. But KE let A1C Hennessy kiss her the second time he tried when he put his hand on her cheek. JA at 175. It did not last long, because she pulled away. *Id.* At some point while in the dorm room, the two of them discussed a concert that was happening that night. JA at 177. KE was not sure who brought it up first, but she stated she wanted to go,

[5] Instagram is a social media platform wherein individuals may direct message or "chat" with each other through their profiles.
[6] Tinder is a dating website.
[7] SnapChat is a social media platform wherein individuals may share "snaps" with all of their friends and/or with specific people and may also "chat" with their friends.

but her friends were busy so she did not have anyone to go with. *Id.* A1C Hennessy messaged later that he was sorry if he was moving too fast. JA at 176. KE appreciated that A1C Hennessy apologized and agreed to hang out with him later. *Id.*

Later that night they went to a concert. JA at 177. KE arrived around 7:15 p.m. or 7:20 p.m. JA at 178. The concert was at the E Club. *Id.* KE spent around three hours there during which time she drank at least 4-5 drinks. JA at 180, 216. At the end of the night, A1C Hennessy asked KE, "So my room or yours?" JA at 183. KE first responded, "You go to yours and I'll go to mine." *Id.* A1C Hennessy responded, "Okay." *Id.* KE was not sure if she was "buzzed or drunk" when she left the E Club. JA at 185. KE did not remember leaving the E Club, but she did remember A1C Hennessy offering to give her a piggy-back ride. JA at 185-86. KE told A1C Hennessy "yes." JA at 186. KE testified that she assumed A1C Hennessy would take her back to her room but also acknowledged that A1C Hennessy did not know where she lived. *Id.*

Her next memory after getting on A1C Hennessy's back was of the two of them on A1C Hennessy's bed. *Id.* KE testified, "I woke up and we were in his room and he's having, like, sex with me, but I just opened my eyes and it's going on." *Id.* She was wearing her top and bra, but her pants and underwear were off. *Id.* KE's legs were on A1C Hennessy's shoulders. JA at 187. KE looked down and saw

A1C Hennessy's penis going in her vagina. JA at 188. KE started panicking in her mind, because she "didn't know how [they] got to that point." JA at 189. She then "decided to fake sleep to get him to stop." *Id.* KE "faked sleep" by closing her eyes and turning her head to the right to face A1C Hennessy's wall. *Id.* In response to KE "faking sleep," A1C Hennessy called KE's name twice trying to get her attention or to get her to wake up. *Id.* He then said, "Oh, no," and started to "shake [her] shoulder to continue to try to get [her] to wake up or open [her] eyes." *Id.* When KE did not open her eyes, A1C Hennessy walked away. JA at 190. KE thought he might have gone to the bathroom. *Id.* KE then opened her eyes and started to gather her stuff. *Id.* When A1C Hennessy came back, he saw KE gathering her stuff and KE said she needed to go because H.P. needed her. *Id.* A1C Hennessy told KE she should stay and sleep on his bed while he slept on the couch. *Id.* KE replied, "No, she really needs me" while pretending to text H.P. *Id.*

B. KE told multiple people that she fell asleep.

a. KE told KB that she woke up to A1C Hennessy having sex with her.

KE told KB that she went back to A1C Hennessy's dorm room with him. JA at 085. KE said she sat on A1C Hennessy's futon and fell asleep. JA at 085-86, 097. KE told him when she woke up, A1C Hennessy was having sex with her. JA at 097. She then got up, pulled her pants back on, and ran down the hill, which was when she called KB. JA at 085. KE also told KB that prior to her leaving,

A1C Hennessy asked her if something was wrong and she told A1C Hennessy, "no." JA at 098.

b. KE told SL she took a nap and woke up to things happening to her.

SL and KE were "very close friends." JA at 109. They would see each other either every weekend or every other weekend and for holidays and birthdays. *Id.* SL was dating LV. JA at 110-11. KE told SL that KE met a guy at a concert and "didn't know how to say no." JA at 119. KE said she wished SL had been there, because then she would have had someone to find to leave with. *Id.* KE told SL she had been drinking a little bit, went back to the guy's room, and felt tired so she fell asleep. *Id.* Specifically, KE said she remembered being in A1C Hennessy's room. JA at 140. KE said she remembered laying on A1C Hennessy's bed. *Id.* KE said she remembered deciding to take a nap. *Id.* SL testified that "when [KE] woke up things were happening, and she said when it was over, she quietly got up, put her clothes on, and ran back to the dorms, and then that's when she called [SL]." JA at 119.

c. KE told LV that she blacked out and woke up to A1C Hennessy penetrating her.

LV was in the room when KE told the group she met A1C Hennessy at the E Club. JA at 154-55. They then went back to his room to hang out and had some drinks. JA at 156. KE said she then blacked out. *Id.* When she woke up, A1C Hennessy was penetrating her. *Id.*

C. Doctor KR testified that those in blackouts are not asleep. Those in blackouts are still conscious, but unable to transfer short-term memories into long-term memories.

Doctor (Dr.) KR testified about alcohol blackouts. JA at 328. Essentially, when one consumes a large amount of alcohol in a short period of time, the hippocampus does not transfer short-term memories into long-term memory. *Id.* Two examples given were when one drinks shots or mixed drinks quickly. *Id.* "[Y]ou're dealing with what's going on right in front of you, but you don't remember it later because that part of the brain [(hippocampus)] whose job it is to move that to the long-term memory so you remember it later is basically asleep." JA at 329. There are two basic types of blackouts. *Id.* The first is an en bloc blackout or an absolute blackout where no short-term memories are transferred to long-term memory. *Id.* The second is a fragmentary blackout where most of the memories are gone, but bits and pieces are transferred into long-term memory. *Id.* The bits and pieces from a fragmentary blackout is sometimes referred to as flashbulb memories. *Id.*

People regularly misuse the term "blackout" since what they really mean is passed out. *Id.* Being passed out is when one drank so much that they become unconscious, which is not a blackout. *Id.* A blackout is a "very specific type of alcohol effect." *Id.* Those in a blackout are still conscious. *Id.* In fact, it is really hard to tell if someone is in a blackout since they typically do not exhibit signs or

symptoms as someone who has been drinking. JA at 329-30. Whereas someone who has drank so much they fell asleep or became unconscious is considered passed out. JA at 330.

People are also capable of engaging in complex behaviors while in a blackout as long as they knew how to do it before the blackout. *Id.* For instance, people in blackouts have been able to drive a car, fly an airplane, or even perform surgery. *Id.* The person in a blackout does not know they are in a blackout at the time. JA at 330-31. They only learn they were in a blackout when they later cannot remember anything that happened for that period of time. JA at 331. "But since you're operating with this little piece of your brain gone to sleep, but not the other manifestations of alcohol it would be really hard for anybody to tell that you were in a blackout." *Id.* There is no particular Blood Alcohol Concentration (BAC) that associated with a blackout. JA at 334. One can get to a blackout slowly or rapidly, it depends on the person. *Id.* Research shows you are at a higher risk of blacking out if you have blacked out before. JA at 336-37. Those in a blackout can still have conversations with others, climb flights of stairs, buy their own drinks, and even engage in consensual sexual activity. JA at 340.

D. Trial counsel argued KE could not consent because she was "not competent."

Trial counsel told the members during closing argument that A1C Hennessy was guilty of Specification 2 of the Charge. JA at 355. When describing the second

element of the Specification, trial counsel defined "consent" as "a freely given agreement from a competent person." JA at 360. Trial counsel argued KE was not competent, that she had been out drinking, and that she was blackout drunk. *Id.* Again, he said "[s]he is blackout drunk. She is not a competent person." *Id.* Trial counsel argued "As her intoxication goes up, so does her incapacitation, so does her blackout, and one of the signs of incapacitation or one of the signs of being drunk is you're tired." JA at 362.

When addressing KE pretending to sleep once she realized what was happening, trial counsel stated A1C Hennessy "does not get a medal because he stopped when he thought the girl was finally comatose. He gets convicted of sex assault because he broke the law." *Id.* Trial counsel later returned to the issue of consent. JA at 367. He referred to Defense's questions of KE on cross examination regarding her being blacked out and how she could have consented. *Id.* Trial counsel asserted that KE did not consent and that "she wasn't competent." *Id.*

E. The AFCCA found A1C Hennessy's conviction factually insufficient.

The AFCCA reviewed A1C Hennessy's conviction for sexual assault of KE (Specification 2 of the Charge) and found it factually insufficient. JA at 025. As such, the AFCCA found the issue of whether A1C Hennessy's Due Process rights were violated because he was convicted of a different theory of criminal liability than was on the charge sheet moot. JA at 024-25.

Summary of the Argument

CCAs are afforded significant deference when this Court assesses the CCA's Article 66, UCMJ, factual sufficiency review. This Court reviews the CCA's interpretation of case law de novo because it is a question of law and the CCA's application of case law for an abuse of discretion. *United States v. Csiti,* No. 24-0175, __ M.J. __, 2025 CAAF LEXIS 349, at *12-13 (C.A.A.F. 2025);[8] *see also Mendoza*, 2024 CAAF LEXIS 590, at *21 ("[W]e retain the authority to review factual sufficiency determinations of the CCAs for the application of correct legal principles, but only as to matters of law."). In this case, the AFCCA both correctly interpreted this Court's precedent in *Mendoza* and correctly applied it to A1C Hennessy's case.

First, the AFCCA correctly cited this Court when stating sexual assault without consent and sexual assault upon a person incapable of consenting are two separate theories of liability. JA at 032 (citing *Mendoza*, 2024 CAAF LEXIS 590, at *17). The AFCCA, guided by this Court, clarified that for a charge of sexual assault without consent, the alleged criminal conduct is committed "upon a victim who is capable of consenting but does not consent." *Id.* (quoting *Mendoza*, 2024 CAAF LEXIS 590, at *17). That was the theory of liability A1C Hennessy was

[8] Understanding *Csiti* involves the new factual sufficiency review, and this case does not, the same general proposition remains regarding factual sufficiency review.

charged with. JA at 050.

Second, the AFCCA did not abuse its discretion when applying this Court's precedent from *Mendoza*. *See Csiti,* 2025 CAAF LEXIS 349, at *12-13. While the Government charged sexual assault without consent, trial counsel argued in closing argument that KE could not consent because she was not a competent person and that as her alcohol intoxication went up, so did her incapacitation. JA at 360-62. This Court in *Mendoza* made clear that "the Government cannot . . . charge one offense under one factual theory and then argue a different offense and a different factual theory at trial." *Mendoza*, 2024 CAAF LEXIS 590, at *18. Logically it follows that the AFCCA would only conduct factual sufficiency analysis for the theory of criminality the Government charged in this case. JA at 034 (stating it did not evaluate legal or factual sufficiency of a charge of sexual assault on a person incapable of consenting since that was not the charge before the court). In its factual sufficiency review, the AFCCA found no evidence related to the gap in time—between when A1C Hennessy gave KE a piggy-back ride (KE's last memory) to KE's next memory of "waking up" in the middle of sex—was presented. JA at 034. As such, the AFCCA was not convinced beyond a reasonable doubt that KE was capable of consenting at the time of the sexual act, but did not consent. *Id.* This was not an abuse of discretion, but instead an application of neither a presumption of innocence nor a presumption of guilt but an independent determination. An abuse

of discretion requires more than a mere difference of opinions but an arbitrary, fanciful, clearly unreasonable, or clearly erroneous decision. *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010) (citations omitted). That does not exist here. The AFCCA did not err in interpreting or applying *Mendoza* in this case.

Of note, A1C Hennessy limits his arguments to the certified issue currently before this Court while noting his Petition for Grant of Review is still pending a decision by this Court.

Argument

The Air Force Court of Criminal Appeals did not err in its application of *Mendoza* to A1C Hennessy's case, and the court correctly found A1C Hennessy's sexual assault conviction factually insufficient.

Standard of Review

This Court "does not review the factual sufficiency of convictions when [it] review[s] cases under Article 67, UCMJ." *Mendoza*, 2024 CAAF LEXIS 590, at *21; *see also Csiti*, 2025 CAAF LEXIS 349, at *2 (holding this Court does not have statutory authority to review factual sufficiency of evidence)). Rather, "[r]eview of the factual sufficiency of the evidence is a special power and duty that Article 66(d)(1), UCMJ, confers only on the [CCAs]." *United States v. Thompson*, 83 M.J. 1, 3 (C.A.A.F. 2022) (citation omitted). Although this Court "retain[s] the authority to review factual sufficiency determinations of the CCAs for the application of

correct legal principles,"[9] it "shall take action only with respect to matters of law." *Csiti*, 2025 CAAF LEXIS 349, at *7 (quoting 10 U.S.C. § 867(c)(4)). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *White*, 69 M.J. at 239 (quotations and citations omitted).

Law and Analysis

This Court reviews the AFCCA's *interpretation* of case law de novo because it is a question of law and the AFCCA's *application* of case law for an abuse of discretion. *Csiti*, 2025 CAAF LEXIS 349, at *12-13).

A. The AFCCA's interpretation of *Mendoza* was correct.

This Court's holding in *Mendoza* was clear—Article 120(b)(2)(A), UCMJ, and Article 120(b)(3)(A), UCMJ, create separate, inconsistent theories of criminal liability *Mendoza*, 2024 CAAF LEXIS 590, at *3-4. Further, "the Government cannot . . . charge one offense under one factual theory and then argue a different offense and a different factual theory at trial." *Id.* at *18. Doing so violates an accused's "constitutional 'right to know what offense and under what legal theory he will be tried and convicted.'" *Id.* (quoting *United States v. Riggins*, 75 M.J. 78,

[9] *Id.* at 4 (quotations and citations omitted); *see United States v. Leak*, 61 M.J. 234, 241 (C.A.A.F. 2005) ("[I]t is within this Court's authority to review a lower court's determination of factual insufficiency for application of correct legal principles. At the same time, this authority is limited to matters of law; we may not reassess a lower court's fact-finding."

83 (C.A.A.F. 2016)).

As such, the AFCCA's interpretation of this Court's decision in *Mendoza* was correct. In its law section for this issue, the AFCCA cited this Court when stating sexual assault without consent and sexual assault upon a person incapable of consenting are two separate theories of liability. JA at 032 (citing *Mendoza*, 2024 CAAF LEXIS 590, at *17). The AFCCA went on to state that for a charge of sexual assault without consent, the alleged criminal conduct is committed "upon a victim who is capable of consenting but does not consent." *Id.* (quoting *Mendoza*, 2024 CAAF LEXIS 590, at *17). The AFCCA then distinguished a charge of sexual assault upon a person incapable of consenting, which alleges the criminal conduct is done "upon a victim who is incapable of consenting to the sexual act due to impairment by any drug, intoxicant, or other similar substance when the victim's condition is known or reasonably should be known by the accused." *Id.* (quoting *Mendoza*, 2024 CAAF LEXIS 590, at *17-18). The AFCCA's distinguishment between these two theories of liability indicates the correct interpretation of this Court's precedent in *Mendoza*. Because if the Government charged sexual assault without consent (under subsection (b)(2)(A)) but could then establish the absence of consent by proving that the victim was asleep, then the Government would obtain an incapable-of-consent conviction under subsection (b)(2)(A) without the obligation to prove the accused's mens rea beyond a reasonable doubt. *See*

Mendoza, 2024 CAAF LEXIS 590, at *17.

The AFCCA understood that while evidence of a victim's level of intoxication may be relevant and admissible in "without consent" cases, it is still improper to use this evidence as proof that the victim's inability to consent is proof of absence of consent. JA at 033 (citing *Mendoza*, 2024 CAAF LEXIS 590, at *22). In essence, what "the Government cannot do is prove the absence of consent under Article 120(b)(2)A), UCMJ, by merely establishing that the victim was too intoxicated to consent." *Id.*

B. The AFCCA application of *Mendoza* to A1C Hennessy's case was not an abuse of discretion.

To convict A1C Hennessy of sexual assault in violation of Article 120(b)(2)(A), UCMJ, the Government was required to prove beyond a reasonable doubt that A1C Hennessy: (1) committed a sexual act upon KE; and (2) that he did so "without the consent" of KE. JA at 032 (citing 2019 *MCM,* Pt. IV-86, ¶ 60.b.(2)(d)). The AFCCA acknowledged and agreed with this Court that circumstantial evidence may sustain a conviction—directly contradicting the Government's argument. *Compare*, JA at 033, *with* Appellant's Br. at 17-18. However, when applying the theory of liability at issue, the AFCCA found the circumstantial evidence was not sufficient to sustain A1C Hennessy's conviction of sexually assaulting KE without her consent. *Id.*

Instead, the AFCCA found significant unanswered questions on whether KE

was capable of consenting. *Id.* The court went through evidence admitted at trial including (1) KE's testimony that she had multiple alcoholic drinks that night; then (2) A1C Hennessy offered to give KE a piggy-back ride and KE agreed; and (3) the next thing KE remembers is waking up in A1C Hennessy's room with him having sex with her. JA at 033-34. There was no evidence regarding what happened between the piggy-back ride and KE "waking up" in the middle of sex. JA at 034. The AFCCA then went into the testimony of a forensic psychologist, Dr. KR, regarding alcohol blackouts and the possibility of KE experiencing a blackout that night. *Id.* For instance, there was a possibility that "KE's level of alcohol consumption compromised her ability to form and retain memories of the evening, but did not compromise her ability to know and appreciate her surroundings and engage in voluntary behavior in relation to the charged sexual act." *Id.* Meaning, there was a real possibility that KE was capable of consenting, did consent, but could not remember consenting.

The AFCCA also considered Dr. KR's testimony that KE may have also experienced an alcohol "pass out" which is incapacitation by alcohol that results in the person falling asleep, unconscious, or incapable of appraising the nature of the conduct at issue; or being physically incapable of declining to participate in or communicate unwillingness to engage in, the sexual acts at issue. *Id.* (citing *United States v. Pease*, 75 M.J. 180, 185 (C.A.A.F. 2016). Of note, this Court in *Pease*

agreed with the CCA's definition of "competent person" being one who possesses the physical and mental ability to consent which incorporated three statutory requirements: (1) one must be "competent" to consent; (2) one cannot consent if asleep or unconscious; and (3) one is incapable of consenting if impaired by a drug, intoxicant, or other substance, or is suffering from a mental disease or defect or physical disability. *Pease*, 75 M.J. at 185.

In this case, because no evidence related to that gap in time was presented, the AFCCA was not convinced beyond a reasonable doubt that KE was capable of consenting at the time of the sexual act, but did not consent. JA at 034. Essentially, Dr. KR's testimony established several real possibilities of the state of intoxication KE could have been at: (1) blacked out and able to consent, but unable to retain memories of what happened during the gap in her memory (Article 120(b)(2)(A)); (2) passed out in the form of being asleep (Article 120(b)(2)(B)); (3) passed out in the form of being unconscious (Article 120(b)(2)(B)); (4) passed out to the point of being incapable of appraising the nature of the conduct (Article 120(b)(3)(A)); (5) physically incapable of declining to participate in sex (Article 120(b)(3)(A)); or (6) physically incapable of communicating unwillingness to engage in sex (Article 120(b)(3)(A)).

a. Contrary to the Government's argument, trial counsel did argue different theories of liability at trial. But, of note, this Court has yet to rule on A1C Hennessy's Petition for Grant of Review as to the Due Process violation in his case.

Trial counsel argued KE was not a competent person and could not consent to sex. JA at 360. He argued KE was blackout drunk. *Id.* Trial counsel argued her intoxication made her incapacitated. JA at 362. Specifically, "As her intoxication goes up, so does her incapacitation, so does her blackout, and one of the signs of incapacitation or one of the signs of being drunk is you're tired." *Id.* Trial counsel was arguing two other theories of liability combined: incapable of consenting due to being incapacitated by alcohol, i.e. impairment by an intoxicant or other similar substance (alcohol)—Article 120(b)(3)(A); and incapacitated by alcohol to the point of being tired, i.e. asleep—Article 120(b)(2)(B). Both theories require an additional proof beyond a reasonable doubt—the mens rea that the person knows or reasonably should know that the other person is asleep, or impaired by alcohol.

This is in direct contradiction of the Government's argument that, "First and foremost, [*Mendoza*] is inapplicable because the prosecution in this case did not switch theories of liability at trial—the pleadings, the proof, and the presentation were clearly focused on proving that KE did not consent." Appellant Br. at 16. In actuality, *Mendoza* does not become "inapplicable" simply because the facts of the case are not the same. Whether trial counsel argued a different theory of liability does go to whether an appellant's Due Process rights were violated, but that is not

the certified issue before this Court. And in fact, A1C Hennessy's Petition for Grant of Review regarding that issue has yet to be ruled upon.

This Court made clear in *Mendoza* that Article 120(b)(2)(A) and Article (b)(3)(A) establish separate theories of liability. 2024 CAAF LEXIS 590, at *11. The AFCCA relied upon that clarification in law when it reconsidered its decision in this case. JA at 025 ("Upon reconsideration and in light of *Mendoza*, we find [A1C Hennessy's] conviction for sexual assault of KE (Specification 2 of the Charge) factually insufficient."). However, this Court's clarification that such a holding "does not bar the trier of fact from considering evidence of the victim's intoxication when determining whether the victim consented" was noted and considered by the AFCCA. JA at 033 ("Here, however, the circumstantial evidence presented, in light of the clarification of the theory of liability at issue, was not sufficient to sustain [A1C Hennessy's] conviction for sexual assault against KE."). The AFCCA considered the evidence offered and the elements of the offense as charged. JA at 032. The AFCCA properly does not go into the theories of criminal liability potentially raised and argued by trial counsel and whether they were proved by the evidence beyond a reasonable doubt at trial *since they were not charged*. *See* JA at 034.

b. Regardless of which theory of liability trial counsel argued, the AFCCA in its de novo factual sufficiency review found the evidence insufficient.

The AFCCA properly conducted a de novo review of factual sufficiency. JA at 031 (citing *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002)). It does not matter what trial counsel argued, it only matters what the evidence showed. The AFCCA took a fresh, impartial look at the evidence and applied neither a presumption of innocence nor a presumption of guilt in concluding it was not convinced beyond a reasonable doubt that the evidence proved the offense. JA at 031-32 (citing *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017), *aff'd*, 77 M.J. 289 (C.A.A.F. 2018)). The Government points to KE's "nonconsent upon waking up to the sexual act." Appellant's Br. at 17. But once KE "woke up" she then pretended to be asleep at which point A1C Hennessy stopped, called her name twice, shook her, and when she did not respond, he left her. JA at 189-90. Once, KE pretended to be asleep, there was no evidence presented that A1C Hennessy continued to penetrate KE. Instead, he stopped. *Id.* He took measures to try to wake her. *Id.* And when she did not appear to be awake anymore, he left her. *Id.* That is not evidence of someone who would have had sex with her while she appeared to be asleep or even intoxicated to the point of being passed out as asleep or unconscious. Trial counsel's argument on this point was that A1C Hennessy "does not get a medal because he stopped when he thought the

girl was finally comatose." JA at 362. But the Government did not prove KE did not consent—as opposed to blacked out and unable to record memories as to not "know[ing] how [they] got to that point." JA at 189. This is the gap of time pointed out by the AFCCA. JA at 034. And the other theories of liability were not charged, so the Government avoided having to prove the required mens rea for those specific type of offenses. When referencing the Defense's questions of KE on cross examination about her being blacked out and how she could have consented, trial counsel stated KE did not consent as "she wasn't competent." *Id.*

Abuse of discretion is a strict standard where more than a mere difference of opinion is required. *White*, 69 M.J. at 239. The AFCCA properly did not evaluate legal or factual sufficiency of a charge of sexual assault on a person incapable of consenting, because that was not the charge before it. JA at 034. The AFCCA's factual sufficiency review was not arbitrary, fanciful, clearly unreasonable, or clearly erroneous. *White*, 69 M.J. at 239. As such, the AFCCA did not abuse its discretion in finding A1C Hennessy's conviction of sexual assault without consent factually insufficient.

Conclusion

The AFCCA correctly interpreted and applied this Court's holding in *Mendoza* to A1C Hennessy's case. At A1C Hennessy's court-martial, the Government argued a theory of incapable of consent due to the alleged victim being

intoxicated—that KE could not consent because she was not competent. JA at 360-62. The AFCCA correctly declined to assess whether the evidence was legally and factually sufficient to prove a theory of criminality not alleged on the charge sheet. JA at 034.

Importantly, there was not evidence in the record related to the time from A1C Hennessy giving KE a piggy-back ride to KE waking up in the middle of sex with him. As such, the AFCCA in applying neither a presumption of innocence nor a presumption of guilty but by making its own independent determination, found the evidence did not convince the AFCCA of A1C Hennessy's guilt beyond a reasonable doubt of sexual assault without consent. JA at 034. This Court should find that the AFCCA interpreted *Mendoza* correctly and did not abuse its discretion in applying *Mendoza* when concluding A1C Hennessy's conviction was factually insufficient. As such, this Court should answer the certified question in the negative and affirm the decision of the AFCCA.

Although still pending as an issue in A1C Hennessy's Supplement to the Petition for Grant of Review, the Government violated A1C Hennessy's constitutional rights to due process and fair notice at his court-martial.

Respectfully submitted,

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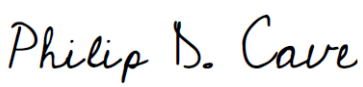

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CERTIFICATE OF FILING AND SERVICE

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CERTIFICATE OF COMPLIANCE WITH RULES 24(b) AND 37

This brief complies with the type-volume limitation of Rule 24(b) because it contains 7,404 words.

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