IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellant,

v.

NICHOLAS J. MOORE,
Airman (E-2),
United States Air Force,
Appellee.

USCA Dkt. No. 25-0110/AF

Crim. App. Dkt. No. 40442 (f rev)

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 legally and factually insufficient.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) reviewed Airman (Amn) Moore's case pursuant to Article 66(d), Uniform Code of Military Justice (UCMJ).[1] The AFCCA issued its opinion in this case on November 13, 2024.[2]

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.[3] On March 5, 2025, Major General (Maj Gen) Rebecca Vernon, the Air Force Deputy Judge Advocate General (DJAG), held a

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[1] 10 U.S.C. § 866(d) (2024). The 2024 edition of the UCMJ governs the AFCCA's ability to exercise jurisdiction over this matter, pursuant to the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116-283, § 542, 134 Stat. 3388 (2021). Article 66, UCMJ, 10 U.S.C. § 866 was subsequently amended by the National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117–81, 135 Stat. 1698 (2021), and the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117–263, 136 Stat. 2582 (2022). However, neither of the amendments are applicable to 10 U.S.C. § 866 for Amn Moore's case based on the date of the alleged offense.

[2] JA at 001.

[3] 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.

"[The Judge Advocate General] Dialogue" for members of the Air Force's JAG Corps.[4] During this dialogue, Maj Gen Vernon stated Lt Gen Plummer was "on leave pending retirement" or words to that effect.[5]

On March 5, 2025, Maj Gen Vernon signed a Certificate for Review of the AFCCA's decision in Amn Moore's case; Maj Gen Vernon's signature included the title, "Performing The Duties of The Judge Advocate General."[6] 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.[7] On March 7, 2025, the Government filed the Certificate of Review with this Court.[8]

On March 27, 2025, Amn Moore's appellate defense counsel served a discovery request on the Air Force Government Trial and Appellate Operations Division.[9] On April 3, 2025, the Government responded to the discovery request

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[4] *United States v. Moore*, Motion to Compel Production of Post-Trial Discovery, April 22, 2025, Appendix A.
[5] *Id.*
[6] Certificate for Review, Mar. 5, 2025.
[7] *Id.*; *see* 10 U.S.C. § 867(a)(2) (2024) (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 "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).
[8] *United States v. Moore*, USCA Dkt. No. 25-0110, 2025 CAAF LEXIS 178 (C.A.A.F. Mar. 7, 2025).
[9] Mot. to Compel Production of Post-Trial Discovery, Appendix B, Apr. 22, 2025,

and denied all requested discovery.[10] On April 22, 2025, Amn Moore, through his appellate defense counsel, filed a motion with this Court to compel the production of post-trial discovery.[11] On April 29, 2025, the Government filed an opposition to Amn Moore's motion to compel the production of post-trial discovery.[12]

Amn Moore challenges whether this Court has jurisdiction to review the certified issue under Article 67(a)(2), UCMJ.[13] Questions of jurisdiction are reviewed de novo.[14] This Court's jurisdiction is limited to military cases presented under specific circumstances.[15] 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.[16]

United States v. Moore, USCA Dkt. No. 25-0110 (C.A.A.F).
[10] Mot. to Compel Production of Post-Trial Discovery, Appendix C, Apr. 22, 2025, *United States v. Moore*, USCA Dkt. No. 25-0110 (C.A.A.F).
[11] Mot. to Compel Production of Post-Trial Discovery, Apr. 22, 2025, *United States v. Moore*, USCA Dkt. No. 25-0110 (C.A.A.F).
[12] Opposition to Mot. to Compel Production of Post-Trial Discovery, Apr. 29, 2025, *United States v. Moore*, USCA Dkt No. 25-0110 (C.A.A.F).
[13] 10 U.S.C. § 867(a)(2) (2024). The 2024 edition of the UCMJ governs this Court's ability to exercise jurisdiction over this matter, pursuant to the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116-283, 134 Stat. 3388 (2021) . Article 67, UCMJ, 10 U.S.C. § 867 was subsequently amended by the National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117–81, 135 Stat. 1698 (2021), however the amendment did not have any impact on subsection (a)(2) of 10 U.S.C. § 867.
[14] *United States v. Williams*, 85 M.J. 121, 124 (C.A.A.F. 2024).
[15] 10 U.S.C. § 867 (2024).
[16] 10 U.S.C. § 867(a)(2) (2024).

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 Amn Moore's case, and whether she had the authority to certify Amn Moore'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.[17] 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."[18] The Supreme Court presumes

[17] *See* U.S. CONST. art. II, § 2, cl. 2.
[18] *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted).

that "a cause lies outside this limited jurisdiction."[19] "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."[20] 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 Amn Moore's case, then this Court does not have jurisdiction to review the certified issue.[21] 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 Amn Moore's case to this Court for review.[22] 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.

This Court has stated that it "must always satisfy itself that it has jurisdiction" and its jurisdiction is "strictly confined by statute."[23] In other words, this Court "must exercise [its] jurisdiction in strict compliance with authorizing statutes."[24]

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[19] *Id.*
[20] *Ctr. for Constitutional Rights v. United States*, 72 M.J. 126, 128 (C.A.A.F. 2013) (quotations and citations omitted).
[21] 10 U.S.C. § 867(a)(2) (2024).
[22] *Id.*; 10 U.S.C. § 9037 (2024).
[23] *United States v. Jacobsen*, 77 M.J. 81, 85 (C.A.A.F. 2017) (citations omitted); *see Downum*, 85 M.J. at 116 ("This Court . . . has an independent duty to determine whether it has jurisdiction.").
[24] *Ctr. for Constitutional Rights*, 72 M.J. at 128.

Amn Moore, through his appellate defense counsel, has taken steps to identify the answer to the outstanding question of jurisdiction and is awaiting this Court's decision on his motion to compel production of post-trial discovery. However, as the party asserting this Court's jurisdiction, the Government bears the burden.[25] Unless and until the Government demonstrates it complied with Article 67(a)(2), UCMJ, Amn Moore challenges whether this Court has jurisdiction to review the certified issue in his case.

Relevant Authorities

In relevant part, Article 66(d)(1)(B), UCMJ, 10 U.S.C. § 866(d)(1)(B) (2024) provides:

> (B) FACTUAL SUFFICIENCY REVIEW.—
> (i) In an appeal of a finding of guilty under subsection (b), the Court may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof.
> (ii) After an accused has made such a showing, the Court may weigh the evidence and determine controverted questions of fact subject to—
> (I) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and
> (II) appropriate deference to findings of fact entered into the record by the military judge.
> (iii) If, as a result of the review conducted under clause (ii), the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.

[25] *Guardian Life Ins. Co. of Am.*, 511 U.S. at 377.

In relevant part, Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2) (2024), provides:

> (a) The Court of Appeals for the Armed Forces shall review the record in—
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> (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)(4), UCMJ, 10 U.S.C. § 867(c)(4) (2024), provides:

> (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)(2)(A)-(B), UCMJ, 10 U.S.C. § 920(b)(2)(A)-(B) (2018), provides:

> (b) SEXUAL ASSAULT. Any person subject to this chapter who—
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> (2) commits a sexual act upon another person—
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> (A) without the consent of the other person; or
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> (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 . . .
>
> is guilty of sexual assault and shall be punished as a court-martial may direct.[26]

[26] Article 120, UCMJ, has not been amended since 2017. The National Defense Appropriations Act for Fiscal Year 2018, Pub. L. No. 115–91, 131 Stat. 1598 (2017). The Government's brief discusses a "2019 amendment to Article 120, UCMJ," (Gov't Br. at 33-35), however this was a 2016 Amendment that took effect on Jan. 1, 2019. The National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114–328, 130 Stat. 2949 (2016). The version of Article 120, UCMJ, in effect at the time of the alleged offense, and at the time of trial, is the same version in effect as of the filing of this brief.

Statement of the Case

On January 13, 2023, a panel of officer and enlisted members sitting as a general court-martial convicted Amn Nicholas J. Moore, contrary to his pleas, of one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2018).[27] The members sentenced Amn Moore to a dishonorable discharge, 18 months' confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1.[28] The convening authority took no action on the findings and sentence of the court-martial.[29] On November 13, 2024, the AFCCA set aside the findings of guilty and the sentence, and dismissed with prejudice the charge and its specification.[30]

On March 5, 2025, the Air Force DJAG signed a Certificate for Review of the AFCCA's decision in Amn Moore's case.[31] On March 7, 2025, the Government filed the Certificate of Review with this Court.[32]

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[27] JA at 013, 224. Unless otherwise noted, all references to the UCMJ are to the version published in Appendix 2 of the *Manual for Courts-Martial*, *United States* (2019 ed.).
[28] JA at 013.
[29] JA at 016.
[30] JA at 010.
[31] Certificate for Review, Mar. 5, 2025. She purported to do so performing the duties of the Judge Advocate General.
[32] *United States v. Moore*, USCA Dkt. No. 25-0110, 2025 CAAF LEXIS 178 (C.A.A.F. Mar. 7, 2025).

Statement of Facts

A. AB testified that she was asleep when Amn Moore allegedly touched her.

Amn Moore was charged with one specification of sexual assault without consent, in violation of Article 120, UCMJ, for alleging sexually assaulting Airman First Class (A1C) AB.[33] At Amn Moore's court-martial, the Government called AB as its first witness.[34] AB testified that Amn Moore, A1C KA, and Senior Airman (SrA) BM, and she were friends who lived in the same dorm on Hill Air Force Base.[35] They would regularly get together to cook dinner and watch television.[36] According to AB, around 8 p.m. on February 8, 2022, the group of four Airmen got together in AB's dorm, cooked dinner, and watched a television show.[37] By 2230, A1C KA and SrA BM had left the dorm room, and only Amn Moore and AB remained.[38]

According to AB, she and Amn Moore were seated together on the couch in her room.[39] AB testified that she fell asleep on the couch, and woke up to Amn Moore's fingers inside her vagina.[40] Once she "had fully woken up" and

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[33] JA at 011. For purposes of consistency with the AFCCA's opinion, A1C AB will be referenced as AB below.
[34] JA at 024-25.
[35] JA at 027-28.
[36] JA at 028.
[37] JA at 029, 031.
[38] JA at 031-32.
[39] JA at 035.
[40] JA at 038-39, 042-43.

"realized that [Amn Moore] was inside of [her]," she pushed him off and said, "What the fuck are you doing?"[41] According to AB, Amn Moore said, "You're right, you're right," gathered his belongings, and then left her dorm room.[42]

Throughout AB's testimony, trial counsel brought up AB sleeping prior to, or waking up during, the alleged sexual assault at least nineteen times.[43] Trial counsel also asked AB about her sleep habits.[44] AB testified she was a "heavy sleeper," and she set three alarms at maximum volume to wake up each day.[45] Trial counsel asked AB, "[D]id you consent to the sexual activity?" and "Did you want [Amn] Moore to put his fingers inside of your vulva?"[46] AB answered, "No, sir."[47] Trial counsel then asked AB, "Were you asleep when that happened?"[48] AB replied, "Yes, sir."[49]

B. Three Government witnesses testified that AB told them she was asleep when the sexual assault allegedly happened.

After AB's testimony, the Government called three witnesses. SrA BM testified that AB told him that "she . . . fell asleep, and when she woke up . . . [Amn Moore] had his fingers inside of her."[50] Master Sergeant (MSgt) RS testified

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[41] JA at 045, 095-96.
[42] JA at 096-97.
[43] JA at 038-46, 118-20.
[44] JA at 041-42.
[45] *Id.*
[46] JA at 119-20.
[47] JA at 120.
[48] *Id.*
[49] *Id.*
[50] JA at 126, 129, 133.

that AB told him that "she fell asleep and woke up with [Amn Moore] on top of her."[51] Specialist (SPC) CW, AB's boyfriend at the time of the alleged sexual assault, testified that AB told him that "she woke up to someone touching her inappropriately."[52] The Government also elicited evidence from SPC CW that AB "is a heavy sleeper," that she "fall[s] asleep in movie theaters," and even if woken up, she "fall[s] back asleep immediately."[53]

C. During closing argument, the Government asserted the element of lack of consent was met because AB was asleep and incapable of consenting.

During closing argument, the Government maintained that AB was asleep and could not consent to sexual activity with Amn Moore. Trial counsel first described the purported facts, arguing that "[AB] [fell] into a sleep," that she was asleep "for approximately an hour," and then "she's woken up and the sexual assault is occurring."[54] Trial counsel then argued that "AB would have been going into a deep sleep," offered different scenarios of what happens when people are in a state of deep sleep, and argued how AB could have slept through aspects of the sexual assault while it was occurring.[55] Trial counsel contended a person "can be in [their] sleep and somewhat cognizant of what is physically happening to [them], but [they are]

[51] JA at 148.
[52] JA at 161.
[53] JA at 162
[54] JA at 179.
[55] JA at 180-81.

not fully conscious. [They] don't really know what's going on. And [AB] didn't either."[56] And only once "[AB brought] herself out of that subconscious state, she realize[d] . . . [t]hat [Amn] Moore's fingers [were] inside of her vulva."[57]

Trial counsel stated, "[Amn Moore didn't] have consent to [touch AB]. This was an act of subterfuge he did while she was sleeping."[58] Trial counsel then directly connected AB's state of sleep to the impossibility of consent:

> [S]pecifically for our case, "A sleeping person cannot consent." Legally, of course, that is an impossibility. So whether, members, [AB] was completely asleep, as she says, or even if defense wants to come up here and say, members, she was half-asleep, she was mumbling, she was sleep talking, is that actually consent? Of course not. You can't consent in that state.[59]

D. The AFCCA found Amn Moore's conviction legally and factually insufficient.

The AFCCA reviewed Amn Moore's conviction for legal and factual sufficiency, as well as whether Amn Moore's due process rights were violated because his conviction was for a different offense than the one the prosecution charged.[60] The lower court stated that "Article 120(b)(2)(A), UCMJ . . . and Article

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[56] JA at 182.
[57] *Id*.
[58] JA at 183.
[59] JA at 185-86.
[60] JA at 002. In his appeal before the AFCCA, Amn Moore challenged the legal sufficiency of his conviction pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). *Id.*

120(b)(2)(B), UCMJ . . . establish separate theories of liability."[61] Citing to this Court's decision in *Mendoza*, the AFCCA concluded that "the Government was required to show the victim was capable of consenting but did not" in order "to convict [Amn Moore] under a lack of consent theory."[62]

The AFCCA found Amn Moore's conviction legally insufficient because the Government charged sexual assault without consent but then proved a different theory centered on the alleged victim being asleep.[63] The AFCCA determined "the Government offered no evidence that AB was capable of consenting and did not consent."[64] Rather, "the Government's evidence presented during [Amn Moore's] court-martial was limited to the fact that AB was asleep, and therefore not capable of consenting when the sexual act occurred."[65] Additionally, "the Government's closing argument was solely focused on the fact that AB was incapable of consenting because she was a 'heavy sleeper' and was asleep while the sexual act occurred."[66]

For the same reasons, and after giving appropriate deference to the factfinder, the AFCCA was "clearly convinced the findings of guilty [were] against the weight

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[61] JA at 009.
[62] *Id.* (citing *United States v. Mendoza*, __ M.J. __, 2024 CAAF LEXIS 590, at *20-21 (C.A.A.F 2024)).
[63] JA at 009.
[64] *Id*.
[65] *Id.*
[66] JA at 010.

of the evidence."[67] Ultimately, the AFCCA found "the evidence in the record does not support legal or factual sufficiency and set aside the sole charge and specification of the conviction."[68]

Summary of the Argument

This Court affords a CCA significant deference when assessing the CCA's Article 66, UCMJ, factual sufficiency determination. This Court may review the lower court's factual sufficiency decision for the application of correct legal principles,[69] but this Court does not conduct its own factual sufficiency review.[70] Only when a CCA "acted without regard to a legal standard or otherwise abused its discretion" will this Court disrupt a CCA's action to disapprove findings.[71] Here, the AFCCA correctly interpreted and applied this Court's holding in *Mendoza* to

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[67] JA at 010.
[68] JA at 003.
[69] *United States v. Thompson*, 83 M.J. 1, 4 (C.A.A.F. 2022)(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."
[70] *See* 10 U.S.C. § 867 (2024) ("The Court of Appeals for the Armed Forces shall take action only with respect to matters of law."); *see also Mendoza*, 2024 CAAF LEXIS 590, at *21 (citations and quotations omitted) ("[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."); *but see United States v. Csiti*, 85 M.J. 139 (C.A.A.F. 2024) (granting a petition for review on the issue of whether this Court has statutory authority to decide whether a conviction is factually sufficient).
[71] *United States v. Nerad*, 69 M.J. 138, 147 (C.A.A.F. 2010).

Amn Moore's case.

Mendoza stands to remind the Government that it "cannot . . . charge one offense under one factual theory and then argue a different offense and a different factual theory at trial."[72] "Congress has articulated multiple legal theories of sexual assault."[73] Two of these theories are "sexual assault when the victim is capable of consenting and does not consent" and "sexual assault when the victim is physically incapable of consent and that condition is known or reasonably should be known by the accused."[74] Therefore, Article 120(b)(2)(A), UCMJ, and Article 120(b)(2)(B), UCMJ, create separate, inconsistent theories of criminal liability. Per *Mendoza*, the Government cannot charge sexual assault without consent and then attempt to prove lack of consent solely by arguing the victim is incapable of consenting.[75] The holding of *Mendoza* applies equally to cases where the Government charges sexual assault without consent and then argues lack of consent is met because the victim was asleep.

The AFCCA did not err in conducting its factual sufficiency review of Amn Moore's conviction. The Government charged Amn Moore with sexual assault without consent.[76] But at Amn Moore's trial, the Government repeatedly, and

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[72] *Mendoza*, 2024 CAAF LEXIS 590, at *18.
[73] *Id.* at *40-41 (Sparks, J., concurring in part, dissenting in part).
[74] *Id.*
[75] *Mendoza*, 2024 CAAF LEXIS 590, at *18.
[76] JA at 011.

exclusively, pursued a theory that AB was incapable of consenting because she was asleep. "An appellate court cannot affirm a criminal conviction on the basis of a theory of liability not presented to the trier of fact."[77] The sufficiency of a conviction must be tied to a permissible theory of liability.

The lower court applied the correct legal principles from *Mendoza* to Amn Moore's case, and its factual sufficiency review did not constitute an abuse of discretion. Thus, this Court does not need to decide whether the conviction is legally sufficient. This Court should find that the AFCCA did not err in its factual sufficiency analysis, answer the certified question in the negative, and affirm the decision of the AFCCA.

Furthermore, despite the Government's attempt to litigate the violation of Amn Moore's constitutional due process rights at his court-martial,[78] the Government declined to certify that issue for review.[79] As such, Amn Moore limits his argument to the certified issue before this Court.[80]

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[77] *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008) (citing *Chiarella v. United States*, 445 U.S. 222, 236-37 (1980)).
[78] Gov't Br. at 22-24.
[79] Certificate for Review, Mar. 5, 2025 (certifying only the issue of legal and factual sufficiency).
[80] *See Mendoza*, 2024 CAAF LEXIS 590, at *19 n.4 (citation omitted) ("[The appellant] argued both that his conviction was legally insufficient and that there had been a constructive amendment to the charged offense. This Court granted review only of the legal sufficiency issue. Accordingly, we consider any due process concerns only through the narrow lens of legal sufficiency.")

Argument

The Air Force Court of Criminal Appeals did not err in its application of *Mendoza* to Amn Moore's case, and the court correctly found Amn Moore'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."[81] 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]."[82] Although this Court "retain[s] the authority to review factual sufficiency determinations of the CCAs for the application of correct legal principles,"[83] it "shall take action only with respect to matters of law."[84]

When a CCA disapproves findings as factually insufficient, this Court "accept[s] the CCA's action unless in disapproving the findings the CCA clearly

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[81] *Mendoza*, 2024 CAAF LEXIS 590, at *21; *but see Csiti*, 85 M.J. 139 (granting a petition for review on the issue of whether this Court has statutory authority to decide whether a conviction is factually sufficient).
[82] *Thompson*, 83 M.J. at 3 (citation omitted).
[83] *Id.* at 4 (quotations and citations omitted); *see Leak*, 61 M.J. at 241 ("[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."
[84] 10 U.S.C. § 867(c)(4) (2024).

acted without regard to a legal standard or otherwise abused its discretion."[85] "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."[86]

Law and Analysis

A. Article 120(b)(2)(A), UCMJ, and Article 120(b)(2)(B), UCMJ, create separate, inconsistent theories of liability.

The holding in *Mendoza* is clear: Article 120(b)(2)(A), UCMJ, and Article 120(b)(3)(A), UCMJ, create separate, inconsistent theories of criminal liability[87] and "the Government cannot . . . charge one offense under one factual theory and then argue a different offense and a different factual theory at trial."[88] Doing so violates an accused's "constitutional 'right to know what offense and under what legal theory he will be tried and convicted.'"[89]

The same rationale applies to Article 120(b)(2)(B), UCMJ—sexual assault

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[85] *Nerad*, 69 M.J. at 147; *see Mendoza*, 2024 CAAF LEXIS 590, at *21 (quotations and citations omitted) ("[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.").
[86] *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010) (quotations and citations omitted).
[87] *Mendoza*, 2024 CAAF LEXIS 590, at *3-4.
[88] *Id.* at *18.
[89] *Id.* (quoting *United States v. Riggins*, 75 M.J. 78, 83 (C.A.A.F. 2016)).

when the victim is asleep.[90] To achieve a conviction under subsection (b)(2)(B),[91] the Government must prove not only that the victim was asleep, but also that the accused knew or reasonably should have known that the victim was asleep.[92] 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.[93]

The Government attempts to rewrite *Mendoza* by arguing this Court should not interpret subsection (b)(2)(A) to apply only to victims who are capable of consenting when it involves a sleeping victim.[94] But the interpretation of a statute does not change based on the facts of a case, the condition of the victim, or the strategy the Government pursues at trial. Furthermore, this Court already addressed the surplusage and constitutional due process concerns that would arise if the offense of sexual assault without consent did not apply only to victims who are capable of

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[90] 10 U.S.C. § 920(b)(2)(B) (2018).
[91] For readability purposes, Article 120(b)(2)(A), UCMJ, and Article 120(b)(2)(B), UCMJ, are referred to as "subsection (b)(2)(A)" and "subsection (b)(2)(B)," respectively.
[92] 10 U.S.C. § 920(b)(2)(B) (2018); *see Mendoza*, 2024 CAAF LEXIS 590, at *16-17 (explaining similar circumstances for Article 120(b)(3)(A), UCMJ).
[93] *See Mendoza*, 2024 CAAF LEXIS 590, at *17.
[94] Gov't Br. at 29-37.

consenting.[95] Were that the case, "every sexual act committed upon a victim who is incapable of consenting under subsection (b)(3)(A) would also qualify as a sexual assault under subsection (b)(2)(A) because the victim did not consent," rendering subsection (b)(3)(A) as surplusage.[96]

The same logic applies for subsection (b)(2)(B). If this Court does not interpret subsection (b)(2)(A) to only apply to victims who were capable of consenting, subsection (b)(2)(B) would become "mere surplusage without any purpose or effect."[97] Rendering (b)(2)(B) as surplusage would allow the Government to "circumvent the mens rea requirement that Congress specifically added to the offense of sexual assault of a victim" who is asleep.[98]

The Government's resort to legislative history to support its argument[99] is not warranted by the statutory text. This Court recently acknowledged the Supreme Court's reminders that "legislative history is not the law"[100] and that "using legislative history to determine legislative intent is 'a relic from a bygone era of

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[95] *See Mendoza*, 2024 CAAF LEXIS 590, at *16-17 ("[I]f the Government can establish the absence of consent by proving that the victim was incapable of consenting, then the Government can obtain an incapable-of-consent conviction under subsection (b)(2)(A) without proving the accused's mens rea beyond a reasonable doubt.").
[96] *Id.* at *16 (citation omitted).
[97] *Id*.
[98] *Id.*
[99] Gov't Br. at 33-34.
[100] *Azar v. Allina Health Servs.*, 587 U.S. 566, 579 (2019).

statutory construction.'"[101] Notwithstanding some lingering debate over the role of Congress's legislative history in construing a statute, the Government is seeking to suggest that a report by a Department of Defense (DoD) federal advisory committee establishes what Congress "contemplated."[102] Such an attenuated source is an improper tool in interpreting a statute's meaning. As Justice Scalia and Bryan Garner wrote, "Even if the members of each house wish to do so, they cannot assign responsibility for making law—or the details of law—to one of their number, or to one of their committees."[103] The notion that the details of law could be outsourced to a DoD federal advisory committee is even more extraordinary and unconstitutional. It is ironic that the Government cited this Court's opinion in *United States v. Valentin-Andino*[104] for the proposition that "extratextual sources" cannot change a statute's meaning,[105] while citing the JPP Report in its statutory construction argument.[106] But the fact remains—legislative history and historical

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[101] *United States v. Avery*, 79 M.J. 363, 368 n.8 (C.A.A.F. 2020) (quoting *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 437 (2019) (internal quotation marks omitted) (citation omitted)).
[102] *See* Gov't Br. at 34-35 (discussing the Judicial Proceedings Panel (JPP) Report on Article 120, UCMJ, and arguing that "the 2019 amendment to Article 120 contemplated that cases with significantly impaired victims who had no memory of the encounter might still be charged as sexual assault without consent.")
[103] ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 386 (2012).
[104] __ M.J. __, 2025 CAAF LEXIS 248 (C.A.A.F. 2025).
[105] Gov't Br. at 36.
[106] Gov't Br. at 34-35.

context do not supersede the text of Article 120, UCMJ, the Constitution, or the due process concerns that would arise if the Government were allowed to circumvent the mens rea requirement in subsection (b)(2)(B).[107]

In *Mendoza*, this Court surmised that the factfinder may have convicted the appellant of sexual assault on a theory that the victim was incapable of consenting without the Government proving that the appellant knew or should have known she was incapable.[108] This same due process violation can arise in cases where the Government charges sexual assault without consent but attempts to prove absence of consent by demonstrating the victim is asleep, and therefore incapable of consenting. And that is exactly what happened in Amn Moore's case, with the AFCCA finding a due process violation and the Government declining to certify that conclusion for review by this Court.[109] "[T]o avoid these [fundamental due process] concerns and consistent with the language and structure of Article 120, UCMJ," this

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[107] *See United States v. Ron Pair Enters.*, 489 U.S. 235, 240-41 (1989) ("Rather, as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute."); *see also SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 368 (2018) (citation omitted) ("We need not and will not invent an atextual explanation for Congress's drafting choices when the statute's own terms supply an answer.").

[108] *Mendoza*, 2024 CAAF LEXIS 590, at *17.

[109] *Compare* JA at 004 ("[T]he Government violated his due process rights by conflating two different theories of criminal liability under Article 120, UCMJ, during his court martial."), *with* Certificate for Review, Mar. 5, 2025 (certifying only the issue of legal and factual sufficiency), *and* Gov't Br. at 22-24 (arguing no due process violation occurred).

Court should clarify that subsection (b)(2)(A) and subsection (b)(2)(B) *also* establish separate theories of liability.

B. The prosecution's theory of liability guides a CCA's sufficiency analysis.

The Government's complaints about the lower court's decision should be viewed in the context of what the AFCCA actually did. Here, the AFCCA did not produce an opus full of expansive determinations of law. Instead, the AFCCA's dispositive analysis totaled a concise 252 words—counting citations—spanning two main points.[110] On the one hand was what the Government failed to show, as the AFCCA stressed the absence of "evidence that AB was capable of consenting and did not consent."[111] On the other was the Government's single-minded focus in presenting evidence and argument limited to AB's inability to consent due to being asleep.[112] In other words, there was no evidence to support a conviction under Article 120(b)(2)(A), UCMJ, and the only theory of liability that the Government did offer, when viewed as part of the AFCCA's consideration of the entire record, was one that the Government did not charge and, as discussed above, thereby was prohibited from arguing.

Discerning the delineated theory of liability at trial in this manner is consistent with the process from investigation through trial laid out in the Government's brief.

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[110] JA at 009-010.
[111] JA at 009.
[112] JA at 009-010.

The Government starts with evidence gathered by law enforcement.[113] Then the prosecution determines what to charge.[114] Once in trial, the Government can put forth one or multiple theories of liability under the charge.[115] For evaluating sufficiency of the conviction, a theory presented by the prosecution is tested against the Court's findings.[116]

But these latter junctures and their focus on the prosecution's theory of liability at trial are not boundless. There is no reason to believe, and the Government does not argue, that it can put forth a theory of liability that would fall outside the contours of the charged provision of the UCMJ. In turn, as the Government's brief indirectly acknowledges,[117] "[a]n appellate court cannot affirm a criminal conviction on the basis of a theory of liability not presented to the trier of fact."[118] The result is that the sufficiency of a conviction must be tied to a permissible theory of liability.

Here, the Government took an approach to theories of liability akin to a buffet, claiming it put a little bit of everything on the members' plates based on the expansive pre-*Mendoza* reading of Article 120(b)(2)(A) evinced by trial counsel's

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[113] *See* Gov't Br. at 31.
[114] *See* Gov't Br. at 25.
[115] *Ober*, 66 M.J. at 405.
[116] *See, e.g.*, *United States v. Nicola*, 78 M.J. 223, 226 (C.A.A.F. 2019) (evaluating legal sufficiency by examining the theory of liability—in other words, the means of committing the offense—at trial).
[117] Gov't Br. at 40.
[118] *Ober*, 66 M.J. at 405 (citing *Chiarella*, 445 U.S. at 236-37).

conduct. The Government appropriately concedes that trial counsel "did focus much of his closing argument on AB being asleep."[119] That constitutes one theory of liability, albeit one that was not charged. But the Government asserts there was another theory, that its case was not "*merely*" focused on AB being asleep,[120] and instead contained a separate theory related to a lack of consent.

As *Mendoza* establishes, only one of these theories was within the bounds of what Article 120(b)(2)(A), UCMJ, permits. AB being asleep was not a permissible theory because of how the Government chose to charge the case. But it is all the Government presented. The AFCCA's assessment of what the Government presented and argued is "a quintessential question of fact: what happened?"[121] As it relates to the AFCCA's determination regarding the factual sufficiency of the conviction, "what the [individual purportedly acting as the] Judge Advocate General of the Air Force seeks is to have [this Court] revisit the factual basis for the CCA's legal ruling" and is beyond the scope of this Court's authority.[122] Just as importantly, that factual basis underlying the AFCCA's determination is amply supported by the law and the record below.

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[119] Gov't Br. at 39; *see also* Gov't Br. at 20 (acknowledging the same).
[120] Gov't Br. at 18 (emphasis added in Gov't's Br.) (citing *Mendoza*, 2024 CAAF LEXIS 590, at *22).
[121] *Kerr v. Dittman*, 744 F.3d 483, 487 (7th Cir. 2014).
[122] *United States v. Piolunek*, 74 M.J. 107, 110 (C.A.A.F. 2015).

C. The AFCCA did not abuse its discretion in conducting its factual sufficiency review of Amn Moore's case.

To convict Amn Moore of sexual assault in violation of Article 120(b)(2)(A), UCMJ, the Government was required to prove beyond a reasonable doubt that Amn Moore: (1) committed a sexual act upon AB, and (2) that he did so "without the consent" of AB.[123] The AFCCA correctly concluded that when the Government charged Amn Moore with sexual assault without consent in violation of Article 120(b)(2)(A), UCMJ, it "was required to show the victim was capable of consenting but did not."[124] "[A] charge of sexual assault without consent is equivalent to the government stipulating that the victim was competent to consent under the circumstances alleged."[125] "[E]vidence establishing [a] victim's incapacity necessarily disproves an allegation of sexual assault without consent."[126]

In applying the law to the facts, the AFCCA found that "the Government offered no evidence that AB was capable of consenting and did not consent."[127] Rather, the Government's presentation of evidence "was limited to the fact that AB was asleep, and therefore not capable of consenting when the sexual act occurred."[128]

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[123] 10 U.S.C. § 920(b)(2)(A) (2018); *Mendoza*, 2024 CAAF LEXIS 590, at *17-19.
[124] JA at 009 (citing *Mendoza*, 2024 CAAF LEXIS 590, at *20-21).
[125] *Mendoza*, 2024 CAAF LEXIS 590, at *47 (Sparks, J., dissenting in part, concurring in part).
[126] *Id.* at *46 (Sparks, J., dissenting in part, concurring in part).
[127] JA at 009.
[128] JA at 009.

AB testified that while she and Amn Moore were sitting on her couch in her dorm room, she fell asleep and woke up to Amn Moore's fingers inside her vagina.[129] According to AB, once she "had fully woken up" and "realized that [Amn Moore] was inside of [her]," she pushed him off.[130] Throughout AB's testimony, trial counsel brought up AB sleeping prior to, or waking up during, the alleged sexual assault at least nineteen times.[131] He asked her about her sleep habits, how many alarms AB sets to wake up in the morning (AB responded three alarms), and whether AB is a light or heavy sleeper (AB responded she is a heavy sleeper).[132]

Trial counsel asked AB whether she "consent[ed] to the sexual activity[,]" and whether she "want[ed] [Amn] Moore to put his fingers inside of [her] vulva[.]"[133] Even though AB answered, "No," to both questions,[134] it only demonstrated that she *would not* have consented. This is not the same as testimony that she was capable of consenting and did not. Trial counsel followed up these questions with, "Were you asleep when that happened?" to which AB responded, "Yes"[135]—further demonstrating that the Government's presentation of evidence was focused on AB's lack of capacity to consent.

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[129] JA at 038-39, 042-43.
[130] JA at 045.
[131] JA at 038-46; 118-20.
[132] JA at 041-42.
[133] JA at 119-20.
[134] *Id.*
[135] JA at 120.

During the remainder of the presentation of evidence, the Government advanced the asleep theory of liability. SrA BM testified that AB told him that "she . . . fell asleep, and when she woke up . . . [Amn Moore] had his fingers inside of her."[136] MSgt RS testified that AB told him that "she fell asleep and woke up with [Amn Moore] on top of her."[137] SPC CW testified that AB told him that "she woke up to someone touching her inappropriately."[138] Furthermore, the Government elicited evidence from SPC CW that AB "is a heavy sleeper," that she "fall[s] asleep in movie theaters," and even if woken up, she "fall[s] back asleep immediately."[139]

During closing argument, the Government repeatedly and emphatically argued that AB was asleep and could not consent to sexual activity with Amn Moore. Trial counsel first argued that "[AB] [fell] into a sleep," that she was asleep "for approximately an hour," and then "she[ ] woke[ ] up and the sexual assault [was] occurring."[140] Trial counsel then argued that "AB would have been going into a deep sleep," offered different scenarios of what happens when people are in a state of deep sleep, and posited how AB could have slept through aspects of the sexual assault while it was occurring.[141] Relentlessly asserting the asleep theory, trial

[136] JA at 126; *see* JA at 129, 133.
[137] JA at 148.
[138] JA at 161.
[139] JA at 162
[140] JA at 179.
[141] JA at 180-81.

counsel contended a person "can be in [their] sleep and somewhat cognizant of what is physically happening to [them], but [they are] not fully conscious. [They] don't really know what's going on. And [AB] didn't either."[142] And only once "[AB brought] herself out of that subconscious state, she realize[d] . . . [t]hat [Amn] Moore's fingers [were] inside of her vulva."[143] Trial counsel then directly connected AB's state of sleep to the impossibility of consent:

> [S]pecifically for our case, "A sleeping person cannot consent." *Legally, of course, that is an impossibility*. So whether, members, [AB] was completely asleep, as she says, or even if defense wants to come up here and say, members, she was half-asleep, she was mumbling, she was sleep talking, is that actually consent? Of course not. *You can't consent in that state*.[144]

This clearly established sleep as the fundamental premise negating consent in the Government's theory of liability, and it is one with which the Government is now stuck on appeal.[145]

The Government tries to analogize Amn Moore's case with *United States v. Boren*, a recent decision by the AFCCA where it found the appellant's conviction legally and factually sufficient.[146] But the Government misses a key fact that distinguishes the AFCCA's opinion in *Boren* from its decision in Amn Moore's

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[142] JA at 182.
[143] *Id*.
[144] JA at 185-86.
[145] *See Ober*, 66 M.J. at 405 (citing *Chiarella*, 445 U.S. at 236-37).
[146] 2025 CCA LEXIS 103 (A.F. Ct. Crim. App. Mar. 19, 2025).

case. In *Boren*, the victim "testified that she awoke to the feeling of [the appellant] touching her vagina with his fingers through her clothing."[147] According to the victim's testimony, "the touching stopped," she "laid there awake attempting to process what had just happened," and then the appellant "*touched her vagina again*."[148] The lower court's decision in *Boren* indicates that it found the latter touching met the elements for sexual assault without consent—specifically, that the victim was capable of consenting but did not consent.[149]

This is not what happened in Amn Moore's case. According to AB, once she had fully woken up and realized Amn Moore was touching her vagina, she immediately pushed him off her.[150] The AFCCA found AB was asleep, and thus not capable of consenting, when the actus reus occurred.[151] After affording appropriate deference to the factfinder, the lower court was clearly convinced the findings of guilty were against the weight of the evidence.[152] Even if this Court would have

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[147] *Boren*, 2025 CCA LEXIS 103, at *16.
[148] *Id.* (emphasis added).
[149] *See id.* at *16-17 ("[T]he evidence introduced at trial demonstrates that, towards the end of the encounter, [the victim] was both capable of consenting and never consented to [the appellant] touching her vagina . . . the Government presented ample evidence to establish that [the victim] was awake and capable of consenting when the *actus reus* . . . was occurring.").
[150] JA at 045.
[151] *See* JA at 009 ("[T]he Government offered no evidence that AB was capable of consenting and did not consent. Instead, the Government's evidence presented during [Amn Moore's] court-martial was limited to the fact that AB was asleep, and therefore not capable of consenting when the sexual act occurred.").
[152] JA at 010.

resolved the factual sufficiency review differently, it cannot overturn the lower court's determination on that basis alone.[153] The AFCCA applied the correct legal principles to the facts in Amn Moore's case and correctly found Amn Moore's conviction factually insufficient. And because the lower court's factual sufficiency review did not constitute an abuse of discretion, this Court does not need to decide whether the conviction is legally sufficient.

Conclusion

The AFCCA correctly interpreted and applied this Court's holding in *Mendoza* to Amn Moore's case. At Amn Moore's court-martial, the Government repeatedly, and exclusively, pursued a theory of incapable of consent due to the alleged victim being asleep. The lower court correctly found that the Government's evidence presented at trial "was limited to the fact that AB was asleep, and therefore not capable of consenting when the sexual act occurred."[154] After applying the correct legal principles from *Mendoza* to Amn Moore's case, the AFCCA correctly concluded that Amn Moore's conviction was factually insufficient. Because the lower court's factual sufficiency review did not constitute an abuse of discretion, this Court does not need to decide whether the conviction is legally sufficient. This

[153] *See Nerad*, 69 M.J. at 147 ("To be clear, when a CCA acts to disapprove findings . . . 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.").
[154] JA at 009.

Court should find that the AFCCA did not err in its factual sufficiency analysis, answer the certified question in the negative, and affirm the decision of the AFCCA.

Although not certified as an issue before this Court, the Government violated Amn Moore's Fifth and Sixth Amendment constitutional rights to due process and fair notice at his court-martial.[155] If this Court finds Amn Moore's conviction is legally sufficient, and finds that the lower court's factual sufficiency review was an abuse of discretion, Amn Moore requests this Court remand his case back to the AFCCA for a new factual sufficiency review and to allow for briefing and further disposition of these constitutional issues and the other issues earlier raised by Amn Moore.

Respectfully submitted,

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[155] *See* JA at 009 (finding a due process violation); U.S. CONST. amend. V, VI.

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 May 7, 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 10,104 words.

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

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