IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*	)	**UNITED STATES' BRIEF IN SUPPORT OF THE CERTIFIED ISSUES**
v.	)	
Technical Sergeant (E-6) **VIDARR SLAYTON** United States Air Force *Appellant.*	)	Crim. App. No. 40583 USC Dkt. No. 26-0077/AF 9 February 2026

UNITED STATES' BRIEF IN SUPPORT OF THE CERTIFIED ISSUES

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

ISSUES CERTIFIED

I.

DID THE AIR FORCE COURT OF CRIMINAL APPEALS ERR BY FINDING APPELLEE'S CONVICTION FACTUALLY INSUFFICIENT, IN PART, BASED ON MISTAKE OF FACT AS TO CONSENT, WHEN APPELLEE DID NOT IDENTIFY OR ARGUE MISTAKE OF FACT AS TO CONSENT AS A SPECIFIC DEFICIENCY IN PROOF IN HIS APPEAL?

II.

DID THE AIR FORCE COURT OF CRIMINAL APPEALS ERR IN APPLYING UNITED STATES V. MENDOZA, 85 M.J. 213 (C.A.A.F. 2024) TO FIND APPELLEE'S SEXUAL ASSAULT CONVICTION FACTUALLY INSUFFICIENT?

III.

DID THE AIR FORCE COURT OF CRIMINAL APPEALS ABUSE ITS DISCRETION BY FAILING TO GIVE APPROPRIATE DEFERENCE TO THE FACT THAT THE TRIAL COURT SAW AND HEARD THE WITNESSES AND OTHER EVIDENCE?

INTRODUCTION

Appellee was charged with committing sexual assault without consent upon CL. (JA 24.) The trial involved competing testimony from the victim, CL, and Appellee. CL testified that after a night of heavy drinking, she awoke to Appellee having sex with her – something she had not consented to. (JA 62-66, 74, 101.) When she realized what was happening, she moved away from Appellee on the bed to get him to stop. (JA 79.) In contrast, Appellee testified at trial that CL was awake and participating at all times, and in fact, initiated the sexual intercourse. (JA 196-98.) But in Facebook messages exchanged between the Appellee and CL 11 days after the encounter, Appellee had essentially acknowledged that he had sex with CL when she was "not moving," "not facing" him, and "not touching" him, admitting that he did not know why he thought doing that was "okay." (JA 347.)

By convicting Appellee of sexual assault, the court members necessarily believed CL's testimony and disbelieved Appellee's. But the Air Force Court of Criminal Appeals (AFCCA) overturned Appellee's conviction as factually insufficient by accepting Appellee's trial testimony at face value, rather than

giving "appropriate deference to the fact that the trial court saw and heard the witnesses," as required by Article 66(d)(1)(B)(ii)(I), UCMJ, 10 U.S.C § 866(d)(1)(B)(ii)(I) (Supp. II 2019-2021). Relying on Appellee's version of events, AFCCA found that the government failed to prove CL was capable of consenting at the time of the sexual act and did not consent, and also failed to disprove mistake of fact as to consent. (JA 2.) In overturning Appellee's conviction, AFCCA second-guessed the members' credibility determinations on a cold record – a result that, on its face, Article 66(d)(1)(B)(ii)(I) intends to limit.

Not only did AFCCA abuse its discretion by giving no deference to the members' determination that CL was credible and Appellee was not, AFCCA erred in its factual sufficiency review in two other ways that require reversal. To start, the court erred by finding factual insufficiency based on mistake of fact as to consent, when Appellee never raised mistake of fact as a "specific deficiency in proof" as required under Article 66(d)(1)(B)(i). Next, this Court misapplied United States v. Mendoza, 85 M.J. 213 (C.A.A.F. 2024) to erroneously require that the government prove beyond a reasonable doubt that CL was "capable of consenting" at the time of the sexual act. Based on AFCCA's three errors, this Court should vacate AFCCA's decision and remand the case for a new Article 66 review using correct legal principles.

STATEMENT OF STATUTORY JURISDICTION

AFCCA reviewed this case under Article 66(d)(1)(B), UCMJ. This Court has jurisdiction to review this case under Article 67(a)(2), UCMJ, 10 U.S.C § 867(a)(2) (Supp. II 2019-2021).

RELEVANT AUTHORITIES

Article 66 (d)(1)(B), UCMJ, defines the test for a CCA to review a conviction for factual sufficiency, stating as follows:

> (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.

Article 67, UCMJ states, in relevant part:

> (c)(1) In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to—
>
> > (C) the findings set forth in the entry of judgment, as affirmed, dismissed, set aside, or modified by the Court of Criminal Appeals as incorrect in fact under section 866(d)(1)(B) of this title (article 66(d)(1)(B)).
>
> (4) The Court of Appeals for the Armed Forces shall only take action with respect to matters of law.

Article 120(b), UCMJ states, in relevant part:

> (b) SEXUAL ASSAULT.—Any person subject to this chapter who—
>
> > (2) commits a sexual act upon another person—
> >
> > (A) without the consent of the other person;
> >
> > (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.

10 U.S.C. § 920(b) (2018).

Article 120(g)(7), UCMJ defines "consent" as follows:

> (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.

10 U.S.C. § 920(g)(7).

STATEMENT OF THE CASE

Appellee was tried by a general court-martial composed of officer and enlisted members at Patrick Space Force Base, Florida. (JA 26.) Contrary to his pleas, he was convicted of one specification of sexual assault without consent against CL, in violation of Article 120(b)(2)(A), UCMJ. (Id.)

The members sentenced Appellee to a dishonorable discharge, confinement for 9 months, reduction to the grade of E-1, and a reprimand. (Id.) The convening authority took no action on the findings and approved the adjudged sentence. (Id.)

On appeal, AFCCA found the evidence of Appellee's guilt for sexually assaulting CL factually insufficient. United States v. Slayton, 2025 CCA LEXIS 427 (A.F. Ct. Crim. App. 8 September 2024) (unpub. op.). (JA 1-23.) The court therefore set aside Appellee's sexual assault conviction and dismissed the specification with prejudice. (JA 15.) The government requested reconsideration of AFCCA's decision, which AFCCA denied. (JA 581.)

The general officer performing the duties of the Judge Advocate General, timely certified this case to this Court under Article 67(a)(2), UCMJ, for review.

STATEMENT OF FACTS

The government's case against Appellee

CL met Appellee in technical school for retraining into the religious affairs career field at Keesler Air Force Base, Mississippi in March 2022. (JA 53.) Five days into the training, CL and Appellee decided to go to a concert at the Beau Rivage casino in Biloxi, Mississippi. (JA 57-58.) CL did not view this as a date, nor did she want Appellee to think it was a date. (JA 59.)

On 12 March 2022, Appellee picked CL up at her hotel, which was about six minutes away from the casino. (JA 61.) Trial counsel elicited that there had been no romantic interactions between CL and Appellee in the days before the concert. (Id.) CL drank a large amount of alcohol that night, and by the end of the concert, "felt very drunk." (JA 62-66.)

CL recalled going to a couple of bars and Waffle House after the concert. (JA 68.) She did not recall much from Waffle House, "just sitting at a booth and talking to the waitress," with Appellee across from her. (Id.) CL did not remember leaving Waffle House, getting back to her hotel, walking into her room, preparing to go to bed, or going to bed. (JA 69, 74.)

The next thing CL remembered was waking up to Appellee behind her thrusting his penis inside her. (JA 74, 78.) CL was on the side of the bed closest to the window, on her left side facing the window, wearing a T-shirt and nothing else. (JA 74, 77.) CL felt "scared, confused," and "violated." She moved her body over towards the window away from Appellee, which stopped the penetration. (JA 79.)

CL started crying, and Appellee came around to her side of the bed and knelt down in front of her face. (JA 80.) Appellee asked what was wrong, and CL said she felt like Appellee had raped her. (JA 81.) Appellee said he was sorry CL felt that way and that he had been raped before. (JA 82.) CL thought she fell back asleep at that point and remembered waking up to Appellee leaving. (JA 82-83.) CL called her boyfriend and told him what happened. (JA 84.)

When CL went into the bathroom after the incident, she noticed the clothes she had worn to the concert. (JA 86.) That suggested to CL that she had brought her pajamas into the bathroom to close the door and change and that she had not been comfortable taking her clothes off with Appellee in the room. (Id.)

CL then went to an off-base emergency room because she was unsure whether she wanted to report the incident. (JA 88-89.) Two days later, she reported the sexual assault to an instructor at her course and decided to file an unrestricted report of sexual assault. (JA 92-93.)

As part of the investigation, on 24 March 2022, 11 days after the encounter, CL engaged in a pretext conversation over Facebook Messenger with Appellee. (JA 95-96.) At trial, the government presented Facebook messages between CL and Appellee. (JA 343-48.) Appellee described engaging in sexual activity with CL and him being "in and out of consciousness/drunken sleep." (JA 343.) CL said she "was under the impression that [Appellee] wouldn't take advantage of [her] like that." Appellee replied that he was "blacked out drunk and definitely not making good decisions." (Id.) Appellee said that "when it started it was mutual, I'm not saying consensual . . .," and then explained "you can't consent if you're drinking but you can be two people acting on something mutual." (Id.)

CL told Appellee, "I was literally asleep and you had sex with me anyways . . . Nothing was mutual in any moment because I don't remember it and there's no possible way I could have consented to it while I was sleeping." (JA 346.) Later, CL asked, "So you're not disagreeing that I was asleep when you had sex with me?" (Id.) Appellee responded, "The 2nd time that may be what happened I

wasn't fully aware if you were or not but if you were then yes." (Id.) After some more discussion, the following exchange occurred:

> **CL:** "So you're saying we had sex twice and the second time was when I was asleep and that's when I woke up? But you just thought it was a continuation of the first time?"
>
> **Appellee:** Correct.
>
> **CL:** How could you not tell I was asleep if I was laying on my side not even facing you? And you still have sex with me?
>
> **Appellee:** Because I wasn't fully conscious at all. I think we both passed out between that and I was half asleep and drunk. And you hadn't been facing me before the end of what we were doing.

(JA 347.)

Then the following exchange occurred:

> **CL:** Even if you were half asleep and drunk, if I'm not moving or facing you or touching you at all why would you think it would be okay to have sex with me?
>
> **Appellee:** I don't know why. I wouldn't if I were thinking it through.

(Id.)

Later, the two said:

> **CL:** I already told you I don't remember anything except waking up to you being inside of me. Nothing was ever mutual and it's fucked up that you're trying to say it was.
>
> **Appellee:** When you asked me to come to bed, asked me to touch you, etc. that part. The last part yes I fucked up. I completely made a terrible judgment and did the wrong thing. It was all wrong.

(JA 348.)

CL testified that she was "[o]ne hundred percent confident" that she was asleep before she awoke to Appellee's penis in her vagina. (JA 101.) When trial counsel asked, "Did you tell the accused that he could penetrate [your] vagina while you slept?," CL responded "No." (Id.) When trial counsel asked, "Did you consent to the accused penetrating your vagina while you slept?," CL responded "No." (Id.)

The government introduced closed camera television (CCTV) footage that contained images of Appellee and CL generally interacting in a friendly manner at the casino. (JA 349). But one clip showed CL and Appellee in the garage elevator as they were leaving the casino. (Id., Clip 38.) In the clip, Appellee leaned in to kiss CL, but she pushed him away. (Id.) CL testified that she did not remember pushing Appellee away in the elevator. (JA 110.)

The defense's case

The defense presented testimony from Dr. KR, an expert in forensic psychology who explained that someone in an alcohol-induced blackout is "awake and functioning," but "just not remembering" what happened. (JA 155, 160.) According to Dr. KR, someone in a blackout can engage in goal-directed behaviors and engage in consensual sexual behavior, but an outside observer often cannot tell whether someone is in a blackout. (JA 160, 162.)

Appellee testified at his court-martial. He claimed that after the concert, on the way to his car, CL jumped into his arms and wrapped her legs around him. (JA 189.) Appellee disclaimed that CL needed any help getting around. (JA 191-92.) He asserted that the two were being flirtatious with each other and hugged and kissed. (JA 194.) The two eventually went back to CL's hotel, where Appellee said CL had no trouble managing the stairs to her room on the second floor. (JA 192.) According to Appellee, CL offered for him to sleep on the floor so he would not have to drive back onto base after drinking alcohol. (Id.) Appellee confirmed that CL went into the bathroom to change her clothes, and she came out wearing a T-shirt and shorts. (JA 193.)

Appellee next claimed that CL invited him into the bed, where they touched and kissed each other. (JA 195.) According to Appellee, CL took her own shorts off, pulled Appellee on top of her, implied she wanted him to perform oral sex, and helped undress Appellee. (JA 196-97.) Appellee said CL was awake and never said she did not want Appellee to do these things. (Id.) Appellee said CL retrieved a condom, and the two had sexual intercourse. (JA 197-98.) Appellee disclaimed having sex with CL "at any point . . . while she was asleep" or unconscious. (JA 198, 206, 212.)

Appellee testified that he then fell asleep and woke up flaccid. (JA 200.) At that point, Appellee touched CL, and she recoiled from him, moved away, and told

him to leave. (Id.) Appellee said that eventually he knelt down in front of CL, and she said she felt like Appellee had raped her. (JA 202.)

Appellee said that he disagreed with CL's testimony that he was thrusting inside her when she woke up. (JA 203-04.) Appellee's counsel asked him whether CL ever told Appellee that she did not "want to consent to any sexual activity," and Appellee responded that CL had not. (JA 212.) But Appellee admitted on cross-examination that he had tried to kiss CL in the elevator and that she rebuffed him by pushing him away. (JA 230-31.)

Appellee explained his Facebook messages with CL by saying that he did not want CL to think he was "gaslighting her," so he tried to agree with some parts of her story. (JA 207.) Appellee claimed that he did not tell CL that she was "okay" with the sexual acts during the Facebook conversation, because he did not want her to feel like he was "just mansplaining what happened to her." (JA 207-08.) Appellee also said he was giving CL "double speak" and "placating her." (JA 209.)

Appellee claimed that when he said during the messaging that he had sex with CL when she was asleep, he was "frustrated" and was being "sarcastic," because he thought CL did not care what his side of the story was, so he was "just going to give her whatever it is she's looking for." (JA 209-10.) Appellee also said

that when he referred to making a "mistake," he was referring to cheating on his wife and driving while he had been drinking. (JA 211.)

Appellee admitted during his trial testimony that he lied to CL in the text messages about being "in and out of consciousness" and "in a drunken sleep." (JA 240.) He claimed that he was lying to CL in the text messages when he said that he may have been penetrating her while she was asleep. (JA 246.) In fact, Appellee agreed with trial counsel on cross-examination that he was lying to CL "throughout the course of the[] text messages." (JA 250.) During the last exchange of redirect examination, Appellee said that although he felt bad about the situation, it was not because he did not think CL "gave consent." (JA 270.)

Closing arguments of the parties

During closing argument, trial counsel began by describing how CL "woke up . . . to the accused thrusting his penis in her vagina, *something that she had never consented to.*" (JA 293.) (emphasis added). He emphasized that Appellee had sex with CL "as she slept, while she's not moving, while she's not touching him, while she's not facing him, not speaking to him, not interacting with him." (JA 295.) Trial counsel described that CL "woke up to somebody she never invited into her bed." (JA 296.)

Trial counsel reiterated that "consent" was a "freely given agreement" and asked the members to think about how individuals form agreements. (JA 297.) He

said that "[y]ou can't form agreements with a sleeping or unconscious person." (Id.) Trial counsel told the members that they had to consider "all the surrounding circumstances," and said, "Where is the evidence for this consent? In these particular circumstances, these circumstances where she's laying on the bed, motionless, not communicating, not speaking to him, not gesturing at him. Nothing. What evidence do we have that a freely given agreement was made in that moment for the accused to penetrate her?" (JA 298.)

Trial counsel explained that one reason why there was no consent was because CL was asleep. (JA 301.) But he then said, "It doesn't really matter if she was asleep in this context." (JA 305.) He told the members to "*remove sleep from the situation*," and said:

> She is laying there not moving, not facing, not touching him at all. Why, under those circumstances do you think its okay to have sex with me? Why, under those circumstances, would it be okay to have sex with anyone? Awake, asleep, drunk out of their mind, tripping on acid, what difference does it possibly make if these are the conditions we're facing? There cannot have been a freely given agreement in these circumstances, because she's not moving, she's not touching him, she's not facing him, not speaking to him, not interacting with him. That equals no agreement and no consent.

(JA 305-06.) (emphasis added).

Trial counsel then reiterated, "if an individual is motionless, laying away from you, not communicating with you, you cannot get their agreement to do

anything. Nothing. That's the case whether she was asleep or blacked out or wide awake. Makes no difference." (JA 306.)

Then, when discussing mistake of fact as to consent, trial counsel stated that CL "moved away from [Appellee] to stop the sex. She said nothing, didn't look over. Didn't look around." (JA 308.) And trial counsel pointed out that there was nothing in the text messages to suggest that CL had given consent. (JA 309.) As one of his final statements trial counsel said, "I lay down here on the floor, face away from all of you, and then ask whether it's possible for us to reach some sort of agreement, there's some sort of psychic connection, I would be laughed at" (JA 314.)

In contrast, the defense's main theory during closing argument was that CL was in a blackout, but awake and consented, or Appellee had a mistake of fact as to consent. (JA 317-19, 329.)

Appellee's brief before AFCCA

In his brief at AFCCA, Appellee did not assert "mistake of a fact as to consent" as a specific deficiency in proof. In fact, Appellee only mentioned "mistake of fact" twice in his brief: first, when recounting how trial counsel argued against the mistake of fact defense; and second, when describing how the defense, at one point during trial, asked the military judge to reread the mistake of

fact instruction to the members. (JA 478, 480.) Appellee did not mention mistake of fact in his reply brief. (JA 462-81.)

AFCCA's opinion

In overturning Appellee's conviction for factual insufficiency, AFCCA held "that CL did not consent to a sexual act with Appell[ee] at a time when she may have been capable of consenting and that the Government failed to disprove Appell[ee] had a reasonable and honest mistake of fact beyond a reasonable doubt as to CL's consent to engage sexually with Appell[ee]." (JA 2.)

AFCCA's opinion described that "[CCTV] from the casino shows [Appellee and CL] interacting in a friendly manner with him touching her shoulder and playing with her hair. CCTV footage further shows the two dancing together back-to-back and generally interacting in a close matter." (JA 4.) AFCCA's opinion did not mention the CCTV footage from the garage elevator where CL pushed Appellee away when he tried to kiss her.

In recounting the Facebook message conversation between CL and Appellee, AFCCA only stated that "Appell[ee] texted, *inter alia*, that he was sorry for what happened that night and that he made mistakes." (JA 5-6.) AFCCA did not mention any admissions Appellee made in the Facebook messages about CL being asleep or not moving, facing him, or touching him.

AFCCA stated that "[t]he Government's theory on the lack of consent was predicated solely on the fact that CL was sleeping when Appell[ee] penetrated her," and that "[a]ll of the Government's arguments centered around this theory of a sleeping victim." (JA 6.)

AFCCA then claimed that Appellee "had asserted an assignment of error and shown a specific deficiency in proof." (JA 10.) But the court did not identify what "specific deficiency in proof" Appellee had shown. Despite Appellee not raising mistake of fact as a specific deficiency in proof, AFCCA claimed that "intrinsic to [the] theory [that CL did not consent at a time when she was capable of consenting] and raised by Appell[ee] at trial *and on appeal* is his contention that if in fact CL did not consent, he held an honest and reasonable mistake of fact as to consent. (JA 10.) (emphasis added).

AFCCA stated, "Appell[ee]'s testimony of what occurred after they returned to CL's hotel room leading up to and including the sexual act was more complete than the events relayed by CL." (JA 10). Thus, AFCCA was left "with significant questions unanswered related to whether CL was capable of consenting at any point surrounding the sexual act(s) and whether she did not consent to sexual conduct with Appell[ee]." (JA 11.)

AFCCA said that some of CL's and Appellee's conduct "could be characterized as flirtatious," and then stated, *"[a]ccording to Appell[ee],* they also

hugged and kissed. At one point, CL jumped playfully into his arms and threw her legs around him." (Id.) (emphasis added.) The court figured that "[i]t is not inconceivable that this mutual flirtatious behavior continued when they were in CL's hotel room in the early morning hours after leaving the Waffle House as described by Appell[ee]." (Id.) AFCCA then said, "Given the conflicting evidence about what occurred in CL's hotel room and her complete lack of memory during that time, in addition to the testimony from both CL and Appell[ee] comprising the totality of the circumstances of the evening, we are not convinced beyond a reasonable doubt that CL was, at the time of the sexual act, capable of consenting but did not consent." (JA 12.)

AFCCA then said that even if CL could consent before any sexual acts occurred, but did not consent, "the Government did not disprove the affirmative defense of mistake of fact as to consent." (Id.) The court again claimed that "[a]t trial *and on appeal*, Appell[ee] raised the defense of reasonable mistake of fact as to consent." (Id.) (emphasis added). The court proceeded to describe in two long paragraphs only Appellee's testimony about the interactions between Appellee and CL leading up to the charged incident. (JA 12-13.) The court concluded that [g]iven the facts as provided by Appell[ee], *the person with the clearest account of events throughout the evening*, we find the Government did not disprove

Appell[ee]'s contention that he had an honest and reasonable mistake of fact as to consent by CL for the sexual act(s) between the two." (JA 13.) (emphasis added).

AFCCA found it crucial that Appellee was not charged with sexual assault on a sleeping person. (Id.) The court claimed that "[e]ffectively, the Government charged one offense and factual theory and then argued a different offense and different factual theory at trial." (Id.) AFCCA distinguished this Court's recent opinion in United States v. Casillas, 86 M.J. 94 (C.A.A.F. 2025), saying that even if there were a point where CL woke up, realized Appellee was penetrating her, and moved over on the bed to stop the penetration, Appellee would have a reasonable mistake of fact before that happened. (Id.) The court claimed that (1) "if you believe Appell[ee], sex was not occurring at the moment CL awoke and indicated by recoiling that she did not want Appell[ee] to touch her;" or (2) "If you believe CL, there was no point in the moment when she was awake and capable of consenting wherein Appell[ee] would have known she did not in fact consent." (JA 14). AFCCA found that "[b]oth scenarios result in the facts being insufficient to sustain the conviction." (Id.)

The Chief Judge wrote a separate opinion dissenting in part and concurring in the result in part. (JA 15-23.) He found that Appellee "did not make a 'specific showing' the findings were factually insufficient either because CL's testimony was not credible, or because Appell[ee] had a reasonable mistake of fact that CL

was consenting, or any other specific basis." (JA 19.) As a result, the Chief Judge asserted that "according to my understanding of Article 120(b)(2)(A), UCMJ, I do not believe I am empowered to review the factual sufficiency of the evidence on such alternative bases." (Id.) The Chief Judge would have found the conviction factually sufficient but would have overturned the conviction based on improper argument under Mendoza and authorized a rehearing. (JA 19-23.)

SUMMARY OF ARGUMENT

AFCCA's factual insufficiency determination under Article 66(d)(1)(B), UCMJ was marred by three legal errors. First, AFCCA erroneously found Appellee's sexual assault conviction factually insufficient based on a "deficiency in proof" – mistake of fact as to consent – not specifically raised by Appellee as required by Article 66(d)(1)(B)(i). Second, the court incorrectly applied Mendoza by requiring the government to prove beyond a reasonable doubt that CL was "capable of consenting" at the time of the sexual act, and by disregarding the evidence, other than sleep, that the government presented to prove lack of consent. Third, AFCCA abused its discretion by failing to give any deference, let alone "appropriate deference," to the fact that the court members saw and heard the witnesses and obviously credited CL's testimony over Appellee's.

Issue I presents the same issue as another certified case before this Court, United States v. Hunt, Dkt. No. 25-0257/AF, so this Court's eventual decision in

Hunt should also apply here. AFCCA found Appellee's conviction factually insufficient, in part, based on the government's failure to disprove Appellee's mistake of fact as to consent beyond a reasonable doubt. The court did so despite Appellee not raising mistake of fact as to consent as a specific "deficiency in proof" in his brief before AFCCA. This was error. Article 66(d)(1)(B)(i) requires an appellant to make a "specific showing of a deficiency in proof" before a Court of Criminal Appeals (CCA) can "weigh the evidence and determine controverted questions of fact." A deficiency in proof not raised by an appellant is not a "controverted question of fact" for a CCA to decide under that framework. Based on the plain language of Article 66, AFCCA was not authorized to overturn Appellee's conviction based on an alleged deficiency that was neither raised nor controverted on appeal.

As for Issue II, AFCCA erred in applying Mendoza, first, by requiring the government to prove beyond a reasonable doubt that CL was "capable of consenting" at the time of the sexual act. As clarified by this Court's recent opinion in United States v. Moore, ___ M.J. ____, 25-0110/AF, slip op. at 5 (C.A.A.F. 23 January 2026), the victim's capacity to consent at the time of the sexual act is not an element of sexual assault without consent charged under Article 120(b)(2)(A), UCMJ. So the government's alleged failure to prove

capacity to consent was an invalid reason for finding Appellee's conviction factually insufficient.

AFCCA also erred by finding that the government's "theory on the lack of consent was predicated solely on the fact that CL was sleeping when Appell[ee] penetrated her." (JA 6.) In fact, trial counsel repeatedly told the members that, ultimately, it did not matter if CL was asleep or not, because, regardless, she was not moving, facing Appellee or touching Appellee, and therefore did not make a freely given agreement to sex. (JA 305-06.) And consistent with Mendoza and Moore, the government presented ample evidence beside the fact that CL was asleep at the beginning of the sexual intercourse to prove absence of consent. This other evidence included:

- evidence that CL rebuffed a kiss from Appellee in the garage elevator; (JA 349, Clip 38.)
- evidence that, before going to sleep, CL changed clothes in the bathroom, rather than in front of Appellee; (JA 86, 193.)
- CL's testimony that she did not tell Appellee he could penetrate her while she was asleep and that she did not consent to such penetration; (JA 101.)
- Appellee's apparent admissions in Facebook messages that he penetrated CL while she was not moving, not facing him, and not touching him; (JA 347.)
- CL's testimony that upon waking up and realizing what Appellee was doing, she felt "scared, "confused," and "violated," and moved away from Appellee to stop the penetration. (JA 79)

In disregarding the evidence that CL awoke, realized what was happening, and moved away from Appellee to get him to stop, AFCCA erroneously relied on its belief that Appellee had a reasonable mistake of fact as to consent – the deficiency in proof not raised by Appellee himself. Thus, AFCCA compounded its error in applying Mendoza with its error in analyzing a deficiency in proof not raised by Appellee.

Finally, as for Issue III, AFCCA abused its discretion by failing to give any deference to the fact that the court members saw and heard the witnesses, contrary to Article 66(d)(1)(B)(ii)(I)'s dictate to give "appropriate deference." Since CL and Appellee provided competing, contradictory testimony about their sexual encounter, the members' verdict showed they believed CL, and not Appellee. Yet, in weighing the evidence, AFCCA appeared to discount the member's credibility determinations – not discussing their implication at all. Instead, AFCCA relied on Appellee's version of events to find factual insufficiency because he testified to the "clearest account of events." (JA 13.) In taking Appellee's trial testimony as true, AFCCA arbitrarily and unreasonably disregarded Appellee's motivation to testify falsely, his prior inconsistent statements about the event, and the incriminating Facebook messages where he appeared to admit that CL was not moving, not facing him, and not touching him when he began penetrating her.

The amended version of Article 67(c)(1)(C), UCMJ that governs this case gives this Court the express authority to review and act on findings that a CCA has overturned as factually insufficient. This Court should give effect to the amended Article 67(c)(1)(C) by instituting a standard for CCAs to follow when determining what deference to give to the factfinder: before a CCA gives a diminished level of deference to the factfinder's credibility determination, the CCA must cite specific facts from the record, that under the totality of the circumstances, reasonably support that decision to give less deference. This Court should find that AFCCA abused its discretion by failing to follow that standard here.

Since AFCCA made three substantial errors in finding Appellee's conviction factually insufficient, this Court should vacate its decision and remand this case for a new Article 66 review.

ARGUMENT

The 2021 Amendments to Articles 66 and 67

Before the Fiscal Year 2021 (FY21) National Defense Authorization Act (NDAA),[1] Article 66(d)(1), UCMJ "required CCAs to conduct de novo review of the factual sufficiency of the evidence in every case." United States v. Harvey, 85 M.J. 127, 129-30 (C.A.A.F. 2024). "Such a review involve[d] a fresh, impartial

[1] William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542, 134 Stat. 3388, 3611.

look at the evidence, giving no deference to the decision of the trial court on factual sufficiency beyond the admonition in Article 66[], UCMJ, to take into account the fact that the trial court saw and heard the witnesses." Id. (citing United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)).

In 2015, the congressionally-created Military Justice Review Group (MJRG) recommended changes to the CCAs' factual sufficiency review authority under Article 66, UCMJ. Office of the General Counsel, Dep't of Defense, Report of the Military Justice Review Group 605-20 (22 December 2015) (MJRG Report). The proposed changes would "modernize military appellate practice" by "[p]roviding for review of *issues identified by an accused* regarding factual sufficiency when the appellant makes a sufficient showing to justify relief." Id. at 8. (emphasis added.) The MJRG stated its proposal would "[p]rovide for factual sufficiency review only when appellant raises the issue for the court's review and makes an appropriate showing that the court should dismiss the findings." Id. at 35. And "[a]lthough the court could weigh the evidence and determine controverted questions of fact, it would be *required* to give deference to the trial court on those matters." Id. at 610. (emphasis added). The MJRG summarized that the amendments would "channel the exercise of that authority [to set aside a finding] through standards that are more deferential to the factfinder at trial and more reviewable by higher courts." Id. at 619.

Congress eventually adopted the MJRG's proposal in the FY21 NDAA. Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, Appellate Review Study 10 (March 2023).[2]

The new factual sufficiency standard requiring appellants to make a "specific showing of a deficiency in proof" and requiring the CCA to give "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence," was introduced in the House of Representatives by Representatives Speier and Byrne via amendment to the draft FY21 NDAA. H.R. Rep. No. 116-457, at 359 (2020). The amendment's cosponsor, Representative Speier, explained that the new factual sufficiency standard would "make it more difficult for appeals courts to second guess witness testimony, which has disproportionately resulted in lost convictions for sexual assault, domestic violence, and child abuse." John M. Donnelly, *NDAA envisions new military policies on sexual assaults*, Roll Call (8 December 2020).[3]

In a letter to chairs of the House and Senate Armed Services Committees, several members of Congress urged the passage of Representative Speier's

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[2] https://dacipad.whs.mil/sites/default/files/Public/08-Reports/DACIPAD_Appellate-Review-Study_Final.pdf.

[3] https://rollcall.com/2020/12/08/ndaa-envisions-new-military-policies-on-sexual-assaults/.

"bipartisan" provision which "implements a recommendation of the Military Justice Review Group" and addresses CCAs' "unprecedented power to review the factual sufficiency of a conviction, to second-guess a jury's determination of guilt." Letter to Chairman Smith, Ranking Member Thornberry, Chairman Inhofe, and Ranking Member Reed, 14 September 2020.[4] These members of Congress described that, under the then-existing scheme, a "military defendant must be found guilty beyond a reasonable doubt before the conviction can stand—first at trial and again on appeal." Id. They believed that this level of review was "no longer justified in the modern military system." Id. These members highlighted that the then-existing factual sufficiency review had "disproportionally affected sexual assault, child abuse, and domestic violence cases where appellate courts are measuring the credibility of witnesses based only on a written transcript." Id.

The House of Representatives' draft amendment to Article 66 for the FY21 NDAA originally included a provision requiring en banc review by the CCA of any panel's decision to overturn a conviction for factual insufficiency. H.R. Rep. No. 116-617, at 1605 (2020). The Senate receded "with an amendment that would remove the requirement for the entire [CCA] to review a determination by a panel of the Court that a finding of guilty was clearly against the weight of the evidence

[4]https://trahan.house.gov/uploadedfiles/letter_to_ndaa_conferees_sa_sh_dv_provisions_-_with_signatures.pdf.

and would amend Article 67 . . . to authorize the United States Court of Appeals for the Armed Forces to review such a determination." Id. Thus, the amended Article 67(c)(1)(C) specifically authorizes this Court "to act" with respect to findings "set aside" by the CCA "as incorrect in fact."

After these amendments, two triggers are required for a CCA to conduct factual sufficiency review. An appellant must (1) assert an assignment of error and (2) make a specific showing of a deficiency in proof. Harvey, 85 M.J. at 130. If these two triggers are not met, "then nothing in the amended Article 66, UCMJ either requires or *allows* a CCA to review the factual sufficiency of the evidence. Id. (emphasis added).

In conducting its factual sufficiency review, the CCA's weighing of the evidence and determination of controverted questions of fact are subject to "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence." Id. "The degree of deference" given to the factfinder "will depend on the nature of the evidence at issue" – for example, the CCA may decide the level of deference for witness testimony is high, since the CCA did not personally observe the testimony. Id. "The statute affords the CCA discretion to determine what level of deference is appropriate." Id. at 131.

Finally, this Court has identified two requirements for a CCA to be "clearly convinced that the finding of guilty was against the weight of the evidence." Id. at

132. "First, the CCA must decide that the evidence, as the CCA has weighed it, does not prove that the appellant is guilty beyond a reasonable doubt. Second, the CCA must be clearly convinced of the correctness of this decision." Id.

As for the amended Article 67, the changes do not allow this Court to conduct its own factual sufficiency review. United States v. Csiti, 85 M.J. 414, 418 (C.A.A.F. 2025). Article 67(c)(4) still restricts this Court to only act with respect to matters of law. Id. The Court may, however, review the CCA's application of Article 66(d)(1)(B), UCMJ, for an abuse of discretion. Id. at 420.

I.

AFCCA ERRED IN FINDING APPELLEE'S CONVICTION FACTUALLY INSUFFICIENT, IN PART, BASED ON MISTAKE OF FACT AS TO CONSENT, WHEN APPELLEE DID NOT IDENTIFY MISTAKE OF FACT AS TO CONSENT AS A SPECIFIC DEFICIENCY IN PROOF IN HIS APPEAL.

Standard of Review

"This Court may review whether a Court of Criminal Appeals (CCA) applied 'correct legal principles' to a factual sufficiency review." Harvey, 85 M.J. at 129 (citing United States v. Thompson, 83 M.J. 1, 4 (C.A.A.F. 2022)). When the "record reveals that a CCA misunderstood the law, this Court remands for another factual sufficiency review under correct legal principles." Thompson, 83 M.J. at 4.

Law and Analysis

Appellee did not raise mistake of fact as to consent as a specific deficiency in proof in his briefs before AFCCA. Instead, Appellee contended that he had made "a specific showing that proof of CL's capacity to consent at the time of the sexual act was deficient." (JA 394.) For the period when CL awoke and realized what was happening, Appellee did not argue that he had a reasonable mistake of fact as to consent during that period. Rather, he argued that "[c]oncerning the brief moment when CL was awake before the penetration ended, the record contains copious evidence suggesting that CL was . . . 'too drunk to do anything.'" (Id.)[5]

This case raises the same issue as that certified in United States v. Hunt, Dkt. No. 25-0257/AF, and so this Court's disposition of Hunt should govern the outcome of this case as well. In short, the United States asserts that a Court of Criminal Appeals may not overturn a conviction for factual sufficiency on a basis not raised by the appellant before the CCA as a specific deficiency in proof. The plain language of the amended Article 66(d)(1)(B)(i) establishes that a CCA may only conduct a factual sufficiency review after an accused "makes a specific showing of a deficiency in proof." And only after the "accused has made such a showing," may the CCA "weigh the evidence and determine controverted

[5] The majority opinion did not provide any support for its claims that Appellee raised mistake of fact as to consent on appeal, and the dissenting judge disagreed that Appellee had done so. (JA 10, 12, 18-19.)

questions of fact." Article 66(d)(1)(B)(ii). In this new framework, the only "controverted questions of fact" are those raised by the appellant. The CCA lacks the authority to decide questions of fact not placed into controversy by the appellant on appeal.

Since Appellee never claimed on appeal – much less made a specific showing – that the government failed to disprove the defense of mistake of fact as to consent beyond a reasonable doubt, mistake of fact was not a "controverted question of fact" for AFCCA to decide. AFCCA exceeded its statutory authority by determining that "the government did not disprove the affirmative defense of mistake of fact as to consent" and using that determination to find Appellee's conviction factually insufficient.

AFCCA erred in its application of Article 66(d)(1)(B), and this Court should remand the case to AFCCA for a new Article 66 review using correct legal principles. Since Appellee never raised the mistake of fact as to consent defense to AFCCA in his initial appeal, that issue should be considered waived on remand, and Appellee should be foreclosed from raising it. *See* United States v. Husband, 312 F.3d 247, 251 (7th Cir. 2002).

II.

AFCCA ERRED IN APPLYING MENDOZA TO FIND APPELLEE'S SEXUAL ASSAULT CONVICTION FACTUALLY INSUFFICIENT.

Standard of Review

The standard of review for this issue is the same as for Issue I.

Law and Analysis

AFCCA based its finding of factual insufficiency, in part, on this Court's opinion in United States v. Mendoza. But this Court has now issued an opinion in United States v. Moore, __ M.J. ___ 25-0110/AF (C.A.A.F. 23 January 2026), which clarifies the legal principles from Mendoza. This Court affirmed that there are only two elements of sexual assault without consent under Article 120(b)(2)(A) that must be proven beyond a reasonable doubt: first, that the accused committed a sexual act upon another person, and second, that the act occurred without the consent of the other person. Moore, slip op. at 5. This Court's recitation of the elements did not include an additional element requiring that the victim be "capable of consenting."

Next, this court recognized three other legal principles. First, this Court reiterated the holding from Mendoza: the government cannot prove the absence of consent under Article 120(b)(2)(A), UCMJ by *merely* establishing that the victim was incapable of consenting or asleep. Id. at 7-8.

Second, "[i]f a rational trier of fact could find from the evidence *both* that the victim did not consent before falling asleep *and* that the sexual act subsequently occurred while the victim was asleep, the evidence is legally sufficient to prove the 'without . . . consent' element of Article 120(b)(2)(A), UCMJ." Id. at 8. (emphasis in original). The sexual act does not have to "coincide with a period when the person upon whom the act is committed is capable of consenting," if the evidence shows that "the victim does not consent to the sexual act prior to the start of a period of incapacity." Id. at 9, n.4.

Third, "evidence that the victim woke up while the sexual act was occurring and did not consent is legally sufficient to establish the "without . . . consent" element. Id. at 11.

In its opinion, AFCCA stated that "[p]er Mendoza, the Government was required to prove that CL did not consent to sexual conduct with Appell[ee] at a time when she was capable of consenting." (JA 10.) The court "was not convinced beyond a reasonable doubt that CL was, at the time of the sexual act, capable of consenting but did not consent," as the court believed was required under Mendoza. (JA 12). AFCCA then asserted that the government had proceeded entirely on the theory that CL was asleep during the sexual act and had effectively pursued a different theory at trial from the "without consent" theory on the charge sheet. (JA 13.)

As shown by Moore, AFCCA's application of Mendoza was misplaced. AFCCA's opinion erred in two ways. First, AFCCA incorrectly required the government to prove beyond a reasonable doubt that the sexual act occurred at a time when CL was "capable of consenting." Second, AFCCA claimed that the government only proceeded under the theory that Appellee was guilty because CL was asleep, yet that contention is not supported by the entire record.

a. The government was not required to prove beyond a reasonable doubt that CL was capable of consenting at the time of the sexual act.

In its opinion, AFCCA signaled its belief that the government had to prove beyond a reasonable doubt that CL was capable of consenting *at the time of the sexual act* but did not consent. (JA 12.) This Court rejected that reasoning in Moore, saying that, in a prosecution under Article 120(b)(2)(A), the sexual act does not necessarily have to "coincide with a period when the person upon whom the act is committed is capable of consenting." Moore, slip op. at 9, n.4. AFCCA's misunderstanding of the elements of Article 120(b)(2)(A) therefore warrants reversal and remand for a new Article 66 review.

b. At trial, the government did not prove absence of consent merely by establishing that CL was asleep.

Contrary to AFCCA's assertions, the government's theory on lack of consent was not "predicated solely on the fact that CL was sleeping when Appell[ee] penetrated her." The government offered ample other evidence

showing that CL did not consent. In fact, trial counsel told the members multiple times that it did not matter whether CL was asleep. (JA 305-06.) If trial counsel was proceeding under a sleeping victim theory, where one of the elements to be proven beyond a reasonable doubt was that the victim was asleep, *see* Article 120(b)(2)(B), it would have been strange indeed for trial counsel to have argued that it did not matter whether CL was awake or asleep. AFCCA's accusation that "[e]ffectively, the Government charged one offense and factual theory and then argued a different offense and different factual theory at trial," is unsupported by the record.

Instead, trial counsel merely told the members that CL could not make a freely given agreement with Appellee to sexual intercourse while she was asleep (JA 297), which was an accurate statement of the statutory law from Article 120(g)(7). But trial counsel also repeatedly claimed during closing argument that there was no "freely given agreement" because, as Appellee himself admitted in the Facebook messages, CL was "not moving; not touching him; not facing him; not speaking with him; not interacting with him whatsoever." (JA 298.) Trial counsel emphasized, "if an individual is motionless, laying away from you, not communicating with you, *you cannot get their agreement to do anything*. Nothing. That's the case whether she was *asleep or blacked out or wide awake*." (JA 306.) (emphasis added). In fact, trial counsel's list of things CL was not doing, "not

moving; not touching him; not facing him; not speaking with him; not interacting with him whatsoever," was repeated on four of his PowerPoint slides from closing argument. (JA 359, 361-63.)

Trial counsel also told the members that they needed to consider all of the surrounding circumstances in deciding whether CL gave consent. (JA 297.) In all, trial counsel's argument focused on whether CL made a "freely given agreement" to the conduct at issue under all the circumstances, irrespective of whether she was asleep – in other words, whether she consented.

The facts here are somewhat unique compared to other fact patterns involving sleeping victims where there is no direct evidence of what happened when the penetration began. Here, the government presented an apparent admission from Appellee that CL was not moving and not facing or touching Appellee when penetration began, which established that CL did not make a "freely given agreement" to the sexual act at that time. This showed more than just that CL *could not* consent because she was asleep; it showed she actually *did not* consent because she took no actions that could be construed as giving consent.

And CL testified that she never told Appellee he could penetrate her while she was asleep and did not consent to him penetrating her while she was asleep. (JA 101.) In Moore, this Court confirmed that "a rational trier of fact could find that [the victim] did not consent to the sexual act before she fell asleep based on

her testimony that she did not 'ever consent to that.'" Moore, slip op. at 11. So too here. CL's testimony that she did not consent was competent evidence to establish that the sexual act occurred "without consent," based on the second legal principle in Moore.

CL's testimony that she never consented before falling asleep was corroborated by other evidence. Video evidence showed that CL rebuffed an attempted kiss from Appellee in the garage elevator. (JA 349, Clip 38.) Trial counsel also elicited that, after Appellee left, CL found her clothes from the concert in the bathroom, suggesting that she had felt uncomfortable changing clothes in front of him. (JA 101.) This allowed the inference that because CL felt uncomfortable, even in her drunken state, changing in front of Appellee, she did not consent to the more intimate act of sexual intercourse with Appellee.

CL's reaction after she woke up also provided circumstantial evidence of her lack of consent before falling asleep: as soon as she realized what was happening, she felt "scared," "confused," and "violated," and she moved away from Appellee to get him to stop. (JA 79.) If, before falling asleep, CL had consented specifically to being penetrated while sleeping, one would not have expected her to feel scared, confused, and violated, upon waking up and then to immediately try to stop the penetration. This evidence shows that CL did not consent before she fell asleep and that she did not make a freely given agreement to the sex at the time

penetration began. Trial counsel's elicitation the above evidence shows that the government did not try to establish lack of consent *merely* by showing CL was asleep.

In all, the government prosecuted this case within the parameters of Article 120(b)(2)(A) and Moore. Rather than merely showing that CL was asleep, the government provided (1) her testimony that she never told Appellee that he could penetrate her while she was asleep; (2) evidence that she was facing away from Appellee and not interacting with him in any way when the sex began; (3) evidence that when she awoke, she manifested nonconsent by moving away from Appellee.

Under Casillas, 86 M.J. at 102, and the third principle discussed in Moore, the government could prove the sexual act occurred without consent by showing that "the victim woke up while the sexual act was occurring and did not consent." Moore, slip op. at 10. Here, the government did just that. The government presented evidence that CL woke up during the penetration, realized what was happening, and then manifested nonconsent by moving away from Appellee to stop the penetration. (JA 79.)

AFCCA deflected this problem by claiming that Casillas was distinguishable, because even if CL were momentarily capable of consenting but did not consent, at that point, Appellee would have had a reasonable mistake of

fact as to consent. (JA 14.) This conclusion was problematic for two reasons. First, as argued in Issue I, Appellee did not raise mistake of fact as a specific deficiency in proof, and thus AFCCA could not consider it as a "controverted fact" in need of resolution. Second, as will be argued in Issue III, finding that Appellee had a reasonable mistake of fact required believing Appellee's testimony and disregarding CL's – contrary to what the members must have done. In reaching its conclusion, AFCCA failed to give appropriate deference to the fact that the members saw and heard the witnesses.

In sum, for AFCCA to have found the case factually insufficient based on mistake of fact as to consent, AFCCA would have both decided factual sufficiency based on a deficiency in proof not raised by Appellee *and* given no deference to the factfinder's determination that Appellee's testimony was not credible. These were both legal errors that should result in a remand to AFCCA for a new Article 66, UCMJ review.

But if this Court also decides Issue I in the United States' favor, then Appellee should be precluded from raising factual sufficiency again at AFCCA. In his initial AFCCA brief, Appellee chose to assert only one specific deficiency in proof: that the government had failed to prove CL's "capability to consent at the time of the sexual act." (JA 394.) Moore establishes that failure to prove a victim is not "capable of consenting" at the time of the sexual act is not a viable basis for

finding a sexual assault without consent conviction factually insufficient. Moore, slip. op at 9. So on remand, there is nothing for AFCCA to re-review regarding Appellee's only raised "deficiency in proof." On remand, based on the waiver doctrine, Appellee should also be prohibited from raising any new alleged deficiencies in proof, such as failure to prove lack of consent and failure to disprove mistake of fact as to consent. *See* Husband, 312 F.3d at 251.

III.

AFCCA ABUSED ITS DISCRETION WHEN IT FAILED TO GIVE APPROPRIATE DEFERENCE TO THE FACT THE TRIAL COURT SAW AND HEARD THE WITNESSES AND OTHER EVIDENCE.

Standard of Review

A CCA's determination on the level of deference afforded to the factfinder is reviewed for an abuse of discretion. Harvey, 85 M.J. at 131.

Law and Analysis

a. To enable meaningful review by this Court under Article 67(c)(1)(C), this Court should require CCAs to provide a reasonable explanation for any decision to give diminished deference to the factfinder.

In the FY21 NDAA, Congress explicitly gave this Court authority to act on findings "set aside" by the CCA as "incorrect in fact." Article 67(c)(1)(C). By simultaneously amending Article 66 and Article 67, Congress evinced its intent for this Court to exercise oversight of a CCA's application of the new factual

sufficiency standards. And indeed, one of the impetuses behind amending Article 66's factual sufficiency standard was to make the CCA's review "more reviewable" by CAAF. MJRG Report 619. Although, in the past, this Court exhibited "a strong disinclination to involve [itself] in the review of" the CCA's exercise of their "unique power," United States v. Clark, 75 M.J. 298, 300 (C.A.A.F. 2016), the amendments to Article 67(c)(1)(C) show that Congress now specifically desires that this Court involve itself in the review of the CCA's exercise of their factual sufficiency authority.

The Supreme Court has recognized that "[w]hen Congress acts to amend a statute, [courts must] presume it intends its amendments to have real and substantial effect." Stone v. INS, 514 U.S. 386, 397 (1995). To give "real and substantial effect" to the amendments to Articles 66 and 67, this Court should be keenly attuned to whether the CCA applied the correct law and applied it in a reasonable manner. It is within this Court's authority to consider whether a CCA properly determined the level of deference to give the factfinder with respect to determining the credibility of witnesses. *See* Csiti, 85 M.J. at 420 ("we see nothing to indicate an abuse of discretion by the AFCCA in determining what deference to give to the court-martial with respect to any of the evidence"). A CCA abuses its discretion when it acts "arbitrarily, capriciously, or unreasonably – as a matter of law." United States v. Nerad, 69 M.J. 138, 142 (C.A.A.F. 2010).

While this Court has said that CCAs "are not required to state their reasoning for their decisions," Thompson, 83 M.J. at 4, this Court should reassess that rule to give "real and substantial effect" to the statutory changes to Articles 66 and 67. *See* Stone, 514 U.S. at 397. It is difficult for this Court to fulfill its duties under the amended Article 67(c)(1)(C), if the CCA does not explain how it conducted its factual sufficiency review, especially when it does not explain its decision to give no or minimal deference to the court-martial's witness credibility determinations. *See* Nerad, 69 M.J. at 147 ("Even though a CCA is not required to identify the basis for its action, failure to do so makes it difficult to determine whether a CCA's exercise of its Article 66[], UCMJ power was made based on a correct view of the law.") Since the plain language of Article 66(d)(1)(B)(ii)(I) suggests that the default posture is to give at least *some* level of deference to the factfinder, the CCA should justify any departure from the default.

Although there is a general presumption that appellate military judges know the law and apply it correctly, Clark, 75 M.J. at 300, this Court should decline to apply the presumption to a CCA's factual insufficiency determination. To just presume AFCCA properly applied the law would be to provide no oversight of a factual insufficiency determination at all, contrary to congressional intent.

To give effect to the amendments to Articles 66 and 67, the United States proposes a standard for the CCAs to use that this Court can then review: before a

CCA gives a diminished level of deference to the factfinder's credibility determination, the CCA must cite specific facts from the record, that under the totality of the circumstances, reasonably support that decision to give less deference. Since giving deference is the statutory default, the standard for giving less deference should be high. For example, run-of-the-mill impeachment evidence, heard by the factfinder but obviously found unpersuasive, should not normally suffice to give diminished deference. If the CCA fails to identify such specific facts, or if the facts do not reasonably support the CCA's decision to give less deference, this Court may find that the CCA abused its discretion.

This proposed test finds its basis in well-recognized principles of military law. A requirement for the CCA to cite specific facts supporting a decision to give diminished deference to the factfinder is in keeping with this Court's general practice of affording *judges* less deference if they fail to articulate their analyses on the record. *See e.g.*, United States v. St. Jean, 83 M.J. 109, 113 (C.A.A.F. 2023); United States v. Keago, 84 M.J. 367, 373 (C.A.A.F. 2024). Requiring the CCA to consider the totality of the circumstances before giving the factfinder diminished deference also comports with this Court's acknowledgment that judges abuse their discretion when they "fail to consider important facts." United States v. Commisso, 76 M.J. 315, 321 (C.A.A.F. 2017). And requiring that the CCA's cited facts *reasonably* support its decision to give diminished deference recognizes that

this Court has always been able to review whether a CCA's actions under Article 66 were arbitrary or capricious. *See* Clark, 75 M.J. at 300.

In this case, to determine whether AFCCA abused its discretion in conducting its factual sufficiency review, this Court should first recognize that, given the conflicting testimony received at trial, the court members' verdict of guilty reflected that they believed CL and not Appellee. Then, this Court should examine why AFCCA rejected the members' credibility determinations and ask whether AFCCA's reasons for doing so reasonably supported giving no deference to the members.

b. The court members' verdict required them to determine which one of CL or Appellee testified to the true version of events.

Since this case turned heavily on conflicting witness testimony, the members had to determine the credibility of the witnesses. (JA 289.) CL testified that she did not consent to Appellee penetrating her while she was asleep, that she woke up facing away from Appellee, with him penetrating her, and that she moved away from Appellee to stop the penetration. (JA 79.) CL began crying, Appellee knelt down in front of her, and CL told Appellee she felt like he had raped her. (JA 80-81.)

In contrast, Appellee testified that he only penetrated CL while she was awake and actively participating, and the only time she recoiled and moved away from him was when he later woke up, flaccid, and touched her. (JA 196-98, 200.)

At that point, Appellee came and knelt down in front of CL, and CL told Appellee she felt like he had raped her. (JA 202.)

In sum, both witnesses agreed that at one point, CL moved away from Appellee, he went and knelt down in front of her, and she said she felt he had raped her. There testimonies differed in what happened immediately before. CL testified that she had just awoken to Appellee penetrating her; Appellee claimed he woke up flaccid and merely touched CL. Only one version of events could be accurate, so the members had to decide which witness's testimony to believe.

If the factfinder accepted Appellee's trial testimony as true, the only sexual intercourse occurred earlier in the night, and CL consented to it. Or, considering that Appellee reported that CL had no problems getting around or navigating stairs and that CL initiated the sex, at worst he held a reasonable mistake of fact that she consented. Appellee would have been not guilty. Thus, in convicting Appellee, the members must have disbelieved his testimony.

Trial counsel clarified during closing argument that the only incident the government was prosecuting was the sexual act that began while CL was asleep and that she awoke to occurring. (JA 295.) If the factfinder accepted CL's testimony, Appellee began penetration while CL was not facing him and not interacting with him, and when she realized what was happening, she moved away to stop the penetration. Her testimony established that, considering all surrounding

circumstances, she did not make a freely given agreement to the conduct at issue – and she manifested nonconsent. Her testimony also confirmed that Appellee could not have had a reasonable mistake of fact as to consent. No reasonable person would have believed that someone facing away from him and not interacting with him had made a freely given agreement to sexual intercourse, especially when she had not told Appellee that he could have sex with her while she was sleeping. In convicting Appellee, the members must have credited CL's testimony.

Although AFCCA stated that "[i]f you believe CL, there was no point in the brief moment when she was awake and capable of consenting wherein Appell[ee] would have known she in fact did not consent" (JA 14), that conclusion also relied on believing Appellee's testimony. No reasonable person who began having sexual intercourse with a sleeping person, who was not moving, not facing him, and not interacting with him (as CL testified she was), would believe that he had suddenly obtained consent after the sleeping person awoke. Even Appellee agreed that he did not know why he would have thought committing the sexual act under such circumstances was "okay." (JA 347.) The only way Appellee could have reasonably believed CL was consenting was if his testimony about believing she was awake and participating during sex were true. The members' vote to convict Appellee once again shows that they rejected his testimony.

c. AFCCA's opinion appears to give no deference to the members' determination that CL's testimony was credible, and Appellee's was not.

Since this case relied heavily on conflicting witness testimony, in weighing the evidence on appeal, AFCCA also had to consider the credibility of the witnesses. In doing so, Congress required AFCCA, under Article 66(b)(1)(B)(ii)(I), to give "appropriate deference" to the fact that the trial court saw and heard the witnesses – and here, credited CL's testimony over Appellee's. Yet at several points in its opinion, AFCCA appeared to take Appellee's testimony at face value as true and to give his testimony equal or even more weight than CL's. For example, AFCCA:

- commented that "Appell[ee]'s testimony of what occurred after they returned to CL's hotel room leading up to and including the sexual act **was more complete than** the events relayed by CL." (JA 10.) (emphasis added).

- stated that "[g]iven **the conflicting** evidence about what occurred in CL's hotel room. . . in addition to **the testimony from both CL and Appellee comprising the totality of the circumstances of the evening**, we are not convinced beyond a reasonable doubt that CL was, at the time of the sexual act, capable of consenting but did not consent." (JA 12.) (emphasis added).

- found that "the Government did not disprove Appell[ee]'s contention that he had an honest and reasonable mistake of fact as to consent" based on "the facts as provided by Appell[ee]" because he was "**the person with the clearest account of events throughout the evening**." (JA 13.) (emphasis added).

AFCCA supported its conclusion that "the Government did not disprove the affirmative defense of Appell[ee]'s reasonable mistake of fact as to consent" entirely by taking the facts from Appellee's testimony as true. (JA 12.) AFCCA accepted Appellee's uncorroborated testimony that CL and Appellee "kissed" during the night before the charged offense, that CL "jumped playfully into [Appellee's] arms and threw her legs around him," and that CL invited Appellee to stay in her hotel room, helped undress Appellee, brought him a condom, and initiated oral and vaginal sex. (JA 12-13). AFCCA's uncritical acceptance of Appellee's testimony to support a reasonable mistake of fact again shows that the court gave no deference to the members' credibility determination.

And although AFCCA perfunctorily said that it had "given appropriate deference to the fact that the trial court saw and heard the witnesses" (JA 10), the court did not at all address the elephant in the room – that its assessment of witness credibility differed from what the members must have found in reaching their verdict. It is not evident from AFCCA's opinion that the members' credibility determinations factored into the court's weighing of the evidence whatsoever. Absent any such description, it is fair to say that AFCCA gave *no* deference to the fact that the members saw and heard the witnesses. And while it would theoretically be within the CCA's discretion under Article 66(d)(1)(B) to give no deference to the factfinder's credibility determinations, *see* United States v.

Downum, __ M.J.___, 2025 CAAF LEXIS 828, at *13 n.4 (C.A.A.F. 23 October 2025), considering Congress's specific directive to give *appropriate* deference, the CCA should have to explain in detail why it decided no deference was appropriate.

Specific to this case, this Court cannot merely presume AFCCA understood the law. On its face, AFCCA's action of putting CL and Appellee's testimonies on equal footing immediately calls into question whether AFCCA followed congressional directive to afford *appropriate* deference to the fact that the factfinder saw and heard the witnesses. One would presume that the instances in which a CCA would give *no* deference to the factfinder's witness credibility determinations would be exceedingly rare. Otherwise, the exceptions would swallow the rule requiring deference to be given in the first place. When a CCA fails to address the factfinder's credibility determinations at all, closer scrutiny, rather than invocation of a presumption, is warranted.

d. AFCCA abused its discretion by giving no deference to the members' credibilty determination.

Reading through the lines of AFCCA's opinion, the only discernible reason why the court gave Appellee's testimony more weight was because his testimony "was more complete than the events relayed by CL" and because Appellee was "the person with the clearest account of events throughout the evening." (JA 10, 13.) AFCCA abused its discretion because, under the totality of the circumstances,

Appellee's supposedly superior recollection of events does not reasonably support a decision to disregard the members' credibility determinations.

To start, it defies logic to say that the witness who gives the "more complete" narrative events is inherently the more credible and that it alone allows a CCA to reject the factfinder's credibility determination. Many other factors are relevant to witness credibility. The members were instructed that in determining the believability of the witnesses, they were to consider, among other things, each witness's "ability to observe and accurately remember," "sincerity and conduct in court," "the extent to which each witness is either supported or contradicted by other evidence," and "how each witness might be affected by the verdict." (JA 289.) In determining how much deference to afford to the factfinders' credibility determination, AFCCA should have considered the totality of the circumstances that affected witness credibility and, per congressional direction, should have given special weight to the fact that the members were best positioned to judge the witnesses' sincerity and conduct in court.[6]

Yet AFCCA disregarded that Appellee had a motivation to lie while testifying, that he had already lied multiple times to CL about the night of the

[6] For example, in this case, during closing argument, trial counsel highlighted how CL "became emotional" and "broke into tears" during her testimony when shown pictures of the hotel where the sexual assault occurred. (JA 293.) The members could personally observe and evaluate the sincerity of CL's conduct, but AFCCA could not.

charged offense, and that much of his in-court testimony was contradicted by the Facebook messages he sent soon after the charged offense. The court gave no reason (such as inconsistent statements, improbable testimony, or motivation to lie) for disbelieving CL's version of events, which included her memory of waking up, facing away from Appellee, with him penetrating her, and her memory of then immediately moving away from Appellee to get him to stop.

The CCA also gave no reasons, other than his supposed "clearest account of events," for crediting Appellee's testimony that CL was awake and participating during the sexual act. This is especially perplexing since, contrary to his trial testimony, Appellee seemingly corroborated in Facebook messages that CL was not moving, facing him, or touching him when he had sex with her. (JA 347) He also admitted that he did not know why he would think it was "okay" to have sex with CL when she was not moving, facing him, or touching him, and that he would not have thought it was okay if he "were thinking it through." (Id.)[7] The members understandably rejected Appellee's unbelievable explanation on the stand that he was merely placating CL in the Facebook messages. But AFCCA did not explain why it did not consider all of the relevant factors for judging credibility – including the damning text messages that contradicted his trial testimony – and instead

[7] As AFCCA's Chief Judge noted in his separate opinion, the majority gave no attention to Appellee's incriminating Facebook message admissions. (JA 17 n.3.)

treated Appellee's testimony as if it were true. In the context of AFCCA's decision to give no deference to the members' witnesses credibility determinations, this Court should find AFCCA abused its discretion by failing to consider the totality of the circumstances, which included Appellee's inconsistent statements and motive to testify falsely. *See* Commisso, 76 M.J. at 321.

If a CCA regularly used the "who remembers more" criterion to judge witness credibility and override the members' credibility determinations, few convictions involving extremely intoxicated or incompetent victims will be able to withstand appellate review. An accused will have every incentive to take the stand and give a very detailed but false account of events and then use that narrative on appeal to successfully argue factual insufficiency. That cannot be what Congress intended when it instituted the requirement that CCAs give "appropriate deference to the fact that the trial court saw and heard the witnesses."

In any event, AFCCA's treatment of Appellee's testimony as more credible because he had a "more complete" recall of events is also perplexing because Appellee himself made inconsistent statements about how much of the night he remembered. In the Facebook messages, Appellee:

- described himself as "in and out of consciousness/drunken sleep;"
- described himself as "blacked out off and on and definitely not making good decisions but my memory comes back;"

- claimed to have memories of the evening that were recovered after he drove back to base the next morning;

- said that the second time he had sex with CL he wasn't "fully aware if [CL was asleep] or not" and that he "wasn't even aware that it wasn't a continuation [of the first time they had sex] at that moment until later;"

- claimed "I wasn't fully conscious at all; I think we both passed out between [the two times we had sex] and I was half asleep and drunk;"

- Said, "I wasn't fully conscious because I didn't even realize I was asleep before that and how drunk I was."

(JA 344, 346-47.)

Then, in his trial testimony, Appellee claimed that all of his statements about lack of memory in the Facebook messages were lies and agreed that he, in fact, "remembered everything from the evening with respect to the encounter in the hotel." (JA 232, 240-41, 245-48.) Yet AFCCA unquestioningly accepted Appellee's "more complete" account of events from his trial testimony without considering (1) whether the discrepancies between the testimony and the Facebook messages "resulted from an innocent mistake or a deliberate lie" (*see* JA 275); or (2) how the discrepancies affected Appellee's overall credibilty. Again, AFCCA abused its discretion by sidestepping important facts in conducting its factual sufficiency analysis.

Applying the United States' proposed standard, Appellee's so-called "clearest account of events" did not reasonably support AFCCA's decision to give

no deference to the factfinder, especially since, considering the totality of the circumstances, Appellee's "clearest account of events" was contradicted by his own prior inconsistent statements. AFCCA's failure to give deference to the members' credibility determinations was arbitrary and clearly unreasonable, and therefore an abuse of discretion.

e. This Court should give effect to the congressional amendment to Article 67(c)(1)(C) by acting in this case and overturning AFCCA's factual insufficiency finding.

This case presents an opportunity for this Court to provide more guidance to the CCAs on when it is inappropriate to afford diminished deference to the factfinder. In Downum,[8] this Court observed that the text of Article 66(d)(1)(B) did not "foreclose[] the possiblity that – based on the type of evidence presented at trial – a service court might owe little to no deference to the trial court in performing its factual sufficiency review." 2025 CAAF LEXIS 828, at *13 n.4.

[8] Downum was a positive urinalysis case, where the appellant was convicted of cocaine use despite his testimony denying such use. 2025 CAAF LEXIS 828, at *14. This Court's conclusion in Downum that the CCA was not bound to defer to the members' apparent disbelief of the appellant's testimony, is consistent with the United States' proposed standard. Id. at *15. In Downum, this Court found that the factual sufficiency analysis turned on the reliability of scientific evidence rather than on "the veracity or the credibility of the witnesses who testified at trial or whether the ACCA provided appropriate deference to the fact that the trial court heard and saw those witnesses testify." Id. at *15-16. The specious scientific evidence specifically identified by the CCA could have reasonably supported, under the totality of the circumstances, the CCA's decision to give little deference to the factfinder's apparent determination that the appellant was not credible.

While that is true, this Court should be careful not to let such possibilities swallow the rule. If the statute allows a CCA to give little to no deference to the factfinder's credibility determinations whenever it wants, without good cause (and without threat of rebuke from its superior Court), then why would Congress have included the requirement to give "appropriate deference" to the factfinder in the first place?

In this case, AFCCA made a mechanical statement that it "gave appropriate deference" to the members, but then rejected the members' credibility determinations for CL and Appellee. It apparently did so only because Appellee testified to the "clearest account" of events. And in doing so, AFCCA declined to even address Appellee's motivation to testify falsely, Appellee's prior inconsistent statements about the events, and Appellee's damning admissions in the Facebook messages that he had sex with CL while she was not moving, not facing him, and not touching him. The court's failure to consider these other indicators of credibility was arbitrary and clearly unreasonable.

Congress intended its amendments to Article 66 to prevent or substantially limit instances where a CCA would overturn a conviction by second-guessing the factfinders'credibility determinations on a cold record. Yet, that is exactly what AFCCA did here without reasonable explanation. If this Court does not step in

here and find an abuse of discretion in the level of deference the CCA afforded to the factfinder, when would it ever?

Congress did not amend Article 67(c)(1)(C) with the expectation that this Court would sit idly by and decline to perform a meaningful review of a CCA's factual insufficiency determination. Congress intended for this Court to give "real and substantial effect" to its amendment by serving as a guardrail against a CCA's unreasonable application of the new factual sufficiency standard. *See* Stone, 514 U.S. at 397. Congress expected that, in the appropriate cases, this Court will "*act* with respect to" findings "as . . . set aside by a [CCA] as incorrect in fact." Article 67(c)(1)(C) (emphasis added). This case, where AFCCA set aside Appellee's conviction based on an arbitrary and unreasonable decision to give no deference to the members' credibility determinations, is the appropriate case for this Court to act.

This Court should find that AFCCA abused its discretion in the level of deference it gave to the factfinder. As a result, this Court should vacate AFCCA's decision and remand for a new Article 66 review. If based on its resolution of the other certified issues, this Court finds that it is appropriate for AFCCA to do a new factual sufficiency review on remand, then it should instruct AFCCA to employ the following standard: before AFCCA gives a diminished level of deference to the factfinder's credibility determination, the court must cite specific facts from the

record that, under the totality of the circumstances, reasonably support a decision to give less deference.

CONCLUSION

In sum, AFCCA erred in its factual sufficiency review by (1) finding factual insufficiency based on a deficiency in proof not raised by Appellee, (2) incorrectly applying Mendoza, and (3) failing to give appropriate deference to the fact that the members saw and heard the witnesses. This Court should reverse AFCCA's decision and remand for a new review under Article 66, UCMJ. If the United States prevails on Issues I and II, this Court should consider any other "deficiencies in proof" not previously raised at AFCCA to be waived, and Appellee should be precluded from raising factual sufficiency on remand.

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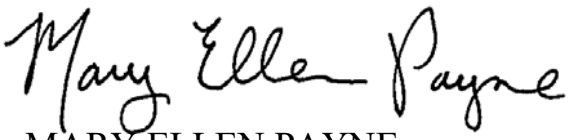
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 9 February 2026.



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