IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant v. Dustin M. CLARK, Airman (E-3) U.S. Navy Appellee	)	BRIEF ON BEHALF OF APPELLANT Crim.App. Dkt. No. 201400232 USCA Dkt. No. 16-0068/NA

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

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ARTICLE 66(c), UCMJ, REQUIRES THAT COURTS OF CRIMINAL APPEALS CONDUCT A PLENARY REVIEW OF THE ENTIRE RECORD AND "RECOGNIZ[E] THAT THE TRIAL COURT SAW AND HEARD THE WITNESSES." IN REVERSING APPELLEE'S CONVICTIONS FOR FACTUAL INSUFFICIENCY WITHOUT ACKNOWLEDGING THE MILITARY JUDGE'S NON-GUILT SPECIAL FINDINGS, DID THE LOWER COURT FAIL TO CONDUCT A COMPLETE ARTICLE 66(c) REVIEW?

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IN CONDUCTING ITS FACTUAL SUFFICIENCY REVIEW, THE LOWER COURT USED A DIFFERENT STANDARD OF REVIEW FOR THE NON-GUILT SPECIAL FINDINGS MADE BY THE MILITARY JUDGE UNDER RULE FOR COURTS-MARTIAL 918(b) THAN THAT ADOPTED BY THE ARMY AND AIR FORCE COURTS OF CRIMINAL APPEALS. SHOULD THE LOWER COURT HAVE REVIEWED THE MILITARY JUDGE'S NON-GUILT SPECIAL FINDINGS UNDER THE CLEAR ERROR STANDARD ADOPTED BY THE ARMY AND AIR FORCE COURTS OF CRIMINAL APPEALS?

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012), because Appellee's approved sentence included a dishonorable discharge and over one year of confinement. This Court has jurisdiction pursuant to Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2) (2012).

Statement of the Case

A military judge sitting as a general court-martial convicted Appellee, contrary to his pleas, of rape and forcible

sodomy, in violation of Articles 120 and 125, UCMJ, 10 U.S.C. §§ 920, 925 (2006). The Military Judge sentenced Appellee to seven years of confinement, reduction to pay grade E-1, and a dishonorable discharge. The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

On July 14, 2015, the Navy-Marine Corps Court of Criminal Appeals set aside the findings and sentence. ***United States v. Clark***, No. 201400232, 2015 CCA LEXIS 287 (N-M. Ct. Crim. App. July 14, 2015). On August 13, 2015, the United States moved the Navy-Marine Corps Court of Criminal Appeals to reconsider its decision *en banc*. That Motion was denied on August 18, 2015.

On October 19, 2015, the Judge Advocate General of the Navy certified this case pursuant to Article 67(a)(2), UCMJ.

Statement of Facts

A. Appellee raped and forcibly sodomized SW.

1. Appellee and SW met at a party.

On the evening of March 24, 2012, SW met her friend Operations Specialist Second Class (OS2) MacKellar and attended a house party on Joint Base Anacostia. (J.A. 60-61.) SW consumed between five and eight alcoholic drinks before going upstairs to "make out" with OS2 MacKellar. (J.A. 67-68.) While "making out," they were interrupted and returned to the party.

(J.A. 70-71.) SW then consumed "a shot or two" of Jagermeister. (J.A. 68.)

Later, SW flirted with another man, Mr. Claxton. They went upstairs and engaged in consensual intimate activity. (J.A. 71.) SW made clear to Mr. Claxton that she would not have sex with him. (*Id.*) This encounter ended when Mr. Claxton ran out to vomit. (J.A. 71-72.) A short time later, SW, OS2 MacKellar, Appellee, and others left the party and went to Appellee's house. (J.A. 74-77.)

2. Appellee raped and forcibly sodomized SW at his home.

SW was "heavily intoxicated" when she arrived at Appellee's house. (J.A. 67-68, 75, 77-78.) But Appellee urged her to continue drinking. (J.A. 64, 68, 78.) Appellee got a beer for SW, and they began kissing on the couch. (J.A. 80.) While on the couch, SW told Appellee she did not want to have sex with him, and Appellee agreed that "was not a condition of making out or [his] expectation." (J.A. 81.) Appellee then told SW that she "could crash up in his room." (J.A. 83.) SW did not go home "[b]ecause [she] was too drunk to drive and Alex MacKellar had left." (*Id.*)

Once upstairs in the room, Appellee began kissing SW again. (J.A. 84-85.) SW again told Appellee that she did not want to have sex with him. (J.A. 81, 85.) The next thing SW remembered

was Appellee being on top of her, holding her down by the arms. (J.A. 85-86.) SW remembered "lying down on my back on the floor. All my clothes were on, but I remember like him sort of being on top of me and like holding me down. I remember telling him to stop." (J.A. 85.) SW felt immobilized and scared. (J.A. 86.) SW also feared that if she resisted Appellee, he might hurt her. (*Id.*)

The next thing SW remembered was being naked on her back while Appellee was penetrating her vagina with his penis. (J.A. 87-88.) The penetration was very painful for SW, who had never had sex before. (J.A. 88, 96.) Appellee also pried open SW's mouth and forced his penis inside it, causing her to gag. (J.A. 85, 89-90.)

SW did not consent to any sexual contact beyond kissing. (J.A. 91.) The next day, SW's arms were sore, and the following day, she noticed significant bruising on her inner thighs. (J.A. 85, 101-02.)

B. SW did not immediately remember every detail of the rape.

SW decided to go to Washington Hospital Center due to her bruising. (J.A. 112.) Although SW did not initially recall the details of the rape in the days immediately following, she later remembered images and a feeling of Appellee having raped and sodomized her. (J.A. 85, 89-90, 199.) SW's memories regarding

the rape were segmented, and did not fully return until the following Tuesday——a little over two days later. (J.A. 85, 113.)

Appellee initially denied having sex with SW, and claimed to have only shaken her hand. (J.A. 472.) He did, however, admit that SW "could barely stand up" when she arrived at his house. (J.A. 471.) During a subsequent interview with law enforcement, Appellee admitted that he awoke the next morning with an open condom wrapper next to him. (J.A. 475.) This led him to believe that he had sex with SW. (*Id.*)

C. Experts in psychiatry and forensic toxicology testified regarding alcohol and its effect on memory formation and recall.

Dr. Henry testified as an expert in the fields of general, forensic, and addiction psychiatry, in both the United States' case-in-chief and on rebuttal. (J.A. 250.) Dr. Henry explained the effect alcohol has on memory, noting that "alcohol primarily interferes with that transfer of memory from short-term to long-term. So the normal organized way in which memories are laid down are disrupted. Because they were not laid down in an organized fashion, their retrieval is often therefore haphazard." (J.A. 256.)

Dr. Henry testified that an individual who suffered a fragmentary blackout could recall memories formed during the blackout for the first time even three or four days later.

(J.A. 303.) He explained that phenomenon could "absolutely" occur because he had seen it happen in a clinical setting. (*Id.*) He conducted a four-and-a-half hour face-to-face interview of SW prior to trial. (J.A. 260.) He testified that it was his expert opinion, "to a reasonable degree of medical and psychiatric certainty, that Ms. [S]W provided a description which was very clinically consistent with a fragmentary blackout." (*Id.*)

Dr. Grieger testified for the Defense as an expert in clinical and forensic psychiatry. (J.A. 317.) Dr. Grieger stated that "[I]f the memory was not present the day after, it would not be present three days later." (J.A. 361.) Dr. Grieger further opined that "if they don't remember [the memory] the following morning, it was not put into long-term memory, and they will not recall it as a memory." (*Id.*)

Dr. Henry, testifying in rebuttal, disagreed with Dr. Grieger's opinion. (J.A. 301.) Dr. Henry explained that "alcohol disrupts that transfer process [of memories]. The transfer process is disorganized. It would then stand to reason that, given the disorganization of the transfer and encoding process that later retrieving those memories will also be haphazard." (*Id.*)

D. <u>Upon Defense request, the Military Judge made special findings</u>.

1. <u>The Military Judge made findings regarding the credibility of SW and the physical evidence</u>.

Upon Defense request, the Military Judge issued special findings pursuant to R.C.M. 918(b). (J.A. 428.) The Military Judge found SW to be "a very credible witness," in that she testified in a "forthright manner" and answered all questions "without any significant hesitation." (*Id.*) He found certain aspects of SW's testimony "particularly persuasive." (J.A. 428-29, 432-33.) Specifically, he cited SW's memory of Appellee penetrating her vagina with his penis ***after*** she had repeatedly told him "no," "stop," or words to that effect. (J.A. 81, 85, 87, 428.)

The Military Judge found that SW's testimony describing her intoxication raised a reasonable inference in his mind that SW had a diminished ability to resist Appellee. (J.A. 67-68, 83, 86, 429.)

The Military Judge also considered the bruising on SW's inner thighs as "circumstantial evidence that the accused committed the offense of rape." (J.A. 102-07, 430, 477-85.) He found credible SW's testimony that "she did not bruise easily, that she did not have any bruises on her legs prior to 25 March 2012, that none of her prior consensual physical activity with

OS3 MacKellar or Mr. Claxton could have caused those bruises." (J.A. 102-07, 429, 477-85.)

The Military Judge found that OS3 MacKellar denied doing anything to or with SW that would have caused bruises to her inner thighs or legs. (J.A. 406, 430.) Though Mr. Claxton did lie on top of SW, he denied grabbing her inner thighs forcefully or thrusting. (J.A. 409, 430.)

2. The Military Judge found that Appellee's conflicting statements to NCIS demonstrated Appellee's "consciousness of guilt."

The Military Judge found that Appellee's inconsistent statements to NCIS were evidence of Appellee's consciousness of guilt. (J.A. 431, 434.) In Appellee's second statement to NCIS, Appellee said that he "talked to [his] Dad after [his] first interview with NCIS and told him about the allegations and . . . that [he] probably did have sex with SW." (J.A. 431, 434, 475.) The Military Judge "consider[ed] this statement an admission by the accused that he believe[d] he did engage in sexual activity with SW on the night in question." (J.A. 431, 434.) The Military Judge further found "the fact that he omitted this information from his first statement to NCIS [to be] circumstantial evidence of the accused's consciousness of guilt." (*Id.*)

3. The Military Judge made special findings regarding the credibility and reliability of one expert over another.

The Military Judge "found Dr. Henry's testimony credible based on his education and experience." (J.A. 247, 249-50, 430.) He also gave Dr. Henry's opinion more weight "because he has observed this phenomenon [of fragmentary blackouts] clinically in patients, his testimony that because memories are recorded haphazardly during a fragmentary blackout that it stands to reason that such memories are also retrieved haphazardly, and the Court's own exercise of common sense." (J.A. 256, 302-03, 430.)

Additionally, the Military Judge concluded that Dr. Henry "testified credibly" that he had "never heard or read anything in the field's literature that a memory formed during a fragmentary blackout must be remembered by the person the next morning or it can never be retrieved." (J.A. 301, 430.)

The Military Judge discounted Dr. Grieger's testimony that "memories formed during a fragmentary alcohol induced blackout must be retrievable by the person on the morning after the incident or they will never be able to be retrieved." (J.A. 328-29, 430.) Although the Military Judge found Dr. Grieger to have "extensive education and experience in the relevant field, [Dr. Grieger] could not offer a specific study that supported his opinion." (J.A. 430.) The Military Judge also assessed Dr.

Grieger's credibility and found both his opinion and demeanor during in-court testimony "to be unduly dogmatic, that is taking one position that fits all circumstances." (J.A. 430, 434.)

E. The lower court did not recognize or mention the Military Judge's special findings.

Though the lower court stated that it made "allowances for not having seen or heard the witnesses," it did not mention the special findings of the Military Judge. (J.A. 7.)

The lower court found that "SW's segmented memories lacked significant details and she could provide no chronology of the events she did remember." (J.A. 7.) The lower court determined that the "disorganized, potentially non-sequential order" of SW's memories indicated that the United States had failed to prove the element of "force" under either offense. (*Id.*) Additionally, the lower court explained that the "lack of physical findings to support SW's description of events also gives rise to reasonable doubt." (*Id.*)

The lower court referenced Appellee's inconsistent statements in its recitation of the facts. Unlike the Military Judge, however, it did not address these statements in its analysis. (J.A. 3.)

The lower court found that there was "nothing in the Record to favor one expert's opinion over the other," regarding the

experts' "differing opinions on the reliability of SW's delayed recollection of events." (J.A. 7-8.)

Summary of Arguments

I.

All words in a statute are to be given effect by the courts. The last ten words of Article 66(c) require the Courts of Criminal Appeals to "recogniz[e] that the trial court saw and heard the witnesses," but it is unclear from the text of the statute or the case law how this must be done. The legislative history of Article 66(c) reveals that the statute's architects intended the Boards of Review to continue to give "considerable weight" to the findings of the trial court due to its superior position in seeing and hearing the witnesses testify in person. In some cases, the Courts of Criminal Appeals have continued this practice, but in others they have not. When the lower court failed to give any weight to, or even address, the special findings of the Military Judge, it failed to recognize that the trial court saw and heard the witnesses in the manner required by Article 66(c). This Court should remand this case to the lower court and instruct it to comply with the statute by giving considerable weight to the findings of the Military Judge and, if it disagrees, to justify its departure from those findings by explaining why its inability to see and hear the witnesses is irrelevant to its conclusions.

II.

Article 51(d), UCMJ, is modeled after Federal Rule of Criminal Procedure 23(c) and as such, the practice of the Federal Circuits with regard to special findings should guide the military courts. Both the Army and Air Force Courts of Criminal Appeals have recognized this and applied the Federal Circuits' "clearly erroneous" standard of review to non-guilt, special findings of a military judge, even in the context of Article 66(c) review. The lower court erred when it did not apply any standard of review, let alone the proper "clearly erroneous" standard, to the non-guilt findings of the Military Judge. This Court should remand this case to the lower court and instruct it to apply the "clearly erroneous" standard of review to the non-guilt findings of the Military Judge.

Argument

I.

WHEN THE LOWER COURT REVERSED THE VERDICT OF THE TRIAL COURT AS FACTUALLY INSUFFICIENT WITHOUT RECOGNIZING THE MILITARY JUDGE'S SPECIAL FINDINGS, IT IGNORED BOTH THE PLAIN LANGUAGE AND CONGRESSIONAL INTENT OF ARTICLE 66(c), WHICH REQUIRES THE COURTS OF CRIMINAL APPEALS TO "RECOGNIZ[E] THAT THE TRIAL COURT SAW AND HEARD THE WITNESSES."

A. When the lower court does not conduct a complete or correct Article 66 review, this Court has remanded for corrective proceedings.

This Court has confronted cases in which it is unclear whether the lower court properly conducted an Article 66 review. In *United States v. Nerad*, 69 M.J. 138 (C.A.A.F. 2010), this Court remanded the case to the Air Force Court of Criminal Appeals because it was "unclear from the CCA's opinion whether it exceeded its authority by disapproving a finding with reference to something other than a legal standard, potentially infringing on the sole prerogative of the convening authority under Article 60, UCMJ . . . to disapprove a finding based on purely equitable grounds." *Id.* at 140.

Similarly, in *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987), this Court remanded when it was unclear whether the Navy-Marine Corps Court of Military Review conducted a factual sufficiency review or only reviewed the record for legal sufficiency. *Id.; see also United States v. Jenkins*, 60 M.J. 27

(C.A.A.F. 2004) (remanding where it was unclear whether the lower court performed a proper Article 66(c) review because it copied substantial portions of the Government's answer in its written opinion). Thus, where it is unclear from the lower court's action whether it properly fulfilled its statutory obligations under Article 66(c), this Court should remand the case for corrective proceedings.

B. This Court reviews the interpretation of statutes and legislative history *de novo*.

Interpretation of a statute and its legislative history are questions of law that this Court reviews *de novo*. *United States v. Martinelli*, 62 M.J. 52, 56 (C.A.A.F. 2005); *see also Nerad*, 69 M.J. at 141-42 ("The scope and meaning of Article 66(c), UCMJ, is a matter of statutory interpretation, a question of law reviewed *de novo*.").

C. The canons of statutory construction require that the last ten words of Article 66(c) be given effect.

This Court's duty in interpreting a statute is to implement the intent of Congress, "so far as the meaning of the words fairly permit." *Sec. & Exch. Comm'n v. Joiner,* 320 U.S. 344, 351 (1943). It is a well-settled rule of statutory construction that all parts of a statute, when possible, must be given effect. *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 513 (1981); *see Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) ("It is the duty of the court to give effect, if possible, to every

clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.”).

Courts are thus reluctant to treat statutory terms as surplusage “in any setting.” *Duncan v. Walker*, 533 U.S. 167, 174 (2001); *see also United States v. Murphy*, 74 M.J. 302, 306-07 (C.A.A.F. 2015) (reading “ammunition” as included within “explosives” for purposes of 18 U.S.C. § 844(j) because to read otherwise would render a statutory exemption for ammunition stored within a checked airline bag as meaningless and “surplusage.”); *Nerad*, 69 M.J. at 151 (Stucky, J., dissenting) (“In [interpreting a statute], where possible, we should ‘avoid rendering superfluous any parts thereof.’”) (quoting *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991)).

D. The scope and meaning of the requirement in Article 66(c) to “recogniz[e] that the trial court saw and heard the witnesses” is ambiguous.

“The first step [of statutory construction] is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent.” *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014) (quoting *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002)). “Whether the statutory language is ambiguous is determined ‘by reference to

the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" ***Id.*** (quoting ***Robinson v. Shell Oil Co.***, 519 U.S. 337, 340 (1997)).

Article 66(c), UCMJ, requires the Court of Criminal Appeals to determine whether the findings and sentence of the court-martial are "correct in law and fact." Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2012). In making this determination, the court may "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact . . . ." ***Id.*** This puts the review function of these appellate courts nearly on an equal plane with two of the primary functions of the trial court: (1) making determinations concerning weight of the evidence and witness credibility; and, (2) using these determinations to determine whether the evidence, as a whole, proves the accused's guilt beyond a reasonable doubt. ***Turner***, 25 M.J. at 325.

The power of the Courts of Criminal Appeals to reweigh the evidence and judge the credibility of witnesses is not, however, unconditional. Article 66(c) expressly requires the court to "recogniz[e] that the trial court saw and heard the witnesses." Article 66(c), UCMJ. This phrase has been interpreted to require Courts of Criminal Appeals to "take into account" that the trial court, unlike the appellate court, saw and heard the

witnesses testify in person. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002); *see Cone v. W. Virginia Pulp & Paper Co.*, 330 U.S. 212, 216 (1947) ("[T]he judge who *saw and heard the witnesses* . . . has the feel of the case which no appellate printed transcript can impart") (emphasis added). Indeed, in *Nerad* this Court recognized that while broad, the statutory authority of the Courts of Criminal Appeals to act with respect to the findings and sentence, is not unlimited. *Nerad*, 69 M.J. at 145; *see United States v. Doctor*, 7 C.M.A. 126, 137 (C.M.A. 1956) ("The board of review['s] . . . powers are not quite so broad as the trial forum.").

Though the words of the Congressional injunction to "recogniz[e] that the trial court saw and heard the witnesses" have plain meaning, the question remains as to what these words mean in practicality. "The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification." *United States v. Monia*, 317 U.S. 424, 431 (1943) (Frankfurter, J., dissenting). The scope and meaning of the last ten words of Article 66(c) is ambiguous in the context of a statute that allows Courts of Criminal Appeals to weigh the evidence and requires them to determine whether the findings are true "in fact." This ambiguity is exacerbated by inconsistent interpretations of the scope and

meaning of these words by this Court and the Courts of Criminal Appeals.

E. This Court and the Courts of Criminal Appeals have given unclear and inconsistent effect to the last ten words of Article 66(c).

1. This Court has never articulated *how* the Courts of Criminal Appeals must "make allowances for" and "take into account" the fact that the trial court saw and heard the witnesses.

In ***Turner***, the issue was whether the lower court reviewed the record of trial only for legal sufficiency without evaluating the weight of the evidence as required under Article 66(c). ***Turner***, 25 M.J. at 325. The ***Turner*** Court determined that the Courts of Criminal Appeals must review the record for factual sufficiency as well as legal sufficiency. ***Id.*** Since the lower court's opinion was unclear as to whether it fulfilled this requirement, this Court remanded and ordered it to perform a factual sufficiency review. ***Id.***[1] The ***Turner*** Court announced the following test for factual sufficiency:

> [W]hether, after weighing the evidence in the record of trial and ***making allowances for not having personally observed the witnesses***, the members of the Court of Military Review are themselves convinced of the accused's guilt beyond a reasonable doubt.

[1] ***Cf. People v. Bleakley***, 69 N.Y.2d 490, 495-96 (N.Y. 1987) (remitting the case where the Appellate Division reviewed a conviction for legal sufficiency but failed to conduct the "weight of the evidence" review required under New York law).

Id. (emphasis added). However, the Court did not address the *amount* of deference or *quantum* of weight to be accorded to the trial court's determinations of the evidence and witness credibility. Instead, the *Turner* test expressly requires the Courts of Criminal Appeals to "mak[e] allowances for not having personally observed the witnesses"——thus leaving unresolved the question of *how much* deference is required by this mandate. *Id.*

In *United States v. Cole*, 31 M.J. 270 (C.M.A. 1990), the issue before this Court was whether the Air Force Court of Military Review exceeded its authority when it determined that the military judge erred by allowing the trial counsel to elicit prejudicial information from an expert defense witness during the presentencing hearing. *Id.* at 271-72. This Court held that the lower court did not exceed its authority, noting that Article 66(c) allowed the Air Force court to itself weigh the danger of unfair prejudice to the appellant against the probative value of the information elicited. *Id.* In *dicta*, the *Cole* Court described the review power under Article 66(c) as an "awesome, plenary, *de novo* power of review [that] grants unto the Court of Military Review authority to, indeed, 'substitute its judgment' for that of the military judge . . . [and] for that of the court members." *Id.* at 272. Though sweeping in its language, *Cole* left unaddressed and unresolved the relationship between factual sufficiency review and the level of deference

required to the trial court's determinations of evidentiary weight and witness credibility. Thus, as in ***Turner***, the Court did not resolve the question of ***how*** and ***to what degree*** the lower courts are legally required to "mak[e] allowances for having not personally observed the witnesses." ***Turner***, 25 M.J. at 325.

In ***Washington***, this Court confronted the question of whether the presumption of innocence applies to an appellant during Article 66 review. ***Washington***, 57 M.J. at 394. Though the ***Washington*** Court agreed with the lower court that this presumption did not apply, it took issue with the lower court's reasoning, which seemed to lower the standard of evidence on appeal and shift the burden to the appellant. ***Id.*** at 400; ***see also United States v. Sills***, 56 M.J. 239, 240-41 (C.A.A.F. 2002) (declining to apply a preponderance-of-the-evidence standard for factual sufficiency review).

In ***dicta***, the Court described factual sufficiency review as "a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency ***beyond the admonition*** . . . to take into account the fact that the trial court saw and heard the witnesses." ***Id.*** at 399 (emphasis added). Notably, as in ***Turner***, this Court specifically declined to adopt a pure ***de novo*** standard of review in which no deference at all is given to the trial court. ***Id.*** Instead, the Court expressly required that the Courts of Criminal Appeals "take

into account the fact that the trial court" had the unique opportunity to see and hear the witnesses. *Id.*

Thus, this Court has not resolved the question of *how* the Service courts must apply the last ten words of Article 66(c) when conducting factual sufficiency review. Additionally, this Court has not addressed what effect these words have in cases where a military judge has made special findings pursuant to Article 51(d), UCMJ. Notwithstanding the "awesome, plenary, *de novo" dicta* from *Cole*, the *Turner* requirement to "mak[e] allowances for having not personally observed the witnesses" and the *Washington* requirement to "take into account the fact that the trial court saw and heard the witnesses" both still apply. The meaning of these affirmative requirements, however, remains unclear.

2. The Courts of Criminal Appeals have inconsistently applied the last ten words of Article 66(c).

The Courts of Criminal Appeals have given effect to the last ten words of Article 66(c) inconsistently. In many cases, the Courts of Criminal Appeals have stated that trial court determinations regarding the weight of evidence and witness credibility are entitled to "great weight" or "considerable weight" because of the trial court's relative advantage in seeing and hearing the witnesses in person. *See, e.g., United States v. Morsell*, 30 M.J. 808 (A.F. Ct. Crim. App. 1990)

(noting that a "trial forum's findings must be accorded great weight" but reversing for factual insufficiency in a urinalysis case where the technician clearly did not follow proper procedures); *United States v. Johnson*, 6 M.J. 681, 682 (N.M.C.M.R. 1978) (rejecting appellant's factual insufficiency claim following marijuana conviction because, even though the evidence on the elements of the crime was directly in conflict, the court gave "great weight to the determination of the finder of fact at trial, the military judge, and conclude[d] there [was] no reason to disturb his findings."); *United States v. Perry*, 10 C.M.R. 387, 389-90 (A.B.R. 1953) (emphasizing that the court must "attach considerable weight to [the trial court's] decision" but reversing in a desertion case where the Government's only evidence were documents establishing the accused's unauthorized absence and there was no evidence rebutting the accused's testimony that he did not intend to shirk service); *see also United States v. Brown*, 43 BR 221, 227 (A.B.R. 1944) ("[C]onsiderable weight must be accorded [the trial court's] findings by reason of the superior position which the court enjoyed in seeing the witnesses and hearing them testify."). (J.A. 887, 893.)

In other cases, the courts have emphasized the need for deference to the fact-finder while reaffirming the statutory requirement for an independent assessment of the evidence. *See,*

e.g., *United States v. Carroll*, 40 M.J. 554, 557 (A.C.M.R. 1994) ("[W]e should give great deference to panel members who have personally observed and judged the demeanor of the witnesses. However, we must ourselves independently weigh the evidence and determine controverted questions of fact.").[3]

In *United States v. Johnson*, 30 M.J. 930 (A.C.M.R. 1990), the Army Court of Military Review concluded that the amount of deference owed to the trial court's findings depends on the nature of the issue under review:

> [I]n cases where witness credibility plays a critical part in the outcome of the trial, we hesitate to second-guess the court's findings . . . . Conversely, where these findings do not depend on the court's observation of the witnesses, our independence as a fact-finder should only be constrained by the evidence of record and the logical inferences emanating therefrom.

Id. at 934 (citing *United States v. Albright*, 9 C.M.A. 628 (C.M.A. 1958)); *accord United States v. Smith*, 31 M.J. 823, 824

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[3] *See also United States v. Hayes*, 40 M.J. 813, 817 (C.G.C.M.R. 1994) ("[W]e are not completely free to disregard the evidentiary conclusions of the factfinder below. We must factor into our analysis of the trial evidence that the original factfinder had the opportunity to actually observe and hear the witnesses. We are not required to defer to the factfinder below. Rather, we must exercise our own independent judgment, but recognize that we do not have the benefit of any demeanor evidence."); *cf. People v. Sanducci*, 195 N.Y. 361, 367 (N.Y. 1909) (although the "credibility of witnesses is necessarily for the twelve jurors who looked into their faces and heard them testify rather than for the seven judges who simply read the printed record of what they said," factual sufficiency review requires the court to "determin(e) whether the evidence fairly and reasonably supports their conclusion . . . .").

(A. Ct. Crim. App. 1990); *see also United States v. Goodyear*, 14 M.J. 567, 573 (N.M.C.M.R. 1982) (declining to give "great weight" to the trial court's determination of credibility because, based on the specific facts, there was "little that could be enhanced by oral and visual observation and assessment").

In *United States v. House*, No. 20061064, 2009 CCA LEXIS 192 (A. Ct. Crim. App. March 30, 2009), a members case, the Army court——consistent with its reasoning in *Johnson* and *Brown*—— recognized that the credibility of witnesses was a paramount factor in analyzing the factual sufficiency of a rape conviction. (J.A. 871-72.) The *House* court emphasized the statutory requirement to "recogniz[e] that the trial court saw and heard the witnesses" as well as the directive from this Court in *Turner* to "mak[e] allowances for not having personally observed the witnesses." (J.A. 871) (citing Article 66(c), UCMJ; *Turner*, 25 M.J. at 325). The court then conducted a meticulous review of the facts supporting and undermining the alleged victim's credibility, including contradictions between her testimony, her prior and subsequent statements to investigators and other witnesses, and other facts in the record. (J.A. 873-76.) *See also id.* at *31 (Tozzi, J., concurring) (noting the "important requirement that [the] court

fulfilled" through its scrupulous application of Article 66(c)) (J.A. 876.)

Here, the lower court noted that it "made allowances for not having heard and observed the witnesses" but made no reference to the Military Judge's special findings. (J.A. 5-7.) These special findings addressed in detail the trial court's conclusions concerning the relative credibility of witnesses and weight of the evidence based on in-person observation. (J.A. 428-34.) Thus, it appears the lower court gave no deference to the fact that the trial court saw and heard the witnesses.

3. In cases in which a military judge has made special findings, the other Courts of Criminal Appeals have effectuated the last ten words of Article 66(c) by specifically recognizing those findings and giving them considerable weight.

In *United States v. Brown*, 48 M.J. 578 (A. Ct. Crim. App. 1998), the court recognized and considered the special findings of the military judge concerning the victim's lack of consent in a prosecution for sexual assault. *Id.* at 581. Citing to Article 66(c), the court noted: "In making our findings we are particularly aware that both the victim and appellant testified in this case and that the military judge was in the unique position of being able to *see and hear the evidence and witnesses in judging credibility and making findings.*" *Id.* (emphasis added).

Similarly, in ***United States v. Vazquez***, No. 37647, 2013 CCA LEXIS 207 (A.F. Ct. Crim. App. March 1, 2013), the Air Force Court of Criminal Appeals recognized that a military judge's special findings are entitled to different levels of review depending on their characterization as guilt or non-guilt findings. (J.A. 877.) Though in that case the court determined that the findings covered mixed questions of law and fact pertaining to the ultimate issue of guilt, the court still addressed the special findings and determined the appropriate level of deference to apply to those findings. (J.A. 882-83.) ***See also United States v. Truss***, 70 M.J. 545 (A. Ct. Crim. App. 2011).

F. The legislative history of Article 66(c) indicates that Congress intended the Boards of Review to give considerable weight to the trial court concerning weight of the evidence and witness credibility.

Because the scope and meaning of the last ten words of Article 66(c) remain unclear, it is necessary to look to the legislative history of these words to understand their original intent. ***See United States v. Falk***, 50 M.J. 385, 390 (C.A.A.F. 1999) (stating that if a statute is unclear, the court "look[s] next to the legislative history"); ***Stone v. INS***, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, [it is] presume[d] it intends its amendment to have real and substantial effect."). In evaluating the legislative history of a statutory

provision, an explanation of the statute's meaning by its sponsor is an "authoritative guide to the statute's construction." ***Bowsher v. Merck & Co.***, 460 U.S. 824, 832 (1983) (quoting ***North Haven Board of Education v. Bell***, 456 U.S. 512, 527 (1982)). Furthermore, a committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation. ***Zuber v. Allen***, 396 U.S. 168, 186 (1969). Thus, in assessing the meaning and effect of the last ten words of Article 66(c), this Court should look to the statute's background, origin, and any statements made by the statute's sponsors or architects.

1. Under the 1920 Articles of War, the Army Boards of Review could weigh the facts and judge witness credibility in some cases. In doing so, they gave the trial court's initial determinations "considerable weight."

Until World War I, "appellate review" of Army court-martial records of trial by legally trained officers was virtually non-existent. (J.A. 684, 694-709.) As the Army Judge Advocate General's Department expanded, judge advocates increasingly played a more active and important role in the review of court-martial records. (J.A. 711-15.) During Congressional hearings concerning proposed amendments to the Articles of War in 1919, General Crowder, the Army Judge Advocate General, advocated the need for the Boards of Review to have broad authority to review facts on appeal. (J.A. 786, 823.)

In 1920, Congress enacted major revisions to the Articles of War, including a new Article 50 1/2 ("Review; Rehearing"), a statutory predecessor to the current Article 66, UCMJ. (J.A. 514, 535-36.) Under the new review system, Boards of Review were required to determine whether the record before them was "legally sufficient to support the findings and sentence." (J.A. 535.) In conducting this legal sufficiency review, the Boards employed two different scopes of review depending on the type of case.

For "Presidential cases" (cases in which the sentence required confirmation by the President[4]), the Boards of Review could weigh the evidence, judge the credibility of witnesses, and reach conclusions on controverted questions of fact. (J.A. 716-17.) The Boards exercised this power in a limited and deferential manner, "[i]n accordance with the principle that on the question of credibility, the findings of the trial court, which enjoyed the opportunity both ***to see and hear the witnesses***, while not conclusive, are entitled to ***considerable weight***." *United States v. Calder*, 27 BR 365, 382 (A.B.R. 1944) (emphasis added) (J.A. 943, 960).

[4] "Presidential cases" included all cases in which the accused was a general officer or in which the sentence adjudged and approved included dismissal of an officer, dismissal or suspension of a cadet, or death. (J.A. 532-33, 535, 716-17.) *See also* Manual for Court-Martial (1928), App. 1 (note on Article of War 50 1/2).

In *Calder*, the Army Board of Review deferred to the findings of the court-martial that accepted the testimony of a key witness and rejected the conflicting testimony of the accused. (J.A. 960.) The *Calder* Board compared its scope of review to that applied by appellate courts in equity:

> As it is the function of the Board of Review to weigh the evidence in Presidential cases the position of the Board in such cases is in some respects analogous to the position of appellate courts in equity, where it is generally held that the findings of the trial court, while not conclusive, are entitled to great respect and deference on appeal.

(J.A. 960.) *See Brown*, 43 BR at 227 ("The evidence in this case presents the not unusual situation of directly conflicting testimony by the prosecuting witness and the accused on the question of consent. This issue of fact was decided by the court against the accused. Although their determination does not, of course, preclude the Board from reaching an opposite conclusion, nevertheless, considerable weight must be accorded their findings by reason of the superior position which the court enjoyed in seeing the witnesses and hearing them testify.") (J.A. 887, 893); *accord United States v. Lacewell*, 72 BR 105, 109 (A.B.R. 1947) (J.A. 907, 911); *United States v. Velasquez*, 69 BR 395, 404 (A.B.R. 1947) (J.A. 917, 926); *United States v. Hulme*, 2 BR 9, 16 (A.B.R. 1930) (J.A. 897, 904); *see also* Fed. R. Civ. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly

erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."); ***Washington***, 57 M.J. at 409 n.3 (Sullivan, J., concurring in part and dissenting in part) ("Similar language [to the last ten words of Article 66(c)] was also used before 1938 with respect to appeals in equity to describe a judicially created limit on the traditionally broad scope of appeal in equity which extended even to the facts of a case.").

In "non-Presidential cases," the Boards of Review were not empowered to weigh the evidence or judge the credibility of witnesses. (J.A. 720-21.) In these cases, the Boards of Review treated the findings below as presumptively correct, and examined the record of trial to determine whether they were supported by substantial evidence. (J.A. 721.) *See* Manual (1943), at 216, note ("In [non-Presidential] cases, the law gives to the court-martial and the reviewing authority exclusively this function of weighing evidence and determining what facts are proved thereby . . . .").

2. Efforts to reform the Boards of Review leading up to the passage of the Elston Act in 1948 focused on extending the scope of review employed in Presidential cases to all cases, similar to New York State appellate practice. There was no intent to remove the requirement of appropriate deference to the fact-finder.

After World War II, there were widespread calls for reform of the Articles of War and the Articles for the Government of

the Navy, to include improvements to appellate review. (J.A. 826-37.) The Vanderbilt Committee, appointed by the Secretary of War and chaired by the Dean of New York University Law School, proposed several statutory amendments. (J.A. 486-88.) The Vanderbilt Report included a recommendation from a former master sergeant and lawyer to adopt the New York state system of appeals. (J.A. 489.) The New York appellate system includes factual sufficiency review. *See generally People v. Romero*, 7 N.Y.3d 633 (N.Y. 2006). The Committee Report recommended extending the scope of appellate review applicable in "Presidential cases" to all cases.[5]

In 1947, Representative Charles Elston introduced a bill to substantially amend the Articles of War. H.R. Rep. No. 80-1034 (1947); (J.A. 514.) The Act incorporated many of the recommendations from the Vanderbilt Report, including changes to the Boards of Review. (J.A. 533-36.) Under the revised Article of War 50 (Article of War 50 1/2 was deleted), the Boards of Review could now weigh the facts, judge witness credibility, and resolve controverted questions of fact in all cases, not just Presidential cases. (J.A. 535, 735.) For the first time, the

[5] Both the New York County and City Bar Associations also exerted substantial influence in military justice reforms during this time, including issuing formal recommendations. *Id.* at 130-31; *see, e.g.*, Association of the Bar of the City of New York, *Report on Pending Legislation for the Revision of the Army Court-Martial System*, February 27, 1948. (J.A. 507.)

scope of appellate review appeared explicitly in the statute. (*Id.*)

In describing the changes to the Boards of Review to the House Armed Services Committee, Representative Elston, the sponsor of the bill, emphasized the limited nature of factual appellate review under Article of War 50(g). Responding to Representative Burleson's criticism that "[a]n individual who is not present on the trial of a case is not going to be in very good position . . . to judge the credibility of the witness unless he can see him and hear him testify," Representative Elston observed:

> I think the provision . . . about weighing the evidence, was to give greater protection to the accused, so that a reviewing court could review all the evidence in the case and could even pass on the credibility of witnesses. *That doesn't mean, as I interpret it, that the reviewing court is going to place itself in the position of the trial court*, but if it is obvious on review that a witness was not a credible witness, the reviewing court will have a right to reject his testimony entirely.

Hearings on H.R. 2575 Before a Subcomm. of the House Comm. on Armed Services, 80th Cong. 2114-16 (1947) (emphasis added); (J.A. 542, 565-67.) Thus, according to its sponsor, Article of War 50(g) was not meant as a departure from the general rule of giving appropriate deference to the fact-finder. Rather, it allowed Boards of Review to discount the testimony of certain

witnesses when their testimony was "obvious[ly]" not credible. (J.A. 567.)

Notably, the proposed and enacted version of Article of War 50(g) did not contain the admonition of the last ten words currently in Article 66(c), UCMJ. (J.A. 535.) Even without these words, the Boards of Review continued to adhere to the principle that "considerable weight must be accorded the court's findings by reason of the superior position it enjoyed in seeing the witnesses and hearing them testify." ***United States v. Waggoner***, 8 BR 149, 157 (A.B.R. 1950) (reversing the trial court's findings only after thoroughly reviewing all the evidence, pointing out why the primary accuser was not credible, and explaining why the other evidence was not corroborated); (J.A. 933, 941.)[6]

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[6] At this same time, a separate committee tasked with reforming military justice practice in the Navy issued similar recommendations with respect to appellate review. (J.A. 490, 745.) The General Court-Martial Sentence Review Board, chaired by Arthur Keeffe of Cornell Law School and largely run by Felix Larkin——formerly an assistant on the New York Court of General Sessions——recommended "an exhaustive and comprehensive power of review, which should include the power to reweigh the facts." (J.A. 503, 828.) The Review Board pointed specifically to New York as an example of a state jurisdiction that allowed a similar type of appellate review of the "weight of the evidence." (J.A. 502-03.) It also expressly noted that the Boards of Review would generally defer to the trial court: "Naturally, such power [of reweighing the facts on appeal] would rarely be exercised, for in most cases the Board of Legal Review would defer to the court's conclusions on issues of fact." (J.A. 503.)

3. In drafting and refining the provision that would become Article 66(c), the UCMJ Drafting Committee sought to retain an appropriate standard of deference to the trial court concerning evidentiary weight and witness credibility.

In May 1948, a month before the Elston Act passed through the Senate as an amendment to the Selective Service Act, Secretary of Defense Forrestal appointed a committee to draft the Uniform Code of Military Justice (hereinafter "Drafting Committee"). (J.A. 838-43.) Secretary Forrestal appointed Professor Edmund Morgan as Chairman of the Drafting Committee. (J.A. 575, 786, 793, 818, and 826.) On October 5, 1948, Professor Morgan sent his proposed draft of the military appellate process to Felix Larkin, an Assistant General Counsel in the Department of Defense and the Executive Secretary of the Drafting Committee and Chairman of the UCMJ Working Group. (J.A. 583, 840-48.) The draft was entitled "Memo on legality of judicial council in appellate system and drafts of letters to Secretary of Defense on points of difference etc." (*Id.*)

Professor Morgan described the role of the Boards of Review and their appellate scope of review as follows:

> The Board of Review shall examine the whole record to ascertain whether the court has committed any error which has injuriously affected the substantial rights of the accused; it shall have the authority to weigh the evidence, judge the credibility of witnesses and determine controverted questions of fact, ***bearing in mind that the court saw and heard the witnesses who testified before it***, and the Board shall determine whether the findings or sentence or both in so far as

> theretofore approved by the convening authority shall be set aside in whole or in part or affirmed in whole or in part, or modified, and whether the charges shall be dismissed or the case reheard.

(J.A. 596-97.)

This initial draft is notable because Professor Morgan added specific qualifying language to the provision contained in Article of War 50(g) concerning the scope of review to be employed by the Boards. (J.A. 596-97.) This limiting language in Professor Morgan's draft differs only slightly from the last ten words of the current version of Article 66(c) and tracked Representative Elston's understanding that Boards of Review were generally not to second-guess credibility determinations of the trial court. (J.A. 567, 596-97.)

On October 14, 1948, the Drafting Committee and the Working Group met at the Pentagon to discuss Professor Morgan's draft proposal. (J.A. 600, 606-07, 850-51.) Notes from that meeting show that Professor Morgan's provisions for the Boards of Review were debated and further refined. (J.A. 602-03.) With respect to the limiting language on the Board's ability to weigh the evidence, judge credibility, and determine controverted questions of fact, the words "bearing in mind" in the phrase "*bearing in mind* that the court saw and heard the witnesses who testified before it" were crossed out. (J.A. 603.) Two alternative phrases were proposed: (1) "giving due weight to the

fact that . . . ."; and (2) "recognizing that . . . .". (*Id.*) Professor Morgan and the Drafting Committee appeared to be trying to find the right words to describe the appropriate level of appellate deference to evidentiary and credibility determinations of the trial court.

One week later, Mr. Larkin and Cornell Law Professor Robert Pasley sent Professor Morgan a revision of his initial appellate process draft. (J.A. 608-09, 852-53.) Messrs. Larkin and Pasley separated Professor Morgan's proposal into separate statutes, including a draft Article 55(c) which addressed the Boards of Review:

> The Board of Review shall examine the whole record to ascertain whether any error has been committed which has injuriously affected the substantial rights of the accused. It shall have the authority to weigh the evidence, judge the credibility of witnesses and determine controverted questions of fact, ***recognizing that the trial court saw and heard the witnesses.*** The Board of Review shall determine whether the findings and sentence, as theretofore approved by the Convening Authority, shall be affirmed in whole or in part, set aside in whole or in part, or otherwise modified, and whether, in any case where the findings and sentence have been set aside, the charges shall be dismissed or a new trial ordered.

(J.A. 608-09)(emphasis added). Although similar to Professor Morgan's initial draft, this version contained the limiting language that appears in Article 66(c) today: "recognizing that the trial court saw and heard the witnesses." (J.A. 608.)

By November 26, 1948, the draft provisions were fully developed. (J.A. 613.) Now moved to Article 56, the Drafting Committee's proposals concerning the Boards of Review were substantively identical with the current versions of Article 66(c):

> (c) In any case referred to it, the Board of Review shall act only with respect to the findings and sentence as approved by the Convening Authority. It shall affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record it shall have authority to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, ***recognizing that the trial court saw and heard the witnesses***.

(J.A. 613)(emphasis added).

Throughout October and November of 1948, the Drafting Committee was actively debating the appropriate amount of deference to be given to the trial court's findings by the Boards. The Drafting Committee was well aware of the corresponding provision in the Elston Act, Article of War 50(g), and specifically chose to add the limiting language at the end of Article 66(c). The level of attention given to this limiting language confirms that these words are not surplusage and must be given effect.

4. <u>The drafters of Article 66(c) and Congress understood the statute to require the Boards of Review to affirm the findings and sentence of the lower court so long as they were not "against the weight of the evidence." This standard of review reflected New York appellate practice, which requires some deference to the trial court's determinations concerning evidentiary weight and witness credibility</u>.

During the Congressional hearings on the UCMJ in 1949, Professor Morgan testified regarding the factual sufficiency review powers of the Boards of Review under the proposed Article 66(c). *Uniform Code of Military Justice, Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 604 (1949); (J.A. 627, 633.) First, he noted that "[t]his board of review is a counterpart to the present board of review of the Army." (J.A. 633.) Then, in an exchange with Representative Elston, he confirmed that factual sufficiency review under Article 66(c) would allow the Boards to "set aside cases because it is manifestly *against the weight of the evidence*." (J.A. 634) (emphasis added). This interpretation of the scope of review under Article 66(c) was further buttressed by the commentary prepared by the Drafting Committee, which was read during the Congressional hearings and was adopted by the Armed Services committees of both the House and the Senate:

> The board of review shall affirm a finding of guilty of an offense or a lesser included offense (see art. 59) if it determines that the finding *conforms to the weight of the evidence* and that there has been no

> error of law which prejudices the substantial rights of the accused.

(J.A. 621-26, 637, 647-50) (emphasis added). *See Jackson v. Taylor*, 353 U.S. 569, 577 (1957) (citing the reports of the House and the Senate on Article 66(c) as manifesting the intent of Congress with respect to the appellate review powers of the Boards of Review).

The "against the weight of the evidence" standard that Professor Morgan articulated, and which was included in both the House and Senate Armed Services Committee Reports, reflected the factual sufficiency review powers of the New York appellate courts at the time of the UCMJ's enactment. *See People v. Williams*, 292 N.Y. 297, 304 (N.Y. 1944); *People v. Crum*, 272 N.Y. 348, 350 (N.Y. 1936); *People v. Gaimari*, 176 N.Y. 84, 94 (N.Y. 1903). Notably, in exercising this factual review power, New York intermediate appellate courts give appropriate deference to the fact-finder. *See, e.g., People v. Bleakley,* 69 N.Y.2d at 495 (N.Y. 1987) ("Empowered with this unique factual review, intermediate appellate courts have been careful not to substitute themselves for the jury. Great deference is accorded to the fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor. Without question the differences between what the jury does and what the appellate court does in weighing evidence are delicately nuanced, but

differences there are.”). *See generally People v. Romero*, 7 N.Y.3d 633 (N.Y. 2006).[7]

This symmetry between the factual review power of the Boards of Review and that of New York intermediate appellate courts is not surprising given the level of influence New York lawyers, academics, and law had on the formation of the UCMJ. Indeed, Mr. Larkin was an assistant at the Court of General Sessions in New York City before he joined the Department of Defense; Robert Pasley and Arthur Keefe were law professors at Cornell University; Arthur Vanderbilt was the Dean of New York University Law School; the City, County, and State of New York bar associations were all heavily involved in the formation of the UCMJ; and throughout the drafting and development of the UCMJ, New York appellate practice was looked to repeatedly as a potential model. (J.A. 635, 786-856.) In fact, during the Congressional hearings on the UCMJ in 1949, a witness specifically pointed to New York appellate practice as a potential model for the power of the Boards of Review to weigh

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[7] The “against the weight of the evidence” standard is still applicable in New York appellate courts. *See* N.Y. Crim. Proc. Law § 470.15 (authorizing intermediate appellate courts to reverse jury verdicts of conviction when the court determines that the “judgment was, in whole or in part, against the weight of the evidence”); *People v. Bleakley*, 69 N.Y.2d 490 (N.Y. 1987). In applying the standard, New York courts continue to emphasize the need to take into account the fact that the jury saw and heard the witnesses and to give this fact appropriate weight. *See Bleakley*, 69 N.Y.2d at 495.

the evidence and judge the credibility of witnesses on appeal. (J.A. 635.)

During the Congressional Floor Debates on the UCMJ in July of 1949 and February of 1950, two amendments were proposed that would have altered the language of Article 66 and eliminated the last ten words in Article 66(c). (J.A. 651-70.) Both of these proposed amendments were rejected by the Senate, reflecting Congress's intent that these words should be included in the Code and given meaning and effect.[8]

G. When the lower court set aside the findings of the trial court for factual insufficiency without acknowledging the Military Judge's special findings, it failed to take into account those findings in the manner required by Article 66(c) and intended by Congress.

This Court and the lower courts must give meaning and effect to the last ten words of Article 66(c). *See Am. Textile Mfrs. Inst.*, 452 U.S. at 513; *Montclair*, 107 U.S. at 152. The text of the statute is silent as to how this is to be done, but

[8] The two amendments were proposed by Senator Kem and Senator Tobey. Senator Kem's proposal would have extended the Articles of War, as revised by the Elston Act in 1948, to cover the Navy in addition to the Army and Air Force. (J.A. 652-53.) Senator Tobey's proposal would have kept the same overall organization of articles that was proposed by the Drafting Committee, but would have transferred the applicable provision concerning the ability of the Boards of Review to weigh the evidence and judge the credibility of witnesses from Article 66(c) to a stand-alone subsection (f) within the statute. (J.A. 658-59.) As amended by Senator Tobey's proposal, the requirement to "recogniz[e] that the trial court saw and heard the witnesses" would have been eliminated. (J.A. 659.)

the statute’s background and legislative history is instructive. The precursors to Article 66(c), the architects of Article 66(c), the Congressional action concerning Article 66(c), and the State appellate procedure upon which Article 66(c) was based, all indicate that the Boards of Review, now the Courts of Criminal Appeals, must give some level of deference to the trial court’s determinations concerning weight of the evidence and witness credibility.

1. <u>Both the Army and Navy Courts of Criminal Appeals have properly complied with Article 66(c) in the past</u>.

In *Johnson*, *House*, and *Brown*, the Army Court of Criminal Appeals gave proper effect to the last ten words of Article 66(c) by addressing the findings of the trial court, particularly credibility determinations. This was true even in *House* and *Johnson*, two members cases, in which the credibility determinations of the trial court were not specifically articulated as they are in a case with special findings. In *Johnson*, the Army Court set aside the findings of the lower court for factual insufficiency only after recognizing that those findings did not turn on witness credibility. *Johnson*, 30 M.J. at 934. In *Brown*, the Army Court rejected the appellant’s factual sufficiency challenge to his rape conviction despite the “numerous inconsistencies and incongruities in the victim’s testimony” because the court recognized “that the military judge

was in the unique position of being able to see and hear the evidence and witnesses in judging credibility . . . ." *Brown*, 48 M.J. at 580-81.

This reasoning is not alien to the lower court's jurisprudence. In *Johnson*,[9] the lower court rejected the appellant's factual sufficiency challenge to his marijuana possession conviction despite the fact that "the evidence on the elements of the crime was directly in conflict." *Johnson*, 6 M.J. at 682. There, the lower court properly "recognize[d] the fact that the trial court [a military judge] saw and heard the witnesses" and "gave great weight" to the determination of the military judge. *Id.*

2. In this case, the lower court did not properly comply with Article 66(c) because it ignored the special findings of the military judge.

Here, the lower court set aside the findings of the trial court without even acknowledging the special findings of the Military Judge——many of which essentially went to the credibility of witnesses. (J.A. 8, 428-34.)

First, the lower court concluded that SW's testimony about being held down by her arms by Appellee was too "disorganized" to link this force to any sexual acts performed by Appellee.

[9] This was an unrelated Navy case that predates the Army case referenced in the preceding paragraph. The appellants shared the same last name.

(J.A. 7.) Second, the court noted a lack of "physical findings" supporting SW's testimony. (*Id.*) Third, the court considered the expert testimony of Dr. Henry and Dr. Grieger about SW's delayed recollection of her assault. (*Id.*) The court specifically "found nothing in the record to favor one expert's opinion over the other . . . ." (*Id.*)

The lower court's lack of regard for the credibility determinations of the Military Judge are particularly problematic in this case, because the Military Judge's conclusion that SW was "very credible" was based on facts that cannot be gleaned from a cold record. (J.A. 428, 432.) He specifically referred to her testimony as "forthright" and noted that she answered questions "without any significant hesitation." (*Id.*) These are exactly the kinds of findings that "depend on the court's observation of the witnesses." *Johnson*, 30 M.J. at 934; *see also United States v. Taylor*, 5 C.M.A. 775, 779 (C.M.A. 1955) ("[C]redibility is a matter within the province of the triers of fact . . . . Since we were not afforded an opportunity to observe [the witness's] demeanor and deportment on the stand, of necessity we must accord great deference to the court-martial's implicit conclusion with respect to his credibility."); *United States v. Strong*, 1 C.M.A. 627, 637 (C.M.A. 1952) ("It is universally recognized that the weight of the evidence and the credibility of witnesses is a

matter for the triers of fact to determine"); ***cf. Bleakley,*** 69 N.Y.2d at 495.

Likewise, the lower court's determination that there were "no physical findings" ignored the special findings of the Military Judge that the bruises on SW's inner thighs were "circumstantial evidence" that Appellee raped SW. (J.A. 429-30.) The lower court cited the fact that "[SW] could recall no actions by [Appellee] that caused the bruises." (J.A. 7.) But the lower court failed to address the Military Judge's finding and SW's testimony that while Appellee was "restraining her by holding her arms" that "she remember[ed] feeling pressure on her legs." (J.A. 428-29.) The Military Judge inferred that this pressure was Appellee's body weight. (J.A. 428-29.) Still, the lower court was silent on this testimony and again ignored these special findings by the Military Judge. (J.A. 7.)

Likewise, the lower court's observation that there was "nothing in the record to favor one expert's testimony over the other" ignores that the Military Judge credited the testimony of Dr. Henry over that of Dr. Grieger, in part because Dr. Henry had observed alcohol-induced blackouts clinically. (J.A. 7, 256, 302-03, 429-33.)

The Military Judge also found Dr. Grieger's opinion to be unconvincing, in that it was "unduly dogmatic," whereas he found Dr. Henry's testimony to be credible. (J.A. 429, 432-33.)

These credibility findings are the kind that depend on an "observation of the witness." ***Johnson***, 30 M.J. at 934. Still, the lower court gave no weight to the Military Judge's finding, nor did it explain why the Military Judge's findings about Dr. Grieger's or Dr. Henry's opinion were incorrect or unimportant. (J.A. 7.)

3. The lower court's action renders the last ten words of Article 66(c) surplusage.

The lower court's action merely paid lip service to the last ten words of Article 66(c), because though it states it "made allowances" for not having seen or heard the witnesses, it ignored the special findings of the Military Judge. (J.A. 7.) This suggests that all that is necessary for a Court of Criminal Appeals to satisfy Article 66(c) is to merely recite in its written opinion that it realizes it was not present to see or hear the witnesses. This cannot be the case.

A Court of Criminal Appeals judge does not need to be reminded that he or she was not a member or participant in the court-martial below because this fact is obvious. Indeed, any appellate judge who did serve as a member or participant in the court-martial below is ***prohibited*** from sitting as a member of the Court of Criminal Appeals on the same case. Article 66(h), 10 U.S.C. § 866(h) (2012). The last ten words must have a more practical effect on the review of the Courts of Criminal

Appeals, otherwise subsection (h) of Article 66 ceases to have any meaning and the last ten words of Article 66(c) would be rendered surplusage. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001).

Conclusion

Article 66(c) does not bestow unlimited powers on the Courts of Criminal Appeals. *Doctor*, 7 C.M.A. at 137; *see also Nerad*, 69 M.J. at 145. Congress limited their factual sufficiency review with the last ten words of Article 66(c). This Court should remand this case to the lower court and instruct it to comply with the statute by giving considerable weight to the findings of the Military Judge and, if it disagrees, to justify its departure from those findings by explaining why its inability to see and hear the witnesses is irrelevant to its conclusions.

II.

IN ADDRESSING THE APPROPRIATE STANDARD OF REVIEW FOR NON-GUILT SPECIAL FINDINGS BY A TRIAL JUDGE IN A CRIMINAL CASE, FEDERAL COURTS——TO INCLUDE THE ARMY AND AIR FORCE COURTS OF CRIMINAL APPEALS——HAVE APPLIED THE "CLEARLY ERRONEOUS" STANDARD. THE PLAIN TEXT AND LEGISLATIVE HISTORY OF ARTICLE 51(d), UCMJ, SUPPORT THIS INTERPRETATION OF THE STATUTE. BECAUSE THE LOWER COURT FAILED TO ACKNOWLEDGE THE EXISTENCE OF THE MILITARY JUDGE'S NON-GUILT AND GUILT SPECIAL FINDINGS AND THEREFORE APPLIED NO STANDARD OF REVIEW AT ALL, THIS COURT SHOULD REMAND THIS CASE TO THE LOWER COURT TO CONDUCT ITS ARTICLE 66(c) REVIEW APPLYING THE "CLEARLY ERRONEOUS" STANDARD TO THE MILITARY JUDGE'S NON-GUILT SPECIAL FINDINGS.

A. The statutory requirement under Article 51(d), UCMJ, for a military judge to issue special findings upon request is based on Fed. R. Crim. P. 23(c) and is intended to operate in the same manner as the federal rule.

In a military judge alone case, an accused has a statutory entitlement to special findings upon request. Article 51(d), UCMJ; *see United States v. Gerard*, 11 M.J. 440, 441-42 (C.M.A. 1981); *United States v. Falin*, 43 C.M.R. 702, 704 (A.C.M.R. 1971) (finding error in military judge's decision not to make special findings and remanding case "for the entry of appropriate special findings"). Congress added this provision to the Code in 1968 when it created the position of the military judge. Military Justice Act of 1968, Pub. L. No. 90-632, § 2(21)(D), 82 Stat. 1335-1340; *see United States v. Hussey*, 1 M.J. 804 (A.F.C.M.R. 1976). The President has implemented

Article 51(d) through Rule for Courts-Martial (R.C.M.) 918(b), which is derived from paragraph 74*i* of the 1969 Manual for Courts-Martial (MCM).[10]

Congress based Article 51(d) on the specific language of Federal Rule of Criminal Procedure 23(c). *Gerard*, 11 M.J. at 442 (stating that with the exception of the first seven words, Article 51(d), UCMJ, is identical to the Federal Rule).[11] In addition to the symmetry of the text, the provision's legislative history indicates a clear Congressional intent to mirror federal civilian practice with respect to special findings by a judge in a non-jury trial. *See Uniform Code of Military Justice, Hearings on H.R. 12705 Before a Subcomm. of the House Comm. on Armed Services*, 90th Cong. 8367 (1967).

B. Two of the Courts of Criminal Appeals and the Federal Courts review non-guilt special findings for "clear error."

The Air Force and Army Courts of Criminal Appeals have adopted "the standards applied to the appellate review of

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[10] *See* Manual (2012), App. 21 (Analysis of Rule 918(b)).

[11] At that time, the federal rule stated: "(c) *Trial without a Jury.* In a case tried with a jury the court shall make a general finding and shall in addition on request find the facts specially." Fed. R. Crim. P. 23(c) (1967); *see United States v. Morris*, 263 F.2d 594 (7th Cir. 1959). The current version of Rule 23(c) reads as follows: "(c) *Nonjury Trial.* In a case tried without a jury, the court must find the defendant guilty or not guilty. If a party requests before the finding of guilty or not guilty, the court must state its specific findings of fact in open court or in a written decision or opinion." Fed. R. Crim. P. 23(c) (2013).

special findings under Fed. R. Crim. P. 23(c) when [the court] evaluate[s], on appeal, a military judge's special findings made pursuant to R.C.M. 918(b)." ***Vazquez***, 2013 CCA LEXIS 207, at *10 (citing ***Truss***, 70 M.J. at 547); (J.A. 883.)

In ***Truss***, the Army Court of Criminal Appeals affirmed convictions for sodomy and assault consummated by a battery, in a military judge-alone case. ***Truss***, 70 M.J. at 545. The ***Truss*** Court assessed the military judge's special findings, separating the judge's factual (non-guilt) findings from his general (guilt) findings. ***Id.*** at 548. The court determined that the judge's finding that the victim did not consent to oral sodomy was a factual (non-guilt) finding. ***Id.*** at 547-48. Thus, the Army Court found the factual finding that the victim did not consent was "amply supported by the record" and therefore "not clearly erroneous."[12] ***Id.*** at 548.

In evaluating whether the judge's factual finding was clearly erroneous, the Army Court emphasized the importance of a military judge's entry of special findings under R.C.M. 918(b).

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[12] The Army Court also evaluated an additional "general guilt" special finding by the military judge that addressed a mixed question of law and fact, as pertained to the ultimate issue of guilt. ***Truss***, 70 M.J. at 548. This special finding was therefore "reviewed the same as the general finding of guilt." ***Id.*** The Army Court then held that both the military judge's general and special findings were not inconsistent, and were legally and factually sufficient, under their applicable standards of review. ***Id.***

Id. at 546. The Army Court further explained that, in the context of this important right, "special findings may be made whenever the judge concludes that the record does not adequately reflect all significant matters considered when the trial court ***saw and heard the witnesses***." *Id.* (emphasis added). The court in ***Truss*** lauded this procedure because it "is designed to preserve for appeal questions of law. It is the remedy designed to rectify judicial misconceptions regarding: the significance of a particular fact, the application of any presumption, or ***the appropriate legal standard***." *Id.* at 546-47 (internal citations omitted) (emphasis added); *see generally* Lee D. Schinasi, *Special Findings: Their Use at Trial and on Appeal*, 87 Mil. L. Rev. 73, 75 (1980).

In *Vazquez*, the Air Force Court of Criminal Appeals affirmed convictions for rape and assault in a military judge-alone case. (J.A. 880.) In doing so, the court adopted the standard for evaluating a military judge's special findings used in ***Truss***; the court further found that "[u]nder that federal rule, special findings on the ultimate issue of guilt or innocence are subject to the same appellate review as a general finding of guilt, while other special findings are reviewed for clear error." (J.A. 882-83) (citing ***Truss***, 70 M.J. at 547). However, the military judge's special findings involved mixed questions of law and fact which pertained to the ultimate issue

of guilt. (*Id.*) The Air Force Court therefore applied the same standard used for reviewing a general finding of guilt, and affirmed the appellant's conviction. (*Id.*)

The reasoning of the Army and Air Force courts in this regard mirrors that of the Federal Circuit Courts of Appeals. The Circuits apply a clear error standard of review to non-guilt findings by trial judges. ***Maine v. Taylor***, 477 U.S. 131, 145 (1986); ***see United States v. Martin***, 56 M.J. 97, 105 (C.A.A.F. 2001) (observing that federal standard of review for to non-guilt findings of fact is the "clearly erroneous" standard); ***United States v. Jabara***, 644 F.2d 574, 577 (6th Cir. 1981) (holding that under Fed. R. Crim. P. 23(c) findings of fact are reviewed under the "clearly erroneous" standard in criminal cases based in part on the "trial judge's superior opportunity to assess the credibility of witnesses").

This Court has applied the "clearly erroneous" standard to non-guilt findings made by military judges in other contexts. ***See Martin***, 56 M.J. at 105 (citing, as examples, ***United States v. Allen***, 53 M.J. 402 (C.A.A.F. 2000); ***United States v. Starr***, 53 M.J. 380 (C.A.A.F 2000); ***United States v. Chaney***, 53 M.J. 383 (C.A.A.F. 2000); ***United States v. Youngman***, 48 M.J. 123 (C.A.A.F 1996); ***United States v. Kelley***, 45 M.J. 275 (C.A.A.F. 1996); ***United States v. Radvansky***, 45 M.J. 226 (C.A.A.F. 1996); ***United***

States v. Proctor, 37 M.J. 330 (C.M.A. 1993)); *see also United States v. Leedy*, 65 M.J. 208 (C.A.A.F. 2008).

C. Non-guilt findings are factual findings that do not address the general issue of guilt.

Non-guilt findings do not go to an ultimate issue of guilt, but instead to factual determinations. *See Taylor*, 477 U.S. at 145 (observing that the "clearly erroneous" standard of review in Fed. R. Civ. P. 52(a) "applies with full force in the criminal context, at least with respect to factual questions having nothing to do with guilt") (citing *Campbell v. United States*, 373 U.S. 487, 493 (1963)); 2 C. Wright, Federal Practice and Procedure § 374 (2d ed. 1982); *see also* Steven A. Childress & Martha S. Davis, *Federal Standards of Review* § 10.04 (3d Ed. 1999) ("In a bench trial, the nonguilt findings are factfindings, and the guilt findings are the mixed law-fact questions involved when law is applied to facts."); *accord Truss*, 70 M.J. at 547.

The Federal Courts have considered the following determinations to be non-guilt findings, reviewable for clear error on appeal: a trial court's determination of a prosecutor's alleged discriminatory intent in a *Batson* challenge (*Hernandez v. New York*, 500 U.S. 352, 365 (1991)); a trial judge's decision to credit one witness over another in a sex discrimination case (*Anderson v. City of Bessemer City*, 470 U.S. 564, 574-75

(1985)); a trial judge's factual determination regarding whether a document was "producible" (*Campbell*, 373 U.S. at 492-93); a trial judge's credibility determination of a police officer witness (*United States v. Punzo*, 208 Fed. Appx. 468, 470-71 (7th Cir. 2006)); and a trial judge's factual determination that the government failed to prove the existence of a conspiracy (*Jabara*, 644 F.2d at 576-77 (6th Cir. 1981)).

D. Prior to setting aside the findings for factual insufficiency, the lower court should have analyzed the Military Judge's non-guilt factual findings under the "clearly erroneous" standard.

In this case, though the Military Judge made numerous special findings, a few are instructive in relation to the lower court's action here. For example, the lower court found SW's memories to be "disorganized" and "potentially non-sequential," which it found was not sufficient to link Appellee's force to any of the forcible sexual acts. (J.A. 7.) This ignored the Military Judge's special findings in two respects. First, it ignored the Military Judge's findings that SW was a "very credible" witness. (J.A. 428, 432.) Second, it ignored the aspects of her testimony that the Military Judge found to be "particularly persuasive," including SW's testimony:

> (1) "to a memory of the accused penetrating her vagina with his penis after she had repeatedly told him 'no', 'stop' or words to that effect"; and
> (2) "that at the time the accused was penetrating [SW's] vagina with his penis, she initially attempted to resist by trying to move her body, but soon gave up

> these attempts because she was scared and did not know if anyone else was around."

(J.A. 428-29.) These and other findings of the Military Judge are clearly non-guilt findings, because they ultimately go to the credibility of testimony. *See, e.g.*, ***Anderson***, 470 U.S. at 574-75; ***Punzo***, 208 Fed. Appx. at 470-71. Not only did the lower court fail to apply the clearly erroneous standard to these findings, it did not apply any standard because it ignored these findings outright. (J.A. 7.)

Likewise, the lower court's determination that SW's bruises did not corroborate her story ignored the special findings of the Military Judge that it was "reasonably inferable" that the pressure that SW felt was from Appellee and that her bruises came from Appellee's rape of SW. (J.A. 428-30.) The source of SW's injuries is another non-guilt finding because it is not dispositive of the issue of guilt. Indeed, Appellee's theory was that SW consented to the sexual activity and later regretted it due to her previous virginity, not that the sex did not occur, though Appellee did initially deny that any sexual activity took place. (J.A. 430-31, 433-34.) Again, the lower court failed to apply the proper standard to the non-guilt finding that Appellee caused SW's bruises. (J.A. 7.)

Finally, the lower court did not credit either expert's testimony over the other, finding that there was "nothing in the

Record to favor one expert’s opinion over the other . . . .” (J.A. 7-8.) Not so. The Military Judge specifically cited the fact that Dr. Henry had observed fragmentary blackouts clinically in patients as a reason that his opinion was more credible than Dr. Grieger’s. (J.A. 429, 432-33.) The Military Judge also found that Dr. Grieger’s opinion was “unduly dogmatic” in that he took one position that “fit all circumstances.” (*Id.*) The nature of Dr. Henry’s experience and the demeanor of Dr. Grieger in giving his opinion are certainly non-guilt findings because they ultimately go to the credibility of the experts and not the ultimate question of guilt in the case. ***See, e.g., Anderson***, 470 U.S. at 574-75; ***Punzo***, 208 Fed. Appx. at 470-71. However, the lower court failed to apply the proper “clearly erroneous” standard, or any standard, when reviewing these findings. (J.A. 7.) This is evident because the lower court’s conclusion that there was nothing in the Record to credit one expert’s opinion over the other is false. (J.A. 303, 429, 432-33.)

Conclusion

The delineation between guilt and non-guilt findings is important; it not only considers the unique position of the trial court in assessing in-person witness credibility, but also “reflects and preserves the proper relationship between trial courts and the courts of appeal.” ***Jabara***, 644 F.2d at 577; ***cf.***

Doctor, 7 C.M.A. at 137 (observing that it is the duty of trial court to determine credibility of witnesses and that the Courts of Criminal Appeals "are admonished by the Code to give consideration to the fact that the court-martial saw and heard the witnesses"). The lower court's failure to recognize the Military Judge's findings and to apply the "clearly erroneous" standard, or any apparent standard, has created a split amongst the Courts of Criminal Appeals regarding the applicable standard of review for non-guilt findings under R.C.M. 918(b). This was error and the only proper remedy is for this Court to remand this case to the lower court with instructions that it apply the proper "clearly erroneous" standard to the non-guilt, special findings of the Military Judge.

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I certify that the foregoing was delivered to the Court and a copy served on opposing counsel on November 18, 2015.

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