IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

MARK K. JAMISON
Colonel, U.S. Marine Corps
Director, Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7427
Bar no. 31195

JAMES M. BELFORTI
Lieutenant, U.S. Navy
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7678
Bar no. 36443

ROBERT J. MILLER
Lieutenant, U.S. Navy
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7433
Bar no. 36656

JETTI L. GIBSON
Lieutenant, U.S. Navy
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7686
Bar no. 36636

INDEX

Page

Table of Authorities..... v

Issues Presented..... 1

I. 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 WITNESESES." IN REVERSING APPELLEE'S CONVICTIONS FOR FACTUAL INSUFFICIENCY WITHOUT ACKNOWLLEDGEING THE MILITARY JUDGE'S NON-GUILT SPECIAL FINDINGS, DID THE LOWER COURT FAIL TO CONDUCT A COMPLETE ARTICLE 66(C) REVIEW?

II. 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..... 1

Statement of the Case..... 1

Argument..... 2

I..... 13

A. Appellee's argument ignores the central issue of this case, namely: What do the words "recognizing that the trial court saw and heard the witnesses" mean in the context of Article 66(c) factual sufficiency review..... 2

1. The meaning of the last ten words of Article 66(c) is not plain. Appellee's argument to the contrary merely cites to *dicta* already addressed and reconciled in the United States' previous brief and would render those

words superfluous..... 3

2. The United States did not and does not concede that Article 66(c) has plain meaning.... 6

3. Appellee's claim that there is "no confusion" over the meaning of the last ten words of Article 66(c) misreads this Court's precedent and ignores the varying manners in which factual sufficiency is conducted amongst the Service courts..... 7

4. The United States is not asking this Court to legislate; it is asking this Court to give legal effect to every word of the statute..... 9

B. In exercising its legal and factual sufficiency review power under Article 66(c), the lower court was required to consider the Military Judge's Special Findings. Its apparent failure to do so necessitates remand in this case..... 11

1. Contrary to Appellee's claim, the lower court was required to consider the Military Judge's Special Findings..... 11

2. It is apparent that the lower court did not consider the Military Judge's Special Findings..... 13

3. Appellee's reliance on the United States' unrelated pleading in *Redmon* is misplaced..... 15

C. Requiring the Courts of Criminal Appeals to give "considerable weight" to the findings of the trial court does not undermine their authority to independently weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact..... 16

II..... 17

A. The United States agrees that the purpose of special findings is to preserve for appeal questions of law. The United States disagrees with Appellee that this Court should create an exception to the general standards of review to be applied to special findings in the context of factual sufficiency review..... 17

B. Appellee offers only a policy argument to support his contention that this Court should not apply the “clearly erroneous” standard to non-guilt special findings in the context of factual sufficiency review..... 21

C. The lower court’s decision is inconsistent with the special findings of the Military Judge. Appellee’s claim to the contrary is unsupported and irrelevant to whether non-guilt special findings should be reviewed under the clearly erroneous standard..... 22

Conclusion..... 23

Certificate of Compliance..... 24

Certificate of Service..... 24

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES

Anderson v. City of Bessemer City, 470 U.S. 564 (1985).....22

Colautti v. Franklin, 439 U.S. 379 (1979).....6

Harrington v. Richter, 562 U.S. 86 (2011).....17

Jarecki v. G. D. Searle & Co., 367 U.S. 303 (1961).....6

Maine v. Taylor, 477 U.S. 131 (1986).....18

United States v. Monia, 317 U.S. 424 (1943).....7

FEDERAL CIRCUIT COURT CASES

United States v. Morris, 263 F.2d 594 (7th Cir. 1959).... 10

United States v. Palmeri, 630 F.2d 192 (3rd Cir. 1980)... 10

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES AND COURT OF MILITARY APPEALS CASES

United States v. Allen, 53 M.J. 402 (C.A.A.F. 2000)..... 20

United States v. Beatty, 64 M.J. 456 (C.A.A.F. 2007). *passim*

United States v. Chaney, 53 M.J. 383 (C.A.A.F. 2000)..... 20

United States v. Kelley, 45 M.J. 275 (C.A.A.F. 1996)..... 20

United States v. Martin, 56 M.J. 97 (C.A.A.F. 2001).. 18, 20

United States v. Matias, 25 M.J. 356 (C.M.A. 1987)..... 15

United States v. Oliver, 70 M.J. 64 (C.A.A.F. 2011)..... 16

United States v. Proctor, 37 M.J. 330 (C.M.A. 1993)..... 20

United States v. Radvansky, 45 M.J. 226 (C.A.A.F. 1996).. 20

United States v. Solis, 46 M.J. 31, 35 (C.A.A.F. 1997)... 21

United States v. Starr, 53 M.J. 380 (C.A.A.F. 2000)..... 20

United States v. Turner, 25 M.J. 324 (C.M.A. 1987).....3, 14

United States v. Washington, 57 M.J. 394 (C.A.A.F. 2002)..... *passim*

United States v. Youngman, 48 M.J. 123 (C.A.A.F. 1996)... 20

NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS CASES

United States v. Clark, No. 201400232, 2015 CCA LEXIS 287 (N-M. Ct. Crim. App. July 14, 2015).....*passim*

United States v. Redmon, No. 201300077, 2014 CCA LEXIS 369 (N-M. Ct. Crim. App. June 26, 2014)..... 24

United States v. Johnson, 6 M.J. 681 (N.M.C.M.R. 1978).....8

OTHER COURTS OF CRIMINAL APPEALS

United States v. Davis, No. 20130996, 2015 CCA LEXIS 530 (A. Ct. Crim. App. Nov. 25, 2015)..... 23

United States v. Hayes, 40 M.J. 813 (C.G.C.M.R. 1994).....8

United States v. Hussey, 1 M.J. 804 (A.F.C.M.R. 1976)..9, 10

United States v. Irvinspence, 39 M.J. 893 (A.C.M.R. 1994) .8

United States v. Johnson, 30 M.J. 930 (A.C.M.R. 1990).....8

STATUTES AND RULES

Uniform Code of Military Justice, 10 U.S.C. §§ 801-941:

Article 51.....*passim*

Article 66.....*passim*

Article 67.....1, 2

Article 120..... 2

Article 125..... 2

Rules of Procedure:

R.C.M. 918(b).....11

R.C.M. 1103(b).....12

Issues Presented

I.

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?

II.

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. On November 18, 2015, the United States filed its Brief. On January 12, 2016, Appellee filed his Answer. The United States replies.

Argument

I.

A. Appellee's argument ignores the central issue of this case, namely: What do the words "recognizing that the trial court saw and heard the witnesses" mean in the context of Article 66(c) factual sufficiency review?

In his Answer, Appellee in essence contends the following: that the meaning of the last ten words of Article 66(c), UCMJ,

is plain; that the United States concedes their meaning to be plain; that no court has ever expressed confusion over the meaning of these words; and that the United States is "ask[ing] this Court to legislate." (Appellee's Br. at 13-15, 18-19.) Not so.

1. The meaning of the last ten words of Article 66(c) is not plain. Appellee's argument to the contrary merely cites to *dicta* already addressed and reconciled in the United States' previous brief and would render those words superfluous.

As the United States argued at length in its previous brief, the heart of this issue is what the last ten words of Article 66(c) mean "in practicality." (Appellant's Br. at 17-18.) In other words, in the context of factual sufficiency review, how and to what degree are the Courts of Criminal Appeals required to "mak[e] allowances for having not personally observed the witnesses." *Turner*, 25 M.J. at 325; (Appellant's Br. at 20.)

Appellee's contention that the meaning of these ten words is plain is belied by his failure to explain their meaning in his Answer. (Appellee's Br. at 13.) Indeed, this is the central issue in the case, and yet Appellee utterly fails to explain *how* the Courts of Criminal Appeals are to interpret, apply, and give legal effect to these words when determining whether findings of guilty by a trial court are correct "in fact." Instead, he merely quotes from previous decisions of

this Court——ignoring the United States' analysis of these cases——that do not squarely address the question. (Appellee's Br. at 10-13.)

For example, Appellee cites to *Washington* to support his argument that the final phrase of Article 66(c) is apparently meaningless. (Appellee's Br. at 12.) Appellee emphasizes the words "no deference" from the opinion, but fails to reconcile these with the words that immediately follow in the same sentence: ". . . beyond the admonition of Article 66(c), UCMJ, to take into account the fact that the trial court saw and heard the witnesses." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). As noted by the United States, *Washington* is compatible with its position. (Appellant's Br. at 20.) The phrase "no deference *beyond* . . ." implies that the "admonition" of Congress requires Service courts to give some deference to the fact that the "trial court saw and heard the witnesses." *Washington*, 57 M.J. at 399; Article 66(c), UCMJ.

Appellee's analysis of *Washington* mirrors his analysis——or lack thereof——of the text of Article 66(c). His argument ignores the operative words from *Washington*, just as it ignores the operative words of Article 66(c), thereby rendering both sets of words surplusage. If Congress had intended to grant the Courts of Criminal Appeals' unlimited factual sufficiency review powers, then Congress would not have included the final words of

Article 66(c). Appellee makes no rebuttal to this argument, and indeed dismisses the entire legislative history of Article 66(c) contained in the United States' Brief as a mere "spill[age] [of] considerable ink." (Appellee's Br. at 14.) Similarly, he ignores the operative words from *Washington* that specifically serve to qualify *Washington*'s articulation of "no deference." *Washington*, 57 M.J. at 399. But if this Court in *Washington* intended to render the final ten words of Article 66(c) meaningless surplusage, then it could have easily done so: by cutting short the test it announced after the words "no deference." It did not.

At best, Appellee's argument suggests that the lower court's simple recitation of the statutory words satisfied its requirement to give legal effect to the last ten words of Article 66(c). (Appellee's Br. at 12.) But as the United States pointed out in its previous brief, such an interpretation would lead to an absurd result. It would render subsection (c) of the statute a mere gentle reminder of what subsection (h) already makes plain: that individuals are forbidden from sitting as appellate judges on cases in which they were already involved at the trial court level. (Appellant's Br. at 46 (citing Article 66(h), 10 U.S.C. § 866(h) (2012).) A Court of Criminal Appeals judge needs no reminder of this prohibition, and such an interpretation would render the statute redundant of

itself. *See United States v. Palmeri*, 630 F.2d 192, 199 (3d Cir. 1980), *cert. denied*, 450 U.S. 967 (court will not interpret a statute to cause redundancy); *see also Colautti v. Franklin*, 439 U.S. 379, 392 (1979) (Court refused to read Pennsylvania abortion statute in a manner that would have rendered a portion of said statute "redundant or largely superfluous in violation of the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative"); *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307-08 (1961) (if a statute admits a reasonable construction that gives effect to all of its provisions, the Supreme Court will not adopt a strained reading which renders one part a mere redundancy).

2. The United States did not and does not concede that Article 66(c) has plain meaning.

In addition to ignoring the final words of Article 66(c), Appellee's argument attempts to avoid the legislative history of the statute by incorrectly summarizing the United States' brief. Appellee asserts there is no reason to explore the legislative history of the statute by contending that the United States "concedes that the language of Article 66(c) is plain." (Appellee's Br. at 13 (citing Appellant's Br. at 17).) The United States' previous brief contains no such concession.

As the United States argued in its previous brief, the statutory injunction to "recogniz[e] that the trial court saw

and heard the witnesses" is ambiguous. (Appellant's Br. at 17.) Its previous brief merely pointed out that although those words appear to have plain meaning in isolation, they are ambiguous in terms of practical effect "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.'" (Appellant's Br. at 17 (citing *United States v. Monia*, 317 U.S. 424, 431 (1943) (Frankfurter, J., dissenting)).) Appellee's assertion that the United States claimed otherwise is, at best, mistaken.

3. Appellee's claim that there is "no confusion" over the meaning of the last ten words of Article 66(c) misreads this Court's precedent and ignores the varying manners in which factual sufficiency is conducted amongst the Service courts.

Appellee seeks to support his argument about the plainness of Article 66(c) by claiming that there are no cases in which "a court expresses confusion over the meaning of the subordinate clause." (Appellee's Br. at 19.) First, this incorrectly implies that this Court has definitively addressed what the last ten words of Article 66(c) mean in practicality. As already noted, this Court has not. (Appellant's Br. at 18-21.) Indeed, had it done so, there would be no need for this case to be certified.

Second, Appellee's argument ignores the lack of uniformity in how the Service courts have interpreted and applied the last

ten words of Article 66(c). *Compare United States v. Irvinspence,* 39 M.J. 893, 896 (A.C.M.R. 1994) ("We will not defer to the findings on credibility by the trier of fact . . . [but instead] will consider their credibility determination after observing the witnesses as a factor in our independent determination of credibility."), *and United States v. Hayes*, 40 M.J. 813, 817 (C.G.C.M.R. 1994) ("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."), *with United States v. Johnson*, 30 M.J. 930, 934 (A.C.M.R. 1990) ("We hesitate to second guess the [trial] court's findings . . . in cases where witness credibility plays a critical role in the outcome of the trial . . . ."), *and United States v. Johnson*, 6 M.J. 681, 682 (N.M.C.M.R. 1978) ("We give great weight to the determination of the finder of fact at trial, the military judge, and conclude there is no reason to disturb his findings.").

This inconsistency amongst the Service courts is not a mere relic of the past. Less than two months ago, the Army Court of Criminal Appeals——addressing this Court's opinion in *Washington*——noted that although it does not give deference to the "*decisions* of the trial court . . . the degree to which [it] 'recognize[s]' or give[s] deference to the trial court's ability to see and hear the witnesses will often depend on the degree to

which the credibility of the witness is at issue." *United States v. Davis*, No. 20130996, 2015 CCA LEXIS 530, at *25-26 (A. Ct. Crim. App. Nov. 25, 2015) (emphasis in original). *Davis* not only further demonstrates the level of disparity amongst how the Service courts apply the last ten words of Article 66(c), it further supports United States' original position: that the last ten words of the statute require the Courts of Criminal Appeals to accord some deference to the trial court's credibility determinations.

4. The United States is not asking this Court to legislate; it is asking this Court to give legal effect to every word of the statute.

Not content to simply ignore the statutory text at the heart of this case, Appellee mischaracterizes the United States' request that this Court give legal effect to the words of Article 66(c) as equivalent to asking "this Court to legislate." (Appellee's Br. at 13.) He offers no evidence to support this claim. Instead, Appellee observes that Congress did "not create a provision for special findings until 1968——eighteen years after Article 66(c) was enacted." (Appellee's Br. at 14.) The United States agrees with this factual observation that appears to be wholly unrelated to Appellee's argument. Indeed, there were no military judges before 1968 to issue special findings. Military Justice Act of 1968, Pub. L. No. 90-632, § 2(2)-(21), 82 Stat. 1335, 1335-1340 (1968); *see United States v. Hussey*, 1

M.J. 804, 808 (A.F.C.M.R. 1976) (explaining the legislative history of Article 51(d), including that it was "obviously taken from Rule 23c of the Federal Rules of Criminal Procedure," and noting that "bench trials are of a fairly recent origin in the military, and did not exist prior to the Military Justice Act of 1968").[1]

In a similarly peculiar manner, Appellee observes that one of the undersigned counsel served on the Military Justice Review Group (MJRG) prior to joining the Appellate Government Division. (Appellee's Br. at 15.) This observation is correct, though irrelevant. More relevant to the specified issue is the fact that one of the MJRG's operational considerations was "to reduce unnecessary litigation by addressing *ambiguities, uncertainties, and inconsistencies* in rules, *statutes*, and *case law*." (J.A. 973) (emphasis added). Appellee mistakenly assumes that the MJRG's proposed amendment to Article 66(c) means that the current statute is completely free of such "ambiguities, uncertainties, and inconsistencies." (J.A. 973.) It is not.

[1] At the time Article 51(d) was enacted by Congress, Federal Rule of Criminal Procedure 23(c) read as follows: "In a case tried without a jury the court shall make a general finding and shall in addition on request find facts specially." *Hussey*, 1 M.J. at 808; *see United States v. Morris*, 263 F.2d 594 (7th Cir. 1959). Although the wording of the federal rule has since been amended, Article 51(d) is nearly identical to the original rule: "The military judge of such a court-martial shall make a general finding and shall in addition on request find the facts specially." Article 51(d), UCMJ, 10 U.S.C. 851(d) (2012).

The MJRG's proposed amendment reflects this fact and actually buttresses the United States' position: Article 66(c) contains ambiguities and this Court must look beyond the plain text of the statute in order to give meaning and legal effect to every word of the statute.

Contrary to his strawman "legislative argument," it is the Appellee who requests this Court to legislate. If it accepts Appellee's argument that the last ten words of the statute require only mere lip service from the Service courts, then this Court will have indeed legislated by effectively repealing these words.

B. In exercising its legal and factual sufficiency review power under Article 66(c), the lower court was required to consider the Military Judge's Special Findings. Its apparent failure to do so necessitates remand in this case.

1. Contrary to Appellee's claim, the lower court was required to consider the Military Judge's Special Findings.

Appellee claims that "Article 66(c) does not require the NMCCA to review the military judge's special findings when reviewing for factual sufficiency." (Appellee's Br. at 13.) Appellee is mistaken. Rule for Courts-Martial 918(b) provides that "the military judge shall make special findings upon request by any party," and that such special findings "shall be made before authentication and *included in the record of trial*." R.C.M. 918(b) (emphasis added). Article 66(c) provides that the

Court of Criminal Appeals "may affirm only such findings of guilty . . . as it finds correct in law and fact and determines, *on the basis of the entire record*, should be approved." Article 66(c), UCMJ. Because the Court of Criminal Appeals is required to base its factual sufficiency review on the entire record, and because this record includes any special findings issued by the military judge, the lower court was required to review the Military Judge's Special Findings.

Furthermore, pursuant to Rule for Courts-Martial 1103(b)(2), "a complete record shall include . . . any appellate exhibits," and the only time written special findings will merely be "attached" to the record is when said special findings are not used as exhibits. R.C.M. 1103(b)(2)(D)(v), 1103(b)(3)(A)(iv) (2012). Here, the Special Findings were included in the Record as Appellate Exhibit XIX. (J.A. 428.) Thus they were part of the Record and not merely "attached" to it.

Appellee ignores these rules, and instead cites only to *United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007). (Appellee's Br. at 13.) But *Beatty* merely stands for the unremarkable proposition that where the underlying validity of a Court of Criminal Appeals' Article 66(c) review is in question, the remedy is to remand the case for a proper legal and factual sufficiency review. *Id.* at 459 (determining whether the Air

Force Court of Criminal Appeals had considered the victim's pretrial motion or presentencing testimony in order to assess her credibility for purposes of factual sufficiency). *Beatty* does not mean that the Military Judge's Special Findings in this case are somehow not a portion of the Record. Indeed, there were no special findings in *Beatty*. Nor does Appellee explain how the lower court's consideration of these Special Findings would have been inappropriate, as was potentially the case in *Beatty* with respect to the victim's pretrial and presentencing testimony.

Contrary to Appellee's claim, *Beatty* directly supports the United States' position: in cases in which the validity of a Service court's Article 66(c) review is even in question——such as where a lower court apparently fails to consider the entire record by ignoring a military judge's special findings——"the remedy is to remand the case for a proper factual and legal sufficiency review of the findings of guilty." *Id.*

2. <u>It is apparent that the lower court did not consider the Military Judge's Special Findings</u>.

Here, despite Appellee's claims to the contrary, the lower court's opinion evidences a total lack of consideration of the Special Findings of the Military Judge. The Military Judge found SW to be "a very credible witness" who testified in a "forthright manner" and answered all questions "without any

significant hesitation"; yet the lower court found her memory too "disorganized" to be reliable. (J.A. 7, 428.) The Military Judge found the bruising on SW's inner thighs to be "circumstantial evidence that the accused committed the offense of rape"; yet the lower court found a lack of any "physical findings" to support SW's testimony. (J.A. 7, 430.) The Military Judge "found Dr. Henry's testimony credible based on his education and experience" and Dr. Grieger's opinion "unduly dogmatic"; yet the lower court stated that there was "nothing in the Record to favor one expert's opinion over the other . . . ." (J.A. 7-8, 430.)

These factual and evidentiary discontinuities——argued at length in Appellant's Merits Brief——are uncontested by Appellee. (Appellant's Br. at 54-56.) He merely relies on a presumption of appellate regularity to support his claim that the lower court *did*, in fact, consider the Special Findings. (Appellee's Br. at 16-17.) Furthermore, these inconsistencies are completely unaddressed by the lower court. (J.A. 6-8.) This lack of analysis, analytical reconciliation, or even mere mention belies Appellee's reliance on "a presumption of appellate regularity" and amply demonstrates the lower court's failure to consider the "entire record" as it was required to do pursuant to Article 66(c). *See, e.g.*, *Turner*, 25 M.J. at 325 (remanding where it was unclear whether the lower court

"evaluate[d] not only the sufficiency of the evidence but also its weight"); *Washington*, 57 M.J. at 400 (remanding where it was unclear whether the lower court "erroneously placed the burden on appellant to raise doubts about his guilt").

3. Appellee's reliance on the United States' unrelated pleading in *Redmon* is misplaced.

Equally unavailing is Appellee's citation to one of the United States' pleadings in *United States v. Redmon*, No. 201300077, 2014 CCA LEXIS 369 (N-M. Ct. Crim. App. June 26, 2014). (Supp. J.A. 1007.) In *Redmon*, the appellant requested *en banc* reconsideration, arguing that the lower court did not respond to one of his assignments of error, an alleged Fifth Amendment violation that the lower court determined to be "not worthy of further comment." (Supp. J.A. 1006-7.) In its opposition to *en banc* reconsideration, the United States emphasized that the appellant was "not owed any further explanation from [the lower court.]" (Supp. J.A. 1007.) This is a correct statement of the law. *United States v. Winckelmann*, 73 M.J. 11, 16 (C.A.A.F. 2013) (stating that CCA was not "obligated" to detail its analysis); *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987) (noting that no provision in the UCMJ or the R.C.M. requires the lower court to address all assignments of error in a written opinion).

This case is not *Redmon*. The United States is not raising a meritless Fifth Amendment claim and the lower court's error is not that it simply failed to "detail all of its analysis." (Appellee's Br. at 16.) Rather, the lower court's opinion is plainly in conflict with the Military Judge's Special Findings, demonstrating that it did not fulfill its statutory obligation to review the entire record. Therefore, remand is the only proper remedy, as this Court held in *Beatty*.

C. Requiring the Courts of Criminal Appeals to give "considerable weight" to the findings of the trial court does not undermine their authority to independently weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact.

Appellee argues that *de novo* factual sufficiency review is incompatible with giving "considerable weight"——or any deference at all——to the trial court's determinations of evidentiary weight and witness credibility. (Appellee's Br. at 10-14.) This argument is built on the false premise that the *de novo* standard of appellate review is incompatible with any level of deference to the trial court. In fact, there are numerous situations in which appellate courts give great deference to the parties and proceedings below, yet still employ a *de novo* standard of review. Two such examples are claims of legal insufficiency and ineffective assistance of counsel. *See United States v. Oliver*, 70 M.J. 64, 67 (C.A.A.F. 2011) (noting that

legal sufficiency review involves application of "long-standing doctrines of appellate deference to the factfinder"); *Harrington v. Richter*, 562 U.S. 86, 105 (2011) ("Even under *de novo* review, the standard for judging counsel's representation is a most deferential one"). This Court need not abandon *de novo* factual sufficiency review in order to give legal effect to the last ten words of Article 66(c), nor is the United States requesting it do so. Appellee's argument is a red herring.

II.

A. The United States agrees that the purpose of special findings is to preserve for appeal questions of law. The United States disagrees with Appellee that this Court should create an exception to the general standards of review to be applied to special findings in the context of factual sufficiency review.

Appellee does not contest that the "clearly erroneous" standard of review should *generally* be applied to non-guilt special findings. (Appellee's Br. at 19-24.) Instead, Appellee argues that in the context of factual sufficiency review, this general rule should be ignored.

To do this, he attempts to distinguish *Truss* as only "analyzing a legal issue" and casts *Vasquez* as a "legal sufficiency" case. (Appellee's Br. at 21-22.) Appellant's attempts to distinguish *Truss* and *Vasquez* are unpersuasive.

The fact that *Truss* analyzes a legal issue does not undermine the principle for which it was cited: that the

standard of review to be applied to special findings varies depending on their characterization as "guilt" or "non-guilt" findings. *Truss*, 70 M.J. at 547. Appellee's primary objection is that *Truss* makes "not a single reference to 'guilt' or 'non-guilt' findings." (Appellee's Br. at 21.) While accurate that *Truss* does not use the specific term "non-guilt finding," Appellee's argument fails given the plain language in *Truss*:

> Special findings for an 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.

Id.[2]

Appellee's claim that *Vasquez* is a legal sufficiency case is unsupported by anything in the court's opinion. (J.A. 882-84.) In *Vasquez*, the appellant specifically assigned factual insufficiency as an error and the Air Force Court of Criminal Appeals addressed it as such. (J.A. 882-84 ("The appellant contends the evidence in his case is *factually insufficient* to sustain his conviction for raping Ms. CH . . . We disagree. . . . Our own review of the record convinces us that the evidence admitted at trial is *factually sufficient* to sustain appellant's

[2] Moreover, Appellee's argument ignores *Truss's* citation to Childress and Davis, Federal Standards of Review § 10.04 (3d Ed. 1999), which specifically uses the word "nonguilt." *Id*. In its Brief, the United States elected to use the term "non-guilt" as a hyphenate based on this Court's use and adoption of that term in *United States v. Martin*, 56 M.J. 97, 105-06 (C.A.A.F. 2001) (quoting *Maine v. Taylor*, 477 U.S. 131, 145 (1986)).

conviction for raping Ms. CH, as well as to support the military judge's special findings.") (emphasis added).) Thus Appellee's attempt to distinguish *Vasquez* as a "legal sufficiency" case fails.

In analyzing the claim of factual insufficiency, the *Vasquez* court expressly recognized the principle that the United States emphasized in its previous brief: non-guilt special findings are reviewed for "clear error," whereas "special findings on the ultimate issue of guilt or innocence are subject to the same appellate review as a general finding of guilt." (J.A. 883.) Appellee's mischaracterization of the issue in *Vasquez* notwithstanding, this case demonstrates that there is no need for this Court to create an exception in factual sufficiency cases to the application of the "clearly erroneous" standard to non-guilt special findings.

Appellee also attempts to discount the United States' argument by noting its inclusion of a string citation from *Martin* and observing that these cases "were analyzing special findings in review of legal issues, not conducting a *de novo* review of factual sufficiency." (Appellee's Br. at 23.) Appellee is incorrect for at least two reasons. First, these are not special findings cases. Second, and more to the point, the fact that these cases do not involve factual sufficiency review does nothing to undermine the proposition for which they

were cited: that "[t]his Court has applied the 'clearly erroneous' standard to non-guilt findings made by military judges *in other contexts*." (Appellant's Br. at 52) (emphasis added). *See, e.g.*, *United States v. Martin*, 56 M.J. 97 (C.A.A.F. 2001) (discussing the "clearly erroneous" standard and observing that a trial judge's finding of mental responsibility would be reviewed by an appellate court for clear error in a military judge alone case); *United States v. Allen*, 53 M.J. 402 (C.A.A.F. 2000) (reviewing the military judge's finding that a warrant affidavit was not knowingly and intentionally false under the "clearly erroneous" standard, in the context of evaluating the legality of a civilian search warrant); *accord 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).

Other than these unsuccessful attempts to distinguish cases from the United States' brief, Appellee offers no case law to support his contention that there should be an exception to application of the "clearly erroneous" standard of review to non-guilt special findings in factual sufficiency cases.

B. Appellee offers only a policy argument to support his contention that this Court should not apply the "clearly erroneous" standard to non-guilt special findings in the context of factual sufficiency review.

Appellee complains that he "should not be penalized with a more unfavorable standard of review because he exercised his right to request special findings." (Appellee's Br. at 24.) This is merely a policy argument——the same type of argument Appellee chides the United States for making earlier in his brief. (Appellee's Br. at 14.) Unlike the United States, however, Appellee's argument is not based in an analysis of statutory language. Instead, Appellee simply claims this would lead to "an absurd result." (Appellee's Br. at 26.) But merely pointing out that the United States' position could be unfavorable to him does not render it absurd. To quote Appellee, "this way lies with the legislature." (Appellee's Br. at 14.) This Court should reject Appellee's policy argument to read into Article 51(d) an exception to the "clearly erroneous" standard of review in factual sufficiency cases. *See United States v. Solis*, 46 M.J. 31, 35 (C.A.A.F. 1997) (rejecting the appellant's invitation to read the "exculpatory no" doctrine into Article 31(b), noting that "[s]uch policy arguments . . . must be directed to Congress and the President for consideration, not to this Court.").

C. The lower court's decision is inconsistent with the special findings of the Military Judge. Appellee's claim to the contrary is unsupported and irrelevant to whether non-guilt special findings should be reviewed under the clearly erroneous standard.

Appellee asserts that the lower court's opinion is "not at odds with any of the military judge's special findings related to seeing and hearing the witnesses." (Appellee's Br. at 26.) This assertion in incorrect. As argued in the United States' original Merits Brief and *supra* at 13-15, there are multiple irreconcilable differences between the lower court's opinion and the Military Judge's Special Findings, particularly pertaining to the credibility of witnesses, the classic type of non-guilt finding. (Appellant's Br. at 43-46.). *See Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985) (stating that "[w]hen findings are based on determinations regarding the credibility of witnesses . . . [it] demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said"). Moreover, this argument has nothing to do with the second certified issue in this case, which concerns the standard of review to be applied to non-guilt special findings of a military judge.

Conclusion

This Court should remand this case to the lower court and instruct it: (1) to comply with Article 66(c) 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; and (2) to apply the proper "clearly erroneous" standard to the non-guilt, special findings of the Military Judge.

MARK K. JAMISON
Colonel, U.S. Marine Corps
Director, Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7427
Bar no. 31195

JAMES M. BELFORTI
Lieutenant, U.S. Navy
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7678
Bar no. 36443

ROBERT J. MILLER
Lieutenant, U.S. Navy
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7433
Bar no. 36656

JETTI L. GIBSON
Lieutenant, U.S. Navy
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7686
Bar no. 36636

Certificate of Compliance

1. This brief complies with the type-volume limitation of Rule 24(c) because: This brief contains 5,265 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because: This brief has been prepared in a monospaced typeface using Microsoft Word Version 2010 with 12 point, Courier New font.

Certificate of Filing and Service

I certify that the foregoing was delivered to the Court and a copy served on opposing counsel on January 22, 2016.

JAMES M. BELFORTI
Lieutenant, U.S. Navy
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7678
Bar no. 36443