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	ANSWER ON BEHALF OF APPELLEE USCA Dkt. No. 16-0068/NA Crim.App. Dkt. No. 201400232

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

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Statement of Statutory Jurisdiction

Appellee's approved court-martial sentence included a punitive discharge. Accordingly, his case fell within the jurisdiction of the Navy-Marine Corps Court of Criminal Appeals (NMCCA) under Article 66(b), Uniform Code of Military Justice (UCMJ).[1] This Court now has jurisdiction under Article 67(a)(2), UCMJ.[2]

Statement of the Case

On February 21, 2014, a military judge sitting as a general court-martial convicted Airman (AN) Clark, contrary to his pleas, of one specification each of forcible rape and forcible sodomy in violation of Articles 120 and 125, UCMJ.[3] The military judge sentenced AN Clark to seven years' 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 it executed.

On July 14, 2015, a panel of the NMCCA unanimously set aside the findings and sentence and dismissed the charges with prejudice for factual insufficiency.[4] The court denied the

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[1] 10 U.S.C. § 866(b) (2012).

[2] 10 U.S.C. § 867(a)(2) (2012).

[3] 10 U.S.C. §§ 920, 925 (2008).

[4] *United States v. Clark*, No. 201400232, 2015 CCA LEXIS 287 (N-M. Ct. Crim. App. July 14, 2015) (per curiam) (unpublished).

Government reconsideration and reconsideration *en banc* on August 18, 2015.

On October 16, 2015, the Judge Advocate General of the Navy granted two Government requests to certify the issues now before this Court.

Statement of Facts

On a Saturday night in March 2012, S.J.W., and her semi-romantic friend, OS3 Alexander MacKellar, went to a party together at the house of a fellow service member, Cody Fox.[5] S.J.W. brought her own liquor: nearly half a gallon of Jagermeister, a 750ml bottle of moscato, and a carton of sangria.[6] At the party, she visited with her friends, drinking both Jagermeister and moscato.[7]

Insterspersed with her drinking, S.J.W. had multiple consensual sexual interactions with three different men before "blacking out."[8] At Fox's house, she first went into a bedroom alone with OS3 Alex MacKellar for about fifteen minutes.[9] This encounter ended when another party-goer, Mr. Wesley Claxton,

[5] J.A. at 60-61.

[6] J.A. at 62-63.

[7] J.A. at 64.

[8] J.A. at 70-72, 81.

[9] J.A. at 68, 70.

interrupted and asked them to join the people downstairs.[10] S.J.W. continued drinking Jagermeister.[11]

Within a short time, S.J.W. became attracted to and began flirting with Mr. Claxton, whom she met for the first time that night.[12] She soon made out with Mr. Claxton on the balcony and then accompanied him to an upstairs bedroom.[13] There, S.J.W. took her shirt off and helped Mr. Claxton take all his clothes off before making out, kissing, and touching each other.[14] Mr. Claxton, 6'4" and 230 pounds at the time, later testified to his memory of being on top of S.J.W. in the missionary position attempting to have sex with her.[15] Mr. Claxton testified that his then-current girlfriend would sometimes receive bruising to her inner thighs from this activity.[16] This consensual sexual interaction between S.J.W. and Mr. Claxton ended when Mr. Claxton ran to the bathroom and threw up.[17] Other party-goers, including AN Clark, OS3 Keith Coleman, and HN3 Garrett Medina,

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[10] J.A. at 70.

[11] J.A. at 71.

[12] J.A. at 63, 71.

[13] J.A. at 71.

[14] J.A. at 72, 407.

[15] J.A. at 408.

[16] J.A. at 408.

[17] J.A. at 73.

heard this, came to help, and saw Mr. Claxton "buck naked," wearing only a condom.[18] S.J.W. was wearing her bra and panties.[19]

After this encounter, a handful of party-goers, including S.J.W., decided to go back to AN Clark's house.[20]

S.J.W. found herself attracted to AN Clark, and the two chatted on the way to his house.[21] At AN Clark's house, the group played a drinking game, during which S.J.W drank less than a can of beer.[22] It was around this time that S.J.W. started making out with AN Clark on the couch.[23] This included both kissing and touching.[24] OS3 Keith Coleman observed S.J.W. sitting on the couch wearing Clark's hat while "rubbing his chest and kissing him on the ear."[25]

Because it was late and they had been drinking, AN Clark allowed guests to stay the night.[26] S.J.W. chose to stay because she did not think she could drive.[27] S.J.W. remembered Clark

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[18] J.A. at 412, 408.

[19] J.A. at 403.

[20] J.A. at 74.

[21] J.A. at 385.

[22] J.A. at 78-79.

[23] J.A. at 80.

[24] J.A. at 81, 411.

[25] J.A. at 411.

[26] J.A. at 83.

[27] J.A. at 83.

helping her to get upstairs and then kissing in the bedroom.[28] S.J.W. later testified that her last clear memory of the night was going upstairs with AN Clark.[29]

Hours later, between 6 and 7 o'clock Sunday morning, S.J.W. woke up unclothed.[30] Her clothes were on the floor and Clark was next to her.[31] Having no memory after kissing AN Clark in the bedroom, she was not sure what happened and was immediately afraid that she might have had drunk sex.[32] S.J.W. put her clothes on and checked herself before she went downstairs.[33] Although her arms felt sore, she had no vaginal pain.[34] She had no visible injury.[35]

She retrieved her car from Cody Fox's house and drove off the base, but could not figure out how to get home.[36] After driving around for a while, S.J.W. stopped her car in a "small like town-type area" and slept in her car for at least 2 hours.[37]

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[28] J.A. at 84-85.

[29] J.A. at 92.

[30] J.A. at 90.

[31] J.A. at 90.

[32] J.A. at 144.

[33] J.A. at 91-92.

[34] J.A. at 95, 143.

[35] J.A. at 92.

[36] J.A. at 94.

[37] J.A. at 94.

After S.J.W. woke up, she went to a friend's house where she spent the remainder of her Sunday.[38] Monday morning, she went to work as normal.[39] S.J.W. text messaged her sister, "Betsyyyy! What's the sluttiest thing you've done?"[40] She then worked until the afternoon and then went home to change her clothes.[41] She sent a follow-up message to OS3 MacKellar,

> And the way you talked to me yesterday sounded a whole lot like you thought I was a whore. Made out with a majority of the guys? I mean you seriously don't need to exaggerate what I did to [sic] if you wanted to point out that I acted like a whore. But I don't want to argue about it. I just can't see myself ever wanting to face you after what I did. I don't even fucking want to face myself.[42]

At home, she noticed for the first time that there were bruises on the inside of her thighs.[43] Still unable to remember her actions from Saturday night, she went to Washington Hospital Center to have a sexual assault exam performed.[44] While at the hospital Monday evening, S.J.W. still had no memory about what happened Saturday night.[45]

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[38] J.A. at 94, 99-100.

[39] J.A. at 102.

[40] J.A. at 149, 418-19.

[41] J.A. at 102.

[42] J.A. at 419.

[43] J.A. at 102.

[44] J.A. at 111-12.

[45] J.A. at 113.

The SANE doctor and nurse at the Washington Hospital Center examined S.J.W. comprehensively, finding no evidence that sexual intercourse ever occurred.[46] The only visible marks on S.J.W. were the bruises on her thighs.[47] There were no other injuries, such as bite marks on S.J.W.'s breasts.[48] The SANE informed S.J.W. that the hospital could not determine whether sexual intercourse ever occurred because there was no evidence supporting either way.[49]

S.J.W. claimed that, shortly after she left the hospital early Tuesday morning,[50] her memory of Saturday night in AN Clark's bedroom started coming back.[51] Despite the SANE's un-notable examination, S.J.W.'s newfound memory pictured a brutal and violent rape.[52] S.J.W. claimed that AN Clark took off her clothes, holding her down by her arms, and forced his penis into her vagina.[53] She also claimed that AN Clark sucked and bit her breasts, forced her mouth open with his hand and inserted his penis into her mouth.[54] She further claimed that at one point AN

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[46] J.A. at 112.

[47] J.A. at 234, 238.

[48] J.A. at 238.

[49] J.A. at 114.

[50] J.A. at 114.

[51] J.A. at 113, 182.

[52] *See* J.A. at 85-90.

[53] J.A. at 87-89.

[54] J.A. at 89-90.

Clark flipped her over onto her stomach and held her hips and torso from behind.[55]

S.J.W. testified that by Tuesday night, most of her substantial memory came back.[56] It would be close to three months later, after moving back to her parents' house, before she made any report.[57]

Summary of Argument

Factual sufficiency review under Article 66(c) involves a *de novo* review of the facts in which the CCA has complete authority to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, bearing in mind that the trial court saw and heard the witnesses. Here, the NMCCA complied with its Article 66 mandate and applied the correct standards and tests in its review. The Government's argument seeks to amend Article 66(c) by judicial decision to change the CCAs' standard of review to one less protective of an accused.

The Government misunderstands the purpose and applicability of special findings and seeks to have this Court mandate a standard of review applicable to review of legal errors and not to factual sufficiency.

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[55] J.A. at 88.

[56] J.A. at 182.

[57] J.A. at 114.

Argument

I.

THE NMCCA PROPERLY CONDUCTED A COMPLETE FACTUAL SUFFICIENCY REVIEW UNDER ARTICLE 66(c), UCMJ.

Standard of Review

Whether the court below properly performed its Article 66(c) review is a question of law this Court reviews *de novo*.[58]

Discussion

The ability of a Court of Criminal Appeals (CCA) to affirm a trial court's guilty findings is constrained by Article 66(c), UCMJ:

> It 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. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.[59]

A. The NMCCA properly applied each part of Article 66(c).

In conducting its review under Article 66(c), the NMCCA applies a *de novo* standard, assessing the evidence "without regard to the findings reached by the trial court, and it must make its own independent determination as to whether the

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[58] *See United States v. Akbar*, 74 M.J. 364, 408 (C.A.A.F. 2015) ("Our task is to assure that the lower court's review was 'properly performed.'") (citing *United States v. Curtis*, 33 M.J. 101, 109 (C.M.A. 1991)).

[59] 10 U.S.C. 866(c) (2012).

evidence constitutes proof of each required element beyond a reasonable doubt."[60] The test used in the NMCCA's *de novo* factual sufficiency review is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the [CCA] are themselves convinced of the accused's guilt beyond a reasonable doubt."[61]

This "awesome, plenary, *de novo* power of review"[62] grants a military accused protections against wrongful conviction unique to the military justice system.[63] This Court has recognized that under Article 66(c), the CCA:

> provides a *de novo* trial on the record at [the] appellate level, with full authority to disbelieve the witnesses, determine issues of fact, approve or disapprove findings of guilty, and, within the limits set by the sentence approved below, to judge the appropriateness of the accused's punishment. We believe such a court's exercise of its fact-finding powers in determining the degree of guilt to be found on the record is more apposite to the action of a trial court than to that of an appellate body.[64]

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[60] *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

[61] *United States v. Turner*, 25 M.J. 324, 325 (C.A.A.F. 1987).

[62] *United States v. Cole*, 31 M.J. 270, 272 (C.A.A.F. 1990).

[63] *United States v. Leak*, 61 M.J. 234, 245 (C.A.A.F. 2005) ("The power of *de novo* factual review that the courts of criminal appeals possess was intended as a safeguard to service members.") (citing *United States v. Parker*, 36 M.J. 269, 271 (C.M.A. 1993)); *see also United States v. Claxton*, 32 M.J. 159, 162 (C.A.A.F. 1991) ("A clearer *carte blanche* to do justice would be difficult to express.").

[64] *United States v. Crider*, 22 C.M.A. 108, 111 (1973).

This Court has further explained this review "involves a fresh, impartial look at the evidence, giving **no deference** to the decision of the trial court on factual sufficiency beyond the admonition of Article 66(c), UCMJ, to take into account the fact that the trial court saw and heard the witnesses."[65] Finally, the reviewing court has "authority to, indeed, 'substitute its judgment' for that of the military judge."[66]

Here, the NMCCA issued a fifteen-page opinion detailing much of its factual sufficiency review. The court expressly stated that it reviewed the "record of trial and evaluated the arguments by the appellant and the Government."[67] Notably, the Government did not deem the trial judge's special findings appropriate to mention *even once* in its brief below, but complains now that the NMCCA did not explicitly discuss them in its decision.

Additionally, the court expressly stated, "we have made allowances for not having heard and observed the witnesses."[68] Having applied the tests articulated by this Court in *Turner* and

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[65] *United States v. Washington*, 57 M.J. at 399 (emphasis added).
[66] *United States v. Cole*, 31 M.J. at 272.
[67] *United States v. Clark*, 2015 CCA LEXIS at *18-19.
[68] *Clark*, 2015 CCA LEXIS at *19.

Washington, the NMCCA concluded, "we are not personally convinced of appellant's guilt of rape or forcible sodomy."[69]

B. Article 66(c) does not require the NMCCA to review the military judge's special findings when reviewing for factual sufficiency.

Article 66(c) limits the CCAs' review to the "entire record."[70] The "entire record" has different meanings depending on the review being conducted. "In a succession of early cases, [this Court] established that the review of findings--of guilt and innocence--was limited to the evidence presented at trial."[71]

Rather than ask this Court to correct an error, the Government asks this Court to legislate. But "'when the statute's language is plain, the sole function of the courts--at least where the disposition required by the text is not absurd--is to enforce it according to its terms.'"[72] The Government concedes that the language of Article 66(c) is plain.[73] Nonetheless, the Government asks this Court to create a constraint on the CCAs' power to independently weigh the evidence, judge the credibility of witnesses, and determine

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[69] *Clark*, 2015 CCA LEXIS at *19.

[70] 10 U.S.C. § 866(c) (2012).

[71] *United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007).

[72] *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004) (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (in turn quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917))).

[73] Appellant's Br. at 17.

controverted questions of fact. Specifically, the Government asks this Court to require the lower court to "giv[e] considerable weight" to a military judge's special findings and "to justify its departure from those findings."[74] But the power to amend Article 66(c) this way lies with the legislature--not the judiciary.

Nonetheless, the Government maintains at great length its pretense that it merely asks for error correction. For example, it spills considerable ink reciting Article 66(c)'s legislative history. Conspicuously absent from any of the nearly 400 pages of legislative history provided by the Government is reference to a military judge's special findings. In fact, Congress would not create a provision for special findings until 1968--eighteen years after Article 66(c) was enacted.[75]

And when Congress passed the Military Justice Act of 1968, Article 66(c) was not overlooked. Congress amended Article 66(c), substituting "Court of Military Review" for "board of review."[76] It did not amend Article 66(c) by adding the additional constraint the Government now seeks. In the forty-seven years since Congress added a provision for special

[74] Appellant's Br. at 47.

[75] Military Justice Act of 1968, Pub. L. No. 90-632, § 2(21)(D), 82 Stat. 1340.

[76] Military Justice Act of 1968, Pub. L. No. 90-632, § 2(28), 82 Stat. 1342.

findings, Congress has not amended Article 66(c) to add this constraint.

This is not to say there has been no *attempt* to add this constraint as an amendment to Article 66(c). Notably, one of the opposing counsel on brief in this case is an "Attorney Advisor" staff member of the Military Justice Review Group (MJRG).[77] The MJRG has drafted a legislative proposal to amend Article 66(c) to make it what the Government argues before this Court that it currently is.[78]

C. Even if Article 66(c) required the NMCCA to review special findings in its factual sufficiency review, the court was not required to acknowledge the military judge's special findings in its opinion.

The Government argues that because the NMCCA did not acknowledge the military judge's special findings in its written

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[77] Supp. J.A. at 999 (REPORT OF THE MILITARY JUSTICE REVIEW GROUP – PART I: UCMJ RECOMMENDATIONS 1280 (2015), http://www.dod.gov/dodgc/images/ report_part1.pdf [hereinafter MJRG]).

[78] *See, e.g.*, Supp. J.A. at 978 (MJRG at 610. ("Under this proposal: (1) the accused would be required to raise the issue and to make a specific showing of deficiencies in proof; and (2) the court could then set aside the finding if it is clearly convinced the finding was against the weight of the evidence. Although the court could weigh the evidence and determine controverted questions of fact, it would be required to give deference to the trial court on those matters.")); *see also* Supp. J.A. at 990-91 (MJRG at 1135-36 (legislative proposal to amend Article 66 to add constraint on authority of a CCA to "weigh the evidence and determine controverted questions of fact, subject to . . . (B) appropriate deference to findings of fact entered into the record by the military judge.")).

opinion, it "failed to take into account those findings" as required by Article 66(c).[79] This argument is a *non sequitur*.

It is well-settled that the NMCCA is not required to detail all of its analysis.[80] The Government recently has taken this position in at least one other case:

> Appellant's mere disagreement with the Panel's decision is neither grounds for *en banc* reconsideration nor support for the claim that he did not receive proper review pursuant to Article 66 of the Uniform Code of Military Justice. **Contrary to his argument, Appellant is not owed any further explanation from this Court.**[81]

Assuming *arguendo* that the NMCCA was required to consider the military judge's special findings, nothing in its opinion shows that it did not do so sufficient to overcome a presumption of regularity in the appellate process.[82] Appellate judges are presumed to know the law and apply it correctly, "absent clear

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[79] Appellee's Br. at 41.

[80] *United States v. Akbar*, 74 M.J. at 408 ("However, we do not require a lower court to 'always articulate its reasoning for its decisions.'") (quoting *United States v. Wean*, 37 M.J. 286,287 (C.M.A. 1993) (citing *United States v. Clifton*, 35 M.J. 79 (C.M.A. 1992)) (further citing *United States v. Winckelmann*, 73 M.J. 11, 16 (C.A.A.F. 2013); *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987)).

[81] *See, e.g.*, Supp. J.A. at 1007 (Govt's Answer to Appellant's Mot. *En Banc* Recon. at 8, *United States v. Redmon*, No. 201300077, 2014 CCA LEXIS 369 (N-M. Ct. Crim. App. June 26, 2014) (citing *United States v. Winckelmann*, 74 M.J. at 16)) (emphasis added).

[82] *Cf*. *Voorhees v. Jackson*, 35 U.S. 449, 472 (1836) ("There is no principle of law better settled, than that every act of a court of competent jurisdiction shall be presumed to have been rightly done, till the contrary appears.")

evidence to the contrary."[83] Here the NMCCA clearly stated that it considered the record of trial.[84]

That the NMCCA did not explicitly mention the special findings in its written opinion does not lead to a necessary conclusion that the court did not consider them. In fact, given the presumption of regularity, nothing in the NMCCA's opinion lends any support to such a conclusion.

D. The Government's requested interpretation would render the operative part of Article 66(c) meaningless.

The Government argues that when the CCA conducts its factual sufficiency review under Article 66(c) it is bound by the military judge's special findings unless clearly erroneous.[85] However, this incredible contortion of the phrase "recognizing that the trial court saw and heard the witnesses" would render the operative clause of the sentence void by stripping the CCA of the power to "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact[.]"[86] The Government's argument that in order to "give effect to" the subordinate clause the CCA is required to justify its departure from the military judge's special findings strains credulity. If

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[83] *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997).

[84] *Clark*, 2015 CCA LEXIS at *18.

[85] Appellee's Br. at 54-57.

[86] 10 U.S.C. § 866(c) (2012).

Congress intended such a reading, it could have said so. Congress has shown no reservation in doing so in other areas.[87]

In the context of the rest of Article 66(c), the word "recognizing" within the subordinate clause has the plain meaning to bear in mind. The legislative history provided by the Government shows as much. As the Government points out, when Professor Morgan added this clause to the initial draft of the UCMJ, it read, "bearing in mind that the court saw and heard the witnesses who testified before it[.]"[88] The three words "bearing in mind" were simplified to one: "recognizing." The Boards of Review have applied this plain meaning to the subordinate clause for the last sixty-four years.[89] Moreover, in the nearly 35,000

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[87] *See, e.g.*, 18 U.S.C. 3742(e)(4) (2012) ("The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous . . . .").

[88] Appellee's Br. at 34; J.A. 596-97.

[89] *See, e.g.*, *United States v. Doby*, 2 C.M.R. 704, 707 (A.F.B.R. 1951) ("Authority is given the Board of Review by the Uniform Code of Military Justice, Article 66(c) and the Manual for Courts-Martial, 1951, to weigh the evidence, judge the credibility of witnesses and determine controverted questions of fact, **bearing in mind**, however, that the trial court saw and heard the witnesses.") (emphasis added); *see also United States v. Scott*, 8 C.M.R. 526, 531 (A.B.R. 1952) ("**bearing in mind**, that the trial court saw and heard the witnesses") (emphasis added) (internal quotations omitted); *United States v. Vaher*, No. 27016, 1988 CMR LEXIS 946, *1 (A.F.C.M.R. 1988) ("**[b]earing in mind** that the military judge had the opportunity to observe the witnesses and determine their credibility") (emphasis added); *United States v. Ruiz*, 46 M.J. 503, 511 (A.F. Ct. Crim. App. 1997) ("**bearing in mind** that we did not personally observe

cases decided by the service courts since Article 66(c) was enacted, there does not appear to be any in which a court expresses confusion over the meaning of the subordinate clause.

II.

THE NMCCA DID NOT APPLY AN INCORRECT STANDARD OF REVIEW TO THE MILITARY JUDGE'S SPECIAL FINDINGS.

A. The Government misunderstands the purpose of special findings.

The Government correctly states that Congress modeled Article 51(d), UCMJ--the statutory basis for special findings--on Federal Rule of Criminal Procedure 23(c).[90] In the federal system, this rule serves as the means "by which a defendant may preserve a question of law for purposes of appeal."[91] The service courts have universally recognized this same purpose for special findings. "Special findings are to a bench trial as instructions are to a trial before members. Such procedure is designed to preserve for appeal questions of law."[92]

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the witnesses") (emphasis added).

[90] Appellee's Br. at 48-49.

[91] *Cesario v. United States*, 200 F.2d 232, 233 (1st Cir. 1952)

[92] *United States v. Falin*, 43 C.M.R. 702, 704 (A.C.M.R. 1971); *see also United States v. Corcoran*, No. 201400074, 2014 CCA LEXIS 901, *20 (N-M. Ct. Crim. App. Dec. 23, 2014); *United States v. O'Quin*, 16 M.J. 650, 651 (A.F.C.M.R. 1982) ("[T]he purpose of special findings is to preserve questions of law for appeal.") (quoting *United States v. Hussey*, 1 M.J. 804, 808-09 (A.F.C.M.R. 1976)).

Significantly, the federal civilian criminal system, upon which Article 51(d) was based, has no provision for a *de novo* factual sufficiency review similar to that under Article 66(c). Thus, federal jurisprudence on this issue is not relevant to factual sufficiency review. In the federal civilian system, review is limited to legal sufficiency and other errors of law. Special findings are used to assist the appellate court in conducting its *legal* review of a judge-alone case by affording "a reviewing court a clear understanding of the basis of the trial court's decision."[93] This is important because in a judge-alone trial, there are no jury instructions.

> It is a fundamental precept of the administration of justice in the federal courts that the accused must not only be guilty of the offense of which he is charged and convicted, but that he be tried and convicted according to proper legal procedures and standards. In short, it is not enough that the accused be guilty; our system demands that he be found guilty in the right way.[94]

The purpose of special findings in a judge alone trial is to allow a reviewing court to review whether the trial judge, in convicting an accused, used correct standards, applied appropriate presumptions, and considered appropriate defenses. It is not to circumscribe the ability of the appellate court to

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[93] *United States v. Hogue*, 132 F.3d 1087, 1090 (5th Cir. 1998) (citing *United States v. Johnson*, 496 F.2d 1131, 1138 n.7 (5th Cir. 1974); *Featherstone v. Barash*, 345 F.2d 246, 249 (10th Cir. 1965)).

[94] *Wilson v. United States*, 250 F.2d 312, 324 (9th Cir. 1957).

conduct its own independent review of the evidence required under Article 66(c).

The Government cites two CCA cases to imply that the Army and Air Force Courts of Criminal Appeals review a military judge's special findings for clear error when conducting their factual sufficiency review.[95] However, these courts only relied on the military judges' special findings when conducting their *legal* sufficiency review.

First, in *United States v. Truss*[96], the Army CCA reviewed a legal issue: the constitutionality of the appellant's conviction in light of *Lawrence v. Texas*, 539 U.S. 558 (2003). This is the only purpose for which that court considered the special findings. "The special findings in this case are factual findings made in the context of evaluating the constitutionality of the specification . . . ."[97] The Government implies *Truss* delineated between "guilt" and "non-guilt" findings.[98] But a reader will not find a single reference to "guilt findings" or "non-guilt findings." The Government's argument here is akin to trying to force a square peg into a round hole. Instead the

[95] Appellant's Br. at 50.

[96] *United States v. Truss*, 70 M.J. 545 (A. Ct. Crim. App. 2011).

[97] *Id*. at 548.

[98] Appellee's Br. at 50.

distinction lies in the fact that in *Truss*, the court was analyzing a legal issue, not factual sufficiency.

Second, the Government points to the unpublished decision of the Air Force CCA in *United States Vazquez*[99], and argues that the Air Force CCA "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."[100] However, like *Truss*, a reader will not find the court parsing the military judge's special findings for "guilt" and "non-guilt." Instead, the court only analyzes the special findings when detailing its *legal* sufficiency review to ensure the military judge convicted the accused *the right way*. By analyzing the special findings, it concludes (1) the military judge found both elements beyond a reasonable doubt and the evidence used to do so[101]; (2) the military judge properly considered the legal defense of mistake of fact[102]; and (3) that the military judge applied the correct burden of proof and legal standards to these two affirmative defenses."[103]

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[99] No. 37647, 2013 CCA LEXIS 207 (A.F. Ct. Crim. App. Mar. 1, 2013).

[100] Appellee's Br. at 26.

[101] *United States v. Vazquez*, 2013 CCA LEXIS at *12.

[102] *Id.* at *13-14.

[103] *Id.* at *14.

Following this, the court made separate conclusions that the evidence was factually sufficient and legally sufficient. In order to be legally sufficient, the court concluded the evidence admitted at trial supported the military judge's special findings.[104] If the evidence did not support the military judge's special findings (i.e., special findings were clearly erroneous), then the conviction would be legally insufficient.

Here, the NMCCA had no occasion to analyze the special findings because it found AN Clark's convictions factually insufficient. Only if the NMCCA were affirming AN Clark's convictions, would it need to analyze the sufficiency of the evidence to support the military judge's special findings in conducting its legal sufficiency review.

Finally, the Government cites a string citation from *United States v. Martin* (but deletes the important parentheticals) to support its argument that the NMCCA should have reviewed the military judge's special findings for clear error.[105]

The thread running through each of the cases *Martin* cites is that the reviewing courts were analyzing special findings in review of legal issues, not conducting a *de novo* review of factual sufficiency:[106]

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[104] *Id.* at *15.

[105] Appellee's Br. at 52-53.

[106] *United States v. Martin*, 56 M.J. 97, 105 (C.A.A.F. 2001).

Case	Conclusion/Issue Under Review
United States v. Martin, 56 M.J. 97 (C.A.A.F. 2001)	Affirmative defense of lack of mental responsibility
United States v. Allen, 53 M.J. 402 (C.A.A.F. 2000)	Search warrant affidavit not knowingly or intentionally false
United States v. Starr, 53 M.J. 380 (C.A.A.F 2000)	Finding there was no intent to punish
United States v. Chaney, 53 M.J. 383 (C.A.A.F. 2000)	No purposeful discrimination
United States v. Youngman, 48 M.J. 123 (C.A.A.F 1996)	Decision to prosecute was not independent of immunized testimony
United States v. Kelley, 45 M.J. 275 (C.A.A.F. 1996)	Declarant had expectation of medical benefit under M.R.E. 803(4)
United States v. Radvansky, 45 M.J. 226 (C.A.A.F. 1996)	Appellant voluntarily consented to search
United States v. Proctor, 37 M.J. 330 (C.M.A. 1993)	Appellant mentally competent to stand trial
United States v. Leedy, 65 M.J. 208 (C.A.A.F. 2008)	Probable cause existed for search authorization

B. An accused should not be penalized with a more unfavorable standard of review because he exercised his right to request special findings.

In both the federal civilian courts and military courts, the provision allowing an accused to request special findings in judge-alone trials is "considered to embrace an important right of the [accused] in a non-jury criminal case."[107] It is also undisputed that Article 66(c) was created in order to protect an

[107] *United States v. Gerard*, 11 M.J. 440, 441 (C.M.A. 1981) (citing *United States v. Snow*, 484 F.2d 811, 812 (D.C. Cir. 1973); *Cesario v. United States*, 200 F.2d 232, 233 (1st Cir. 1952)).

accused servicemember from a wrongful conviction. "For sure, Congress 'intended to give an accused a de novo proceeding on the merits and to empower the Courts of Criminal Appeals to acquit an accused.'"[108]

The Government's position, if adopted by this Court, would lead to the absurd result that in a military judge alone trial, an accused must forfeit one of the protections Congress granted him. Under the Government's scheme, an accused will have a choice. He could exercise his right to request special findings so that an appellate court may fully review the military judge's findings for legal error, thereby binding the appellate court to those same findings (unless clearly erroneous). Or he could elect to preserve a *de novo* factual sufficiency review, thereby forfeiting his right to request special findings and test the validity of the legal standards used to convict him.

Worse still, under the Government's scheme, it may not even be the accused who gets to make this choice. Because Rule for Courts-Martial 918(b) requires the military judge to make special findings upon "request by any party,"[109] it may be the Government that gets to decide which standard of review an accused will forfeit.

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[108] *United States v. Leak*, 61 M.J. 234, 244 (C.A.A.F. 2005) (quoting *United States v. Riley*, 55 M.J. 185 (C.A.A.F. 2001)).

[109] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 918(b) (2012).

Congress has not shown any intent that an accused should be placed in a worse position by exercising an important right. And this Court should not create such a rule.

C. The NMCCA's decision is not at odds with any of the military judge's special findings related to seeing or hearing the witnesses.

Even if the NMCCA were required to afford deference to the military judge's special findings, Article 66(c)'s last clause would restrict that deference to findings based on the trial court's "s[eeing] and hear[ing] the witnesses."

The Government can point to only two findings of fact stemming from the trial court's unique position of being able to see and hear the witnesses: (1) that S.J.W. "testified in a forthright manner" and (2) "answered all questions without any significant hesitation."[110]

The lower court's opinion includes no finding in conflict with either of the military judge's special findings related to his ability to see and hear the witnesses. Therefore, nothing in the military judge's special findings concerning his ability to see and hear the witnesses would have changed the CCA's opinion that "we are not personally convinced of [AN Clark's] guilt of rape or forcible sodomy."[111]

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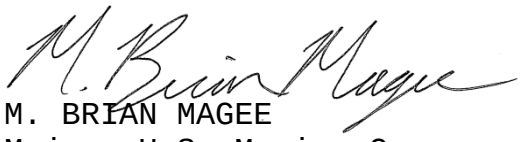
[110] Appellee's Br. at 7.

[111] *United States v. Clark*, 2015 CCA LEXIS 287 at *19.

Conclusion

This Court should reject the Government's misreading of Article 66(c), UCMJ, and invitation to amend Article 66(c) through judicial decision. The plain language of Article 66(c), UCMJ, supported by more than sixty years of military justice practice, vindicates the NMCCA's decision.



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I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on January 12, 2016.

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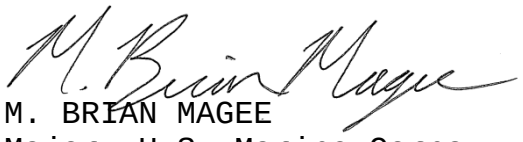

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