IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant	)	REPLY BRIEF ON BEHALF OF APPELLANT
v.	)	Crim.App. Dkt. No. 201400165
Jacob L. PEASE, Information Systems Technician Second Class (E-5) U.S. Navy Appellee	)	USCA Dkt. No. 16-0014/NA

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

MATTHEW M. HARRIS
Captain, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7430
Bar no. 36051

SUZANNE M. DEMPSEY
Major, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7059
Bar no. 36266

MARK K. JAMISON
Colonel, U.S. Marine Corps
Appellate Government Division
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

BRIAN K. KELLER
Deputy Director
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682
Bar no. 31714

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Issues Presented

I.

THE LOWER COURT JUDICIALLY DEFINED "INCAPABLE OF CONSENTING" CONTRARY TO THE INSTRUCTIONS GIVEN TO THE MEMBERS AND USED THIS DEFINITION TO FIND THREE CHARGES OF SEXUAL ASSAULT AND ONE CHARGE OF ABUSIVE SEXUAL CONTACT FACTUALLY INSUFFICIENT. IN CREATING THIS NEW LEGAL DEFINITION NOT CONSIDERED BY THE FACTFINDER AND NOWHERE PRESENT IN THE RECORD, DID THE LOWER COURT CONSIDER MATTERS OUTSIDE THE RECORD AND OUTSIDE ITS STATUTORY AUTHORITY IN CONDUCTING ITS FACTUAL SUFFICIENCY REVIEW?

II.

THE LOWER COURT JUDICIALLY DEFINED "INCAPABLE OF CONSENTING" IN A MANNER THAT LIMITS PROSECUTIONS TO ONLY TWO SITUATIONS—— "INABILITY TO APPRECIATE" AND "INABILITY TO MAKE AND COMMUNICATE" AN AGREEMENT. TO PROVE THE LATTER, THE COURT FURTHER REQUIRED PROOF THAT A VICTIM BE UNABLE BOTH TO MAKE *AND* TO COMMUNICATE A DECISION TO ENGAGE IN THE CONDUCT AT ISSUE. NOTHING IN THE STATUTE REFLECTS CONGRESSIONAL INTENT TO LIMIT ARTICLE 120, UCMJ, PROSECUTIONS IN THIS MANNER. DID THE LOWER COURT ERR?

Statement of the Case

On September 14, 2015, the Judge Advocate General of the Navy filed a certificate for review of the United States Navy-Marine Corps Court of Criminal Appeals' decision in this case to this Honorable Court. On October 14, 2015, Appellee filed its Brief. On November 13, 2015, Appellant filed his Answer. Appellee replies herein.

Argument

I.

A. The certified issue encompasses the lower court's factual sufficiency review of the knowledge element that was based on its flawed interpretation of "incapable of consenting" that was neither instructed upon by the Military Judge nor considered by the Members.

Appellee erroneously asserts that the lower court's interpretation of "incapable of consenting" had no impact on its finding on whether Appellee knew or reasonably should have known that the victims were incapable of consenting. (Appellee's Br. at 23-24.)

But that ignores the lower court's holding to the contrary:

> The short answer is *our interpretation of the law* applied to our assessment of the facts in this case leaves us with reasonable doubt that the complainants were legally "incapable of consenting" as well as reasonably doubt that the appellant knew or reasonably should have known they were *incapable of consenting*.

United States v. Pease, 74 M.J. 763, 770 (N-M. Ct. Crim. App. 2015) (emphasis added). To reach the conclusion that it had reasonable doubt that Appellee knew or reasonably should have known that the victims were incapable of consenting, the lower court applied its faulty interpretation of "incapable of consenting." *Id.* Thus, the certified question of whether the court applied the correct law to its factual sufficiency review applies equally to the lower court's finding on whether Appellee

knew or reasonably should have known that the victims were "incapable of consenting."

B. When the lower court elected to reverse for factual insufficiency, it was required to apply the correct legal principles. By applying legal principles not instructed upon at trial, the lower court abused its Article 66(c) power.

Appellee claims that the lower court was within its statutory authority to decide the case under Article 66(c) vice Article 59(a), UCMJ. (Appellee's Br. at 24-29.) The United States does not disagree. Under the constraints of Articles 59(a) and 66(c), UCMJ, the lower court could have (1) reviewed for instructional error and reversed under Article 59(a), if it also found material prejudice to Appellee's substantial rights, or (2) found the convictions factually insufficient under Article 66(c) and reversed. *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002) (Article 59(a) constrains authority to reverse and Article 66(c) constrains power to affirm). The court took the latter approach. Under *Tardif*, the lower court could do so without addressing the assigned instructional error issue.

But that is not the issue. The certified issues ask this Court to analyze whether the lower court applied the correct legal principles to its factual sufficiency review——the exact issue certified by the Judge Advocate General of the Army in *United States v. Leak*, 61 M.J. 234, 238, 241 (C.A.A.F. 2005).

1. Appellee's attempt to distinguish *Cagle* and *Long* fails——the Courts of Criminal Appeals have an independent duty to review for factual sufficiency.

Appellee attempts to distinguish *United States v. Cagle*, No. 38592, 2015 CCA LEXIS 294, *13-*15 (A.F. Ct. Crim. App. July 16, 2015), and *United States v. Long*, 73 M.J. 541, 544-45 (A. Ct. Crim. App. 2014), by arguing that, unlike here, the Air Force and Army courts were not presented with a claim of factual insufficiency——"[t]he two courts simply reviewed the errors as assigned and issued rulings accordingly." (Appellee's Br. at 25.)

But Appellee's argument disregards that Courts of Criminal Appeals have a statutory duty to determine legal and factual sufficiency in every case, regardless whether the issue is raised by the appellant. Article 66(c), UCMJ; *see also United States v. Nerad*, 69 M.J. 138, 145 (C.A.A.F. 2010) ("a CCA clearly may not approve a legally or factually insufficient finding"); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987) (remand appropriate when unclear whether lower court conducted factual sufficiency review).

Moreover, that argument fails to explain why the lower court went to great lengths to define and redefine statutory terms, well beyond the scope of the contested issue in the case——the definition of competent——and beyond the legal

principles instructed upon at trial by the Military Judge and considered by the Members——if it simply found the offenses as charged and as instructed upon factually insufficient.

This suggests a backdoor approach used to avoid a more deferential standard of review as recognized in the dissent in *Tardif*. 57 M.J. at 230 (Sullivan, S.J., dissenting) ("Article 66(c), UCMJ, was not intended by Congress as a means for a subordinate court to evade or avoid unpopular legal precedent of this Court").

2. Appellee's attempt to distinguish *Holt* and *Beatty* is unpersuasive——the lower court's interpretation of Article 120's statutory language directly conflicts with the Military Judge's instructions given at trial.

Contrary to Appellee's assertion, (Appellee's Br. at 32), there is an identifiable conflict between the Military Judge's instructions, (J.A. 187), and the legal principles used by the lower court in conducting its factual sufficiency review. *Pease*, 74 M.J. at 770. Indeed, the lower court not only defined the disputed word "competent," but also *sua sponte* defined "incompetent," "freely given agreement" and "incapable of consenting" when none of those words or phrases were disputed or defined at trial. *Id.*

Although not directly on point, *Beatty* and *Holt* recognize that factual sufficiency review under Article 66(c) is not unlimited. *United States v. Beatty*, 64 M.J. 456, 459 (C.A.A.F.

2007); *United States v. Holt*, 58 M.J. 227, 232 (C.A.A.F. 2003). Importantly, both cases limit factual sufficiency review to consideration of matters within the record. *Id.* A logical extension of both cases, applicable here, is that a service court's factual sufficiency review is necessarily constrained by the legal principles upon which a conviction is based.

C. Remand is appropriate to correct the lower court's faulty factual sufficiency review.

Remand for a proper legal and factual sufficiency review is appropriate "where the underlying validity of the Article 66(c), UCMJ, review is in question." *Beatty*, 64 M.J. at 459. *See also Leak*, 61 M.J. at 248 (remanded for application of correct standard of law to factual sufficiency review); *Turner*, 25 M.J. 325 (remanded for proper factual sufficiency review).

Similar to *Leak*, the lower court here erred by applying the incorrect standards to its factual sufficiency review. Thus, remand is appropriate. But as Appellee suggests, the lower court need not review for both instructional error and factual sufficiency. (Appellee's Br. at 29-30.) Indeed, the lower court could continue to review for factual sufficiency using the legal principles that define Appellee's convictions——the charge sheet and the Military Judge's instructions——without reaching the question of instructional error. But, the lower court must be given the opportunity to review both the question of fact and

the question of law when fulfilling its Article 66(c) duties. *See Tardif*, 57 M.J. at 224 (Article 66(c) factual sufficiency review "do[es] not involve errors of law" but legal sufficiency review involves errors of law and thus also implicates Article 59(a)).

II.

A. Appellee's interpretation of the lower court's analysis and definition of the anti-element "incompetent" demonstrates that the lower court's interpretation creates ambiguity, it does not resolve it.

Appellee argues that the lower court's analysis "clearly" shows that the lower court derived the "causes" that render a person incompetent "from the text of Article 120(b)(3) itself." (Appellee's Br. at 36-38.) But that ignores the direct application of the first sentence of the consent definition to Article 120(b)(2) offenses when a person is "otherwise unaware" and Article 120(a)(5) offenses when a person is administered a substance without their knowledge that impairs their ability to appraise or control their conduct. Surely Congress' definition of consent——a freely given agreement by a competent person—— applies equally to Article 120(b)(2) and 120(a)(5) offenses. *See Brown v. Gardner*, 513 U.S. 115 (1994) ("there is a presumption that a given term is used to mean the same thing throughout a statute").

Thus, Appellee's attempt to find clarity in the lower court's faulty analysis fails. To the contrary, it "clearly" demonstrates the ambiguity created by the lower court's interpretation of the statutory text.

B. Appellee's interpretation of the lower court's analysis and definition of "incapable of consenting" demonstrates that the lower court's interpretation does not employ the plain and ordinary meaning of the words and contravenes Congressional intent.

Appellee asserts that the lower court employed the plain meaning of the text. (Appellee's Br. at 34.) Appellee also asserts that the lower court interpreted the statute to highlight Congressionally-established parameters for Article 120(b)(3)(A) offenses. (Appellee's Br. at 38-39.) Notably, Appellee asserts "[b]y looking at the text of the punitive portion of the statute, we find that they must be incapable of mentally or physically making or communicating a decision regarding an agreement to enter into the conduct." (Appellee's Br. at 39.)

But that argument ignores that when a statute's language is plain, the sole function of the courts is to enforce it according to its terms. *United States v. Kearns*, 73 M.J. 177, 181 (C.A.A.F. 2014) (internal quotation marks and citations omitted). And nowhere in Article 120(b)(3)(A) did Congress use the words "mentally," "physically," "making," "communicating," or "decision." (Appellee's Br. at 39.) Moreover, nowhere in

the definition of consent did Congress use the words "cognitive ability," "appreciate," or "nature." (Appellee's Br. at 39.) In fact, several of these words or concepts were removed by Congress in the 2012 iteration of the statute.[1]

The lower court was not free to "append additional language as it sees fit," especially when its interpretation injected an ambiguous term——cognitive ability——into the statutory scheme. *Kearns*, 73 M.J. at 181 (quoting *Fides, A.G., v. Comm'r*, 137 F.2d 731, 734-35 (4th Cir. 1943)) ("[C]ourts should be extremely cautious not to add words to a statute that are not found in the statute.").

C. Appellee's factual comparison to *Ginn* is misplaced. This Court has no authority to conduct its own factfinding on a legal issue not resolved below.

Appellee spends eight pages of his brief detailing his version of the facts, (Appellee's Br. at 3-11, 22), and three pages of his brief comparing his version of the facts to those found by the Air Force Court in *United States v. Ginn*, No. 38551, 2015 CCA LEXIS 334 (A.F. Ct. Crim. App. Aug. 17, 2015), (Appellee's Br. at 41-45). But the offense-specific facts outside the facts presented within the lower court's opinion are

[1] A person commits aggravated sexual assault if they "engage in a sexual act with another person of any age if that other person is substantially incapacitated or substantially incapable of (A) appraising the nature of the sexual act; (B) declining participation in the sexual act; or (C) communicating unwillingness to engage in the sexual act." 10 U.S.C. § 920(c)(2) (2007).

irrelevant to this Court's analysis of the legal issues presented.[2] The United States is not asking this Court to conduct its own factual sufficiency review of the evidence. Indeed, such review would be inappropriate under Article 67, UCMJ, and this Court's precedent. *See Leak*, 61 M.J. at 241 (cannot reassess a service court's factfinding). Moreover, the United States is not asking this Court to review for instructional error when the lower court did not do so. *Cf. United States v. Piolunek*, 74 M.J. 107, 110 (C.A.A.F. 2015) (certified issue improperly asked Court to revisit factual basis for lower court's legal ruling). Rather, as discussed *supra*, the United States is asking that this Court remand the case to the lower court to properly conduct its Article 66(c) review.

Conclusion

Wherefore, the United States respectfully requests that this Court reverse the decision of the lower court and remand to allow the lower court to: (1) properly conduct its factual sufficiency review using only those legal principles instructed upon by the Military Judge and considered by the Members, and (2) address whether the Military Judge abused his discretion in failing to give the defense-requested instruction on the

[2] Appellant's version of the offense-specific facts are detailed in its Answer before the lower court. (J.A. 40-49.)

definition of competent under *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.A.A.F. 1993).

MATTHEW M. HARRIS
Captain, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7430
Bar no. 36051

SUZANNE M. DEMPSEY
Major, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7059
Bar no. 36266

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

BRIAN K. KELLER
Deputy Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682
Bar no. 31714

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I certify that the foregoing was delivered to the Court and a copy served on opposing counsel on November 23, 2015.

SUZANNE M. DEMPSEY
Major, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7059
Bar No. 36266