IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

United States Appellee **v.** Hospital Corpsman First Class **Rodney D. Harvey** United States Navy Appellant	*Amicus Curiae* Brief Crim. App. Dkt. No. 202200040 **USCA Dkt. No. 23-0239/NA**

Brief of *Amicus Curiae* In Support of Neither Party

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

INTEREST OF AMICUS

Amicus is a retired judge advocate whose career focused on military justice, including two tours of duty as a military judge and two as a military appellate judge. After retiring from military service, *Amicus* served more than 14 years as the senior legal advisor for the Honorable Scott Stucky, a senior judge of this Court. *Amicus* has written extensively on military justice in military law reviews and journals and made presentations at several military justice seminars and conferences, including this Court's Annual Continuing Legal Education and Training Program.

Amicus has no personal stake in the outcome of the proceedings, has not consulted either party on the contents of this brief, and is only interested in improving the military justice system and its processes.

ISSUE PRESENTED

DID THE LOWER COURT ERRONEOUSLY INTERPRET AND APPLY THE AMENDED FACTUAL SUFFICIENCY STANDARD UNDER ARTICLE 66(D)(1)(B), UCMJ?

RELEVANCE OF THE BRIEF

The duties and standards of the first level of appellate court review for courts-martial remained the same from the

adoption of the Uniform Code of Military Justice (UCMJ) in 1950 until changes mandated by the Military Justice Act of 2016. As amended, the version of Article 66d)(1) at issue is confusing and raises questions as to its appropriate application. This brief is not meant to support either party but rather to assist the Court in interpreting the meaning and proper application of the statute.

THE STATUTE

Before the recent amendments, the UCMJ provided:

> In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it 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.

Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2012).

The revised statute applicable in this case reads, in part:

> (d) Duties.-
>
> (1) Cases appealed by accused.-
>
> (A) In general.-In any case before the Court of Criminal Appeals under subsection (b), the Court may act only with respect to the findings and sentence as entered into the record under section 860c of this title (article 60c). The Court may affirm only such findings of guilty as the Court finds correct in law, and in fact in accordance with subparagraph (B). The Court may affirm only the sentence, or such part or amount of the sentence, as the

> Court finds correct in law and fact and determines, on the basis of the entire record, should be approved.
>
> (B) Factual sufficiency review.-
>
> (i) In an appeal of a finding of guilty under subsection (b), the Court may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof.
>
> (ii) After an accused has made such a showing, the Court may weigh the evidence and determine controverted questions of fact subject to—
>
> (I) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and
>
> (II) appropriate deference to findings of fact entered into the record by the military judge.
>
> (iii) If, as a result of the review conducted under clause (ii), the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.

Article 66(d), UCMJ, 10 U.S.C. § 866(d); Pub. L. No. 116-283 § X, 134 Stat. 3612-13 (2021).

THE LOWER COURT'S OPINION

In its opinion, the Navy-Marine Corps Court of Criminal Appeals (CCA) determined:

(1) The accused was entitled to have the CCA review his case for factual sufficiency review under the revised statute. *United States v. Harvey*, 83 M.J. 685, 691 (N-M. Ct. Crim. App. 2023).

(2) Although the revised statute no longer specifically provides authority for the CCAs to determine the credibility of witnesses, they may do so. *Id.* at 692.

(3) It "was not clearly convinced that the finding of guilty is against the weight of the evidence in this case." *Id.* at 694.

SUMMARY OF ARGUMENT

As this is a case of first impression concerning the interpretation and application of the revised Article 66(d), and in light of the seeping nature of the issue granted, *Amicus* has chosen to brief several aspects of the revised statute. This brief will argue.

1. This Court interprets a statute *de novo* applying the rules of statutory construction.

2. The plain meaning of Article 66(d)(1)(B) as it relates to factual sufficiency review violates the Absurdity Doctrine.

3. The CCA's interpretation of the statute does not remedy its problems.

4. A CCA no longer has the authority to judge the credibility of witnesses.

ARGUMENT

1. This Court should interpret the statute *de novo*.

The scope, applicability, and meaning of Article 66(d), UCMJ, is a matter of statutory interpretation this Court reviews *de novo*. *See United States v. McAlhaney*, 83 M.J. 164, 166 (C.A.A.F. 2023). In such a review, "this Court employs principles of statutory construction." *United States v. Beauge*, 82 M.J. 157, 162 (C.A.A.F. 2022). A fundamental rule of statutory construction is that "the plain language of a statute will control unless it leads to an absurd result." *United States v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012).

2. The plain language of Article 66(d)(1)(B) as it relates to factual sufficiency review violates the Absurdity Doctrine.

"The absurdity doctrine focuses on the inherent absurdity of the results of interpreting statutes according to their plain meaning." *United States v. McPherson*, 81 M.J. 372, 381–82 (C.A.A.F. 2021) (citing *United States v. X-Citement Video*, 513 U.S. 64, 69 (1994)). "A statutory outcome is absurd if it defies rationality by rendering a statute nonsensical or superfluous or if it creates an outcome so contrary to perceived social values that Congress could not have intended it." *Lovitky v. Trump*, 949 F.3d 753, 761 (D.C. Cir. 2020) (cleaned up); *see United States v. King*, 71 M.J. 50, 52

(C.A.A.F. 2012). "A provision may be either disregarded or judicially corrected as an error (when the correction is textually simple) if failing to do so would result in a disposition that no reasonable person could approve." Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 234 (2012).

(a) A CCA's decisions to consider factual sufficiency review and to affirm or set aside a conviction are not discretionary.

Article 66(d)(1)(A), UCMJ, provides that a CCA "may affirm only such findings of guilty as the Court finds correct in law, and in fact in accordance with subparagraph (B)." Subsection (B) states that a CCA "*may* consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency of proof." Article 66(d)(1)(B), UCMJ (emphasis added). If a CCA grants factual sufficiency review, it "*may* weigh the evidence …. Article 66(d)(1)(B)(ii), UCMJ (emphasis added). If thereafter the CCA is "clearly convinced that the finding of guilty was against the weight of the evidence, the Court *may* dismiss, set aside, or modify the findings, or affirm a lesser sentence." Article 66(d)(1)(B)(iii), UCMJ (emphasis added).

The word "may" as used in subparagraph (B) inappropriately suggests that the CCA has discretion in making these judgments. It does not.

Permissive words, such as "may," grant discretion, while mandatory words, such as "shall" impose a duty. Scalia et al., *supra*, at 112. Use of the term "may" in these three provisions of subparagraph (B) makes no sense. No reasonable person would approve of a disposition in which the CCA is entitled to ignore factual sufficiency review when the accused has established the necessary precondition for review. Nor could a reasonable person conclude that once factual sufficiency review is granted a CCA could decline to weigh the evidence or to implement a remedy if the CCA was clearly convinced the finding of guilty was against the weight of the evidence. Reading "may" in Article 66(d)(1)(B) as "shall" in these situations is the only way to make sense of the text.

(b) Requiring an accused to "make[] a specific showing of a deficiency in proof" to obtain factual sufficiency review renders the concept a chimera.

Until the amendments to Article 66, the accused would have been entitled to review for factual sufficiency by virtue of the approved sentence. The CCA would have had to determine whether each conviction was factually sufficient re-

gardless of whether the accused contested the proposition. This Court declared Article 66(c) "requires the Courts of Criminal Appeals to conduct a *de novo* review of legal and factual sufficiency of the case." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

> In the performance of its Article 66(c), UCMJ, functions, the Court of Criminal Appeals applies neither a presumption of innocence nor a presumption of guilt. The court must assess the evidence in the entire record without regard to the findings reached by the trial court, and it must make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.

Id.

Although federal civilian appellate courts do not review the facts *de novo*, they have the discretionary authority to order a retrial "in the interest of justice" if it concludes "the verdict is so contrary to the 'weight of the evidence' that a new trial is required." 1 Report of Military Justice Group 608 (2015) (citing Fed. R. Crim. P. 33(a); *see, e.g.*, *United States v. Chambers*, 642 F.3d 588, 592 (7th Cir. 2011); *United States v. Johnson*, 302 F.3d 139, 150 (3d Cir. 2002)). In 2015, noting the difference between federal civilian practice and Article 66, the Military Justice Review Group (MJRG), recommended Congress amend Article 66 to provide statutory standards for factual sufficiency review. 1 MJRG at 610.

Congress adopted a revised version of the MJRG's proposal. For cases such as this one, in which all offenses occurred on or after 1 January 2021, the accused bears the burden of convincing the CCA to review for factual sufficiency by making "a specific showing of a deficiency of proof." Article 66(d)(1)(B)(i), UCMJ.

The statute does not define "deficiency of proof," so we look to its ordinary definition. *See United States v. Harris*, 78 M.J. 434, 437 (C.A.A.F. 2019). "Deficiency" means "the quality or state of being defective or of lacking some necessary quality or element." https://www.merriam-webster.com/dictionary/deficiency. In legal terms, a "deficiency in proof" exists if the prosecution's evidence is insufficient to establish every element of an offense beyond a reasonable doubt. *United States v. Pettingill*, 45 C.M.R. 183, 186 (C.M.A. 1972).

In any case before it, under revised Article 66(b), the CCA "may affirm only such finding of guilty as the Court finds correct in law ...." Article 66(d)(1)(A), UCMJ. This Court has commonly referred to the term "correct in law" as legal sufficiency. *McAlhaney*, 83 M.J. at 166 (citation omitted). "The evidence is legally sufficient for finding an accused guilty of an offense if any rational factfinder could have found all essential elements of the offense beyond a

reasonable doubt." *United States v. Mays*, 83 M.J. 277, 280 (C.A.A.F. 2023).

If the CCA determines, as required, that any rational factfinder could have found all essential elements of the offense beyond a reasonable doubt, an accused cannot make the requisite "specific showing of a deficiency of proof" such as to warrant factual sufficiency review. And if the CCA determines the conviction is legally insufficient, any factual sufficiency argument would be unnecessary. Thus, factual sufficiency review is merely a fancy from which an accused cannot obtain relief. The result is absurd.

(c) The CCA's interpretation of the statute does not resolve the problem.

The CCA tacitly recognized the burden placed on an accused to obtain a factual sufficiency review was problematic. *Harvey*, 83 M.J. at 691. It thereafter interpreted the statutory language as requiring the accused to "*identify* a weakness in the evidence admitted at trial to support an element (or more than one element) and explain why, on balance, the evidence (or lack thereof) admitted at trial *contradicts* a guilty finding." *Id.* at 691 (emphasis added).

That interpretation presents its own problems. It requires an accused to explain why the evidence presented at

trial *contradicts* a guilty finding. But factual sufficiency review is not about denying or refuting the truth of the allegation. It instead focuses on the weight of the evidence. Is the CCA"clearly convinced that the finding of guilty is against the weight of the evidence." Article 66(d)(1)(B)(ii), UCMJ.

Therefore, the sensical reading of the statutory language is that the accused has the burden of convincing the CCA that the finding of guilty was clearly against the weight of the evidence.

3. In performing its Article 66(d)(1)(B) duties, the CCA no longer has the authority to judge the credibility of witnesses.

Until the recent amendments to Article 66, in performing its review of the record, the CCA could "weigh the evidence, *judge the credibility of witnesses*, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses." (Emphasis added). In the revised statute applicable to this case, Congress deleted the emphasized language.

Despite recognizing the failure of Congress to reenact the emphasized language in the revision, the CCA insisted it still had the authority to judge the credibility of witnesses because "the statute explicitly allows this Court to 'weigh the

evidence and determine controverted questions of fact.'" *Harvey*, 83 M.J. at 692 (quoting Article 66(d)(1)(B)(ii), UCMJ. *Amicus* disagrees.

If a legislature amends a statutory provision, "a significant change in language is presumed to entail a change in meaning." Scalia et al., *supra*, at 256 (regarding the Reenactment Canon). This Court should presume that Congress eliminated the language from the statute to effect a change in the role of the CCA in reviewing an accused's case. Thus, the CCA has no authority to judge the credibility of witnesses.

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CERTIFICATE OF COMPLIANCE

I certify that this *amicus* brief complies with the maximum length authorized by Rule 26(d) as it contains 2,489 words not including front matter, the certificate of compliance, and the certificate of filing and service. This brief complies with the typeface and typestyle requirements of Rule 37 because it was prepared using Century Schoolbook 14-point font.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means on 28 January 2024, to the Clerk of the Court; Government Appellate Division, and Counsel for Appellant.

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