IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee

v.

Rodney B. HARVEY,
Hospital Corpsman
First Class (E-6)
United States Navy

Appellant

BRIEF ON BEHALF OF APPELLANT

Crim.App. Dkt. No. 202200040

USCA Dkt. No. 23-0239/NA

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

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Issue Presented

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

Introduction

Congress recently amended the factual sufficiency review standard in Article 66(d)(1)(B), UCMJ.[1] Interpretation of this statute is a matter of first impression for this Court.

Applying the canons of statutory construction to this amended statute reveals that Congress has only slightly modified the factual sufficiency standard. The plain language of the statute renders it unambiguous. Indeed, some of the critical terms are the same, eliminating any possible ambiguity.[2] And if one resorts to legislative history, it supports that the amended statute does not significantly change the fundamental application of factual sufficiency review.[3] The amended statute provides (1) for a new triggering requirement; (2) that review remains *de novo* with a requirement for "appropriate deference" to the factfinder's evidentiary findings; and (3) that the test for sufficiency remains that the reviewing court must be independently convinced of an appellant's guilt beyond a reasonable doubt.

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[1] 10 U.S.C. § 866(d)(1)(B) (effective Jan. 1, 2021) (J.A. at 170-73); Public Law 116-283, sec. 542(e), 134 STAT 3612-12 (J.A. at 170-73). Section 542(e) of the FY2021 National Defense Authorization Act amended the factual sufficiency standard and made the changes applicable to cases where all the charged offenses occurred after January 1, 2021. Public Law 116-283, sec. 542(e), 134 STAT 3612-12.

[2] This includes "weigh the evidence" and "determine controverted questions of fact." *Compare* 10 U.S.C. § 866(d) (2018) *with* 10 U.S.C. § 866(d)(1)(B)(ii) (effective Jan. 1, 2021) (J.A. at 168, 171).

[3] *See* Report of the Military Justice Review Group, Part I: UCMJ Recommendations (Dec. 22, 2015) [hereinafter MJRG] at 605-22 (J.A. at 839-56).

But that is not how the Navy-Marine Corps Court of Criminal Appeals (NMCCA) interpreted it. Instead, the NMCCA's interpretation of the amended statute conflicts with the statute's plain language. And, despite implicitly finding the statute was ambiguous, it disregarded legislative history. Most alarmingly, it incorrectly found Article 66(d)(1)(B)'s plain language creates an implicit presumption that an appellant is guilty. It ignored the text to hold: "Congress has *implicitly* created a rebuttable presumption that in reviewing a conviction, a court of criminal appeals presumes that an appellant is, in fact, guilty" and that the "burden" is on an appellant to prove otherwise.[4] But if Congress had intended to place a sweeping burden on an appellant to prove he or she is not guilty, it would have done so explicitly—with "plain language."

The NMCCA also declined to define the statute's "appropriate deference" to the factfinder language, then applied "appropriate deference" in a manner that resulted in total deference to the member's findings. It found Appellant's conviction for indecent exposure sufficient despite also finding the critical account from the complaining witness was "dubious" as to whether the exposure occurred and any corroborating evidence was "inconclusive."[5] By disregarding its own

[4] *United States v. Harvey*, No. 202200040, slip. op. at 10, 83 M.J. 685 (N-M. Ct. Crim. App. May 23, 2023) (emphasis added) (J.A. at 1-21).
[5] *Id*. at 11-12 (J.A. at 11-12).

valid reservations, the lower court's holding afforded total deference to the member's verdict—another interpretation against the statute's plain language.

The NMCCA's interpretation and application is incorrect and establishes an insurmountable burden for an appellant, effectively eliminating factual sufficiency review—something that the statute's language does not do and Congress did not intend. Indeed, the Army Court of Criminal Appeals (ACCA) held in *United States v. Scott* that factual sufficiency review instead remains largely the same.[6]

Statement of Statutory Jurisdiction

Appellant's approved sentence included a dishonorable discharge. The NMCCA reviewed this case under Article 66(b)(3), Uniform Code of Military Justice (UCMJ).[7] Thus, this Court has jurisdiction pursuant to Article 67(a)(3), UCMJ.[8]

Statement of the Case

A panel of members, with enlisted representation, sitting as a general court-martial, found Appellant guilty, contrary to his plea, of one specification of indecent exposure in violation of Article 120(c), UCMJ.[9] Appellant was acquitted

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[6] *United States v. Scott*, 83 M.J. 778, 779-80 (A. Ct. Crim. App. Oct. 27, 2023); *see also United States v. Coe*, 2024 CCA LEXIS 52, at *12-15 (A. Ct. Crim. App. Feb. 1, 2024).
[7] 10 U.S.C. § 866(b)(3) (2018) (J.A. at 167).
[8] 10 U.S.C. § 867(a)(3) (2018) (J.A. at 174).
[9] 10 U.S.C. § 920(c) (2018) (J.A. at 176-77).

of one specification of aggravated sexual contact and one specification of abusive sexual contact under Article 120, UCMJ, and one specification of assault consummated by battery under Article 128, UCMJ.[10] The members sentenced Appellant to a dishonorable discharge, twelve months' confinement, and reduction to paygrade E-1.[11] The Convening Authority deferred Appellant's reduction in rate to E-1 until the entry of judgment and waived forfeiture of pay and allowances for six months.[12] The military judge then entered the judgment on February 1, 2022.[13]

On May 23, 2023, the NMCCA affirmed the findings.[14] Appellant sought reconsideration *en banc*, but this request was denied on June 27, 2023. Appellant timely petitioned this Court for review on August 25, 2023 and this Court granted review.

[10] 10 U.S.C. §§ 920, 928 (2018) (J.A. at 176-80).
[11] J.A. at 804.
[12] J.A. at 496-97.
[13] J.A. at 498-500.
[14] *United States v. Harvey*, No. 202200040, slip. op., 83 M.J. 685 (N-M. Ct. Crim. App. May 23, 2023) (J.A. at 1-21).

Statement of Facts

A. While working out at the gym one evening, Appellant and C.E. flirted, partially undressed themselves, and repeatedly touched one another.

C.E. (the alleged victim) and Appellant were regulars at a gym with a large membership of bodybuilders and aspiring bodybuilders.[15] Appellant was a well-known bodybuilder and C.E. was working towards her first competition.[16]

One night at the gym, the two began to discuss bodybuilding. Appellant offered her advice on how to properly pose and what to work on for her upcoming competition.[17] The two spoke for forty-five minutes out of the view of the security cameras and then for over thirty minutes in the view of the cameras inside the gym.[18] These cameras revealed their interactions in the main gym area as well as in a side posing room enclosed with black curtains where members are able to look in a mirror to improve bodybuilding competition poses.[19]

During their interaction, Appellant made sexually suggestive comments, told C.E. he and his wife were looking to have a threesome, and showed C.E. pictures of his penis and sex toys on his phone.[20] Appellant also repeatedly touched C.E.'s

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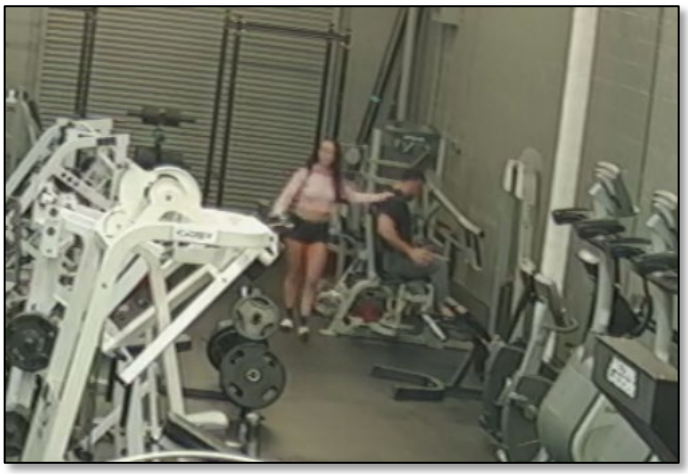
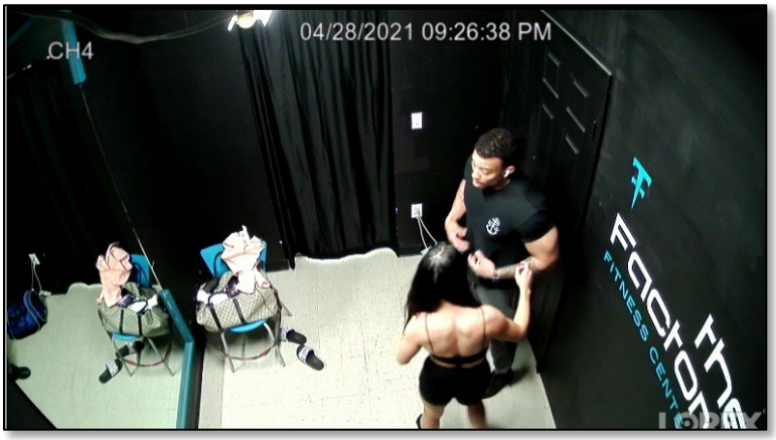
[15] J.A. at 502, 792, 811-15.
[16] J.A. at 502-04, 507-08, 549-50, 794.
[17] J.A. at 507.
[18] J.A. at 569.
[19] J.A. at 502, 511-12.
[20] J.A. at 514, 527, 557, 591.

body and exposed the outline of his penis through his underwear when demonstrating how to pose.[21] C.E. was not deterred by any of these actions. She not only welcomed his advances and physical touch, but removed her clothing, recorded a video with him where she called him "boo," isolated herself with him, and touched Appellant several times.[22]





[21] J.A. at 805 (Pros. Ex. 2, Video 4 at 01:32-01:45).
[22] J.A. at 562, 569, 805 (Pros. Ex. 2, Video 2 at 00:18-00:30; Pros. Ex. 2, Video 4 at 0:40-08:16; Pros. Ex. 2, Video 5 at 00:00-2:05; Def. Ex. A, Video 11 at 00:23-00:30; Def. Ex. A, Videos 4, 5; Def. Ex. G).

B. Video recordings show Appellant and C.E. exited the gym together and were the only two people present in the dark parking lot outside the gym. Appellant then stood outside C.E.'s car for a few minutes before they went separate ways.

At 2238, Appellant and C.E. departed the gym together and entered the parking lot alone.[23] At this point, they had spent approximately an hour and sixteen minutes together.[24] It was dark outside and lighting in the parking lot was poor.[25]

[23] J.A. at 805 (Pros. Ex. 3, Video 1 at 00:00).
[24] J.A. at 805 (Pros. Ex. 2, Video 1 at 01:10; Pros. Ex. 3, Video 1 at 00:00).
[25] J.A. at 681, 805 (Pros. Ex. 3).

The gym's glass entry doors were blacked out with paint, preventing anyone in the gym from seeing into the parking lot.[26] There were several cars in the parking lot.[27] Around the gym were car dealerships and a Coca-Cola distribution center, but no visible people.[28] C.E.'s car was a sedan parked between two cars, including one taller Sport Utility Vehicle (SUV), which belonged to Appellant.[29] The investigation produced no eyewitnesses to their interaction.[30]

Appellant and C.E. chatted at his car for a moment.[31] C.E. and Appellant then shared a long embrace, with Appellant lifting her off the ground and C.E.'s hand lingering on Appellant's shoulder:[32]

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[26] J.A. at 680, 817-19.
[27] J.A. at 805 (Pros. Ex. 3).
[28] J.A. at 502, 548, 817-19.
[29] J.A. at 805 (Pros. Ex. 3).
[30] J.A at 798-801. One car can be seen in the distance with its headlights on, but the view from that car to C.E.'s car is obstructed by Appellant's SUV, which was to the right of the passenger side of her car. J.A. at 805 (Pros. Ex. 3). There is no evidence the vehicle with the headlights on was occupied. The lights turned off after some time and no one exited the vehicle. J.A. at 805 (Def. Ex. A, Video 30 at 00:11).
[31] J.A. at 805 (Pros. Ex. 3, Video 1 at 00:00-00:15).
[32] J.A. at 805 (Pros. Ex. 3, Video 1 at 00:13-00:20).

C.E. then got into her car and continued to chat with Appellant.[33] The lights in the interior of C.E.'s car turned off after a moment.[34] Appellant approached the car and leaned onto the driver's side windowsill (the window was down).[35] Appellant faced away from the camera in the video footage of this encounter.[36]

[33] J.A. at 805 (Pros. Ex. 3, Video 1 at 00:20-00:40; Pros. Ex. 3, Video 2 at 00:00-00:05).
[34] J.A. at 805 (Pros. Ex. 3, Video 2 at 00:05).
[35] J.A. at 805 (Pros. Ex. 3, Video 2 at 00:05-00:12).
[36] J.A. at 805 (Pros. Ex. 3, Video 2).

The Government hired an expert to enhance the footage here, but it remains difficult to see what happened between Appellant and C.E.[37]

After some time, C.E. shifted her car into reverse.[38] C.E. testified she left "immediately," but video evidence reveals Appellant then leaned into the car

[37] J.A. at 690-714, 805 (Pros. Exs. 9-11). This clip is from J.A. at 805 (Pros. Ex. 11 at 02:08). While it is difficult to see what occurred, Appellant is at various times handling his phone (as indicated by a lit device in his right hand). *See* J.A. at 805 (Pros. Ex. 11). The Government's expert who enhanced the video footage testified the object emitting light was not created during the enhancement process and that it was present before any enhancement took place. J.A. at 709-10. Notably, C.E. never reported or testified that Appellant held his phone during their car interaction.

[38] J.A. at 805 (Pros. Ex. 3, Video 2 at 02:18-02:20). This is indicated by the lights on the back of her vehicle changing to reverse lights and not changing again until she shifted into drive and left the parking lot. J.A. at 805 (Pros. Ex. 3, Video 2). Her foot remained on the brake with her car in reverse for approximately ninety seconds. J.A. at 805 (Pros. Exs. 2, 11).

through the window again.[39] Appellant later stood up and C.E. then backed up and left at a normal pace, about ninety seconds after she shifted her car into reverse.[40] The time was 2242.[41]

C. C.E. reported a sexual assault and indecent exposure to the police the following day. Appellant was convicted of indecent exposure only.

The next day C.E. reported to police that after Appellant followed her around the gym without consent, what happened in those few minutes in the parking lot was a physical and sexual assault and an unwelcome exposure of Appellant's penis.[42] Specifically, C.E. alleged that Appellant choked her and attempted to penetrate her vagina through her shorts.[43] C.E. also alleged that Appellant exposed himself by putting his erect penis on her windowsill.[44]

Among other issues with her allegation, the investigating officer testified that he was surprised after reviewing the footage because it was "not consistent" with her report.[45] Appellant was nonetheless charged with, among other things,

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[39] J.A. at 587, 805 (Pros. Ex. 3, Video 2 at 02:35-03:50).
[40] J.A. at 805 (Pros. Ex. 3, Video 2 at 03:50-04:06; Pros. Exs. 2, 11).
[41] J.A. at 805 (Pros. Ex. 3, Video 2 at 04:06).
[42] J.A. at 806-08. C.E.'s friend testified that C.E. called her that night "hysterical" and alleged she had been assaulted. J.A. at 532-33, 539, 625-31. This friend advised her to make a police report. J.A. at 532-33, 539, 625-31.
[43] J.A. at 806-08.
[44] J.A. at 806-08.
[45] J.A. at 793. These issues included that C.E. had no injuries and had also destroyed any chance of DNA recovery because she advised investigators she washed her shorts (despite being advised not to) and that she spilled a protein drink

"intentionally expos[ing] his genitalia in an indecent manner, to wit: exposing his penis to C.E. in a public parking lot."[46] The members found Appellant guilty of only indecent exposure.[47] Appellant was acquitted of the aggravated sexual contact, abusive sexual contact, and assault consummated by battery.[48] All of which were alleged to have occurred in the same course of conduct.

D. The lower court found the video evidence to be "inconclusive" and the account from C.E. to be "dubious," but held the finding was nonetheless factually sufficient.

The NMCCA applied the recently amended factual sufficiency standard in Article 66(d)(1)(B), UCMJ to Appellant's case.[49] In doing so, the NMCCA found "Appellant's allegation that [C.E.] was not credible has merit because her testimony about how she was uncomfortable in the posing room was contradicted by the surveillance video of the [gym's] internal cameras."[50] It also found that "there was evidence that [C.E.] had a character trait for untruthfulness" and "the surveillance video of the parking lot was inconclusive as to whether Appellant exposed his penis."[51]

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on her windowsill and cleaned it with hand sanitizer. J.A. at 584-85, 631-34, 795, 796-97, 802.

[46] J.A. at 493-95

[47] J.A. at 803.

[48] J.A. at 803.

[49] *Harvey*, slip. op. at 11-12 (J.A. at 11-12); 10 U.S.C. § 866(d)(1)(B) (effective Jan. 1, 2021) (J.A. at 171).

[50] *Id*. at 11 (J.A. at 11).

[51] *Id*. (J.A. at 11).

The NMCCA similarly found that "[g]iven the video evidence of the interactions between Appellant and [C.E.] in the posing room and the video interaction of the parking lot, her account of the interaction leaves us dubious as to the veracity of some portions of her testimony."[52] Nonetheless, the NMCCA found that because Appellant stood next to the car in the video footage and "[t]he members found her testimony that he was intentionally exposing his genitalia to her at that moment to be credible," their finding that an exposure occurred was factually sufficient.[53]

As to whether the exposure was indecent, the NMCCA agreed "with the member's conclusion that the exposure was indecent" and identified facts and case law that in support of their conclusion.[54]

[52] *Id*. at 12 (J.A. at 12).
[53] *Id*. (J.A. at 12)
[54] *Harvey*, slip. op. at 12 (J.A. at 12).

Argument

The lower court erroneously interpreted and applied the amended factual sufficiency standard under Article 66(d)(1)(B), UCMJ.

Standard of Review

This Court reviews questions of statutory construction *de novo*.[55]

Analysis

A. An amended version of Article 66, UCMJ, was enacted on January 1, 2021, modifying the language that authorizes Courts of Criminal Appeals to conduct factual sufficiency review.

For cases in which at least one offense occurred before January 1, 2021, the old factual sufficiency standard applies. It is stated below. The italicized language also appears in the new factual sufficiency standard.

> *In any case before 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, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact*[56] and determines, on the basis of the entire record, should be approved. In considering the record, *the Court 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*.[57]

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[55] *United States v. Kohlbek*, 78 M.J. 326, 330-31 (C.A.A.F. 2019) (citing *United States v. Atchak*, 75 M.J. 193, 195 (C.A.A.F. 2016)).

[56] The new legal sufficiency standard expounds on how a CCA assesses whether the findings are correct in fact.

[57] 10 U.S.C. § 866(d)(1) (2018) (J.A. at 168).

Appellate courts have interpreted this standard as "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of [this Court] are themselves convinced of the accused's guilt beyond a reasonable doubt."[58]

For cases where all charged offenses are alleged to have occurred on or after January 1, 2021, as is the case here, the factual sufficiency analysis is as follows. Again, language that appears in both statutes is italicized. And new key language is underlined. Headings that indicate the purpose of each section have been added in brackets.

[Threshold requirement to trigger 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.

[Standard of review.]

(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.

[58] *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

[Test for factual sufficiency review.]

(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.[59]

Each of the three clauses in the new statute provide a notable change applicable to the factual sufficiency review in this case.[60] First, an appellant is required to show specific deficiencies of proof to trigger factual sufficiency review.[61] Second, when weighing the evidence instead of "*recognizing* that the trial court saw and heard *the witnesses*" a reviewing court may now give "*appropriate deference* to the fact that the trial court saw and heard *the witnesses and other evidence*."[62] Third, the statute provides a standard to assess whether the evidence is factually sufficient: a reviewing court must be "clearly convinced the finding of guilty was against the weight of the evidence."[63]

[59] 10 U.S.C. § 866(d)(1)(B) (effective Jan. 1, 2021) (J.A. at 171).
[60] 10 U.S.C. § 866(d)(1)(B)(ii)(II) (effective Jan. 1, 2021) (J.A. at 171)—requiring deference to the military judge's findings of fact—is not implicated in this case.
[61] 10 U.S.C. § 866(d)(1)(B)(i) (effective Jan. 1, 2021) (J.A. at 171).
[62] *Compare* 10 U.S.C. § 866(d) (2018) *with* 10 U.S.C. § 866(d)(1)(B)(ii)(I) (effective Jan. 1, 2021) (J.A. at 168, 171).
[63] 10 U.S.C. § 866(d)(1)(B)(iii) (effective Jan. 1, 2021) (J.A. at 171).

B. Aside from a new triggering requirement, interpretation of the revised factual sufficiency statute reveals a distinction with only marginal difference.

This is the first case before this Court to interpret Article 66(d)(1)(B) as amended.[64] "In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself."[65] When "a statute is unambiguous, the plain meaning of the words will control, so long as that meaning does not lead to an absurd result."[66] Indeed, "[w]here the language of the statute is clear and 'Congress has directly spoken to the precise question at issue,' a court must 'give effect to the unambiguously expressed intent of Congress.'"[67] The "sole function of the courts" is to enforce a statute according to its terms and where "that examination yields a clear answer, judges must stop."[68]

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[64] The lower court interpreted the amended statute in this case and the ACCA also later interpreted it in *Scott*. *Scott*, 83 M.J. at 779-80; *see also Coe*, 2024 CCA LEXIS 52, at *12-15.

[65] *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (citing *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 407 (2011)).

[66] *United States v. Ortiz*, 76 M.J. 189, 191-92 (C.A.A.F. 2017) (citing *United States v. Kearns*, 73 M.J. 177, 181 (C.A.A.F. 2014); *United States v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012); *United States v. Graham*, 16 M.J. 460, 42-66 (C.M.A. 1983); *United States v. Dickenson*, 6 C.M.A. 438, 449-50 (1955)).

[67] *Kearns*, 73 M.J. at 181 (quoting *Chevron U.S.A., Inc. v. Natural res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

[68] *Id*. (citing *Lamie v. United States Tc.*, 540 U.S. 526, 534 (2004)); *Food Mktg. Inst.* 139 S. Ct. at 2364.

Interpretation must begin with the "common and approved usage" of a statute's words and their context in the new statute.[69] "[W]hile both legal and lay dictionaries can be eminently helpful and instructive in the course of interpreting statutes, a definition contained in a dictionary—standing alone—is not dispositive of the legal issue of what a provision in a statute actually means."[70] Instead, the meaning of a statute "is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."[71]

"There is no rule of statutory construction that allows for a court to append additional language as it sees fit."[72] And resorting to legislative history to determine the meaning of words is appropriate only to resolve statutory ambiguity.[73] It is a "relic" from a "bygone era of statutory construction" to "inappropriately resort to legislative history before consulting the statute's text and structure."[74] Even then, "legislative history will never . . . be used to 'muddy' the

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[69] *United States v. McCollum*, 58 M.J. 323, 340 (C.A.A.F. 2003).
[70] *United States v. Schmidt*, 82 M.J. 68, 75-76 (C.A.A.F. 2022), *cert. denied*, 143 S. Ct. 214 (2022)).
[71] *Id*. (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).
[72] *Kearns*, 73 M.J. at 181 (citing *Fides, A.G., v. Comm'r*, 137 F.2d 731, 734-35 (4th Cir. 1943)).
[73] *Barnhill v. Johnson*, 503 U.S. 393, 401 (1992); *Board of Trade of the City of Chicago v. S.E.C.*, 187 F.3d 713, 720 (7th Cir. 1999).
[74] *Food Mktg. Inst.*, 139 S. Ct. at 2364 (citing *National Parks & Conservation Assn. v. Morton*, 498 F.2d 765, 767 (D.C. Cir. 1974)); *cf. United States v. Avery*, 79 M.J. 363, 366 (C.A.A.F. 2000) (quoting *United States v. Anderson*, 68 M.J. 378,

meaning of 'clear statutory language.'"[75] And in reviewing legislative history, its varying forms of are owed different weight.[76]

"[W]here the statute's language is susceptible to more than one interpretation, [this Court] can and may consider whether one interpretation or the other creates potential constitutional or other issues."[77] There is a preference for the "meaning that preserves to the meaning that destroys."[78]

Applying these rules of statutory construction while reviewing the plain meaning of Article 66(d)(1)(B) reveals that Congress has only slightly modified the factual sufficiency standard. As the ACCA correctly found in *United States v. Scott*, the amended statute directs a Court of Criminal Appeals (CCA) to "continue to adhere to the *de novo* standard articulated" by precedent under the previous iteration of the statute modified only by the statute's "required deference."[79]

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387 (C.A.A.F. 2010) (determining congressional intent to preempt an offense "through direct legislative language or express legislative history").

[75] *Food Mktg. Inst.*, 139 S. Ct. at 2364 (quoting *Milner v. Department of Navy*, 562 U.S. 562, 572 (2011)).

[76] *See, e.g.*, *id*. (articulating that "'excerpts from committee hearings' are 'among the least illuminating forms of legislative history'") (internal citations omitted); *Dig. Realty Tr., Inc. v. Somersi*, 138 S. Ct. 767, 782 (2018) (Sotomayor, J. concurring) (explaining that committee reports "are a particularly reliable source" as to a bill's meaning).

[77] *Kohlbek*, 78 M.J. at 331 (internal citations omitted).

[78] *Panama Refining Co. v. Ryan*, 293 U.S. 388, 439 (1935)) (Cardozo, J., dissenting)

[79] *Scott*, 83 M.J. at 779-80; *see also Coe*, 2024 CCA LEXIS 52, at *14-15 (equating "appropriate deference" to the factfinder with the statute's prior language requiring a CCA to "recogniz[e] that the trial court saw and heard the witnesses")

Indeed, as discussed in Part C below, the plain language of the statute reveals that beyond the new triggering requirement, review remains *de novo* with a caveat for "appropriate deference" for all evidentiary determinations made by the trial court vice merely "recognizing" that the trial court saw and heard the witnesses as in the prior statute.[80] And the text also underscores that a reviewing court should continue to find a conviction factually insufficient only when, after review, it has an independent reasonable doubt.

Legislative history is also compelling in supporting this unambiguous interpretation.[81] The version of factual sufficiency review that Congress made effective on January 1, 2021 is substantially identical to the factual sufficiency review that the Military Justice Review Group (MJRG) recommended in 2015.[82] The MJRG's report provides the group's justification for this recommendation.

Specifically, the report reveals that by adopting this language, Congress sought to merely codify "statutory standards for factual sufficiency review."[83] It

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[80] *Compare* 10 U.S.C. § 866(d) (2018) *with* 10 U.S.C. § 866(d)(1)(B)(ii)(I) (effective Jan. 1, 2021) (J.A. at 168, 171).
[81] *See Food Mktg. Inst.*, 139 S. Ct. at 2364.
[82] MJRG at 605-22 (J.A. at 837-56). The MJRG generated this report in an effort to make legislative proposals to "enhance the purpose of military law" through amendment to the UCMJ. MJRG at 605-06 (J.A. at 839-40). The MJRG's report made several recommendations to Congress and has been cited as a source for Congressional decision-making by this Court. *See United States v. Hale*, 78 M.J. 268, 276 (C.A.A.F. 2019) (Ohlson, C.J., concurring in part and dissenting in part).
[83] MJRG at 605 (J.A. at 839).

intended the *de novo* standard of review to continue to apply under the revised standard, with a slight modification regarding "appropriate deference" to the factual determinations of trial court.[84] The MJRG also explained that the standard was derived from New York State practice (which reviews factual sufficiency issues *de novo* for an independent reasonable doubt) "*in a manner that reflects military practice since 1948*."[85] This is a direct reference to a desire for continuity with the initial statute authorizing the military to conduct factual sufficiency review (The Elston Act, enacted in 1948) despite recommendations for minor changes of the statute's language.[86]

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[84] MJRG at 619 (J.A. at 853) ("The Court's authority to weigh the evidence and to determine controverted questions of fact would be *retained*, but would channel the exercise of such authority through standards that are more deferential to the factfinder at trial.") (emphasis added); *compare* 10 U.S.C. § 866 (2018) *with* 10 U.S.C. § 866(d)(1)(B) (effective Jan. 1, 2021) (J.A. at 168, 171). "Weigh[ing] the evidence and determin[ing] controverted questions of fact" from the prior statute required a reviewing court to "assess the evidence in the entire record without regard to the findings reached by the trial court." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

[85] MJRG at 607-08, n.6, 610 (J.A. at 841-42, 844) (emphasis added); *People v. Danielson*, 9 N.Y.3d 342, 348 (2007); *People v. Bleakley*, 69 N.Y.2d 490, 495 (1987); *People v. Romero*, 7 N.Y.3d 633, 644 (2006).

[86] The Elston Act, implemented in 1948, provided: "the Judge Advocate General and all appellate agencies in his office shall have authority to weigh evidence, judge credibility of witnesses, and determine controverted questions of fact." H. Rep. No. 80-1034 at 22 (J.A. at 203). "The section makes explicit the finality of sentences of court-martial, and, for the first time, authorizes reviewing authorities *to weigh the evidence* in addition to determining the law. Absence of this authority heretofore has been a common cause of criticism." H. Rep. No. 80-1034 at 7 (J.A. at 188) (emphasis added).

In other words, the plain language, legislative history, and the ACCA's holding in *Scott* support that the statute is only marginally changed.

C. A clause-by-clause interpretation reveals that factual sufficiency review remains *de novo* and the test for factual sufficiency remains beyond a reasonable doubt.

The following discussion breaks down clause-by-clause how factual sufficiency is raised and applied correctly through the lens of statutory interpretation under Art. 66(d)(1)(B).

1. Clause (i): The new statute places a preliminary requirement that must be satisfied to trigger factual sufficiency review.

The congressional change to Article 66, UCMJ, created a prerequisite for a CCA to conduct factual sufficiency review. Now, in cases involving offenses that occurred on or after January 1, 2021, factual sufficiency review is only triggered "[u]pon request of the accused" by making "a specific showing of a deficiency in proof."[87]

The statutory language of this preliminary requirement is unambiguous. The meaning of "upon request of the accused" is axiomatic. The meaning of a "specific showing" is similarly plain, particularly in the context of the entire clause. Black's Law Dictionary, the "preeminent source for definitions of legal terms and phrases," does not define the phrase "specific showing," but it does

[87] 10 U.S.C. § 866(d)(1)(B) (effective Jan. 1, 2021) (J.A. at 171).

define the individual terms.[88] It defines "specific" as "[o]f, relating to, or designating a particular and defined thing" and "showing" as "[t]he act or an instance of establishing through evidence and argument; proof."[89] Analysis of "deficiency in proof" alongside these definitions provides a complete understanding.

In the context of the statute, "deficiency in proof" refers to the Government's failure to prove an element of a charged offense. The definition of "deficiency" supports this. Black's Law Dictionary defines "deficiency" as "a lack, shortage, or insufficiency of something that is necessary."[90] Thus, a "deficiency in proof" is not a complete lack of evidence, but instead occurs when a finding was not adequately proven. For instance, in 1970 the Army Court of Military Review explained that a "deficiency of proof, specifically, is the failure of the Government, either directly or circumstantially, to establish that [an element of the offense was met]."[91]

When these phrases are paired together, the plain language thus indicates a blanket request for factual sufficiency review will not be an adequate trigger for

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[88] *Schmidt*, 82 M.J. at 75-76.
[89] *Specific* and *showing*, BLACK'S LAW DICTIONARY (11th ed. 2019) (J.A. at 829-30).
[90] *Deficiency*, BLACK'S LAW DICTIONARY (11th ed. 2019) (J.A. at 827).
[91] *United States v. Dolan*, 42 C.M.R. 893, 894 (A.C.M.R. 1970); *see also United States v. Anderson*, 37 M.J. 953, 958 (A.C.M.R. 1993) (finding that presentation of only circumstantial evidence can still create a deficiency of proof).

review. Indeed, the Air Force Court of Criminal Appeals has applied this language from Article 66(d)(1)(B)(i) in this manner.[92] An appellant must specifically identify at least one deficiency in the evidence supporting an element of the Government's case against him or her. Critically, there is no modifier on "showing" beyond the requirement for a "showing" to be "specific."[93] Thus, there is no heightened threshold to satisfy this triggering requirement beyond simply identifying any specific deficiencies in the Government's case "through evidence and argument."[94]

This understanding is supported by the context of the remaining statute. Clause (ii) explains that only "[a]fter an accused has made such a showing" will a CCA "weigh the evidence and determine controverted questions of fact."[95] This deliberate step in analysis indicates that a CCA will not engage in evaluating any evidence, including weighing the merits of an appellant's "specific showing of a deficiency in proof," until it moves into clause (ii) and later clause (iii). No

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[92] *See United States v. Bennett*, No. S32722, 2023 CCA LEXIS 293, at *2 n.3 (A.F. Ct. Crim. App. July 14, 2023) (unpublished) (J.A. at 33-34) (finding that a blanket statement requesting factual sufficiency review does not amount to "a specific showing of a deficiency in proof" under Article 66(d)(1)(B)(i) and does not trigger review); *United States v. Porterie*, 2023 CCA LEXIS 229, at * (A.F. Ct. Crim. App. May 30, 2023) (unpublished) (J.A. at 150) (same).

[93] 10 U.S.C. § 866(d)(1)(B) (effective Jan. 1, 2021) (J.A. at 171).

[94] *Showing*, BLACK'S LAW DICTIONARY (11th ed. 2019) (J.A. at 830). For instance, a "showing by clear and convincing evidence."

[95] 10 U.S.C. § 866(d)(1)(B)(ii) (effective Jan. 1, 2021) (J.A. at 171).

analysis is made of a "specific showing" beyond if it is specific enough to identify a potential deficiency in the Government's case.

While unambiguous, the MJRG report supports this interpretation.[96] It indicates the justification for this provision is a desire for the proposed language to "require the accused to raise any factual sufficiency issues regarding the findings" by making "a specific showing of deficiencies in proof."[97] The MJRG's proposal was generally adopted, indicating Congressional agreement with this intent.[98]

Moreover, the MJRG proposal drew upon "New York state practice."[99] In doing so, it explicitly identified New York law as having a two-step process for factual sufficiency review where "upon request of the defendant . . . the court must [first] 'determine whether an acquittal would not have been unreasonable'" before proceeding to weigh the evidence and review for factual sufficiency.[100] That the MJRG acknowledged this requirement in New York state law but did not include the same test in its proposed language here supports that it desired a similar two-step process, but intended the new triggering requirement to demand less from an

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[96] *See Food Mktg. Inst.*, 139 S. Ct. at 2364.
[97] MJRG at 610 (J.A. at 844).
[98] The MJRG proposed "the Court of Criminal Appeals, upon request of the accused, may consider the weight of the evidence upon a specific showing of deficiencies in proof by the accused." MJRG at 615 (J.A. at 849).
[99] MJRG at 610 (J.A. at 844).
[100] MJRG at 610 n.25 (J.A. at 844) (citing N.Y. Crim. Proc. Law § 470.15 (J.A. at 229-30); *Danielson*, 9 N.Y.3d at 348).

appellant.

Thus, this clause is satisfied when an appellant merely requests review of a deficiency in the evidence supporting an element of an offense. This is a "specific showing of a deficiency in proof" and triggers factual sufficiency review, permitting a CCA to "consider whether the finding is correct in fact" as controlled by clauses (ii) and (iii) discussed below.[101]

2. Clause (ii): Once triggered, factual sufficiency review remains *de novo*.

As it applies to Appellant's case, clause (ii) of the amended Article 66 contains the following language: "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 . . . ."[102] Both the prior and amended versions of the statute call for a CCA to "weigh the evidence and determine controverted questions of fact."[103] The language specifically authorizing a CCA to "judge the credibility of witnesses" has been removed.[104] And the admonishment to "recogniz[e] that the trial court saw and heard the witnesses" while reviewing a case for factual sufficiency has also been altered.[105]

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[101] 10 U.S.C. § 866(d)(1)(B) (effective Jan. 1, 2021) (J.A. at 171).
[102] 10 U.S.C. § 866(d)(1)(B)(ii) (effective Jan. 1, 2021) (J.A. at 171).
[103] *Compare* 10 U.S.C. § 866(d) (2018) *with* 10 U.S.C. § 866(d)(1)(B)(ii) (effective Jan. 1, 2021) (J.A. at 168,171).
[104] *Compare* 10 U.S.C. § 866(d) (2018) *with* 10 U.S.C. § 866(d)(1)(B)(ii) (effective Jan. 1, 2021) (J.A. at 168,171).
[105] 10 U.S.C. § 866(d) (2018) (J.A. at 168).

Now the statute calls for "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence" when conducting this review.[106]

As in the previous statute, there is no direct reference to the standard of review that weighing the evidence requires.[107] But the previous version was nonetheless interpreted as requiring a reviewing court to "conduct a *de novo* review of the entire record of trial, which includes the evidence presented by the parties and the findings of guilt."[108] A review of the plain language, precedent, and legislative history (if needed) provides that the removed and altered language has been subsumed within the new standard and it does not substantially change application of the standard of review from anything other than *de novo*.[109]

i. "[T]he Court may weigh the evidence and determine controverted questions of fact."[110] Thus, review remains *de novo*.

Black's Law Dictionary defines "weight of the evidence" as "[t]he persuasiveness of some evidence in comparison with other evidence," outlining a *de novo* approach.[111] And, as this Court has acknowledged, the phrase "'weigh the

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[106] 10 U.S.C. § 866(d)(1)(B)(ii) (effective Jan. 1, 2021) (J.A. at 171).
[107] *Compare* 10 U.S.C. § 866(d) (2018) *with* 10 U.S.C. § 866(d)(1)(B)(ii) (effective Jan. 1, 2021) (J.A. at 168,171).
[108] *Washington*, 57 M.J. at 399.
[109] 10 U.S.C. § 866(d) (2018) (J.A. at 168); *see Scott*, 83 M.J. at 779-80.
[110] 10 U.S.C. § 866(d)(1)(B)(ii) (effective Jan. 1, 2021) (J.A. at 171).
[111] *Weight of the Evidence,* BLACK'S LAW DICTIONARY (11th ed. 2019) (J.A. at 831).

evidence' comes without textual presumption" in favor of one party or the other.[112] Black's Law Dictionary also defines "controvert" as "[t]o dispute or contest" and a "question of fact" as "[a]n issue that has not been predetermined and authoritatively answered by the law."[113] This further indicates that the current statutory language—"the Court may weigh the evidence and determine controverted questions of fact"—gives a reviewing court the authority to decide disputed factual issues *de novo*. That Congress retained this language stresses that the "common and approved" usage of this language is also retained, demonstrating further that the amended statute calls for a *de novo* review.[114]

ii. Removing the language "judge the credibility of witnesses" from the statute does not impact a CCA's ability to judge the credibility of witnesses due to other statutory language that contemplates that.

The amendments made to the remaining language in clause (ii) do not meaningfully alter the interpretation that review remains *de novo*. While deletion of a reviewing court's authority to "judge the credibility of witnesses" from the

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[112] *Washington*, 57 M.J. at 403 (Baker, J., concurring).
[113] *Controvert* and *Question of Fact,* BLACK'S LAW DICTIONARY (11th ed. 2019) (J.A. at 826, 828).
[114] *McCollum*, 58 M.J. at 340; *see Finley v. United States*, 490 U.S. 545, 554 (1989) ("Under established canons of statutory construction, 'it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.'") (citations omitted); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521 (1989) ("A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change.").

language of the statute may indicate a removal of that authority at first glance, that is not the case.[115]

First, the amended language unavoidably includes this authority: "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."[116] The direction to "weigh the evidence and determine controverted questions of fact" necessarily requires a reviewing court to make evidentiary credibility determinations, rendering that specific authorization redundant.[117] That authority has also been subsumed by the amended "appropriate deference" language. Specifically, inclusion of the word "appropriate" denotes that Congress intentionally limited—rather than required—deference to triers of fact.[118] "Congress is not presumed to have used words for no purpose . . . Courts are to accord a meaning, if possible, to every word in a statute."[119] As this does

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[115] Both the NMCCA in *Harvey* and the ACCA in *Scott* and *United States v. Coe* determined that a CCA could still evaluate the credibility of evidence under the amended language. *Coe*, 2024 CCA LEXIS 52, at *12-15; *Scott*, 83 M.J. at 779-80 ("Given the testimony on the record credibly establishing that the victim was at the very least underage . . . ."); *Harvey*, slip. op. at 9 (J.A. at 9) ("We hold that 'appropriate deference' does *not* mean that this Court can no longer make any credibility determinations of witnesses . . . .").

[116] 10 U.S.C. § 866(d)(1)(B)(ii) (effective Jan. 1, 2021) (J.A. at 171).

[117] 10 U.S.C. § 866(d)(1)(B)(ii) (effective Jan. 1, 2021) (J.A. at 171); *Harvey*, slip. op. at 9 (J.A. at 9).

[118] *See appropriate*, NEW OXFORD AMERICAN DICTIONARY (2nd ed. 2005) (J.A. at 834) (defining "appropriate" as "suitable or proper in the circumstances").

[119] *Platt v. Union P.R. Co.*, 99 U.S. 48, 58 (1878).

not call for total deference, a CCA implicitly still has the authority to reach a differing opinion and can judge the credibility of evidence independently in doing so.

Second, the statutory language was expanded from articulating what deference was owed for a factfinder's evaluation of "witnesses" to both "witnesses and other evidence."[120] The amendment—removing the words "judge the credibility of witnesses"—establishes that what deference is "appropriate" could change based on the evidence at issue and is not limited to witnesses only.[121] Evidentiary credibility determinations as a whole are now subject to "appropriate deference" to the factfinder.[122]

iii. The CCAs now give "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence" rather than merely "recognizing that the trial court saw and heard the witnesses." The slight modification does not remove a CCA's ability to make credibility determinations.

The amendment to the prior language of "recognizing that the trial court saw and heard the witnesses" is similarly subsumed by the "appropriate deference" standard now requiring CCAs to give "appropriate deference to the fact that the

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[120] *Compare* 10 U.S.C. § 866(d) (2018) *with* 10 U.S.C. § 866(d)(1)(B)(ii) (effective Jan. 1, 2021) (J.A. at 168, 171).
[121] *Compare* 10 U.S.C. § 866(d) (2018) *with* 10 U.S.C. § 866(d)(1)(B)(ii) (effective Jan. 1, 2021) (J.A. at 168, 171).
[122] *Turner*, 25 M.J. at 325; *Washington*, 57 M.J. at 403 (Baker, J., concurring).

trial court saw and heard the witnesses and other evidence."[123] Military courts interpreted the prior statute's language as requiring a court to weigh evidence independently while "making allowances for not having personally observed the witnesses."[124] A plain understanding of "appropriate deference" compliments this understanding.[125] Indeed, the ACCA in *United States v. Coe* equated "appropriate

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[123] *Compare* 10 U.S.C. § 866(d) (2018) *with* 10 U.S.C. § 866(d)(1)(B)(ii) (effective Jan. 1, 2021) (J.A. at 168, 171).

[124] *Turner*, 25 M.J. at 325 (quoting *Jackson*, 443 U.S. at 319); *United States v. Clark*, 75 M.J. 298, 300 (C.A.A.F. 2016); *United States v. Ayalacruz*, 79 M.J. 747, 753-54 (N-M. Ct. Crim. App. 2020); *United States v. Perkins*, 78 M.J. 550, 567 (N-M. Ct. Crim. App. 2018).

[125] Several military appellate courts have used "appropriate deference" while analyzing factual sufficiency under the language of the prior statute. *See, e.g.*, *United States v. Hale*, No. 20190614, 2021 CCA LEXIS 245, at *13 (A. Ct. Crim. App. May 19, 2021) (unpublished) (J.A. at 97) ("[A]fter recognizing the trial court's ability to observe all of the witnesses as they testified, and giving appropriate deference to her superior position in making credibility determinations, we agree with the military judge's implicit conclusion that the victim was more credible."); *United States v. Lasalle*, No. 38831, 2016 CCA LEXIS 749, at *14-15 (A.F. Ct. Crim. App. Nov. 23, 2016) (unpublished) (J.A. at 117) ("None of the inconsistencies, either standing alone or taken together, causes us to believe that the victim's in-court testimony was not credible. Giving appropriate deference to the trial court's ability to see and hear the witnesses, and after our own independent review of the record, we are ourselves convinced of Appellant's guilt beyond a reasonable doubt."); *United States v. Ingram*, No. 38849, 2016 CCA LEXIS 658, at *7 (A.F. Ct. Crim. App. Nov. 8, 2016) (unpublished) (J.A. at 112) ("None of the inconsistencies, either standing alone or taken together, causes us to believe that the victim's in-court testimony was not credible. Giving appropriate deference to the trial court's ability to see and hear the witnesses, and after our own independent review of the record, we are ourselves convinced of Appellant's guilt beyond a reasonable doubt."); *United States v. Wilson*, No. 901850, 1990 CMR Lexis 1448, at *3 (N-M.C.M.R. Nov. 29, 1990) (citing *Turner*, 25 M.J. 324) ("After weighing the evidence in the record of trial and giving appropriate deference to the military

deference" in the amended Article 66 with the deference derived from the previous admonishment to "recogniz[e] that the trial court saw and heard the witnesses."[126]

Application of the "appropriate deference" standard supports this conclusion as well. Deference is only "appropriate" because a CCA cannot always know what the members determined with respect to a specific piece of evidence's credibility or how one piece of evidence weighed against another at trial. And what amount of deference is "appropriate" could also change based on the nature of the evidence at issue and how relevant it is that a factfinder "saw and heard" it in a courtroom while a CCA did not.[127] For instance, a trial court's conclusion regarding the credibility of video evidence would be afforded little, if any, deference as the perspective of the court and the factfinder in reviewing that evidence would be the same. And "appropriate deference" to a finding that a victim's testimony was

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judge's opportunity to personally observe the witnesses we are convinced beyond a reasonable doubt of the appellant's guilt.").

[126] *See Coe*, 2024 CCA LEXIS 52, at *14-15 (finding that the amended statute "still requires" that a CCA give "appropriate deference.") (internal citations omitted).

[127] 10 U.S.C. § 866(d)(1)(B)(ii) (effective Jan. 1, 2021) (J.A. at 171); *see also Coe*, 2024 CCA LEXIS 52, at *14 (commenting that in applying the amended statute, the degree of deference a CCA affords the trial court for having seen and heard the witnesses will change depending on the "degree to which the credibility of the witness is at issue") (internal citations omitted).

more credible than an accused's would not require total deference, as the text does not require this.[128]

Thus, the plain language indicates only a minor change in the deference owed to the trial court. An independent, *de novo* review is still required with a similar admonishment to consider the factfinder's apparent view of the evidence appropriately.

iv. Legislative history confirms this interpretation is correct.[129]

This interpretation is confirmed with a review of the MJRG report. This report supports that any change to the language of the statute was not intended to substantially change the standard of review or remove a reviewing court's ability to make credibility determinations. Critically, the MJRG proposed this language so a CCA's "authority to weigh the evidence and determine controverted questions of fact would be *retained*" in a manner that "reflects military practice *since 1948*."[130] This underscores that adoption of the MJRG's recommendation was a deliberate choice by Congress to "retain" the *de novo* standard—dating back to the Elston Act—for a reviewing court.[131] That the Elston Act notably allowed for the

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[128] *See Coe*, 2024 CCA LEXIS 52, at *15 (giving deference to the military judge's implicit finding that the victim's testimony, when compared with the testimony of other witnesses, indicated that she did not affirmatively consent).
[129] *See Food Mktg. Inst.*, 139 S. Ct. at 2364.
[130] MRJG at 610, 619 (J.A. at 844, 853) (emphasis added).
[131] MJRG at 610, 615, 619 (J.A. at 844, 849, 853) ("The Court's authority to weigh the evidence and to determine controverted questions of fact would be *retained*,

reviewing authority to "judge the credibility of witnesses" also indicates that deletion of this language (with a desire to "retain" the same *de novo* standard for a reviewing court under the amended statute) was not intended to be significant.[132]

It is also noteworthy that the MJRG report makes no reference to the deletion of the language authorizing a court to "judge the credibility of witnesses," again indicating the insignificance of this change.[133] Instead, the MJRG report simply provides that factual sufficiency review is now "more deferential to the factfinder at trial," in a manner that provides "statutory standards for factual sufficiency review."[134] This increased deference is found in the expansion of deference from only witnesses to all evidence as outlined above and "appropriate deference" provides a succinct standard for that review.

And New York state law ("draw[n] upon" by the MJRG) also conducts an impartial review of the evidence with a caveat for deference to the fact-finder's determinations.[135] Indeed, the primary case on which the MJRG relied in

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but would channel the exercise of such authority through standards that are more deferential to the factfinder at trial") (emphasis added); MJRG at 606-07, n.6 (J.A. at 840-41) (citing H. Rep. No. 80-1034 (J.A. at 182-209)).

[132] MJRG at 619 (J.A. at 853). The Elston Act, implemented in 1948, provided: "the Judge Advocate General and all appellate agencies in his office shall have authority to weigh evidence, judge credibility of witnesses, and determine controverted questions of fact." H. Rep. No. 80-1034 at 22 (J.A. at 203).

[133] 10 U.S.C. § 866(d) (2018) (J.A. at 168).

[134] MJRG at 605, 610, 619

[135] *Danielson*, 9 N.Y.3d at 348 ("the court must weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate

explaining the New York standard, *People v. Danielson*, provides: "[e]ssentially, the court sits as a thirteenth juror and decides which facts were proven at trial."[136]

Thus, Congress has not drastically modified the lens through which a reviewing court analyzes the evidence. *De novo* review still applies. Under the amended statute, a CCA must conduct a *de novo* review of the evidence tempered by the caveat that it must give "appropriate deference" to the factfinder's evidentiary determinations.[137]

3. Clause (iii): The legal test for factual sufficiency remains beyond a reasonable doubt.

"Clearly convinced" is by itself somewhat ambiguous on its face, but the plain language of the phrase "clearly convinced that the finding of guilty was against the weight of the evidence" as a whole provides an unambiguous meaning.

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the strength of such conclusions."); *Bleakley*, 69 N.Y.2d at 495 ("Great deference is accorded to the fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor.")

[136] *Id*. (citing *People v. Crum*, 272 N.Y.3d 348 (1936)). *But see Washington*, 57 M.J. at 403 (Baker, J., concurring) (explaining that because there is no appellate presumption of innocence, description of an appellate court as a "thirteenth juror" is a "confusing analogy"); *see also Coe*, 2024 CCA LEXIS 52, at *14-15 (finding that because "appropriate deference" is owed to the factfinder, "our role in a factual sufficiency review is *not* to substitute ourselves for the factfinder and decide what verdict we would have rendered").

[137] While not applicable to Appellant's case, the explicit addition of "appropriate deference" to the military judge is also plainly appropriate, as he or she also personally observed the witnesses or other evidence in reaching any findings of fact. MJRG at 619 (J.A. at 853).

"Clearly convinced" is not used elsewhere in the UCMJ nor in the Manual for Courts-Martial. The NMCCA once used "clearly convince[d]" in a factual sufficiency review under the prior statute, but did not provide a definition.[138] It has been used sporadically in other contexts as well through military precedent, but similarly without definition.[139]

Black's Law Dictionary also does not provide a definition. But "when a word has an easily graspable definition outside of a legal context, authoritative lay dictionaries may also be consulted."[140] Lay dictionaries provide that "clearly" is defined as "in a clear manner" and "convince" is defined as "overcome by

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[138] *See United States v. Staley*, 50 M.J. 604, 606 (N-M. Ct. Crim. App. 1999) ("our review of the record of trial . . . clearly convinces us that the evidence was both legally and factually sufficient . . . .").

[139] *See, e.g.*, *United States v. Huchel*, 2003 CCA LEXIS 152, *9-10 (A.F. Ct. Crim. App. 2003) (unpublished) (J.A. at 105) ("The military judge's findings, supported by ample evidence in the record of trial and his ruling that the appellant knowingly and voluntarily consented, were based on a correct view of the law. Under the totality of the circumstances, we are also clearly convinced that the appellant knew his options and made a voluntary decision to give the agents consent to search his apartment."); *United States v. Sharar*, 30 M.J. 968, 968-69 (N.M.C.M.R. 1990) ("The record reveals that appellant was clearly convinced that he used and distributed heroin."); *United States v. Andrews*, 77 M.J. 393, 400 (C.A.A.F. 2018) ("When a court is 'clearly convinced that precedent is no longer sound because of changing conditions and that more good than harm will come by departing from precedent, the court is not inexorably bound by its own precedents.'") (alterations omitted) (internal citations omitted).

[140] *Schmidt*, 82 M.J. at 75-76.

argument."[141] While helpful, this does not complete the picture of clause (iii)'s meaning without context.

The phrase: "that the finding of guilty was against the weight of the evidence" provides that context.[142] The meaning of "finding of guilty" is plain. Black's Law Dictionary defines "against the weight of the evidence" as "contrary to the credible evidence; not sufficiently supported by the evidence in the record."[143] Under "weight of the evidence," Black's Law Dictionary provides the following example: "because the verdict is against the great weight of the evidence, a new trial should be granted."[144] Applying this to a "finding of guilty," this means that the finding of guilty was "not sufficiently supported by the evidence" presented at trial (i.e., not supported beyond a reasonable doubt).

Put together, the plain language thus reveals that the phrase means if the reviewing court is not convinced of the finding of guilty beyond a reasonable doubt, it should then modify the findings. This essentially encapsulates the prior precedent-based standard of whether "the members of [the reviewing court] are

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[141] *Clearly* and *convince*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 2001) (J.A. at 832-33); *see also clearly* and *convinced*, NEW OXFORD AMERICAN DICTIONARY (2nd ed. 2005) (J.A. at 835-36) (defining "clearly" as "in such a way as to allow easy interpretation" and "convinced" as "firm in one's belief").
[142] 10 U.S.C. § 866(d)(1)(B) (effective Jan. 1, 2021) (J.A. at 171).
[143] *Against the Weight of the Evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019) (J.A. at 825).
[144] *Weight of the Evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019) (J.A. at 831).

themselves convinced of the accused's guilt beyond a reasonable doubt."[145] Of note, the ACCA in both *Scott* and *Coe* applied this language in this manner.[146]

Legislative history supports the unambiguous plain language interpretation provided here.[147] The MJRG report specifically recommended the adoption of a factual sufficiency standard that "authorize[s] the Courts of Criminal Appeals to dismiss a finding that it is clearly convinced is contrary to the weight of the evidence."[148] This was adopted nearly word for word.[149]

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[145] *Turner*, 25 M.J. at 325 (quoting *Jackson*, 443 U.S. at 319). This understanding also undercuts any question as to whether "clearly convinced" means "by clear and convincing evidence." "By clear and convincing evidence" is a burden of proof. *See, e.g.*, *United States v. Green*, 62 M.J. 501, 503 (A.F. Ct. Crim. App. 2005). "Clearly convinced," as noted above, is a state of confidence about the evidence as it relates to the burden (convinced of the burden in a clear way). Indeed, this Court uses "clearly convinced" as a legal test for overturning precedent, which similarly establishes the phrase is not a burden of proof. *See Andrews*, 77 M.J. at 400 ("When a court is 'clearly convinced that precedent is no longer sound because of changing conditions and that more good than harm will come by departing from precedent, the court is not inexorably bound by its own precedents.'") (alterations omitted) (internal citations omitted). Moreover, neither the MJRG nor Congress adopted language containing the words "by clear and convincing evidence." This is significant when also considering that "clear and convincing evidence" is used in other areas of the UCMJ, but was not selected for this provision. *See* R.C.M. 109, 916 (J.A. at 231-33, 234-36); M.R.E. 313, 314, 321, 615 (J.A. at 210-17, 225); 10 U.S.C. § 806(b) (2018) (J.A. at 164-65); 10 U.S.C. § 850a(b) (2018) (J.A. at 166); *Irving v. United States*, 162 F.3d 154, 163 (1st Cir. 1998) (en banc) ("Comparison of this language to a parallel provision . . . strongly suggests that Congress' choice of words was no accident.").

[146] *Scott*, 83 M.J. at 779-80; *Coe*, 2024 CCA LEXIS 52, at *15.

[147] *See Food Mktg. Inst.*, 139 S. Ct. at 2364.

[148] MJRG at 610, 615 (J.A. at 844, 849).

[149] 10 U.S.C. § 866(d)(1)(B)(ii) (effective Jan. 1, 2021) (J.A. at 171).

Although the MJRG did not define this phrase, they explained that the standard was derived from New York state practice "in a manner that reflects military practice."[150] Indeed, no indication for a desire to depart from precedent was given. And New York State's factual sufficiency test is an independent review for reasonable doubt.[151] In other words then, the military's precedent-based beyond a reasonable doubt factual sufficiency review was indeed encapsulated in this "statutory standard," just simply styled off other sources.[152] Notably, New York state law labels factual sufficiency review as "weight of the evidence" review.[153]

People v. Crum, which the MJRG cited, provides clarification.[154] *Crum* "manifested a definitive, lasting principle of law" with regard to New York's "weight of the evidence review:"[155]

> It is not sufficient, as in most cases with us, to find evidence which presented a question of fact; it is necessary to go further before we can affirm a conviction and find that the evidence is of such weight and credibility as to convince us that the jury was justified in finding the defendant guilty beyond a reasonable doubt." [156]

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[150] MJRG at 610 (J.A. at 844).
[151] *Danielson*, 9 N.Y.3d at 348; *Romero*, 7 N.Y.3d at 644; *Bleakley*, 69 N.Y.2d at 495.
[152] MJRG at 610 (J.A. at 844).
[153] *Bleakley*, 69 N.Y.2d at 495 (establishing that factual sufficiency review is referred to as a review of the "weight of the evidence" in New York).
[154] MJRG at 610, n.25 (J.A. at 844) (citing *Crum*, 272 N.Y. 348).
[155] *See Romero*, 7 N.Y.3d at 646 (citing *Crum*, 272 N.Y. 348).
[156] *Crum*, 272 N.Y. at 350.

In *Crum*, the New York Court of Appeals explained that this standard was met when the Court has a reasonable doubt as to the verdict.[157] The dissent in *Crum* disagreed with the majority's interpretation of the evidence and argued under the same standard: "all this court need find is that the verdict of the jury is sustained by the weight of the evidence beyond a reasonable doubt."[158] And as explained in *Danielson*, which explicitly relies on *Crum*, "even if the prosecution's witnesses were credible their testimony must prove the elements of the crime beyond a reasonable doubt."[159]

That Congress endorsed the MJRG's recommended language as-is is a clear endorsement of the MJRG's explanation, definition, and goals. Particularly when considering that this New York law was only meant to be "draw[n] upon" to reflect military practice, the statute is effectively unchanged in this regard. Congress codified the prior precedent-based standard and the test remains one of reasonable doubt in a manner "more reviewable by higher courts."[160]

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[157] *Id*. ("a reasonable doubt . . . compels us to reverse this conviction and grant a new trial").
[158] *Id*. at 359 (Finch, J., dissenting).
[159] *Id*. at 349; *see also People v. Battle*, 116 A.D.3d 782, 784 (App. Div. 2nd Dept. 2014) ("Upon the exercise of our factual review power, we find that the rational inferences which can be drawn from the evidence presented at trial do not support the conviction beyond a reasonable doubt.")
[160] MJRG at 619 (J.A. at 853); *Turner*, 25 M.J. at 325 (quoting *Jackson*, 443 U.S. at 319).

D. The long-standing protections offered by factual sufficiency review in military justice support that the factual sufficiency standard is largely unchanged.

Factual sufficiency review is a unique authority granted to the CCAs to "provide a source of structural integrity to ensure the protection of service members' rights within a system of military discipline and justice where commanders themselves retain awesome and plenary responsibility."[161] This review has been deemed necessary in a process where (1) the military is an inherently coercive environment; (2) the person who selects the charges also selects the members and initially grants or denies the defense's requests for expert assistance and witnesses; and (3) unanimous verdicts are not required.[162] Factual sufficiency review is critical in ensuring the military justice system can operate within these limitations and produce convictions in which the public can have confidence.[163]

A significant change in this authority would upset the "the tests and limitations [of due process]" that exist uniquely in the military justice system.[164] Therefore, beyond the plain language, precedent, and legislative history

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[161] *United States v. Jenkins*, 60 M.J. 27, 29 (C.A.A.F. 2004).
[162] *United States v. Anderson*, 83 M.J. 291, 299 (C.A.A.F. 2023); *United States v. Finch*, 64 M.J. 118, 129 (C.A.A.F. 2006); *Jenkins*, 60 M.J. at 29.
[163] *See United States v. Uribe*, 80 M.J. 442, 449 (C.A.A.F. 2021) (citing *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 868 (1988)).
[164] *Anderson*, 83 M.J. at 299 (quoting *Weiss*, 510 U.S. at 177) (alterations in original).

surrounding this amendment, the pre-existing standard must remain largely intact to continue to adequately protect servicemembers absent clear congressional intent to the contrary, which is absent here.

E. The NMCCA incorrectly found Article 66(d)(1)(B), UCMJ, creates a presumption that an appellant is guilty and a burden for him or her to prove otherwise. The total deference to the verdict that results from this interpretation is an incorrect application of the statute.

The NMCCA reached a different understanding of the statute's text from that outlined above. Appellant generally agrees with the NMCCA's limited definition of the triggering requirement in clause (i). But the NMCCA's interpretation and blended application of clauses (ii) and (iii) unrecognizably strayed from the text of the statute and—despite looking to implicit meaning—never acknowledged the MJRG report.

1. The NMCCA incorrectly analyzed evidence in determining whether clause (i)'s threshold triggering requirement was met. This goes against the statute's plain language requiring only a "specific showing of a deficiency in proof"[165]

As to clause (i), the NMCCA held that "an appellant must 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."[166] Yet the NMCCA incorrectly analyzed

[165] 10 U.S.C. § 866(d)(1)(B)(i) (effective Jan. 1, 2021) (J.A. at 171).
[166] *Harvey*, slip. op. at 8 (J.A. at 8).

evidence in determining if this threshold was met.[167] In doing so, it went against the plain language of the statute, as outlined above.[168] This clause merely requires the identification of a weakness in the evidence supporting an element of an offense. The language of clause (i) requires no analysis of that claim. Nonetheless, the NMCCA correctly found that Appellant raised two deficiencies of proof here, triggering review: (1) the Government failed to prove that Appellant exposed himself and (2) the Government failed to prove that any exposure was indecent.[169]

2. The NMCCA looked to the "plain language" of clause (iii) and found that "Congress has *implicitly* created a rebuttable presumption that in reviewing a conviction, a court of criminal appeals presumes that an appellant is, in fact, guilty."[170] This is incorrect.

In reviewing clause (iii), the NMCCA stated that the statute is not ambiguous.[171] It suggested that it therefore applied the plain language.[172] But that is not what it did. Instead, the NMCCA announced that it provides a standard for factual sufficiency that it expressly stated is not found in the statute's plain

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[167] *Id*. at 11 (J.A. at 11).
[168] *See also United States v. Ellard*, 2023 CCA LEXIS 363 at *14-15 (N-M. Ct. Crim. App. Aug. 31, 2023) (unpublished) (J.A. at 73) (finding "no meaningful argument that there was a deficiency of proof" even though the appellant identified an element of the offense that he alleged the evidence did not satisfy, but nonetheless continued a factual sufficiency analysis).
[169] *Harvey*, slip. op. at 11 (J.A. at 11).
[170] *Id*. at 10 (emphasis added) (J.A. at 10).
[171] *Id*. (J.A. at 10).
[172] *Id*. (J.A. at 10).

language: "Congress has *implicitly* created a rebuttable presumption that in reviewing a conviction, a court of criminal appeals presumes that an appellant is, in fact, guilty."[173] The NMCCA also found that appellants must rebut this presumption of guilt and that it does not review evidence impartially:

> [T]he factual sufficiency standard in the revised Article 66, UCMJ, statute has altered this Court's review from taking a fresh, impartial look at the evidence . . . to a standard where an appellant has the burden to both raise a specific factual issue, and to show that his or her conviction is against the weight of the evidence admitted at trial.[174]

This construction is improper. "There is no rule of statutory construction that allows for a court to append additional language as it sees fit."[175] Nowhere in the statute's language does Congress create a presumption of guilt, let alone place a burden on an appellant to rebut it. And nowhere does the statute provide that service CCAs should not impartially review evidence. The NMCCA's blanket, unsupported statement that "Congress undoubtedly altered the factual sufficiency standard in amending the statute, making it more difficult for a court of criminal appeals to overturn a conviction for factual insufficiency" does not make absent language a reality.[176]

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[173] *Id*. (emphasis added) (J.A. at 10).
[174] *Harvey*, slip. op. at 10 (J.A. at 10).
[175] *Kearns*, 73 M.J. at 181 (citation omitted).
[176] *Harvey*, slip. op. at 7 (J.A. at 7)

Moreover, applying the NMCCA's standard, an appellant is at a loss as to what the NMCCA believes the burden is. The NMCCA only reiterated the language of the statute and stated that the burden is not that the evidence of guilt be "substantially outweighed by the evidence not supporting guilt" or "that we must be convinced beyond a reasonable doubt that the Accused [sic] is *not* guilty in order to reverse a conviction—as Congress did not go that far."[177]

The NMCCA's failed attempt to delineate a burden is revealing as to the fact that there is no burden on an appellant. Indeed, that the NMCCA could not do so indicates that Congress did not intend to put this undefined burden and presumption of guilt on an appellant.

The text is clear: while an appellant must make "a specific showing of a deficiency in proof" to *trigger* factual sufficiency review, it is then left to the CCAs to determine whether they are "clearly convinced that the finding of guilty was against the weight of the evidence."[178] Yet the NMCCA held that "an appellant has the burden to *both* raise a specific factual issue, and to show that his or her conviction is against the weight of the evidence at trial."[179] There is no such plain language in this statute. The NMCCA thus inappropriately "append[ed]

[177] *Id*. at 10-11 (J.A. at 10-11)
[178] 10 U.S.C. § 866(d)(1)(B)(iii) (effective Jan. 1, 2021) (J.A. at 171).
[179] *Harvey*, slip. op. at 10 (emphasis added) (J.A. at 10).

additional language" to the statute.[180] Indeed, if this statute is ambiguous, as the NMCCA implicitly found despite its declaration otherwise, the conclusions and recommendations made in the MJRG report and outlined above, which indicate the standard is largely unchanged, cannot be ignored.[181]

3. The NMCCA's failure to define "appropriate deference" to the factfinder in clause (ii) resulted in total deference to the verdict in Appellant's case. This result is contrary to the plain language of the statute.

In reviewing clause (ii), the NMCCA did not state how much deference is "appropriate deference," how to measure it, or how to apply it. It correctly found it could still "make credibility determinations of witnesses," but rejected the arguments of both parties on the meaning of this provision as a whole.[182] It looked to the "statutory language" and held without authority that it "is a higher standard than the prior 'recognizing that the trial court saw and heard the witnesses'" standard.[183] But it did not articulate what that higher standard is—it only rejected the assertion that it is "slightly more deferential" than the former standard.[184]

When paired with its interpretation of a "burden" on an appellant and a presumption of guilt, this lack of definition led the NMCCA's application of

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[180] *Kearns*, 73 M.J. at 181.
[181] *Food Mktg. Inst.*, 139 S. Ct. at 2364; *Barnhill*, 503 U.S. at 401; *Board of Trade of the City of Chicago*, 187 F.3d at 720.
[182] *Harvey*, slip. op. at 9 (J.A. at 9).
[183] *Id*. at 8-9 (J.A. at 8-9).
[184] *Id*. at 9 (J.A. at 9).

"appropriate deference" to result in total deference to the members findings. This again goes against the plain language and legislative history of the statute and has produced an absurd result.

The NMCCA found: (1) merit to the Appellant's argument that C.E. was not credible "because her testimony about how she was uncomfortable in the posing room was contradicted by the surveillance video;" (2) evidence was presented of C.E.'s character for untruthfulness; (3) the surveillance video of the alleged exposure was "inconclusive;" and (4) a comparison of the video evidence with C.E.'s "account of the interaction leaves us dubious as to the veracity of some portions of her testimony."[185] Despite these findings establishing an astounding lack of credibility in C.E.'s account of events, the NMCCA then held the conviction was factually sufficient in applying its understanding of the statute.

Regarding whether the exposure occurred, the NMCCA stated that video evidence showed Appellant standing beside the car and "[t]he members found her testimony . . . at that moment to be credible. *That being the case*, we agree with the members' conclusion [that an exposure occurred]."[186] Thus, the NMCCA affirmed the finding because (1) video evidence placed Appellant physically next to C.E. (which it considered "inconclusive" as to whether the exposure occurred

[185] *Id*. at 11-12 (J.A. at 11-12).
[186] *Id*. at 12 (emphasis added) (J.A. at 12).

and rendered her testimony "dubious") and (2) the members convicted Appellant.[187] In other words, the NMCCA did not identify any credible evidence—and only pointed to a lack thereof—instead totally deferring to the members' finding that an exposure occurred.

The result here goes against even the NMCCA's limited definition of "appropriate deference," which it articulated is a standard that at least did not "entirely eliminate[e] credibility determinations" from its power.[188] This was total deference.

Indeed, if applied correctly and without applying a mistaken "burden," the NMCCA should have found Appellant's conviction was not factually sufficient for this element. In this case, "appropriate deference" required a finding of factual insufficiency as to whether an exposure occurred where "inconclusive" video evidence and "dubious" testimony were the crux of the Government's evidence and the members themselves indicated doubts about C.E.s' credibility as demonstrated by their mixed findings.[189] Instead, the reason the lower court found the member's finding of Appellant exposing himself to be factually sufficient is

[187] *Harvey*, slip. op. at 11-12 (J.A. at 11-12).
[188] *Id*. at 9 (J.A. at 9).
[189] *Id*. at 11-12 (J.A. at 11-12).

because the members found as much, not because it independently reached that conclusion based upon its own review of the evidence.[190]

Therefore, the NMCCA improperly applied the "appropriate deference" standard against the court's undefined "burden" resulting in total deference. The incongruity of this result highlights precisely why there cannot be both a "burden" on an appellant and "appropriate deference." The NMCCA's interpretation of the statute is therefore incorrect as demonstrated by this application.

And this contrasting application happened again when evaluating the element of indecency. In "agree[ing] with the members' conclusion that the exposure was indecent," the NMCCA only outlined facts that would support the member's conclusion and cited case law on indecency that could support their finding.[191] In doing so, there is no indication that the NMCCA conducted its own analysis. In fact, it did not address several facts that demonstrate the exposure (if it occurred) was not indecent and did not provide a conclusion on what specifically made any exposure indecent in its view.[192] The NMCCA should have merely

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[190] *See Jenkins*, 60 M.J. 27, 29 (C.A.A.F. 2004) (At least under the prior version of the statute, a CCA is not permitted to abdicate its factual sufficiency review authority to another entity).

[191] *Harvey*, slip. op. at 12 (J.A. at 12).

[192] For example, there were no witnesses, the exposure was on the windowsill of the vehicle and thus obstructed by it, and the parking lot was pitch black—not even the enhanced video could pierce the confines of the vehicle. J.A at 681, 798-801, 805 (Pros. Ex. 3, 9-11; *see United States v. Graham*, 56 M.J. 266, 268-69 (C.A.A.F 2002) (explaining that the location of the exposure only matters if it occurs "where

afforded "appropriate deference" to the member's conclusions on what the video evidence showed (none in this case) and determined whether it was independently convinced any exposure was indecent beyond a reasonable doubt. Instead, the NMCCA bypassed "appropriate deference" to the member's evidentiary credibility determinations and totally deferred to the members finding on this element as well.

In sum, the NMCCA's interpretation of factual sufficiency review is essentially the same as legal sufficiency (which at least is subject to *de novo* review, unlike the presumption of guilt the NMCCA applied here).[193] This is not the plain language and "[t]he Supreme Court has said that 'a departure from the letter of the law' may [only] be justified to avoid an absurd result if 'the absurdity . . . is so gross as to shock the general moral or common sense.'"[194] This is not the case here. The definitions the NMCCA provided as to clause (ii) and clause (iii) are both incomprehensible and incongruent. And even if its interpretation is reasonable, "when a statute is reasonably susceptible of two interpretations . . . the

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it is certain to be observed" because "the focus of this offense is on the victim, not on the location of the crime"). The NMCCA's only independent factual analysis and conclusion on whether an exposure was indecent appeared in the discussion on legal sufficiency. *Id*. at 13 (finding alongside a review of some facts that an exposure was indecent because it was "nonetheless done in an indecent manner because Appellant was in a public parking lot where other people could have seen it"). That this analysis and conclusion was not provided in its factual sufficiency analysis supports it did not conduct an independent analysis there.

[193] *See Washington*, 57 M.J. at 399.

[194] *United States v. McPherson*, 81 M.J. 372, 380 (C.A.A.F. 2021) (quoting *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930)).

court prefers the meaning that preserves to the meaning that destroys."[195] On this principle alone, Appellant's interpretation preserving factual sufficiency review is the correct one.

Conclusion

Appellant respectfully asks this Court to reverse the NMCCA's decision and return the case for analysis under a correct understanding of the amended statute.

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[195] *Kohlbek*, 78 M.J. at 331 (quoting *Panama Refining Co.*, 293 U.S. at 439 (1935)) (Cardozo, J, dissenting).

CERTIFICATE OF FILING AND SERVICE

I certify that the Brief was delivered to the Court, to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on February 9, 2024.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This Brief complies with the type-volume limitations of Rule 24(c) because it contains 12, 544 words, and complies with the typeface and style requirements of Rule 37. Undersigned counsel used Times New Roman, 14-point type with one-inch margins on all four sides.

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