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	**APPELLANT'S REPLY** 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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The canons of statutory construction are clear. Discerning "whether a statute is plain or ambiguous '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.'"[1] 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."[2] Even if the text is ambiguous, "there is no rule of statutory construction that allows for a court to append additional language as it sees fit."[3]

Yet in its Answer, the Government attempts to avoid these unavoidable principles of statutory construction. In doing so, it mistakenly asks this Court to add language to the amended statute and usurp plain congressional intent. The Government declares the statute provides for a standard of review that is no longer *de novo*, prevents a reviewing court from conducting credibility determinations, and places a presumption of guilt on an appellant.[4] But the text cannot be ignored and none of these arguments are supported by it. The military's precedent-based, *de novo* factual sufficiency review for an independent reasonable doubt was simply

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[1] *United States v. Schmidt*, 82 M.J. 68, 75-76 (C.A.A.F. 2022), cert. denied, 143 S. Ct. 214 (2022) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).
[2] *United States v. Ortiz*, 76 M.J. 189, 191-92 (C.A.A.F. 2017) (internal citations omitted).
[3] *United States v. Kearns*, 73 M.J. 177, 181 (C.A.A.F. 2014) (citing *Fides, A.G., v. Comm'r*, 137 F.2d 731, 734-35 (4th Cir. 1943)).
[4] Appellee's Ans. at 15-53.

encapsulated in a new "statutory standard" and there is no evidence in the text of congressional intent otherwise.[5]

And if the text is ambiguous (as the Government and NMCCA imply), this Court should look to the Military Justice Review Group (MJRG) report that recommended the amended language for guidance.[6] The Government's focus instead on tenuous context from other jurisdictions and statutes is misguided.[7]

"A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change."[8] The Government (and the NMCCA) has failed to satisfy that burden.

A. 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."[9] But if the text is ambiguous, the MJRG report is an unchallenged source of the congressional intent behind the amended language.

The Government alleges "[A]ppellant's argument relies heavily on both [New York] state practice and legislative history."[10] But Appellant *relies* on

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[5] Report of the Military Justice Review Group, Part I: UCMJ Recommendations (Dec. 22, 2015) [hereinafter MJRG] at 610 (J.A. at 844).
[6] *See* MJRG (J.A. at 837-56).
[7] Appellee's Ans. at 13-14, 23-26, 32-33, 36-40, 49, 54.
[8] *Tome v. United States*, 513 U.S. 150, 163 (1995) (quoting *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521 (1989)).
[9] *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (citing *National Parks & Conservation Assn. v. Morton*, 498 F.2d 765, 767 (D.C. Cir. 1974)).
[10] Appellee's Ans. at 53.

neither. As outlined in Appellant's Brief, the text is unambiguous. A Court of Criminal Appeals' (CCA's) authority to test for factual sufficiency is unique and Congress chose unique statutory standards to further codify that sweeping power. But that language is clear. It is a "relic" of a "bygone era" to reach outside of the unambiguous plain language of a statute to discern congressional intent from legislative history and Appellant does not attempt to do so.[11]

Appellant's Brief included an analysis of the MJRG report (including New York state law, which the MJRG drew upon in recommending the proposed language) only to assist in rebutting the NMCCA's interpretation of the amended statute which indirectly found the text was ambiguous.[12] As such, analysis of the MJRG report serves an important role: to establish congressional intent if the language is indeed ambiguous. If this Court finds the same, the MJRG report should prove useful in that regard as well. And this is significant, as there is no evidence in the MJRG report to indicate that factual sufficiency review has been materially altered.[13]

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[11] *Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz*, 144 S. Ct. 457 (2024) (quoting *Food Mktg. Inst.*, 139 S. Ct. at 2364).
[12] *United States v. Harvey*, No. 202200040, slip. op. at 10, 83 M.J. 685 (N-M. Ct. Crim. App. 2023) (J.A. at 10) (outlining that the NMCCA deduced Congress' "implicit[]" intent).
[13] *See* MJRG 605-22, (J.A. at 839-55).

And despite the Government's unfounded objections, this report is a reliable source of legislative history.[14] Legislative history is not limited to a handful of sources as the Government states (without authority).[15] It is broadly defined as "compilations of related documents to a specific U.S. public law that generally precede the law's enactment" and "may include related published reports from a federal executive agency."[16] The MJRG report, a product of the Department of the Defense, meets this criteria.

In arguing against consideration of the MJRG report, the Government espouses committee reports as the primary trustworthy source of legislative history.[17] While this is often true, here, much like a committee report, the MJRG report is what outlines the purpose of the amendment, the history of the statute, and the reasoning for the language chosen.[18] Indeed, the committee reports endorsing

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[14] Appellee's Ans. at 53.
[15] Appellee's Ans. at 33-35.
[16] Richard J. McKinney and Ellen A. Sweet, *Federal Legislative History Research: A Practitioner's Guide to Compiling the Documents and Sifting for Legislative Intent* (2019) (www.llsdc.org/federal-legislative-history-guide).
[17] Appellee's Ans. at 34 (quoting *Garcia v. United States*, 469 U.S. 70, 76 (1984)).
[18] MJRG at 605-22 (J.A. at 837-56); *Dig. Realty Trust, Inc. v. Somers*, 583 U.S. 149, 171 (2018) (Sotomayor, J., concurring) (outlining that committee reports "are a particularly reliable source to which we can look to ensure our fidelity to Congress' intended meaning" as they share "a bill's context, purposes, policy implications, and details . . . .") (internal citations omitted).

this amendment do not add much analysis, but do add strength to the recommendations of the MJRG.[19]

When Congress overhauled several UCMJ provisions in the 2017 National Defense Authorization Act (NDAA), the House Armed Services Committee (HASC) report specified it promoted these changes based on "recommendations from the Military Justice Review Group."[20] It is unclear why the amendment to factual sufficiency review (based on the same set of MJRG recommendations) was not made until the 2021 NDAA.[21] Nonetheless, there is no evidence in the committee reports on this amendment that Congress intended a significant change.[22] Instead, the striking similarity between the MJRG's proposed language

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[19] *See* S. Rep. No. 116-236 at 201 (2020); H. Rep. No. 116-442 (2020).
[20] H. Rep. No. 114-537 at 5-6 (2016); National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328, §§5001-5542 (2016).
[21] National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116-283, §542(b) (2020). The Senate Armed Services Committee (SASC) report for the 2017 NDAA sought to "provide statutory standards for factual sufficiency review" and the bill that passed the Senate included a substantially similar provision to the current law (the bill that passed the House did not). S. Rep. No. 114-255 at 610 (2016); S. 2943 at 1620 (2016); H.R. 4909 §6910 (2016). This language was ultimately not included in the 2017 NDAA, but the SASC report for the 2021 NDAA explicitly recommended this amendment again and it was then ultimately passed. S. Rep. No. 116-236 at 201 (2020). The House's version of the 2021 NDAA contained the same language, but the HASC committee report was silent on its inclusion. H.R. 6395 §540J (2020).
[22] *See* S. Rep. No. 116-236 at 201 (2020); H. Rep. No. 116-442 (2020). There is only a stated reliance on the Department of Defense for "recommendations for improvements to the Uniform Code of Military Justice" as part of a continuing relationship to "remain[] abreast" of issues in military justice during "ongoing military justice reforms." H. Rep. No. 116-442 at 123 (2020).

and the language ultimately adopted is a powerful indication of Congress' adoption again of the MJRG's stated reasoning, just at a later date.[23] Thus, the MJRG report is a reliable source of congressional intent on this issue.

B. Once triggered, factual sufficiency review remains *de novo*. A reviewing court's authority to judge the credibility of witnesses is similarly unchanged.

Appellant generally agrees with the Government's interpretation of the first clause of the amended statute.[24] It establishes that review of a "finding" is triggered upon "a specific showing of a deficiency in proof" by an accused and nothing more.[25] Congress undoubtedly intended to "change[] settled law" by adding a triggering requirement with the introduction of this new provision.[26]

But the Government's interpretation of the language in clause (ii) is rife with error.[27] As outlined in Appellant's Brief, factual sufficiency review remains *de novo* with a caveat for "*appropriate* deference" to the factfinders evidentiary determinations.[28] And a reviewing court's authority to judge the credibility of witnesses remains.[29] "Under established canons of statutory construction, 'it will

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[23] *Compare* MJRG at 615 (J.A. at 849) *with* 10 U.S.C. § 866(d)(1)(B) (effective Jan. 1, 2021) (J.A. at 171).
[24] Appellee's Ans. at 23-26.
[25] 10 U.S.C. § 866(d)(1)(B)(i) (effective Jan. 1, 2021) (J.A. at 171); App. Br. at 23-27.
[26] *Tome*, 513 U.S. at 163 (quoting *Green*, 490 U.S. at 521).
[27] Appellee's Ans. at 26-30.
[28] App. Br. at 27-36.
[29] App. Br. at 27-36.

not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.'"[30] Clause (ii) provides no evidence of that "clearly expressed" intent:

> (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
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> (II) appropriate deference to findings of fact entered into the record by the military judge.[31]

Instead of attaching weight to the fact that Congress carried over a CCA's authority to "weigh the evidence and determine controverted questions of fact" from the prior version of the statute, the Government asserts that the plain language in the amended statute reflects the efforts of a string of Air Force Court of Criminal Appeals (AFCCA) decisions in 2001 attempting to deconstruct the previous statute's *de novo* standard.[32] It stated that Article 66 was "modified to mimic that lower court precedent."[33] This is not only baseless, but that Congress

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[30] *Finley v. United States*, 490 U.S. 545, 554 (1989).
[31] 10 U.S.C. § 866(d)(1)(B)(ii) (effective Jan. 1, 2021) (J.A. at 171)
[32] *See* Appellee's Ans. at 17-20, 50 (citing *United States v. Washington*, 54 M.J. 936 (A.F. Ct. Crim. App. 2001); *United States v. Sills*, 56 M.J. 556, 562 (A.F. Ct. Crim. App. 2001); *United States v. Nazario*, 56 M.J. 572, 573-74 (A.F. Ct. Crim. App. 2001)); *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).
[33] Appellee's Ans. at 50-51.

declined to explicitly adopt the outcomes of any of these cases instead only serves as evidence that the opposite is true.[34] Congress instead deliberately selected the same core words in the previous statute this Court affirmed created a *de novo* review.[35]

Additionally, there is no evidence outside of the text to support that Congress considered these AFCCA cases as the groundwork for their recommendations. Rather, the MJRG report states that the amendments were proposed "in a manner that reflects military practice since 1948."[36] These cases were overruled by this Court.[37] Thus, these cases do not "reflect[] military practice" and were not endorsed by the MJRG and therefore Congress.[38]

Next, in addressing the "appropriate deference" provisions of clause (ii), the Government asserts that "any level of appellate deference is contrary to the notion

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[34] *Advocate Health Care Network v. Stapleton*, 581 U.S. 468, 477 (2017) ("When legislators did not adopt 'obvious alternative' language, 'the natural implication is that they did not intend' the alternative.") (quoting *Lozano v. Montoya Alvarez*, 572 U.S. 1, 16 (2014)).

[35] *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); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002); *United States v. Sills*, 56 M.J. 239, 240-41 (C.A.A.F. 2002). "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." *Washington*, 57 M.J. at 399.

[36] MJRG at 606-07, n.6, 610 (J.A. at 841-42, 844).

[37] MJRG at 610 (J.A. at 844).

[38] MJRG at 606-07, n.6, 610 (J.A. at 841-42, 844).

of review de novo . . . ."[39] But just as the Army Court of Criminal Appeals (ACCA) held in *United States v. Coe,* the amended statute's requirement for "appropriate deference" necessitates the same level of deference as the previous statute's admonishment to "recogniz[e] that the trial court saw and heard the witnesses."[40] And the Government's suggestion that the ACCA recently retreated from their definitive position on *de novo* review in is incorrect.[41] The ACCA stated again in a recent decision: "[w]e review factual sufficiency de novo" under the amended statute, even with its caveat for "appropriate deference."[42]

Then, in its most explicit departure from the plain language of clause (ii), the Government asserts that a reviewing court can no longer make credibility determinations.[43] In doing so, it ignores the plain language of the statute authorizing a reviewing court to "weigh the evidence and determine controverted questions of fact."[44] As outlined in Appellant's Brief, this plain language encapsulates that authority.[45] And the new "appropriate deference" provision also

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[39] Appellee's Ans. at 50.
[40] *See United States v. Coe*, No. 20220052, 2024 CCA LEXIS 52, at *14-15 (A. Ct. Crim. App. Feb. 1, 2024) (finding that the amended statute "still requires" that a CCA give "appropriate deference.") (internal citations omitted).
[41] *See* Appellee's Ans. at 51; *See United States v. Scott*, 83 M.J. 778, 779-80 (A. Ct. Crim. App. Oct. 27, 2023).
[42] *United States v. Downum*, No. 20220575, 2024 CCA LEXIS 70, at *1-2 (A. Ct. Crim. App. Feb. 6, 2024) (unpublished) (Appendix 1).
[43] Appellee's Ans. at 28-29.
[44] 10 U.S.C. § 866(d)(1)(B)(ii) (effective Jan. 1, 2021) (J.A. at 171).
[45] App. Br. at 27-36.

absorbed it to include "other evidence" as well.[46] Yet instead of accepting the plain language of the statute, the Government argues "appropriate deference" requires that deference "to the factfinder's choice at trial must be higher—or in some cases will be absolute . . . ."[47] But this oxymoron points precisely to why deletion of the language "judge the credibility of witnesses" was not a removal of that authority, but instead the deletion of a redundancy.[48] Deference cannot both be "appropriate" and "absolute." This difference in word choice underscores Congress' intent to maintain that a CCA still has the authority to judge the credibility of witnesses.

Indeed, the Government correctly provides that "'[d]efer' has been defined as 'to yield to the opinion of.'"[49] But the Government curiously declined to define the modifier for the deference to be given: "appropriate."[50] "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."[51] The inclusion of the word "appropriate"

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[46] 10 U.S.C. § 866(d)(1)(B)(ii) (effective Jan. 1, 2021) (J.A. at 171); App. Br. at 27-36.
[47] Appellee's Ans. at 30.
[48] *Compare* 10 U.S.C. § 866 (2018) *with* 10 U.S.C. § 866(d)(1)(B)(ii) (effective Jan. 1, 2021) (J.A. at 168, 171); *See* App. Br. at 27-36.
[49] Appellee's Ans. at 29 (citing *Defer*, BLACK'S LAW DICTIONARY (11th Ed. 2019)).
[50] *See appropriate*, NEW OXFORD AMERICAN DICTIONARY (2nd ed. 2005) (J.A. at 834) (defining "appropriate" as "suitable or proper in the circumstances").
[51] *Platt v. Union P.R. Co.*, 99 U.S. 48, 58 (1878).

denotes that Congress intentionally limited—rather than required—deference to triers of fact. The authority to make credibility determinations is thus still found in the text of the statute.

And last, the Government argues that the previous *de novo* review was revoked by the change in language from "recognizing that the trial court saw and heard the witnesses" to "appropriate deference" because this language inserts deference where there previously was none.[52] This is incorrect. As this Court held in *United States v. Washington*, that "review involve[d] a fresh, impartial look at the evidence, *giving no deference* to the decision of the trial court on factual sufficiency *beyond the admonition* . . . to take into account the fact that the trial court saw and heard the witnesses."[53] Thus, the "admonition" was interpreted by this Court to mean some level of "deference."[54] This "appropriate deference" has merely now been encapsulated in the statute's text and just as that deferential review was *de novo* prior to amendment, it remains *de novo* now.

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[52] Appellee's Ans. at 29, 44 (arguing that the admonition "involved no actual deference").
[53] *Washington*, 57 M.J. at 399.
[54] *Id*.

C. A reviewing court still determines if it has an independent reasonable doubt after weighing the evidence and determining controverted questions fact subject to appropriate deference for the factfinders' evidentiary determinations. There is no presumption of guilt or burden applied to an appellant in doing so.

Clause (iii) of the amended statute provides:

> (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.[55]

As outlined in Appellant's Brief, this language unambiguously solidifies that the test for factual sufficiency remains one of an independent reasonable doubt and provides for no presumption or burden on an appellant to prove he or she is not guilty.[56] The Government's arguments parsing out the words of the phrase "clearly convinced that the finding of guilty is against the weight of the evidence" to rebut this understanding are a grasp for language that does not exist.[57]

1. <u>"Clear error" and "clearly convinced" are not synonymous.</u>

The Government asserts that the phrase "clearly convinced" invokes a "clear error" test and means "'a definite and firm conviction,' not a mere reasonable doubt."[58] But the "clear error" test is not applicable here. While the word "clearly" is contained in the phrase "clearly convinced," the similarity ends there.

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[55] 10 U.S.C. § 866(d)(1)(B) (effective Jan. 1, 2021) (J.A. at 171).
[56] App. Br. at 36-41.
[57] Appellee's Ans. at 31-52.
[58] Appellee's Ans. at 31, 42, 52.

Notably, despite the Government's contentions, the amended statute adopted none of the phrases "clear error," "definite and firm conviction," or even "abuse of discretion," indicating these tests were not what Congress intended to import.[59]

The Government's explanation of the Fourth Circuit's holding in *United States v. Span* is enlightening in revealing why Congress' word choice matters on this point.[60] The Government provides that "[t]he *Span* court described 'clear error' as occurring when trial-level findings 'are against the *clear* weight of the evidence."[61] This argument is made again when the Government compares the statute to Utah and Ohio law, which look for a finding "against the *clear* weight of the evidence" and "against the *manifest* weight of the evidence," respectively.[62] Congress explicitly declined to apply the modifier "clear" or "manifest" to "weight of the evidence" here.[63] Thus, instead of revealing any correlation, these citations instead again reveal that Congress did not intend for the standards to be the same.

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[59] *Advocate Health Care Network*, 581 U.S. at 477 ("When legislators did not adopt 'obvious alternative' language, 'the natural implication is that they did not intend' the alternative.")

[60] Appellee's Ans. at 31 (citing *United States v. Span*, 789 F.3d 320, 325 (4th Cir. 2015)).

[61] Appellee's Ans. at 31 (citation omitted) (emphasis added).

[62] Appellee's Ans. at 40-41 (emphasis added) (quoting *State v. Bingham*, 348 P.3d 730, 734 (Utah Ct. App. 2015); *State v. Brunner*, No. 15AP-97, 2015 Ohio App. LEXIS 4170 (Ohio Ct. App. Oct. 15, 2015)).

[63] 10 U.S.C. § 866(d)(1)(B)(iii) (effective Jan. 1, 2021) (J.A. at 171).

"When legislators did not adopt 'obvious alternative' language, 'the natural implication is that they did not intend' the alternative."[64]

Moreover, the MJRG never references an intent to adopt "clear error" in their report on Article 66. Instead, they sought to explicitly maintain factual sufficiency review "in a manner that reflects military practice since 1948"—a practice that has not used a "clear error" test while conducting factual sufficiency review.[65] The MJRG also explicitly distinguished federal practice, supporting that "clear error" in that jurisdiction is inapplicable here.[66]

2. The words "weight of the evidence" do not mean by a "preponderance of the evidence."

Next, the Government inserts the phrase "preponderance of the evidence" into the language that Congress chose by extrapolating on the phrase "weight of the evidence."[67] In doing so, the Government points to federal and New York state court decisions as justification for that addition.[68] But the Government's citations to federal and New York law are inapposite. Review remains for an independent reasonable doubt as reflected by the plain language of the statute.[69]

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[64] *Advocate Health Care Network*, 581 U.S. at 477.
[65] MJRG at 610 (J.A. at 844).
[66] MJRG at 607-09 (J.A. at 841-43).
[67] Appellee's Ans. at 32, 52.
[68] Appellee's Ans at 36-41.
[69] *See* App. Br. at 36-41.

First, comparison to federal law is irrelevant as federal appellate courts "review verdicts only for legal sufficiency."[70] Federal Rule of Criminal Procedure (FRCP) 33, cited by the Government, is a rule regarding post-trial motions, not factual sufficiency (or even appellate practice).[71] The operative language in FRCP 33(a) that a court may "grant a new trial if the interest of justice so requires" is not found in Article 66.[72] If the Government's implicit assertion that Congress likened Article 66 to FRCP 33 when drafting it is true, then that again underscores the importance of the cavernous discrepancy in the language of each statute.

If anything, Congress intentionally separated itself from FRCP 33 and any case law interpreting it. As the Government highlights, "[c]omparison of . . . language to a parallel provision . . . strongly suggests that Congress's choice of words was no accident."[73] The Government's argument that FRCP 33's interpreting precedent shows that our factual sufficiency review includes a "preponderance of the evidence standard" and should be "invoked only in exceptional cases" thus fails because that language is missing.[74]

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[70] MJRG at 608 (J.A. at 842) (citing *United States v. Jackson*, 443 U.S. 307, 319 (1979)).
[71] Fed. R. Crim. App. 33(a) (J.A. at 181).
[72] *Compare* Fed. R. Crim. App. 33(a) (J.A. at 181) *with* 10 U.S.C. § 866(d)(1)(B) (effective Jan. 1, 2021) (J.A. at 171).
[73] Appellee's Ans. at 14; *Irving v. United States*, 162 F.3d 154, 163 (1st Cir. 1998) (en banc).
[74] Appellee's Ans. at 36-37 (internal citations omitted).

And again, nowhere does the MJRG report state that the new standard seeks to align with a federal standard. Instead, it explicitly distinguishes military and federal law as a helpful guide for the reader to better understand the drastic differences.[75] New York state practice (which reviews for an independent reasonable doubt) is the only non-military jurisdiction that the MJRG explicitly pointed to for inspiration.[76]

But the Government's interpretation of New York's "weight of the evidence" review is similarly flawed.[77] As discussed in Appellant's Brief, New York case law demonstrates the standard adopted here remains *de novo* and for an independent reasonable doubt.[78] There is no indication that New York applies a "preponderance of the evidence" standard in its "weight of the evidence" review.

The Government cites *People v. Robertson*, a New York case, for the proposition that this "weight of the evidence" is not a reasonable doubt determination.[79] But in *Robertson*, the lower court explicitly stated: "[w]hile the

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[75] MJRG at 607-09 (J.A. at 841-43).
[76] MJRG at 610 (J.A. at 844) ("[t]he proposal draws upon New York state practice"). *See People v. Danielson*, 9 N.Y.3d 342, 349 (2007) ("even if the prosecution's witnesses were credible their testimony must prove the elements of the crime beyond a reasonable doubt.")
[77] Appellee's Ans. at 38-40; *People v. Bleakley*, 69 N.Y.2d 490, 495 (1987) (establishing that factual sufficiency review is referred to as a review of the "weight of the evidence" in New York).
[78] App. Br. at 22, 35-36, 40-41.
[79] Appellee's Ans. at 39 (citing *People v. Robertson*, 61 A.D.2d 600 (App. Div. 1st Dept. 1978)).

evidence is circumstantial in nature, the test of its sufficiency is the same 'as in any criminal case, i.e., whether the evidence 'points logically to defendant's guilt and excludes to a moral certainty, every other reasonable hypothesis.'"[80] The statement in *Robertson* provided by the Government that the finding of guilt must be "clearly against the weight of the evidence" plainly means "not beyond a reasonable doubt" when in context with the rest of the court's opinion.[81] The Government also later asserts that "there is no requirement in the New York statute for an appellate court to be 'clearly convinced' before disturbing a conviction" but while true, in doing so it ignores the holding it cited itself here interpreting that statute.[82]

The Government's quotation of *People v. Jones* also demonstrates its misunderstanding of New York appellate practice.[83] Like the revised Article 66, New York factual sufficiency analysis requires an initial showing before factual sufficiency review is triggered.[84] However, unlike the new Article 66 (which requires showing a "deficiency in proof"), the New York prerequisite is to demonstrate that a different outcome would have been reasonable (a preliminary

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[80] *Robertson*, 61 A.D.2d at 606 (internal citations omitted).
[81] Appellee's Ans. at 39.
[82] Appellee's Ans. at 53.
[83] Appellee's Ans. at 39-40 (citing *People v. Jones*, 162 N.Y.S.3d 559, 560 (App. Div. 2022)).
[84] *See* MJRG at 610, n.25 (J.A. at 844) (citing *Danielson*, 9 N.Y.3d at 348).

requirement that was not recommended or adopted in Article 66).[85] The Government conflates this prerequisite with New York's ensuing factual sufficiency review.[86] Thus, the Government fails to recognize that New York's inquiry into whether an acquittal would not have been unreasonable is not actually a review for factual sufficiency. It is instead a prerequisite for factual sufficiency review. New York looks for reasonable doubt—just as Congress intended for military justice.

And last, the Government's citations to the three 2001 AFCCA cases that incorrectly interpreted the prior version of the statute similarly offer no evidence that a civil "preponderance of the evidence" standard was adopted by use of the words "weight of the evidence" here.[87] The phrase "weight of the evidence" by itself is simply defined as "[t]he persuasiveness of some evidence in comparison with other evidence."[88] As this Court held in *United States v. Sills*, there is no evidence that the words "weight of the evidence" indicate congressional intent to apply a "preponderance of the evidence" standard.[89] This holds true here as well.

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[85] *See* 10 U.S.C. § 866(d)(1)(B) (effective Jan. 1, 2021) (J.A. at 171).
[86] Appellee's Ans. at 38-40, 53.
[87] Appellee's Ans. at 17-20 (citing *Washington*, 54 M.J. at 940-41; *Sills*, 56 M.J. at 562; *Nazario*, 56 M.J. at 573-74).
[88] *Weight of the Evidence,* BLACK'S LAW DICTIONARY (11th ed. 2019) (J.A. at 831).
[89] *Sills*, 56 M.J. at 240-41.

3. The word "against" does not delineate a presumption of guilt or a burden for an appellant to prove he or she is not guilty.

In addition to its argument that the phrase "preponderance of the evidence" exists somewhere in the plain language of the statute, the Government asserts that the NMCCA was correct in finding that "the amended Article 66 does include a presumption" that an Appellant is guilty.[90] There is similarly no support in the language of the statute for this conclusion. Nonetheless, the Government states that the word "against" in the phrase "clearly convinced that the finding of guilty is against the weight of the evidence" overturns the Article 66 standard as we know it by importing a presumption of guilt onto an appellant.[91]

The Government also asserts "the lower court's statement that an appellant has the burden to show the conviction is against the weight of the evidence *is inaccurate*" but then contradictorily states that "an appellant must be successful" in overcoming the preponderance of the evidence standard it purports exists.[92] It is unclear how a presumption of guilt would not also impose a burden on an appellant to overcome that presumption. Black's Law Dictionary explains that a "presumption" means a "rule of evidence" that "shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the

[90] Appellee's Ans. at 47.
[91] Appellee's Ans. at 47.
[92] Appellee's Ans. at 47-49.

presumption."[93] This inconsistency alone concisely establishes why the Government's interpretation of the amended statute is deeply flawed. But whatever the case, if Congress sought to upend the fabric of factual sufficiency review and insert a presumption of guilt or a burden on an appellant it would have done so—with plain language.

Moreover, 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."[94] There is no indication of a presumption of guilt or burden in this plain definition. And that the NMCCA (and the Government) was unable to define this imaginary "burden" is compelling evidence that it does not exist.[95] Even if the phrase "against" is somewhat ambiguous (it is not), the MJRG report gives no indication of a hidden meaning that imports a presumption of guilt or burden against an appellant.

And critically, if this presumption or burden does exist, it is incongruous with the Government's other argument that clause (ii) of the amended statute requires "absolute" deference to the factfinder's evidentiary determinations at times. There is no point to a presumption or a burden on an appellant, let alone the

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[93] *Presumption*, BLACK'S LAW DICTIONARY (11th Ed. 2019) (Appendix 2).
[94] *Against the Weight of the Evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019) (J.A. at 825).
[95] *Harvey*, slip. op. at 10 (J.A. at 10).

power to conduct factual sufficiency review at all, if an appellant cannot overcome the verdict of the factfinders and the implicit credibility determinations made by them as a reviewing court must afford them "absolute" deference.

For instance, the Government's example for how to conduct factual sufficiency review asks a reviewing court to "without engaging in credibility determinations . . . categorize the evidence as either supporting the finding of guilty, or contrary to the finding of guilt" and make a decision on sufficiency based on the "preponderance of the evidence."[96] But it is unclear how a court could determine where to place evidence if it could not make credibility determinations and had to defer to the decisions made by the members. Even if it disagreed with an outcome, it could not disagree with the credibility determinations underlying that outcome. Such a test would be an empty ritual and defeat the purpose of factual sufficiency review entirely. This is important, as in discerning the meaning of a statute there is a preference for the "meaning that preserves to the meaning that destroys."[97]

Indeed, the NMCCA similarly incorrectly blended clauses (ii) and (iii) when applying the amended statute to Appellant's case as discussed in Appellant's Brief and below by applying an undefined "burden" to Appellant despite having

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[96] Appellee's Ans. at 32.
[97] *Panama Refining Co. v. Ryan*, 293 U.S. 388, 439 (1935)) (Cardozo, J., dissenting)

reservations about the evidence against him.[98] What Congress intended was for a reviewing court to review a statute *de novo* (giving *appropriate* deference) and then independently decide if the appellant was rightfully convicted *beyond a reasonable doubt*.

D. The Government's defense of the NMCCA's opinion cannot save it. This Court should reverse.

The Government's analysis and defense of the NMCCA's definition and application of the amended statute is similarly flawed.

1. The case against Appellant was saturated with deficiencies of proof and the NMCCA agreed.

In interpreting the NMCCA's holding regarding clause (i) of the amended statute, the Government is correct that the NMCCA's requirement for an appellant to "explain why, on balance, the evidence (or lack thereof) admitted at trial contradicts a guilty finding" is improper.[99] The Government also correctly concedes that Appellant raised two deficiencies in proof as identified by the NMCCA: (1) the evidence does not support a finding that he exposed his penis and if he did (2) the evidence does not support a finding that any exposure was indecent.[100]

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[98] App. Br. at 43-52.
[99] Appellee's Ans. at 41-42; *see* App. Br. at 43-44.
[100] Appellee's Ans. at 43.

But the Government also subtly minimizes the depth of the deficiency alleged by asserting that Appellant only pointed to an "inconclusive video" to support his argument that the evidence against him was deficient.[101] Indeed, the NMCCA agreed not only that the video evidence was "inconclusive," but also that C.E.'s account was "dubious" and incredible as Appellant argued.[102] As discussed below, this is critical to revealing how an incorrect outcome was reached here.

2. The NMCCA's evidentiary determinations should have led to a finding of factually insufficiency.

In testing for factual sufficiency, the NMCCA did not only re-state the language of the statute and then apply it as the Government purports.[103] Instead, the NMCCA found, without citation or authority, 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 sufficiency."[104] The NMCCA applied an understanding that the amendment "has altered this Court's review from taking a fresh, impartial look at the evidence requiring this Court to be convinced of guilt beyond a reasonable doubt, to a

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[101] Appellee's Ans. at 43.
[102] *Harvey*, slip. op. at 11-12 (J.A. at 11-12); J.A. at 251-99, 391-422, 423-56, 457-86.
[103] Appellee's Ans. at 46. While the Government later agrees with these conclusions of the NMCCA, it does not acknowledge that these conclusions impacted its analysis of the facts of the case. Appellee's Ans. at 45-49.
[104] *Harvey*, slip. op. at 7 (J.A. at 7) (emphasis added).

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*."[105]

And perhaps most egregiously, the NMCCA reached beyond the text to conclude 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."[106] These conclusions of the NMCCA—which undeniably impacted its framing and analysis of the issue—cannot be ignored. Not only are these conclusions completely unsupported by the plain language of the statute as discussed above and outlined in Appellant's Brief, but they led to an incorrect finding of factual sufficiency.[107]

If correctly applied, application of the NMCCA's findings regarding C.E's lack of credibility and the "inconclusive" video evidence in the case should have resulted in a finding of factual insufficiency as they should have created an independent reasonable doubt unencumbered by a burden on an appellant.[108] Tellingly, in reviewing the NMCCA's factual sufficiency analysis, the Government improperly inserts its own factual conclusions for the NMCCA in an effort to salvage the NMCCA's reasoning. Specifically, the Government points to pieces of

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[105] *Id*. at 10 (J.A. at 10) (emphasis added).
[106] *Id*. at 10 (J.A. at 10).
[107] App. Br. at 43-52.
[108] *Harvey*, slip. op. at 11 (J.A. at 11).

the record that the NMCCA gave no indication it believed warranted weight.[109] But applying the NMCCA's conclusions (the only conclusions that matter here) under the proper framework of the amended statute should have led it to at least hold that a finding that an exposure occurred was not factually sufficient.

Moreover, the Government sidestepped how the NMCCA's lack of an indecency analysis also indicated total deference.[110] Under the NMCCA's own case law, indecency is determined by looking to "(1) lack of consent; (2) involvement of a child; and/or (3) public visibility."[111] The mixed findings of the members indicate that they found C.E. consented to the exposure (or that Appellant at least had a reasonable mistake of fact as to consent). Thus, as recognized by the NMCCA, only "public view" existed as a basis to find that any exposure here was indecent.[112]

And this is significant, as contrary to the suggestion of both the NMCCA and the Government, a "public location" is not the same as "public view."[113] As this Court explained in *United States v. Graham* (a case cited neither by the NMCCA nor the Government), "the focus of this offense is on the victim, not on

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[109] Appellee's Ans. at 46.
[110] Appellee's Ans. at 42-47.
[111] *See United States v. Johnston*, 75 M.J. 563, 567 (N-M. Ct. Crim. App. 2016).
[112] The NMCCA did not engage in an analysis on any other factor to find the exposure was indecent, implying this was the only factor it considered. *See Harvey*, slip. op. at 12 (J.A. at 12).
[113] Appellee's Ans. at 43; *Harvey*, slip. op. at 12 (J.A. at 12).

the location of the crime."[114] Absent "some action by which a defendant draws attention to his exposed condition," an exposure must occur in a place "so public that it must be presumed it was intended to be seen by others" to satisfy "public view."[115] But a public place only meets the criteria for "public view" under this scenario where the exposure "is *certain to be observed*."[116]

In conducting an appropriate independent analysis for reasonable doubt, the NMCCA should have at least considered this controlling legal standard, weighed the evidence indicating that the exposure was not in "public view" and thus not indecent, and made a conclusion on indecency. Instead, it totally deferred to the members finding.[117]

And in another effort to save the NMCCA's flawed analysis, the Government quixotically asserts that the NMCCA did not actually hold Appellant to a burden.[118] But this is flatly incorrect, as the NMCCA defined the text as including a burden and then concluded Appellant's case was factually sufficient under that definition.[119] This interpretation cannot be saved.

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[114] *United States v. Graham*, 56 M.J. 266, 268-69 (C.A.A.F. 2002).
[115] *Id*. at 268 (quoting *United States v. Stackhouse*, 37 C.M.R. 99, 101 (C.M.A. 1967)).
[116] *Id*. (quoting *Stackhouse*, 37 C.M.R. at 102) (emphasis added).
[117] *Harvey*, slip. op. at 12 (J.A. at 12).
[118] Appellee's Ans. at 49 ("The court did not hold Appellant to any burden not mandated by the statute.")
[119] *Harvey*, slip. op. at 10-12 (J.A. at 10-12).

E. Amicus also fails to establish that Congress intended to change settled law.

Just as the Government failed to prove "that legislative action changed" factual sufficiency review, so has Amicus where it alleges as much has occurred.[120] First, Amicus alleges that the new triggering requirement necessitating an appellant to "make a specific showing of a deficiency in proof" renders factual sufficiency a nullity because such a showing would mean a finding was legally insufficient.[121] But under Amicus' own reasoning, this is not the case. As stated by Amicus, a "deficiency in proof" is when "the prosecutions' evidence is insufficient to establish every element of an offense beyond a reasonable doubt."[122] This is plainly not the legal sufficiency standard, which as Amicus correctly noted requires a finding that "any rational factfinder could have found all essential elements of the offense beyond a reasonable doubt."[123] Thus, it is not "a fancy from which an accused cannot obtain relief."[124]

Next, Amicus blends the statute's clauses to determine that "the sensical [sic] 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

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[120] *Tome*, 513 U.S. at 163 (quoting *Green*, 490 U.S. at 521.
[121] Amicus Br. at 7-10.
[122] Amicus Br. at 9.
[123] Amicus Br. at 10. *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987) (citing *Jackson*, 443 U.S. at 319).
[124] Amicus Br. at 10.

evidence."[125] But Amicus asserts no textual basis for arguing as much. As outlined above and in Appellant's Brief, there is no basis for this conclusion.[126]

Then, similar to the Government, Amicus argues that "the CCA no longer has the authority to judge the credibility of witnesses" because that phrase was deleted from the amended statute.[127] As outlined above and in Appellant's Brief, while this was a change in the language, it was not a meaningful change.[128] There is no evidence in the text of the amended statute, which still confers the authority to "weigh the evidence and determine controverted question of fact" subject to only "appropriate deference," to believe that is the case.[129]

And last, while not directly relevant to this case, the plain meaning of the amended statute does not violate the absurdity doctrine.[130] Amicus suggests that the word "may" as used several times in the amended statute "inappropriately suggests that the CCA has discretion in making these judgments. It does not."[131] But the text is clear: a CCA has discretion as indicated by usage of the word "may."[132] Amicus points to no foundation in the text of the statute to support a

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[125] Amicus Br. at 11.
[126] App. Br. at 45.
[127] Amicus Br. at 11.
[128] App. Br. at 31-36.
[129] Amicus Br. at 12.
[130] Amicus Br. at 7 (citing *Lovitky v. Trump*, 949 F.3d 753, 761 (D.C. Cir. 2020)).
[131] Amicus Br. at 7.
[132] 10 U.S.C. § 866(d)(1)(B) (effective Jan. 1, 2021) (J.A. at 171).

conclusion otherwise. Instead, it merely states that it "makes no sense" because "[n]o reasonable person would approve" of the statute being used in a discretionary manner.[133] Regardless, as correctly identified by the Government, this issue is not before this court.[134] The lower court applied the amended statute to Appellant's case.

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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[133] Amicus Br. at 7.
[134] Appellee's Br. at 54-55.

Appendix

1. *United States v. Downum*, No. 20220575, 2024 CCA LEXIS 70 (A. Ct. Crim. App. Feb. 6, 2024) (unpublished).

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 March 30, 2024.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This Reply complies with the type-volume limitations of Rule 24(c) because it contains 6,968 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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United States v. Downum

United States Army Court of Criminal Appeals

February 6, 2024, Decided

ARMY 20220575

Reporter
2024 CCA LEXIS 70 *; 2024 WL 493254

UNITED STATES, Appellee v. Captain ROSS E. DOWNUM, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Prior History: **[*1]** Headquarters, 1st Cavalry Division. Steven C. Henricks and Scott Z. Hughes, Military Judges. Lieutenant Colonel Shari F. Shugart, Staff Judge Advocate.

Core Terms

finding of guilt, test result, urinalysis, Military, factual sufficiency, expert testimony, scientifically, cutoff, infer, weight of the evidence, appropriate deference, superior court, use cocaine, drug use, de novo, specification, metabolite, persuasive, three-part, ingestion, witnesses, innocent, reliable, sentence, urine

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN1[] **Judicial Review, Standards of Review**

Where the evidence is legally and factually insufficient, the appellate court grants relief.

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN2[] **Judicial Review, Standards of Review**

An appellate court reviews legal sufficiency de novo. It reviews factual sufficiency de novo.

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Real Evidence & Writings

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN3[] **Admissibility of Evidence, Real Evidence & Writings**

The government may use a positive urine test as part of its effort to prove illegal drug use, but judicial precedent has established predictable conditions. The metabolite in question must not occur naturally in the human body; the test must be scientifically reliable; and the test must reliably account for the possibility of innocent ingestion. Subject to these substantive requirements, a positive urinalysis allows a factfinder to infer a person has knowingly used the substance in question.

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Real Evidence & Writings

HN4[] **Admissibility of Evidence, Real Evidence & Writings**

Judicial precedent holds that expert testimony is required to explain the urinalysis results. This is interpreted to require two things: test results and expert testimony.

Military & Veterans
Law > ... > Evidence > Admissibility of Evidence > Real Evidence & Writings

HN5 **Admissibility of Evidence, Real Evidence & Writings**

If the government relies upon urinalysis test results, it is not precluded from using evidence other than the three-part standard if such evidence can explain, with equivalent persuasiveness, the underlying scientific methodology and the significance of the test results, so as to provide a rational basis for inferring knowing, wrongful use.

Counsel: For Appellant: Daniel Conway, Esquire; Captain Matthew S. Fields, JA (on brief and reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Major Chase C. Cleveland, JA; Captain Anthony J. Scarpati, JA (on brief).

Judges: Before PENLAND, HAYES, and MORRIS, Appellate Military Judges.

Opinion by: PENLAND

Opinion

SUMMARY DISPOSITION

PENLAND, Senior Judge:

This is the proverbial "paper" urinalysis case, but without the paper. ***HN1*** Where the evidence is legally and factually insufficient, we grant relief. A panel of officers sitting as a general court-martial convicted appellant of one specification of unlawfully using cocaine, in violation of *Article 112a, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 912a*. The military judge sentenced him to a reprimand, to forfeit $1000 pay per month for one month, and 30 days restriction.

We review the case under *Article 66, UCMJ*. Appellant raises multiple assignments of error. One of them, essentially the same as one of appellant's personally raised matters under *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*, merits discussion and relief.[1]

[1] Appellant's remaining assigned errors and personally raised matters are moot. Regarding his claim of ineffective assistance of counsel, we note that his attorneys' performance was not deficient.

HN2 We review legal sufficiency de novo. *United States v. Brown, M.J. , 2024 CCA LEXIS 18 (C.A.A.F. 10 January 2024)* (citing *United States v. Wilson, 76 M.J. 4, 6 (C.A.A.F. 2017*; *United States v. Oliver, 70 M.J. 64, 68 (C.A.A.F. 2011)*. We review factual sufficiency de novo. **[*2]** *United States v. Scott, 83 M.J. 778 (Army Ct. Crim. App. 27 Oct. 2023)*. *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002*. Additionally, the *National Defense Authorization Act for Fiscal Year 2021* amended *Article 66(d)(1)(B)* regarding our factual sufficiency review as follows:

> (B) FACTUAL SUFFICIENCY REVIEW
>
> (i) In an appeal of a finding of guilty under *subsection (b)*, the Court of Criminal Appeals 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 —
> (1) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and
> (2) 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.

Pub. L. No. 116-283, § 542(b), 134 Stat. 3611-12. The amendment to *Article 66(d)(1)(B)* applies only to courts-martial where every finding of guilty in the Entry of Judgment is for an offense that occurred on or after 1 January 2021. *Id.* at 3612.

The government called four witnesses, all related to a urinalysis, and rested. **[*3]** ***HN3*** The government may use a positive urine test *as part of* its effort to prove illegal drug use, but our superior court has established predictable conditions. The metabolite in question must not occur naturally in the human body; the test must be

Considering our disposition of the case, we also need not resolve the claim of unreasonable post-trial delay. However, we are gravely concerned about the excessive time (174 days) it took the government to submit this fundamentally flawed result for appellate review (especially where *Article 60a, UCMJ*, has eliminated the convening authority's power to correct such an injustice in the field by disapproving the finding of guilty for this offense).

scientifically reliable; and the test must reliably account for the possibility of innocent ingestion (this is usually addressed with testimony about the significance of the "cutoff" level). *United States v. Campbell, 50 M.J. 154, 160 (C.A.A.F. 1999)*. (citing *United States v. Harper, 22 M.J. 157, 163 (C.M.A. 1986)*. *(See also United States v. Green, 55 M.J. 76, 79-81 (C.A.A.F. 2001)*. Subject to these substantive requirements, a positive urinalysis allows a factfinder to infer a person has knowingly used the substance in question. *Harper, 22 M.J. at 163*. *(See Also*, Military Judges' Benchbook panel instruction for *Article 112a*: "[Y]ou may infer from the presence of [cocaine] in the accused's urine that the accused knew [he] used [cocaine]." Dep't of Army, PAM 27-9, Legal Services: Military Judges' Benchbook, para. 3a-36a-2 (5 February 2024) [Benchbook]).

In appellant's trial, the government asked its expert, "[W]hat is GC-MS?" The expert answered, "Gas chromatography mass spectrometry....[i]t is the confirmation, the one that looks for the fingerprint of the drug." Beyond this metaphor the expert offered virtually no information about the test itself, whether it is regarded as scientifically sound, and whether it was conducted in accordance with prescribed **[*4]** procedures in this case.[2] The expert did testify the metabolite from the sample exceeded the cutoff level and did not occur naturally in the body, but there was no explanation of the cutoff level's relevance, or any other evidence indicating test controls for the possibility of innocent ingestion.[3] [4]

The government's case also omitted the test results themselves.[5] Instead, the prosecution asked only for the expert's "opinion based off of your review of the results." The expert responded, "It was positive for BZE at 295 nanograms per milliliter."

We are unfamiliar with any authority supporting the government's contention that an expert opinion alone is sufficient to prove wrongful drug use. ***HN4***[↑] Our superior court has held expert testimony is required to *explain* the urinalysis results. *Campbell, 50 M.J. at 159* (citing *United States v. Graham, 50 M.J. 56, 58-59 (C.A.A.F. 1999)*. We interpret this to require two things: *test results* and expert testimony. This case failed to include the former but included the latter. ***HN5***[↑] We recognize "[i]f the Government relies upon test results, it is not precluded from using evidence other than the three-part standard if such evidence can explain, with equivalent persuasiveness, the underlying scientific methodology and the significance of the test **[*5]** results, so as to provide a rational basis for inferring knowing, wrongful use." *United States v. Campbell, 52 M.J. 386, 388-389 (C.A.A.F. 2000)*. In appellant's case, the prosecution did not follow the three-part standard or an equally persuasive method. Without the admission of the test results, commonly accomplished by offering them as non-testimonial business records under Mil. Rule Evid. 803(6),[6] the expert's testimony lacked any relevance. There were no facts in evidence for her to explain and no test results for her to interpret.

For these reasons, and after reviewing all the evidence, we conclude the finding of guilty was legally and factually insufficient.[7]

The finding of guilty and the sentence are SET ASIDE. The charge and its specification are DISMISSED with prejudice.

Judge HAYES and Judge MORRIS concur.

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[2] On the other hand, the chain of custody evidence was very detailed.

[3] In our experience as practitioners, the cutoff level is used to control for the possibility of innocent ingestion. But our experience is no substitute for expert testimony - this is still something for the government to prove.

[4] The expert's description of the preliminary screening test was equally lacking.

[5] Government counsel did not offer Prosecution Exhibit 8 for identification, which was the positive test. Apparently, this was not an oversight, as the trial counsel had previously informed the court that he would not be offering that exhibit on page 302 of the Record of Trial.

[6] *But see United States v. McGee, ARMY20190844, 2022 CCA LEXIS 160, at *9 (Army Ct. Crim. App. 17 March 2022) (Mem. op.)*, distinguishing between laboratory results, which are not testimonial hearsay, and accompanying analysts' certifications, which are.

[7] The defense case did not include enough information to (unwittingly) make the case legally and factually sufficient. We have considered *United States v. Pleasant, 71 M.J. 709 (Army Ct. Crim. App. 2012)* (an appellant's testimony can be sufficiently incredible to incriminate him).