IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
v.	)	Crim.App. Dkt. No. 202200040
Rodney B. HARVEY, Hospital Corpsman First Class (E-6) U.S. Navy Appellant	)	USCA Dkt. No. 23-0239/NA

TO THE 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?

Statement of Statutory Jurisdiction

The Entry of Judgment includes a sentence of a dishonorable discharge. The lower court had jurisdiction under Article 66(b)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(3) (2020). This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his plea, of indecent exposure in violation of Article 120c, UCMJ, 10 U.S.C. §§ 920c. The Members sentenced Appellant to twelve months of confinement, reduction to paygrade E-1, total forfeitures, and a dishonorable discharge. The Convening Authority deferred the reduction until the Entry of Judgment, and the Military Judge entered the judgment into the Record.

On review, the lower court affirmed the findings and sentence. *United States v. Harvey*, 83 M.J. 685 (N-M. Ct. Crim. App. 2023).

Upon Appellant's Petition, this Court granted review. (Appellant Pet., Aug. 8, 2023; Appellant Supp. Pet., Dec. 20, 2023); *United States v. Harvey*, No. 23-0239/NA, 2024 CAAF LEXIS 13 (C.A.A.F. Jan. 10, 2024).

Statement of Facts

A. The United States charged Appellant with aggravated sexual contact, abusive sexual contact, indecent exposure, and assault consummated by battery.

The United States charged Appellant with indecent exposure when he "intentionally expose[d] his genitalia in an indecent manner . . . [by] exposing his penis to [the Victim] in a public parking lot." (J.A. 493.)

The United States also charged Appellant with aggravated sexual assault, abusive sexual contact, and assault consummated by a battery for touching the Victim's vulva with his hand and grabbing the Victim's neck. (J.A. 493, 495.)

B. The Government presented evidence that Appellant exposed himself to the Victim in a public parking lot.

1. The Victim testified Appellant approached her at the gym and gave her bodybuilding advice.

The Victim testified that while she worked out at "Factory Fitness" gym, Appellant "approached me after I posed in the mirror. . . . [and] asked me if I was doing bodybuilding." (J.A. 502, 507.) The Victim testified she "was training for her first competition" in six weeks and Appellant told her "[she] wasn't ready, that [her] body wasn't ready . . . and pretty much made me feel like if I didn't have the help from somebody else, that I probably wouldn't get there." (J.A. 507.) The Victim explained she believed Appellant could help because "[h]e told me he was a pro bodybuilder [and] a coach." (J.A. 507.)

The Victim testified she had never met Appellant before that night and did not know him. (J.A. 508.) The Victim explained Factory Fitness was a place where fellow gym members often helped each other with workout advice: "[e]veryone was very helpful . . . always made sure you were safe and you were doing the right thing . . . working out in the correct way." (J.A. 503.) That was why she accepted Appellant's offer of help. (J.A. 508.) The Victim noted she had received help from other men at the gym before and she was not concerned because "he seemed like everyone else at the gym." (J.A. 509.) The Victim exchanged Instagram information with Appellant so he could contact her and "could be my coach . . . [and] help me." (J.A. 509.)

The Victim testified that after Appellant talked to her for "10, 15 minutes" she walked away from him and went to "the cardio room." (J.A. 509–10.) The Victim testified Appellant "came in right after me. . . . [and] sat down right next to me" even though she "did not" ask him to come with her. (J.A. 510.) She felt "uncomfortable, because [of her workout position]" and that Appellant might be "staring at me." (J.A. 510.) The Victim said she "finished [her] workout. . . . said goodbye to [Appellant], and [she] went to the posing room." (J.A. 511.) The Victim explained she regularly went to the posing room after her workouts to "take photos of [myself and see] my progress." (J.A. 511–13.) The Victim explained the posing room is "very small. . . . the size of a little bathroom . . . there's just

mirrors all over it." (J.A. 512.) A curtain covered the entryway, but the Victim "usually [did]n't close the curtain because I'm there so late, and no one's usually there." (J.A. 513.) The Victim did not invite Appellant to join her in the posing room. (J.A. 513.) The Victim testified Appellant "walked in unannounced and shut the curtain right behind him" and "insisted on helping [the Victim] with posing." (J.A. 513.) The Victim recalled accepting Appellant's help and he "[took] my body and put[] it in positions [for posing] . . . [and] I felt a little uncomfortable" but allowed it because "I would do anything it would take to get help [for bodybuilding]." (J.A. 513–14.)

The Victim testified Appellant "took my phone without consent. . . . and he started going through my phone and all my photos." (J.A. 514.) Appellant then "gave me his phone open to pictures of his penis and [sex] toys." (J.A. 514.) The Victim, crying during her testimony, explained she was "scared, [and] didn't know what to do" and never expressed interest in seeing his photos or that she liked them. (J.A. 515.) After about twenty minutes in the posing room, the Victim told Appellant, "I'm going to go." (J.A. 515.) When Appellant offered to "walk [her] out," the Victim said, "No it's fine" and "went to the bathroom . . . like any girl does when they feel uncomfortable." (J.A. 515.)

When the Victim left the bathroom, Appellant moved next to her and followed her outside. (J.A. 516.) The Victim testified she went "[o]utside to my

car" and gave Appellant "a side hug with one of my arms and I said goodbye." (J.A. 516.) The Victim got in her car, parked outside the gym "at the front door," shut her car door, and Appellant "came and knocked on my window." (J.A. 516.)

2. The Victim testified that Appellant approached her, grabbed her throat and her crotch, and exposed his penis.

The Victim testified she thought "[m]aybe I forgot something. . . . [so] I rolled down the window. . . . [and Appellant] put his body [from the waist up] all the way in my car and started choking me." (J.A. 517.)

The Victim testified that she yelled, "Please stop. Please. Please Stop." (J.A. 518.) Appellant then "tried to penetrate [the Victim's vagina] through [her] shorts." (J.A. 518.) Appellant tried to "come in and kiss me" and the Victim said "No, no," but could not get away because "[Appellant] was so much bigger than me . . . I couldn't move." (J.A. 518–19.)

The Victim explained, "The whole time I was trying to fight back, and I was scared he might kill me or something." (J.A. 520.) The Victim testified Appellant then stood back from her car and "whipped his penis out, fully erect[], and he put it on my door. . . . on my windowsill." (J.A. 520–21.)

The Victim put her car in reverse and drove away while Appellant stood next to her car. (J.A. 384, 805 (Pros. Ex. 3).) The Victim testified she did not consent to Appellant exposing his penis. (J.A. 622.)

The United States offered, and the Military Judge admitted, Prosecution Exhibits 2 and 3 containing video footage of Appellant's interactions with the Victim inside the gym, and Trial Counsel published them to the Members. (J.A. 523, 530.) The Victim narrated her interactions with Appellant while the footage played. (J.A. 524–31.)

3. The Victim drove away and reported the assault to her friend, Ms. Gibbs. Ms. Gibbs testified the Victim was "crying" and "hysterical."

As she drove away, the Victim testified she "FaceTimed" her friend Ms. Gibbs with a video call and told her what Appellant had done. (J.A. 523, 626.) Ms. Gibbs testified the Victim was "hysterical. . . . I've never seen her like that before [and] [w]e've been through a lot together. . . . [she was] crying out loud." (J.A. 625.) Ms. Gibbs testified the Victim told her how Appellant "attacked her in the car. . . . [and put] his penis on her [windowsill]." (J.A. 626.) Ms. Gibbs described she "could see her through the glow of the phone. . . . [and] [s]he was a mess. She was crying and her eyes were all puffy." (J.A. 627.)

4. The Victim reported Appellant the next morning to law enforcement.

The Victim testified she reported Appellant's indecent exposure and assault to law enforcement "the next day, in the morning" when she "called 911 and I went to the Sheriff's Office." (J.A. 533.)

Law enforcement testified to taking the Victim's initial report alleging Appellant's assault and indecent exposure. (J.A. 792) Law enforcement explained the Victim was distraught, shaking, and crying. (J.A. 793.)

The United States offered, and the Military Judge admitted, the Victim's police report. (J.A. 602, 610; 806–08.)

5. The Government presented surveillance footage of Appellant's interactions with the Victim in the gym and parking lot.

The gym owner testified he observed the Victim "[c]rying in fits" as she watched the surveillance videos with police, and she was unable to finish watching them. (J.A. 685.)

The gym owner testified that the music that played in the gym would mask a call for help from the parking lot. (J.A. 686.)

A digital forensics examiner laid the foundation for Prosecution Exhibits 9, 10, and 11, which contained enhanced parking lot footage. (J.A. 698–704.) The United States offered and the Military Judge admitted Prosecution Exhibits 9–11, and the United States published the Exhibits to the Members. (J.A. 699, 701, 704.) In the footage, Appellant removed his torso from the car, stood up, put his hands near his waistline, and appeared to move his shorts around. (Pros. Ex. 9–11.) The Victim then reversed her car and drove away. (J.A. 531, 805 (Pros. Exs. 3, 9–11).)

6. Appellant's Command Master Chief testified Appellant denied knowing the Victim after she filed a restraining order.

The United States offered, and the Military Judge admitted, Prosecution Exhibit 8, which showed a text message between Appellant and his Command Master Chief. (J.A. 753–55.) Prosecution Exhibit 8 showed Appellant informed his Command Master Chief he received a restraining order for "Factory Fitness" and "a name of a person that I don't know." (J.A. 757.)

7. A law enforcement agent conducted DNA testing on the Victim's clothes and car days later, but found nothing as the Victim had washed her clothes and it had rained. The Agent testified as to the Victim's "distraught" demeanor while they collected evidence.

An Agent from Naval Criminal Investigative Service testified she examined the Victim's car and clothes for DNA evidence days after the incident. (J.A. 795.) The Agent explained the Victim provided her clothes and access to her car, but "she had washed [her shorts]" and the Victim had "put hand sanitizer [on the windowsill] after the alleged incident occurred, because she was so uncomfortable." (J.A. 795.) The Agent testified "there was not enough DNA" for use as evidence. (J.A. 797.)

8. The Government presented testimony from two victims from Appellant's prior court-martial for sexual harassment.

a. Petty Officer Bravo testified Appellant sexually harassed her by non-consensually touching her private areas while on duty as a medical corpsman.

Petty Officer Bravo testified that while aboard ship in Hawaii in March 2020, her chief "told me I needed to go see the doc that morning because my entire back side of my body was sunburned, so he thought it was sun poisoning." (J.A. 762.) Petty Officer Bravo testified Appellant, as their corpsman, saw her for her skin condition. (J.A. 670–71.) Appellant "offered for me to have lotion put on [the burned areas]. . . . he [said] he had to put it on himself." (J.A. 764.)

Petty Officer Bravo explained she told Appellant "[he] could do my back because I cannot reach that . . . [then] he told me to pull down my pants because he was going to do my entire body. He told me he was the doc and that he knew what was best, and I should trust him." (J.A. 764–65.)

Petty Officer Bravo testified Appellant then "started putting the lotion on my butt at first. . . . [and] told me I had a 'nice ass'" . . . he actually moved in further than where my bikini line was, where the sunburn actually was. And he asked me if I had a boyfriend." (J.A. 765–66.) Petty Officer Bravo testified she told Appellant "15 to 20 times" which "part was obviously not sunburned, and that I could do it myself" but Appellant insisted on putting lotion all over her body. (J.A. 766–68, 771.) Petty Officer Bravo testified she did not consent to him touching

her in non-sun burned areas and did not feel she could leave because Appellant "was higher ranking" and she felt "powerless." (J.A. 771.)

Petty Officer Bravo had no prior relationship, romantic or otherwise, with Appellant. (J.A. 762.)

b. Ms. Delta testified Appellant forcibly grabbed her crotch, tried to kiss her, and offered to show her his penis.

Ms. Delta testified that Appellant assaulted her in July 2020. Ms. Delta explained she "messaged [Appellant] for a referral . . . [because] he was my command corpsman, and I was having gastric issues." (J.A. 778.) Appellant offered to "come to [Ms. Delta's] house" and then later Appellant "walked into [Ms. Delta's] house" and started talking about how her separated husband "was very controlling. . . . then asked if I was seeing anyone at the time. . . . then he said, 'we should all hook up sometime.'" (J.A. 779–81.) Ms. Delta asked "Can I just get my medicine?" (J.A. 781.)

Ms. Delta testified Appellant then gave her a hug, tried to "make out" with her, grabbed her vagina over her shorts, and said, "I can't wait to fuck you later." (J.A. 782, 784–85.) Ms. Delta "pushed him away" because "it was shocking at the time . . . there [were] kids [and guests] in my house." (J.A. 786.) Ms. Delta explained Appellant "lifted up his shirt and he said 'do you want to see it?' And he looked down to his penis. And I said 'No.'" (J.A. 786.)

Ms. Delta testified she and Appellant were acquaintances with no prior romantic or social relationship outside of "work functions"; he "was merely a coworker." (J.A. 778, 785.)

C. The Members convicted Appellant of indecent exposure.

The Members convicted Appellant of Charge II, indecent exposure, and found him not guilty of the other Charges. (J.A. 803.)

D. The Members sentenced Appellant.

The Members sentenced Appellant to a dishonorable discharge, one year of confinement, and reduction to paygrade E-1. (J.A. 804.)

E. The lower court affirmed the findings and sentence.

The Navy-Marine Corps Court of Criminal Appeals upheld the findings and sentence as legally sufficient. (J.A. 11–12.) The court also found the conviction was factually sufficient. After Appellant made the requisite "specific showing of a deficiency of proof," the court then weighed the evidence while giving "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence." Following this analysis, the court was not "clearly convinced that the finding of guilty is against the weight of the evidence in this case." (J.A. 11–12.)

Argument

THE LOWER COURT'S INTERPRETATION AND APPLICATION OF THE AMENDED FACTUAL SUFFICIENCY STANDARD UNDER ARTICLE 66(d)(1)(B), UCMJ WAS SUBSTANTIALLY CORRECT. FIRST, THE COURT FOUND APPELLANT MADE A SPECIFIC SHOWING OF A DEFICIENCY OF PROOF. SECOND, THE COURT WEIGHED THE EVIDENCE AND DETERMINED CONTROVERTED QUESTIONS OF FACTS, GIVING APPROPRIATE DEFERENCE TO THE TRIAL COURT. THIRD, THE COURT APPLIED THE NEW STANDARD AND WAS NOT CLEARLY CONVINCED THE FINDING OF GUILTY WAS AGAINST THE WEIGHT OF THE EVIDENCE.

A. The standard of review is de novo.

Appellate courts review questions of statutory interpretation de novo. *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017).

B. Appellate courts interpret statutes using principles of statutory interpretation. Plain meaning is determined by its language and context.

The first step in statutory interpretation is "to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014) (quoting *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002)). Plain meaning 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." *United States v. Schmidt*, 82 M.J. 68, 76 (C.A.A.F. 2020) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

Context and coherence matter for construing plain meaning. "The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into a harmonious whole." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000).

"The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *McPherson*, 73 M.J. at 395. The plain language of a statute will control unless it is ambiguous or leads to an absurd result. *United States v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012).

The ordinary meaning of words indicates legislative intent. *See United States v. Easter*, 981 F.2d 1549, 1558 (10th Cir. 1992).

Ordinarily, courts will not read back into a statute language that Congress previously used but discarded from the current version. *Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001).

Resort to legislative history to determine the meaning of words is appropriate only to resolve statutory ambiguity. *Barnhill v. Johnson*, 503 U.S. 393, 401 (1992).

Congress' use of parallel language and construction in different statutes can inform judicial interpretation. *See 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's choice of words was no accident"); *Greenwood Tr. Co. v. Massachusetts,* 971 F.2d 818, 827 (1st Cir. 1992) (parallelism "not mere happenstance," reflected "conscious choice" of Congress).

Likewise, the "common use" of identical phrases in state statutes can inform federal judicial interpretation of similar federal statutes. *See Hickman v. Tex. (In re Hickman*), 260 F.3d 400, 402 (5th Cir. 2001) ("This common usage is evidenced by the dictionary definition of forfeiture as well as the term's use in state and federal statutes and caselaw."); *Curtis Lumber Co. v. La. Pac. Corp*., 618 F.3d 762, 776 (8th Cir. 2010) (state canons of interpretation apply to federal interpretation of state laws).

C. The amended Article 66 redefines the scope of factual sufficiency review, presenting a matter of first impression for this Court. The amended statute discards the previous standard of de novo review and adopts a new standard: "clearly convinced that the finding of guilty was against the weight of the evidence."

1. Factual sufficiency review is a creature of statute and its scope is determined by the statute.

"The right of appeal, as we presently know it in criminal cases, is purely a creature of statute." *Abney v. United States*, 431 U.S. 651, 656 (1977).

Thus, Article 66 sets the scope of and standards for factual sufficiency review within the military justice system. 10 U.S.C. § 866(d)(1)(A–B) (2021).

2. The amended statute discards the previous standard of de novo review, which was based on the specific language and structure of the previous statute.

The previous scope of factual sufficiency review was based on the previous statute, which prescribed the duties of the Courts of Criminal Appeals—previously known as Courts of Military Review—as:

> In any case before the Court of Criminal Appeals under subsection (b), the Court may act only with respect to the findings and sentence as entered into the record under section 860c of this title (article 60c). The Court may affirm only such 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 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 witness, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

Article 66(d)(3), UCMJ, 10 U.S.C. § 866(b)(3) (2019).

a. This Court established the old de novo standard based on the previous version of the statute.

In *United States v. Crider*, 22 C.M.A. 108, 110 (C.M.A. 1973), the court quoted the then-applicable statute and explained that Courts of Criminal Appeals "possess far-reaching powers that are not normally attributes of appellate bodies." Courts of Criminal Appeals provide "a de novo trial on the record at appellate level, with full authority to disbelieve witnesses, determine issues of fact, approve or disapprove findings of guilt . . . ." *Id*. at 111.

In *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987), the court interpreted the previous statute to mean that Courts of Criminal Appeals had "the duty of determining not only the legal sufficiency of the evidence but also its factual sufficiency." The court held the test for factual sufficiency was "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the [Courts of Criminal Appeals] are themselves convinced of the accused's guilt beyond a reasonable doubt." *Id*. at 325.

In *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990), the court quoted the previous statute and opined, "This awesome, plenary, de novo power of review grants unto the [Court of Criminal Appeals] authority to, indeed, 'substitute its judgment' for that of the court members."

In *Crider*, *Turner*, and *Cole*, the court interpreted a version of Article 66 that (1) contained no guidance to assess "correct in . . . fact" in accordance with an additional clause; (2) was grammatically connected to determining what finding "should be approved"; (3) contained an explicit power to "judge the credibility of witnesses"; and (4) merely directed the court to "recognize" that the trial court saw and heard the witnesses. The particular text and structure of the previous Article 66 supported an expansive interpretation of the lower court's factual sufficiency powers.

b. The old de novo standard was clarified in 2002, when the Air Force Court attempted to institute a "weight of the evidence" standard.

In 2001, the Air Force Court of Criminal Appeals issued three opinions on the scope of the old Article 66 factual sufficiency review.

In *United States v. Washington,* 54 M.J. 936 (A.F. Ct. Crim. App. 2001), the Air Force Court rejected the de novo factual sufficiency standard implicitly established by *Turner*, and instead found support for a "weight of the evidence" standard in the legislative history of the Boards of Review. *Washington,* 54 M.J. at 940–41. It defined "weight of the evidence" as "preponderance of the evidence," and held that "Congress clearly intended the service courts of criminal appeals to affirm the trial court's findings if . . . the *weight of the credible evidence* for conviction outweighed that for acquittal." *Id.* (emphasis added).

In *United States v. Sills,* 56 M.J. 556, 562 (A.F. Ct. Crim. App. 2001), the Air Force Court cited to the *Washington* "weight of the evidence" discussion while conducting its factual sufficiency review.

In *United States v. Nazario,* 56 M.J. 572, 573–74 (A.F. Ct. Crim. App. 2001), the Air Force Court again held that the Courts of Criminal Appeals should only "set aside cases . . . manifestly against the weight of the evidence." (internal citation omitted). As in *Washington*, it stated that "'weight of the evidence' appears to be synonymous with the *preponderance of the evidence*." *Id.* at 574 (citing *Washington,* 54 M.J. at 940–41) (emphasis added). The *Nazario* court further noted that the legislative history supporting "weight of the evidence" review had "disappeared into the dustbin of history," and asserted that the Boards of Review had adopted the de novo standard by judicial fiat. *Id.* at 574.

In 2002, this Court reversed all three Air Force Court decisions.

In *United States v. Washington*, 57 M.J. 349, 399 (C.A.A.F. 2002), the court held that the previous Article 66 required Courts of Criminal Appeals "to conduct a de novo review of the entire record for a trial, which includes the evidence presented by the parties and the findings of guilt." "Such a review involves a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency beyond the admonition in Article 66(c), UCMJ, to take into account the fact that the trial court saw and heard the witnesses." *Id.* at 399.

The court rejected an appellate presumption of innocence and explained, "In the performance of its Article 66(c) functions, the Court of Criminal Appeals applies neither a presumption of innocence nor a presumption of guilt. The Court [of Criminal Appeals] must assess the evidence in the entire record without regard to the findings reached by the trial court, and it must make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Id*. The court further held that under that version Article 66, "an appellant does not bear the burden of raising doubts about the trial-level finding of guilt." *Id*. at 400.

In *United States v. Sills*, 56 M.J. 239, 240–41 (C.A.A.F. 2002), the court rejected the notion that Article 66 called for anything other than a de novo review and noted the absence of Congressional intent "to supplant the traditional criminal law standard [of beyond a reasonable doubt] with [the] civil law standard [of weight of the evidence]."

And, in *United States v. Nazario,* No. 02-0056/AF, 2002 CAAF LEXIS 1683 (C.A.A.F. Dec. 16, 2002), the court reversed, holding that in light of *Washington* and *Sills,* the lower court applied the wrong factual sufficiency standard.

Because the Air Force Court failed in its attempt to insert a "weight of the evidence" review into Article 66, the longstanding de novo "beyond a reasonable

doubt" factual sufficiency standard continued until the current Article 66 took effect.

As demonstrated below, the new Article 66 scheme reprises some of the issues litigated twenty years ago and overturns the old system.

3. The amended Article 66 adopts a new standard: "clearly convinced that the finding of guilty was against the weight of the evidence."

In the National Defense Authorization Act for Fiscal Year 2021, Congress amended Article 66 and limited the power of the Courts of Criminal Appeals to conduct factual sufficiency reviews. 10 U.S.C. § 866(d)(1)(A–B) (2021).[1]

> In any case before the Court of Criminal Appeals under subsection (b), the Court may act only with respect to the findings and sentence as entered into the record under section 860c of this title (article 60c). The Court may affirm only such findings of guilty as the Court finds correct in law, and in fact in accordance with subparagraph (B). The Court may affirm only the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved.

10 U.S.C. § 866(d)(1)(A) (2021).

> (B) FACTUAL SUFFICIENCY REVIEW.—
>
> (i) In an appeal of a finding of guilty under subsection (b), the Court may consider whether the finding is correct in fact upon request of the

[1] The amended Article 66 factual sufficiency standard applies to "any case in which every finding of guilty entered into the record . . . is for an offense that occurred on or after" January 1, 2021. National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542(b), 134 Stat. 3388, 3611-12 (2021).

accused if the accused makes a specific showing of a deficiency in proof.

(ii) After an accused has made such a showing, the Court may weigh the evidence and determine controverted questions of fact subject to—

(I) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and

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

(iii) If, as a result of the review conducted under clause (ii), the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.

10 U.S.C. § 866(d)(1)(A) (2021).

Congress thus amended the plain language and structure of Article 66 in four critical ways relevant to disposition of this case:[2]

First, whereas Courts of Criminal Appeals were previously required to conduct a factual sufficiency review for all cases, *Turner*, 25 M.J. at 324, now they may only review a case for factual sufficiency "upon request of the accused if the

[2] Under the amended Article 66(d)(1)(B)(iii), the court may dismiss, set aside, or modify the finding, or affirm a lesser finding. Under the amended Article 67(c)(1)(C), this Court may now act with respect to "the findings set forth in the entry of judgment, as affirmed, dismissed, set aside, or modified by the Court of Criminal Appeals as incorrect in fact under section 866(d)(1)(B)." Notably, Article 67(c)(4) remains unchanged and this Court "shall take action only with respect to matters of law."

accused makes a specific showing of a deficiency of proof." 10 U.S.C. § 866(d)(1)(B)(i).

Second, whereas Courts of Criminal Appeals were previously only admonished to recognize that the trial court saw and heard the witnesses, *Washington*, 57 M.J. at 399, now they must give "appropriate deference to the fact the trial court saw and heard the witnesses and other evidence." 10 U.S.C. § 866(d)(1)(B)(ii)(I-II).

Third, whereas Courts of Criminal Appeals could previously weigh the evidence, judge the credibility of witness, and determine controverted questions of fact, *Crider*, 22 C.M.A. at 111, now they can only weigh the evidence and determine controverted questions of fact: the explicit power to judge the credibility of witnesses was removed. 10 U.S.C. § 866(d)(1)(B)(ii).

Fourth, whereas Courts of Criminal Appeals could previously set aside a guilty finding if they themselves were not "convinced of the accused's guilt beyond a reasonable doubt," *Turner*, 25 M.J. at 325, now they may only disturb a conviction if they are "clearly convinced that the finding of guilt was against the weight of the evidence." 10 U.S.C. § 866(d)(1)(B)(iii).

These changes are addressed in further detail below.

a. The new statute requires an appellant to make "a specific showing of a deficiency in proof" as to a finding of guilt before factual sufficiency review is triggered.

The new statute places the burden on an appellant to request a factual sufficiency review and make "a specific showing of a deficiency in proof." 10 U.S.C. 866(d)(1)(B)(i). This has several impacts on factual sufficiency review.

i. The phrase "upon request of the accused" shows that an appellant must request a factual sufficiency review.

The Courts of Criminal Appeals are neither required nor able to review every case for factual sufficiency. The accused must request review as a necessary procedural step. *Cf. United States v. Moss,* 63 M.J. 233 (C.A.A.F. 2014) ("upon petition of the accused" in Article 67 is a right "personal to appellant").

For example, no factual sufficiency review is required when a case is submitted without any assignments of error. *See*, *e.g.*, *United States v. Estradameza*, No. 202300241, 2024 CCA LEXIS 73 (N-M. Ct. Crim. App. Feb. 13, 2024).

This is analogous to Federal Rule of Criminal Procedure 33, under which a judge has no power to order a new trial sua sponte and can only act in response to a motion made by a defendant. (J.A. 181); *see, e.g., United States v. McGowen*, 668 F.3d 601 (9th Cir. 2012).

ii. The phrase "specific showing of a deficiency of proof" means an appellant must make a prima facie allegation that one or more elements of an offense are undermined by a defect in the evidence. Review is limited to those findings of guilt adequately raised by an appellant.

Based on the plain language, common usage, and statutory context, the phrase a "specific showing of a deficiency of proof" requires an appellant to make a prima facie allegation that, due to a defect in the evidence, at least one required element of a charged offense was not proven beyond a reasonable doubt.

The term "showing" is defined as "the act or an instance of establishing through evidence and argument; proof." Black's Law Dictionary (11th ed. 2019) (J.A. 830); *see also* Art. 67(a)(3), 10 U.S.C. § 867(a)(3) (J.A. 174) ("upon good cause *shown*") (emphasis added).

Black's Law Dictionary defines "deficiency" as "a lack, shortage, or insufficiency." (J.A. 827.)

An appellant must also point to a "specific" deficiency. Under common usage, this precludes summary allegations that "the finding was factually insufficient" without identifying what evidence was lacking from which element of a specific finding of guilty. *See United States v. McCollum*, 58 M.J. 323, 340 (C.A.A.F. 2003).

Applying the plain meaning of these words, it follows that an appellant's allegation must, if valid, undermine at least one element of at least one guilty

finding. If an appellant's claim does not rise to this level, then there is no deficiency of proof. *See United States v. Lofton*, 233 F.3d 313 (4th Cir. 2000) (new trial motion properly denied since defendant merely presented evidence which, whether true or false, was irrelevant to essential elements).

For example, in *United States v. Porterie*, No. ACM S32735, 2023 CCA LEXIS 229 (A.F. Ct. Crim. App. May 30, 2023), the appellant submitted the case without specific assignments of error, but requested the court consider "whether the findings are correct in fact," which the court found was not "a specific showing of a deficiency of proof."

Further, the subsequent "weight of the evidence" review is limited to the specific findings of guilt adequately raised by an appellant. By analogy to the "weight of evidence" review conducted under Federal Rule of Criminal Procedure 33, a trial court has no authority to conduct a "weight of evidence" review on bases not raised by an accused. *United States v. Nguyen*, 507 F.3d 836 (5th Cir. 2007).

Since factual sufficiency review is now a personal right triggered by an appellant, the scope of the review is also analogous to Article 67 petitions, which are granted "for good cause shown" and limited to the grounds raised by the appellant in his "specific showing of a deficiency." *Cf. Moss,* 73 M.J. at 67 (Article 67 petition is right personal to appellant).

For example, in *United States v. Ellard*, No. 202200051, 2023 CCA LEXIS 363, *5–15 (N-M. Ct. Crim. App. Aug. 31, 2023), the appellant only challenged the factual sufficiency of his aggravated assault conviction, and not his convictions for orders violations or negligent discharge, and the court limited its factual sufficiency review to only the aggravated assault conviction. The court also noted the appellant merely reiterated his legal insufficiency argument; there was "no meaningful argument that there was a specific deficiency of proof in this case." *Id.* at *14–15.

Again, this interpretation is in line with federal precedent. When applying Federal Rule Criminal Procedure 33(a), federal courts have identified some arguments as frivolous when there is overwhelming evidence of a defendant's guilt. *United States v. Boros*, 636 F. App'x 688 (7th Cir. 2016) (J.A. 39–43).

b. Courts of Criminal Appeals must now give "appropriate deference" to the fact-finder and cannot make their own credibility determinations.

Once an appellant has made a prima facie showing of deficiency, Courts of Criminal Appeals "may weigh the evidence and determine controverted questions of fact" while giving "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence" and to "findings of fact entered into the record by the military judge." Art. 66(d)(1)(B)(ii).

Congress' removal of language that previously granted authority to a grantee has the effect of removing that power from the grantee. *See*, *e.g.*, *United States v. Steele*, No. 20170303, 2019 CCA LEXIS 95, at *8 (A. Ct. Crim. App. Mar. 5, 2019) (J.A. 151–56) (removal of grant of power to disapprove punitive discharges from statute causes convening authorities to no longer be able to disapprove them).

The prior version of Article 66 granted Courts of Criminal Appeals the authority to "weigh the evidence, *judge the credibility of witnesses*, and determine controverted questions of fact." Art. 66(c) (2016) (emphasis added). It only required the courts to "recogniz[e] that the trial court saw and heard the witnesses." *Id.*

By contrast, the new Article 66 removes the court's power to "judge the credibility of witnesses," while leaving untouched its authority to "weigh the evidence" and "determine controverted questions of fact." Art. 66(d)(1)(B)(ii). It also requires the court to give "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence" and also to "findings of fact . . . by the military judge." *Id.* (emphasis added).

The addition of new statutory language is viewed in light of the "common and approved usage" of those words. *McCollum*, 58 M.J. at 340. We can see that these changes to the statute have four major impacts.

First, the court no longer has the power to "judge the credibility of witnesses." This is a plain language, common-sense reading of the statute. This Court should not read back in language that Congress previously used but then deleted from the current version. *Chickasaw Nation*, 534 U.S. at 93.

Two types of credibility determinations are made at trial by the factfinder: explicit credibility determinations, made by the military judge as part of findings of fact; and implicit credibility determinations made by the factfinder after hearing the witnesses and "other evidence." While the old Article 66 permitted the court to discount or ignore witness testimony if it found the testimony "not credible,"[3] that is no longer authorized. Credibility determinations must be accepted on appeal, unless, as shown below, they are inextricably tied to controverted questions of fact.

That the Courts of Criminal Appeals no longer have the power to "judge the credibility of witnesses" is further supported by the new scheme Congress created

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[3] *See, e.g.*, *United States v. Dawkins*, No. 201800057, at *30 (N-M. Ct. Crim. App. Oct. 4, 2019) (overturning a conviction for factual insufficiency due to finding the victim "wholly *incredible*") (emphasis added); *United States v. Murphy*, No. 202000233, 2022 CCA LEXIS 105, at *9 (N-M. Ct. Crim. App. Feb. 17, 2022) (J.A. 139–44) (overturning a conviction that rested on the testimony of the victim and her sister because their testimony "conflict[ed] in a number of material areas and also present[ed] *significant credibility issues*) (emphasis added); *United States v. Clark*, 75 M.J. 298, 300 (C.A.A.F. 2016) ("The special findings of the military judge in this case go virtually entirely to the *credibility of witnesses* and the weight of the evidence—issues that lie at the *core of the . . . Article 66 factual sufficiency powers* of the CCAs") (emphasis added).

in Article 67 enabling this Court to review the lower court's weight of the evidence review. Art. 67(c)(1)(C), UCMJ. This Court remains limited to acting "with respect to matters of law." Art. 67(c)(4), UCMJ; *see United States v. Holt*, 52 M.J. 173, 186 (C.A.A.F. 1999) (old Article 67 precluded this Court from "reweigh[ing] the evidence and reevaluat[ing] credibility"). But Congress has now removed the lower court's credibility-finding power. If despite this removal the lower courts could still conduct a trial-court-like fact-finding as to credibility, this Court could not fully review the lower court's weight of the evidence review as a matter of law.

Second, Congress removed the old de novo standard, which was subject only to "*recognizing* that the trial court saw and heard the witnesses." Art. 66(c) (2019). By longstanding interpretation, this "recognizing" requirement was merely a nominal admonition and involved no actual deference. *Washington*, 57 M.J. at 399 (Courts of Criminal Appeals gave "*no deference* to the decision of the trial court on factual sufficiency beyond the *admonition* . . . to take into account" that the factfinder "saw and heard the witnesses") (emphasis added).

In the amended Article 66, Congress mandates that the trial factfinder be given "appropriate deference." "Defer" has been defined as "to yield to the opinion of." Black's Law Dictionary.

Third, Congress elevates the old admonition to "recognize[e]" the factfinder saw the witnesses, to now requiring "appropriate deference" not just to witnesses, but also to two new categories of evidence: "other evidence" and "findings of fact . . . by the military judge." Art. 66(d)(1)(B)(ii) (2021).

Fourth, where controverted questions of fact are inextricably tied to trial-level credibility determinations, the "appropriate deference" due to the factfinder's choice at trial must be higher—or in some cases will be absolute—since the Court of Criminal Appeals is unable on appeal to make its own credibility determinations.

c. Before disturbing a conviction, the court must be "clearly convinced that the finding of guilty was against the weight of the evidence."

Under the new statute, the court must be "clearly convinced that the finding of guilty was against the weight of the evidence" before it may modify the findings. 10 U.S.C. § 866(d)(1)(B)(iii).

i. "Clearly convinced" requires more than "convinced." The "clear error" tests used in military and federal appellate courts provide a useful analogue.

Military appellate courts have long reviewed trial court findings of fact for clear error. Findings of fact are "clearly" erroneous "when there is *no evidence* to support the finding, or when, although there is evidence to support it, the reviewing court on the entire evidence is left with the *definite and firm conviction* that a

mistake has been committed." *United States v. Horne,* 82 M.J. 283, 289 (C.A.A.F. 2022) (internal citation omitted and emphasis added).

Federal appellate courts likewise apply a heightened standard of review to trial-level fact-finding in criminal cases, looking not just at whether an error occurred, but whether "clear error" occurred. "The clear error standard requires 'a reviewing court [to] ask whether on the entire evidence, it is left with the definite and firm conviction that a mistake has been committed.'" *United States v. Span*, 789 F.3d 320, 325 (4th Cir. 2015) (citation omitted).

Federal appellate courts "will not reverse a lower court's finding of fact simply because we would have decided the case differently" but can find clear error "where the factual determinations are not supported by *substantial evidence.*" *Id.* (citation and quotation marks omitted) (emphasis added). The *Span* court describes "clear error" as occurring when trial-level findings "are against the clear weight of the evidence." *Id.* (citation omitted).

Consistent with other federal courts' use of the word "clear" and the word's common meaning in the statutory scheme, this Court should interpret "clearly convinced" to mean that it must have a "definite and firm conviction" that the finding of guilt is against the weight of the evidence. Additionally, a Court of Criminal Appeals could be "clearly convinced" where the evidence of guilt is substantially outweighed by the evidence not supporting guilt.

ii. The plain meaning and common usage of "against the weight of the evidence" means the majority of accumulated evidence is contrary to a finding of guilt.

The Court of Criminal Appeals must be "clearly convinced that the finding of guilt was *against* the weight of the evidence" to disturb the conviction. (emphasis added.) As the sentence is structured, the Court of Criminal Appeals starts with the finding of guilt, and then determines if it was contrary to the weight of the evidence. "Against the weight of the evidence" has been defined as "contrary to the credible evidence; not sufficiently supported by the evidence in the record." Black's Law Dictionary (J.A. at 825). To assess this, the Court of Criminal Appeals should—without engaging in credibility determinations—categorize the evidence as either supporting the finding of guilty, or contrary to the finding of guilty. Where a preponderance of the evidence is not against the finding of guilty, the Court of Criminal Appeals must affirm the conviction. The Court of Criminal Appeals may only dismiss, set aside, modify the finding, or affirm a lesser finding when a preponderance of the evidence is contrary to a finding of guilty.

As detailed further below, *see* Section D.2, the changes incorporated into the new statute mean that reversals for factual insufficiency will: (1) be exercised rarely, in exceptional circumstances; and (2) should not involve setting aside the

verdict "merely because the court would have ruled the other way." *Cf. United States v. Crittenden,* 46 F.4th 292, 297 (5th Cir. 2022).

D. The Military Justice Review Group's recommendation provides historic background, but is not controlling. Neither New York state appellate practice nor Federal Rule of Criminal Procedure 33 motions for new trial mandate a de novo or beyond a reasonable doubt standard for Article 66 review.

1. Appellant relies on non-authoritative opinions from the Military Justice Review Group to justify a continued de novo standard for factual sufficiency. The Military Justice Review Group's opinions are not part of legislative history and do not control the statutory interpretation.

a. Appellate courts only look to legislative history if the text is ambiguous.

The Supreme Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992). Military courts "interpret words and phrases used in the UCMJ by examining the ordinary meaning of the language, the context in which the language is used, and the broader statutory context." *United States v. Pease*, 75 M.J. 180, 184 (C.A.A.F. 2016). Only where "the statute [remains] unclear, [does the court] look next to the legislative history." *United States v. Falk*, 50 M.J. 385, 390 (C.A.A.F. 1999). "Legislative history, for those who take it into account, is

meant to clear up ambiguity, not create it." *Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011).

b. In reviewing legislative history, courts look to records from the legislature itself to determine drafter's intent, not outside third parties.

"In surveying legislative history [the Supreme Court has] repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'" *Garcia* v. *United States*, 469 U.S. 70, 76 (1984) (quoting *Zuber v. Allen*, 396 U. S. 168, 186 (1969)). When conducting review of legislative history, the Supreme Court and military courts look to the documents of the legislature itself including draft bills, correspondence and memoranda, committee reports, tapes and transcripts of hearings, and tapes and transcripts of floor debate concerning consideration of a bill—not third parties outside the legislative process. *See Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1815 (2019) (reviewing committee reports from Congress); *United States v. Avery*, 79 M.J. 363, 369 (C.A.A.F. 2020) (looking at Senate reports to interpret legislative intent in National Defense Authorization Acts).

c. The Military Justice Review Group was created by the Department of Defense to propose legislative changes to the UCMJ. As a third-party committee created by the Executive Branch, it cannot be considered part of legislative history. If this Court believes Article 66's text is ambiguous, it can look to federal and state analogues for guidance or legislative materials from Congress itself.

The Secretary of Defense directed review of the Uniform Code in 2013, resulting in the creation of the Military Justice Review Group. Report of the Military Justice Review Group at 5. The Group made legislative proposals to Congress. *Id.* at 6–8.

Appellant's argument that the Review Group's report constitutes "legislative history" incorrectly conflates executive recommendations with congressional intent. (Appellant Br. at 34.) Nowhere in the statute is the Review Group or its recommendations mentioned. Regardless of any similarities in language between the recommendations and the statute, Appellant does not point to any committee reports or congressional records that show a legislative intent to adopt the Review Group's interpretation of the statutory text. This Court should reject Appellant's use of the Review Group's report, because to use Appellant's method would run afoul of how superior courts conduct statutory interpretation and review legislative history. *Garcia*, 469 U.S. at 76.

2. Looking at federal and state analogues, "weight of the evidence" means "a preponderance of the evidence," not an independent assessment of proof beyond a reasonable doubt. Convictions may be set aside only where the court, after giving appropriate deference, is clearly convinced that the finding of guilty was against the weight of the evidence.

Rather than relying on an executive branch committee to inform us about legislative intent, this Court should look to useful analogues in the federal and state courts. The first of these analogues is the federal rule regarding the granting of a new trial; the second is New York appellate practice. In addition, both Utah and Ohio use similar standards in appellate review.

a. Federal rules permit new trials when the evidence "preponderates heavily" against the verdict.

Federal Rule of Criminal Procedure 33 permits an order for a new trial "[u]pon the defendant's motion" and "if the interest of justice so requires." Fed. R. Crim. P. 33(a) (J.A. 181). A new trial may therefore be granted where a trial judge finds the verdict is contrary to the "weight of the evidence" or "the evidence preponderates heavily against the verdict." *See, e.g., United States v. Paquin,* 216 F. App'x 46, 49 (2nd Cir. 2007) (J.A. 146) (verdict must be against weight of evidence, and letting verdict stand must be "manifest injustice"); *United States v.*

Landesman, 17 F.4th 298 (2nd Cir. 2021), *cert. denied*, 143 S. Ct. 86 (2022) (evidence did not "preponderate" against verdict).[4]

This power should be "exercised with caution" and "invoked only in exceptional cases." *United States v. Sinclair,* 438 F.2d 50, 51 n.1 (5th Cir. 1971) (Wisdom, J.) (quoting 2 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 553, at 487 (1969) (J.A. 820)); *United States v. Campos,* 306 F.3d 577, 579 (8th Cir. 2002). The judge cannot "entirely usurp the jury's function" and set aside the verdict merely because the court would have ruled the other way. *Crittenden,* 46 F.4th at 297 (citing *United States v. Tarango,* 396 F.3d 666, 672 (5th Cir. 2005)); *United States v. Brooks*, 647 F. App'x 988, 993 (11th Cir. 2016)

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[4] *See also United States v. Brennan,* 326 F.3d 176 (3rd Cir. 2003); *United States v. Fletcher,* 237 F. App'x 991, 995 (5th Cir. 2007) (denial of Rule 33 motion proper because "weight of the evidence [did not] preponderate[] against the verdict"); *United States v. Fuchs*, 467 F.3d 889 (5th Cir. 2006) (same); *United States v. Mallory,* 902 F.3d 583, 596 (6th Cir. 2018) ("Rule 33 permits a new trial if a verdict is against the 'manifest weight' of evidence"); *United States v. Washington,* 184 F.3d 653, 657–58 (7th Cir. 1999) ("court may properly consider the credibility of the witnesses, and may grant a new trial if the verdict is so contrary to the weight of the evidence that a new trial is required in the interest of justice."); *United States v. Oliver*, 950 F.3d 556 (8th Cir. 2020) (weight of evidence review requires that evidence "preponderate[] heavily against the verdict"); *United States v. Hernandez*, 327 F.3d 1110, 1114 (10th Cir. 2003) (overturning grant of new trial motion where verdict was not against weight of evidence); *United States v. Gil,* 581 F. App'x 766 (11th Cir. 2014) (weight of evidence means that "evidence must preponderate heavily against the verdict").

(J.A. 44) (new trial motions "against the weight of the evidence" should be granted sparingly, in exceptional cases only).

b. New York appellate courts apply a "weight of the evidence" standard when considering appellate factual sufficiency issues under N. Y. Crim. Proc. § 470.15.

Another analogue is New York state practice. New York statutes grant intermediate appellate courts the ability to conduct a factual sufficiency review and grant relief where the conviction "was, in whole or in part, against the weight of the evidence." N.Y. Crim. Proc. Law § 470.15(5) (J.A. 229).[5]

New York courts conducting factual sufficiency review weigh the evidence upon request of an appellant, and in doing so "have been careful not to substitute themselves for the jury. Great deference is accorded to the factfinder's opportunity

[5] Of note, in New York the appellate court makes an initial determination "whether an acquittal would not have been unreasonable," even before conducting factual sufficiency review. *People v. Bleakley*, 508 N.E.2d 672 (N.Y. 1987). If a New York appellate court initially finds an acquittal would have been unreasonable, even assuming the accused's argument, the appellant would fail to show a prima facie deficiency and the assessment would stop. Only if the court initially finds an acquittal "would not have been unreasonable," would it then proceed to weigh the evidence and determine controverted questions of fact per Art. 66(d)(1)(B)(ii). But there are differences in the new Article 66 that make the New York "prefatory test" inapposite: (1) New York acquittals must be unanimous, N.Y. Crim. Proc. Law § 310.80 (verdict of not guilty must be unanimous); in contrast, acquittals in the military only require that more than a quarter of the members vote to acquit, R.C.M. 921(c)(3); and, (2) the New York "acquittal would not have been unreasonable" test appears to require a substantive determination by the appellate court that the "specific showing" allegation by an appellant does not require under Article 66.

to view the witnesses, hear the testimony and observe demeanor." *Bleakley*, 508 N.E.2d at 675 (N.Y. 1987); *see also People v. Hayward,* 182 N.Y.S.3d 377 (App. Div. 2023); *People v. Mateo*, 811 N.E.2d 1053, 1069 (N.Y. 2004).

In practice, "if there is a fair conflict in the evidence or it is such that different inferences can be properly drawn from it, the determination of the jury will not be interfered with, unless it is *clearly against the weight of evidence.*" *People v. Robertson*, 403 N.Y.S.2d 234, 240 (App. Div. 1978) (internal citation and quotation omitted). Given the jury's decision to convict beyond a reasonable doubt, if "there was a rational doubt of the guilt of the defendant, it would not be a sufficient ground for [factual sufficiency] reversal . . . unless the case is so weak that the verdict should be set aside because [it was] against the weight of the evidence." *Id.*

Another recent New York factual sufficiency analysis looked to whether an appellant's conviction for robbery was "against the weight of evidence" due to lack of proof that the appellant "intended to forcibly steal" property from victims. *People v. Jones*, 162 N.Y.S.3d 559, 560 (App. Div. 2022). The *Jones* court held that "a different verdict would not have been unreasonable had the jury decided to credit defendant's testimony that he did not intend to forcibly steal from the victims." *Id.* at 562–63. But, the *Jones* court held "these credibility issues were

fully explored during cross-examination and were ultimately resolved by the jury in favor of the People." *Id.* at 563 (internal citation omitted).

c. Utah and Ohio state appellate courts use the "clear weight of the evidence" standard in a similar fashion.

When Utah state appellate courts review bench trials "for sufficiency of the evidence," they "must sustain the trial court's judgment unless it is *against the clear weight of the evidence*" or they reach "a definite and firm conviction that a mistake has been made." *State v. Bingham,* 348 P.3d 730, 734 (Utah Ct. App. 2015) (internal citation omitted) (emphasis added). Utah courts defer to "the trial court's ability and opportunity to evaluate credibility and demeanor" and recognize "its superior position to assess credibility." *Id.* at 735 (internal quotation and citation omitted). Utah statutes do not explicitly state a "clear weight of evidence" test, which exists in precedent. *See generally State v. Gordon*, 84 P.3d 1167, 1168 (Utah 2004); *State v. Andreason*, 38 P.3d 982, 983 (Utah Ct. App. 2001).

Ohio appellate courts also review criminal convictions for factual sufficiency under a "weight of the evidence" standard similar to Fed. R. Crim. P 33 "new trial" motions. "Even though supported by sufficient evidence, a conviction may still be reversed as being against the manifest weight of the evidence." *See State v. Brunner*, No. 15AP-97, 2015 Ohio App. LEXIS 4170 (Ohio Ct. App. Oct. 15, 2015) (internal quotation and citations omitted). Ohio appellate courts "review[] the entire record, weigh[] the evidence and all

reasonable inferences, consider[] the credibility of witnesses and determine[] whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Id.* at ¶ 17.

E. The Navy-Marine Corps Court of Appeals' interpretation and application of the amended factual sufficiency standard under Article 66(d)(1)(B) was correct, except for maintaining its ability to judge witness credibility.

The lower court held that: (1) "deficiency in proof" means a "weakness" or "defect" in the evidence that undermines an element of the offense; (2) "appropriate deference" requires a higher level of deference than the previous statute; and (3) to disturb a conviction requires the court "to be clearly convinced that the guilty verdict is contradicted by the weight of the evidence." (J.A. 7–9, 11.) This is consistent with the plain meaning of the statute. *See supra* Section I.B–D.

1. The lower court correctly found that Appellant must—and in this case did—make a specific showing of a deficiency of proof to trigger factual sufficiency review.

The Navy-Marine Corps Court held that for making a specific showing of a deficiency of proof, "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." *Harvey*, 83 M.J. at 691.

This interpretation is not inconsistent with the plain meaning of the statute, as described *supra*, Section I.C.3.a. As the court explained: "Congress requires two circumstances to be present: (1) a request of the accused; and (2) a specific showing of a deficiency of proof." *Harvey*, 83 M.J. at 691.

Further, the court distinguished factual and legal sufficiency standards, and, contrary to Amicus' concerns, did not require an appellant show a "complete absence of evidence" as the "deficiency of proof." *Id*.

a. Article 120c criminalizes indecent exposure.

Article 120c criminalizes "intentionally expos[ing], in an indecent manner, the genitalia." Art. 120c(c), UCMJ (J.A. 17).

The elements of indecent exposure are:

(1) That [Appellant] exposed [his] genitalia;

(2) That the exposure was in an indecent manner; and

(3) That the exposure was intentional.

See Manual for Courts-Martial, United States (MCM) pt. IV, ¶ 63.b.(6) (2019 ed.) (J.A. 247).

Indecent manner "means conduct that amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations." Art. 120(d)(6).

The Navy-Marine Corps Court of Criminal Appeals further established that the "hallmarks of indecent conduct" are "(1) lack of consent; (2) involvement of a child; and/or (3) public visibility." *United States v. Johnston*, 75 M.J. 563, 567 (N-M. Ct. Crim. App. 2016). "Although no longer a requirement for indecent exposure, a public setting can still render the manner of exposure indecent. On the other hand, a non-public setting can afford protection for adults engaging in consensual sexual conduct even if others may consider it indecent." *Id.* at 568. "Intentional exposure in a public place will still satisfy the element of indecency in most cases." *Id.* at 567.

The sole Specification of Charge II alleges Appellant "intentionally expose[d] his genitalia in an indecent manner, to wit: exposing his penis to [the Victim] in a public parking lot." (J.A. 493.)

b. <u>The United States concedes Appellant showed a "deficiency in the proof" that would enable the court to review factual sufficiency</u>.

Here, United States concedes Appellant made a specific showing of a deficiency of proof. He alleged a weakness in the evidence—inconclusive video—that supported elements of the offense: whether he exposed his penis and whether any exposure was indecent. (Appellant Br. at 22–34.) The court correctly applied the new triggering standard.

2. The lower court correctly recognized that the new requirement for "appropriate deference" is a higher standard than the previous mandate to "recognize" the trial court "saw and heard" the witnesses.

The Navy-Marine Corps Court found that "'appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence" is a higher standard than the prior "recognizing that the trial court saw and heard." *Harvey*, 83 M.J. at 692.

This interpretation is consistent with the plain meaning of the statute. *See supra* Section I.C.3.b. Deference means *yielding* to the opinion of another. Black's Law Dictionary. Thus, the new statute requires greater deference than the "simple admonition or caution" of recognizing that the trial court saw and heard the testimony firsthand. *Washington*, 57 M.J. at 409.

Here, the lower court explicitly gave "appropriate deference to the fact that the members heard the testimony of the [Victim] and the other witnesses." It weighed the evidence, and noted that the video corroborated an important portion of the Victim's testimony while calling other parts into question. The court also used the video evidence to assess that the exposure in a parking lot was public, thus determining this controverted question of fact.

The lower court applied the standard that Congress established for how to conduct a factual sufficiency review.

3. The lower court incorrectly preserved its ability to engage in credibility determination. However, Appellant suffered no prejudice as the lower court judged the Victim's credibility to Appellant's benefit.

The lower court incorrectly held that it can still make credibility determinations. *Harvey*, 83 M.J. at 692. Congress deleted the power to "judge the credibility of witnesses" from the current version of the statute. As explained above, the court can weigh evidence, determine controverted questions of fact, and give appropriate deference without having to judge credibility. Thus, it was error to implicitly read credibility determinations back into the concept of "appropriate deference." Congress knew how to use those specific words and declined to do so here. (J.A. 8–9); *see supra* Section I.C.3.b.

However, the lower court's erroneous interpretation did not prejudice Appellant. To the extent that the lower court judged the Victim's credibility, it did so to Appellant's benefit, leaving the court "dubious as to the veracity of some portions of her testimony." *Harvey*, 83 M.J. at 694.

4. The lower court correctly interpreted and applied the "clearly convinced that the finding of guilty was against the weight of the evidence" standard.

The Navy-Marine Corps Court found no ambiguity in the plain language that they must be "clearly convinced that the finding of guilty was against the weight of the evidence" to disturb a conviction. *Id.* at 693.

The court held the plain language required them to "weigh the evidence in a deferential manner to the result at trial," and if they were then "clearly convinced that, when weighed, the evidence (including the testimony) does not support a conviction," they could set aside the conviction. *Id*.

This interpretation is consistent with the plain meaning of the statute. *See supra* Section I.C.3.c.

Here, although the court did not find the Victim credible on all things, the Record also showed Appellant's false exculpatory statement and recent sex offense convictions. Appellant lied about knowing the Victim when confronted by his leadership, even though he and the Victim had exchanged social media information and talked at the gym. (J.A. 753–55, 757.) This showed consciousness of guilt and supported his conviction. Furthermore, evidence of Appellant's two previous convictions for sexual battery and harassment showed his propensity to commit sexual offenses, were close in time to the instant offense, and were of a similar nature in that they involved aggressive, unwanted sexual advances towards women Appellant barely knew. (J.A. 762–68, 771, 778–86.)

The lower court followed the plain language, weighed the evidence in this case, and concluded, "Accordingly, applying the current statute, giving appropriate deference to the fact that the trial court saw and heard the witnesses and other

evidence, we are not clearly convinced that the finding of guilty is against the weight of the evidence in this case." *Harvey*, 83 M.J. at 694.

a. The lower court's commentary on "presumption of guilt" language was a restatement of the statutory language that the "weight of the evidence" must contradict the guilty verdict.

The lower court's "presumption of guilt" language was unnecessary but not incorrect. (J.A. 10.)

In *Washington*, the court found that Article 66 required "neither a presumption of innocence nor a presumption of guilt," because the language of the statute did not indicate a presumption either way. 57 M.J. at 399.

However, the amended Article 66 does include a presumption: the court must be "clearly convinced the finding of guilty is *against* the weight of the evidence." 10 U.S.C. § 866(d)(1)(B)(iii) (emphasis added). As the plain language now indicates, the court starts with the conviction—a presumption—and then determines if it is against the weight of the evidence—a rebuttal. The Navy-Marine Corps Court correctly identified that "the revised Article 66, UCMJ, statute has altered this [c]ourt's review from taking a fresh, impartial look at the evidence requiring this [c]ourt to be convinced of guilt beyond a reasonable doubt," to a new "weight of the evidence" standard. (J.A. 10.)

b. The lower court placing the burden on an appellant to prove the conviction was "against the weight of the evidence" was inaccurate. However, the lower court did not place this purported burden on Appellant.

The lower court's statement that an appellant has the burden to show the conviction is against the weight of the evidence is inaccurate. (J.A. 10.) The appellant has a burden to make an initial "specific showing." The Court of Criminal Appeals then weighs the evidence in the record subject to appropriate deference, and determines whether it is "clearly convinced" that the conviction is against the weight of the evidence. Art. 66(d)(1)(B) (2021).

The court's statement is accurate insofar as an appellant must be successful at both the threshold stage—his showing of a specific deficiency of proof—and the court then being clearly convinced that the conviction is against the weight of the evidence, for him to receive relief for the assignment of error.

Regardless, it is evident that Appellant suffered no prejudice. The court applied the plain language of the statute and neither held nor suggested that Appellant *himself* failed to show the conviction was against the weight of the evidence. Rather, the court's review shows it clearly understood the duty to review for factual sufficiency once the threshold "specific showing" was met. The court weighed the evidence and ultimately determined it was "not clearly convinced that the finding of guilty is against the weight of the evidence in this case." *Harvey*, 83

M.J. at 694. The court did not hold Appellant to any burden not mandated by the statute.

F. Maintaining the de novo and beyond a reasonable doubt standards would require ignoring the plain language of the amended Article 66. Appellant's arguments to the contrary fail.

This Court does not have to guess what standards of review Congress intended for factual sufficiency, because the correct standards were added to the new statute itself. The amended Article 66 specifically directs the Courts of Criminal Appeals to weigh the evidence subject to appropriate deference, and then to only disturb the conviction if it is clearly convinced the finding of guilty is against the weight of the evidence. Insistence on the use of any other standard would mean ignoring the plain language of the statute.

1. The amended statute mandates "appropriate deference," which conflicts with the very notion of de novo review. Appellant's reliance on *Washington* is no longer apposite.

"De novo review is review without deference." *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 168 (2d. Cir. 2001) (citing *Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991) ("When de novo review is compelled, no form of appellate deference is acceptable."). An appellate court conducting de novo review will "take note" of the decision below, and "study the reasoning on which it is based," but then looks "at the matter anew, as though the matter had come to the courts for the first time." *Id.*

Appellant's insistence on the survival of de novo review flies in the face of the amended statute, which requires "appropriate deference." Since any level of appellate deference is contrary to the notion of review de novo, Appellant's argument must fail. *Salve Regina*, 499 U.S. at 238.

In *United States v. Scott*, 83 M.J. 778 (A. Ct. Crim. App. 2023), the Army Court of Criminal Appeals stated, without providing an explanation, that the standard for factual sufficiency review remained de novo. *Id.* at 779–80 (citing *Washington*, 57 M.J. at 399). Appellant makes much the same argument. (Appellant Br. at 42–43.)

The *Scott* court, however, overlooked the plain contradiction between de novo review and deference of any sort. It also relied on *Washington* to hold that the standard remained de novo. 83 M.J. at 779–80. But *Washington* reversed a lower court opinion that rejected de novo review; to do so, it relied on statutory language that has since been modified to mimic that lower court precedent. *Washington* is therefore no longer convincing as support for de novo review. 57 M.J. at 399; *see supra* Section I.C.3.

In addition, the Army Court of Criminal Appeals may have recently retreated from the de novo position it took in *Scott*. In *United States v. Coe*, No. 20220052, 2024 CCA LEXIS 52, *14–15 (A. Ct. Crim. App. Feb. 1, 2024), an unpublished case decided several months after *Scott*, the court made no mention of

de novo review and emphasized that "our role in a factual sufficiency review is *not* to substitute ourselves for the factfinder and decide what verdict we would have rendered." 2024 CCA LEXIS 52 at *14–15 (emphasis in original). The *Coe* court held that the amended Article 66 "expressly cabins our discretion" by requiring deference to the factfinders. *Id*. at *15. As noted above, such deference is inconsistent with de novo review.

2. Appellant relies on language retained in the new Article 66 but ignores added language modifying the standard of review.

Although Article 66 continues to state that the Courts of Criminal Appeals "may affirm only such findings of guilty . . . as the [c]ourt finds correct in law and fact," Congress also added that "correct in fact" requires the appellant to make a "specific showing of a deficiency in proof" and the court to be "clearly convinced that the finding of guilty was against the weight of the evidence." *Compare* Art. 66(d)(1), UCMJ (2016), *with* Art. 66(d)(1)(B), UCMJ (2022).

Contrary to Appellant's arguments, the addition of the term "clearly convinced" and the requirement that the *guilty finding* be against the "weight of the evidence" cannot be dismissed as inconsequential changes. (Appellant Br. at 16–17); *supra* Section I.C. The former Article 66 language requiring the courts to "weigh the evidence" was not placed against the fact that the appellant had already received a guilty finding. Art. 66(d)(1), UCMJ (2016). Without reference to the guilty finding, the court's "weighing" was de novo. *See Washington*, 57 M.J. at

399. Since reference to the guilty finding is now required, the "weighing" can no longer be de novo. *See supra* section I.C.

3. Appellant's argument that the test for factual sufficiency remains beyond a reasonable doubt is unsupported by the plain language of the statute.

Appellant asserts that the "context" of the statute shows the service courts must continue to use "beyond a reasonable doubt" as the test for factual sufficiency review. (Appellant Br. at 36–41.) This argument fails for two reasons.

First, it is inconsistent with the plain language of the statute. The amended Article 66 tells us what the new standard is: the service court may not disturb the finding of guilty unless it is "clearly convinced" that the finding of guilty is against the weight of the evidence. The common usage of "clearly convinced" in both federal and state courts suggests that it means a "definite and firm conviction," not a mere reasonable doubt. *See supra*, Section C.3.c. Similarly, "weight of the evidence" is equated with a preponderance of the evidence—a far lower burden of proof than is required for conviction beyond a reasonable doubt. *See supra*, Section D.2. The phrases "clearly convinced" and "weight of the evidence" are facially inconsistent with a "beyond a reasonable doubt" test—their purposeful addition to the amended statute cannot simply be ignored.

Second, Appellant's argument relies heavily on both New York practice and the "legislative history" purportedly provided by the Military Justice Review Group report. (Appellant Br. at 40–41.) As explained previously, the report of an executive committee is not a reliable indicator of legislative intent for purposes of statutory interpretation. *See supra*, Section D.1. But even if the Review Group was inspired by New York jurisprudence, and intended to import New York practice into military justice, the language adopted by Congress is substantially different from the New York statute. In particular, there is no requirement in the New York statute for an appellate court to be "clearly convinced" before disturbing a conviction. N.Y. Crim. Proc. Law § 470.15. The inclusion of "clearly convinced" indicates that Congress intended factual sufficiency review in the military to be more deferential to the trial court than it is in New York, where such language is absent. Appellant's citations to New York precedent can therefore carry no weight.

The plain language of the statute controls, and Appellant's claims fail.

H. Amicus curiae's claim that the amended statute renders factual sufficiency review "a chimera" and violates the absurdity doctrine is unsupported by the plain language of the statute.

The amicus brief suggests that requiring an accused to make a "specific showing of proof" to obtain factual sufficiency review "renders the concept a chimera." (Amicus Curiae Br. at 7.) Amicus, however, appears to conflate the

requirements for legal sufficiency and factual sufficiency in making this claim. (Appellant Br. at 10) (arguing that an appellant cannot make a "specific showing" when "any rational factfinder could have found all essential elements of the offense beyond a reasonable doubt"). In raising a "deficiency of proof," an appellant can attack the quality of the evidence without the court being required to view the evidence in any particular light. *See supra* Section I.C. The lower court certainly did not set an impossible standard for a "deficiency of proof" here, where it required only a "weakness in the evidence" rather than a complete absence thereof. *Harvey*, 83 M.J. at 691.

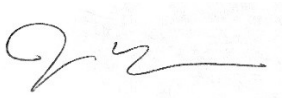
Amicus further urges that the absurdity doctrine requires that the words "may" in the amended statute, which appear to give the service courts discretion to deny factual sufficiency review even when the threshold showing has been made, must be read as "shall." (Appellant Br. at 7.)

Assuming arguendo that the amended statute makes factual sufficiency review discretionary, there is no reason to consider such a result absurd, as it is neither "nonsensical or superfluous" nor "so contrary to perceived social values that Congress could not have intended it." *Lovitky v. Trump*, 949 F.3d 753, 760 (D.C. Cir. 2020) (quoting *United States v. Cook*, 594 F.3d 883, 891 (D.C. Cir. 2010)). As noted above, only a small minority of states allow any kind of appellate review on factual sufficiency grounds. *See supra*, Section D.2.

But this Court need not decide the question. Whether discretionary or mandatory, Appellant did receive a full and legally correct review of the factual sufficiency of his conviction. The lower court found that Appellant had made a "specific showing of a deficiency of proof" and proceeded to weigh the evidence. After giving "appropriate deference" to the trial court, the Court of Criminal Appeals was not "clearly convinced that the finding of guilty was against the weight of the evidence." *Harvey*, 83 M.J. at 694. The lower court properly affirmed Appellant's conviction.

Conclusion

The United States respectfully requests this Court affirm the lower court's decision, while also clarifying that Article 66 no longer authorizes courts to judge the credibility of witnesses.



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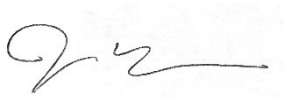

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