IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES	Appellee	**REPLY BRIEF ON BEHALF OF APPELLANT**
v.		Docket No. ARMY 20220450
Private First Class (E-3) **JUSTIN M. SCOTT** United States Army	Appellant	Tried at Fort Hood, Texas, on 8, 30, and 31 August 2022, before a general court-martial convened by the Commander, Headquarters, III Corps and Fort Hood, Lieutenant Colonel Tiffany Pond and Lieutenant Colonel Joseph T. Marcee, military judges, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Statement of the Case

On 5 June 2023, appellant, Private First Class Justin M. Scott filed his initial brief. On 3 August 2023, the government filed its answer brief. This is appellant's reply.

I. WHETHER APPELLANT'S CONVICTION FOR THE CHARGE AND ITS SPECIFICATION IS FACTUALLY SUFFICIENT WHERE APPELLANT RAISED THE AFFIRMATIVE DEFENSE OF MISTAKE OF FACT AS TO AGE.

The government's interpretation of Article 66(d)(1)(B), Uniform Code of Military Justice, 10 U.S.C. § 866(d)(1)(B) (2021) [UCMJ], is flawed because the

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new statute does not assign a presumption of guilt but rather a level of deference. The government urges this court, in conducting a factual sufficiency review, to recognize a rebuttal presumption that appellant "is, in fact, guilty." (Gov't Br. at 4) (quoting *United States v. Harvey*, __ M.J. __, 2023 CCA LEXIS 220*, *14 (N.M. Ct. Crim. App. 23 May 2023). Such an interpretation is inconsistent with the reasoning behind the provision and transforms this court's factual sufficiency review into a legal sufficiency review.

This court should adopt the procedure outlined in *People v. Danielson*, 9 N.Y.3d 342 (N.Y.C.A. 2007), cited by the Military Justice Review Group (MJRG) in recommending the change to Article 66, UCMJ. That is a two-step process. First, the court must 'determine whether an acquittal would not have been unreasonable.'" MIL. JUST. REV. GROUP, REPORT OF THE MILITARY JUSTICE REVIEW GROUP, PART I: UCMJ RECOMMENDATIONS (2015), 610, fn 25 [MJRG REPORT] (citing *Danielson*, 9 N.Y.3d at 348). Second, if an acquittal would not have been unreasonable "'the court must weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions. Based on the weight of the credible evidence, the court then decides whether the jury was justified in finding the defendant guilty beyond a reasonable doubt.'" *Id*. In application, this process continues this court's fresh an

impartial look at the evidence while establishing a Congressionally-mandated level of deference if the court determines an acquittal would not have been unreasonable.

A. Legal Sufficiency Versus Factual Sufficiency

Applying a presumption of guilt transforms a factual sufficiency review into a legal sufficiency review. The standard for legal sufficiency is, "considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt." *United States v. Gutierrez*, 74 M.J. 61, 65 (C.A.A.F. 2015). Furthermore, when applying the legal sufficiency test, courts are "'bound to draw every reasonable inference from the evidence of record in favor of the prosecution.'" *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993) (quoting *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991). Although reviewed de novo, a legal sufficiency review is more akin to an application of a presumption of guilt because its reasonable inference standard does not allow for a weighing of evidence.

In contrast, a factual sufficiency review involves "a fresh, impartial look at the evidence," where "neither a presumption of innocence nor a presumption of guilt" is applied. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). Furthermore, prior to the new Article 66(d)(1)(B) provision, this court could not

affirm a conviction unless, "'after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses,' [it]was personally convinced beyond a reasonable doubt of appellant's guilt." *United States v. Holms*, 2020 CCA LEXIS 39, at *5 (quoting *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Applying either a presumption of innocence or a presumption of guilt to this review would be accompanied by a requirement to draw inferences favorable to one party or another.

B. The New Article 66(d)(1)(B) statutory language – No Presumption of Guilt

The new version of Article 66(d)(1)(B) does not change the essence of a factual sufficiency review but rather assigns a level of deference not previously required. The new level of deference this court is required to apply in "weigh[ing] the evidence and determin[ing] controverted questions of fact" encompasses two parts: "(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." Article 66(d)(1)(B)(ii)(I) and 66(d)(1)(B)(ii)(II), UCMJ. Notably, the statutory language does not contain a presumption of guilt.

C. The United States Navy-Marine Corps Court of Criminal Appeals application of Article 66(d)(1)(B) is incorrect.

The application of Article 66(d)(1)(B) in *United States v. Harvey* is incorrect. Without citing any legal authority, the court made the following statement:

> [i]t is clear that the factual sufficiency standard in the revised Article 66, UCMJ, statute has altered this Court's review from taking a fresh, impartial look at the evidence requiring this Court to be convinced of guilty beyond a reasonable doubt, to a standard where an appellant has the burden to both raise a specific factual issue, and to show that his or her conviction is against the weight of the evidence admitted at trial. Thus, 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.

Harvey, __ M.J. __, 2023 CCA LEXIS 220, at *11. While the court is correct the statute now requires an appellant to make a specific showing of a deficiency of proof, it is incorrect in three respects.

First, the New York "weight of the evidence" review, upon which the [redacted]'s recommendation was based, demonstrates that intermediate appellate courts take a fresh look to determine whether an acquittal would not have been unreasonable. Second, although requiring an appellant to raise a deficiency in proof to trigger a factual sufficiency review, the statute does not place a burden of proof on the appellant, rather, that is for the court to decide. Third, and most

troubling, the court reads-in a presumption of guilt where none exists. In doing so, the court oddly states that "[w]e are guided by the well-settled principle that unless ambiguous, the plan language of a statute will control unless it leads to an absurd result." *Harvey*, __ M.J. __, 2023 CCA LEXIS at *14-15. However, no language in the statute addresses a presumption of guilt.

D. The history behind the statutory change does not support the implicit creation of a presumption of guilt

The [redacted]'s recommendation for the Article 66, UCMJ, modification does not support the implicit creation of a presumption of guilt. In pertinent part, the [redacted]'s proposal summary states it "provide[s] statutory standards for factual sufficiency review, sentence appropriateness review, and review of excessive post-trial delays." [redacted] REPORT, 605. The proposal never discusses establishing a presumption of guilt for factual sufficiency reviews.

The [redacted] proposal states it "draws upon New York state practice, in a manner that reflects military practice since 1948." [redacted] REPORT, 610. Specifically, the report cites to New York Criminal Procedure Law where "upon request of the defendant, the intermediate appellate court must conduct a weight of the evidence review." [redacted] REPORT, 610 (citing New York Criminal Procedure Law 470.15[5]). The nature of the "weight of the evidence" review is aptly discussed in *Danielson* and *People v. Romero*, 7 N.Y. 3d 633 (N.Y.C.A. 2006).

Those cases are instructive in demonstrating that, in conducting "weight of the evidence" reviews, New York does not apply a presumption of guilt.

In *Danielson*, the court discussed the two-part process an intermediate appellate court engages in once a defendant requests a "weight of the evidence" review. *Danielson*, 9 N.Y. 3d at 348. For this review, the court must first "determine whether an acquittal would not have been unreasonable." *Id.* If it is determined an acquittal would not have been unreasonable, "the court must weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions. Based on the weight of the credible evidence, the court then decides whether the jury was justified in finding the defendant guilty beyond a reasonable doubt." *Id.* The court then stated, "[e]ssentially, the court sits as a thirteenth juror and decides which facts were proven at trial." *Id.*

Furthermore, in *Romero*, a case also cited in the [redacted] REPORT, the court provided a history of the "weight of the evidence" review process. The court discussed how the review was once construed "in a manner consistent with the approach that a verdict was presumed to be correct and would be overturned only if the record revealed that the jury's factual determinations were incorrect." *Romero*, 7 N.Y.3d at 640. (citing *People v. Driscoll*, 107 N.Y. 414, 417 (N.Y.C.A.

1887) ("[t]his provision . . . requires use to review the facts in every capital case, and to determine whether, upon all of the evidence, there is, in our opinion, good and sufficient reason for setting aside the verdict of the jury and granting a new trial." *Id.* at 421).

In 1936, this standard changed. In *People v. Crum*, 272 N.Y. 348 (N.Y.C.A. 1936), a New York court concluded:

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

Id. at 350. In discussing this change, the *Romero* court stated:

> *Crum* struck a balance between the earlier, competing views for examining weight of the evidence: an appellate court had to affirmatively review the record and undertake an independent assessment of the evidence to determine whether the jury's verdict was factually correct . . . but, at the same time, give deference to the factfinder's resolution of witness credibility and conflicting evidence.

Romero, 7 N.Y. 3d at 643. The *Romero* court then noted that in *People v. Bleakley*, 69 N.Y. 2d 490 (N.Y.C.A. 1987), "'the standard for weight of the evidence review [was refined] consistent with the core principles of *Crum*.'" *Id.* at 643. Namely, the *Bleakley* court articulated the two-part test. Furthermore, the *Bleakley* court did state:

> Empowered with this unique factual review, intermediate appellate courts have been careful not to substitute themselves for the jury. Great deference is accorded to the fact-finder's opportunity to view the witnesses, hear the testimony and resolve demeanor. Without question, differences between what the jury does and what the appellate court does in weighing evidence are delicately nuanced, but differences there are.

Bleakley, 69 N.Y. 2d at 495.

Based on the history of how New York interprets the weight of the evidence review, an approach thoroughly considered by the [redacted], the notion of applying a presumption of guilt is outdated. In applying this review, an intermediate appellate court still conducts a "fresh and impartial" look to determine whether an acquittal would not have been unreasonable. If that question is answered in the affirmative, the court then applies the newly assigned standard of deference in determining whether to set aside a conviction.

E. This court should adopt the *Danielson*, two-part process and avoid a result that would lead to another legal sufficiency review.

This court should reject the government's invitation to apply a presumption of guilt as that approach would lead to nothing more than an additional legal sufficiency review. Rather, this court should adopt *Danielson*'s two-part process. That process preserves the court's ability to take a fresh and impartial look at the evidence to determine whether an acquittal would not have been unreasonable. After that step is complete, the court will then comply with Congress's new Article

66(d)(1)(B) mandate to afford deference to the factfinder in determining whether the court is clearly convinced the conviction is against the weight of the evidence.

Conclusion

Appellant proved the defense of mistake of fact as to age by a preponderance of the evidence and there was insufficient proof to rebut the defense resulting in the finding of guilty being against the weight of the evidence. Therefore, appellant requests the court set aside his conviction.

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to the Army Court and Government Appellate Division on 10 August 2023.

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