IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee* v. **Fernando M. BROWN** Chief Machinery Technician (E-7) U.S. Coast Guard, *Appellant*	PETITION FOR RECONSIDERATION Crim. App. Dkt. No. 001-69-21 USCA Dkt. No. 22-0249/CG

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

This Court is requested to reconsider its opinion with respect to Specification 1 of Charge I and the scope of its remand to the CGCCA for the following reasons:

(1) Appellant's conduct has never been evaluated by a factfinder under the proper construction of the elements and (2) this Court relied on a "factual finding" by the CGCCA to affirm Appellant's conviction on Specification 1 of Charge I, but, given the unique procedural posture of this case under Article 69, UCMJ, the CGCCA did not have fact-finding powers.

Discussion

1. Appellant's conduct has never been evaluated by a factfinder under the proper construction of the elements.

Appellant is entitled to have his guilt or innocence as to Specification 1 of Charge I determined by a factfinder, applying the correct elemental analysis. To date, this has never happened.

In its opinion, this Court explains the proper construction of the temporal element of Article 91(3), UCMJ, 10 U.S.C. § 891(3) (2018).[1] It is clear from the Military Judge's findings that he was unaware of the now-settled proper construction, and improperly applied this element to the facts.[2] [3]

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[1] *Brown*, __ M.J. __, 2023 WL 7009636, at *1 (C.A.A.F. Oct 23, 2023) ("This Court holds that under Article 91(3), servicemembers can only be held criminally liable if at the time they conveyed the disrespectful language or behavior the victim was then in the execution of his or her office.") (emphasis in original).

[2] As this Court pointed out, the government failed to introduce *any* evidence that would support a conviction under the proper elemental analysis with respect to two of the victims. *Brown*, 2023 WL 7009636, at *5-6. Nevertheless, the military judge convicted appellant of both specifications. The only conclusion is that the military judge was unaware of the proper construction of the elements and, being so unaware, failed to properly apply the elements to any of the specifications at issue, including Specification 1 of Charge I. While military judges are presumed to know the law and apply it correctly absent clear evidence to the contrary, here there is clear evidence to the contrary. *See United States v. Bridges*, 66 M.J. 246, 248 (C.A.A.F.2008). Respectfully, it is difficult to divine from the record precisely how the military judge interpreted the element in question, but the convictions on Specifications 2 and 3 preclude the conclusion that the military judge interpreted or applied this element in sync with this Court's opinion.

[3] Even assuming the military judge could have found the temporal element was satisfied under a proper construction of that element, this result would by no means be certain. In his testimony, Chief J.D. specifically recalled what he was doing when he saw the message, but when asked, said he could not remember when it was sent. *Compare* JA0084 *with* JA 0092. In short, the evidence was mixed. The relative strength or weakness of the evidence on this point, however, are academic at this procedural posture, because the factfinder did not analyze the evidence

Even if the evidence is legally sufficient for the factfinder to convict on Specification 1 of Charge I under the proper construction of the elements, this is not a substitute for a factfinder *actually* evaluating the evidence under the proper construction, and *actually* determining that the evidence warranted a conviction beyond a reasonable doubt based on the proper elements.[4]

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under the proper standard. As the Supreme Court has emphasized, "appellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial." *Dunn v. United States*, 442 U.S. 100, 107 (1979).

[4] As this Court has stated: "an appellate court may not affirm on a theory not presented to the trier of fact and adjudicated beyond a reasonable doubt." *United States v. Medina*, 66 M.J. 21, 27 (C.A.A.F. 2008) (citation omitted); *see also Chiarella v. United States*, 445 U.S. 222, 236–37 (1980) (stating the Court would not affirm a conviction based on a theory not presented to the jury); *Dunn*, 442 U.S. at 107 ("[A]ppellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial."); *In re Winship*, 397 U.S. 358, 364 (1970) ("It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing *a proper factfinder* of his guilt with utmost certainty.") (emphasis added); *Cole v. State of Ark.*, 333 U.S. 196, 202 (1948) ("To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court."); *United States v. Gaskins*, 72 M.J. 225, 232 (C.A.A.F. 2013) (holding the undisputed fact that the evidence was legally sufficient did "not answer the altogether different question" of whether the trial proceedings violated appellant's rights); *United States v. Humphries*, 71 M.J. 209, 216 n.8 (C.A.A.F. 2012) (noting that, while the evidence would have been legally sufficient to support a conviction under clause 1 or 2 of the terminal element of Article 134, UCMJ, appellant's rights were nonetheless violated because the record did not show which of these two potential theories of liability appellant was

In a case like this, where this Court settles the proper construction of the elements, which the factfinder clearly did not apply, the only remedy is for the factfinder to reconsider the case on the merits, under the proper elemental analysis.[5] While this is an unusual situation, a comparable case is *United States v. Semenza*.[6] Semenza was convicted of allowing unauthorized livestock to trespass on National Forest Land.[7] The appellate court was called on to interpret competing constructions of the mens rea element, and concluded that willfulness was required.[8] Despite the fact that there was evidence that could have supported a trier of fact's conclusion that the offense was willful, the Ninth Circuit ordered a new trial because the trier of fact did not evaluate the evidence under the proper

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convicted under); *United States v. Lubasky*, 68 M.J. 260, 264–65 (C.A.A.F. 2010) (rejecting the government's argument that this Court may affirm a conviction where the evidence was legally sufficient to prove a variant of the charged offense when the factfinder based its findings on a different analysis).

[5] Related to the inescapable conclusion that the military judge did not apply the proper construction of the elements, the government did not argue a proper construction of the elements. The Government's theory of guilt for the Article 91 offenses was that the only time relevant was when the victims *viewed* the messages, not when they were sent, a construction this Court has now rejected. In closing, the Government argued the Chief's Mess "had to use a text stream in order to do their job" and "[w]hen they participated in the message, and they read those messages, sir, they were in the performance of their duty." R. at 405. Based on this Court's decision, this prosecution theory is legally invalid and implicates the above cited precedents that a conviction cannot be upheld based on a basis different than it was tried before the finder of fact.

[6] 835 F.2d 223 (9th Cir. 1987).

[7] *Id.* at 224.

[8] *Id.*

elemental analysis.[9] The present case is now in the same position: appellant is entitled to a new trial governed by a proper construction of Article 91(3), UCMJ.[10]

There are two procedural paths to this result, either of which would be equally suitable. This Court can set aside the finding as to Specification 1 of Charge I while authorizing a rehearing. In the alternative, this Court can clarify the scope of its remand to allow the CGCCA to consider the merits of Specification 1 of Charge I in light of this Court's guidance as to the proper elements of Article 91(3).[11] This would allow the CGCCA to conduct its review under the proper construction of the statute, as well as to make the determination as to whether a rehearing on the merits is required.[12] Neither remedy requires reassessment of the

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[9] *Id.* at 225 ("Semenza is accordingly entitled to a new trial governed by a proper construction of [the criminal provision at issue]").

[10] A similar principle can be seen in this Court's own recent decision in *United States v. Haverty*, 76 M.J. 199 (C.A.A.F. 2017). In *Haverty* this Court determined the proper mens rea for an Article 92 violation was higher than trial judge instructed on and therefore reversed the effected conviction with authorization for a rehearing. In the present case, this Court has similarly found that the factfinder applied a lessor standard than it should have. Just as in *Haverty*, this should result in reversal—notwithstanding legal sufficiency based on the correct standard—because the factfinder did not apply the correct standard.

[11] As written, this Court's decretal could be read to limit the scope of the CGCCA's review on remand only to sentencing.

[12] This remedy may be doubly appropriate in that appellant is entitled to review by the CGCCA under the proper elements. It is clear that, like the military judge, the lower court did not apply the proper elements in its review. As such, appellant has never enjoyed the benefit of CCA review under the proper elemental framework. *See United States v. Beatty*, 64 M.J. 456, 459 (C.A.A.F. 2007) (pointing out that where the lower court conducts an invalid review, the proper remedy is remand for

substance of this Court's opinion, and either could be achieved through a simple editorial amendment to the decretal language.[13]

2. This Court relied on a "factual finding" by the CGCCA to affirm Appellant's conviction on Specification 1 of Charge I, but, given the unique procedural posture of this case under Article 69, UCMJ, the CGCCA did not have fact-finding powers.

Paragraph III.C. of this Court's opinion states the CGCCA's "determination that whenever the officer victims opened the Chief's Mess group text they were 'in the execution of their office' is controlling."[14] This Court describes the CGCCA's "determination" as a "factual finding" made by "[e]xercising its unique factfinding authority."[15] However, as this case came before the CGCCA under the unique procedural provisions of Article 69, UCMJ, the CGCCA could not exercise "its unique factfinding authority" in the case, and was limited to "action only with respect to matters of law," as the relevant version of Article 69(e) provided.[16] As

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a proper review); *United States v. Holt*, 58 M.J. 227, 233 (C.A.A.F. 2003) (where an appellant does not receive a proper legal review from the CCA, the remedy is a remand to the CCA for a proper review) (citation omitted); *see also United States v. Gifford*, 75 M.J. 140 (C.A.A.F. 2016) (remanding for a new CCA review where "the CCA erroneously applied a standard short of that required by law" in its original review).

[13] *See, e.g.*, *United States v. Upshaw*, 81 M.J. 313 (C.A.A.F. 2021) (modifying the decretal paragraph—on reconsideration—interlocutory order).

[14] *United States v. Brown*, 2023 WL 7009636, at *5.

[15] *Id.*

[16] *See* Article 69(e), UCMJ, 10 U.S.C. § 869(e) (2019); *United States v. Arness*, 74 M.J. 441, 442 (C.A.A.F. 2015) ("Review in such cases is limited to matters of law, unlike the CCA's normal review under Article 66(c). *See* Article 69(e), UCMJ.").

such, this factual finding cannot be relied on to affirm Appellant's conviction on Specification 1 of Charge 1 and this Court should reconsider the portions of its opinion that rely thereon. Relatedly, this Court should grant reconsideration to correct this portion of its opinion so as not to give the lower courts the impression that they can find facts when they have jurisdiction to act only with respect to matters of law.[17]

Conclusion

Accordingly, appellant respectfully requests reconsideration.

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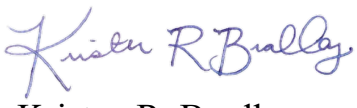
[17] Appellant recognizes that the shelf-life of this precedent's direct applicability to Article 69 review may be limited given the recently expanded appellate jurisdiction for previously "sub-jurisdictional" cases, but nevertheless clear and consistent delineation of the limits of appellate factfinding authority is important. Indeed, with other recent/potential changes to CCA review, this distinction may become increasingly relevant.

Certificate of Filing and Service

The undersigned counsel hereby certifies that a copy of the foregoing was delivered to the Court and appellate government counsel via email on 2 November 2023.



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