IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	) BRIEF ON BEHALF OF APPELLEE
v.	) Crim. App. Dkt. No. 20120104
Private First Class (E-3) **JESUS GUTIERREZ, JR.,** United States Army, Appellant	) USCA Dkt. No. 14-0009/AR

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

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals [the Army Court] reviewed this case pursuant to Article 66(b)(1), Uniform Code of Military Justice, 10 U.S.C. § 866(b) (2008) [hereinafter UCMJ].[1] This Honorable Court has jurisdiction over this matter under Article 67(a), UCMJ.

Statement of the Case

An enlisted panel sitting as a general court-martial convicted appellant, contrary to his plea, of one specification of stalking in violation of Article 120a, UCMJ.[2] The panel acquitted appellant, consistent with his plea, of one

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[1] Joint Appendix [JA] 1-3; Article 66(b), UCMJ.
[2] JA 8-12, 291.

specification of rape in violation of Article 120, UCMJ. The panel sentenced appellant to be reduced to the grade of E-1, to forfeiture of all pay and allowances, to be confined one year, and to be discharged from the service with a bad-conduct discharge.[3] The convening authority approved the adjudged sentence.[4] On July 8, 2013, the Army Court affirmed the findings and sentence.[5] Appellant petitioned this Court for review on September 5, 2013. This Court granted appellant's petition for review on October 16, 2013.

Statement of Facts

The government charged appellant with raping AM between the approximate dates of 1 August 2010 and 31 August 2010 and with stalking AM between the approximate dates of 1 August 2010 and 2 October 2010.[6] AM was the government's primary witness. She testified that she met appellant and his wife, Julia Gutierrez, around 31 December 2009.[7] AM and Mrs. Gutierrez were friends, but AM testified that she did not think highly of appellant and regarded him as an "asshole."[8]

Some time after they met, AM asked if she could have a

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[3] JA-013.
[4] JA-014.
[5] JA-001.
[6] JA-002.
[7] JA-107.
[8] JA-109.

purchase she ordered from an Internet site shipped to the Gutierrezes' Army Post Office (APO) address, as that site would not ship to a German address.[9] Mrs. Gutierrez agreed, and AM had the package sent to the Gutierrezes' address.[10] AM kept ordering items from the website, but she forgot to change the shipping address back to her home.[11] As a result, approximately twelve packages were sent to the Gutierrezes' address instead of AM's address.[12]

A disagreement ensued between AM and Mrs. Gutierrez regarding the packages.[13] AM testified that Mrs. Gutierrez refused to deliver the final three packages to her.[14] AM and Mrs. Gutierrez communicated via Facebook regarding the packages, and AM threatened to contact the military police if she did not receive the packages.[15] Eventually, appellant agreed to deliver the packages to AM at her home.[16] Appellant told AM that he had a meeting to attend and that he would be at her home soon afterward.[17]

Ms. Gutierrez testified that appellant attended an

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[9] JA-109-10, 226, 228.
[10] JA-110.
[11] JA-110.
[12] JA-110.
[13] JA-110-11, 113.
[14] JA-110-11.
[15] JA-153, 184-85.
[16] JA-113.
[17] JA-113.

Alcoholics Anonymous (AA) meeting on the evening of 10 August 2010 and was going to deliver AM's packages after the meeting adjourned.[18] She testified that it took between fifteen and twenty minutes to walk from their home to AM's home.[19] Appellant was gone for between sixty and ninety minutes, meaning he would have been at AM's home for between twenty and forty minutes despite the fact that he did not like, trust, or enjoy being around AM.[20]

AM testified that when appellant arrived at her home, he pushed his way inside her apartment.[21] Appellant dropped AM's packages on the floor and told AM that he "needed a hug."[22] He started hugging AM and kissing her on her neck.[23] AM "kept saying no."[24] At that point, appellant began pulling on AM's sweat shorts while repeatedly saying "I want it" and "just one time," or words to that effect.[25] AM kept telling appellant to stop.[26] As appellant continued pulling her shorts down, AM tried pulling them back up.[27] Appellant then pushed AM toward the bedroom, pushed her onto the bed, succeeded in pulling her

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[18] JA-240.
[19] JA-241, 269.
[20] JA-269.
[21] JA-113-14.
[22] JA-114.
[23] JA-114.
[24] JA-114.
[25] JA-114-15.
[26] JA-116.
[27] JA-116.

shorts down, and penetrated AM's vagina with his penis.[28] AM tried to push appellant away but was unsuccessful.[29] After appellant finally ceased intercourse, he pulled his pants up, said to AM, "I'll call you," and left her apartment.[30]

Appellant, true to his word, called AM the next day.[31] AM did not answer her phone.[32] Appellant continued calling AM and also contacted her via text message and Facebook.[33] AM testified that she had "blocked" appellant on Facebook.[34] However, appellant contacted her from an account with the name of Jose Segura.[35] AM did not know anybody named Jose Segura.[36] AM did not answer appellant's calls.[37] She responded to "some" of appellant's text messages, and her responses were to the effect of "[j]ust leave me alone."[38]

AM testified that "a few weeks later," sometime in August or September 2010, appellant returned to her home.[39] When appellant arrived, AM testified that the "calling would increase

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[28] JA-115-16.
[29] JA-116.
[30] JA-116.
[31] JA-119.
[32] JA-119.
[33] AM was unable to provide an exact or estimated number of calls, but she testified that it was "[a] lot." JA-119.
[34] JA-120.
[35] JA-120, 127.
[36] JA-121.
[37] JA-122.
[38] JA-122.
[39] JA-112.

and the texting, and then the door ringing started."[40] Appellant stood outside AM's apartment building ringing her doorbell.[41] AM testified that the doorbell was "really loud" and that appellant "had his finger on it the whole time" so that the ringing was "constant."[42] Appellant rang the doorbell for approximately one hour.[43] AM told appellant to leave before she called the police or his wife and again told appellant to leave her alone.[44]

Appellant started calling and texting AM again "a lot" during the early morning of 2 October 2010.[45] Appellant then came to AM's apartment building and once again began ringing her doorbell.[46] At first, appellant was outside the building, but he later came inside the building and began kicking on AM's front door.[47] Appellant was kicking the door loudly, and AM and her daughter were "freaking out."[48] AM called her friend, Staff Sergeant (SSgt) David Rosas, at that point.[49]

Sergeant Rosas testified that the "[f]irst thing he noticed was that [AM] was in tears--that she was crying."[50] AM seemed to

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[40] JA-123.
[41] JA-123.
[42] JA-123.
[43] JA-123.
[44] JA-123.
[45] JA-129.
[46] JA-131.
[47] JA-131.
[48] JA-131.
[49] JA-132; SJA 1.
[50] SJA 1.

be "[e]motional, stressed, like she was in fear."[51] Sergeant Rosas could also "hear the doorbell ringing and [] could hear her cell phone going off."[52] AM told SSgt Rosas that "somebody was trying to break into her house.[53] That somebody was calling her incessantly, someone that she knew, kept calling her, kept bothering her, and then a couple of minutes later, she said that this person was trying to . . . get into the building into her house."[54] After five to ten minutes, SSgt Rosas "could hear banging on the door."[55] AM told SSgt Rosas that "she was afraid for her daughter and herself" and that "if this person came in she was afraid of what her daughter might see happen, or something happen to her daughter."[56] As appellant continued his actions, AM "was getting more stressed as it continued to happen."[57] Sergeant Rosas called the military police and then stayed on the phone with AM until they arrived.[58]

Sergeant (SGT) Eric Frantz, a military policeman, arrived pursuant to SSgt Rosas's call. Sergeant Frantz went to the front of the building and saw appellant "pulling on the door,

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[51] SJA 2.
[52] SJA 2. AM called SSgt Rosas from her home phone, not her cell phone.
[53] SJA 4.
[54] SJA 4.
[55] SJA 5.
[56] SJA 5.
[57] SJA 3.
[58] SJA 5.

buzzing the doorbell" and "yelling something into the buzz system."[59] Appellant did not obey SGT Frantz's order to "come here" and continued pulling on the door.[60] When SGT Frantz asked appellant to identify himself, appellant gave the same last name as AM rather than his real name.[61] Sergeant Frantz detained appellant, handcuffing and frisking him.[62] Sergeant Frantz then asked AM to buzz him into the building so that she could identify appellant.[63]

Sergeant Frantz knocked on AM's door, and AM opened it "[j]ust a few inches."[64] When SGT Frantz asked her to identify appellant, appellant "lunged forward toward [AM's] door," saying "let me in."[65] After SGT Frantz's partner restrained appellant, appellant "blew her kisses, and also licked his lips, and did a sexual manner with his tongue."[66] At that point, AM "shut the door real quick."[67]

Eventually, AM went to the military police station for an interview.[68] AM's interview lasted for approximately eight

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[59] SJA 6.
[60] SJA 6-8.
[61] SJA 8.
[62] SJA 9.
[63] SJA 10.
[64] SJA 12.
[65] SJA 12.
[66] JA-133; SJA 12.
[67] SJA 13.
[68] JA-134.

hours.[69] During the interview, appellant continued calling AM's cell phone.[70] AM did not know how many times appellant called her.[71] Special Agent MB, who interviewed AM, testified that he did not know "approximately how many times [AM's] phone rang, but it was enough to get me distracted from the interview."[72]

Any additional facts necessary to resolve the assignments of error are contained in the argument below.

Summary of Argument

Essentially, appellant argues that his conviction for stalking must be reversed because it is inconsistent with his acquittal for rape. However, an appellant may not upset a conviction merely because it is inconsistent with an acquittal for a related or lesser offense, and a legal sufficiency review of appellant's stalking conviction should be independent of the panel's acquittal on the rape specification. Such an independent review shows that the evidence is legally sufficient to sustain appellant's conviction for stalking.

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[69] JA-134.
[70] JA-134-35.
[71] JA-135.
[72] SJA 14.

Granted Issue

WHETHER THE EVIDENCE OF STALKING WAS LEGALLY SUFFICIENT WHERE APPELLANT WAS ACQUITTED OF RAPE AND THE PROSECUTION RELIED ON THE EVIDENCE OF RAPE TO PROVE STALKING.

Standard of Review

This court reviews legal sufficiency issues de novo.[73] The test for legal sufficiency is whether, when viewed in a light most favorable to the prosecution, "a reasonable fact-finder could have found all of the essential elements of the offense beyond a reasonable doubt."[74]

This court is "not limited to appellant's narrow view of the record."[75] To the contrary, this court is required "to draw every inference from the evidence of record in favor of the prosecution."[76] "[T]he appellate question is not whether the evidence is better read one way or the other, but whether . . . a reasonable factfinder reading the evidence one way could have found all the elements of the offenses beyond a reasonable

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[73] *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).
[74] *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987); Article 66, UCMJ.
[75] *United States v. Cauley*, 45 M.J. 353, 356 (C.A.A.F. 1996) (citing *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993)).
[76] *McGinty*, 38 M.J. at 132 (quoting *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991)).

doubt."[77] Moreover, "[r]easonable doubt . . . does not mean the evidence must be free from conflict."[78]

Law and Argument

A. An inconsistent verdict is not a basis for relief

While appellant frames the granted issue in legal sufficiency terms, the crux of his argument is that he is entitled to relief because the panel returned an inconsistent verdict. This claim may be easily resolved against appellant because it ignores the tenet that an inconsistent verdict is not typically a basis for relief.[79]

The Supreme Court has long held that an appellant is not

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[77] *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011).
[78] *United States v. Rankin*, 63 M.J. 552, 557 (N.M. Ct. Crim. App. 2006), *aff'd* 64 M.J. 348 (C.A.A.F. 2007).
[79] While this Court has set aside convictions in cases with inconsistent verdicts, an accurate reading of those opinions shows that the basis for relief was another error, not simply because an inconsistent verdict was rendered.

For example, in *United States v. Lyon*, 15 U.S.C.M.A. 307, 35 C.M.R. 279 (1965), the appellant's conviction for attempted extortion was reversed because the law officer's panel instructions were erroneous, not simply because the panel returned an inconsistent verdict.

Likewise, in *United States v. Stewart*, 71 M.J. 38, 42-43 (C.A.A.F. 2012), the appellant's conviction for aggravated sexual assault was set aside not because of an inconsistent verdict, but because the military judge's instructions caused the panel's verdict to violate the Double Jeopardy Clause.

In other words, *Lyon* and *Stewart* do not establish exceptions to the rule that an inconsistent verdict is not a basis for relief. Rather, those cases grant relief for reasons other than an inconsistent verdict.

entitled to reversal of a conviction because of an inconsistent verdict. For example, in *Dunn v. United States*, the defendant was acquitted of unlawfully possessing and selling liquor but convicted of "maintaining a common nuisance by keeping for sale at a specified place intoxicating liquor."[80] The defendant argued that because the verdict was inconsistent and the evidence for all three counts was the same, he was entitled to a reversal of his conviction.[81] The Court affirmed appellant's conviction, holding that "[c]onsistency in the verdict is not necessary."[82] The Court explained that:

> 'The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.'[83]

The Court concluded by stating "[t]hat the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation

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[80] 284 U.S. 390, 391-92 (1932).
[81] *Id.* at 392.
[82] *Id.* at 393.
[83] *Id.* (quoting *Steckler v. United States*, 7 F.2d 59, 60 (2d. Cir. 1925)).

or inquiry into such matters."[84]

The Supreme Court reaffirmed *Dunn*'s reasoning fifty-two years later. In *United States v. Powell*, the jury acquitted the defendant of possessing cocaine with the intent to distribute and conspiracy to commit the same.[85] However, the jury convicted her of three counts of "using the telephone in 'committing and in causing and facilitating'" those same offenses.[86] The Court rejected "exceptions" to *Dunn* that were created by several circuit courts of appeal, affirmed the defendant's convictions, and rejected the same argument appellant raises here.[87]

Appellant's argument that his acquittal for rape requires reversal of his stalking conviction fails because it "necessarily assumes that the acquittal on the predicate offense was proper - the one the jury 'really meant.'"[88] As the Court points out, appellant's necessary assumption "is not necessarily correct; all we know is that the verdicts are inconsistent."[89] If appellant's argument had merit, then the government could just as easily claim "that since the jury convicted on the compound offense the evidence on the predicate offense must have

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[84] *Id.* at 394. Military law is consistent with this premise. *See* Rule for Courts-Martial 1007(c) and Military Rule of Evidence 606(b).
[85] 469 U.S. 57, 59-60 (1984).
[86] *Id.* at 60.
[87] *Id.* at 64-69.
[88] *Id.* at 68.
[89] *Id.*

been sufficient."[90] As *Powell* makes clear, such an argument from the government would be equally erroneous.[91]

Although *Dunn* and *Powell*, standing alone, are sufficient to extinguish appellant's argument, it is worth noting that this Court has adopted the Supreme Court's precedent with respect to inconsistent verdicts. For example, in *United States v. Jackson*, the appellant was acquitted of drawing a knife against his superior officer but convicted of willfully disobeying the same officer.[92] Before this Court, the appellant argued that his conviction for willful disobedience should be set aside due to inconsistency.[93] The appellant argued that he "ceased running either out of a desire to assault Lieutenant Larkin, or because he recognized the tenor and source of the order and intended to comply."[94] Because the panel acquitted him of assault, the appellant argued, the only remaining possibility was that he stopped running because he intended to comply with the lieutenant's order; therefore, his conviction for willful

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[90] *Powell*, 469 U.S. at 68.
[91] *Id.*
[92] 7 U.S.C.M.A. 67, __, 21 C.M.R. 193, 197 (1956). In *Jackson*, the appellant claimed he had recently been assaulted and ran toward a barracks room with a knife in his hand while threatening to kill the person who assaulted him. The appellant's executive officer ordered him to stop running and put down the knife. After a short distance, the appellant stopped running, turned around, and swing at the officer with the knife.
[93] *Id.*
[94] *Id.*

disobedience could not stand.[95]

This Court rejected appellant's argument and, applying *Dunn*, held that the inconsistent verdict did not entitle appellant to relief.[96] This Court explained that

> [u]nder the facts shown in this record, the court-martial could well have found the accused guilty on all specifications. Because the court preferred to free him on one specification alleging a more serious offense does not also mean it found that one particular element of a less aggravated offense was not also established. Perhaps the court-martial preferred not to return a finding of guilt on an offense which traditionally has been regarded as a most heinous military crime. It is an acknowledged fact that verdicts are sometimes founded on leniency, compromise, or mistake, and if the accused is the beneficiary of compassion or error, he is not in a position to complain.[97]

This Court has applied or cited with approval the same reasoning in additional cases.[98]

Dunn, *Powell*, *Jackson*, and their progenies could not be more clear. An inconsistent verdict, standing alone, is not a basis for relief. Therefore, appellant is not entitled to reversal of his conviction for stalking simply because the panel acquitted him of rape.

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[95] *Id.*
[96] *Id.* (citing *Dunn v. United States*, 284 U.S. 390, 393 (1932)).
[97] *Jackson*, 7 U.S.C.M.A. at __, 21 C.M.R. at 197-98.
[98] *United States v. Stewart*, 71 M.J. 38, 43 n.8 (C.A.A.F. 2012); *United States v. Watson*, 31 M.J. 49, 53 (C.M.A. 1990); *United States v. Wilson*, 13 M.J. 247, 251 n.4 (C.M.A. 1982).

B. Legal sufficiency review is conducted independently of a panel's acquittal

Another component of appellant's argument is that because the panel acquitted him of rape, this Court is precluded from considering any evidence of rape in its review of the stalking conviction. Again, such a claim ignores contrary Supreme Court precedent.

In a case with inconsistent verdicts, a court's legal sufficiency review is conducted independently of the panel's "determination that evidence on another count was insufficient."[99] As the Court wrote in *Powell*, legal sufficiency review "should not be confused with the problems caused by inconsistent verdicts. Sufficiency of the evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilty beyond a reasonable doubt."[100]

Stated otherwise, when an appellate court is conducting a *legal* sufficiency review in a case with an inconsistent verdict, that court may consider evidence relating to the offense of which the appellant was acquitted. As the *Powell* Court pointed out, that is precisely what happened in *Dunn*:

> In *Dunn*, the defendant was acquitted of unlawful possession, and unlawful sale, of

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[99] *Powell*, 469 U.S. 67.
[100] *Id.*

> liquor, but was convicted of maintaining a nuisance by keeping unlawful liquor for sale at a specified place. The same evidence was adduced for all three counts, and Justice Butler's dissent persuasively points out that the jury could not have convicted on the nuisance count without finding that the defendant possessed, or sold, intoxicating liquor.[101]

Even though the panel acquitted appellant of rape, this Court should, in accordance with *Powell*, disregard the panel's acquittal in conducting its legal sufficiency review and may, for purposes of the stalking conviction, find that the rape occurred despite the acquittal.[102]

C. The evidence is legally sufficient to sustain appellant's conviction for stalking

Because appellant is not entitled to relief on the basis of an inconsistent verdict, his only recourse for relief is through a standard legal sufficiency review that is based on *all* of the evidence adduced at trial. Based on that evidence, a reasonable factfinder drawing all reasonable inferences in the government's

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[101] *Id.* at 67-68 (citing *Dunn*, 284 U.S. at 398).

[102] Appellant's reliance on *United States v. Kirkpatrick*, ARMY 20100716, 2013 WL 395616 (Army Ct. Crim. App. 31 Jan. 2013) (mem. op.), is misplaced in light of *Powell*'s reasoning. While *Kirkpatrick* also involved an appellant who was acquitted of rape but convicted of stalking, (JA-372), the similarities end there. *Kirkpatrick*'s conviction for stalking was reversed due to *factual* insufficiency not legal insufficiency. (JA-373). In fact, *Kirkpatrick* does not even include a legal sufficiency analysis. As this Court only has jurisdiction to review the legal sufficiency of a conviction, *Kirkpatrick* is of no relevance to the granted issue.

favor could have found each element of stalking beyond a reasonable doubt.

1. Elements of stalking

Stalking consists, in relevant part, of the following elements:

> (1) That the accused wrongfully engaged in a course of conduct directed at a specific person that would cause a reasonable person to fear death or bodily harm to herself;
>
> (2) That the accused had knowledge, or should have had knowledge, that the specific person would be placed in reasonable fear of death or bodily harm to herself; and
>
> (3) That the accused's acts induced reasonable fear in the specific person of death or bodily harm to herself.[103]

"Course of conduct" means (a) "a repeated maintenance of visual or physical proximity to a specific person" or (b) "a repeated conveyance of verbal threat, written threats, or threats implied by conduct, or a combination of such threats, directed at or towards a specific person."[104] While neither the text of Article 120a, UCMJ, nor the *Manual for Courts-Martial* defines "threat," the Military Judges' Benchbook (in accordance with which the members were instructed) defines a threat as "a communication, by words or conduct, of a present determination

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[103] *Manual for Courts-Martial, United States* (2008 ed.) [hereinafter *MCM*], pt. IV, ¶ 45a.b.
[104] *Id.* at ¶ 45a.a(b)(1).

or intent to physically harm the alleged victim or a member of her immediate family, presently or in the future."[105] "Proof that [an] accused actually intended to physically harm the alleged victim [or] actually intended to induce the requisite fear in the alleged victim is not required."[106] "Repeated" means "two or more occasions of such conduct."[107] Finally, "bodily harm" means "any offensive touching of another, however slight."[108]

2. Sufficiency of the evidence

The evidence is legally sufficient to establish each element of stalking and, therefore, to sustain appellant's conviction. Appellant only contests two issues here. First, he argues that he did not engage in a "course of conduct."[109] Second, he argues that appellant did not know, nor should he have known, that his actions would have placed AM in reasonable fear of death or bodily harm.[110]

The evidence is sufficient to prove both of the contested elements. First, appellant raped AM. AM's testimony

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[105] Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook [hereinafter Benchbook], para. 3-45A-1.d (1 Jan. 2010).
[106] *Id.*
[107] *Id.* at ¶ 45a.a(b)(2).
[108] *Id.* at ¶¶ 45a.c; 54.c(1)(a).
[109] Appellant's Br. 10.
[110] Appellant's Br. 13-14.

establishes that fact, and Mrs. Gutierrez supports AM's testimony by agreeing, in effect, that appellant was at AM's apartment for a period of time longer than necessary to drop off packages.[111] While the panel acquitted appellant of the rape offense, it is still relevant evidence with respect to stalking, and this Court should consider it in accordance with *Dunn* and *Powell*.

After raping AM, appellant said to her, "I'll call you."[112] He then stayed true to his word, repeatedly calling and sending text messages to AM.[113] He also returned to AM's apartment building twice after the rape.[114] Each time, appellant rang the doorbell continuously while continuing to call and text AM.[115] The second time, appellant also repeatedly kicked AM's front door so loudly that SSgt Rosas could hear it over the phone.[116] After AM opened her door to the military police, appellant lunged at AM, saying "let me in," and had to be restrained by a military policeman.[117] Despite being restrained and in the presence of two military policemen, appellant then blew kisses

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[111] JA-116.
[112] JA-116, 119.
[113] JA-119.
[114] JA-112, 123, 121.
[115] JA-123, 131.
[116] SJA 5.
[117] SJA 12.

at her and licked his lips in a sexually suggestive manner.[118] Appellant even continued to call AM repeatedly while AM was being interviewed at the military police station.[119]

Appellant correctly notes that no expressly threatening language was used during the calls or texts, and a review of the testimony and exhibits shows that the messages were to the effect of "I want to talk to you" and "please call me." While those messages may not, on their face, appear to be threatening, a proper review of all the evidence - not just the evidence appellant wants this Court to consider - in its proper context shows otherwise. Based on all the evidence adduced at trial, a reasonable factfinder, drawing all reasonable inferences in the government's favor, could have found beyond a reasonable doubt that appellant's conduct was repeated and impliedly threatening. Likewise, a reasonable factfinder could also have found beyond a reasonable doubt that appellant did know or should have known that his conduct would place AM in reasonable fear of bodily harm or death.

Because the evidence is legally sufficient to sustain appellant's conviction for stalking, appellant is not entitled to relief on the granted issue.

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[118] SJA 12.
[119] JA-134-15; SJA 14.

Conclusion

Appellant is not entitled to relief. Appellant asks this Court to consider those messages and calls in a vacuum by disregarding the rape. However, *Dunn* and *Powell* provide that this Court's legal sufficiency review is conducted independently of the panel's acquittal, and the proper scope of review includes considering the evidence of rape. Such an independent review establishes that the evidence is legally sufficient to sustain appellant's conviction for stalking. Accordingly, the Government requests that this Court affirm the Army Court and approve the findings and sentence in this case.

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December 20, 2013

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