IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Alvin VALENCIA Lance Corporal (E-3) U.S. Marine Corps, Appellant	REPLY ON BEHALF OF APPELLANT Crim. App. Dkt. No. 202300240 USCA Dkt. No. 25-0089/MC

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REPLY

A. The Government's interpretation of "deficiency of proof" is inconsistent with the statute's plain language.

The Government's interpretation of "deficiency of proof" departs from the statute's plain language. Both parties agree that an appellant must make a showing of a "specific deficiency of proof."[1] Likewise, both parties agree "deficiency" means a "lack, shortage, or insufficiency."[2] However, the Government then departs from the plain language of the statute and uses the word "defect" interchangeably with the word "deficiency" to claim the statute requires a "defect in the evidence."[3] This is incorrect.

Black's Law Dictionary defines "defect" as "an imperfection or shortcoming, especially in a part that is essential to the operation or safety of a product."[4] This goes further than the word "deficiency," which is merely a "shortage" or "insufficiency."[5] While these two words are similar, there is an important distinction between them. A "defect" implies there is a problem or error whereas "deficiency" refers to an insufficiency or shortage as to quantity. Congress' use of the later is

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[1] Appellee Ans. at 14.
[2] *Deficiency*, BLACK'S LAW DICTIONARY (11th ed. 2019); Appellee Ans. at 14.
[3] Appellee Ans. at 14.
[4] *Defect*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[5] *See Deficiency*, BLACK'S LAW DICTIONARY (11th ed. 2019).

consistent with the service courts' obligation to "conduct a new weighing of the evidence" under the reasonable doubt standard, which may result in weighing "the evidence differently from how the court-martial weighed the evidence."[6]

This distinction—deficiency versus defect—goes to the heart of the problem with the Government's and lower court's interpretation of the phrase "deficiency of proof." Appellant does not need to identify a "defect" in the evidence, such as inconsistent witness testimony or contradictory evidence. Indeed, these evidentiary problems may not exist in a factually insufficient conviction.[7] This Court is bound by the statute's text, not the Government's inflated version. Therefore, Appellant must merely show there was a "lack," "shortage," or "insufficiency" of proof, not any "defect" in the proof.

Using the proper word (deficiency rather than defect), Appellant contends that an appellant must "make an allegation that, due to [*an insufficiency*] in the evidence, at least one required element of the charged offense was not proven beyond a reasonable doubt."[8]

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[6] *United States v. Harvey*, 85 M.J. 127, 131-32 (C.A.A.F. 2004).
[7] *See United States v. London*, 2023 CCA LEXIS 193, at *14-18 (N-M Ct. Crim App. 2023); *See United States v. Sager*, 2018 CCA LEXIS 40, at *7 (N-M Ct. Crim. App. 2018); See *United States v. Hirst*, 2024 CCA LEXIS 372, at *14-15 (N-M Ct. Crim App. 2024).
[8] Appellee Ans. at 14.

The word "specific" modifies the entire phrase "deficiency of proof" so Appellant must be specific with his claim. Thus, Appellant must allege specifically, through argument, how the Government failed to meet its burden beyond a reasonable doubt triggering a review. The showing of insufficiency requires specific reference to the evidence in the case or lack thereof. Appellant agrees that the triggering requirement is not met by generally identifying an element or elements and stating that the Government failed to meet its burden. He must be more specific than that. But he need not point to a singular fatal flaw (or *defect* as the Government alleges) to meet this requirement. To trigger factual sufficiency review, an appellate needs to request factual sufficiency review through a specific assignment of error, state the element he/she believes the Government did not prove beyond a reasonable doubt, then explain specifically how the Government did not meet that burden.[9]

Looking to the factual sufficiency test itself helps illustrate why identifying a "defect" is unnecessary. Once the triggering requirement is met and the court

[9] Initially, the lower court's opinion is consistent with this. *Valencia*, slip. op. at 9 (J.A. at 9). But it went on to require more. It rejected Appellant's implicit argument that it should weigh the evidence differently than the members did on grounds that Appellant did not show a "substantive conflict [in the testimony] in major respects," and that nothing required it to "resolve a credibility dispute as to what was said, or to otherwise resolve materially inconsistent evidence or conflicting testimony," none of which the statue requires to trigger "a new weighing of the evidence." *Valencia*, slip. op. at 10 (J.A. at 10); *Harvey*, 85 M.J. at 131.

conducts its factual sufficiency analysis, it conducts a "new weighing of the evidence" that may differ from how the court-martial weighed the evidence.[10] Accordingly, an appellant could prevail on a factual sufficiency analysis by arguing the court should weigh the evidence differently than the members did—and explaining how it should weigh it—as Appellant did here.

To further illustrate why identifying a "defect" is unnecessary, consider an example where the Government tries an appellant for a crime based on the testimony of a single eyewitness. In such a case, there may not be conflicting testimony, major inconsistencies, or other defects. However, there may still be a deficiency in proof because the Government did not present sufficient evidence or credible evidence to establish each element beyond a reasonable doubt. Appellant would make a showing of a "specific deficiency of proof" by arguing why the single eye-witness testimony did not satisfy a particular element or more than one element. To require a "defect" such as a major incontinency in testimony, as the lower court suggests, would deprive a class of appellants of the chance for factual sufficiency review, even where the evidence is insufficient. This is inconsistent with the plain meaning of the statute and not a workable standard.

[10] *Harvey*, 85 M.J. at 131.

Concerningly, the Government's interpretation undermines the point of factual sufficiency review, which this Court has identified as a "unique safeguard" for our system of justice.[11] According to the Government, " . . . even if there were inconsistencies in the testimony, these inconsistencies were already considered and resolved by the factfinder."[12] But this ignores that "appellants in the military justice system are also entitled to factual sufficiency review on appeal, ensuring [the factfinders] are subject to oversight."[13] And it requires them to do a "new weighing of the evidence" in doing so.[14] The Government's interpretation attempts to render factual sufficiency review a meaningless legal fiction.

B. Legal and factual sufficiency review are separate analyses and are both available to appellants.

The Government's reading of Article 66 would effectively bar an appellant from making both legal and factual sufficiency assignments of error. In many cases, an appellant challenges a conviction on both legal and factual sufficiency grounds. In some cases, the arguments are similar. However, legal and factual sufficiency review involve distinct legal tests and the existence of one argument does not negate the availability of the other.

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[11] *United States v. Anderson*, 83 M.J. 291, 299 (C.A.A.F. 2023).
[12] Appellee Ans. at 21.
[13] *Anderson*, 83 M.J. at 299.
[14] *Harvey*, 85 M.J. at 131.

The Government essentially argues that if an appellant raises legal and factual sufficiency errors, and the arguments are not sufficiently different, an appellant cannot meet the triggering requirement for factual sufficiency review.[15] This analysis is incorrect in law and has no support in the statute. Under Article 66, legal sufficiency review is *always* required as "the Court may affirm only such findings of guilt as the Court finds correct in law . . . ."[16] To conduct this analysis, the court views "the evidence in the light most favorable to the Prosecution . . ." to determine whether the Government's evidence is capable of satisfying the elements of the offense.[17] Factual sufficiency review, by contrast, is generally a sliding-scale de novo review (with appropriate deference to the factfinder) where the court "conduct[s] a new weighing of the evidence" to determine whether the Government in fact satisfied the elements beyond a reasonable doubt.[18] As such, Congress explicitly allows appellants to raise both errors.[19]

An Appellant can argue the conviction is legally insufficient because (in the light most favorable to the Prosecution) the government's evidence cannot satisfy a particular element, while simultaneously arguing that (in a neutral light) the

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[15] Appellee Ans. at 19.
[16] 10 U.S.C. § 866(d)(1)(A) (effective Jan. 1, 2021).
[17] *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).
[18] *Harvey*, 85 M.J. at 131.
[19] *Id.*

Government's evidence did not satisfy a particular element beyond a reasonable doubt.

Appellant's case illustrates this point. Appellant argues that his conviction is legally insufficient because the Government failed to establish that anything Appellant did was objectively disrespectful in deportment. For the legal sufficiency analysis, the court is required to view the evidence in the light most favorable to the prosecution.[20] In doing so, it found the conviction was legally sufficient.[21] However, when viewing the evidence in a neutral light, it is entirely possible the court could find that the Government failed to prove disrespect beyond a reasonable doubt as Appellant argued this Court should do in weighing the evidence anew. These are distinct arguments with distinct standards of review. As a result, one does not negate the other. Just because an appellant's legal sufficiency argument fails (when viewed in the light most favorable to the prosecution) does not mean there is not a deficiency in the Government's evidence (when viewed in a neutral light).

C. The service courts of appeals do not have discretion to review assignments of error.

The Government argues that the service appellate courts' obligation to review factual sufficiency issues is now analogous to this Court's discretionary review

[20] *Valencia*, slip. op. at 6-7 (J.A. at 6-7).
[21] *Id*.

under Article 67.[22] This argument is without merit. The service appellate courts' jurisdiction, as established under Article 66, extends to all courts-martial that result in a conviction.[23] And their obligation to review factual sufficiency issues is mandatory where the triggering requirement is met: the appellant 1) makes a request for factual sufficiency review, and 2), makes a showing of a specific deficiency of proof (beyond a reasonable doubt).[24] This Court, by contrast, has the discretion to grant review of cases "for good cause shown."[25]

Appellant agrees that the change to Article 66 means the service courts no longer automatically review cases for factual sufficiency. However, the addition of a triggering mechanism for factual sufficiency review is not analogous to this Court's discretionary review under Article 67.

D. Appellant met his burden to trigger factual sufficiency review.

Appellant triggered factual sufficiency review in his brief to the lower court. The Government concedes that Appellant specifically requested and named the

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[22] Appellee's Ans. at 15.
[23] 10 U.S.C. § 866(b) (effective Jan. 1, 2021).
[24] 10 U.S.C. § 866(d)(1)(A) (effective Jan. 1, 2021) ("The Court *may affirm only* such findings of guilty as the Court finds correct in law, and *in fact* in accordance with subparagraph (B).") (emphasis added); 10 U.S.C. § 866(d)(1)(B) (effective Jan. 1, 2021).
[25] 10 U.S.C. § 867(a)(3) (effective Jan. 1, 2021).

element that was not met beyond a reasonable doubt.[26] Appellant specifically identified the lack of evidence (deficiency) in the record that failed to prove Appellant's words or actions (or lack thereof) and explained why the evidence failed to meet the objective standard of disrespect beyond a reasonable doubt.[27] As such, Appellant triggered a factual sufficiency review analysis.

Moreover, Appellant's factual sufficiency argument is not a restatement of its legal sufficiency argument. It was a request for the lower court to weigh the evidence differently than the court-martial. But even if it were, these are two distinct tests that do not negate each other. While in some cases appellants raise these issues in a single assignment of error, here, Appellant separated the assignment of errors and made distinct arguments.[28] Specifically, his factual sufficiency argument is a progression

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[26] Appellee Ans. at 20.

[27] J.A. at 027-30. Appellant argued his refusal to be escorted by Cpl Alpha was not disrespectful in deportment to Cpl Victor where Cpl Alpha interrupted the counseling of Appellant and yelled and spit at Appellant. He further argued the court should not consider the government's witness's subjective opinions in weighing the evidence. J.A. at 018. Rather than concluding Appellant's argument identified a deficiency that triggered factual sufficiency review (leading to a "new weighing of the evidence"), the lower court characterized it as a disagreement with the verdict, which it concluded did not trigger factual sufficiency review. *Valencia*, slip. op. at 10 (J.A. at 10). The court did not explain how a "disagreement with the verdict" supported by argument as to how the evidence should be properly weighed fell short of meeting the triggering requirement. Though the court did go on to impose additional requirements not found in the statute to meet the triggering requirement. *Supra*, n.9.

[28] J.A. at 013.

from his first two assignments of errors (failure to state an offense and legal insufficiency). It assumes in arguendo that the court finds that charging language is permitted and deportment can be language. The overall theme of his factual sufficiency assignment of error is that the Government did not prove disrespect as Appellant's words and actions did not rise to the level of disrespect under the circumstances of this case.[29] Appellant met the triggering threshold. The lower court should have conducted a factual sufficiency analysis, weighed the evidence anew, and decided whether "the evidence, as the CCA has weighed it, does not prove that the appellant is guilty beyond a reasonable doubt."[30]

The lower court erred in failing to do so.

[29] J.A. at 030.
[30] *Harvey*, 85 M.J. at 131.

CONCLUSION

Appellant respectfully asks this Court to reverse the NMCCA's decision and remand the case for factual sufficiency analysis under parts (ii) and (iii) of Article 66(d)(1)(B).

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and delivered to the Director, Appellate Government Division (Code 46), at DACCode46@navy.mil and to the Deputy Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity (Code 40), at Joshua.D.Ricafrente.civ@us.navy.mil on June 27, 2025.

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