IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

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UNITED STATES CIRCUIT COURTS OF APPEALS CASES

STATUTES

Issue Presented

WHETHER THE LOWER COURT ERRED WHEN IT CONCLUDED APPELLANT'S CLAIM OF FACTUAL INSUFFICIENCY DID NOT TRIGGER A FACTUAL SUFFICIENCY REVIEW UNDER ARTICLE 66, UCMJ.

Statement of Statutory Jurisdiction

The Entry of Judgment includes a finding of guilty. The lower court had jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2022). This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2021).

Statement of the Case

A military judge sitting as a general court-martial convicted Appellant, contrary to his pleas, of disrespect toward a noncommissioned officer, in violation of Article 91, UCMJ, 10 U.S.C. § 891. The Military Judge sentenced Appellant to no punishment. The Convening Authority approved the sentence, and the Military Judge entered the judgment into the Record.

Statement of Facts

A. The United States charged Appellant with unauthorized absence, disrespect toward a noncommissioned officer, and assault consummated by battery.

The United States referred charges against Appellant, including unauthorized absence, disrespect toward a noncommissioned officer, and assault consummated by a battery. (J.A. 77.)

Charge I accused Appellant of being "disrespectful in deportment to [then-Corporal Vinson], a noncommissioned officer, then known by the said to be a superior noncommissioned officer, who as then in the execution of her office, by saying to her, ['']I will have an NCO escort, but it will not be Antonio; Antonio will not be the one who supervises me,' or words to that effect.['']" (J.A. 77.)

B. The United States presented evidence against Appellant.

1. Corporal Antonio testified that he supervised Appellant and witnessed Appellant refuse corrective action when being counseled by Sergeant Vinson.

Corporal Antonio testified that he supervised Appellant beginning in February 2023. (J.A. 89–90.) He was in charge of tracking Appellant's whereabouts. (J.A. 89.) Appellant was required to check in before leaving for chow. (J.A. 90.) He failed to do so. (J.A. 90.) Because Appellant had not checked in, Corporal Antonio tried to contact Appellant. (J.A. 90.) Appellant did

not answer his phone several times, forwarded his calls, responded to one message, then stopped all communication with Corporal Antonio. (J.A. 90.)

The United States offered, and the Military Judge admitted, Appellant's text messages with Corporal Antonio. (J.A. 94–95, 205.)

After chow, Corporal Antonio saw Sergeant Vinson counseling Appellant. (J.A. 95–96.) Sergeant Vinson told Appellant that "it's unacceptable to ignore an NCO that's been put in charge of you, like it's not right." (J.A. 96.) Corporal Antonio further testified, "[a]nd then at that moment, [Appellant] told [Sergeant Vinson] with me standing right there that Antonio will not be the one supervising me." (J.A. 96.) Corporal Antonio said that he told Appellant "he doesn't have any choice in the matter who gets to supervise him because he's lost all sense of trust and responsibility he's had." (J.A. 96.)

Cross-examining Corporal Antonio, Trial Defense Counsel asked if Appellant was sitting down while being counseled by Sergeant Vinson. (J.A. 100.) Counsel asked whether Corporal Antonio heard Appellant refuse to be escorted by Corporal Antonio. (J.A. 101–02.) Counsel asked no other questions about Appellant's disrespect.

Trial Defense Counsel, however, asked at length about surrounding circumstances: whether Corporal Antonio entered the room and yelled at

Appellant, how far Corporal Antonio was from Appellant, and about the details of Appellant's alleged unauthorized absence. (J.A. 102–07.)

Sergeant Antonio said that it was not "fuzzy in [Appellant's] mind" who Appellant's supervisor was. (J.A. 111.)

2. Appellant's platoon sergeant, Sergeant Vinson, testified that Appellant interrupted her while she was counseling him, refused Corporal Antonio as his escort, demanded "an NCO of [his] choosing," and referred to Corporal Antonio only by his last name, not his rank.

Sergeant Vinson testified that she was Appellant's platoon sergeant. (J.A. 114–15.) She took over as platoon sergeant while she was a corporal and was promoted to sergeant in February. (J.A. 114.) She is referred to as "Cpl A.V." in the Charge Sheet. (J.A. 77.)

Sergeant Vinson was Appellant's superior noncommissioned officer, and Appellant knew this because Sergeant Vinson had told him she was his unit's platoon sergeant. (J.A. 124–25.) When Sergeant Vinson counseled Appellant on February 1, 2023, she was doing so as part of her official duties. (J.A. 133.)

Appellant blocked Sergeant Vinson's number, so to reach Appellant, Sergeant Vinson needed the help of Corporal Antonio. (J.A. 120–21.) When Sergeant Vinson reached Appellant through Corporal Antonio's phone, she asked Appellant where he was. (J.A. 121–22.) Appellant got "verbally upset," said "he

wasn't a prison inmate" and "wasn't going to be treated like that," "then he just hung up the phone." (J.A. 122.)

When Appellant returned from chow, Sergeant Vinson called Appellant to her office to counsel him. (J.A. 122–23.) Corporal Antonio, Sergeant Wilson, another sergeant, and Lance Corporal Davies were also present. (J.A. 123.) Appellant sat down and remained seated. (J.A. 133–34.)

Sergeant Vinson explained why she was counseling him, and Appellant was "unfazed" because he had been counseled before. (J.A. 123–24.) She told Appellant he would have a noncommissioned officer escort, Corporal Antonio. (J.A. 129.)

Appellant "stopped [Sergeant Vinson] right there" and said "no . . . we're not doing that . . . I will not have a babysitter . . . I will not have anything like that." (J.A. 129.) Sergeant Vinson explained that "well, this is what me and the staff came up with . . . This is . . . what we're going to do." (J.A. 129–30.) Sergeant Vinson and her staff picked Corporal Antonio because they agreed he was responsible, trusted he could get the escort job done, and believed he was the best noncommissioned officer for the job. (J.A. 138–39, 148.)

Appellant said "no . . . if I have to have an NCO escort . . . it's going to be an NCO of my choosing." (J.A. 130.) Appellant interrupted Sergeant Vinson in

the middle of the counseling. (J.A. 130.) Sergeant Vinson testified Appellant did not ask for a different escort—he demanded it. (J.A. 130–31.)

When Appellant talked back to Sergeant Vinson, Corporal Antonio intervened and started yelling at Appellant. (J.A. 142.) But Appellant "just didn't care." (J.A. 144–45.)

Sergeant Vinson believed: (a) "basic military respect is to call somebody by their rank"; (b) "If you're standing up, you're at parade rest"; (c) "if you're speaking to somebody, you wait until they finish what they're saying"; and (d) "if you have a rebuttal for it, you say it tactfully." (J.A. 130.) Sergeant Vinson found Appellant's behavior disrespectful because Appellant "did none of those." (J.A. 130.)

C. Appellant presented a case in his defense.

1. Sergeant Wilson observed Appellant's counseling.

Sergeant Wilson testified he was across the room and within "eyesight" of Sergeant Vinson counseling Appellant. (J.A. 162–63.)

Appellant "said something to the effect of he did not want Corporal Antonio to be the one who was going to be supervising him, so he said he would have anyone else, but not Corporal Antonio." (J.A. 164.)

Corporal Antonio interjected saying something like, "You don't have a choice in this matter. We picked it because you weren't able to do the right thing,

be where you were supposed to be." (J.A. 164.) His voice was "raised . . . a little bit because he was irritated," but he was not "yelling." (J.A. 164.)

2. The United States offered, and the Military Judge admitted, Appellant's prior counseling.

The United States offered, and the Military Judge admitted, Appellant's prior counseling "for the limited purpose of establishing that, at least in Sergeant Vinson's mind, when she gave him this counseling, he had a responsibility to check in before and after chow and before leaving work with Corporal Antonio and to be escorted by Corporal Antonio during work hours." (J.A. 174–75, 206.)

3. Lance Corporal Davies testified Corporal Antonio yelled at Appellant.

Lance Corporal Davies testified he was about fifteen feet from Sergeant Vinson counseling Appellant and had an unobstructed view. (J.A. 177.) Lance Corporal Davies was otherwise occupied and only focused on them when "all the drama started happening." (J.A. 181.)

Initially, Corporal Antonio was not present, and when he came in, he "started screaming at" Appellant. (J.A. 177.) Lance Corporal Davies testified that he did not see Appellant yell. (J.A. 178.)

D. The Military Judge found Appellant guilty of Charge II and sentenced him to no punishment.

The Military Judge found Appellant guilty of Charge II and not guilty of Charges I and III. (J.A. 202.) The Military Judge sentenced Appellant to no punishment. (J.A. 204.)

E. Appellant sought factual sufficiency review at the Navy-Marine Corps Court of Criminal Appeals.

Before the Navy-Marine Corps Court of Criminal Appeals, Appellant noted, "For factual sufficiency review, once an appellant identifies a specific deficiency of proof, this Court must weigh the evidence . . ." (J.A. 27–28.) Appellant then argued that the evidence did not meet the legal definition of disrespect. (J.A. 28–29.) He ended by arguing, "The Government failed to introduce evidence sufficient to satisfy its burden that any action by [Appellant]—even interrupting her—actually disrespected Corporal V[inson]." (J.A. 30.)

Appellant also raised failure to state an offense and legal sufficiency as assignments of error. (J.A. 20–27.)

F. The lower court found Appellant failed to "ma[k]e a specific showing of a deficiency of proof," and declined to perform factual sufficiency review.

The lower court noted that Appellant's brief did "not explicitly state that what he asserts is a specific showing of a deficiency in proof" other than his arguments that: "(1) as a matter of law, language and deportment are mutually

exclusive and cannot overlap; and (2) the Government failed to prove any deportment." (J.A. 9–10.) The lower court noted that Appellant "simply contends generally that '[t]he government failed to introduce evidence to satisfy its burden that any action by [Appellant]—even interrupting her—actually disrespected Corporal V[inson]." (J.A. 10.)

The court found "[t]he testimony did not substantively conflict in major respects. The words used by both Corporal V[inson] and Appellant during the counselling were not in dispute." (J.A. 10.) Accordingly, the court held "Appellant has not made a specific showing of a deficiency in proof to trigger full factual sufficiency review under Article 66, UCMJ." (J.A. 10.)

The court rejected Appellant's failure to state an offense and legal sufficiency claims. (J.A. 4–7.)

Summary of Argument

Recent amendments to Article 66 placed the burden on an appellant to raise an error of factual sufficiency. To trigger factual sufficiency review under Article 66, an appellant must: (1) request factual sufficiency review; and (2) make a "specific showing of a deficiency in proof." If an appellant does so, the court may consider if the finding is correct in fact. The plain language of the second prong requires appellant's allegation undermine at least one element of at least one guilty finding.

Here, the lower court correctly found that Appellant made only a general assertion that the evidence was insufficient; even though Appellant attacked witness testimony, the specific words he used were not in dispute and the testimony was substantially consistent. Such a general argument falls short of the specific showing required to trigger factual sufficiency review.

Argument

APPELLANT FAILED TO MAKE A "SPECIFIC SHOWING OF A DEFICIENCY OF PROOF." THE LOWER COURT CORRECTLY DECLINED TO PROCEED TO WEIGHING 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 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)). "[I]f the statutory language is unambiguous, and the statutory scheme is coherent and consistent," the inquiry is done. *Id.* "Whether the statutory language is ambiguous 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.'" *Id.* (quoting *Robinson v. Shell Oil Co*., 519 U.S. 337, 341, (1997). Thus, 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).

Appellate courts "typically seek[ ] to harmonize independent provisions of a statute." *United States v. Kelly*, 77 M.J. 404, 407 (C.A.A.F. 2018) (quoting *United States v. Christian*, 63 M.J. 205, 208 (C.A.A.F. 2006)). To this end, appellate courts employ the surplusage canon, which requires "that, if possible, every word and every provision is to be given effect and that no word should be ignored or needlessly be given an interpretation that causes it to duplicate another provision or to have no consequences." *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017).

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.").

C. The amended Article 66 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 prior version of Article 66 permitted Courts of Criminal Appeals to "affirm only such findings of guilty . . .as it finds correct in law and fact and determines, on the basis of the entire record, should be approved," without any requirement for an appellant to raise error. Art. 66(c), UCMJ (2016). Congress amended Article 66 after the Military Justice Review Group recommended "statutory standards" for appellate factual sufficiency review. Office of the General Counsel, Dep't of Defense, Report of the Military Justice Review Group Part I: UCMJ Recommendations (Report of the Military Justice Review Group), at 605; (J.A. 212.) The Military Justice Review Group identified that the recommended changes would retain Court of Criminal Appeals' "authority to weigh the evidence" and "determine controverted questions of fact," but would "channel the exercise of such authority through standards that are more deferential to the factfinder at trial." *Id*. at 1300; (J.A. 226.)

As amended, Article 66 now states that the Courts of Criminal Appeals "may consider whether the finding is correct in fact upon the request of the

accused if the accused makes a specific showing of a deficiency in proof." Art. 66(d)(1)(B)(i), UCMJ. Thus, the amended Article 66 removes from the courts the burden to conduct factual sufficiency review in each case and places on an appellant the burden to (1) request a factual sufficiency review and (2) make "a specific showing of a deficiency in proof." If an Appellant does so, the Court of Criminal Appeals "may consider whether the finding is correct in fact."

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

The Courts of Criminal Appeals are not authorized 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"). No factual sufficiency review is required when a case is submitted without any assignments of error. Art. 66(d)(1)(B)(i), UCMJ. *See*, *e.g.*, *United States v. Estradameza*, No. 202300241, 2024 CCA LEXIS 73 (N-M. Ct. Crim. App. Feb. 13, 2024).

Article 66 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).

2. The phrase "specific showing of a deficiency of proof" means an appellant must make an 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 an 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. An appellant must point to a "specific" deficiency, which Black's Law Dictionary defined as "[o]f, relating to, or designating a particular or defined thing. Black's Law Dictionary (11th ed. 2019) (J.A. 207–09). 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. 207–09); *see also* Art. 67(a)(3), 10 U.S.C. § 867(a)(3). Finally, "deficiency" is defined as "a lack, shortage, or insufficiency." Black's Law Dictionary (11th ed. 2019) (J.A. 207–09).

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 offense of which an appellant has been found guilty. 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).

This Court has not previously determined the meaning of "a specific showing of a deficiency in proof," however, since factual sufficiency review is now a personal right triggered by an appellant, parallel use of language and construction demonstrates Article 66 is 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)

Courts of Criminal Appeals have declined to conduct factual sufficiency review absent a specific showing by an appellant. For instance, in *United States v. Porterie*, No. 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 Air Force court found was not "a specific showing of a deficiency of proof." *Id.*

Similarly, 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 Navy-Marine Corps court limited its factual sufficiency review to only the aggravated assault conviction.

The *Ellard* 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.

Even when an appellant does assert specific error, an appellant must make a "showing" of deficiency of proof. In *United States v. Brassfield*, the Army Court of Criminal Appeals held that the appellant had asserted error, however "appellant's testimony and any minor inconsistencies in the victims' testimony" did not amount to a "specific deficiency of proof." *United States v. Brassfield*, 85 M.J. 523, 528 (A. Ct. Crim. App. Nov. 20 2024).

3. Appellant's argument renders the word "specific" superfluous; his reliance on New York state practice is misplaced.

Appellant's restatement of the requirement as an "expla[nation] why the Government's proof does not meet the required beyond-a-reasonable-doubt standard for at least one element" is generally accurate. (*See* Appellant Br. at 10–11.) However, Appellant's reliance on New York state practice as support for a minimal "specific showing" is misplaced because New York's triggering requirement is merely "upon request of the defendant" without any requirement for an appellant to posit anything "specific." (J.A. 217; *see* Appellant Br. at 11–12.) Accordingly, the "specific showing" requirement of Article 66 means that an appellant must do more than merely request factual sufficiency review, as in New York.

D. The Navy-Marine Corps Court of Criminal Appeals' interpretation of the "specific showing" requirement under Article 66(d)(1)(B) is correct: an appellant must "identify a weakness in the evidence" and "explain" why the evidence "contradicts a guilty finding."

The Navy-Marine Corps Court of Criminal Appeals 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." *United States v. Harvey*, 83 M.J. 685, 691 (N-M. Ct. Crim. App. 2023).

Although this Court remanded *Harvey* on other grounds, the Court of Criminal Appeal's interpretation is consistent 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 *Harvey* court distinguished factual and legal sufficiency standards and did not require an appellant show a "complete absence of evidence" as the "deficiency of proof." *Id.*

E. The lower court did not err: Appellant failed to make a "specific showing of a deficiency in proof."

Article 91 prohibits a "warrant officer or enlisted member . . . treat[ing] with contempt or [being] disrespectful in language or deportment toward a warrant

officer, noncommissioned officer, or petty officer, while that officer is in the execution of his office." Art. 91(1), UCMJ.

The elements of disrespecting a non-commissioned officer are:

(a) That the accused was a warrant officer or enlisted member;

(b) That the accused did or omitted certain acts, or used certain language;

(c) That such behavior or language was used toward and within sight or hearing of a certain warrant, noncommissioned, or petty officer;

(d) That the accused then knew that the person toward whom the behavior or language was directed was a warrant, noncommissioned, or petty officer;

(e) That the victim was then in the execution of office; and

(f) That under the circumstances the accused, by such behavior or language, treated with contempt or was disrespectful to said warrant, noncommissioned, or petty officer.

Manual for Courts-Martial, United States (MCM) pt. IV, para. 17.b.(3) (2019 ed.).

"Disrespect by acts includes . . . showing a marked distain, indifference, insolence, impertinence, undue familiarity, or other rudeness . . ." MCM pt. IV, paras. 17.c.(5), 15.c.(2)(b) (cross-referencing the definition of disrespect to that for Article 89).

The United States charged Appellant with being "disrespectful in deportment to [Corporal Vinson], a noncommissioned officer, then known by the said to be a superior noncommissioned officer, who was then in the execution of

her office, by saying to her, [‘]I will have an NCO escort, but it will not be Antonio; Antonio will not be the one who supervises me,’ or words to that effect.” (Charge Sheet at 1.)

1. Consistent with *Ellard*, the lower court correctly found that Appellant failed to specify a weakness in the evidence that undermines an element of the offense.

In *United States v. Ellard*, No. 202200051, 2023 CCA LEXIS 363 (N-M. Ct. Crim. App. Aug. 31, 2023), the court found the appellant merely reiterated his legal sufficiency argument by disputing legal definitions, without specifying “any deficiencies in the evidence,” and thus he made no “meaningful argument that there was a specific deficiency of proof.” *Id*. at *14.

Here, like *Ellard*, the lower court found that Appellant failed to identify and explain an alleged weakness in the evidence connected to an element of the offense. (Appellant Br. at 15–19); *Harvey*, 83 M.J. at 691; *Ellard*, 2023 CCA LEXIS 363, at *14. Instead, Appellant disagrees with the witness testimony on why Appellant’s deportment was objectively disrespectful and chooses to disbelieve the witnesses, including a defense witness, who all testified to Appellant’s behavior. (Appellant Br. at 15–19.) He does not suggest that any witnesses presented conflicting testimony, but rather complains that their perceptions do not matter. (R. 18–19.)

Thus, the lower court correctly found Appellant fails to make the predicate showing for a weight of the evidence review. *See* Art. 66(d)(1)(B)(i); (J.A. 10).

2. Appellant's arguments fail.

The United States agrees that Appellant requested factual sufficiency review. The United States also agrees that Appellant in substance, if not in form, identified the element of "disrespect" as what he was attacking, however, identifying an element is not the same as making a specific showing.

Contrary to Appellant's assertion, his arguments below did not constitute a specific showing of a deficiency in proof. First, Appellant's reliance on *United States v. Felton*, No. 20190214, 2020 CCA LEXIS 482 (A. Ct. Crim. App. Dec. 17, 2020), or any analogous cases was appropriate only for legal sufficiency analysis and not factual sufficiency analysis. (Appellant Br. at 14–15.) Unlike legal sufficiency, factual sufficiency is about the Court of Criminal Appeal's appraisal of the evidence only in the case at bar. *See, e.g.*, *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Insofar as Appellant asserted *Felton* for the proposition that the evidence did not meet the legal definition of disrespect, the lower court correctly and appropriately dispensed of this argument by finding his conviction legally sufficient and rejecting his failure-to-state-an-offense claim. (J.A. 4–7.)

Second, Appellant disagrees with the lower court's rejection of his argument as "nothing more than a disagreement with the factfinder's conclusion" fails. (*See* Appellant Br. at 15.) Appellant argues that this is incorrect because "[a]ll claims of factual insufficiency involve a disagreement with the factfinder's conclusion," and argues that the lower court impermissibly weighed the evidence at the triggering phase. (Appellant Br. at 15.) Appellant's argument fails because the "specific showing" requirement would be rendered meaningless, as mere "disagreement" would be sufficient to trigger factual sufficiency review.

Third, Appellant's argument that the lower court elevated the "specific showing" requirement by requiring a showing of a "substantial[] conflict" in testimony mischaracterizes the lower court's opinion. (*See* Appellant Br. at 16.) What the lower court held was that in the instant case, "[t]he testimony did not substantively conflict in major respects. The words used by both Corporal V[inson] and Appellant during the counseling were not in dispute." (J.A. 10.) In other words, because the testimony was consistent and undisputed, Appellant's assertion that "The Government failed to introduce evidence sufficient to satisfy its burden that any action by [Appellant]—even interrupting her—actually disrespected Corporal V[inson]" was plainly untrue. (*See* J.A. 30.) Additionally, even if there were inconsistencies in the testimony, these inconsistencies were already considered and resolved by the factfinder. Accordingly, Appellant failed

to make a "specific showing of a deficiency of proof" because his asserted deficiency was not present in the Record.

3. If Appellant made the predicate showing to enable weight of the evidence review, this Court should remand.

Should this Court find Appellant did make the requisite "specific showing," it should remand this case to the Navy-Marine Corps Court of Criminal Appeals to conduct factual sufficiency review.

Conclusion

The United States respectfully requests that this Court affirm the findings and sentence as adjudged and approved below.

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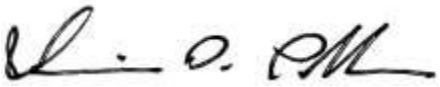

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I certify this document was emailed to the Court's filing address and emailed to Appellate Defense Counsel, Captain Colin P. NORTON, U.S. Marine Corps, on June 13, 2025.

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