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*	**SUPPLEMENT TO PETITION FOR GRANT OF REVIEW** Crim. App. Dkt. No. 202300240 USCA Dkt. No. 25-0089/MC

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

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Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals reviewed this case under Article 66(b)(1), Uniform Code of Military Justice (UCMJ).[1] Appellant invokes this Court's jurisdiction under Article 67(a)(3), UCMJ.

Statement of the Case

A special court-martial consisting of a military judge alone convicted Appellant, contrary to his pleas, of violating Article 91, UCMJ (disrespect in deportment toward a noncommissioned officer).[2] The military judge sentenced

[1] 10 U.S.C. § 866(b)(1) (2023).
[2] R. at 162.

Appellant to no punishment.[3] The military judge entered the findings and sentence into judgment.[4] On direct appeal, the lower court found no prejudicial error and affirmed the findings.[5]

Statement of Facts

Concerned that Appellant went off base for chow without authorization and was unsatisfied with his response about his whereabouts, Corporal (Cpl) Vinson ordered Appellant to report to her office for counseling.[6] He reported as ordered and sat in a chair opposite Cpl Vinson's desk, and she began to counsel him.[7] Cpl Vinson informed Appellant that since he had gone to lunch off base without permission, she was assigning Cpl Antonio to escort him if he had to go anywhere during working hours.[8] Appellant agreed to an escort, but objected to Cpl Antonio filling this role.[9]

Upon hearing this, Cpl Antonio, who was also present, launched into a diatribe.[10] He got into Appellant's face and yelled at him with spit flying onto

[3] R. at 192.
[4] Entry of Judgement.
[5] *United States v. Valencia*, __M.J. __, slip op. (N-M. Ct. Crim. App. 2024).
[6] R. at 58. At the time of her testimony, Cpl Vinson was a Sergeant. However, she was a Corporal at the time of the alleged offense. Charge Sheet.
[7] R. at 58-59.
[8] R. at 76.
[9] R. at 76-77.
[10] R. at 78, 137.

Appellant.[11] When Cpl Antonio finished berating Appellant and left the office, Cpl Vinson completed the counseling.[12]

The Government subsequently charged Appellant with disrespect in deportment (as opposed to language) toward Cpl Vinson under Article 91, UCMJ. In framing the charged specification, however, the Government only alleged that Appellant said certain words to her:

> In that [Appellant], at or near Marine Corps Air Station Cherry Point, on or about February 01, 2023, was disrespectful in *deportment* to Cpl Vinson, a noncommissioned officer, then known by said accused to be a superior noncommissioned officer, who was then in 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.[13]

At trial, based on this charging language, the Government announced during opening statements that the evidence would prove Appellant's "*language"* violated Article 91, UCMJ.[14] The Government then called Cpl Antonio, who testified that when Cpl Vinson was counseling Appellant that it was unacceptable to ignore an NCO who was put in charge of him, Appellant "told her with me standing right there that Antonio will not be the one supervising me."[15]

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[11] R. at 35, 80, 138.
[12] R. at 93.
[13] Charge Sheet (emphasis added).
[14] R. at 18 (emphasis added).
[15] R. at 32.

Cpl Vinson testified next. She testified that although Appellant accepted the fact that he would have an escort, he interrupted her to express his objection to assigning Cpl Antonio to that role, which she found disrespectful. She testified:

> So for junior Marines, unless you're being anything, like, immoral like that, the basic military respect is to call somebody by their rank. If you're standing up, you're at parade rest. Or if you're speaking to somebody, you wait until they finish what they're saying. And if you have a rebuttal for it, you say it tactfully. And [Appellant] did none of those.[16]

Cpl Vinson also testified that she believed Appellant was telling her, rather than asking her, that he would have a different escort.[17]

Following Cpl Vinson's testimony, the defense moved to dismiss Specification 1 for failure to state an offense under Rule for Courts-Martial (R.C.M.) 907, arguing the charging language did not allege any disrespectful act.[18] In responding to the motion, the Government conceded the language alleged in the specification was "not itself disrespectful" or contemptuous.[19] Instead, the Government now argued that it was Appellant's interruption of Cpl Vinson's counseling that was disrespectful and that there was "insolence . . . behind [his]

[16] R. at 77.
[17] R. at 77.
[18] R. at 96.
[19] R. at 100, 104.

words."[20] The military judge reserved the ruling on the defense motion until the close of the evidence.

In its case, the Defense called Sergeant (Sgt) Wilson, who was also present for the counseling. He testified that Appellant was seated for the counseling.[21] He remembered, "[Appellant] said something to the effect of he did not want Cpl Antonio to be the one who was going to be supervising him, so he said he would have anyone else, but not Cpl Antonio."[22]

The Defense then called LCpl Davies, the only witness not an NCO in Appellant's command.[23] He testified that during the counseling he was in the next room and could hear and see everything.[24] He saw Appellant remain seated while Cpl Antonio was screaming at him, and heard Appellant calmly ask Cpl Antonio multiple times to stop spitting on him.[25]

Prior to closing arguments, the military judge denied the R.C.M. 907 motion. He ruled that disrespect in deportment can be by speech and that the language alleged in the specification gave Appellant sufficient notice as to what he was to defend

[20] R. at 1104.
[21] R. at 89.
[22] R. at 109.
[23] R. at 136.
[24] R. at 137.
[25] R. at 137-38.

against.[26] He proceeded to find Appellant guilty of disrespect towards an NCO,[27] but sentenced him to no punishment.[28] He then recommended that the findings and sentence be set aside and that non-judicial punishment be imposed instead.[29]

Appellant raised three assignments of error regarding Specification 1 of the Charge to the lower court, including (1) failure to state an offense, (2) legal insufficiency, and (3) factual insufficiency. The lower court found no prejudicial error on the first two and declined to conduct a factual sufficiency review based on its view that Appellant's claim had not triggered one.[30]

Reasons to Grant Review

I.

THE LOWER COURT ERRED WHEN IT REFUSED TO CONDUCT A FACTUAL SUFFICIENCY REVIEW, PRESENTING AN ISSUE OF FIRST IMPRESSION FOR THIS COURT.

This Court should grant review of the factual sufficiency issue, which is an issue of first impression before the Court. Specifically, whether Appellant sufficiency triggered a factual sufficiency review under the amended Article 66 statute raises a question of law which has not been, but should be, settled by this

[26] R. at 148.
[27] R. at 162.
[28] R. at 192.
[29] Convening Authority Action at 2.
[30] *Valencia*, slip op. at 2.

Court.[31] In *United States v. Harvey,* this Court overruled the lower court in its analysis of the statutory changes to Article 66 as applied to factual sufficiency. In that case, however, because the parties agreed the appellant had met the conditions to trigger factual sufficiency review, this Court did not address the new triggering requirement.[32]

In the present case, the same judge who wrote the lower court's *Harvey* opinion now presents that issue squarely before this Court. The lower court held that despite Appellant's asserted claim of factually insufficiency, Appellant did not sufficiently articulate how the Government's proof failed to satisfy an element of the offense to trigger factual sufficiency review.[33] Thus, this case provides a perfect vehicle for this Court to analyze the triggering requirement in Article 66.

Factual sufficiency review is a critical safeguard in the military justice system.[34] As with its "presumption of guilt" interpretation of factual sufficiency review that was overruled in *Harvey*, the lower court's interpretation of the triggering requirement is equally erroneous, departs from the statutory language, and puts a burden on an appellant that swallows the safeguard itself. As such, this issue

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[31] C.A.A.F. Rule 21(b)(5)(A).
[32] *United States v. Harvey,* __ M.J.__, No. 23-0239, 2024 CAAF LEXIS 502, *5 (C.A.A.F. 2024).
[33] *Valencia*, slip op. at 9-10.
[34] *United States v. Anderson*, 2023 CAAF LEXIS 439, *18 (C.A.A.F. 2023); *United States v. Finch*, 64 M.J. 118, 129 (C.A.A.F. 2006); *United States v. Jenkins*, 60 M.J. 27, 29 (C.A.A.F. 2004).

calls out for this Court's attention. Guidance from this Court will provide clarity to the service courts, as well as practitioners, on what an appellant must do to trigger a factual sufficiency review under the amended statute.

A. The Lower Court's ruling inflates the triggering requirement.

Article 66 requires the service courts to conduct a factual sufficiency review when two conditions are met: (1) "upon request of the accused" and (2) "a specific showing of a deficiency of proof."[35] Since this statutory language is unambiguous, the plain meaning of the language should control.

In this case, however, the lower court departed from the plain meaning of the statute and inflated the triggering requirement. It held that "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."[36] But the requirement to "explain why, on balance, the evidence (or lack thereof) admitted at trial contradicts a guilty finding" is not contained in the triggering language of the statute. The lower court opinion also appears to require testimony that "substantively conflicts in a major respect," a "credibility dispute as to what was said," or "materially inconsistent evidence or conflicting testimony" to satisfy a "deficiency of proof."[37]

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[35] Art. 66, UCMJ, 10 U.S.C. §866 (2019).
[36] *Valencia*, slip op. at 9.
[37] *Id.* at 10.

These requirements grossly exaggerate the plain language of the statute and are reminiscent of the lower court's previous view in *Harvey* that erroneously construed the statute to create a "rebuttable presumption . . . that an appellant is, in fact, guilty."[38] Thus, the lower court is again creating a nearly insurmountable barrier to fair factual sufficiency review in cases where the government's case is weak. Should this new barrier be allowed to stand, the triggering mechanism for factual sufficiency review under a host of punitive articles would be next to impossible to meet where the testimony of a single government witness may support the charge and therefore lack substantive conflict in "major respects."[39]

As it did in *Harvey* for the review standard, this Court should again bring a reasonable, plain-meaning approach to the triggering requirement. Under a plain meaning analysis, the first prong of the triggering requirement, "upon request of the accused," is satisfied simply by an appellant asking for a factual sufficiency review.

Turning to the next prong, whether the appellant has made "a specific showing of a deficiency of proof" is similarly clear from its plain meaning. Black's Law Dictionary does not define the phrase "specific showing," but it does define the individual terms. It defines "specific" as "[o]f, relating to, or designating a particular and defined thing" and "showing" as "[t]he act or an instance of establishing through

[38] *Harvey,* 2024 CAAF LEXIS 502, at *12.
[39] *Valencia*, slip op. at 10.

evidence and argument; proof."[40] And it defines "deficiency" as "a lack, shortage, or insufficiency of something that is necessary."[41]

Thus, "a specific showing of deficiency in proof" does not require claiming a complete lack of evidence, but rather establishing that the Government's proof does not meet the required beyond-a-reasonable-doubt standard for at least one element of the offense. Critically, there is no modifier on "showing" beyond the requirement for a "showing" to be "specific."[42] Thus, there is no heightened threshold to satisfy this triggering requirement beyond simply identifying any specific deficiencies in the Government's case "through evidence and argument."[43]

In other words, an appellant simply needs to identify what element (or elements) he/she contends is deficient and argue how he/she believes the evidence is deficient to prove guilt beyond a reasonable doubt. There need not be testimony that "conflict[s] in major respect[]" or a "credibility dispute" for there to be reasonable doubt as to an element, as the lower court maintains.

B. Appellant satisfied the triggering requirement under Article 66.

Here, Appellant both requested factual sufficiency review and made a "specific showing of a deficiency of proof." In the first line of his initial brief's

[40] *Specific* and *showing*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[41] *Deficiency*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[42] Article 66(d)(1)(B), 10 U.S.C. §866 (2019).
[43] *Showing*, BLACK'S LAW DICTIONARY (11th ed. 2019).

discussion section, he asserted the Government's evidence did not prove beyond a reasonable doubt that Appellant "did . . . certain acts, or used certain language . . . that under the circumstances . . . was disrespectful to a noncommissioned officer."[44] Thereafter, he argued there was a lack of proof beyond a reasonable doubt that Appellant performed any act to Cpl Vinson that was disrespectful.[45] Specifically, that even when Cpl Antonio was yelling and spit flew onto the Appellant he sat waiting for Cpl Vinson to complete her consoling.[46] It is illogical that he could have his bearing then but moments before lose his bearing to the point of being criminally disrespectful. Additionally, Appellant argues that the Government failed to put forth sufficient evidence prove Appellant did indeed "interrupt" Cpl Vinson—to which the Government changed its theory of guilt mid-trial—pointing out that it was Cpl Antonio's actions, rather than Appellant's, that interrupted the counseling session.[47]

Appellant's arguments in his brief, which focus on the evidence adduced at trial, constitute a "specific showing of a deficiency of proof" because they articulate how the Government failed to meet its burden to prove an element of the charged offense beyond a reasonable doubt. As such, at a minimum, Appellant has triggered factual sufficiency review by the lower court.

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[44] Appellant's Br. at 16 (quoting Article 91, UCMJ, 10 U.S.C. § 981 (2019)).
[45] *Id.* at 16-18.
[46] *Id.* at 17.
[47] *Id*. at 18.

Conclusion

Appellant respectfully requests that the Court grant review and reverse the lower court on this issue, in order to bring clarity and avoid further confusion in the service courts regarding the new triggering requirement for factual sufficiency review.

II.

THIS COURT SHOULD SETTLE WHETHER A COURT CAN CONSIDER THE CONTEXT IN WHICH A CHARGED ACTION OCCURRED AS A BASIS FOR FINDING A SPECIFICATION STATES AN OFFENSE.

This Court should also grant review of the lower court's conclusion that Specification 1 states an offense where the Government charged Appellant with disrespect in *deportment* by alleging he said certain *language*, which are two different theories of liability under Article 91, UCMJ.

A. Language and Deportment are separate and distinct charging theories under Article 91, UCMJ.

In *U.S. v. Smith*, this Court ruled that, in the context of an Art 116 violation (breach of the peace), when the Government charges under a theory of "provocative *speech*," it may not prove its case with evidence concerning his "turbulent *act*."[48] It follows logically that where, as here, the Government charges an accused with

[48] *See United States v. Smith*, __ M.J. __, 2024 CAAF LEXIS 759, *8 (C.A.A.F. 2024) (emphasis added).

disrespect by deportment, it fails to state an offense when it alleges only the words that he spoke.

But that is precisely what the Government did in Appellant's case. Relying on this Court's holding in *United States v. Najero*, the lower court found the evidence legally sufficient to sustain Appellant's conviction, reasoning that "uttered speech may constitute disrespectful deportment under certain circumstances. . ."[49] However, *Najero* reached this conclusion only for purposes of legal sufficiency.[50] The same concept does not translate to the actual charging scheme the Government chooses to pursue, since factual context and circumstances cannot be considered when analyzing whether the language of a specification fails to state an offense.

In this case, the Government charged Appellant with disrespect by deportment, but then cited only the words that he spoke to satisfy the gravamen of the offense. This is akin to charging him with an Article 92 violation under a theory of willful dereliction with specification language that states he committed the offense by failing to use due care. As this Court stated in *Smith*, the Government "controls the charge sheet" and had the opportunity to charge the specific action of interruption, demeanor, etc., but failed to do so.[51]

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[49] *Valencia*, slip op. at 6 (citing *United States v. Najera*, 52 M.J. 247, 249 (C.A.A.F. 2000)).
[50] *Najera*, 52 M.J. at 249.
[51] *Smith*, 2024 CAAF LEXIS 759, at *8 (citing *United States v. Simmons*, 82 M.J. 134, 141 (C.A.A.F. 2022)).

Instead, the Government chose to charge Appellant with being "disrespectful in *deportment* to Cpl Vinson . . . by *saying* . . . '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."[52] This charging language fails to state an offense of disrespect in deportment, and consequentially it was unclear from the charge sheet what acts Appellant was defending against prior to the court-martial. In fact, the "actual" offense only materialized mid-trial when in response to the Defense's R.C.M. 907 motion the Government shifted its theory from simply the language Appellant spoke to the (uncharged) act of "interrupting" Cpl Vinson as she was counseling him.

B. The lower court's ruling violates the rule against surplusage.

"If possible, every word and every provision is to be given effect and no word should be ignored or needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence."[53] Like other punitive articles, Article 91 allows for separate and distinct charging schemes: one for disrespect in language (words) and another for disrespect in deportment (acts).[54] Construing "deportment" to encompass "language" not only would completely swallow the charging scheme of disrespect in language, but would render such statutory language mere surplusage. This Court should correct the lower court's interpretation in this regard.

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[52] Charge Sheet (emphasis added).
[53] *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017).
[54] Article 91, UCMJ, 10 U.S.C. § 981 (2019).

Conclusion

Appellant respectfully requests this Court grant review of this issue, reverse the lower court, and provide clear guidance in this area of the law.

Respectfully submitted.

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Certificate of Compliance with Rule 21(b)

This brief complies with the type-volume limitations of Rule 24(c) because it does not exceed 14,000 words, and complies with the typeface and style requirements of Rule 37. The brief contains 3071 words. Undersigned counsel used Times New Roman, 14-point type with one-inch margins on all four sides.

Appendix

A. *United States v. Valencia*, __M.J. __, slip op. (N-M. Ct. Crim. App. 2024).

Certificate of Filing and Service

I certify that the foregoing was filed electronically with this Court, and that copies were electronically delivered to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on February 21, 2025.

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A

United States Navy–Marine Corps Court of Criminal Appeals

Before
KISOR, MIZER, and HARRELL
Appellate Military Judges

UNITED STATES
Appellee

v.

Alvin VALENCIA
Lance Corporal (E-3), U.S. Marine Corps
Appellant

No. 202300240

Decided: 5 December 2024

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judge:
Ryan C. Lipton

Sentence adjudged 27 July 2023 by a special court-martial convened at Marine Corps Air Station Cherry Point, North Carolina, consisting of a military judge sitting alone. Sentence in the Entry of Judgment: no punishment.

For Appellant:
Captain Colin P. Norton, USMC

For Appellee:
Commander James M. Belforti, JAGC, USN (on brief)
Lieutenant Commander James P. Wu Zhu, JAGC, USN (argued)

Senior Judge KISOR delivered the opinion of the Court, in which Judge MIZER and Judge HARRELL joined.

PUBLISHED OPINION OF THE COURT

KISOR, Senior Judge:

Appellant was convicted, contrary to his pleas, at a special court-martial composed of a military judge alone, of one specification of disrespect towards a noncommissioned officer, in violation of Article 91, Uniform Code of Military Justice (UCMJ).[1] He was sentenced to no punishment.

This case is before us on direct appeal pursuant to Article 66(b)(1)(A). Appellant raises three assignments of error: (1) Does the specification of which Appellant was convicted fail to state an offense under Article 91, UCMJ; (2) Is the evidence legally sufficient to prove every element of Article 91, UCMJ; and (3) Is the evidence that a Lance Corporal disagreed with a Corporal factually sufficient to support a conviction of disrespect in deportment toward a noncommissioned officer? We find no prejudicial error and affirm.

I. BACKGROUND

On 1 February 2023, Appellant went out to lunch. Corporal V called him to ask where he was, and he somewhat vaguely said that he was "at chow."[2] Upon his return to his office, he was given a negative counselling by Corporal V for going out to lunch. During this counselling Corporal V informed Appellant that because he had gone out to lunch without being properly released he would,

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[1] The forum consisting of a special court-martial before a military judge alone was created by Congress in 2016 and is codified at Article 16(c)(2)(A), UCMJ, 10 U.S.C. § 816(c)(2)(A) (2018). At this forum, an accused servicemember may not elect trial by a panel of members, and the military judge may not adjudge a sentence that includes a punitive discharge, confinement for more than six months, or forfeiture of pay for more than six months. Article 19(b), UCMJ, 10 U.S.C. § 819(b) (2028); *see* Rule for Courts-Martial (R.C.M.) 201(f)(2)(B)(ii) (2019 ed.)

[2] R. at 57.

consequently, be assigned an escort during working hours.[3] Corporal V testified that "if [Appellant] had to go anywhere, be picked up, anything like that, except during his personal time, which would be chow time, he would be escorted by that NCO and make sure he checks in with him to keep him at work."[4] Corporal V assigned Corporal A to be Appellant's escort.

Appellant, however, did not prefer to have Corporal A as an escort, and interrupted Corporal V to explicitly state his refusal to have Corporal A assigned as his escort. Corporal A, who was within earshot of this counselling, angrily approached Appellant, got within a foot of him, and yelled at him.[5] Several witnesses testified that it was possible that Corporal A became sialoquent while yelling at Appellant. And one witness, Lance Corporal D, testified that he actually saw spit coming out of Corporal A's mouth while he was yelling, and that he heard Appellant ask Corporal A to stop spitting.[6] Corporal V physically inserted herself between Appellant and Corporal A. Sergeant G then directed Corporal A to leave the room, so that Corporal V could finish the negative counselling.

For these interactions, the Government charged Appellant with being disrespectful in deportment to Corporal V, a superior noncommissioned officer then in the execution of her office, by saying to her, "'I will have an NCO escort but it will not be [Corporal A]; [Corporal A] will not be the one who supervises me,' or words to that effect."[7] The Government also charged Appellant with absenting himself from his place of duty without authority when he went out to lunch, and with assaulting Corporal A by pushing him.

The bench trial took a full day, and numerous witnesses testified as to their observations of the incident. In the end, the military judge convicted Appellant of being disrespectful in deportment, but acquitted him of both absenting himself from his place of duty and assault. The military judge sentenced Appellant to "no punishment."[8]

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[3] R. at 58, 62.

[4] R. at 76.

[5] R at 32. During his direct examination, assistant trial counsel asked Corporal A whether yelling in close proximity to someone's face was "a common way to correct certain Marines?" Corporal A testified in response, "[s]ometimes, not all the time, only the ones that have a hard time understanding things." R. at 32-33.

[6] R. at 138

[7] Charge Sheet.

[8] R at 162, 192. The military judge did not make special findings.

II. DISCUSSION

Appellant challenges his conviction in several related ways. First, he avers that the specification fails to state an offense. Second, he contends that the evidence adduced at trial is legally insufficient to sustain his conviction. Finally, he argues that the evidence is factually insufficient, applying the revised standard of review for factual sufficiency which is codified in the amended statute that governs this Court's review of courts-martial. We address each assignment of error in turn.

A. The Specification states an offense under Article 91, UCMJ.

Appellant contends that the specification fails to allege, expressly or by necessary implication, acts constituting disrespect in deportment.

1. Standards of review

On this point, the parties agree on the appropriate standard of review. Whether a specification states an offense is a purely legal issue.[9] And it is axiomatic that Courts review questions of law de novo.[10]

A specification states an offense if it alleges, either expressly or by necessary implication, every element of the offense, so as to give the accused notice and protection against double jeopardy.[11] A specification that does not state an offense provides no protection against double jeopardy.[12] Where, as here, the charge and specification were challenged at trial, we read the wording of the specification narrowly and will consider only the language in the specification to decide whether it states the offense charged.[13]

2. The Specification in this case

The specification at issue in this case alleged:

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[9] *United States v. Rauscher*, 71 M.J. 225, 226 (C.A.A.F. 2012) (citation omitted).

[10] *Id.* Obviously, any specification that fails to state an offense will also result in legal insufficiency if a person is convicted of it contrary to a plea of not guilty.

[11] *See United States v. Turner*, 79 M.J. 401, 403 (C.A.A.F. 2020); *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006).

[12] *See Montana v. Hall*, 481 U.S. 400 (1987); *see also United States v. Richard*, 84 M.J. 586 (C.G. Ct. Crim. App. 2024).

[13] R. at 148; *see Turner*, 79 M.J. at 403.

> In that LCpl Alvin Valencia, did, at or near Marine Corps Air Station Cherry Point, on or about 1 February 2023, was disrespectful in deportment to Cpl [V], a noncommissioned officer, then known by the said accused 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 [Corporal A]; [Corporal A] will not be the one who supervises me," or words to that effect.

The elements of this offense, therefore, are:

> (1) That the accused was a warrant officer or enlisted member;
>
> (2) That the accused committed certain acts, or used certain language;
>
> (3) That such behavior or language was used toward or in sight or hearing of a certain warrant, noncommissioned or petty officer,
>
> (4) That the accused then knew that the person toward whom the behavior or language was directed was a warrant, noncommissioned, or petty officer;
>
> (5) That the victim was then in the execution of office;
>
> (6) That under the circumstances the accused, by such behavior or language, treated with contempt or was disrespectful to said warrant, noncommissioned, or petty officer;
>
> (7) That the victim was the superior noncommissioned, or petty officer of the accused: and
>
> (8) That the accused then knew that the person toward whom the behavior or language was directed was the accused's superior noncommissioned, or petty officer.

3. Analysis

Appellant's argument is twofold: first, that disrespectful language cannot be charged as disrespectful deportment; and second, that the language itself is not disrespectful. The definition of "disrespect" in Article 91, UCMJ, refers back to the explanation of "disrespect" in Article 89 (disrespect to a superior commissioned officer) and includes:

> Disrespectful behavior is that which detracts from the respect due the authority and person of a superior commissioned officer. It may consist of acts or language, however expressed, and it is immaterial whether they refer to the superior as an officer or as a private individual. Disrespect by words may be conveyed by abusive epithets or other contemptuous or denunciatory language. Truth is no defense. Disrespect by acts includes neglecting the customary salute, or showing a marked disdain, indifference, insolence, impertinence, undue familiarity, or other rudeness in the presence of the superior officer.[14]

Appellate Defense Counsel conceded at oral argument that if the Government today charged Appellant with disrespect for that same statement he made on 1 February 2023, but substituted the word "language" for "deportment" in the specification, the concept of double jeopardy would bar re-prosecution. This is fatal to Appellant's position, because if the specification failed to state an offense, there would be no double jeopardy bar on retrial.[15] Moreover, the weakness of Appellant's argument is that although language and deportment are both listed in the statute as mechanisms by which a servicemember may be disrespectful (as opposed to thought, for example), uttered speech may in fact constitute disrespectful deportment under certain circumstances, hence the double jeopardy bar would apply in this case.

As the specification in this case alleges every element of Article 91, UCMJ and was sufficient to provide Appellant notice, we hold that the specification states an offense.

B. The evidence is legally sufficient to prove every element.

Appellant asserts the evidence is legally insufficient to support his conviction under Article 91, UCMJ.

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[14] Manual for Courts-Martial (2024 ed.), pt. IV, para. 15(c)(2)(b) referenced by para. 17(c)(5). The text of this paragraph is unchanged from paragraph 15(c)(2)(b) in the 2019 edition of the Manual.

[15] *See Hall*, 481 U.S. at 404 (stating that the Constitution permits a retrial of conviction reversed for a defect in the charging document); s*ee also Richard*, 84 M.J. at 593 (authorizing a rehearing after setting aside a conviction for involuntary manslaughter where the specification failed to provide the accused adequate notice of what act or omission she committed that resulted in the death of her child by asphyxia).

1. Standard of Review

To determine legal sufficiency, we ask whether, "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."[16] We review questions of legal sufficiency de novo.[17] In conducting this analysis, we must "draw every reasonable inference from the evidence of record in favor of the prosecution."[18]

2. Analysis

The Government correctly points out that "courts-martial are a 'notice pleading jurisdiction.'"[19] Further, the Court of Appeals for the Armed Forces (CAAF) has stated that, in a legal sufficiency analysis, all the circumstances of a case can be considered in determining whether disrespectful behavior has occurred.[20]

The crux of Appellant's argument is that "[t]he government provided no evidence of how uttering this particular language was disrespectful under the circumstances."[21] This is incorrect. At trial, Corporal V (who was promoted to sergeant by the time of trial) testified that not only did Appellant state that he would refuse to have Corporal A as his escort, he also interrupted Corporal V as she was telling him that.[22] We have no trouble drawing the inference in favor of the Government that Appellant's deportment while interrupting Corporal V and refusing her decision to appoint Corporal A as his escort was disrespectful under the circumstances, and was within the explanation of "disrespect" contained in the Manual for Courts-Martial. Accordingly, we find the conviction to be legally sufficient.

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[16] *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *see United States v. Gutierrez*, 73 M.J. 172 (C.A.A.F. 2014).

[17] Article 66(d)(1), UCMJ; *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

[18] *United States v. Gutierrez*, 74 M.J. 61, 65 (C.A.A.F. 2015) (citation and internal quotation marks omitted).

[19] Government Brief at 12 (*citing United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011)).

[20] *See United States v. Najera.* 52 M.J. 247, 249 (C.A.A.F. 2000).

[21] Appellant's Brief at 15.

[22] R. at 77.

C. The evidence is factually sufficient to sustain a conviction.

Appellant asserts the evidence is factually insufficient to support his conviction of disrespect towards a noncommissioned officer by deportment.

1. Standards of review

Regarding factual sufficiency, Congress recently amended Article 66, UCMJ, which now states:

> (d) Duties.
>
> (1) Cases appealed by accused.-
>
> > (A) In general. In any case before the Court of Criminal Appeals under subsection (b), the Court may act only with respect to the findings and sentence as entered into the record under section 860c of this title (article 60c). The Court may affirm only such findings of guilty as the Court finds correct in law and in fact, in accordance with subparagraph (B). The Court may affirm only the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved.
> >
> > (B) Factual sufficiency review.
> >
> > > (i) In an appeal of a finding of guilty under subsection (b), the Court may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof.
> > >
> > > (ii) After an accused has made such a showing, the Court may weigh the evidence and determine controverted questions of fact subject to-
> > >
> > > > (I) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and
> > > >
> > > > (II) appropriate deference to findings of fact entered into the record by the military judge.
> > >
> > > (iii) If, as a result of the review conducted under clause (ii), the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.

2. Deficiency in proof

In *United States v. Harvey*, the CAAF agreed with this Court that that unless both triggering conditions (assertion of error and a specific showing of a

deficiency in proof) are met by an appellant, the amended statute does not require, or even allow, this Court to review the factual sufficiency of the evidence.[23] The CAAF, however, did not further explain what can constitute a "specific showing of a deficiency in proof" because both parties in *Harvey* agreed that that the condition was met.[24]

In *Harvey*, we held that a specific showing of a deficiency in proof meant that "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."[25] The CAAF set aside our opinion in *Harvey* on other grounds. The Parties in this case both correctly agreed at oral argument that, as a matter of law, our published opinion in *Harvey* is no longer binding on us even as to our holdings that the CAAF did not reach.[26] That said, we believe as to the threshold triggering event (assertion of error and specific showing of deficiency in proof), our analysis set forth in *Harvey* remains correct. We therefore hold that a general disagreement with a verdict falls short of a specific showing of a deficiency in proof, and thus will not trigger a full factual sufficiency analysis.[27] Rather, 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.

In his brief, Appellant does not explicitly state that what he asserts is a specific showing of a deficiency in proof, apart from his contentions that, (1) as a matter of law, language and deportment are mutually exclusive and cannot

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[23] *United States v. Harvey*, __M.J.__, No. 23-0239, 2024 CAAF LEXIS 502, at *5 (C.A.A.F. Sep. 6, 2024).

[24] *Id*.

[25] *United States v. Harvey*, 83 M.J. 685, 691 (N.-M. Ct. Crim. App. 2023), *vacated*, *Harvey*, 2024 CAAF LEXIS 502, at *13. In *Harvey*, this Court noted that the parties in that case substantially agreed on the standard for what constitutes a "a deficiency in proof." *Harvey*, 83 M.J. at 691. Nonetheless, the CAAF noted that "the NMCCA and the parties have advanced notably different views on this question." *Harvey*, 2024 CAAF LEXIS 502, at *5.

[26] In federal court, a "reversed" opinion can be cited for principles that were not reversed, but an opinion that has been "vacated" has no precedential authority. *See Durning v. Citibank, N.A.*, 950 F.2d 1419, 1424 n.2 (9th Cir. 1991). Black's Law Dictionary, somewhat tautologically, defines both "set aside" and "vacated" as including each other. Black's Law Dictionary, Sixth Ed. 1990, at 1372 and 1548.

[27] *Harvey*, 2024 CAAF LEXIS 502, at *5.

overlap; and (2) the Government failed to prove any deportment. He simply contends generally that "[t]he government failed to introduce evidence to satisfy its burden that any action by LCpl Valencia – even interrupting her – actually disrespected [Corporal V]."[28] The Government, for its part, argues that Appellant fails to show a deficiency in proof at all. According to the Government, Appellant does not explain a weakness in the evidence, apart from a disagreement with the conclusion of the military judge that the testimony showed that Appellant was disrespectful under the circumstances. And Appellant does not address the Government's point on this issue in his Reply. At oral argument counsel for Appellant again argued that the language used by Appellant in contradicting the decision by Cpl V to assign Cpl A as his escort was neither disrespectful nor qualified as deportment. But, again, this is nothing more than a disagreement with the factfinder's conclusion, not a claim of deficiency in the evidence presented on the question.

We hold that in this case Appellant has not made a specific showing of a deficiency in proof to trigger full factual sufficiency review under Article 66, UCMJ.[29] The testimony did not substantively conflict in major respects. The words used by both Corporal V and Appellant during the counselling were not in dispute. This case does not require us to resolve a credibility dispute as to what was said, or to otherwise resolve materially inconsistent evidence or conflicting testimony.[30]

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[28] Appellant's Brief at 18.

[29] *Harvey*, 2024 CAAF LEXIS 502, at *5.

[30] Even assuming that disagreement with a conviction based on largely witness testimony can constitute a deficiency in proof sufficient to trigger factual sufficiency review, and giving appropriate deference to the fact that the military judge saw and heard the witnesses, we would not be clearly convinced that the verdict is against the weight of the evidence. The evidence in this case was largely testimonial and we would afford the military judge a high level of deference because we did not see the witnesses testify.

III. CONCLUSION

After careful consideration of the record, the briefs of appellate counsel, and the excellent oral argument of both parties heard on 6 November 2024, we have determined that the findings and sentence are correct in law and fact and that no error materially prejudicial to Appellant's substantial rights occurred.[31]

The findings and sentence are **AFFIRMED**.

FOR THE COURT:

MARK K. JAMISON
Clerk of Court

[31] Articles 59 & 66, UCMJ.