IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Second Lieutenant (O-1) **RICKY A. SMITH** United States Army Appellant	SUPPLEMENT TO PETITION FOR GRANT OF REVIEW Crim. App. Dkt. No. 20230482 USCA Dkt. No. 26-0168/AR

Peter Ellis
Major, Judge Advocate
Branch Chief
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0715
USCAAF Bar No. 38209

Kyle C. Sprague
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF Bar Number 36867

Frank E. Kostik Jr.
Colonel, Judge Advocate
Chief
Defense Appellate Division
USCAAF Bar Number 35108

Table of Contents

Table of Authorities

Supreme Court Cases

Court of Appeals for the Armed Forces and Court of Military Appeals Cases

Courts of Criminal Appeals Cases

State Cases

Other Authorities

Statutes

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Second Lieutenant (O-1) **RICKY A. SMITH** United States Army Appellant	SUPPLEMENT TO PETITION FOR GRANT OF REVIEW Crim. App. Dkt. No. 20230482 USCA Dkt. No. 26-0168/AR

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

Issues Presented

I. WHETHER THE ARMY COURT ERRED IN ITS FACTUAL SUFFICIENCY REVIEW OF SPECIFICATIONS 1 AND 2 OF CHARGE II AND THE SPECIFICATION OF CHARGE V?[1]

---

[1] This Issue relates to the appropriate standard for when Article 66, UCMJ, 10 U.S.C. § 866, requires a factual sufficiency review, the so-called "triggering" requirement, and all three specifications are addressed together as the error applies in the same manner to all three. The Army Court adopted a hybrid of its opinion in *US v. Brassfield*, 85 M.J. 523 (Army Ct. Crim. App. 2024), and the Navy-Marine Corps Court of Appeals case, *US v. Valencia*, 85 M.J. 529 (N.M. Ct. Crim. App. 2024). This Court granted review in *Valencia* and heard oral argument but ultimately deemed the case moot. *US v. Valencia*, 2025 CAAF LEXIS 966 (C.A.A.F. 24 Nov. 2025). The Army Court in this case purported to analyze whether the specifications which appellant requested it review for factual sufficiency were factually sufficient *if* it had conducted a factual sufficiency review, but its analyses contain serious legal errors. This supplement demonstrates why the legal errors in the Army Court's hypothetical legal analyses provide this Court with the opportunity to address the issue this Court did not reach in *Valencia* because it is not moot here. The Army Court's alternative analysis appears to be dicta, but appellant would welcome briefing on them should this Court view their resolution as necessary to acting on the issue presented.

II. WHETHER THE ARMY COURT ERRED IN AFFIRMING THE SENTENCE UNDER *U.S. V. WINCKELMAN*?

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 866 (2022). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867 (a)(3) (2021).[2]

Statement of the Case

On September 8, 2023, an officer panel sitting as a general court-martial convicted Appellant, Second Lieutenant (2LT) Ricky A. Smith, contrary to his pleas, of two specifications of indecent conduct in violation of Article 134, UCMJ, 19 U.S.C. § 934; one specification of maltreatment of a subordinate in violation of Article 93, UCMJ, 10 U.S.C. § 893; one specification of failure to obey an order in violation of Article 92, UCMJ, 10 U.S.C. § 892; and one specification of conduct unbecoming an officer in violation of Article 133, UCMJ, 10 U.S.C. §933.[3] (R. at 669; Charge Sheet; Statement of Trial Results [STR]). On September 8, 2023, the officer panel sentenced appellant to forfeit $2,521 pay per month for six months,

---

[2] Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Appellant will submit further matters by motion with 28 days under Rule 19(a)(5)(C).

[3] The panel found Second Lieutenant Smith not guilty of two specifications of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920, and one specification of a false official statement in violation of Article 107, UCMJ, 10 U.S.C. § 907.

and to be dismissed. (R. at 770; STR). On October 18, 2023, the convening authority took no action on the findings and adjudged sentence. (Convening Authority Action). On November 1, 2023, the military judge entered Judgment. (Modified Judgment of the Court).

On December 30, 2025, the Army Court set aside the maltreatment charge and specification and affirmed the remaining findings and the sentence. *United States v. Smith*, ARMY 20230482, 2025 CCA LEXIS 608 (Army Ct. Crim. App. December 30, 2025) (contained in App'x A). Appellant was notified of the Army Court's decision. Appellant moved the Army Court for reconsideration on January 29, 2026, which it denied on February 5, 2026. In accordance with Rule 19 of this Court's Rules of Practice and Procedure, on April 6, 2026, the undersigned appellate defense counsel filed a Petition for Grant of Review, while seeking leave to file the Supplement to the Petition for Grant of Review separately. Additionally, appellant filed motions for extension of time. This court granted appellate defense counsel's motions, granting until and including May 22, 2026 to file the Supplement. The undersigned counsel hereby files the Supplement to the Petition for Grant of Review under Rule 21.

Statement of Facts

All relevant events took place on Mihail Kogalniceanu Air Base (MKAB), Romania, on April 3-4, 2022. (Charge Sheet). Appellant was a member of the 16th

Military Police Brigade (R. 131) while Specialist (SPC) JC, the alleged victim, was a member of a different unit – the 18th Human Resources Company. (R. 238). According to SPC JC, the two did not work together and she had a single sentence exchange with Appellant in the past saying "maybe, 'good evening sir.'" (R. 244); (*see also* Pros. Ex. 22 at 03:36:40) ("I've been around her a couple of times and said what's up, but never had a full on conversation before this.").

On April 3, 2022, First Lieutenant (1LT) Williams, who was in a separate unit from both Appellant and SPC JC, hosted a BBQ at a small shed and the area surrounding it on MKAB. Sergeant (SGT) Stum invited SPC JC to the BBQ (R. 239, 416, 424). SGT Neil DeLeon, who worked as a barber, invited SGT Stum and Appellant. (R. 150, 170). It was undisputed at trial that Appellant did not invite SPC JC to the BBQ or know she was attending.

The BBQ started around 1630 and had "a good mix" of officers, enlisted, and junior enlisted according to the host. (R. 155). Members of the host's unit provided alcohol at the party as they did not have alcohol restrictions; (R. 155) it is not alleged that Appellant bought or even handed a single drink to anyone that evening. While Appellant did have a few beers (R. 156; Pros. Ex. 22), there is very little evidence of what Appellant did at the party as he was either outside of the shed or not involved in the actions. (*See, e.g.,* R. 156 (Appellant was not

involved with serving shots or hard liquor), R. at 230 (the shed was very small and most people were outside while the alcohol was inside)).

While there was initially an order issued by the Brigade Commander that did not permit drinking for Appellant's unit, (Pros. Ex. 12; R. at 156, 163-64, 294-96, 428) it is undisputed that sometime between March and May, that order was verbally modified by the Brigade Commander (R. at 137, 163-64, 166-67, 294-95, 301-303, 428). However, since the exception(s) were passed via telephone to the different sections vis-à-vis a written policy or single email, the timing and substance of the exception(s) varied widely. (R. 302-03, 513-15, 518-19, 601-602). There was no dispute that the modified policy allowed drinking alcohol in some circumstances, and required that when junior enlisted soldiers drank, they were accompanied by a noncommissioned officer (NCO) or officer. (R. at 164, 166-67, 514-16).

The party ended when SPC JC slapped a senior NCO, and soldiers attempted to calm SPC JC down. (R. at 156-67, 173-76, 208, 210-11, 219-20). Appellant also attempted to calm SPC JC down. (R. at 156-58, 224l Pros. Ex. 22, 03:35:15). This was the first interaction Appellant had with SPC JC that evening, according to every witness who testified as well as Appellant's statement. (*See, e.g.,* Pros Ex. 22, 03:25:14 – 03:25:20). As SPC JC calmed down, she and Appellant sat down in the shed as others removed the speakers, tables, alcohol, and food from around

them. The two continued to talk and mildly flirted in the shack while others left. SPC JC then kissed Appellant, and he kissed her back. (Pros. Ex. 22 at 04:48:00, 03:53:45 – 03:56:00; 04:49:15-04:50:20, 04:52:10).[4] Another soldier, SGT Stum, entered the shed and saw Appellant and SPC JC sitting side by side giggling. (R. 158-60).

Shortly thereafter, SPC JC indicated she needed to use the bathroom and left the shed, followed by Appellant and SGT Stum. (R. at 158-160). She attempted to go to the closest building with a bathroom (near the barracks), but Appellant and SGT Stum told her she could use the bathroom in the male barracks. (R. at 159-60, 183-84). She then walked to a female shower facility further away from the barracks (closer to a gym) while Appellant used a separate male bathroom in that area. (R. at 159-160, 183-84, 378-79).

Appellant returned to the shower facility SPC JC had gone into and waited outside for her for a few minutes. (R. at 143, 159-60, 183-84, 378-79, Pros. Ex. 22). He did not see anyone else enter or exit the facility. (Pros. Ex. 22, 4:59:00). He did not see anyone walk by or in the vicinity; it was a Sunday night after 2200 with the next day being a duty day. (*See, e.g.*, R. at 447-48).

[4] All times noted are from the clock on the video itself and not the timestamps from the playback feature.

Specialist JC opened the door and requested Appellant come into the shower facility with her. (Pros Ex. 22, 4:50:00, 5:01:00-5:01:30; R. at 6:27, 378-79). He accepted her invitation and the door closed behind them to the entry room. (Pros. Ex. 22, 05:01:00-05:01:30; R. at 378-79). They then went behind a second door which also closed behind them. (Pros Ex. 22, 5:01:00-5:01:30; Pros Ex. 4-5, 8, 15, 19-21). Specialist JC kissed Appellant and then guided him over to an area that was blocked by the side of a bathroom stall near a sink. (Pros. Ex. 22, 05:02:35, 05:04:30 – 05:05:00; R. 380). She then briefly performed oral sex on Appellant for by pulling his sweatpants below his buttocks – but otherwise he was fully dressed. (Pros. Ex. 22, 05:02:35, 05:04:30 – 05:05:00; R. 380).

Specialist JC then went over to the inner door with Appellant and placed one hand on the door and the other hand on the adjacent wall near the towel rack. (R. 380; Pros. Ex. 22, 04:00:00 – 04:01:40; 05:06:45, 05:06:45 – 05:08:20). She asked Appellant to penetrate as she manipulated the lock. (R. 380; Pros. Ex. 22, 04:00:00 – 04:01:40; 05:06:45, 05:06:45 – 05:08:20). Appellant observed SPC JC fiddling with the lock and twice demonstrated the motion to CID. (R. 380; Pros. Ex. 22, 04:00:00 – 04:01:40; 05:06:45, 05:06:45 – 05:08:20).

Shortly thereafter, SPC JC grabbed Appellant by the wrist and lead him further into the female shower facility. (Pros. Ex. 22, 05:10:00 - 05:10:15). They entered the shower area and went behind a wall to the right. (Pros. Ex. 22, 05:10:00

- 05:10:15; Pros. Ex. 8, 15, 19-21). Behind two closed doors and a wall, SPC JC pulled down Appellant's pants below his buttocks and continued to perform oral sex on him. (Pros. Ex. 22, 05:10:00 – 05:11:04; R. 241, 268-69; 350, 380, 382, 386). She then turned around and the two had vaginal intercourse for a few seconds until her friends arrived who had been looking for her after her assault of the senior NCO. (R. at 434, 440, 465-66). Specialist JC's friend, SPC Cortez, knocked on the second closed door, paused momentarily, then entered. (R. at 465). SPC Cortez, the one who "witnessed" the sexual act, did not witness an act of oral sex, and did not actually see appellant and SPC JC performing intercourse, but only saw Appellant's back. (R. at 446-47).

Reasons to Grant Review

This case presents this Court with the opportunity to decide, per Rule 21(b)(5)(A), a question of law which has not been, but should be, settled by this Court. In declining to do a factual sufficiency review, the Army Court adopted a hybrid version of its own decision on "triggering" factual sufficiency review in *US v. Brassfield*, 85 M.J. 523 (Army Ct. Crim. App. 2024), and the Navy Marine-Corps Court of Appeal case *US v. Valencia*, 85 M.J. 529 (N.M. Ct. Crim. App. 2024), a case which was briefed and heard at oral argument by this Court, but which this Court ultimately deemed moot, 2025 CCA LEXIS 966 (C.A.A.F. 24 Nov. 2025) based on the Navy-Marine Corps Court's hypothetical factual

sufficiency review in footnote 30 of that court's opinion. This case presents this Court the opportunity to hear and resolve that pressing issue, currently being contested before the CCA's (*see, e.g., US v. Harvey,* 85 M.J. 127, 130 (discussing differing positions taken by the parties and amicus curiae on the issue of when a factual sufficiency review is required under Article 66(d)). Besides this case, the Air Force has also used a combination of *Brassfield* and *Valencia*. *See US v. Hughes,* 2026 CCA LEXS 66, 15 (A.F. Ct. Crim. App. 6 February 2026). Furthermore, per Rule 21(b)(5)(B), the CCAs appear to disagree about the triggering event, with the Coast Guard finding such a review triggered when an appellant requests for factual sufficiency review and states why the appellant felt it was factually insufficient, notably involving conflicting witness testimony. *United States v. Mendoza*, 2026 CCA LEXIS 155 (C.G. Ct. Crim. App. Marc 31, 2026). A heightened standard is at odds with the plain language and purpose of the statute and should be reversed.

Although the Army Court discussed what it would have found had it conducted a factual sufficiency review for Specifications 1 and 2 of Charge II and the Specification of Charge V, that discussion contains flawed legal analysis and thus does not moot Appellant's case.

For Specifications 1 and 2 of Charge II, the flaw in the Army Court's analysis could have influenced its declination to do a factual sufficiency review

and would have made their factual sufficiency review legally incorrect *if* they had conducted it. The Army Court would have adopted a conclusive presumption of guilt for indecent conduct when someone is discovered in consensual sexual activity. *Smith* at 8 ("Put simply, we do not need to determine whether appellant and the victim's sexual activity in the latrine 'was reasonably likely to be seen by others,' because said activity was in fact observed by one of the female soldiers looking for the victim when she walked in on them in the shower.'"). That would have been at odds with this Court's precedent in *United States v. Izquierdo*, 51 M.J. 421 (C.A.A.F. 1999) and *United States v. Sims*, 57 M.J. 419 (C.A.A.F. 2002), which held that in deciding whether consensual sexual conduct is open and notorious and thus "indecent," the question is whether it is "reasonably likely" to be discovered considering the facts and circumstances. By adopting actual discovery as a conclusive presumption that the conduct was "open and notorious" and thus "indecent," the Army Court is at odds with this Court's jurisprudence and would merit this Court's consideration under CAAF Rule 21(b)(5)(B), when it "decided a question of law in a way in conflict with applicable decisions of [] this Court."

The CCA's hypothetical factual sufficiency review of the Specification of Charge V likewise contains legal errors that render Issue 1 not moot, and had they been necessary to the CCA's holding would merit this Court's attention under

CAAF Rule 21(b)(1)(F). Besides the Article 133 Specification, 2LT Smith was separately charged with a violation of Article 92, UCMJ for violating an order from his Brigade Commander that he not consume alcohol while deployed. The Army Court stated that if they had done a factual sufficiency review, they would have affirmed based on 2LT Smith's "flouting" the Brigade Commander's policy letter – the basis for the Article 92 conviction. However, that was not the theory on the charge sheet or presented to the fact finder, in violation of this Court's holdings in *United States v. Ober*, 66 M.J. 393 (C.A.A.F. 2008) and *United States v. English,*79 M.J. 116 (C.A.A.F. 2019), and the Supreme Court's in *Chiarella v. United States,* 445 U.S. 222 (1980). Further, to the extent that theory supported the Article 133 specification being factually sufficient, using it on appeal made the Article 133 and Article 92 Charges and Specifications multiplicious, as the Article 92 violation would be a lesser-included offense of the Article 133 Specification. *See, e.g., United States v. Cherrukuri*, 53 M.J. 68 (C.A.A.F. 2000) (holding that when an offense is charged as both an enumerated article and as conduct unbecoming the enumerated article constitutes a lesser included offense). These errors could have influenced the Court's decision not to do a factual sufficiency review and would thus be subject this Court's review. *See Moore* at 6. They additionally make the Issue presented not moot, as if the basis for affirmance becomes the hypothetical factual sufficiency review, then errors that need

addressing become injected into the appellate process and require this Court's attention.

For the second issue presented, the Army Court, in affirming the sentence as adjudged and providing no sentencing relief, so far departed from the accepted and usual course of judicial proceedings, per CAAF Rule 21(b)(5), that it merits review by this Court. The Army Court disregarded this Court's guidance in *Winckelman*, since every *Winckelman* factor supported directing a sentencing rehearing rather than affirming the sentence. This case was a panel case involving military specific convictions where the Army Court's factual sufficiency finding changed it from a case involving a victim to one involving no victim and substantially altered Appellant's punitive exposure. This Court should take this case to clarify the application of *Winckelman*, particularly in a case which changes from one involving a victim to one not involving a victim based on the Army Court's review.

Issues Presented

I. WHETHER THE ARMY COURT ERRED IN ITS FACTUAL SUFFICIENCY REVIEW OF SPEFICIATIONS 1 AND 2 OF CHARGE II AND THE SPECIFICATOIN OF CHARGE V?

Standard of Review

This Court reviews questions of statutory construction *de novo*. *United States v. Armsbury*, __ M.J. ___, 2026 CAAF LEXIS 274 (C.A.A.F. 2026).

Under Article 66(d)(1)(B), the Army Court's factual sufficiency review must give "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence," and to reverse a finding the CCA must be "clearly convinced the finding of guilty was against the weight of the evidence." "This Court may review whether a Court of Criminal Appeals (CCA) applied correct legal principles in performing its factual sufficiency review." *United States v. Harvey*, 85 M.J. 127, 129 (C.A.A.F. 2024) (internal citations and quotation marks omitted). The meaning and application of Article 66(d) is a matter of statutory construction that this Court reviews de novo. *See United States v. McAlhaney*, 83 M.J. 164, 166 (C.A.A.F. 2023) (reviewing the appropriate application of a CCA's sentence appropriateness analysis under Article 66(d), UCMJ).

This Court reviews a CCA's interpretation of an applicable statute or rule de novo, *see United States v. Kohlbek*, 78 M.J. 326, 330-21 (C.A.A.F. 2019) (reviewing the CCA's interpretation of Mil R. Evid. 707), as well as a CCA's understanding and application of a precedent, *see United States v. Baier,* 60 M.J. 382, 285 (C.A.A.F. 2005). When "the record reveals that a CCA misunderstood the law, this Court remands for another factual sufficiency review under correct legal principles." *United States v. Thompson*, 83 M.J. 1, 4 (C.A.A.F. 2022).

Law and Argument

A. "Triggering" Article 66 Factual Sufficiency Review

1. The Army Court

In deciding on a standard for "triggering" factual sufficiency review, the Army Court cited its leading case, *United States v. Brassfield*, 85 M.J. 523, (Army Ct. Crim. App. 2024), where they held that "a combination of appellant's testimony denying the conduct at issue, along with 'minor inconsistences in the victims' testimony does *not* establish a specific deficiency in proof.'" *Smith* at 5-6 (quoting *Brassfield* at 528.) They then cited *Valencia*, to the effect 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." *Smith* at 6 (quoting *Valencia* at 535). 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 a trial contradicts a guilty finding." *Smith* at 6 (quoting *Valencia* at 535). The Court then used these two observations as "guideposts for meeting that standard." *Smith* at 6.

2. The Text of Article 66(d)(1)(B)

"In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself." *Food Mktg. Inst. v. Argus Leader Media*, 139 S.C.t 2356, 2364 (2019) (internal citations omitted). When "a statute is unambiguous, the plain meaning of the words will

control, so long as that meaning does not lead to an absurd result." *United States v. Ortiz*, 76 M.J. 189, 191-02 (C.A.A.F. 2017) (internal citations omitted).

The "triggering" requirement in the statute, is that the CCA will conduct a factual sufficiency review "upon request of the accused if the accused makes a specific showing of a deficiency in proof." Article 66(d)(1)(B). The language is clear and unambiguous. It contains two requirements – a request from the accused, and a specific showing of deficiency in proof.

"Upon request of the accused" appears uncontroversial. The accused asks for factual sufficiency review and satisfies that requirement.

"Specific showing of a deficiency in proof" is likewise clear and unambiguous. Black's Law Dictionary, cited by this Court as the "preeminent source for definitions of legal terms and phrases,"[5] defines some of the individual terms and phrases. Black's defines "specific" as "[o]f, relating to, or designating a particular and defined thing."[6] "Showing" is "[t]he act or an instance of establishing through evidence and argument; proof."[7] "Deficiency" is a "lack, shortage, or insufficiency of something that is necessary.[8]" The Army Court, in 1970 in a slightly different context, defined a deficiency of proof as, "the failure of

---

[5] *United States v. Schmidt,* 82 M.J. 68, 75 (C.A.A.F. 2022)
[6] *Specific*, BLACK'S LAW DICTIONARY (11th ed. 2019)
[7] *Showing*, BLACK'S LAW DICTIONARY (11th ed. 2019)
[8] *Deficiency*, BLACK'S LAW DICTIONARY (11th ed. 2019)

the Government, either directly or circumstantially, to establish that [an element of an offense was met].” *United States v. Dolan*, 42 C.M.R. 893, 894 (A.C.M.R. 1970); *see also United States v. Anderson*, 37 M.J. 953, 958 (A.C.M.R. 1993) (finding that presentation of only circumstantial evidence can create deficiency in proof).

“A specific showing of a deficiency in proof,” is thus simply an appellant pointing to an element of a charged offense and explaining how the Government did not prove it. A simple request for factual sufficiency review and nothing more would likely not satisfy this requirement. However, any statement of how an element[9] was not met, either a lack of credible evidence to support it or evidence cutting against it, or argument in favor of different inferences than those made by the factfinder, would trigger review.

Reading a heightened “trigger” into the statue is also internally contradictory. A CCA cannot determine whether its heightened “trigger” is met without doing a factual sufficiency review. As noted above, the CCAs have found some showings do not trigger “full factual sufficiency review”; and a partial versus

[9] By “element” Appellant does not mean that an Appellant must specifically list an element, but any argument pointing towards a failure of proof can be mapped to an element. For example, if an appellant were to argue in a sexual assault case that rested on the complaining witness’s testimony that the witness was not credible for some reason, that would go towards potentially the elements of the sexual activity occurring and consent depending on the argument even if a brief did not discuss it in terms of “elements.”

a "full" factual sufficiency review is a concept that has no basis in the statute and thus no place in military appellate review.

3. Legislative History of the Current Article 66

The language of Article 66 is not ambiguous. To the extent that it is, the legislative history is supportive of this interpretation.[10] The Military Justice Review Group Report of 2015 proposed amending Article 66, Mil. Just. Rev. Group, Report of the Military Justice Review Group: Part I: UCMJ Recommendations (2015), Rec. 66.2. [hereinafter MJRG], and its proposal was generally adopted by Congress.[11] The recommendation was derived from a New York criminal procedure statute and came into being in a manner that "reflects military practice since 1948" and that was "[s]imilar to current practice" at the time the reforms were adopted." *Id.*

The New York law required the answering of two threshold questions for an appellate court conducting a factual sufficiency review: (1) the court must

---

[10] Appellant notes the Supreme Court's guidance that "in statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself," *Food Mktg. Inst. v. Argus Leader Media* 588 U.S. 427, 436 (2019), but notes that the Supreme Court has not foreclosed the use of legislative history, an interpretation that this Court seems to have adopted. *See United States v. Avery*, 79 M.J. 363, n. 8 (noting the Supreme Court's "recent reminder" in *Food Mktg. Inst.* and explaining why it continued to use legislative history for its analysis in some situations).

[11] The MJRG's proposal was that "the Court of Criminal Appeals, upon request of the accused, may consider the weight of the evidence upon a specific showing of deficiencies in proof by the accused." MJRG at 615.

"determine whether an acquittal would not have been unreasonable"' and (2) [i]f so, the court must weigh conflicting testimony, review any rational inferences that may be drawn from the evidence, and evaluate the strength of such conclusions. Based on the weight of the credible evidence, the court then decides whether the jury was justified in finding the defendant guilty beyond a reasonable doubt. *See* NY Crim. Proc. Law 470.15; *see also People v. Danielson*, 9 N.Y.3d 633. 644 (N.Y.C.A. 2006).

Unlike now, in the prior Article 66 the CCAs had the responsibility to review factual sufficiency in *every* case. *See, e.g., Harvey* at 130 (discussing the change from requiring factual sufficiency review in *every* case to only some cases). The MJRG report notes (p. 610) this broad power in its justification for its recommendation, observing that "[c]urrent law requires the [CCAs] to independently review every case for the factual sufficiency of every conviction," but under its new proposal, it would "require the accused to raise any factual sufficiency findings regarding the findings." MJRG at 610.

The proposal that led to the change, and the sources it cited, seem to indicate that there isn't a particular quantum of proof or level of error that must be raised before a factual sufficiency review is conducted; rather, the accused must ask for it and be specific. The legislative history confirms that the straightforward reading of the statute is correct.

B. 2LT Smith Satisfied Article 66's Triggering Requirement

1. Specifications 1 and 2 of Charge II

2LT Smith requested factual sufficiency review of the Specifications of Charge II. He specifically pointed to numerous factors undercutting the element that they were not reasonably likely to be discovered, and thus not indecent, to include their choice of location, time of day, retreat behind closed doors, and their remaining clothed, as well as actions taken by SPC JC which could have led to the reasonable inference by appellant that she had locked the door.[12] (Appellant's Brief at ii, 54-78). He has thus satisfied the requirement for factual sufficiency review. Rather than analyze the facts, the Army Court adopted a conclusive presumption that, besides having no basis in this Court's precedent, would not even apply to

[12] In volunteering these facts to CID, it is noteworthy that Appellant was not advised that he was suspected of indecent conduct for having sexual relations in a public place (Pros. Ex. 17; 22, 03:18:55) and would not have needed to discuss or demonstrate, multiple times, SPC JC's manipulating the door locks. (Pros. Ex. 22, 05:06:45, 05:08:01). Since he admitted to the sexual intercourse, there would be no incentive to mislead about the door's locking aspect since he was unaware that was a crime, he was not suspected of that crime, and he already knew someone entered the latrine later (as he admitted in the interview). Although he admitted that she had not locked the door, stating, "she was playing with the lock but not really locking it", it is not clear whether he knew that in the moment or learned it later when someone walked through, and was speaking with his current knowledge at the time. (Pros. Ex. 22 05:06:40-45). No one asked him, as they did not have reason to, and he had no reason to clarify either. ACCA did not analyze this in depth as they declined to do a factual sufficiency review and merely adopted a conclusive presumption for their hypothetical "if-we-did-it" factual sufficiency review.

Specification 1, as no one observed the acts forming the basis for it; appellant and SPC JC were only interrupted after they had proceeded to the acts forming the basis for Specification 2.

2. The Specification of Charge V

2LT Smith also requested factual sufficiency review of the Specification of Charge V (Appellant's Brief at ii), and pointed out specific reasons, to include that there was a Policy Letter from his Brigade Commander specifically directing situations where officers and enlisted would consume alcohol together in a deployed environment, a lack of evidence of 2LT Smith actually drinking *with* enlisted Soldiers, and the fact that there was no evidence presented that drinking with enlisted Soldiers was in fact unbecoming of an officer or would in any way undercut his standing as an officer. (Appellant's Brief at 22-30). 2LT Smith thus met the requirement for factual sufficiency review.

C. The Legal Errors in the Army Court's Hypothetical Factual Sufficiency Reviews Prevent this Issue from Being Moot as in *Valencia*.

1. Specifications 1 and 2 of Charge II

As the Army Court noted in its opinion, this Court has held that "consensual sexual acts committed 'openly and notoriously' are actionable under Article 134, indecent conduct.'" *Smith* at 7 (quoting *United States v. Izquierdo,* 51 M.J. 421, 422 (C.A.A.F. 1999)). As they further note, this Court has "held that . . . '[s]exual acts are considered to be committed openly and notoriously when such acts are

performed in such a place and under such circumstances that it is reasonably likely to be seen by others even though others actually do not view the acts.'" *Id.* (quoting *Izquierdo* at 423).

However, while citing the correct legal standard, the Army Court then went on to adopt a conclusive presumption that has no basis in this Court's precedent, stating, "[p]ut simply, we do not need to determine whether appellant and the victim's[13] sexual activity in the latrine 'was reasonably likely to be seen by others,' because said activity was in fact observed by one of the female soldiers looking for the victim when she walked in on them in the shower." *Smith* at 8.

Adopting a conclusive presumption in this manner reads out the requirement for wrongdoing because it looks solely to the outcome, not the situation as a reasonable person in the accused's position would have perceived the risk. The Army Court essentially created a strict liability offense for being observed during sexual activity, which has the possibility to lead to absurd results. Further, the conclusive presumption it uses for its non-decision would only apply to Specification 2, and not Specification 1, as the person who witnessed them did not see the oral sex.

[13] This Court should consider that the Army Court continues to refer to SPC JC as "the victim" despite Appellant being acquitted of all offenses against her except one, and the Army Court finding that one factually insufficient as evidence that the sentence reassessment analysis by the Army Court was tainted and needs to be redone.

The Army Court's misunderstanding of the law in its hypothetical factual sufficiency analysis means that its declination to do a factual sufficiency review is not moot.

2. The Specification of Charge V

The Army Court's hypothetical if-we-had-conducted-it factual sufficiency analysis for the Specification of Charge V is riddled with factual and legal errors. It misconstrues the Appellant's arguments, ignores various deficiencies in proof, wrongly uses a theory on appeal that was not on the charge sheet or argued to the factfinder, and renders the Article 92 and 133 Specifications multiplicious.[14]

The Brigade Commander's order explicitly allowed that, in at least certain circumstances in a deployed environment, officers and enlisted personnel would drink together. Sergeant Stum testified (R. at 166), in response to the question from the defense, "And there was a –some sort of verbal modification of that order that permitted drinking off post, at restaurants, in the present of, you know, officers and senior NCO's?", "Yes sir". 1SG Graham, the unit 1SG, testified to the same effect at (R. at 516), replying to the question, "What were the group rules[?]", states,

[14] As noted above in the footnote to the issues presented section, this appears to be dicta, as it was not necessary to the Court's holding. Appellant thus did not list the multiplicity issue as its own specified issue. However, to the extent this Court is considering whether Issue 1 is moot, if it relies on the CCA's hypothetical factual sufficiency analysis to uphold it, it would be creating a multiplicity issue it should then analyze.

"But you could go out in groups. Sometimes it will . . . be a mingle of both officers and enlisted. But you have to have somebody there of . . . some sort of rank. So it couldn't be a bunch of E5s and E6s just going out with their Joe's consume – having dinner and consuming two drinks." He further explained why a senior person would be required, stating, "You had to have somebody there that, that they thought was responsible enough to be able to, I wouldn't say micromanage, but be able to make sure that everybody's following the two-drink rule."

The Army Court, in upholding the Article 133 conviction, found Appellants "flout[ed]" the Brigade Commander's policy, and found that drinking with enlisted Soldiers "affected his fitness to command the obedience of his subordinates so as to successfully complete the military mission." *Smith* at 12.

The actual words on the charge sheet do not reference his violation of the policy, and that theory was not presented to the fact-finder. (Charge Sheet; R at 602-3; App. Reply Brief at 3); *see United States v. Ober*, 66 M.J. 693 (C.A.A.F. 2008) (holding that an appellate court cannot uphold a conviction "on the basis of a theory of liability not presented to the trier of fact").

By itself, drinking with enlisted Soldiers in a deployed environment would not violate Article 133 – the Brigade Commander's policy letter, in uncontradicted testimony from witnesses, recognized and carved out exceptions for situations in

which officers and enlisted drank together in a deployed environment; evidence that the conduct, by itself, is not conduct unbecoming an officer and a gentleman.

This CCA appears to be upholding the conviction because it violated the earlier policy order, which means that it is both using a different theory than Appellant was not charged with, while also making the Article 92 specification multiplicious. *See, e.g. United States v. Cherrukuri,* 53 M.J. 68 (C.A.A.F. 2000) (holding that when an offense is charged as both an enumerated article and as conduct unbecoming the enumerated article constitutes a lesser included offense).

Furthermore, the Army Court did not address the fact that the gathering that Appellant went to was widely attended and appears to have drawn no attention, aside from the events leading to the court-martial that occurred afterward; in other words, that there was no evidence his conduct was "to the disgrace of the Armed Forces" as alleged on the charge sheet. (Charge Sheet; Appellant's Brief at 30). The fact that other officers were drinking and were allowed to is not "whataboutism," but rather affirmative evidence that the conduct is not a violation of service custom or unbecoming an officer.

Additionally, the Army Court engaged in burden-shifting, noting that defense did not present evidence that 2LT Smith's conduct was not unbecoming (ignoring the substantial amount of circumstantial evidence to that effect discussed both above and in Appellant's Brief). *Smith* at 12. The Army Court did not note

that the Government, the party with the burden of proof, did not present any evidence that drinking with enlisted soldiers while deployed *was* unbecoming, in and of itself, and not without regard to the policy letter. *Id.*

Despite these multiple and highly specific deficiencies in proof, the Army Court did not even conduct a factual sufficiency review, but deemed the evidence factually sufficient nonetheless. *Smith* at 12. The Army Court's misunderstanding of the law in its hypothetical analysis shows its declination to do a factual sufficiency review is not moot, as affirming the conviction based on the hypothetical factual sufficiency review would lead to other legal errors.

Conclusion

This Court should grant appellant's petition as to whether the Army Court erred in declining to do a factual sufficiency review of The Specifications of Charge II and The Specification of Charge V. To the extent that it informs this Court's analysis, appellant would also welcome the opportunity to brief the legal errors in the Army Court's hypothetical non-review reviews.

II. WHETHER THE ARMY COURT ERRED IN AFFIRMING THE SENTENCE UNDER *U.S. V. WINCKELMAN*?

Standard of Review

This Court reviews whether a CCA erred in reassessing a sentence when necessary to correct an obvious miscarriage of justice or an abuse of discretion.

United States v. Williams, 84 M.J. 362 (C.A.A.F. 2024) (*citing United States v. Harris*, 53 M.J. 86, 88 (C.A.A.F. 2000)).

Law and Argument

In *United States v. Winckelman*, 73 M.J. 11, 15-16 (C.A.A.F. 2013), this Court addressed when a CCA could reassess a sentence after vacating a finding rather than having a rehearing on sentence. The Court articulated four factors to guide the analysis, including, "1) Dramatic changes in the penalty landscape and exposure," "2) whether an appellant chose sentencing by members or a military judge alone," "3) whether the nature of the remaining offenses capture the gravamen of criminal conduct included within the original offenses and, in related manner, whether significant or aggravating circumstances addressed at the court-martial remain admissible and relevant to the remaining offenses," and "4) whether the remaining offenses are of the type that judges of the courts of criminal appeals should have the experience and familiarity with to reliably determine what sentence would have been imposed at trial." *Winckelman* at 15-16.

The Army Court abused its discretion in applying *Winckelman*. Although the court cites *Winckelman*, it did no analysis of any of its four factors, all of which favor the defense.

For factor one, the punitive exposure was eight years and six months at trial (R. at 739-40), with three years of that being for the Article 93 violation. MCM

App. 12 (Maximum Punishment Table). The factual insufficiency finding for the Article 93 violation takes away over a third of that exposure. In other words, dismissal of the Article 93 violation alone constituted a dramatic change in the penalty landscape.

For factor two, Appellant was sentenced by a panel rather than a military judge, making it significantly more difficult to determine what the panel would have done, as they are not fellow military judges like this Court. This Court noted in *Winckelman* that "as a matter of logic, judges of the criminal appeals are more likely to be certain of what a military judge would have done as opposed to members." *Winckelman* at 16. Further, "this factor could become more relevant where charges address service custom, service discrediting conduct, or conduct unbecoming." *Id.* at 16. All of Appellant's convictions were for military-specific offenses – Articles 92, 93, and 134 – exactly the type of offenses a panel could view differently from a judge.

Perhaps most compelling in this case is *Winckelman* factor three. After determining that the maltreatment specification was factually insufficient, there was no crime with a victim, taking away the gravamen of the original offenses. Besides Appellant's Soldier Talent Profile, the Government put on no evidence in presentencing. (R. at 680). However, SPC JC gave a victim impact statement during the sentencing hearing (R. at 681-83), claiming she had lost significant

weight, had "little to no sleep", "had to fight for my career while trying to cope with trauma." (R. at 682). The military judge highlighted the evidence from the victim impact statement with an instruction to the panel explaining how they could consider the impact on the victim in reaching their sentence. (R at 738). Finally, the trial counsel tied the victim impact evidence and instruction together in requesting a significant sentence during pre-sentencing argument.[15] (R. at 726). None of that evidence and argument would have been admissible absent the Article 93 conviction that was found to be factually insufficient.

Finally, regarding the fourth *Winckelmann* factor, court-martial cases with convictions for military specific crimes that resulted in a sentence severe enough to reach a CCA are likely rare enough for it to be difficult for the CCA to reliably determine what sentence would have been imposed at trial. It is unlikely that this fact pattern, absent the sexual assault allegations, would ever be referred to a court-martial in the first place.

Conclusion

For the foregoing reasons, this Court should grant Issue II to provide guidance on the application of the factors in *United States. v. Winckelman*.

---

[15] "We ask that you consider the statement of Specialist [JC], and the effect that this has had on her. You heard the impact on the victim, the physical toll, the change in her. I ask you, consider them, weigh them carefully, respect them. The impact of the accused's crimes against this junior enlisted are far reaching. And they have lasted the last 18 months." (R.at 726).

Peter Ellis
Major, Judge Advocate
Branch Chief
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0715
USCAAF Bar No. 38209

Kyle C. Sprague
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF Bar Number 36867

Frank E. Kostik Jr.
Colonel, Judge Advocate
Chief
Defense Appellate Division
USCAAF Bar Number 35108

Certificate of Compliance with Rules 21 and 37

1. This Brief on Behalf of Appellant complies with the type-volume limitation of Rule 2(b) because it contains 7,054.

2. This Brief on Behalf of Appellant complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

Peter Ellis
Major, Judge Advocate
Branch Chief
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0715
USCAAF Bar No. 38209

Appendix A: Army Court Decision

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
MORRIS, ARGUELLES,[1] and JUETTEN
Appellate Military Judges

UNITED STATES, Appellee
v.
Second Lieutenant RICKY A. SMITH
United States Army, Appellant

ARMY 20230482

Headquarters, Fort Bragg
G. Bret Batdorff, Military Judge
Colonel Joseph B. Mackey, Staff Judge Advocate

For Appellant: Lieutenant Colonel Autumn R. Porter, JA; Lieutenant Colonel Robert D. Luyties, JA (on brief); Colonel Frank E. Kostik, Jr., JA; Lieutenant Colonel Kyle C. Sprague, JA; Major Peter M. Ellis, JA (on reply brief).

For Appellee: Colonel Richard E. Gorini, JA; Major Stephen L. Harmel, JA; Captain Andrew T. Bobowski, JA; Mitchell Taylor, law student (on brief).

30 December 2025

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

ARGUELLES, Judge:

An officer panel sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of failure to obey a written order, one specification of maltreatment, one specification of conduct unbecoming an officer, and two specifications of indecent conduct, in violation of Articles 92, 93, 133, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 893, 933, and 934 [UCMJ].[2] The panel acquitted appellant of one specification of making a false

---

[1] Judge ARGUELLES decided this case while on active duty.

[2] For purposes of clarity and efficiency, subsequent reference to the UCMJ will exclude citation to that work.

official statement and two specifications of sexual assault, in violation of Articles 107 and 120. The panel sentenced appellant to a dismissal and forfeiture of $2,521 per month for six months. The convening authority took no action on the sentence.

This case is before the court for review pursuant to Article 66. Appellant raises five assignments of error, one of which (factual sufficiency of the maltreatment specification) merits relief.[3]

BACKGROUND

On 3 April 2022, appellant, a second lieutenant (O-1), and the victim, a specialist (E-4), attended a barbecue together while both were forward deployed to Mihail Kogalniceanu Airbase ("MK Airbase") in Romania. Appellant and the victim were members of the same unit, but there were also soldiers from other units present at the barbecue. The victim testified, and appellant confirmed in his interview with the Army Criminal Investigative Division (CID), that prior to the barbecue, the two had limited professional interactions and did not speak more than a sentence to each other while working.

Officers, enlisted, and noncommissioned officers (NCOs) attended the barbecue, where both appellant and the victim were drinking. There is no evidence, however, that appellant and the victim drank together or had any interaction during the barbecue. While soldiers from other units present at the barbecue were authorized to consume alcohol, appellant and the victim's unit was subject to an order prohibiting the consumption of alcohol while deployed on MK Airbase.

The party ended around 2100 when the victim slapped an NCO who was also attending the party, and one of the partygoers called the victim's friends to come get her because she was "out of control." After the party broke up but before the victim's friends arrived, witnesses observed appellant and the victim side by side, giggling and laughing together in the shack that had housed the party. One of the witnesses testified that when he asked if they were okay and if "everything's good," both appellant and the victim responded that "yes, everything was good."

In an interview admitted into evidence, appellant told CID that he sat with the victim for a few minutes after her altercation with the NCO to calm her down, and that when he tried to leave, she pulled him in for a kiss. Several soldiers observed them in the shack, and appellant and at least one other soldier said the victim was lying next to him on the ground while fully clothed.

---

[3] We have also given full and fair consideration to the matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find them to be without merit.

At some point, appellant and the victim left the shack, whereupon the victim announced that she needed to use the restroom and initially attempted to access the latrine in the nearby men's barracks. Appellant and another soldier were able to keep her from entering the male barracks. Appellant and the victim then headed across the way towards the public latrine and showers located in a Morale Welfare and Recreation (MWR) facility. These restrooms were open and remained accessible and unlocked 24 hours a day.

Appellant told CID that after arriving at the MWR latrines, he went to the male restroom and the victim went to the female restroom. Appellant used the restroom and exited the bathroom to wait for the victim. After appellant waited a few minutes for the victim by the female door, she opened the door and pulled him into the female restroom, which contained both toilets and a shower area in the rear. Per appellant, the two kissed and then the victim led him around the room, performing oral sex on him both in the open part of the room by the sinks and back in the enclosed shower area. Appellant also described how at one point by the door, the victim lowered her pants and guided his penis into her vagina.

During the interview, appellant described how the victim put her hand by the door and was playing with the lock but then specifically said, "she never even locked it." Although not entirely clear from the videotape of his interview, it appears appellant then said something along the lines of "anyway she was locking it." At no point during his interview, however, did appellant assert that he knew for certain whether the victim had locked the door or that he had relied on the victim's alleged locking of the door as a justification for his conduct in the latrine. Finally, appellant asserted that all of the sexual activity was fully consensual and described how the victim took a leading role throughout the encounter.

The victim, at trial, provided a different account of events. The victim testified that, based on the facts that she did not eat anything during the day and the amount of alcohol she drank at the barbecue, she had no memory of what happened shortly after arriving at the barbecue, including her altercation with the NCO. She asserted that her only recollection after arriving at the barbecue was "a faint memory of being pinned up against the wall, and being kissed on, in the bathroom." Neither side asked the victim if she recalled anything about the lock.

As described above, after the victim slapped the NCO, one of the partygoers called her female friends to come get her. By the time three of the victim's friends responded to the shack, the victim was no longer there. Unable to find her, the friends testified as to how they were growing increasingly worried. Finally, they ran into another soldier who told them that he saw appellant and the victim heading towards the MWR restrooms. The first friend who entered the restroom testified that after she heard someone say "oh f***" in the back showers, she went into the shower area where she saw a male "hovered over" a female with his pants down and his

buttocks exposed. That soldier immediately ran out of the restroom and was "crying hysterically" when she reported to her friends still outside that "somebody's in there having sex." Two more members of the search party entered and saw appellant standing in the corner of the shower with the victim "like on her knees."

One of the female soldiers then helped the victim wash her face and led her outside, where she joined the others. A few minutes after that, appellant walked out of the female restroom, where one of the female soldiers took a picture of him on her phone. From there, all the females returned to the party shack to look for the victim's phone. Following along, appellant was able to find the victim's phone using the flashlight on his phone. After that, all of the females and appellant went to the on-post dining facility (DFAC), but when appellant tried to sit with the girls, they told him they wanted to be alone, and he returned to his barracks room.

There was conflicting testimony about the victim's level of intoxication, both at the party and after her friends found her in the MWR latrine. After the female soldiers returned to the female barracks, one of the witnesses testified that the victim was a "happy drunk" and was joking about "popping champagne" after another soldier dropped a soda that sprayed everywhere. Another one of the female soldiers testified that when she asked the victim back in the barracks if appellant took advantage of her, the victim responded, "[N]o, he is my friend." Sometime after arriving back at the barracks, the victim went back to the MWR latrine to call a male soldier who was stateside.

The victim testified that based on "what was being told to me" by her friends the next day and the fact that she "could tell the next morning that something had been inside of me," she reported to her first sergeant that "I thought I'd been assaulted."

Based on his attendance at the barbecue and his interaction with the victim that night, appellant was charged with two specifications of Article 120 (sexual assault on a victim incapable of consenting due to alcohol), two specifications of Article 134 (indecent conduct for penetrating the victim's vulva and mouth in an unlocked latrine), one specification of Article 93 (maltreatment for kissing the victim), one specification of Article 92 (failure to obey a lawful order prohibiting him from drinking alcohol), one specification of Article 133 conduct unbecoming (consuming alcohol with enlisted soldiers in a deployed environment), and one specification of Article 107 (false official statement for telling CID that the victim was "good to go" and "in her right state" on the night in question). As noted above, the panel acquitted appellant of the two sexual assault specifications and the false official statement specification but found him guilty on all of the other charges and specifications.

LAW AND DISCUSSION

A. Indecent Conduct Specification

Charge II set forth two specifications alleging indecent conduct: (1) appellant penetrated the victim's vulva with his penis in an unlocked latrine; and (2) appellant kissed the victim in an unlocked latrine. Appellant now claims that his conviction for indecent conduct is factually and legally insufficient because he took affirmative steps to be behind multiple closed doors, did not disrobe, and picked a location further away from other soldiers. For the reasons set forth below, this claim is without merit.

1. Law – Factual Sufficiency

Article 66(d)(1)(B), Factual Sufficiency Review, provides:

> (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.

The Court of Appeals for the Armed Forces [CAAF] addressed the application of Article 66(d)(1)(B) in *United States v. Harvey*, 85 M.J. 127 (C.A.A.F. 2024). First, the CAAF held that if the two "trigger conditions (i.e., an assertion of an error and a showing of a deficiency) are not met, then nothing in amended Article 66, UCMJ, either requires or allows [this court] to review the factual sufficiency of the evidence." *Id.* at 130.

To date, the CAAF has not provided any additional guidance on what constitutes the second *Harvey* trigger of a "showing of deficiency in proof." In its most recent discussion of factual sufficiency, the CAAF did not delve into what constitutes a showing of deficiency of proof, but rather only generally held that

"when stating the standard of review and performing factual sufficiency review, service courts should cite and follow this Court's guidance in *Harvey*, 85 M.J. at 130-32, instead of the Court's prior guidance in" *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). *United States v. Downum*, __ M.J. __, 2025 CAAF LEXIS 828, at *13 (C.A.A.F. 30 Sept. 2025).

In *United States v. Brassfield*, we held that the combination of appellant's testimony denying the conduct at issue, along with "minor inconsistencies in the victims' testimony does *not* establish a specific deficiency of proof" under *Harvey*. 85 M.J. 523, 528 (Army Ct. Crim. App. 2024) (emphasis added), pet. denied, 85 M.J. 446 (C.A.A.F. 2025); *see also United States v. Myers*, ARMY 20230100, 2024 CCA LEXIS 535, at *14 (Army Ct. Crim. App. 16 Dec. 2024) (mem. op.) (appellant fails to make a specific showing of deficiency in proof where "indisputable" facts established his guilt), pet. denied, 85 M.J. 405 (C.A.A.F. 2025).

Addressing the same issue, our sister court in *United States v. Valencia* held:

> a general disagreement with a verdict falls short of a specific showing of a deficiency in proof, and thus [under *Harvey*] will not trigger a full factual sufficiency analysis. 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.

85 M.J. 529, 535 (N.M. Crim. Ct. Crim. App. 2024), aff'd, 2025 CAAF LEXIS 966 (C.A.A.F. 24 Nov. 2025); *see also United States v. Penaloza*, ARMY 20230473, 2025 CCA LEXIS 76, at *14 (Army Ct. Crim. App. 28 Feb. 2025) (mem. op.) (fact negating element of offense satisfies the second *Harvey* trigger).

We will adopt a combination of our holding in *Brassfield* and our sister court's holding in *Valencia* as guideposts for meeting that standard. Assuming the trigger conditions are met, the CAAF construed the requirement of "appropriate deference" to imply "that the degree of deference will depend on the nature of the evidence at issue," and held that Article 66 "affords the [Court of Criminal Appeals (CCA)] discretion to determine what level of deference is appropriate . . . ." *Harvey*, 85 M.J. at 130-31. Explaining, the CAAF in *Harvey* held:

> For example, a CCA might determine that the appropriate deference required for a court-martial's assessment of the testimony of a fact witness, whose credibility was at issue, is high because the CCA judges could not see the witness testify. In contrast, when the CCA can assess documents,

> videos, and other objective evidence just as well as the court-martial, the CCA might determine that the appropriate deference required is low. The statute affords the CCA discretion to determine what level of deference is appropriate, and we will review a CCA's decision only for an abuse of discretion.

Id at 131. Finally, with respect to the last part of the analysis, the CAAF held "the quantum of proof necessary to sustain a finding of guilty during a factual sufficiency review is 'proof beyond a reasonable doubt,' the same as the quantum of proof necessary to find an accused guilty at trial." *Id.* The CAAF concluded:

> Accordingly, for a CCA to be "clearly convinced that the finding of guilty was against the weight of the evidence," two requirements must be met. First, the CCA must decide that the evidence, *as the CCA has weighed it*, does not prove that the appellant is guilty beyond a reasonable doubt. Second, the CCA must be clearly convinced of the correctness of this decision.

Id. at 132 (emphasis in original).

2. Law – Legal Sufficiency

With respect to legal sufficiency, our review is de novo. *United States v. Robinson*, 77 M.J. 294, 297 (C.A.A.F. 2018) (citation omitted). "'The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id.* at 297-98 (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)). Because we must draw "every reasonable inference from the evidence of record in favor of the prosecution[,]" the standard for legal sufficiency "involves a very low threshold to sustain a conviction." *United States v. Smith*, 83 M.J. 350, 359 (C.A.A.F. 2023) (first quoting *Robinson*, 77 M.J. at 298; and then quoting *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019)).

3. Law – Indecent Conduct

In *United States v. Izquierdo*, the CAAF held that consensual sexual acts committed "openly and notoriously" are actionable offenses under Article 134 indecent conduct. 51 M.J. 421, 422 (C.A.A.F. 1999) (citations omitted). The CAAF further held that the military judge properly instructed the members that "[s]exual acts are considered to be committed openly and notoriously when such acts are performed in such a place and under such circumstances that it is reasonably likely to be seen by others even though others actually do not view the acts." *Id.* at 423.

In *Izquierdo*, the CAAF specifically held that while hanging up a sheet to have sex with others still present in the room was legally sufficient to sustain a conviction for indecent conduct, having sex in an unlocked barracks room where no one else was present was legally insufficient. *Id.*

In *United States v. Sims*, the CAAF reaffirmed the holding of *Izquierdo*—that it was not necessary to prove that a third person actually observed the indecent act, but rather only that it was reasonably likely that a third person would observe it. 57 M.J. 419, 422 (C.A.A.F. 2002). In *Sims*, the CAAF held that where the conduct occurred in a private bedroom with no one else present and neither party disrobed, appellant's guilty plea to an indecent conduct specification was improvident. *Id.*; *see also United States v. Castellano*, 72 M.J. 217, 222 (C.A.A.F. 2013) ("Whether consensual sexual activity between adults is subject to criminal sanction because it is 'open and notorious' – i.e., public as opposed to private under this Court's case law – is a factual determination committed to the trier of fact." (citations omitted)); *United States v. Rollins*, 61 M.J. 338, 344 (C.A.A.F. 2005) ("The determination of whether an act is indecent requires examination of all the circumstances, including the age of the victim, the nature of the request, the relationship of the parties, and the location of the intended act." (citation omitted)).

4. Analysis

Appellant argues that because at least some of the sexual activity occurred in the shower (which was located behind another wall of the latrine), he and the victim did not fully disrobe, and that there was "no substantial risk" of discovery by others, the indecent conduct specification is factually insufficient.

Appellant's attempt to draw parallels between this case and *Izquierdo* and *Sims* fails for several reasons. First, having sex in a public MWR latrine is simply not the same thing as having sex in an unlocked private barracks. *See United States v. McLeod*, 67 M.J. 501, 504 (C.G. Ct. Crim. App. 2008) ("[S]exual conduct that occurred in a military chapel – a public building on a military installation that provides unrestricted access to military members . . . ." is "open and notorious"). Moreover, and again unlike both *Izquierdo* and *Sims*, in this case a third party did actually walk into the latrine, where she observed appellant with his pants down, buttocks exposed, and hovering over the victim. Put simply, we do not need to determine whether appellant and the victim's sexual activity in the latrine "was reasonably likely to be seen by others," because said activity was in fact observed by one of the female soldiers looking for the victim when she walked in on them in the shower.

Appellant also argues that his conviction is factually and legally insufficient because he "believed he was behind a locked door." This contention, however, lacks evidentiary support. To the contrary, although during his recorded interview

appellant made some references to the victim playing with the lock and/or having her hands near the lock, he never claimed he knew she locked the door. Nor did he ever expressly or even implicitly assert that he relied on her locking the door as a justification for his conduct in the latrine.

Based on this record, appellant has not even met the threshold "showing of a deficiency" to trigger our Article 66 review. Specifically, appellant has failed to show either: (1) that the female MWR latrine was so "private" as to undermine the panel's implicit finding that his conduct was "open and notorious" conduct; or, (2) that his belated justification that the victim locked the door is a "weakness in the evidence" that contradicts the panel's guilty finding.[4]

For all of the same reasons, his indecent conduct conviction is also legally sufficient.

B. Failure to Obey Lawful Order Specification

Appellant now claims that his conviction for failing to obey a lawful written order by drinking alcohol on-post is factually insufficient. Specifically, appellant asserts that the command modified the order, the order had exceptions and an unclear timeframe, and that there were multiple different understandings from those who received the order. For all of the reasons set forth below, we disagree.

1. Additional Facts

On 9 February 2022, the commander of appellant's unit issued a formal written order that provided, in pertinent part, "Soldiers shall not consume, purchase, possess, manufacture, distribute, import or export any alcohol while deployed." Multiple witnesses testified at trial that at some point the commander relaxed the order so that soldiers in appellant's unit could drink two or three alcoholic beverages at pre-approved restaurants *off-post*. The unit's first sergeant testified soldiers who drank off-post under the relaxed order had to go out in a "mingle of both officers and enlisted." Further clarifying, the first sergeant explained:

> it couldn't be a bunch of E5s and E6s just going out with their Joe's consume – having dinner and consuming two drinks. You had to have somebody there that, that they

[4] Even assuming that appellant has satisfied the second *Harvey* trigger, his factual insufficiency claim is still without merit. After giving the appropriate level of deference to the panel members who saw and heard the witnesses as they testified, we are clearly convinced, based on our own review and weighing of all the evidence in the record of trial, that appellant was guilty of indecent conduct beyond a reasonable doubt.

> thought was responsible enough to be able to, I wouldn't say micromanage, but be able to make sure that everybody's following the two-drink rule.

Likewise, another soldier confirmed that "the only permission is if we have like a platoon as a whole. They have – when we go off-post, we have to have like an NCOIC, an officer with us that's from our unit."

No witnesses, including those called by the defense, testified that the command ever expressly modified the order to allow for drinking *on-post*. On appeal, appellant places great weight on the testimony of the company commander, who stated, "Later on in time that was relaxed to allow, I believe it was two alcoholic drinks. And then they were allowed to go off post to like five establishments." To the extent the company commander's testimony created any ambiguity pertaining to the permissibility of drinking both on-post and off-post, every other witness who addressed this issue was certain that the command never modified the order to allow drinking on-post. For example, the first sergeant testified that even under the modified policy, members of appellant's unit could not drink on-post and when similarly asked on direct examination whether the modified policy allowed for drinking on-post, another soldier in the same unit replied, "Oh no, that, that didn't apply to that, ma'am."

Finally, it was unclear from the testimony when the modification allowing off-post drinking even took effect, as multiple witnesses seemed to believe that this change occurred *after* the date of the barbecue at issue in this case.

2. Analysis

As set forth above, *Harvey* governs our review of factual sufficiency. Given that the witnesses expressed some ambiguity about the order, to include the company's commander's testimony, we find that appellant has set forth a sufficient "showing of a deficiency" to trigger our Article 66 review.

Based on our own review and weighing of all the evidence in the record of trial, however, we are still clearly convinced that appellant was guilty beyond a reasonable doubt. Likewise, while we agree with the panel's guilty verdict on the failure to obey a lawful order specification, given the fact that no witness, or even appellant himself in his CID interview, ever expressly stated that the commander modified the order to allow for drinking on-post, this is simply not a case which calls for a high level of deference to the fact-finder's credibility determinations.

C. Conduct Unbecoming Specification

Appellant avers his conviction for conduct unbecoming an officer by consuming alcohol with noncommissioned officers and soldiers in a deployed environment is factually insufficient. For the reasons set forth below, we disagree.

1. Law

Again, *Harvey* governs our review of factual sufficiency. The elements of a violation of Article 133, conduct unbecoming an officer are: (1) "the accused did or omitted to do a certain act;" and (2) "under the circumstances, the act or omission constituted conduct unbecoming an officer and [a] gentleman." *Manual for Courts-Martial, United States* (2019 ed.) [*MCM*], pt. IV, ¶ 90.b.; *United States v. Lofton*, 69 M.J. 386, 388 (C.A.A.F. 2011). In addition, an officer's conduct need not violate other provisions of the UCMJ or even be criminal, but must only "disgrace[] him personally or bring[] dishonor to the military profession such as to affect 'his fitness to command the obedience of his subordinates so as to successfully complete the military mission.'" *United States v. Schweitzer*, 68 M.J. 133, 137 (C.A.A.F. 2009) (quoting *United States v. Forney*, 67 M.J. 271, 275 (C.A.A.F. 2009)); *see also United States v. Meakin*, 78 M.J. 396, 404 (C.A.A.F. 2019) (holding that the "heightened standard for officers [subject to Article 133 charges] commands respect and obedience and preserves their ability to lead and command their subordinates." (citing *Parker v. Levy*, 417 U.S. 733, 743-45 (1974)); *United States v. Gonzalez*, __ M.J. __, 2025 CAAF LEXIS 761, at *6 (C.A.A.F. 15 Sept. 2025) ("'The gravamen of the [Article 133, UCMJ,] offense is that the officer's conduct disgraces him personally or brings dishonor to the military profession such as to affect his fitness to command the obedience of his subordinates so as to successfully complete the military mission.'" (alteration in original) (quoting *Lofton*, 69 M.J. at 388)).

2. Analysis

Appellant argues that because his commander mandated that members of the unit could only drink alcohol when an officer was present, his conduct unbecoming conviction for drinking with enlisted soldiers at the barbecue is factually insufficient. Specifically, appellant points to the testimony of the first sergeant, who described how the order was modified to allow for drinking off-post only if there was a "mingle of both officers and enlisted. . . . to make sure that everybody's following the two-drink rule." Appellant also highlights that another soldier testified, "when we go off post [to drink], we have to have like an NCOIC, an officer with us that's from our unit."

In addition, appellant claims the first sergeant testified that it would not have been disgraceful to the armed forces "for an officer to consume alcohol in the presence of enlisted Soldiers on" MK Airbase. This, however, is *not* what the first

sergeant testified to. Specifically, when asked if he thought it would be a "disgrace to the Armed Forces for *noncommissioned officers* and Soldiers to be consuming alcohol while in Romania at that time[,]" he responded, "No, ma'am, I would not." Simply put, defense counsel never asked the first sergeant what he thought about *officers* drinking with enlisted personnel, nor was he even asked if it would be problematic for NCOs and enlisted personnel to be drinking together at *the same time.*

Appellant relies heavily on *United States v. Guaglione*, 27 M.J. 268 (C.M.A. 1988), in support of this second point. In that case, appellant's battery commander, battalion commander, and first sergeant all testified that his actions amounted to no more than "poor judgment," with his battalion commander and first sergeant refusing to characterize his conduct as "unbecoming." 27 M.J. at 270-72. As such, the Court of Military Appeals held there was insufficient evidence to sustain an Article 133 conviction. *Id.* at 273. In this case, however, no senior officer ever testified on appellant's behalf, and as noted above, appellant misrepresents the first sergeant's testimony. As such, *Guaglione* is easily distinguishable.

In this case, there is no evidence that the commander ever mandated that officers be present when enlisted soldiers drank on-post; to the contrary, the command issued an order that prohibited anyone from drinking on-post. Nor is there any evidence that anyone in appellant's chain of command ever expressed an opinion that his conduct was not "unbecoming." In short, we reject both appellant's assertion that his command "mandated" that officers drink with enlisted soldiers on-post and his misrepresentation of the record that his first sergeant testified that it was not disgraceful for officers and enlisted to be drinking together on MK Airbase. Accordingly, we decline to find that there is a "weakness in the evidence" that undercuts any of the elements of the alleged Article 133 offense.

But, even if we were to reach appellant's factual sufficiency claim, this specification essentially boils down to the panel's implicit finding that his conduct in not only flouting the order prohibiting drinking on-post in a deployed environment but also drinking with enlisted soldiers "affect[ed] 'his fitness to command the obedience of his subordinates so as to successfully complete the military mission.'" *Schweitzer*, 68 M.J. at 137 (citation omitted). Based on our own review and weighing of all the evidence in the record of trial, we agree with the panel and are clearly convinced beyond a reasonable doubt that appellant was guilty of conduct unbecoming an officer.

D. Maltreatment Specification

Appellant makes two separate challenges to his maltreatment specification: (1) it is fatally ambiguous under *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003); and (2) it is factually insufficient. Because we find that the conviction for

this specification is factually insufficient, we need not reach appellant's first contention.

1. Law

Harvey governs our review of factual sufficiency. The elements of Article 93 maltreatment are: (1) "a certain person was subject to the orders of the accused;" and (2) "the accused was cruel toward, or oppressed, or maltreated that person." *MCM*, pt. IV, ¶ 19.b. In *United States v. Carson*, the CAAF held that in a maltreatment case, because the "essence of the offense is abuse of authority," the government need only prove that, under an objective standard, the accused's actions reasonably could have caused physical or mental harm or suffering. 57 M.J. 410, 415 (C.A.A.F. 2002); *see also United States v. Caldwell*, 75 M.J. 276, 280 (C.A.A.F. 2016) ("Moreover, such conduct [underlying a maltreatment conviction] need not result in actual harm to the victim – either mental or physical – because 'the essence of the offense is abuse of authority.'" (alteration omitted) (quoting *Carson*, 57 M.J. at 415)).

On the other hand, in *United States v. Fuller*, the CAAF held that "'Art[icle] 93, UCMJ, . . . is not a strict liability offense punishing all improper relationships between superiors and subordinates.'" 54 M.J. 107, 111 (C.A.A.F. 2000) (quoting *United States v. Johnson*, 45 M.J. 543, 544 (Army Ct. Crim. App. 1997), pet. denied, 48 M.J. 345 (C.A.A.F. 1997)), rev'd on other grounds, *United States v. Miller*, 67 M.J. 385, 389 (C.A.A.F. 2009). Specifically, in *Fuller* the CAAF found the maltreatment specification to be legally insufficient where the government failed to present evidence that: (1) the victim ever felt coerced to have sex with appellant because of his rank; (2) appellant in any way used his rank to pressure the victim to have sex; or (3) that appellant knew the victim was "extremely intoxicated." *Id.* at 111-12; *see also United States v. Cardenas*, ARMY 20180416, 2019 CCA LEXIS 479, at *9-10 (Army Ct. Crim. App. 27 Nov. 2019) (mem. op.) (holding that maltreatment conviction factually insufficient where no evidence that victim ever alluded to appellant's rank or position bearing on her consent to enter into consensual personal relationship), aff'd, 80 M.J. 420 (C.A.A.F. 2021). Finally, the fact that the victim may have consented or acquiesced is not an absolute defense to maltreatment but rather is only one factor to consider. *United States v. Patton*, ARMY 20150675, 2017 CCA LEXIS 237, at *8 (Army Ct. Crim. App. 7 Apr. 2017) (mem. op.); *see also United States v. Harris*, 41 M.J. 890, 893-94 (Army Ct. Crim. App. 1995) (evidence going to consent to sexual conduct would have had probative value in defending against maltreatment, and excluding the evidence was prejudicial error).

2. Analysis

As was the case in both *Fuller* and *Cardenas*, there is no evidence in this case that the victim ever felt coerced to engage in sexual activities with appellant, or that

appellant in any way used his rank to pressure her to participate in such conduct. There is also no evidence that the victim ever suffered or was reasonably likely to suffer physical or mental harm. To the contrary, none of the three soldiers who encountered the victim in the latrine testified that she was crying or in any way appeared upset when they found her. One of the females testified that after they returned to the barracks, the victim was a "happy drunk" and joked about "popping champagne" after another soldier dropped a soda. Likewise, another female soldier testified that when she asked the victim if appellant took advantage of her, she responded, "No, he is my friend." The victim herself testified that she had no recollection of the events in question other than being "kissed on" in the latrine, and that she "thought I'd been assaulted" based on "what was being told to me" by her friends, and because she "could tell the next morning that something had been inside of me." Finally, appellant asserted in his CID interview that the sexual activity was fully consensual and described how the victim took a leading role.

The government contends that the maltreatment specification is factually sufficient because the evidence proved beyond a reasonable doubt that the victim did not consent to either kiss, notwithstanding the fact that the panel acquitted appellant of the sexual assault charges. We recognize that the panel's not guilty findings for the sexual assault and false statement charges do not necessarily compel us to conclude that the victim consented to either kiss. *See United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017) ("Defendants are generally acquitted of offenses, not of specific facts, and thus to the extent facts form the basis for other offenses, they remain permissible for appellate review."). Nevertheless, based on our own independent review of the record, we disagree with the government that the evidence proved beyond a reasonable doubt that the victim did not consent. To the contrary, we find it far more likely that both the kiss in the shack and the kiss in the latrine were consensual.

Starting with the obvious, there is virtually no evidence in the record that the victim did *not* consent to kissing appellant. To the contrary, and consistent with appellant's statement that everything that occurred during the course of the evening was consensual, multiple witnesses testified that the two were laughing and giggling in the shack, and in response to a question, the victim said she "was good." In addition, both appellant and another soldier said he and the victim were lying on the ground fully clothed while in the shack. Finally, as noted above, the victim was described as being a "happy drunk" when she got back to the barracks and specifically told one of her roommates that appellant did *not* take advantage of her.

We acknowledge that, unlike both *Fuller* and *Cardenas,* where there was no dispute that the victim consented to the conduct at issue, the best we can say in this case is that the government did not prove lack of consent beyond a reasonable doubt. There is also, however, no evidence that appellant's rank played any role in the offense nor is there any evidence, when viewed under an objective standard, that his

actions reasonably could have caused the victim physical or mental harm. While the victim may have regretted her actions the next morning and felt bad about the fact that the amount of alcohol she drank may have lowered her inhibitions, that is not the type of "mental suffering" sufficient to support a maltreatment conviction.

In sum, with respect to the second *Harvey* trigger, given that there is no evidence in the record that the victim did not consent to kissing appellant, appellant has met his burden to "identify a weakness in the evidence admitted at trial to support an element . . . ." *Valencia*, 85 M.J. at 535. Moreover, given that the victim testified that she had no recollection of the events in question other than being "kissed on" in the latrine, and that she "thought I'd been assaulted" based on "what was being told to me" by her friends the next morning, we give minimal deference to the panel's assessment of her testimony as it pertains to the specific issue of whether she was "maltreated." Finally, given that the factfinder heard appellant's version of events in question via a videotape of his CID interview, we again determine that our deference to the panel's evaluation of this evidence is minimal. *See Harvey*, 85 M.J. at 131 ("In contrast, when the CCA can assess documents, videos, and other objective evidence just as well as the court-martial, the CCA might determine that the appropriate deference required is low.").

Turning to our factual sufficiency determination, for all of the reasons above, and based on our review and weighing of the entire record, we are clearly convinced that the government failed to prove that appellant is guilty of maltreatment beyond a reasonable doubt. As such, this specification is factually insufficient and must be set aside.

CONCLUSION

The findings of guilty to The Specification of Charge III and Charge III are SET ASIDE, and that specification and charge are DISMISSED. The remaining findings of guilty are AFFIRMED.

Having considered the entire record, and after reassessing the sentence in accordance with the principles articulated by our superior court in *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986), and *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013), we AFFIRM the original sentence as entered in the Judgment of the Court.

Senior Judge MORRIS and Judge JUETTEN concur.

ARGUELLES, Judge, concurring;

I write separately only to explain why appellant's fatal ambiguity challenge to the maltreatment specification is also without merit.

The Specification of Charge III alleged appellant did "maltreat [the victim], a person subject to his orders, by kissing [the victim's] mouth." Appellant argues that because there was evidence he actually kissed the victim on two separate occasions, specifically first in the shack and then later in the latrine, his conviction is fatally ambiguous pursuant to *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003), and must be set aside.

We review de novo whether a conviction is fatally ambiguous. *United States v. Rodriguez*, 66 M.J. 201, 203 (C.A.A.F. 2008).

A. United States v. Walters

In *United States v. Walters*, the Court of Appeals for the Armed Forces [CAAF] held that where an accused is charged with committing an illegal act "on divers occasions," but the panel returns a guilty verdict by exceptions and substitutions to a single, unspecified act, the conviction must be set aside because the Criminal Court of Appeals cannot "find as fact any allegation in a specification for which the fact-finder below has found the accused not guilty." 58 M.J. at 395 (citations omitted).

Appellant is correct there was evidence that he and the victim kissed two separate times, specifically in the shack and in the latrine, despite the specification alleging only a single kiss. Appellant now asserts that since we do not know which kiss formed the basis for the panel's guilty verdict, we cannot perform an Article 66 factual sufficiency review, which in turn renders the guilty finding fatally ambiguous. In support of his argument, appellant cites *Walters* and a number of cases that followed it, all of which again stand for the proposition that where the government charges an accused with committing an offense on divers, or multiple, occasions, and the panel returns a verdict by exceptions and substitutions to a single unspecified act, the conviction cannot stand. *See, e.g.*, *United States v. Augspurger*, 61 M.J. 189, 190 (C.A.A.F. 2005) (holding that when the phrase "on divers occasions" is removed from a specification, the effect is "that the accused has been found guilty of misconduct on a single occasion and not guilty of the remaining occasions.").

Unlike *Walters* and its progeny, however, the maltreatment specification in this case did *not* allege that appellant kissed the victim on more than one occasion. Likewise, because the panel did not return its verdict with "exceptions and substitutions," there is no evidence that it found appellant not guilty of either the kiss in the shack or the kiss in the latrine. Indeed, the CAAF has repeatedly held that *Walters* "applies only in those narrow circumstances involving the conversion of a divers occasions specification to a one occasion specification through exceptions and substitutions by the members." *Rodriguez*, 66 M.J. at 205 (cleaned up) (quoting *United States v. Brown*, 65 M.J. 356, 358 (C.A.A.F. 2007)).

In *Rodriguez*, the panel found appellant guilty of using marijuana on "divers occasions." *Id.* at 202. Although the government presented evidence that appellant used marijuana three separate times, on appeal it was determined that the evidence for only one of those uses was factually sufficient. *Id.* at 202-03. Rejecting appellant's *Walters* challenge, the CAAF held that, unlike a general verdict, where it is presumed that the verdict attaches to each of the alleged multiple acts, the *Walters* rule applies only where "the members' exceptions and substitutions on the findings worksheet implicitly meant that the factfinder had found that the accused was not guilty of some of the acts alleged at trial." *Id.* at 204-05.

Put another way, because the panel here did not either implicitly or explicitly find that appellant did not kiss the victim in either the shack or the latrine, the logic and reasoning of *Walters* and its progeny is not applicable to this case.

B. Unanimity of Fact vs. Unanimity of Theory

The Supreme Court and the federal circuit courts have held that there is a difference between unanimity of fact and unanimity of theory. In *Schad v. Arizona*, 501 U.S. 624 (1991) (plurality opinion), the Supreme Court rejected the approach of requiring jury unanimity when the means used to commit an offense simply satisfied an element of a crime and did not themselves constitute a separate offense or an element of an offense. 501 U.S. 624, 630-33 (1991). In *Richardson v. United States*, the Supreme Court similarly held that although a jury in a federal criminal case cannot convict unless the Government proves each "element" beyond a reasonable doubt, it "need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime." 526 U.S. 813, 817 (1999) (citing *Schad*, 501 U.S. at 631-32; *Andersen v. United States*, 170 U.S. 481, 499-501 (1898)).

Using the example of the robbery element of force or the threat of force, the Court in *Richardson* held that "some jurors might conclude that the defendant used a knife to create the threat; others might conclude he used a gun. But that disagreement -- a disagreement about means -- would not matter as long as all 12 jurors unanimously concluded that the Government had proved the necessary related element, namely that the defendant had threatened force." *Id.* (citing *McKoy v. North Carolina*, 494 U.S. 433, 449 (1990) (Blackmun, J., concurring)).

Along the same lines, the majority of federal and state courts recognize a distinction between unanimity of theory, which refers to alternate means of committing a charged criminal act, and unanimity of fact, which refers to multiple and distinct acts of the same type of criminal conduct charged as a single offense. As concisely explained by the Seventh Circuit Pattern Criminal Instructions:

> When *Richardson v. United States*, 526 U.S. 813 (1999), and *Schad v. Arizona*, 501 U.S. 624, 631–32 (1991) (plurality opinion), are read together, it appears that unanimity is required when the government alleges more than one possibility for an element of the crime (*e.g.*, a false statement charge in which the government charges that the defendant made one or more of three alleged false statements), but not when the government contends that the defendant committed an element of the crime using one or more of several possible means (*e.g.*, an armed robbery charge in which the government charges that the defendant committed a robbery using a knife, or a gun, or both). *Richardson*, 513 U.S. at 817.

William J. Bauer Pattern Crim. Jury Instructions of the Seventh Cir., inst. 4.04 cmt. (2023 ed.).[5]

---

[5] *See also United States v. Newell*, 658 F.3d 1, 22 (1st Cir. 2011) ("As we have noted, it is true that a jury does not need to agree upon 'a single means of commission' . . . . it does not follow from the fact that unanimity is not required with respect to alternative means of committing one and the same criminal act that unanimity is not required with respect to multiple instances of the same type of criminal act." (emphasis omitted) (citations omitted)); *United States v. Chen Chiang Liu*, 631 F.3d 993, 1000 (9th Cir. 2011) (A general unanimity instruction is not sufficient if it appears "that a conviction may occur as the result of different jurors concluding that the defendant committed different acts." (internal quotation marks omitted) (citation omitted)); *United States v. Sila*, 978 F.3d 264, 267 (5th Cir. 2020) ("But an exception to the general rule arises when the 'differences between means become so important that they may not reasonably be viewed as alternatives to a common end, but must be treated as differentiating what the Constitution requires to be treated as separate offenses.'") (citation omitted)); Crim. Pattern Jury Instructions, inst. 1.24 (Crim. Pattern Jury Instruction Comm. of the United States Ct. of Appeals for Tenth Cir. 2025 ed.) ("Your verdict must be unanimous. Count —— of the indictment accuses the defendant of committing the following acts: [description of individual acts]. The government does not have to prove all of these different acts for you to return a guilty verdict on count ——. But in order to return a guilty verdict, all twelve of you must agree upon which of the listed acts, if any, the defendant committed *and* that he committed at least [number of acts identified above] of the acts listed." (emphasis in original)); *United States v. Powell*, 226 F.3d 1181, 1196 (10th Cir. 2000) ("Following *Richardson*'s instruction that when determining whether a specific unanimity instruction is required we must differentiate between 'means' and 'elements,' we conclude that here the various acts

(continued . . .)

The CAAF, however, appears to have rejected any such distinction between unanimity of fact and unanimity of theory. Specifically, in *United States v. Nicola*, the government charged appellant with one specification of "knowingly and wrongfully viewing the private area of [the victim] without her consent, and under circumstances in which she had a reasonable expectation of privacy[,]" in violation of Article 120c, UCMJ. 78 M.J. 223, 225 (C.A.A.F. 2019) (first alteration omitted, second alteration altered) (internal quotation marks omitted). The evidence, however, showed that appellant first indecently viewed the victim when he brought her back to her room and then indecently viewed her while she was in the shower. *Id.* at 226. The CAAF held that the government could prove its case under two different "theories," one being that appellant indecently viewed the victim when she was first in her room, and the other being that he indecently viewed her in the shower. *Id.*

In other words, unlike the federal and state courts cited above, the CAAF in *Nicola* had no issue with the government presenting "multiple instances of the same type of criminal act" to prove up a single allegation of that criminal act. *Newell*, 658 F.3d at 22 (emphasis omitted). Instead, the CAAF ultimately held that because the evidence was legally sufficient to support both "theories," that is indecent viewing in the room and indecent viewing in the shower, it affirmed the conviction. *Nicola*, 78 M.J. at 227-30.

Further explaining, the CAAF reiterated that where there is no indication that the factfinder has rejected either of the acts in question, "'a factfinder may enter a general verdict of guilt even when the charge could have been committed by two or more means, as long as the evidence supports at least one of the means beyond a reasonable doubt.'" *Id.* at 226 (alteration omitted) (quoting *Brown*, 65 M.J. at 359); *see also United States v. Vidal*, 23 M.J. 319, 325 (C.M.A. 1987) ("It makes no difference how many members choose *one act* or the other, one theory of liability or the other." (emphasis added)).

(. . . continued)
which the jury was to consider -- seize, confine, inveigle, decoy, kidnap, abduct, and carry away and hold -- fall closer to the 'means' end of the means/element spectrum."); *People v. Russo*, 25 Cal.4th 1124, 1132 (2001) ("This requirement of unanimity as to the criminal act 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.'" (citation omitted)); *People v. Deletto*, 147 Cal.App.3d 458, 472 (1983) ("The [unanimity] instruction is designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done *something* sufficient to convict on one count." (emphasis in original)).

The CAAF in *Nicola* did not, however, explain how its conflation of the concepts of unanimity of fact and unanimity of theory comports with the Supreme Court's holding in *Richardson* that there is a distinction between the requirement of jury unanimity on elements versus means underlying the element. Likewise, although the CAAF in *Brown* cited *Griffin v. United States*, 502 U.S. 46 (1991), for the proposition that a "factfinder may enter a general verdict of guilt even when the charge could have been committed by two or more *means* . . . ." it also couched its holding on the fact that the government charged a single incident of rape "as a continuing course of conduct over a short period of time." 65 M.J. at 358-59 (emphasis added). Finally, the CAAF has also not meaningfully addressed the extensive body of federal and state case law recognizing a distinction between unanimity of fact and unanimity of theory.[6]

In short, while the panel clearly found appellant guilty on the government's "theory" that he maltreated the victim by kissing her, we have no way of knowing if the requisite number of the panel members found that the government proved beyond a reasonable doubt that appellant kissed the victim either in the shower, or in the shack, or in both. Likewise, it is also entirely possible that some of the panel members believed that appellant kissed the victim only in the shower, while others concluded that he kissed her only in the shack. Simply put, because there is a difference between the government's "theory" and the multiple separate and distinct *acts* constituting separate offenses offered into evidence to support that theory, the failure to give a unanimity of fact instruction in this case would constitute error in the majority of federal and state jurisdictions. Nevertheless, under *Nicola* and the current state of CAAF precedent, this distinction is without a difference and does not render appellant's conviction fatally ambiguous.

FOR THE COURT:

James W. Herring, Jr.

JAMES W. HERRING, JR.
Clerk of Court

[6] In *Brown*, the CAAF distinguished a Ninth Circuit case dealing with unanimity of fact (*United States v. Garcia-Rivera*, 353 F.3d 788 (9th Cir. 2003)) on the grounds that it did not "involve[] a single course of conduct . . . ." 65 M.J. at 359. In light of the federal and state caselaw discussed above, however, I respectfully encourage the CAAF to provide additional clarity and/or reconsider its analysis of this issue. *See United States v. Tovarchavez*, 78 M.J. 458, 465 (C.A.A.F. 2019) ("[I]t is for this Court, not the ACCA, to overrule our precedent") (citation omitted)).

Appendix B: Unpublished Cases

User Name: Peter Ellis
Date and Time: Tuesday, May 12, 2026 10:35 PM KST
Job Number: 284135205

Document (1)

1. *United States v. Hughes*
   Client/Matter: -None-
   Search Terms:
   Search Type: Natural Language
   Narrowed by:

Content Type	Narrowed by
	-None-

United States v. Hughes

United States Air Force Court of Criminal Appeals

February 6, 2026, Decided

No. ACM 24066

Reporter
2026 CCA LEXIS 66 *; 2026 LX 68907

UNITED STATES, Appellee v. Zechariah S. HUGHES, Senior Airman (E-4), U.S. Air Force, Appellant

Notice: THIS IS AN UNPUBLISHED OPINION AND, AS SUCH, DOES NOT SERVE AS PRECEDENT UNDER AFCCA RULE OF PRACTICE AND PROCEDURE 30.4.
NOT FOR PUBLICATION

Prior History: Appeal from the United States Air Force Trial Judiciary[1] **[*1]** . Military Judge: Julie L. Pitvorec (pretrial motion); David M. Cisek. Sentence: Sentence adjudged 17 April 2024 by SpCM convened at Dyess Air Force Base, Texas. Sentence entered by military judge on 14 May 2024: Reduction to E-3 and a reprimand.

Core Terms

legal sufficiency, factual sufficiency, beyond a reasonable doubt, military, remember, shop, overnment, phone, trial counsel, contradict, sentence, jest

Case Summary

Overview
Key Legal Holdings

- Where CK testified Appellant said he would 'f**k [him] up' and JN testified Appellant said 'I'm going to beat his ass,' the conviction for communicating a threat was legally sufficient because both statements expressed the same determination to injure and the specification charged 'or words to that effect.'.
- Appellant's threat conditioned on 'if [CK] tells me what to do again' did not defeat the conviction because CK could reasonably be expected to give future corrective directives to Appellant in their workplace setting.

Material Facts

- Appellant and CK worked in same office at Dyess AFB from 2019-2023.
- In September 2022, CK (staff sergeant) corrected Appellant for being on phone during work.
- Appellant responded with threatening language heard by JN and others.
- CK testified threat made him frustrated, upset, and worried Appellant could act on it.
- JN described Appellant as 'difficult' to work with.

Controlling Law

- Article 115, UCMJ (communicating a threat); Manual for Courts-Martial Part IV, ¶ 53 (elements and definitions); legal sufficiency standard from United States v. Robinson requiring evidence viewed in light most favorable to prosecution; factual sufficiency review under Article 66(d)(1)(B) requiring specific showing of deficiency in proof.

Court Rationale

Court reasoned that witness testimony discrepancies were immaterial given the 'words to that effect' language in the specification. Both versions communicated the same essential threat. The conditional nature did not negate liability as the condition was reasonably possible. Context supported wrongfulness finding - Appellant was defiant, statement caused concern, and

[1] Appellant appeals his conviction under *Article 66(b)(1)(A), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1)(A)*, pursuant to the Manual for Courts-Martial, United States (2024 ed).

no evidence suggested jest or innocent purpose. Appellant failed to make specific showing of proof deficiency required for factual sufficiency review.

Outcome
Procedural Outcome

Conviction and sentence affirmed. Appellant's motion for finding of not guilty under RCM 917 was denied at trial. On appeal, both legal and factual sufficiency challenges were rejected.

LexisNexis® Headnotes

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN1 **Evidence, Weight & Sufficiency of Evidence**

An appellate court reviews issues of legal sufficiency de novo.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Evidence > Types of Evidence > Circumstantial Evidence

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

HN2 **Procedural Due Process, Scope of Protection**

The court's assessment of legal sufficiency is limited to the evidence produced at trial. The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In resolving questions of legal sufficiency, the court is bound to draw every reasonable inference from the evidence of record in favor of the prosecution. As a result, the standard for legal sufficiency involves a very low threshold to sustain a conviction. The Government is free to meet its burden of proof with circumstantial evidence. The term reasonable doubt, however, does not mean that the evidence must be free from conflict. This deferential standard impinges upon the factfinder's discretion only to the extent necessary to guarantee the fundamental protection of due process of law.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

HN3 **Trial Procedures, Burdens of Proof**

The court reviews questions of factual sufficiency when an appellant asserts an assignment of error and shows a specific deficiency of proof. *10 U.S.C.S. 866(d)(1)(B)(i)*, Manual for Courts-Martial, United States (2024 ed.) (2024 MCM).

Criminal Law & Procedure > ... > Terrorism > Terroristic Threats > Elements

HN4 **Terroristic Threats, Elements**

For the offense of communicating a threat, the communication must be one that a reasonable person would understand as expressing a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently or in the future. Proof that the accused intended to kill, injure, intimidate, damage, or destroy is not required. MCM, pt. IV, ¶ 53.b.(1)(a)-(c). A communication is wrongful if the accused transmitted it for the purpose of issuing a threat or with the knowledge that it would be viewed as a threat. MCM, pt. IV, ¶ 53.c.(2). A communication is not wrongful if it is made under circumstances that reveal it to be in jest or for an innocent or legitimate purpose that contradicts the expressed intent to commit the act. MCM, pt. IV, ¶ 53.c.(2).

Criminal Law & Procedure > ... > Crimes Against Persons > Coercion & Harassment > Elements

HN5 Coercion & Harassment, Elements

The offense of communicating a threat has both an objective and a subjective standard. Whether the words spoken were threatening is judged from the objective perspective from the viewpoint of a reasonable person in the recipient's place. The wrongfulness element is viewed from the subjective perspective of the speaker. In assessing the wrongfulness of the speaker's intent, the surrounding circumstances may so belie or contradict the language of the declaration as to reveal it to be a mere jest or idle banter. A statement made under such circumstances is not wrongful. MCM, pt. IV, ¶ 53.c.(2). In reviewing communicating a threat cases, context matters and words should not be considered in a vacuum.

Criminal Law & Procedure > ... > Crimes Against Persons > Coercion & Harassment > Elements

HN6 Coercion & Harassment, Elements

A threat is not negated when the condition imposed on the threat is reasonably possible of being fulfilled. It is only if the threatened injury is stated to be contingent on the occurrence of some event that obviously could not take place that an accused is not criminally liable.

Evidence > Weight & Sufficiency

HN7 Evidence, Weight & Sufficiency

Under legal sufficiency's deferential standard, the testimony of a witness regarding a threat not contingent on any future event is sufficient.

Evidence > Weight & Sufficiency

HN8 Evidence, Weight & Sufficiency

Unless an appellant makes both an assertion of error and a specific showing of a deficiency in proof, the court is not permitted to review the factual sufficiency of the evidence. 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. Further, minor inconsistencies in the witnesses' testimony do not establish a specific deficiency in proof.

Counsel: For Appellant: Lieutenant Colonel Jarett Merk, USAF; Captain Joyclin N. Webster, USAF.

For Appellee: Lieutenant Colonel Thomas J. Alford, USAF; Major Vanessa Bairos, USAF; Major Kate E. Lee, USAF; Major Jocelyn Q. Wright, USAF; Captain Donnell D. Wright, USAF; Mary Ellen Payne, Esquire.

Judges: Before GRUEN, KEARLEY, and MORGAN, Appellate Military Judges. Senior Judge GRUEN delivered the opinion of the court, in which Judge KEARLEY and Judge MORGAN joined.

Opinion by: GRUEN

Opinion

GRUEN, Senior Judge:

A military judge sitting as a special court-martial convicted Appellant, contrary to his pleas, of one specification of communicating a threat, in violation of *Article 115, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 915*.[2],[3] The military judge sentenced Appellant to reduction to the grade of E-3 and a reprimand. The convening authority took no action on the findings or sentence. Appellant did not request any deferment of reduction in grade.

Appellant **[*2]** asserts one issue: whether Appellant's conviction for communicating a threat is legally and factually sufficient. We find that even though a complete review of the record supports factual sufficiency of the conviction, Appellant did not meet a specific showing of a deficiency in proof for a full factual sufficiency review. We find Appellant's conviction for communicating a threat in violation of *Article 115, UCMJ*, legally and factually sufficient and affirm the findings of guilty and the sentence.

I. Background

CK testified that he met Appellant when they worked in the same shop at Dyess Air Force Base (AFB), Texas.

---

[2] Unless otherwise noted, all references in this opinion to the UCMJ and Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

[3] Appellant was acquitted of three specifications of dereliction of duty in violation of *Article 92, UCMJ, 10 U.S.C. § 892*; and one specification of assault consummated by a battery in violation of *Article 128, UCMJ, 10 U.S.C. § 928*.

They shared an office from 2019 to 2021, and then again from the summer of 2022 until CK left Dyess AFB in 2023. Sometime around September 2022, CK and Appellant started working on the same shift. CK stated he and Appellant worked on different sides of the same office and "stuck to" their respective sides having not much interaction. CK was a staff sergeant and therefore senior to Appellant in rank at that time. When asked by trial counsel, "do you recall correcting [Appellant] and him having a negative reaction," CK responded,

> I do remember having to tell him to get [off] his phone, everyone **[*3]** else in the office on his shop was out doing work, and there was a big push in our office about not being on our phones, you know, when you were inside. It didn't look good. I didn't like that. I remember correcting and telling him he had to get off his phone, and he did have a negative reaction.

Trial counsel then asked CK, "what was that reaction," to which CK responded,

> So, he said something to the effect, again, it's been quite a while, so I don't remember verbatim, but something to the effect of that he was going to "F[**]k me up."
>
> . . . .
>
> [H]he was on the other side of the desk or other side of the office from where I was at.

Trial counsel continued to ask CK, "[A]fter you told [Appellant] to get off his phone, did you stay in that same location?" CK responded,

> I believe I just sat back down, or I might have walked out, but I don't really remember.

CK testified he was facing Appellant's general direction when Appellant made the threatening statement. Although he did not remember seeing the words come out of Appellant's mouth, he knew it was Appellant who made the remark because Appellant "has a very distinctive voice." CK could not remember who else was in the shop at that time, but **[*4]** felt like there were others there. When trial counsel asked CK how he felt after Appellant made the threatening statement, CK responded,

> I mean, frustrated, upset. A little worried that he could have done it, but, you know, my world didn't come crashing down or anything like that.

On cross-examination, trial defense counsel asked CK if he was "terrified of [Appellant]" after what Appellant said to him, to which CK replied,

> Not necessarily terrified. . . . I wasn't anymore mortified than [if] some random person on the street said something the same.
>
> . . . .
>
> I took it as a threat; however, do I think that he would do it? I have, again, I could see him doing it at the same point, not.

On re-direct, trial counsel asked if CK believed Appellant "could have acted on th[e] threat," to which CK responded, "Yes."

The Government also called JN, an Airman at the time of the offense and the same rank as Appellant, who testified to the relevant charge. JN testified that during the charged time frame he worked in the "same shop" with Appellant "almost every day," and that Appellant was "difficult" to work with. JN also testified regarding an incident between [Appellant] and CK. Regarding this incident, **[*5]** JN recalled:

> supervision had came in [to the office] and saw that people -- had their feet -- on the tables and they were on their phones. They were told not to do that. As soon as supervision left, [Appellant] put his feet back on the table. [CK] told [Appellant] not to. [CK] left the room and then [Appellant] said, "If he tells me what to do again, I'm going to beat his ass."

JN further testified that Appellant said this as CK "was walking out of the office."

On cross-examination, JN confirmed Appellant made the threatening statement "as [CK] was walking out of [the room]," not after CK left the room. JN did not recall this being said to anyone in particular, but that Appellant "just said it aloud in the room." JN did not recall who specifically was in the shop when this statement was made, but that "it was the rest of the shop at the time."

Appellant was convicted of the Specification of the Additional Charge, which reads as follows:

> In that [Appellant] . . . did, between on or about 1 September 2022 and on or about 31 December 2022, wrongfully communicate to [JN] a threat to injure [CK] by stating he would "f[**]k him up," or word[s] to that effect.

II. Discussion

Appellant argues that **[*6]** his conviction for

communicating a threat is legally insufficient because the Government failed to establish any evidence that Appellant's statement was wrongful. Appellant further argues that his conviction is factually insufficient because the Government did not prove each element beyond a reasonable doubt. Specifically, Appellant asserts: (1) that "the only two witnesses the [G]overnment could provide disagreed on the language that was said;" (2) that "the [G]overnment failed to establish beyond a reasonable doubt that the charged language was indeed said to JN;" and (3) that with regard to the "wrongfulness element, again the [G]overnment presented no evidence." We do not agree with Appellant that the Government failed to establish any evidence that Appellant's statement was wrongful. While we agree the testimony given at trial specific to proving the Specification of the Additional Charge by the two witnesses, JN and CK, provided different versions of the threatening language, we note that the specification included the caveat "or word[s] to that effect." We do not agree that the Government failed to establish beyond a reasonable doubt that the charged language was indeed said **[*7]** to JN or that with regard to the wrongfulness element they failed to establish all elements beyond a reasonable doubt.

A. Law

HN1 We review issues of legal sufficiency de novo. *United States v. Harrington, 83 M.J. 408, 414 (C.A.A.F. 2023)* (citing *United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019)*).

HN2 Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Rodela, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021)* (citing *United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993)*). "The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson, 77 M.J. 294, 297-98 (C.A.A.F. 2018)* (citation omitted). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001)* (citations omitted). As a result, "[t]he standard for legal sufficiency involves a very low threshold to sustain a conviction." *King, 78 M.J. at 221* (alteration in original) (citation omitted). "[T]he [G]overnment is free to meet its burden of proof with circumstantial evidence." *Id.* (citations omitted). "The term reasonable doubt, however, does not mean that the evidence must be free from conflict." *United States v. Wheeler, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017)* (citing *United States v. Lips, 22 M.J. 679, 684 (A.F.C.M.R. 1986)*), *aff'd*, *77 M.J. 289 (C.A.A.F. 2018)*. "This deferential standard impinges upon the factfinder's discretion only to the extent necessary to guarantee the fundamental **[*8]** protection of due process of law." *United States v. Mendoza, 85 M.J. 213, 217 (C.A.A.F. 2024)* (internal quotation marks and citation omitted).

HN3 We review questions of factual sufficiency when an appellant asserts an assignment of error and shows a specific deficiency of proof. *United States v. Harvey, 85 M.J. 127, 130 (C.A.A.F. 2024)* (citing *Article 66(d)(1)(B)(i), UCMJ, 10 U.S.C. § 866(d)(1)(B)(i)*, *Manual for Courts-Martial, United States* (2024 ed.) (2024 *MCM*)). The current version of *Article 66(d)(1)(B), UCMJ*, states:

> (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 a request of the accused if the accused makes a specific showing of a deficiency of proof.
>
> (ii) After an accused has made 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.

10 U.S.C. § 866(d)(1)(B) (2024 MCM).

In the Specification of the Additional Charge, **[*9]** Appellant was convicted of communicating a threat in violation of *Article 115, UCMJ*, which required the Government to prove the following three elements beyond a reasonable doubt: (1) that Appellant communicated certain language, to wit: he would "f[**]k him up," or words to that effect, expressing a present determination or intent to injure CK presently or in the

future; (2) that the communication was made known to CK or a third person; and (3) that the communication was wrongful. *See Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), pt. IV, ¶ 53.b.(1)((a)-(c).

For this offense, "threat"

> means an expressed present determination or intent to kill, injure, or intimidate a person or to damage or destroy certain property presently or in the future. ***HN4*** The communication must be one that a reasonable person would understand as expressing a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently or in the future. Proof that the accused intended to kill, injure, intimidate, damage, or destroy is not required.

Id. A communication is "wrongful" if the accused transmitted it "for the purpose of issuing a threat or with the knowledge that it would be viewed as a threat." *Id.* at ¶ 53.c.(2). A communication is not "wrongful" if it **[*10]** is made under circumstances that "reveal it to be in jest or for an innocent or legitimate purpose that contradicts the expressed intent to commit the act." *Id.*

HN5 The offense of communicating a threat has both an objective and a subjective standard. *Harrington, 83 M.J. at 414*. Whether the words spoken were "threatening" is judged from the objective perspective from the viewpoint of a "reasonable person in the recipient's place." *Id.* (emphasis and citation omitted). The wrongfulness element is viewed from the subjective perspective of the speaker. *Id.* (citation omitted). In assessing the wrongfulness of the speaker's intent, "the surrounding circumstances may so belie or contradict the language of the declaration as to reveal it to be a mere jest or idle banter." *United States v. Gilluly, 13 C.M.A. 458, 32 C.M.R. 458, 461 (C.M.A. 1963)* (citation omitted). "A statement made under such circumstances . . . is not wrongful." *MCM*, pt. IV, ¶ 53.c.(2). In reviewing communicating a threat cases, context matters and words should not be considered in a vacuum. *United States v. Brown, 65 M.J. 227, 231 (C.A.A.F. 2007)* ("Context gives meaning to literal statements.").

B. Analysis

There are sufficient facts in the record to support a finding that Appellant made a threatening statement to injure CK, which was heard by JN. This case was litigated before a military judge alone. **[*11]** We cannot be certain as to the specifics regarding the military judge's thought process when he made his determinations in findings regarding Appellant's guilt. However, before the military judge deliberated and came to his findings, trial defense counsel raised and litigated a motion for a finding of not guilty pursuant to Rule for Courts Martial 917, to all charges and specifications. With respect to the Specification of the Additional Charge, the military judge stated, when issuing his ruling denying the motion, "[T]here has been witness testimony that [Appellant] made the alleged comments after being told to get off his phone and take his feet down." The military judge further stated, "[T]here has been some evidence presented that [Appellant] transmitted that communication for the purpose of issuing a threat or with the knowledge that it would be viewed as a threat." We agree with the military judge and further find that Appellant made the threat to injure CK in a room where co-workers were present, to include JN, and that JN heard Appellant make the threatening comment directed at CK.

We find it of no consequence that CK remembered Appellant say "something to the effect of that he was going to 'f**]k [him] **[*12]** up,'" and JN remembered Appellant saying "if [CK] tells me what to do again, I'm going to beat his ass." Not only did the charged offense include the caveat "or word[s] to that effect," but both statements communicate effectively the same threat made to everyone present to hear, to include JN, expressing a present determination or intent to injure CK presently or in the future—such threat being made by Appellant. Additionally, we find it of no consequence that JN remembered the threat being conditioned upon "if [CK] [were to tell] [Appellant] what to do again." ***HN6*** Our superior court made clear in *United States v. Phillips, 42 M.J. 127, 131 (C.A.A.F. 1995)*, that a threat is not negated when the condition imposed on the threat is reasonably possible of being fulfilled. It is only "[i]f the threatened injury is stated to be contingent on the occurrence of some event that obviously could not take place [that] an accused is not criminally liable." *United States v. Alford, 34 M.J. 150, 152 (C.M.A. 1992)*. Obviously CK very well could have told Appellant, again, to take his feet off of his desk, or to get off of his cell phone, or any other number of corrective directives given the circumstances in the shop on the day in issue. More importantly, viewing the evidence in the light most favorable to the Prosecution, **[*13]** CK testified to a threat which was not conditioned on a future event and JN's recollection of a threat with slightly different wording serves to corroborate the threat was made. ***HN7*** Under legal sufficiency's deferential standard, the testimony of CK regarding a threat not contingent on

any future event is sufficient. *See* Robinson, 77 M.J. at 297-98 (citation omitted).

Additionally, we know from the testimony of CK and JN that the communication was made known to CK and at least one third person, JN. The record further supports the fact that Appellant transmitted the statement "for the purpose of issuing a threat or with the knowledge that it would be viewed as a threat." *See MCM*, pt. IV, ¶ 53.c.(2). CK testified that the statement made him "frustrated," "upset," and "a little worried [Appellant] could have done it." Appellant was described as surly and defiant at the time he made the threatening comment and there are no facts to support the contention that Appellant made the statement under circumstances that "reveal it to be in jest or for an innocent or legitimate purpose that contradicts the expressed intent to commit the act." *Id.* Because Appellant directed the threatening communication towards those in the shop, **[*14]** to include JN and CK, we find that an objective observer in JN's place would have perceived Appellant's words and body language as a threat to "f[**]k [CK] up" or "beat [CK's] ass." We also conclude that, under the totality of the circumstances, Appellant intended his communication to be perceived by those hearing the communication as a threat.

As to legal sufficiency, we find that after viewing the evidence in the light most favorable to the Prosecution and drawing all reasonable inferences, a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See* Robinson, 77 M.J. at 297-98 (citation omitted).

As to factual sufficiency, we do not find that Appellant has made a sufficient showing of a deficiency in proof for the offense. Appellant's contentions that "the only two witnesses the [G]overnment could provide disagreed on the language that was said;" that "the [G]overnment failed to establish beyond a reasonable doubt that the charged language was indeed said to JN;" and that with regard to the "wrongfulness element, again the [G]overnment presented no evidence" do not amount to a specific showing of a deficiency of proof because there is no merit to these contentions. **[*15]** ***HN8*** Per Harvey, unless Appellant makes both an assertion of error and a specific showing of a deficiency in proof, this court is not permitted to review the factual sufficiency of the evidence. We agree with our sister court 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." United States v. Valencia, 85 M.J. 529, 535 (N.M. Ct. Crim. App. 2024), *aff'd*, 2025 CAAF LEXIS 966 (C.A.A.F. 24 Nov. 2025). Further, minor inconsistencies in the witnesses' testimony do not establish a specific deficiency in proof. United States v. Brassfield, 85 M.J. 523, 528 (A. Ct. Crim. App. 2024), *rev. denied*, 85 M.J. 446, 2025 CAAF LEXIS 271 (C.A.A.F. 11 Apr. 2025). Here we considered the minor inconsistencies in the testimonies of CK and JN and conclude such inconsistencies do not establish a specific deficiency of proof. We further conclude that the evidence in the record supports that the charged language was said to multiple persons in the office, to include JN, and that there was sufficient evidence supporting the wrongfulness element. Even assuming Appellant had made a sufficient showing of a deficiency in proof for the offense of communicating a threat against CK, we are clearly convinced the weight of the evidence proved his guilt beyond a reasonable doubt.

III. Conclusion

[*16] The findings as entered are correct in law and fact. Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d) (2024 MCM). In addition, the sentence as entered is correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings and sentence are **AFFIRMED**.

End of Document

User Name: Peter Ellis
Date and Time: Tuesday, May 12, 2026 10:09 PM KST
Job Number: 284132432

Document (1)

1. *United States v. Mendoza*
   Client/Matter: -None-
   Search Terms: mendoza
   Search Type: Natural Language
   Narrowed by:

Content Type	Narrowed by
	-None-

United States v. Mendoza

United States Coast Guard Court of Criminal Appeals

March 31, 2026, Decided

Docket No. 1506

Reporter
2026 CCA LEXIS 155 *; 2026 LX 146606; __ M.J. __; 2026 WL 874431

UNITED STATES v. Julianee I. ***MENDOZA***, Culinary Specialist Second Class (E-5), U.S. Coast Guard

Prior History: [*1] 25-003(66). Special court-martial sentence adjudged on 24 August 2024. Military Judges: CAPT Emily P. Reuter, USCG, CDR Bryan D. Tiley, USCG.

Core Terms

military, buttock, touching, grab, implied bias, sentence, deference

Counsel: Appellate Defense Counsel: LT Justin S. Allen, USCG.

Appellate Government Counsel: LCDR Lorhel E. Stokes, USCG.

Special Victims' Counsel: Mr. Paul T. Markland.

Judges: BEFORE MCCLELLAND, BRUBAKER & PELL, Appellate Military Judges. Chief Judge MCCLELLAND and Judge PELL concur.

Opinion by: BRUBAKER

Opinion

BRUBAKER, Judge:

A special court-martial of members with enlisted representation convicted Appellant, contrary to his pleas, of four specifications of abusive sexual contact, in violation of Article 120, Uniform Code of Military Justice (UCMJ). After one specification was conditionally dismissed, Appellant was sentenced to reduction to E-1 and a bad-conduct discharge. Judgment was entered accordingly.

Appellant now asserts that: (1) there is factually insufficient evidence to support two of his three convictions; and (2) the military judge erred by denying his challenge for cause of a member.[1] We disagree and affirm.

Background

During a port call in New Zealand, a group of crewmembers from USCGC *Polar Star*—including Appellant and Storekeeper Second Class (SK2) M.B.—went to a local bar. One witness observed that while walking to the **[*2]** bar, Appellant repeatedly poked SK2 M.B and groped his buttocks. "[I]t was pretty constant. I remember one time SK2 grabbed his hands and told him like, hey, stop, like, that's not cool." R. at 979. SK2 M.B. laughed uncomfortably, "like he was trying to kind of play it off, but he did tell him to stop several times, and he, I think, made it very clear that he didn't want to be touched anymore." *Id.* at 981.

A different witness testified that while she was having her identification checked to get into the bar, she observed Appellant, who was already in the bar, grab SK2 M.B.'s buttocks. She saw SK2 M.B. look back and she told Appellant to let go. Once in the bar, the witness

---

[1] Appellant's specific assignments of error are:

I. The evidence for Charge I Specification 2 is factually insufficient to support appellant's conviction for abusive sexual contact when the complaining witness failed to testify that the charged touching occurred and two other witnesses provided conflicting testimony.

II. The evidence for Charge I Specification 4 is factually insufficient to support appellant's conviction for abusive sexual contact on a person who is asleep when the complaining witness testimony was inherently unreliable.

III. The military judge erred by not applying the liberal grant mandate to an implied bias challenge for a member who believed some punishment should be adjudged for a conviction.

saw Appellant grab SK2 M.B.'s buttocks again and she again told Appellant to let go.

SK2 M.B. testified that while playing pool in the bar, he felt something grab his groin as Appellant walked by. SK2 M.B. thought perhaps it was a mistake, but Appellant walked by again and grabbed SK2 M.B.'s penis. On cross-examination, SK2 M.B. acknowledged that he did not recall Appellant touching his buttocks.

Separately, while the *Polar Star* was in drydock in Vallejo, California, Information Systems Technician First Class (IT1) **[*3]** M.M. woke up to the sensation of pressure on his anus. He flipped over, saw Appellant's head poked through the curtains on his rack, and realized that his shorts and underpants had been pulled down to expose his buttocks.

Factual Sufficiency

Under the revised Article 66 standard, we only review for factual sufficiency if two triggering conditions are met: (1) Appellant asserts error and requests such review; and (2) he "makes a specific showing of a deficiency in proof." Article 66(d)(1)(B)(i), UCMJ; *United States v. Harvey, 85 M.J. 127, 130 (C.A.A.F. 2024)*. If these conditions are met, we "may weigh the evidence and determine controverted questions of fact subject to . . . appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence." Article 66(d)(1)(B)(ii), UCMJ. The level of deference we deem appropriate is a matter within our discretion and "depends on the nature of the evidence at issue." *United States v. Harvey, 85 M.J. 127, 130 (C.A.A.F. 2024)*. If, after such review, we are "clearly convinced that the finding of guilty was against the weight of the evidence," we may "dismiss, set aside, or modify the finding, or affirm a lesser finding." Article 66(d)(1)(B)(iii), UCMJ.

Appellant requests we review the factual sufficiency of his convictions for abusive sexual contact by grabbing SK2 M.B.'s buttocks and by touching IT1 M.M.'s anus. For **[*4]** both, Appellant asserts a deficiency in proof regarding the first element of each offense: that he committed either act of sexual contact. Specifically, for the first specification, he points out that SK2 M.B. testified he did not remember a touching of his buttocks—only of his penis. Regarding the two witnesses who testified to the contrary, he notes that they offered completely different accounts and challenges their credibility. For the second specification, Appellant points to evidence that the berthing area was lit only by red light, making a positive identification more difficult, to the lack of corroborating evidence, and to IT1 M.M.'s asserted unreliability as a witness.

We conclude that this constitutes both an express request for factual sufficiency review and a specific showing of a deficiency in proof. We thus turn to our review of the evidence.

We do not discount Appellant's point that SK2 M.B., despite remembering other events at the time, had no recollection of Appellant grabbing his buttocks. Still, we give considerable deference to the fact that the members saw and heard his testimony as well as that of his shipmates and concluded that the touching occurred. SK2 M.B. **[*5]** was clear that he was not saying that Appellant did *not* touch his buttocks, just that he did not remember. Given his consumption of alcohol and the more shocking nature of his penis being grabbed, we do not find his lack of memory dispositive. Two witnesses plainly saw the touchings and SK2 M.B.'s discomfort with them. And although the witnesses provided distinct accounts, we do not find them contradictory. Both witnesses testified to Appellant repeatedly touching SK2 M.B., so the fact that two witnesses saw different touches to the buttocks does not impeach the verdict.

Regarding IT1 M.M., we again give considerable deference to the fact that the members saw and heard his testimony and found him credible. IT1 M.M. was clear that despite the fog of gradually coming out of a deep sleep and realizing what was happening, he felt pressure on his anus, that his shorts and underwear had been pulled down to expose his buttocks, and that there was plenty of light to positively identify Appellant, who was his roommate, as the person whose head was sticking through the curtains staring at him.

Having conducted our review of the evidence, we are not clearly convinced that the findings of guilty **[*6]** to these two specifications were against the weight of the evidence. We thus conclude that they are correct in fact.

Challenge of Member

During individual voir dire, trial defense counsel asked a prospective member, Operations Specialist Chief Petty Officer (OSC) L.R., whether, in the event of conviction, he would "be comfortable with the punishment of no punishment beyond just the conviction?" R. at 798. OSC L.R. responded, "I feel like there--there should be some sort of punishment with a conviction. Just my personal

opinion." *Id.* Trial defense counsel then advised OSC L.R. that "the judge is going to instruct you that no punishment would be an option. But I guess, from your personal belief, you know, some sort of punishment should accompany a sex offense, if you're convicted," to which OSC L.R. replied, "Yes." *Id.* at 798-99.

Following up, trial counsel stated that the military judge would instruct the members to consider all levels of punishment, including no punishment, and that he must consider those options. Asked if he understood, OSC L.R. affirmed that he did. Trial counsel then asked, "Do you have an issue with being able to consider those options based on the evidence that you **[*7]** hear during sentencing?" R. at 800. OSC L.R. replied:

> Yeah. Based on the evidence during sentencing, yeah. I have to look at everything and, as instructed by the judge, if no punishment is an option, then I would have to weigh that with the same, like, how I'm looking at it with the no punishment, compared to the broad range of punishments. Look at each one.

Id.

Trial defense counsel then asked, "[D]o you think it would be difficult, given your personal opinion, towards the punishment for sex offenses to consider no punishment?" R. at 801. OSC L.R. answered, "I don't think it would be difficult." *Id.*

Trial defense counsel challenged OSC L.R. for cause on the basis of implied bias. The military judge denied the challenge.

We review the denial of an implied bias challenge "under a standard of review that is less deferential than abuse of discretion, but more deferential than de novo review." *United States v. Keago, 84 M.J. 367, 373 (C.A.A.F. 2024)* (cleaned up). When a military judge places his implied bias analysis on the record, we accord greater deference. When he fails to do so, "the standard of review shifts toward de novo." *Id.* (citing *United States v. Rogers, 75 M.J. 270, 273 (C.A.A.F. 2016)*).

Implied bias is "bias conclusively presumed as a matter of law." *United States v. Hennis, 79 M.J. 370, 385 (C.A.A.F. 2020)* (cleaned up) (quoting *United States v. Wood, 299 U.S. 123, 133 (1936)*). The test for **[*8]** implied bias is whether, viewed objectively under the totality of the circumstances, and "through the eyes of the public, reviewing the perception or appearance of fairness of the military justice system," *United States v. Dockery, 76 M.J. 91, 96 (C.A.A.F. 2017)* (cleaned up) (quoting *United States v. Elfayoumi, 66 M.J. 354, 356 (C.A.A.F. 2008)*), the presence of the member creates an intolerable risk that the public would "perceive that the accused received something less than a court of fair, impartial members." *Keago, 84 M.J. at 372* (quoting *United States v. Woods, 74 M.J. 238, 243-44 (C.A.A.F. 2015)*).

Under the "liberal grant mandate," military judges must err on the side of granting defense challenges for cause, and if an implied bias challenge presents a "close question," the military judge should grant it. *Id.*

Applying these standards, we conclude that the military judge did not err. The military judge stated the correct law, including the liberal grant mandate, and found that the challenge did not present a close question. Beyond that, he provided limited analysis, reciting the same boilerplate explanation for each challenge he denied. This tilts our review toward de novo.

Still, the military judge did not err in concluding there was no implied bias. "[A] mere predisposition to adjudge some punishment upon conviction is not, standing alone, sufficient to disqualify a member. **[*9]** Rather, the test is whether the member's attitude is of such a nature that he will not yield to the evidence presented and the judge's instructions." *United States v. McGowan, 7 M.J. 205, 206 (C.M.A. 1979)*.

Although OSC L.R. expressed a "personal opinion" that some punishment should accompany a conviction, he made it very clear that he would yield to the evidence presented and the military judge's instructions. This was not just through "predictable answers to leading questions." *Keago, 84 M.J. at 374*. In his own words, he provided a thoughtful response indicating he could and would consider all options, including no punishment. Then, responding to trial defense counsel's prodding, he attested that despite his personal opinion that some punishment should accompany a conviction, he would not find it difficult to set that aside and consider all options. The military judge had the opportunity to observe OSC L.R., and he clearly found such attestations credible.

Under these circumstances, we conclude that OSC L.R.'s inclusion as a member would not cause the public to perceive Appellant's panel as less than fair and impartial. The military judge did not err in denying his challenge for cause. *Accord* *Hennis, 79 M.J. at 387*.

Decision

We determine that the findings and sentence are correct **[*10]** in law and fact; and that the sentence, on the basis of the entire record, should be approved. Accordingly, the findings of guilty and the sentence, as entered into the record, are affirmed.

Chief Judge MCCLELLAND and Judge PELL concur.

Certificate of Filing and Service

I certify that a copy of the foregoing in the case of *United States v. Smith*, Crim. App. Dkt. No 20230482, USCA Dkt. No. _____/AR. was electronically filed with the Court and the Government Appellate Division on May 22d, 2026.

Peter Ellis
Major, Judge Advocate
Branch Chief
Defense Appellate Division
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0715