IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Mark J. Rosario Sergeant (E-5) United States Marine Corps, Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 201500251 USCA Dkt. No. 16-0424/MC

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

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Issues Presented

WHETHER THE LOWER COURT ERRED IN CONDUCTING ITS ARTICLE 66(c), UCMJ, REVIEW BY FINDING AS FACT ALLEGATIONS THAT SUPPORTED CHARGES OF WHICH SGT ROSARIO WAS ACQUITTED TO AFFIRM THE FINDINGS AND SENTENCE.

Statement of Statutory Jurisdiction

Appellant's approved court-martial sentence included a bad-conduct discharge. Accordingly, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) reviewed the case under Article 66(b), Uniform Code of Military Justice ("UCMJ"); 10 U.S.C. § 866(b) (2012). On January 28, 2016, the NMCCA affirmed the conviction. Appellant timely filed a Petition for a Grant of Review under Article 67(a)(3), UCMJ.[1]

Statement of the Case

A panel of officer and enlisted members, sitting as a special court-martial, convicted Sgt Rosario, contrary to his pleas, of one specification of violating a lawful general order, (Marine Corps Order 1000.9A (Sexual Harassment)) in violation of Article 92, UCMJ.[2] Consistent with his pleas, the members acquitted Sgt Rosario acquitted of two specifications of abusive sexual contact and one specification of assault consummated by a battery in violation of Articles 120 and

[1] 10 U.S.C. § 867(a)(3).
[2] 10 U.S.C. § 892 (2012); JA at 0147.

128, UCMJ.[3] The court-martial sentenced Sgt Rosario to reduction to E-1 and a bad-conduct discharge.[4] The convening authority approved the sentence as adjudged and, except for the punitive discharge, ordered it executed.[5]

Sgt Rosario appealed his conviction to the NMCCA, which affirmed his conviction on January 28, 2016. Sgt Rosario filed a Petition for a Grant of Review with this Court on March 28, 2016 and the Supplement to the Petition on April 18, 2016. This Court granted review on June 10, 2016.

Statement of Facts

A. Allegations of Sexual Harassment

Lance Corporal (LCpl) B.A. checked into Marine Wing Support Squadron 272 (MWSS) on board Camp Lejeune on 13 September 2013.[6] Sgt Rosario, the appellant, was the platoon sergeant for MWSS.[7] Both Sgt Rosario and LCpl B.A. were refrigeration mechanics.

During check-in, LCpl B.A. claimed Sgt Rosario asked, "You're not one of those females that's going to report me for everything I do, right?"[8] Despite this, LCpl B.A. described Sgt Rosario as very "laid back" when she first met him.[9]

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[3] 10 U.S.C. §§ 920, 928 (2012); JA 0147.
[4] JA at 0019-0021.
[5] *Id*.
[6] JA at 0027.
[7] *Id*.
[8] JA at 0028.
[9] JA at 0028.

Lance Corporal B.A. further described Sgt Rosario as "very approachable," "available to everyone," and "he seems like he really cares for the Marines."[10]

Lance Corporal B.A. testified Sgt Rosario would make off-handed comments to her like "te quiero"[11] or "you're too pretty to be a Marine."[12] Lance Corporal B.A. stated she would laugh it off or say "thank you."[13]

Lance Corporal B.A. visited her husband for the Thanksgiving holiday. After returning from the Thanksgiving holiday break, Sgt Rosario asked her how leave was.[14] Lance Corporal B.A. claimed that during this conversation, Sgt Rosario asked her how many times she had sex with her husband.[15] According to LCpl B.A., she told Sgt Rosario that it was none of his business.[16] Sergeant Rosario asked why it was such a big deal, laughed it off, but did not press her for an answer or ask again.[17]

Around Christmas stand down, LCpl B.A. allowed another Lance Corporal to stay in her apartment while she was home on leave.[18] Before going home, LCpl

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[10] *Id*.
[11] This roughly translates to "I love you" or "I want you." However, the military judge did not take judicial notice of these terms, nor was there testimony to tell the members what they meant.
[12] JA at 0029.
[13] *Id*.
[14] JA at 0032.
[15] JA at 0033.
[16] *Id.*
[17] *Id*.
[18] JA at 0034.

B.A. asked Sgt Rosario if it was okay if the other Marine left the key with Sgt Rosario after he was done staying in LCpl B.A.'s apartment. Sgt Rosario agreed to receive the key.[19]

When LCpl B.A. landed in Jacksonville, NC, she checked in with Sgt Rosario to inform him that she was back in the area.[20] Lance Corporal B.A. claimed that Sgt Rosario said things like, "I really missed you; I missed your face" and "I missed having you around; I missed your face and just having you here."[21] The next day, when LCpl B.A. went to get the key, Sgt Rosario joked, "I'm going to keep this key; this is going to be the spare key when I come over."[22] However, Sgt Rosario immediately gave the key to LCpl B.A. after making this offhanded comment.[23]

Sometime in January 2014, LCpl B.A. confronted Sgt Rosario in the smoke pit and wanted to discuss some of Sgt Rosario's comments to her.[24] She alleged Sgt Rosario responded to her statements by telling her that he had feelings for her.[25] Sgt Rosario and LCpl B.A. discussed these feelings at length, with LCpl

[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] JA at 0035.
[23] *Id.*
[24] JA at 0041.
[25] JA at 0041.

B.A. ultimately saying despite these feelings Sgt Rosario may have for her, they were both married and any romantic relationship would be inappropriate.[26]

Before the smoke pit discussion, LCpl B.A. expressed her desire to go to the Marine Corps Martial Arts Program (MCMAP), the rifle range, and to the Corporal's course.[27] Following the smoke pit discussion, LCpl B.A. asked her friend, Corporal (Cpl) Castro, if she would ask Sgt Rosario if LCpl B.A. could attend these courses. Sgt Rosario denied these requests.[28] However, it was MWSS policy to send only non-commissioned officers (NCO's) to the course. Lance Corporals, including LCpl B.A., would not be included.[29] Further, the training NCO, not Sgt Rosario, decided whether to send Marines to MCMAP or the rifle range.[30]

Despite Sgt Rosario's alleged comments, LCpl B.A. continued to interact regularly with him on personally and professionally. She talked to him about issues she had with her marriage and counseling for her job performance.[31] LCpl B.A. and Sgt Rosario even went to the Marine Corps Ball in the same social group.[32] Lance Corporal B.A. denied that Sgt Rosario was holding back her

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[26] *Id*.
[27] JA at 0042.
[28] JA at 0043.
[29] JA at 0106.
[30] JA at 0169.
[31] JA at 0046.
[32] JA at 0047.

career.[33] She also testified that, after discussing Sgt Rosario's comments with him in January, his behavior changed and there were no further comments that she would classify as "inappropriate."[34]

B. Allegations of Abusive Sexual Contact and Assault

Lance Corporal B.A. made two allegations of abusive sexual contact and assault against Sgt Rosario. These incidents allegedly occurred in October 2013 and January 2014. Lance Corporal B.A. alleged that Sgt Rosario kissed her on the cheek and touched her hand in October 2013 and licked her ear in January 2014.[35] These allegations were discussed in great detail during testimony at trial. The evidence completely failed to support these allegations and the members acquitted Sgt Rosario of both charges stemming from these allegations. Despite this, the NMCCA heavily relied on these allegations in addressing all three of Sgt Rosario's assignments of error.

Summary of Argument

The lower court resurrected facts of which Sgt Rosario was acquitted and used them in its analysis to find the conviction legally sufficient. This violated the Double Jeopardy Clause and precedent from the Supreme Court and this Court.

[33] JA at 0054.
[34] JA at 0065.
[35] JA at 0018-0020.

Argument

I.

THE LOWER COURT ERRED BECAUSE IT RELIED ON FACTS OF WHICH THE MEMBERS FOUND SGT ROSARIO NOT GUILTY.

Standard of Review

Whether an appellate court's factual sufficiency review violated the Double Jeopardy Clause by rehearing an incident for which the accused was found not guilty is a Constitutional question.[36] Thus, this Court reviews the question under a *de novo* standard.[37]

Discussion

A. Sergeant Rosario was acquitted of committing abusive sexual contact and assault consummated by a battery against LCpl B.A.

The members convicted Sgt Rosario of violating the Marine Corps Sexual Harassment Policy, but acquitted him of the charged abusive sexual contact and assault consummated by a battery offenses. Under established case law, the lower court could not consider the facts supporting allegations resulting in acquittals in conducting its Article 66(c), UCMJ, review. The lower court, though, affirmed the conviction as factually and legally sufficient by heavily relying on conduct of which Sgt Rosario was acquitted.

[36] *United States v. Stewart*, 71 M.J. 38, 42 (C.A.A.F. 2012).
[37] *United States v. Marcum*, 60 M.J. 198, 202-03 (C.A.A.F. 2004) (citing *Jacobellis v. Ohio*, 278 U.S. 184, 190 (1964)).

B. The lower court erred when it affirmed the conviction based on conduct of which the members acquitted Sgt Rosario.

As a result of the express acquittals, the lower court violated the Double Jeopardy Clause when it relied on the not-guilty findings to affirm the conviction. The Double Jeopardy Clause of the Fifth Amendment protects an accused from "a second prosecution for the same offense after acquittal."[38] This principle means a "Court of Military Review may not make findings of fact contradicting findings of not guilty reached by the factfinder."[39] Appellate courts can "affirm only such findings of guilty . . . as it finds correct in law and fact."[40] Courts "cannot find as fact any allegation in a specification for which the fact-finder below has found the accused not-guilty."[41]

Here, the court heavily relied on the evidence that went to the offenses of which the court-martial acquitted Sgt Rosario. It relied on this evidence in its analysis of all three of Sgt Rosario's assignments of error. These repeated errors denied Sgt Rosario a fair review under Article 66(c). In their analysis, though, the lower court wrongly relies on *Dunn v. United States*[42] and *United States v. Jackson*,[43] two cases that apply to inconsistent verdict challenges, for the

[38] *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).
[39] *United States v. Smith*, 39 M.J. 448, 451-52 (C.M.A. 1994).
[40] 10 U.S.C. § 866(c) (2012).
[41] *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003).
[42] 284 U.S. 390 (1932).
[43] 7 C.M.A. 67 (C.M.A. 1956).

proposition that they can consider the acquitted facts as part of their analysis.[44] In the "Background" section of its brief, the court finds as fact the allegations that resulted in acquittals:

> There were also non-verbal advances. The appellant placed his hand over hers and kissed her cheek while she worked on a refrigeration unit in October 2013. He put his hand on her neck and stuck his tongue in her ear while she repaired another unit in January 2014.[45]

In its analysis of Sgt Rosario's void for vagueness challenge, the court wrote:

> Considering all the relevant facts, including the incidents where he touched LCpl B.A., we have no difficulty concluding that a person of ordinary intelligence could reasonably understand the regulation proscribed the appellant's conduct.[46]

Finally, regarding the factual and legal sufficiency of the conviction:

> LCpl B.A.'s testimony that the appellant made unwanted sexual advances—touching her hand and kissing her cheek during the October 2013 incident, touching her neck and sticking his tongue in her ear during the January 2014 incident . . . clearly conveyed that she felt harassed.[47]

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[44] *United States v. Rosario*, 2016 CCA LEXIS 32, at *6 (N-M. Ct. Crim. App. Jan. 28, 2016); in an inconsistent verdict challenge, an accused attacks the validity of a guilty finding or findings when the same evidence is offered for both guilty and not-guilty findings. This type of challenge does not warrant relief, as the *Dunn* and *Jackson* courts stated. Here, though, Sgt Rosario is not attacking inconsistent verdicts of the factfinder at the trial level, but rather the flawed Article 66(c) review of the lower court. Inconsistent verdict case law is inapplicable.
[45] *Id.* at 3.
[46] *Id*. at 6-7.
[47] *Id.* at 9-10.

The court followed this passage with a footnote that referenced a portion of LCpl B.A's testimony about the alleged sexual contact incident of which Sgt Rosario was acquitted.[48] The lower court's reliance on evidence offered in support of allegations of which Sgt Rosario was acquitted taints its entire analysis, as each of the theories articulated by the lower court were expressly contradicted by the members' findings.

While not a perfect analog for the present case, this Court addressed a similar issue in *United States v. Stewart*.[49] In *Stewart*, the members were presented with two separate specifications alleging sexual offenses.[50] Despite the distinct specifications, the military judge defined both the offenses in the exact same manner.[51] Further, the judge instructed the members that they could only return a finding of guilt for one but not both offenses.[52] The members returned a finding of not guilty to the first specification, but guilty to the second specification.[53] The CCA then affirmed the conviction. This Court reversed, however, and held that it was impossible for the CCA to conduct a factual sufficiency review "without

[48] *Id.* at 10 n.10.
[49] 71 M.J. 38 (C.A.A.F. 2012).
[50] *Id.* at 40.
[51] *Id.*
[52] *Id.* at 41.
[53] *Id.*

finding as fact the same facts the members found Stewart not guilty of in Specification 1 "because doing so would violate the Double Jeopardy Clause.[54]

The Air Force recently demonstrated the correct way to treat acquitted conduct in conducting factual sufficiency review. In *Hernandez*, the appellant was convicted of indecent liberties with a minor for kissing a fifteen year-old female on the mouth. He was acquitted, though, of rape by digital penetration and abusive sexual contact by engaging in oral sodomy. Recognizing the limits placed on the service courts of criminal appeals in conducting Article 66(c), UCMJ review, the AFCCA stated, "[W]e are mindful that we may not make findings of fact contrary to not guilty findings. Limiting our review *to exclude the actions of which Appellant was acquitted . . . .*"[55]

In conducting their review, the Air Force court cited all of the testimony presented at trial supporting the victim's claims. They did not, however, cite any testimony regarding the digital penetration or oral sodomy specifications of which appellant was acquitted.[56] While the conviction was ultimately affirmed, the AFCCA took great care to not violate the appellant's Double Jeopardy rights. The NMCCA did not give the same protections to Sgt Rosario.

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[54] *Id.* at 43.
[55] *United States v. Hernandez*, 2015 CCA LEXIS 499, at *5 (A.F. Ct. Crim. App. Nov. 4, 2015) (emphasis added) (internal citations omitted).
[56] *Id*. at 5-6.

Here, the members acquitted Sgt Rosario of any contact offenses. Yet, despite the acquittals, the lower court relied on those factual theories to find the conviction both factually and legally sufficient. Based on the language the lower court used in its analysis, there is simply no way to separate the lower court's decision from the acquittals in this case. The lower court's reliance on facts that contradict the findings of not guilty by the members (i.e., that Sgt Rosario licked the complaining witness's ear, kissed her cheek, or assaulted her by touching her hand) was error because it violated the Constitution's Double Jeopardy Clause.[57] This is a clear case of a reviewing court improperly affirming a conviction based on acquitted conduct.

C. The lower court's violation of the Double Jeopardy Clause requires reversal.

As this Court held in *Smith*, the appellate review process should not prejudice an accused.[58] The lower court, however, used conduct of which Sgt Rosario was acquitted used against him during his statutorily guaranteed Article 66, UCMJ, review. Since the lower court relied on facts of which the members acquitted Sgt Rosario, this Court should reverse the lower court's decision.

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[57] *United States v. Stewart*, 71 M.J. 38, 42 (C.A.A.F. 2012); *United States v. Wilson*, 67 M.J. 423, 428 (C.A.A.F. 2009) (citing *Green v. United States*, 355 U.S. 184, 187-88 (1957)); *United States v. Walters*, 58 M.J. 391, 295 (C.A.A.F. 2003); *United States v. Smith*, 39 M.J. 448, 451-52 (C.M.A. 1994).
[58] 39 M.J at 451.

Conclusion

This Court should vacate the lower court's ruling and remand it for review consistent with Double Jeopardy principles.

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Certificate of Filing and Service

I certify that the foregoing was delivered to this Court, the Appellate Government Division, and to the Administrative Support Division, Navy-Marine Corps Appellate Review Activity on July 11, 2016.

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