IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Jonatan O. RosarioMartinez Corporal (E-4) United States Marine Corps, Appellant	**SUPPLEMENT TO PETITION FOR GRANT OF REVIEW** Crim.App. Dkt. No. 202300154 USCA Dkt. No. 25-0102/MC

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

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I.

Did unlawful command influence occur when the members discussed Marine Corps Sexual Assault Prevention and Response policies on consent and alleged victim credibility during their deliberations before convicting Appellant of sexual assault?

II.

Did the lower court err in denying Appellant's motion to attach two members' declarations under M.R.E. 606(b)(2)(B) to support his claim that unlawful command influence was improperly brought to bear on the members during deliberations?

III.

The Court should settle whether *United States v. Jessie* has been overruled or superseded by the removal of the statutory language, "on the basis of the entire record," from Article 66, UCMJ.

STATEMENT OF STATUTORY JURISDICTION

The sentence entered into judgment includes a punitive discharge. The lower court had jurisdiction under Article 66(b)(3), Uniform Code of Military Justice (UCMJ).[1] Appellant invokes this Court's jurisdiction under Article 67(a)(3), UCMJ.

[1] 10 U.S.C. § 866(b)(3) (2024).

STATEMENT OF THE CASE

A general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of sexual assault due to lack of consent, in violation of Article 120(b)(2)(A), UCMJ.[2] The Military Judge sentenced him to confinement for 18 months and a dishonorable discharge.[3] The convening authority approved the sentence, and the Military Judge entered it into judgment.[4] The lower court affirmed the findings and sentence on December 18, 2024.[5] Appellant timely petitioned this Court for review on February 16, 2025.

STATEMENT OF FACTS

A. The members of the venire discussed the Marine Corps Sexual Assault Prevention and Response (SAPR) policy that drinking any alcohol deprives a person of the ability to consent to sex.

Appellant's court-martial consisted of eight members selected from an original venire of fifteen Marines.[6] The charges involved two specifications of

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[2] R. at 722. The members acquitted Appellant of committing the same sexual act when he knew or reasonably should have known that the complaining witness was asleep. *Id*.
[3] R. at 786. A dishonorable discharge is mandatory for convictions in violation of Article 120(b), UCMJ.
[4] Convening Authority Action, Mar. 14, 2023; Entry of Judgment, June 2, 2023.
[5] *United States v. RosarioMartinez*, No. 292300154, slip op. at 1 (N-M. Ct. Crim. App. Dec. 18, 2024).
[6] R. at 91-92, 274.

sexual assault, one alleging the alleged victim did not consent to the sexual act, the other alleging she was asleep at the time.[7]

During his preliminary instructions, the Military Judge told the members of the venire that they "may not consult any other source as to the law pertaining to this case unless it is admitted into evidence."[8] He instructed them, "[D]o not consult any source of law or information, written or otherwise, as to any matters involved in this case, and do not conduct your own investigation or research."[9] He further instructed them to "not allow any unauthorized intrusion into your deliberations."[10]

During group voir dire, the Military Judge asked, "In your annual SAPR and related training, has any member received training about what consent means and what qualifies as consent to sexual activity?"[11] All members responded in the affirmative.[12] Subsequently, the members generally agreed that it is "okay to engage in sex with someone else who has been drinking alcohol," after which they were excused to the deliberation room for twelve minutes.[13] Before commencing

[7] Charge Sheet.
[8] R. at 92.
[9] R. at 98.
[10] R. at 99.
[11] R. at 110.
[12] *Id*.
[13] R. at 111-12.

individual voir dire, the Military Judge recalled all the members and provided them the legal definition of consent.[14]

During individual voir dire, Captain J, the most senior member of the venire, told the military judge that he had just been discussing the "Marine Corps definition" of consent, that it was "what's up for debate," and that he did not know if it differed by command, but that "one [drink] is enough to not give consent."[15] He said that "in the Marine Corps term and my eyes, no they cannot [consent]."[16] He said he had posed the same question to the other members in the deliberation room to see if they shared the same definition of "consent" that he used in his unit.[17] He said he did not believe the definition he provided to the court differed from the definition the Military Judge had provided.[18] Captain J was challenged for cause, which was granted.[19]

During the next individual voir dire, Captain S, who ultimately served as the senior member on Appellant's panel, denied having any conversation about consent before returning for individual voir dire,[20] but agreed that the Marine Corps SAPR policy he received training on provided a different definition of

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[14] R. at 113.
[15] R. at 139.
[16] *Id*.
[17] R. at 140.
[18] R. at 143.
[19] R. at 149.
[20] R. at 151.

consent than the one the Military Judge had provided.[21] Captain S said the Marine Corps SAPR policy he had been trained on, which had been repeated in multiple annual trainings, was that "if they've ever had alcohol, they can't consent."[22]

Six of the eight members ultimately empaneled on Appellant's court-martial received training on this erroneous Marine Corps SAPR policy that if someone consumes any alcohol, they are not able to consent to sex.[23]

B. Despite the Military Judge's instructions, the members referenced the Marine Corps SAPR training on alcohol, consent, and alleged victim credibility during deliberations before convicting Appellant.

During deliberations on findings, the members discussed Marine Corps SAPR training regarding the need to believe alleged victims who make sexual assault allegations and the fact that any consumption of alcohol renders a person unable to consent.[24] In his declaration, First Lieutenant (1stLt) H states that prior to convicting Appellant, the members made references during their deliberations to the Marine Corps SAPR training about "having to believe" alleged victims like the complaining witness.[25] In his declaration, Staff Sergeant (SSgt) P states that prior to convicting Appellant the members made references during deliberations to the

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[21] R. at 154.
[22] R. at 154-55.
[23] R. at 154 (Captain S), 180 (1stLt H), 205 (MGySgt R), 219 (MSgt C), 241 (SSgt P) and 246 (SSgt C). 2ndLt M stated that there was no conversation in the deliberation room about the legal definition of consent. R. at 190-91.
[24] Appellant's Mot. to Attach, Oct. 24, 2023, App. A.
[25] *Id.*, App. A

Marine Corps SAPR training that, "if someone had been drinking then they can't consent to sexual activities."[26] The members found Appellant guilty of sexual assault by lack of consent where the complaining witness had consumed alcohol.[27]

C. The lower court denied Appellant's motion to attach declarations describing the members' references to the Marine Corps SAPR training during deliberations, then denied Appellant's UCI claim based on a lack of evidence.

Appellant moved to attach the two members' declarations to the record pursuant to Military Rule of Evidence (M.R.E.) 606(b)(2)(B) and *United States v. Jessie*,[28] in order to support his claim that UCI was improperly brought to bear on the members during their deliberations.[29] The lower court denied the motion.[30] Having refused to attach this evidence in support of Appellant's UCI claim, the lower court then denied the UCI claim based on a lack of evidence.[31]

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[26] *Id.*, App. B.
[27] R. at 722.
[28] *United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020).
[29] *See* Appellant's Mot. to Attach, Oct. 24, 2023, at 5.
[30] *RosarioMartinez*, slip op. at 11.
[31] *Id.* at 15.

SUMMARY OF ARGUMENT

The Marine Corps SAPR policies—that alcohol causes automatic non-consent and that an alleged sexual assault victim must be believed—injected UCI into the deliberations at Appellant's court-martial. Inconsistent with the law instructed by the Military Judge, this UCI in the deliberation room led the members to convict Appellant of the only charged specification to which the erroneous SAPR policies could conceivably apply: sexual assault by lack of consent. The UCI prejudiced Appellant's case and deprived him of a fair trial, which this Court should remedy by setting aside the findings and sentence.

The lower court avoided the gravamen of Appellant's UCI claim by erroneously denying his motion to attach competent evidence from two members describing the references to the Marine Corps SAPR policies made during deliberations, which were inconsistent with the law as instructed. Contrary to the lower court's view, M.R.E. 606(b)(2)(B) specifically provides that members are competent to testify about whether "[UCI] or any other outside influence was improperly brought to bear on any member." This Court should reverse the lower court's denial of Appellant's motion, attach the members' declarations to the record, and consider them in resolving Appellant's UCI claim.

REASONS FOR GRANTING REVIEW

I.

The Court should settle whether the panel members' discussion of pervasive SAPR training during deliberations, which are inconsistent with the law as instructed, injects UCI into court-martial proceedings for sexual offenses.

UCI "is the mortal enemy of military justice. Where it is found to exist, judicial authorities must take those steps necessary to preserve both the actual and apparent fairness of the criminal proceeding."[32] "[T]he law of unlawful command influence establishes a low threshold for the defense to present some evidence of unlawful command influence."[33] "[T]here must be 'more than mere allegation or speculation,' but all that is required is 'some evidence.'"[34] Once the accused satisfies this burden, the burden shifts to the government to prove beyond a reasonable doubt that the UCI did not affect the proceedings.[35]

The prohibition against UCI holds that "[n]o person subject to [the UCMJ] may attempt to coerce or, by an unauthorized means, attempt to influence the action of a court-martial or any member thereof, in reaching the findings or

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[32] *United States v. Lewis*, 63 M.J. 405, 407 (C.A.A.F. 2006).
[33] *United States v. Harvey*, 64 M.J. 13, 20 (C.A.A.F. 2006) (citation and quotations omitted).
[34] *United States v. Leal*, 81 M.J. 613, 620 (C.G. Ct. Crim. App. 2021) (quoting *United States v. Biagase*, 50 M.J. 143, 151 (C.A.A.F. 1999)).
[35] *Biagase*, 50 M.J. at 151.

sentence in any case . . . .[36] Court-martial panel members are subject to this prohibition, just like other persons subject to the UCMJ. This Court and its predecessor "have long condemned any references to departmental or command policies made before members" which "in effect brings the commander into the deliberations room."[37] And "it is the *fact* of the reference to [such] policy that has been condemned and not the *source* of the reference."[38]

In *United States v. Dugan*, for example, one of the panel members on the appellant's court-martial submitted a letter expressing her concerns about the comments made by other members during their deliberations.[39] Some stated a bad-conduct discharge was a "given" based on the charges in the case, while others referenced a Commander's Call where the convening authority had discussed the illegal drug the appellant was accused of using and their belief that a harsh punishment was therefore expected.[40] This Court held these contents of the member's letter constituted "some evidence" of UCI during the deliberations.[41]

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[36] 10 U.S.C. § 837(a)(2) (2024).
[37] *United States v. Washington*, 80 M.J. 106, 107 (C.A.A.F. 2020) (Ohlson, C.J., concurring in part and dissenting in part) (quoting *United States v. Grady*, 15 M.J. 275, 276 (C.M.A. 1983)).
[38] *Grady*, 15 M.J. at 276 (emphasis in original).
[39] *United States v. Dugan*, 58 M.J. 253, 258 (C.A.A.F. 2003).
[40] *Id.*
[41] *Id.* at 259.

Similarly, in *United States v. Schloff*, the Army Court of Criminal Appeals (ACCA) received a declaration from a panel member stating that during deliberations on findings "two members argued that politically, the United States Army could not afford to seem weak on sexual harassment and assault."[42] As in *Dugan*, the ACCA found that the member's declaration satisfied "[the appellant's] burden to produce [some] evidence that, if true, constituted UCI . . . ."[43] The court found the member statements "injected policy and career concerns into the deliberations . . . despite the military judge's clear guidance that the case be decided solely on the evidence presented in court and the instructions on the law given by the military judge."[44] It found that as a result "[t]he UCI was a palpable cloud throughout the deliberations left to permeate in each panel member's decision-making process."[45]

Here, SSgt P described during voir dire that prior to trial he had received training on such SAPR policies some eight or nine times stating that "if you drink any alcohol you cannot give consent."[46] Various other members discussed during voir dire that they, too, had received training on the same SAPR policy annually

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[42] *United States v. Schloff*, No. ARMY 20150724, 2018 CCA LEXIS 350, at *2 (A. Ct. Crim. App. Feb. 5, 2018).
[43] *Id.* at *2.
[44] *Id.* at *6 (internal quotation marks omitted).
[45] *Id.*
[46] R. at 237-38, 241.

and at formations from their command. Captain S said he had received SAPR training that if you had any alcohol you could not consent to sex.[47] 1stLt H was trained on the same definition.[48] Master Gunnery Sergeant R received training that incorrectly defined consent related to alcohol.[49] Master Sergeant C was trained that if a victim has any alcohol, she cannot consent.[50]

And while the Military Judge's instruction provided a different definition, SSgt P's declaration states that during deliberation the members "discussed the USMC and SAPR policy relating to: if someone has been drinking alcohol then they can't consent to sexual activities."[51] This is in the context of SSgt P describing an earlier discussion among the members during voir dire about how the "Marine Corps SAPR policy" may be different from what the Military Judge instructed the members on,[52] which created confusion because ". . . in the military, if you drink any alcohol you cannot give consent."[53]

As in *Dugan* and *Schloff*, the discussion of this departmental policy, on which a majority of the members had been repeatedly trained, is "some evidence" of UCI during deliberations. So, too, is the discussion of the Marine Corps SAPR

[47] R. at 154-55.
[48] R. at 180.
[49] R. at 205-06
[50] R. at 219.
[51] Appellant's Mot. to Attach, Oct. 24, 2023, App. B.
[52] R. at 240.
[53] R. at 241.

policy, and the training the members received, about "having to believe" alleged victims, which according to 1stLt H's declaration was also referenced during the deliberations. Both policies are inaccurate statements of the law and differ from the instructions provided by the Military Judge. One of them led to an erroneous comparison of law and policy by the members throughout voir dire. And both permeated the members' decision-making process during deliberations, which eventually led to Appellant's conviction for sexual assault, specifically due to lack of consent, in a case where the complaining witness had consumed alcohol.[54]

In concluding the declarations do not contain "some evidence" of UCI (and therefore could not be attached to the record under M.R.E. 606(b)(2)(b)),[55] the lower court not only caused a circuit split with *Schloff*, but also erred in two key areas this Court should address.

First, the lower court reasoned that the discussion of SAPR policy training during the members' deliberations in this case was more "innocuous" than the introduction of such training by the Government in its case-in-chief in *United States v. Washington*.[56] But as this Court noted in *Washington*, since the members in that case agreed to follow the military judge's proper instructions, the

[54] *Schloff*, 2018 CCA LEXIS 350, at *6.
[55] *RosarioMartinez*, slip op. at 13.
[56] *Id.* (citing *United States v. Washington*, 80 M.J. 106 (C.A.A.F. 2020)).

conclusion that the SAPR evidence had influenced their deliberations was pure speculation.[57]

Here, on the other hand, the opposite is true. The injection of prejudicial UCI into the deliberations by the members themselves requires no speculation since, as in *Dugan* and *Schloff*, some of those same members have told us what occurred. Thus, far from being more "innocuous" than in *Washington*, the infection of Appellant's court-martial panel by similar, erroneous SAPR policies is more certain and, therefore, more prejudicial.

Second, the lower court attempts to distinguish *Dugan* and *Schloff* by declaring, "What this case . . . lacks is any evidence that someone attempted to use policy considerations to influence the deliberations."[58] But the holdings of *Dugan* and *Schloff* support that the panel members themselves can violate Article 37's prohibition against injecting UCI into court-martial proceedings, just like anyone else subject to the UCMJ. And if the policy-laden statements of one or two panel members can constitute "some evidence" of UCI during deliberations, as in *Dugan* and *Schloff*, then it certainly follows that the discussion and reference of multiple (erroneous) Marine Corps SAPR policies by virtually every member can also infect such court-martial proceedings, in violation of the Military Judge's instructions.

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[57] *Washington*, 80 M.J. at 113.
[58] *RosarioMartinez*, slip op. at 13.

As this Court's predecessor explained in *United States v. Grady*, "it is the *fact* of the reference to [such] policy that has been condemned and not the *source* of the reference."[59] In *Grady*, the court correctly identified that "there is [not] anything wrong with the determination and promulgation of general service or command polices and pronouncements which are a proper exercise of the command function."[60] But the nature of the UCI goes beyond the policy at issue when it is coopted by one or more panel members and used—without authorization and in violation of the Military Judge's specific instructions—to influence the other members in reaching their findings or sentence.

The UCI in this case stems from Marine Corps trainings on erroneous SAPR policies, which provide incorrect and misleading definitions of both the relation of alcohol to consent and whether the credibility of alleged sexual assault victims must be assumed as opposed to analyzed. The nature of this UCI also demonstrates how this case does not just involve the mere discussion of policy.[61] Appellant was ultimately convicted of sexual assault by engaging in a sexual act without the complaining witness's consent. The incorrect teachings of the SAPR policies related to automatically believing alleged victims and their supposed inability to

[59] *United States v. Grady*, 15 M.J. 275, 276 (C.M.A. 1983).
[60] *Id*.
[61] *Id.* at 275-76.

consent to sex after consuming *any* alcohol both bear directly on the elements of the offense to which Appellant was found guilty.

Thus, the nature of the deliberations in this case raises the specter of UCI affecting them, not through the exercise of rank as in *United States v. Lawson*,[62] but through the pervasive effect of the erroneous SAPR policies. The discussion during deliberations of these *incorrect* policies "br[ought] the commander into the deliberation room," and created the appearance of improperly influencing the court-martial proceeding.[63] "This appearance of impartiality cannot be maintained in trial unless the members of the court are left unencumbered from powerful external influences."[64] And as in *Dugan*, this infection of the deliberations with erroneous information and considerations goes beyond the "common knowledge" of a court member.[65] In fact, if allowed to stand, the lower court's holding will set a precedent in the Navy and Marine Corps that members *can* in fact encourage their fellow members to reach the findings and sentence in a case based on an interpretation of the law—provided to them through official departmental trainings—other than the one they are authorized to use through the instructions of the Military Judge.

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[62] *United States v. Lawson*, 16 M.J. 38, 41 (C.M.A. 1983).
[63] *Grady*, 15 M.J at 276.
[64] *Id.*
[65] *Dugan*, 58 M.J. at 257.

II.

The Court should settle whether M.R.E. 606(b)(2)(B) permits a panel member to offer evidence about pervasive SAPR policies—which are inconsistent with the law as instructed—that are brought to bear on the members during deliberations in sexual assault cases.

As discussed above, the statement by SSgt P that "all members discussed the USMC and SAPR policy relating to: if someone has been drinking alcohol then they can't consent to sexual activities" is "some evidence" of UCI, which meets the threshold for admissibility under M.R.E. 606(b).[66] M.R.E. 606 generally prohibits a member in a court-martial from testifying as a witness before that court-martial. But M.R.E. 606(b)(2) makes specific exceptions for members to testify about (a) extraneous prejudicial information improperly brought to the members' attention, *(b) unlawful command influence or any other outside influence improperly brought to bear on the members*, and (c) a mistake made in entering the finding or sentence on the forms.

In *United States v. Leal*, the Coast Guard Court of Criminal Appeals (CGCCA) provides a helpful discussion of the parameters in which improper influences during deliberations may be inquired into under M.R.E. 606:

> But even when this exception [under M.R.E. 606(b)(2)(B)] is triggered, limitations remain. The exception allows inquiry into objective manifestations of impropriety, but inquiry into subjective effects of

[66] Appellant's Mot. to Attach, Oct. 24, 2023, App. B.

> alleged impropriety remains prohibited. *United States v. Dugan,* 58 M.J. 253, 259-60 (C.A.A.F. 2003). This allows inquiry into M.R.E. 606(b)'s first generally-prohibited area (statements made or incidents occurring during deliberations), but the remaining two (effect on a member's vote and mental processes) are subjective and thus remain off-limits. *Harvey*, 64 M.J. at 22; *Dugan*, 58 M.J. at 259. Stated succinctly, "Even when the exceptions to [M.R.E.] 606(b) are triggered, disclosures should be limited to the fact and nature of the extrinsic evidence; the impact of the extrinsic evidence or influence on the deliberations or voting should not be disclosed." *United States v. Straight*, 42 M.J. 244, 249 (C.A.A.F. 1995)).[67]

The lower court's denial of Appellant's motion to attach the two members' declarations in this case is at odds with this discussion and thus creates another circuit split. It also ignores the precedential value of *Dugan*, *Schloff*, and other cases where the appellants' claims were supported precisely by kind of evidence. Simply put, if an appellate court is unable to accept a declaration from a member to support an appellant's claim about UCI that occurred in the deliberation room, then not only will this Court need to overrule every case like *Dugan* and *Schloff*, but it will also nullify an appellant's ability to prove such claims (since generally only the members have knowledge of what occurred during their deliberations).

[67] *United States v. Leal*, 81 M.J. 613, 620 (C.G. Ct. Crim. App. 2021).

III.

The Court should settle whether *United States v. Jessie* has been overruled or superseded by the removal of the statutory language, "on the basis of the entire record," from Article 66, UCMJ.

Recently the Air Force Court of Criminal Appeals (AFCCA) found that Rule for Courts-Martial (R.C.M.) 707 need not be "specifically referred to somewhere in the record in order for the record to "raise" an apparent R.C.M. 707 violation within the meaning of *United States v. Jessie*.[68] This Court's analysis in *Jessie* was based on the then-applicable version of Article 66(c), UCMJ, which included language limiting the reviewing authority to affirming the findings and sentence "on the basis of the entire record."[69]

However, effective 1 January 2021, Congress revised Article 66, removing this operative language.[70] The Court has yet to address what, if any, impact this statutory change had on its holding in *Jessie*. In *Giles*, for example, the AFCCA allowed the government to supplement the record to resolve the question of whether it violated the R.C.M. 707.[71]

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[68] *United States v. Giles*, No. ACM 40482, 2024 CCA LEXIS 544, at *29 (A.F. Ct. Crim. App. Dec. 23, 2024) (citing *United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020)).
[69] *Jessie*, 79 M.J. at 440.
[70] *See* National Defense Authorization Act for Fiscal Year 2021, § 542(b)(1)(A), Pub. L. 116-283, 134 Stat. 3388, 3560 (Jan. 1, 2021); 10 U.S.C. § 866(d)(1)(A) (2024).
[71] *Giles*, 2024 CCA LEXIS 544, at *29.

Historically, this Court has generally held that a court of criminal appeals (CCA) reviewing a case pursuant to the then-applicable Article 66, UCMJ, "cannot consider matters outside the 'entire record,'" defined as the "record of trial," "allied papers," and "briefs and arguments that government and defense counsel (and the appellant personally) might present regarding matters in the record of trial and 'allied papers.'"[72] But there are exceptions to this general rule.[73] Relevant here, "some precedents have allowed the CCAs to supplement the record" with affidavits or hearings "when deciding issues that are raised by materials in the record."[74]

Here, the issue of UCI was raised in the record through the voir dire of each member ultimately empaneled, but is not fully resolvable by the materials in the record, which does not illuminate the references to Marine Corps SAPR policy that occurred during the members' deliberations. In such situations, "[t]he Court has concluded based on experience that extra-record fact determinations may be necessary predicates to resolving appellate questions that arise during Article 66(c), UCMJ, reviews."[75] In *Tucker*, for example, the CGCCA concluded that

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[72] *Jessie*, 79 M.J. at 440-41 (citing R.C.M. 1103(b)(2)-(3) (2016); *United States v. Healy*, 26 M.J. 394, 396 (C.M.A. 1988); *United States v. Fagnan*, 30 C.M.R. 192, 194 (C.M.A. 1961)).
[73] *Jessie*, 79 M.J. at 442-43.
[74] *Id*. at 442.
[75] *Id.* at 442-43 (internal quotation marks and citations omitted).

"*Jessie* does not apply to appellate claims of UCI or disqualification" and allowed attachment of materials in that case.[76]

This Court should grant review to "provide crisp, clear guidance to the CCAs about the practical effects" of the recent statutory changes, by analyzing their impact on the lower court's denial of Appellant's motion to attach in this case.[77]

Conclusion

Accordingly, this Court should grant this petition for review.

Appendices

1. *United States v. RosarioMartinez*, No. 292300154, slip op. at 1 (N-M. Ct. Crim. App. Dec. 18, 2024).
2. Appellant's Motion to Attach, Oct. 24, 2023.
3. Submission made pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[76] *United States v. Tucker*, 82 M.J. 553, 564 (C.G. Ct. Crim. App. 2022).
[77] *United States v. Flores*, 84 M.J. 277, 284 (C.A.A.F. 2024) (Ohlson, C.J., concurring in part and dissenting in part).

Certificate of Filing and Service

I certify that a copy of the foregoing was delivered to the Court and delivered to opposing counsel on 12 March, 2025.

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Certificate of Compliance

1. This brief complies with the type-volume limitation of Rule 24(b) because it contains fewer than 9,000 words.
2. This brief complies with the typeface and type style requirements of Rule 37.

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United States Navy–Marine Corps Court of Criminal Appeals

Before
DALY, GROSS, and de GROOT
Appellate Military Judges

UNITED STATES
Appellee

v.

Jonatan O. ROSARIOMARTINEZ
Corporal (E-4), U.S. Marine Corps
Appellant

No. 202300154

Decided: 18 December 2024

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judge:
Ryan C. Lipton (arraignment)
Benjamin A. Robles (motions)
Adam L. Workman (trial and post-trial)

Sentence adjudged 27 January 2023 by a general court-martial convened at Marine Corps Base Camp Lejeune, North Carolina, consisting of members with enlisted representation. Sentence in the Entry of Judgment: confinement for 18 months and a dishonorable discharge.[1]

[1] Appellant was credited with 32 days' confinement credit.

For Appellant:
Lieutenant Morgan Sanders, JAGC, USN

For Appellee:
Lieutenant Rachel E. Noveroske, JAGC, USN
Major Mary-Claire Finnen, USMC

Judge GROSS delivered the opinion of the Court in which Senior Judge DALY and Judge de GROOT joined.

PUBLISHED OPINION OF THE COURT

GROSS, J:

For over one hundred years, courts in the United States have flatly prohibited the admission of juror testimony to impeach a verdict, except in sharply limited circumstances.[2] The Supreme Court, explaining the prohibition, stated

> There is little doubt that post-verdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process.[3]

Appellant now asks us to condone such an investigation, invade the deliberative process of his court-martial by attaching declarations of two members relating to their closed deliberations, and reverse his conviction. We decline to do so.

A general court-martial composed of members with enlisted representation convicted Appellant, contrary to his pleas, of one specification of sexual assault

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[2] *Tanner v. United States*, 483 U.S. 107, 117 (1987).

[3] *Id*. at 120.

in violation of Article 120, Uniform Code of Military Justice (UCMJ).[4] The military judge imposed a sentence of confinement for 18 months and a dishonorable discharge.

Before us, Appellant asserts two assignments of error which we rephrase as follows: (1) whether unlawful command influence (UCI) occurred during the members' deliberations; and (2) whether Appellant was entitled to a unanimous verdict.[5] In support of Appellant's first AOE, he sought to attach three declarations—two from members of the court-martial and one from his trial defense counsel—which the Government opposed. We then ordered briefing on six specified issues relating to Appellant's motion to attach.[6] Having considered the entire record of trial and the briefs of the parties, including the briefs on the specified issues, we now set forth our reasons for our previous denial of Appellant's motion to attach.

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[4] 10 U.S.C. § 920.

[5] We find that pursuant to *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023), Appellant is not entitled to a unanimous verdict. On 3 June 2024, Appellant filed a motion to file a supplemental AOE claiming that this Court erred in denying his motion to attach supplemental matters to the record in support of his first AOE. On 24 June 2024, we denied Appellant's motion to file a supplemental AOE stating that Appellant's claim of error had already been properly preserved and that the reason for our denial of the motion to attach would be addressed in our opinion on the merits.

[6] I: Should the affidavits be analyzed as potential evidence of unlawful command influence, improper outside influence, or extraneous prejudicial information?

II: Is U*nited States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020), the appropriate framework to analyze the motion to attach?

III: If *Jessie* is the proper framework for this Court's analysis, where was the issue raised in the record?

IV: If this Court determines a portion of an affidavit may be attached to the record, must that affidavit be attached in its entirety or may it be redacted?

V: Under what legal theory would trial defense counsel's affidavit be attached to the record?

VI: Would a violation of the military judge's order proscribing the parties and their agents from communicating with the members affect the competency of the evidence contained in the affidavits being offered?

Upon review of the record as a whole, and Appellant not having challenged the factual sufficiency of his convictions, we find that Appellant's conviction and sentence are correct in law, that his sentence is correct in law and fact, and that no prejudicial error to his substantial rights occurred.[7]

I. BACKGROUND

Appellant was charged with two specifications of sexual assault, one for committing a sexual act on Lance Corporal (LCpl) Oscar without her consent, and one for committing a sexual act on LCpl Oscar when he knew, or reasonably should have known, that she was asleep. The two specifications were based upon the same incident and were pleaded in the alternative based on contingencies of proof. The members convicted Appellant of sexual assault without consent, but acquitted him of the specification that alleged that LCpl Oscar was asleep. Appellant then elected to be sentenced by military judge.

A lengthy exposition of the facts surrounding Appellant's conviction is largely unnecessary for our consideration of the assigned errors, except to note that on the night in question, the evidence showed that Appellant sexually assaulted LCpl Oscar after the two had been drinking together at a bar earlier in the evening. At trial, Appellant's defense focused largely on issues of consent and mistake of fact as to consent.

Appellant elected to be tried by members with enlisted representation. During voir dire, the military judge asked the detailed members whether any of them had received training during their time in the Marine Corps about what "consent" means and what qualifies as consent. All members said that they had. Shortly after asking that question, the military judge excused the members and took a brief recess. He then brought back all of the members and read them the definition of consent from the Military Judges' Benchbook.[8] After reading the legal definition of consent, the military judge asked if the members agreed to follow the instruction and all members agreed that they would.

1. Voir Dire and Captain Jordan.

During individual voir dire, the military judge and counsel questioned Captain (Capt) Jordan, who indicated that he had been confused about what definition of consent to use as a potential member in hearing the case. Capt Jordan stated that he felt that the Marine Corps had a "black and white definition" of

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[7] Articles 59 and 66, UCMJ.

[8] Dep't of the Army Pam. 27-9, Military Judges' Benchbook, para. 3a-44-2, Note 5.

what consent is, and that under that definition, if "an individual does drink alcohol they can no longer consent."[9] Capt Jordan also described a conversation that he had with the other potential members during the brief recess before the military judge read them the legal definition of consent.

Capt Jordan described this conversation as focusing on the definition of consent and the "Marine Corps policy" on consent. He said that he did not direct his question at any particular potential member, but rather "just opened [it] to the room."[10] After the military judge again asked Capt Jordan if he could follow the instruction that the military judge had given on consent, Capt Jordan said that he could. However, Capt Jordan went on to say that he believed that Marine Corps policy on consent dictated that a person cannot consent after drinking alcohol, and that policy did not conflict with the military judge's definition. The Government challenged Capt Jordan for actual bias and the Defense joined the challenge, which the military judge granted.

After Capt Jordan's disclosure regarding the discussion in the deliberation room, the military judge and the parties asked some, but not all, of the potential members about Capt Jordan's discussion regarding the definition of consent. The military judge imposed no limitations on voir dire by either side, and both sides engaged in extensive questioning of each member of the venire. Appellant and the Government each challenged two members for cause, with Appellant joining in both Government challenges (one of which was the previously mentioned Capt Jordan). The military judge granted all four challenges for cause, and eight panel members were ultimately selected to hear Appellant's case.

Of the empaneled members, two recalled the discussion, three did not recall the discussion, and three were not asked about it. All of the empaneled members affirmed that they would follow the military judge's definition of consent, and all eight said they would remain open to evidence that a person could consent to sex after drinking alcohol, even if the person drank to the point of memory loss.

2. Post-trial and Captain Sierra.

After trial, Appellant's two military trial defense counsel (TDC), at the urging of their superiors, reached out to members of the panel to conduct a "hot

[9] R. at 140-142

[10] R. at 141.

wash."[11] The senior member of the panel, Capt Sierra, agreed to meet with TDC to discuss the trial. At one point during the meeting, Capt Sierra asked TDC a question about how "hung juries" work in the military. Appellant's TDC explained that under court-martial procedures a panel is not required to be unanimous, and if the number of votes for guilty was less than three quarters of the panel that would result in a not-guilty verdict. Capt Sierra then told Appellant's TDC that the panel had numerous votes where three or more members voted for a finding of not guilty before finally reaching six votes for guilty.

Appellant's detailed TDC then sought further guidance from their superiors before asking Capt Sierra to sign an affidavit attesting to what he had just told them. Capt Sierra signed the affidavit and Appellant filed a motion for a post-trial Article 39(a) session seeking to "correct the findings worksheet" pursuant to R.C.M. 922. Capt Sierra's affidavit did not include any information regarding what the members discussed during deliberations, only referring to the multiple votes taken.

Prior to holding a post-trial Article 39(a) session under Rule for Courts-Martial (R.C.M.) 1104 on the Defense motion, the military judge sent an email to all counsel, stating "all parties and their agents are ORDERED to CEASE and DESIST communicating with any members."[12] The military judge then heard argument on the Defense motion, found that Capt Sierra's affidavit was a prohibited disclosure under Mil. R. Evid. 509 and that it did not meet any of the exceptions set forth in Mil. R. Evid. 606. Specifically, the military judge found that the affidavit did not raise any claim of extraneous prejudicial information being brought to the members' attention, nor did it allege that unlawful command influence or any other outside influence was improperly brought to bear on any member. With respect to the Defense claim that "a mistake was made in entering the finding" the military judge found that the members did not make a mistake, but rather correctly announced their findings even though the affidavit appeared to state that the members had violated the military judge's instructions on voting and reconsideration.

3. Appeal, Capt Romeo, 1stLt Hotel, and SSgt Papa.

On appeal, Appellant sought to attach three additional declarations: two from other members of Appellant's court-martial and one from one of Appellant's TDC, Capt Romeo. We denied Appellant's motion to attach on 10 May

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[11] R. at 790. A "hot wash" is a term used by military personnel for a meeting between participants to conduct a quick review of the high and low points of an exercise. "A QDR "Hot Wash" - War on the Rocks" available at https://waronthe rocks.com/2014/03/a-qdr-hot-wash/ (last visited 2 December 2024).

[12] App. Ex. LXVII (capitalization in original).

2024, concluding that the declarations of the members constituted incompetent evidence. We describe them below and provide analysis to explain what drove our decision to deny the motion to attach.

The declarations of 1st Lieutenant (1stLt) Hotel and Staff Sergeant (SSgt) Papa described the same voting procedure as does Capt Sierra's affidavit, but added additional details. 1stLt Hotel stated that after the members initial vote failed to produce six votes for either a conviction or acquittal that "some members discussed the USMC and SAPR policy relating to: 'having to believe her' when discussing the alleged victim."[13] SSgt Papa stated that, during further deliberations after the initial vote "all members discussed the USMC and SAPR policy relating to: if someone has been drinking then they can't consent to sexual activities."[14]

Captain Romeo's declaration merely stated that he was unaware that members had discussed either of the aforementioned policies during deliberations. He further stated that if he had known that the policies were discussed, he would have filed a motion for unlawful command influence.

II. DISCUSSION

A. The motion to attach the affidavits of 1st Lieutenant Hotel, Staff Sergeant Papa, and Captain Romeo is denied.

To assist and inform our decision whether to attach the declarations to the record, we ordered the parties to brief six specified issues. Having now considered the briefs of the parties and the declarations, we find that we can resolve the question of whether to attach the declarations based on our finding that they do not meet any of the exceptions under Mil. R. Evid. 606(b) and are therefore not competent evidence.[15]

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[13] Decl. of 1stLt Hotel.

[14] Decl. of SSgt Papa.

[15] The Government urges us to find that *Jessie* precludes attaching evidence of UCI that was not raised in the record at trial as a whole. While we need not decide whether *Jessie* acts as a bar to our consideration of matters outside the record related to UCI, we note that our sister court, in a well-reasoned opinion, found that the CAAF's opinion in *Jessie* did not alter the authority of a CCA to attach matters relating to UCI to the record. *See United States v. Tucker*, 82 M.J. 553 (C.G. Ct. Crim. App. 2022).

1. Law

a. Competence of member testimony and declarations

Military Rule of Evidence 509 states, "[e]xcept as provided in Mil. R. Evid. 606, the deliberations of … courts-martial … are privileged to the extent that such matters are privileged in trial of criminal cases in the United States district courts…"[16] Mil. R. Evid. 606 prohibits a member from testifying "about any statement made or incident that occurred during the deliberations of that court-martial."[17] The rule recognizes three exceptions: (1) whether extraneous prejudicial information was improperly brought to the members attention; (2) whether unlawful command influence or other outside influence was improperly brought to bear on any member; and (3) whether a mistake was made in entering the findings or sentence.[18]

"In general, inquiries into jury verdicts and deliberations are looked upon with strong disfavor."[19] The Manual for Courts-Martial (MCM) implements this general restriction on questioning members about their deliberations. In other cases we have found that members cannot be questioned about their deliberations and voting except as provided in Mil. R. Evid. 606. The MCM "prohibits questioning court members about their deliberations and voting except as provided in Mil. R. Evid. 606. R.C.M. 923 permits the impeachment of findings which are proper on their face only when an exception contained in Mil. R. Evid. 606 exists."[20]

"The purpose of this rule is to protect freedom of deliberation, protect the stability and finality of verdicts, and protect court members from annoyance and embarrassment."[21] "[A]n appellant has the burden of showing that something was said or done during deliberations which falls under an exception contained in R.C.M. 923 and Mil. R. Evid. 606(b) that reasonably could have affected the verdict before appellant is entitled to depositions or in-court questioning of court members regarding their deliberations."[22]

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[16] Mil. R. Evid. 509.

[17] Mil. R. Evid. 606(b)(1).

[18] Mil. R. Evid. 606(c).

[19] *United States v. Thomas*, 39 M.J. 626, 632 (N-M.C.M.R. 1993) (cleaned up).

[20] *Id*.

[21] *United States v. Loving*, 41 M.J. 213, 236 (C.A.A.F. 1994).

[22] *Thomas*, 39 M.J. at 634.

Courts have repeatedly cautioned that even when an exception to the general prohibition on receiving evidence of deliberations might apply, the extent of inquiry into deliberations must be limited.

> We caution counsel and court members to be mindful of the obligation to protect the secrecy of deliberations. Even when the exceptions to Mil.R.Evid. 606(b) are triggered, disclosures should be limited to the fact and nature of the extrinsic evidence; the impact of the extrinsic evidence or influence on the deliberations or voting should not be disclosed.[23]

Pronouncements like this demonstrate that the overarching policy with respect to questioning members about their deliberations is that such questioning is to be avoided unless narrowly tailored to a specific exception.

In response to our first specified issue, Appellant only claimed that the declarations were evidence of unlawful command influence. He made no attempt to claim that they were evidence of extraneous prejudicial information or other outside improper influence. We therefore analyze the declarations primarily under the theory of UCI.[24]

b. Unlawful Command Influence

"Unlawful command influence is the mortal enemy of military justice. Where it is found to exist, judicial authorities must take those steps necessary to preserve both the actual and apparent fairness of the criminal proceeding."[25] To make a prima facie case of actual unlawful command influence, an accused bears the initial burden of presenting "some evidence" of UCI—

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[23] *United States v. Straight*, 42 M.J. 244, 251 (C.A.A.F. 1995).

[24] We also considered whether the declarations were evidence of extraneous prejudicial information. However, the caselaw supports that extraneous prejudicial information does not include matters that a member brings to the deliberation room, including knowledge of training or policy. *Straight*, 42 M.J. at 250 ("[E]vidence of information acquired by a court member during deliberations from a third party or from outside reference materials may be extraneous prejudicial information which is admissible under Mil.R.Evid. 606(b) to impeach the findings or sentence. [But] the general and common knowledge a court member brings to deliberations is an intrinsic part of the deliberative process, and evidence about that knowledge is not competent evidence to impeach the members' findings or sentence.").

[25] *United States v. Lewis*, 63 M.J. 405, 407 (C.A.A.F. 2006) (cleaned up).

facts that if true would constitute UCI.[26] "Although this burden is low, the accused must present more than mere allegations or speculation."[27]

"[T]he use of command meetings to purposefully influence the members in determining a court-martial sentence violates Article 37, UCMJ."[28] However, even when there is no intent to influence a court-martial proceeding, "the mere 'confluence' of the timing of such meetings with members during ongoing courts-martials and their subject matter dealing with court-martial sentences can require [a rehearing]."[29]

In *United States v. Dugan*, the Court of Appeals for the Armed Forces (CAAF) confronted the issue of what constituted "some evidence" of UCI during deliberations.[30] In *Dugan*, a member sent the defense counsel a letter setting forth concerns with respect to comments made by other members during deliberation on sentence. The CAAF identified two statements that required additional fact finding and the piercing of the deliberative privilege under Mil. R. Evid. 509 and 606. The first was a comment that a bad-conduct discharge "was a given" for the types of charges of which the Appellant was convicted. The second was a statement by a member of the panel "that our sentence would be reviewed by the convening authority and we needed to make sure our sentence was sending a consistent message." The letter went on to state that "[a]nother member pointed out that we needed to make sure it didn't look like we took the charges too lightly … He or she said it was especially important because our names would be identified as panel members."[31]

We recently addressed UCI in the context of deliberation in the case of *United States v. Longshore*.[32] There, the appellant sought to introduce evidence in the form of an affidavit from a member who claimed that the members conducted straw polls, read their notes to each other, and that one member commented that "as servicemembers, [they had] a duty to send a message that

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[26] *United States v. Gilmet*, 83 M.J. 398, 403 (C.A.A.F. 2023).

[27] *Id*.

[28] *United States v. Baldwin*, 54 M.J. 308, 310 (C.A.A.F. 2001).

[29] *Id*. (Citing *United States v. Brice*, 19 M.J. 170, 172 n. 3 (C.M.A. 1985)).

[30] *United States v. Dugan*, 58 M.J. 253, 258 (C.A.A.F. 2003).

[31] *Id*. at 255.

[32] *United States v. Longshore*, No. 202200177, 2024 CCA LEXIS 56 (N-M. Ct. Crim. App. Feb, 6, 2024), *rev. denied*, __M.J.__ , 2024 CAAF LEXIS 414, (C.A.A.F. July 19, 2024).

sexual assault is not tolerated in the Navy."[33] We determined there that the language used in deliberations did not raise "some evidence" of UCI.

Appellant invites our attention to our sister court's decision in *United States v. Schloff*, where the Army Court of Criminal Appeals (ACCA) reversed a conviction based on UCI during deliberations on findings.[34] In *Schloff*, the ACCA ordered a *DuBay* hearing[35] after one of the members averred that another member had argued that the Army could not afford to seem weak on sexual harassment and sexual assault.[36] Following the *DuBay* hearing, the ACCA found that the Government could not prove beyond a reasonable doubt that UCI had not impacted the appellant's court-martial.[37]

The CAAF has considered the issue of sexual assault training and whether the mere mention of such training constituted UCI in *United States v. Washington*.[38] In *Washington*, the trial counsel introduced testimony that the appellant had attended such training (referred to in the Army as "SHARP training") as evidence rebutting the appellant's reasonable mistake of fact defense. In rejecting the appellant's UCI claim, the CAAF stated, "[t]he SHARP training was not done for the purpose of influencing the trial, no one argued at trial that the SHARP training reflected the law, the military judge properly instructed the members, and the members agreed that they could follow the military judge's instructions."[39]

2. Discussion

We hold that we cannot consider the declarations of either 1stLt Hotel or SSgt Papa, because the declarations do not fit within one of the very narrow exceptions to the general prohibition on members providing evidence of deliberations. Because we determined that we cannot attach the declarations of 1stLt Hotel and SSgt Papa, the declaration of Capt Romeo is irrelevant to any matter raised in the record.

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[33] *Id*. at *19.

[34] *United States v. Schloff,* No. ARMY 20150724, 2018 CCA LEXIS 350 (Army Ct. Crim. App. Feb. 5, 2018) (unpublished).

[35] *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967).

[36] *Schloff*, 2018 CCA LEXIS 350 at *2.

[37] *Id.*

[38] *United States v. Washington*, 80 M.J. 106 (C.A.A.F. 2020).

[39] *Id*. at 113.

In reaching our decision on the whether the declarations here show "some evidence" of UCI, we find no reason to depart from our decision in *Longshore*, that a generalized statement by a member regarding a "duty to send a message that sexual assault is not tolerated in the Navy" is insufficient to meet an appellant's initial burden under *Biagase*.[40] We find the circumstances of Appellant's case to be more akin to that of *Longshore* and *Washington* than the circumstances involved in *Dugan* and *Schloff*.

We begin by noting that controlling precedent conclusively holds that much of the declarations of 1stLt Hotel and SSgt Papa are completely covered by the privilege in Mil. R. Evid. 509 and therefore completely inappropriate for inclusion in a declaration. These matters include discussing the number of times the members voted and the number of members who voted for a specific outcome.[41] The inclusion of these statements in the declarations was a violation of black letter law protecting the sanctity of the deliberations of the court-martial, and we agree completely with the military judge's order to the parties to cease and desist from communicating with the members, particularly regarding these topics.[42]

The central issue for this case, however, is whether the members' statements regarding the discussion of various alleged Marine Corps and "SAPR" policies fall within an exception contained in Mil. R. Evid. 606(b). These statements are specifically: "During … deliberations, some members discussed the

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[40] *Longshore*, 2024 CCA LEXIS 56 at *20.

[41] *See Loving*, 41 M.J. at 237; *Thomas*, 39 M.J. at 634 ("Even prior to the adoption of the Military Rules of Evidence, post-trial affidavits alleging errors in voting procedures, to include erroneous reconsideration, were considered incompetent evidence.")

[42] The parties did not fully brief the question of whether the military judge's order had continuing effect on Appellate Defense Counsel, or whether a violation of such an order would render the declarations at issue invalid. While we need not consider the matter to resolve Appellant's case, we once again pause to disavow the dubious practice of counsel conducting post-trial interviews of members. Nor should litigants view our decision today as an invitation to seek more detailed information from members to determine whether UCI occurred in the deliberation room. The military judge was well within his authority to restrict the parties' communications with members in his ruling. Federal Courts have repeatedly upheld such orders and required counsel to petition the court for permission to interview jurors. "Courts simply will not denigrate jury trials by afterwards ransacking the jurors in search of some ground, not previously supported by evidence, for a new trial." *United States v. Riley*, 544 F. 2d 237, 242 (5th Cir. 1976). Further, as the CAAF noted, "[t]o the extent there is any justification for post-trial interviews (of members), impeaching a verdict is not one of them." *United States v. Ovando-Moran*, 48 M.J. 300, 304 (C.A.A.F. 1998).

USMC and SAPR policy relating to: having to believe her when discussing the alleged victim";[43] and "during … deliberations, all members discussed the USMC and SAPR policy relating to if someone has been drinking alcohol then they can't consent to sexual activities."[44] After evaluation of the contents of the declarations, however, we find that the declarations do not contain "some evidence" of UCI and therefore cannot be attached to the record. These references to SAPR training are more innocuous than the explicit use of training by the Government (over Defense objection) that the CAAF held did not constitute UCI in *Washington*. They were not introduced by the Government, and the military judge repeatedly admonished the members to only consider the evidence and law as he instructed.

Regarding 1stLt Hotel's declaration, we find no evidence in the record regarding a "USMC [or] SAPR policy relating to: having to believe" an alleged victim, nor does Appellant ask us to take judicial notice that such a policy even exists. We are therefore left without any information regarding what 1stLt Hotel meant by his declaration, and we decline to engage in a fishing expedition to suss out its meaning. Nor do we believe that a *DuBay* hearing is appropriate given that this line in the declaration on its face does not implicate a Mil. R. Evid. 606 exception to Mil. R. Evid. 509.

There was discussion on the record regarding a Marine Corps policy or training that said that anyone who had one drink of alcohol could not consent to sexual activity. This was primarily through the voir dire of Capt Jordan. While Capt Jordan did discuss his understanding of a "one drink" policy with the military judge and the parties, and admitted to discussing the definition of "consent" with the other members prior to individual voir dire, there is no evidence that Capt Jordan took any action with the intent of influencing the court-martial. Indeed, the record is unclear as to whether, and to what extent, Capt Jordan even discussed policy issues with the members prior to the military judge recalling them and instructing them on the definition of consent.

What this case therefore lacks is any evidence that someone attempted to use policy considerations to influence the deliberations of the members. The members' passing reference to discussion of Marine Corps policy during deliberation, without more, does not rise to the level of 2ndLt Green's letter in *Dugan*, nor does it even rise to the level of concern the Army court had in *Schloff*. There is no evidence that any member who heard Appellant's case had recently been to a training espousing any policy on sexual assault and consent, nor is there any evidence that any member stated that the panel was obligated

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[43] Decl of 1stLt Hotel, para. 3

[44] Decl of SSgt Papa, para. 4.

to follow such a policy in their deliberations, or even that the policy was to be considered. Courts have repeatedly stated that if members discuss irrelevant matters during deliberations, courts will not question or permit external inquiry into these matters absent a very narrow set of circumstances. The fact that the members discussed purported Marine Corps policies, without more, simply does not demonstrate a violation of Article 37.

B. Appellant is not entitled to reversal of his convictions based on UCI.

Having decided that we cannot attach the declarations of 1stLt Hotel and SSgt Papa, we must still determine whether there is some evidence of UCI in the record. We begin by again recognizing that the threshold for an appellant to raise the issue of UCI is very low. However, it still must be more than mere speculation.[45]

Here, the record is completely lacking anything beyond conjecture and speculation regarding the question of UCI. Appellant seeks to place much emphasis on Capt Jordan's revelation during voir dire that he had a discussion with the other members about the definition of consent during a brief recess of less than 15 minutes following the military judge's group voir dire session. However, careful review of Capt Jordan's colloquy with the military judge reveals that, rather than injecting Marine Corps policy into the deliberation room, Capt Jordan was confused about his role as a potential member. No other member recalled this discussion as being directive in nature. (In fact, most members who were questioned did not recall the conversation at all, and those who did found it unremarkable).

When the military judge questioned the members, they all agreed that they would disregard Marine Corps policy and decide Appellant's case solely based on the facts presented and the law as the military judge instructed. After voir dire, the only mention of SAPR training or Marine Corps policy in the record of trial was by Appellant's civilian defense counsel during closing argument, who argued that the SAPR training was wrong in saying that a person who had any alcohol could not consent. Appellant then requested that the military judge advise the members of the definition of a "competent person" from the Military Judges' Benchbook, which the military judge did.[46]

The discussion of SAPR training throughout this trial was unremarkable. The military judge took great pains to ensure that the members understood the law and agreed to follow the law. Each of the members agreed that they

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[45] *Gilmet*, 83 M.J. at 403.

[46] Dep't of the Army Pam. 27-9, para. 3a-44-2, note 6.

could do so. Even if we were to attach those parts of the declarations of 1stLt Hotel and SSgt Papa to the record relating to policy discussions in the deliberation, we still would not find that there is some evidence of UCI in this case. There is simply no evidence that anyone sought to influence the members of this court through SAPR training, or that the members were so influenced.

III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, we have determined that the findings and sentence are correct in law and fact and that no error materially prejudicial to Appellant's substantial rights occurred.[47] The findings and sentence are **AFFIRMED.**

FOR THE COURT:

Mark K. Jamison

MARK K. JAMISON
Clerk of Court

[47] Articles 59 & 66, UCMJ.

IN THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES *Appellee* v. **Jonatan O. ROSARIOMARTINEZ** Corporal (E-4) U.S. Marine Corps *Appellant*	NMCCA Case No. 202300154 **APPELLANT'S MOTION TO ATTACH** Tried at Marine Corps Base Camp Lejeune, North Carolina, on 25 August, 28 September, and 17 November 2022, and 12 and 23-27 January and 22 February 2023 before a General Court-Martial convened by Commanding General, 2d Marine Division, Maj Ryan Lipton, LtCol Benjamin Robles, and LtCol Adam Workman, USMC, Military Judges, presiding

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURTS OF CRIMINAL APPEALS

COMES NOW Appellant, through counsel, and moves pursuant to Rules 6.1 and 23.4 of this Court's Rules of Appellate Procedure to attach the following materials in support of Appellant's Brief Assigning Error. Appellant seeks to attach:

- Appendix A: Declaration of First Lieutenant Hotel, USMC (October 15, 2023)

- Appendix B: Declaration of Staff Sergeant Papa, USMC (October 16, 2023)
- Appendix C: Declaration of Captain Romeo, USMC (October 23, 2023)

Appendix A and B are declarations from members of Appellant's court-martial panel that describe unlawful influence that was exerted during the deliberations. Appendix C is a declaration from Appellant's trial defense counsel stating they were unaware of any unlawful influence occurring in the deliberation room and if they had been made aware, they would have filed motions related to unlawful command influence.

A. Factual Background

1LT Hotel sat as a panel member in the United States' case against Appellant.[1] In a post-trial declaration, he detailed a deliberations environment that was tainted by unlawful influence.[2] Specifically, various panel members discussed USMC and SAPR policy as it related to an alleged victim, namely, the policy of "having to believe" an alleged victim who has reported sexual assault allegations.[3] After each of the numerous votes that were taken, that did not result in guilty findings, panel members continued to discuss the policy of "having to believe" the alleged victim, after which Appellant was eventually convicted of one charge and

[1] Decl. of 1LT Hotel at 1.
[2] *Id*.
[3] *Id*.

specification of sexual assault that she had alleged.[4]

SSgt Papa also sat as a panel member on Appellant's court-martial.[5] In a post-trial declaration, he described a deliberation environment that was tainted by unlawful influence.[6] Specifically, the members all discussed the USMC and SAPR policy that "if someone has been drinking alcohol then they can't consent to sexual activities."[7] After each of the numerous votes that were taken, that did not result in guilty findings, panel members discussed the policy involving alcohol and nonconsent, after which Appellant was eventually convicted of one charge and specification of sexual assault that allegedly occurred without her consent after she had been drinking alcohol.[8]

Captain Romeo was one of the trial defense counsel's on Appellant's court-martial.[9] In his declaration, he states that the trial defense team was unaware of any unlawful influence involving the USMC and SAPR policies being discussed during deliberations.[10] Additionally, if he had been aware, they would have filed motions pursuant to unlawful command influence.[11]

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[4] *Id*.
[5] Decl. of SSgt Papa at 1.
[6] *Id*.
[7] *Id*.
[8] *Id*.
[9] Decl. of Capt Romeo at 1.
[10] *Id*.
[11] *Id*.

B. The declarations are necessary and comport with *United States v. Jessie*.

The declarations are necessary because they support issues that are not fully resolvable by the materials in the record. When conducting a proper review of an Appellant's findings and sentence, this Court may supplement a record of trial when necessary to resolve a "wide variety" of claims or issues when those claims and issues are raised by the record but are not fully resolvable by the materials in the record.[12]

Here, the issue is whether Appellant's findings were affected by unlawful command influence (UCI), which Appellant must raise by offering some evidence of UCI.[13] This issue is not fully resolvable by the materials in the record because the UCI occurred during deliberations on findings. While the Marine Corps and SAPR one-drink-equals-no-consent policy is referenced in the record during *voir dire*,[14] the parties were unaware of the extent to which this and other USMC and SAPR policy was discussed during the members' deliberations on findings. The attached declarations contain additional facts necessary to resolving Appellant's claim that this UCI affected the findings, prejudicing his case and his right to a fair trial free from UCI. To find otherwise would preclude post-trial claims of UCI

[12] *United States v. Jessie*, 79 M.J. 437, 442 (C.A.A.F. 2020).
[13] *See United States v. Biagase*, 50 M.J. 150, 151 (C.A.A.F. 1999).
[14] R. at 138-143.

unknown at the time of adjournment from being brought on appeal.[15] The trial defense counsel declaration contains facts necessary to resolving Appellant's claim that this adjudicative UCI was not known and therefore, could not have been affirmatively and knowingly waived during the trial and post-trial proceedings.

C. Because Appendix A and B contain evidence of UCI and the times it occurred during the deliberations, they are permitted under M.R.E. 606(b).

Military Rule of Evidence 606(b) discusses a court-martial member's competency as a witness. The rule specifically allows members' testimony regarding whether "unlawful command influence or any outside influence was improperly brought to bear on any member."[16] The attached declarations in Appendices A and B fall within this exception as they detail UCI in the form of Marine Corps and SAPR policies that were improperly brought to bear on the members by "unauthorized means" during their deliberations.[17]

WHEREFORE, counsel respectfully requests this Court grant this motion to attach.

[15] *See United States v. Longshore*, NMCCA No. 202200177 (N-M. Ct. Crim. App. Jan. 10, 2023) (unpublished order granting the appellant's motion to attach materials under circumstances similar to this case).
[16] M.R.E. 606(b)(2)(B).
[17] Article 37(a), UCMJ.

Respectfully submitted.

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CERTIFICATE OF FILING AND SERVICE

I certify that this document was e-mailed to the Court's filing address, uploaded into the Court's case management system, and was e-mailed to the Director, Appellate Government Division on 24 October 2023.

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DECLARATION OF FIRST LIEUTENANT [redacted], USMC

I, First Lieutenant [redacted], declare that:

1. I was a member in the trial of U.S. v. Cpl RosarioMartinez.
2. We voted by secret written ballot numerous times over the course of 2 days.
3. Each vote had 3 or more members vote not guilty for both specifications.
4. After each vote, we would deliberate further.
5. During these further deliberations, some members discussed the USMC and SAPR policy relating to: "having to believe her" when discussing the alleged victim.
6. It was after these discussions and numerous additional rounds of voting by secret written ballot, that the votes changed to 6 members for guilty of one specification.
7. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing information is true and correct.

[redacted]

1stLt, USMC

Date: 20231015

DECLARATION OF STAFF SERGEANT [redacted], USMC

I, Staff Sergeant [redacted], declare that:

1. I was a member in the trial of U.S. v. Cpl RosarioMartinez.
2. We voted by secret written ballot at least 6 times before we found him guilty of any specification.
3. After each vote, we would deliberate further.
4. During these further deliberations, all members discussed the USMC and SAPR policy relating to: if someone has been drinking alcohol then they can't consent to sexual activities.
5. It was after these discussions and 6 or more rounds of voting by secret written ballot, that the votes changed to 6 members for guilty of one specification.
6. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing information is true and correct.

[redacted]

SSgt, USMC
Date: 20231016

DECLARATION OF CAPTAIN [redacted], USMC

I, Captain [redacted], declare that:

1. I was one of the trial defense counsel in the trial of U.S. v. Cpl RosarioMartinez.
2. During a "hot wash" with the senior member post-trial, he brought to our attention that the court's voting instructions were not followed.
3. Once we became aware that the court's voting instructions were not followed, we obtained an affidavit from him outlining the error.
4. Next, we notified the court and government of this discovery.
5. The court responded by coordinating a date for a post-trial 39a and ordered the government and trial defense counsel to cease communicating with all members.
6. The trial defense team is unaware of any USMC and SAPR policy, as it relates to "having to believe" an alleged victim or if someone has been drinking alcohol then they cannot consent to sexual activities, ever being discussed during deliberations.
7. If we were aware of these policies being discussed during deliberations, we would have filed motions related to unlawful command influence.
8. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing information is true and correct.

[redacted]

Captain, USMC
Date: 20231023

APPENDIX 3

SUBMISSION MADE PURSUANT TO *UNITED STATES V. GROSTEFON*

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982),

Corporal (Cpl) RosarioMartinez personally requests this Court consider the following matters:

IV.

Was Appellant deprived of his right to a fair and impartial jury when there was not a requirement to reach a unanimous verdict for a conviction?

The Court should reconsider its decision in *United States v. Anderson*. This Court previously determined that an Appellant must demonstrate that "[t]he factors militating in favor of [a different procedure] are so extraordinarily weighty as to overcome the balance struck by Congress."[1] And though the facts of *Anderson* may not have overcome that balance, the facts in Appellant's case do.

A. Sixth Amendment

Appellant acknowledges that this Court cannot overrule the Supreme Court's decision in *Quirin* and the line of Supreme Court cases discussed in *United States*

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[1] *United States v. Anderson*, 82 M.J. 291 at 298 (C.A.A.F., 2023) (quoting *Weiss v. United States*, 510 U.S. 163, 177-78, 181, 114 S. Ct. 752, 127 L. Ed. 2d 1 (1994) and *Middendorf v. Henry,* 425 U.S. 25, 44, 96 S. Ct. 1281, 47 L. Ed. 2d 556 (1976)).

v. Anderson, but seeks to preserve the issue should military jurisprudence later apply the unanimity requirement from *Ramos v. Louisiana*.[2]

Before *Ramos*, the Supreme Court considered non-unanimous verdicts as an issue of "whether unanimity serves an important 'function' in contemporary society," concluding that "unanimity's costs outweigh its benefit in the modern era."[3] The Supreme Court rejected arguments that the framers intended to leave "impartiality" behind in drafting the Sixth Amendment, even though common law required unanimity for hundreds of years.[4] The Court concluded: "...at the time of the Amendment's adoption, the right to a jury trial *meant* a trial in which the jury renders a unanimous verdict."[5]

Appellant disagrees with this Court's assertion that, "[a]t no point in the opinion does the Supreme Court consider what the word "impartial" means or what is required for a jury to be impartial."[6] In its opinion, the Supreme Court wrote, "…The text and structure of the Constitution clearly suggest that the term "trial by an impartial jury" carried with it *some* meaning about the content and requirements

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[2] The Supreme Court held that the Sixth Amendment requires that a jury trial much reach a unanimous verdict to convict. *Ramos v. Louisiana*, 590 U.S. 83 (2020).
[3] *Ramos v. Louisiana*, 590 U.S. 83, 94.
[4] *Ramos*, 590 U.S. 83, at 95.
[5] *Id.* at 98.
[6] *United States v. Anderson*, 82 M.J. 291, 293 at 297 (C.A.A.F., 2023).

of a jury trial. One of those requirements was unanimity."[7] Unanimity and impartiality need not be synonymous for *both* to be required under the Sixth Amendment.[8]

This line of Supreme Court decisions is largely from a time before the Uniform Code of Military Justice (UCMJ) was established.[9] Since the inception of the UCMJ, military courts have gained jurisdiction over more offenses, even those that are not military specific. "By enacting the Uniform Code of Military Justice in 1950, and through subsequent statutory changes, Congress has gradually changed the system of military justice so that it has come to more closely resemble the civilian system,"[10] and maintaining discipline through trials is no longer "merely incidental to an army's primary fighting function."[11]

B. Fifth Amendment: Due Process

The question at issue under the Due Process Clause is whether the existence of a unanimous verdict is such an extraordinarily weighty factor as to overcome the

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[7] *Ramos*, 590 U.S. at 89-90.
[8] *Anderson*, 82 M.J at 297.
[9] *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).
[10] *Weiss v. United States*, 510 U.S. 163, 174. Congress also directed the Secretary of Defense to conduct a study on the feasibility and advisability of requiring unanimous votes for findings of guilty, and directed the drafting of revisions to the UCMJ requiring a unanimous verdict. National Defense Authorization Act for Fiscal Year 2024, H.R. 2670, 118th Cong., 1st Sess., Div. A, Tit. V, § 536(a) (Dec. 14, 2023).
[11] *Quarles*, 350 U.S. at 17.

balance struck by Congress. This balancing test considers three factors: historical practice with respect to the procedure at issue, the effect of the asserted right on the military, and the existence in current practice of other procedural safeguards that satisfy the Due Process Clause of the Fifth Amendment.[12] In this case, factors two and three weigh in favor of the Appellant.

1. History

Historical tradition is not dispositive of the question whether a proceeding violates the Fifth Amendment.[13] There is no history of unanimous verdict in the military.[14] Before the establishment of the Uniform Code of Military Justice, courts-martial required a majority vote to convict.[15] Then, Congress required at least two-thirds of the members vote "guilty" for a conviction.[16] The UCMJ was not updated to require the current standard of three-fourths majority for a conviction until 2016.[17] In the national Defense Authorization Act for Fiscal Year

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[12] *United States v. Wheeler*, 85 M.J. 70 (C.A.A.F. 2023).
[13] *Wheeler*, 85 M.J. at 78.
[14] "Although the early Articles of War did not specify the required votes to convict in a general court-martial, Winthrop notes that "the result—in all cases, whether grave or slight, and whether capital or other—is determined by a majority of the votes." Winthrop, *supra*, at 377. In 1920, Congress formally codified the required number of votes for conviction as two-thirds, which the UCMJ similarly required upon its enactment in 1950…" United States v. Anderson, 83 M.J. 291, 298-299.
[15] *United States v. Anderson*, 83 M.J. 291, 298-299.
[16] *Id.*
[17] National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5234, 130 Stat. 2000, 2916 (2016).

2024, Congress directed the Secretary of Defense to conduct a study on the feasibility of instituting a unanimous verdict, and also directed that the Secretary draft language to amend the UCMJ.[18] Although there is no historical practice of a unanimous verdict in the military, this Court has noted repeatedly that historical practice is not dispositive.

2. A Unanimous Verdict Requirement Would Not Burden the Armed Forces

In declining to find service members had a Due Process right to a defense counsel at summary courts-martial, the *Middendorf* Court's rationale relied in part on the need for speed and efficiency.[19] *Middendorf*, however, also stands for the swift and efficient administration of justice for *minor offenses*.[20] This is not the case here, nor would requiring a unanimous verdict add any additional, material burden to the current deliberation process.

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[18] National Defense Authorization Act for Fiscal Year 2024, H.R. 2670, 118th Cong., 1st Sess., Div. A, Tit. V, § 536(a) (Dec. 14, 2023).
[19] *Middendorf v. Henry,* 425 U.S. 25 (1976).
[20] The Court reasoned that requiring representation by counsel at summary court-martial would turn a brief, informal hearing into an "attenuated proceeding which consumes the resources of the military to a degree which Congress could properly have felt to be beyond what is warranted by the *relative insignificance* of the offense being tried." *Middendor*f, 425 U.S. at 45.

The Government has previously relied on the argument that non-unanimous verdicts are necessary to promote speed and efficiency in the military justice system.[21] However, Congress already carved out multiple forums for speedy and efficient discipline such as the summary court-marital[22] and military judge-alone court-martial.[23] In both those forums, the curtailment of service member rights was balanced by significantly reduced criminal exposure. In the case of a non-unanimous verdict, service members face no such benefit.

Additionally, the argument that a non-unanimous verdict is somehow always "faster" to achieve than a unanimous verdict is belied by the fact that in Appellant's case, voting on only two specifications took nearly two days. In Appellant's case, the court closed for deliberations at 1217 on 26 January 2023[24] and reopened for the announcement of findings at 1627 on 27 January 2023.[25] *Ramos* also considered "efficiency" in the context of the Sixth Amendment, noting that the state had argued that non-unanimous juries would likely result in

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[21] *Anderson*, 83 M.J. 291.
[22] Article 20, UCMJ; 10 U.S.C. §820. Summary courts-martial may not adjudge a punitive discharge, confinement for more than one month, hard labor without confinement for more than 45 days, restriction to specified limits for more than two months, or forfeitures of more than two-thirds of one month's pay. Additionally, a summary court-martial "does not constitute a criminal conviction."
[23] Article 16(c)(2)(A), UCMJ; 10 U.S.C. §816.
[24] R. at 696.
[25] R. at 721.

fewer hung juries.[26] The Court rejected that argument, noting several flaws with its logic.

3. The Current Legal Safeguards Are Insufficient

The safeguards relied upon in *Weiss* do not outweigh the due process concern faced by Appellant in this case.[27] For example, even though Appellant exercised his right to voir dire and challenge members, it did not prevent the specific harm caused by a non-unanimous verdict in this case, nor did it prevent UCI from permeating deliberations. In *Wheele*r, this Court deferred to Congress's determination that an un-refusable military judge-alone special court-martial promotes discipline in the armed forces and enhances a commander's ability to fairly and efficiently deal with *minor offenses*.[28] The safeguards relied upon in *Wheeler* do not protect Appellant in this case. Although an accused's rights are limited at a special court-martial judge-alone forum, *so too is his criminal exposure*.[29] Appellant's criminal exposure is not limited in any way by his

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[26] *Ramos*, at 99-101.
[27] Regarding the safeguards that make military judges without tenure fair and impartial, Justice Scalia wrote in a concurrence, "…no one can suppose that similar protections against improper influence would suffice to validate a state criminal-law system in which felonies were tried by judges serving at the pleasure of the Executive. I am confident that we would not be satisfied with mere formal prohibitions in the civilian context, but would hold that due process demands the *structural* protection of tenure in office…" *Weiss*, at 198.
[28] *Wheeler*, at 78.
[29] *Id*.

deprivation of a unanimous verdict. In the present case, the only forum at which Appellant could be tried was a general court-martial.[30]

The *Ramos* Court rejected arguments in favor of non-unanimous verdicts, citing research that "requiring unanimity may provide other possible benefits, including more open-minded and more thorough deliberations[.]"[31] This Court in *Anderson* noted several procedural safeguards that are intended to protect the fairness of the proceedings, such as Article 51(a), UCMJ, which requires voting by secret ballot. However, Article 51(a) is not a sufficient safeguard to protect Appellant from the harm caused here by not requiring a unanimous verdict.

Although not noted in the *Anderson* opinion, there are a variety of safeguards that service members used to have that no longer exist. Service members are now subject to judge-alone sentencing with specific sentencing parameters.[32] Additionally, convening authorities have less clemency power. In courts-martial involving even moderate punitive exposure the convening authority may only *suspend* non-mandatory sentences, and even then only if based on the

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[30] Article 18, UCMJ; 10 U.S.C. §818.
[31] *Ramos*, 590 U.S. 83, at 596.
[32] With the exception of the few UCMJ articles with established mandatory minimum punishments, members' sentencing authority was "largely unfettered." *United States v. Geier*, No. ACM S32679 (f rev), 2022 CCA LEXIS 468, at *10 (A.F. Ct. Crim. App. Aug. 2, 2022).

military judge's recommendation.[33] In this case, Appellant was limited in the relief he could ask for in clemency. The Military Judge did not recommend suspending any portion of his sentence,[34] and the Convening Authority did not approve Appellant's request for clemency.[35]

Although the procedural safeguards in the military and civilian justice systems need not be identical, the existing safeguards do not protect against the harm caused by non-unanimous verdicts. In light of the new changes to the UCMJ not considered in *Anderson*, this Court should reconsider that decision due to the decreased procedural safeguards for non-unanimous verdicts.

Conclusion

WHEREFORE, Cpl RosarioMartinez respectfully requests that this honorable Court grant review of these issues.

Respectfully Submitted,

Corporal Jonatan O. RosarioMartinez

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[33] Art. 60a(a), (c), UCMJ; 10 U.S.C. §860.
[34] Statement of Trial Results, Jan. 27, 2023.
[35] Convening Authority Action, Mar. 14, 2023.