IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. **Jonatan O. RosarioMartinez** Corporal (E-4) U.S. Marine Corps, Appellant	**BRIEF ON BEHALF OF APPELLANT** 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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FEDERAL RULE OF EVIDENCE

ISSUE PRESENTED

Did the Military Judge err in finding the affidavit of the Senior Member to be incompetent evidence under M.R.E. 606(b)(2)(C) and in denying Appellant's Motion for Appropriate Relief to correct an error in the findings worksheet?

STATEMENT OF STATUTORY JURISDICTION

The sentence entered into judgment includes a punitive discharge.[1] The lower court had jurisdiction under Article 66(b)(3), Uniform Code of Military Justice (UCMJ).[2] Appellant invokes this Court's jurisdiction under Article 67(a)(3), UCMJ.[3]

RELEVANT AUTHORITIES

Military Rule of Evidence 606(b)(2)(C), as amended in 2013, states in relevant part:

> (2) Exceptions. A member may testify about whether: (A) extraneous prejudicial information was improperly brought to the members' attention; (B) unlawful command influence or any other outside influence was improperly brought to bear on any member; or (C) a mistake was made in entering the finding or sentence on the finding or sentence forms. [4]

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[1] J.A. at 143.
[2] 10 U.S.C. § 866(b)(3) (2024).
[3] 10 U.S.C. § 867(a)(3) (2024).
[4] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 606(b)(2)(c) (2019) [hereinafter MCM].

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.[5] The Military Judge sentenced him to confinement for eighteen months and a dishonorable discharge.[6] The Convening Authority approved the sentence, and the Military Judge entered it into judgment.[7] The lower court affirmed the findings and sentence on December 18, 2024.[8] Appellant timely petitioned this Court for review on February 16, 2025. This Court granted review on April 23, 2025.

STATEMENT OF FACTS

Appellant's court-martial consisted of eight members selected from an original venire of fifteen Marines.[9] The Charges involved two specifications of sexual assault, one asserting the alleged victim did not consent to the sexual act, the other asserting she was asleep at the time.[10] During his instructions on findings, the Military Judge told the members:

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[5] J.A. at 140. 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*.
[6] J.A. at 143. A dishonorable discharge is mandatory for convictions in violation of Article 120(b), UCMJ.
[7] J.A. at 51; 53.
[8] J.A. at 1.
[9] J.A. at 60-62, 274.
[10] J.A. at 58.

> The concurrence of at least three-fourths of the members present when the vote is taken is required for any finding of guilty. Since we have eight members, that means six members must concur in any finding of guilty. If you have at least six votes of guilty of any offense, then that will result in a finding of guilty for that offense. *If fewer than six members vote for a finding of guilty, then your ballot resulted in a finding of not guilty.* You may reconsider any finding prior to its being announced in open court. However, after you vote, if any member desires to reconsider any finding, open the court and the president should announce only that a reconsideration of a finding has been proposed.[11]

Appellant was ultimately convicted of one specification.[12]

Before the members were dismissed, the Military Judge instructed the members that they were prohibited from speaking about their deliberations, but that they may "discuss [] personal observations in the courtroom and the process of how a court-martial functions . . . ."[13]

During a "hotwash" with the panel President a week after trial, the President asked the Trial Defense Counsel how the military handles hung juries.[14] The Trial Defense Counsel explained that because a unanimous decision is not required, an accused is acquitted if the minimum number of votes is not reached, preventing a hung jury from occurring.[15] The President informed the Trial Defense Counsel that

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[11] J.A. at 109-10 (emphasis added).
[12] J.A. at 140.
[13] J.A. at 141-42.
[14] J.A. at 148. The Senior Member requested to conduct the hotwash with the trial defense counsel in person. He provided them stylistic feedback before asking about hung juries in the military system. The trial counsel were not present.
[15] J.A. at 148.

the members "incorrectly did not complete the findings worksheet after each finding that would have resulted in a not guilty verdict."[16] He provided an affidavit stating such, also saying, "I would like to correct the findings worksheet to accurately reflect the correct findings of the panel."[17]

The Defense filed a post-trial Motion for Appropriate Relief pursuant to Military Rule of Evidence (M.R.E.) 606, and Rules for Court-Martial (R.C.M.) 922 and 1104 wherein the Defense requested relief in the form of "correct[ing] the verdict by entering a finding of not guilty to both Specifications of the Charge."[18] This resulted in an Article 39(a), UCMJ, hearing, during which the Military Judge declined to call the panel President as a witness.[19]

The Trial Defense Counsel explicitly raised this issue under M.R.E. 606(b)(2)(C) during the post-trial hearing.[20] He identified, "the mistake here is that they didn't return the findings immediately after they had their first proper vote. The why. . . it really doesn't necessarily matter."[21] In response to a hypothetical question from the Military Judge, the Trial Defense Counsel argued that "it would make sense for the Court to not consider anything about the final vote that was

[16] J.A. at 191.
[17] J.A. at 191
[18] J.A. at 184, 109.
[19] J.A. at 144-45.
[20] J.A. at 151, 184
[21] J.A. at 154.

made and only consider the part of the affidavit that says there was a mistake."[22] The Military Judge asked the Trial Defense Counsel to clarify if the issue was whether the worksheet was filled out correctly, or whether the members understood the instructions. The Trial Defense Counsel confirmed that their position was that a mistake had been made on the form and the members ". . . didn't fill out the worksheet correctly."[23]

The Military Judge made findings of fact that the affidavit did not make any "explicit or implicit statement" about unlawful command influence, other improper influence, or extraneous prejudicial information.[24] He also found there was no evidence of pressure or coercion during the voting.[25] He made no finding of fact as to whether there was a mistake in the findings worksheet.[26]

[22] J.A. at 157-58.
[23] J.A. at 152.
[24] J.A. at 224.
[25] *Id.*
[26] *Id.*

SUMMARY OF ARGUMENT

Contrary to the Military Judge's view, M.R.E. 606(b)(2)(C) provides that members are competent to testify about whether "a mistake was made in entering the finding or sentence on the finding or sentence forms." Here, the panel President provided an affidavit stating that the Members had made a mistake completing the findings worksheet and that he would like to correct it. Because this evidence is admissible, and an error in the announcement of the findings occurred, this Court should consider that portion of the senior member's affidavit and find that the members worksheet should have reflected a finding of "not guilty." This Court should therefore dismiss the charge with prejudice and set aside the sentence.

ARGUMENT

The Military judged erred by not considering the admissible portions of the panel President's affidavit, and by not granting the requested relief of allowing the findings to be corrected.

Standard of Review

An appellate court reviews questions of statutory construction *de novo*.[27] It reviews a military judge's evidentiary rulings for an abuse of discretion.[28] A military judge abuses his discretion when he: "(1) predicates a ruling on findings of fact that are not supported by the evidence of record;" (2) "uses incorrect legal principles;" (3) "applies correct legal principles to the facts in a way that is clearly unreasonable;" or (4) "fails to consider important facts."[29]

A. Portions of the panel President's affidavit are admissible under M.R.E. 606.

M.R.E. 606(b)(2)(C) permits a member to provide testimony during an inquiry into the validity of a finding or sentence, if the testimony addresses whether "a mistake was made in entering the finding or sentence on the finding or sentence forms."[30] M.R.E. 606(b)(2) does not establish a specific time for this issue to be raised. This Court has yet to address the admissibility of member testimony

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[27] *United States v. Kohlbek*, 78 M.J. 326, 330 (C.A.A.F. 2019).
[28] *United States v. Rudometkin*, 82 M.J. 396, 401 (C.A.A.F. 2022) (citations omitted).
[29] *Id*.
[30] MCM, MIL. R. EVID. 606(b)(2)(c).

offered pursuant to subsection (C), which was added to the Manual for Court-Martial in 2013.[31]

This Court uses principles of statutory construction to construe Military Rules of Evidence.[32] "Statutory construction begins with a look at the plain language of a rule."[33] "[T]he plain language of a statute [rule] will control unless it leads to an absurd result."[34]

Interpretation and application of M.R.E. 606(b)(2)(C) need not be complicated because its language is not ambiguous. The rule's plain language raises two questions in this case: (1) was a mistake made when entering the findings on the worksheet? and (2) can a member testify to that mistake? The answer to both questions in this case is: yes. The error here was a failure to properly memorialize the outcome of the initial, valid vote. The panel President identified that there was an error in the findings entered on the worksheet, and

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[31] Exec. Order No. 13643, Vol. 78 Fed. Reg. 98, 29594-95 (May 21, 2013) (amending M.R.E. 606).
[32] *Rudometkin*, 82 M.J. at 401; *see also United States v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012).
[33] *United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2007) (citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241-42 (1989)); *see also United States v. Apfelbaum*, 445 U.S. 115, 121 (1980) (discussing the "well-established principle of statutory construction that absent clear evidence of a contrary legislative intention, a statute should be interpreted according to its plain language.").
[34] *King*, 71 M.J. at 52 (citing *Lewis*, 65 M.J. at 88).

clearly stated that it was wrong and did not "reflect the correct findings of the panel."[35]

The absurdity doctrine allows a court to depart from the plain language of the statute "if the absurdity… is so gross as to shock the general moral or common sense."[36] This Court declined to invoke the absurdity doctrine in *United States v. McPherson* and should decline to do so here too.[37]

In *McPherson*, this Court analyzed the statute of limitations established in Article 43, UCMJ.[38] In that case, the Government urged the Court to depart from Article 43's plain language, in part, because "[t]o the extent the legislation can be read to plainly subject Appellee's crime to a mere five-year limitation period, that result is bizarre and shocking to morals and common sense and should be avoided."[39] This Court found that argument failed. "A party's argument that the court should reject 'a literal reading' of a statute 'because it produces absurd results' fails if 'Congress *could rationally have* made such a' reading [of] the law."[40]

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[35] J.A. at 191.
[36] *United States v. McPherson*, 81 M.J. 372 (C.A.A.F. 2021) (citing *Crooks v. Harrelson*, 282 U.S. 55 (1930)).
[37] *United States v. Taylor*, No. 24-0234, 2025 CAAF LEXIS 449, at *14 (C.A.A.F. June 10, 2025); *United States v. McPherson*, 81 M.J. 372 (C.A.A.F. 2021) (citing *Crooks v. Harrelson*, 282 U.S. 55 (1930)).
[38] *McPherson*, 81 M.J. at 377.
[39] *Id.* at 380.
[40] *Id*.

Here, the President could rationally have allowed a member to testify to whether there was a mistake made on the findings worksheet. The plain meaning of the rule unambiguously allows that. No absurdity is present here, so this Court should not permit a departure from the rule's plain language.[41]

B. The finding for Specification 2 of the sole Charge was incorrectly entered on the findings worksheet.

United States v. Dotson is analogous to the facts of this case.[42] As in *Dotson*, this case involves an error in the recording and announcement of the verdict. Dotson was convicted, initially, of all ten counts with which he was charged.[43] The jurors were all polled informally before being discharged.[44] Each of the twelve jurors agreed to the findings that were announced by nodding.[45] Later that evening, two jurors contacted the trial judge to tell him they unanimously voted to acquit Dotson on one of the ten counts.[46] The judge then called the foreman of the jury to confirm that was true.[47] There was no discussion of how the jurors came to realize that what was recorded and announced differed from their verdict.[48] The trial judge

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[41] *United States v. Taylor*, No. 24-0234, 2025 CAAF LEXIS 449, at *14 (C.A.A.F. June 10, 2025).
[42] *United States v. Dotson*, 817 F.2d 1127 (5th Cir. 1987), *reh'g granted in part and denied in part on other grounds*, 821 F.2d 1034 (5th Cir. 1987).
[43] *Id.* at 1129.
[44] *Id*.
[45] *Id*.
[46] *Id*.
[47] *Id*.
[48] *Id*.

corrected the verdict to reflect that Dotson was acquitted on count ten.[49] The Fifth Circuit Court of Appeals affirmed this action on appeal.[50]

Although *Dotson* was decided before the exception was codified in the Federal Rules of Evidence, the circuit recognized an exception to the general prohibition on juror testimony.[51] That exception, just like M.R.E. 606(b)(2)(C), allows that a juror's affidavit is admissible "to show that the verdict delivered was not that actually agreed upon . . . but a juror may not subsequently impeach a verdict by stating how it was reached."[52]

Like *Dotson*, the members in Appellant's case did not immediately identify the error.[53] However, once the panel President identified that there was an error in the findings, he wrote an affidavit stating he desired to "correct the findings worksheet to accurately reflect the correct findings of the panel."[54] Correcting the error need not be contemporaneous with the findings announcement if the error is

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[49] *Id.*
[50] *Id.* at 1130.
[51] *Id*.
[52] *Id*. (quoting *University Computing Co. v. Lykes-Youngstown Corp*., 504 F.2d 518, 547-48 n.43 (5th Cir. 1974) (citing *Fox v. United States*, 417 F.2d 84, 89 (5th Cir.1969) ("It has long been well settled that the affidavit of a juror is admissible to show the true verdict or that no verdict was reached at all."))).
[53] J.A. at 140. The Military Judge asked the panel President if the findings were reflected on the worksheet and the panel President provided a non-verbal response. The Military Judge reviewed the form of the findings worksheet, and then the findings were announced in open court. Neither the parties nor any member made an objection at that time. J.A. at 139-40.
[54] J.A. at 191.

discovered later because R.C.M. 1104 provides a timeline for either party to file post-trial motions.[55] Appellant filed his post-trial motion within the established fourteen-day timeframe. Additionally, R.C.M. 1104(a)(3) allows the Military Judge to enter a finding of not guilty at any time prior to the entry of judgment.[56]

The Military Judge abused his discretion in finding the panel President's affidavit inadmissible for two reasons. First, in his ruling, the Military Judge wrote, "[t]he central question before the court is whether the member's alleged misapplication of the procedural instructions on findings is competent evidence to be considered by this court."[57] The Military Judge based his ruling on a conclusion that "the defense seeks to explore *how* the verdict was reached, which is a proposition forbidden by the very case they seek to rely upon."[58] This is incorrect. The Trial Defense Counsel did not seek this information, and explicitly argued that "[t]he why. . . it really doesn't necessarily matter."[59]

The Military Judge was neither required nor requested to consider anything but the relevant, admissible portions of the panel President's affidavit, which clearly stated, "I would like to correct the findings worksheet to accurately reflect

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[55] MCM, R.C.M. 922(d) Discussion ("See R.C.M. 1104 concerning the action to be taken if the error in the announcement is discovered after final adjournment."), 1104(a).
[56] MCM, R.C.M. 922(d), 1104(a)(3).
[57] J.A. at 228.
[58] J.A. at 230.
[59] J.A. at 154.

the correct findings of the panel."[60] How the panel President determined that a mistake was made in how the finding was entered is collateral, and need not be considered. Thus, the Military Judge predicated his ruling "on findings of fact that are not supported by the evidence of record" and failed "to consider important facts."[61] He therefore abused his discretion.

Second, the Military Judge admonished the Trial Defense Counsel for not relying on *United States v. Loving* or *United States v. Thomas*, two military cases that cited *Dotson*.[62] Yet he did not provide any analysis for how those cases apply under the circumstances of this case.[63] In any event, both cases were decided before M.R.E. 606(b) was amended and are otherwise distinguishable.[64]

The error alleged in *Thomas* related to the members' failure to request an instruction on reconsideration and taking multiple votes, not an error in recording the finding or sentence on the findings or sentencing worksheet.[65] In *Loving*, the member affidavits offered discussed: (1) the process the members used to vote; (2) the factors they did not consider; and (3) the fact that they did not ask for an

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[60] J.A. at 191.
[61] *Rudometkin*, 82 M.J. at 401.
[62] *United States v. Loving*, 41 M.J. at 239 (C.A.A.F. 1994); *United States v. Thomas*, 39 M.J. 626 (N.M.C.M.R. 1993); J.A. at 164-65, 230.
[63] J.A. at 164-65.
[64] *United States v. Loving*, 41 M.J. at 239 (C.A.A.F. 1994).
[65] *Thomas*, 39 M.J.at *3-7.

instruction on reconsideration.[66] In contrast, the issue raised here by the panel President's affidavit is whether the findings announced were the findings agreed upon.

At the time *Loving* and *Thomas* were decided there was no exception under M.R.E. 606(b) for correcting errors to the findings or sentence worksheet, rendering member testimony to that effect inadmissible.[67] Regardless, the content of the affidavits also ran afoul of this Court's previous decisions that affidavits of members cannot be considered to support an allegation that members used an incorrect interpretation of the law or procedures during deliberations.[68] Federal courts, similarly, have refused to consider evidence from jurors to support that allegation.[69] That is neither what Appellant asked the Military Judge to consider nor what Appellant asks this Court to consider. Appellant asks this Court to address a mistake in recording the finding to the worksheet.

C. Dismissing the findings with prejudice and setting aside the sentence is the appropriate remedy in this case.

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[66] *Id.* at 234-36.
[67] Because previous case law interpreting MRE 606(b)(2) was published prior to the addition of the exception at issue here, those cases are no longer controlling. *See also United States v. Brooks*, 42 M.J. 484 (C.A.A.F. 1995), *United States v. Straight*, 42 M.J. 244 (C.A.A.F. 1995), and *United States v. Lambert*, 55 M.J. 293, 294 (C.A.A.F. 2001).
[68] *Id.*, at 236.
[69] *Id.*

Had the military judge ruled properly in this case, the panel President would have corrected the findings worksheet and the findings of acquittal would have been announced at the court-martial. This Court can effectuate this outcome by dismissing the findings with prejudice and setting aside the sentence. This remedy addresses the specific harm the mistake caused, and does not require an examination of the Members' deliberations. The facts and circumstances of this case fall clearly into the scope delineated by M.R.E. 606(b)(2)(C) and do not intrude upon the deliberative process. Correcting this error does not undermine the finality of verdicts because the error is unique to these circumstances, and the panel President's affidavit clearly established this error.

Remedying the error in this way avoids possible intrusions into the deliberative process, such as polling. The use of polls is common in federal practice, where unanimous verdicts are required.[70] However, as this Court recognized, "[t]he military practice is different."[71] Rule for Courts-Martial 922(e) prohibits it.[72] The use of polling would undermine the use of a secret, written ballot for voting, which is a key safeguard for the impartiality and fairness of courts-martial in the absence of unanimous verdicts.[73]

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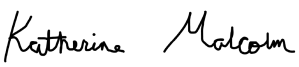
[70] *United States v. Hendon*, 6 M.J. 171, 173 (C.M.A. 1979).
[71] *Id.* at 173.
[72] MCM, R.C.M. 922(e).
[73] *United States v. Anderson*, 83 M.J. 291, 299 (C.A.A.F. 2023).

Conclusion

Accordingly, this Court should dismiss Specification 2 of the sole Charge with prejudice and set aside the sentence.



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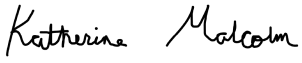

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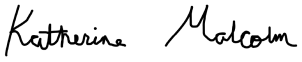

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