

**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

**REPLY 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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Table of Contents

Table of Authorities	iii
Reply	1
1. The issue is not waived.....	1
2. The affidavit describes a clerical error.	2
3. This Court has not considered what constitutes a clerical error.....	4
4. The verdict was not "impeached" under R.C.M. 923.....	8
Conclusion	9
Certificate of Filing and Service	10
Certificate of Compliance with Rule 24(d).....	11

Table of Authorities

UNITED STATES SUPREME COURT

<i>McDonald v. Pless</i> , 238 U.S. 264 (1915)	8
<i>Pena-Rodriguez v. Colorado</i> , 580 U.S. 206 (2017)	8
<i>Tanner v. United States</i> , 483 U.S. 107 (1987)	8
<i>Warger v. Shauers</i> , 574 U.S. 40 (2014)	8

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

<i>United States v. Anderson</i> , 83 M.J. 291(C.A.A.F. 2023)	4
<i>United States v. Brooks</i> , 42 M.J. 484 (C.A.A.F. 1995)	6, 7
<i>United States v. Hendon</i> , 6 M.J. 171 (C.M.A. 1979).....	3
<i>United States v. Lambert</i> , 55 M.J. 293 (C.A.A.F. 2001).....	6
<i>United States v. Schmidt</i> , 82 M.J. 68 (C.A.A.F. 2022).....	2
<i>United States v. Straight</i> , 42 M.J. 244 (C.A.A.F. 1995).....	5
<i>United States v. Sweeney</i> , 70 M.J. 296 (C.A.A.F. 2011).....	1

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

<i>United States v. RosarioMartinez</i> , No. 292300154, slip op. (N-M. Ct. Crim. App. Dec. 18, 2024)	5
---	---

FEDERAL CIRCUIT COURT OF APPEALS

<i>Karl v. Burlington N. R. Co.</i> , 880 F.2d 68 (8th Cir. 1989).....	3
<i>Robles v. Exxon Corp.</i> , 862 F.2d 1201 (5th Cir. 1989)	2
<i>United States v. DiDomenico</i> , 78 F.3d 294 (7th Cir. 1996)	3
<i>United States v. Dotson</i> , 817 F.2d 1127 (5th Cir. 1987)	3, 9
<i>United States v. Griffith</i> , 867 F.3d 1265 (D.C. Cir. 2017).....	1
<i>United States v. Morris</i> , 570 F. App'x 151 (3d Cir. 2014)	2

RULE FOR COURT-MARTIAL (2019)

R.C.M. 921	5, 7, 9
R.C.M. 923	7, 8

MILITARY RULE OF EVIDENCE (2019)

M.R.E. 606	passim
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OTHER AUTHORITIES

F.R.E. 606.	2
Fed. R. Crim. P. 31(d).....	3

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?

REPLY

1. The issue is not waived.

Appellant did not intentionally relinquish or abandon a known right.¹ He did not fail to make an objection to the error in the findings worksheet. Once the error became known, Appellant filed a motion for appropriate relief asking that the Military Judge use M.R.E. 606(b)(2)(C) to correct the findings worksheet.² The record was fully developed during the post-trial hearing under the theory that the members made a mistake in recording the findings.³ Appellant also raised this issue on appeal under other exceptions to M.R.E. 606(b)(2). The granted issue here—as the Court itself rephrased it—is simply an extension of Appellant's challenge at trial, which he has pressed all along.⁴ This is a species of the same legal theory raised at trial and with the lower court.⁵

¹ *United States v. Sweeney*, 70 M.J. 296, 303-04 (C.A.A.F. 2011).

² J.A. at 184.

³ J.A. at 144-75.

⁴ *United States v. Griffith*, 867 F.3d 1265, 1277 (D.C. Cir. 2017).

⁵ *Id.* at 1277-78.

Since discovery of the issue, Appellant has continuously contested the findings worksheet and its purported reflection of the member vote. His challenge has been consistent and he has never wavered in his attack on the member vote. As two judges of this Court explained in declining to find waiver for an instruction issue, there is no waiver where the appellant “expressly argued at trial” the issue that the Government now asserts is waived.⁶

Appellant made a timely objection at trial, expressly argued the granted issue, raised a “species of the same legal theory” at the lower court, and this Court rephrased and granted the specified issue. It is not waived.⁷

2. The affidavit describes a clerical error.

The exception for mistakes made in entering the findings is limited to cases “where the jury foreperson . . . mistakenly stated that the defendant was ‘guilty’ when the jury had actually agreed that the defendant was not guilty.”⁸ In this case, the panel President wrote in his affidavit, “I would like to correct the findings worksheet to accurately reflect the correct findings of the panel.”⁹ Unlike *United*

⁶ *United States v. Schmidt*, 82 M.J. 68, 78 (C.A.A.F. 2022) (Ohlson, C.J., concurring); see also *United States v. Brooks*, 42 M.J. 484 (C.A.A.F. 1995) (declining to find waiver against the Government when it challenged post-verdict voir dire of the members, even where trial counsel acquiesced to, and participated in, the voir dire).

⁷ J.A. at 152; *Griffith*, 867 F.3d at 1277.

⁸ *Robles v. Exxon Corp.*, 862 F.2d 1201, 1208 (5th Cir. 1989).

⁹ J.A. at 191.

States v. Morris, the panel President’s affidavit suggests that “the verdict contained a transcription error or *inaccurately reflected the will of the jury*.”¹⁰

The Fifth Circuit held that a district court did not abuse its discretion by amending the verdict in *United States v. Dotson* because the verdict that was announced was not what the jurors had actually agreed upon.¹¹ Although the circumstances are not common, “courts have accepted that an appropriate means to remedy a clerical error in a verdict discovered by juror affidavits is to simply amend the verdict to reflect the intent of the jury, as the district court did here.”¹² So too should this Court.

In federal practice, “the judge is permitted to inquire whether the verdict represents the actual decision of the jury.”¹³ In fact, federal defendants have an absolute right to demand individual polling of the jury.¹⁴ Federal courts have also

¹⁰ *United States v. Morris*, 570 F. App’x 151, 153 (3d Cir. 2014) (emphasis added). The jurors in *Morris* convicted appellant and his co-defendant of drug related offenses involving powder and crack cocaine. The verdict form included a special interrogatory asking the jury to determine the weight *only* of the crack cocaine, if any. After the jury was dismissed, a juror informed the judge that they considered the amount of both substances. Morris moved to correct the verdict. The District Court denied the motion, finding that it was not a clerical, or correctable, error. On appeal, the order of the District Court was affirmed because the court found the error was a mistake in the jury’s understanding of the instructions. *Id.*

¹¹ *United States v. Dotson*, 817 F.2d 1127, 1131 (5th Cir. 1987).

¹² *Id.* at 1130.

¹³ *United States v. DiDomenico*, 78 F.3d 294, 302 (7th Cir. 1996). The use of polls is common in federal practice, where unanimous verdicts are required. *United States v. Hendon*, 6 M.J. 171, 173 (C.M.A. 1979).

¹⁴ Fed. R. Crim. P. 31(d).

accepted juror testimony under this exception when “the juror’s testimony indicated that through inadvertence, oversight, or mistake, the verdict announced was not the verdict on which the jurors had agreed.”¹⁵ Under those circumstances, the court recognized that it could consider such testimony to amend the verdict.¹⁶ These are the circumstances in the case at hand.

In *United States v. Anderson*, this Court justified non-unanimous verdicts in the military by pointing to the “unique safeguard” of secret ballots.¹⁷ That holding relies on military accused having *more* safeguards to ensure correct member voting than civilian juries—not less. *Anderson* is not sustainable if neither the accused, nor the trial court, can actually enforce the “one vote and done” system. When the members make a clerical error and mistakenly mark that they convicted the accused when they actually acquitted him, the system must have a way to correct the error.

3. This Court has not considered what constitutes a clerical error.

This Court has not addressed the exceptions to M.R.E 606(b)(2) since the 2013 amendment that created an exception for mistakes on the findings or sentencing worksheet.¹⁸ This relatively recent update has significant implications

¹⁵ *Karl v. Burlington N. R. Co.*, 880 F.2d 68, 72 (8th Cir. 1989).

¹⁶ *Id.*

¹⁷ 83 M.J. 291, 299-300 (C.A.A.F. 2023).

¹⁸ Exec. Order No. 13643, Vol. 78 Fed. Reg. 98, 29594-95 (May 21, 2013) (amending M.R.E. 606).

for Appellant’s case. And this Court’s most recent analyses of M.R.E. 606(b)(2) in *United States v. Straight* and *United States v. Brooks*—both 1995 decisions—predate the change.¹⁹ Because *Straight* and *Brooks* did not contemplate the exception later established in M.R.E. 606(b)(2)(C) they are not controlling.

The members in *Straight* discussed parole, and whether the appellant would serve the entirety of his adjudged sentence, during deliberations.²⁰ In *Straight*, this Court held that the mention of parole was not “extraneous prejudicial information” as contemplated under M.R.E. 606(b)(2)(A)—a different exception than the one at issue here. The affidavits in that case did not raise “anything other than internal matters regarding the deliberations of the members on the court-martial sentence,” rendering that information inadmissible.²¹

In contrast, the affidavit in this case does raise an issue other than “internal matters regarding the deliberations of the members.”²² The issue, as the panel President articulated, was that the findings worksheet was wrong. That has nothing to do with their deliberations—it has to do with the accuracy of the findings worksheet and that it does not reflect the actual vote under R.C.M. 921.²³ He

¹⁹ *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).

²⁰ *Straight*, 42 M.J. at 248.

²¹ *Id.* at 250.

²² *Id.*

²³ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 921 (2019) [hereinafter MCM].

wrote, “I would like to correct the findings worksheet to accurately reflect the correct findings of the panel.”²⁴

In *Brooks*, this Court held the military judge erred by questioning the panel president concerning the voting procedures the members used during deliberations.²⁵ While at first blush *Brooks* looks similar to this case, there are two key distinctions.²⁶ First, at the time, the only exceptions to M.R.E. 606(b)(2) were extraneous prejudicial information and unlawful command influence, and “[n]one of the exceptions . . . were triggered in [that] case.”²⁷ The Court saw this as a threshold issue that prevented any inquiry into the deliberative process.²⁸ But now, the President has specifically added an exception that directly speaks to the Panel President’s concern: an error in entering the findings.

Second, and perhaps more importantly, the panel president in *Brooks* did not come forward with the issue, did not believe the members made a mistake, and appeared insistent that the panel had convicted the appellant.²⁹ The members in *Brooks* did not communicate that the finding announced was not what they agreed upon. This would not have triggered M.R.E. 606(b)(2)(C) even if the amendment

²⁴ J.A. at 191.

²⁵ *Brooks*, 42 M.J. at 486.

²⁶ 42 M.J. 484.

²⁷ *Id.* at 486.

²⁸ *Id.* at 486-87.

²⁹ *Id.* at 485.

had been in effect at the time. Unlike the present case, the “error” was discovered because the appellant asked the military judge to “voir dire the panel president concerning voting procedures.”³⁰ To the extent this Court looks to *Brooks* to affirm a questionable conviction where the members are on record stating they actually acquitted under R.C.M. 921’s voting procedure—this Court must revisit that holding in light of M.R.E. 606’s amendment and this Court’s ruling in *Anderson*.

3. The verdict was not “impeached” under R.C.M. 923.

The issue here regards clarification of the verdict and not impeaching the substance of a conviction—R.C.M. 923 is therefore not applicable. “Findings that are proper on their face may be impeached only when extraneous prejudicial information was improperly brought to the attention of a member, outside influence was improperly brought to bear upon any member, or unlawful command influence was brought to bear upon any member.”³¹

Impeach means “to discredit the veracity of (a witness)” or “to challenge the accuracy or authenticity of (a document).”³² Appellant is not alleging any wrongdoing or misconduct on the part of the jurors that would trigger application of R.C.M. 923. The Supreme Court has not permitted juror testimony to impeach a verdict when the testimony relates to “anomalous behavior from a single jury—or

³⁰ *Id.*

³¹ MCM, R.C.M. 923 (2019).

³² *Impeach*, BLACK’S LAW DICTIONARY (11th Ed. 2019).

juror—gone off course.”³³ The Eighth Circuit has identified this distinction: “the court concluded that Rule [of Evidence] 606(b) allowed it to consider testimony of jurors aimed at clarifying, as opposed to impeaching, the verdict.”³⁴ The Fifth Circuit has noted the same distinction: “we have held that [Federal R]ule 606(b) does not bar juror testimony as to whether the verdict delivered in open court was actually that agreed upon by the jury. . . . These holdings simply embody the sound reasoning that such inquiries are not directed at the ‘validity’ of the verdict and thus are not covered by the rule.”³⁵

This case does not involve misconduct that calls into question the validity or credibility of the verdict. It is a simple clerical error, as the panel president described: “I would like to correct the findings worksheet to accurately reflect the correct findings of the panel.”³⁶ Appellant does not ask this Court to adjudicate the merit of what the members did in the deliberation room. He does not seek to “impeach” a conviction because one member did this or another member did that.

³³ *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 223-24 (2017) (citing *Tanner v. United States*, 483 U.S. 107 (1987); *Warger v. Shauers*, 574 U.S. 40 (2014); *McDonald v. Pless*, 238 U.S. 264 (1915)).

³⁴ *Karl v. Burlington N. R. Co.*, 880 F.2d 68, 71-72 (8th Cir. 1989).

³⁵ *Robles v. Exxon Corp.*, 862 F.2d 1201 at 1207 (referring to *United States v. Dotson*, 817 F.2d 1127, 1130 (5th Cir.) *modified on rehearing*, 821 F.2d 1034 (5th Cir. 1987); *University Computing Co. v. Lykes-Youngstown Corp.*, 504 F.2d 518, 547-48 n.43 (5th Cir. 1974)).

³⁶ J.A. at 191.

To decide this issue, this Court need not get into what any member said or did prior to voting, or even, how any particular member voted.

M.R.E. 606(b)(2)(C) is the mechanism to ensure there is no error in the findings worksheet. Absent the ability to poll members, this is how we ensure fidelity in non-unanimous panels. Appellant asks the Court, as the essential last backstop in military justice, to enforce safeguards that make non-unanimous panels fair. The federal system has unanimous panels *and* such safeguards. The military cannot be left with non-unanimous panels and *no* safeguards, and be content to affirm convictions that were clearly acquittals under the law.

Conclusion

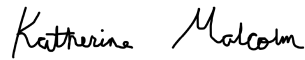
Accordingly, this Court should dismiss Specification 2 of the sole Charge with prejudice and set aside the sentence.

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Certificate of Filing and Service

I certify that a copy of the foregoing was delivered to the Court and delivered to the Director, Appellate Government Division, at DACCode46@navy.mil and to the Deputy Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, at Joshua.D.Ricafrente.civ@us.navy.mil on 18 September, 2025.



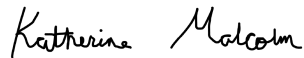
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