

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	ANSWER ON BEHALF OF
Appellee	)	APPELLEE
	)	
v.	)	Crim.App. Dkt. No. 202300154
	)	
Jonatan O. ROSARIOMARTINEZ,	)	USCA Dkt. No. 25-0102/MC
Corporal (E-4)	)	
U.S. Marine Corps	)	
Appellant	)	

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

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Issue Presented

DID THE MILITARY JUDGE ERR IN FINDING THE AFFIDAVIT OF THE SENIOR MEMBER TO BE INCOMPETENT EVIDENCE UNDER [MIL. R. EVID.] 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 Entry of Judgment includes a dishonorable discharge. The lower court had jurisdiction under Article 66(b)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(3) (2024). This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2024).

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of sexual assault without consent in violation of Article 120(b), UCMJ, §10 U.S.C. 920(b) (2024). The Military Judge sentenced Appellant to dishonorable discharge and eighteen months’ confinement. The Convening Authority took no action on the Sentence, the Military Judge entered the Judgment into the Record, and the Sentence, except for the punitive discharge, was executed. The lower court affirmed the Findings and Sentence on December 18, 2024. Appellant filed a timely Petition for review.

Statement of Facts

A. The United States charged Appellant with sexual assault.

In Specification 2 of the Charge, the United States charged Appellant with penetrating the Victim's vulva without her consent on or about October 30, 2021. (J.A. 58.)

B. The Military Judge gave the Members preliminary Instructions.

Appellant pled not guilty and chose to be tried by members with enlisted representation. (J.A. 56, 59–60.) Fifteen Members were sworn and received preliminary Instructions. (J.A. at 61–71.) These preliminary Instructions included that they were required to follow the Military Judge's Instructions on the law and that they were to determine if the accused was guilty or not guilty. (J.A. at 61–64.)

The Military Judge instructed that “only when you are in closed session deliberations, may you properly make a determination as to whether the accused is guilty or not guilty.” (J.A. 67.) The Judge also instructed that they each had “an equal voice and vote with the other members in discussing and deciding all issues submitted to you,” but that the Senior Member would speak for the court martial in announcing the results. (J.A. 70.) The Military Judge told the Members about the sequence of events they could expect, including that they would be given procedural Instructions on voting. (J.A. 70.)

- C. During voir dire, the Members agreed with the Military Judge that they could follow instructions to not return a finding of guilty unless they were convinced beyond a reasonable doubt that Appellant was guilty.

During voir dire, the Military Judge asked, “Can each of you . . . vote for a finding of not guilty unless you are convinced beyond a reasonable doubt that the accused is guilty?” (J.A. 75.) He received an affirmative response from all the Members. (J.A. 75.) He later asked “On the other hand can each of you vote . . . for a finding of guilty if you are convinced that under the law, the accused guilt [sic] has been proved by legal and competent evidence beyond a reasonable doubt?” (J.A. 76.) Once again, he received an affirmative response from all the Members. (J.A. 76.)

- D. After the close of the evidence, the Military Judge gave substantive Instructions and instructed the Members on voting procedures.

Before instructing the Members, the Military Judge told them he was going to give the Members copies of the Instructions so they could have them during their deliberations. (J.A. 96.) He instructed the Members on the charges, defenses, evidence, and reasonable doubt. (J.A. 96–108.) He then instructed the Members that “each of you must impartially decide whether the accused is guilty or not guilty, according to the law I’ve given you, the evidence admitted in court, and your own conscience.” (J.A. 108.)

After closing arguments, the Military Judge gave the Members the Findings Worksheet and instructed them on voting procedures. (J.A. 109–10.) He directed: “[a]fter you have completed your discussion[,], then voting on your findings must be accompanied by secret written ballot and, [sic] all members of the court are required to vote.” (J.A. 109.) He instructed the Members to vote on the Specifications under a Charge first, and then, if they found the accused guilty of any Specification under the Charge, to vote on the Charge. (J.A. 109.) He told the Junior Member to collect and count the votes and the President to check them before immediately announcing the results to the Members. (J.A. 109.)

The Military Judge further instructed the Members that “[t]he concurrence of at least three-fourths of the members present when the vote is taken is required for any finding of guilty,” and since there were eight Members, “six members must concur in any finding of guilty.” (J.A. 109–10.) Then he told the Members, “[i]f fewer than six members vote for a finding of guilty, then your ballot resulted in a finding of not guilty.” (J.A. 110.)

He also instructed the Members on how to reconsider their vote: “after you vote, if any member expresses a desire to reconsider any finding, open the court and the president should announce only that a reconsideration of a finding has been proposed.” (J.A. 110.) He told the Members “[a]s an aide and [sic] putting your findings in proper form and making a proper announcement of the findings, you

may use [the Findings Worksheet].” (J.A. 110, 183.) He informed the Members that he would review the Findings Worksheet to ensure the Findings were in the proper form, and then the Findings would be announced by the President in the presence of all the Parties. (J.A. 110.)

The Members had no questions about the Findings Worksheet. (J.A. 111.) The Military Judge told them that if they had any questions during deliberations, he would open the Court and assist them. (J.A. 111.) Lastly, he told them that when they reached Findings, they should notify the bailiff, who would notify the Judge. (J.A. 112.) The Members had no questions about any of the Instructions and indicated they did not need anything before beginning deliberations. (J.A. 112–13.) Neither Trial Defense Counsel nor Trial Counsel objected to the Instructions or requested any additional ones. (J.A. 112.)

E. During deliberations, the Members had questions but not about the Findings Worksheet.

Slightly into the second hour of deliberations, the Members had a question for two Witnesses. (J.A. 114.) The Military Judge said the Witnesses would not be recalled and reminded the Members, “If the evidence was not produced, I remind you that the burden of proof at all times is on the government and it never shifts.” (J.A. 115.) The Judge asked if the Members had any other questions and reminded them that if they had a question “about instructions or about procedure,

you can ask those questions.” (J.A. 115.) The Members had no questions and returned to closed deliberations. (J.A. 115.)

After hearing from Counsel, the Military Judge opened the Court again and instructed the Members that they could request to re-open the case and may then call an additional witness. (J.A. 117.) The Members returned to deliberations without reopening the case. (J.A. 118–23.)

Less than two hours later, the Members had another question. (J.A. 123.) They asked for the testimony of three Witnesses, so the Military Judge ordered audio of the testimony be prepared to play for them. (J.A. 126–27.) The Military Judge recessed the Members in the meantime but reminded them not to discuss the case with anyone while in recess. (J.A. 128–29.) Once ready, the audio was played for the Members before all the Parties. (J.A. 131–35.) Except to recess the Members for lunch, court was not opened again before the Members announced their Findings. (J.A. 131–40.)

F. After deliberating for almost two days, the Members found Appellant guilty of Specification 2, and the Military Judge confirmed the Findings Worksheet was in proper form.

After deliberating from around 1000 to around 1630 on the second day of deliberations, the Members returned with Findings. (J.A. 132–40.) At no point during the two days of deliberations did Trial Counsel or Trial Defense Counsel request that the Members receive additional instructions. (J.A. 112–40.)

After the Senior Member confirmed the Findings were reflected on the Worksheet, the Military Judge inspected the Worksheet and declared they “appear[ed] to be in proper form.” (J.A. 138–39.) The Senior Member then announced that they found Appellant guilty of Specification 2, sexual assault without consent. (J.A. 140.) No Member indicated this verdict was contrary to what they had agreed upon or otherwise contested it. (J.A. 140.)

G. Before discharging the Members, the Military Judge reminded them of the prohibition against discussing their deliberations.

After Appellant chose sentencing by judge alone, the Military Judge called the Members back to inform them of Appellant’s choice. (J.A. 141.) He concluded by instructing them:

If you are asked about your service on this court-martial, I remind you of the oath you took. Essentially, that oath prevents you from discussing your deliberations with anyone, to include stating any members’ opinion or vote, unless ordered to do so by a court. You may discuss your personal observations in the courtroom and the process of how a court-martial functions but, [sic] not what was discussed during your deliberations.

(J.A. 141–42.)

H. The Military Judge sentenced Appellant.

After formally discharging the Members, the Military Judge sentenced Appellant to eighteen months’ confinement and a dishonorable discharge. (J.A. 142–43.)

- I. In a post-trial hearing, Appellant admitted that the Senior Member discussed the Members’ deliberations with Trial Defense Counsel in a post-trial hotwash. Over Government opposition, Appellant moved for appropriate relief, using an Affidavit from the Senior Member.

A post-trial hearing was held less than a month after sentencing. (J.A. 144.)

As the Judge summarized, the hearing was to address two Motions from Appellant, and the United States’ Responses. (J.A. 144.) Both Parties had requested oral argument. (J.A. 144.)

During the hearing, Trial Defense Counsel explained: (1) in the week after the court-martial, the two Trial Defense Counsel met with the Senior Member for a “hotwash” (J.A. 147); (2) despite the Military Judge’s earlier order not to discuss what occurred during deliberations, the Senior Member told them there had been “multiple votes where . . . [they] had three or more members vote not guilty” (J.A. 147–48); and (3) rather than alerting the court to the issue, Trial Defense Counsel met with the Senior Member again to draft an affidavit, which Appellant used to support a Motion for Appropriate Relief. (J.A. 149, 184–92.)

In his Motion, Appellant moved the court to “correct the erroneous findings that were announced by entering a finding of not guilty because” the Members’ “initial vote returned a finding of not guilty.” (J.A. 187.) His evidence was the Senior Member’s Affidavit and a copy of the “Instructions provided to the members during deliberations.” (J.A. 190.) These Instructions covered the substantive law concerning the crimes with which Appellant was charged,

including definitions, defenses, burdens, and guidance on how the Members were to evaluate all the evidence. (J.A. 192–99.)

The Senior Member’s Affidavit stated “it was [the Members’] understanding that in order to reach a verdict we needed either 6 votes in favor of guilty or 6 votes in favor of not guilty for both specifications.” (J.A. 191.) The Members “called for a vote at least 5-6 times.” (J.A. 191.) “The first vote where all [M]embers were decided had 3 or more [M]embers vote in favor of not guilty for both [S]pecifications.” (J.A. 191.) The Affidavit further stated that the Members “incorrectly did not complete the findings worksheet after each finding that would have resulted in a not guilty verdict because we did not believe we had reached the required number of votes for a finding of not guilty.” (J.A. 191.) Finally, the Senior Member asserted “Had we known the proper procedure we would have filled out the findings worksheet correctly to return a finding of not guilty,” and that he “would like to correct the findings worksheet.” (J.A. 191.)

The Government opposed Appellant’s Motion. (J.A. 200–21.)

During the 39(a) hearing, Appellant argued that Mil. R. Evid. 606(b)(2)(C) applied because a “mistake” was made in entering the Findings: when the Members “completed their first vote by secret, written ballot . . . that was a proper finding . . . [and] there was no vote to reconsider that finding.” (J.A. 151–52.) Thus, the Finding of guilty after the initial vote was “irrelevant” because “it wasn’t

a properly conducted vote.” (J.A. 154.) Appellant argued further that the alleged mistake was the Members’ misapplication of voting procedures:

[T]hat whole procedural aspect of voting was not conducted properly. And so that is where the mistake is . . . Had they done a vote to reconsider their original vote, and then done another vote and found him guilty, we wouldn’t be here today. But it’s because they had there [sic] original proper vote that was conducted and then they continued deliberating without following any processes that were correct after the fact. And they didn’t circle [sic] because they had a misunderstanding of the procedural instructions . . . the procedure explains the mistake . . . [and] for a mistake to have been made, there has to be a reason why.

(J.A. 154–56.)

But the Military Judge noted that there was no “exception here for procedural mistakes” and that “when federal rule of evidence 606 came into effect, there was consideration that objective deliberations would be allowed to be explored.” (J.A. 157.) Appellant then modified his argument and moved the Military Judge to “only consider the fact that a mistake was made and disregard anything about procedure in the affidavit under [Mil. R. Evid.] 606(b)(2)(C).”

(J.A. 158.)

J. The Military Judge denied Appellant’s Motion.

1. The Military Judge found the Members were properly instructed and that no evidence supported a finding of improper influence on the Members or extraneous prejudicial information during deliberations and voting.

In a written Ruling, the Military Judge found the Members “took an oath not to disclose or discover the vote or opinion of any member of the court.” (J.A.

222.) They were instructed: (1) that six members had to agree in order to find Appellant guilty but “if fewer than six members voted for a finding of guilty then the ballot resulted in a finding of not guilty;” and (2) “on the procedures for reconsideration of a vote and properly filling out the findings worksheet.” (J.A. 222–23.)

The Military Judge also found that while the Members asked to reopen the court and asked two questions during deliberations, “[a]t no point did [they] request an instruction from the court regarding reconsideration.” (J.A. 222–23.) Further, on returning to “open court at the conclusion of their deliberations,” the Senior Member stated the “worksheet reflected their findings, and upon inspection by the military judge, the worksheet was determined to be in proper form.” (J.A. 223.)

Lastly, the Military Judge found that the Affidavit made “no explicit or implicit statement” about any unlawful command influence, “any other improper influence upon the members,” any extraneous prejudicial information that may have influenced the members, or any evidence “the members were pressured or coerced in any way during their voting on findings.” (J.A. 224.)

2. The Military Judge considered multiple legal authorities before concluding the Affidavit was incompetent evidence.

The Military Judge considered military and civilian authorities¹ before ruling that “[u]ltimately, the [M]embers agreed by the six required votes to convict the accused of specification 2 of the charge, and the facts presented by the defense regarding how the members arrived at those six votes are an impermissible breach into their deliberative process that the rules, as well as a full and complete body of case law, simply do not allow.” (J.A. 225–28.)

He distinguished Appellant’s case from *United States v. Dotson*, 817 F.2d 1127 (5th Cir. 1987)—which he noted Appellant “relie[d] almost exclusively on.” (J.A. 228.) In *Dotson*, the juror’s affidavit did not impeach the verdict by saying how it was reached; the affidavit instead showed the verdict the jury delivered was

¹ *Tanner v. United States*, 483 U.S. 107 (1987); *United States v. Ovando-Moran*, 48 M.J. 300, 304 (C.A.A.F. 1998); *United States v. Hardy*, 46 M.J. 67, 74 (C.A.A.F. 1997); *United States v. Brooks*, 42 M.J. 484 (C.A.A.F. 1995); *United States v. Loving*, 41 M.J. 213 (C.M.A. 1994); *United States v. Perez*, 40 M.J. 373 (C.M.A. 1994); *United States v. Elmore*, 33 M.J. 387 (C.M.A. 1991); *United States v. Accordino*, 20 M.J. 102 (C.M.A. 1985); *United States v. Carr*, 18 M.J. 297 (C.M.A. 1984); *United States v. Witherspoon*, 16 M.J. 252 (C.M.A. 1983); *United States v. Brooks*, 41 M.J. 792 (A. Ct. Crim. App. 1995); *United States v. Thomas*, 39 M.J. 626 (N-M. Ct. Crim. App. 1993); *United States v. Almeida*, 19 M.J. 874 (A. F. Ct. Crim. App. 1985); Mil. R. Evid. 509 and 606; R.C.M. 922, 923, and 1104.

never actually agreed upon—a clerical error. (J.A. 228–29.) But in Appellant’s case, “the members did eventually reach a finding of guilty that was reflected on the findings worksheet and announced by the senior member,” meaning Appellant’s Motion sought “to explore how the verdict was reached.” (J.A. 229.) Thus, the Affidavit was not competent evidence because “[t]his [was] simply not a situation where the findings were mistakenly annotated on the form, but rather a quest to determine how the members arrived at the findings they did” and Mil. R. Evid. 606(b) “does not provide an exception” for “an inquiry into the deliberative process.” (J.A. 227–28.)

Lastly, the Military Judge ruled that even if the Affidavit was competent evidence, it “would still not be a proper basis” to grant Appellant’s request to enter a finding of not guilty. (J.A.184, 229.) R.C.M. 923 “only allows findings that are proper on their face to be impeached where extraneous prejudicial information, outside influence, or unlawful command influence was improperly brought to any member.” (J.A. 229.) Because there was no such evidence in this case, he denied Appellant’s Motion. (J.A. 229–30.)

K. On direct appeal at the lower court, Appellant moved to attach three additional Affidavits and specified two Issues—none of which alleged errors in the Findings Worksheet.

During direct appeal at the lower court, Appellant never alleged the Military Judge erred in ruling the Senior Member’s Affidavit was incompetent evidence—

he instead sought relief for alleged unlawful command influence during deliberations and denial of a unanimous verdict. (J.A.3; Appellant Br. at 2, *United States v. RosarioMartinez*, 85 M.J. 535 (N-M. Ct. Crim. App. 2024).)

His sole reference to the Military Judge’s decision was to say that Appellant filed the Affidavit “with a motion to set aside the findings and sentence on grounds of M.R.E. 606, R.C.M. 922, and R.C.M. 1104,” but the Military Judge deemed it incompetent evidence because “it did not make any explicit or implicit statement that [unlawful command influence], extraneous prejudicial information, or outside influence may have influenced the members . . . [and] therefore did not consider it in ruling on the defense motion.” (Appellant Br. at 10, *United States v. RosarioMartinez*, 85 M.J. 535 (N-M. Ct. Crim. App. 2024) (No. 202300154).) Appellant summarized that the Military Judge found “the members did ‘eventually reach a finding of guilty,’ which was reflected on the findings worksheet and announced. On this basis, he denied” Appellant’s Motion. (Appellant Br. at 10–11, *United States v. RosarioMartinez*, 85 M.J. 535 (N-M. Ct. Crim. App. 2024) (No. 202300154).)

In support of his first assigned error, Appellant submitted Affidavits from two other Members and his Trial Defense Counsel, all of which discuss “how the court’s voting instructions were not followed” but say nothing about the Findings

Worksheet. (Appellant Mot. Attach at 8–10, *United States v. RosarioMartinez*, 85 M.J. 535 (N-M. Ct. Crim. App. 2024) (No. 202300154).)

“[The lower court] then ordered briefing on six specified issues relating to Appellant’s motion to attach,” which it ultimately denied; it explained its reasons for doing so in its Opinion, discussed *infra*. (J.A. 3–6.)

L. The lower court denied Appellant’s Motion to Attach and affirmed his conviction.

In its Opinion, the lower court explained “Appellant only claimed that the declarations were evidence of unlawful command influence.” (J.A. 09.) Despite Appellant not raising the voting procedures as error, the lower court briefly summarized “that controlling precedent conclusively holds that much of the declarations . . . are completely covered by the privilege in Mil. R. Evid. 509 These matters include discussing the number of times the members voted and the number of members who voted for a specific outcome.” (J.A. 12.) Thus, it “denied Appellant’s motion to attach . . . [because] the declarations of the members constituted incompetent evidence,” and it affirmed the Findings and Sentence. (J.A. 7, 15.)

Summary of Argument

Appellant waived the Issue at the lower court by intentionally relinquishing his argument that the Affidavit fit under the clerical error exception of Mil. R.

Evid. 606(b)(2)(C). However, even if the Issue is not waived, the Military Judge did not abuse his discretion in finding the Senior Member's Affidavit to be incompetent evidence and denying Appellant's Motion. Courts narrowly construe the exceptions in Mil. R. Evid. 606(b), and the corresponding Federal Rule, to the prohibition against post-verdict inquiry. Appellant's argument at most amounts to an allegation that the Members failed to follow the Judge's Instructions for reconsideration of a verdict. Neither this Court nor other courts have permitted inquiry into member deliberations based on an alleged failure to follow instructions.

Argument

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN FINDING THE SENIOR MEMBER'S AFFIDAVIT TO BE INCOMPETENT EVIDENCE AND DENYING APPELLANT'S MOTION. COURTS UNIFORMLY HOLD (1) MIL. R. EVID. AND FED. R. EVID. 606(b)'S EXCEPTIONS ARE NARROW AND (2) AN ALLEGATION THAT MEMBERS FAILED TO FOLLOW A JUDGE'S INSTRUCTIONS DOES NOT FALL WITHIN THE EXCEPTIONS PERMITTING INQUIRY.

- A. This Court determines waiver de novo, but if the Issue is not waived, the standard of review is abuse of discretion.
1. Appellant waived the clerical error exception by not raising that issue at the Navy-Marine Corps Court of Criminal Appeals, so this Court should hold the Military Judge's decision is the law of the case.

“This Court reviews de novo whether an accused has waived an issue.”

United States v. Blackburn, 80 M.J. 205, 209 (C.A.A.F. 2020). “[W]aiver is the intentional relinquishment or abandonment of a known right . . . and for a waiver to be effective it must be clearly established that there was an intentional relinquishment of a known right or privilege.” *United States v. Sweeney*, 70 M.J. 296, 303–04 (C.A.A.F. 2011). Stated differently, “waiver is a deliberate decision not to present a ground for relief that might be available in the law.” *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009) (quoting *United States v. Cook*, 406 F.3d 485, 487 (7th Cir. 2005)). Waiver extinguishes error, depriving the Court of the opportunity for review. *See United States v. Harcrow*, 66 M.J. 154, 156 at n. 1

(C.A.A.F. 2008); *United States v. Cupa-Guillen*, 34 F.3d 860, 863 (9th Cir. 1994) (equal protection punishment claim waived by not being raised at trial)).

Further, “[w]here neither party appeals a ruling of the court below, that ruling will normally be regarded as law of the case and binding upon the parties.” *United States v. Parker*, 62 M.J. 459, 464 (C.A.A.F. 2006). And while the law of the case doctrine is discretionary, as an appellate policy, this Court generally only departs from it “when the lower court’s decision is ‘clearly erroneous and would work a manifest injustice.’” *Id.* at 464–65. “That standard is difficult to achieve: a finding of manifest injustice requires a definite and firm conviction that a prior ruling on a material matter is unreasonable or obviously wrong.” *United States v. Lewis*, 63 M.J. 405, 413 (C.A.A.F. 2006).

- a. The Military Judge directly addressed the Issue, and Appellant has not met his burden to show it was clearly erroneous or manifestly unjust.

In *United States v. Mack*, 65 M.J. 108 (C.A.A.F. 2007), the appellant argued this Court should treat a military judge’s Article 13 ruling as the law of the case because the government had not appealed it. *Id.* at 112. However, this Court held they were not required to apply the law of the case doctrine in that instance because the military judge had not directly ruled on the specified issue, only related issues. *Id.* See also *Lewis*, 63 M.J. at 413 (where the service court directly addressed whether unlawful command influence occurred, this Court applied the

law of the case doctrine because the government did not meet its burden to show the ruling was clearly erroneous or a manifest injustice); *United States v. Kress*, 58 F.3d 370, 373 (8th Cir. 1995) (appellant waived arguments about trial court’s verdict correction because they “were certainly ripe at the time of the original appeal and should have been raised there”).

Like *Lewis* and unlike *Mack*, the Military Judge directly ruled on the specified issue here: he determined that the “defense[‘s] motion does not amount to a mistake being made in entering the findings on the findings form . . . but rather a quest to determine how the members arrived at the findings they did,” and since “[v]oting irregularities are not a proper basis for impeaching findings” under R.C.M. 923, he did not have a basis to grant Appellant’s Motion. (J.A. 228–29.) Appellant did not challenge this ruling at the lower court or in his Supplement to his Petition to this Court. (Appellant Br. at 2, *United States v. RosarioMartinez*, 85 M.J. 535 (N-M. Ct. Crim. App. 2024) (No. 202300154); Appellant Supp. Petition for Review at 1, *United States v. RosarioMartinez*, No. 25-0102/MC, 2025 CAAF LEXIS 116* (C.A.A.F. Feb. 18, 2025).)

However, he now argues that the Military Judge erred in declining to accept the Senior Member’s Affidavit and in denying his Motion to enter a finding of not guilty. (Appellant Br. at 7.) For the reasons discussed, *infra*, the Military Judge’s ruling was neither “unreasonable or obviously wrong,” so Appellant has not met

his burden to demonstrate a manifest injustice. *Lewis*, 63 M.J. at 413. And since Appellant did not appeal the Military Judge’s direct Ruling on this matter before now, this Court should decline to depart from the law of this case; it should hold that Appellant intentionally relinquished his right to pursue relief under Mil. R. Evid. 606(b)(2)(C). *Sweeney*, 70 M.J. at 303–04; *Kress*, 58 F.3d at 373.

2. If this Court determines Appellant did not waive the Issue, then it should review for abuse of discretion.

In determining whether and how to investigate a verdict, “as well as whether and to what extent the conduct was prejudicial, the trial court has wide discretion;” thus, such “[d]iscretionary decisions will be reviewed for abuse only.” *United States v. Lambert*, 55 M.J. 293, 295–96 (C.A.A.F. 2001).

A military judge “abuses his discretion when his findings of fact are clearly erroneous, the court’s decision is influenced by an erroneous view of the law, or the military judge’s decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law.” *United States v. Kelly*, 72 M.J. 237, 242 (C.A.A.F. 2013). A “finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *United States v. Martin*, 56 M.J. 97, 106 (C.A.A.F. 2001).

B. Mil. R. Evid. 606(b) generally prohibits member testimony and affidavits.

Mil. R. Evid. 606(b)(1) states:

During an inquiry into the validity of a finding or sentence, a member of a court-martial may not testify about any statement made or incident that occurred during the deliberations of that court-martial; the effect of anything on that member's or another member's vote; or any member's mental processes concerning the finding or sentence. The military judge may not receive a member's affidavit or evidence of a member's statement on these matters.

However, a member may testify if one of three exceptions are met:

- (A) extraneous prejudicial information was improperly brought to the members' attention;
- (B) unlawful command influence or another outside influence improperly 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.

Mil. R. Evid. 606(b)(2).

1. Mil. R. Evid. 606(b) is nearly identical to Fed. R. Evid. 606(b), and this Court should follow federal civilian appellate court interpretation of that rule.

In *United States v. Loving*, 41 M.J. 213 (C.A.A.F. 1994), while looking at an earlier version of the rule, this Court stated, "Mil. R. Evid. 606(b) is taken from Fed. R. Evid. 606(b). Except for changes to reflect court-martial terminology, Mil. R. Evid 606(b) is identical to Fed. R. Evid. 606(b) with one addition: the reference to unlawful command influence." *Id.* at 235.

The *Loving* court found the “identical language” was “consistent with the statutory mandate in Article 36(a), UCMJ, 10 USC § 836(a), that the President prescribe procedures which, ‘so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.’” *Id.* at 235–36. Because the Military Rules of Evidence drafters adopted the language of Fed. R. Evid. 606(b), they “clearly intended that the federal rule apply to courts-martial.” *Id.*

In 2006, the Federal Rule was amended to permit evidence of “a mistake in entering the verdict onto the verdict form.” Fed. R. Evid. 606(b)(3) (2006). Seven years later, in 2013, Mil. R. Evid. 606(b) was likewise amended to include when “a mistake was made in entering the finding or sentence on the finding or sentence form.” 2013 Amend. to the Manual for Courts-Martial, United States, 78 Fed. Reg. 98, 36 (May 15, 2013). Thus, Mil. R. Evid. 606(b) remains identical to Fed. R. Evid. 606(b), except for unlawful command influence, and this Court should look to precedent applying the federal rule. *See also* Mil. R. Evid. 101(b) (“In the absence of guidance in [the Manual for Courts-Martial] or these rules, courts-martial will apply . . . the Federal Rules of Evidence and the case law interpreting them”).

2. Authorities on the Fed. R. Evid. show Mil. R. Evid. 606's exceptions should be narrowly interpreted.
 - a. Both the Supreme Court and Congress disfavor broad interpretations of Fed. R. Evid. 606(b).

In *Pena-Rodriguez v. Colorado*, 580 U.S. 206 (2017), the Supreme Court summarized the history of the Federal Rule:

The version of [Fed. R. Evid. 606(b)] that Congress adopted was no accident. The Advisory Committee at first drafted a rule . . . prohibiting admission of juror testimony only as it related to jurors' mental processes in reaching a verdict . . . The Advisory Committee then drafted the more stringent version now in effect, prohibiting all juror testimony, with exceptions only where the jury had considered prejudicial extraneous evidence or was subject to other outside influence . . . The Court² adopted this second version and transmitted it to Congress. The House favored the [first] approach, but the Senate expressed concern that it did not sufficiently address the public policy interest in the finality of verdicts . . . Siding with the Senate, the Conference Committee adopted, Congress enacted, and the President signed the Court's proposed rule. The substance of the Rule has not changed since 1975, except for a 2006 modification permitting evidence of a clerical mistake on the verdict form.

Id. at 217 (internal quotations and citations omitted).

Further, in *Warger v. Shauers*, 574 U.S. 40 (2014), the Supreme Court acknowledged that it had "occasionally employed language [in earlier decisions]

² Under 28 U.S.C. § 2072(a) (2025), the Supreme Court has "the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals."

that might have suggested a preference” for the broader version of Fed. R. Evid. 606(b) proposed by the House. *Id.* at 46. However, not only had its subsequent decisions made clear that it favored a narrower interpretation, but “[i]n any event these decisions predated Congress’ enactment of Rule 606(b), and Congress was undoubtedly free to prescribe a broader version of the anti-impeachment rule than we had previously applied.” *Id.* at 47–48.

But Congress explicitly rejected a broader interpretation “because an inquiry into whether the jury misunderstood or misapplied an instruction goes to the jurors’ mental processes underlying the verdict, rather than the verdict’s accuracy in capturing what the jurors had agreed upon.” Fed. R. Evid. 606 advisory committee’s notes to 2006 Amendments. Thus, Congress intended Fed. R. Evid. 606(b)(2)(C) be “limited to cases such as ‘where the jury foreperson wrote down, in response to an interrogatory, a number different from that agreed upon by the jury, or mistakenly stated that the defendant was “guilty” when the jury had actually agreed that the defendant was not guilty.’” Fed. R. Evid. 606 advisory committee’s notes to 2006 Amendments.

As both Congress and the Supreme Court have consistently disfavored broad interpretations of Fed. R. Evid. 606(b) and its exceptions, this Court should do likewise.

- b. The sole appellate court to address Fed. R. Evid. 606(b)(2)(C) since the 2006 amendment held that evidence of the jury's misapplication of calculation instructions did not qualify as a clerical error.

In *United States v. Morris*, 570 Fed. App'x. 151 (3d Cir. 2014), the “verdict form contained a special interrogatory for each charged offense. With respect to each count, upon a finding of guilty, the jury was tasked with determining the weight of the crack cocaine, if any, involved in the offense.” *Id.* at 152. The foreperson announced the verdict and the other jurors confirmed they agreed. *Id.* at 153. Later, however, a juror told the court they had mistakenly considered the amount of both powder cocaine and crack cocaine. *Id.* The appellant moved to “recall the jury and investigate the reported mistake to ascertain whether it was a mere transcription error made when completing the verdict form.” *Id.*

The trial judge denied the motion, and the Third Circuit affirmed. *Id.* The court held that while Fed. R. Evid. 606(b)(2)(C) “permit[s] a juror to testify about whether ‘a mistake was made in entering the verdict on the verdict form,’” the juror’s statement did not “suggest that the verdict contained a transcription error or inaccurately reflected the will of the jury.” *Id.* Rather, the “error . . . was a mistake in the jury’s understanding of the Court’s instructions and how the special interrogatory should be answered.” *Id.* at 154. The court was therefore barred “from receiving such evidence, which pertained to the jurors’ thought process.” *Id.* at 154.

3. Federal courts had already outlined what constitutes a clerical error even before the 2006 amendment.

The 2006 amendment to Fed. R. Evid. 606(b) was added due “to a divergence between the text of the Rule and the case law that has established an exception for proof of clerical errors.” Fed. R. Evid. 606 advisory committee’s notes to 2006 Amendments. As a result, these earlier cases’ analyses of what constitutes a clerical error are relevant for the present case.

- a. The Seventh Circuit held clerical errors are those that do not reflect the actual decision of the jury.

In *United States v. DiDomenico*, 78 F.3d 294 (7th Cir. 1996), the appellant was found guilty of one count but not guilty of another concerning the same conspiracy to murder, which each juror indicated was correct when polled. *Id.* at 302. After a juror later stated they had voted not guilty for both counts, the judge interviewed the jurors and corrected the initial guilty verdict but “refused the defendants’ request that she ask the jurors whether they had made any other mistakes in filling the verdict form.” *Id.*

In affirming the judge’s decision, the Seventh Circuit held “Although not permitted to inquire into the deliberative process itself—the discussion or thoughts or votes of the jurors . . . the judge is permitted to inquire whether the verdict represents the actual decision of the jury . . . The line is drawn between determining whether the verdict is true in the sense of an accurate statement of the

jury's decision and rational in the sense of intelligent and deliberated.” *Id.* *Cf.* *Robles v. Exxon Corporation*, 862 F.2d 1201, 1202–04 (5th Cir. 1989) (prohibiting juror testimony about failure to understand district court’s instructions because “[f]rom the face of the special verdict form, there [was] no indication that the jury did anything other than follow its instructions to the letter and answer the special interrogatories, which were put to it in a clear and consistent manner”).

- b. Similarly, the Eighth Circuit held that while inquiring whether there was a clerical error is permissible, such inquiries cannot be a ruse for questioning the validity of a verdict.

In *Karl v. Burlington N. R. Co.*, 880 F.2d 68 (8th Cir. 1989), the jury had to answer several special interrogatories to determine liability and damages in a personal injury case, but their initial answers on the verdict form were inconsistent, so the judge re-instructed them and sent them back to deliberations. *Id.* at 70–71. The jury returned with one answer changed, and the judge “confirmed that the verdict read was the verdict of the jury.” *Id.* at 71. However, upon request of counsel, the judge later interviewed the foreman to assess whether the damages specified in the verdict were meant to be a net or gross figure and ultimately changed the amount of damages, concluding “the jury had erred in transmitting the verdict, rather than in reaching the verdict itself.” *Id.*

The 8th Circuit affirmed the judge’s decision to have the jury resolve the inconsistencies in the special verdict answers, and it stated the “district court was correct when it noted that Rule 606(b) does not bar juror testimony as to whether the verdict delivered in court was that actually agreed upon by the jury” because the “admission of a juror’s testimony is proper to indicate the possibility of a ‘clerical error’ in the verdict, but not the ‘validity’ of the verdict.” *Id.* at 72–74.

However, the judge erred in interviewing the foreman about the damages and changing them because that “mistake” was “not ‘clerical’ but [went] to the ‘validity’ of the verdict.” *Id.* at 74. The 8th Circuit then held examples of clerical errors were

where the foreperson wrote down, in response to an interrogatory, a damage amount different from that agreed upon by the jury . . . or where the foreperson mistakenly stated that the defendant was ‘guilty’ when the jury had actually agreed that the defendant was not guilty . . . The error alleged here, however, involves more than just a clerical mistake by the jury, as it involves the jury’s understanding of the court’s instructions.

Id.

The 8th Circuit further held the judge’s “characterization of the error as one of ‘transmission’ rather than one in the verdict itself” was unhelpful: all verdicts are “transmitted . . . by words written by the foreman on a piece of paper. The piece of paper truly stated what the jury had agreed to.” *Id.* at 75. Thus, the alleged mistake was not “a simple error in transmission or in putting words or

figures to paper, it [was] the jurors' mental processes that gave rise to the concerns at issue," and "the evidence of the jury's misinterpretation of its instructions" was "incompetent and inadmissible under Rule 606(b)." *Id.*

- c. This Court similarly considered what constitutes a clerical error prior to the 2006 amendment.

In *Loving*, this Court held affidavits from members were not competent evidence to rebut the presumption that court members follow instructions where

that presumption [was] reinforced by the sentence worksheet and the president's announcement that all members found that the aggravating factors were proven beyond a reasonable doubt, that all members found that the aggravating circumstances outweighed the extenuating and mitigating circumstances, and that all members voted to impose the death sentence. No court member disputed the president's announcement at the time.

41 M.J. at 235.

Thus, Mil. R. Evid. 606 applied a "blanket prohibition . . . to testimony of court members about 'any matter,' including voting procedures, 'occurring during the course of the deliberations' . . . except for the limited purpose of determining if extraneous influence or unlawful command influence may have been injected into the deliberations," and the affidavits were therefore not competent evidence. *Id.* at 236–37.

In reaching this conclusion, this Court predicted Mil. R. Evid. 606(b)(2)(C) when it considered that "some authority for a 'clerical error' exception . . . in which the affidavits of a juror were received to show that the verdict announced

was not the verdict ‘actually agreed upon’” existed. *Id.* at 239. This Court held, however, that—at most—the affidavits suggested only that the members “did not ‘revote’ on the aggravating factors after their earlier unanimous findings.” *Id.* Thus, this Court’s reasoning in *Loving* mirrors the civilian courts’ narrow interpretations of Fed. R. Evid. 606(b)(2)(C), cited above, and is still applicable to Appellant’s case.

4. Contrary to Appellant’s claim, this case is not like *Dotson* because the *Dotson* jury never reached the announced verdict.

In *United States v. Dotson*, 817 F.2d 1127 (5th Cir. 1987), the “jury returned a verdict that, on its face, convicted appellant of all ten of the counts in the indictment.” *Id.* at 1129. All twelve jurors nodded in agreement when the district court polled them; however, after the court released them, two jurors called and claimed, that contrary to the verdict read in court, they had unanimously voted to acquit Dotson on one of the counts. *Id.* The district court confirmed the claim with the jury foreman, then, “acting ex parte, corrected the verdict to acquit Dotson on count ten.” *Id.* Noting that “cases to which this exception applies are few and far between,” the Fifth Circuit nonetheless upheld the district court’s action because the jurors’ statements were not evidence of how their verdict was reached, merely “that the verdict delivered was not that actually agreed upon.” *Id.* at 1130.

As the Military Judge noted, Appellant relies almost exclusively on *Dotson* to support that there was an error in the Findings Worksheet. (J.A. 228; Appellant

Br. at 10–12.) However, the Military Judge aptly distinguished Appellant’s case from *Dotson*: “[t]he verdict . . . in *Dotson* was a clerical error, [sic] and did not reflect what the court had ever actually agreed upon . . . [here] the members did eventually reach a finding of guilty that was reflected on the findings worksheet and announced by the senior member.” (J.A. 229.) Whereas the court in *Dotson* made no inquiry into how the jury reached its agreement, Appellant sought “to explore how the verdict was reached, which is a proposition expressly forbidden by the very case [he seeks] to rely upon.” (J.A. 229); *Dotson*, 817 F.2d at 1130.

Further, unlike in *DiDomenico* or *Dotson*, the Senior Member’s Affidavit does not reveal a mistake in entering the Findings on the Worksheet: he makes no statements suggesting he mistakenly circled “guilty” for Specification 2 when he thought he had circled “not guilty.” (J.A. 183, 191–92.) He does not indicate the panel intended to vote guilty on Specification 1 instead of Specification 2. (J.A. 183, 191–92.) He does not state he meant to say “no” when the Military Judge asked if the panel had reached findings or when he asked if their findings were reflected on the worksheet. (J.A. 139–40, 191–92.) He filled out the Findings Worksheet in accordance with the Instructions, and the Military Juddge confirmed they “appear[ed] to be in proper form.” (J.A. 139, 183.) And the Findings announced by the Senior Member match those on the Findings Worksheet. (J.A. 140, 183.)

Rather, like in *Loving*, the Affidavit communicates issues the panel had in their deliberations that ultimately led to the outcome they announced and confirmed in open court. *See* 41 M.J. at 239. While the Members did not understand how to cast votes for conviction or acquittal and improperly reconsidered their votes, they ultimately agreed on a conviction for Specification 2. (J.A. 183, 191.) No one disputed this announcement prior to the Military Judge temporarily excusing the Members or when they returned for formal discharge. (J.A. 139–42.) Further, the Members in this case clearly understood how to ask questions to the court while deliberating—they did so twice. (J.A. 114, 123, 222.)

Thus, the Affidavit does not reveal “a simple error in transmission or in putting words or figures to paper . . . [but the Members’] mental processes that gave rise to the concerns at issue,” and the Affidavit is ineligible for the clerical-error exception of Mil. R. Evid. 606(b)(2)(C). *Karl*, 880 F.2d at 75. Therefore, the Findings were proper, and the Military Judge did not err in declining to consider the Affidavit.

C. The Military Judge also did not err in denying Appellant’s Motion.

1. The Rules for Courts-Martial explicitly prohibit impeachment of facially proper verdicts absent improper outside influence or unlawful command influence.

“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.” R.C.M.

923. The same applies to sentences that are “proper on [their] face.” R.C.M. 1008.

2. The *Brooks* court prohibited questioning members about voting procedures absent these limited circumstances.

In *United States v. Brooks*, 42 M.J. 484 (C.A.A.F. 1995), the military judge asked the panel president to confirm they had reached the requisite two-thirds majority for conviction, not just a simple majority as the president initially implied. *Id.* at 485. The military judge also asked him to confirm whether it was reflected on the findings worksheet. *Id.* The panel president confirmed both before announcing the panel’s findings of guilt. *Id.*

But when the court-martial reconvened [two] weeks later for sentencing, the military judge—at defense counsel’s request—questioned the panel president concerning the voting procedures’ the members used during deliberations. *Id.* Based on his inquiry, the judge concluded that the members had not actually reached the requisite number of votes to convict and “had revoted several times without following the procedure for reconsideration, before convicting appellant.” *Id.*

The *Brooks* court held the military judge erred. *Id.* at 487. No evidence supported that any of the members were “coerced or pressured during voting on findings,” so the military judge’s actions were an improper inquiry into the panel’s

deliberative process and “any evidence obtained by such an inquiry was incompetent.” *Id.* at 485–87 (citing *Loving*, 41 M.J. at 237–39). *See also United States v. Straight*, 42 M.J. 244, 249–50 (C.A.A.F. 1995) (juror statements excluded “in the absence of a claim of external influence;” members’ declarations inadmissible under Mil. R. Evid. 606(b) because they did not “raise[] anything other than internal matters” during deliberations) (citing *Silagy v. Peters*, 905 F.2d 986, 1009 (7th Cir. 1990)).

3. There is no evidence of such circumstances in Appellant’s case.

As the Military Judge found, nothing in the Affidavit makes any “explicit or implicit statement” that “any unlawful command influence” or “any other improper influence” was “brought to bear upon the members.” (J.A. 191, 224.) Nor does it make any “explicit or implicit statement regarding any extraneous prejudicial information that may have influenced” them. (J.A. 191, 224.) The Military Judge further found there was “no evidence the members were pressured or coerced in any way during their voting on the findings.” (J.A. 224.)

Instead, it explicitly describes how the Members misunderstood and misapplied voting procedures in arriving at the guilty verdict:

During deliberations we were not provided a written copy of the procedural instructions for voting . . . It was our understanding that in order to reach a verdict we needed either 6 votes in favor of guilty or 6 votes in favor of not guilty for both specifications . . . We called for a vote at least 5-6 times . . . because we did not believe we had reached the required number of votes for a finding of not guilty . . . I have

learned that I should have filled out the findings worksheet consistent with the first vote of the panel . . . Had we known the proper procedure, we would have filled out the findings worksheet . . . to return a finding of not guilty.

(J.A. 141–42, 148–50, 191.)

The Affidavit does not state that anyone, including the Senior Member himself, ever contested the Findings he announced as contrary to what the Panel eventually agreed upon. (J.A. 140.) Thus, the Affidavit and Appellant’s arguments instead implicate the panel’s voting procedures during deliberations, which—under *Brooks*, *Silagy*, and *Straight*—are prohibited absent “a claim of external influence.” *Brooks*, 42 M.J. at 485–87; *Silagy*, 905 F.2d at 1009; *Straight*, 42 M.J. at 249–50. Given that the Military Judge found no such evidence in this case and that his findings are not clearly erroneous, this Court should find the Military Judge did not abuse his discretion in denying Appellant’s Motion.

Further, Appellant’s final argument at trial that the Military Judge should “only consider the fact that a mistake was made and disregard anything about procedure in the affidavit under [Mil. R. Evid.] 606(b)(2)(C)” —repeated now in his assertion that he did not ask the Military Judge “to consider anything but the relevant, admissible portions of” the Affidavit—should be rejected. (J.A. 158; Appellant Br. at 12.) As Appellant admitted in his initial motion, “the procedure explains the mistake . . . [and] for a mistake to have been made, there has to be a

reason why.” (J.A.156.) Otherwise, Appellant asks this Court to take him at his word that the mistake that occurred, if any, qualifies for an exception to the prohibition against impeaching a verdict under the R.C.M.s and Mil. R. Evid. 606(b).

Thus, the Military Judge was correct when he reasoned that “[t]his is simply not a situation where the [F]indings were mistakenly annotated on the form, but rather a quest to determine how the members arrived at the [F]indings they did.” (J.A. 228.) His conclusions were not clearly erroneous when he found: (1) there was no evidence of extraneous prejudicial information improperly before the Members; (2) there was no evidence of unlawful command or outside influence; and (3) the Findings Worksheet was in proper form. As such, he had no grounds to find a clerical error under Mil. R. Evid. 606(b) or to impeach facially proper findings under R.C.M. 923. Neither his exclusion of the Affidavit as incompetent evidence nor his denial of Appellant’s Motion to enter a finding of not guilty was an abuse of discretion.

D. Appellant’s citation to the absurdity doctrine does not aid him as the United States could find no cases that support his interpretation of Mil. R. Evid. 606(b) or its federal counterpart.

The United States does not contest that this Court should only “depart from the plain language of [a] statute ‘if the absurdity . . . is so gross as to shock the general moral or common sense.’” (Appellant Br. at 9 (citing *United States v.*

McPherson, 81 M.J. 372 (C.A.A.F. 2021).) However, Appellant cited no case, other than *Dotson*, 817 F.2d, in support of his reading of Mil. R. Evid. 606(b)'s clerical error exception, and both the Military Judge and the United States demonstrated how even that case directly contradicts Appellant's reasoning for admitting the Senior Member's affidavit. See Section B.4. (Appellant Br. at 10–12.)

The United States could find no case from any military service court supporting Appellant's interpretation of the clerical error exception under Mil. R. Evid. 606(b).³

³ See *United States v. Lanzafame*, No. 201500227, 2016 CCA LEXIS 222 (N-M. Ct. Crim. App. Apr. 12, 2016) (affidavit implicating member's application of instructions the presumption of innocence not competent evidence); *United States v. Griffing*, No. 38443, 2015 CCA LEXIS 101 (A. F. Ct. Crim. App. Mar. 23, 2015) (affirming military judge's denial of mistrial motion alleging panel failure to follow military judge's instructions on reconsideration); *United States v. Daniels*, No. 38371, 2014 CCA LEXIS 769 (A. F. Ct. Crim. App. Oct. 14, 2014) (questioning court members about whether they followed instructions for reconsidering votes "specifically forbidden by Mil. R. Evid. 606(b)"); *United States v. Murray*, No. 20111120, 2014 CCA LEXIS 460 (A. Ct. Crim. App. Jul. 22, 2014) (affirming military judge's denial of inquiry into whether panel adhered to definitions); *United States v. Burgh*, No. 38207, 2014 CCA LEXIS 824 (A.F. Ct. Crim. App., Apr. 16, 2014) (declining to attach affidavit about member failure to follow instructions on accused right to remain silent); *United States v. Hollingsworthmata*, 72 M.J. 619 (Army Ct. Crim. App. 2012) (evidence about

Nor could the United States find a federal court adopting Appellant's interpretation of clerical error under Fed. R. Evid. 606(b).⁴

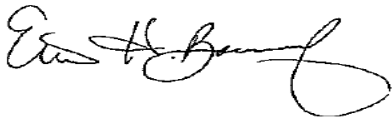
compliance with instructions on accused's right to remain silent not within exceptions to Mil. R. Evid. 606(b)).

⁴ See *Morris*, 570 Fed. Appx. at 151 (evidence of jurors' mistake in applying instructions prohibited because it did not indicate a transcription error or an inaccurate reflection of their will); *United States v. Diaz*, No. 21-179 SECTION "H", 2023 U.S. Dist. LEXIS 121205 (D. La. Jul. 14, 2023) (Fed. R. Evid. 606(b)(2)(C) did not apply where post-trial statements detailed issues leading to jurors' decision, not a transcription error or inaccurate reflection of their will); *United States v. Gibbs*, 570 F. Supp 3d 1096 (D. Okla. Nov. 8, 2021) (post-trial letter stating intent to convict on lesser offenses not evidence of clerical error because it concerned mental processes); *Wilkerson v. Univ. of N. Tex.*, No. 4:15-CV-00540, 2019 U.S. Dist. LEXIS 108485 (D. Tex. Jun. 28, 2019) (juror confusion over application of law and sympathy toward defendant not evidence of clerical mistake); *United States v. Temeck*, No. 1:17cr050, 2018 U.S. Dist. LEXIS 17446 (D. Ohio Feb. 2, 2018) (affidavit describing misunderstanding of polling process leading to guilty vote prohibited); *Baugh v. Wingate Inns Int'l, LLC*, No. 4:15-cv-00064 KGB, 2016 U.S. Dist. LEXIS 165227 (D. Ark. Nov. 30, 2016) (foreperson confusion over verdict form, percentages, and "gross versus net sums" was "incompetent and inadmissible" testimony); *Holland v. City of San Francisco*, No. C10-2603 TEH, 2013 U.S. Dist. LEXIS 179099 (D. Cal. Dec. 19, 2013) (clerical errors do not include juror misunderstanding of verdict consequences or court instructions); *Hitachi Med. Sys. Am. v. Branch*, No. 5:09CV01575, 2012 U.S. Dist. LEXIS 125629 (D. Ohio Sep. 5, 2012) (post-trial statements about confusion over how to apply legal standard prohibited); *Imperial Trading Co. v. Travelers Prop. Cas. Co. of Am.*, No. 06-4262 SECTION: R, 2009 U.S. Dist. LEXIS 88126 (D. La. Sep. 10, 2009) (clerical error exception meant for discovering whether error made in entering verdict onto form, not jury's potential failure to render

Thus, Appellant's arguments that not accepting the Senior Member's Affidavit or his broad interpretation of Mil. R. Evid. 606(b)(2)(C) requires this Court to apply the absurdity doctrine are inapt. (Appellant Br. at 7–9.) Appellant's failure to find any cases supporting his interpretation—and the voluminous number of cases in opposition to it—show how much his arguments are contrary to the plain language of the Rule. Thus, this Court should reject his request to deem the Senior Member's Affidavit competent evidence under a plain language reading of Mil. R. Evid. 606(b)(2)(C).

Conclusion

The United States respectfully requests this Court affirm the findings and sentence adjudged below.



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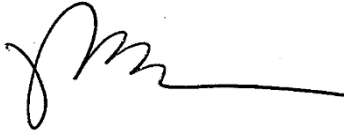


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unanimous verdict); *United States v. El Herman*, No. CR 04-4042-MWB, 2008 U.S. Dist. LEXIS 23726 (D. Iowa Mar. 25, 2008) (no exception under Fed. R. Evid. 606(b) allows impeaching verdicts absent showing of improper, external influence).

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I certify that this document was emailed to the Court's filing address, uploaded to the Court's case management system, and emailed to Appellate Defense Counsel, Captain Katherine MALCOLM, U.S. Marine Corps, on September 10, 2025.

A handwritten signature in black ink, reading "Mary Claire Finnen". The signature is written in a cursive, flowing style.

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