

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S ,)	BRIEF ON BEHALF OF APPELLANT
Appellee)	
)	
v.)	Crim. App. No. 20050703
)	
AARON R. STANLEY)	USCA Dkt. No. 11-0143/AR
Sergeant (E-5), U.S. Army)	
Appellant)	

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Index of Brief

Statement of Statutory Jurisdiction	1
Statement of the Case	2
Statement of Facts	3
Issue Presented:	
WHETHER THE MILITARY JUDGE'S INSTRUCTIONS ON SELF-DEFENSE INCORRECT AND INCOMPLETE, AND IF SO, DID THE LOWER COURT ERR IN CONCLUDING THAT THIS CONSTITUTED HARMLESS ERROR	28
Summary of Argument	28
Standard of Review	29
Argument	30
Conclusion	45

Table of Cases, Statutes, and Other Authorities

Cases

<u>Neder v. United States</u> , 527 U.S. 1 (1999)	29,44
<u>United States v. Cardwell</u> , 15 M.J. 124 (C.M.A. 1983)	30,32,35
<u>United States v. Dearing</u> , 63 M.J. 476 (C.A.A.F. 2006)	<i>passim</i>
<u>United States v. Hubbard</u> , 58 M.J. 71 (C.A.A.F. 2003)	30
<u>United States v. Lewis</u> , 65 M.J. 85 (C.A.A.F. 2006)	<i>passim</i>
<u>United States v. McDonald</u> , 57 M.J. 18 (C.A.A.F. 2002)	29,44
<u>United States v. Stanley</u> , No. 20050703 (Army Ct. Crim. App. Sept. 29, 2010)	<i>passim</i>
<u>United States v. Wells</u> , 52 M.J. 126 (C.A.A.F. 1999)	39
<u>United States v. Wolford</u> , 62 M.J. 418 (C.A.A.F. 2006)	29

Statutes

Article 66, UCMJ, 10 U.S.C. § 866	1
Article 67, UCMJ, 10 U.S.C. § 867	1
Article 81, UCMJ, 10 U.S.C. § 881	2
Article 86, UCMJ, 10 U.S.C. § 886	2
Article 92, UCMJ, 10 U.S.C. § 892	2
Article 112a, UCMJ, 10 U.S.C. § 912a	2
Article 118, UCMJ, 10 U.S.C. § 918	2
Article 134, UCMJ, 10 U.S.C. § 934	2

Other Authorities

Timothy Grammel, <u>Annual Review of Developments in Instructions - 2004</u> , Army Law., Apr. 2005	31
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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE ARMED FORCES

Issue Presented

WHETHER THE MILITARY JUDGE'S INSTRUCTIONS ON SELF-DEFENSE
WERE INCORRECT AND INCOMPLETE, AND IF SO, WHETHER THE
LOWER COURT ERRED IN CONCLUDING THAT THIS CONSTITUTED
HARMLESS ERROR.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals had jurisdiction over
this case pursuant to Article 66, Uniform Code of Military
Justice (UCMJ), 10 U.S.C. § 866. This Court has jurisdiction
over this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. §
867(a)(3).

Statement of the Case

Appellant was tried by general court-martial, officer and
enlisted members, on May 2, May 12, May 26, and June 6-11, 2005,
with a post-trial Article 39(a) session conducted on June 9,
2006. In accordance with his pleas, Appellant was found guilty
of one specification of wrongful possession of marijuana with

intent to distribute, one specification each of wrongful use and distribution of methamphetamines, one specification of unauthorized absence, one specification of violating an order, and one specification of adultery, in violation of Articles 112a, 86, 92, and 134, UCMJ, 10 U.S.C. §§ 912a, 886, 892, and 934. He was found not guilty of conspiracy to commit murder, charged as a violation of Article 81, UCMJ, 10 U.S.C. § 881. Contrary to his pleas, he was found guilty of two specifications of premeditated murder, in violation of Article 118, 10 U.S.C. § 918.

Appellant was sentenced to confinement for life without eligibility for parole (LWOP), a dishonorable discharge, reduction to E-1, forfeiture of all pay and allowances, and to a reprimand. With the exception of the reprimand, the convening authority approved the sentence as adjudged.

The Army Court of Criminal Appeals affirmed the findings and sentence. United States v. Stanley, No. 20050703 (Army Ct. Crim. App. September 29, 2010) (unpublished) (JA at 1-7). This Court granted the petition for review on May 1, 2008. United States v. Stanley, ____ M.J. ____, No. 11-0143/AR (C.A.A.F. Order, March 31, 2011).

Statement of Facts

On the night of September 13, 2004, Appellant, in the presence of SGT Eric Colvin, shot and killed SSG Matthew "Matt"

Werner and SPC Christopher Hymer at a rural farmhouse near Fort Riley, Kansas. Appellant testified that he shot SPC Hymer in self-defense after SPC Hymer fired a rifle at him and that he shot SSG Werner as SSG Werner, who had already sliced SGT Colvin's ear with a knife, was moving to stab SGT Colvin from behind. Sergeant Colvin, testifying pursuant to a pretrial agreement which required the government to dismiss murder charges against him, claimed that Appellant shot SPC Hymer as SPC Hymer lay face-down on the floor and then shot SSG Werner as SSG Werner lay on his back in another room.

Appellant, SPC Hymer, SSG Werner, and SGT Colvin were Iraq combat veterans stationed together at Fort Riley. JA at 88, 181. Appellant shared a barracks room with SPC Hymer but leased a rural off-post farmhouse where he manufactured methamphetamines (meth) and dried marijuana. JA at 89, 181-82, 196, 464-65; Pros. Ex. 39 and 40¹ (JA at 742 and 752). Specialist Hymer and SSG Werner received free drugs in exchange for buying supplies and for SPC Hymer helping to cook the meth. JA at 182, 187.

In the weeks leading up to the shootings, SSG Werner, his wife Kristen, and the other three soldiers regularly used meth.

¹Pros. Ex. 40 (JA at 752) is a detailed floor plan of the farmhouse.

JA at 89-90. According to Kristen, her husband's use and SPC Hymer's use had been increasing in the period leading up to September 12, 2004. JA at 90.

Kristen and all four soldiers used meth at the farmhouse on the afternoon of Sunday, September 12, 2004. JA at 91. Kristen, her husband, and SPC Hymer headed back to the Werners' quarters at Fort Riley in the late afternoon. Id. Appellant and SGT Colvin joined them around 2100. Id. A few hours later SGT Colvin drove Appellant, Kristen, and Kristen's friend Debbie Pipes to the farmhouse, where they used meth. JA at 92-93, 194. Staff Sergeant Werner, however, remained at his quarters to babysit. JA at 93. After driving the two women back to Fort Riley around 0430, Appellant stood outside SSG Werner's quarters talking to SSG Werner for about an hour. JA at 94, 196. Kristen testified that afterwards, her husband acted "very distant" and seemed angry with her. JA at 93-95.

Appellant assumed duty as CQ at the HHC barracks at 0900, Monday, September 13, 2004. JA at 109, 461. However, he went out to the farmhouse shortly after assuming duty, used meth around 1130, and did not return to the barracks until late afternoon, when he and SGT Colvin came back with food in a Burger King bag. JA at 109, 196-97, 424-25, 507. Throughout the day, SSG Werner repeatedly accused Kristen, who had gone back out to the farmhouse with her friend Debbie, of sleeping

with Appellant, whom he threatened to kill. JA at 96, 101, 815. Staff Sergeant Werner, who had a cast on his right hand, hit Kristen after she returned home that afternoon, and kicked her in her thigh, which left a red footprint that was turning blue by the time Appellant saw it at the barracks a short while later. JA at 89, 104-05, 107, 815.

Appellant and SGT Colvin arrived back at the barracks around 1600. JA at 196. Sergeant Colvin went to his room, where he received a phone call from SSG Werner, who sounded upset. JA at 197. Staff Sergeant Werner threatened to kill both Appellant and SGT Colvin, and told SGT Colvin that he wanted to "bite a chunk of flesh" out of his face. JA at 248. Staff Sergeant Werner had left multiple messages on the answering machine in SGT Colvin's room. A transcript of these messages follows:

Mon 3:44 PM: Hey, . . . Dick. Where are you motherfuckers at? You didn't come by my house. I ain't going to stop looking for you, you little bastards. Hey, take a good look in the mirror because it's the last good look you're gonna get.

Mon 3:51 PM: Hey, we're on our way out to the farm, man. Be ready!

Mon 4:00 PM: Why ain't you answering your phone, man? Are you scared? You should be. I'm coming out there. Be ready. I hope you are. Take up your little fort positions. I'm coming in.

Mon 4:04 PM: Hey, we are about there. You need to answer your phone and let us know if we are going to do this like men or like boys. Peace.

Mon 4:49 PM: Get my son out of the house. We'll be there real soon. If you don't get my son out of the house, my brothers in the Mafia are going to go after your motherfucking family. So get my son out of that house and then it's going to go down.

Mon 4:58 PM: Hey, you've got two choices. Meet us down at the end of the road, the dirt road, or I'll come down with the motherfucking cops. Ain't no sneak attack, boys. We are going men on men. It's your fucking choice. My wife don't want to give me a call. All right. We are going to . . . it up. Have a good time. I'll see you at the end of the road by Milford.

Def. Ex. D (JA at 812); JA at 252-55. Sergeant Colvin initially testified that he listened to his answering machine when he returned to his room, but subsequently claimed that he never heard these messages until his attorney played them for him. JA at 197, 296-97. He also claimed that he had never set the date and time function on his answering machine, although the day of the week (Monday) was correct. JA at 297.

Appellant testified that he went to SGT Colvin's room after 1700, at which point SGT Colvin told him that SSG Werner thought that both Appellant and SGT Colvin had been sleeping with his wife. JA at 425. Appellant did not take SSG Werner's allegation seriously and "kind of blew it off" until SGT Colvin played the answering machine for him. JA at 425, 455. He recalled words in one message to the effect of "Have fun with my wife, Dick." JA at 425.

Staff Sergeant Werner also called Appellant directly, accusing Appellant of sleeping with Kristen and threatening to kill him. JA at 255, 426. Staff Sergeant Werner was "extremely angry," "very excitable," and spoke in a rapid voice. JA at 426. Even though Appellant repeatedly denied having slept with Kristen, SSG Werner told Appellant that he was armed and that Appellant should come over to SSG Werner's house and bring a "piece" with him; Appellant responded that he was not going to come over simply to get shot in the front yard. JA at 426-28, 530. When SSG Werner threatened to come to the barracks and cut a chunk out of Appellant's face, Appellant told him he could come out to the farmhouse to handle it. JA at 198. Appellant thought SSG Werner was "flippin' out" and took his threats as "extremely real." JA at 428. He took SSG Werner's comments as a legitimate threat and discussed the situation with another soldier, SPC Robinson, after he got off the phone with SSG Werner. JA at 429. Staff Sergeant Werner had told Appellant that he had a gun, and Appellant knew that SPC Hymer had a 9mm pistol that was pawned but could be retrieved for only \$90. JA at 435. Appellant believed that SSG Werner was going to hunt him down that night, no matter what. JA at 435, 516.

At that point one of the CQ runners came to SGT Colvin's room to advise Appellant that he had a call on the CQ phone. JA at 429. The caller was Kristen Werner, who was hysterical and

crying as she told Appellant that her husband was going to kill her and kill Appellant because he thought they were sleeping together. JA at 430. She told Appellant that SSG Werner had beat up SPC Hymer, which added to Appellant's belief that SSG Werner was "crazy," because SPC Hymer was SSG Werner's best friend. Id. Kristen told Appellant that she wanted to come speak with him at the barracks. JA at 431. She showed up within the hour. Id.

After speaking with Kristen, Appellant returned to SGT Colvin's room and saw that SGT Colvin was on the phone with SPC Hymer. JA at 199, 431. After SGT Colvin handed the phone to Appellant, SPC Hymer confirmed to Appellant that SSG Werner thought Appellant was sleeping with Kristen. JA at 432-33. In the background, Appellant could hear SSG Werner screaming, "I'm going to fucking kill him. He's fucking dead." Id. Staff Sergeant Werner then got on the phone with Appellant and told him that he was going to kill him and that Appellant needed to come over to his house and "handle it like a man." Id. Appellant replied, "I already told you before - I'm not coming over there and getting shot in your front yard." Id. Upon hearing that again, SSG Werner told Appellant, "Well, if you won't come over here, then I'm going to call the cops and tell them everything that you have out at your house." JA at 434.

In an effort to defuse the situation, Appellant told SSG Werner that he had CQ and could not leave the barracks. JA at 434. Staff Sergeant Werner again told Appellant that he was going to call the cops to the farmhouse if he did not go to SSG Werner's quarters. Id.

When he got off the phone, Appellant told SGT Colvin that SSG Werner was going to call the cops on the drugs at the farmhouse. JA at 1253. Appellant asked SGT Colvin whether he thought they ought to go try to talk to SSG Werner. Id. Sergeant Colvin told Appellant that it was not a good idea and that they would get shot if they went over to SSG Werner's house. Id. Instead, Appellant and SGT Colvin decided to go to the farm to get rid of the drugs. JA at 199, 257, 435. There was never any conspiracy or agreement between the two to kill either SSG Werner or SPC Hymer. JA at 256. According to SGT Colvin, SSG Werner's issue at that point was not drugs, but rather SSG Werner's suspicion that Appellant had been sleeping with Kristen. JA at 257-58.

Appellant and SPC Robinson walked out to SGT Colvin's truck. JA at 174. They saw Kristen Werner, who told Appellant that her husband was "freaking out, enraged" because he thought they were having an affair. JA at 97-99, 104, 109, 176, 535. Specialist Robinson thought Kristen looked angry and scared, and Appellant thought she was hysterical. JA at 176, 436. She told

Appellant that her husband had hit her because he was "irate." JA at 100, 104. Staff Sergeant Werner had hit or slapped her in her head, and had kicked her. JA at 89, 104, 107. She was wearing shorts, which revealed a footprint (a red spot already turning into a large bruise) on her leg where her husband had kicked her on her thigh. JA at 99-100, 104-05, 177-78, 436; Def. Ex. U (JA at 815). Kristen described SSG Werner as "freaking out" and stated that he had threatened to kill her and Appellant. JA at 436. At that point, Kristen's cell phone rang and she yelled into the phone, "I didn't sleep with him, I didn't sleep with him." JA at 437. Appellant assumed she was talking to SSG Werner. Id.

Kristen wanted Appellant to speak with her husband and "fix" things because the allegation was not true and because Appellant was friends with SSG Werner. JA at 97, 108. She pleaded with Appellant to go to her house because her husband was killing her cats in front of her son Brandon. JA at 437. Appellant told her that they could do nothing for the cats, that he was not going over to her house, and that they were going to the farmhouse. Id.

Specialist Robinson claimed that at some point before Appellant drove off with SGT Colvin, Appellant pulled a pistol from in between the seats of the pick-up truck. JA at 174. Appellant testified that SGT Colvin always kept guns in his

truck, and that Appellant drove SGT Colvin's truck "a lot." JA at 485, 516.

Nicole Lewis, who knew both SSG Werner and SPC Hymer, saw the two men at SSG Werner's house and then followed them to the shoppette so that Nicole could pay for gas for SSG Werner's car. JA at 397. She believed that the two men were only going out to the farmhouse so that SSG Werner could ask Appellant if he had slept with Kristen. Id. However SPC Hymer told her that he did not know what would happen at the farmhouse, and that she could not go with them. Id. Specialist Hymer gave her his dog tags, kissed her on the cheek, and told her to know that he loved her "if something happened." Id.

Staff Sergeant Werner called his wife and left a series of threatening messages on her cell phone, including a warning that "the drug man's going down," that if she got caught in the middle, she would be "going down too," and that "someone's gonna get shot - I hope it's me." Def. Ex. C (JA at 811); JA at 103. These messages were played for the panel to show SSG Werner's state of mind and intent at the time he left the messages, which was during a period from 1938 until 2058 that night. JA at 102. Before going to the farmhouse, SSG Werner tried to borrow a weapon from one of the sergeants in his squad, but the sergeant refused. JA at 384-87, 390.

When Appellant and SGT Colvin got to the farmhouse, which was after 2100, they pulled the truck around the back in the hope that SSG Werner would not see it and thus assume they weren't there. JA at 200, 258, 438-39. Once inside, Appellant started to gather up marijuana that he had around the house. JA at 439.

Appellant heard a car come flying up the driveway and then screaming outside. JA at 440. Staff Sergeant Werner and SPC Hymer came onto the back porch and tried to get into the farmhouse. JA at 441. Sergeant Colvin, who was carrying his sniper rifle, saw SPC Hymer trying to take the chain off the door. JA at 206, 412. When SPC Hymer told SGT Colvin that he and SSG Werner did not have a gun, SGT Colvin let them in. JA at 206-07. Sergeant Colvin then set down his rifle near the kitchen doorway to the pantry, which was close to the porch door. JA at 206; Pros. Ex. 40 (JA at 752).

Meanwhile, Appellant, thinking that SSG Werner and SPC Hymer had not seen the truck, had gone into the weight room closet to hide. JA at 443, 477. Believing that SSG Werner and SPC Hymer would have guns, he armed himself with SGT Colvin's .22 pistol. JA at 433, 539. Appellant heard SSG Werner scream at SGT Colvin to put down the gun (which he apparently did) and ask, "Where the fuck is Stan?" JA at 442. Sergeant Colvin told SSG Werner that Appellant had taken the truck to town. Id.

Staff Sergeant Werner told SGT Colvin that they had "fucked up big time" because both of them had "fucked" his wife, which SGT Colvin denied. JA at 277, 310. Staff Sergeant Werner punched SGT Colvin in the head, and when SGT Colvin hit back, SSG Werner grabbed a knife off the stove and stabbed at SGT Colvin's head, splitting SGT Colvin's left ear in two. JA at 207-08, 259, 310-11. He bit SGT Colvin and struck him repeatedly to the point where SGT Colvin believed that SSG Werner was "unstoppable." JA at 259-260, 271. Sergeant Colvin wrestled SSG Werner to the ground to try and get the knife, and struck him in the face. JA at 209-10. Specialist Hymer came over and kicked SGT Colvin in the head to get him off SSG Werner. Id. Appellant heard SGT Colvin call for him, which apparently tipped off SPC Hymer that Appellant was in the farmhouse. JA at 445. Peering from the closet, Appellant could see SPC Hymer walk by with something black in his hand, which Appellant thought was a gun. JA at 444-45. Appellant jumped out of the closet, pointed the pistol at SPC Hymer, and, still believing that SPC Hymer was armed, moved him into the kitchen at gunpoint. JA at 211, 446.

Sergeant Colvin and SSG Werner continued to fight on the floor over the knife. JA at 211, 446. Sergeant Colvin's head was bleeding, and he screamed at Appellant, "He fucking stabbed me, he fucking stabbed me." JA at 446. Appellant yelled at everyone "Don't move" and told SPC Hymer to get down on the

floor. Id. Sergeant Colvin told Appellant to check the other two men for weapons, and urged Appellant to shoot SSG Werner in the hands because he had stabbed SGT Colvin. JA at 447.

Appellant found no weapons on SPC Hymer. JA at 214, 448, 479, 508. Appellant yelled at SSG Werner, "I didn't fuck your wife" but SSG Werner tried to spit at him and said, "Fuck you, fuck you, I'm going to fucking kill you." JA at 448. Staff Sergeant Werner had repeatedly told SGT Colvin that he had a gun in his waistline, which SGT Colvin relayed to Appellant, who went to check SSG Werner for weapons. JA at 226, 449, 507, 540. Sergeant Colvin, who was angled over the top of SSG Werner, testified that he had wrested the knife from SSG Werner and had thrown it towards the entrance to the dining room. JA at 215. As Appellant leaned over, SSG Werner kicked him, and Appellant responded by pulling SSG Werner's sweatpants off. JA at 215, 449, 479-80, 525-27.

While still searching SSG Werner, Appellant had his back to SPC Hymer. JA at 449, 480, 525. He turned when he heard a commotion behind him, and saw SPC Hymer coming at him, trying to pull the trigger of an 8mm Mauser rifle that had been propped near the entrance to the dining room. JA at 217, 450, 504. Appellant and SGT Colvin each believed that he was the target as SPC Hymer pulled the trigger; however, the weapon did not fire because there was no round in the chamber. JA at 218, 450.

Specialist Hymer ran towards Appellant and put a round in the chamber. JA at 218. 450, 486, 505, 58. Appellant tried to grab the rifle but SPC Hymer jerked it away, and Appellant ran out the door, taking a hard left when he entered the porch. JA at 450-51. He heard a "big blast" just as SPC Hymer fired at him, and over his right shoulder he saw a burst of muzzle fire. JA at 451, 498, 521.

Believing that SPC Hymer was trying to "jack" another round in the rifle and trying to kill him, Appellant ran back into the kitchen while firing the .22 pistol at SPC Hymer. JA at 221, 451-52, 458, 521-22, 529, 532. He had no recollection of how many times he fired but knew that he fired until SPC Hymer "went down." JA at 452, 504-05, 522. According to Appellant, this series of events unwound "extremely fast" and in a "split second." JA at 453. Sergeant Colvin testified that SPC Hymer fell face down just inside the living room and that Appellant stood over SPC Hymer and fired two more rounds into SPC Hymer, after which Appellant said, "He's fucking dead, he's dead." JA at 222-23, 306. Sergeant Colvin admitted, however, that he had not mentioned this "final two shot" claim shortly before trial, meaning that he had not provided that information in an interview with law enforcement agents within hours of the shootings; to trial counsel in a taped interview in February 2005; or to the defense in five-hour interview conducted the

week before SGT Colvin testified. JA at 268-69. In fact, he only revealed the "final two shots" theory to the government's crime scene analyst on approximately May 26, 2005, after signing a pretrial agreement a few days earlier, and he only revealed it to the trial counsel in early June, about a week before testifying. JA at 269, 306, 340. According to SGT Colvin, he waited until this point to relay the "two shot" theory because it was the first time he had been asked to relay the exact sequence of events. JA at 306.

Appellant testified that as he walked over to SPC Hymer, he heard SGT Colvin yelling, "No, Hymer." JA at 453, 494, 509, 529. Appellant looked over at SGT Colvin, who was on his knees, and saw SSG Werner, on either one or both knees, closing in on SGT Colvin, who was on his knees, and about to stab SGT Colvin in the back with a knife that he was holding in his left hand. JA at 453-54, 458, 490, 494, 512, 529, 531, 537-38. Sergeant Colvin was unaware that SSG Werner was trying to stab him, and Appellant, believing that SSG Werner was trying to kill SGT Colvin, shot SSG Werner. JA at 454, 458, 469-70, 510, 512-14. Appellant, who was adamant that SSG Werner was not on the ground when he shot him, did not remember how many times he fired at SSG Werner, but he did see SSG Werner fall backwards as he was being shot. JA at 455, 469, 490.

Sergeant Colvin, however, claimed that after shooting SPC Hymer, Appellant walked back into the kitchen and stood at the feet of SSG Werner, who was laying on his back with his hands up on either side of his face saying, "Please, man." JA at 225, 240, 301. According to SGT Colvin, Appellant told SSG Werner, "I didn't fuck your wife and now you are going to die" and then fired approximately four shots from waist-high down at SSG Werner. JA at 224, 240, 261, 277. Sergeant Colvin claimed that for the final shot, Appellant stepped forward, brought the pistol down to his knee level to where the muzzle was about two feet from SSG Werner, and then shot down almost directly into SSG Werner's face. JA at 237, 261-62. Sergeant Colvin claimed that SSG Werner's head was propped up when he was shot, but again admitted that he never provided this detail to the law enforcement officers who interviewed him immediately after the shootings, to trial counsel during an audio-taped interview almost four months before trial, or to defense counsel a week before trial; in fact, SGT Colvin never mentioned it to trial counsel until a week before he testified at Appellant's court-martial. JA at 265-67.

Appellant was unable to call 911 from the farmhouse because there was no landline, so he ran out to SGT Colvin's truck and drove it to a convenience store, where he called 911, provided his name and address, and said he needed two ambulances because

he had just shot two people. JA at 229, 456. Once back at the farmhouse, he saw an off-duty law enforcement officer. JA at 456. Appellant ran up to him, asked if he was a sheriff, and told him that he needed help. Id. The law enforcement officer, who was a reserve deputy, testified that Appellant admitted shooting two men in the farmhouse. JA at 162, 456-57.

While Appellant was off getting help, SGT Colvin picked up SSG Werner's head and cradled him in his arms; SSG Werner died as SGT Colvin tried to wipe the wound in SSG Werner's neck. JA at 229. After hearing his name called, SGT Colvin went over to SPC Hymer. Id. Sergeant Colvin dragged SPC Hymer from the living room, through the dining room and kitchen, and out to SSG Werner's car. JA at 229-30. He drove to the same convenience store that Appellant had just left. JA at 414.² The sheriff and an ambulance arrived at the store within seconds of each other. JA at 416. The sheriff said that SGT Colvin was speaking in "babbling, incoherent, incomplete sentences," and that his demeanor was consistent with someone who was high on meth. JA at 414-19.

A deputy took custody of Appellant at the farmhouse and read him his Miranda rights, after which Appellant repeatedly

²The lower court stated that SGT Colvin "rushed" SPC Hymer to a hospital where he died that night after surgery. Stanley at 4 (JA at 4). This is not supported by the record because SGT Colvin only transported SPC Hymer to the convenience store, where he was transferred to an ambulance. JA at 416.

stated that he had shot two people, including one named "Matt." JA at 84-87. Appellant was formally interrogated starting around 2330 that night. JA at 471. He told the interviewing agent that SPC Hymer had grabbed a rifle and had shot at him, and that he had shot SPC Hymer. JA at 495-96. He also told the agent that SSG Werner was about to stab SGT Colvin from behind. JA at 496.

Sergeant Colvin initially declined to speak with law enforcement agents because he was high on meth and had been up for several days. JA at 263, 265. When he was interviewed a few hours later, he stated repeatedly that Appellant had shot SPC Hymer in self-defense and that SSG Werner had gone for an imaginary gun in his pocket. JA at 263-65, 268, 273. He admitted at trial that he had lied to law enforcement agents during this interview about details such as Appellant going out into the woods at the farmhouse before the other two soldiers arrived. JA at 273. He admitted that he had been diagnosed with PTSD, had blackouts, and sometimes zoned out and forgot where he was. Id. He admitted that he had problems with his memory. JA at 276. At times he thought that people were reading his mind, that the Army was bugging his phone, and that he thought he was being followed. JA at 276-77.

As other law enforcement officers arrived at the farmhouse, one of them intentionally shot a Rottweiler that Appellant kept

at the farmhouse. JA at 309, 543. The dog was not in the house at the time of the shootings but would have been able to enter if a door had been left open. JA at 544. The dog, who was inside the house at the time he was shot, walked into the living room, and was still alive when the police entered hours later. JA at 148, 162-64, 168, 170, 172, 309. The crime scene was further contaminated when the police released their own dog to "clear" the house before the police themselves entered. JA at 164-65.

Staff Sergeant Werner's body was found face-up in the kitchen. Pros. Ex. 36 (JA at 741). A total of thirteen .22 casings were found in the house (five in the kitchen, three in the dining room, and five in the living room), although law enforcement agents could not tell if all of those casings were related to the alleged murders.³ JA at 118-122, 147; Pros. Ex. 43-51 (JA at 754-762). The primary agent conducting the search acknowledged that casings can bounce off walls or floors, and can be disturbed by people's movements. JA at 148. He confirmed that no bullet holes were found in the carpet. JA at 149.

The agents found a total of six knives in the kitchen area, including a "long bread-type knife" found on the floor in the

³The maximum capacity of the .22 pistol was 11 rounds: 10 in the magazine and 1 in the chamber. JA at 335.

doorway between the kitchen and dining room and two knives on the floor of the entryway between the pantry and the kitchen. JA at 150, 153-155, 159-60. There were three bullet holes in the walls in the dining room. JA at 129. Sergeant Colvin's sniper rifle was found on the porch, and a .22 caliber handgun and black sap were found on the kitchen counter. JA at 124-25, 142-43. A 7.62 caliber rifle containing a spent casing in the chamber and three live rounds in the magazine was found in the corner of the living room near where SPC Hymer had fallen. JA at 126, 130, 141, 149. A 7.62 caliber bullet hole was found in the door frame of the kitchen and the bullet itself was found outside on the ground. JA at 157-58, 161.

Dr. Donald Pojman, the deputy county coroner, conducted autopsies on both SSG Werner and SPC Hymer. JA at 41, 67-68. A toxicologist who reviewed the post-mortem level of methamphetamines in SSG Werner's blood testified that the level was so high as to cause hallucinations, paranoia, irrational behavior, or death. JA at 391-93. Dr. Pojman produced diagrams depicting the various entry and exit wounds on both bodies, although he was careful to note that his diagrams were only guidelines and that his depictions of trajectory were only approximates and not exact angles in any way. Pros. Ex. 91 and 93 (JA at 779 and 780); JA at 51.

The following table, compiled from Dr. Pojman's testimony,⁴ summarizes Dr. Pojman's findings as to SSG Werner's gunshot wounds:

Code	Location	Type	DOT1	DOT2	DOT3
B1	Face: left side Traveled only an inch or two in direction	Penetrating: Fragments recovered from jaw and mouth	Left to right	Slight front to back	"Hard to say" whether upwards or downwards
A1	Face: left ear canal – strikes flesh at ear, and reenters; travels under skin over skull	Perforating: entrance			
A2	Exit of A1				
C1	Left jaw line – travels within tissue and exits at back of head	Perforating: entrance	Left to right	Front to back	Upward
C2	Exit of "C"				
D1	Neck just over left shoulder; recovered in the body	Penetrating: Bullet recovered from right upper back muscle	Left to right	Slight front to back	Slight downward
E3	Over left nipple – went through left lung and lodged near spinal cord; recovered in body	Penetrating – possible re-entry of bullet in F1 and F2	Left to right	Front to back	Slight upward, depending on whether inhaling or exhaling
F1	Back of left forearm	Perforating: entrance			
F2	Inside left forearm: Exit of F1				

The gunshot wound that killed SGT Werner was the one that penetrated his chest, because it struck his left lung and punctured his aorta. JA at 64. Dr. Pojman noted bruising on

⁴ See JA 52-62.

the lip and on the mouth was consistent with being punched in the face shortly before death. JA at 65-66.

The following table, compiled from Dr. Pojman's testimony,⁵ summarizes Dr. Pojman's findings as to SPC Hymer's wounds:

Code	Location	Type	DOT1	DOT2	DOT3
G1	Upper back thigh just below buttocks; recovered on outer aspect of right thigh	Penetrating	Left to right	No appreciable front-to-back Angle	Slightly downward
A1	Near left ear; two large fragments recovered within head region	Penetrating	Left to right	Slight front-to-back	No reference to up and down movement
B1	Left side of neck; traveled one inch at most and did not strike either jugular or carotid artery (removed during surgery).	Penetrating but no round recovered during autopsy; believed to be re-entry from E1 or F1	Depicted left to right		
D1	Back of left upper arm/left shoulder	Perforating	Left to right	Back to front	"small upward component"
D2	Beneath left collarbone	Exit of D1	Left to right	Front to back	Upward
E1	Back of left forearm and wrist	Perforating	Back of the forearm to the front of the forearm		
F1	Back of left forearm and wrist	Perforating	Back of the forearm to the front of the forearm		Slight downward
E2	Front of left forearm and wrist	Exit of E1		Front to back	Slight upward, depending on whether inhaling or exhaling
F2	Front of left forearm and wrist	Exit of F1			
C1	Upper left arm just beneath shoulder; bullet travels only an inch or two	Perforating		Back to front	

⁵ See JA at 70-81.

C2	Upper left arm	Exit of C1			
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Dr. Pojman testified that it was possible that some of SPC Hymer's wounds were reentry wounds, including the shot on the side of the neck. JA at 78-81. There were three penetrating shots, with the remaining wounds dependent upon manipulation of the body possibly causing one shot to make three wounds. JA at 82. In sum, SPC Hymer could have received as many as seven distinct shots or as few as three. JA at 83.

Both sides called an expert crime scene analyst to testify at trial as to the overall crime scene forensics. The government's expert, Alexander Jason, testified that the forensics were consistent with SGT Colvin's narrative of events, although he clarified that he was not called upon to test any variables other than SGT Colvin's version. JA at 33-37, 342-43, 372-73. He admitted that there were no bullet holes under either SSG Werner or SPC Hymer, although SGT Colvin claimed that Appellant shot down at both of them while they were on the floor. JA at 374. He also testified that SGT Colvin had told him that the knife he threw near the doorway was black, when in fact the knife recovered from that location had a wooden handle. JA at 345.

The defense expert was James Pex, former director of a state crime laboratory and a board-certified forensic scientist.

JA at 559. Mr. Pex expressed his concerns over the contamination of the crime scene, noting the dog that had been shot and then moved around the house bleeding. JA at 565-66. Given SGT Colvin's claim that he dragged SPC Hymer's body through the kitchen doorway, Mr. Pex did not know how a knife in the doorway would not have been disturbed by the body drag. JA at 566-67. Unlike the government's expert, he discussed possible variables in SSG Werner's position at the time of the shooting. JA at 575, 581-83. He noted that there was no physical evidence, such as powder particles, lead fragments, or stippling, to support SGT Colvin's claim that Appellant fired two shots into SPC Hymer's back from close range. JA at 567. Nor did he see gunpowder particulates or stippling on SSG Werner, although he would have expected to see at least some gunpowder particulate if the gun was fired as close to SSG Werner as SGT Colvin claimed. JA at 596, 613.

Sergeant Colvin was himself charged with two specifications of murder, conspiracy to commit murder, and various drug charges. JA at 277. At SGT Colvin's Article 32 hearing in February 2005, the prosecution painted SGT Colvin as the "mastermind" behind Appellant's actions. JA at 278, 289. Sergeant Colvin wrote a letter shortly after the Article 32 hearing stating that the government's "mastermind" argument had "put the fear" in him, that the prosecutors were pushing for

life, and that he was "wiggin' out" because they thought he planned the whole thing. JA at 287. He wrote that no one believed that "any of this was self-defense." JA at 288-09, 305. Yet while in pre-trial confinement, he told a cellmate that Appellant acted in self-defense and had basically saved him because "the guy had a knife and he tried to stab him, and that's when Stanley did what he did." JA at 401. Two months later he told another detainee, "In my eyes, I'm fucked." JA at 399-400. During the 5-hour interview with defense counsel a week before he testified, SGT Colvin described the government's story as a "far stretch" but claimed the government continued to let him know that they had him "by his balls." JA at 406. He testified that if the prosecution got a good conviction on Appellant, they would probably "go easy" on him. JA at 291, 406. He admitted that he felt "the pressure to do a good job" when he testified. JA at 291-92.

The defense provided notice that they intended to raise self-defense. JA at 23. Both parties requested that the military judge give a pre-voir dire instruction to the panel on self-defense. JA at 24-29. Included in that instruction was language that a mutual combatant was not entitled to self-defense unless he previously withdrew in good faith. JA at 27. During voir dire, the government elicited the agreement of the

panel members that a mutual combatant loses his right to self-defense. JA at 30.

During closing arguments, the prosecution repeatedly stressed that mutual combatants cannot avail themselves of self-defense. As to the killing of SSG Werner, the trial counsel argued:

What the government wants you to remember about the defense of others and self-defense - they are both the same in terms of this - is that there is no self-defense for mutual combatants. And today the military judge read you some instructions on that. Specifically he said, "A person who intentionally provokes an attack up on himself or voluntarily engages in mutual fighting is not entitled to self-defense, unless he previously withdrew.

JA at 670-71.

Now, he [SGT Stanley] can regain that right to self-defense if he withdraws. But Members of the Panel, he never withdrew. . . . Now, Sergeant Colvin, there might be an argument that Sergeant Colvin put his .308 rifle down. But he didn't put his .308 rifle down to stop the fight. What he did is he went from an armed conflict to a fistfight. Still mutual combat because they went to blows very soon after that, both of them. Not withdrawing at all. And Sergeant Stanley is certainly not withdrawing. All he's done is hide, with his weapon. And at the appropriate time, he came out, with his weapon. So even if you think that maybe Sergeant Colvin might have withdrawn, Sergeant Stanley never withdrew. There is not right to self-defense. And that applies equally to both murders.

JA at 672-73.

So, self-defense - there's no self-defense for mutual combatants. The government believes they were mutual combatants.

JA at 681.

As to the killing of SPC Hymer, the trial counsel argued:

Once again, the government goes back to the two things we'd like you to remember: There's no self-defense for mutual combatants. And all the things that apply to Sergeant Werner with regards to being a mutual combatant apply to Specialist Hymer too. . . . Specialist Hymer was acting out of defense of another. Mutual affray going on. No right to self-defense.

JA at 685.

I mean heaven forbid that Mr. Jason would get enough evidence to say that it would be consistent with Sergeant Colvin's story that the accused put at least two into Specialist Hymer right here by the armchair. How does that rise up to self-defense? Well, the government doesn't believe that there is self-defense for mutual combatants - and he's a mutual combatant.

JA at 691-92.

Other facts necessary for resolution of the assigned errors are set forth *infra*.

Issue Presented

WHETHER THE MILITARY JUDGE'S INSTRUCTIONS ON SELF-DEFENSE WERE INCORRECT AND INCOMPLETE, AND IF SO, WHETHER THE LOWER COURT ERRED IN CONCLUDING THAT THIS CONSTITUTED HARMLESS ERROR.

Summary of Argument

The military judge's instructions were incorrect and incomplete because they failed to advise the panel that a mutual combatant does not lose his right to claim self-defense if the opposing party escalates the conflict or if he is unable to withdraw in good faith. The lower court declined to rule on whether the instructions were erroneous, finding that if there had been error, it was harmless beyond a reasonable doubt.

However, the lower court improperly conducted its harmlessness analysis because it gave undue weight, *inter alia*, to credibility issues and the ultimate verdict, which in turn contributed to the lower court's erroneous holding that the instructional error was harmless beyond a reasonable doubt. Given the nature of the evidence in this fiercely-contested case, it is not clear beyond a reasonable doubt that a rational panel would have found Appellant guilty in the absence of the instructional error.

Standard of Review

The adequacy of a military judge's instructions is reviewed *de novo*. United States v. Dearing, 63 M.J. 478, 482 (C.A.A.F. 2006) (internal citations omitted). Given the "constitutional dimensions at play," if instructional error is found, then reviewing courts must apply a harmless error analysis. Id., citing United States v. Wolford, 62 M.J. 418 (C.A.A.F. 2006). "The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence." Wolford, 62 M.J. at 420. Another way of stating the test is to inquire if the government has shown it "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?"

United States v. McDonald, 57 M.J. 18, 20 (C.A.A.F. 2002),
citing Neder v. United States, 527 U.S. 1 (1999).

Argument

A military judge, while instructing on findings, must include a description of any special defenses, including self-defense, in issue under R.C.M. 916. R.C.M. 920(e)(3). A military judge is required to instruct the panel on affirmative defenses "if the JA contains some evidence to which the military jury may attach credit if it so desires." United States v. Hubbard, 58 M.J. 71, 72 (C.A.A.F. 2003).

It was apparent from early in Appellant's case that the defense intended to rely on a defense of self-defense. The defense provided notice of the defense, and both sides requested that the military judge provide an instruction of self-defense at the start of voir dire. Prior to deliberations, the military judge advised the panel that self-defense was a complete defense to premeditated murder and its lesser-included offenses of unpremeditated murder and voluntary manslaughter. He defined the objective and subjective prongs of the defense, and instructed the panel that a mutual combatant could not avail himself of the defense unless he previously withdrew in good

faith. JA at 1526. As to mutual combat, the military judge⁶ specifically instructed, prior to deliberations, as follows:

There exists evidence in this case that the accused may have been a person who intentionally provoked the incident or was a person who voluntarily engaged in mutual fighting. A person who intentionally provoked an attack upon himself or voluntarily engaged in mutual fighting is not entitled to self-defense unless he previously withdrew in good faith. A person has provoked an attack, and therefore given up the right to self-defense if he willingly and knowingly does some act toward the other person reasonably calculated and intended to lead to a fight or a deadly conflict. . . .

The burden of proof on this issue is on the prosecution. If you are convinced beyond a reasonable doubt that the accused intentionally provoked an attack upon himself so that he could respond by injuring or killing Specialist Christopher Hymer or Staff Sergeant Matthew Werner, or that the accused voluntarily engaged in mutual fighting, then you have found that the accused gave up the right to self-defense. However, if you have a reasonable doubt that the accused intentionally provoked an attack upon himself or voluntarily engaged in mutual fighting then you must conclude that the accused retained the right to self-defense, and then, you must determine if the accused actually did act in self-defense.

Even if you find that the accused intentionally provoked an attack upon himself or voluntarily engaged in mutual fighting, if the accused later

⁶The military judge in this case is the same one whom this Court cited in denying the government's petition for reconsideration in Dearing. "We also note that Cardwell . . . continues to be cited as a valid precedent in the literature. See, e.g., Timothy Grammel, Annual Review of Developments in Instructions - 2004, Army Law., Apr. 2005, at 35 n. 113." United States v. Dearing, 64 M.J. 316 (C.A.A.F. 2006) (order denying petition for reconsideration).

withdrew in good faith and indicated to his adversary a desire for peace, by words or actions or both, and if Specialist Christopher Hymer or Staff Sergeant Matthew Werner revived the conflict or fight, then the accused was no longer voluntarily engaged in mutual fighting or provoking an attack, and was entitled to act in self-defense.⁷

⁷The language in this instruction is taken verbatim from Notes 6 and 7 to Instruction 5-2-6 of the 2002 edition of the Military Judges' Benchbook, DA PAM 27-9. The military judge cited this instruction number as well as the notes. JA at 658. There was no objection from either counsel as to the instructions. Id. The Benchbook instructions on self-defense have now been amended. The 2010 edition states that a person who intentionally provokes an attack or engaged in mutual fighting is not entitled to self-defense (unless (he)(she) previously withdrew in good faith)(unless it was physically impossible for (him)(her) to withdraw in good faith)(unless the adversary escalated the level of conflict). Note 7, Instruction 5-2-6, Military Judges Benchbook, DA PAM 27-9. A Note 8 has been added that covers escalation as reviving the right to self-defense and cites United States v. Dearing, 63 M.J. 478 (C.A.A.F. 2006); United States v. Cardwell, 15 M.J. 124 (C.M.A. 1983); and United States v. Lewis, 65 M.J. 85 (C.A.A.F. 2007). It provides as follows:

"Even if you find that the accused (intentionally provoked an attack upon (himself) (herself)) (voluntarily engaged in mutual fighting), if the adversary escalated the level of the conflict, then the accused was entitled to act in self-defense if (he) (she) was in reasonable apprehension of immediate death or grievous bodily harm. Therefore, if the accused (intentionally provoked an attack upon (himself) (herself) by using force not likely to produce death or grievous bodily harm) (voluntarily engaged in mutual fighting not involving force likely to produce death or grievous bodily harm), and the adversary escalated the level of the conflict to one involving force likely to produce death or grievous bodily harm and thereby placed the accused in reasonable apprehension of immediate death or grievous bodily harm, the accused was entitled to use force (he) (she) actually believed was necessary to prevent death or grievous bodily harm.

Accordingly, even if you find beyond a reasonable doubt that the accused (intentionally provoked an attack upon

JA at 1528-29 (emphasis added).

The military judge also instructed on self-defense as to third parties, which focused on whether SGT Colvin was an aggressor or mutual combatant.

The evidence has raised the issue of defense of another in relation to the offense of premeditated murder and the lesser included offenses of unpremeditated murder and voluntary manslaughter. A person may use force in defense of another only if that other person could have lawfully used such force in defense of himself under the same circumstances. Therefore, if Sergeant Eric J. Colvin was an aggressor, intentionally provoked an attack, or was a mutual combatant, then the accused could not lawfully use force in his behalf regardless of the accused's understanding of the situation.

For defense of another to exist, the accused must have had a reasonable belief that death or grievous bodily harm was about to be inflicted on the person defended, and the accused must have actually believed that the force he used was necessary to protect that person. In other words, defense of another has two parts. First, the accused must have had a reasonable belief that death or grievous bodily harm was about to be inflicted on Sergeant Eric J. Colvin. The test here is whether, under the same facts and circumstances, a reasonably prudent person, faced with the same situation, would have believed that death or grievous bodily harm was about to be inflicted. Second, the accused

(himself) (herself) by using force not likely to produce death or grievous bodily harm) (voluntarily engaged in mutual fighting not involving force likely to produce death or grievous bodily harm), but you have reasonable doubt that the adversary did not escalate the level of the conflict to one involving force likely to produce death or grievous bodily harm and thereby placed the accused in reasonable apprehension of immediate death or grievous bodily harm, the accused was entitled to act in self defense. You must then decide if the accused acted in self-defense.

Id. at Note 8.

must have actually believed that the amount of force he used was necessary to protect against death or grievous bodily harm. To determine the accused's actual belief as to the amount of force necessary, you must view the situation through the eyes of the accused. In addition to what was known to the accused at the time, the accused's age, intelligence, and emotional control are all important factors to consider in determining his actual belief as to the amount of force necessary to protect Sergeant Eric J. Colvin. As long as the accused actually believed that the amount of force he used was necessary to protect against death or grievous bodily harm, the fact that the accused may have used such force or a different type of force than that used by the attacker does not matter. . .

The burden is on the prosecution to establish the guilt of the accused. Unless you are satisfied beyond a reasonable doubt that the accused did not act in defense of another, you must acquit the accused of the offense of premeditated murder and the lesser-included offenses of unpremeditated murder and voluntary manslaughter.

JA at 665-666 (emphasis added).

- a. The instructions were incomplete and incorrect under United States v. Dearing and United States v. Lewis.

The military judge's instructions as to mutual combat, both as to self-defense and as to the defense of others, were deficient. As to self-defense, the military judge failed to tell the panel that a mutual combatant may still claim self-defense, even if there is no effort to withdraw, if the opposing party escalates the level of the conflict or there is no opportunity to withdraw. As to the defense of others, the military judge failed altogether to explain escalation and withdrawal; he simply told the panel that Appellant lost the

right to defend SGT Colvin altogether if the panel believed that SGT Colvin engaged in mutual combat.

Even a person who starts a fight is entitled to use self-defense if the opposing party escalates the level of the conflict. United States v. Cardwell, 15 M.J. 124, 126 (C.M.A. 1984). This Court has stated quite clearly that it is error to instruct that a mutual combatant must first withdraw in order to regain his right to self-defense if the other party escalates the conflict. United States v. Dearing, 63 M.J. 476 (C.A.A.F. 2006). Nor is the right to self-defense lost if there is no opportunity to withdraw in good faith. United States v. Lewis, 65 M.J. 85, 89 (C.A.A.F. 2006).

The lower court attempted to distinguish Appellant's case from Dearing and Lewis (both of which had been relied upon by Appellant in his brief below) on three grounds. First, the lower court noted that Appellant's counsel did not object to the instructions given or ask for any additional instructions. Stanley at 4 (JA at 4). However, that did not excuse the military judge of his duty to provide a complete and accurate instruction.

Secondly, the lower court claimed that the facts of Dearing and Lewis are distinguishable from the facts in Appellant's case "as to the nature of the underlying conflict." Stanley at 4 (JA at 4). Dearing and Lewis both involved the use of knives in

response to being hit and kicked by multiple parties. Appellant fired a gun in response to being attacked by a gun, an a gun in response to an attempted knife attack on a third party; this arguable provided even greater justification for the use of deadly force in self-defense and the defense of another. It is absolutely uncontroverted that the first person at the farmhouse to use a deadly weapon was SSG Werner, when he cut SGT Colvin with a knife, and the first person to fire a gun was SPC Hymer, who fired a rifle at Appellant. The defense theory of the case was that Appellant acted instantly in self-defense and kept firing until SPC Hymer was down, and that Appellant shot SSG Werner only after seeing that SSG Werner had raised a knife and was preparing to stab SGT Colvin again.

The third way in which the lower court attempted to distinguish Dearing and Lewis was through the "extent of the instructions given by the military judge." However, this conclusion too is short-sighted because the error in Appellant's case was essentially the same as the error presented in the Dearing and Lewis instructions: advising the panel that an aggressor had to first withdraw regardless of escalation and an inability to withdraw.

In Dearing, the military judge instructed that a "person who is considered an 'aggressor' or engaged in mutual fighting, without previously withdrawing in good faith, is not entitled to

argue self-defense." Dearing, 63 M.J. at 482. It was error, however, to instruct that an accused, if an aggressor or a mutual combatant, was not entitled to self-defense unless he previously withdrew in good faith because it ruled out the situation where the opposing party escalates the violence.

Similarly, the instructions given in Appellant's case clearly indicated to the panel that Appellant was not entitled to defend himself as a mutual combatant unless he first withdrew, regardless of any possible escalation. Both SPC Hymer and SSG Werner escalated the confrontation. However, the members were told that mutual combatants have no right to self-defense unless they first made a good-faith effort to withdraw. Just as in Dearing, the instructional error in Appellant's case was "a deficiency that rendered the instruction on self-defense erroneous and incomplete." Dearing, 63 M.J. at 484. This Court found that failure to give the correct self-defense instruction in Dearing was not harmless beyond a reasonable doubt because the "defense theory of escalation of the conflict was a vital point in the case" and the instructional error "eviscerated the Appellant's self-defense theory. . . ." Dearing, 63 M.J. at 484-85. Without a correct self-defense instruction, the members in Dearing did not have guideposts for an "informed deliberation." Id. at 485 (internal citation omitted).

In Lewis, the military judge erred in not instructing the members that a mutual combatant could regain the right to self-defense when the conflict is escalated or when he is unable to withdraw in good faith. Lewis, 65 M.J. at 89. This error was not harmless because it undercut the defense theory and could very well have contributed to Lewis having been found guilty. The "incomplete instruction" prevented Lewis from "fully asserting that he rightfully defended himself (1) after an escalation of violence; and (2) when he was incapable of withdrawing in good faith." Id.

The military judge in Appellant's case likewise made no mention of an inability to withdraw, yet given the location of the fight and the speed with which events unfolded, the members could readily have found that there was not a reasonable opportunity for Appellant, who was in his own home, and SGT Colvin to withdraw. The net impact of these instructional errors is that the panel could have believed Appellant's version of events and still have convicted due to the faulty instruction, by finding that Appellant lost all entitlement to self-defense through being a mutual combatant and by finding that Appellant had no entitlement to defend SGT Colvin because SGT Colvin was, likewise, a mutual combatant.

b. In assessing harmlessness, the lower court should not have attempted to resolve a credibility contest or relied upon equivocal forensic findings.

The lower court ultimately declined to decide whether the instructions in Appellant's case were erroneous. Rather, the lower court stated that it was convinced beyond a reasonable doubt that the error "did not contribute to the appellant's conviction or sentence." Stanley at 5 (JA at 5). However, the lower court erred both in the manner in which it conducted its harmless error analysis and as to its ultimate conclusion.

First, the lower court erred in how it conducted its harmlessness analysis because it focused unduly on credibility issues, essentially siding with SGT Colvin's credibility over Appellant's. As this Court has admonished, "An appellate court does not normally evaluate the credibility of the evidence presented in a case to determine harmless error, especially in a case . . . where evidence on the disputed matters is not overwhelming." United States v. Wells, 52 M.J. 126, 131 (C.A.A.F. 1999) (reversing lower court finding that it was not harmless error where trial judge had failed to instruct on a lesser-included offense). Yet in applying its harmless error analysis in Appellant's case, the lower court bluntly observed, "Apparently, the panel believed SGT Colvin's version of events and so do we." Stanley at 5 (JA at 5).

This case provides a good example of why appellate courts should avoid credibility contests in determining harmlessness. First, SGT Colvin had issues with recall. By his own admission, he was high on the evening of the shootings, and had been up for five days; indeed, two law enforcement agents testified that his mannerisms and speech were consistent with someone high on meth. JA at 264. He had a history of blackouts and memory issues, and sometimes forgot where he was. JA at 273-75. Secondly, he had great incentive to lie. After his Article 32 hearing, he was fearful of being painted as the mastermind behind what happened at the farmhouse. He admitted that the government's story was a "far stretch" but felt that the government was continuing to remind him that they had him "by his balls." He felt pressured to do a good job while testifying and felt that the prosecution would likely "go easy" on him if they got a good conviction on Appellant.

Thirdly, SGT Colvin changed his story to suit his needs. As previously discussed, he never relayed - despite interviews with the prosecution, law enforcement agents, and the defense team - until almost the eve of trial that Appellant had supposedly fired two bullets into SPC Hymer on the ground or that SSG Werner's head was propped up. He also waffled on where he was when SPC Hymer was shot, initially telling the government in the taped interview in February 2005, that he was curled in a

ball on the floor and could only see SPC Hymer catty-corner from the legs down. JA at 269. However, he had told defense counsel in the interview prior to trial that he "didn't see anything" because he was "balled up by the sink." JA at 402-403, 410-11. At trial, he initially testified that he saw Appellant stand above SPC Hymer and fire the final two shots. JA at 233. However, on cross-examination, he stated that he could not see Appellant, only SPC Hymer. JA at 270.

The lower court also improperly relied on credibility issues when it disregarded various aspects of Appellant's testimony. The lower court dismissed Appellant's testimony in part because he had lied to a law enforcement officer about his drug involvement. Appellant admitted that this was a lie. However, unlike SGT Colvin's narrative and its eve-of-trial modifications, Appellant's story was essentially consistent from the first interview he gave to law enforcement shortly after the shootings. Sergeant Colvin had also lied during his own interview with law enforcement agents, and in far greater detail, not only denying drug involvement but also claiming that SSG Werner was going for a gun in his pocket and that Appellant had taken a walkie-talkie out into the woods. JA at 263, 254, 273. However, the real issue is not which witness lied more - it's whether an appellate court should even make that type of credibility determination when assessing harmlessness.

In assessing credibility, the lower court relied on forensic evidence to boost SGT Colvin's testimony and to diminish Appellant's. Even though the defense "exposed SGT Colvin's potential weaknesses in credibility," his version "rings true on the most important points concerning the murders themselves." Stanley at 5-6 (JA at 5-6). The lower court noted that SGT Colvin's testimony was supported by the "position and direction of the wounds in the victims; the blood spatter evidence, the location of pooled blood, the location of shell casings throughout the house, the absence of a knife in the vicinity of SSG Werner when he was shot, and testimony from recognized crime scene experts." Stanley at 6 (JA at 5-6). However, several of these forensic factors are red herrings. For example, Dr. Pojman explained that bullets yaw and tumble in the body and stated plainly that his views of trajectory were only guidelines and by no means entirely accurate. Multiple witnesses testified that where shell casings come to rest may be affected by whether they ricochet off other objects. Moreover, by the time the locations of the casings and knives (including a bread knife found in between the dining room and kitchen) were memorialized, the crime scene had been contaminated by SGT Colvin dragging SPC Hymer through the kitchen and by the two dogs loose in the house. Even the government's own photographs show that items in the kitchen were moved by law enforcement

agents. Compare Def. Ex. H with Def. Ex. N (JA 813 and JA 814). Although the lower court relied on testimony of "recognized crime scene experts," the defense expert arguably had stronger credentials and tested for more variables in position than the government expert did; in fact, even the government's experts disagreed as to SSG Werner's torso and hand position at the time he was shot. JA at 631, 652. Again, all of these "weight" factors simply reemphasize that these were matters for the panel to consider after being properly instructed, not matters for an appellate court to balance in determining harmlessness.

The same holds true of the lower court's use of physical evidence to disbelieve Appellant's testimony. For example, the lower court noted that Appellant had testified that SSG Werner attempted to stab SGT Colvin with a knife in his left hand. Stanley at 6 (JA at 6). Although SSG Werner was right-handed, photographs show that he had a long cast on his right hand and lower right arm. Pros. Ex. 143 (JA at 795). He may have used the right hand early in the fight simply because that was the hand closest to the stove that held the knife he used to slash SGT Colvin's ear. Given that there was a bullet entry and exit in SSG Werner's left forearm, he may have been holding up a knife when he was shot in the forearm. The lower court also maintained that Appellant was not credible because he had testified that he did not have possession of the murder weapon

before he arrived and found it on the shelf where he was hiding. Stanley at 6 (JA at 6). However, Appellant never denied having possession of the murder weapon before he arrived; he admitted that it was possible that he had moved the pistol around in SGT Colvin's truck before they drove to the farmhouse and he explained that SGT Colvin must have brought it into the house because he had not done so himself. JA at 544.

Notwithstanding all the reasons to doubt SGT Colvin's claims, the lower court opined that the panel had an "obvious belief in SGT Colvin's version of events." Stanley at 6 (JA at 6). They presumably based this conclusion, at least in part, on the fact that the panel found Appellant guilty of premeditated murder. But those findings do not rule out that the panel may have returned findings of guilty because of the erroneous instructions. In other words, the panel may have tended to agree with Appellant's version of events but felt constrained by the instructions to find that he had not acted in self-defense because he was a mutual combatant who had not first withdrawn. In fact, the government pounded home time and again in its closing argument that mutual combatants have no right to self-defense.

In determining harmless error, a reviewing court must determine whether it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the

error. United States v. McDonald, 57 M.J. 18, 20 (C.A.A.F. 2002), citing Neder v. United States, 527 U.S. 1, 18 (1999). It is hardly clear - much less clear beyond a reasonable doubt - that a rational panel would have convicted Appellant in the absence of the judge's instructional error. There was just too a great a chance that the members concluded that Appellant was not entitled to claim self-defense simply because he engaged in mutual combat. The lower court ultimately concluded that "even if the self-defense instructions now envisioned by appellant were provided to the panel it would have made absolutely no difference" because "[n]o self-defense instruction would have excused the appellant's actions" when he "deliberately fired two additional rounds into a severely wounded man lying face down in the living room, and when he deliberately shot an unarmed man as he lay on his back in the kitchen pleading for his life." Stanley at 6-7. However, this analysis presumes the truthfulness and accuracy of SGT Colvin's narrative at trial. A finding of harmlessness should be based on evidence that is undisputed in nature and overwhelming in degree, neither of which describe the government's case against Appellant.

Conclusion

WHEREFORE, Appellant prays that this Court set aside the findings of guilty as to both specifications of Charge II and direct a sentence rehearing.



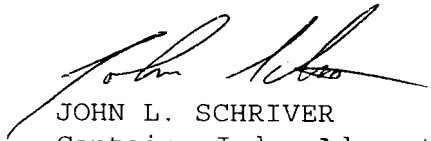
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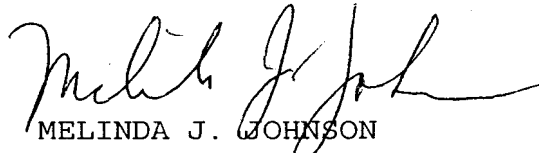
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Stanley, Crim. App. Dkt. No. 20050703, Dkt. No. 11-0143/AR, was delivered to the Court and Government Appellate Division on May 2, 2011.

A handwritten signature in black ink, appearing to read 'Melinda J. Johnson', is written over the printed name.

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