

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,)	BRIEF ON BEHALF OF APPELLEE
Appellee)	
v.)	Crim.App. Dkt. No. 200900115
)	
Richard R. MOTT,)	USCA Dkt. No. 12-0604/NA
Seaman (E-3))	
U.S. Navy)	
Appellant)	

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

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Issues Granted

I.

A LACK OF MENTAL RESPONSIBILITY DEFENSE EXISTS WHEN A MENTALLY DISEASED ACCUSED CANNOT APPRECIATE THE WRONGFULNESS OF HIS CONDUCT. HERE, EXPERTS TESTIFIED THAT APPELLANT'S PARANOID SCHIZOPHRENIA AND SEVER DELUSIONS CREATED HIS SUBJECTIVE BELIEF THAT STABBING THE VICTIM WAS JUSTIFIED. BUT THE MILITARY JUDGE AND NMCCA ADOPTED AN OBJECTIVE STANDARD FOR "WRONGFULNESS." WHAT IS THE APPROPRIATE STANDARD IN DETERMINING WHETHER AN ACCUSED CAN APPRECIATE THE WRONGFULNESS OF HIS CONDUCT?

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Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2006), because Appellant's approved sentence included a punitive discharge. This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2006).

Statement of the Case

A Military Judge sitting as a general court-martial convicted Appellant, contrary to his plea of not-guilty by reason of insanity, of one specification of attempted premeditated murder in violation of Article 80, UCMJ, 10 U.S.C. § 880 (2006). The Military Judge sentenced Appellant to twelve years' confinement, reduction to pay-grade E-1, total forfeitures, and a dishonorable discharge. The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered it executed. The pretrial agreement had no effect on the sentence adjudged.

On direct appeal, Appellant raised four assignments of error with the Navy-Marine Corps Court of Criminal Appeals. On November 24, 2009, the lower court set aside the findings and sentence, holding that the Trial Counsel's failure to disclose exculpatory evidence to Appellant's Defense Counsel prejudiced his right to a fair trial, and authorized a rehearing. On January 5, 2010, the Convening Authority ordered a rehearing.

In the rehearing held in August 2010, a panel of members sitting as a general court-martial convicted Appellant, contrary to his plea, of attempted premeditated murder in violation of Article 80, UCMJ. The Members sentenced Appellant to nine years' confinement, reduction to pay grade E-1, and a dishonorable discharge. The Convening Authority approved the sentence as

adjudged and, except for the punitive discharge, ordered the sentence executed. The Navy-Marine Court of Criminal Appeals affirmed the findings and sentence. This Court granted review on May 9, 2012.

Statement of Facts

A. Charged Offense.

In an unprovoked and vicious attack on the mess deck of the USS CAPE SAINT GEORGE, the Appellant brutally stabbed Seaman LG while he ate his morning meal. (J.A. 103.) A new Sailor only recently reported to his first command, Seaman LG was permanently disabled in this attack. (J.A. 100.) For his part Appellant was operating under the mistaken belief that, years before either had even joined the Navy, Seaman LG had raped him in his bed, threatening his life in the process. (J.A. 104.)

1. Night before the attack.

The night before Appellant's attack on Seaman LG, Appellant purchased a 3.5 inch lock-blade folding-knife. (J.A. 100, 103.) Also on the night prior to his attack on Seaman LG, Appellant ran into Seaman LG in a computer lab onboard the ship and mess deck. (R. 378.) Appellant did not attack Seaman LG, report his fears of Seaman LG to his chain of command, or flee from Seaman LG. (R. 378.) Rather, Appellant merely waited for Seaman LG to depart the lab and the mess deck before Appellant did. (R. 378.)

2. Day of Appellant's attack on Seaman LG.

With the knife in his pocket, Appellant reported to work on the mess deck and seemed to keep watch over the mess area, several times looking out into the mess area from his work station. (J.A. 100; R. 253.) These disruptions brought a rebuke from his LPO, who ordered him to return to work. (R. 253.) When Appellant finally noticed Seaman LG eating in the mess hall, Appellant left his workstation, poured himself a glass of water, and walked over to Seaman LG to kill him. (J.A. 103.) Approaching Seaman LG, Appellant removed the knife from his pocket, opened it, and placed it in his right hand. (J.A. 103.) Appellant placed his left arm around Seaman LG and began stabbing him in the throat with the knife. (J.A. 103.) Appellant then thrust the knife into Seaman LG's chest and abdomen. (J.A. 103.) During the attack, Appellant was heard screaming, "you raped me," or, "he raped me." (J.A. 99.)

Shortly after the attack began, Appellant's shipmates intervened and restrained him. (J.A. 100.) A medical Corpsman reached the scene within one minute of the attack and provided treatment to Seaman LG. (J.A. 100.) A few minutes later, an Independent Duty Corpsman arrived on the scene and rendered additional medical care. (R. 272.) Shortly after the incident, law enforcement arrived and took Appellant into custody. (R. 49-50.)

B. The Military Judge's instruction on "wrongfulness."

During deliberations, the panel's president asked, "[w]hat is the legal definition of wrongfulness of his conduct?" (J.A. 111; R. 573.) Regarding the instruction on "wrongfulness," the Military Judge noted that the law does not permit an individual to be his own judge of what is right or wrong, but focuses on the accused's ability to appreciate that his conduct would be contrary to public or societal standards of morality. (R. 573.) The Military Judge then asked both parties if they agreed that the military standard focused on determining whether Appellant had the ability to realize that his conduct would be viewed as wrong. (R. 574.)

Trial Defense Counsel did not proffer a subjective standard instruction, nor did he argue that the objective societal standard test, articulated in *United States v. Ewing*, was an incorrect standard to determine "wrongfulness." (R. 574-77.) Instead, Trial Defense Counsel merely argued that argued that since the instruction came after the trial, Defense witnesses would not have the opportunity to explain that Appellant was unable to appreciate the wrongfulness of his conduct within the meaning of the Military Judge's proposed instruction. (R. 575.) Trial Defense Counsel noted that Appellant believed others would not believe him; therefore, Appellant found his conduct wrong,

not because Appellant's conduct violated society's standards, but because other people would not believe him. (J.A. 94.)

The Military Judge heard both party's arguments and ruled that the proper standard focuses on the accused's ability to appreciate his conduct would be contrary to public or society standards of morality. (J.A. 95.) Accordingly, in determining "wrongfulness", the Member's focus should be guided by morality "decided by the society, not by the accused." (J.A. 95.)

C. Appellant's statement to NCIS.

At the time of the confession, Appellant was twenty-four years old, a Naval Sailor with three years of college education, average intelligence, and could easily read and write the English language. (J.A. 114.) After Appellant arrived at NCIS, agents read him his rights under Article 31(b), which Appellant waived. (J.A. 102.) Appellant then made a written statement after discussing the attack with NCIS agents for approximately four hours. (J.A. 114.) Although some of Appellant's statements were bizarre, Appellant made no allegation at trial that the agents' conduct violated Appellant's rights. (J.A. 108-10.)

Appellant's motion at trial solely concerned whether Appellant's mental condition removed from his mind the ability to understand his Constitutional rights and appreciate the consequences of waiving those rights. (J.A. 108-10.) During

the conclusion of the interview with NCIS, when the agents discussed with Appellant the phrasing that would go into the statement, Appellant seemed concerned with how his statements would be perceived. (R. 82.)

After hearing the testimony of one of the NCIS agents who interrogated Appellant, viewing the DVD recording of the interview, and reviewing Appellant's written statement, the Military Judge denied the motion to suppress Appellant's confession. (R. 112-13.) Following the trial, the Military Judge attached his written ruling on the motion, including findings of fact to the Record of Trial. (J.A. 113-17.)

Summary of Argument

I.

Current federal case law and statutory reform show that the Military Judge clearly did not err when he instructed the Members to apply the objective standard test in determining "wrongfulness." As a matter of law, the Military Judge properly instructed the Members to apply the objective standard test. Even if this Court determines a subjective standard test could be instructed upon, such an instruction is not warranted in Appellant's case. Specifically, the Record reflects Appellant attempted to conceal his act of vengeance, as he knew it was not self-defense and wrongful.

II.

The evidence establishes that the Appellant knew and understood the consequences of waiving his right to remain silent. The Military Judge's factual conclusions support his ruling and are not clearly erroneous. Absent coercion, the sole matter for this Court to address is whether Appellant understood the consequences of waiving his right to remain silent. Here, there is no compelling evidence of Appellant's incapacity to make a knowing waiver of his Article 31(b) rights after NCIS explained in simple terms what those rights were. Thus, the Military Judge correctly denied Appellant's motion to suppress his confession.

Argument

I.

THE MILITARY JUDGE DID NOT ERR IN INSTRUCTING MEMBERS TO FOCUS THEIR WRONGFULNESS DETERMINATION ON SOCIETY'S MORALITY RATHER THAN APPELLANT'S, AS THIS OBJECTIVE STANDARD IS SUPPORTED BY STATUTORY REFORM AND CURRENT CASE LAW.

A. Standard of Review.

Whether a jury was properly instructed is a question of law reviewed *de novo*. *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002). This Court must determine whether the verdict, which found that Appellant "did not prove lack of mental responsibility by clear and convincing evidence[,] was correct

in both law and fact.” *United States v. Martin*, 56 M.J. 97, 99 (C.A.A.F. 2001) (citing Article 66(c), UCMJ, 10 U.S.C. § 866(c)). In cases involving a defense of mental responsibility, trial courts are recognized as being “better positioned” than appellate courts to “appraise and weigh the evidence and apply the burden of proof.” *Martin*, 56 M.J. at 107.

B. The Military Judge did not err when he instructed the Members that the definition of “wrongfulness” referred to objective societal standards of law and morality.

1. The Insanity Defense Reform Act of 1984 (IDRA) looks to the Appellant’s understanding of his actions as being contrary to public morality to define the wrongfulness of those actions.

Congress made substantial modifications to the insanity defense available under Federal law in the Insanity Defense Reform Act of 1984 (“IDRA”). 18 U.S.C. § 17. Article 50a, UCMJ, is substantially identical to this Act. *Martin*, 56 M.J. at 103. Article 50a, like its federal counterpart, shifted the burden to the accused to prove the defense of lack of mental responsibility by clear and convincing evidence and prescribed “expert testimony on the ultimate legal issue, thus leaving the ultimate issue to the trier of fact alone.” *Id.* The statute further defines the defense of lack of mental responsibility:

It is an affirmative defense in a trial by court-martial that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts.

Article 50a(a), UCMJ.

Yet neither this statute nor the IDRA define “wrongfulness.” *United States v. Ewing*, 494 F.3d 607, 616 (7th Cir. 2007). The Seventh Circuit discussed this issue in *Ewing*: “Because the [IDRA] adopts the elements of the *M’Naghten* test, however, we may infer that wrongfulness carries the same meaning as in *M’Naghten’s Case* and the common law that developed around it.” *Id.* at 618.

In *M’Naghten*, the appellant acted under a delusion that a political party was persecuting him when he shot and killed the private secretary to the Prime Minister of Great Britain. *Id.* The appellant claimed he could not be found guilty of “any act committed while he was laboring under a delusion, regardless of whether the act was a direct product of that delusion.” *Id.* After the public outrage that followed the verdict, the House of Lords asked the “Queen’s Bench to answer five questions regarding the proper formulation of the insanity defense.” *Id.* Those answers formed the basis for the insanity defense in American common law for the next century. *Id.* The first question states that if the accused was aware that he was acting

contrary to law, but did the act complained of with a view, under the influence of an insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit . . . The judges responded that such a defendant ‘is nevertheless punishable according to the nature of the

crime committed, if he knew at the time of committing such crime that he was acting contrary to law.'

Id. at 618-19.

Another question posed to the *M'Naghten* judges is when an accused operates under an insane delusion as to existing facts and commits a crime while relying on the delusion, "is he thereby excused?" *Id.* at 619. The Queen's Bench answered: "If under the influence of his delusion he supposes another man to be *in the act* of attempting to take away his life, and he kills that man, as he supposes, in self-defense, he would be exempt from punishment." *Id.* (emphasis added).

2. Federal courts define the crucial inquiry as to whether the appellant understood society would consider his actions an appropriate response to his delusions.

Ewing noted the crucial inquiry is not the defendant's knowledge of criminal law, but whether the defendant understood the difference between right and wrong. *Id.* at 619. Secondly, the right versus wrong test does not focus on the defendant's belief that his actions were justified; rather, it examines "whether society would judge his actions an appropriate response to his delusions." *Id.* at 619-20.

The appellant in *Ewing* argued, similar to Appellant's argument here, for an instruction adopting a subjective definition of wrongfulness. *Id.* at 616. The *Ewing* court noted that the appellant's adoption of a subjective standard to define

wrongfulness relied primarily on *United States v. Segna*, 555 F. 2d 226 (9th Cir. 1977). The court noted that the appellant's reliance on *Segna* was flawed, because *Segna* predated IDRA and relied primarily on the Model Penal Code's definition of legal insanity. *Id.* Accordingly, the court held that the district court properly rejected the proposed instruction stating, "wrongfulness for purposes of the insanity defense statute is defined by reference to objective societal or public standards of moral wrongfulness, not the defendant's subjective personal standard of moral wrongfulness." *Id.* at 621.

In surveying cases that addressed whether the standard for wrongfulness was a subjective or an objective one, *Ewing* noted the importance of *People v. Rittger*, 54 Cal. 2d 720 (Cal. 1960). In *Rittger*, the California court reviewed a defendant's insanity plea during a murder trial. *Ewing*, 494 F.3d at 621. There, the appellant argued that although he knew his conduct did not comport with "social standards of right and legal justification," his belief that the victim might attack him at some future time "justified" the murder. *Id.* The court held "the fact that a defendant claims and believes that his acts are justifiable according to his own standards does not compel a finding of legal insanity." *Id.*

In addition to *Rittger*, *Ewing* noted that it could not find any pre-1984 cases that supported the proposition that

M'Naghten's wrongfulness inquiry focused on the defendant's personal believe that his conduct was right, though contrary to public morals. *Id.*; see, e.g., *State v. Crenshaw*, 659 P.2d 488, 493 (Wash. 1983) ("[I]n discussing the term 'moral' wrong, it is important to note that it is society's morals, and not the individual's morals, that are the standard for judging moral wrong under *M'Naghten*."); *State v. Hamann*, 285 N.W.2d 180, 183 (Iowa 1979) ("Those states which believe the right or wrong test should be conducted with a view to moral right or wrong are quite uniform in rejecting a subjective test."); *State v. Corley*, 495 P.2d 470, 473 (Ariz. 1972) ("We find no authority upholding the defendant's position that one suffering from a mental disease could be declared legally insane if he knew that the act was morally and legally wrong but he personally believed that act right.").

In *United States v. Cuebas*, the Third Circuit applied the *Ewing's* rationale, noting that IDRA had narrowed the scope of the insanity defense and that the *Ewing* Court had done a detailed analysis of "wrongfulness." *United States v. Cuebas*, 415 Fed. Appx. 390, 397 (3rd Cir. 2012). There, the court noted that although courts have applied various formulations of the insanity defense the IDRA closely tracks the common law *M'Naghten* standard, which applies the objective standard. *Id.* Thus, in adopting a test akin to *M'Naghten*, the Third Circuit

agreed with *Ewing* that "Congress did not intend to allow subjective moral justification to factor into the insanity defense." *Id.*

In sum, IDRA, *Ewing*, *Cuebas*, and *Rittger* all show that the Military Judge clearly did not err when he instructed the Members to apply the objective standard test in determining "wrongfulness." The above case law and analysis clearly show the military judge understood the relevant law and, as a matter of law, properly instructed the Members to apply the objective standard test. (R. 573.)

3. *United States v. Dubray* relies upon *United States v. Segna's* call for a subject standard instruction; however, *Segna* predates and fails to account for IDRA reforms.

Nonetheless, Appellant asserts that *Ewing* is seemingly contradicted by the *United States v. Dubray*, where the circuit court noted that "a defendant's delusional belief that his criminal conduct is morally justified may establish an insanity defense under federal law, even where the defendant knows that the conduct is illegal." *United States v. Dubray*, 854 F.2d 1099, 1101 (8th Cir. 1988). However, *Dubray* relies upon *United States v. Segna*, 555 F.2d 226, 233 (9th Cir. 1977), stating that "[t]he jury should be instructed on the distinction between moral and legal wrongfulness, however, only where evidence at trial suggests that this is a meaningful distinction in the

circumstances of the case. *Id.* (citing *Segna*, 555 F.2d at 233.) Like the appellant's argument for a subjective standard in *Ewing*, Appellant's reliance on *Segna*, albeit indirect, still finds its authority for a subjective standard instruction from case law that fails to account for IDRA's reforms. *Supra*.

Accordingly, Appellant's current argument for a subjective test for wrongfulness simply fails to account for IDRA's reforms and fails to find support in current federal cases that do account for these reforms.

4. Even if this Court determines that a subjective-objective standard could be appropriate in some circumstances, the facts and evidence of concealment here show that *Ewing's* objective standard was appropriate.

The *Martin* court limited the application of instructions between moral and legal wrongfulness to cases where the distinction between the two was "meaningful." *Martin*, 56 M.J. at 109 (citing *Dubray*, 854 F.2d at 1101). In determining "meaningfulness," *Martin* noted that "evidence of concealment can rebut claims of legal and moral justification, negating the need to address legal and moral justification separately." *Martin*, 56 M.J. at 109.

In *Dubray* the circuit court noted that "a defendant's delusional belief that his criminal conduct is morally justified may establish an insanity defense under federal law, even where the defendant knows that the conduct is illegal." 854 F.2d at

1101. However, the *Martin* court recognized the principle that there is a distinction between moral and legal wrongfulness but limited its application to cases where the distinction between the two was "meaningful." *Martin*, 56 M.J. at 109 (citing *Dubray*, 854 F.2d at 1101).

For example, "evidence of concealment can rebut claims of legal and moral justification, negating the need to address legal and moral justification separately." *Id.* (noting *Freeman*, 804 F.2d 1574, 1577 (11th Cir. 1986) (evidence demonstrating that the defendant knew robbing a bank was wrongful included: changing clothes after robbing the bank, employing a mask, handgun, and satchel to execute the robbery and avoid apprehension, informing bank personnel that if the police were called he would come back and kill everyone, running from police to avoid apprehension); *United States v. Newman*, 889 F.2d 88 (6th Cir. 1989), *cert. denied*, 495 U.S. 959 (1990) (there was sufficient evidence to sustain conviction for interstate transportation of stolen property and stolen motor vehicle, in light of evidence relating to defendant's performance of intricate and delicate tasks, driving rig, negotiating for sale of shingles, fabricating story to mislead arresting officers, and orientation as to time, place, and person); *United States v. Reed*, 997 F.2d 332, 334 (7th Cir. 1993) (defendant admitted he knew that the voices were telling him to do something wrong);

United States v. Hiebert, 30 F.3d 1007, 1007 (8th Cir. 1994) (evidence of defendant's attempt to conceal involvement in murder-for-hire scheme was relevant to whether defendant appreciated the wrongfulness of distributing marijuana and possessing firearm; "knowledge that one crime was wrong evidences that he understood that other criminal acts were inappropriate").

Like *Ewing*, this case squarely presents facts where an Appellant thought his "delusions justified his attack." (Appellant' Br. at 17.) As such this Court should use this as an opportunity to unequivocally adopt the objective definition developed in *Ewing* rather than the subjective and speculative definition proposed by Appellant. The efficacy of doing so is clear when applying the objective standard to the case at bar. Applying this objective definition, Appellant failed to prove by clear and convincing evidence that he lacked mental responsibility because (1) he clearly understood that society would not approve of his actions, (2) he took measures to conceal his conduct, and (3) his actions fail to support his assertion that he acted in self-defense. Since the evidence of concealment rebuts his claims of moral justification, the Military Judge did not err in not addressing the distinction between legal and moral justifications. *Martin*, 56 M.J. at 109 (noting *Freeman*, 804 F.2d at 1577.)

- a. Assuming this Court uses a subjective-objective hybrid analysis to determine wrongfulness, Appellant is still criminally liable as revenge does not equate to justifiable homicide.

Even if this Court finds that Appellant believed his actions were subjectively justified, this does not legally absolve him of criminal responsibility because revenge does not equate to justifiable homicide. Appellant well understood that his motive: revenge, would be condemned by society. Therefore, he fails to prove that he did not appreciate the legal wrongfulness of his conduct.

- b. The Record reveals that Appellant sought to conceal his conduct because he knew of its legal and moral wrongfulness.

Appellant's actions immediately preceding and immediately following the attack inform this Court of Appellant's state of mind at the time of the offense. Appellant admits that he took measures designed to avoid suspicion. Specifically, he told Dr. Simmer that he wanted to procure a gun, or sign one out from the ship, but decided not to because it might "raise suspicion." (J.A. 72.) Appellant then decided to obtain a lock-blade folding-knife. (J.A. 103.) Obviously, a knife of this sort attracts little if any attention in the military as they are routinely sold at the local exchanges. While Appellant obtained a deadly weapon, he did so in a manner calculated to avoid suspicion or detection from his command and fellow sailors.

This evidence of concealment rebuts his claims of moral justification. As such there was no error when the Military Judge chose not to address the distinction between legal and moral justifications. *Martin*, 56 M.J. at 109 (noting *Freeman*, 804 F.2d at 1577.)

- c. Appellant did not act in self-defense but instead planned and executed his revenge for a delusional attack.

Appellant's delusions and actions show that he sought revenge against Seaman LG, not that Appellant was acting in self-defense for fear of imminent danger. Like in *Martin*, Appellant's attempts at concealing his plan to attack indicate the lack of a meaningful distinction between moral and legal wrongfulness; thus, the application of this distinction does not extend to Appellant's case. *Martin*, 56 M.J. at 109. And as in *Ewing*, when there is no meaningful distinction between legal and moral wrongfulness, wrongfulness should be purely defined by reference to objective societal or public standards of moral wrongfulness, not Appellant's subjective personal belief that he could exact revenge on Seaman LG. *Ewing*, 494 F. 3d at 621. Appellant understood that his attack on Seaman LG was contrary to law, but still carried it out to exact revenge; accordingly, Appellant is subject to the punishments of the crime committed. *Ewing*, 494 F.3d at 618-19.

On the night prior to the attack, Appellant ran into the victim in a computer lab onboard the ship and mess deck. Yet, despite Appellant's asserted imminent threat of impending death, Appellant did not take any action to protect himself. In fact, nothing in the Record indicates that Appellant left the lab or the mess deck to get away from Seaman LG. (R. 378.) Rather, Dr. Simmer testified that Appellant waited for Seaman LG to depart the lab and mess deck before Appellant did. (R. 378.) Contrary to Appellant's doctors acceptance of Appellant's statements that he needed to attack the victim in order to protect himself from imminent harm, Appellant's actions in the computer lab and mess deck and throughout the Record do not support this contention. (J.A. 74.) Indeed, Appellant at no point reports his fears to his chain of command or any fellow sailors, but instead awaits his moment to exact revenge.

The sequence of events on the day of the attack also undermine Appellant's claim that he believed he was in imminent danger. The day after Appellant purchased the knife, he reported to work on the mess deck and seemed to keep watch over the mess area, several times looking out into the mess area from his work station, likely to spot Seaman LG. (R. 253.) These disruptions brought a rebuke from his LPO, who ordered him to return to work. (R. 253.) When Seaman LG finally arrived at the mess hall for chow, Appellant's attack was not immediate.

Instead, it was delayed, allowing Seaman LG to go through the meal line and finish a substantial portion of his meal before the attack. The sequence strongly indicates that Appellant did not perceive any imminent threat, but rather he executed a well-thought-out plan to exact revenge on Seaman LG when the moment was most propitious.

Finally, Appellant's pouring himself a glass of water, just prior to the attack, contradicts Appellant's assertion that he believed an attack from Seaman LG was immediate or imminent. As Appellant emerged from the mess area, he walked over to the beverage area, calmly poured himself a glass of water, and drank it. (J.A. 103.) This calm sequence of events refutes the inference that Appellant was fearful that his life was in grave danger. If one's life is about to end at the hands of an assailant, absent direct and decisive action on their part to save themselves, one does not take crucial seconds away to psyche themselves up for their own premeditated attack.

In sum, even if this Court does not accept that Appellant was exacting revenge on Seaman LG, this Court should still reject Appellant's contention that Appellant believed an attack on him was imminent. In order to find that Appellant did not appreciate the wrongfulness of his actions based on self-defense, Appellant must have believed an attack from Seaman LG was so imminent that it was actually about to occur the moment

Appellant stabbed the victim. If Appellant's belief was simply that at some point in the future Seaman LG planned to attack him, this does not equal legal insanity. Rather, Appellant must have believed that at the moment he stabbed Seaman LG, Appellant was about to plunge a knife into his chest or begin another brutal rape. Because no evidence in the Record supports the inference that Appellant believed these actions (that justify deadly force) were about to occur in that immediate instance, this Court should determine that Appellant appreciated the wrongfulness of his actions.

- d. Appellant's yelling, "you raped me," revealed that his attack on Seaman LG was to exact revenge.

Moreover, the claim that Appellant was acting in self-defense is belied by his Appellant's repeated exclamations as the crime occurred: "You raped me." (R. 259.) These statements prove that the motive for the attack was revenge rather than self-defense. While it may be obvious today that this delusion was devoid of reality, at the time he believed he was exacting payback on Seaman LG for the trauma Seaman LG caused Appellant. Appellant's understanding that his actions would result in his incarceration reveal his understanding that society would condemn them. Dr. Sadoff, who performed the second R.C.M. 706 examination, believed that the imminence of the attack was supported by Appellant's decision to attack Seaman LG in the

open with many people around. (R. 445.) This conclusion ignores the second part of the Doctor's own testimony, that Appellant chose that area because people were around to stop him. (R. 445.) This statement shows that at the time of the act, Appellant knew that others would stop him, he knew that others in society would perceive his actions as so wrong or immoral that they would risk bodily harm to end his attack on Seaman LG.

There is a fundamental difference between justifiable homicide and revenge. Although Appellant offers a tenuous self-defense argument, the Government asserts that Appellant's motivation for his actions was revenge for a traumatic experience that he believed, based on his delusions, was caused by Seaman LG. This does not equate to justification for murder. And it does not lead to the conclusion that Appellant was unable to appreciate the wrongfulness of his actions. In sum, even if this Court applies an objective-subjective hybrid analysis of Appellant's understanding of his attack's wrongfulness, this should find the military judge and the lower court properly applied the objective standard of wrongfulness, given the facts and circumstances of this case.

II.

PRIOR TO MAKING A STATEMENT TO NCIS, AGENTS ADVISED APPELLANT OF HIS RIGHTS AND OBTAINED A WRITTEN WAIVER. APPELLANT DOES NOT ARGUE THAT THE POLICE COERCED HIS CONFESSION IN ANY WAY; THUS, THE CONFESSION WAS VOLUNTARILY MADE. THE ONLY DETERMINATION THIS COURT NEED MAKE IS WHETHER HE KNOWINGLY WAIVED HIS RIGHTS. THE MILITARY JUDGE'S FINDINGS OF FACT SUPPORT THE FINDING OF A KNOWING AND INTELLIGENT WAIVER AND ARE NOT CLEARLY ERRONEOUS.

A. Standard of Review.

A trial court's ruling that a confession was voluntary and thus given "in a manner compatible with the requirements of the Constitution is a" question of law, reviewed *de novo*. *Miller v. Fenton*, 474 U.S. 104, 112 (1985). In order to admit the confession, the Government must prove by a preponderance of the evidence that the confession was voluntarily made. *United States v. Bubonics*, 45 M.J. 93, 95 (C.A.A.F. 1996). Where a Military Judge makes special findings of fact that support his ruling regarding the suppression motion, those facts "form the basis" for the appellate court's review of the question of voluntariness, "unless clearly erroneous." *United States v. Ford*, 51 M.J. 445, 451 (C.A.A.F. 1999). Thus, this Court must adopt the Military Judge's findings of fact, unless clearly erroneous, while reviewing his ultimate ruling that the confession was not obtained in violation of Appellant's right to due process, *de novo*.

B. Government coercion is the lynchpin of an involuntary confession. Here, Appellant voluntarily made a statement.

A statement is not compelled within the meaning of the Constitution if an individual "voluntarily, knowingly and intelligently" waives his constitutional rights. *Colorado v. Spring*, 479 U.S. 564, 574 (1987). That inquiry "has two distinct dimensions." *Moran v. Burbine*, 475 U.S. 412, 421 (1986). In order to admit a confession, the Government must first demonstrate that the decision to speak with the police was "voluntary in the sense that it was the product of a free and deliberate choice" and lacked Government "intimidation, coercion, or deception." *Berghuis v. Van Thompkins*, 130 S.Ct. 2250, 2260 (2010). Second, the Government must demonstrate that the appellant's waiver was "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.* (citing *Moran*, 475 U.S. at 421).

"Coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). There, the Court rejected the argument that prior Supreme Court case law held that a "deficient mental condition" was "sufficient to render [the confessions at issue] involuntary." *Id.* at 164.

Rather, the crucial factor in those cases was overreaching on the part of the police. *Id.* Likewise, this Court has applied the *Connelly* holding to military courts-martial, stating that the mental condition of a person who confesses is not itself sufficient to establish" a due process violation. *United States v. Campos*, 48 M.J. 203, 207 (C.A.A.F. 1998) (citing *Connelly*, 479 U.S. 157). In *Campos*, this Court expressly left open the issue addressed below, whether a mental impairment invalidates an otherwise valid Article 31(b) rights waiver. *Campos*, 48 M.J. at 207 n.1.

At trial, Appellant conceded that the Government met the standard for voluntariness. (J.A. 35.) Thus, the question on appeal is simply whether the evidence admitted during the pre-trial Article 39(a) hearing sufficiently established that Appellant understood the nature of the rights he abandoned and the consequences of his decision to abandon those rights.

C. The Military Judge did not abuse his discretion when he determined Appellant's waiver was made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

1. The Government need only show that Appellant had a "simple understanding" that he was relinquishing the protection of his right to remain silent.

When the Government establishes that warnings were given, and the accused made a non-coerced statement, those facts

"standing alone" are insufficient to demonstrate a "valid waiver" of *Miranda*. *Van Thompkins*, 130 S.Ct. at 2261 (citing *Miranda v. Arizona*, 384 U.S. 436, 475 (1966)). "The prosecution must make the additional showing that the accused understood those rights." *Id.* The waiver "need only meet the standard of *Johnson v. Zerbst*." *Id.* at 2262. The waiver must be voluntary and "a knowing and intelligent relinquishment of a known right or privilege, a matter which depends in each case upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Edwards v. Arizona*, 451 U.S. 477, 482 (1981) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

The Government need only show waiver by a preponderance of the evidence. *Van Thompkins*, 130 S.Ct. at 2261; Mil. R. Evid. 304(e)(1). The "general proposition" announced in *Van Thompkins* bears directly upon the facts of this case: "the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford." *Van Thompkins*, 130 S.Ct. at 2262. The Fifth Amendment's protection does not concern itself with any psychological pressure upon the accused to confess if the pressures "emanate[e] from sources other than official coercion." *Id.* at 2263. A simple understanding is all that is

required, the "Constitution does not [mandate] that a criminal suspect know and understand every possible consequence of a waiver of the" privilege. *Spring*, 479 U.S. at 574.

In *Rice v. Cooper*, for instance, the Seventh Circuit analyzed a mentally challenged sixteen year-old defendant's confession and whether it was knowingly and intelligently made. 148 F.3d 747, 749-751 (7th Cir. 1998). In that case, the defendant confessed to the authorities shortly after his offense, and then, prior to trial, a psychiatrist as a result of a court-ordered examination determined that he was not fit to stand trial. *Id.* at 749. Because there "was neither police abuse nor compelling evidence of [the petitioner's] incapacity to make a knowing waiver of his *Miranda* rights after the police explained in simple terms what those rights were," accordingly, the confession was properly admitted. *Id.* at 752.

2. Appellant's mental condition did not prevent him from understanding his rights and the consequences of waiving them.

Appellant's argument that because he was found incompetent to stand trial, he could not waive his constitutional rights is incorrect. As in *Rice v. Cooper*, the degree of Appellant's mental impairment did not prevent him from understanding his rights and making the informed decision to waive those rights. Appellant confessed after receiving the warnings required by Article 31(b). (J.A. 102.) At the time of the confession,

Appellant was a 24-year-old Naval Sailor with three years of college education, of average intelligence, and could easily read and write the English language. (J.A. 114.) Most importantly, the Military Judge found as a matter of fact that Appellant "understood the consequences of talking to the agents." (J.A. 114.) This finding is amply supported in the record.

- a. Appellant's verbal and physical responses to the NCIS interview indicate Appellant understood the questions being posed to him.

Appellant's statements, though bizarre in their delusions, are not alone sufficient evidence that he lacked the very simple fact that he was under no obligation to speak with police. Dr. Sadoff testified that Appellant understood the questions posed by NCIS in an intellectual sense and gave appropriate responses to those questions. (R. 81.) The Military Judge also noted that during the conclusion of the interview with NCIS, when the agents discussed with Appellant the phrasing that would go into the statement, Appellant seemed concerned with how his statements would be perceived. (R. 82.) While Dr. Sadoff disagreed with the notion that such statements demonstrated Appellant's ability to appreciate the nature of his conduct, Dr. Sadoff also recognized the change in Appellant's demeanor. (J.A. 31.)

This change in Appellant's demeanor, during the NCIS interview, shows Appellant understood the consequences of his talking with NCIS. In one exchange, Appellant asked the agents to change the part stating that he wanted another person "dead" to read "brought to justice." (R. 323¹.) Later, he asks that "I purchased a knife for protection" be changed to "I purchased a knife to be prepared for a confrontation." (R. 325.) As the Military Judge found, Appellant changed these statements because of his concern with how the reader of his statement would perceive him. Appellant's concern reflects a precise understanding of the consequences of waiving the right to remain silent.

Appellant discussed with the NCIS agents his reluctance to ask for a handgun because it may set off alarms on the ship. (R. 85.) Referencing this discussion, Dr. Sadoff noted:

[Appellant's] not stupid. He knows that if he asks for a gun, that's going to set off alarms. . . because even people who are psychotic and paranoid have an awareness and an intellectual ability to understand and be aware of the reality of what they may do, and its effect on people.

(R. 86.)

¹ This same DVD that was submitted to the Military Judge for his consideration on the motion to suppress was offered into evidence on the merits. (R. 59-60; Prosecution Ex. 6.) All citations in the brief reference the page in the testimony when the DVD was played before the Members.

Just as Appellant understood that obtaining a firearm would cause people to be alarmed at his behavior, Appellant's "softening" of "fairly harsh language" on a regular basis during the interview demonstrates that he understood the consequences of speaking with the authorities. (See R. 96.) Appellant's understanding of his surroundings during the interview and his repeated desire to soften his conduct are sufficient to meet the Government's burden to prove that it was more likely than not that he understood his right to remain silent.

- b. Appellant demonstrated his understanding of his constitutional rights when he rescinded his consent to allow his quarters to be searched.

Another portion of Appellant's interview reveals that he understood his ability to assert his constitutional rights. After he signed his written statement, the agents discussed Appellant's verbal consent to allow NCIS agents to search his quarters. (R. 333-334.) After discussing his rights with the agents, Appellant rescinded his consent to search. (R. 334.) While the agents were already finished searching Appellant's barracks room, the fact that Appellant understood the discussion he had with those agents and knew that he could rescind his consent reveals that Appellant understood how to waive as well as exercise his constitutional rights.

- c. The Military Judge's ruling expressly addresses Appellant's understanding of his constitutional rights, considered the facts before the court, and he did not err in ruling that Appellant's statement was knowing.

Appellant argues that the Military Judge's written ruling demonstrates that he did not apply the proper case law in ruling on Appellant's motion to suppress. (Appellant's Br. at 25.) As stated above, the two-part analysis requires, first, whether the statement was voluntary and, second, whether the waiver was knowing. The Military Judge specifically addressed the first prong of voluntariness, Government coercion, finding no coercion existed. Next, the Military Judge expressly answered the question of whether Appellant understood his constitutional rights. The Military Judge addressed the knowing and intelligent waiver prong in his oral ruling on the record:

The accused was aware of his rights and the nature of those rights. It's clear to the court that the accused understood the consequences of both talking to the agents, and how what he said to them would be perceived, and how it would affect his future; i.e., he was aware of the consequences of his decision and the decision that he made to abandon his right to remain silent. Therefore based upon a preponderance of the evidence and, as stated by the [Supreme Court] in [*Van Thompkins*,] the defense motion to suppress is denied.

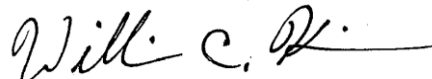
(R. 113.) Thus, the Military Judge addressed both parts of the analysis, voluntariness and whether the waiver was knowing and intelligent, i.e., that Appellant understood his rights and the consequences of waiving them. Appellant's attempts to ignore

part of the record should not cloud this Court's analysis of the issue and the sufficiency of the Military Judge addressing both prongs of the analysis.

The testimony before the Military Judge supported a belief that Appellant understood his rights and that his delusions while surfacing to some degree during the interview were not so pervasive as to destroy his cognitive ability to understand his rights as explained to him by NCIS. The Military Judge's findings of fact are not clearly erroneous, thus this Court should affirm his ruling that admission of Appellant's confession did not violate his right to due process of law.

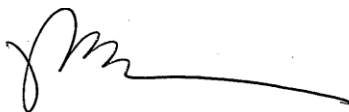
Conclusion

The findings and sentence, as approved by the court below, should be affirmed.

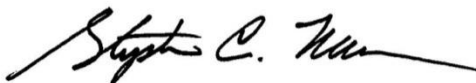


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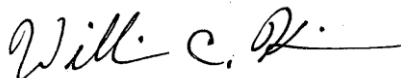
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